

## CLIENT ALERT

### Insurers' COVID-19 Notepad: What You Need to Know Now (Week of May 4)

May 5, 2020

#### New Business Interruption Suits Against Insurers:

Goodwood Brewing sued United Fire Group in federal court (W.D.Ky.) seeking coverage under its property policy's Business Income, Extra Expense, and Civil Authority Additional Coverage provisions. Plaintiff alleges Executive Order 2020-215 issued by the Governor of Kentucky, as well as supplemental rules issued by the Kentucky Department of Alcoholic Beverage Control, prevented the insured's properties from functioning as intended, and as a result, plaintiff was forced to suspend operations. Plaintiff asserts these actions resulted in covered business losses due to the acts of civil authorities. The policy's virus exclusion is alleged to be applicable only to Plaintiff's Indiana property. In addition to seeking declaratory relief, Plaintiff asserts claims for breach of contract, violation of Kentucky's Unfair Claims Settlement Practices Act, and common law bad faith.

Valerio's Ristorante sued Erie Insurance Exchange in Ohio state court (Cuyahoga County) seeking coverage for business losses due to the presence of the pathogen that causes COVID-19. Plaintiff alleges the Erie policy provides coverage for "Income Protection Coverage, Extra Expenses Coverage, and loss due to the actions of civil authorities." Complaint at ¶ 4. The complaint alleges that as a result of an executive order issued by the Governor of Ohio and a Director's Order issued by the Ohio Department of Health Plaintiff has been compelled "to restrict its business activities at the insured premises...and will continue to sustain serious business interruption losses." *Id.* at ¶ 9.

Luke Wholey's Wild Alaskan Grill in Pittsburgh sued Erie Insurance Exchange in Pennsylvania state court (Allegheny County) seeking coverage (and damages for breach of contract) for losses it has incurred as a result of the coronavirus and state government orders. Complaint at ¶¶45-51. According to the Complaint, the "all risk" policy at issue provides coverage for business income protection, extra expense, and civil authority (*id.* at ¶¶7-9), and that the policyholder has sustained direct loss of property due to the spread of the human virus as well as the state civil authority orders, because it was forced to close its dine-in services indefinitely. *Id.* at ¶¶39-39.

The owner of DiAnoia's Italian restaurants in Pittsburgh sued Motorists Mutual Insurance Company in Pennsylvania state court (Allegheny County) seeking a declaration that it "is entitled to coverage for losses, damages, and expenses caused by the COVID-19 pandemic and state civil orders." Complaint at ¶¶35-45. According to the Complaint, the "all risk" policy at issue provides coverage for business income, extra expense, and civil authority. *Id.* at ¶¶6-12.

The owner of a car dealership in Pennsylvania sued Chubb and Federal Insurance Company in the Pennsylvania state court (Allegheny County) seeking coverage for losses arising from the COVID-19 pandemic. Complaint at ¶¶37-49. According to the Complaint, the "all risk" policy at issue provides business income, extra expense, and civil authority coverage (*id.* at ¶¶7-13), and, as a result of the pandemic and closure orders, Plaintiff has been forced to stop car sales, seen a dramatic decrease in its parts, service, and body shop business, and has been forced to furlough employees. *Id.* at ¶¶26-27. The Complaint further alleges that Plaintiff's business operates in a "closed environment" where many people cycle in and out, creating a risk of contamination and transmittal. *Id.* at ¶¶28-29.

The owner of a Florida dental office sued First Community Insurance Company in Florida state court, alleging that it suffered losses due to COVID-19 government closure orders. The complaint alleges that First Community issued a business owners policy providing coverage for business income losses, that the policy does not include a virus exclusion, and that the policy's exclusion for "acts or decisions of . . . a governmental body" do not bar coverage. Plaintiff alleges that it notified First Community of its losses and was denied coverage.

A chiropractic medical center sued Hartford Casualty Insurance Company for declaratory relief, damages, and bad faith in Florida state court alleging that it suffered losses due to COVID-19 government closure orders. Plaintiff alleges that Hartford did not adequately investigate the claim and instead issued a generic denial letter that was created for all of its policyholders' claims for business income coverage, demonstrating that "Defendant is taking the position that no matter the circumstances which led to a policyholders' business income losses resulting from this pandemic, Defendant alleges to have an applicable provision in the Policy to deny coverage."

