

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of June 8)

June 9, 2020

FCA Identifies BI Policy Wording for Test Case

The Financial Conduct Authority (FCA) has reviewed several hundred business interruption policy wordings from 40 insurers and identified 17 policy wordings representative of the key issues surrounding BI claims. The UK regulator now plans to move forward with a test case and obtain a court declaration to resolve contractual uncertainty surrounding BI coverage. The regulator reiterated its view that in the majority of cases “insurers are not obligated to pay out in relation to the coronavirus pandemic.” The FCA has published a representative sample of the 17 policy wordings and those insurers who use at least one of the policy wordings in the representative sample.

European Insurers Announce Dividends

Axa SA announced plans to issue a 2019 dividend to shareholders despite the recommendation of EU regulators that insurers conserve capital to withstand the financial impact of the COVID-19 pandemic. The insurer has, however, reduced the dividend amount to 0.73 euros per share from the initial 1.43 euro payout. Several other European insurers have also announced plans to issue dividend payments despite the recommendation of regulators.

Insurance Broker Seeks To Have COVID-19 Lawsuit Thrown Out

An insurance broker asked a Missouri state court to dismiss a lawsuit filed against it by a barbeque chain alleging that the broker was partly responsible for the insurer’s denial of coverage for the restaurant’s coronavirus-related business interruption losses. The broker argued that it was not required to “speculate upon and predict to [the insured] every potential circumstance in which [the insurer] might deny a claim,” or to “advise [the insured] what coverage could exist or predict every possible gap in coverage under the policy.”

New Business Interruption Suits Against Insurers:

The owner of a restaurant in Pennsylvania sued Scottsdale Insurance Company and Nationwide Insurance Company in federal court (W.D. Pa.), seeking a declaratory judgment affirming that its insurance policy provides coverage for any current and future closure of its business due to physical loss or damage arising from COVID-19 and subsequent state closure orders. The “all risk” policy at issue allegedly provides business income, extra expense, contamination, and civil authority coverage. Complaint at ¶¶15-16. The Complaint alleges that the plaintiff contacted its insurance agent about making a claim under the policy and was told that its insurers would reject the claim. *Id.* at ¶19.

A law firm in Pennsylvania sued Continental Casualty Company in federal court (E.D. Pa.), seeking a declaration that it is covered for all business loss incurred as a result of the pandemic or subsequent state closure orders. The “all risk” policy at issue

allegedly provides business income, extra expense, contamination, and civil authority coverage. Complaint at ¶¶14-17. The policy does not contain a virus exclusion. *Id.* at ¶19. The Complaint alleges that the virus is physically impacting the plaintiff's businesses and that as a result of the orders, it cannot initiate new suits, move cases forward, collect fees from clients, and remains forcibly shut down. *Id.* at ¶38.

The owner of a restaurant in Pennsylvania sued Selective Insurance Company of the Southeast in federal court (E.D. Pa.), seeking a declaration that its policies provide coverage for any current and future loss of business income as a result of state civil authority orders due to physical loss or damage caused by the pandemic. The "all risk" policy at issue allegedly provides business income, extended business income, extra expense, and civil authority coverage. Complaint at ¶¶15-18. The policy also contains an "Exclusion of Loss Due to Virus or Bacteria." *Id.* at ¶22. The Complaint alleges that the insurer denied the plaintiff's claims for coverage. *Id.* at ¶12.

A museum in South Carolina sued AXA Insurance Company in federal court (D.S.C.), asserting claims for breach of contract and bad faith. The policy at issue allegedly provided business income and civil authority coverage, and did not contain a virus exclusion. *Id.* at ¶¶14-18. According to the Complaint, it submitted a claim to its insurer after two of its employees experienced COVID-19 symptoms and that the property was contaminated or otherwise at risk for being contaminated. *Id.* at ¶24. The Complaint alleges that the insurer denied the claim without conducting an investigation (*id.* at ¶¶28-30), and that and denied the claim in bad faith warranting punitive damages. *Id.* at ¶¶36, 42.

A Texas company sued State Farm Lloyds in Texas state court (Travis 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 Complaint alleges that the plaintiff sustained and will sustain covered losses during the pandemic and subsequent state closure orders, and that State Farm wrongfully denied its claim for coverage without conducting a proper investigation. The Complaint further alleges that State Farm and its broker made material misrepresentations about policy provisions, coverage, and Texas law.

