

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of August 3)

Aug.03.2020

Trial of UK Financial Conduct Authority Test Case Concludes; Ruling Expected Mid-September

Trial has concluded in the UK test case, in which the FCA asked for a ruling on how a representative sample of BI policy wordings -- without a direct physical loss requirement --respond to COVID-19 related losses. In the last two weeks of July, the trial took place over eight days in the High Court. Submissions were made by the FCA, the intervenors Hospitality Insurance Group Action and Hiscox Action Group, and eight participating insurers. The FCA put forward the policyholders' arguments in the trial, often expressing arguments critical of the insurers, and causing some to express concerns about the neutrality of the UK regulator.

The FCA has noted that "the exact date of judgment is not known. Lord Justice Flaux expressed a hope that judgment would be available by the middle of September, although he made clear that this was not a binding indication." Once it is issued, any party may appeal the court's decision, subject to procedural rules for seeking permission to appeal and making an appeal. If an appeal is taken, the parties have agreed they will seek to have any appeal heard on an expedited basis, including the possibility of seeking a "leapfrog" appeal to the UK Supreme Court.

Oregon Department of Consumer and Business Services Amends Property and Casualty Order Addressing Premium Grace Periods

The Oregon Department of Consumer and Business Services amended previously issued property and casualty order, effective through August 30, 2020, providing that Oregonians with property and casualty policies can request a one-time 60-day grace period for each policy to pay past due premiums. Such policyholders must contact their insurance company and confirm that the extension is needed due to a COVID-19 related financial hardship. The order also requires insurers to pay any covered losses during the grace period and to extend all deadlines for reporting claims and other communications.

New Business Interruption Suits Against Insurers:

The owner and operator of a marketing company sued Certain Underwriters at Lloyd's London in Florida state court (Hillsborough County) "to affirm that the Civil Authority constitutes a direct physical loss or damage to property," that the "decreased use of the property because of Civil Authority is tantamount to direct physical loss or damage to property," that "acts of Civil Authority are tantamount to a direct physical loss or damage to property," and that "Civil Authority is a covered cause of loss under the Policy not subject to any exclusions." Complaint at ¶¶ 32-35.

The operator of restaurant and retail sales businesses sued Fireman's Fund Insurance Company, Associated Indemnity Corporation, 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, and violations of G.L. c. 176D and G.L.c. 93A. The "all risk" policy at issue allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶ 9. The Complaint alleges

that as a direct result of Massachusetts' COVID-19 closure orders, the plaintiff "has incurred a physical loss of and damage to their insured properties for regular business operations." *Id.* at ¶ 45. The insurer allegedly "failed to make a good faith investigation, determine coverage and adjust [the plaintiff's] claim because defendants reached a pre-determined conclusion to deny coverage." *Id.* at ¶ 71.

A sports equipment and apparel store franchisee sued Erie Indemnity Company in Ohio state court (Delaware County), asserting claims for declaratory relief, breach of contract, and bad faith. The "all risk" policy allegedly provides business interruption, extra expense, and civil authority coverage. Complaint at ¶¶ 26-33. The Complaint alleges that the plaintiff's losses "are 'direct' in that they were directly caused by the Executive Orders; and they are 'physical' in that Plaintiff's employees and customers have been unable to be physically present on the property, meaning that Plaintiff has been physically deprived of its property and business." *Id.* at ¶ 45. The insurer allegedly denied the claim on the grounds that there was no physical loss or damage to property and various policy exclusions were applicable, and the insurer is alleged to have "failed to appreciate or investigate the basis for the Claim." *Id.* at ¶¶ 83, 84.

A hair salon sued Continental Casualty Company in Florida state court (Broward County), asserting claims for declaratory relief, breach of contract, and bad faith claims adjusting in violation of Florida Statutes Section 624.155. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 14, 15. The Complaint seeks a declaration that the COVID-19 closure orders has caused physical property loss and damage to insured property and that coverage is provided for future civil authority orders that result in suspensions or curtailments of business operations. *Id.* at ¶ 24. The insurer is alleged to have denied the plaintiff's claim without conducting a reasonable investigation and to have failed to provide a reasonable written explanation of the basis for its lack of a reasonable settlement offer. *Id.* at ¶ 57.