The Simon Wiesenthal Center sued Chubb in the United States District Court (C.D. Ca.) alleging that it has been forced to cancel fundraising events and close operations due to government-ordered lockdowns intended to curb the spread of COVID-19. Plaintiff alleges that the policy provides coverage for business interruption and civil authority orders, does not include a virus exclusion, and that the policy's pollution exclusion does not contain the word "virus" and therefore does not apply.

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

Equity Planning Corp., a corporation engaged in the commercial real estate business, leasing, administration, and management, filed a class action complaint against Westfield Insurance Company in Ohio state court (Cuyahoga County). The class complaint seeks declaratory relief, breach of contract and bad faith damages arising from losses allegedly sustained due to the presence of COVID-19 and orders issued by the Governor of Ohio requiring the suspension of Plaintiff's operations and prohibiting access to Plaintiff's properties under several coverage sections of "all-risk" Westfield policies issued to class members. Plaintiff alleges Westfield wrongfully denied its claim based "on exclusions that are not applicable to the pandemic."

Palmieri Salons filed a class action complaint against State Automobile Mutual Insurance Company in Ohio state court (Cuyahoga County) seeking coverage under common policy forms allegedly contained in the policies issued to class members. Plaintiff alleges, on behalf of itself and members of the class, it has sustained losses covered by Business Income, Extra Expense, and/or Civil Authority provisions arising from the spread of COVID-19 in the community and the orders issued by the Governor of Ohio and the Ohio Department of Health.

The owner of Westport Flea Market Bar and Grill in Kansas City filed a class action complaint against Lexington Insurance Co. in federal court (W.D. Mo.) seeking class wide damages in connection with business losses sustained due to the COVID-19 pandemic and arising from state and local state at home orders. The complaint alleges that the Lexington policy is an "all-risk" policy providing coverage the incurred losses under the "Business Interruption, Civil or Military Authority, Extra Expense, Ingress or Egress and/or Sue and Labor" policy provisions. Complaint at ¶ 74.

Buffalo Xerographix filed a class action complaint against several Hartford insurance companies in United States District Court (W.D.N.Y.) alleging claims of breach of contract and violations of New York General Business Law. The complaint alleges that the "Spectrum Business's Owner's Policy" provides coverage for business interruption and related losses, that the presence of COVID-19 caused "direct physical loss of or damage" to covered property, and that government orders required the suspension

of its business and/or the use of commercial properties” of class members. Complaint at ¶¶ 41-42. Plaintiff alleges that Hartford denied the claim without referencing any facts of Plaintiff’s loss.

A New York car dealership sued Erie Insurance Company in the U.S. District Court (W.D. PA) on behalf of itself and others similarly situated for wrongfully denying claims for business income and extra expense coverage resulting from losses sustained due to the COVID-19 pandemic. The Complaint alleges that the “all risk” policy at issue provides income protection, extra expense, and civil authority coverage (Complaint at ¶2), that the insurer issued a blanket denial of coverage without conducting a meaningful investigation (*id.* at ¶3), and that the policy does not contain a virus exclusion (*id.* at ¶22). Plaintiff alleges that as a result of the pandemic and closure orders, it was required to close its storefront and suspend its in-person workforce, and that the continuous presence of COVID-19 on or around its premises has damaged its property. *Id.* at ¶¶43-46.

Certain Church’s Fried Chicken and Little Ceasar’s franchise owners brought a class action on behalf of itself and others similarly situated against Nationwide and Allied in U.S. District Court (D. AZ) for business interruption losses sustained as a result of Arizona’s shutdown order and companion order mandating social distancing. The complaint details similar closure orders from across the country, and seeks certification of a nationwide class, an Arizona subclass, and a New Mexico subclass. The complaint alleges that policies at issue provide coverage for business interruption losses due to an act of civil authority that prohibits access to the insured premises, and that defendants “wrongfully repudiated coverage under the Policy.”

Hair Perfect International brought a class action against Sentinel in U.S. District Court (C.D. CA) for business interruption losses due to COVID-19, and seeks certification of a nationwide class. Plaintiff alleges that it purchased “special property coverage” providing coverage for business interruption, extra expenses, and civil authority orders, that it suspended business due to civil authority orders, and that defendant has “on a widescale and uniform basis refused to pay its insureds under its Business Income, Civil Authority, Extra Expense, and Sue and Labor coverages for losses suffered due to COVID-19.”

