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COVID-19 Insurance Coverage and Liability Update

Introduction

Since our last Update, the first state Supreme Court decisions have been rendered. Massachusetts and Iowa ruled in favor of insurers on the ground of lack of direct physical loss or damage. We address these cases and identify state intermediate court decisions. Those, too, favored the insurers.

In addition, the U.S. Courts of Appeal for the Second, Fourth, Seventh, Eighth, Ninth and Eleventh Circuits, which had previously issued decisions in favor of insurers, issued additional decisions.

With these decisions, insurers have prevailed at every Circuit that has ruled: the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits. The decisions have been based on lack of direct physical loss or damage or virus exclusions, or both.

There have been many additional decisions in lower courts, the vast majority of which continue to favor insurers, on the grounds of lack of direct physical loss or damage, a virus exclusion, a pollution or contamination provision or some combination of these. Our Updates do not address all decisions, only those with unusual aspects or widespread effects.

Finally, below we provide an update on "take home COVID" jurisprudence developing on the West Coast and report on a recent Connecticut Supreme Court case rejecting impossibility of performance and frustration of purpose defenses to commercial lease obligations, allegedly due to COVID.

Business Interruption Coverage Decisions

State Supreme Court Decisions

Insurer Prevails Under Massachusetts Law for Lack of Direct Physical Loss or Damage

Verveine Corp v. Strathmore Ins. Co., 184 N.E.3d 1266 (Mass. 2022) affirmed the dismissal of claims for business interruption coverage under an all-risk property policy by the operators of three restaurants. The Court noted that "this type of policy is somewhat inaccurately referred to as an 'all-risk' property insurance policy." The insureds alleged that the suspension of their business operations was caused by the "presence" of the virus on surfaces and in the air in their restaurants. The Court disagreed, holding that mere "presence" does not amount to loss or damage. It concluded that "direct physical loss of or damage" to property requires "some distinct, demonstrable, physical alteration of the property." It noted that every appellate court that has

addressed this issue has agreed. It also rejected a claim for civil authority coverage because the virus did not cause "damage" to the properties within one mile of the restaurants.

One of the policies contained a virus exclusion. The Court did not need to address the substance of the exclusion because its other rulings made it moot. However, it addressed and rejected the argument that the presence of a virus exclusion in one of the policies gave rise to a negative implication that policies without such an exclusion should cover claims arising from the virus.

In Iowa, Insurers Prevail in Two Decisions for Lack of Direct Physical Loss or Damage

Wakonda Club v. Selective Ins. Co. of America, No. 21-0374, 2022 WL 1194012 (Iowa Apr. 22, 2022) affirmed a grant of summary judgment against a private golf and country club that closed its dining facilities in response to governmental orders. It sought coverage under its all-risk commercial property insurance policy. It argued simply that the mere loss of use of business property constitutes "direct physical loss of or damage to property" and triggered its business interruption coverage. The Court rejected that argument. It cited lower Iowa Appellate Court decisions construing the term "physical" to mean tangible as opposed to only economic. It reasoned that "physical" has to mean something. Unlike the insureds in *Verveine Corp, supra,* this insured expressly denied having any contamination on its property or among its employees or members, to avoid the virus exclusion in the policy. The Court said that "[this] concession removes even any potential physical element to the loss of use of its property." In view of its holding on direct physical loss or damage, the Court did not need to address the effect of the virus exclusion. The Court noted that its conclusion was consistent with every other appellate level decision on this subject. Finally, the Court rejected the insured's argument that it maintained a reasonable expectation of coverage under the circumstances. The insured presented no evidence of representations that might have fostered expectations, nor any reliance on any representations.

