

## CLIENT ALERT

### Insurers' COVID-19 Notepad: What You Need to Know Now (Week of November 16)

Nov.16.2020

#### Courts Dismiss COVID-19 Business Interruption Claims in Arizona, California and Florida

On November 9, 2020, the U.S. District Court for the Northern District of California, applying Hawaii law, granted Fireman Fund Insurance Company's motion to dismiss the business interruption claim brought by the owner of twelve retail stores. The court held that "the mere threat of coronavirus cannot cause a 'direct physical loss damage to' covered property as required" by the policy, thus "follow[ing] the overwhelming majority of courts" that have addressed the same issue. Finding no loss or damage, the court concluded that the plaintiff failed to plead that business income or civil authority coverage existed. Because the underlying breach of contract claim failed, the court also dismissed the plaintiff's claims for unfair or deceptive trade practices, breach of the covenant of good faith and fair dealing, and declaratory relief.

On November 10, 2020, the Circuit Court for Hillsborough County, Florida granted Markel Insurance Company's motion to dismiss a fitness center's COVID-19 business interruption claim and dismissed the complaint with prejudice. According to the court, under a plain reading of the policy, purely economic business income loss and lack of access alleged were not a direct physical loss as "defined by other courts—the consensus of which is that 'direct physical loss' requires a 'physical alteration of the property.'" Finding no direct physical or covered cause of loss, the court held that the plaintiff failed to plead that the civil authority provision applied and also held that the policy and its virus exclusion are "clear and unambiguous" in excluding the claimed loss. The complaint failed to state a cause of action for breach of contract and thus the court also dismissed plaintiff's declaratory relief claim.

On November 10, 2020, the Circuit Court for Hillsborough County, Florida granted Main Street America Protection Insurance Company's motion to dismiss a dental practice's COVID-19 business interruption claim. The court found that the policy did not cover the plaintiff's economic losses because the only reasonable interpretation of the plain language of the policy is that "the mere presence of COVID-19 on business premises does not constitute a direct physical loss of or damage to property." Order at 5. The court further found that coverage is excluded by the policy's virus exclusion. *Id.* at 7.

On November 12, 2020, the U.S. District Court for the Central District of California granted Ohio Security Insurance Company's motion to dismiss a flooring company's COVID-19 business interruption claim. The court held that there is no coverage under the policy for the plaintiff's loss of business caused by COVID-19 closure orders because the plaintiff had not been permanently dispossessed from its storefronts and can regain possession when the closure orders are lifted. Order at 5-6. The court further found that coverage is precluded by the policy's virus exclusion. *Id.* at 6.

On November 13, 2020, the U.S. District Court for the District of Arizona granted National Casualty Company's motion to dismiss a COVID-19 business interruption claim filed by entities that provide services for minor league baseball teams. The court found that the plaintiffs' claims were barred by the policy's virus exclusion and rejected their contention that there was a factual dispute as to whether the alleged losses were caused by a virus when the complaint alleged that the COVID-19 closure orders were issued as a direct result of the coronavirus. Order at 4.

### **New Business Interruption Class Actions:**

Chocolatiers filed a class action complaint against Mitsui Sumitomo Insurance USA, Inc. in federal court (N.D. Ill.) for declaratory relief, breach of contract, bad faith, unjust enrichment, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 29-30. The Complaint alleges that COVID-19 closure orders “caused direct physical loss or damage to their covered locations by physically impairing, detrimentally altering, and rendering it nonfunctional or only partial functional as the business and institution it was formerly.” *Id.* at ¶ 2. The Complaint further alleges that if the insurer prevails against coverage, “then Plaintiffs and all others similarly situated in a Nationwide Class must receive a rebate of premium for the windfall that Mitsui kept for itself by reduced claims due to Closure Order shutdowns, partial operations mandates and other constraints.” *Id.* at ¶6. The proposed nationwide class is defined as “all businesses in the United States who are insureds of Defendant under commercial insurance policies and who have experienced a complete or partial shutdown of their business operations as a result of a Closure Order issued by a State or local governmental authority on or after March 1, 2020, to the present.” *Id.* at ¶ 116.

