

## CLIENT ALERT

### Insurers' COVID-19 Notepad: What You Need to Know Now (Week of June 29)

June 30, 2020

#### Ohio Court Denies Policyholder Preliminary Injunction Request

An Ohio state court denied a well-known Cincinnati restaurant's motion for preliminary injunction seeking a declaration that its insurer, Cincinnati Financial Corporation, is prohibited from denying the restaurant's claim for business interruption losses due to the coronavirus pandemic. The court recognized that, to prevail on the motion for a preliminary injunction, the plaintiff would be required to show by clear and convincing evidence (1) a substantial likelihood of success on the merits; (2) it will suffer irreparable harm without the relief sought; (3) no unjustifiable harm will happen to third parties; and (4) the injunctive relief would serve the public interest. In a short, two-page order entered on June 5, 2020, the court held that the restaurant had not shown the required elements by clear and convincing evidence, particularly that it "failed to demonstrate that it will suffer irreparable harm if injunctive relief is denied."

#### Nevada Division of Insurance Disallows New COVID-19 Exclusions

The Nevada Department of Business and Industry, Division of Insurance issued a notice informing all property and casualty insurers offering business interruption coverage that the department "will not approve any new policy or endorsement language containing exclusions of coverage that specifically mention COVID-19, viruses, or pandemics." The Department noted that while it expresses no opinion on whether past-issued policies do or do not cover COVID-19 related losses, the temporary prohibition of such exclusions during the current state of emergency is necessary in order to "protect consumers against unexpected narrowing of previously expected insurance coverage and ambiguity of interpretation of insurance contracts during a time of great uncertainty and financial strain." The notice also requests that insurers that received approval for such exclusions on or after March 12, 2020 voluntarily withdraw such language.

#### Update on Requests to Joint Panel on MultiDistrict Litigation to Centralize COVID-19 Suits

Several plaintiffs have asked the Judicial Panel on Multidistrict litigation to centralize seven suits in Arkansas, which allege that Arch Insurance Co., United Specialty Insurance Co., American Claims Management and Beecher Carlson Insurance LLC, wrongfully denied claims for canceled ski trips due to COVID-19. Plaintiffs assert each suit arises out of "virtually identical factual circumstances" and there is a clear overlap between the various claims and allegations.

Plaintiffs seek centralization of more than thirty putative class actions alleging the "passenger airlines have refused to offer required refunds for flights that they cancelled in response to the COVID-19 pandemic." The movants seek centralization before the Northern District of Illinois, although other forums have been suggested.

The pending motions to centralize business interruption insurance litigation, MDL No. 2942, IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION, which already are pending and briefed before the Joint Panel on Multidistrict Litigation have been [set for remote hearing](#) on July 30, 2019.

#### **UK: FCA Test Case on BI COVID-19 Coverage Proceeds**

As reported in June 8 [Notepad](#), the Financial Conduct Authority's COVID-19 related insurance test case is proceeding in the UK, with the FCA having filed its [witness statement](#). Recently, the insurers filed their defenses, and the FCA reply is due on July 3, with proceedings headed toward an 8 day court hearing on 20-23 and 27-30 July. The Hospitality Insurance Group Action and the Hiscox Action Group were permitted to intervene in the test case. Each may file written submissions and make brief oral submissions at the hearing in July. In addition to conducting the test litigation, the [FCA has published guidance](#) which sets out its expectations for insurers and insurance intermediaries when handling claims and complaints for business interruption policies during the test case brought by the FCA.

#### **France: Restaurants Settle With Insurer Over Lockdown-Related Losses**

The owner of several restaurants in Paris [settled](#) with their insurer over a dispute concerning business interruption losses. As reported in the May 25 [Notepad](#), the owner had sued in a Paris court after the insurer failed to pay for alleged losses incurred following imposition of France's COVID-19 lockdown, and the French court had ordered the insurer to pay two months' worth of revenue losses for one of the restaurants. The settlement terms have not been released, but the owner stated that it is a broad agreement that covers all of his restaurants. The insurer is reportedly now also in talks with some 600 other restaurants over compensation for lockdown-related losses.

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

A cosmetic surgeon [sued](#) Twin City Fire Insurance Company in Florida state court (Miami-Dade County), alleging the insurer wrongfully denied his claim for business interruption losses due to Florida's COVID-19 closure orders. The "all risk" policy allegedly provides coverage for business losses and extra expenses that result from an involuntary interruption of business operations, as well as for actions of civil authority. Complaint at ¶¶ 17, 29. The Complaint alleges that the surgeon's "lost business income and extra expenses due to a national disaster have not been excluded from coverage." *Id.* at ¶ 48.

