ECKERT SEAMANS
ATTORNEYS AT LAW

April 22, 2020

COVID-19 Legal Update

Business Interruption Insurance: Litigation and Legislative Update

By Michael J. O'Brien and Gretchen N. Panchik

As state and local governments continue civil orders directing the mandatory shut down of commercial activity deemed non-essential or non-life sustaining, there have been an increasing number of lawsuits wherein business interruption insurance policy holders seek coverage for lost income due to government-mandated closures. In addition, multiple states are considering legislation, which would mandate coverage for pandemic related business losses regardless of contractual language. This update provides a review of recent litigation and legislative developments.

LITIGATION UPDATE

Below are a few of the many examples of coverage claims filed by business owners for lost income. There are three determinative issues in these cases. The first is whether COVID-19 constitutes "direct physical loss or damage" to property. While many courts require physical damage to the property in order to satisfy this requirement, other jurisdictions have held that the presence of harmful substances such as asbestos, fumes or odors may constitute "direct physical loss or damage" to the extent that the presence of such substances renders a property uninhabitable or unusable. The second is whether government-mandated closures constitute the type of "civil authority" action that is contemplated when designing and pricing some business interruption insurance, and therefore occurrence, which implicates the relevant policies. The final issue is whether the existence of certain policies, which contain specific virus exclusions, lends itself to the argument that those policies without specific virus exclusions are required to cover COVID-19 related loss.

In the first case specific to COVID-19, filed on March 16, a large seafood restaurant in New Orleans' French Quarter filed a declaratory judgment action asking a state court to confirm that its business interruption policy would cover lost income due to civil-authority shutdowns or quarantine directives. To conform to the language of the policy, Plaintiffs argue that coronavirus is "physically impacting public and private property, and physical spaces in cities around the world" and "any effort…to deny…that the virus causes physical damage and loss would constitute a false and potential fraudulent misrepresentation that could endanger policyholders and the public." Plaintiffs also argue that contamination of the insured premises would be a "direct physical loss needing remediation to clean the surfaces of the establishment." See *Cajun Conti, LLC, et al. v. Certain Underwriter at Lloyd's, London, et al.,* No. 2020-02558, complaint filed (La. Dist. Ct., Orleans Parish, Mar. 16, 2020).

On March 24, the Chickasaw and Choctaw Nations filed separate lawsuits in Oklahoma state court seeking declaratory judgment that losses the Native American tribes are incurring from closing their casinos are covered by their business interruption policies. See *Chickasaw v. Lexington Ins. Co., et al.,* No. CV-20-35, complaint filed (Ok. Dist. Ct., Pontotoc County, Mar. 24, 2020); *Choctaw Nation of Oklahoma v. Lexington Ins., et al.,* No. CV-20-42, complaint filed (Ok. Dist. Ct., Bryan County, Mar. 24, 2020). On March 25, the famed French Laundry and Bichon Bistro restaurants filed declaratory judgment actions in Napa County, California, where they argue that a specific "Property Choice Deluxe Form"

in the policy extends coverage for a loss or damage due to virus. See *French Laundry Partners, LP d/b/a The French Laundry, et al. v. Hartford Fire Ins. Co., et al.,* complaint filed (Ca. Super. Ct., Napa County, Mar. 25, 2020).

In Pennsylvania, the South Philadelphia restaurant River Twice has filed a lawsuit seeking to force its insurance carrier, Admiral Indemnity Co., to cover financial losses incurred due to its mandatory coronavirus shutdown. Along with Newchops Restaurant Comcast, LLC, which operates a high-end restaurant in Philadelphia's Comcast Center, River Twice is seeking federal multi-district litigation (MDL) status to address similar claims. See *LH Dining LLC d/b/a River Twice Restaurant vs. Admiral Indemnity Co.,* complaint filed (E.D. Pa., Apr. 10, 2020). Meanwhile, Pittsburgh area HTR Restaurants, Inc. is seeking relief under a proposed class action against Erie Insurance Exchange. See *HTR Restaurants, et al., vs. Erie Insurance Exchange,* No. GD-20-5138, complaint filed (Ct. of Common Pleas, Allegheny County, Apr. 17, 2020).

In *Big Onion Tavern Group, LLC v. Society Insurance, Inc.,* No. 1:20-cv-02005, complaint filed, (N.D. Ill., Mar. 27, 2020), a group of Chicago based theater and restaurant owners seek declaratory judgment that its business interruption policy would cover approximately $10 million in lost income due to state-mandated closures beginning on March 20, 2020. In addition to declaratory judgment, Big Onion seeks damages for bad faith denial of insurance and breach of contract. Specifically, the Plaintiffs allege that the insurer issued a blanket denial of claims without first conducting a meaningful investigation of all available information as required by Illinois law.

In Texas, a theater owner has sued Lloyd's of London after the insurer denied coverage on a $1 million business interruption policy, alleging that the policy included a "pandemic event endorsement" that specifically contemplated coronavirus-related disease. The Plaintiff, SCGM Inc., alleges it purchased the endorsement because of the catastrophic effect a pandemic would have on its business, and that Lloyd's marketed the pandemic endorsement following the 2014 Ebola outbreak. See *SCGM Inc., et al. v. Certain Underwriters at Lloyd's,* 4:20-CV-001199, complaint filed, (S.D. Texas, Apr. 3, 2020). Meanwhile, in Indiana, the state's largest nonprofit professional theater is suing its insurance carrier over its denial of business interruption coverage incurred during the pandemic. The insurer, Cincinnati Casualty Co., argues that the coronavirus does not constitute a physical loss that would trigger the policy. See *Indiana Repertory Theatre, Inc., v. The Cincinnati Casualty Co.,* No. 39D01-2004-PL-013137, complaint filed, (Super. Ct. of Ind., Marion County, Apr. 3, 2020).

