

CLIENT ALERT

Insurers' COVID-19 Notepad: What You Need to Know Now (Week of May 25)

May.27.2020

Plaintiff Dismisses SDNY Case Where PI Was Denied

Social Life Magazine, Inc. filed suit in the Southern District of New York against Sentinel Insurance Company Limited seeking coverage for business income losses relating to COVID-19. On May 4, 2020, it filed an application for preliminary injunction seeking an order requiring Sentinel, pending resolution of the lawsuit, to pay nearly all of the amount claimed. During a telephonic hearing on May 14, 2020, Judge Valerie E. Caproni of the U.S. District Court for the Southern District of New York, rejected the policyholder's arguments for a preliminary injunction, stating that "New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going." After noticing an appeal to the Second Circuit, the policyholder abruptly changed course and dismissed its case before any order was entered on the trial court's ruling.

PA High Court Refuses King's Jurisdiction

The Pennsylvania Supreme Court rejected an Emergency Application for Extraordinary Relief Pursuant to Rule 3309, 42 Pa.C.S. § 726 and King's Bench Powers in a plaintiff asked the Court to assume jurisdiction of the restaurant's pending business interruption suit against Erie Insurance Exchange and to establish and coordinate a system for resolving all similar COVID-19 business interruption insurance cases in Pennsylvania. The request had asked Pennsylvania's highest court to assume control – via the exercise of its own plenary jurisdiction – over all COVID-19 business interruption claims in the state on the grounds that they were matters of immediate public importance.

Workers Compensation and COVID-19

The Industrial Commission of Arizona issued an advisory "Substantive Policy Statement" indicating that workers' compensation insurance carriers, self-insured employers, the Special Fund, and authorized claims processing representatives administering Arizona workers' compensation claims "*may not* categorically deny COVID-19 claims." (emphasis in original). According to the policy statement, "a denial of a COVID-19 claim must be based upon a reasonable investigation and must be based on facts and evidence relevant to the claim."

The California Workers' Compensation Insurance Ratings Bureau actuarial committee estimates that the rebuttable presumption enacted by California Governor Gavin Newsom, which creates the presumption that essential workers who acquire COVID-19 contracted the virus at work, will cost the state \$1.2 billion. The committee based the figure on its estimate of 66 million compensable COVID-19 claims, including medical and indemnity benefits. The enactment of the presumption was reported in our May 11 Insurers' Notepad.

New Business Interruption Suits Against Insurers:

A Texas retail company sued Travelers Casualty Insurance Company of America in Texas state court (Comal County) asserting claims for breach of contract, noncompliance with the Texas Insurance Code, and breach of the duty of good faith and fair dealing. The complaint alleges that Travelers wrongfully denied and mishandled the plaintiff's claim for business interruption coverage.

A law firm with four offices in Pennsylvania sued Travelers Property Casualty Company of America in federal court (E.D. Pa.) for declaratory relief and breach of contract. The "all risk" policy at issue allegedly provides business income, extra expense, and civil authority coverage (Complaint at ¶14), and contains an "Exclusion of Loss Due to Virus of Bacteria." *Id.* at ¶22. The complaint alleges that the civil orders have "physical impacted" its offices because "attorneys and staff have been unable to adequately perform their job duties" (*id.* at ¶42), and that Travelers wrongfully denied the plaintiff's claim for coverage. *Id.* at ¶25.

The owner of a restaurant in Nashville sued The Cincinnati Insurance Company seeking declaratory relief, breach of contract and punitive damages. The "all risk" policy at issue allegedly provides business suspension, extra expense, and civil authority coverage. Complaint at ¶¶26-29. The complaint alleges that, as a result of state closure orders, the plaintiff was forced to suspend ordinary operations and furlough or lay off the majority of its employees (*id.* at ¶6), and that the insurer "began issuing blanket denials to insureds for any losses related to the [state] closure orders without conducting any meaningful investigation," including a denial of coverage here. *Id.* at ¶7.