The operator of a Florida restaurant [sued](#) Scottsdale Insurance Company in Florida state court (Pinellas County), alleging the insurer wrongfully denied its claim for business interruption losses due to Florida's COVID-19 closure orders. The "all risk" policy allegedly provides coverage for business losses and extra expenses that result from an involuntary interruption of business operations, as well as for actions of civil authority. Complaint at ¶¶ 17, 29. The Complaint alleges that the plaintiff "lost the physical use of the insured restaurant, resulting in a significant physical loss of its business income and incurred extra expenses." *Id.* at ¶ 41.

A Florida wholesale distributor [sued](#) Depositors Insurance Company in Florida state court (Broward County), alleging the insurer wrongfully denied its claim for business interruption losses due to Florida's COVID-19 closure orders. The "all risk" policy allegedly provides coverage for business losses and extra expenses that result from an involuntary interruption of business operations, as well as for actions of civil authority. Complaint at ¶¶ 17, 29. The Complaint alleges that the COVID-19 pandemic is

a “natural disaster” and like “other specific disasters, such as hurricanes or earthquakes, it involves substantial damage to property, hardship, suffering, and loss of life.” *Id.* at ¶ 37.

The owner and operator of a salon sued Hartford Casualty Insurance Company in Florida state court (Clay County), alleging the insurer wrongfully denied its claim for business interruption losses due to Florida’s COVID-19 closure orders. The “all risk” policy allegedly provides business income and civil authority coverage. Complaint at ¶ 26. The Complaint alleges that the COVID-19 pandemic “caused direct physical loss and resultant/ensuing damages to the Subject Property.” *Id.* at ¶ 13. The insurer allegedly denied the claim on the basis that “coronavirus did not cause property damage” and therefore “business income loss is not covered.” *Id.* at ¶ 32.

A party center, a food catering company, a wholesale food seller, and a real estate holding company sued Westfield Insurance Company in Ohio state court (Lake County), alleging the insurer wrongfully denied their claim for business interruption losses due to COVID-19 closure orders. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶ 6. The Complaint alleges that “Coronavirus and the Pandemic caused and continue to cause direct physical loss and property damage.” *Id.* at 23. The insurer allegedly denied coverage, in part, based on the policy’s virus/bacteria exclusion. *Id.* at ¶ 45.

The owner and operator of a dental practice sued The Cincinnati Insurance Company in Ohio state court (Cuyahoga County), alleging the insurer wrongfully denied its claim for business interruption losses due to Ohio’s COVID-19 closure orders. The policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 33-50. According to the Complaint, the “insurance industry recognizes that viruses can cause physical loss of or physical damage to property” and that the insurer “chose not to use [an] ISO drafted and approved exclusion, or any other expressly stated and applicable alternative policy language, to eliminate coverage for loss or damage caused by viruses or bacteria in Plaintiff’s policy.” *Id.* at ¶ 15.

The owners and operators of franchised Denny’s and Ruby Tuesday restaurants in Indiana, Illinois, and Wisconsin sued State Auto Insurance Companies in Ohio state court (Franklin County), alleging the insurer wrongfully denied their claims for business interruption losses due to closure orders in Indiana, Illinois, and Wisconsin. The “all risk” policies allegedly provide business income, extra expense, and civil authority coverage. Complaint at ¶¶ 66-71. The insurer allegedly denied coverage because the actual or alleged presence of coronavirus does not constitute “direct physical loss” sufficient to trigger the policies’ insuring agreements. *Id.* at ¶ 12. The Complaint alleges the coronavirus “created invisible, dangerous conditions that rendered Plaintiffs’ locations unsuitable for normal business operations.” *Id.* at ¶ 13.

The owners and operators of restaurants and bars in Ohio sued The Cincinnati Insurance Company in Ohio state court (Cuyahoga County), alleging the insurer wrongfully denied their claims for business income, extra expense, extended business income, civil authority, and business income from dependent properties coverage due to Ohio’s COVID-19 closure orders. Complaint ¶ 1. The Complaint alleges that the “insurance industry recognizes that viruses can cause physical loss of or physical damage to property” and that the insurer “chose not to use [an] ISO drafted and approved exclusion, or any other expressly stated and applicable alternative policy language, to eliminate coverage for loss or damage caused by viruses or bacteria in Plaintiffs’ policy.” *Id.* at ¶ 15. Plaintiffs seek “to recover their incurred costs, expenses, and losses to mitigate the spread of the SARS-CoV-2 virus in complying with the Civil Authority Orders, which are covered under the Insurance Policy.” *Id.* at ¶ 69.

