

## CLIENT ALERT

### Insurers' COVID-19 Notepad: What You Need to Know Now (Week of August 17)

August 18, 2020

#### JPML Denies Motions to Centralize COVID-19 Business Interruption Cases; Leaves Open Question of Single-Insurer MDLs

The U.S. Judicial Panel on Multidistrict Litigation denied two motions to centralize 278 COVID-19 business interruption cases against more than 100 insurers pending in 48 district courts. The Panel reasoned that industry-wide centralization “will not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation,” and noted that the purportedly common questions advanced by plaintiffs “share only a superficial commonality.” Because there is no common defendant in the actions, the Panel noted there “is little potential for common discovery across the litigation,” and added that “these cases involve different insurance policies with different coverages, conditions, exclusions, and policy language, purchased by different businesses in different industries located in different states. These differences will overwhelm any common factual questions.” The Panel also declined requests to create regional and state-based MDLs, noting they would suffer from many of the same problems. However, the Panel requested further briefing on insurer-specific MDLs, reasoning that actions limited to a single insurer group are more likely to “share common discovery and pretrial motion practice.” Stating that it did not have a sufficiently developed record to create an insurer-specific MDL, the Panel issued orders to four insurers – Certain Underwriters at Lloyd’s, London; Cincinnati Insurance Company; the Hartford insurers; and Society Insurance – to show cause as to why actions against them should not be centralized. It later issued a further show cause order directing Travelers Insurance Company to address why actions against it should not be centralized.

#### California Trial Court Grants Demurrer in COVID-19 Claim

The California Superior Court for Monterey County on August 6, 2020 granted an insurer’s demurrer in *The Inns By The Sea v. California Mutual Insurance Company*. The Court held that the plaintiff had failed to and could not allege its business income loss was caused by “direct physical loss of or damage to property,” had not pled facts to state a cause of action based on the policy’s limited coverage for business income loss caused by civil orders, and could not amend its complaint to overcome the deficiencies.

#### Texas Federal Court Dismisses COVID-19 Business Interruption Claim

On August 13, 2020, in *Diesel Barbershop, LLC, et al. v. State Farm Lloyds*, the United States District Court for the Western District of Texas dismissed COVID-19 business interruption claims brought by several Texas barbershops. According to the court, the plain language of the policies explicitly required an accidental, direct physical loss to property in order to afford coverage, which was not present. In addition, the court found that, even if the plaintiffs had plead direct physical loss, the claims would be barred by the policy’s virus exclusion.

### **Missouri Federal Court Denies Motion to Dismiss COVID-19 Business Interruption Claim**

On August 12, 2020, the United States District Court for the Western District of Missouri entered an order in *Studio 417, Inc. v. The Cincinnati Insurance Co.*, denying a motion to dismiss. The Court found that the policyholders had merely pled enough facts to proceed with discovery, which would shed light on the merits of their allegations. The order emphasized that the ruling will be subject to further review following discovery, and that subsequent case law in the COVID-19 context addressing similar insurance provisions and facts may be persuasive. The court also stated that the insurer may reassert its arguments at the summary judgment stage.

### **Tennessee COVID-19 Presumption Bill Fails**

On August 11, 2020, Tennessee’s Senate Commerce and Labor Committee rejected a bill that would have made COVID-19 an occupational disease for essential workers under certain conditions. The bill, S.B. 8007, would have created a presumption that workers suffering from COVID-19 contracted the coronavirus in the course of their employment if 10 or more employees at the same location had contracted COVID-19 or if the employee is an essential worker. The bill would have allowed the presumption to be rebutted by clear and convincing evidence that an employee’s contraction of COVID-19 did not arise out of or in the course of the employee’s employment. A similar bill, H.B. 8008, was introduced in the Tennessee House the day after S.B. 8007 failed in the Senate Committee.

### **Michigan Introduces Workers’ Compensation COVID-19 Presumption**

Michigan Representative Brian Elder introduced H.B. 6040, which creates a presumption that essential workers who contract COVID-19 during a state of emergency declared by Michigan’s governor sustained such personal injury while on the job. The burden then shifts to the employer to rebut the presumption. Essential workers are defined as employees whose employers require them to work outside of their home during the declared emergency. The legislation would apply to diagnoses of COVID-19 on or after March 10, 2020.

