

Commercial Crime, Computer Fraud, Physical Loss Coverage Update

April 1, 2021

Commercial Crime and Computer Fraud – Indiana

G&G Oil Co. of Indiana v. Cont'l W. Ins. Co.

No. 20S-PL-617, 2021 WL 1034982 (Ind. Mar. 18, 2021)

The Indiana Supreme Court held that neither Continental Western Insurance Company (Continental) nor its insured, G&G Oil Company of Indiana (G&G Oil), were entitled to summary judgment in an action brought by G&G Oil for insurance coverage after a ransomware attack on its computer system led to it paying four Bitcoins valued at nearly \$35,000 to the hackers. Prior to the ransomware attack, G&G Oil purchased an insurance policy from Continental that contained a Commercial Crime Coverage Part and a Computer Fraud provision covering losses “resulting directly from the use of any computer to fraudulently cause a transfer of money.” Continental denied G&G Oil’s claim for coverage because G&G Oil declined computer hacking and computer virus coverage and because G&G Oil voluntarily transferred the Bitcoin to the hackers, and G&G Oil filed suit. Thereafter, G&G Oil filed a motion for summary judgment and Continental filed a cross-motion for summary judgment.

The trial court granted Continental’s motion for summary judgment, holding that G&G Oil’s losses were not fraudulently caused because they were the result of theft, that G&G Oil’s payment to the hackers did not result from the use of a computer, and that G&G Oil voluntarily made the payment to the hackers. The Court of Appeals of Indiana affirmed the trial court’s ruling. However, the Indiana Supreme Court found that neither party was entitled to summary judgment.

The Supreme Court noted that while G&G Oil’s losses resulted directly from the use of a computer, it is less clear that the ransomware attack “fraudulently caused a transfer of money.” The Supreme Court explained that not every ransomware attack is fraudulent, citing an example of where no safeguards were put in place on a computer. Moreover, the Supreme Court found that Continental was not entitled to summary judgment because there remained a question of fact as to whether G&G Oil’s computer systems were obtained fraudulently or “by trick.” Thus, the Supreme Court reversed the grant of summary judgment in Continental’s favor and remanded the matter for further proceedings.

Physical Loss – Northern District of Georgia (Georgia Law)

Restaurant Group Mgmt., LLC v. Zurich Am. Ins. Co.

1:20-cv-4782-TWT (N.D. Ga. Mar. 16, 2021)

Plaintiffs, Restaurant Group Management, LLC and 10 restaurants (collectively RGM), filed a declaratory judgment action against their insurer, Zurich American Insurance Company (Zurich), as a result of Zurich's denial of insurance coverage for business closures resulting from the COVID-19 pandemic. The U.S. District Court for the Northern District of Georgia granted Zurich's motion to dismiss RGM's claims under Fed. R. Civ. P. 12(b)(6).

The court was tasked with determining whether RGM had sufficiently pled facts that triggered the policy's coverage. First, the court concluded that all but one of the applicable coverage provisions in the policy required "direct physical loss of or damage to" the covered premises caused by a covered cause of loss. In its complaint, RGM identified two alleged direct physical losses that triggered coverage: (1) social distancing requirements that led to a change in table arrangements and a reduction in capacity, and (2) property contamination due to the COVID-19 virus. The court concluded that reduced capacity did not constitute "direct physical loss" of the property, and the contamination allegations did not indicate that an "actual physical change occurred on the premises as the result of COVID-19." Thus, the court held that RGM's failure to allege direct physical loss of or damage to their properties was a legal deficiency and dismissed with prejudice those claims by RGM that required a showing of direct physical loss of or damage to the covered premises.

Second, the court held that one coverage provision – the "Expense to Reduce Loss Provision" – did not include a reference to a requirement of direct physical loss of or damage to property. Instead, the provision broadly covered expenses made to reduce potential losses of business income. Nonetheless, the court found that RGM's complaint failed to identify what expenses were incurred to reduce the amount of lost business income. The court held that the deficiency in the complaint was factual, rather than legal, and dismissed the claim for coverage under the Expense to Reduce Loss Provision without prejudice.

Physical Loss and Physical Damage – Western District of Michigan (Michigan Law)

St. Julian Wine Co., Inc. v. The Cincinnati Ins. Co.

No. 1:20-CV-374, 2021 WL 1049875 (W.D. Mich. Mar. 19, 2021)

The insured, St. Julian Wine Company, Inc. (St. Julian), sought insurance coverage under a policy issued by The Cincinnati Insurance Company (CIC) for losses suffered as a result of COVID-19. St. Julian alleged that it was entitled to insurance coverage for the loss of business income it sustained as a result of executive orders requiring residents of the state of Michigan to stay home. St. Julian also

sought coverage for income losses and expenses, asserting that they were caused by “an action by a ‘civil authority that prohibited access’ to St. Julian’s premises.” CIC denied coverage and St. Julian filed a declaratory judgment action. CIC responded by filing a motion to dismiss for failure to state a claim.

The U.S. District Court for the Western District of Michigan concluded that “[a]n insurance policy like the one here, which insures against ‘physical loss’ and ‘physical damage,’ does not cover economic losses stemming from the pandemic.” The court explained that the COVID-19 virus and the executive stay-at-home orders “had no connection to the physical condition of St. Julian’s property, or to any physical damage or loss.” “Put another way, there is no reasonable construction of ‘physical loss’ or ‘physical damage’ that encompasses the presence of a contagious virus in the general population.” The court also cited to the numerous other courts that have held that business losses sustained as a result of the COVID-19 pandemic are not covered by insurance policies that require physical loss or damage. As a result, the court granted CIC’s motion to dismiss.

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