GFELLER LAURIE LLP
ATTORNEYS AT LAW

December 3, 2020

COVID-19 Insurance Coverage Litigation

There have been many recent decisions on motions to dismiss business income coverage claims since our last Update. With the current exception of ***JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co***., discussed below, insurers continue to prevail in the overwhelming majority of those cases with decisions based on the absence of direct physical loss or analogous coverage terms, or on the presence of virus exclusions, or both. As the decisions proliferate, there is a certain repetitiveness in the arguments and analyses. Therefore, the synopses below will address only the essential holdings and certain distinctive or otherwise interesting aspects of the decisions.

Decisions Granting Motions to Dismiss Based on Lack of Direct Physical Loss or Damage

Uncork and Create, LLC v. The Cincinnati Ins. Co., Civil Action No. 2:20-cv-00401, 2020 WL 6436948 (S.D. W. Va. Nov. 2, 2020). Plaintiff conducted art and cooking classes. In holding there was no "physical loss or physical damage," the Court ruled that "even actual presence of the virus would not be sufficient to trigger coverage . . . routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces . . ." The Complaint was dismissed.

Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co., Case No. 20-cv-03750-WHO, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020). Plaintiff operated twelve Hawaiian-themed gift shops in Hawaii. The Court construed the phrase "direct physical loss of or damage to." It distinguished the cases finding coverage for other contaminants such as asbestos, e-coli and arsenic on the ground that those contaminants were physically present on the property. There was no such presence alleged here and plaintiff's counsel admitted at argument it would not be able to plead facts that the virus was physically present. Plaintiff further made an argument of "deprivation of functionality," *i.e.*, loss of use, but the Court noted that plaintiff had not alleged "*any direct physical anything* that happened to it or at its specified properties." [Emphasis added.] Plaintiff also argued that other properties in Hawaii are in the "same tourism and supply chains" and thus, there would be coverage relating to these as "income support properties." The Court dismissed, but gave limited leave to amend, suggesting that plaintiff "may be able to allege the physical presence of coronavirus and additional facts in support of its 'supply chain' argument."

Decision Granting in Part and Denying in Part Motion to Dismiss Based on Virus Exclusion

Independence Barbershop, LLC v. Twin City Fire Ins. Co., A-20-CV-00555-JRN, 2020 WL 6572428 (W.D. Tex. Nov. 4, 2020). Plaintiff is a barbershop and grooming supply retailer. The Policy contained a multi-pronged "Fungi", Wet Rot, Dry Rot, Bacteria and Virus Endorsement,

which provided, "[w]e will not pay for any loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss: (1) . . . virus." The Court applied the exclusion to most of the Policy because it could not "in good faith hold that the SARS-CoV-2 virus is not even a *contributing* cause" to the other causes. [Emphasis by the Court.] However, a provision of the Virus Endorsement, Section B.1.f., allows for up to thirty days of coverage for business interruption if "loss or damage to property caused by . . . virus" causes a suspension of operation and if "Time Element Coverage applies." Time Element Coverage refers to coverages measured in time, including Busines Interruption and Civil Authority. The insurer argued that this only applied to a specific Form in the Policy. The Court did not find support for that argument in the Policy, so it denied the motion to dismiss the claims specifically relating to Section B.1.f. Finally, the Court declined to apply the regulatory estoppel doctrine, holding that it had been rejected by courts applying Texas law.

Decisions Granting Motion to Dismiss Based on Virus Exclusion

N&S Restaurant, LLC v. Cumberland Mut. Fire Ins. Co., Case No. 1:20-cv-05289-RBK-KMW, 2020 WL 6501722 (D.N.J. Nov. 5, 2020). Plaintiff operates a restaurant. The Policy contains a Virus Exclusion providing that the insurer "will not pay for loss or damage caused directly or indirectly by" any "Virus or Bacteria," which is any "virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." There is also an anti-concurrent causation preamble stating that "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." (This language shall be referred to throughout Update as the "Core Virus Exclusion"). The Court applied the Exclusion, emphasizing the anti-concurrent causation language. It expressly rejected New Jersey's "Appleman Rule," which applies an exclusion only if the excluded peril was the "efficient proximate cause" of the loss, thus providing coverage where any covered cause is either the first or last step in the chain of causation. The Court found the Policy was drafted to eliminate the efficient proximate cause doctrine as applied in New Jersey. The Amended Complaint was dismissed.