The owner of a restaurant chain with locations in several states sued The Cincinnati Insurance Company seeking declaratory relief, breach of contract and punitive damages. The "all risk" policy at issue allegedly provides business suspension, extra expense, and civil authority coverage. Complaint at ¶¶27-35. The complaint alleges that, as a result of state closure orders, the plaintiff has been forced to furlough its workers and may have to close some or all of its locations permanently (*id.* at ¶41), and the insurer "began issuing blanket denials to insureds for any losses related to the [state] closure orders without conducting any meaningful investigation," including a denial of coverage here. *Id.* at ¶¶8-11.

The owner of restaurant and catering businesses in Texas sued Acada Insurance Group in Texas state court (Bexar County), asserting claims for breach of contract, noncompliance with the Texas Insurance Code, and breach of the duty of good faith and fair dealing. The policy at issue allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶13-14. The plaintiff claims covered losses due to the COVID-19 outbreak and subsequent state closure orders, including having to lay off almost its entire staff. *Id.* at ¶¶8, 12. The complaint further alleges that the insurer wrongfully denied the plaintiff's claim without meaningful investigation. *Id.* at ¶15. Plaintiff alleges that the insurer largely based its denial on a "virus" endorsement in the policy, which excludes losses caused "from any virus, bacterium ... that induces or is capable of inducing physical illness or disease." *Id.* at ¶17.

The owner of several restaurants in Austin and Dallas sued State Automobile Mutual Insurance Company and Rucker-Ohlendorf Insurance in Texas state court (Travis County), asserting claims for declaratory relief, breach of contract, breach of the duty of good faith and fair dealing, violations of the Texas Insurance Code, Violations of the Texas Prompt Payment Act, and negligence. The policy at issue allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶ 10, 17. The

Plaintiff allegedly was forced to cease full operations due to the COVID-19 virus and resulting state closure orders (*id.* at ¶18), and that the insurer denied coverage without providing any justification. *Id.* at ¶19.

The owner of a distillery in Texas sued Philadelphia Insurance Company in Texas state court (Tarrant County) asserting claims for breach of contract, noncompliance with the Texas Insurance Code, breach of the duty of good faith and fair dealing, fraudulent inducement, and punitive damages. The complaint alleges that the insurer wrongfully denied the plaintiff's claims for coverage for business income losses sustained due to the COVID-19 outbreak and subsequent state closure orders. Complaint at ¶8. According to the complaint, when the plaintiff inquired about its policy's business interruption coverage before renewing, the insurer fraudulently misrepresented that it would provide business interruption insurance. *Id.* at ¶¶17-20.

The Artisan Gathering Salon filed a declaratory action against Owners Insurance Company in federal court (N.D. Ga.) seeking coverage for business interruption losses related to COVID-19 civil authority orders. The complaint alleges as a result of the civil authority orders plaintiff was required to shut its doors to customers and were prohibited access to the Insured Property. Complaint at ¶29. Plaintiff asserts the all-risk policy's Exclusion of Loss Due to Virus or Bacteria does not apply. *Id.* at ¶38.

Several retail clothiers sued Twin City Fire Insurance and Hartford Fire Insurance in federal court (E.D.La.) seeking coverage for business interruption losses related to COVID-19 civil authority orders. The complaint seeks coverage under the all-risk policy for Business Income, Civil Authority, and Extra Expenses provisions. Plaintiffs allege that COVID-19 has caused "direct physical loss or damage...to Plaintiffs' premises." Complaint at ¶21. Plaintiffs also allege they have suffered covered losses due to government orders prohibiting access to their property. *Id.* at ¶22.

The Del Pietro Restaurants sued Cincinnati Insurance in Missouri state court (St. Louis County) for declaratory relief alleging that the applicable policy provides coverage for loss of Business Income, Extra Expense coverage, and for loss due to the actions of a Civil Authority. As a result of state orders, plaintiff's business allegedly was required to "close their restaurants to the public for on-premise dining." Complaint at ¶24. Plaintiff contends the Cincinnati policy "actually extends coverage for [viral pandemic] loss or damage under the business suspension and civil authority provisions of the Policy." *Id.* at ¶33.