### **Pennsylvania Introduces Business Interruption Act**

The Pennsylvania legislature introduced H.B. 2759, titled the “Business Interruption Insurance Act.” If passed, the legislation would require that all business interruption policies in force as of the date of a declaration of a state of emergency be construed to cover losses due to a global virus or pandemic. The coverage “shall be afforded not subject to any exclusions, including ones for virus or pandemic, as long as the loss is the result of the natural disaster causing the proclamation to be issued.” The proposed bill applies to policies issued to insureds with fewer than 100 employees working at least 25 hours per week, and insurers who indemnify insureds pursuant to the Act are able to apply to the state Insurance Commissioner for reimbursement.

### **New Business Interruption Suits Against Insurers:**

The owner of a property containing a hotel, restaurant, farmers’ market, beauty salon, and post office in Philadelphia sued Erie Insurance Exchange in Pennsylvania state court (Philadelphia County), asserting claims for declaratory relief and breach of contract. The “all risk” policy allegedly provides business income, rental income, extra expense, and civil authority coverage. Complaint at ¶¶22-24. The policy contains an exclusion for loss or damage caused “[b]y or resulting from any virus, bacterium or

other microorganism that induces or is capable of inducing physical distress, illness or disease.” *Id.* at ¶70. The Complaint alleges that the defendant wrongfully denied the plaintiff’s claim for coverage, and has or will deny similarly situated policyholders’ claims for coverage. *Id.* at ¶¶94, 103-104.

The owner of a gym in Pennsylvania sued The Cincinnati Insurance Company and its broker in state court (Lackawanna County), asserting claims for declaratory relief, breach of contract, statutory bad faith, negligence, negligent supplying for the information or guidance of others, and negligent misrepresentation. The “all risk” policy allegedly provides business income, extended business income, extra expense, and civil authority coverage. Complaint at ¶¶32-42. The policy does not contain a virus or pandemic exclusion. *Id.* at ¶33. The Complaint alleges that the defendant wrongfully denied the plaintiff’s claim for coverage, failed to promptly investigate the claim, misrepresented the law applicable to the plaintiff’s claims, misled the plaintiff regarding available coverage limits, and misrepresented the terms of the policy. *Id.* at ¶¶56-89.

A university in Houston sued American Home Assurance Company in federal court (S.D. Tex.), asserting claims for breach of contract, declaratory relief, violations of the Texas Insurance Code, and breach of the duty of good faith and fair dealing. The “all risk” policy allegedly provides business interruption, relocation expenses, attraction property, civil authority, limitations of ingress and egress, and extra expense coverage. Complaint at ¶¶8-11. The Complaint alleges that individuals with confirmed cases of coronavirus were present on the covered property (*id.* at ¶27), and that the insurer wrongfully denied the plaintiff’s claim for coverage. *Id.* at ¶¶34, 40.

The owner and operator of a bar sued Aspen Specialty Insurance Company in Florida state court (Pinellas County) alleging that the plaintiff sustained business losses as a result of the spread of SARS-CoV-2 and state and local government closure orders, but the insurer “chose not to pay Plaintiff for the Loss.” Complaint at ¶¶ 10, 13.

The owner and operator of an ophthalmic medical practice sued Certain Underwriters at Lloyd’s, London in Florida state court (Sarasota County), asserting claims for declaratory relief, breach of contract, negligence, and negligent misrepresentation. The “all risk” policy allegedly provides coverage for “loss of business income and other losses and damages.” Complaint at ¶ 11. The Complaint alleges that the loss of use of insured property and the property’s inability to function as intended constitutes direct physical loss as contemplated by the policy. *Id.* at ¶ 28. The Complaint further alleges the insurer’s agent failed to properly explain all coverages, exclusions, and limitations and failed to appropriately procure insurance covering losses resulting from the COVID-19 pandemic. *Id.* at ¶ 42.

The owner and operator of an escape room sued Aspen Specialty Insurance Company in Florida state court (Pinellas County) alleging that it sustained covered losses as a result of the spread of COVID-19 and related closure orders that resulted in the suspension of operations at the insured premises and that the insurer “chose not to pay Plaintiff for the Loss.” Complaint at ¶¶ 9, 13.