The owners and operators of scrap metal businesses sued The Cincinnati Insurance Company in Ohio state court (Cuyahoga County), making claims for business income, extra expense, extended business income, civil authority, and business income from

dependent properties coverage due to Ohio's COVID-19 closure orders. Complaint ¶ 1. Plaintiff alleges that the "insurance industry recognizes that viruses can cause physical loss of or physical damage to property" and that the insurer "chose not to use [an] ISO drafted and approved exclusion, or any other expressly stated and applicable alternative policy language, to eliminate coverage for loss or damage caused by viruses or bacteria in Plaintiffs' policy." *Id.* at ¶ 15. Plaintiffs allege they "are entitled to recover their incurred costs, expenses, and losses to mitigate the spread of the SARS-CoV-2 virus in complying with the Civil Authority Orders, which are covered under the Insurance Policy." *Id.* at ¶ 64.

A restaurant sued Midwest Mutual Family Insurance Co. in Minnesota state court (Ramsey County) seeking coverage for business interruption losses related to COVID-19. Plaintiff alleges it suspended operations in response to the government orders designed to stem the spread of COVID-19. Complaint at ¶¶11-12. Plaintiff later resumed limited dine-out operations. *Id.* at ¶11. Plaintiff alleges it "sustained lost business income" and "was unable to use certain food inventory." *Id.* at ¶¶12-13. The Complaint seeks damages for "Expired Food Inventory and lost business income." *Id.* at ¶¶23-24. Plaintiff seeks declaratory relief and damages for breach of contract.

A beverage and liquor sales company sued Erie Insurance Exchange in Pennsylvania state court (Philadelphia County), asserting claims for declaratory relief, injunctive relief, and compensatory relief for breach of contract. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage, and does not contain a virus exclusion. Complaint at ¶¶6-11. The Complaint alleges that the insurer allegedly wrongfully denied a claim due to losses allegedly sustained as a result of the COVID-19 pandemic and subsequent state closure orders. *Id.* at ¶¶34-36. The plaintiff also seeks to enjoin the defendant from denying coverage to other insureds for coverage for losses caused by the COVID-19 virus and referenced civil orders. *Id.* at ¶38.

The owners of restaurants in Philadelphia sued State Automobile Mutual Insurance Company and State Auto Insurance Companies in Pennsylvania state court (Philadelphia County), asserting claims for declaratory relief, breach of contract, and bad faith. The policy allegedly provides business income, extra expense, and pollutant-clean-up and removal coverage. Complaint at ¶¶16-18. The Complaint alleges that the plaintiffs have had to close their restaurants and will have to keep their restaurants closed or opened in a limited capacity, resulting in loss of income, and that as a result of the pollution and contamination of their property, they have and will continue to incur cleanup expenses. *Id.* at ¶¶19-20. The Complaint further alleges that the defendants wrongfully denied the plaintiffs' claim for coverage without proper investigation. *Id.* at ¶25.

A law firm in Philadelphia sued The Hartford, Hartford Fire Insurance Company, The Hartford Casualty Company, USI Insurance Services LLC, and USI Affinity Colburn Insurance Service in Pennsylvania state court (Philadelphia County), asserting claims for declaratory relief, injunctive relief, breach of contract, statutory bad faith, breach of the covenant of good faith and fair dealing, fraudulent misrepresentation, and unjust enrichment. The policy allegedly provided business income, extra expense, civil authority, and fungi, bacteria and virus coverage. Complaint at ¶¶5, 8. Plaintiff submitted a claim for loss of business income as a result of the presence of COVID-19 and subsequent state civil orders, and defendants denied coverage. *Id.* at ¶¶41-43. The Complaint further alleges that the defendants did not investigate the claim or investigated the claim in bad faith. *Id.* at ¶71.

Several Minor League Baseball teams located throughout the U.S. sued Philadelphia Indemnity Insurance Company, Acadia Insurance Company, National Casualty Company, Scottsdale Indemnity Company, and Scottsdale Insurance Company in federal court (E.D. Pa.). They sought to recover under various business interruption policies for business losses arising due to the cancellation of the Minor League Baseball season. Complaint at ¶¶ 2-8. The plaintiffs allegedly suffered business loss due to: the MLB's denial of players to the minor league teams; loss of event revenue from game tickets, merchandise, and food/beverage;

and costs of normal operating expenses, including lease payments and payroll costs. *Id.* at ¶¶60-65. Plaintiffs alleged that their “all risk” policies are “materially similar,” allegedly providing business income, extra expense, civil authority, pollution, and loss of rental value coverage. *Id.* at ¶¶66-82. The policies also contain exclusions for “loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” *Id.* at ¶83. The Complaint alleged that the defendants “have all denied or will all deny the Team’s claims for coverage on the grounds that the Team’s losses (1) do not result from direct physical loss or damage to the property and (2) are barred by the [virus] exclusion.” *Id.* at ¶84. The court already has severed the claims into individual suits.

