CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of November 23)

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U.K. Supreme Court COVID-19 Hearing in FCA Test Case Concludes

The appellate argument has concluded in the U.K. Supreme Court of the decision by the U.K. High Court regarding coverage for COVID-19-related losses under several policies that provided non-physical damage Business Interruption extension cover. The appeal considers the impact of U.K. governmental actions and measures on 28 clauses in the 21 lead policies written by the Appellant Insurers. The FCA and the Appellant Insurers agreed to submit those policy wordings for consideration with the aim of addressing issues arising from similar policies prevalent in the insurance industry. The case was heard in July 2020 and resulted in a finding that many of the policies responded to COVID-19 business interruption.

These appeals concern the construction of certain insurance policies which provide coverage in the event of business interruption that is not tied to physical loss or damage to property, and their application to COVID-19 scenarios. The Supreme Court is asked to construe:

- "Disease Clauses" (*i.e.* those which can be triggered by the occurrence of severe acute respiratory syndrome coronavirus 2 (COVID-19), typically within a specified distance of the insured's premises);
- "Prevention of Access Clauses" (*i.e.* those triggered by public authority intervention preventing access to, or use of, premises as a result of COVID-19); and
- "Hybrid Clauses" (*i.e.* those clauses which contain wording from both Disease and Prevention of Access Clauses).

The Court also will determine whether the Court was correct to apply certain counterfactual scenarios in relation to clauses in relevant policies which provided for loss adjustments (the "Trends Clauses"); and in its analysis of *Orient-Express Hotels Ltd v Assicurazioni Generali S.p.A.*

The court ruling on appeal determined that the insured peril was composite and incorporated the pandemic and the effect of government action. The decision is seen as controversial as it created a new concept in English insurance law, namely, that of a composite peril. The court also disapproved of the logic in the long-standing U.K. *Orient Express Hotels* case, which concerned how to measure loss under the Trends clause in an All Risks policy for business interruption loss to a hotel in New Orleans caused by Hurricane Katrina. Finally, the FCA is appealing the Court's decision to require the unities of time, place and cause when considering whether local outbreaks of COVID-19 should be grouped with the national outbreak of the disease in wordings that refer to an Event giving rise to the business interruption loss. The court held that the word Event had an established meaning which required all three unities to be present for coverage to be triggered.

A ruling expected by the year end. The panel includes the judge who decided the *Orient Express Hotels* case, which has created additional interest in the U.K. Supreme Court's ruling.

Courts Dismiss COVID-19 Business Interruption Claims

On November 17, 2020, the Superior Court of New Jersey in Mercer County granted Philadelphia Indemnity Insurance Company's motion to dismiss a health club's COVID-19 business interruption claims and dismissed the complaint with prejudice. The court held that the health club's claims fall within the virus exclusion, (Order at 8), and that "by its plain terms," the civil authority provision does not apply. *Id.* The court dismissed the plaintiff's regulatory estoppel argument as "far outside the bounds of the equitable principles underlying it." *Id.* at 9. Because the virus exclusion applies, the court did not reach whether the complaint alleged a direct physical loss. *Id.*

On November 9, 2020, the U.S. District Court for the Western District of Oklahoma granted Philadelphia Indemnity Insurance Company's motion to dismiss a non-profit corporation's COVID-19 business interruption claims. The court found that the plaintiff failed to allege a "direct physical loss," because the complaint did not allege that a substance entered the insured premises or attached to its surfaces. The court further held that even if it applied an expansive definition of direct physical loss, the claim was still subject to dismissal because the policy's Virus Endorsement expressly excluded coverage.

New Business Interruption Class Actions:

A sports club and its owner filed a class action complaint against American Zurich Insurance Company in federal court (E.D.N.Y.) for declaratory relief, breach of contract, unjust enrichment, and partial refund of paid premiums. The "all risk" policy allegedly provides building and personal property, business income, extra expense, and civil authority coverage. Complaint ¶¶ 3, 27, 35. The policyholders argue that the policy's virus exclusion is inapplicable because their losses "were not caused by a 'virus' or any requirement to remove the virus contamination from the insured premises." *Id.* ¶ 43. Instead, they allege Governor Andrew Cuomo's Executive Order No. 202.3 directing certain retail businesses to close, including gyms, to prevent the spread of COVID-19 caused the loss. *Id*. ¶¶ 21, 42, 44. The policyholders demand a refund or premium reduction for the "windfall" the insurer received because of "substantially reduced" risk of loss and less claims during the business closure orders. *Id.* ¶¶ 71, 77. The named plaintiffs seek to represent "[a]ll gyms, health clubs, health & fitness centers, and other similarly situated businesses" whose claims the insurer denied and who overpaid insurance premiums to the insurer, as well as a New York and New Jersey subclass. *Id*. ¶¶ 87–88.

Two vacation rental companies filed a class action complaint against Certain Underwriters at Lloyd's London; Underwriters at Lloyd's London known as Syndicate XLC 2003, CNP 4444, NVA 2007, QBE 1886, ARG 2121, and ASC 141; and HDI Global Specialty SE in federal court (E.D.N.C.) for declaratory relief. The "all risk" policy allegedly provides property, business income, extra expense, and civil authority coverage. Complaint ¶¶ 16–17, 19, 21–27. The policyholders allege that COVID-19's presence "caused direct physical loss of and/or damage to the Insured Property" and that the civil authorities' closure orders prohibited access to the property "in response to dangerous physical conditions resulting from a covered cause of loss." *Id*. ¶¶ 49–50. The insurer denied the claim. *Id.* ¶ 55. The named plaintiffs seek to represent "[a]ll persons and entities with Vacation Rental Business Income coverage under a property insurance policy issued by Defendants that suffered a suspension of business due to COVID-19 at the premises covered by the business income coverage[,] . . . that suffered loss of Business Income and/or Extra Expense caused by a Closure Order[, and] . . . that sought to minimize the suspension of business in connection with COVID-19 at the premises covered by their property insurance policy[.]" *Id.* ¶ 60.

