

## CLIENT ALERT

### Insurers' COVID-19 Notepad: What You Need to Know Now (Week of October 12)

October 16, 2020

#### Federal Courts Dismiss COVID-19 Business Interruption Claims, Address Effect of Executive Orders on Physical Damage Issue

On October 7, 2020, the U.S. District Court for the Northern District of Texas granted Cincinnati Insurance Company's motion to dismiss a restaurant group's complaint for COVID-19 business interruption losses. The court concluded that the plaintiff failed to plead that it suffered a direct physical loss or damage and therefore could not state a claim for breach of contract due to the conclusory nature of its allegations. Order at 2. The declaratory judgment claim failed for the same reason. *Id.* at 4-5. The court granted the plaintiff leave to replead because its complaint had been filed under Texas state pleading rules prior to the case being removed to federal court and the court determined that it should be allowed an opportunity to replead under the federal pleading standards. *Id.* at 6.

On October 6, 2020, the U.S. District Court for the Northern District of Georgia granted Allied Insurance Company of America's motion to dismiss a restaurant's complaint for COVID-19 business interruption losses. The court rejected the restaurant's argument that "the Governor's Executive Order generated a physical change that rendered the once-satisfactory dining rooms 'unsatisfactory,'" reasoning that "[u]nder the Plaintiffs' logic, a minute before the Governor issued the Order, the dining rooms existed in one state. A minute later, the Governor issued the Order, and the restaurant underwent a direct physical change that left the dining rooms in a different state. This interpretation of the contractual language exceeds any reasonable bounds of possible construction, pushing the words individually and collectively beyond what any plain meaning can support." Order at 9-10. The Court went on to note that "Plaintiffs' construction would potentially make an insurer liable for the negative effects of operational changes resulting from any regulation or executive decree, such as a reduction in a space's maximum occupancy." *Id.* at 11.

#### New Business Interruption Class Actions:

The owner and operator of a fitness studio filed a class action complaint against NOVA Casualty 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, extra expense, and civil authority coverage. Complaint at ¶¶ 26-28. The Complaint alleges that COVID-19 closure orders "caused both property loss and property damage by directly, physically impairing the functionality of Plaintiff's property and dispossessing Plaintiff of its tangible space" and that the policy's virus exclusion is impermissibly overbroad and unenforceable. *Id.* at ¶¶ 30, 42. The Complaint further alleges that if the insurer prevails against coverage, then the plaintiff and class members "must receive a rebate of premium for the windfall that NOVA kept for itself by reduced claims due to Closure Order shutdowns, partial operations mandates and other constraints." *Id.* at ¶ 6. 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 ¶ 115.

A tanning studio filed a class action complaint against Scottsdale Insurance Company and Nationwide Mutual Insurance Company in federal court (D.N.J.) for declaratory relief, breach of contract, violation of New Jersey’s Consumer Fraud Act, and unjust enrichment. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 41-45. The Complaint alleges that the plaintiff and proposed class members suffered direct physical loss of and damage to property because they have been unable to use their property for its intended purpose and that the policy’s virus exclusion does not apply because the sole proximate cause of loss was the COVID-19 closure orders, not the coronavirus. *Id.* at ¶¶ 46-48. The proposed multistate class is defined as “[a]ll entities who have entered into standard all-risk commercial property insurance policies with Scottsdale Insurance Company or Nationwide Mutual Insurance Company insuring property in the United States, where such policies provide for business income loss and extra expense coverage and do not exclude coverage for pandemics, and who have suffered losses due to measures put in place by civil authorities’ stay-at-home or shelter-in-place orders since March 15, 2020.” *Id.* at ¶ 55.

The owner of a dental office in Pennsylvania sued CNA Financial Corporation and Transportation Insurance Company on behalf of himself 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, and civil authority coverage. Complaint at ¶¶ 16-26. The complaint does not contain a virus exclusion. *Id.* at ¶ 24. The Complaint alleges that the defendants wrongfully denied the plaintiff’s claim for coverage, and that defendants “have similarly refused to, or will refuse to, honor their obligations under” policies purchased by the class. *Id.* at ¶¶ 4-5, 55-59. The class is defined as “[a]ll policyholders in the United States who purchased commercial property coverage, including business or interruption income (and extra expense) coverage from Defendants 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 ¶ 64.

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

A furniture retailer sued Hallmark Specialty Insurance Company, Crum & Forster Specialty Insurance Company, Everest Indemnity Insurance Company, Ironshore Specialty Insurance Company, HDI Global Specialty SE, Underwriters at Lloyd’s, London, Partnerre Ireland Insurance DAC, Starr Surplus Lines Insurance Company, Evanston Insurance Company, Aspen Specialty Insurance Company, Landmark American Insurance Company, Maxum Indemnity Company, and Homeland Insurance Company of New York in federal court (M.D. Fla.) for declaratory relief and breach of contract. The “all risk” policies allegedly provide business interruption, extra expense, contingent business interruption, civil authority, ingress/egress, and loss adjustment expense coverage. Complaint at ¶ 68. The Complaint alleges that the coronavirus causes physical damage to property “because it is physically present on and attaches to objects and surfaces,” *id.* at ¶ 63, and that the insurers had the opportunity to clearly and unambiguously exclude coverage for the plaintiff’s losses when it issued the policies in March 2020 due to the visible impact of COVID-19 at the time but chose not to do so. *Id.* at ¶ 108.