The owners of several automobile dealerships in Pennsylvania sued Sentry Insurance Group in federal court (E.D. Pa.), seeking a declaration that their insurance policy provides business income coverage for any current, future or continued civil authority closures of its business due to COVID-19, and in the event that COVID-19 has caused a loss or damage at the plaintiff’s properties. The “all risk” policy at issue allegedly provided business income, extra expense, continuation, and civil authority coverage. Complaint at ¶¶14-15. The policy also contains an exclusion of Loss Due to Virus or Bacteria. *Id.* at ¶19.

A provider of vending machine, coffee service, micro market and pantry products for businesses in Philadelphia sued Union Insurance Company and its underwriters in Pennsylvania state court (Philadelphia County), asserting claims for declaratory relief, breach of contract, negligence, and negligent supply of information for the guidance of others. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶33-35. It also contains a “Virus or Bacteria Exclusion, which provides that the insurer will not pay for “any loss, cost or expense as a result of ... any contamination by any virus, bacterium, or other microorganism or ... any denial of access to property because of any virus, bacterium or other microorganism. *Id.* at ¶42. The plaintiff allegedly “experienced a significant reduction of normal business operations due to the disruption of business and/or shutdown of a majority of the customers to whom Plaintiff provides products and services” due to the COVID-19 pandemic and subsequent closure orders. *Id.* at ¶61. The Complaint further alleges that the insurer denied the plaintiff’s claim for coverage, in part based on the policy’s virus exclusion. *Id.* at ¶¶70-71.

Restaurant Ox Cart Ale House sued Midwest Mutual Family Insurance Co. in Minnesota state court (Ramsey County) seeking coverage for business interruption losses related to COVID-19. Plaintiff alleges it was not economically feasible to operate the business while remaining in compliance with the COVID-19 closure orders. Complaint at ¶11. As a result of suspending its business, Plaintiff alleges it “sustained lost business income” and “was unable to use certain food inventory.” *Id.* at ¶¶12-13. The Complaint seeks damages in connection with the denial of its claim for “Expired Food Inventory and lost business income.” *Id.* at ¶¶23-24.

The owner of a dental practice in Texas sued Allstate Insurance Company, as well as its broker individually, in Texas state court (Bexar County), asserting claims for breach of contract, noncompliance with the Texas Insurance Code, breach of the duty of good faith and fair dealing, and civil conspiracy. The “all risk” policy at issue allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶7. The policy also contained an exclusion for “loss Due to Virus or Bacteria.” *Id.* at ¶17. The Complaint alleges that the defendants mishandled the plaintiff’s claim and wrongfully denied coverage. Complaint at ¶¶8, 15.

A business owner in Dallas sued Federal Insurance Company, as well as its broker individually, in Texas state court (Dallas County), asserting claims for breach of contract, noncompliance with the Texas Insurance Code, breach of the duty of good faith and fair dealing, and civil conspiracy. The policy at issue allegedly provides business income coverage. The Complaint alleges that

the plaintiff has sustained and will continue to sustain covered losses during the COVID-19 outbreak and subsequent state closure orders, and that the defendants mishandled and wrongfully denied the plaintiff's claim for coverage.

A catering and event-management business in San Antonio sued Cincinnati Insurance Company and its adjuster in Texas state court (Bexar County), asserting claims for declaratory relief, breach of contract, violations of the Texas Insurance Code, and bad faith. The policy allegedly provides business income, extra expense, and civil authority coverage, and does not contain a virus exclusion. Plaintiff allegedly suffered business losses due to COVID-19 and ensuing civil authority orders mandating the suspension of non-essential business. The Complaint further alleges that the insurer wrongfully denied the plaintiff's claim for coverage, and conducted an inadequate investigation.

The owner of several restaurants in San Antonio sued Cincinnati Insurance Company and its adjuster in Texas state court (Bexar County), asserting claims for breach of contract, noncompliance with the Texas Insurance Code, breach of the duty of good faith and fair dealing, and civil conspiracy. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶7. The Complaint alleges that the insurer wrongfully denied coverage, in part based on the policies "pollution" exclusion, and conducted an inadequate investigation. *Id.* at ¶¶8, 16-17.

