March 15, 2021

COVID-19 Insurance Coverage and Liability Update

In this Update, we begin what will be an extended look at the "other" frontier in COVID-19 litigation – employer liability – and legislative efforts to limit employers' exposure. This category of COVID-19 litigation has the potential to be vast, absent enactment of exposure-limiting legislation, which some states already have in place, while the federal push for such legislation flagged in 2020.

We also discuss Massachusetts legislators' recent revisiting of their efforts early in the pandemic to legislate into existence coverage for business income losses due to COVID-19 shutdown orders and a notable development in COVID-19 legal exposure under Securities and Exchange Commission rules.

Following up on our last Update's sports theme, we report on a recent decision dismissing several Minor League Baseball teams' claims for business income coverage due to COVID-19 shutdown orders and we highlight other recent decisions of note, outside the sports industry, involving such claims.

Employer Liability Issues In The Time Of COVID-19

As employees increasingly have access to COVID-19 vaccinations, employers are entering a new phase of the pandemic: transitioning the workforce back to the workplace. With some employees vaccinated and some not yet eligible, employers must now address questions such as when employees will transition back to work, if at all, what health and safety policies employers must put in place during this transition, and the ever-looming question of *how long will this all last*? Given this transition phase underway, in this Update we provide a broad overview of some of the key employer liability issues COVID-19 presents during that transition and the types of litigation emerging against employers concerning COVID-19 health and safety in the workplace.

One year into the pandemic, there are hundreds of cases providing insight into potential areas of employer liability due to COVID-19. As recently as last month, New York Attorney General Letitia James sued Amazon, alleging "flagrant disregard" for COVID-19 health and safety requirements in the Staten Island fulfillment center and the Queens distribution center. Attorney General James began investigating Amazon as early as March 2020 after she received several complaints from current and former employees regarding Amazon's failure to comply with health and safety requirements or implement appropriate policies regarding hygiene, cleaning and social distancing. The suit includes allegations that Amazon did not properly identify or notify potentially exposed employees and retaliated against those who raised concerns about Amazon's COVID-19 practices.

Amazon disputed these allegations and filed its own suit stating, among other things, that Attorney General James does not have the authority to bring her case on behalf of the Amazon employees

or oversee Amazon's efforts to keep employees safe. Notably, in November 2020, the Eastern District of New York dismissed the same Amazon employees' claims that Amazon breached its duty to provide a safe workplace, finding that New York's Workers' Compensation Law barred the employees' claims against Amazon.

COVID-19 Workplace Exposure Claims

Workers' compensation laws traditionally limit employees' potential causes of action against employers for alleged workplace injuries. Each state handles workers' compensation differently. However, a fundamental principle applies to any such claims: employees must prove that they suffered an injury *during/in the course and scope of their employment*.

Applying this principle, courts in some jurisdictions have held that employees are limited to asserting claims against employers for workplace exposure to COVID-19 under state workers' compensation laws. See, e.g., *Palmer v. Amazon.com, Inc*., No. 20-CV-2468 (BMC), 2020 WL 6388599, at *10 (E.D.N.Y. Nov. 2, 2020)(underlying Amazon case granting motion to dismiss on the ground that workers' compensation laws barred employees' claims); *Brooks v. Corecivic of Tennessee LLC*, No. 20CV0994 DMS (JLB), 2020 WL 5294614, at *7 (S.D. Cal. Sept. 4, 2020) (finding workers' compensation laws barred claims for negligent supervision and intentional infliction of emotional distress arising from employer's failure to protect workers from COVID-19 and violation of related health and safety regulations).

Last month, this principle of workers' compensation exclusivity was tested further in the context of one spouse's claims of COVID-19 exposure due to the other spouse's workplace exposure in *Kuciemba et al v. Victory Woodworks, Inc.* No. 3:20-cv-09355. The plaintiff couple alleged that Victory Woodworks violated local and federal virus safety guidelines when it moved workers from one site to another in the San Francisco region. The company's alleged failure to take basic precautions caused Robert Kuciemba to contract the virus and unknowingly bring it home and infect his wife, according to the complaint, which states that both husband and wife required extended hospital stays and suffer from after-effects.

The case originally was filed in October 2020 in California Superior Court and was removed to U.S. District Court for the Northern District of California. On February 22, 2021, the District Court granted the defendant's motion to dismiss but afforded the plaintiffs leave to amend, finding that the plaintiff wife's alleged injury was dependent entirely on her husband's work-related infection, so the state's workers' compensation law provided the only possible remedy. The judge also dismissed the wife's public nuisance claim under San Francisco public health law, saying she did not have standing to pursue such claims.

