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COVID-19 Insurance Coverage Litigation

There is no shortage of newly filed lawsuits seeking business interruption coverage both in the U.S. and abroad, perhaps, in part, because State and Federal efforts to legislate such coverage into existence have come to a standstill or even backtracked.

Below, we highlight some developments in select cases in which business interruption coverage for COVID-19 losses is in issue. These decisions may be a harbinger of things to come in other pending litigation. We also report on litigation pending in the United Kingdom and France involving claims for coverage for COVID-19 losses. Though these examples involve decidedly different procedural avenues in which those countries are vetting the issues, the similarities with U.S. pending litigation in the policy language in issue and the facts on which the claims are based make these cases noteworthy.

Relatedly, a push to establish multi-district litigation ("MDL") continues, but given the number of players, the lack of consensus as to the judicial venue in which such a docket would be established and the emerging majority opposition – including among some policyholders – to creation of such a docket, we predict establishment of such a docket is unlikely.

Finally, we summarize below recent Insurance Commissioners' statements as to the intended scope of business interruption coverage. These appear to directly contradict legislative efforts to write such coverage into existence and could weaken plaintiffs' claims for such coverage on the litigation front.

Case Activity of Special Interest

Since our May 7, 2020 Update, there have been many additional cases filed seeking coverage for business interruption losses following government orders. None of the complaints have presented new theories for recovery. However, there has been significant activity in various courts in the United States and Europe, including some decisions in pending cases that may represent the future fate of much of the other pending litigation.

Social Life Magazine, Inc. v. Sentinel Insurance Co. Ltd., Case No. 20-cv-03311 (U.S.D.C., S.D.N.Y. filed April 28, 2020, terminated May 22, 2020). This short-lived case resulted in a bench ruling in favor of an insurer. The plaintiff tried to accelerate the issue by making an emergency application for a preliminary injunction seeking immediate payment. Judge Valerie E. Caproni conducted oral argument by telephone, and on the call denied the application. She said, "New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going." The court referred to *Roundabout Theatre Co., Inc. v. Continental Casualty Co.,* 301 A.D.2d 1 (N.Y. App. Div. 1st Dep't 2002), which required that the property

suffer direct physical damage. A written decision would have followed. Before that could happen, plaintiff appealed and then dismissed its appeal and the underlying case without prejudice. The ruling has no precedential value, but it does reflect the approach of a highly respected Judge applying New York law. (Judge Caproni had a distinguished career as a federal prosecutor, a Regional Director of the Securities and Exchange Commission, and General Counsel to the FBI, before being appointed to the bench by President Obama and approved by the Senate in a 73-24 vote).

Joseph Tambellini, Inc. v. Erie Ins. Exchange, No. 52 W 2020 (Pa. Sup. Ct.) was another failed attempt at accelerated consideration. A restaurant filed an action for business interruption coverage but instead of allowing that case to run its course, it made an emergency application for extraordinary relief. Specifically, it asked the Pennsylvania Supreme Court to exercise plenary jurisdiction over its case and assume authority over all COVID-19 litigation to immediately resolve insurance coverage issues. The basis for this included the Supreme Court's authority under Pennsylvania law to invoke King's Bench Powers. The Supreme Court denied the application with no substantive discussion.

United Kingdom Financial Conduct Authority Pandemic Test Case. In the UK, however, a more global approach is being pursued under the auspices of the Financial Conduct Authority ("FCA"). The FCA is a regulatory body, not part of the UK Government, but funded by the financial services community, which regulates financial firms providing services to consumers. It is seeking to obtain declarations in a "Test Case" before the High Court in London to help resolve contractual uncertainties in representative business interruption wordings.

On May 15, the FCA invited policyholders who were in disputes with their insurers to send their arguments to the FCA. On June 1, it identified a representative sample of 17 policy wordings to be examined, which the FCA says are "carefully chosen as a representative sample of the most frequently used policy wordings that are giving rise to uncertainty." This list is expected to be updated in July. The FCA identified 16 insurers issuing those wordings,[1] and an initial list of eight insurers from whom participation in the Test Case has been requested.[2] There is a schedule for submissions and it is currently expected that a five to ten day hearing will take place in the second half of July.

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[1] The companies using the representative wordings are Allianz Insurance plc, American International Group UK Limited, Arch Insurance (UK) Limited, Argenta Syndicate Management Limited, Aspen Insurance (UK) Limited, Aviva Insurance Limited, AXA Insurance (UK) plc, Chubb European Group SE, Ecclesiastical Insurance Office plc, Hiscox Insurance Company Limited, Liberty Mutual Insurance Europe SE, MS Amlin Underwriting Limited, Protector Insurance UK, QBE UK Ltd, Royal & Sun Alliance Insurance plc, and Zurich Insurance plc.

[2] The initial companies from whom participation has been requested are Arch Insurance (UK) Limited, Argenta Syndicate Management Limited, Ecclesiastical Insurance Office plc, Hiscox Insurance Company Limited, MS Amlin Underwriting Limited, QBE UK Ltd, Royal & Sun Alliance Insurance plc, and Zurich Insurance plc.

