

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of September 21)

September 21, 2020

Northern District of California Grants Motion To Dismiss In COVID-19 Business Interruption Suit

On September 14, 2020, the United States District Court for the Northern District of California granted Travelers Casualty Insurance Company's motion to dismiss a retail store's business interruption claim with leave to amend. The court found that the store's "inability to occupy its storefront does not into fall within the Business Income and Extra Expense coverage of this policy." The court reasoned that because plaintiff's complaint "contains no allegations of a physical force which 'introduced a detrimental change in the property's capabilities,'" the store had "failed to establish a 'direct physical loss of property' under its insurance policy." The court also found that there was no civil authority coverage because the store did not establish the "requisite causal link between damage to adjacent property and denial of access" to its store.

English High Court Issues Ruling in UK COVID-19 Business Interruption Test Case

The English High Court issued its highly-anticipated ruling in the COVID-19 Financial Conduct Authority test case on Tuesday, September 15, 2020. The policies selected for the test case generally were those which had clauses offering protection against either disease outbreaks or denial of access to premises due to action by a public authority caused by an occurrence of any human infectious or contagious disease. The ruling held that many, but not all, of the disease clauses offered coverage and that some denial of access clauses offered coverage, dependent on several factors, such as whether the business was forced to close partially or completely. The FCA stated that insurers should reflect on the findings of the case and "consider the steps they can take now to progress claims of the type that the judgment says should be paid." None of the policies at issue required physical loss to trigger coverage, or contained a virus exclusion.

QBE Considers Appeal of FCA Test Case

QBE, one of eight insurers involved in the FCA COVID-19 business interruption test case, indicated that based on the high court's judgment it would have to pay out \$170 million in claims, reduced to \$70 million after consideration of reinsurance. The insurer noted that it had the opportunity to appeal the judgment, but did not say if it would do so. In a stock market update given after the decision was rendered, QBE stated that "the FCA test case decision is highly complex and will take time for the industry to fully consider and for claims to be resolved."

Zurich Claims Its Business Interruption Wordings Are Not Triggered By Ruling In FCA Test Case

Zurich, one of eight insurers involved in the COVID-19 FCA test case, issued a press release in response to Tuesday's ruling stating that "[t]he UK High Court has confirmed that the wordings represented by Zurich Insurance Group" in the FCA test case "do not provide cover for business interruption in relation to the COVID-19 outbreak." According to Zurich, the limited number of claims relating to policies with these wordings received to date further supports that conclusion.

New Business Interruption Class Actions:

A provider of products and training to the US military, first responders, and law enforcement sued Certain Underwriters at Lloyd's, London Trading as Syndicates WRB 1967 and KLN 0510 on behalf of itself and all others similarly situated in federal court (M.D. Pa.), 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 ¶¶ 15-24. The Complaint alleges that the defendant wrongfully denied the plaintiff's claim for coverage. *Id.* at ¶¶ 50-51. The nationwide class is defined as all policyholders who purchased coverage from the defendant "and who have been denied coverage under their policy for lost business income after being ordered by a governmental entity, in response to the COVID-19 pandemic, to shut down or otherwise curtail or limit in any way their business operations." *Id.* at ¶55.

The owner of a preschool in Illinois sued West Bend Mutual Insurance Company on behalf of itself and all others similarly situated in federal court (E.D. Wis.), asserting claims for declaratory relief and breach of contract. The "all risk" policy allegedly provides business income, extra expense, communicable disease, civil authority, and sue and labor coverage. Complaint at ¶ 23-35. The Complaint alleges that the defendant wrongfully denied the plaintiff's claim for coverage due to losses caused by the pandemic and subsequent civil closure orders, and that it "has, on a wide scale basis refused to provide ... coverage" to other class members. *Id.* at ¶¶ 56-57. The nationwide class is divided into declaratory judgment and breach subclasses, as well as business income, civil authority, extra expense, communicable disease, and sue and labor subclasses. *Id.* at ¶ 59.

