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**May 18, 2021**

# COVID-19 Insurance Coverage and Liability Update

In this Update, we report on the growing body of caselaw involving Factory Mutual Insurance Company's and Affiliated FM's "all risk" policies. As noted in our April 2021 Update, lawsuits are emerging involving claims under these types of policies, which provide civil authority, ingress or egress, extra expense and time element coverage and do not include a virus exclusion, but may contain either contamination coverage and/or a contamination exclusion. As reported below, the decisions rendered to date construing this policy language in the context of claims for COVID-19 business income losses have not been uniformly favorable to FM and there is no clear majority view to date.

Once again, there have been many decisions since our last Update on standard policies for COVID-19 business income loss claims. 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 only identify decisions with unusual aspects such as coverage language or arguments that have not been repeatedly addressed and other significant developments. Also, appeals from some of the earlier decisions involving that standard language have begun to proceed: the Eighth Circuit was the first Federal Court of Appeals to hear oral argument on an appeal from a trial court order in favor of Cincinnati Insurance, as discussed below.

Finally, we report on one of the less-anticipated COVID-19 risks, losses in connection with hot tub use, and on the latest State law establishing a COVID-19 liability shield for businesses.

## Factory Mutual Insurance Company's/Affiliated FM's All Risk Policies

In the last Update, we noted that a new line of cases was developing involving "all risk" policies, in particular, Factory Mutual Insurance Company ("FM") and Affiliated FM policies, which contain notably different language than the policies typically involved in the 2020 and early 2021 litigation concerning claims for COVID-19-related business income losses. Among other arguments presented in these cases, FM and Affiliated FM have maintained that the policies' contamination coverages are "exceptions" to the policies' Contamination Exclusion, with the exclusion precluding coverage for communicable disease loss under other policy coverages. Courts have reached varied conclusions.

In *Mohawk Gaming Enterprises, LLC v. Affiliated FM Insurance Co.*, Docket No. 8:20-CV-701, 2021 WL 1419782 (N.D.N.Y. Apr. 15, 2021), the Court entered judgment for Affiliated FM on all claims, ruling that the Saint Regis Mohawk Tribe, which operates Mohawk Gaming Enterprises, LLC on reservation land in New York, but which closed its doors in March 2020 after a COVID-19 case was reported at a nearby college, cannot recover under its FM Global unit policy's business income coverage. Mohawk asserted claims for breach of contract and fraud and moved for partial summary judgment on the question of whether the policy's "contamination exclusion" barred coverage for the business income lost at the casino. Affiliated FM opposed and cross-moved for

judgment on the pleadings based on its contention that the tribe's closure order did not trigger coverage under the policy's "civil authority provision."

Notable are the policy provisions affording coverage for "Property Damage" and "Business Interruption" that is caused by "Communicable Disease." More specifically, these provisions afford coverage for business income losses as well as the "the reasonable and necessary costs" incurred to cleanup, remove and dispose of the "presence of communicable disease from insured property" if a described location owned, leased or rented by the Insured *has the actual not suspected* presence of communicable disease and access to the location is limited, restricted or prohibited by: a) An order of an authorized governmental agency regulating such presence of communicable disease; or b) A decision of an Officer of the Insured as a result of such presence of communicable disease. "Communicable disease" is defined as disease that is "transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges."

Affiliated FM argued that this Communicable Disease coverage is a limited exception to the policy's broader Contamination Exclusion which excludes "[c]ontamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy." 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 or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew."

The Court held that the "plain language" of the Communicable Disease provisions requires the "*actual not suspected* presence of communicable disease" at a "described location" and concluded that Mohawk had not alleged any actual exposure at the college, at the casino or at another "described location."

Beyond that, the Court also concluded that Mohawk's claim for coverage was grounded in the policy's Civil Authority provision and therefore, "the initial burden is on [Mohawk] to allege facts that would plausibly establish that the business interruption it suffered is 'the direct result of physical damage of the type insured,'" either at the casino or at the college. The Court found that Mohawk failed to allege any such physical damage, which the Court held requires that "the damage actually be tangible in nature" and adopted other courts' view that "the mere presence or spread of the novel coronavirus is insufficient to trigger coverage when the policy's language requires physical loss or damage." *See also Ralph Lauren Corporation v. Factory Mutual Insurance Company*, No. CV2010167SDWLDW, 2021 WL 1904739 (D.N.J. May 12, 2021)(no coverage for pandemic-related losses where no specific allegations of physical loss or damage to properties and alleged presence of virus in or around Ralph Lauren's stores did not equate to actual or imminent physical loss or damage; Ralph Lauren did not allege that any of its on-site customers or employees had COVID-19 and provided no other reason to conclude that COVID-19 was present at its locations; even if adequately pled, the policy's Contamination Exclusion barred coverage).

