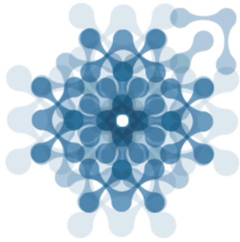



April 13, 2020

# COVID-19: Business Interruption Insurance Suit Examination

On March 30, 2020, Kutak Rock's National Insurance Group published a Client Alert titled "COVID-19 and Key Commercial Insurance Issues." As a follow up to that Client Alert, we have highlighted a few more recent insurance coverage lawsuits that have been filed pertaining to "Business Interruption Insurance" ("BII") over the past two weeks. One of the issues that will be hotly litigated for the next several years, and possibly decades, is the insurance coverage that insurance companies must (arguably) provide to policy-holders under various "Business Interruption Insurance" provisions of certain commercial insurance policies. For way of brief background:

- Business Interruption Insurance ("BII") is a component of commercial property insurance coverage that generally provides coverage for a policyholder's loss of income and extra expenses when the business is partially or entirely shut down.
- This coverage is usually limited to and applies when there is a "direct physical loss" to the insured property.
- The significant dispute regarding COVID-19 is whether there is a "direct physical loss to property" sufficient to trigger coverage.
- State law and the terms of policy (the written contract between the insured and insurance company) will have a large influence on these points.

Beginning almost immediately following state and local government shutdown orders, business owners began making claims to insurance carriers and, when denied coverage, filing lawsuits demanding payment of benefits under the policy. Three of these recent lawsuits are highlighted and briefly analyzed below.

***Wagner Shoes, LLC v. Auto-Owners Insurance Company*, No. 7-20-v-00465-GMB (N.D. Ala. Apr. 7, 2020).**

According to the Complaint filed in federal court in the United States District Court for the Northern District of Alabama, the insured, Wagner Shoes, possessed a Businessowners Policy (BP) contract of insurance and a Commercial Insurance Policy contract of insurance with the insurer- Auto Owners.

The Complaint alleges that Wagner Shoes owns and operates a retail store, Wagner's Shoes for Kids in Tuscaloosa, Alabama. On March 26, 2020, the City of Tuscaloosa issued an order that closed all non-essential businesses, including Wagner Shoes. Wagner Shoes argued in the Complaint that "as a retailer, Wagner's very economic survival is dependent on engaging and selling to local customers physically present in the store."

Wagner holds a valid BP that states that Auto-Owners "will pay for direct physical loss or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." According to the Complaint, portions of that coverage also state that "Covered Cause of Loss" includes "RISKS OF DIRECT PHYSICAL LOSS" unless excluded. Finally, Wagner alleges that the BP is an "All-

Risk" policy that only requires the insured to show (a) the existence of the policy and (b) a loss to the covered property."

The Business Interruption Insurance ("BII") of the BP "typically indemnifies for loss of revenue that would have been earned had there been no business interruption and the continuing normal operating expenses incurred during the time it takes to restore the damaged property." In trying to get around (or meet) the "Direct Physical Loss" of the BP, Wagner alleges that:

> Direct physical loss can exist without actual destruction of property or structural damage to property: in analogous circumstances to the COVID-19 agent, the presence of harmful substances on a property can constitute "property damage" or "direct physical loss" that triggers first party property coverage.

In its sole count (requesting a Declaratory Judgment) Wagner requests that the Court find that: (1) Wagner has proven a loss to covered property; (2) all losses incurred by Wagner related to the COVID-19 agent and business interruption caused by current and ongoing closure orders are insured losses under Plaintiff's policy of insurance; and (3) Auto-Owners is obligated to pay Plaintiff for the full amount of losses incurred and to be incurred in connection with its covered business losses and expenses related to the COVID-19 agent and current and ongoing closure orders.

Critically, the Wagner Complaint spends a significant amount of time and space tracing the origins of the COVID-19 outbreak, how long the virus is believed to live on different surfaces and the cleaning steps that are necessary (or, at this time, thought to be necessary) to kill and prevent the virus from spreading. Time (and this Court) will tell if that approach will be successful in compensating Wagner for its alleged losses.

***SCGM, Inc. d/b/a Star Cinema Grill, et al. v. Certain Underwriters at Lloyd's*, No. 4:20-cv-01199 (S.D. Tex. Apr. 3, 2020).**

According to the Complaint filed in the United States District Court for the Southern District of Texas, the insured SCGM, Inc. ("SCGM") is a "hospitality and entertainment provider" in and around Sugar Land, Texas. SCGM operates a chain of movie theaters and a restaurant in the greater Houston, Texas area.