Mac Property Group, LLC v. Selective Fire and Cas. Ins. Co., No. L-2629-20 (N.J. Super. Ct. Law Div., Camden Cty. Nov. 5, 2020). Plaintiff operates a bakery. The Policy contained the Core Virus Exclusion, *supra.* The Court found it to be clear and unambiguous, making any expectation of coverage unreasonable. It dismissed the Complaint with prejudice.

Chattanooga Professional Baseball, LLC v. National Cas. Co., No. CV-20-01312-PHX-DLR, 2020 WL 6699480 (D. Ariz. Nov. 13, 2020). Plaintiffs are twenty-four entities associated with or providing services to nineteen Minor League Baseball teams in ten states. They all sought coverage under Policies containing a Virus Exclusion. The Court stated that it "generally reads, '[w]e will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism.'" The Court, applying the law of each of the ten states, enforced the Exclusion, rejecting the argument that a factual dispute exists as to the cause of loss because the plaintiffs

explicitly alleged the cause was the virus. A subsidiary argument that the loss was caused by Major League Baseball's failure to provide players failed because the Policies also include an exclusion for losses stemming from the "[s]uspension, lapse or cancellation" of a contract. The Court also refused to apply regulatory estoppel, calling it a "New Jersey state law defense" that had not been adopted by any of the ten states' laws applying to this case. The case was terminated.

Mattdogg, Inc. (d/b/a Pure Focus Sports) v. Philadelphia Ind. Ins. Co., Case No. l-820-20 (Super. Ct, Mercer Co., N.J. Nov.17, 2020). Plaintiff operates a health club and sought Civil Authority coverage. The Policy contained the Core Virus Exclusion. The Court denied coverage because the applicable Executive Orders were the direct result of COVID-19. The Court declined to apply regulatory estoppel because there were no allegations in support of it and in any event, it "does not void clear and unambiguous provisions or provide a basis for rescission." The Complaint was dismissed with prejudice.

Border Chicken AZ, LLC v. Nationwide Mut. Ins. Co., No. CV-20-00785-PHX-JJT, 2020 WL 6827742 (D. Ariz. Nov. 20, 2020). Plaintiff is a franchise of fried chicken and pizza franchises. Its attempt to obtain Civil Authority coverage failed because of a Virus Exclusion. The Exclusion provided: "[w]e will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area. (i.) Any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness or disease." The Court found that this language "plainly and unambiguously bars coverage." It emphasized the language "directly or indirectly" and the anti-concurrent cause language and stated that "at the very least, COVID-19 was an indirect cause of Plaintiff's loss." The Court also found that plaintiff had no basis for a "reasonable expectation" of coverage. It made no allegations of prior negotiations and relied only on the ISO Circular issued upon the introduction of the ISO Exclusion. The Court reasoned that ISO is not a party, that plaintiff did not allege it relied on or even read the Circular and in any event, the Circular makes no statements supporting any of plaintiff's arguments. The Court found no ambiguity in the Exclusion. It declined to apply regulatory estoppel because Arizona courts have not recognized the theory, plaintiff pled no facts concerning this theory and "the ISO Circular is clear that the Virus Exclusion is meant to exclude losses caused by pandemics." The Court denied leave to amend and dismissed the case.