A jewelry brand and a restaurant filed a class action complaint against West Bend Mutual Insurance Company 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" policies allegedly provide business income, extra expense, and civil authority coverage. Complaint at ¶¶33-35. The Complaint alleges that COVID-19 closure orders "caused both property loss and property damage by directly, physically impairing the functionality of Plaintiffs' property and dispossessing Plaintiffs of their tangible spaces" and that the policies' virus exclusions are overbroad and unenforceable. *Id.* at ¶ 36, 42, 54. The Complaint further alleges that if the insurer prevails on the coverage issues, then class members must receive a rebate of premium "for the windfall that [the insurer] kept for itself by reduced claims due to Closure Order shutdowns, partial operations mandates and other constraints." *Id.* at ¶ 7. 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 ¶ 127.

New Business Interruption Suits Against Insurers:

The owner of an apparel company with locations in Pennsylvania and New York sued The Hartford Financial Servs. Group, Inc. and Hartford Fire Insurance Company in federal court (E.D. Pa.), asserting claims for declaratory relief and breach of contract. The "all risk" policy allegedly provides business income, extra expense, dependent property, and civil authority coverage. Complaint at ¶¶26-28. The policy also contains an exclusion for "loss or damage caused by or resulting from any virus, bacterium or other microorganism." *Id.* at ¶70. The Complaint alleges that the defendant wrongfully denied the plaintiff's claim for coverage, and that it has denied or will deny all similar claims for coverage. *Id.* at ¶¶91, 101-102.

The owner of a chiropractic care practice in Arlington, Texas sued Hartford Lloyd's Insurance Company in Texas state court (Tarrant County), asserting claims for breach of contract, breach of the duty of good faith and fair dealing, gross negligence, and/or malice, and violations of the Texas Prompt Pay Act. The "all risk" policy allegedly provides business income, extra expense, civil authority, and sue and labor coverage. Complaint at ¶¶ 2.2, 3.2-3.6. The policy also specifically provides "limited fungi, bacteria or virus" coverage. *Id.* at ¶ 3.5. The Complaint specifically alleges that the plaintiff suffered contamination of its premises when a person with known exposure to COVID patients was present at its premises (*id.* at ¶ 2.9), and that the defendant wrongfully denied the plaintiff's claim for coverage. *Id.* at ¶¶ 4.1-4.4.

A group of tattoo parlors sued Nautilus Insurance Company in Florida state court (Palm Beach County) for breach of contract. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶ 15. The Complaint alleges that Florida's COVID-19 closure orders "deprived Plaintiffs of their property, making it unsafe and unusable, resulting in direct physical loss to the premises and property." *Id.* at ¶ 24.

The owner and operator of a retail store sued Certain Underwriters at Lloyd's, London, National Fire & Marine Insurance Company, and Crum & Forster Specialty Insurance Company in Florida state court (Palm Beach County) for breach of contract. The "all risk" policy allegedly provides business personal property, business income, extra expense, contamination, and civil authority coverage. Complaint at ¶¶ 17, 18. The Complaint alleges that the plaintiff has suffered direct physical loss of or damage to its property because COVID-19 "made the retail location unusable in the way that it had been used before COVID-19, rendered the property substantially unusable and uninhabitable, intruded upon the property, damaged the property, prevented physical access to and use of the property, and caused a suspension of business operations at the property." *Id.* at ¶ 3. The insurers allegedly "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." *Id.* at ¶ 48.

A physicians group sued Bankers Insurance Company in Florida state court (Seminole County) for declaratory relief. The "all risk" policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶ 14. The Complaint seeks a declaration that "the policy provides coverage to Plaintiff for any current and future civil authority closures due to physical loss or damage from the Pandemic and the policy provides business income coverage in the event that the Pandemic has caused a loss or damage at the insured premises." *Id.* at ¶ 35.

