

Bucking Trend, Three Federal Courts Deny Insurers' Motions To Dismiss COVID-Related Coverage Suits

05.27.21



(Article from *Insurance Law Alert*, May 2021)

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While the majority of courts continue to dismiss claims seeking coverage for business losses incurred during government-mandated shutdowns, a few courts have allowed such claims to proceed.

In *Treo Salon, Inc. v. West Bend Mutual Ins. Co.*, 2021 WL 1854568 (S.D. Ill. May 10, 2021), an Illinois federal district court ruled that a putative class action complaint sufficiently alleged coverage under a Communicable Disease Business Income endorsement. The provision applied to loss incurred as a result of a suspension of operations “due to an outbreak of ‘communicable disease’ . . . at the insured premises.” The insurer argued that the government shutdown was not “due to” a communicable disease at the insured premises, but rather was based on the COVID-19 pandemic in general. In denying the insurer’s motion to dismiss, the court noted the absence of a factual record indicating whether or not the virus was actually present on the insured premises. The court also declined to rule on whether the endorsement was ambiguous.

An Alabama federal district court also denied an insurer’s motion to dismiss a suit brought by several restaurants seeking coverage for business losses incurred in the wake of COVID-related shutdowns. *Serendipitous, LLC v. Cincinnati Ins. Co.*, 2021 WL 1816960 (N.D. Ala. May 6, 2021). The policy defined “loss” as “accidental physical loss or accidental physical damage.” The court reasoned that use of the disjunctive “or” indicated that loss meant something other than damage. The court further explained that physical loss may be established when the insured “has lost possession of and been deprived of insured property.” The court ruled that the restaurants sufficiently pled physical loss because the complaint alleged that they were unable to use their premises and tables during the mandated closures and restrictions.

The Eleventh Circuit, applying Florida law, reached a contrary decision in *Mama Jo’s Inc. v. Sparta Ins. Co.*, 823 Fed. Appx. 868 (11th Cir. 2020) (see [September 2020 Alert](#)). However, the *Serendipitous* court deemed that decision non-binding and distinguishable. In particular, the court emphasized that *Mama Jo’s* was decided on a summary judgment motion rather than a motion to dismiss, and that unlike the present case, the *Mama Jo’s* complaint did not allege that employees tested positive for COVID-19.

Finally, a Texas federal district court denied an insurer’s motion to dismiss, ruling that a movie theater sufficiently alleged a claim for coverage

under an all risk policy. *Cinemark Holdings, Inc. v. Factory Mutual Ins. Co.*, 2021 WL 1851030 (E.D. Tex. May 5, 2021). The complaint alleged that more than 1700 Cinemark employees had tested positive for or were exposed to or displayed symptoms of COVID-19, forcing the company to close its theaters. Factory Mutual denied coverage on the basis of a contamination exclusion and the absence of alleged physical loss or damage to insured property.

In denying Factory Mutual’s motion to dismiss, the court emphasized that the complaint alleged property damage based on the actual presence of the virus and altered air content. The court also noted that the policy expressly covered loss and damage caused by “communicable disease.” The court acknowledged that another Texas federal district court recently dismissed COVID-19-related business loss claims in *Selery Fulfillment, Inc. v. Colony Ins. Co.*, 2021 WL 963742 (E.D. Tex. Mar. 15, 2021), but distinguished *Selery* on the bases that (i) the policyholder in that case did not allege that the virus entered the property and (ii) the governing policy did not include a communicable disease provision.

The *Cinemark* decision appears to be an outlier. A New Jersey federal district court recently granted Factory Mutual’s motion to dismiss in *Ralph Lauren Corp. v. Factory Mutual Ins. Co.*, 2021 WL 1904739 (D.N.J. May 12, 2021), rejecting the arguments set forth in *Cinemark*. In particular, the court ruled that the alleged “presence” of the virus in or near the policyholder’s stores did not constitute actual or imminent physical loss or damage to property. The court also ruled that the coverage claims were barred by the policy’s contamination exclusion. Further, the court dismissed the policyholder’s claim for coverage under the communicable disease provision based on the lack of actual (rather than suspected) viral presence at a covered location. Other federal district courts have likewise rejected policyholder arguments that coverage is triggered by the alleged presence of the COVID-19 virus and/or available under a communicable disease provision. See *Mohawk Gaming Enterprises, LLC v. Affiliated FM Ins. Co.*, 2021 WL 1419782 (N.D.N.Y. Apr. 15, 2021); *Out West Rest. Grp., Inc. v. Affiliated FM Ins. Co.*, 2021 WL 1056627 (N.D. Cal. Mar. 19, 2021).

