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Double Tic-Tac-Toe: Insurers Have Now Prevailed in The First Six U.S. Court of Appeals Decisions Regarding COVID-19 Coverage

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Insights for Insurers

Racking up three more victories at the U.S. Court of Appeals for the Ninth Circuit, insurers have now prevailed in the first six decisions of United States Court of Appeal. Each of these decisions have affirmed the dismissal of policyholder complaints. Most recently, the Sixth Circuit had found no coverage for COVID-19 claims.

On October 1, the Ninth Circuit issued three separate decisions on COVID-19 related business interruption claims. In each case, it affirmed dismissals in favor of the insurers. The Ninth Circuit now joins the Sixth, Eighth, and Eleventh Circuits in rejecting policyholder COVID-19 coverage claims. One of the Ninth Circuit decisions was decided under the laws of ten states.

First, in *Mudpie, Inc. v. Travelers Cas. Ins. Co*., 2021 U.S. App. LEXIS 29624 (9th Cir. Oct. 1, 2021, the Ninth Circuit affirmed the dismissal of a putative class action filed by a children's store asserting claims of breach of contract and breach of the implied covenant of good faith and fair dealing in the context of alleged COVID-19 related business interruption losses and extra expenses. First, the Ninth Circuit determined that "direct physical loss of or damage to property" has not occurred, absent a distinct, demonstrable, physical alteration to property," which the policyholder failed to allege. Applying California's efficient proximate cause test, it also held that the virus exclusion applied to bar coverage.

Next, in *Selane Products Inc. v. Continental Cas. Co. 2021 U.S. App. LEXIS 29633 (9th Cir. Oct. 1, 2021)*, the Ninth Circuit affirmed the dismissal of the action. Selane filed a putative class action lawsuit, alleging that Continental improperly denied its claims. Continental moved to dismiss, arguing that Selane did not allege any "direct physical loss of or damage to" its property. The U.S. District Court for the Central District of California granted the motion to dismiss.

The Ninth Circuit concluded that Selane did not plausibly allege that its property sustained any physical alterations for two reasons. First, Selane did not allege that SARS-CoV-2 was present on its property to cause any damage. Second, although Selane alleged that the stay-at-home orders caused it to suspend its operations, it did not plausibly allege that the stay-at-home orders caused its property to sustain any physical alterations. Thus, there is no coverage under the Business Income and Extra Expenses endorsements. It rejected Selane's

Attorneys

Scott M. Seaman

argument that the microbe exclusion in the policy establishes that microscopic organisms could cause physical loss or damage to property and, therefore, by extension so could viruses. The Ninth Circuit stated, "[w]e are not persuaded. But even if we were, this argument is unavailing because Selane did not allege that SARS-CoV-2 was present on its property to cause any damage."

As to coverage under the Civil Authority endorsement. Under this provision, Selane must establish: (1) there was "direct physical loss of or damage to" property at locations, other than the insured premises; (2) a civil authority action was required *because* of that physical loss or damage; and (3) the civil authority action prohibited access to Selane's property. The Ninth Circuit pointed out once again that Selane has not alleged any direct physical loss of or damage to property.

Finally, in *Chattanooga Professional Baseball LLC v. National Cas. Co*. 2021 U.S. App. LEXIS 29632 (9th Cir. 2021), the Ninth Circuit affirmed the decision of the U.S. District Court for the District of Arizona. The court affirmed the dismissal based upon virus exclusion contained in the National Casualty and Scottsdale policies.

The Ninth Circuit began by noting that under Arizona choice of law rules, the law of the ten states in which the ballparks were located would apply respectively to the ball team owners and operators as those were the locations of the risks. The ballparks were located in California, Idaho, Indiana, Maryland, Oregon, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

In 2020, plaintiffs experienced their first-ever cessation, which they allege was caused by continuing concerns for the health and safety of players, employees, and fans related to the SARS-CoV-2 virus; action and inaction by federal and state governments related to controlling the spread of the virus; and Major League Baseball for not supplying players to their affiliated minor league teams. Following cessation, plaintiffs submitted claims for coverage under the policies to defendants, but defendants have allegedly denied their claims or intend to do so. The operative amended complaint, filed on August 21, 2020, asserts claims for breach of contract, anticipatory breach of contract, and declaratory judgment.

The policies contained a virus exclusion that expressly excludes coverage for losses caused by a virus. The virus exclusion provides: "[w]e will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism."

The insurers filed a 12(b)(6) motion to dismiss. The district court granted the motion, rejecting plaintiffs' arguments that the exclusion did not apply and that the insurers were barred from asserting the exclusion based upon regulatory estoppel.

The Ninth Circuit noted that plaintiffs have not plausibly alleged that the need for the government to act in the first place was related to anything other than the COVID-19 virus, and they also failed to plausibly allege that Major League Baseball did not supply them with players for reasons independent of the spread of COVID-19. The Ninth Circuit determined that plaintiff's arguments that the exclusions did not apply must fail under the efficient proximate cause analysis applied or approved by most states or any other applicable standard.

The Ninth Circuit also affirmed the district court's determination that the insurers were not estopped from enforcing the virus exclusion by reason of regulatory estoppel as none of the ten states have not adopted regulatory estoppel, and plaintiffs failed to meet the test for regulatory estoppel under West Virginia law as it was not shown that insurers were relying on any interpretation that was contrary to any representation made to regulators.