Jerry's Sandwiches AV LLC sued Erie Insurance Company in federal court (N.D. Ill.) seeking coverage for business losses sustained due to COVID-19 and related civil authority orders. Plaintiff alleges that, as a result of the orders issued by Illinois, it has been prohibited access to the insured premises and suffered a covered loss under the policy. Complaint at ¶42

A medical practice sued Liberty Mutual in Kentucky state court (Fayette County) seeking coverage for business losses as a result of COVID-19 related closure orders. The complaint asserts Plaintiff's operations have ceased as the majority of its business (elective surgeries) are prohibited under government orders. Complaint at 23. Plaintiff asserts it has sustained covered losses under the policy's Business Income, Extra Expense, and Civil Authority provisions, and the policy's virus exclusion is not applicable.

Jewelry companies sued Steadfast Insurance Company in Louisiana state court (Parish of Orleans) seeking coverage for business interruption losses related to COVID-19 civil authority orders. The complaint seeks coverage for loss caused by, *inter alia*, the suspension of business activities and the inability to gain access to the covered property due to the actions of a civil authority. Complaint at ¶4. Plaintiffs allege the policy's contamination exclusion has been deleted in its entirety by the Louisiana Amendatory Endorsement and it not applicable to any loss sustained in connection with the pandemic. *Id.* at ¶40.

United Group Imports sued Hartford in New Jersey state court (Bergen County) alleging that because of COVID-19 and state-mandated closures, the plaintiff “has been unable to operate[] in the ordinary court of business” and has suffered loss covered under the policy’s Business Income, Extended Business Income, Extra Expense, and Civil Authority coverage provisions. Complaint at ¶¶26-27, 31-33

Law firm Abrams Fensterman sued Valley Forge Insurance Company in New York state court (Kings County) seeking coverage for COVID-19 related business losses. Plaintiff alleges its employees were prohibited from physically accessing their offices due to orders issued by the Governor of New York and were required to close. Complaint at ¶20. The complaint alleges the policy provides coverage loss incurred due to the “result of any action by a civil authority prohibiting access” to Plaintiff’s property. *Id.* at ¶13. Plaintiff alleges that, as a result of the executive order mandating closure of the firm’s office, it sustained a substantial loss of revenue. *Id.* at ¶21.

The owner/operators of several hotels and restaurants sued Hartford Fire Insurance Company in federal court (W.D.N.Y.) seeking coverage for business losses resulting from state and local orders issued in response to COVID-19. Plaintiffs allege they have suffered losses as a result of the “stay-at-home orders for public safety issued by the Governor New York and the State of New York in general.” Complaint at ¶37.

Kusman Management filed a declaratory action against Mt. Hawley Insurance Company in Oklahoma state court (Cleveland county) seeking coverage for COVID-19 related business losses. Plaintiff alleges the “all-risk” policy provides coverage for Business Income, Extra Expense, and business interruption by civil authority. Complaint at ¶6. The complaint alleges that Plaintiff was required to suspend operations due to the orders and proclamations issued by state and local authorities designed to respond to the COVID-19 pandemic. *Id.* at ¶18.

An ophthalmology clinic sued Farmers Insurance Exchange in Oregon state court (Lane County) alleging that the insurer wrongfully denied its claim for business interruption losses due to executive orders issued by the Governor of Oregon. The complaint contends that “the majority of Plaintiff’s business income stemmed from procedures and appointments that were considered non-urgent” and prohibited under the orders. Complaint at ¶23. As a result, Plaintiff was allegedly “unable to conduct their normal procedures,” which resulted in loss allegedly covered under the policy’s Business Income and Extra Expense provisions. *Id.* at ¶27.

A South Florida escape room sued Mesa Underwriters Specialty Insurance Company in Florida state court (Broward County), seeking coverage for loss of business income under its “all risk” policy. The Complaint alleges that “[d]irect, resultant, and/or ensuing damages and/or loss of business income caused by the COVID-19 pandemic and Emergency Order 20-01 are covered under the Subject Policy.” Complaint at ¶ 17. The insurer allegedly denied all claims for coverage, contending that “the Policy excludes coverage for loss or damage caused directly or indirectly by a virus.” *Id.* at ¶ 26. The Complaint seeks a declaratory judgment that the policy does not “blanketly exclude coverage for loss caused by viruses,” *id.* at ¶ 33(D), and damages for breach of contract for allegedly failing to “timely and promptly pay all amounts due and owing under the Policy.” *Id.* at ¶ 37.

The operator of restaurants located throughout Florida sued Illinois Union Insurance Company and Westchester Surplus Lines Insurance in Florida state court (Miami-Dade County), seeking damages for breach of contract for allegedly refusing to provide coverage for losses related to the closure of its restaurants due to COVID-19 and resulting civil authority orders. The “all risk” policy at issue allegedly provides coverage for business losses and extra expenses that result from an involuntary interruption of

business operations. Complaint at ¶ 18. The insurers allegedly “denied and refused to provide coverage for Plaintiff’s business income losses and extra expenses.” *Id.* at ¶ 51.

