

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of August 24)

August 26, 2020

Federal Court Dismisses Claim Against Broker For Negligence in Placing Business Interruption Coverage

On August 18, 2020, the U.S. District Court for the Northern District of Texas dismissed a restaurant group's claim against its insurance broker for negligent misrepresentation in securing business interruption coverage. In addition to suing its insurer over the denial of its COVID-19 business interruption claim, the restaurant group had sued the broker, alleging it had informed the group that its policy would provide coverage for closures related to a virus or pandemic. The court dismissed the claim against the broker for failure to state a claim, concluding that the damages sought for the amount of coverage that allegedly should have been received are not recoverable in a negligent misrepresentation claim because they are not out-of-pocket losses in reliance on the broker's alleged misrepresentations.

New Business Interruption Suits Against Insurers:

A Pennsylvania-based gaming company and its subsidiaries sued its insurers in Pennsylvania state court (Philadelphia county) asserting claims for declaratory relief and breach of contract. The defendants' "all risk" policies were part of an insurance tower providing the plaintiffs \$725 million in coverage, and allegedly provides business income, extra expense, civil authority, loss of attraction, leasehold interest, dependent time element, and professional fees coverage. Complaint at ¶¶209-256. Some of the policies contain virus exclusions. *Id.* at ¶¶260-263.

The owner of a dental practice in Pennsylvania sued Hartford Casualty 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 ¶¶23-25. The policy contains an exclusion for "loss or damage cause[d] directly or indirectly" by virus. *Id.* at ¶70.

A non-profit orchestra operating in Seattle sued Hartford Fire Insurance Company in federal court (W.D. Wash.), asserting claims for declaratory relief and breach of contract. The "all risk" policy allegedly provides business income, extra expense, extended business income, civil authority, and ingress and egress coverage. Complaint at ¶¶16-18. The policy specifically deletes a virus exclusion by endorsement. *Id.* at ¶13-14.

Several dental practices sued Massachusetts Bay Insurance Company in Illinois state court (Cook County) for COVID-19 related business losses. Plaintiffs allege they were required to suspend operations in response to the orders entered by civil authorities in several states. The Complaint asserts Massachusetts Bay wrongfully denied the claim submitted under the policies' Business Income, Gold Property Broadening Endorsement, Medical Facilities Property Broadening Endorsement, and Disease Contamination policy provisions. Plaintiffs seek declaratory relief and assert claims for breach of contract and bad faith.

Two dental practices sued Sentinel Insurance Company in federal court (N.D. Ill.) alleging that Sentinel wrongfully denied their claims for business interruption losses related to the COVID-19 pandemic. The Complaint asserts insured premises located in

Virginia, New Mexico, and California sustained business interruption losses when required to shut down operations in response to state and local orders designed to slow the spread of COVID-19. Plaintiffs allege the policy's Business Income and Extra Expense provisions provide coverage for the submitted loss, and Sentinel's denial of the claim was "unreasonable" and "without proper justification."

Several auto dealerships sued Auto-Owners Insurance Company in Illinois state court (Cook County) seeking coverage for business losses stemming from COVID-19. Plaintiff alleges that the presence of COVID-19 on the insured premises through infected customers and employees of the insured constituted physical damage under the policy. In addition, Plaintiff alleges that as a result of the presence of the coronavirus on the insured premises and the orders issued by local and state governments, it was required to modify business operations and sustained covered losses. The Complaint asserts the policy's Business Income, Extended Business Income, Extra Expense, Ordinance or Law, and Civil Authority provisions provide coverage for the submitted loss. Plaintiff seeks declaratory relief and damages in connection with claims for breach of contract and bad faith.

Rosebud Restaurant sued QBE North America in Illinois state court (Cook County) alleging it was required to cease operations in response to orders issued by the State of Illinois concerning COVID-19. The Complaint asserts QBE wrongfully denied coverage under the "all-risk" policy's Business Income, Extra Expense, and Civil Authority coverage provisions, and seeks damages through claims of breach of contract and bad faith.

Birmingham Center for Cosmetic Dentistry sued The Cincinnati Insurance Company in federal court (E.D. Mich.) seeking coverage for COVID-19 related business losses. Plaintiff alleges "COVID-19 and the resulting response by state and local governments caused physical loss to Plaintiff's property and have interrupted Plaintiff's business." Complaint at ¶12. The Complaint asserts the "all-risk" policy's Business Income, Extra Expense, and Civil Authority provisions provide coverage for the submitted loss. Plaintiff seeks declaratory relief, an appraisal of the loss sustained at Plaintiff's property, and damages in connection with claims for breach of contract and bad faith.

