GFELLER LAURIE LLP
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COVID-19 Coverage Considerations Update

The rate of change with the COVID-19 pandemic is outpaced only by the information circulated regarding its impact on the insurance industry. We are monitoring this situation daily to stay abreast of developments and new information that potentially affects insurance coverage positions and to summarize important topics and address issues that we believe may be pertinent and useful. We will only circulate periodic summaries so as not to clutter your inbox with redundancy.

Civil Authority Coverage

As demonstrated by the four lawsuits commenced thus far seeking coverage for COVID-19 losses, discussed below, insurers are seeing an influx of claims for civil authority coverage. Civil authority coverage is provided under many insurer business income and extra expense coverage forms and is intended to provide coverage for income losses resulting from actions of local police, fire or an order of civil authority.

Depending on the specific policy language, coverage may apply when the insured suffers loss of income due to an action (or order) of civil authority prohibiting access to the insured's property as a direct result of physical loss or physical damage to any property other than the insured's own property that was caused by a covered cause of loss.

Thus, there are several requirements to trigger coverage under most civil authority coverage grants, which in many cases will not be met. First, there must be a finding that COVID-19 caused "physical loss or property damage." As explained below, this issue is already being litigated, and it remains to be seen how the issue will be resolved by the courts.

Further, even if a court rules that the virus caused physical damage, under most clauses, the court would then need to find that the civil authority order was issued as a direct result of that physical damage or loss. This determination will require an analysis of the specific language of the applicable order and the specific reasons for why the civil authority acted. Thus far, the language of many of the orders indicates that they were issued to mitigate the spread of COVID-19 for the protection of public health and not as a result of physical damage to property. As explained below, however, a civil authority order at issue in the recently filed case ***French Laundry Partners, LP dba The French Laundry v. Harford Fire Insurance Company***, specifically references property damage as an impetus for the issuance of the order. Clearly, this coverage issue will evolve if government officials specifically tailor the wording of future civil authority orders to attempt to create coverage.

Coverage Litigation - The First Wave

Four lawsuits against insurers have been filed in recent days. All relate to aspects of coverage for business interruption losses. The first was brought by a restaurant in New Orleans, Louisiana. The second two are related, brought by Native American Tribes with respect to casino and other commercial operations in Oklahoma. The fourth was brought by a renowned restaurant group in Napa Valley, California.

Cajun Conti, LLC v. Certain Underwriters at Lloyd's, London, No. 20-02558 (La. Civ. Dist. Ct., Orleans Parish) filed Mar. 16, 2020, seeks a declaratory judgment concerning coverage under an All Risk policy, as well as the interpretation of a state civil authority order and city restrictions on the operations of a restaurant.

The restaurant's allegations are as follows: The policy provides "an extension of coverage in the event of business closure by order of Civil Authority...," which should be given effect because, as an All Risk policy, the Lloyd's policy covers all risks unless clearly and specifically excluded or limited. The policy excludes losses due to biological materials such as pathogens in connection with terrorism or malicious use but does not have a general exclusion for a virus or global pandemic.

The complaint further alleges that COVID-19 is a cause of real physical loss and damage and that "contamination of the insured premises would be direct physical loss needing remediation." It draws an analogy to Louisiana cases holding that the intrusion of lead or gaseous fumes constitutes direct physical loss. There are also references to the views of the "scientific community" as recognizing COVID-19 as a cause of real physical loss and damage. It alleges that "the deadly virus physically infects and stays on the surface of objects or materials, 'fomites,' for up to twenty-eight days, particularly in humid areas below eighty-four degrees." *Note that this language and emphasis suggests that there will be many battles of experts ahead.*

The complaint also names the Governor and the State of Louisiana. It refers to a statewide Civil Authority Order dated March 13, 2020 (the "Order") banning gatherings of more than 250 people in close proximity to one another. (The restaurant seats 500.) The Order has various exemptions, but restaurants are not among them. The Mayor of New Orleans also imposed city restrictions on restaurants, including a 9 PM closing time and limiting seating by 50%. Plaintiff alleges that it expects more severe restrictions to follow.

The complaint seeks a declaratory judgment on the following: (1) whether the state order applies to restaurants whose capacity exceeds 250 people; (2) whether the state order and the city's restrictions trigger the civil authority provision of the policy; and (3) an affirmative declaration

that because there is no viral pandemic exclusion, the policy provides coverage for any future civil authority shutdowns due to physical loss from COVID-19 contamination, and there is business income coverage if the insured's premises have been contaminated.