The owner and operator of restaurants located in Miami-Dade County, Florida sued Arch Specialty Insurance Company in Florida state court (Miami-Dade County), seeking damages arising from the alleged refusal to provide insurance coverage for business losses arising from closure orders. The “all risk” policy at issue allegedly provides coverage for business losses and extra expenses that result from an involuntary interruption of business losses. Complaint at ¶ 17. The Complaint alleges that the COVID-19 pandemic is tantamount to a natural disaster and therefore involves substantial damage to property, like other disasters such as hurricanes and earthquakes. *Id.* at ¶ 34.

The operator of restaurants in and around Miami-Dade County, Florida sued Western World Insurance Company in Florida state court (Miami-Dade County), seeking damages arising from the alleged refusal to provide insurance coverage for business losses resulting from closure orders. The “all risk” policy at issue allegedly provides coverage for business losses and extra expenses that result from an involuntary interruption of business operations. Complaint at ¶ 17. The Complaint alleges that the policy does not contain an exclusion “for business interruption caused by a declaration of a national emergency and urgent lock down of non-essential businesses and at-home quarantine of the vast majority of the national population due to a global pandemic.” *Id.* at ¶ 22.

The owner and operator of eye centers providing ophthalmologic services and ophthalmologic surgery services sued Harleysville Worcester Insurance Company and Nationwide Mutual Insurance Company in Ohio state court (Cuyahoga County), seeking a declaratory judgment that the necessary interruption of Eye Specialists’ businesses stemming from the COVID-19 pandemic are covered losses and that the closure orders constitute a prohibition of access to properties by a Civil Authority as defined by the policy. The “all risk” policy at issue allegedly provides coverage for business income and extra expense “in the event of business closures by order of Civil Authority.” Complaint at ¶ 29. The Complaint alleges that the insurers denied coverage for losses related to closure orders “without first conducting any meaningful coverage investigation.” *Id.* at ¶ 11.

A jewelry retailer sued Travelers in California state court (San Diego Cty.) alleging the insurer wrongfully denied its claim for business interruption losses due to California’s COVID-19 closure orders. The complaint alleges that the policy at issue specifically includes fungi, bacteria, and virus coverage, that the jewelry store has suffered property loss due to the closure orders that were issued “due to droplets containing the Coronavirus being on surfaces and objects in, on, around and in the immediate area of the business location,” and that “every surface and object” in the store “are implicated.”

The owner of Supercuts hair salons sued Hartford Underwriters 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 the “Defendants have accepted the policy premiums with no intention of providing any coverage for business losses or the Civil Authority extension due to a loss and shutdown,” and that the policy’s virus exclusion “does not apply to this pandemic.”

A San Diego café owner sued the Hanover Insurance Group in California state court (San Diego Cty.) alleging the insurer wrongfully denied its claims for business interruption losses due to California’s COVID-19 closure orders. The complaint alleges that the policy at issue includes fungi, bacteria, and virus coverage, that Hanover has “summarily declined coverage” for claims filed for business interruption losses during the pandemic, and that the goal of the insurance industry is “to generate revenues by charging high premiums for insurance while avoiding paying anything on legitimate claims by small businesses.”

A retail shoe company sued Valley Forge Insurance Company in California state court (San Diego Cty.) alleging the insurer wrongfully denied its claims for business interruption losses due to California's COVID-19 government closure orders. The complaint alleges that while the company continues to sell footwear online, the closure of its eleven physical locations caused a substantial loss of business income that is "certain to continue into the foreseeable future."

The owner of a San Francisco hair salon sued Sentinel Insurance Company 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 complaint alleges that as a result of the governmental orders, "Plaintiff was physically unable to utilize his business premises and thus lost the physical use thereof."

A restaurant sued Fireman's Fund in California state court (Sonoma Cty.) alleging the insurer wrongfully denied its claim for business interruption losses due to California's COVID-19 closure orders. The restaurant claims that the policy at issue expressly provides coverages for loss from "Communicable Disease," and that of the people who were on the premises in the two weeks prior to the restaurant's closure, "at least one and likely several were infected with COVID-19, and came into contact with surfaces and persons both at the restaurant and within a one-mile radius around it," leading the owners to conclude the restaurant was "contaminated." The complaint alleges that Fireman's Fund, in bad faith, failed to conduct an investigation "of the existence of physical loss or damage to the Property."