AFM Mattress Co., LLC v. Motorists Commercial Mut. Ins. Co., Case No. 20 CV 3556 (U.S.D.C., N.D. Ill., Nov. 25, 2020). Plaintiff operated fifty-two mattress stores in two states and sought Civil Authority coverage. The Policy contained the Core Virus Exclusion and the Court pointed out it specifically applied to "all coverage under all forms and endorsements that comprise this Coverage Part or Policy." The Court applied the Exclusion, saying "governments typically don't issue shutdown orders for no reason so the underlying cause of damage matters . . . In this case, the governments issued shutdown orders in response to the virus, an excluded cause of loss." The Court also rejected that the word *any* is ambiguous, even though other cases in other contexts had held it could mean "some," "one out of many," or an "indefinite number." The Court held that

as used in this Policy, in the phrase "loss or damage caused by or resulting from any virus . . .," it "means all viruses that induce or are capable of inducing illness or disease." However, the dismissal was without prejudice, "given that plaintiff may have an alternative theory for why defendant should cover its losses, [so] amendment is not obviously futile."

Decisions Granting Motion to Dismiss Based on Lack of Direct Physical Loss or Damage *and* a Virus Exclusion

West Coast Hotel Management, LLC v. Berkshire Hathaway Guard Ins. Cos., 2:20-cv-05663-VAP-DFMx, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020). Plaintiff operates hotels. Business Income coverage was denied because "[u]nder California law, a 'detrimental economic impact alone'. . . is not compensable under a property insurance contract." There was no Civil Authority coverage because plaintiff only made conclusory allegations about the reasons for issuance of the applicable Executive Orders and damage to other properties. Most importantly, the Court enforced the Core Virus Exclusion, *supra*. The Court stated that "the Virus Exclusion is plainly stated in language free of jargon." Plaintiffs did not dispute that their losses were caused by a virus, but rather that the Exclusion is unenforceable under the reasonable expectations doctrine. The Court found the doctrine was only available in the event of an ambiguity. Plaintiff argued an ambiguity exists because "[a] pandemic is a social health crisis that afflicts entire countries and continents globally; it is much more than just a simple virus." The Court rejected this position, adopting the insurer's argument that plaintiff's position is "akin to arguing that a coverage exclusion for damage caused by fire does not apply to damage caused by a very large fire." Because amendment would be futile, the Complaint was dismissed without leave to amend.

Raymond H Nahmad D.D.S., P.A. v. Hartford Cas. Ins. Co., Case No. 1:20-cv-22833-BLOOM/Louis, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020). Plaintiff is a dentist. With respect to "direct physical loss," plaintiff took pains to be clear in its Complaint that it was not alleging the presence of the virus on insured property. The Court cited to and joined other decisions "across the country" finding no coverage where there is no physical property damage. The Policy also contained a "Fungi", Wet Rot, Dry Rot, Bacteria and Virus Endorsement, which has a Virus Exclusion and an anti-concurrent causation provision. The Court applied the Exclusion because coronavirus was part of the causal chain leading to the losses. It rejected the argument that the Exclusion was ambiguous because the term "virus" was undefined in the Policy. It dismissed the Complaint with prejudice.

Real Hospitality, LLC d/b/a Ed's Burger Joint v. Travelers Cas. Ins. Co. of America, Civil Action No. 2:20-cv-00087-KS-MTP (U.S.D.C., S.D. Miss. Nov. 4, 2020). Plaintiff operates a restaurant. It argued that the phrase "direct physical loss of" does not require tangible damage or alteration to property. The Court rejected this argument and noted plaintiff did not allege that any property was damaged or that plaintiff was permanently disposed of its property, so no coverage existed. The Court also applied the Core Virus Exclusion, *supra*. The Court held the Exclusion "unequivocally exempts" viruses and noted several references to viruses in the Complaint. The Complaint was dismissed.