The owner of retail department stores in Pennsylvania, New York, New Jersey, Delaware, Maryland, Ohio, Connecticut, and Rhode Island sued American Guarantee & Liability Insurance Company in federal court (E.D. Pa.), asserting claims for declaratory relief, breach of contract, and breach of the duty of good faith and fair dealing and bad faith. The "all risk" policy allegedly provides business income, civil or military authority, protection and preservation of property, and time element coverage, and excludes "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. . ." *Id.* at ¶¶43, 45-46. "Contaminant" is defined as "any solid, liquid, gaseous, thermal or other irritant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste (including materials to be recycled, reconditioned or reclaimed), other hazardous substances, Fungus or Spores." *Id.* at ¶53. The complaint alleges that the defendant wrongfully denied the plaintiff's claim for coverage under the policy without conducting any investigation. *Id.* at ¶¶73-79. The complaint further alleges that the defendant "like other insurers has been engaged in a pattern and practice of refusing to conduct individual analysis of claims on their merits," and "is engaged in an ongoing, one-sided, bad faith effort to ignore any and all obligations under all-risks property and business and interruption policies like" the plaintiff's. *Id.* at ¶¶80-83.

The owner of a lounge and bar in Texas sued Crum & Forster and its insurance agent in Texas state court (Harris County), asserting claims for deceptive trade practices and common law fraud. The Complaint alleges that the defendants told the plaintiff that it had a business interruption insurance policy that would cover all losses "that included anything that would prevent the business from operating," and that after the plaintiff's business was closed due to COVID-19, the defendants told the plaintiff that the insurance would cover the shutdown. Complaint at ¶13. The Complaint alleges that the defendants engaged in an "unconscionable action of course of action" and "misrepresentation of insurance policy" in violation of the Texas

Consumer Protection Act. *Id.* at ¶¶14-19. Plaintiff seeks economic and actual damages, damages for mental anguish, punitive damages, and attorney's fees. *Id.* at ¶¶26-32.

The owner of a dog grooming service in Texas sued Massachusetts Bay Insurance Company, Governor Insurance Agency, Inc., and its insurance broker in Texas state court (Bexar County), asserting claims for breach of contract, noncompliance with the Texas Insurance Code, and breach of the duty of good faith and fair dealing. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶8. The policy contained a "virus" endorsement which excluded losses caused "from any virus, bacterium . . . that induces or is capable of inducing physical illness or disease." *Id.* at ¶24. The Complaint alleges that the defendants wrongfully denied the plaintiff's claim for coverage without conducting a reasonable investigation. *Id.* at ¶21.

The owner of an eCommerce service provider in Texas sued Colony Insurance Company and Burns & Wilcox of Texas, Inc. in Texas state court (Denton County), asserting claims for breach of contract, violation of the Texas Insurance Code, breach of the duty of good faith and fair dealing, and declaratory relief. The "all risk" policy allegedly provides business income extra expense, and civil authority coverage, and does not contain a virus exclusion. Complaint at ¶¶29-32, 37-40. The complaint alleges that the defendant wrongfully denied the plaintiff's claim for coverage without conducting any investigation. *Id.* at ¶43.

The owner of a hotel chain in Washington state sued Fireman's Fund Insurance Company in state court (Spokane County), asserting claims for violations of the state's Insurance Fair Conduct Act, bad faith, negligence, breach of contract, violations of the state's Consumer Protection Act, and declaratory relief. The policy allegedly provides business income, extra expense, extended business income, business access, and civil authority coverage. Complaint at ¶11. The complaint alleges that the defendant wrongfully and in bad faith denied the plaintiff's claim for coverage. *Id.* at ¶29.

