GFELLER LAURIE LLP
ATTORNEYS AT LAW

July 19, 2021

COVID-19 Insurance Coverage and Liability Update

In this Update, we will address the first known decision from an appellate court on business interruption coverage, from the U.S. Court of Appeals for the Eighth Circuit. In addition, there have been many additional recent lower court decisions; 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 address all the decisions. It will only address those with unusual aspects, such as coverages or arguments that have not been repeatedly addressed.

We also feature a section on the continuing rise in claims for coverage for business income losses due to COVID-19 by the fashion industry, the newest "wave" of such claims.

Update on Business Interruption Decisions Generally

First Appellate Decision

Eighth Circuit Gives Insurers First Appellate Win, based on Lack of Accidental Physical Loss or Accidental Physical Damage. In ***Oral Surgeons, P.C. v. The Cincinnati Ins. Co.,*** No. 20-3211, 2021 WL 2753874 (8th Cir., July 2, 2021), a group of oral and maxillofacial surgeons stopped performing non-emergency procedures after government orders imposed restrictions on dental practices. They sought coverage for lost business income and certain extra expense due to the suspension of operations "caused by direct 'loss' to property." The Policy defined "loss" as "accidental physical loss or accidental physical damage." Applying Iowa law, the Court construed this language to mean "there must be some physicality to the loss or damage of property – *e.g.,* a physical alteration, physical contamination, or physical destruction." Plaintiff did not allege any of these, and its claims were dismissed. No other issues were addressed. The Policy did not have a Virus Exclusion.

Other Cases of Note

Court Requires Disclosure of Underwriting Information, Claims Information, and Representations to State Regulators. The Court gave extremely broad scope to discovery in ***Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.,*** Civil Action No. 4:21-CV-00011, 2021 WL 2662178 (E.D. Tex. June 29, 2021). Cinemark is the third-largest movie theatre circuit in the U.S. and is in litigation with Factory Mutual about the coverage afforded by various provisions, including a "Communicable Disease Response" section and an "Interruption by Communicable Disease" section. The Court ordered production of "six categories of requested information" which it found "relevant because they relate to the central insurance coverage dispute." These were as follows: the underwriting and drafting history of the Policy; the Insurer's investigation and handling of the claim; governing procedure manuals; the Insurer's representations to state regulators about the meaning of the Policy; the Insurer's understanding of how COVID-19 affects property; and information about other COVID-19 claims under the same policy wording.

COVID-19 Virus Is Included in the Term "Pathogen." The Court granted an insurer's Motion for Judgment on the Pleadings in ***Till Metro Entertainment, d/b/a the Vanguard, individually and on behalf of others similarly situated v. Covington Specialty Ins. Co.,*** Case. No 20-CV-255, 2021 WL 2649479 (N.D. Ok. June 28, 2021). Applying Oklahoma law, the Court first found there was no direct physical loss, and hence no business income or civil authority coverage. It then went on to construe an "Exclusion of Pathogenic or Poisonous Biological or Chemical Materials." The insured argued that a reasonable consumer would not understand the term "pathogenic material" to include a virus like COVID-19. The Court disagreed. It referred to the Merriam-Webster Dictionary definition of "pathogenic" as "causing or capable of causing disease," and concluded "COVID-19 fits easily within this definition."

An "Explosive Cough or Sneeze" and "Falling Skin or Droplets" Do Not Give Rise to Coverage. Of the many creative arguments plaintiffs have advanced in these cases, very few fail the ***red-face test*** (this is a term of art among advocates). Two that failed the test were made in ***The Kirkland Group, Inc. v. Sentinel Ins. Co. Ltd., d/b/a The Hartford,*** Civil Action No. 3:20-cv-496, 2021 WL 2772561 (S.D. Miss. June 29, 2021). The Policy had a "Limited Fungi Bacteria or Virus Coverage Endorsement." It provided limited coverage for a virus with respect to removal and replacement, including subsequent testing. The coverage only applied when the virus resulted from either a "Specified Cause of Loss" or equipment breakdown.

