TRAUB LIEBERMAN

INSURANCE LAW BLOG

September 15, 2021

Federal Court in New York Court Dismisses Civil Authority Claim for COVID-19 Coverage

BY: Eric D. Suben

Courts nationwide have been grappling with coverage for business interruption claims arising from closures occasioned by the COVID-19 pandemic, with mixed results by jurisdiction. A recent decision on the issue from the federal Southern District of New York sheds light on New York law regarding this pressing issue.

In *Elite Union Installations, LLC v. National Fire Insurance Company of Pittsburgh, PA*, 2021 WL 4155016 (Sept. 13, 2021), directives issued by governmental authorities required the insured construction company to shut its doors, leading to a layoff of some employees while others continued to work from home. The insured made a claim under its commercial property coverage for damage to its premises, which it claimed were rendered "uninhabitable" and required repair in the form of alterations to comply with social distancing requirements. In the ensuing coverage litigation, National Union moved to dismiss the complaint alleging covered first-party property damage defined in the policy as "direct physical loss of or damage to property."

In ruling on the motion to dismiss, the court noted as an initial matter that courts considering the issue have uniformly determined that the loss of use of a business caused by COVID-19 does not qualify as a "direct physical loss" under New York law. Reading the policy wording as a whole, the court reasoned that "direct physical loss" requires a change to "physical size, construction, configuration [or] material specifications" requiring restoration, whereas the alleged loss of use here would not require repairs to the building in order for operations to resume.

Although the insured argued that the policy definition of "property damage" included "loss of use," the court observed that said definition was contained within the commercial general liability coverage part and not the commercial property coverage part at issue. The court also rejected the argument that the policy's Civil Authority coverage came into play, reasoning that government directives requiring employers to maximize telecommuting and minimize in-person staffing did not preclude all use of the insured premises.

In any event, the court held, the policy's "microbe" exclusion applied to preclude coverage even if the insured could establish "direct physical loss." Said exclusion, barring coverage for damage to property "directly or indirectly caused by or resulting from ... microbes," was deemed unambiguous on the facts before the court. On this ground, the court rejected the insured's argument that the loss was caused not by the virus but by the civil authority directives, reasoning that even if so, the virus "indirectly" caused the loss, invoking the exclusion.

Based on the court's discussion in *Elite Union Installations*, it is reasonable to anticipate that courts applying New York law will continue to resist policyholder efforts to characterize pandemic-related shutdowns as physical injury to property. This area of the law is continuing to evolve, however, and developments should be carefully monitored.