Life Time Fitness sued Zurich American Insurance Company in Minnesota state court (Hennepin County) seeking coverage under the "all-risk" policy's Business Income, Extra Expense, and Civil Authority coverage provisions. Plaintiff alleges it has sustained covered business interruption losses and damage as a result of state and local government closure orders put in place to slow the spread of COVID-19. The Complaint asserts Zurich wrongfully amended the policy to retroactively include the "Interruption By Communicable Disease" and "Crisis Management" endorsements, which limit coverage, without the knowledge or consent of Life Time Fitness. Life Time Fitness seeks declaratory relief and damages in connection with claims for breach of contract and bad faith.

Superior Athletics Performance Systems sued Markel Insurance Company in New Jersey state court (Morris County) seeking coverage for COVID-19 related business losses. Plaintiff alleges the "all-risk" policy provides coverage for Business Income, Extra Expense, and the actions of civil authorities. The Complaint asserts Plaintiff was required to cease operations in response to orders issued by the Governor of New Jersey, resulting in losses covered under the policy. Plaintiff alleges Markel's denial of the submitted claim was wrongful and no exclusion applies. Plaintiff seeks declaratory relief and asserts claims for breach of contract and bad faith.

Mario Badescu Skin Care, Inc. sued Sentinel Insurance Company Ltd. in federal court (S.D.N.Y.) seeking insurance coverage for business interruption losses due to the coronavirus pandemic. Plaintiff alleges the presence of the COVID-19 at the insured premises and the area surrounding the insured premises caused physical damage covered under the policy. Plaintiff also alleges

the orders issued by the state of New York in response to the coronavirus pandemic, requiring Plaintiff's business to close, also resulted in covered losses. The Complaint asserts the policy's Business Income, Extra Expense, Civil Authority, Business Income from Dependent Properties, and Extended Business Income coverage provisions respond to the submitted claim. Plaintiff seeks damages in connection with a claim for breach of contract.

Broadway Dance and Broadway Dance West 65th "St. sued The Hartford Financial Services Group Inc. and Sentinel Insurance Company in New York state court (New York County) seeking coverage for COVID-19 related business losses. Plaintiffs allege the "all-risk" policies provide coverage for losses sustained as a result of the restricted operations mandate issued by state and local government orders and the presence of a COVID-19 positive employee of Broadway Dance. The Complaint asserts the policies' Business Income, Extra Expense, and Civil Authority provisions provide coverage for the submitted loss, and the virus exclusion does not preclude coverage for pandemics and the actions of a civil authority.

Several Wahoo Fish Taco franchise owners sued Amtrust North America and Security National Insurance Company in Nevada state court (Clark County) seeking coverage for business losses related to COVID-19. Plaintiffs allege they, as well as businesses located near several franchise locations, were required to close or drastically alter business operations in response to the government directives designed. The Complaint asserts the policies' Business Income, Extra Expense, and Civil Authority coverage provisions respond to the submitted claim. Plaintiffs contend the virus exclusion is not applicable "because the virus was not the efficient proximate cause of the Loss." Complaint at ¶88. The Complaint seeks declaratory relief and damages in connection with claims for breach of contract, bad faith, and misrepresentation.

Wolfgang Puck Restaurant Management Group sued Zurich American Insurance Company in federal court (D. Nev.) seeking coverage for COVID-19 related business losses. Plaintiff seeks declaratory relief and asserts claims for breach of contract, bad faith, and breach of the implied covenant of good faith and fair dealing. The Complaint asserts the "all-risk" policy provides coverage for Time Element Loss, Extra Expense, and the actions of a civil or military authority. Plaintiff alleges it has sustained covered losses at U.S. and international locations due to the coronavirus and the actions taken by civil authorities in response to COVID-19. Plaintiff contends Zurich failed to "undertake a proper and thorough investigation of Wolfgang Puck's claim, by denying coverage through a form letter which was not tied to the specific facts." Complaint at ¶66.

Several hotels sued Hartford Fire Insurance Company and Zurich American Insurance Company in New York state court (New York County) seeking coverage for COVID-19 related business losses. Plaintiffs allege the actual and/or threatened presence of COVID-19, infected individuals have caused property damage to the insured premises, and Plaintiffs have sustained losses due to the government orders issued in response to the pandemic. The Complaint asserts the "all-risk" policies provides coverage for the losses under the business income, extra expense, dependent properties, and civil authority provisions. The Complaint asserts the Zurich policy's virus exclusion does not apply to loss resulting for the actions of civil authorities or pandemics. Plaintiffs further allege Hartford and Zurich have summarily denied Plaintiffs' claims in breach of the applicable policies and the implied covenant of good faith and fair dealing, and in violation of New York General Business Law §349. Complaint at ¶5. Plaintiffs seek declaratory relief and damages in connection with claims for breach of contract and bad faith.