"Specified Cause of Loss" was defined as: "fire; lightning; ***explosion****;* windstorm or hail; smoke; aircraft or vehicle; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; ***falling objects****;* weight of snow, ice or sleet; water damage" *(emphasis added).* The Insured argued that the Virus followed an "explosion" or "falling objects." Specifically, it argued that "a virus enters property or causes damage" through "an explosion, such as an explosive cough or sneeze" or "falling objects, such as shedding virus from skin or through respiratory droplets." Applying Mississippi law, the Court rejected this argument, calling it "simply unreasonable," and granted the insurer's motion to dismiss.

Fashion Industry Hits the Runway

Like other industries, the fashion industry claims to have experienced economic havoc due to the COVID-19-induced whole or partial cessation of their business. The United Nations predicted pandemic-related losses within the fashion industry would reach $50 billion, with Europe experiencing a $15.6 billion loss, the United States a $5.8 billion loss, and Japan a $5.2 billion loss. Many iconic fashion groups, brands, and stores based in the United States, such as Neiman Marcus, Brooks Brothers, J.C. Penney, Century 21 department store, J. Crew, Stein Mart, Tailored Brands (owner of Men's Warehouse and JoS A. Bank), True Religion, Lucky Brand, G-Star Raw Retail Inc., and Ascena Retail (owner of Ann Taylor and Lane Bryant) have declared bankruptcy. Fashion retailers, manufacturers and warehouses began filing lawsuits for insurance coverage for COVID-19-related losses in Spring 2020 due to the pandemic halting non-essential in-person shopping experiences. But as the pandemic showed no signs of ending, more fashion industry companies joined the fray.

Late 2020 and the first half of 2021 saw an uptick in fashion industry filings, many of which remain pending. In some of the cases discussed here, courts have sided with insurers, generally holding that "physical loss of or damage to" requires actual, physical loss or damage and not loss of use. However several of these cases remain pending, some with pending motions to dismiss, while others are on appeal, making it too early to determine which of these holdings are "in vogue."

Marc Fisher Manufacturer Falls Out Of Step

In ***Hartford Fire Insurance Company v. Moda LLC*****,** No. X06-UWY-CV-20-6056095-S (Conn. Super. Ct. June 15, 2021) the Connecticut Superior Court **ruled** in favor of Hartford in a declaratory judgment action Hartford instituted against its insured, Moda LLC ("Moda"), concerning coverage for business income losses allegedly attributable to COVID-19 shutdown orders. Hartford insured Moda under two insurance policies: a multi-flex business insurance policy and an ocean marine business insurance policy. The multi-flex policy contained two related virus exclusions: a New York virus exclusion and a general (non-New York) virus exclusion.

The New York virus exclusion states that Hartford "will not pay for loss or damage caused directly or indirectly by . . . presence, growth, proliferation, spread or any activity of . . . bacteria or virus." Moda argued that since most of their business did *not* take place in New York, this exclusion was inapplicable, but the Court disagreed. The Court also found that the general, non-New York virus exclusion applied, which states that Hartford "will not pay for loss or damage caused directly or indirectly by . . . . [p]resence, growth, proliferation, spread or any activity of . . . bacteria or virus."

However, the exclusion also states that if direct physical loss or damage to Covered Property was caused by aircraft or vehicles, Hartford would provide coverage. Moda argued that since the virus was brought to the United States by a traveler via airplane, the exclusion was inapplicable. The Court rejected Moda's argument again, holding that travel conveyances could not be the cause of Moda's business losses.

As to the marine policy, the Court held that the plain meaning of the words "direct" and "physical" narrows the scope of coverage to *physical damage to the insured's property itself* and that "loss" in the policy does not mean "loss of use" of Moda's property. Additionally, because Moda did not allege that any of its shoes were infected with COVID-19, Moda's contamination coverage argument also failed. Also of note, the Court determined that an insurer's labeling of a policy as an "all-risk" policy does not relieve the insured of its initial burden of demonstrating a covered cause of loss.

