

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of November 2)

Nov.02.2020

U.K. Supreme Court to Hear FCA BI COVID-19 “Test Case” Appeal

On the leapfrog appeal from the High Court of Justice Queen's Bench Division Commercial Court, in the FCA Covid-19 business interruption cases, the Supreme Court granted permission on November 2, 2020 to appeal in these cases. The hearing will take place by video link from Monday 16 November 2020 and is estimated to last for four days. The Court has decided that the following Justices will hear the case: Lord Reed, Lord Hodge, Lord Kitchin, Lord Hamblen, Lord Leggatt.

Federal Courts Dismiss COVID-19 Business Interruption Claims

On October 26, 2020, the U.S. District Court for the Northern District of California granted California Capital Insurance Company's motion to dismiss a class action COVID-19 business interruption complaint filed by restaurant plaintiffs. The court concluded that the plaintiffs' claims were barred by the policy's virus exclusion, which “excludes viruses as a Covered Cause of Loss, thereby precluding Plaintiffs' claim for business income losses and extra expenses under the Civil Authority provision.” Order at 5.

On October 26, 2020, the U.S. District Court for the Western District of Texas granted Nationwide Mutual Insurance Company's motion to dismiss a COVID-19 business interruption claim filed by a car wash operator. The court found that the policy's virus exclusion was “unambiguous” and “plainly excludes ‘loss or damage’ caused even indirectly by a virus.” Because “Plaintiff's allegations make clear that Plaintiff's business income losses that are the subject of Plaintiff's insurance claim stem – at least indirectly – from the Covid-19 viral pandemic,” coverage was “barred” by the policy's virus exclusion. Order at 14. Plaintiff's bad faith claim further failed, because the plaintiff had not alleged any injury independent of Nationwide's failure to pay benefits under the policy. *Id.* at 17.

New Business Interruption Class Actions:

The owner and operator of a hotel filed a class action complaint against Continental Insurance Company in federal court (N.D. Ill.) for declaratory relief, breach of contract, and bad faith. The “all risk” policy allegedly provides business income, extra expense, and Fungi, Wet Rot, Dry Rot and Microbe coverage. Complaint at ¶¶ 43-44. The Complaint alleges that COVID-19 particles cause direct damage to property, as the presence of such particles “renders the premises unsafe, thereby impairing the premises' value, usefulness and/or normal function.” *Id.* at ¶ 32. The proposed nationwide class is defined as “[a]ll persons and entities in the United States with Fungi, Wet Rot, Dry Rot and Microbe coverage under a property insurance policy issued by Defendant that suffered an actual loss of Business Income and/or Extra Expense caused by the presence or damage of COVID-19, and for which Defendant has either actually denied or stated it will deny a claim for the losses or has otherwise failed to acknowledge, accept a covered loss, or pay for the covered losses.” *Id.* at ¶ 108.

New Business Interruption Suits Against Insurers:

The operator of a restaurant sued Mt. Hawley Insurance Company in Arizona state court (Maricopa County) for breach of contract and breach of the duty of good faith and fair dealing. The policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 14-18. The Complaint alleges that COVID-19 closure orders caused the plaintiff to suffer “a direct physical loss of, and damage to, the Premises, including the ability of customers to physically enter the Premises, the ability to occupy and otherwise utilize the Premises for services, the ability of the Premises to operate and function as intended, and other losses.” *Id.* at ¶ 25. The insurer allegedly denied coverage “without investigating the presence of SARS-CoV2 at property within one mile of the Premises.” *Id.* at ¶ 33.

An event promoter sued Vigilant Insurance Company in federal court (N.D. Cal.) for declaratory relief, breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, and negligent misrepresentation. The “all risk” policy allegedly provides business income, extra expense, civil authority, and dependent business premises coverage. Complaint at ¶¶ 47-53. The Complaint alleges that “SARS-CoV-2 particles attached to and damaged [the plaintiff’s] premises that were insured under the Policy, as well as the surrounding vicinity, rendering its premises unsafe and unusable, and resulted in direct physical loss or property damage.” *Id.* at ¶ 58. The insurer allegedly denied coverage “even though it knew, or should have known, that by selling its Policy without a virus exclusion or a pandemic exclusion, [the plaintiff] reasonably would understand and expect that the Policy covered losses associated with viruses and pandemics.” *Id.* at ¶ 65.

A chain of fitness clubs sued Zurich American Insurance Company in California state court (San Francisco County) for declaratory relief and breach of contract. The “all risk” policy allegedly provides business income, civil authority, and ingress/egress coverage. Complaint at ¶¶ 38-46. The Complaint alleges that COVID-19 closure orders “have caused Plaintiffs and their franchisees to suffer both (a) direct physical loss of, and, (b) damage to, their property because the Executive Orders have deprived Plaintiffs and their franchisees of access to their property, prevented customers from physically occupying Plaintiffs’ and their franchisees’ property, and prohibited Plaintiffs and their franchisees from operating their businesses, thereby impairing, and in fact nearly eliminating entirely, the normal function and value of Plaintiffs’ and their franchisees’ business property.” *Id.* at ¶ 66.

