Simpson Thacher

Insurance Law Alert

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Simpson Thacher Names Lynn K. Neuner Co-Chair of Global Litigation Department

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Oklahoma Supreme Court Rules That Pollution Exclusion Is Ambiguous In The Context Of Earthquake Damage, But That Earth Movement Exclusion Unambiguously Bars Coverage

The Supreme Court of Oklahoma ruled that a total pollution exclusion was ambiguous as to whether it barred coverage for earthquake-related claims but that an earth movement exclusion squarely applied to preclude coverage. *National Am. Ins. Co. v. New Dominion, LLC*, 2021 WL 5459471 (Okla. Nov. 23, 2021). (Click here for full article)

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This month, the Seventh Circuit dismissed four policyholder suits seeking coverage for business losses incurred in the wake of government shutdowns aimed at slowing the spread of COVID-19. *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 2021 WL 5833525 (7th Cir. Dec. 9, 2021); *Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.*, 2021 WL 5833485 (7th Cir. Dec. 9, 2021); *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.*, 2021 WL 5833486 (7th Cir. Dec. 9, 2021); *Mashallah, Inc. v. West Bend Mutual Ins. Co.*, 2021 WL 5833488 (7th Cir. Dec. 9, 2021). (Click here for full article)

Two Ohio Appellate Courts Affirm Dismissals Of COVID-19 Coverage Suits

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Two New York Courts Rule On COVID-19 Coverage Suits, Reaching Different Results

One New York trial court denied an insurer's motion to dismiss a COVID-19-related coverage suit, finding that a communicable disease exclusion did not bar coverage, *Tina Turner Musical LLC v. Chubb Ins. Co. of Europe SE*, 2021 WL 5818352 (N.Y. Sup. Ct. Dec. 6, 2021), whereas another granted an insurer's motion to dismiss based on the absence of direct physical loss or damage, *Buffalo Bills, LLC v. American Guarantee and Liability Ins. Co.*, 2021 WL 5863939 (N.Y. Sup. Ct. Dec. 7, 2021). (Click here for full article)

After Allowing Submission Of Expert Testimony, Indiana Court Dismisses Business Interruption Coverage Claims

An Indiana state court granted an insurer's summary judgment motion, ruling that expert testimony offered by the policyholder failed to raise a triable issue of fact as to the availability of business interruption coverage for COVID-19-related losses. *Indiana Repertory Theatre, Inc. v. Cincinnati Cas. Co.*, No. 49D01-2004-PL-013137 (Ind. Super. Ct. Dec. 13, 2021). (Click here for full article)

Florida Court Rules That Professional Services Exclusion Does Not Relieve Insurer Of Duty To Defend

A Florida district court ruled that an insurer was obligated to defend a professional women's tennis organization in an underlying arbitration alleging injury stemming from drug testing requirements, finding that the organization's enforcement of drug testing regulations was not a "professional service" under the policy exclusion. *Depositors Ins. Co. v. WTA Tour, Inc.*, 2021 WL 5908833 (M.D. Fla. Dec. 14, 2021). (Click here for full article)

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Reimbursement Alert:

Applying Florida Law, Connecticut Court Rules That Primary Insurer Cannot Recover Defense Costs From Co-Primary Insurer

A Connecticut trial court ruled that Florida law does not permit a primary insurer to recover defense costs from another insurer that was also obligated to defend the mutual insured. *Hartford Cas. Ins. Co. v. XL Ins. Am., Inc.*, 2021 WL 5112993 (Ct. Super. Ct. Oct. 21, 2021).

MCM, the general contractor for the construction of a pedestrian bridge in Florida, was insured under a general liability policy issued by Greenwich. MCM was also listed as an additional insured under a policy issued by Hartford to a subcontractor involved in the project. When the bridge collapsed, lawsuits were filed against MCM and others. Greenwich agreed to defend MCM and thereafter sought reimbursement of $6 million in defense costs from Hartford. In ensuing litigation, both insurers moved for summary judgment. The court ruled in Hartford's favor, finding that it had no duty to reimburse Greenwich for amounts Greenwich incurred in defending MCM in the underlying lawsuits.

