

## Client Alert

### Insurers' COVID-19 Notepad: What You Need to Know Now (Week of September 28)

September 30, 2020

#### Federal Court Rulings Granting Insurers' Motions to Dismiss COVID-19 Business Interruption Claims Continue

On September 21, 2020, Judge Gettleman in the Northern District of Illinois granted Cincinnati Insurance Company's motion to dismiss the complaint of a dental office which alleged it suffered business interruption losses due to COVID-19 closure orders. The Court held that the "critical policy language here – 'direct physical loss' – unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage," and that "Plaintiff simply cannot show any such loss as a result of either inability to access its own office or the presence of the virus on its physical surfaces." Order at 4. The Court further noted that its holding is "consistent with other courts that have evaluated whether the coronavirus causes property damage warranting insurance coverage." *Id.*

On September 22, 2020, Judge Corley in the Northern District of California granted Hartford Financial Services Group, Inc.'s motion to dismiss the complaint of a waxing salon which alleged it suffered business interruption losses due to COVID-19 closure orders. Order at 1. The court concluded that "drawing all inferences from the complaint's allegations in Plaintiffs' favor, the policy's virus exclusion bars coverage of Plaintiffs' financial losses." *Id.* Specifically, the Court held that Hartford had "met its burden of proving that the [policy's] Virus Exclusion applies to Plaintiff's allegations of coverage" under its "plain and unambiguous language," given that the complaint "repeatedly alleges that the virus caused and continues to cause the risk of direct physical loss." *Id.* at 3. The Court rejected Plaintiff's allegation that losses were covered by the policy's civil authority provision, which "provides that it applies when access is prohibited by order of the civil authority **as the direct result of a Covered Cause of Loss.**" (emphasis added). The court noted that, "under Plaintiffs' theory, the Closure Orders (the orders of a civil authority) were issued as the direct result of the Closure Orders, a claimed Covered Cause of Loss." According to the court, however, "the Closure Orders cannot have been issued as a result of the Closure Orders; instead, as the Complaint repeatedly alleges, the Closure Orders were issued as the direct result of COVID-19 – a cause of loss that falls squarely within the Virus Exclusion." *Id.* at 5.

#### Both FCA and Insurer Parties Appeal FCA Test Case Decision

The FCA has confirmed that it has filed a 'leapfrog' application to appeal directly to the UK Supreme Court. The FCA states that its intention has, throughout the process, been to achieve clarity on affected BI policies at speed. Several insurers have also taken the procedural step of applying for a leapfrog certificate. Meanwhile the FCA has stated that it is working closely with the insurers involved in the test case in an effort to reach an agreement on issues, so that an appeal process may not be necessary. On October 2, 2020, a hearing will be held concerning the next steps in the test case proceeding, including the terms of the draft order reflecting the court's September 15 decision and the process for any appeal of the order.

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

A fitness studio filed a class action complaint against Twin City Fire 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” policy allegedly provides business income and civil authority coverage. Complaint at ¶ 28. The Complaint alleges that the plaintiff “will present scientific evidence to support that COVID-19 causes a direct physical impact (including altering property in one or more of ‘appearance, shape, color or other material dimension’)” and that the policy’s virus exclusion is impermissibly overbroad and unenforceable. Complaint at ¶¶ 31, 65. The Complaint further alleges that if the insurer prevails on the coverage issues, then the class “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 ¶ 6. The proposed 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.

A dentistry practice filed a class action complaint against State Farm & Casualty Co. in Illinois state court (Cook County) for declaratory relief and bad faith. The “all risk” policy allegedly provides business income and extra expense coverage. Complaint at ¶ 6. The Complaint alleges that the COVID-19 virus “is a physical actual accidental damage to property, premises and equipment, which endangers life health and safety and thus a covered event.” *Id.* at ¶ 31. The proposed class is defined as “(A) dental and medical offices in Illinois (B) whose operations were interrupted (C) by accidental damages occasioned by covid 19 to the premises, property and equipment and (D) which occasioned Loss of Income (E) which State Farm vexatiously denied.” *Id.* at ¶ 37.

The owners of restaurants in New York sued Indemnity Insurance Company of North America on behalf of themselves and all others similarly situated in federal court (E.D. Pa.), asserting claims for declaratory relief, breach of contract, and bad faith breach of contract and the duty of good faith and fair dealing. The “all risk” policy allegedly provides business income, extended business income, extra expense, restaurant enhancement, and civil authority coverage. Complaint at ¶¶ 30-40. The nationwide class is divided into business income, extra expense, and civil authority subclasses, and is defined as “[a]ll bars, restaurants and other eaters that purchased” insurance from the defendant “covering the period of March 2020 through the present that suffered an actual loss ... due to government prohibitions on the used of their insured premises and for which the Defendant has either actually denied or stated it will deny a claim for the extra expenses or has otherwise failed to acknowledge, accept as covered expense, or pay for the covered expenses.” *Id.* at ¶ 80.

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

The owner of a restaurant sued Certain Underwriters at Lloyd’s London in Florida state court (Pinellas County) for declaratory relief and breach of contract. The “all risk” policy allegedly provides business interruption, extra expense, and civil authority coverage. Complaint at ¶¶ 5-7. The Complaint alleges that the presence of COVID-19 caused direct physical loss of and/or damage to covered property by “damaging 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, and/or causing a suspension of business operations on the premises.” *Id.* at ¶ 44.