Seoul Taco sued Cincinnati Insurance in Missouri state court (Circuit Court for St. Louis City) for declaratory relief alleging that the applicable all-risk policy provides coverage for loss of Business Income, Extra Expense coverage, and for loss due to the actions of a Civil Authority. As a result of orders issued by Missouri and Illinois, Plaintiffs claim they were forced to suspend operations until the spread of the virus had been adequately controlled (Complaint at ¶28), and were prohibited complete access to the insurers premises. *Id.* at ¶¶20, 24-25, 29.

A dental practice sued Hartford Insurance in federal court (D. N.J.) for business interruption losses related to COVID-19 civil authority orders. Plaintiff alleges that the "all-risk" policy provides coverage for Business Interruption, Extra Expense, and the actions of civil authorities. Plaintiff alleges the policy's virus exclusion is not applicable, as the losses "were caused by the civil authority orders issued by [the New Jersey] Governor" and others. Complaint at ¶33.

Addiego Endontist DMD sued Hartford Insurance in federal court (D. N.J.) for business interruption losses related to COVID-19 civil authority orders. Plaintiff alleges that the "all-risk" policy provides coverage for "catastrophic events such as the current pandemic and non-essential business closures mandated by Civil Authority Orders." Complaint at ¶17. Plaintiff alleges COVID-19 related losses under the policy's coverage for Business Interruption, Extra Expense, and the actions of civil authorities. Plaintiff

alleges the policy's virus exclusion is not applicable, as the losses "were caused by the civil authority orders issued by [the New Jersey] Governor" and others. Complaint at ¶133.

A marketing and advertising agency sued CNA in federal court (S.D.N.Y.) seeking coverage under the all-risk policy for losses related to COVID-19. Plaintiff asserts it sustained business interruption losses as a result of the actions of civil authorities in New York and California, which prohibited Plaintiff's business from operating. Complaint at ¶29. Plaintiff seeks coverage under the policy's "personal property, business income and extra expense, [and] contamination coverage." *Id.* at ¶12. The policy allegedly contains a virus exclusion.

James Servedio sued Travelers in federal court (S.D.N.Y.) seeking coverage for business losses sustained due to COVID-19 and related orders issued by the Governor and State of New York. The complaint alleges that, as a result of the orders issued by the civil authorities, plaintiff shut down its business and sustained covered losses under the all-risk policy. Complaint at ¶30. Plaintiff alleges the policy's "Virus Exclusion was not properly disclosed and does not apply to the pandemic." *Id.* at 16.

Results Fitness sued Cincinnati Insurance Company in Ohio state court (Cuyahoga County) for declaratory relief and breach of contract in connection with business losses sustained due to COVID-19 arising from state and local stay at home orders. The complaint alleges that the Cincinnati policy is an "all-risk" policy providing coverage of incurred losses under the Business Income, Civil Authority, and Extra Expense policy provisions.

Hospitality plaintiffs Mikmar and LaMalfa sued Westfield Insurance Company for declaratory relief, damages, and bad faith in Ohio state court (Lake County) alleging that they suffered losses under the all-risk policy due to COVID-19 government closure orders. Plaintiffs allege they were forced to close and/or subject to underutilization or loss of use of their properties due to COVID-19 related government closure orders. Complaint at ¶14. Plaintiffs allege Westfield wrongfully denied its claim, and the claims of putative class members, based on exclusionary language that is not applicable to the pandemic. *Id.* at ¶44.

A Florida barbershop sued Ohio Security Insurance Company in federal court (M.D. Fla.) alleging the insurer wrongfully denied its claim for business interruption losses due to Florida's COVID-19 closure orders. The complaint alleges that Ohio Security Insurance "ha[s] accepted the policy premiums with no intention of providing any coverage due to direct physical loss resulting for (*sic*) Civil Authority action."

The owner of a Maryland medical practice sued the Hartford Fire Insurance Company in federal court (D. Conn.) alleging that the insurer wrongfully denied its claim for business interruption losses due to Maryland's COVID-19 closure orders. The insured alleges that the policy's virus exclusion "does not apply to the business losses incurred by Plaintiffs here" because such losses are "proximately caused by the Civil Authority Orders issued in response to the COVID-19 pandemic."