Still, workers' compensation laws typically include certain exceptions that permit employees to initiate COVID-19 related claims against employers outside the confines of workers' compensation laws. For instance, an employee may bring a claim alleging wrongful termination against an employer outside of the workers' compensation rubric. See *Gomes v. Steere House*, No. CV 20-270-JJM-PAS, 2020 WL 6397930, at *3 (D.R.I. Nov. 2, 2020)(denying employer's motion

to dismiss where employee sufficiently pled wrongful termination and violations of Family and Medical Leave Act); *Wells v. Enter. Leasing Co. of Norfolk/Richmond, LLC*, No. 2:20-CV-305, 2020 WL 6779470, at *2 (E.D. Va. Nov. 12, 2020)(finding that the court has jurisdiction where employee claimed wrongful termination arising from his refusal to be tested for COVID-19; ultimately dismissing the case as employee failed to state a claim). Additionally, at least one court has held that an *employee* (as contrasted with an employee's spouse, as in *Kuciemba, supra)* may bring a public nuisance claim for alleged workplace exposure to COVID-19, but to succeed on that claim, the employee must show a substantial and unreasonable interference with public health and actual injury resulting from that interference. *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, 459 F. Supp. 3d 1228, 1244 (W.D. Mo. 2020)(dismissing employees' public nuisance claims as employees could not demonstrate an injury).

Insurance Coverage for Employer Liability Exposure

Courts also are considering whether insurers must defend insured employers as to employees' claims for unsafe COVID-19 conditions in the workplace. An Illinois federal judge recently ruled that an insurer must cover defense costs in an underlying case regarding two McDonald's franchisees' allegedly subpar COVID-19 safety protocols. See *McDonald's Corp. et al. v. Austin Mut. Ins. Co.,* No. 1:20-CV-05057 (N.D. Ill. Eastern Div.). In his February 22, 2021 Order (accessible here), Judge Charles P. Kocoras analyzed three key insurance policy terms bearing on the duty to defend these cases: "damages," "because of," and "bodily injury." He found that the mandatory injunction sought in the underlying complaint required damages as it requested that the McDonald's franchisees bear the monetary cost of remediating the continuous and ongoing COVID-19 exposure. Judge Kocoras further found that the franchisees met their burden of establishing that they were "on the hook for 'damages' 'because of' or 'but for'" the franchisees' employees contracting COVID-19. Lastly, Judge Kocoras also found that contracting COVID-19 is indisputably "bodily injury." Such claims for defense and indemnity coverage for employer liability exposure are likely to expand as the transition back to work continues, and we will continue to update you as new cases of note arise.

Employer Liability Shields

Both state and federal governments have proposed some relief from COVID-19 liability exposure for employers, but the clear trend is for states to press forward with such legislation individually as the effort has stalled at the federal level. In July 2020, Senator Mitch McConnell proposed the Safe To Work Act, which would require employees to show by "clear and convincing evidence" that the employer committed a "conscious, voluntary act or omission in reckless disregard" of their legal duties. Organized labor and safety advocates criticized the Act, stating that it would have the effect of diminishing employee safety measures directed to COVID-19 exposure in the workplace. Congress considered a variation of the Act for the December 2020 Coronavirus Relief bill, which included several employer liability shields. Ultimately, Congress excluded the employer liability shields from the relief bill.

On the state level, roughly a dozen states have implemented some form of employer liability shield. These shields vary significantly by state, with some states, such as Tennessee, requiring that an employee's complaint include a physician's certification that the employer caused the COVID-19 exposure. See S.B. 8002, H.B. 8001, Sec. Ext. Sess. (Tenn. 2020). Other states, such as North Carolina, enacted "limited business immunity" legislation restricting employer liability shields to "essential businesses" See S.B.704, 2019 Gen. Assemb. Sess. (N.C. 2020). The Georgia COVID-19 Pandemic Business Safety Act ("GCPBSA") protects businesses from liability if the business: (i) provides visitors with a receipt that states that all visitors waive any civil liability against the business; or (ii) posts a warning sign at the entryway stating that the business holds no liability for death or injury as a result of COVID-19 and that visitors enter at their own risk. Governor Wolf from Pennsylvania, however, recently vetoed a bill to temporarily extend civil liability protection to hospitals, nursing homes, schools, businesses, manufacturers and other businesses.

The trend continues: multiple states have signed into law new employer or business liability shields over the past month. South Dakota lawmakers passed House Bill 1046 on February 8, 2021, which prohibits suits for damages or relief alleging exposure or potential exposure to COVID-19 unless the exposure results in a COVID-19 diagnosis and the exposure is a result of *intentional exposure* with the *intent to transmit* COVID-19. On February 12, 2021, Alabama enacted a new law that shields covered businesses from liability based on "actual, alleged or feared exposure to or contraction of" COVID-19 unless a plaintiff can produce "clear and convincing evidence" that the business acted with wanton, reckless, willful or intentional conduct in failing to comply with then applicable healthcare or governmental guidance. On February 15, 2021, Indiana lawmakers signed into law Senate Bill 1, which shields some Indiana businesses from personal injury liability arising from COVID-19 damages, including damages that occur during activities the businesses manage, organize or sponsor.