SCGM contracted with and bought a business insurance policy from Certain Underwriters at Lloyd's ("Lloyd's"). The Complaint specifically notes that following the 2014 Ebola crisis, many insurance carriers made specific exclusions for Ebola and other communicable diseases and viruses. The Complaint alleges that Lloyd's sought to "take advantage of the exclusions in coverage by rolling out a Pandemic Event Endorsement that claimed to 'fill in the gaps that [other insurers] creatively exclude or do not address' that may relate to future pandemics." SCGM purchased this endorsement which, according to SCGM, was marketed by Lloyd's as being "stand alone business interruption" insurance that "will cover business interruption along with extra expenses with crisis management that is crucial ***during*** pandemic events." (Emphasis added). The Complaint claims that Lloyd's marketing material states that this coverage afford a "strong defense against microscopic, but deadly threats." The Pandemic Event Endorsement that SCGM purchased provides a certain level of coverage during a "Pandemic Event", which is defined as:

> "The announcement by a Public Health Authority that a specific Covered Location is being closed as a result of an Epidemic declared by the [Centers for Disease Control and Prevention] or [World Health Organization.]"

The Complaint traces the COVID-19 outbreak and states that on March 19, 2020, SCGM was "required to temporally [sic] close all of its Texas locations" when Texas Governor Abbott issued a pertinent Public Health Disaster Declaration and Executive Order.
The Complaint alleges that Lloyd's denied coverage under the Pandemic Event Endorsement because COVID-19 "is not a named disease on that endorsement." Like the Wanger Complaint, the Plaintiffs in SCGM also

seeks a declaratory judgment against Lloyd's that the COVID-19 outbreak, which caused the temporary shuttering of SCGM's locations in Texas, was a "Pandemic Event" for purposes of the policy endorsement. (SCGM also brought standard breach of contract, breach of duty of good faith and fair dealing and negligence claims against Lloyd's.)

***Sandy Point Dental PC v. The Cincinnati Insurance Company, et al.*, No. 1:20-cv-02160 (N.D. Ill. Apr. 6, 2020).**

According to the Complaint filed in the United States District Court for the Southern District of Illinois, Plaintiff Sandy Point Dental ("Sandy Point") provides dental services by licensed dentists in Illinois. In order to protect its business from situations like the COVID-19 outbreak, Sandy Point claims that it obtained business interruption insurance from the Defendants.

Like many other businesses in Illinois, Sandy Point claims that it was forced to cease most of its operations when the State of Illinois deemed its elective dental work "non-essential." While the Illinois order did not close all dental operations (according to the Complaint, emergency dental work can go on), the Complaint goes to great lengths noting that "The American Dental Association and the Centers for Disease Control and Prevention recommended that all non-emergency dental operations cease."

The Complaint alleges that Defendants quickly issued a denial of coverage, without investigating the reasons for a denial, and that Defendants simply denied coverage on the basis that "the presence of coronavirus, which led to the Closure Orders that prohibited Plaintiffs from operating their businesses, does not constitute 'direct physical damage.'" The Complaint also notes that the policy at issue does not contain a virus exclusion, which should strengthen Sandy Point's claim for coverage, according to the Complaint.

Plaintiffs brought declaratory judgment, breach of contract and statutory claims (under Illinois law) arguing that the insurance policy that Sandy Point purchased covered "business losses incurred as a result of the government orders forcing [Plaintiff] to close their business."

**Conclusion**

Kutak Rock will be tracking these suits carefully, especially since many of them are "bellwether," meaning that state and federal circuit courts are likely to set precedent in the coming months based on the facts and issues presented in each of these suits. For more information about any of the matters discussed in this Client Alert, please contact an attorney listed below.


| **Contacts** | | | |
|---|---|---|---|
| Larry Fields | Kansas City | (816) 502-4604 | larry.fields@kutakrock.com |
| Andrew Shedlock | Minneapolis | (612) 334-5022 | andrew.shedlock@kutakrock.com |



This Client Alert is a publication of Kutak Rock LLP. It is intended to notify our clients and friends of current events and provide general information about litigation issues. This Client Alert is not intended, nor should it be used, as specific legal advice, and it does not create an attorney-client relationship.

© *Kutak Rock LLP 2020* – All Rights Reserved. This communication could be considered advertising in some jurisdictions. The choice of a lawyer is an important decision and should not be based solely upon advertisements.