A healthcare provider in Washington sued Affiliated FM Insurance Company in federal court (W.D. Wash.), asserting claims for declaratory relief, breach of contract, anticipatory repudiation of contract, bad faith, and violations of the Washington Consumer Protection Act. The "all risk" policy allegedly provides business income civil authority, ingress/egress, attraction property, and "protection and preservation of property" coverage, as well as coverage for the "cleanup, removal, and disposal of such presence of communicable disease from insured property." Complaint at ¶¶11-16. The policy also contains a "contamination" exclusion, which applies if contamination "directly and solely results in the loss or damage" or "initiates a sequence of events that results in loss or damage. *Id.* at ¶19, 22-27. The Complaint alleges that state civil authority closures have limited the plaintiff's business activity, including by halting non-urgent medical procedures, and that the plaintiff has confirmed the presence of COVID-19 in at least five of its clinics. *Id.* at ¶¶32-33. The Complaint further alleges bad faith claim handling, asserting the insurer made clear that it is trying to bar and/or limit the plaintiff's claim, and engaged in an unreasonable delay in making a coverage determination. *Id.* at ¶¶44-45. Lastly, the plaintiff claims that the bad-faith handling of its claim is part of a systematic practice it has implemented to try and deny and/or limit COVID-19 claims. *Id.* at ¶47.

The Eagle Street Grill sued Midwest Mutual Family Insurance Co. in Minnesota state court (Ramsey County) seeking coverage for business interruption losses related to COVID-19. The Complaint asserts it was not economically feasible for Plaintiff to operate the business while remaining in compliance with the government orders issued in response to the pandemic. Complaint at ¶11. As a result of suspending its business, Plaintiff alleges it "sustained lost business income" and "was unable to use certain food inventory." *Id.* at ¶¶12-13. Plaintiff seeks damages in connection with the denial of its claim for "Expired Food Inventory and lost business income." *Id.* at ¶¶22-23.

A group of Alabama restaurants sued The Cincinnati Insurance Company in federal court (N.D. Ala.) alleging the insurer wrongfully denied their claim for business interruption losses due to Alabama's COVID-19 closure orders. The complaint alleges that the policy does not have a virus exclusion, does not "exclude losses due to pandemics or the threat of pandemics, or government shutdowns/restrictions" and therefore "covers the losses claimed by Plaintiffs." The complaint further alleges that "immediately" upon receipt of the restaurants' claim, Cincinnati sent a reservation of rights letter "clearly indicating an intent to



deny the claim based on . . . Cincinnati Insurance’s position that: ‘the fact of the pandemic, without more, is not direct physical loss to property at the premises.’”

A California coffee shop sued The Hartford Insurance Companies and its subsidiary in federal court (D. Ariz.) alleging the insurer wrongfully denied its claim for business interruption losses due to California’s COVID-19 closure orders. The complaint alleges that the all-risk policy’s virus exclusion does not preclude coverage because “[t]he exclusion for viruses does not apply to this pandemic,” and that “[a]ny effort by Defendant Hartford to deny the reality that the virus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger Plaintiff [] and the public.”

An Arizona retailer sued CNA in federal court (D. Ariz.) alleging the insurer wrongfully denied its claim for business interruption losses due to Arizona’s COVID-19 closure orders. The Complaint alleges that “[t]he scientific community . . . recognize[s] COVID-19 as a cause of real physical loss and damage,” and that “[i]t is clear that contamination of the Insured Property would be a direct physical loss requiring remediation,” but does not allege the property was contaminated with the virus.

Green Lantern and Public Kitchen and Bar sued Midwest Mutual Family Insurance Co. in Minnesota state court (Ramsey County) seeking coverage for business interruption losses related to COVID-19. The Complaint asserts it was not economically feasible for Plaintiff to operate the business and comply with government closure orders. Complaint at ¶11. As a result of suspending its business, Plaintiff alleges it “sustained lost business income” and “was unable to use certain food inventory.” *Id.* at ¶¶12-13. Plaintiff seeks damages in connection with the denial of its claim for “Expired Food Inventory and lost business income.” *Id.* at ¶¶22-23.