The insurers' summary judgment motions centered on whether the underlying allegations gave rise to additional insured coverage for MCM under Hartford's policy. However, the court declined to address those substantive coverage arguments, instead ruling as a threshold matter that "Florida law is clear that an insurer cannot recover from another insurer costs incurred in defending a mutual insured."

Greenwich argued that this rule of law did not apply because its policy provided excess coverage whereas Hartford's coverage was primary. The court ruled that even assuming that Greenwich's policy was excess to Hartford, Greenwich's claim for reimbursement would nonetheless fail because Greenwich also provided primary coverage to MCM under a different policy issued to another MCM subcontractor. The court explained that both the Hartford policy listing MCM as an additional insured and the other Greenwich policy listing MCM as an additional insured contained "Other Insurance" provisions purporting to make each policy excess to the other. The court held that these polices "cancel each other out," rendering both insurers primary to MCM as a mutual insured. Based on the co-primary status, the court concluded that Florida law bars Greenwich from seeking reimbursement of defense costs from Hartford.

Coverage Alert:

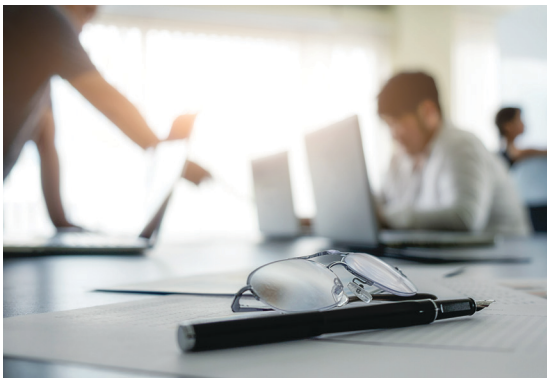
Oklahoma Supreme Court Rules That Pollution Exclusion Is Ambiguous In The Context Of Earthquake Damage, But That Earth Movement Exclusion Unambiguously Bars Coverage

The Supreme Court of Oklahoma ruled that a total pollution exclusion was ambiguous as to whether it barred coverage for earthquake-related claims but that an earth movement exclusion squarely applied to preclude coverage. *National Am. Ins. Co. v. New Dominion, LLC*, 2021 WL 5459471 (Okla. Nov. 23, 2021).

A series of lawsuits against New Dominion alleged personal injury and property damage as a result of seismic activity allegedly caused by New Dominion's oil and gas operations. Its insurer denied coverage on the basis of exclusions for pollution and earth movement. The Oklahoma Supreme Court ruled that while the pollution exclusions in several consecutive policies did not clearly and unambiguously preclude coverage, the earth movement exclusions did.

The pollution exclusion in each policy defined pollutants as "any solid, liquid, gaseous or

thermal irritant or contaminant." The court held that the terms "irritant or contaminant" were ambiguous as to whether the exclusion applied only when the injury or damage for which coverage was sought arose out of the irritating or contaminating nature of the pollutant, or whether it applied even when the injury was not the result of the harmful nature of the substance. The court reasoned that while wastewater is clearly a contaminant or irritant, the underlying claims alleged harm based on the injection of wastewater into the land in a manner that caused seismic activity—not on the contaminating qualities of the wastewater. The court explained: "[T]he substance being injected into the ground could have been something more innocuous, such as fresh, potable water, and the result would have been the same." Having determined that the pollution exclusion was ambiguous, the court held that it was reasonable for New Dominion to understand the pollution exclusion to apply only when injury or damage resulted from the irritating or contaminating nature of a pollutant.



However, the court ruled that an earth movement exclusion in each policy (the language of which differed slightly across the policies) unambiguously barred coverage. In the first two policy periods, the exclusion barred coverage for damage "whether direct or indirect, arising out of, caused by, resulting from, contributed to, or aggravated by the subsidence, settling, expansion, sinking, slipping, falling away, tilting, caving in, shifting, eroding, mud flow, rising or any other movement of land or earth." In the second two policy periods, the exclusion language also included "earthquake" in the list of events for which there would be no coverage. New Dominion argued that omission of the term "earthquake" in the first two policies created ambiguity as to the applicability of the exclusions in those periods.