A South Florida restaurant filed a class action suit in federal court against Chubb Ltd. in response to denial of business interruption claims. The Fort Lauderdale restaurant possessed an "all-risk" policy, which provided for unconditional coverage for all risks of loss except those specifically omitted. This policy did not contain a virus exclusion. The suit alleges that Chubb's chief executive officer announced on national television that the insurer intends to take the position that its standard property policies do not cover claims related to COVID-19 and would not pay for such claims. The Plaintiff seeks to represent three nationwide classes: policyholders who did not receive coverage for business suspensions pertaining to COVID-19, those who were denied coverage for lost business income caused by a civil authority and those who were denied coverage for expenses incurred trying to minimize suspension of business. See *Café Int'l Holding Co., et al. v. Chubb Limited, et al.,* No. 1:20-cv-21641, complaint filed (S.D. Fl., Mar. 20, 2020).

In Virginia, an Arlington restaurant, Guajillo Mexican Cuisine, filed suit against Twin City Fire Insurance Co., arguing that denial of business interruption coverage was wrongful because its policy explicitly covered loss when caused by a virus, including the salaries and other expenses owed. The policy specifically provides for loss due to a virus through an endorsement that states that the insurer "will pay for loss or damage by 'fungi,' wet rot, dry rot, bacteria and virus." The family-owned restaurant claims that coverage is warranted by the express virus endorsement and sets forth that there has been a direct physical loss because the premises are unusable and have lost all function. See *Baroso, Inc., et al. v. Twin City Fire Ins. Co., et al.,* No. CL-20001556-00, complaint filed (Arlington Co. (Va.) Cir. Ct., Apr. 21, 2020).

LEGISLATIVE UPDATE

State lawmakers are pushing legislation to provide coverage for business interruption losses incurred as a result of the COVID-19 pandemic. As of April 20, 2020, seven states, including Pennsylvania, have introduced legislation that would seek to address this issue. These bills would retroactively expand business interruption insurance policies to cover companies' losses attributable to the COVID-19 related circumstances from the date in which the state's state of emergency was declared.

In New Jersey, assembly bill A-3844 was introduced on March 16 that would force insurers to pay certain COVID-19 business interruption claims, even if the policy language provides for a specific virus exclusion. The legislation was part of an emergency resolution, waiving committee reference and sending it directly to the full Assembly for a floor vote on the same date it was introduced, and the bill awaits further action. The bill would cover businesses with fewer than 100 employees working at least 25 hours a week, and would mandate coverage regardless of contractual language. The proposed bill would be retroactive for any insured with a business interruption policy in place from March 9, 2020, when Governor Phil Murphy declared a state of emergency due to COVID-19. The bill "is intended to hold harmless a certain portion of the business sector, which had the foresight to purchase business interruption insurance, for losses sustained as a result of the current health emergency, but for which no such coverage is currently offered."

Ohio's bill, House Bill 589, similarly applies only to businesses with 100 or fewer full-time employees. Both New Jersey and Ohio's bills implicitly override terms commonly contained in business interruption policies, such as exclusions for viruses and the requirement that there be a "direct physical loss." The Massachusetts bill, S.D. 2888, on the other hand, explicitly states that insurers cannot deny business interruption claims on the grounds that COVID-19 is a virus, even if the policy excludes such loss, or there is no physical damage. On April 8, 2020, South Carolina Bill S. 1188 was introduced, which also contains express language overriding virus exclusions.

On April 3, Pennsylvania introduced House Bill 2372, which would require an insurer to cover and indemnify insureds suffering business interruption losses due to COVID-19, "subject to the broadest or greatest limit and lowest deductible afforded to the business interruption coverage under the insurance policy." Similar to the New Jersey bill, the Pennsylvania bill would allow insurers to apply to the state commissioner/regulator for relief and reimbursement. The Pennsylvania bill applies to policies in effect on March 6, 2020 and would apply to insured parties with fewer than 100 employees. The Pennsylvania bill does not address policies with virus exclusions. New York introduced similar legislation on March 27, Assembly Bill 10226, which applies to insureds with fewer than 100 employees and provides for reimbursement from the state. On March 31, Louisiana also introduced legislation through House Bill 858 and Senate Bill 447. Unlike other states, the Louisiana bill is not limited to small businesses and does not provide a mechanism for insurers to seek reimbursement from the state.

To date, these bills remain pending in their respective state legislatures. If any or all of these bills were to be passed into law, state governments can expect constitutional challenges rooted in the Contracts Clause contained in Article I of the Constitution, which limits the ability of states to interfere with private contracts.

Eckert Seamans will continue to monitor this important and complex issue. In the meantime, clients and attorneys should review commercial property insurance policies generally, and business interruption provisions specifically, to determine the legal challenges and opportunities that may arise during and after the current health crisis.

ECKERT SEAMANS ATTORNEYS AT LAW

This COVID-19 Legal Update is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact author Michael J. O'Brien at 215.851.8532 or mobrien@eckertseamans.com, Gretchen N. Panchik at 412.566.6133 or gpanchik@eckertseamans.com, or any other attorney at Eckert Seamans with whom you have been working.