Salon Envy sued West Bend Mutual Insurance Company in federal court (N.D. Ill.) seeking coverage for business interruption losses related to government efforts to slow the spread of COVID-19. The Complaint asserts the policy’s “Communicable Disease Business Income and Extra Expense Coverage, provide[s] coverage for losses related to shutdowns by local, state, or federal authorities due to an outbreak of a communicable disease.” Complaint at ¶25. Plaintiff alleges the insurer wrongfully denied its claim and “failed to undertake or conduct a reasonable investigation of Plaintiff’s claims under the Policy.” *Id.* at ¶36. The Complaint asserts the policy’s virus exclusion is overly broad and “introduces ambiguity into the Policy that must be construed against the [Insurer].” *Id.* at ¶68. Plaintiff seeks declaratory relief and damages in connection with claims for breach of contract and bad faith.

Kutest Kids Early Intervention sued Liberty Mutual Insurance and Ohio Security Insurance Company seeking coverage for business losses sustained due to COVID-19 and related civil authority orders. Plaintiff alleges as a result of stay-at-home orders issued by civil authorities, it has been unable to operate in the ordinary course of business. Complaint at ¶¶38-43. The Complaint asserts Plaintiff has suffered business income losses as a result of the pandemic and Civil Authority orders. *Id.* at ¶46. Plaintiff alleges the “all-risk” policy’s virus exclusion does not apply “because Plaintiff’s losses were not directly caused by a virus,” but “were caused by a pandemic and the civil authority orders.” *Id.* at ¶¶27-28.

The owners/operators of several northeast hotels filed a declaratory action against their insurers in New Hampshire state court (Merrimack County) seeking coverage for damage caused by COVID-19 and the actions of civil authorities in response to the pandemic. Plaintiffs alleged they have suffered covered business interruption losses under the “all-risk” policy’s attraction coverage provision because of the presence of coronavirus on “real or personal property located in the vicinity of the Hotels that attracts business to the Hotels.” Complaint at ¶106. Further, Plaintiffs allege they have suffered business interruption losses

under the “all-risk” policy’s Civil Authority Coverage provision due to the acts of state and local governments in response to the pandemic. *Id.* at ¶109.

A New Jersey optometry practice sued Franklin Mutual Insurance Company in New Jersey state court (Bergen County) seeking declaratory relief and damages in connection with claims for breach of contract and bad faith. The “all-risk” policy allegedly provides coverage for loss of income, extra expense, and the actions of civil authorities. The Complaint asserts “non-essential” businesses such as Plaintiff’s were required to close pursuant to orders issued by the Governor of New Jersey, which were made “in direct response to the continued and increasing risk of the presence of COVID-19” surrounding the insured premises. Complaint at ¶28. Plaintiff asserts the policy’s virus exclusion is not applicable, as the suffered loss was caused by “the measures taken by the State of New Jersey... to prevent the spread of COVID-19 in the future.” *Id.* at ¶37.

Food distributor Chefs’ Warehouse sued Liberty Mutual Insurance Company and Employers Insurance Company of Wausau in federal court (S.D.N.Y.) seeking coverage for business losses sustained due to COVID-19 and related civil authority orders. Plaintiff asserts it “suffered a loss of inventory that it was unable to sell to customers that were ordered to close” at the direction of civil authorities. Complaint at ¶53. Plaintiff alleges that, as a result of the COVID-19 pandemic, it has sustained covered losses under the “all-risk” policy’s Time Element, Attraction Property, Civil or Military Authority, Ingress/Egress, and Contingent Time Element coverage provisions. *Id.* at ¶55. The Complaint alleges the policy’s Contamination exclusion does not apply to “the threatened presence of contamination,” or “concurrent causes of loss.” *Id.* at ¶¶68-69.

A dental practice sued Hartford Insurance Company of The Midwest in federal court (E.D.N.Y.) asserting claims for declaratory relief and breach of contract. The “all-risk” policy at issue allegedly provided Business Income, Extra Expense, and Civil Authority coverage. Complaint at ¶¶4-5. Plaintiff alleges it was “forced to suspend business operations as a result of COVID-19” and related action of civil authority. *Id.* at ¶7. The Complaint asserts the policy does not contain any applicable exclusion for losses caused by COVID-19 or the related actions of Civil Authorities taken in response. *Id.* at ¶22.

A St. Paul restaurant sued Midwest Mutual Family Insurance Co. in Minnesota state court (Ramsey County) seeking coverage for business interruption losses related to COVID-19. Plaintiff alleges it suspended operations in response to the government orders designed to stem the spread of COVID-19. Complaint at ¶¶11-12. Plaintiff later resumed limited dine-out operations after “evaluating the economic feasibility of operating” as a “carry-out” establishment. *Id.* at ¶11. As a result of suspending its business, Plaintiff alleges it “sustained lost business income” and “was unable to use certain food inventory.” *Id.* at ¶¶12-13. The Complaint seeks declaratory relief and damages in connection with its denied claim for “Expired Food Inventory and lost business income.” *Id.* at ¶¶22-23.

