

## CLIENT ALERT

### Insurers' COVID-19 Notepad: What You Need to Know Now (Week of April 27)

April 27, 2020

#### Business Interruption Multi-District Litigation Filings:

LH Dining LLC and Newchops Restaurant Comcast LLC moved in the U.S. District Court (E.D. Pa.) pursuant to 28 U.S.C. § 1407 to consolidate business interruption coverage lawsuits they filed with similar lawsuits filed in other federal courts. Movants assert that consolidation is appropriate since all actions seek a finding that government-mandated closure orders issued in response to COVID-19 trigger coverage under the plaintiffs' business interruption insurance policies.

El Novillo Restaurant moved in the U.S. District Court (S.D. Fla.) pursuant to 28 U.S.C. § 1407 to consolidate the business interruption coverage lawsuit it filed with similar lawsuits in other federal courts. El Novillo asserts that the Southern District of Florida, rather than the Eastern District of Pennsylvania, is the most appropriate forum for multi-district litigation, as it "has a greater concentration of underlying victims and business activity."

#### New Business Interruption Suits Against Insurers:

Several barber shops around San Antonio, Texas have sued State Farm Lloyd's in Texas state court (Bexar County), alleging that State Farm wrongfully denied coverage under the policies' Loss of Income and Civil Authority coverage provisions. Plaintiffs allege that Bexar County Executive Order NW-03 directing all non-exempt businesses to cease operations during the COVID-19 pandemic has forced Plaintiffs to shutter operations resulting in covered business interruption losses. Plaintiffs assert causes of action for breach of contract, violation of the Texas Insurance Code, and breach of the duty of good faith and fair dealing.

Somco, LLC has sued Lightning Rod Mutual Insurance Company in Ohio state court (Cuyahoga County) seeking a declaration of coverage under a "Businessowners Package Policy." Plaintiff alleges the Lightning Rod policy "provides coverage for loss of Business Income, Extra Expense coverage, and coverage for loss due to actions of a Civil Authority." Complaint at ¶ 5. Specifically, Plaintiff alleges it has sustained covered losses due to the presence of the COVID-19 pathogen (*id.* at ¶ 56) and local government orders requiring Plaintiff's non-essential business to cease operations. *Id.* at ¶ 57

Restaurant Nicholas sued Liberty Mutual in New Jersey state court (Monmouth County) seeking a declaration of coverage for lost business income and expenses resulting from actions taken by a civil authority in response to the COVID-19 pandemic. Plaintiff alleges that the executive order constitutes an action by a civil authority, and that Liberty Mutual is "obligated to pay the loss of Business Income and necessary Extra Expense caused by civil authority that prohibits access to the Insured Premises." Complaint at ¶ 14. The complaint notes that the policy contains an exclusion "for losses under coverages for Business Income, Expense, and Civil Authority caused by, resulting from, or relating to any virus," but alleges it is inapplicable. *Id.* at ¶ 20.

Two restaurant owners sued The Hartford Financial Services Group, Sentinel Insurance Company, and Norbay Insurance Services in California state court (San Francisco County) for declaratory relief, breach of contract, bad faith, and fraud. Plaintiffs allege that a "Spectrum Business Owner's Policy" provides coverage for business interruption losses suffered by their restaurant

following San Francisco closure orders. Plaintiffs allege coverage under the policy’s “Civil Authority,” “Lost Business Income & Extra Expense,” Extended Business Income, “Business Income Extension for Essential Personnel,” and “Limited Fungi, Bacteria, Or Virus” Provisions. Complaint at ¶ 10. The Complaint indicates that Hartford denied Plaintiffs’ claim. *See id.* at ¶¶ 54-55.

Millennia Hospitality Group, LLC sued Cincinnati Insurance Company in Ohio state court (Cuyahoga County) for declaratory relief, alleging that the applicable policy provides “coverage for loss of Business Income, Extra Expense coverage, and coverage for loss due to the actions of a Civil Authority.” Complaint at ¶ 5. According to the Complaint, as a result of state orders, Plaintiff’s business was required to “cease and/or significantly reduce operations at all of its locations.” *Id.* at ¶ 39. Millennia contends it is entitled to coverage for its “past and future Business Income loss(es) and Extra Expense resulting from COVID-19... and the actions of Ohio’s civil authorities” (*id.* at ¶ 58), and alleges that an “Infectious or Communicable Disease” exclusion is inapplicable.