Rejecting this assertion, the court ruled that the exclusion in each policy "must stand independently" and that extrinsic evidence from other policy periods should not be considered in evaluating ambiguity. The court concluded that the exclusion in the first two policy periods unambiguously barred coverage for the events alleged in the underlying complaints because the list of excluded events included "nearly every event that is commonly associated with an earthquake."

Finally, the court rejected New Dominion's estoppel claims. The company argued that the insurer was estopped from denying coverage for the third policy based on statements made to New Dominion by its insurance agent and a senior claims manager at National American Insurance regarding earthquake coverage. The court explained New Dominion would be unable to establish reliance for statements made after renewal of the third policy and that statements made prior to the renewal did not provide any "definitive answers" on the question of earthquake coverage. Regarding the fourth policy, the court held that New Dominion was charged with constructive knowledge of the exclusionary language, which clearly and unambiguously contradicted any statements that the insurance agent and claims manager might have made.

COVID-19 Alerts:

Seventh Circuit Affirms Dismissal Of Four Suits Seeking Coverage For Pandemic-Related Losses

This month, the Seventh Circuit dismissed four policyholder suits seeking coverage for business losses incurred in the wake of government shutdowns aimed at slowing the spread of COVID-19. The Seventh Circuit is the fifth federal appellate court to rule in insurers' favor in such suits.

In *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 2021 WL 5833525 (7th Cir. Dec. 9, 2021), a consolidated opinion resolving three separate appeals, the Seventh Circuit ruled that a dental group and hotel operators

failed to allege direct physical loss or damage to property and were therefore not entitled to coverage under Cincinnati's commercial property policies.

Noting the absence of state law precedent, the court predicted that the Illinois Supreme Court would not find that a loss of use of property sufficed to meet the "direct physical loss" policy requirement. The court emphasized that the policies were "replete with textual clues that reinforce the conclusion that 'direct physical loss' requires a physical alteration to property," such as clauses referring to "restoration" of property.

The policyholders alleged that the virus rendered the property unsafe or unfit for its intended use and therefore caused physical property damage. The court ruled that these allegations were insufficient to allege direct physical loss, emphasizing that the policyholders were able to perform some business operations during the shutdown period. The court also ruled that amending the complaint would be futile because even if the policyholder alleged that the virus was present and physically attached itself to surfaces, the complaint would still fail to allege that the virus altered the physical structures to which it attached.

The court distinguished decisions in which courts ruled that the presence of other substances at insured property (*e.g.*, asbestos or harmful gas) satisfied the physical loss requirement, noting that those cases "led to more than a diminished ability to use the property." The court explained that in those cases, "the contamination made the premises 'uninhabitable' or 'unfit for normal human occupancy' . . . thus barring all uses by all persons." In the COVID-19 context, however, the policyholders' preferred uses of insured premises were "partially limited" at most.

In two other decisions, the Seventh Circuit affirmed dismissal of coverage suits based on the reasoning set forth in *Sandy Point*, but also held that policy exclusions provided a second basis for dismissal. In *Cresent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.*, 2021 WL 5833485 (7th Cir. Dec. 9, 2021), the court also held that coverage was unavailable based on a microorganism exclusion. The exclusion applied to loss "directly or indirectly arising out of or relating to: mold, mildew, fungus, spores or other microorganism of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health." The court ruled that the exclusion was unambiguous and that the virus qualified as a microorganism. In so ruling, the court noted the broad exclusionary language ("of any type, nature or description") and its application to any substance that poses a potential threat to health. The court rejected the assertion that the inclusion of a specific communicable disease exclusion in a later policy amounted to a "tacit admission" that the policy at issue did not exclude losses caused by viruses.