The owner of a Hilton hotel sued American Automobile Insurance Company in California state court (Riverside 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, civil authority, extended business income, and sue and labor

coverages, and does not contain a virus exclusion. The complaint alleges that “[t]he fact that virus or disease constitutes physical loss or damage to property has been recognized in the insurance industry since at least 2006.”

New Business Interruption Class Action Filings:

Club Pilates Marlboro filed a class action complaint against Arch Insurance Company in federal court (D. N.J.) seeking coverage for COVID-19 related business interruption losses. Plaintiff alleges orders issued by New Jersey and several other states “requiring resident to stay-at-home...and suspending or severely limiting business operations of non-essential businesses...have been financially devastating.” Complaint at ¶2. The Complaint asserts the “all-risk” policies held the Plaintiff and Class Members provide Business Income, Extra Expense, and Civil Authority coverage, which respond to sustained business losses. The class action complaint seeks declaratory relief and damages on behalf of a Nationwide Class and a New Jersey Sub-Class. >

MAIA Salon Spa filed a class action complaint against Sentinel Insurance Company and Twin City Fire Insurance Company in federal court (E.D.N.Y.) seeking coverage for COVID-19 business interruption losses. The Complaint asserts the “all-risk” policy provides coverage for Business Income, Extra Expense, Extended Business Income, and Civil Authority. Plaintiff alleges it sustained covered losses as a result of the orders issued by state and local governments, requiring the closure of Plaintiff’s and Class Members operations. The Complaint asserts the insurers wrongfully denied coverage under the policies and seeks declaratory relief and damages on behalf of a “Non-Essential Business Class” and an “Essential Business Class.”

Green Beginnings filed a class action complaint against West Bend Mutual Insurance Company in Illinois state court (Cook County) seeking coverage for COVID-19 related losses. Plaintiff alleges the policies Business Income, Extra Expense, Civil Authority, and Communicable Disease Business Income provisions provide coverage for the submitted losses. The Complaint asserts West Bend systematically denied coverage to Plaintiff and Class Members for losses stemming from the COVID-19 pandemic and government closure orders issued in response to the virus. Plaintiff contends the virus exclusion does not apply to the losses sustained as a result of the actions of civil authorities. The Complaint seeks declaratory relief and damages on behalf of “all Illinois business insured under a policy issued by West Bend Mutual Insurance Company...who were denied coverage or met with a reservation of rights arising out of claims” for COVID-19. Complaint at ¶104.

Great Steak & Potato Company filed a class action complaint against Liberty Mutual Insurance Company and West American Insurance Company in federal court (N.D. Ill.) seeking coverage for COVID-19 business interruption losses. The Complaint asserts the “all-risk” policy provides coverage for Business Income, Extra Expense, and the actions of a civil authority. Plaintiff alleges it was required to cease operations in response to government closure orders relating to the pandemic. The Complaint seeks declaratory relief and damages on behalf of all Illinois business with Liberty Mutual and/or West American Insurance Company policies that have made a claim for lost Business Income as a result of one or more Closure Orders and been denied coverage.

Valley Lo Club filed a class action complaint against Cincinnati Insurance Company in federal court (N.D. Ill.) seeking coverage for COVID-19 related business interruption losses. Plaintiff seeks declaratory relief and asserts claims for breach of contract and bad faith. The Complaint asserts Plaintiff was required to alter operations, resulting in losses, in response to the Governor of Illinois’s pandemic related orders. Plaintiff contends the “all-risk” policy’s Business Income coverage provision responds to the sustained losses. The Complaint seeks relief on behalf of members of either an Illinois “Bar and Restaurant Class” or an “Amusement Class” who submitted Business Income claims under a Cincinnati policy and were denied coverage.

The owner of a dental practice in Pennsylvania sued The Cincinnati Insurance Company (and its affiliates) on behalf of itself and all others similarly situated in federal court (W.D. Pa.), asserting claims for declaratory relief and breach of contract. The “all risk” policy allegedly provides business income, extra expense, civil authority, and rental value coverage. Complaint at ¶¶11-26. The Complaint alleges that the defendant denied the plaintiff’s claim for coverage with no explanation. *Id.* at ¶¶55-57. The nationwide class is defined as “all policyholders ... who purchased commercial property coverage ... from 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 ¶61.

The owners of bars and restaurants in Memphis sued Certain Underwriters at Lloyd’s, London on behalf of themselves and all others similarly situated in federal court (W.D. Tenn.), asserting claims for declaratory relief, breach of contract, and breach of the duty of good faith and fair dealing. The “all risk” policy allegedly provides business income, extra expense, rental value, and civil authority coverage. Complaint at ¶¶21-36. The Complaint alleges that the defendant wrongfully denied the plaintiffs’ claims for coverage, and that “[t]his denial appears to be consistent with the position Defendants have taken with other similarly situated businesses nationwide.” *Id.* at ¶¶67-69. The nationwide class is divided into business income, extra expense, and civil authority coverage subclasses. *Id.* at ¶72.