The complaint does not allege that Lloyd's has denied coverage yet. It alleges that "based on information and belief, Lloyd's has accepted the policy premiums with no intention of providing any coverage due to direct physical loss and/or from a civil authority shutdown due to a global pandemic virus." It also states that "any effort by Lloyd's to deny the reality that the virus causes physical damage and loss would constitute a false and potentially fraudulent representation that could endanger policyholders and the public." Certainly, the pre-emptive nature of the coverage declarations sought raises ripeness and justiciability issues.

Chockataw Nation of Oklahoma v. Lexington Ins. Co., No. CV-20-42 (Dist. Ct., Bryan County) filed March 24, 2020. This is a declaratory judgment action brought against 15 insurance companies and Lloyd's Syndicates. It is a sparse, bare bones complaint.

The Chockataw Nation of Oklahoma ("Nation") owns and operates several commercial businesses and services, including casinos. The complaint alleges the Nation obtained multiple All Risk policies from the defendant insurers. It alleges that "the benefits provided include business interruption, interruption by civil authority, limitations of ingress and egress, and extra expense." It alleges that the COVID-19 pandemic resulted in direct physical loss or damage covered by the policies, and that the property cannot be used for its intended purpose. The Nation seeks a declaration that the policies cover its losses and expenses related to the COVID-19 pandemic. The Nation specifies that its claims are based on Oklahoma contract and insurance law and disavowed any federal claim or question. Although not referred to in the complaint, press reports suggest that the Nation made a voluntary decision to temporarily close its casinos and that its other businesses have been impacted in various (unspecified) ways.

Chickasaw Nation Department of Commerce v. Lexington Ins. Co., No. CV-20-35 (Dist. Ct., Pontotoc County) filed March 24, 2020. This case is parallel in all respects to the ***Chockataw Nation*** case described above. It names the same insurer defendants issuing policies through the same Alliant program and makes the same claim for coverage, verbatim.

French Laundry Partners, LP dba The French Laundry v. Harford Fire Insurance Company, (Supr. Ct, Napa County) is dated March 25, 2020. The Thomas Keller Restaurant Group commenced the declaratory judgment action alleging their operations were shut down by a March 18th order of a Napa County health officer, requiring all residents to stay at home unless they are

performing certain essential activities or running certain essential businesses. The order required all non-essential businesses to cease activities.

Again, the alleged coverage arises under an All Risk policy. According to the complaint, the policy contains a Civil Authority coverage grant. The complaint alleges there is no exclusion for a viral pandemic, and that in fact the "policy's Property Choice Deluxe Form specifically extends coverage to direct physical loss or damage caused by virus."

The principal public policy impetus behind the various orders across the country requiring people to stay at home is to implement social distancing. So, to address the physical loss or damage requirement, the complaint alleges that COVID-19 has physically impacted "public and private property, and physical spaces in cities around the world and in the United States." The virus "physically infects and stays on surfaces of objects or materials, 'fomites,' for up to twenty-eight days" and notes that "China, Italy, France and Spain have implemented the cleaning and fumigating of areas before allowing those areas to re-opened to the public."

Of interest, as alluded to in the complaint, the Order states that it is being "issued based on evidence of [among other things] the physical damage to property caused by the virus." This provision undoubtedly was included specifically to support claims for insurance coverage.

Crisis Management Coverage

Some policyholder firms have urged clients to consider crisis management coverage. This is typically provided as an extension or endorsement to excess or umbrella liability coverage, although it can also be written as primary insurance. Crisis management coverage was designed initially to address reputational injuries following a crisis associated with an insured company, such as fall-out from a data breach that became public. It has expanded to include a broader range of perils, such as contamination or recall, natural disasters, and terrorism or political violence. The crisis payments can include a variety of costs, including, for example, temporary living, travel, and emergency psychological counseling. Some policies even extend to loss of business income. Limits tend to be low, in the range of $250,000 - $500,000, often much lower. The scope of coverage varies widely across insurers, and whether such coverage would apply is a function of the specific grants, exclusions, conditions, and other policy provisions and any underlying policy.

Legislative Initiatives & Challenges

Last week, legislators in both Ohio and Massachusetts proposed Bills that would retroactively expand business interruption insurance policies to cover insureds' losses attributable to the outbreak of COVID-19, regardless of the policies' express terms.

The Ohio Bill, H.B. 589, introduced by Ohio State Reps. Jeffrey Crossman and John M. Rogers, states that the legislation itself "is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity is to protect small businesses from catastrophic losses caused by commercial decline necessary to prevent the spread of COVID-19. Therefore, this act shall go into immediate effect."