Similarly, in *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.*, 2021 WL 5833486 (7th Cir. Dec. 9, 2021), the court held that exclusions relating to "loss of use" and "ordinance or law" provided independent bases for upholding coverage denials, separate and apart from the *Sandy Point* reasoning. One exclusion barred coverage for loss or damage caused by "[d]elay, loss of use or loss of market." The other applied to loss caused directly or indirectly from "[t]he enforcement of or compliance with any ordinance or law: (1) Regulating the construction, use or repair of any property." The court concluded that both exclusions applied, noting that the insured hotel's COVID-19-related losses stemmed precisely from "loss of use" and that the local executive closure orders were "ordinances" or "laws" that regulated the "use" of property. Declining to address the "difficult and esoteric" question of what actions qualify as "law" in the abstract, the court explained that the "executive orders here had the force of law and could be enforced with coercive sanctions against private businesses and persons."

Finally, in *Mashallah, Inc. v. West Bend Mutual Ins. Co.*, 2021 WL 5833488 (7th Cir. Dec. 9, 2021), the Seventh Circuit upheld dismissal of a COVID-19-related coverage suit involving two policies based on virus exclusions. One policy barred coverage for loss or damage "caused directly or indirectly" by "[a]ny virus . . .that induces or is capable of inducing physical distress, illness or disease." The exclusion in the other included similar language, but omitted the phrase "directly or indirectly." The district court bypassed the issue of whether the complaints alleged direct physical loss or damage, ruling that the exclusions foreclosed any possibility of coverage.

On appeal, the Seventh Circuit rejected the policyholders' argument that the losses were caused by the orders rather than the virus, stating:

> The complaint's attempt to decouple the government COVID-19 orders from the COVID-19 virus itself [is] untenable. . . . [T]here can be no honest dispute that the coronavirus was *the* reason these orders were promulgated. It was, so to speak, the prime mover. The causal relationship between the novel coronavirus, the COVID-19 pandemic, the government orders, and the alleged losses and expenses "is not debatable."

The court also rejected the assertion that the virus must be physically present on the insured property in order for the exclusion to apply, noting that the policy language did not support such an interpretation.

Two Ohio Appellate Courts Affirm Dismissals Of COVID-19 Coverage Suits

This month, appellate courts in two Ohio districts affirmed the dismissal of policyholder suits seeking business interruption coverage in the wake of government-mandated shutdowns.

In *Nail Nook, Inc. v Hiscox Ins. Co. Inc.*, 2021 WL 5709971 (Ohio Ct. App. 8th Dist. Dec. 2, 2021), the court ruled that a virus or bacteria exclusion unambiguously barred coverage for the policyholder's losses. The exclusion applied to loss or damage caused directly or indirectly by "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Alternatively, the court noted that even absent the virus exclusion, the policyholder's claims would fail because the complaint did not allege "direct physical loss of or damage" to insured property.

Similarly, in *Sanzo Enterprises, LLC v. Erie Ins. Exchange*, 2021 WL 5816448 (Ohio Ct. App. 5th Dist. Dec. 7, 2021), the court held that the phrase "direct physical loss of or damage to property" in an insurance contract does not cover the loss of use of a property caused by government shutdown orders. Rather, "the plain and ordinary meaning of the phrase 'direct physical loss of or damage to' unambiguously requires a tangible and structural damage to the property." Because the policyholder's property "exists in the same state as it did before the Orders," the court held that there was no physical loss. The court noted that even if the policyholder alleged that the virus was physically present on its premises, coverage would still be unavailable because the virus would not cause damage that required repair or restoration.

Additionally, the court found that the absence of a virus exclusion was not material to the coverage analysis. The court explained: "Because appellant cannot establish its initial entitlement to coverage, we need not consider the impact of the lack of a virus exclusion."

Finally, the court ruled that a civil authority provision did not apply. The court reasoned that the government orders were issued to prevent the spread of the virus, not in response to any damage to other property.

Two New York Courts Rule On COVID-19 Coverage Suits, Reaching Different Results

A New York trial court denied an insurer's motion to dismiss a COVID-19-related

coverage suit, finding that a communicable disease exclusion did not bar coverage. *Tina Turner Musical LLC v. Chubb Ins. Co. of Europe SE*, 2021 WL 5818352 (N.Y. Sup. Ct. Dec. 6, 2021).

The exclusion precluded coverage for "any communicable disease or threat or fear of communicable disease (whether actual or perceived) which leads to: . . . the imposition of quarantine or restriction in movement of people or animals by any national or international body [or] . . . any travel advisory or warning being issued by a national or international body or agency." The court ruled that this provision did not apply because the policyholder's losses stemmed from an order issued by the New York Governor rather than a national or international authority.