FM hasn't prevailed across the board. In *Cinemark Holdings, Inc. v. Factory Mutual Insurance Company*, No. 4:21-CV-00011, 2021 WL 1851030 (E.D. Tex. May 5, 2021), a Federal judge denied FM's motion for judgment on the pleadings, holding that Cinemark adequately pled claims for coverage for business income losses by asserting that COVID-19 damages property by *changing the content of the air* and therefore, the alleged business income losses potentially are covered under the policy's communicable disease provision. The Court distinguished Cinemark's allegations from those in other suits in which policyholders alleged that COVID-19 only caused the inability to *use* the property, not that the virus *entered* the property and therefore, failed to meet the requirement, under the standard policy language, that there be direct physical loss or damage.

In contrast, the judge wrote that Cinemark's policy expressly covers loss and damage caused by "communicable disease" and Cinemark alleged a different harm in which the virus changes the content of the air at its theaters. Cinemark specifically alleged that over 1,700 Cinemark employees were either positive for the coronavirus, exposed to it or showed signs of COVID-19, which forced the closure of the theaters and losses. *See also Thor Equities LLC v. Factory Mut. Ins. Co.*, No. 1:20-cv-03380 (S.D.N.Y. Mar. 31, 2021)(denying FM summary judgment, concluding that the policy's Contamination Exclusion and "Loss of Market or Loss of Use Exclusion" did not bar coverage for commercial landlord's loss of rents claim; also finding the Contamination Exclusion ambiguous given Thor's plausible argument that by referring only to *cost* due to contamination, the provision does not bar coverage for *loss* due to contamination, and FM's equally plausible position that the policy's mention of "inability to use or occupy property" would exclude losses of rental income; as to the Loss of Market or Loss of Use Exclusion, the Court concluded that "loss of use" could mean lack of access but that the record before it was insufficient to make a determination on that issue).

***The Philadelphia Eagles' Suit Against FM Remains Aloft***

The FM/Affiliated FM policy language also is the focus of a pending suit by the Philadelphia Eagles against FM, *Philadelphia Eagles Limited Partnership v. Factor Mutual Insurance Company*, Civ. Action No. 2:21-cv-01776-MMB (E.D. Pa.). Originally filed in State court, FM successfully removed it to Federal court. The team argued that the policy's "time element" coverage should be triggered and that FM owes coverage for COVID-19 business income losses but FM denied coverage based upon the policy's "Contamination Exclusion." The team argued that the exclusion failed to define terms such as "communicable disease" and, as in *Thor*, further argued that the "Contamination Exclusion" bars coverage only for contamination and any direct *costs* rather than *loss* or damage.

On April 22, 2021, FM moved to dismiss the complaint arguing that the definition of contamination and its references to "virus," "pathogen" and "disease causing or illness causing agent" includes COVID-19 and that government orders that restrict or reduce property usage are issued to help curb the spread of COVID-19, not because of physical loss or damage. FM further argued that loss of use or access to an insured property does not constitute a physical loss or damage and that a "loss of use" exclusion within the policy bars the team's claims.

On May 1, 2021, the Eagles moved to remand the case to State court on the ground that there is no federal question but there are novel insurance law issues presented and therefore, the case should be decided by a State court where numerous similar COVID-19 insurance disputes are pending. Both the team and FM have agreed that U.S. District Judge Michael M. Baylson should address the remand motion before the motion to dismiss. We will report further on this case in future Update.

## Business Interruption and Related Insurance Coverage Decisions

Once again, there have been many 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 identify all the decisions. It will only identify decisions with unusual aspects such as coverages or arguments that have not been repeatedly addressed, and other significant developments. As appellate decisions begin to be handed down, future Updates will provide analytical synopses.

