GFELLER LAURIE LLP
ATTORNEYS AT LAW

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COVID-19 Insurance Coverage and Liability Update

Maybe it's the new year and the health and fitness resolutions that typically brings, or just the prospect of Spring ahead (and the imminent start of Spring training!) that has led us to focus in this issue, in part, on recent COVID-19 litigation developments in the sports world - baseball and soccer in particular. We also provide some insights on potential COVID-19 liability claims that could emerge from youth sports activities in light of the current status of vaccine availability for those age groups.

The vast majority of decisions on claims for coverage for COVID-19 business income losses continue to find no coverage, though there are some exceptions. We identify those cases below, within broad categories of results. Given this trend, we also provide an update on efforts at the Federal level to fund COVID-19 business income losses.

Finally, the "Test Case" brought by the UK Financial Authority against various insurers for a determination of business interruption insurance coverage issues under many common insuring clauses has been decided. The Supreme Court ruled in favor of the insureds, so all insuring clauses considered will provide coverage for losses from COVID-19. The detailed judgment was over 100 pages, so we include a link to a thorough and thoughtful analysis by our long-time friends in London, the Solicitors Carter Perry Bailey.

Major and Minor League Baseball and Major League Soccer Take a Swing (and a Kick) at Coverage For COVID-19 Business Income Losses

Major League Baseball:

This case is of interest because it is one of the few cases in which the plaintiffs claim that physical *attributes* of the virus caused property damage. In many other cases, insureds have alleged that the *presence* of the virus, standing alone, was sufficient to constitute property damage under a policy. Major League Baseball ("MLB"), however, takes this analysis one step further.

Oakland Athletics Baseball Co. et al. v. AIG Spec. Ins. Co. et al., Civil Case No. RG20079003 (Cal. Super. Ct. Alameda Cnty. Oct. 16, 2020). All thirty Major League Baseball teams, the Office of the Commissioner of Baseball and other affiliated entities (collectively, "MLB") recently filed a lawsuit in California state court seeking declaratory relief and claiming breach of contract against three insurers based on their denial of MLB's claim for losses stemming from the COVID-19 pandemic. In its complaint, MLB alleges that it suffered losses during the 2020 Major League Baseball season arising from government orders that initially prevented teams from playing and, once permitted to play, prohibited fans from attending the games. Regarding the virus specifically, MLB alleges that the presence of the virus as "respiratory droplets and nuclei" on *surfaces in the various insured locations altered those surfaces and/or made it so that physical contact became*

dangerous, thus causing and continuing to cause direct physical damage to physical property and ambient air at the premises.

In addition, MLB alleges that the three All Risks policies in issue cover their business income losses, the costs of crisis management and extra expense payments MLB claims to have sustained as a result of the pandemic because the policies include coverage for "communicable disease caused by virus." Two of the policies cover actual losses and extra expenses "if an order or civil or military authority limits, restricts, prohibits partial or total access to an insured location provided such order is the direct result of physical damage of the type insured at the insured location or within ten statute miles . . . of it." The policies also provide the same coverage if ingress or egress from the insured locations is either partially or totally physically prevented.

MLB also seeks coverage under one policy's crisis management coverage, which applies when an insured location is partially or totally closed as a result of the actual or suspected existence or threat of hazardous conditions. MLB claims that the contamination exclusion on which the insurers based their denial of coverage "refers to 'virus' and to 'disease causing or illness causing agent,' but not to communicable disease, which is expressly covered by the Policies." MLB also alleges that the exclusion applies to "costs" but does not mention "losses," which it claims accounts for nearly all of the "losses" in issue as that term is used in the policies.

Minor League Baseball:

Minor League Baseball recently had several of its members' cases for COVID-19 business income coverage dismissed. In the first, below, the reviewing court held the policies' Virus Exclusion, as well as an exclusion for loss from "suspension, lapse or cancellation" of contract, barred coverage. In the second, the court concluded the teams had not alleged "direct physical loss or damage" to property and that the policies' virus exclusion also applied to bar coverage.

Chattanooga Professional Baseball LLC, et al. v. National Cas. Co., et al., No. CV-20-01312-PHX-DLR) (D. Az. 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 the policies "generally read, '[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. It rejected 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," which had not been adopted under any of the ten states' laws in issue in the case. The case was terminated.

