

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now, Week of September 13, 2021

Sep.13.2021

Courts Dismiss COVID-19 Business Interruption Claims

On September 9, 2021, the district court for the Western District of Tennessee granted Covington Specialty Insurance Company's motion for judgment on the pleadings and dismissed a restaurant owner and operator's COVID-19 related business interruption complaint with prejudice. The court found the plaintiff failed to allege any direct physical loss or damage because "the property at issue remained physically capable of being used in its intended manner." Order at 9. Even if the plaintiff could have alleged a direct physical loss, however, the court found the policy's pathogenic materials exclusion would have barred coverage. *Id.* at 13-14. Finally, the court dismissed the plaintiff's claim for breach of the covenant of good faith and fair dealing because the underlying claim for breach of contract was not viable. *Id.* at 19-20. The case is *Creative Bus., Inc. v. Covington Specialty Ins. Co.*

On September 7, 2021, the district court for the District of Oregon granted Liberty Mutual Fire Insurance Company's motion to dismiss several businesses' putative COVID-19 class action. The court held the plaintiffs failed to allege any covered physical loss or damage. Order at 13-14. The case is *N. Pacific Mgmt., Inc. v. Liberty Mut. Fire Ins. Co.*

On September 6, 2021, the district court for the District of Oregon granted Oregon Mutual Insurance Company's motion to dismiss two restaurants' putative COVID-19 class action. The court held the plaintiffs failed to allege any covered physical loss or damage. Order at 18-21. The court also found the plaintiff failed to adequately plead a claim for coverage under the policy's civil authority provisions because none of the civil authority orders at issue prohibited access to specific portions of restaurants or restaurant property. *Id.* at 24. The court also dismissed the plaintiffs' bad faith and unfair competition claims because the plaintiffs failed to allege a viable claim for breach of contract. *Id.* at 28-31. The case is *Nari Suda LLC v. Oregon Mut. Ins. Co.*

On September 7, 2021, the district court for the District of Oregon granted Oregon Mutual Insurance Company's motion to dismiss a COVID-19 business interruption claim filed by the operator of a restaurant and bar. The court concluded that the phrase "direct physical loss of or damage to property" means "direct (without any intervening space or time) physical (of or relating to natural or material things) loss of (the act or fact of losing) or damage (injury or harm) to property" and the "plain meaning of those terms thus requires a Covered Cause of Loss to directly cause property—Plaintiff's property or other property—to be lost or physically damaged for coverage to exist under the Business Income and Civil Authority provisions." Order at 14. While the plaintiff characterized the effects of COVID-19 closure orders as "physical loss" or "physical damage," its alleged losses "are purely economic and not the result of any 'direct physical loss of or damage to property.'" *Id.* at 19-20. The case is *Hillbro LLC v. Oregon Mut. Ins. Co.*

On September 4, 2021, the district court for the District of Oregon granted Oregon Mutual Insurance Company's motion to dismiss a class action complaint filed by a Seattle street food restaurant. Agreeing with the majority of courts construing "physical loss of or damage to covered property," the court held the provision was unambiguous. Order at 10. The court found there was nothing in the policy to suggest intangibles like loss of use and profitability constituted covered property. *Id.* at 25. Instead, the policy only covered loss of business income if it resulted from the insured being unable to continue its operations

“as a direct result of having lost or damaged” tangible property, like the building, its fixtures, and personal property. *Id.* Despite plaintiff’s best efforts “to characterize the harmful effects of government closure orders . . . as ‘physical loss’ or ‘physical damage,’” the losses were “purely economic and not the result of any ‘direct physical loss of or damage to property.’” *Id.* at 18. The case is *Nue, LLC v. Oregon Mutual Insurance Co.*

On July 20, 2021, the district court for the Eastern District of Wisconsin granted Ohio Security Insurance Company’s motion for judgment on the pleadings of a furniture retailer’s COVID-19 business interruption complaint. Although the “pandemic was a tragedy with many unfortunate consequences, which include business losses,” not all insurance policies cover these losses. Order at *7. Because the plaintiff did not allege it lost access to its property, nor that the property was destroyed or damaged, the policy does not provide coverage. *Id.* at *4. The court also found that the policy does not provide coverage for loss of use, and loss of use does not qualify as a physical loss under Wisconsin law. *Id.* at *5. Losses from the virus, the court found, were also excluded under the policy. *Id.* at *6. When reading the plain terms of the policy to not provide coverage, the court held that it “simply cannot rewrite the policy to provide coverage where none was due.” *Id.* at *7. Instead, the court said the parties should look to Congress. *Id.* The case is *Biltrite Furniture, Inc. v. Ohio Security Insurance Co.*

New Business Interruption Suits Against Insurers:

The trustees of the University of Pennsylvania sued Factory Mutual Insurance Company in Pennsylvania state court (Philadelphia County) for breach of contract. The plaintiffs’ “all-risk” commercial property insurance policy allegedly provides, among other things, communicable disease response, interruption by communicable disease, claims preparation cost, decontamination cost, protection and preservation of property, civil authority, business income, and extra expense coverage. Complaint at ¶ 8. The complaint alleges the plaintiffs suffered covered losses because: (i) COVID-19 is a communicable disease that was present on its property and (ii) plaintiffs suffered direct physical losses because state civil authority orders limited the plaintiffs’ ability to use their properties and rendered their premises unsafe and unfit for intended use. *Id.* at ¶¶ 42-53, 59, 67. The case is *Trustees of the University of Pa. v. Factory Mut. Ins. Co.*

Three companies that own and operate hotels sued Everest Indemnity Insurance Company in Washington state court (King County) for declaratory judgment and breach of contract. The plaintiff’s “all risk” policy allegedly provides business interruption/time element, extra expense, civil authority, ingress/egress, and infectious disease coverage. Complaint at ¶¶ 15, 108-34. The complaint alleges the plaintiffs suffered covered physical losses because COVID-19 allegedly “transforms everyday surfaces and objects . . . into a transmission vehicle for disease from one host to another.” *Id.* at ¶¶ 47-48. The case is *Spire Hospitality, LLC v. Everest Indemnity Ins. Co.*

The owners and operators of ski resorts sued Lexington Insurance Company in Colorado state court (Denver County) for declaratory relief, breach of contract, bad faith, and violation of C.R.S. § 10-3-1115. The “all risk” policy allegedly provides business interruption, extra expense, civil authority, and loss of attraction coverage. Complaint at ¶ 6. The Complaint alleges that “the presence of any SARS-CoV-2 virus particles causes direct physical harm, direct physical damage, and direct physical loss to property,” *id.* at ¶ 73, and the “presence of people infected with or carrying the SARS-CoV-2 virus renders physical property in their vicinity unsafe and unusable, resulting in direct physical loss to that property.” *Id.* at ¶ 74. The case is *Alterra Mountain Co., et al. v. Lexington Ins. Co.* For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Laura Foggan

Partner – Washington, D.C.

Phone: +1 202.624.2774

Email: lfoggan@crowell.com

Adam J. Singer

Associate – Washington, D.C.

Phone: +1 202.688.3508

Email: asinger@crowell.com

Rachel A. Jankowski

Associate – Washington, D.C.

Phone: +1 202.624.2647

Email: rjankowski@crowell.com

Samuel H. Ruddy

Associate – Washington, D.C.

Phone: +1 202.624.2564

Email: sruddy@crowell.com