The owner of a Texas chiropractic practice sued The Hartford Fire Insurance Company in federal court (D. Conn.) alleging the insurer wrongfully denied its claim for business interruption losses due to Texas' COVID-19 closure orders. The complaint alleges that "Defendants have accepted Plaintiff's policy premiums with no intention of providing any coverage for business losses," and that "[a]ny effort by Defendants to deny the reality that the virus has caused Plaintiff physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger Plaintiff and the public."

The owner of a dental practice sued First Community Insurance Company in Florida state court (Miami-Dade Cty.) alleging that the insurer wrongfully denied its claim for business interruption losses due to Florida's COVID-19 closure orders. The complaint

contends that the policy at issue does not contain a virus exclusion, and that “because the Policy is an all-risk policy and does not specifically exclude the losses that Plaintiff has suffered, those losses are covered.”

A wine and beer distributor sued Southern-Owners Insurance Company in Florida state court (Orange Cty.) alleging that the insurer wrongfully denied its claim for business interruption and spoilage of product losses due to Florida’s COVID-19 closure orders. The complaint alleges that the inability of the insured property “to function as contemplated and intended by Plaintiff and Defendant is a direct physical loss” that is covered under the policy issued by Southern-Owners.

A San Francisco restaurant sued Atain Specialty Insurance Company in federal court (N.D. Cal.) alleging the insurer wrongfully denied its claim for business interruption losses due to California’s COVID-19 closure orders. The complaint alleges that the orders, “as they relate to the closure of all ‘non-life-sustaining businesses,’ evidence an awareness on the part of both state and local governments that COVID-19 causes damage to property.”

A restaurant management company sued Scottsdale Insurance Company in Florida state court (Hillsborough Cty.) alleging that the insurer wrongfully denied its claim for business interruption losses due to Florida’s COVID-19 closure orders. The complaint alleges that Florida’s closure orders do “not specifically exempt restaurants and ha[ve] caused a shutdown of [Plaintiff’s] business operations. As a direct and proximate result of this Order, access to the Insured Properties has been specifically prohibited.”

New Business Interruption Class Action Filings:

Hutch’s Restaurant and Remington Tavern & Seafood Exchange filed a class action complaint against several Erie Insurance Company entities in New York state court (Erie County) seeking coverage for business losses sustained due to COVID-19 and related civil authority orders. Plaintiffs allege, as a result of the presence of COVID-19 and the orders issued by New York State, they have substantially ceased business operations and have suffered direct physical loss. Complaint at ¶¶ 41-48. Plaintiffs allege Erie denied the submitted claims “related to the Virus, CV-19, and the CA orders without consideration of the unique facts or circumstances of each loss, and rather, adopted a pattern and /or practice to deny such claims.” Complaint at ¶81.

Plaintiff Hometown Tavern filed a class action complaint against Certain Underwriters at Lloyd’s in federal court (S.D.N.Y.) for denying class members’ claims for losses resulting from the COVID-19 pandemic and related Stay at Home Orders. The Complaint alleges that the “all-risk” policy at issue provides Business Income, Extra Expense, Civil Authority, and Sue and Labor coverage. The class consists of breach of contract and declaratory judgment and injunctive subclasses, as well as Rhode Island and nationwide subclasses. *Id.* at ¶160.

Plaintiff Ital Uomo, a clothing and travel accessory business, filed a class complaint against Starr in federal court (E.D.N.Y.) seeking coverage for COVID-19 related business interruption losses. Plaintiff alleges the standard “all-risk” policy provides for Business Income, Extended Business Income, Extra Expense, and Civil Authority coverage. The class complaint seeks a declaration of whether the all-risk policies issued to class members “applies to the suspension, curtailment, and interruption of business operations resulting from measures put into place by civil authorities.” Complaint at ¶45.

Café Du Soleil has filed a class action complaint against AXA XL in federal court (S.D.N.Y.) on behalf of itself and others similarly situated for denying claims for losses resulting from COVID-19 and related government orders. The Complaint alleges that the “all-risk” policy at issue provides Business Income, Extra Expense, and Civil Authority coverage. Plaintiff alleges the policy’s virus

exclusion does not apply “because the COVID-19 pandemic is such a devastating, far-ranging, and unforeseen event that it does not fall within a reasonable interpretation of the “virus” exclusion. Complaint at ¶36. Plaintiff asserts claims of breach of contract, breach of the duty of good faith and fair dealing, and unjust enrichment.