We will continue to monitor the progress of employer liability COVID-19 exposure claims as well as any updated employer liability shield legislation and report on developments in future updates.

Massachusetts State Legislature Renews Efforts To Mandate COVID-19 Business Income Coverage

Early in the pandemic, many states attempted to legislate into existence business income coverage for losses related to COVID-19 shut down orders and, as reported, those efforts largely were abandoned with an alternative federal still effort underway to establish a program similar to the post-9/11 fund for such losses. However, last month, a Massachusetts Senator and Representative revisited those early efforts, each introducing companion bills (S.D. 1845 and H.D. 3170), which propose a series of rebuttable presumptions that would apply to businesses employing 50 or fewer employees that have suffered business income losses due to COVID-19 restrictions on business operations. The bills home in on the key terms in the property insurance policies involved in COVID-19 business income loss coverage litigation, such as "direct physical loss or damage," and purport to shift the burden to insurers to prove that COVID-19 losses are *not* covered under such policies. More specifically, and clearly in reaction to some of the judicial conclusions reached in

prior litigation as to such coverage, the bills would establish rebuttable presumptions directly targeted at triggering coverage including that:

- COVID-19 "was present" and caused "(i) physical loss of or (ii) physical damage" to "Covered Property" resulting in business interruption losses;
- the declaration of a public health emergency "means there is (i) physical loss of or (ii) damage" to Covered Property;
- "COVID-19 was present on property other than" the Covered Property, which prohibited access to the Covered Property, thereby causing business losses;
- due to a civil authority order, "COVID-19 caused direct physical loss of or property damage to Covered Property" and "an action of civil authority was taken in response to dangerous physical conditions resulting from the damage[s]" to Covered Property; and
- "direct physical loss of or damage to Covered Property" includes "restriction on operations" and "limiting customer density" or "permitting only distant customer interaction."

The legislation also would preclude insurers from relying on certain standard policy exclusions to deny coverage due to COVID-19-related losses, dictating, for example, that pollution, mold and animal infestation exclusions cannot be construed to include COVID-19 and further specifying that virus exclusions "shall be construed to have an exception for COVID-19." The legislation also would mandate that a policy that affords indemnity coverage for debris removal or pollutant clean up "shall be construed" to afford coverage for removal or clean up expenses incurred in connection with compliance with COVID-19 "public health emergency" requirements.

Finally, the bills also excuse insureds from compliance with notice requirements and related time limitations on such notice, on the ground that policyholders may have held off on filing claims for COVID-19 business income losses due to the wave of court decisions finding no coverage for such claims. Instead, the bills place the burden on insurers to demonstrate that they were directedly prejudiced from the insured's non-compliance with such notice provisions.

We will continue to monitor the progress of this legislation.

Minor League Baseball Posts a Loss

In our last Update, we reported on litigation instituted by Major and Minor League Baseball teams, among other professional sports teams, seeking coverage for business income losses due to COVID-19 restrictions. In the case *7th Inning Stretch LLC d/b/a Everett AquaSox et al. v. Arch Insurance Co. et al.,* No. 2:20-cv-08161, the U.S. District Court for the District of New Jersey recently ruled in favor of Arch Insurance Co., dismissing claims by the plaintiff Minor League Baseball teams against Arch for coverage for their COVID-19 related losses. The policies provided coverage for: 1) "direct physical loss to covered property at a 'covered location' caused by a covered loss;" 2) lost earnings and expenses "during the 'restoration period' when [Plaintiffs'] 'business' is necessarily wholly or partially interrupted by direct physical loss of or damage to

property at a 'covered location' . . . as a result of a covered peril;" and 3) "coverage for earnings and extra expense to include loss sustained while access to 'covered locations' or a 'dependent location' is specifically denied by an order of civil authority. This order must be a result of direct physical loss of or damage to property." The Policies also excluded coverage for any "loss, cost or expense caused by, resulting from or relating to any virus, bacterium or other microorganism that causes disease, illness or any physical distress that is capable of causing disease, illness or physical distress."

The Court held that the teams failed to allege any physical loss or damage that would trigger their policies, explaining that each of the coverage provisions the teams relied upon require "direct physical loss or damage to property," but the teams only alleged that stay-at-home orders and other government action forced the cancelation of the season and the resulting loss of income, which the Court characterized as "not enough." In addition, the Court 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.

Business Interruption Insurance Coverage Cases

There have been dozens of decisions since our last Update. The vast majority continue to favor insurers on the grounds of a lack of direct physical loss or damage, a Virus Exclusion or both. This Update will not list the decisions. It will only identify cases with unusual procedural or substantive aspects, or other special significance. As appellate decisions begin to be handed down, we will provide analytical synopses.