A chiropractic business sued Hartford Casualty Insurance Company in Florida state court (Orange 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 Defendant 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 owner of a restaurant sued Certain Underwriters at Lloyd’s London in Florida state court (Pinellas County) for declaratory relief and breach of contract. The “all risk” policy allegedly provides business interruption, extra expense, and civil authority coverage. Complaint at ¶¶ 5-7. The Complaint alleges that the presence of COVID-19 “caused direct physical loss of and/or damage to the covered premises by, among other things, damaging 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, and/or causing a suspension of business operations on the premises.” *Id.* at ¶ 44.

The owner and operator of a macron/sweet shop sued Ohio Security Insurance Company for breach of contract. The policy allegedly provides business income coverage. Complaint at ¶ 11. The Complaint alleges that the plaintiff’s business suffered a suspension of business operations as a result of the coronavirus and corresponding state and local closure orders and that the insurer “chose not to pay Plaintiff for the Loss.” *Id.* at ¶¶ 25, 29.

The owner of a restaurant sued Aspen Specialty Insurance Company in Florida state court (Pinellas County) for declaratory relief and breach of contract. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 5-7. The Complaint alleges that COVID-19 caused direct physical loss of and/or damage to insured property by, among other things, “damaging 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, and/or causing a suspension of business operations on the premises.” *Id.* at ¶ 44.

The owner and operator of a restaurant sued Acuity Insurance in federal court (N.D. Ill.) for declaratory relief, breach of contract, and bad faith. The “all risk” policy allegedly provides business income and civil authority coverage. Complaint at ¶¶ 22, 23. The Complaint alleges that the insurer denied the plaintiff’s claim for losses related to Illinois’ COVID-19 closure orders without conducting a meaningful investigation by merely asserting that the presence of coronavirus does not constitute physical loss when in fact the presence of a dangerous substance in a property constitutes physical loss or damage under Illinois law. *Id.* at ¶ 8-9.

A casino sued Westchester Surplus Lines Insurance Company in Mississippi state court (Harrison County) for breach of contract and negligence per se in violation of Mississippi statutory law. The policy allegedly provides cancellation coverage. Complaint at ¶ 7. The Complaint alleges that the insured was unable to receive admissions and/or accept bookings or reservations for accommodations due to Mississippi’s COVID-19 closure

order, that the insurer has improperly delayed adjusting its claim, and that such “delay actions constitute a breach of contract (policy) under the terms of the Policy.” *Id.* at ¶¶ 12, 23.

A YMCA sued United States Fire Insurance Company in Montana state court (Gallatin County) for declaratory relief, breach of contract, and bad faith. The policy allegedly provides business income, civil authority, food contamination, and communicable disease coverage. Complaint at ¶ 12, 13. The Complaint alleges that the insurer wrongfully denied the plaintiff’s claim for losses resulting from Montana’s COVID-19 closure order and “impermissibly read language into the Policy that the closure must be due to communicable disease ‘at the Premises’ when no such language exists in the Policy.” *Id.* at ¶ 23.

The owners and operators of several restaurants sued The Hartford Financial Services Group, Inc. and Sentinel Insurance Company Ltd. in federal court (D.N.J.) declaratory relief, breach of contract, and bad faith. The “all risk” policies allegedly provide business personal property, business income, extra expense, extended business income, business income from dependent properties, civil authority, and virus coverage. Complaint at ¶ 53. The Complaint alleges that any “exclusions in the policies that contradict the business income, extra expense, extended business income, business income from dependent properties, civil authority, and virus provisions are not enforceable as they violate New Jersey public policy as contracts of adhesion.” *Id.* at ¶ 71. The insurer allegedly denied coverage on the basis of a Pollution Exclusion and further asserted that coverage under the Fungi, Bacteria, or Virus provision was not applicable because the virus did not result from a specified cause of loss. *Id.* at ¶¶ 75, 76.

The owner and operator of a series of retail clothing stores sued Hanover Insurance Group and Hanover American Insurance Company in federal court (M.D.N.C.) for declaratory relief and breach of contract. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 4, 5. The Complaint alleges that the COVID-19 virus and related restrictions on the use of property “are tantamount to ‘risks of direct physical loss.’” *Id.* at ¶ 31. The Complaint further alleges that the policy’s virus exclusion is inapplicable to “the extent that the governmental orders, in and of themselves, constitute direct physical loss of or damage to Plaintiff’s Covered Property, and/or preclusion of access to the Covered Property because of a Civil Authority order related to damage to nearby properties.” *Id.* at ¶ 80.

The owner of a restaurant in Philadelphia sued Axis 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, and civil authority coverage. Complaint at ¶¶ 21-23. The policy also contains an exclusion for “loss or damage caused by or resulting from any virus, bacterium or other microorganism.” *Id.* at ¶68. The Complaint alleges that the defendant wrongfully denied the plaintiff’s claim for coverage. *Id.* at ¶¶102-103.

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)

**Adam J. Singer**

Counsel – Washington, D.C.

Phone: +1.202.688.3508

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