

Client Alert

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of September 14)

September 21, 2020

Delaware Modification to State of Emergency Requires Insurers to Provide 90-Day Payment Plan for Past Due Premiums

On September 3, 2020, the Governor of Delaware issued the Twenty-Seventh Modification of The Declaration of a State of Emergency For the State of Delaware Due To A Public Health Threat. The Modification requires insurers, beginning July 1, 2020, to provide a 90-day payment plan for past due premiums to individual policyholders who demonstrate a loss of job/termination of employment due to the COVID-19 State of Emergency, or business policyholders who demonstrate that they were required to close or significantly reduce their business operations due to the State of Emergency. *See* Modification § J. Repayment of unpaid premiums are to be amortized over the 90-day period in up to three equal installments, and failure to make payment under the payment plan may be the basis for cancellation or nonrenewal of a policy. *Id.* The Modification became effective on September 4, 2020.

Virginia House Passes COVID-19 Workers' Compensation Presumption Bill

On September 4, 2020, the Virginia House of Representatives passed H.B. 5028, which establishes a presumption that COVID-19 is an occupational disease compensable under the state's Workers' Compensation Act, unless overcome by a preponderance of evidence to the contrary, for firefighters, emergency medical services personnel, law enforcement officers, first responders, health care providers, and school board employees. If enacted into law, the bill would be retroactive to January 1, 2020.

Federal Court Remands COVID-19 Business Interruption Case to State Court

On September 8, 2020, the U.S. District Court for the Western District of Texas granted a restaurant group's motion to remand its COVID-19 business interruption suit to Texas state court, concluding that diversity jurisdiction did not exist because the joinder of the insurance adjuster assigned to the claim as a defendant was not improper. The plaintiffs' complaint alleges that the adjuster made no requests for documents relating to the claims, conducted an investigation that was outcome-oriented, misrepresented the scope of the policy, and that the insurer's denial of coverage was so quick that the adjuster could not have conducted a proper investigation. The court found that these allegations stated a claim against the adjuster for violations of the Texas Insurance Code separate and apart from the breach of contract claims asserted against the insurer.

Lloyd's Announces Losses Due to COVID-19 Claims

On September 8, 2020, Lloyd's of London announced that it recorded a pretax loss of approximately £400 million during the first half of 2020. The loss compares with a £2.3 billion profit during the same time period in 2019. The loss is predominantly attributable to COVID-19 claims, with Lloyds' combined ratio, a measure of underwriting profitability, being 110.4% overall compared to 91.7% when COVID-19 claims are excluded.

Two Federal Courts Dismiss COVID-19 Business Interruption Claims

On September 11, 2020, the U.S. District Court for the Southern District of California granted Farmers' motion to dismiss a barbershop's COVID-19 business interruption claim. The court concluded that alleged losses from an inability to use property do not amount to "direct physical loss of or damage to property" and that physical loss or damage occurs only when property undergoes a distinct and demonstrable physical alteration. The court further concluded that the complaint failed to allege that any COVID-19 Civil Authority Orders prohibited access to the business' premises as required under the policy's Civil Authority provision, as the government orders prohibited the operation of the plaintiff's business, not access to its place of business.

On September 11, 2020, the U.S. District Court for the District of Nevada dismissed an RV park's COVID-19 claim against National Casualty Company (NCC) due to the plaintiff's failure to respond to NCC's motion to dismiss.

New Business Interruption Suits Against Insurers:

The owner of a dental practice in Nashville sued The Cincinnati Insurance Company (and its affiliates) in federal court (M.D. Tenn.) for declaratory relief and breach of contract. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 25-31. The policy does not contain a virus exclusion. *Id.* at ¶ 9. The Complaint alleges that the defendant wrongfully denied the plaintiff's claim for coverage. *Id.* at ¶¶ 42-43.

The owner of a real estate company and manager of numerous commercial properties in Texas and Arizona sued its various insurers and insurance broker in Texas state court (Harris County), for declaratory relief, breach of contract, breach of the duty of good faith and fair dealing, fraud, negligent misrepresentation, and violations of the Texas Insurance Code. The "all risk" policies allegedly provide business income coverage, and "specifically provides coverage for viruses." The Complaint alleges that the defendants wrongfully denied the plaintiff's claim for coverage without conducting an adequate investigation, mishandled the claim, and made material representations about the policy, coverage, and Texas law.