A salon sued Erie Insurance Company in Maryland state court (Baltimore County) for breach of contract. The policy allegedly provides business interruption coverage. Complaint at ¶ 7. The Complaint alleges that the plaintiff suffered a total loss of income for over two months due to Maryland's COVID-19 closure order and further lost half of the regular rent due to it from a tenant who was not permitted to conduct its business for two months. Complaint at ¶¶ 3-5. The insurer allegedly "breached its contractual duty to the Plaintiff by refusing to honor the Plaintiff's business interruption claim as it continued to take money and continues today from the Plaintiff for the aforesaid insurance coverage premiums." *Id.* at ¶ 7.

Three restaurants sued Property-Owners Insurance Company in Michigan state court (Wayne County) for declaratory relief and breach of contract. The "all risk" policy allegedly provides business income and civil authority coverage. Complaint at ¶¶ 58, 59. The Complaint alleges that there has been direct physical loss of or damage to covered property because "Plaintiffs cannot use their covered properties for its intended purposes to combat the imminent threat of Covid-19 contamination, transmission, and infection," and that the policy's virus exclusion is inapplicable because it "does not apply to pandemics or executive orders

issued to protect public health and welfare” and “Plaintiffs always understood the Virus Exclusion in the Policies to apply only in cases where its’ customers were infected with a virus while on covered property.” *Id.* at ¶¶ 55, 74, 75.

Three restaurants 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 income, extra expense, and civil authority coverage. Complaint at ¶¶ 61-63. The Complaint alleges that it is likely that customers, employees, and/or other visitors were infected with the coronavirus and thereby caused physical loss and damage to insured property. *Id.* at ¶ 44. The Complaint further alleges that damage due to viruses constitutes loss under the policy and “[d]espite the availability of a specific exclusion for viruses, Plaintiffs’ Policy contains no relevant exclusion.” *Id.* at ¶¶ 58, 59.

The owner of a California health and wellness camp sued Beazley USA Services, Inc. in federal court (C.D. Cal.) 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, Expenses to Reduce Loss, and Civil Authority coverages, and does not contain a virus exclusion. The complaint alleges that while Beazley denied the claim because, among other reasons, it contended that coverage was excluded under the policy’s Microorganism Exclusion, “this exclusion does NOT exclude coverage for ‘viruses’ or exclude coverage for damages which may be caused by a pandemic.”

A California apparel retailer sued Hartford Fire Insurance Company in federal court (E.D. Cal.) 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, Civil Authority, Dependent Properties, Future Earnings, Ingress or Egress, and Business Personal Property coverages, and does not contain a virus exclusion. The complaint alleges that “without even investigating it, Hartford summarily rejected [plaintiff’s] claim within four days of [plaintiff’s] original notice of loss,” and “[i]n doing so, it ignored long accepted constructions of the operative insurance policy terms.”

A group of restaurants and cafes sued Affiliated FM Insurance Company in California state court (San Diego Cty.) alleging the insurer wrongfully denied their claims for business interruption losses due to various states’ COVID-19 closure orders. The “all-risk” policy allegedly provides Business Interruption coverage, and contains a coverage extension for Communicable Diseases – Business Interruption. The complaint alleges that “Plaintiffs had the right to rely on Affiliated FM to handle their insurance claims for business interruption losses in a manner consistent with [] standards of good faith and fair dealing,” and that Affiliated FM “failed in all respects, and abruptly, unreasonably and with a callous disregard for the interests of its insured denied Plaintiffs’ business interruption claim, except as to the sub-limit for Communicable Disease for the actual presence of the COVID-19 virus at one specified location.”

The owner of a photography studio sued 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 policy allegedly provides Business Income, Extra Expense, and Civil Authority coverages, and includes “Super Stretch” and virus endorsements. The complaint alleges that Hartford contended the virus endorsement did not provide coverage for losses incurred during the pandemic, because the “virus endorsement only applied ‘when the virus is caused by the following scenarios: Fire, lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.’ Plaintiff is informed and believes that viruses cannot be ‘caused’ by any of the above scenarios.”

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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

Mark Meyer

Partner – London
Phone: +44.20.7413.1326
Email: mmeyer@crowell.com

Adam J. Singer

Associate – Washington, D.C.

Phone: +1.202.688.3508

Email: asinger@crowell.com