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COVID-19 Insurance Coverage Litigation

Since our July 29, 2020 Update, three of the business interruption actions filed near the beginning of the pandemic progressed through decisions on motions to dismiss or for summary judgment. Two of those have been wins for the insurer and one (temporarily) for the insured.

There has been a decision from the Judicial Panel on Multidistrict Litigation denying the motion to centralize all COVID-19 business interruption cases, but leaving open the question of MDL's against single insurers.

There have also been many new complaints filed seeking coverage for business interruption losses. None of the complaints have presented substantially new theories for recovery. However, there is a recurring strain of allegations that the insurers have not conducted sufficient investigations prior to denying coverage. Others seek to demonstrate that virus exclusions do not extend to a pandemic. The validity of that distinction is highly questionable.

One very unusual complaint filed in state court in New York seeks to combine business interruption claims by fifty bars and restaurants against twenty-seven insurers into a single action.

Finally, looking ahead to the non-coverage litigation likely to follow attempts to reopen, we present an analysis of the effects of pre-injury exculpatory waivers executed by individuals and provided to various organizations.

Case Activity of Special Interest

Rose's I, LLC v. Erie Ins. Exchange, Civil Case No. 2020 CA 002424 B (D.C. Super. Ct, decided Aug. 6, 2020.) The court granted summary judgment in favor of the insurer, holding no coverage existed for business interruption caused by governmental orders ("orders") for a number of prominent D.C. restaurants that purchased an "Ultrapack Plus Commercial Property Coverage" policy. The court framed the issue by writing that "at the most basic level, the parties dispute whether the closure of the restaurants due to Mayor Bowser's orders constituted a 'direct physical loss' under the policy." The court ruled for the insurer on three grounds. First, standing alone and absent intervening actions, the orders did not cause any direct changes to the properties. Second, plaintiffs presented no evidence that COVID-19 actually was present at their premises and the "orders did not have any effect on the material or tangible structure of the insured properties." Third, even if the term "loss" were construed to include "loss of use," coverage would require "direct physical intrusion" onto the properties. This was an issue of first impression in the jurisdiction. The court analogized to an earlier decision from the District of Columbia Court of Appeals which found no coverage when a restaurant was forced to close due to a curfew imposed because of riots following the assassination of Dr. Martin Luther King, Jr. *Bros., Inc. v. Liberty Mutual Fire Ins. Co.*, 268 A.2d 611 (D.C. 1970).

Diesel Barbershop, LLC, et al. v. State Farm Lloyds, Case No. 5:20-cv-00461-DAE (U.S.D.C. W.D. TX, decided Aug. 13, 2020). The court granted a motion to dismiss the complaint of a group of Barbershops seeking business interruption coverage under a Businessowners Policy. Several local and state orders had been issued. The policy required an "accidental direct physical loss." The court acknowledged that some courts have found coverage even without tangible destruction to covered property, and some have found coverage for losses associated with ammonia, E. coli, and carbon monoxide. It nonetheless found the cases requiring tangible injury to be more applicable and persuasive, noting that the Fifth Circuit requires a "distinct, demonstrable physical alteration of the property." *Hartford Ins. Co. of Midwest v. Mississippi Valley Gas Co.,* 181 F. App'x 465, 470 (5th Cir. 2006).

The policy also contained a Virus Exclusion embedded within an Anti-Concurrent Causation Clause. Even though arguments were made about the meaning and application of the Anti-Concurrent Causation language, the court found the clause to be unambiguous and enforceable. It held that the presence of COVID-19 in the county was the primary root cause of the business closure. And finally, the court found that on these facts, the policy's Civil Authority provision was not triggered.