The owners/operators of several restaurants filed a class action complaint in federal court (D. N.J.) against Utica National Insurance Group, seeking coverage for business losses sustained due to COVID-19 and related civil authority orders. Plaintiffs allege, as a result of the stay-at-home orders issued by the majority of states, they have been unable to operate in the ordinary course of business and suffered business losses as a result. Complaint at ¶32. Although the all-risk policy contains a virus exclusion, the class complaint asserts the policies issued to plaintiffs and class members provide Business Income, Extra Expense, and Civil Authority coverage for losses sustained by class members as a result of measures taken by state officials in response to COVID-19. *Id.* at ¶45.

A dental practice sued Hartford Casualty Insurance Company in federal court (E.D. Mo.), individually and on behalf of all others similarly situated, for business interruption losses related to COVID-19 civil authority orders. Plaintiff alleges that the all-risk commercial property policies provide coverage for Business Interruption, Extra Expense, and the actions of civil authorities. The complaint asserts the virus exclusion is not applicable as “there is no evidence that the virus has ever been on [the insured’s] premises.” Complaint at ¶71. Plaintiff alleges his “loss was caused by the worldwide pandemic and, as recommended by the CDC and dental organizations, the need to prevent it from spreading to his employees, his patients and others.” *Id.* at ¶71. The complaint seeks declaratory relief and damages in connection with claims for breach of contract and the breach of the implied covenant of good faith and fair dealing.

Club 31 Sports Bar & Grill sued Mesa Underwriters Specialty Insurance Company in federal court (S.D. Missouri) on behalf of itself and all others similarly situated, asserting claims for declaratory relief and breach of contract. The policy allegedly provides Business Income, Extra Expense, Sue and Labor, and Civil Authority coverage. The Complaint alleges that Plaintiff’s property has sustained direct physical loss and/or damages related to the virus and state closure orders. Complaint at ¶57. Plaintiff alleges that the insurer “denied coverage and refused to cover Plaintiff’s COVID-19 losses,” and “has caused material harm to Plaintiff and the proposed class by refusing coverage under the Policy. *Id.* at ¶¶22-23 The class consists of breach of contract and declaratory relief subclasses, as well as Missouri and nationwide subclasses, of plaintiffs who are insured under Mesa policies. *Id.* at ¶65.

Sea Land Air Travel Service, Inc. filed a class complaint against Auto-Owners Insurance Company in Michigan state court (Wayne County) for declaratory relief, damages, and violation of Michigan’s Uniform Trade Practices Act. The complaint alleges that Plaintiff suffered “damages caused by the physical presence of the COVID-19 virus to property at and around Plaintiff’s insured premises triggered the Business Income and Extra Expense coverages provided by the Special Property Coverage Form.” Complaint at ¶18. Plaintiff alleges Auto-Owners “issued its denials without first conducting a meaningful coverage investigation...as Michigan law requires,” (*id.* at ¶43) and “mischaracterized Plaintiff’s claim as the result of governmental action in response to the COVID-19 virus.” *Id.* at 44.

The Tavern on Clark sued Erie Insurance Company in the U.S. District Court (E.D. Ill.) 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 COVID-19. Complaint at ¶22. The Complaint alleges that the “all-risk” policy at issue provides Business Income, Extra Expense, and Civil Authority coverage and that the insurer has “denied claims related to COVID-19 on a uniform and class-wide basis,

without individual bases or investigation.” *Id.* at ¶166. Plaintiff alleges that as a result of the pandemic and closure orders, it was required to close its dining room operations and incurred covered business losses as a result.