A catering company filed a class action complaint against Wesco Insurance Company and Amtrust Financial in federal court (E.D.N.Y.) asserting claims for declaratory relief and breach of contract. The “all-risk” policy at issue allegedly provided Business Income, Extra Expense, and Civil Authority coverage. Complaint at ¶37. The Complaint alleges that the insurer denied its claim for losses due to the pandemic and civil authority orders, and that it has “denied similar claims by other Class members across-the-board.” *Id.* at ¶43. Plaintiff alleges the policy’s virus exclusion is not applicable “because Plaintiff’s, and other class members’, losses were...the efficient proximate cause of...the Closure Orders.” *Id.* at ¶41.

The owner of an office project and furniture installation company sued National Fire Insurance Company of Hartford in federal court (S.D.N.Y.). The Complaint seeks a declaratory judgment that its insurance policy provides coverage for any current and future closure of its business due to physical loss or damage arising from coronavirus and subsequent orders by civil authorities.



The policy at issue allegedly provides coverage for business interruption losses, extended expenses, and the actions of civil authorities. Complaint at ¶¶57-60.

Mohawk Gaming Enterprises, LLC sued Affiliated FM Insurance Company in federal court (N.D.N.Y.) seeking damages in connection with claims for breach of contract, bad faith, and fraud under the issued “all-risk” policy. Plaintiff alleges that, as a result of civil authority orders, it sustained business interruption losses, extra expense, and losses due to the actions of a civil authority covered under the all-risk policy at issue. Plaintiff alleges the insurer wrongfully denied its claim in a manner that “will allow it to engage in the blanket denial of all claims for coverage related to the coronavirus regardless of investigation or facts.” *Id.* at ¶14

A property management company filed a class action complaint against Travelers in federal court (S.D.N.Y.) seeking coverage in connection with business losses sustained due to COVID-19. The policy allegedly provides Business Income, Extra Expense, and Civil Authority coverage. Plaintiff alleges civil authority orders issued by the State of New York prohibited Plaintiff “from accessing the premises by government action.” Complaint at ¶52. The complaint asserts that as a result of the civil authority orders, Plaintiff has suffered losses covered under the “all-risk” policy’s Business Income, Extra Expense, and Civil Authority provisions. Plaintiff alleges the policy’s virus exclusion is not applicable, because “Plaintiff’s and Class Members’ losses were solely the result of precautionary measures taken by Plaintiff at the behest of New York State and the federal government to prevent the prospective spread of COVID-19.” *Id.* at ¶42.

The Gray Duck Tavern sued Midwest Mutual Family Insurance Co. in Minnesota state court (Ramsey County) seeking coverage for business interruption losses related to COVID-19. The Complaint asserts it was not economically feasible for Plaintiff to operate the business while remaining in compliance with the government orders issued in response to the pandemic. Complaint at ¶11. As a result of suspending its business, Plaintiff alleges it “sustained lost business income” and “was unable to use certain food inventory.” *Id.* at ¶¶12-13. Plaintiff seeks damages in connection with the denial of its claim for “Expired Food Inventory and lost business income.” *Id.* at ¶¶22, 24.

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

Kiddie Academy sued Selective Insurance individually and on behalf of all others similarly situated in federal court (D. N.J.), for business interruption losses related to COVID-19 civil authority orders. The “all-risk” policy at issue allegedly provides business income, extended business income, and civil authority coverage. The Complaint asserts the policy’s virus exclusion does not apply because Plaintiff’s losses “were caused by the entry of Civil Authority Orders...to mitigate the spread of COVID-19.” Complaint at ¶40. The class is defined as “all Child Care Centers insured by Selective ... who have been denied business interruption coverage ... as a result of Civil Authority Orders issued in response to the COVID-19 pandemic.” *Id.* at ¶65.

A chiropractic center filed a class action complaint against State Farm Mutual Automobile Insurance Company in federal court (E.D. Mich.) for business interruption losses related to COVID-19 civil authority orders. Plaintiff alleges that the “all-risk” commercial policies provide coverage for Loss of Income, Extra Expense, and the actions of civil authorities. According to the complaint, the virus exclusion is not applicable as the sustained loss was due to the civil authority orders issued “to ensure the absence of the virus, or persons carrying the virus, from the Plaintiff’s premises.” Complaint at ¶8.