Brian Handel D.M.D., P.C. v. Allstate Ins. Co., Civil Action No. 20-3198, 2020 WL 6545893 (E.D. Pa. Nov. 6, 2020). Plaintiff is a dentist. The Court applied the Third Circuit rule that "direct physical loss or damage" requires "distinct, demonstrable and physical alteration." Even contamination cases require that the functionality of the property is nearly eliminated or destroyed, or that the property is made useless or uninhabitable. The Court found the property remained inhabitable and useful, available for emergency procedures. Moreover, the Core Virus Exclusion, *supra,* unambiguously bars coverage. "There is no other way to characterize COVID-19 than as a virus which causes physical illness and distress." Finally, the Court declined to apply the regulatory estoppel doctrine because "the defendant does not take a contradictory position to the one made to the regulatory agencies." The Amended Complaint was dismissed.

Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc., 20STCV16681, (Cal. Super. Ct., L.A. Cty. Nov 9, 2020). Plaintiff operates a restaurant. The Court held that "direct physical loss" requires physical damage, not just loss of use. It further held that the Virus Exclusion (the language was not quoted) applied, citing to authority on the concept of efficient cause. The Complaint was dismissed without leave to amend.

Dime Fitness, LLC v. Markel Ins. Co., Case No. 20-CA-5467, 2020 WL 6691467 (Fla. 13th Jud. Cir., Hillsborough Cty. Nov. 10, 2020). Plaintiff operates a fitness center. The Court began its analysis by expressing sympathy for the plight of business owners, yet said it "cannot allow sympathy to cloud its review of the plain meaning of an insurance policy. Insurance companies cannot bear the burden of this crisis where, as here, the Policy does not provide coverage for purely economic losses resulting from the COVID-19 pandemic." The subsequent analysis was notably thorough. The Court found that pure economic loss did not meet the Policy definition of "covered cause of loss." The Court identified several separate reasons why Civil Authority Coverage did not apply. Finally, it applied the Core Virus Exclusion**,** *supra*. It found "the [applicable] Executive Order would not have been issued had COVID-19 not created a public health concern. The Executive Order was in direct response to the threat of COVID-19 and aimed at slowing its spread." Finally, plaintiff attempted to rely on the concurrent causation doctrine, which is that when a loss has two possible causes, one covered, one not, there is an issue for the trier of fact. The Court did not comment on whether, as between COVID-19 and the Executive Order, the latter was covered, even though it had previously ruled that Civil Authority Coverage did not apply. It simply said that "the Executive Order was issued as a result of COVID-19. Because the Executive Order was dependent upon the existence of COVID-19, the concurrent causation rule does not apply here." The Complaint was dismissed with prejudice.

DAB Dental PLLC v. Main Street Am. Protection Ins. Co., Case No. 20-CA-5504 (Fla. 13th Jud. Cir., Hillsborough Cty. Nov. 10, 2020). Plaintiff is a dentist. This decision is by the same Judge who decided ***Dime Fitness***, *supra* and it is equally thorough. In sum, the Court held "[t]he Civil Authority Provision requires direct physical loss or damage and Florida law supports a legal conclusion that *the mere presence of COVID-19 on business premises does not constitute direct physical loss or damage.*" [Emphasis added.] It also applied the Core Virus Exclusion, *supra,*

because the applicable Executive Order was issued to address a public health crisis caused by COVID-19. The Complaint was dismissed with prejudice.

Decisions Granting Motion to Dismiss Based on Lack of Direct Physical Loss and a Virus Exclusion

Goodwill Industries of Central Oklahoma, Inc., d/b/a Goodwill Career Pathways Institute v. Philadelphia Ind. Ins. Co., Case No. 5:20-cv-00511-R (U.S.D.C., W.D. Ok. Nov. 9, 2020). Plaintiff Goodwill sought Civil Authority coverage. The Policy required "direct physical loss or damage" and contained the Core Virus Exclusion, *supra*. The Court held that there could be no direct physical loss without allegations that a substance entered the plaintiff's premises or attached to its surfaces and that in any event, a showing of tangible damage was required. The Court also applied the Exclusion, rejecting the argument that it only applies in the event of "actual contamination" rather than "suspected contamination." The Court pointed to the language "any virus *capable* of inducing physical distress, illness, or disease." [Emphasis by the Court.] The motion to dismiss was granted in its entirety.