Small Bridal Boutique Left at the Altar?

As previously reported, in April 2020, Bridal Expressions, a bridal boutique in Ohio, filed suit against its insurer, Owners Insurance Company ("Owners"), for failure to provide coverage for business income losses allegedly attributable to COVID-19. ***Bridal Expressions LLC v. Owners Ins. Co.*****,** No. 1:20-cv-00833-SO (N.D. Ohio Apr. 17, 2020). The Owners policy at issue included

special property coverage for loss due to the necessary suspension of operations and extra expenses thereby incurred. Bridal Expressions claimed it had to temporarily close its store due to governmental stay-at-home orders and that this amounted to "direct physical loss or damage" under the policy and also alleged that the policy did not include an exclusion for losses caused by viruses or communicable diseases related to property loss.

On March 23, 2021, the United States District Court for the District of Ohio dismissed Bridal Expressions' action for failure to state a claim, holding that there was no actual physical loss or damage. The Court wrote, "The most logical reading of the policy is that tangible harm to property is necessary to meet the threshold requirement for coverage. Consequently, because Bridal Expressions fails to plausibly allege a tangible harm to property, the court finds that it is not entitled to coverage under the policy."

Bridal Expressions has appealed to the United States Court of Appeals for the Sixth Circuit, and the appeal is currently pending. We will write separately on the outcome of that appeal.

Diamonds Are Forever But…

A diamond wholesaler, J Kleinhaus & Sons ("J Kleinhaus"), has sued its insurer, Defendant Valley Forge Insurance Company ("Valley Forge"), in the United States District Court for the Southern District of New York for denying coverage for business income losses allegedly brought on by the pandemic. ***J Kleinhaus & Sons, LLC v. Valley Forge Ins. Co.***, No. 1:21-cv-02202-JPC (S.D.N.Y. Mar. 12, 2021). J Kleinhaus alleges that the "all-risks" policy that Valley Forge issued covers loss of business income due to the suspension of operations caused by "direct physical loss of or damage" to property at the insured premises. The complaint also states that J Kleinhaus's reasonable expectation was that the Business Income, Extra Expense, and Civil Authority coverages contained in the policy provided coverage when a virus, pandemic, or government order forced business closure.

Valley Forge denied coverage on all grounds. This case is currently pending, **with Valley Forge having recently filed a motion to dismiss**. We will report separately on the outcome of that pending motion practice.

Kate Spade, Coach & Stuart Weitzman Join the Trend

On June 24, 2021, Tapestry, Inc., a global fashion luxury group consisting of Coach, Kate Spade New York, and Stuart Weitzman, filed suit against FM in Maryland's circuit court. ***Tapestry, Inc. v. Factory Mut. Ins. Co.***, No. C-03-CV-21-002002 (Md. Cir. Ct.). Tapestry claims that it suffered a loss of more than $1 billion in revenue due to the pandemic, which FM refuses to cover. Tapestry's complaint seeks a declaratory judgment declaring that FM's all risk policies cover the losses it has suffered due to COVID-19 and that FM is responsible for fully and timely paying Tapestry's claims.

Tapestry alleged that it experienced physical loss or damage to its property in at least four ways: (1) at least 1,261 Tapestry employees tested positive for COVID-19, demonstrating the presence of COVID-19 in Tapestry stores; (2) through state, local, and agency governmental orders that limited Tapestry's business operations and use of its property; (3) through the need to modify physical behaviors through the use of social distancing in order to reduce or minimize the potential for viral transmission; and (4) through the need to mitigate the threat or actual physical presence of Coronavirus on door handles, clothing, clothing racks, miscellaneous surfaces, in heating and air conditioning systems, and in or on any of the multitude of other places the Coronavirus has been or could be found.

FM issued to Tapestry two "all-risk" policies. The policies include Time Element—or business interruption—coverage for loss "directly resulting from physical loss or damage of the type insured." The phrase "physical loss or damage" is not defined in the policies. Tapestry has claimed that, in other legal proceedings, FM admitted that "physical loss or damage," as referenced in the Policies, means loss of use, and that no structural alteration is required for coverage.