To that end, the Bill states, "every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption, in force in this state on the effective date of this section, shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic during the state of emergency." The legislation further specifies that the required coverage shall indemnify insureds up to policy limits for any loss of business or business interruption for the duration of the state of emergency. However, the legislation only applies to policies issued to businesses located in Ohio that had such insurance policies in place as of March 9, 2020 and that employ fewer than 100 people.

The Massachusetts Bill, S.D. 2888, introduced by State Sen. James B. Eldridge, is similar. The Massachusetts Bill would apply to policies sold to businesses in the Commonwealth with 150 or fewer full-time employees, so long as the policies were in place by the time Gov. Charlie Baker issued his March 10, 2020 emergency declaration. It purports to find indemnity coverage for COVID-19 related losses in any policy containing loss of use and occupancy and business interruption coverage regardless of the "terms" of the policy, including any endorsements to the contrary, with the following bill language:

> "SECTION 1. (a) …. every policy of insurance insuring against loss or damage to property, *notwithstanding the terms of such policy (including any endorsement thereto or exclusions to coverage included therewith*) which includes, as of the effective date of this act, the loss of use and occupancy and business interruption in force in the commonwealth, shall be construed to include among the covered perils under such policy coverage for business interruption directly or indirectly resulting from the global pandemic known as COVID-19, including all mutated forms of the COVID-19 virus. Moreover, no insurer in the commonwealth may deny a claim for the loss of use and occupancy and business interruption on account of (i) COVID-19 being a virus (*even if the relevant insurance policy excludes losses resulting from viruses*); or (ii) there being no physical damage to the property of the insured or to any other relevant property."

[Emphasis added.]

The Bill provides that this forced coverage exists for as long as the Governor's March 10, 2020 emergency declaration is in place.

What is usually only noted in passing when reporting and commenting on both States' Bills is the fact that they both also establish funds or pools from which insurers complying with the Bills'

indemnification requirements can seek reimbursement for indemnity payments. Both Bills call for funding the pools through assessments charged against insurers doing business in their States in an amount based on total premiums written in-State. As such, the funds would function similarly to the UST funds many states established decades ago to address the rash of leaking underground storage tanks and related investigation and cleanup losses. However, unlike UST Funds, which usually are accessible when there is *no* coverage available under private insurance, these Bills force coverage first, through retroactively imposed changes to insurance policy language, and then reimburse compliant insurers later.

The language of both Bills tracks closely with the legislation recently introduced in New Jersey, Garden State A3844. The New Jersey Bill was approved by the General Assembly's Homeland Security and State Preparedness Committee on March 16 and was set for a vote by the full chamber the same day, but the sponsors later pulled it so they could engage in further discussions with concerned insurance industry representatives.

The Ohio and Massachusetts Bills likely will be met with the same opposition. In addition to a substantial number of insurance law issues, all three Bills raise Constitutional law questions of encroachment on freedom of contract. Moreover, the Bills' disparate treatment of insurers as well as insureds will create another hurdle in defending them on Constitutional grounds.

Senator Eldridge, sponsor of the Massachusetts Bill, reportedly acknowledged the Constitutional issues in the draft legislation and admitted that the legislation is an attempt to bring insurers to the table to work with legislators. The Ohio Bill's sponsors reportedly admitted as much as well, explaining that "if this proposal boils down to bringing parties to the table, to iron out a better solution, we all succeed."

Relatedly, the American Property Casualty Insurance Association ("APIAC") issued a statement on March 26, 2020 that it believes that most insurance policies -- including those with business interruption coverage -- do not cover viruses such as COVID-19 and that to "retroactively rewrite existing insurance policies" could put the insurance industry at risk. David A. Sampson, President and CEO of the Association, stated, "If policymakers force insurers to pay for losses that are not covered under existing insurance policies, the stability of the sector could be impacted and that could affect the ability of consumers to address everyday risks that are covered by the property casualty industry."

Our Firm

Gfeller Laurie LLP's coverage attorneys have extensive experience with the types of first- and third-party coverage claims and related coverage issues and regulators' involvement emerging out of the COVID-19 crisis outlined in this alert. We have direct experience handling such claims and providing related client counseling with respect to insurance department relations throughout New England, New York, New Jersey, Georgia, South Carolina and North Carolina.

So that we may be of further assistance, 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), Elizabeth Ahlstrand (eahlstrand@gllawgoup.com, 860-760-8420), Vince Vitkowsky (vvitkowsky@gllawgroup.com, 212-653-8870), or Melicent Thompson (mthompson@gllawgroup.com, 860-760-8446).

Sincerely,

Gfeller Laurie LLP

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