

Business Income Coverage, Bad Faith Coverage Update

April 3, 2023

Business Income Coverage – Louisiana

Cajun Conti LLC v. Certain Underwriters at Lloyd's, London

--- So. 3d ----, 2023 WL 2549132, 2022-01349 (La. Mar. 17, 2023)

As a result of the COVID-19 pandemic and related governmental regulations prohibiting most gatherings, Oceana Grill's restaurant operations were limited to take-out and delivery services. Oceana Grill reopened in incremental capacities, pursuant to the governmental orders, and remained at 60% or less capacity throughout the COVID-19 pandemic. Oceana Grill also incurred expenses to sanitize the space, and as a result of the capacity limitations and incidental expenses, it could not generate pre-COVID-19 income.

Oceana Grill's owner maintained an all-risks commercial insurance policy with loss of business income coverage through Certain Underwriters at Lloyd's, London (Lloyd's). Oceana Grill sought a declaratory judgment that the "policy provides business income coverage from the contamination of the insured premises by COVID-19."

Lloyd's sought summary judgment on the basis that there is no coverage under the policy because COVID-19 does not cause "direct physical loss of or damage to property." The trial court denied summary judgment, and after trial, denied declaratory relief without providing reasons. The Louisiana Court of Appeals reversed, finding the policy ambiguous, and reasoning that "direct physical loss" could mean loss of use of the property from the COVID-19 virus and subsequent government regulations.

The policy provides that to recover lost business income, the insured must experience a suspension of operations "caused by direct physical loss of or damage to property." The suspension may be a "slowdown" or a "cessation" of business activities, and the claimant may recover lost business income during the "period of restoration," as a result of "direct physical loss of or damage to property." The Louisiana Supreme Court granted certiorari "to interpret 'direct physical loss of or damage to property' in the context of business income losses due to the COVID-19 pandemic."

Lloyd's argued that the policy covers risks causing tangible alteration to property, and COVID-19 does not cause tangible damage that can be seen or touched. Oceana Grill maintained that either COVID-19 contamination caused direct physical loss of or damage to its property or that the policy is ambiguous.

The Louisiana Supreme Court held that the “plain, ordinary and generally prevailing meaning of ‘direct physical loss of or damage to property’ requires the insured’s property sustain a physical, meaning tangible or corporeal, loss or damage.” As such, the Supreme Court found that the COVID-19 pandemic, and resulting governmental regulations, did not cause direct physical loss of or damage to Oceana Grill’s property because “the property remained physically intact and functional, needing only to be sanitized.” Moreover, during the pandemic, Oceana Grill “continued to provide take-out and delivery service, and the restaurant’s physical structure was neither lost nor changed.” In summary, the Supreme Court found that the insurance contract is clear and must be enforced as written, and because COVID-19 did not cause damage or loss that was physical in nature, Oceana Grill was not entitled to coverage under the policy.

By: Danielle Chidiac

Bad Faith – Eleventh Circuit (Florida Law)

Ilias v. USAA Gen. Indem. Co.
61 F.4th 1338 (11th Cir. 2023)

The U.S. Court of Appeals for the Eleventh Circuit reversed the decision of the district court granting summary judgment to an insurer, finding that issues of fact required the parties to go to trial.

USAA General Indemnity Company (USAA) issued an auto policy to Scott Dunbar (Dunbar). In July 2017, Dunbar lost control of his vehicle, causing a crash that resulted in serious injuries to Daniel Ilias (Ilias). USAA was put on notice of the crash the day it occurred, and accepted liability after determining that Dunbar was at fault for the accident.

The assigned adjuster communicated with Ilias and his attorney in the weeks following the accident. Subsequently, a new adjuster took over the case and, about a month after the crash, offered Ilias the \$10,000 per-person limit of the policy USAA issued to Dunbar. Ilias, thereafter, filed a lawsuit against Dunbar and was ultimately awarded a judgment exceeding \$5 million.

Ilias then commenced a lawsuit against USAA alleging a single count of bad faith in the handling of the claim. The trial court granted summary judgment to USAA, finding that even if USAA could have been considered negligent in handling the claim, its conduct did not constitute bad faith.

The appellate court reversed the trial court and remanded the coverage action for trial, reasoning that a question of fact remained because the insurer waited over one month to tender its policy limits where it had sufficient information to determine that it was required to tender its policy limits within days of the accident. Further, the appellate court reasoned that USAA failed to provide information to Ilias’s attorney that may have facilitated settlement of the case, doing “nothing in its capacity as the ‘go-

between' to facilitate the exchange of that information or to seriously apprise its insured of the risk posed by an excess judgment." Such failure could be seen by the factfinder as causing or contributing to an excess judgment against Dunbar.