### **Business Interruption Class Action Filings:**

PGB Restaurant filed a class action complaint in the U.S. District Court (N.D. Ill.) against Erie Insurance Co. which alleges that an “all-risk” policy (which allegedly does not contain a virus exclusion) provides coverage for “the loss of income sustained by Plaintiff due to partial or total interruption of business resulting directly from loss or damage to property.” Complaint at ¶ 29. Plaintiff alleges, on behalf of itself and members of the class, that as a result of government orders all Illinois businesses offering food or beverages for on-premises consumption were required to limit its business to “off-premises” consumption. *Id.* at ¶ 39. According to the Complaint, Erie denied Plaintiff’s lost income claim. *Id.* at ¶ 38.

Café International Holding Co. filed a class action complaint in the U.S. District Court (S.D. Fla.) against Chubb. Plaintiff alleges the Chubb “all-risk” policy provides coverage for “loss of business income due to a suspension of the restaurant’s operations,” as well as “Extra Expense” and “Civil Authority” coverage. Complaint at ¶¶ 5-6. Plaintiff asserts, on behalf of itself and the putative class, a determination must be reached regarding whether coverage under Chubb “all-risk” policy provides coverage for the suspension of business operations caused by COVID-19 and related actions of civil authorities take in response to the virus. *Id.* at ¶¶ 8, 59.

Chan Soon Shiong Medical Center has filed a class action complaint in the U.S. District Court (W.D. Pa) against Travelers Property Casualty Company of America alleging coverage for its forced closure and furlough of its employees in response to government orders. Plaintiff seeks coverage under the policy’s business income, extra expense, contamination, civil authority and other coverage provisions. According to the complaint, Travelers denied the claim. Plaintiff also seeks to enjoin Travelers from maintaining its denial and/or refusing to acknowledge coverage to insureds for losses caused by the COVID-19 virus and the related government orders.

### **Travelers Files Declaratory Business Interruption Suit**

Travelers Casualty filed a declaratory action against insured Geragos & Geragos, A.P.C. in United States District Court (C.D. Cal.). Travelers alleges that the applicable policies “require ‘direct physical loss or damage’ to property, and the presence of suspected presence of a virus does not constitute the requisite ‘direct physical loss or damage.’” Complaint at ¶13. In addition, Travelers alleges that the alleged losses are excluded by the “plain language” of the policies’ “virus exclusion,” which excludes coverage

for “loss or damage caused by or resulting from any virus...that induces or is capable of inducing physical distress, illness or disease.” *Id.* at 4.

#### **New State Actions: COVID-19 And Workers’ Compensation:**

Several business groups are calling on California Governor Gavin Newsom to exercise caution in issuing an executive order that would remove (like other states) standard restrictions to worker compensation benefits for essential workers suffering from COVID-19. The Workers’ Compensation Insurance Rating Board estimated the potential cost impact of favorable presumptions provided to front-line workers in California range from \$2.2 billion to \$33.6 billion. In a letter to Gov. Newsom, the U.S. Chamber of Commerce urged for any presumption enacted to be limited in its application.

#### **New Litigation: COVID-19 And Workers’ Compensation:**

Two Illinois business associations filed a lawsuit in Illinois state court alleging that the Illinois Workers Compensation Commission exceeded its authority when it expanded workers’ compensation coverage through an emergency amendment rather than the legislative process. The amendment, reported on in the April 20, 2020 Notepad, created a presumption that all front-line workers who contract COVID-19 were infected as a result of their employment. The associations sought to block the implementation of the rule, arguing that it could cost Illinois employers billions of dollars. Insurance industry experts note that the expansion could negatively impact the workers’ compensation industry. A TRO has been issued blocking implementation of the order.

#### **New State Insurance Commissioner Actions:**

The North Carolina Insurance Commissioner issued a letter to business owners regarding the applicability of business interruption insurance to the COVID-19 pandemic, as well efforts being made by his office to provide financial relief to policyholders. The Commissioner states that “standard business interruption policies are not designed to provide coverage for viruses, diseases, or pandemic-related losses,” and that insurers cannot legally be forced to provide coverage for a risk they did not intend to cover. Nevertheless, his office is willing to work with legislators and the insurance industry to “navigate this unprecedented peril.”

The Oregon Department of Consumer and Business Services extended its emergency order on insurance deadlines. The order requires all insurance companies to extend grace periods for premium payments, postpone policy cancellations and nonrenewals, and extend deadlines for reporting claims.

After surveying Washington state insurers, the Washington Insurance Commissioner found that only two insurers offer coverage for a pandemic event through their base policy, and an additional 15 offered limited coverage through endorsements. The Commissioner’s office reviewed 226 sample notices to policyholders from 84 individual insurance companies and insurance groups doing business in Washington. The insurers reported over 194,000 commercial policies had at least one type of business interruption or civil authority coverage in effect as of March 15, with an estimated premium totaling \$437 million.