7th Inning Stretch LLC d/b/a Everett AquaSox et al. v. Arch Insurance Co. et al., No. 2:20-cv-08161 (D.N.J Jan. 19, 2021). In a letter Order, the Court dismissed claims for COVID-19 business

income coverage by two minor league baseball teams, Everett AquaSox and Asheville Tourists. Similar claims in the lawsuit by another team, West Michigan Whitecaps, against Federal Insurance, remain pending and were not addressed in the Order. In dismissing the teams' claims, the Court, applying New Jersey law, held that the teams failed to allege "direct physical loss of or damage to property," as required to trigger business income coverage under their policies. Rather, they alleged only that shut down orders forced the cancelation of their season and resulting loss of income, due, in part, to Major League Baseball's decision not to send any players to the Minor League due to the pandemic. The Court also concluded that the policies clearly and explicitly exclude coverage for losses arising from a virus and the stay-at-home orders were issued to slow the spread of the coronavirus, "inextricably" tying the teams' losses to the virus.

Major League Soccer:

Perhaps taking a cue from the MLB suit, at least one Major League Soccer team has sued for business income coverage on the theory that there is a "direct physical damage" element to its players and employees becoming infected with COVID-19 allegedly due, in part, to their exposure to the virus at the team's stadium and practice facilities.

Keystone Sports Entertainment, LLC et al. v. Federal Insurance Company et al., No: 210100008 (Philadelphia Cnty. Ct. of Common Pl. 2021). The owners of the Philadelphia Union Major League Soccer team sued, seeking a declaratory judgment that they are entitled to coverage for COVID-19 business income loss and damages for breach of contract and bad faith. They claim that they were forced to shut down the team's stadium, Subaru Park, its practice fields and training facilities after the team suspended all league activities in March due to the pandemic. Federal denied coverage in June on the ground that there was no physical damage. Plaintiffs claim Federal did not conduct "any meaningful investigation" and never visited the insured locations.

Beyond that, they also allege that "COVID-19 has physically infested" the insured premises and that various players and employees contracted the virus (allegedly, at least in part, as a result of their exposure to it at the insured premises). They also allege that "COVID-19 made Subaru Park and the insured premises unusable in the way that they had been used before the onset of the COVID-19 pandemic." They claim their policy provides coverage for business income and other related losses caused by "direct physical loss or damage" and that their properties have suffered such direct physical loss. The policy does not contain a virus exclusion.

Given that this lawsuit alleges employee/player infection specifically in connection with the virus' alleged presence at the insured premises, we will continue to monitor this lawsuit, especially as to whether this alleged connection between the affected facilities and infected personnel is held to demonstrate the requisite "direct physical loss or damage" to property.

Risk Management of COVID-19 Exposures in Youth Sports

The promise of a COVID-19 vaccine has now become a reality for adults. However, vaccines have not yet been approved for use in children and it is unclear when a pediatric vaccine will become available. Since the majority of children will remain unvaccinated by the start of the spring sports season, for youth sports organizations and communities planning to move forward in some fashion with youth sports, there are certain risk management and litigation considerations. Litigation in the youth sports arena most likely will stem from COVID-19 transmission during practices and games and the resulting illness of an athlete and/or family members. The grounds for these claims and possible lawsuits could include failure to implement appropriate safety measures, failure to warn of the risk of exposure and/or failure to follow applicable Federal, state, and CDC guidelines. Though these claims will be very difficult to prove, they likely will become a significant part of the youth sports litigation landscape.

The Centers for Disease Control and Prevention (CDC) has provided guidance and considerations to supplement state and local health and safety regulations for communities, offering a relatively simplistic concept of the five risk levels in youth sports, all of which depend upon the risk of spread and available social distancing measures. The lowest level of risk is skill-building drills at home. The second level of risk is team practice, followed by the third level of risk of inter-team competition and the fourth level of risk of competition with teams from your area. The fifth level of risk is full competition from different areas and this is deemed the highest level of risk because it involves competitions with teams outside of the local community.