**Ohio Supreme Court Accepts Certified Question on Direct Physical Loss.** As reported in our March 15 Update, Ohio Federal District Court Judge Benita Y. Pearson filed a certification order with the Supreme Court of Ohio in *Neuro-Communications Services, Inc., et al. v. The Cincinnati Ins. Co., et al.*, No. 4:20-CV-1275, 2021 WL 274318 (N.D. Ohio Jan. 19, 2021. On April 14, 2021, the Supreme Court accepted certification of the following question: "Does the general presence in the Community, or in surfaces at a premises, of a novel coronavirus known as SARS-CoV-2, constitute direct physical loss or damage to property; or does the presence on a premises of a person infected with COVID-19 constitute direct physical loss or damage to property at that premises?" *See* 2021-Ohio-1202, 162 Ohio St. 3d 1427, 166 N.E.3d 29. Briefing is to begin within 40 days of the date of certification.

**American Property Casualty Insurance Association and National Association of Mutual Insurance Companies File Amicus Briefs.** Two national insurance company trade groups filed amicus curiae briefs in *TJBC Inc. v. The Cincinnati Ins. Co.*, Case. No 21-1203, U.S. Court of Appeals for the Seventh Circuit. The groups argued that all-risk policies do not cover pure economic loss, that state closure orders did not cause physical loss or damage, and that forcing insurers to cover business interruption losses would "subject insurers to overwhelming claim payment liability that would threaten their solvency."

**Both the Organic Pathogen Exclusion and the Virus Exclusion Applied to Dismiss Claims.** The overwhelming majority of cases involving a Virus Exclusion apply it to dismiss business interruption claims. Less attention has been placed on the Organic Pathogen Exclusion present in some policies. Such provisions generally state that the insurer "will not pay for loss or damage caused directly or indirectly by" among other things, the "[p]resence, growth, proliferation, spread or any activity of 'organic pathogens[,]'" including viruses. Moreover, "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence

to the loss." The Court in *L&L Logistics and Warehousing Inc. dba L&L Trucking v. Evanston Ins. Co.*, No. 3:20-CV-324, 2021 WL 1396280 (E.D. Va. Apr. 13, 2021) construed this provision as operating to remove "organic pathogens" from the definition of "covered cause of loss." The policy also contained a standard Virus Exclusion. The Court found that both exclusions were unambiguous and clearly applied to exclude coverage. It also rejected the insured's argument that the exclusions did not expressly refer to pandemics. The Court stated that a pandemic is a disease, here a virus, "that has affected a lot of people in a lot of places" and nothing in either Exclusion suggests it becomes "inoperative when a virus outbreak crosses some undisclosed bright line and becomes a 'pandemic.'"

**Communicable Disease Coverage Extension Applied to Allow Claim to Continue.** The policy in *Treo Salon, Inc. v. West Bend Ins. Co.*, No. 20-CV-1155-SPM, 2021 WL 1854568 (S.D. Ill. May 10, 2021) contained an endorsement for Communicable Disease Business Income and Extra Expense Coverage. It provides coverage for losses sustained as a result of a governmental shutdown or suspension of operations "due to an outbreak of a communicable disease … at the insured premises." The only close issue was whether the outbreak was *at* the insured premises. The Court asked "[H]ow can West Bend or anyone else be so certain that COVID-19 was not on Treo's premises?" Noting that it lacked a developed evidentiary record and briefing, the Court concluded that the insured had sufficiently pled a cause of action and plausibly alleged that coverage exists, so it allowed the case to continue. The Court said any disputed issues may be better suited for summary judgment after further case development.

**Insurers' Arguments on Household Disinfectants Accepted by Courts.** One of the arguments insurers are including in motions to dismiss is that the definition of "repairs" in policies does not apply to buildings that can be disinfected by using household cleaners, so there is no physical damage. This argument has been included among the grounds for dismissal in various courts. *See, e.g., Ascent Hospitality Mgmt. Co., LLC v. Employers Ins. Co. of Wausau, et al.*, No. 2:20-CV-770-GMB, 2021 WL 256634 (N.D. Ala. Jan. 26, 2021)*; Dukes Clothing, LLC. v. The Cincinnati Ins. Co.*, No. 7:20-CV-860-GMB, 2021 WL 1791488 (N.D. Ala. May 5, 2021); and *Barbizon School of San Francisco, Inc., et al. v. Sentinel Ins. Co. Ltd*, No. 20-CV-08578-TSH, 2021 WL 1222161 (N.D. Cal. Mar. 31, 2021).