The operators of a dental practice and a restaurant filed a class action complaint against Liberty Mutual Insurance and Ohio Security Insurance Company in federal court (D. Mass.) for declaratory relief, breach of contract, and bad faith. The “all risk” policies allegedly provide business income, extra expense, and civil authority coverage. Complaint at ¶¶ 5-8. The Complaint alleges that there has been direct physical loss resulting from COVID-19 closure orders “by, among other things, denial of access to the property, preventing customers and employees from physically occupying the property, causing the property to be physically uninhabitable by customers and employees, causing its function to be nearly eliminated or destroyed, and/or causing a suspension of business operations on the premises.” *Id.* at ¶ 71. The insurer allegedly denied coverage “within hours of the notices of loss, showing they engaged in no meaningful investigation of the claim or review of the Policy.” *Id.* at ¶ 15.

The owner and operator of two gyms filed a class action complaint against Hanover American Insurance Company and Hanover Insurance Group, Inc. in federal court (D. Mass.) for declaratory relief, breach of contract, and bad faith. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 32-34. The Complaint alleges that the policy’s virus exclusion is inapplicable because its losses “were not caused by a ‘virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease’” but, rather, that proximate cause of losses “were precautionary measures taken by the State of North Carolina to prevent the spread of COVID-19 in the future.” *Id.* at ¶ 59. The named plaintiffs seek to represent a “Business Income Coverage Class,” an “Extra Expense Coverage Class,” a “Civil Authority Coverage Class” and a Massachusetts subclass. *Id.* at ¶¶ 64-65.

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

Mt. Hawley Insurance Company sued its policyholder, the City of Richmond Heights, Missouri, in federal court (E.D. Mo.) seeking a declaratory judgment that it is not obligated under the policy for the defendant’s alleged losses arising from COVID-19. The policy allegedly provides business income, loss of sales tax revenue, and civil authority coverage. Complaint at ¶¶ 8, 17, 20. The policy also includes a pollution exclusion endorsement and an exclusion for any loss or damage caused by the enforcement of property use regulations. *Id.* ¶¶ 22, 25. The complaint alleges that the defendant submitted a claim under the policy for loss of business income associated with COVID-19, which the plaintiff denied. *Id.* ¶¶ 9, 15.

The owner of a notary service in Pittsburgh sued Erie Insurance Exchange in Pennsylvania state court (Allegheny County), asserting claims for breach of contract and bad faith. The “all risk” policy allegedly provides business income, extra expense, civil authority, and sue and labor coverage. Complaint at ¶¶8, 11-21. The policy does not contain a virus exclusion. *Id.* at ¶¶10, 20. The complaint alleges that the defendant denied the plaintiff’s claim for coverage in bad faith. *Id.* at ¶¶61-63, 82-83.

The owner of various semiprofessional minor league baseball operations and facilities in Pennsylvania sued The Cincinnati Insurance Company, The Cincinnati Casualty Company, and The Cincinnati Indemnity Company in federal court (W.D. Pa.), asserting claims for declaratory relief and breach of contract. The “all risk” policy allegedly provides business income, extra expense, and rental value coverage. Complaint at ¶¶ 21-29. The policy does not contain a virus exclusion. *Id.* at ¶32. The Complaint alleges that the defendant wrongfully denied the plaintiff’s claim for coverage. *Id.* at ¶¶ 56-57.

A contemporary art museum in Pittsburgh sued The Cincinnati Insurance Company in federal court (W.D. Pa.), asserting claims for declaratory relief, breach of contract, and bad faith. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 51-53. The policy does not contain a virus exclusion. *Id.* at ¶59. The complaint alleges that the defendant wrongfully denied the plaintiff’s claim for coverage, and misrepresented coverage afforded by the policy. *Id.* at ¶66-77.

The owners of various related businesses that share a common location in New York City, including hotels, restaurants, and retail spaces, sued Affiliated FM Insurance Company in Rhode Island state court (Providence/Bristol County), asserting claims for declaratory relief, breach of the covenant of good faith and fair dealing, and bad faith. The “all risk” policy allegedly provides business income, communicable disease, attraction property, civil authority, ingress/egress, protection and preservation of property, rental income, and extra expense coverage. Complaint at ¶¶44-71. The policy does not contain a virus exclusion. *Id.* at ¶72-76. The complaint specifically alleges that several of the plaintiffs’ facilities have had significant, reported COVID-19 outbreaks, including deaths. *Id.* at ¶¶23-24. The complaint further alleges that the defendant conducted an inadequate and improper investigation of plaintiff’s claim for coverage, took the “bad faith position” that the virus does not cause physical damage, and denied the plaintiff’s claim in bad faith. *Id.* at ¶¶82-96.