The FCA has said that the Test Case "is not intended to impact the normal claims process." But any declaratory judgments obtained will be legally binding on the insurers that are parties to the Test Case, with respect to the particular wordings reviewed. The judgments will not determine the amount due under individual policies. The FCA has said the results will "provide persuasive guidance for the interpretation of similar policy wordings and claims, that can be taken into account in other court cases including in Scotland and Northern Ireland, by the Financial Ombudsman Service and by the FCA in looking at whether insurers are handling claims fairly."

Sas Maison Rostang v. SA AXA France Iaard, Paris Commercial Court, May 22, 2020.[3] The only noteworthy success for policyholders came in an action brought by a group of restaurants against AXA in Paris. The President of the Commercial Court handed down an interim Order finding coverage for business interruption resulting from a government order. (The procedure was in the nature of a United States application for interim relief.) The entire policy wording is not available, and there is little discussion of it in the Order. However, 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." There was no pandemic exclusion.

One interesting argument AXA presented was that losses caused by a pandemic were, by their very nature, too significant to be covered by insurance companies, as their business model is based on fortuity, *"aléa,"* and the pooling of resources, *"mutualisation"* and cannot operate if a considerable number of insureds simultaneously suffer significant losses due to a single, common event. In its *ratio decidendi*, the Court expressly rejected this argument because it does not rely on any legal sources or authorities, and the Court was only asked to apply a contract, binding on the contracting parties.

Following this decision, there was confusion in press reports and headlines about AXA's response. Sorting it out, it appears that AXA is appealing the Order. But it has also conducted a review of its contracts with restaurant owners and concluded that about 10% of them – 1,700 – contain some ambiguity. Or, as the President of AXA conceded publicly, they "are not clear." AXA is seeking an amicable solution to claims on these. Its President has said, "We want to compensate a substantial part of these contracts, we want to do it quickly."

A Brief Note on Riot and Looting Losses under Property Insurance

In the United States, some COVID-19 claims have an extra level of complication because the insured property has been affected (or destroyed) by riots and looting arising in connection with the social unrest following the death of George Floyd.

[3] Gfeller Laurie LLP gratefully acknowledges the assistance of Christian Bouckaert and Alexis Valencon, partners in the Paris office of Kennedys, in the preparation of this section.

In general, riot and looting losses are covered under many property policies, except for those issued on a surplus lines basis. This position has been publicly affirmed by the American Property Casualty Insurance Association. The California Department of Insurance issued a statement that it "is expecting adjusters to be on the ground as soon as possible to help any looted businesses quickly assess their insurance benefits."

As they arrive, adjusters will find complications. For example, if there is a business interruption component, the lost income will be measured taking into effect the COVID-19 background. That is, instead of the loss being calculated on historic data in similar seasons, it will be based on projected actual income under the present circumstances or possibly other analogous methods.

Also, as these claims arise, it will be useful to keep two concepts in mind. The first is ***concurrent causation,*** which is the doctrine that if a loss has two separate causes, one covered and one not, there is coverage. This is the default position, whether stated or not, with most policies. The other concept is ***anti-concurrent causation clause,*** which is basically an exclusion to the concurrent causation doctrine. The application of these will further complicate claim evaluations.

Update on Petition for Multi-District Litigation

The April 20, 2020 Motion to Transfer to the United States Judicial Panel on Multidistrict Litigation remains pending. At the request of the insurer defendants, the Panel granted a Motion for Extension of Time, allowing all interested parties through June 5, 2020 to file responses to the Motion to Transfer. Although several plaintiffs filed responses in support of consolidating the cases, the parties disagreed about the location at which the cases should be consolidated and advocated for three different districts: the Eastern District of Pennsylvania, the Southern District of Florida, and the Northern District of Illinois.

In support of consolidation, Plaintiffs argued the pending matters have common issues of fact arising out of the COVID-19 pandemic and claimed that consolidated discovery would avoid duplication.

The majority of the interested parties' responses, including some plaintiffs' responses and all of the insurer defendants' responses, oppose the Motion to Transfer and argue against consolidation of the cases. They all argue that the moving parties cannot meet the requirements of transfer under 28 U.S.C. § 407(a): that the actions involve common questions of fact, that transfer would be for the convenience of the parties and witnesses and that transfer would advance the just and efficient conduct of the actions. Specifically, they argue that there is no commonality of facts because these insurance coverage actions involve different policies with different policy provisions and coverages, issued by different insurers to different policyholders and each plaintiff will have to prove an individualized set of facts in order to demonstrate coverage under its respective policy.

They further argue that the facts underlying the alleged losses lack commonality, as the proposed cases for consolidation involve entities from different industries, in different states, which have

been subject to differing and oftentimes conflicting executive orders issued by governmental leaders. The oppositions also note that even those in favor of transfer cannot agree on the proper venue for consolidation and given that the parties in this matter span the country, it would not be convenient to consolidate the matters into a single forum. Finally, they claim that consolidation would not promote the "just and efficient" conduct of the actions, as the parties still face inconsistent rulings given that cases are also pending in state courts, as well as the potential for significant delays faced by parties that have already filed dispositive motions.