A restaurant sued Ohio Security Insurance Company in Florida state court (Hillsborough 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. The Complaint alleges that the policy is ambiguous as to whether direct physical damage is required to trigger civil authority coverage and that “a reasonable interpretation of the policy should be that if property around the insured location suffers damage, not direct physical loss or damage, and a civil authority prevents access to that property as well as to the insured property, there would be coverage for the business interruption loss.” *Id.* at ¶ 26.

The owner and operator of a restaurant sued Society Insurance Inc. in federal court (N.D. Ill.) for declaratory relief, breach of contract, and bad faith. The policies allegedly provide business income and civil authority coverage. Complaint at ¶ 16. The Complaint alleges that the “continuous presence of the coronavirus on or around Plaintiff’s premises has, through Civil action, rendered the premises unsafe and unfit for its intended use and therefore caused physical property damage or loss under the Policy.” *Id.* at 18.

The owner and operator of a restaurant sued Society Insurance Inc. 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 ¶ 16. The Complaint alleges that the presence of COVID-19 causes property damage and that Illinois courts “have consistently held that the presence of dangerous substance in a property constitutes ‘physical loss or damage.’” *Id.* at ¶ 6.

A child care facility sued West Bend Mutual Insurance Company in Kentucky state court (McCracken County) for breach of contract and bad faith. The policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶ 8. The Complaint alleges that that plaintiff timely filed a claim for loss of business income and extra expense as a result of Kentucky’s COVID-19 closure order, but the insurer denied its claim and the insurer’s actions “were willful, malicious, and with a reckless disregard for Plaintiff’s rights, and its actions amount to bad faith under common law and in violation of KRS 304.12-230, the Unfair Claims Settlement Practices Act.” *Id.* at ¶ 10-12.

A medical practice sued CNA and Transportation Insurance Company in New Jersey state court (Passaic County) for declaratory relief, breach of contract, and bad faith. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶ 9. The Complaint alleges that the coronavirus “causes damage to property, particularly in places of business . . . where the operation of the business requires interaction, gatherings and close contact, often in confined areas where there exists a heightened risk of contamination.” *Id.* at ¶ 28.

The owners and operators of child care centers sued Berkshire Hathaway Specialty Insurance Company, American Association of Insurance Services, Inc. and Insurance Services Office, Inc. in federal court (D.N.J.) for declaratory relief, breach of contract, bad faith, negligent misrepresentation, fraud and conspiracy. The “all risk” policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 35, 235, 236. The Complaint alleges that “[h]aving the virus on surfaces or in the air within insured premises, with resulting danger to human health and safety, is undoubtedly a form of physical injury to the premises.” *Id.* at ¶ 147. The Complaint further alleges that the absence of an anti-concurrent causation clause in the policy means that a risk of loss such as a government closure order remains a covered cause of loss even if there is a multi-causal chain where another cause is excluded. *Id.* at ¶ 182.

The owner and operator of tennis clubs sued American Home Assurance Company in New York state court (Suffolk County) for declaratory relief and breach of contract. The “all risk” policy allegedly provides business income, extra expense, contingent time element, civil authority, and ingress & egress coverage. Complaint at ¶¶ 96-111. The Complaint alleges that COVID-19 closure orders “caused direct physical loss or damage to the Insured Clubs and directly affected [the plaintiff’s] use of the Insured Clubs by requiring physical alterations to them that substantially impaired and/or rendered them incapable of performing the intended function of the Insured Clubs.” *Id.* at ¶ 6.

A bus contractor sued Utica National Insurance Group and Utica National Insurance of Texas in New York state court (Orange County) for breach of contract and breach of the covenant of good faith and fair dealing. The “all risk” policy allegedly provides business income, extra expense, extended business income, and civil authority coverage. Complaint at ¶¶ 40-50. The Complaint

alleges that actions taken to comply with COVID-19 closure orders “in order to prevent or mitigate an imminent risk of direct physical loss or damage to people and property, in the face of a widespread pandemic, are the cause of Plaintiffs’ loss of utility of its property and attendant business income loss.” *Id.* at ¶ 47.

A restaurant sued Century National Insurance Company in California state court (San Bernardino 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, extended income, extra expense, and civil authority coverages, and does not have a virus exclusion. The complaint alleges that “[t]he fact that policyholders expect and believe that a Pandemic related to a virus would constitute physical loss of or damage to property has been recognized in the insurance industry since at least 2006.”

The owner of a restaurant sued Scottsdale Insurance Company in California state court (Orange 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 and extra expense coverages, and has a virus exclusion. The complaint alleges that “Scottsdale’s 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 Gallio’s claim.”

The owner of an adult daycare and community service center in Philadelphia sued Selective Insurance Company of South Carolina and Selective Insurance Company of America 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 ¶¶ 21-29, 100. The policy also contains a virus exclusion that states: “We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” *Id.* at ¶ 77. The Complaint alleges that the defendants wrongfully denied the plaintiff’s claim for coverage. *Id.* at ¶¶ 73-74.

Various insurers sued Fertitta, the operator of a nationwide chain of restaurants, hospitality, and gaming facilities, and its other insurers in Texas state court (Harris County), seeking a declaratory judgment to resolve the parties’ coverage dispute. The policy at issue allegedly provides business interruption, extra expense, civil authority, and contingent business interruption and extra expense coverage. Complaint at ¶¶ 40-46. The policy also contains a virus exclusion. *Id.* at ¶¶51-52. The Complaint alleges that Fertitta made a claim for coverage under the policy for all losses allegedly due to civil orders issued to slow the spread of COVID-19. *Id.* at ¶¶ 54-60. The plaintiffs contend that there is no coverage because Fertitta has not established “direct physical loss, damage or destruction” to insured property by a covered peril, and pursuant to the policy’s virus exclusion.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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