CDC guidance offers strategies that youth sports organizations and communities can implement to foster behaviors that reduce the risk of COVID-19 spread while playing team sports. CDC recommendations include the standard bearers of staying home (when sick and/or exposed), wearing a mask and social distancing. In sports, the social distancing requirement is best satisfied by choosing an outdoor setting, selecting a larger playing area and reducing team sizes. Travel, especially outside of the local community, should be limited. Athletes should be encouraged to use their own equipment and extra precautions should be taken with shared equipment, including cleaning and disinfecting between use. Coaches and athletes should promote hand hygiene and respiratory etiquette and they should be equipped with adequate supplies for such purposes. The CDC also suggests that verbal announcements be made and signs posted in highly visible locations that promote protective measures and describe how to stop the spread of germs.

Notably, CDC guidelines place responsibility *on coaches* to educate and keep track of players, maintain a safe and sanitary environment and implement the suggestions promulgated by the CDC. Nonetheless, youth sports organizations and communities also should educate parents and participants on risks of exposure and mitigation of those risks.

To avoid potential liability, youth sports organizations should consider implementing risk management techniques and protocols to educate participants and parents and to mitigate the spread of COVID-19 consistent with CDC guidelines. These should include, but not be limited to,

educating parents, guardians and athletes about COVID-19 and the youth sports organization's expectations; keeping track of athletes' activities outside of practice and games; social distancing; wearing masks; smaller team size; conducting activities outdoors; and promoting a sanitary environment.

Youth sports organizations also may consider employing specific COVID-19 exculpatory agreements that athletes and/or their families are required to execute before participating in sports and consider whether to include such language in an existing exculpatory agreement or in a separate document. Exculpatory agreements are employed by certain businesses and organizations, often those providing recreational services, to minimize or eliminate liability for personal injury occurring while an individual is engaged in an activity that includes certain inherent risks or dangers. The law relating to exculpatory agreements and their enforceability varies significantly by State. Certain jurisdictions hold exculpatory agreements void as a matter of public policy while others require exculpatory agreements to contain specific language or relate to a specific inherently risky or dangerous activity (*e.g.*, skiing, horseback riding, or sky diving). As such, prior to implementing any exculpatory agreements, it is important to review the relevant regulations, statutes and case law in a particular jurisdiction.

Legislative Developments and Federal Legislation Addressing COVID-19 Business Income Losses

As previously reported, Congress introduced legislation in the first two months of the COVID-19 outbreak and related lockdown periods designed to mandate business interruption coverage. On May 26, 2020, Carolyn Maloney (D-N.Y.), a member of the House Financial Services Committee, introduced the Pandemic Risk Insurance Act of 2020. The Act would mandate that insurers offer business interruption insurance policies to cover losses incurred due to pandemics. It would also establish a Pandemic Risk Reinsurance Program (PRRP) within the Department of the Treasury under which private insurance companies and the Federal government would share the responsibility for paying claims for covered losses. The Act would apply to any "outbreak of infectious disease or pandemic" on or after January 1, 2021 that is certified as a public health emergency.

On November 19, 2020, the House Financial Services Committee held a subcommittee hearing titled "Insuring against a Pandemic: Challenges and Solutions for Policyholders and Insurers." Witnesses included key representatives from Chubb North America, the American Property Casualty Insurance Association and global insurance broker, Marsh.

Throughout the hearing, lawmakers agreed that business interruption insurance issues continue to devastate small businesses. There were few practical resolutions proposed as it was clear that the subcommittee needed additional information prior to voting on the Act. As Representative Emanuel Cleaver (D-M.O.) candidly stated, "Aren't we just kind of blowing in the wind right now? […] This is a big deal, but if we had to vote on something today, we would be voting in

ignorance. We have no data. I just don't think that we should wade into the water without an organized system presenting data."

Still, Congresswoman Maloney hopes to make the Act a part of President Biden's first one hundred days in office. In a press release the same day as the hearing, Congresswoman Maloney speculated that the bill would "be made law in the beginning days of Joe Biden's presidency."

It is possible that the 117th Congress will agree with Representative Cleaver's assessment that additional information is critical before voting on the Act. President Biden's Administration has already begun the process of enacting sweeping legislation on various fronts, especially COVID-19-related issues. For now, H.R. 7011 remains under consideration by the House Financial Services Committee. We will continue to monitor the progress of this legislation.

Business Interruption Insurance Coverage Litigation

There has been a rapid proliferation of reported decisions on business interruption claims. Insurers continue to prevail in the overwhelming majority of the cases with decisions based on the absence of direct physical loss or analogous coverage terms or on the presence of virus exclusions, or both. For the most part the analysis is repetitive, so extended discussion of the cases would no longer be productive. We simply identify the cases within broad categories of results. In the few instances where there are noteworthy new points, we have provided essential additional commentary.