A dentist sued First Community Insurance Company in Florida state court (Collier County) alleging that it sustained covered losses as a result of the spread of COVID-19 and related closure orders that resulted in the suspension of operations at the insured premises and that the insurer “chose not to pay Plaintiff for the Loss.” Complaint at ¶¶ 9, 14.

A cigar bar sued Aspen Specialty Insurance Company in Florida state court (Broward County) alleging that the plaintiff sustained covered losses as a result of the spread of COVID-19 and related closure orders that resulted in the suspension of operations at the insured premises and that the insurer “chose not to pay Plaintiff for the Loss.” Complaint at ¶¶ 9, 14.

The operator of a restaurant sued XL Catlin Insurance Company UK Ltd., HDI Global Specialty SE, Endurance Worldwide Insurance Limited, and Underwriters at Lloyd's London in Florida state court (Palm Beach County) for breach of contract. The "all risk" policy allegedly provides business interruption, extra expense, and civil authority coverage. Complaint at ¶¶ 5, 6. The Complaint alleges that the "presence of COVID-19 caused direct physical loss of and/or damage to the covered premises under the Policy by, among other things, damaging the property, denying access to the property, preventing customers from physically occupying the property, causing the property to be physically uninhabitable, causing the partial or complete loss of the property's essential use and function, and/or causing a suspension of business operations on the premises." *Id.* at ¶ 49.

A restaurant sued Westchester Surplus Lines Insurance Company in Florida state court (Collier County) alleging that the plaintiff sustained covered losses as a result of the spread of COVID-19 and related closure orders that resulted in the suspension of operations at the insured premises and that the insurer "chose not to pay Plaintiff for the Loss." Complaint at ¶¶ 9, 14.

An ice cream shop sued Twin City Fire Insurance Company in Florida state court (Orange County), alleging that coronavirus-related losses "are tantamount to direct physical loss or damage to property" and that the insurer "has waived, forfeited or should be estopped from asserting any policy conditions as a defense to this action." Complaint at ¶¶ 10, 28.

The owner and operator of a bar sued Colony Insurance Company in Florida state court (Polk County) alleging that the plaintiff sustained covered losses as a result of the spread of COVID-19 and related closure orders that resulted in the suspension of operations at the insured premises and that the insurer "chose not to pay Plaintiff for the Loss." Complaint at ¶¶ 9, 13.

The owners and operators of several restaurants sued Fireman's Fund Insurance Company and Allianz Global Risks United States Insurance Company in federal court (D. Mass.), asserting claims for breach of contract, breach of the covenant of good faith and fair dealing, violation of G.L. c. 176D, and violation of G.L. c. 93A. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶15. The Complaint alleges that the plaintiffs suffered physical loss of or damage to their insured properties in that they "lost the ability to provide restaurant, alcohol, and sales at their insured properties, their customers were prevented from physically occupying their insured properties, causing the insured properties to be physically uninhabitable and unusable by employees and customers, causing Plaintiffs' core business functions to be nearly eliminated or destroyed, all of which caused and constituted a suspension of Plaintiffs' business operations at their insured properties." *Id.* at ¶ 46.

The Bend Hotel sued Cincinnati Insurance Company in federal court (N.D. Ill) seeking coverage for COVID-19 related business losses. Plaintiff alleges it was required to cease the majority of its operations in response to pandemic related orders issued by the State of Illinois. The Complaint alleges the "all-risk" policy provides coverage for the loss of business income, extra expenses, and loss caused by the actions of a Civil Authority. Plaintiff alleges the policy contains no applicable exclusion.

Firebirds International, the owner/operator of restaurants in the U.S., sued Zurich Insurance Company in Illinois state court (Cook County) seeking coverage for COVID-19 related business losses. Plaintiff alleges as a result of local and state government orders, it was required to close or alter operations at a number of locations resulting in severe losses. The Complaint asserts the policy's Time Element, Preservation of Property and Civil Authority coverage provisions respond to the submitted losses, no exclusion applies, and Zurich wrongfully denied the claim.

Several New Jersey based YMCA's sued The North River Insurance Company, U.S. Fire Insurance Company, and Philadelphia Insurance Company in New Jersey state court (Union County) seeking coverage for losses sustained as a result of COVID-19. The

Complaint asserts the policies' Business Income and Food Contamination and Communicable Disease provisions respond to the submitted loss. Plaintiffs contend the Virus Exclusion, which contains an Anti-Concurrent Causation clause, does not apply.