Jesse's Embers, LLC v. Western Agricultural Ins. Co. d/b/a/Farm Bureau Financial Services, No. 21-0623, 2022 WL 1194006 (Iowa April 22, 2022) was decided the same day in an opinion written by the same judge as *Wakonda Club, supra*. It involved a bar and restaurant that suspended operation in response to government orders. The insured relied solely on loss of use of the property. The Court affirmed summary judgment against the insured, finding that "direct physical loss or damage to Covered Property" requires a physical aspect to the property loss. Thus, it denied claims under the Business Coverage, Extra Expense and Civil Authority provisions. It pointed to the companion decision in *Wakonda Club*. The Court did not need to address whether the virus exclusion would have also excluded coverage. The Court also rejected a reasonable expectation argument, saying that the insured "failed to explain what led him to believe he purchased an 'all-risks business interruption' policy rather than an 'all-risks commercial property' policy that included business interruption coverage." As in *Wakonda Club*, there was no evidence of representations or reliance.

State Intermediate Appellate Court Decisions

As these Courts have noted, every state intermediate Appellate Court that has addressed the issue has also held for the insurer and denied coverage or lack of direct physical loss or damage. These include the following:

Inns by the Sea v. Cal. Mut. Ins., 286 Cal. Rptr. 3d 576 (Ct. App. 2001).

Commodore Inc. v. Certain Underwriters at Lloyd's London, et al., No. 3D21-0671, 2022 WL 1481776 (Fla. 3d Dist. Ct. App. May 11, 2022).

Ind. Repertory Theatre v. Cincinnati Cas. Co., 189 N.E.3d 404 (Ind. Ct. App. 2022).

Gavrilides Mgmt. Co. v. Mich. Ins., No 354418, 2022 WL 301555 (Mich. Ct. App. Feb. 1, 2022).

Consolidated Restaurant Operations, Inc. v. Westport Ins. Corp., 205 A.D.3d 76 (N.Y. App Div. 1st Dept. Apr. 7, 2022).

Recent Additional Decisions by U.S. Courts of Appeal Ruling on the Issues

BR Restaurant Corp. v. Nationwide Mut. Ins. Co., No. 21-2100-cv, 2022 WL 1052061 (2nd Cir. Apr. 8, 2022) (applying New York law).

Cordish Cos. Inc. v. Affiliated FM Ins. Co., No. 21-2055, 2021 WL 5448740 (4th Cir. Apr. 14, 2022) (no state's law specified, marked "Unpublished").

East Coast Entertainment of Durham LLC v. Houston Cas. Co., 31 F.4th 547 (7th Cir. 2022) (applying Ill. Law).

Paradigm Care & Enrichment Center LLC, et al. v. West Bend Mut. Ins. Co., No. 21-1695, 2022 WL 1316382 (7th Cir. May 3, 2022) (applying Michigan and Illinois law).

Monday Rests v. Intrepid Ins. Co., 32 F.4th 656 (8th Cir. 2022) (applying Missouri law).

Glen R. Edwards Inc., et al. v. Travelers Cas. Ins., et al., No. 21-3035, 2022 WL 1510818 (8th Cir. May 13, 2022) (applying Missouri law).

Circus LV, LP v. AIG Specialty Ins. Co., No. 21-15367, 2022 WL 1125663 (9th Cir. Apr. 15, 2020) (applying Nevada law, marked "Not for Publication").

Rialto Pockets, Inc., et al. v. Beazley Underwriting Ltd., No. 21-55196, 2022 WL 1172134 (9th Cir. Apr. 20, 2022) (applying California law, marked "Not for Publication").

Cafe Int'l Holding Co., LLC v. Chubb Ltd., No. 21-11930, 2022 WL 1510441 (11th Cir. May 13, 2022) (applying Florida law).

Gio Pizzeria & Bar Hospitality, LLC, et al. v. Certain Underwriters at Lloyd's, London, No. 21-12229, 2022 WL 1558771 (11th Cir. May 17, 2022) (applying Florida Law, marked "Do Not Publish").

Update on "Take Home COVID"

In our February 2022 Update, we reported on the 2021 California Superior Court Case, *Matilde Ek v. See's Candies, Inc.* (Los Angeles County Super. Ct. No. 20STCV49673) in which Matilde Ek, a See's Candies employee, contracted COVID on the job and later exposed her husband to COVID, resulting in his death. Ek sued See's, alleging that the employer did not provide sufficient safeguards against COVID infection at the plant where she worked. In analogizing Ek's COVID "take home COVID" claim to asbestos claims, the trial court denied See's motion to strike, holding that employers have a duty to exercise reasonable care to prevent contaminant exposure to foreseeable third parties. The trial court held that Ek's husband was a foreseeable third party, even though he was not a See's employee.