The owner of a beauty salon in New Jersey sued United States Liability Insurance Company in federal court (E.D. Pa.) on behalf of itself and all others similarly situated, asserting claims for breach of contract, breach of the duty of good faith and fair dealing, and unjust enrichment. The “all risk” policy at issue allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶15-19. The policy excluded claims arising from any “virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” *Id.* at ¶15. The Complaint alleges that the insurer denied the plaintiff’s claim on the grounds that the virus exclusion barred coverage and the plaintiff’s losses were not “direct physical loss of or damage” to his business. *Id.* at ¶15. The class is defined on all persons who made insurance claims with the insurer for business income, extra expense, and/or civil authority coverage. *Id.* at ¶36.

The owner of a New York bed-and-breakfast sued Brit Global Specialty and Lloyd’s of London in federal court (E.D. Pa.) on behalf of itself and all others similarly situated, asserting claims for declaratory relief and breach of contract. The policy allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶6-7. The complaint alleges that as a result of COVID-19, the plaintiff was forced to suspend all business operation and incurred substantial revenue loss. *Id.* at ¶¶32-46. The class is defined as all persons and entities with a policy issued by the defendants, which included business income or civil authority coverage, who suffered a suspension of business or loss of business income as a result of COVID-19 or civil authority. *Id.* at ¶50.

A yoga studio owner sued Cincinnati Insurance Company in federal court (E.D. Pa.) on behalf of itself and all others similarly situated, asserting claims for declaratory relief and breach of contract. The policy c allegedly provides business income, extra expense, and civil authority coverage. Complaint at ¶¶10-11. The plaintiff also purchased a “crisis event expense” endorsement, which does not apply to any loss “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 ¶12. The complaint alleges that, as a result of civil closure orders, it suffered business income losses under the policy, and that the insurer denied its claim for coverage. *Id.* at ¶¶33-38.

The owner of a dental business sued American Fire & Casualty Company in federal court (W.D. Wash.) on behalf of itself and all others similarly situated, asserting claims for declaratory relief and breach of contract. The policy allegedly provided business income, extra expense, extended business income, and civil authority coverage. Complaint at ¶13. The complaint alleges that the plaintiff submitted a claim for coverage for its losses caused by COVID-19 and subsequent state closure orders, and that the insurer denied coverage “and will deny all similar claims for coverage.” *Id.* at ¶¶26-28. The class is divided into declaratory relief and breach of contract subclasses, and Washington and nationwide subclasses. *Id.* at ¶30.

An Alabama optometrist’s office filed a class action lawsuit in federal court (S.D. Ala.) against Continental Casualty Company, alleging the insurer has failed to provide a response to the claim it filed for business interruption losses due to Alabama’s COVID-19 closure orders. The optometrist alleges that it sustained “direct physical loss” because “its business premises were rendered physically unusable for their intended purpose,” and its losses are therefore covered under the all-risk policy issued by Continental.

A California barbershop owner filed a class action lawsuit in federal court (S.D. Cal.) against Farmers Group, Farmers Insurance Company, and Truck Insurance Exchange, alleging Farmers wrongfully denied its claim for business interruption losses due to California’s COVID-19 closure orders. The owner contends that the all-risk policy’s microorganism and virus exclusions are not

applicable “because the efficient proximate cause of losses was precautionary measures taken by the state to prevent the spread of COVID-19 in the future, not because coronavirus was found on or around Plaintiffs’ insured properties.”

A Florida dental practice filed a class action lawsuit against Bankers Insurance Group alleging the insurer wrongfully denied its claim for business interruption losses due to Florida’s COVID-19 closure orders. The complaint alleges that the “Policies purport to cover all risks of direct physical loss except for those expressly excluded,” that the policies “do not expressly exclude loss or damage resulting from a virus,” and that the “insurance industry has long recognized that viruses constitute a risk of physical loss or damage.”

U.K. and Europe:

A Paris court ruled in favor of a restaurant seeking coverage for operating losses after a government order required restaurants and bars to close due to COVID-19. The court said that the administrative decision to close the restaurant qualified for coverage under the Axa SA policy as a business interruption loss. The language at issue reportedly states: “The cover is extended to the administrative closure imposed by police or health and safety services. The cover is excluded when the closure is the consequence of a voluntary breach of regulations.” Axa indicated it intends to appeal the decision, stating “the vast majority of Axa France contract for catering professionals provide that a generalized event like the one we are experiencing today cannot bring into play the contractual guarantees.”

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