A restaurant sued Farmers Insurance Exchange in California state court (San Francisco Cty.) alleging the insurer wrongfully denied its claim for business interruption losses due to California's COVID-19 closure orders. The policy allegedly provides business interruption, extra expense, and civil authority coverages, and contains a virus exclusion. The complaint alleges that "insurance companies operating in California are categorically denying claims from restaurants arising from California's mandated interruption of business services" and that "form letters denying coverage for such losses appear to rest on crabbed readings of coverage language and overbroad readings of exclusions. That gets insurance law exactly backwards – and raises the specter of bad-faith denials."

#### **New Business Interruption Class Action Filings:**

A Missouri dental practice filed a class action complaint against Cameron Mutual Insurance Company in Missouri state court (Clay County) seeking coverage for business interruption losses due to COVID-19. Plaintiff alleges, on behalf of itself and Class Members, as a result of the "pandemic and related governmental restriction on non-essential businesses" it has suffered significant business losses. Complaint at 2. The Complaint alleges the "all-risk" policy provides coverage for the claim under the Business Income, Extra Expense, Civil Authority, and Sue and Labor provisions. The Complaint defines the putative class as "A Missouri citizens insured by one of the Defendant's property insurance policies in effect during the COVID-19 pandemic. *Id.* at 56.

The owner of a restaurant in Tennessee sued Erie Insurance group on behalf of itself and all others similarly situated in federal court (E.D. Tenn.), asserting claims for declaratory relief, breach of contract, and breach of the implied covenant of good faith and fair dealing. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 35, 43. The Complaint alleges that the defendant wrongfully denied its claim for coverage, and informed the plaintiff "that as a 'general rule,' [it] was denying business interruption claims related to COVID-19." *Id.* at ¶¶37-39. The class is defined as "[a]ll restaurants in Tennessee that purchased comprehensive business insurance coverage from Defendant . . . which includes coverage for business interruption, filed a claim for lost business income following Tennessee's Closure Orders, and were denied coverage by Erie Insurance." *Id.* at ¶45.

The owner of a dental practice in Washington state sued Aspen American Insurance Company on behalf of itself and all others similarly situated in federal court (W.D. Wash.), asserting claims for declaratory relief and breach of contract. The "all risk" policy allegedly provides practice income, extra expense, extended practice income, and civil authority coverage. Complaint at ¶¶11-13. The Complaint alleges that the defendant denied the plaintiff's claim for coverage, and that it "has denied and will deny coverage to other similarly situated policyholders." *Id.* at ¶¶28-30. The nationwide class is divided into declaratory relief and breach of contract subclasses. *Id.* at ¶32.

Franchisees and operators of barre exercise studios in Seattle and Vancouver sued Sentinel Insurance Company, Ltd. on behalf of themselves and all others similarly situated in federal court (W.D. Wash.), asserting claims for declaratory relief and breach of contract. The all risks policies allegedly provide business income, extra expense, extended business income, and civil authority coverage. Complaint at ¶¶20-22. The Complaint alleges that the defendant denied the plaintiffs' claims for coverage via "materially identical" denial letters, and that the defendant "has denied and will deny coverage to other similarly situated

policyholders.” *Id.* at ¶¶43-45. The nationwide class is divided into breach of contract and declaratory relief subclasses. *Id.* at ¶47.

A California hair salon filed a class action lawsuit against Certain Underwriters at Lloyd’s, London, alleging the insurer wrongfully denied its claim for business interruption losses due to California’s COVID-19 closure orders. The salon alleges that the “all risk” policy’s Contamination Exclusion does not preclude coverage because the “losses were not caused directly or indirectly by any of the actions set forth in the exclusions. Rather, the efficient proximate cause of Plaintiff’s . . . losses were precautionary measures taken by the State of California and other Civil Authorities to prevent the spread of COVID-19 in the future, not because coronavirus was found in or on Plaintiff’s or Class members’ insured properties.” The complaint further alleges that Lloyd’s denied the salon’s claim without conducting any inspection or review of “Plaintiff’s physical location or documents concerning its business activities in 2020,” and therefore Lloyds has “waived any right to inspect these premises, deny coverage for any reason related to the conditions at this location, or raise any defense related to the conditions at this location or facts specific to Plaintiff.”

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