See's appealed this decision and the California Court of Appeals ruled for Ek, holding her husband's death was not dependent on her disease, but in the way she served *as a conduit* for the virus. *See's Candies, Inc. v. Super. Ct. Cal. for Cnty. L.A.*, 73 Cal. App. 5th 66 (2021), *review denied* (Apr. 13, 2022). The decision is significant in its implications for workers' compensation claims in that it narrows the "exclusive remedy"/derivative injury defense available to employers by preempting workers' compensation laws, even where the foreseeable third party is not an employee. The decision makes employers more vulnerable to COVID "take-home" exposure liability claims.

Since last profiled in February, See's appealed the *Ek* decision to the California Supreme Court. In mid-April, the Court declined to review the case, without explanation and despite urging by the public and judiciary alike. *See's Candies, Inc. v. Super. Ct. Cal. for Cnty. L.A.*, No. S272923 (Cal. 2022).

But the California Supreme Court is not off the hook. Just one week after the Court declined to review *Ek*, the Ninth Circuit heard a similar "take home COVID" exposure liability claim, ***Kuciemba v. Victory Woodworks,* Inc.,** 31 F.4th 1268 (9th Cir. 2022). The Ninth Circuit certified the following two questions to the California Supreme Court:

1. If an employee contracts COVID-19 at his workplace and brings the virus home to his

spouse, does California's derivative injury doctrine bar the spouse's claim against the employer?

2. Under California law, does an employer owe a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19?

The California Supreme Court's responses to these certified questions remains pending. If the Court answers "no" to the first and "yes" to the second, California would be the first state to rule in favor of the employees' claims in this context. Of note, See's and other corporations' position that such third-party exposure claims are barred under workers' compensation exclusivity laws is a position the U.S. Chamber of Commerce supports. Similarly, trade groups warn that foreseeable third parties could be *anyone* in an employee's inner circle and could subject employers to infinite and unforeseeable liability. As Ninth Circuit Judge John Wallace commented, *Ek* could be a "gamechanger."

Connecticut Supreme Court Rejects Impossibility of Performance and Frustration of Purpose as Defenses to Commercial Lease Rent Obligation

In ***AGW Sono Partners, LLC v. Downtown Soho, LLC,*** 343 Conn. 309 (2022), the Connecticut Supreme Court recently affirmed a trial court's rejection of a commercial tenant's purportedly COVID-related impossibility of performance and frustration of contract defenses in a suit to collect on past due rent under a commercial lease. In December 2018, Downtown Soho signed a ten-year lease to operate a fine dining restaurant and bar known as Blackstone's Bistro in South Norwalk's Sono commercial venue. Downtown Soho began to default on its lease even before COVID – in January 2020. After Governor Lamont's executive orders effectively closed all restaurants in response to the COVID outbreak, Blackstone's Bistro did not open again until May 2020 and Downtown Soho did not pay rent after March 2020.

AGW Sono Partners served a notice to quit in June 2020 and signed a ten-year lease with a new restaurant in November 2020. AGW Sono Partners then sued Downtown Soho for past due rent for the period of default.

Downtown Soho argued that Lamont's executive orders and the COVID pandemic made performance on the lease impractical and raised the doctrines of impossibility of performance and frustration of contract as special defenses.

The trial held that COVID in and of itself did not make performance on the lease impossible, noting that the lease did *not* include a force majeure clause and concluding therefore, that the pandemic or a similar event was not an unforeseeable event within the terms of the specific contract in issue. The trial court also concluded that Downtown Soho did not meet its burden of proof for

a frustration of purpose claim, as the lease did not specify the kind of dining Downtown Soho could offer, nor did it preclude outdoor dining or takeout.

The Supreme Court affirmed, finding dispositive the fact that no executive order barred *every* dining option and agreeing with the trial court that a pandemic was not a completely unforeseeable event under the terms of the lease.

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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