

Communicable Disease, Direct Physical Loss Exclusion Coverage Update

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Communicable Disease Coverage – Eastern District of Michigan (Michigan Law)

Salon XL Color & Design Grp., LLC v. W. Bend Mut. Ins. Co.
No. CV 20-11719, 2021 WL 391418 (E.D. Mich. Feb. 4, 2021)

The U.S. District Court for the Eastern District of Michigan held that Salon XL Color & Design Group, LLC (Salon XL) may proceed with its lawsuit against its insurer, West Bend Mutual Insurance Company (West Bend) for alleged damages resulting from closure to due to COVID-19. Salon XL sought coverage under the West Bend policy's business income and extra expense coverage, civil authority coverages, and the communicable disease coverage due to losses it sustained after Michigan's governor ordered the shutdown of salon services in response to the COVID-19 pandemic.

West Bend moved to dismiss Salon XL's complaint under Federal Rule of Civil Procedure 12(b)(6). Salon XL argued that the lawsuit should continue because it "has been unable to use its property for its intended purpose" due to the COVID-19 pandemic and the resulting shutdown order. Moreover, Salon XL specifically alleged that the shutdown order included their premises. Because the West Bend policy did not define "loss" or "damage," the court held that Salon XL's allegation was "enough to survive a motion to dismiss when the Policy states that it will cover 'direct physical loss or damage.'" Moreover, the court stated that Salon XL was able "to establish a causal nexus between the Executive Order and COVID-19's presence at the insured property ... to survive a motion to dismiss."

On the other hand, West Bend argued, and the court agreed, that the West Bend policy's Virus or Bacteria Exclusion was "clearly written to exclude 'any virus' from the Business Income, Extra Expense, and Civil Authority coverages." Neither party disputed that COVID-19 is a virus. Thus, the District Court held that the Virus or Bacteria Exclusion precluded coverage for the business income, extra expense, and civil authority coverages, but not for communicable disease coverage because "[a] special grant of coverage for communicable diseases followed by an exclusion for virus or bacteria cannot plausibly exist in the same policy." Finally, the court held that the Consequential Losses exclusion, which states that West Bend will not pay for "'delay, loss of use or loss of market' for the Business Income, Extra Expense, and Civil Authority coverages," precluded coverage because Salon XL specifically asserted loss of use of its property in the complaint.

The court granted in part and denied in part West Bend's motion to dismiss, and Salon XL's case was permitted to go forward with respect to the communicable disease coverage.

Direct Physical Loss and Virus Exclusion – Ohio

McKinley Dev. Leasing Co. Ltd. v. Westfield Ins. Co.

No. 2020 CV 00815, 2021 WL 506266 (Ohio Com. Pl. Feb. 09, 2021)

The Ohio Court of Common Pleas held that a North Canton real estate development and leasing company, McKinley Development Leasing Company Ltd. (McKinley), could continue its lawsuit against its insurer, Westfield Insurance Company (Westfield), for its COVID-19 related losses after Ohio's governor and the Ohio director of health issued multiple executive orders closing “non-essential” businesses. Due to these orders, some of McKinley's tenants were unable to pay rent owed to McKinley, which allegedly resulted in McKinley suffering business income losses. McKinley filed a claim with Westfield for payment to cover the losses, which Westfield denied. McKinley then brought a cause of action against Westfield under its commercial business policy. Westfield filed a motion to dismiss McKinley's complaint.

In its motion to dismiss, Westfield argued that McKinley could not establish that it had suffered a “direct physical loss,” as required under the policy. The court disagreed with Westfield, stating that “[b]oth sides provided reasonable interpretations of the policy language,” which meant that the court could “only surmise that with these differing opinions, [] the policy is ambiguous.” Westfield next argued that McKinley did not prove that COVID-19 caused any direct physical loss to McKinley's nearby property to trigger the policy's civil authority coverage. McKinley countered that the governmental shutdown orders constituted civil authority orders, caused restricted access to and around its premises, and that the “threat of and the actual presence of COVID-19 and the pandemic are a dangerous physical condition that damages the property surrounding McKinley.” The court found that McKinley's allegations were enough to trigger the policy's civil authority coverage.

Finally, Westfield argued that the policy's Virus Exclusion applied to bar coverage. However, McKinley claimed that the damages it had suffered were the result of a pandemic, rather than a virus. The court stated that “[i]t is obvious to this Court that a virus is not the same as a pandemic,” and, thus, it concluded the virus exclusion was ambiguous because it did not distinguish between a pandemic and a virus. As a result of this analysis, the court concluded that McKinley met its standard to survive Westfield's motion to dismiss.

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