A restaurant sued International Catastrophe Insurance Managers, LLC in Florida state court (Sarasota County) for declaratory relief and breach of contract. The policy allegedly provides business income and civil authority coverage. Complaint at ¶ 6. The Complaint alleges that the “actual or reasonably possible physical presence of the Virus at or on the insured premises and personal property renders the insured’s use as a restaurant unreasonably dangerous under the prevailing scientific community’s knowledge rendering a complete or partial loss of the use of the insured property and causes ‘direct physical loss or damage to’ the insured premises and personality, as those terms are used in the Policy.” *Id.* at ¶ 8.

A retail store sued First Community Insurance Company in Florida state court (Pinellas County) for declaratory relief and breach of contract. The policy allegedly provides business income and civil authority coverage. Complaint at ¶ 6. The Complaint alleges that the presence of coronavirus “renders the insured’s use as a retail store unreasonably dangerous under the prevailing scientific community’s knowledge rendering a complete or partial loss of the use of the insured property and causes ‘direct physical loss or damage to’ the insured premises and personality, as those terms are used in the Policy.” *Id.* at ¶ 8.

The owners and operators of two medical centers sued Federal Insurance Company in Indiana state court (Marion County) for declaratory relief. The “all risk” policies allegedly provide business income, extra expense, ingress and egress, and civil authority coverage. Complaint at ¶ 6. The Complaint alleges that the SARS-CoV-2 virus “is a covered cause of loss under the terms of the Policies since it is a risk of direct physical loss of or damage to covered to property and is not excluded in the policies or the subject of any limitation of coverage,” *id.* at ¶ 27, and that the presence of people infected with the virus renders physical property “unsafe and unusable, resulting in direct physical loss or damage to that property.” *Id.* at ¶ 28.

The operator of a retail clothing store sued Ohio Security Insurance Company in Indiana state court (Marion County) for declaratory relief and breach of contract. The “all risk” policy allegedly provides building, personal property, business income, extended business income, extra expense, business income from dependent properties, and civil authority coverage. Complaint at ¶ 32. The Complaint alleges that the “presence of people infected with COVID-19 or carrying SARS-CoV-2 particles renders property unsafe and unusable and causes direct physical damage and direct physical loss to property.” *Id.* at ¶ 12.

The owners and operators of a group of salons sued Main Street America Protection Insurance Company and American Family Insurance Mutual Holding Company in federal court (E.D. Mo.) 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 ¶¶ 57, 66, 72. The Complaint alleges that the “COVID-19 pandemic caused a direct physical loss of [Plaintiff’s] property at the described premises by directly denying Plaintiff the ability to physically access and use the property in the normal fashion in its business.” *Id.* at ¶ 63. The Complaint further alleges that the policy’s virus exclusion is inapplicable because “[a]ny causal relationship between the virus and Plaintiff’s losses is indirect (the virus caused COVID-19, which resulted in the pandemic, which caused Plaintiff to close its salons) and occurred in addition to other causes, namely the COVID-19 disease, the pandemic and government closure orders.” *Id.* at ¶ 19.

Farm Family Casualty Insurance Company sued its insureds, landscaping businesses operating in New York and New Jersey, in New York state court (Albany County), seeking a declaratory judgment that it does not owe the defendants any obligations under the various policies issued to the defendants. The policies allegedly provide business income, extra expense, civil authority, and extended business income coverage. Complaint at ¶¶ 31-37. The policies also contain virus exclusions. *Id.* The complaint alleges that the plaintiff has sent letters to the defendants determining that no coverage exists. *Id.* at ¶¶ 37-39.

The owners of a hotel (which also provided dormitory facilities to students pursuant to contracts with NYC colleges) in New York City sued Affiliated FM Insurance Company in federal court (E.D.N.Y.), asserting a claim for breach of contract. The “all risk” policy allegedly provides business income, rental income, attraction property, civil authority, communicable disease, and ingress/egress coverage. Complaint at ¶¶ 45-52. The plaintiffs allege that, as a result of the mandated closing of NYC colleges with which it held contracts, its tenants were unable to pay rent, resulting in loss of income. *Id.* at ¶ 43-44. The plaintiffs allege that the defendant has failed to respond to its claim for coverage and inexcusably denied payment of claims. *Id.* at ¶ 48.

The owners of various restaurants in North Carolina and South Carolina sued The Cincinnati Insurance Company in federal court (W.D.N.C.), asserting claims for declaratory relief and breach of contract. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 3-5. The policy does not contain a virus exclusion. *Id.* at ¶ 47. The complaint alleges that the defendant wrongfully denied the plaintiff’s claim for coverage. *Id.* at ¶¶ 7-8.

The owners of car dealerships in Pennsylvania sued Erie Insurance Company and others in Pennsylvania state court (Philadelphia County), asserting claims for declaratory relief, breach of contract, and negligence (against its insurance broker only). The “all

risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶35-36. The policy also contains an exclusion for loss “resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness or disease.” *Id.* at ¶42. The complaint alleges that the defendants wrongfully denied the plaintiff’s claim for coverage without conducting a meaningful investigation, *id.* at ¶¶70-71, despite having in-person meetings and phone conversations indicating that plaintiffs purchased coverage that would specifically include coverage for losses caused by viruses like COVID-19. *Id.* at ¶75.

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

Rachael Padgett

Associate – Washington, D.C.
Phone: +1 202.688.3441
Email: rpadgett@crowell.com

Adam J. Singer

Associate – Washington, D.C.
Phone: +1 202.688.3508
Email: asinger@crowell.com