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

Graspa Consulting, Inc. v. United Nat'l Ins. Co., Case No. 20-23245-Civ-WILLIAMS/TORRES, 2020 WL 7062449 (S.D. Fla. Nov. 17, 2020).

T & E Chicago LLC v. The Cincinnati Ins. Co., Case No. 20 C 4001, 2020 WL 6801845 (N.D. Ill. Nov. 19, 2020).

Selane Products, Inc. v. Continental Cas. Co., Case No. 2:20-cv-07834-MCS-AFM, 2020 WL 7253378 (C.D. Cal. Nov. 24, 2020).

BBMS, LLC v. Continental Cas. Co., Case No. 20-0353-CV-W-BP, 2020 WL 7260035 (W.D. Mo. Nov. 30, 2020).

4431, Inc. v. Cincinnati Ins. Cos., No. 5:20-cv-04396, 2020 WL 7075318 (E.D. Pa. Dec. 3, 2020).

Promotional Headwear Int'l v. The Cincinnati Ins. Co., Case No. 20-cv-2211-JAR-GEB, 2020 WL 7078735 (D. Kan. Dec. 3, 2020), *appeal docketed*, No. 21-3000 (10th Cir. Jan. 4, 2021).

El Novillo Restaurant v. Certain Underwriters at Lloyd's, London, Case No. 1:20-cv-21525-UU, 2020 WL 7251362 (S.D. Fla. Dec. 7, 2020).

Michael Cetta, Inc. v. Admiral Ind. Co., 20 Civ. 4612 (JPC), 2020 WL 7321405 (S.D.N.Y., Dec. 11, 2020), *appeal docketed*, No. 21-57 (2d Cir. Jan. 11, 2021).

Catlin Dental, P.A. v. The Cincinnati Ind. Co., Case No. 20-CA-004555 (Fla. Cir. Ct. Lee Cty. Dec. 11, 2020).

Kirsch v. Aspen American Ins. Co., Case No. 20-11930, 2020 WL 7338570 (E.D. Mich. Dec. 14, 2020), *appeal docketed*, No. 21-1038 (6th Cir. Jan. 14, 2021).

Terry Black's Barbecue, LLC v. State Automobile Mut. Ins. Co., Case No. 1:20-cv-665-RP, 2020 WL 6537230 (W.D. Tex. Nov. 5, 2020).

10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd., Case No. 20 Civ. 4471 (LGS), 2020 WL 7360252 (S.D.N.Y. Dec. 15, 2020), *appeal docketed*, No. 21-80 (2d Cir. Jan. 13, 2021).

Prime Time Sports Grill, Inc. v. DTW 1991 Underwriting Ltd., Case No. 8:20-cv-771-T-36JSS, 2020 WL 7398646 (M.D. Fla. Dec. 17, 2020).

VStyles Inc. v. Continental Cas. Co., Case No. RIC2003415 (Cal. Super. Ct. Riverside Cty. Dec. 23, 2020).

Sun Cuisine, LLC v. Certain Underwriters at Lloyd's London, Case No. 1:20-cv-21827-GAYLES/OTAZO-REYES, 2020 WL 7699672 (S.D. Fla. Dec. 28, 2020).
Atma Beauty, Inc. v. HDI Global Specialty SE, Case No. 1:20-cv-21745-GAYLES, 2020 WL 7770398 (S.D. Fla. Dec. 30, 2020).

Jonathan Oheb MD, Inc. v. Travelers Cas. Ins. Co. of Am., Case No. 2:20-cv-08478-JWH-RAOx, 2020 WL 7769880 (C.D. Cal. Dec. 30, 2020).

Drama Camp Productions, Inc. v. Mt. Hawley Ins. Co., Case No. 1:20-CV-266-JB-MU, 2020 WL 8018579 (S.D. Ala. Dec. 30, 2020).

Bluegrass, LLC v. State Automobile Mut. Ins. Co., C.A. No. 2:20-cv-00414, 2021 WL 42050 (S.D. W. Va. Jan. 5, 2021).

KD Unlimited Inc. v. Owners Ins. Co., C.A. No. 1:20-CV-2163-TWT, 2021 WL 81660 (N.D. Ga. Jan. 5. 2021).