Goodwill Industries of Orange County, California sued Philadelphia Indemnity Insurance Company and Certain Underwriters at Lloyd’s, London in California state court (Orange County) for breach of contract, declaratory relief, and breach of the implied covenant of good faith and fair dealing. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶ 46. The Complaint alleges that the coronavirus has caused direct physical loss or damage by “altering the physical conditions of properties such that properties were no longer safe or fit for occupancy or use” and that it “physically alter[s] and damage[s] air within buildings such that the air is no longer safe to breathe.” *Id.* at ¶ 3.

The thirty Major League Baseball Clubs and affiliated entities sued AIG Specialty Insurance Company, Factory Mutual Insurance Company, and Interstate Fire & Casualty Company in California state court (Alameda County) for declaratory relief and breach of contract. The “all risk” policies allegedly provide business interruption, extra expense, civil authority, ingress/egress, leasehold interest, and rental insurance coverage. Complaint at ¶¶ 82-83. The Complaint alleges that the presence of coronavirus within a facility “causes physical loss and damage by necessitating remedial measures that include without limitation extensive cleaning and disinfecting, repairing or replacing air filtration systems, remodeling and reconfiguring physical spaces, and other measures to reduce or eliminate the presence of cases of COVID-19 and the coronavirus on-site” and that losses have occurred at each club’s baseball stadiums and facilities. *Id.* at ¶¶ 101, 105. The policies’ contamination exclusion is allegedly inapplicable because

it “refers to ‘virus’ and to ‘disease causing or illness causing agent,’ but not to communicable disease, which is expressly covered by the Policies.” *Id.* at ¶ 265.

A group of restaurants sued Twin City Fire Insurance Company and The Hartford in Connecticut state court (Hartford District) for breach of contract, breach of the covenant of good faith and fair dealing, and violation of the Connecticut Unfair Insurance Practices Act. The “all risk” policy allegedly provides business income, extra expense, civil authority, and sue and labor coverage. Complaint at ¶ 7. The Complaint alleges that the COVID-19 pandemic caused direct physical loss of or damage to covered property “by causing the necessary suspension or limitation of operations during a period of restoration.” *Id.* at ¶ 69. The insurer is allegedly “using a form denial letter to deny coverage to all its insured with policies similar to Plaintiffs’ and is otherwise uniformly refusing to pay insureds under its standard policy for losses related to the Pandemic.” *Id.* at ¶ 74.

The owner and operator of a restaurant sued Lloyd’s London in Florida state court (Palm Beach County) for breach of contract. The policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 11-12. The Complaint alleges that the “occurrence of the pandemic virus from March 18, 2020 to date, tends to infiltrate the Premises resulting in on going damage to the Premises and substantial extra expenses of cleaning and efforts to prevent injury or pandemic infection to customers.” *Id.* at ¶ 31.

The operator of a restaurant sued Cincinnati Insurance Company in federal court (E.D. Mich.) for declaratory relief, breach of contract, appraisal, and violation of the Michigan Uniform Trade Practices Act. The “all risk” policy allegedly provides business interruption, extra expense, and civil authority coverage. Complaint at ¶ 50. The Complaint alleges that losses caused by COVID-19 and related closure orders trigger coverage because “Plaintiff’s full operations ha[ve] been largely suspended, and Plaintiff has lost revenue and business opportunities.” *Id.* at ¶ 64.

The operator of two restaurants sued Cincinnati Insurance Company in federal court (E.D. Mich.) declaratory relief, breach of contract, appraisal, and violation of the Michigan Uniform Trade Practices Act. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶ 50. The Complaint alleges that it “is likely customers, employees, and/or other visitors to the insured property over the months prior to, during, and after the government shutdown were infected with the coronavirus and thereby caused physical loss and damage to the property.” *Id.* at ¶ 44.

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

**Laura Foggan**

Partner – Washington, D.C.

Phone: +1 202.624.2774

Email: [lfoggan@crowell.com](mailto:lfoggan@crowell.com)

**Rachel A. Jankowski**

Associate – Washington, D.C.

Phone: +1 202.624.2647

Email: [rjankowski@crowell.com](mailto:rjankowski@crowell.com)

**Rachael Padgett**

Associate – Washington, D.C.

Phone: +1 202.688.3441

Email: [rpadgett@crowell.com](mailto:rpadgett@crowell.com)

**Adam J. Singer**

Associate – Washington, D.C.

Phone: +1 202.688.3508

Email: [asinger@crowell.com](mailto:asinger@crowell.com)