Laboratorio Kitchen sued Fitchburg Mutual Insurance Company in New Jersey state court (Essex County) alleging that government orders issued in response to COVID-19 caused the insured premises to become "uninhabitable and/or contaminated as a result of a covered cause of loss, resulting in loss of use." Complaint at ¶16. The Complaint alleges that the "all-risk" policy provides coverage for the losses under the Business Income, Extra Expenses, Civil Authority, and Supplemental business Income provisions. Plaintiff seeks damages in connection with claims for breach of contract bad faith.

Northwell Health Inc. sued Illinois Union Insurance Company in New York state court (New York County) seeking coverage for business losses and damages in connection with the insurer's alleged wrongful denial of coverage under the Healthcare Premises Pollution Liability policy. Plaintiff alleges it was required to cease medical procedures described as "elective" and incur additional costs in response to the pandemic. The Complaint alleges that the policy provides coverage for: "costs expended in response to emergencies and to decontaminate its facilities in response to facility-borne illness events and broadly defined pollution conditions, and business interruption caused by covered pollution conditions." Complaint at ¶42.

New Jersey restaurant Casa sued Berkshire Hathaway Guard Insurance Companies in New Jersey state court (Essex County) seeking coverage for COVID-19 related business interruption losses. Plaintiff alleges that the Governor of New Jersey issued orders limiting the operations of restaurants such as Plaintiff's, causing the insured premises to become "uninhabitable and/or contaminated as a result of a covered cause of loss, resulting in loss of use." Complaint at ¶16. The Complaint asserts the "all-risk" policy provides coverage for the losses under the Business Income, Extra Expenses, Civil Authority, and Supplemental Business Income provisions.

City Bar & Central Taco sued Certain Underwriters at Lloyd's London in Louisiana state court (East Baton Rouge Parish) seeking declaratory relief and damages for COVID-19 related business losses. Plaintiff alleges it sustained losses due to the Governor of Louisiana's "stay at home" order. The Complaint asserts the policy provides for the coverage of such losses under the business income and civil authority policy provisions.

Tavistock Restaurant Group LLC filed a declaratory action against Zurich American Insurance Company in Illinois state court (Cook County) in connection with COVID-19 related business losses sustained by several of its covered restaurants across the United States. Plaintiff alleges it was forced to limit or cease operations at several locations due to the orders of several local and state governments. The Complaint alleges that the "all-risk" policy provides coverage for the sustained losses under the Business Income, Extra Expense, Contingent Time Element, Civil or Military Authority, Ingress/Egress coverage provisions, and that the policy's Contamination exclusion does not apply.

Stone Park Entertainment sued Lexington Insurance Company in Illinois state court (Cook County) for declaratory relief and damages in connection with COVID-19 related business losses. Plaintiff, who operates a nightclub, alleges it was forced to cease operations due to the risk of contamination to the insured premises and the risk the presence of the virus posed to its employees and patrons, and that its "all-risk" policy's business interruption provision provides coverage for such losses.

Ticket Alternative sued Hartford Insurance in Georgia state court (Fulton County) alleging it sustained business losses due to the cancellation of events and state and local orders prohibiting access to Plaintiff's offices. The Complaint asserts the policy at issue provides coverage for the sustained losses under the Business Income, Extra Expense, Civil Authority, and Dependent Properties provisions. Plaintiff seeks declaratory relief and damages in connection with claims for breach of contract, breach of fiduciary duty, and negligence.

A D.C. restaurant group sued The Charter Oak Fire Insurance Company in federal court (D.D.C.) alleging the insurer wrongfully denied its claim for business interruption losses due to D.C. and Virginia's COVID-19 closure orders. The "all risk" policy allegedly provides Business Income, Extra Expense, Civil Authority, and Ingress or Egress coverages. The restaurant group alleges that the policy "the "Policy's substantive terms were set unilaterally by Charter Oak, were not subject to individual negotiation by [plaintiff], and were presented to [plaintiff] on a 'take it or leave it basis' despite the hefty premiums charged," and that Plaintiff "was never informed by Charter Oak that for the business income and extra expense coverage to apply, there would need to be visible physical damage to property."