Given that most of the responses opposed consolidation, it is becoming increasingly unlikely that consolidation will occur. As many insurers noted in their oppositions, the general rule of the JPML is to decline to consolidate insurance coverage actions. This is particularly applicable here, where there are more than 100 different insurers named in the related actions, each of which issues its own unique set of policies and coverages. Indeed, insurance coverage cases are ill-suited for consolidation given that each individual policy is tailored to the needs of a specific policyholder, and each state has different laws and regulations governing the interpretation of such policy.

The insurance considerations aside, there is also a complete lack of uniformity as to the impacts of COVID-19 on each individual plaintiff. The plaintiffs hail from differing industries, have faced different executive orders requiring different levels of shut-down and have been impacted in a variety of ways depending upon the omnipresence, or lack thereof, of COVID-19 in their communities. Thus, even if there are some superficial commonalities among the claims, these appear to be outweighed by the uniqueness of each individual claim. The Panel will have to weigh these considerations and more when it decides whether to grant the Motion to Transfer.

The Motion to Transfer is scheduled to be heard before the Panel on July 30, 2020.

Legislative Developments and Insurance Commissioners' Bulletins

Federal and State Legislation Addressing COVID-19 Business Interruption Losses

As previously reported, State legislatures, as well as Congress, introduced legislation in the first two months of the COVID-19 outbreak and related lockdown periods designed to mandate business interruption coverage. However, the U.S. Treasury weighed in in May, expressing concerns about proposals to compel insurers to pay business interruption losses attributable to COVID-19, specifically stating that requiring insurers to retroactively cover such exposures could destabilize the insurance sector. In the letter to Representative Ted Budd, who serves on the House Financial Services Committee, the Treasury official specifically referenced legislative efforts at both the State and Federal level to mandate business interruption coverage and implied that in lieu of that approach, the Treasury "looks forward" to working with Congress, states and insurance trade associations to determine "how best to move forward in addressing losses attributable to the current and potential future pandemics."

The Treasury's concern is shared by a broad coalition of insurers and business organizations which, as previously reported, have written to Congress to call for the creation of a Federally

funded pool to address COVID-19 losses. More recently, those groups also have called for the creation of a Federal program to cover *future* pandemic risks.

Efforts to address such future risks currently are underway in Congress. On May 26, 2020, Carolyn Maloney, a member of the House Financial Services Committee, and several co-sponsors, introduced the Pandemic Risk Insurance Act of 2020. The stated purpose of the Act is "to establish a Federal program that provides for a transparent system of shared public and private compensation for business interruption losses resulting from a pandemic or outbreak of communicable disease." The bill's stated focuses are to (1) protect consumers by addressing market disruptions and ensure the continued widespread availability and affordability of business interruption coverage for losses resulting from a pandemic or outbreak of communicative disease; and (2) allow for a transitional period for the private markets to stabilize, resume pricing of such insurance, and build capacity to absorb any future losses, while preserving State insurance regulation and consumer protections. We will continue to monitor the progress of this legislation and report on it in future updates.

Insurance Commissioners' Bulletins

While litigation over the scope of business interruption coverage continues to be robust, various States' insurance commissioners arguably have undercut plaintiffs' claims for business interruption coverage by taking the position in recently issued statements that COVID-19 claims likely are not covered due to lack of "property damage" and/or virus exclusions. For example, Arkansas, Georgia, Kansas, Maryland, North Carolina and West Virginia recently issued letters, bulletins and press releases regarding business interruption coverage in which they have explained, with varying levels of commitment, that business interruption coverage is potentially triggered only when the policyholder sustains **physical damage to insured property**, among other contingencies, and that virus and disease are typically not an insured peril *unless added by endorsement*.

Kansas, Maryland and West Virginia have taken less firm stances, issuing bulletins stating their understanding or the "typical" scope of business interruption coverage. On the other end of the spectrum, in a letter to business owners, North Carolina Insurance Commissioner Mike Causey indicated that "standard business interruption policies are not designed to provide coverage for viruses, diseases, or pandemic-related losses because of the magnitude of the potential losses." He further adopted the public policy argument that the insurance industry has been advancing since the beginning of the COVID-19 outbreak that "insurability requires that loss events are due to chance and that potential losses are not too heavily concentrated or catastrophic. This is not possible if everyone in the risk pool is subject to the same loss at the same time," also citing the massive financial burden the outbreak presents for the insurance industry generally, in addition to its usual risk exposures.

In the States, efforts to mandate business interruption coverage legislatively appear to have reached a trickle, if not a standstill. In the case of Louisiana, the State's previously-introduced legislation along these lines has been withdrawn. Similarly, the Council in the District of Columbia reportedly has abandoned plans to pursue legislation mandating such coverage.

For more information, please contact the Gfeller Laurie LLP attorney with whom you regularly communicate, or one of our COVID-19 Coordinators:

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Sincerely,

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