An underwriting company in the United Kingdom sued Daniels Hospitality Group, LLC, the owner of a group of service and hospitality properties in Texas, in federal court (W.D. Tex.), for a declaration concerning whether it must pay Daniels Hospitality for damages arising from business income losses due to COVID-19 and subsequent civil closure orders. Complaint at ¶37. The plaintiff's policy allegedly provides business income and civil authority coverage. *Id.* at ¶¶ 10, 26. The Complaint alleges that the defendant made a claim with the plaintiff regarding business income losses due to COVID-19, that the defendant informed the plaintiff that there was no coverage,

and that the plaintiff subsequently issued a demand for coverage. *Id.* at ¶¶ 13-15. The defendant asserts that there is no coverage because the plaintiff did not sustain direct physical loss of damage to a covered property, and because the policy “excludes any losses arising from loss of market, loss of use, microorganisms, or the threat of anything which endangers or threatens to endanger the health, safety, or welfare of persons.” *Id.* at ¶¶ 32-33.

A restaurant sued Certain Underwriters at Lloyd’s, London in Florida state court (Hillsborough County) for declaratory relief and breach of contract. The “all risk” policy allegedly provides business income coverage. Complaint at ¶ 6. The Complaint alleges that the actual or possible presence of coronavirus at the insured premises “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.” *Id.* at ¶ 7. The Complaint further alleges that the policy’s Microorganism Exclusion is inapplicable because the coronavirus “is not a microorganism” but is “a complex molecule that is not capable of being viewed in a lighted microscope.” *Id.* at ¶ 9.

The owner and operator of a dentistry practice sued Aspen American Insurance Company in federal court (M.D. Fla.) for declaratory relief and breach of contract. The policy allegedly provides civil authority and practice income coverage. Complaint at ¶¶ 15, 17. The Complaint alleges that the presence of coronavirus is a covered cause of loss and that the policy’s loss of market exclusion is inapplicable because Florida’s closure order is not an ordinance or law regulating the use of property. *Id.* at ¶¶ 39-40.

An acupuncture facility sued Main Street America Assurance Company in Florida state court (Hillsborough County) for declaratory relief. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶ 14. The Complaint alleges that the COVID-19 pandemic “is physically impacting public and private property” and that any “effort by the [insurer] to deny the reality that the pandemic causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger policyholders and the public.” *Id.* at ¶ 26.

The operator of a restaurant sued Ironshore Europe DAC and Certain Underwriters at Lloyd’s, London in Florida state court (Broward County) for breach of contract. The “all risk” policy allegedly provides business interruption, extra expense, and civil authority coverage. Complaint at ¶¶ 5, 6. The Complaint alleges that COVID-19 caused direct physical loss to the covered premises by “damaging the property, intruding upon the property, denying access to the property, preventing customers from physically occupying the property, causing the property to be physically uninhabitable by customers, causing its function to be nearly eliminated or destroyed, causing the property to become substantially unusable, and/or causing a suspension of business operations on the premises.” *Id.* at ¶ 48.

The operator of a restaurant sued Indian Harbor Insurance Company, HDI Specialty SE, and Underwriters at Lloyd’s, London in Florida state court (Broward County) for breach of contract. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 5, 6. The Complaint alleges that the insurers chose not to include a virus exclusion in the policy and that COVID-19 caused direct physical loss to the covered premises by “damaging the property, intruding upon the property, denying access to

the property, preventing customers from physically occupying the property, causing the property to be physically uninhabitable by customers, causing its function to be nearly eliminated or destroyed, causing the property to become substantially unusable, and/or causing a suspension of business operations on the premises.” *Id.* at ¶¶ 35, 48.