Decisions Granting Motion to Dismiss Based on Virus Exclusion

Natty Greene's Brewing Co., LLC v. Travelers Cas. Ins. Co. of Am., 1:20-CV-437, 2020 WL 7024882 (M.D.N.C. Nov. 30, 2020).

HealthNOW Medical Center, Inc. v. State Farm Gen. Ins. Co., Case No. 20-cv-04340-HSG, 2020 WL 7260055 (N.D. Cal. Dec. 10, 2020), *appeal docketed*, No. 21-15054 (9th Cir. Jan. 11, 2021).

Franklin EWC, Inc. v. The Hartford Financial Svcs. Grp., Inc., Case No. 20-cv-04434 JSC, 2020 WL 7342687 (N.D. Cal. Dec. 14, 2020).

LJ New Haven LLC v. AmGUARD Ins. Co., No. 3:20-cv-00751 (MPS), 2020 WL 7495622 (D. Conn. Dec. 21, 2020).

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

FAFB, LLC v. Blackboard Ins. Co., Case No. MER-L-892-20 (N.J. Super. Ct. Mercer Cty. Nov. 4, 2020) (transcript of decision only).

Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am., Case No. 2:20-cv-03342-JDW, 2020 WL 7024287 (E.D. Pa. Nov. 30, 2020).

Zwillo V, Corp. v. Lexington Ins. Co., Case No. 4:20-00339-CV-RK, 2020 WL 7137110 (W.D. Mo. Dec. 2, 2020). The virus exclusion was contained within the Pollution and Contamination Exclusion.

Palmer Holdings and Investments, Inc. v. Integrity Ins. Co., No. 4:20-cv-154-JAJ (S.D. Iowa Dec. 7, 2020), *appeal docketed*, No. 21-1040 (8th Cir. Jan. 7, 2021).

Kessler Dental Assocs., P.C. v. The Dentists Ins. Co., Case No. 2:20-cv-03376-JDW, 2020 WL 7181057 (E.D. Pa. Dec. 7, 2020).

Robert W. Fountain, Inc. v. Citizens Ins. Co. of Am., Case No. 20-cv-05441-CRB, 2020 WL 7247207 (N.D. Cal. Dec. 9, 2020), *appeal docketed*, No. 21-15053 (9th Cir. Jan. 11, 2021).

Boulevard Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co., C.A. No. 20-11771 (SDW) (LDW), 2020 WL 7338081 (D.N.J. Dec. 14, 2020), *appeal docketed*, No. 21-1061 (3d Cir. Jan. 12, 2021).

Newchops Restaurant Comcast LLC v. Admiral Ind. Co., C.A. No. 20-1949 and ***LH Dining L.L.C. v. Admiral Ins. Co.***, C.A. No. 20-1869, 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020).

1210 McGavock Street Hospitality Partners, LLC v. Admiral Ind. Co., Case No. 3:20-cv-694, 2020 WL 7641184 (M.D. Tenn. Dec. 23, 2020).

Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co., Case No. 5:20-cv-04265-BLF, 2020 WL 7696080 (N.D. Cal. Dec. 28, 2020).

Decision *Denying* Motion to Dismiss *Despite* the Presence of a Virus Exclusion

Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co., C.A. No. 2:20-cv-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020). The Court also found that "it is plausible that Plaintiffs experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders." In addition to declining to enforce the Virus Exclusion, it declined to enforce the Ordinance and Law Exclusion, the Acts or Decisions Exclusion, and the Consequential Loss Exclusion (except for the period between the voluntary closing and the Executive Orders).

Decision *Denying* Motion to Dismiss *Despite* the Presence of a Communicable Disease and Food Contamination Exclusion

Baldwin Academy, Inc. v. Markel Ins. Co., Case No. 3:20-cv-02004-H-AGS, 2020 WL 7488945 (S.D. Cal. Dec. 21, 2020).

UK Supreme Court Ruling in FSA Test Case

The Supreme Court held that most insuring cluses provided coverage for COVID-19 business interruption losses. It provided detailed analysis of each of the issues presented in a judgment of over 100 pages. The judgment is thoroughly and thoughtfully analyzed by the London Solicitors Carter Perry Bailey, and can be found here.

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 these topics or advice on specific questions related to coverage and/or 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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