Insurer Prevails after Trial on Merits. The first judgment in the U.S. on COVID-19 business interruption claims following a trial on the merits was rendered on February 10, 2021. A judge in New Orleans state court entered judgment following a bench trial in *Cajun Conti LLC v. Certain Underwriters at Lloyd's London*, No. 2020-02558 (La. Civ. Dist. Ct. Orleans Parish). The policy at issue was an all-risk property policy that did not contain a virus or pandemic exclusion. The court ruled in favor of Lloyd's. The judgment did not set forth reasons for decision.

Ohio Federal District Court Certifies Direct Physical Loss Question to the Ohio Supreme Court. On the motion of Cincinnati Insurance Company, federal district court Judge Benita Y. Pearson filed a certification order with the Supreme Court of Ohio in *Neuro-Communication Svcs., Inc. v. The Cincinnati Ins. Co.*, Case No. 4:20-CV-1275, 2021 WL 274318 (N.D. Ohio Jan. 19, 2021). The issue certified was whether the insured had a direct physical loss under an all-risk property policy. Courts in Ohio have come to different results on this issue.

Certification Sought in Washington. A group of dentist and orthodontic offices has also asked a federal district court judge in the state of Washington to certify two questions to the Washington State Supreme Court. The first is whether deprivation of use as a result of a government shut-down constitutes direct physical loss. The second is whether the efficient proximate cause rule requires that a factual determination of the predominant cause be made before a virus exclusion can be

applied. The lead case is *Mark Germack DDS v. The Dentists Ins. Co.*, Case No 2:20-cv-00661-BJR, Doc. 80 (W.D. Wash.).

Pennsylvania Federal District Courts Decline Jurisdiction in Favor of State Courts. In *V&S Elmwood Lanes, Inc. v. Everest National Ins. Co.*, Case No. 2:20-cv-03444, 2021 WL 84066 (E.D. Pa. Jan. 11, 2021), a federal district court took the unusual approach of declining jurisdiction under the Declaratory Judgment Act. Noting that the issue of direct physical loss was pending in many Pennsylvania state court actions, the Court said the case could be refiled in state court. Neither party requested the court decline jurisdiction; it exercised its discretion *sua sponte*.

A month later, in *Jul-Bur Associates, Inc. v. Selective Insurance Co. of Am.*, Case No. 2:20-cv-01977, 2021 WL 515484 (E.D. Pa. Feb. 11, 2021), a federal district court reached the same decision with a strikingly similar written analysis. Noting that there was no Pennsylvania appellate court precedent on the issue of direct physical loss, the Court said the case could be refiled in state court. Again, the court exercised its discretion *sua sponte*.

Irish Pubs Prevail in Test Case Against Insurer. On February 5, 2021, the High Court of Ireland found in favor of four pub owners ("publicans") after a trial in a test case against FBD Insurance PLC over closures due to national lockdowns for COVID-19. In a 214-page judgment, the Judge ruled that the insurer should pay claims providing there was evidence of the virus within the 25-mile geographic radius set forth in the policy form. *Hyper Trust Limited Trading as The Leopardstown Inn v. FBD Ins. PLC & Aberken Ltd. Trading as Sinnotts v. FBD Ins. PLC & Inn On Hibernian Way Ltd. Trading as Lemon And Duke v. FBD Ins. PLC & Leinster Overview Concepts Ltd. Trading as Seans Bar v. FBD Ins. PLC* [2021] IEHC 78 (Ir.). (Judgment accessible here). *FBD* sold policies with similar wording to an estimated 1,300 publicans.

The SEC Imposes Penalties For Misleading Statements Regarding COVID-19 Impact

Early in 2020, the U.S. Securities and Exchange Commission issued a Public Statement (Statement accessible here) on the importance of public disclosure by companies of information concerning the effect of COVID-19 on them. On December 4, 2020, it issued a Press Release (Press Release accessible here), indicating it had levied $125,000 in civil penalties on Cheesecake Factory as part of a settlement to resolve the agency's allegations that the company had made materially false and misleading statements to investors about the impact of the COVID-19 pandemic on its business. Among other things, it made statements in its 8-K filings that its restaurants were "operating sustainably" during the pandemic, when in reality the company was "losing approximately $6 million in cash per week" and had only 16 weeks of cash remaining. This was the first such case reported by the SEC.

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:

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)
Stacey Samuel (ssamuel@gllawgroup.com, 860-760-8402)

Sincerely,

Gfeller Laurie LLP

The memorandum is for informational purposes only. It does not constitute the rendering of legal advice or opinions on specific facts or matters. The distribution of this memorandum to any person does not constitute the establishment of an attorney-client relationship.