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Sixth Circuit Holds That Contamination Exclusion Bars Coverage for COVID-19 Losses

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In *Dana Incorporated v. Zurich American Insurance Company*, Case No. 21-4150 (6th Cir. July 6, 2022), the Sixth Circuit recently addressed whether a “contamination exclusion” included within an insured’s property policy barred coverage for COVID-19 related losses. In *Dana*, Zurich issued an insurance policy to Dana Incorporated, a company that provided power-conveyance and energy-management solutions for vehicles and machinery. After suffering financial effects from the COVID-19 pandemic, including extra expenses and suspended operations, Dana sought coverage from Zurich under the policy. Zurich denied coverage and Dana sued. The district court dismissed Dana’s complaint, finding the policy’s “contamination exclusion” applied. The Sixth Circuit, on appeal, affirmed.

Although the Sixth Circuit did not specifically address the policy’s insuring agreement, the court noted that the policy covered Dana’s property against all risks of direct physical loss, except as excluded under the policy. The “contamination exclusion” precluded coverage for “contamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy.” The term “contamination,” in turn, was defined as “any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold, or mildew.” The policy also provided coverage for business interruption expenses under its “TIME ELEMENT” provision, which included an exclusions section that stated “[i]n addition to the exclusions elsewhere in this Policy, the following exclusions apply to TIME ELEMENT loss.” Dana sought coverage for business interruption expenses related to COVID-19 under the policy’s time element provision.

First, the Sixth Circuit addressed Dana’s contention that the “contamination exclusion” did not apply to the time element section of the policy. The court noted that although the “contamination exclusion” was placed under the property damage section of the policy, it is included in the list of exclusions that “apply unless otherwise stated.” Based on this plain language, the court reasoned that the “contamination exclusion” applied throughout the policy, including to the time element section, unless the policy stated otherwise, which it did not.

Next, the court addressed whether the exclusion applied to costs and damages caused by COVID-19 related interruptions. Looking again to the plain language of the policy, the Sixth Circuit held that actual or suspected presence of a virus like COVID-19 on Dana’s property was “contamination.” The policy excluded coverage for contamination and any cost from contamination, unless directly resulting from other covered physical damage. Dana’s claims, according to the court, were exclusively based on damage and loss related to COVID-19, not other covered physical damage. As contamination from viruses such as COVID-19 was excluded, there was no coverage for time element loss from such contamination.

Finally, the Sixth Circuit rejected Dana's argument that the "contamination exclusion" only applied to traditional environmental contamination, which would not include COVID-19. While the court noted prior decisions addressing similar "pollution exclusions" which limited those exclusions to traditional environmental contamination or pollution events, the court was unpersuaded by the insured's argument. Rather, the Sixth Circuit reasoned that the "contamination exclusion" here was completely different from the pollution exclusions in prior case law. Unlike prior policies, for example, the definition of "contamination" in the Zurich Policy clearly encompassed the presence of COVID-19 (i.e, a "virus") and there was no indication the exclusion was limited to traditional environmental contaminants. The court had no trouble concluding that "COVID-19 is a disease caused by a virus," and therefore, the exclusion applied.

While the Sixth Circuit did not address the policy's insuring clause specifically, its holding barring coverage under the policy's "contamination exclusion" continues a rather consistent pattern of ruling in favor of insurance carriers, and against policyholders, regarding coverage, or lack thereof, for COVID-19 related losses.