Studio 417, Inc. v. The Cincinnati Ins. Co., Case No. 20-cv-03127-SRB (U.S.D.C., W.D. MO, decided Aug. 12, 2020) is the first ruling in the U.S. allowing an action by insureds to proceed. It concerns a claim by hair salons and restaurants for business interruption coverage under five policy provisions of all-risk property policies. It bears emphasis that this case is not a ruling on the merits, but merely the denial of a motion to dismiss. The court placed much emphasis on the plaintiffs' express allegations that their properties had, in fact, been physically contaminated by the COVID-19 virus.

The court began by stressing that the policies expressly covered "physical loss ***or*** physical damage." (Emphasis by the court.) It held that the two terms must mean different things. Neither is defined in the policy. The court thus examined the dictionary meanings of "direct," "physical" and "loss," and determined that they supported a conclusion that plaintiffs adequately alleged coverage. The key allegations were that COVID-19 "is a physical substance" that "live[s] on" and is "active on inert physical surfaces," is "emitted into the air," and that it attached to and deprived plaintiffs of their property. Again, plaintiffs expressly alleged physical contamination of their premises. Thus, the court found sufficient allegations of "physical loss" to permit the case to proceed to discovery.

The court also declined to dismiss the claim for Civil Authority coverage. It explained that it was doing so "for substantially the same reasons as discussed above." It also found that even though the restaurants could remain open for take-out services, and the order did not prohibit access to the hair salon, only operations, plaintiffs adequately alleged that access to plaintiffs' property was prohibited. The court found the policies require that civil authorities prohibit "access" but not "all access" or "any access." In the court's view, access was prohibited to such a degree as to trigger

coverage. The court went on to permit the claims to continue under Ingress and Egress Coverage and Dependent Property Coverage (again, in each instance, "substantially for the same reasons discussed above.") Finally, the court found that plaintiffs had adequately stated a claim for a covered loss under the Sue and Labor provisions. It rejected the insurer's argument that this provision is not an additional coverage, but rather the imposition of a duty on the insured to prevent further damage and record expenses.

The court concluded by reiterating its ruling was merely that plaintiffs have pled enough facts to proceed with discovery and that the insurer could reassert its arguments at the summary judgment stage.

Judicial Panel on Multidistrict Litigation Decision

We previously reported on the pending efforts to consolidate into multidistrict litigation a broad swath of cases involving claims for business interruption coverage. As noted above, the Judicial Panel on Multidistrict Litigation ("JPML") recently (August 12, 2020) denied motions to centralize all COVID-19 business interruption cases before it but left open the question of MDL's against four single insurers. The ruling addressed motions by two groups of policyholder plaintiffs, one of which sought to centralize the nation's federal business interruption cases in the Northern District of Illinois in Chicago and the other in the Eastern District of Pennsylvania in Philadelphia.

Noting the fact that the cases involve more than 100 insurers and a wide variety of different policy forms, the JPML concluded that an "industry-wide MDL in this instance will not promote a quick resolution of these matters" because the request involves "very few common questions of fact, which are outweighed by the substantial convenience and efficiency challenges posed by managing a litigation involving the entire insurance industry." More specifically, the panel explained that each case targets only a single insurer or insurance group and the cases involve "different insurance policies with different coverages, conditions, exclusions, and policy language, purchased by different businesses in different industries located in different states."

However, the JPML expressed that it may still be appropriate to create a smaller body of "single-insurer" MDLs to centralize actions as to specific insurers facing a high volume of cases, including The Hartford, Cincinnati Insurance Company, various underwriters at Lloyd's of London and Society Insurance Co. These single-insurer MDLs could be viable, it said, because cases against a single insurer are "more likely to involve insurance policies utilizing the same language, endorsements, and exclusions" and could, therefore, share common discovery and pretrial motion proceedings.

Newly Filed Complaint of Note

Abruzzo Docg Inc., et al. v. Acceptance Indemnity Insurance Co., et al., No. 514089/2020 (N.Y. Sup., Kings Co., filed Aug. 4, 2020) is a highly unusual complaint brought in State Court in Brooklyn. Approximately fifty bars and restaurants sued twenty-seven insurance companies,

purporting to share the common legal threshold question of "whether the insurers must provide coverage for direct physical loss or damage caused by the 'unprecedented executive orders'" limiting their operations. The 138-page, ornate complaint includes color photos of the restaurants and diagrams showing how their floor plans have changed. The bars and restaurants are described glowingly, as if in a travel guide. The complaint is here.