The owners and operators of a hotel sued Fireman’s Fund Insurance Company in Indiana state court (Marion County) for declaratory relief and breach of contract. The “all risk” policy allegedly provides business income, extra expense, business access, dependent property, communicable disease, and civil authority coverage. Complaint at ¶ 1. The Complaint alleges that the insurer chose not to include a virus exclusion and thereby confirmed viruses to be a covered cause of loss. *Id.* at ¶ 61. The Complaint further alleges that the prohibition of access to property for its normal function due to Indiana’s COVID-19 closure orders “arose from the physical presence of SARS-CoV-2 particles within the Other Properties, which caused a direct physical loss or damage to the Other Properties.” *Id.* at ¶ 85.

The operator of a fitness center sued West Bend Mutual Insurance Company in Kentucky state court (Fayette County) for declaratory relief, breach of contract, violation of Kentucky’s Unfair Claims Settlement Practices Act, bad faith, and punitive damages. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 11, 12. The Complaint alleges that the policy’s virus exclusion is inapplicable because the plaintiff’s loss of business income was not a result of a virus on the premises but, rather, “was the result of the forced closure of [the plaintiff’s] premises by reason of the Civil Authority Closure Order.” *Id.* at ¶ 16.

A restaurant and hospitality chain sued Certain Underwriters at Lloyd’s in federal court (E.D. La.) for declaratory relief, breach of contract, failure to pay claims involving immovable property, and breach of the duty of good faith and fair dealing. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 4-11. The Complaint alleges that it “is clear that the pathogen contaminated surfaces of the insured premises would constitute a direct physical loss requiring remediation to sanitize the surfaces of said premises prior to reopening.” *Id.* at ¶ 23.

A group of restaurants sued Indemnity Insurance Company of North America in Maryland state court (Baltimore City) for declaratory relief, breach of contract, and tortious failure to act in good faith. The “all risk” policy allegedly provides business income, extra expense, civil authority, business income from dependent properties, and food contamination coverage. Complaint at ¶¶ 63-72. The Complaint alleges that the policy’s virus exclusion does not limit coverage “if other covered causes of loss are the predominant or proximate cause of loss” and that the presence of COVID-19 “on or around property amounts to ‘direct physical loss of or damage to property.’” *Id.* at ¶¶ 79, 146.

A real estate agency sued Hartford Fire Insurance Company and Sentinel Insurance Company in New York state court (Westchester County) for breach of contract. The “all risk” policy allegedly provides business income, extra expense, extended business income, dependent properties, and civil authority coverage. Complaint at ¶¶ 10, 16, 17. The Complaint alleges that COVID-19 causing fomites were present in the insured property due to the presence of symptomatic, asymptomatic and/or presymptomatic individuals who were observed touching

surface areas, door handles, furniture, and business equipment, “thereby causing direct physical loss and/or damage to [the insured] property and/or individuals present in [the insured] office.” *Id.* at ¶ 35.

A utility consultant business sued Associated Indemnity Corp. in California state court (Contra Costa Cty.) alleging the insurer wrongfully denied its claim for business interruption losses due to California’s COVID-19 closure orders. The policy allegedly provides Business Income, Civil Authority, and “Income Support Properties” coverages, and does not contain a virus exclusion. The complaint alleges AIC’s investigation “was merely a charade designed to cover up the insurer’s preexisting decision to deny all COVID-19 related claims,” and that the insurer did not “conduct a physical investigation of the [insured’s] premises.” The complaint further alleges that the denial letter “contained a detailed examination and evaluation of governmental shut-down orders issued by the County of Los Angeles, not those of Contra Costa County in reaching its conclusion” despite the fact that the insured’s premises is “not subject to the authority of the County of Los Angeles,” and concludes that “AIC, in a rush to deny the claim, simply ‘cut and pasted’ parts of a denial letter that it had previously issued to a Los Angeles Insured.”

A casino sued Zurich American Insurance Company in California state court (Santa Clara Cty.) alleging the insurer wrongfully denied its claim for business interruption losses due to California’s COVID-19 closure orders. The “all risk” policy allegedly provides Business Income, Extra Expense, and Civil Authority coverages, and does not contain a virus exclusion. The complaint alleges that Zurich denied the insured’s claim “[w]ithout performing a full, fair, and balanced investigation” and that the denial “was erroneously based on the COVID-19 event, and failed to acknowledge the losses caused by the governmental orders which were the basis of [the insured’s] claim.”

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