In a different matter, a New York trial court granted an insurer's motion to dismiss a COVID-19-related coverage suit. *Buffalo Bills, LLC v. American Guarantee and Liability Ins. Co.*, 2021 WL 5863939 (N.Y. Sup. Ct. Dec. 7, 2021). There, a professional football team argued that it incurred "direct physical loss or damage" to property based on the loss of use of its stadium and the "alter[ation] [of] the structure of ambient air and Covered Property's surfaces." In response, the insurer contended that the policyholder's loss was economic rather than physical, based on the temporary nature of the viral presence, among other things.

After Allowing Submission Of Expert Testimony, Indiana Court Dismisses Business Interruption Coverage Claims

An Indiana state court granted an insurer's summary judgment motion, ruling that expert testimony offered by the policyholder failed to raise a triable issue of fact as to the availability of business interruption coverage for COVID-19-related losses. *Indiana Repertory Theatre, Inc. v. Cincinnati Cas. Co.*, No. 49D01-2004-PL-013137 (Ind. Super. Ct. Dec. 13, 2021).

The policyholder alleged that the virus was present at its theater and therefore contaminated and "physically altered or damaged" the air and property at the premises. In support of this allegation, the policyholder's expert provided statistical modeling indicating that for an average audience of attendees, an average of 2.2 individuals would be infected with COVID-19.

The court ruled that the expert's statistical modeling raised a genuine issue of material fact as to the presence of the virus at the insured premises, rejecting the insurer's contention that the evidence was based on "speculation" and "guesswork." However, the court nonetheless ruled that coverage was unavailable based on its finding that the virus is not capable of physically altering or damaging property. The court emphasized that the virus can be removed by cleaning and that it dies over time, stating that under the policyholder's argument, "any time an undesirable substance or thing were to enter a room, no matter how fleetingly, property insurance could be implicated. That is an unreasonable and boundless extension of property insurance."

Professional Services Alert:

Florida Court Rules That Professional Services Exclusion Does Not Relieve Insurer Of Duty To Defend

A Florida district court ruled that an insurer was obligated to defend a professional women's tennis organization in an underlying arbitration alleging injury stemming from drug testing requirements, finding that the organization's enforcement of drug testing regulations was not a "professional service" under the policy exclusion. *Depositors Ins. Co. v. WTA Tour, Inc.*, 2021 WL 5908833 (M.D. Fla. Dec. 14, 2021).

A tennis player sued the WTA, the governing body for professional women's tennis, alleging negligence, battery, and intentional infliction of emotional distress, among other claims. The suit claimed that the player suffered from a medical condition that caused her to experience severe pain and swelling from blood draws, and that her requests for medical accommodations with respect to drug testing prior to matches were ignored. The insurer sought a declaration that it had no duty to defend the claims based on a professional services exclusion. The court disagreed and ruled in the policyholder's favor.

The exclusion applied to any "[m]edical, surgical, psychiatric, chiropractic, chiropody, physiotherapy, osteopathy, acupuncture, dental, x-ray, nursing or any other health service, treatment, advice, or instruction." The court acknowledged that the drawing of blood is a medical service within the meaning of the exclusion, but held that the WTA's decision to enforce its regulations mandating drug testing is a business decision rather than a "professional service." The court stated: "[E]ven if Brengle's claims do 'arise out of' the venipuncture, they also arise in part from business decisions made by the WTA to enforce its policies. Such business decisions fall outside the Exclusion." The court further reasoned that requiring an athlete to submit to drug testing is not, itself, a professional service because it "does not involve the use of, or failure to use, any professional skill, knowledge, experience or training."

STB News Alert

Joshua Polster and Associate Conor Mercadante authored an article titled, "BIPA Ruling Should Aid Insurers In Privacy Claims" which was published by *Law360*. The article examines the Illinois Biometric Information Privacy Act that has resulted in substantial litigation against companies that collect biometric information, and, in turn, has led to disputes regarding insurance coverage for such claims.

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