### **Professional Liability and COVID-19:**

Purchasers of American Depositary Shares of Phoenix have filed a securities class action complaint in federal court (S.D.N.Y.) alleging violations of the Securities Act of 1933. The Complaint asserts several causes of action against defendants, including certain directors and officers and the IPO underwriters. Plaintiffs allege “the Offering Materials omitted or otherwise misrepresented ... the Company’s exposure to significant adverse developments, resulting from the onset of the coronavirus in China – particularly in Wuhan – at the time of the IPO.” Complaint at ¶ 2. Plaintiffs assert because “the Offering Materials did not disclose anything about the coronavirus, much less the impact it was then having or could have on the Company, ADS purchasers had no opportunity to consider how the worsening situation might impact the Company.” *Id.* at ¶ 32. The suit alleges that, *inter alia*, complications associated with the coronavirus were adversely affecting Phoenix’s business in the residential rental market in China, as tenants contracted the virus, lost employment, or otherwise experienced difficulty in honoring their leases and paying their rent.

### **COVID-19 and Auto Insurance:**

The Oregon Department of Consumer and Business Services, Division of Financial Regulation, issued Bulletin No. DFR 2020-11, which provides guidance to auto insurers regarding modifications to auto policies made in response to changes in exposure due to COVID-19 emergency orders. The Bulletin sets forth various filing requirements for extensions of coverage to personal delivery drivers, temporary rate reductions, and auto policy rebates.

### **COVID-19 Financial Losses to Insurers:**

The Association of British Insurers has initially estimated that its members expect to pay out over £1.2 billion in claims to support businesses and individual affected by COVID-19. The ABI stated “While many business owners are uninsured for pandemics, UK insurers still expect to pay over £1.2 billion in claims, making this a significant insured event.” It further noted that no country in the world is able to provide widespread pandemic insurance, and whether cover for pandemics can be provided through an insurance model in the future is an important debate. The ABI stressed that the massive, systemic impacts affecting a huge number of businesses at once, it is clear that significant state involvement would be required.

Axis Capital Holdings has estimated it will pay first-quarter catastrophe-related claims of \$300 million, which includes \$235 million in COVID-19 claims. The Bermuda-based insurer and reinsurer said most of its insurance contracts do not cover losses related to the coronavirus outbreak, but has already been processing claims and making payments where coverage does exist.

Beazley PLC estimated coronavirus-related claims at \$170 million, and stated that it was rejecting claims from small companies for business interruption due to COVID-19. It expects the cost of the pandemic across the political, accident and contingency division to be approximately \$70 million, net of reinsurance.

Hiscox stated that its “core small commercial package policies do not provide cover for business interruption as a result of the general measures” enacted by government in response to COVID-19. However, it estimates that it will pay net claims totaling more than \$150 million, and stated it is actively settling claims for event cancellation and abandonment, media and entertainment and other segments including travel.

Alan Schnitzer, chief executive officer of the Travelers Companies, Inc., has called out trial lawyers' filing "frivolous lawsuits" for COVID-19-related losses. Noting that the company has already posted an \$86 million charge in the first quarter for losses related to the pandemic, Mr. Schnitzer also noted that premiums were not collected for viruses, the policies' requirement that "direct physical loss or damage" to property is not satisfied by the presence of a virus, and that baseless lawsuits will "undermine the nation's recovery."

#### **U.S. Congress:**

In a letter to Congress, the Risk & Insurance Management Society advocated for the creation of a public-private partnership that addresses pandemic risk. Citing the need for "strong risk management strategies to address interruptions resulting from a global pandemic," RIMS asserts that such a partnership is critical to providing greater access to capital from lenders and establishing an insurance market with "sufficient, affordable capacity." RIMS noted that 77% of U.S. risk managers expect business interruption losses from COVID-19 of over \$1 million, with more than one third of such losses estimated to exceed \$25 million.

#### **U.K. and Europe:**

The Federation of European Risk Management Associations called on the European Union to develop public-private partnerships to help businesses manage risks associated with pandemics. FERMA noted that such national partnerships are better able to provide funding for those affected in future pandemics because the risk, "like climate change and cyber risk, is systemic." According to FERMA, "[i]t is beyond the capital of the private insurance market to provide material capacity for transfer of risk." FERMA encouraged the EU to provide expertise around modeling and rate setting, as well as potentially providing a backup layer.

#### **Insurance Industry Event Cancelled**

Like many other industry events, the Monte Carlo Reinsurance Rendez-Vous 2020 has been cancelled. The organizers of the event will make a donation of 100,000 Euros towards the fights against COVID-19.

#### **It's Not All Bad – Pandemic Puppies! (And Pet Insurance)**

On a more cheerful note, animal shelters are being cleared as thousands of Americans bring home new best friends. Noting an expansion in demand for pet insurance, for those lucky enough to adopt, NU Property & Casualty 360 offered tips for what to look for when selecting pet insurance.

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)