Neither virus, pandemics, communicable disease, COVID-19, nor the Coronavirus are excluded as causes of loss under the Policies. Thus, Tapestry argues, communicable disease *is* covered as a cause of loss. We will continue monitoring and report on these proceedings.

Versace, Jimmy Choo & Michael Kors Suit Up

Cut from the same cloth as *Tapestry, Inc.* is a suit filed by Capri Holdings Limited ("Capri"), a luxury fashion group consisting of Versace, Jimmy Choo, and Michael Kors, against it insurer, Zurich American Insurance Company ("Zurich"), pending in the Superior Court of New Jersey. ***Capri Holdings Ltd. v. Zurich Am. Ins. Co.***, No. BER-C-000021-21 (N.J. Super. Ct. Mar. 23, 2021), claiming coverage for business income losses related to COVID-19. Capri alleges a $1 billion loss that arose from the direct and physical loss to its own property caused by multiple waves of COVID-19 that it claims are continuing and will continue for many months, if not years. Specifically, Capri alleges that, due to store closures and operations at limited capacity and unwillingness of its customer base to travel to shops, it has experienced physical loss of or damage to its stores and boutiques. Capri also alleges that reopening its stores did not stop the losses in its tracks—it actually has made things worse by requiring its stores to incur extra expenses and imposed restrictions on operations.

Zurich issued two all-risk policies to Capri for consecutive policy periods. The 2019–2020 policy was issued exclusively by Zurich, but the 2020–2021 policy was issued by Zurich (holding 40% of coverage obligations) and a handful of other insurers (splitting the remaining 60% of coverage obligations). Both policies cover "[a]ll risks of direct physical loss of or damage from any cause unless excluded." "Physical loss of or damage" is not defined or limited in the policies. Neither virus, pandemic, communicable disease, COVID-19, nor Coronavirus are excluded causes of loss under the policies.

Capri seeks to recover under Time Element, which covers the suspension of business activities due to direct physical loss of or damage to property. Capri also alleges that the policies' contamination exclusions do not apply because the virus deletion endorsement eliminated virus from the ambit of the exclusion. Capri alleges Zurich has not issued determination for at least eleven months on Capri's claims for loss on the 2019–2020 policy; the other insurers for the 2020–2021 policy have refused coverage. We will continue monitoring and report on these proceedings.

Children's Fashion Companies Seek Coverage

In addition to global luxury brands that market men and women's clothing and accessories, companies that specialize in children's apparel also have claimed coverage for business income losses allegedly attributable to COVID-19. As previously reported, in ***Mudpie, Inc. v. Travelers Casualty Insurance Co. of America***, No. 20-cv-03213-JST (N.D. Cal. May 11, 2020), Mudpie, a San Francisco-based retail store that sells children's clothing, toys, and books, sued Travelers when Travelers denied coverage for Mudpie's claims of loss business income following California's Stay at Home Order. On September 14, 2020, the United States District Court for the Northern District of California granted Travelers' motion to dismiss Mudpie's declaratory judgment action.

Mudpie had purchased a "comprehensive commercial liability and property insurance policy" from Travelers and alleged that its compliance with the government closure orders "result[ed] in substantial loss to business income" because its storefront became "useless and/or uninhabitable." Travelers denied Mudpie's reported loss of business income and determined that Mudpie was not entitled to Business Income, Extra Expense, or Civil Authority coverage under the policy because "the limitations on [Mudpie's] business operations were the result of the Governmental Order, as opposed to 'direct physical loss or damage to property' at the described premises," and the policy contained a virus exclusion.

The Court, in granting the motion to dismiss, found that there was no direct physical loss or damage to Mudpie's property because Mudpie only alleged that its direct physical loss of or damage to the property was due to the governmental order and not COVID-19 itself. Thus, there was no detrimental change in the property's capabilities.

Mudpie has appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit, and oral arguments are scheduled for later this year. We will report separately on the outcome of that appeal.

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)

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