A California event management business sued Blackboard Insurance Company in California state court (Alameda 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 and Extra Expense coverages. Citing to California Insurance Commissioner's notice to insurers that they are "required to conduct and diligently pursue a thorough, fair, and objective investigation of the reported claim," the complaint alleges that "[r]ather than conducting a thorough and good faith investigation . . . Defendant hired an individual in Ohio to convey Defendant's denial of coverage under the policy."

A Nashville restaurant sued Mt. Hawley Insurance Company in Arizona state court (Maricopa Cty.) alleging the insurer wrongfully denied its claim for business interruption losses due to Tennessee's COVID-19 closure orders. The complaint alleges that as a result of Tennessee's closure orders, the restaurant "suffered a direct physical loss of, and damage to, its premises, including the ability of customers to physically enter the premises [and] the ability to occupy and otherwise utilize the premises for services,"

and that in denying its claim, Mt. Hawley “failed to acknowledge caselaw making clear that the type of loss experienced by [plaintiff] is a physical loss of or damage to property, as covered by the Policy.”

A D.C. restaurant sued Travelers Indemnity Company of America in federal court (D.D.C.) alleging the insurer wrongfully denied its claim for business interruption losses due to D.C.’s COVID-19 closure orders. The complaint alleges Travelers’ denial letter “appears to be a form letter prepared to send in response to business interruption claims arising from DC’s Public Health Orders by customers who purchased the same or substantially similar comprehensive business insurance policies,” and that the denial “is contrary to the terms and conditions of the Policy and applicable law, which give effect to plain language, construe ambiguity in favor of coverage, and narrowly construe exclusions, the applicability of which insurers have the burden of proving.”

An Alabama restaurant and bar sued The Cincinnati Insurance Company in federal court (N.D. Ala.) alleging the insurer wrongfully denied its claim for business interruption losses due to Alabama’s COVID-19 closure orders. The “all-risk” policy allegedly provides Property, Business Personal Property, Business Income, Extra Expense, and Civil Authority coverages, and does not contain a virus exclusion. The complaint alleges that “[l]osses due to the COVID-19 pandemic are a Covered Cause of Loss that is not excluded under the Policy,” and that the “presence of a virus or disease can constitute physical damage to property, as the insurance industry has recognized since at least 2006.”

A Los Angeles café sued Amguard Insurance Company in California state court (Los Angeles 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 Income and Extra Expense Coverages. The café alleges that it “was not aware of the presence of any COVID-19 virus on its premises,” and that “[t]he Order was the predominate cause of the suspension of [the] Café’s operation.” The complaint further alleges that Amguard “rejected the claim without even the slightest of an investigation, resulting in a complete and utter violation of California insurance law, regulations, and standards.”

A San Francisco restaurant sued Allianz Global Corporate & Security and its subsidiaries 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 Income, Civil Authority, Extra Expense, Crisis Event, and Premises Contamination and Communicable Disease coverages. The complaint alleges the Closure Orders were “issued due to droplets containing the coronavirus being on surfaces and objects in, on, around, and in the immediate area of” the restaurant, and that insured’s lost income “has been caused by physical damage to the Insured Premises, where every surface and object is implicated.” The complaint further alleges that Allianz did not conduct “any inspection or review of the Insured Premises.”

New Business Interruption Class Action Filings:

The operator of a restaurant filed a class action complaint against Strathmore Insurance Company in federal court (D. Mass.), asserting claims for declaratory relief, breach of contract, and violation of G.L. c. 93A, §§ 2, 11. The “all risk” policy allegedly provides business interruption, extra expense, and civil authority coverage. Complaint at ¶ 6. The Complaint alleges that the insurance industry has “recognized that the presence of virus or disease can constitute physical damage to property since at least 2006” and that the insurer “could have used standard insurance industry forms or coverage provisions to specifically exclude losses relating to viruses like COVID-19 from coverage, but it did not do so.” *Id.* at ¶¶ 64, 65. The insurer allegedly had a strategy “to deny all claims related to the civil authority orders entered by state and local governments and COVID-19.” *Id.* at ¶ 8. The proposed nationwide classes are defined as: (1) “[a]ll persons or entities in the United States (including its territories and