A fitness center sued Markel Insurance Company on behalf of itself and all others similarly situated in federal court (N.D. Ill.), seeking declaratory relief and damages in connection with claims for breach of contract and bad faith. The Complaint alleges as

a result of the orders issued by various civil authorities, it has suffered, and continues to suffer, “losses and expenses directly related to the inability to use the physical locations covered by the Policy.” Complaint at ¶15. The “all-risk” policy at issue allegedly provides Business Income, Extra Expense, and Civil Authority coverage. *Id.* at ¶¶29-35. Plaintiff alleges Markel improperly denied its claim with “no meaningful investigation of the claims or review of the Policy.” *Id.* at ¶17.

The owner and operator of an Ohio restaurant and bar filed a class action complaint against The Cincinnati Insurance Company in Ohio state court (Cuyahoga County), alleging the insurer wrongfully denied claims for business interruption losses due to Ohio’s COVID-19 closure orders. The “all risk” policy at issue allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 10, 12. The Complaint alleges that COVID-19’s actual or suspected physical presence in the vicinity of the property and/or the government closure orders has prevented the plaintiff from making full use of the property, and “this kind of loss constitutes a physical loss to the Property in that there has been a loss of use and/or utilization of the Property.” *Id.* at ¶ 13. The proposed class includes “[a]ll businesses and entities throughout the United States who, from January 1, 2020 to the present have been insured by Commercial and/or Business Owner Policies issued by CIC and denied Business Income loss, Extra Expense and/or Civil Authority coverage due to COVID-19.” *Id.* at ¶ 40.

The owner of a restaurant in Memphis sued Covington Specialty Insurance Company and its underwriters in federal court (W.D. Tenn.) individually and on behalf of all others similarly situated, 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, extended business income, and civil authority coverage. Complaint at ¶¶21-33. The policy does not contain a virus exclusion. *Id.* at ¶36. The insurer assertedly denied the plaintiff’s claim for coverage, and has taken the same position with “other similarly situated businesses nationwide.” *Id.* at ¶¶51-53. The proposed class is divided into subclasses based on whether other insureds have “business income,” “extra expense,” and/or “civil authority” coverage, and extends to all persons and entities with a policy issued by defendants that suffered a suspension of business operations or a loss of income and/or extra expense caused by an action of civil authority, “for which Defendants have 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 loss.” *Id.* at ¶56.

A California dance studio filed a class action lawsuit against Farmers Insurance Company and its affiliates in federal court (C.D. Cal.) alleging the insurer wrongfully denied its claim for business interruption losses due to California’s COVID-19 closure orders. While the complaint quotes Los Angeles Mayor Eric Garcetti’s “Safer at Home” order stating that COVID-19 “is physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time,” the studio alleges that “direct physical loss of property is caused, not by the actual presence of Coronavirus on Plaintiff’s or class members’ properties, but, instead, by the need to prevent the future spread of the Coronavirus.” The complaint further asserts that the policy’s virus exclusion does not preclude coverage “because the covered cause of loss was not bacteria or the Coronavirus, but instead the prevention of the spread of COVID-19.”

The owner of California taco shops filed a class action lawsuit against Century National Insurance Company in federal court (S.D. Cal.) alleging the insurer wrongfully denied its claim for business interruption losses due to California’s COVID-19 closure orders. The complaint asserts that Century National has “on a widescale and uniform basis, refused to pay its insureds under its Business Income, Civil Authority, Extra Expense, and Sue and Labor coverages for losses suffered due to COVID-19.” The complaint further alleges that the all-risk policy at issue does not contain a virus exclusion, that the insurance industry “has recognized since at least 2006” that “the presence of a virus or disease can constitute physical damage to property,” and that the closure orders were therefore issued “in response to dangerous physical conditions resulting from a Covered Cause of Loss.”

A Texas law firm filed a class action lawsuit against The Hartford Financial Services Group and its subsidiary in federal court (D. Conn.) alleging the insurer wrongfully denied its claim for business interruption losses due to Texas' COVID-19 closure orders. The complaint asserts that the all-risk policy's virus exclusion does not preclude coverage "to the extent that the governmental orders, in and of themselves, constitute direct physical loss of or damage to Plaintiffs' Covered Property," and that "to the extent coverage . . . derives from direct physical loss or damage caused by the COVID-19 virus . . . Defendant should be estopped from enforcing the Virus Exclusion, on principles of regulatory estoppel, as well as general public policy." The law firm also filed an identical complaint demanding a jury trial.

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

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