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COVID-19 Insurance Coverage Update

In this Update, we report on the continuing rise in claims for coverage for business income losses due to COVID-19 by sports teams and entertainment venues, the "next wave" after the restaurant and bar industry's and professionals' "first wave" of such claims. We also summarize some notable recent caselaw developments within that "first wave." And finally, we report on one court's opinion discussing what courtroom conditions and/or precautions are necessary and/or appropriate for holding safe courtroom proceedings in the COVID-19 era.

Sports Teams and Venues Now Have the Baton

As reported in recent Updates, sports teams joined the fray in late 2020 and early 2021 in seeking coverage for business income losses due to COVID-19 use and occupancy restrictions. That trend continues, with Minor League Baseball continuing to rack up losses and entertainment venues now in the mix.

Minor League Baseball Strikes Out

As previously reported, in *7th Inning Stretch LLC, 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.

On March 26, 2021, the Court extended the insureds' losing streak to a Michigan team, Whitecaps Professional Baseball Corporation ("WPBC"), also a plaintiff in the case. WPBC asserted similar claims for coverage for business income losses due to the Michigan Governor's COVID-19 shut down orders, this time against another insurer: Federal Insurance Company. The policy provides coverage for: 1) direct physical loss or damage to: building or personal property, caused by or resulting from a peril not otherwise excluded; 2) lost earnings and expenses incurred "due to the actual impairment of . . . operations . . . during the period of restoration" provided that impairment is "caused by or result[s] from direct physical loss or damage by a covered peril to a property;" and 3) lost earnings and expenses incurred by "the prohibition of access to . . . premises . . . or a dependent business premises, by a civil authority" where that prohibition of access is "the direct result of direct physical loss or damage to property away from such premises or such dependent business premises by a covered peril."

The Court granted Federal's motion for judgment on the pleadings, finding that the team had "failed to meet its burden to show that its claim falls 'within the basic terms of the [Policy].'" The Court held that the policy unambiguously limits its coverage to physical loss or damage to Plaintiff's commercial property, requiring "direct physical loss of or damage to property" to trigger coverage. The Court concluded that WPBC had not alleged any facts that support a showing that its property was physically damaged, instead only pleading that the stay at home order and resultant actions by the government and others forced the cessation of the minor league baseball season and

caused WPBC to lose income and incur expenses, which, the Court explained, "is not enough." The Court also dismissed as "insufficient" Plaintiff's general statements that it was "statistically certain" that the COVID-19 virus was "present" on its property "for some period of time since their closures," explaining, "[e]ven if true, the presence of a virus that harms humans but does not physically alter structures does not constitute coverable property loss or damage." In a lengthy footnote, the Court pointed out that the Court is "not alone in this finding, as numerous other federal courts have reached the same conclusion in suits involving similar policy terms," citing to a long list of cases, many previously reported on here, now constituting the solid and growing majority view of no coverage under similar policy language and facts.

Basketball

The Lakers also have sued Federal in the U.S. District Court for the Central District of California for breach of contract over denial of the team's claim for business income losses at the Staples Center stemming from COVID-19 and accompanying government shutdowns of large public gatherings. Perhaps taking a cue from Major League Baseball in the *Keystone Sports Entertainment, LLC et al. v. Federal Insurance Company et al.* matter, the team claims the virus' presence in its facilities is due, at least in part, to about a dozen COVID-positive pro athletes frequenting the building in March 2020. The Lakers claim they suffered tens of millions of dollars in lost revenue from ticket sales, media rights, sponsorships and other sources of revenue due to the pandemic. The Policy includes coverage for "business income and extra expense" because of physical loss or damage to property and civil authority coverage, but does not contain a virus exclusion.

Venue Losses

Madison Square Garden, Caesars, the owners of the Sacramento Kings and sports teams, including the Philadelphia Eagles, also recently have instituted lawsuits seeking coverage for losses due to COVID-19 restrictions on crowd gatherings and/or use of sports and entertainment venues more generally. These cases stand out, in part, due to the different policy language in issue compared to the standard language involved in most of the previously reported cases. More specifically, many of these suits allege the insureds are entitled to coverage under "all risk" policies that they claim provide civil authority, ingress or egress, extra expense, and *time element coverage*, do not include a virus exclusion, but *may contain either contamination coverage or a contamination exclusion*. We will continue to monitor cases involving this policy language and report on relevant rulings and outcomes in future Updates.

Business Interruption and Related-Insurance Coverage Decisions

Once again, there have been dozens of decisions since our last Update. And, once again, 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 aspects such as coverages or arguments that have not been repeatedly addressed. As appellate decisions begin to be handed down, future Updates will provide analytical synopses.

Insurer's Motion to Dismiss Granted under Restaurant Recovery Policy. In ***Egg and I, LLC v. U.S. Specialty Ins. Co.***, Case No. 2:20-cv-00747-KJD-DJA, 2021 WL 769658 (D. Nev. Feb. 25, 2021) *appeal docketed*, No. 21-15545 (9th Cir. Mar. 26, 2021), the Insureds sought coverage under a Restaurant Recovery Insurance Policy. Coverage was provided for certain financial losses for "Accidental Contamination," "Malicious Tampering,' 'Product Extortion" and "Adverse Publicity." The Insureds argued that the government-mandated closure of their dining rooms triggered coverage. The Court disagreed. It found that the Insured Product consists of the food and ingredients, *i.e.*, ingestible items, and not to the actual service of food to onsite customers. Interestingly, the Policy had an express exclusion for Avian Flu but not for other types of flu. The Insured argued that the lack of an exclusion for other similar viruses, such as COVID-19, meant there was coverage for them. It asked the Court to take judicial notice that Avian flu does not spread through food. The Court declined to do so because the Insurers provided evidence that Avian flu can spread through undercooked poultry products including eggs with runny yokes. Thus, to the Court, reasonable doubt exists, judicial notice could not be taken and the argument for coverage failed.