**Availability of Limited Restaurant Services Referred to by Courts in Denying Business Interruption Cases.** In recent cases dismissing business interruption claims on various grounds, courts have found one of the factors to be that a restaurant was able to be open for certain services. For example, in *Rye Ridge Corp., et al., v. The Cincinnati Ins. Co.*, No. 20 CIV. 7132 (LGS), 2021 WL 1600475 (S.D.N.Y. Apr. 23, 2021), the Court referred to takeout, delivery and limited outdoor seating, and concluded that civil authority coverage was not available because the insureds were not denied access to their premises. In *Lansdale 329 Prop, LLC et al. v. Hartford Underwriters Ins. Co.*, No. CV 20-2034, 2021 WL 1667424 (E.D. Pa. Apr. 28, 2021), the Court referred to takeout, delivery and drive-through services, and concluded that closure orders did not render the properties uninhabitable or unusable for their intended purposes.

## Here Come The Appeals

The Eighth Circuit is the first Federal Court of Appeals to consider whether COVID-19 closures trigger business interruption insurance. Before it is the matter *Oral Surgeons PC v. The Cincinnati Insurance Co*. No. 20-3211, in which an Iowa dental clinic has appealed from a trial court order concluding that Cincinnati Insurance is not obligated to provide coverage for the clinic's pandemic-related losses. Oral Surgeons temporarily ceased all non-emergency procedures because of a Statewide stay-at-home order issued by Iowa's governor in March 2020, along with related guidance from the State's dental board. Oral Surgeons made a claim for its lost business income under its Cincinnati "all-risk" property policy (which did not include a Virus Exclusion). Cincinnati declined coverage. Oral Surgeons originally filed suit in State court and Cincinnati removed to Federal court.

Oral Surgeons asserted that its losses fall within policy language granting coverage for business income lost due to a suspension of operations attributable to a direct loss to its property. Cincinnati moved to dismiss the suit on the ground that the policy's terms, taken together, only covered business interruption losses tied to tangible physical damage to Oral Surgeons' property, which did not occur.

In September 2020, U.S. District Judge Charles Wolle issued an order granting Cincinnati's motion, opining that Oral Surgeons had not claimed it suffered any physical or accidental loss. Oral Surgeons appealed to the Eighth Circuit and the Court heard argument on April 14, 2021. In its briefing to the Eighth Circuit, Oral Surgeons argued that nothing in the policy language supports Cincinnati's position that a covered loss must involve tangible physical damage, claiming that the policy defines loss to include either accidental physical loss or accidental physical damage and that as a result, loss and damage must be two distinct concepts, with the loss prong encompassing a loss of the ability to use a property for business purposes. Alternatively, Oral Surgeons argued that the policy language is ambiguous on this point.

Cincinnati argued that the District Court decision gave full effect to all of the relevant terms in Oral Surgeons' policy, particularly the word "physical" in the definition of loss, claiming that the policy is designed to cover losses due to physical events such as a "fire or storm." Cincinnati contends that the policy language is unambiguous and must be enforced as written.

Amicus briefs were filed by the American Property Casualty Insurance Association, the National Association of Mutual Insurance and the Restaurant Law Center.

## Recent Kentucky Liability Shield Legislation

Kentucky's governor recently allowed a pending bill (Senate Bill 5) designed to protect an array of businesses from COVID-19-related lawsuits to become law, but with express reservations about the law's ability to withstand constitutional challenges in the courts. The law protects businesses from lawsuits in which the plaintiffs claim someone contracted COVID-19 while at the place of

business, so long as the business tried to follow guidelines, but no such protections apply if the business engaged in practices deemed grossly negligent or willful or intentional misconduct.

## An Unanticipated Risk – Hot Tub Losses

COVID-19 has led to losses in many lines of business and unanticipated risks have emerged. For example, the U.K. insurer Aviva reported a 188% year-on-year increase in 2020 under homeowners policies for accidental damage relating to hot tubs. Claims include damages to the hot tubs themselves and to objects dropped into them. Aviva attributes this in part to the COVID-19 lockdown, which encouraged people remaining at home to use their tubs more or to purchase tubs. Aviva issued a guidance to homeowners on how to avoid hot tub incidents.

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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