New Business Interruption Class Action Filings:

A chiropractic center sued Sentinel Insurance Company in federal court (D. N.J.), individually and on behalf of all others similarly situated, for business interruption losses related to COVID-19 civil authority orders. Plaintiff alleges that the all-risk commercial property policies provide coverage for Business Interruption, Extra Expense, and the actions of civil authorities. According to the complaint, the virus exclusion is not applicable "in the context of a global pandemic." Complaint at ¶40.

A dental practice filed a class action complaint against Hartford in federal court (E.D.N.Y.) for business interruption losses related to COVID-19 civil authority orders. Plaintiff alleges that the "all-risk" policy provides coverage for Business Interruption, Extra Expense, and the actions of civil authorities. In addition to asserting a claim for anticipatory breach of contract, the complaint seeks "declaratory judgment determining that the business income loss and extra expense coverage provided in common all-risk commercial property insurance policies applies to the suspension, curtailment, and interruption of business operations resulting from measures put into place by civil authorities." Complaint at ¶48.

The owner/operator of several restaurants and bars filed a class action lawsuit against The Cincinnati Insurance Company in federal court (W.D. Mo.) seeking coverage for business losses in connection with government closure orders. Plaintiff alleges the all-risk policies issued to Plaintiff and the putative class provide coverage for losses caused by COVID-19 and related state and local stay at home orders under the Business Income, Civil Authority, Extra Expense, Ingress/Egress, Sue and Labor coverage provisions. Complaint at ¶¶70-75.

The owner/operator of a hospitality support agency filed a class action complaint against Hiscox Insurance in federal court (N.D.Ill.) seeking coverage for business income losses sustained as a result of the closure orders aimed at curbing the spread of COVID-19. Plaintiff alleges the all-risk policies' virus exclusion is not applicable as the sustained losses were a result of "precautionary measures taken by government of their respective countries and states...not because coronavirus was found in or on Plaintiff's insured property." Complaint at ¶43. The class complaint seeks a declaration that the "business income loss and

extra expense coverage provided in standard Hiscox commercial property insurance policies applies to the suspension, curtailment, and interruption of business operations resulting from measures put into place by civil authorities.” *Id.* at ¶48.

The owner of a sandwich shop in Pennsylvania sued Donegal Insurance Group on behalf of itself and all others similarly situated in federal court (E.D. Pa.), seeking a declaratory judgment determining that the class members are entitled to business interruption coverage. The “all risk” policy at issue allegedly provides business income, extended business income, and civil authority coverage. Complaint at ¶11. The insurer allegedly denied all claims for coverage, in part citing the policy’s “Exclusion of Loss Due to Virus or Bacteria.” *Id.* at ¶¶11-12. The class is defined as “all restaurants that have suffered business interruption and lost income as a result of civil authority orders issued in response to the COVID-19 pandemic,” and the Complaint alleges that the insurer sent or would send a similar denial to all class members that file claims. *Id.* at ¶¶12, 42.

The owner of a salon in Pennsylvania sued Erie Insurance Property & Casualty Company in federal court (W.D. Pa.) on behalf of itself and all others similarly situated, seeking a declaratory judgment that the class members are entitled to business interruption coverage. The policy at issue allegedly provides business income, extra expense, and civil authority coverage, and does not contain a virus exclusion. Complaint at ¶¶7, 15. The class is defined as “all Ohio businesses or persons under a policy issued by Erie ... with the same operative language” as the plaintiff’s policy form, who were denied coverage arising out of COVID-19 or related state closure orders. *Id.* at ¶72.

The owner of an ice cream shop in Pennsylvania sued Nationwide Mutual Insurance Company in federal court (W.D. Pa.) on behalf of itself and all others similarly situated, seeking a declaration that Nationwide’s policy provides coverage for any current and future civil authority closures of businesses in Pennsylvania due to the pandemic. The “all risk” policy at issue allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶14-15. The Complaint alleges that Nationwide rejecting the plaintiff’s claim for coverage, citing in part the policy’s Virus Exclusion. *Id.* at ¶12. The class is defined as any of Nationwide’s insureds who have suffered business interruption and lost income as a result of civil authority orders. *Id.* at ¶32.

A catering services company in Pennsylvania sued The Cincinnati Insurance Company on behalf of itself and all others similarly situated in federal court (E.D. Pa.), 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, and did not contain a virus exclusion. Complaint at ¶¶10-15. The Complaint alleges that the insurer denied its claim for losses allegedly due to losses allegedly due to the pandemic and civil authority orders, and that it has refused to pay its insureds for such claims “on a wide-scale and uniform basis.” *Id.* at ¶4. The class consists of declaratory judgment and breach subclasses, as well as Pennsylvania and nationwide, subclasses. *Id.* at ¶24.