the District of Columbia) who own an interest in a business that served food and beverages on the premises which had Business Income and/or Extra Expense coverage under a property insurance policy issued by Strathmore, which does not have an express virus or pandemic exclusion, that suffered a suspension of business operations due to their inability to use their property for their intended purposes due to COVID-19;” and (2) “[a]ll persons or entities in the United States (including its territories and the District of Columbia) who own an interest in a business that served food and beverages on the premises which had Civil Authority coverage under a property insurance policy issued by Strathmore, which does not contain an express virus or pandemic exclusion, that suffered loss of Business Income and/or Extra Expense caused by an action of a civil authority.” *Id.* at ¶¶ 92, 93.

The owner and operator of several hotels filed a class action complaint against Travelers Insurance Company in Ohio state court (Cuyahoga County), asserting claims for declaratory relief, breach of contract, and breach of the covenant of good faith and fair dealing. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 7, 11. The Complaint alleges that, under the terms and conditions of the policy, “[p]hysical Loss does not mean and/or require tangible ‘physical damage.’” *Id.* at ¶ 13. The insurer is alleged to have “had actual and express knowledge of specific coverage forms that specifically exclude losses related to pandemics and/or SARS, but [the insurer] failed to use those coverage forms.” *Id.* at ¶ 36. The Complaint seeks certification of: (1) a nationwide declaratory relief class; (2) a nationwide restitution/monetary relief sub-class; and (3) an Ohio sub-class for insurance bad faith. *Id.* at ¶ 44.

The owner of a restaurant in Memphis sued Erie Insurance Exchange on behalf of itself and all others similarly situated in federal court (W.D. Tenn.), asserting claims for declaratory relief, breach of contract, and breach of the covenant of good faith and fair dealing. The “all risk” policy allegedly provides business income, extra expense, “full resumption of operations,” and civil authority coverage. Complaint at ¶¶ 22-31. The Complaint alleges that the defendant “summarily denied” the plaintiff’s claim for coverage, and “has taken the position it will not pay any such similar claims no matter the circumstances to putative class members.” *Id.* at ¶11. The defendant has allegedly taken the position that the plaintiff’s claims are barred by the policy’s “pollution” exclusion, which defines pollutant as a “solid, liquid, gaseous or thermal irritant or contaminant.” *Id.* at ¶55. The class is defined as “[a]ll persons and entities with business income; extra expense; and/or civil authority coverage under a policy issued by defendant “that suffered an interruption of business operations and for which [the defendant has] either actually denied or stated they will deny a claim for the losses or have otherwise failed to acknowledge, accept as a covered loss, or pay for the covered losses.” *Id.* at ¶61.

A dental practice filed a class action complaint against Aspen American Insurance Company in federal court (D. Kan.) seeking coverage for COVID-19 related business losses. Plaintiff alleges on behalf of itself and Class Members it was required to “greatly reduce” operations due to the virus and “stay-at-home” orders issued by local and state governments—resulting in losses. The Complaint asserts the “all-risk” policy provides coverage under the Practice Income, Extra Expense, Expenses to Reduce Damage, Sue and Labor, and Civil Authority provisions. The Complaint seeks declaratory relief and damages on behalf of a Nationwide Declaratory Judgment and Injunctive Class, a Nationwide Breach Class, and a Kansas subclass.

An Oregon restaurant filed a class action lawsuit against Farmers Insurance Exchange, its affiliates, and its subsidiary in federal court (C.D. Cal.) alleging the insurer wrongfully denied its claim for business interruption losses due to Oregon’s COVID-19 closure orders. The “all-risk” policy allegedly provides Business Income, Extra Expense, and Civil Authority coverage, and contains a virus exclusion. The complaint alleges that “[i]n reaching their denial decision, Defendants conducted no investigation into the covered premises to determine the precise physical loss or damage that resulted from the governmental orders” and

that Farmers “made no attempt to communicate” with the restaurant from the time it filed its claim until the time Farmers denied the claim.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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