Whiskey River on Vintage, Inc., d/b/a Whiskey River on Vintage, Whiskey on Main, Inc., d/b/a Whiskey River, Founders on Main, Inc., d/b/a Founders Irish Pub v. Illinois Cas. Co., Case No. 4:20-cv-185-JAJ (U.S.D.C., S.D. Iowa, Nov. 30, 2020). Plaintiffs are restaurants or bars in Iowa. They admitted they have no knowledge of any of their insured properties being infected with COVID-19 nor were they aware of any customers or employees who contracted the virus. The Court found the language of the Business Income provision unambiguously refers to the destruction or injury of the insured property, meaning the alleged loss or destruction must be physical. It found no Civil Authority coverage because the plaintiffs failed to allege a dangerous physical condition created by damage to another property within a one-mile radius, which the Policy unambiguously requires. In dicta, the Court noted it "is skeptical that the prohibits access prong would be satisfied when the Plaintiffs were able to conduct delivery and take-out services from their premises but chose not to do so." The Policy had the Core Virus Exclusion, *supra* and anti-concurrent causation language and the Court applied it over plaintiffs' argument that the applicable governmental proclamation caused the losses rather than the Virus. It denied claims for estoppel because plaintiffs did not allege that the insurer specifically misrepresented the purpose of the Virus Exclusion to them. Nor could they prevail under the reasonable expectations doctrine because they failed to allege facts to demonstrate "that the policy language is bizarre or oppressive, that the exclusion eviscerates terms explicitly agreed to, or sufficient facts that demonstrate applying the exclusion would eliminate the dominant purpose of coverage." The Court also accepted arguments made by the insurer concerning the provisions on Extended Business Income, Food Contamination Coverage, Spoilage Coverage, the Consequential Losses Exclusion and the Acts or Decisions Exclusion. In each case, the ruling was based on insufficient allegations, with the Court noting "[R]egardless, the Virus Exclusion would preclude coverage for the reasons set forth above." This motion was brought as a motion for judgment on the pleadings under Fed.R.Civ.P. 12(c), which was granted.

Decision Denying Motion to Dismiss

JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co., Case No. A-20-816628-B (Dist. Ct., Clark County, Nev. Nov. 30, 2020). Plaintiff leases space to retail shops in Nevada. It alleges that COVID-19 spreads through infected droplets that are physical objects that attach to and cause harm to other objects based on its ability to survive on surfaces and then affect other people. It alleges that COVID-19 was present at the Mirage Casino, within one mile from plaintiff's space and thus that it was "highly likely" that it was present at plaintiff's property, thus damaging the property it leased to its tenants. The Court found these allegations sufficient to trigger the business interruption and Interruption by Civil or Military Authority provisions of the Policy. The Court also rejected the insurer's reliance on a Pollution and Contamination Exclusion which defines "POLLUTANTS or CONTAMINANTS" as "any solid, liquid, gaseous or thermal irritant or CONTAMINANT including, but not limited to, smoke, vapor, soot, fumes, acids, alkalis, chemicals, virus, waste . . . or hazardous substances . . ." The Court found that, notwithstanding the presence of the word "virus," the insurer "has not shown it is unreasonable to interpret the clause to apply only to instances of traditional environmental and industrial pollution and contamination."

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:

Robert Laurie (rlaurie@gllawgroup.com, 860-760-8405)
Melicent Thompson (mthompson@gllawgroup.com, 860-760-8446)
Vince Vitkowsky (vvitkowsky@gllawgroup.com, 212-653-8870)
Elizabeth Ahlstrand (eahlstrand@gllawgoup.com, 860-760-8420)
Elizabeth Hoff (ehoff@gllawgroup.com, 860-760-8488).

Sincerely,

Gfeller Laurie LLP