The owner of a dental practice in Pennsylvania sued The Cincinnati Insurance Company individually and on behalf of all others similarly situated in federal court (W.D. Pennsylvania), 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 ¶¶11-26. The Complaint alleges that it submitted a claim for business interruption losses caused by the pandemic and state closure orders, which the insurer denied via letter, requesting “inspection and test reports referring or relating to actual or suspected presence of Coronavirus...” *Id.* at ¶50. The class is defined as “[a]ll policyholders in the United states who [a] purchased commercial property coverage ... from Defendant and who have been denied coverage ... for lost business income after being ordered” to shut down or limit their business by a civil order in response to the pandemic. *Id.* at ¶12.

The owner of an orthodontics practice in Washington state sued Valley Forge Insurance Company in federal court (W.D. Wash.) on behalf of herself and all others similarly situated, asserting claims for declaratory relief and breach of contract. The policy at issue allegedly provides business income, extra expense, extended business income, and civil authority coverage. Complaint at ¶13. The Complaint alleges that the plaintiff filed a claim for its loss of income due to the pandemic and related state closure orders, and that its claim was denied after an investigation. *Id.* at ¶¶21-25. The Complaint further alleges that the insurer has denied or will deny all similar claims for coverage. *Id.* at ¶26. The class is divided into breach of contract and declaratory relief subclasses, as well as Washington and nationwide subclasses. *Id.* at ¶28.

The owner of a printing business in Seattle sued Valley Forge Insurance Company in federal court (W.D. Wash.), asserting claims for breach of contract and declaratory relief. The policy at issue allegedly provides business income, extra expense, extended business income, and civil authority coverage. Complaint at ¶13. The Complaint alleges that the insurer “intends to deny or has denied Plaintiff’s claim for coverage” related to physical loss and/or damage related to COVID-19 and related state closure orders, “and has or will continue to deny coverage for other similarly situated policyholders.” *Id.* at ¶¶17-23. The class is divided into breach of contract and declaratory relief subclasses, as well as Washington and nationwide subclasses. *Id.* at ¶25.

A Connecticut restaurant filed a class action lawsuit against AmGUARD Insurance Company in federal court (D. Conn.) alleging the insurer wrongfully denied its claim for business interruption losses due to Connecticut’s COVID-19 closure orders. The complaint alleges that although the restaurant’s policy has a virus exclusion endorsement, it does not apply because “the efficient proximate cause of Plaintiffs’ . . . losses, were precautionary measures taken by their States and/or counties to prevent the spread of COVID-19 in the future, not because coronavirus was found in or on Plaintiffs’ insured property.” The complaint further alleges that “[n]o insurer intends to cover any losses caused by the COVID-19 pandemic,” and that state departments of insurance have “issued advisories to business owners that COVID-19 is not an insured peril” in an attempt to spread “disinformation . . . to discourage business owners from filing claims.”

An Alabama gym filed a class action lawsuit against The Hartford Financial Services Group and its subsidiaries alleging the insurer wrongfully denied its claims for business interruption losses due to Alabama’s COVID-19 closure orders. The complaint alleges that the civil authority actions have caused the gym to suffer “direct physical loss of or damage to the property” by, among other things, “denying or preventing access to the property; . . . causing the property to be uninhabitable and untenable by customers and rendering the facility unfit for occupancy,” and “causing the function of the premises to be nearly eliminated or destroyed.”

The owner of a Palo Alto restaurant filed a class action lawsuit against Sentinel Insurance Company in federal court (N.D. Cal.) alleging the insurer wrongfully denied its claim for business interruption losses due to California’s COVID-19 closure orders. The complaint alleges that the policy’s virus exclusion “explicitly does not apply to the special coverage that provides business interruption protection under which plaintiff seeks coverage,” and that “[t]he reasons given by Sentinel to deny coverage are written in terms that appear designed to deny coverage to all claims under these form contracts.”

A medical and healthcare management business filed a class action lawsuit against Farmers Insurance Group and its subsidiaries in California state court (Orange Cty.) alleging the insurer wrongfully denied its claim for business interruption losses due to California’s COVID-19 closure orders. The complaint alleges that the policy covers “all suspensions of business operations caused by ‘direct physical loss,’” and that Farmers intentionally did not define the term “so that it has the meaning Defendants now assert against its insureds.” The business contends that Farmers “conducted no investigation into the covered premises to

determine the precise physical loss or damage that resulted from the governmental orders,” and that the policy’s virus exclusion does not apply to losses stemming from COVID-19.

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