There are thirty-seven Causes of Action. Two are by all plaintiffs against all defendants, the first is for Declaratory Judgment and the second is for Unjust Enrichment. The other thirty-five are for Breach of Contract by individual plaintiffs against their respective insurers. Needless to say, the attempt to join dozens of insurers whose policies contain materially differing terms and conditions, and whose claim scenarios are unique, raises formidable questions about the propriety of the complaint. Many procedural challenges will be brought.

Pre-Injury Exculpatory Agreements and COVID-19

As states throughout the country begin permitting businesses to reopen during the COVID-19 pandemic, Congress and certain state legislatures are considering legislation to provide new liability protections for businesses. However, while legislatures debate the merits of expanded liability protections, businesses that have reopened or are considering reopening face the dilemma of whether they should ask patrons or other parties with whom they interact to execute pre-injury exculpatory agreements ("exculpatory agreements") to protect against future claims of exposure to COVID-19; and if so, whether to include such language in an existing exculpatory agreement or in a separate document.

Exculpatory agreements are employed by certain businesses, often those providing recreational services, to minimize or eliminate liability for personal injury occurring while a patron is engaged in an activity that includes certain inherent risks or dangers. The law relating to exculpatory agreements and their enforceability varies greatly from state-to-state. Certain jurisdictions hold exculpatory agreements void as a matter of public policy while others require that exculpatory agreements contain specific language or relate to a specific inherently risky or dangerous activity (*e.g.*, skiing, horseback riding or sky diving).

Businesses located in jurisdictions that generally enforce exculpatory agreements may be tempted to insert waiver language related to COVID-19 into an existing document. However, the concern with this approach is that it could dilute the overall effectiveness of the existing exculpatory agreement and create unfavorable law.

Generally, courts in jurisdictions that enforce exculpatory agreements reach their conclusions by looking to statutes, regulations and/or the common law to determine whether the exculpatory agreement is enforceable or void as against public policy. As a result of the scrutiny courts employ when determining the enforceability of an exculpatory agreement, many exculpatory agreements are narrowly tailored to encompass risks inherent to a particular activity. Courts confronted with an exculpatory agreement containing a waiver for potential exposure to COVID-19 could rule that

the risk of COVID-19 is not inherent in a particular activity and, therefore, strike the *entire* exculpatory agreement as over-reaching and unenforceable. Such a ruling could negatively impact the future enforceability of exculpatory agreements generally in that particular jurisdiction and erode previously favorable case law there.

Given these concerns, perhaps the better approach to minimizing the risk created by COVID-19 is for businesses to create a separate exculpatory agreement for COVID-19 distinct from any existing documents. A separate document not only alleviates the concerns addressed above but also alerts patrons more clearly and conspicuously to the risk posed by COVID-19 and the acknowledgment of same and/or waiver of rights relating to same, which they are being asked to sign.

For jurisdictions where exculpatory agreements are unenforceable, businesses can rely on an "acknowledgment of risks" document wherein a patron explicitly acknowledges that he or she understands that exposure to COVID-19 is a risk inherent in everyday life, as opposed to a risk inherent in a particular activity. The same principles of conspicuousness for an exculpatory agreement would also apply to an acknowledgment of risks document.

COVID-19 is a novel risk to the public and, at this time, it remains unknown how courts will address potential liability claims involving exposure. The guidance provided in this Update is a basic overview, with high-level advice, and it should not be applied in the drafting of documentation without further consideration of the specific state laws and factual circumstances involved therewith. For more information on this topic or advice on specific questions related to managing risk for your business in the pandemic, please contact one of our COVID-19 Coordinators, identified below.

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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