The owner of a brewery in Spokane, WA sued Mutual of Enumclaw Insurance Company on behalf of itself and all others similarly situated in Washington state court (Spokane County), asserting claims for declaratory relief and breach of contract. The policy allegedly provides business income, extra expense, extended business income, and civil authority coverage. Complaint at ¶13. The Complaint alleges that the defendant denied the plaintiff’s claim for coverage “and has or will continue to deny coverage for other similarly situated members of the proposed class.” The class is divided into breach of contract and declaratory relief subclasses, and consists of policyholders in the state of Washington who were issued one of the defendant’s policies with business income coverage, who suffered a suspension of business related to COVID-19 and/or related civil authority orders. *Id.* at ¶29.

The operator of a restaurant filed a class action complaint against certain Underwriters at Lloyd’s, London in federal court (S.D. Fla.), asserting claims for declaratory relief and 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 the COVID-19 public health emergency and closure orders have caused direct physical loss of and/or damage “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 ¶ 48. The insurer allegedly chose not to include a virus exclusion in the policy. *Id.* at ¶ 34. The proposed nationwide classes are defined as: (1) “[a]ll persons and entities with Business Income coverage under a property insurance policy issued by any of the Defendants, which suffered a suspension of business due to COVID-19, and for which Defendants have denied a claim for the losses or have otherwise failed to acknowledge, accept as a covered loss, or pay for the covered losses;” (2) “[a]ll persons and entities with Civil Authority coverage under a property insurance policy issued by any of the Defendants, which suffered loss of Business Income and/or Extra Expense caused by an action of a civil authority, and for which Defendants have denied a claim for the losses or have otherwise failed to acknowledge, accept as a covered loss, or pay for the covered losses;” and (3) “[a]ll persons and entities with Extra Expense coverage under a property insurance policy issued by any of the Defendants, which sought to avoid or minimize the suspension of business caused by COVID-19, and for which Defendants have denied a claim for the expenses or have otherwise failed to acknowledge, accept as a covered expense, or pay for the covered expenses.” *Id.* at ¶ 58.

A dentist filed a class action complaint against Safety Insurance Company in federal court (D. Mass.), asserting claims for declaratory relief, breach of contract, and violation of Massachusetts General Laws, Chapter 93A. The “all risk” policy allegedly provides business interruption, extra expense, and civil authority coverage. Complaint at ¶¶ 4-6. The Complaint alleges that there has been direct physical loss of and/or damage to property by “the property being damaged, access to the property being denied, patients being prevented from physically occupying the property, the property being physically uninhabitable by patients, the function of the property being nearly eliminated or destroyed, and/or a suspension of business operations occurring at the property.” *Id.* at ¶ 40. The proposed classes are defined as: (1) “[a]ll persons and entities with Business Income coverage and/or Extended Business Income coverage under a property insurance policy issued by Safety that suffered a suspension of business operations and for which Safety has either actually denied or stated that it will deny a claim for the losses or has otherwise failed to acknowledge, accept as a covered loss, or pay for the covered losses;” (2) “[a]ll persons and entities with Extra Expense coverage under a property insurance policy issued by Safety that suffered a suspension of business operations and for which Safety has either actually denied or stated that it will deny a claim for the expenses or has otherwise failed to acknowledge, accept as a covered expense, or pay for the covered expenses;” and (3) “[a]ll persons and entities with Civil Authority coverage under a property insurance policy issued by Safety that suffered an actual loss of Business Income and/or Extra Expense caused by an action of a civil authority that prohibited access to the premises, and for which Safety has either actually denied or stated that it will deny a claim for the losses or has otherwise failed to acknowledge, accept as a covered loss, or pay for the covered losses.” *Id.* at ¶ 48.

A California restaurant filed a class action lawsuit against Liberty Mutual Insurance Company in federal court (S.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 interruption, extended business income, extra expense, and civil authority coverages, and contains a virus exclusion. The complaint alleges that “[t]he speed with which Liberty Mutual denied Plaintiff’s claims indicates that Liberty Mutual could not have engaged in a good faith or reasonable investigation of the claims,” and that “Liberty Mutual’s categorical treatment, failure to investigate in good faith, and denial of Plaintiff’s claims . . . appears to be part of a broader strategy being employed by the insurance industry generally, to broadly deny claims for business interruption coverage related to the Coronavirus pandemic . . .”

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

Adam J. Singer

Associate – Washington, D.C.
Phone: +1.202.688.3508
Email: asinger@crowell.com