The owner of a microbrewery in Minnesota, lounge and bar in Chicago, and event and catering service in Pennsylvania sued The Cincinnati Insurance Company on behalf of themselves and all others similarly situated in federal court (S.D. Ohio), asserting claims for breach of contract and declaratory relief. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 25-33. The policy does not contain a virus exclusion. *Id.* at ¶26. The complaint alleges that the defendant wrongfully denied the plaintiffs' claims for coverage. *Id.* at ¶72. The nationwide class is divided into business income, civil authority, extra expense, and sue and labor subclasses, as well as breach and declaratory judgment sub-classes, depending on whether the defendant had yet denied the class member's claim for coverage. *Id.* at ¶74.

New Business Interruption Suits Against Insurers:

Mt. Hawley Insurance Company sued its policyholder, a retail shopping center and hotel, in federal court (E.D. La.), seeking a declaratory judgment that it is not obligated under the policy for the defendant's alleged losses arising from the COVID-19 pandemic. The commercial property policy provides business income, extra expense loss, civil authority, and ingress or egress coverage. Complaint ¶¶ 6, 18–19. The policy also includes a pollution exclusion endorsement, which includes viruses, and exclusions for loss of use or market, acts or decisions by government, and loss or damage caused by the enforcement of property use regulations. *Id.* ¶ 19. 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.* ¶¶ 11, 17.

The owner of a radio station in the Philadelphia area sued Vigilant Insurance Company in Pennsylvania state court (Philadelphia County), asserting claims for declaratory relief, breach of contract, statutory good faith, and breach of the implied covenant of good faith and fair dealing. The "all risk" policy allegedly provides business income, extra expense, civil authority, ingress/egress, and dependent premises coverage. Complaint at ¶¶ 23-31. The policy does not include a virus exclusion. *Id.* at ¶ 31. The complaint alleges that the defendant improperly and in bad faith denied the plaintiff's claim for coverage. *Id.* at ¶¶73-91.

The owner of movie theaters with locations throughout the U.S. sued Factory Mutual Insurance Company in Texas state court (Collin County), asserting claims for declaratory relief, breach of contract, breach of the covenant of good faith and fair dealing, and violation of the Texas Insurance Code. The "all risk" policy allegedly provides business income, extra expense, civil authority, ingress/egress, time element loss, logistics extra cost, attraction property, claim preparation costs, protection and preservation of property, and communicable disease coverage. Complaint at ¶¶18-21, 99-107, 117-134. The policy does not contain a virus exclusion. *Id.* at ¶¶135-146. The complaint specifically alleges that numerous of the plaintiff's employees "exhibited signs or actual symptoms of COVID-19, or tested positive." *Id.* at ¶¶74-76. The complaint further alleges that the defendant wrongfully denied the plaintiff's claim for coverage "in bad faith based on an apparent systematic company practice designed to minimize payments for covered COVID-19 claims." *Id.* at ¶113.

The operator of restaurants sued Farmers Group Inc. and Mid-Century Insurance Company in California state court (San Francisco County) for declaratory relief, breach of contract, breach of the covenant of good faith and fair dealing, and violation of California's Unfair Business Practices Act. The "all risk" policy allegedly provides business income and civil authority coverage. Complaint at ¶¶ 65, 72. The Complaint alleges that physical harm caused by COVID-19 closure orders made it "necessary for the Restaurants to suspend operations, lose business income, and suffer other related covered losses (including but not limited to extended business income, extra expenses and food and drink spoilage)." *Id*. at ¶ 70.

A real estate investment trust with interests in hotel properties sued Endurance American Specialty Insurance Company in federal court (C.D. Cal.) for declaratory relief, breach of contract, anticipatory breach of contract, and breach of the implied covenant of good faith and fair dealing. The "all risk" policy allegedly provides business income and extra expense coverage. Complaint at ¶ 25. The Complaint alleges that the insurer wrongfully "applied its systematic denial of coverage to [the plaintiff] without regard to [the plaintiff's] policy and facts underlying its claim." *Id*. at ¶ 5.

The owner and operator of family entertainment gaming businesses sued Liberty Mutual Insurance Company in California state court (San Diego County) for declaratory relief. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 10-12. The Complaint alleges that COVID-19 causes physical damage to property because it contaminates objects and surfaces and "may have attached to and deprived Plaintiffs of their property, making it 'unsafe and unusable' and denying use of and damaging the covered property." *Id*. at ¶ 48.

The owner and operator of sports bars and restaurants sued Federal Insurance Company in federal court (D. Colo.) for declaratory relief, breach of contract, bad faith, and violation of C.R.S. § 10-3-1115. The "all risk" policy allegedly provides business income, extra expense, ingress and egress, civil authority, dependent business, and prohibition of access coverage. Complaint at ¶¶ 35-59. The Complaint alleges that the insured premises suffered direct physical loss or damage "because a dangerous and potentially deadly substance, the novel coronavirus, has been unleashed in and around the premises, rendering the premises unfit and incapable of being used for their intended purpose, and causing multiple civil authorities to order their closure." *Id*. at ¶ 65. The Complaint further alleges that the "addition of a virus exclusion to *other* policies, written on the same forms as [the plaintiff's] policy, demonstrates that [the plaintiff's] policy, with no such exclusion, *does* provide coverage. *Id*. at ¶ 3 (emphasis in original).

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