Pigment Inc. filed a class action lawsuit against Hartford and Sentinel Insurance in the United States District Court (S.D. CA) for business interruption losses related to COVID-19 civil authority orders. The complaint seeks coverage for business interruption, civil authority, and extra expenses and alleges that, although the policy contains a virus exclusion, the policy provides coverage for COVID-19 losses because such losses were caused by “precautionary measures taken by its state to prevent the spread of COVID-19 in the future, not because coronavirus was found on or around plaintiff’s insured property.”

#### **COVID-19 Legislation:**

Michigan legislators have proposed Michigan HB 5739, which provides that an insurer who issues or renews a business interruption policy in the state to an insured that has less than 100 eligible employees “shall include in the business interruption insurance policy coverage for business interruption due to the novel coronavirus (COVID-19).”

New York legislators have already proposed a COVID-19 related coverage bill (discussed in a prior entry here). However, two additional bills have now been introduced: SB 8178 (which would apply to insureds with no more than 100 employees) and SB 8211 (no more than 250 employees). Each bill provides that every policy insuring against property damage “shall” provide business interruption coverage for COVID-19.

## COVID-19 & Workers' Compensation

California's largest workers' compensation insurer, the State Compensation Insurance Fund, removed a requirement that essential workers afflicted by COVID-19 prove they contracted the virus while working. Specifically, the Fund is now "accepting any claim by an essential worker" (as defined by the Governor's Executive Order) "for a diagnosed case of COVID-19 regardless of whether or not that worker can demonstrate the virus was contracted during the course of employment." However, "the diagnosis must include a confirmed positive test for COVID-19 and must occur during the period of time between when the Governor issued his stay-at-home order and before that order is lifted."

## Professional Liability and COVID-19:

SCWorx securities purchasers filed a securities class action complaint in United States District Court (S.D.N.Y.) alleging violations of the Securities Act of 1933 against the company and its CEO. Plaintiffs allege the company made materially false and/or misleading statements regarding COVID-19 rapid testing kits and its ability to fulfill the order, which caused the company's share price to dramatically rise. Complaint at ¶¶ 18-19.

## COVID-19 Financial Losses to Insurers:

Willis Towers Watson reported that property/casualty insurance losses related to COVID-19 are estimated to be between \$32 billion and \$80 billion across key classes in the U.S. and U.K. The broker's estimates are based on adjusting the length of time (e.g., three months, six months, etc.) in which social distancing measures are deployed to mitigate the impact of the virus.

Swiss Re recorded a net loss of \$225 million for the first quarter of 2020, compared to a profit of \$429 million in 2019. The company booked \$476 million for anticipated and actual claims mainly related to the cancellation or postponement of events such as the Olympics. In addition, it took a \$300 million charge from its investments due to market turbulence. The reinsurer's chief executive stated that the company's "business remains resilient despite the financial impact of the crisis on our results."

Liberty Mutual has said that COVID-19's impact on first-quarter earnings will be akin to a "moderately sized catastrophe." The areas most exposed to insurance losses related to the coronavirus include trade credit, general liability, workers compensation, and event cancellation coverage. While the first-quarter net written premium was not "materially impacted by COVID-19," future quarters are expected to see a loss to premiums.

## U.K. and Europe:

The UK's Financial Conduct Authority (FCA) announced that it intends to obtain a court declaration to resolve contractual uncertainty in business interruption (BI) insurance cover. This is due to continuing and widespread concerns about the lack of clarity and certainty for some customers making business interruption claims, and the basis on which some firms are making decisions in relation to claims. The FCA stated its action was to be taken in the public interest to advance our consumer protection and market integrity objectives, opining that the circumstances of the current coronavirus (Covid-19) emergency, and its effect on businesses holding BI policies means that any uncertainty needs to be resolved as quickly as possible.

France's Finance Minister established a working group to examine insurance options to cover events like pandemics. Reportedly it is working on a new mechanism for pandemics insurance cover that could entail some state backing, and is exploring funding

options to have a scheme in place ahead of another potential coronavirus lockdown. The working group includes lawmakers, business lobbies, France's insurance association, and public reinsurer CCR and aims to submit proposals by the first half of June. The British insurance industry has also formed a steering committee comprising the leaders of several insurance companies that will work with government-backed terrorism reinsurance fund Pool Re to develop pandemic cover.

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)