Insurer's Motion to Dismiss Granted Despite Food Contamination Provision.
In ***Nashville Underground, LLC v. AMCO Ins. Co.***, No. 3:20-cv-00426, 2021 WL 826754 (M.D. Tenn. Mar. 4, 2021), a property policy contained a Food Contamination Endorsement. It provided coverage if the Insured restaurant was shut down by a governmental authority as a result of "the discovery or suspicion" of "an outbreak of . . . food related illness of one or more persons arising out of . . . [f]ood which has been contaminated by virus . . . transmitted through one or more of [its] employees." The Court parsed the Policy language very closely, holding that it was written in the "past tense or present perfect tense." The Court ruled that the provision applied only if there had been a suspicion of one or more people "actually having become ill," but not a suspicion that an illness may occur in the future. That is, there had to be a confirmed case giving rise to a suspicion of possible future cases. But a forward-looking closure because of a fear that there *might* be an outbreak would not give rise to coverage.

Insurer's Motion to Dismiss Granted because of Acts or Decisions Exclusion. In ***Florexpo LLC v. Travelers Prop. Cas. Co. of Am.***, Case No.: 20-CV-1024 JLS (DEB), 2021 WL 857004 (S.D. Cal. Mar. 8, 2021), the Insureds were importers and distributors of fresh-cut flowers from South America. They sought coverage under an all perils Policy form because between March 16 and 22, 2020, governmental authorities prevented them from entering two warehouses containing their flower stock, which led to the total loss of the stock at the locations. (Although the opinion does not elaborate on the orders, presumably they were among the general severe lockdown and shelter in place orders imposed in various California locations during that time period.) The Court found that even though the losses would otherwise have been covered as direct physical loss or damage, they were excluded. The Exclusion applied to "acts or decisions . . . of any person, group, organization or governmental body." The Court found the governmental action was the direct

cause of the loss and contrary to the Insureds' argument, there was no requirement that the governmental action be negligent.

Dentist Wins Summary Judgment Finding Business Interruption Coverage.
Timothy Ungarean v. CNA, Case No. GD-20-006544 (Ct. Com. Pl., Allegheny Cty. Pa. Mar. 22, 2021) is unusual on several grounds. First, the Court found that the loss of use of property constituted "direct physical loss or damage," which is a rare finding. Next, the decision came on a motion for summary judgment, increasing the likelihood of reaching the Pennsylvania Supreme Court early. Pennsylvania jurisprudence is widely inconsistent on COVID-19 issues, so guidance would be especially useful.

Cross-Motions for Judgment on the Pleadings Denied Because Exclusions for Contamination and Loss of Market or Loss of Use are Ambiguous.
Thor Equities, LLC v. Factory Mutual Ins. Co., Case No. 1:20-cv-03380-AT 2021 WL 1226983 (S.D.N.Y. Mar. 31, 2021), involved an unusual Contamination Exclusion in a property Policy. The Insured, a large commercial landlord, seeks recovery for loss of rents. The Policy, with limits of $750 million, was issued on March 13, 2020, a few days before governmental stay-at-home orders began to be promulgated across the country and coverage was effective March 15. The Policy granted additional coverages for communicable disease response and interruption by communicable disease, which together had a $1 million aggregate sublimit. But it also had a "Contamination Exclusion" and a "Loss of Market or Loss of Use Exclusion." The full scope and effect of all potentially-applicable coverage provisions were not before the Court on the motions for judgment on the pleadings. Only the Contamination Exclusion and Loss of Market or Loss of Use Exclusion were.

The Policy defined Contamination as "any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen, pathogenic organism, bacteria, ***virus***, disease causing or illness causing agent, fungi, mold, or mildew." The Contamination Exclusion referred to "any cost due to **contamination** including the inability to use or occupy property." The Insured argued that by referring only to *cost* due to contamination, the provision does not bar coverage for *loss* due to contamination. The Insurer argued that the mention of "inability to use or occupy property" would exclude losses of rental income. The Court found the provision ambiguous. As to the Loss of Market or Loss of Use Exclusion, the Court concluded that "loss of use" could mean lack of access. But the Court concluded that the record before it was not sufficient to make a determination at this point.

Courts Split on COVID-19 Courtroom Security

Many courts across the nation have resumed trials with security measures to limit the spread of COVID-19. A prominent feature is plexiglass separating most people – witnesses, jurors, counsel, and others. But not every court agrees. A federal court in Hartford, Connecticut announced that it will hold a jury trial in October in a class action concerning an alleged $9 million cryptocurrency Ponzi scheme. *Audet v. Fraser*, No. 3:16-cv-00940 (MPS) (D. Conn.). After taking advice from

experts, the judge accepted the view that plexiglass interferes with ventilation, which is the top priority for safety. There must be the maximum possible airflow. Thus, the only plexiglass in the courtroom will be around the witness box, and only the witness will be allowed to unmask. There will be an air-cleaning filter in the witness box. Everyone else will be required to wear masks, regardless of vaccination status.

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:

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Sincerely,

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