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**PROGRAM MATERIALS**

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# **COVID-19 Business Interruption Claims Litigation and Legislation: The Current Lay of the Land**

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# Covid-19

## Business Interruption Legislation & Litigation

The current lay of the land



# INTRODUCTION



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Caitlin L. Bronner specializes in complex contractual disputes, including, but not limited to, insurance litigation, real estate and commercial disputes. Caitlin's expertise in commercial disputes also includes shareholder disputes, Civil RICO, and white collar litigation. In this regard, Caitlin notably has secured one of the few Civil RICO awards to have ever been issued in an arbitration in New York. An experienced litigator, Caitlin regularly handles matters before the New York State and Federal Courts, as well as arbitrations and mediations before, among others, JAMS and the AAA. Also an experienced appellate practitioner, Caitlin has argued matters before the Second Circuit Court of Appeals, the New York State Court of Appeals, and the Appellate Division.

Caitlin has fifteen years of experience counseling clients on how to avoid costly litigation by anticipating potential problem areas, including advising clients on options relating to insurance policies and scopes of coverage.

# AGENDA

- We will begin with some background on the issues surrounding Covid-19 insurance claims legislation and litigation.
- We will then explore current developments and trends in Covid-19 business interruption legislation and litigation across three core areas:

# CORE AREAS OF FOCUS

- I. Review relevant provisions of property insurance policies bearing on the availability of insurance coverage for Covid-19 related losses.
- II. Explore the current state of Covid-19 business interruption legislation.
- III. Explore a national snapshot of the current, rapidly-developing area of Covid-19 insurance claims litigation.



**BACKGROUND**

# BACKGROUND

***Understanding how the pandemic has progressed, and the response of state and local governments thereto, explains the genesis of Covid-19 insurance claims legislation and litigation.***

- Businesses have been heavily impacted by lost business income due to the Covid-19 pandemic because, among other things, of state and local stay-at-home orders, and the increased costs associated with safeguarding their premises against Covid-19.
- For businesses with all-risk property insurance coverage suffering significant lost business income due to either a governmental shutdown order, the presence of Covid-19 within their insured premises, or both, the natural question is, does our property insurance policy cover our business's Covid-19 related losses?
- That is a question that is being addressed at the legislative level and in litigation across the country, the answer is not necessarily consistent across jurisdictions, and it depends significantly on the language of the insurance policy in question and the nature of the claimed loss.

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# THE POLICY

## Part I



# PART I: THE POLICY

- Although rules regarding burden-shifting may vary from jurisdiction to jurisdiction, as a general matter, “a policyholder bears the burden of showing that the insurance contract covers the loss.” *Morgan Stanley Grp. Inc. v. New Eng. Ins. Co.*, 225 F.3d 270, 276 (2d Cir. 2000)
  - *Performance Autoplex II Ltd. v. Mid-Continent Cas. Co.*, 322 F.3d 847, 856 (5th Cir. 2003) (“It is an insured's burden to put forth evidence to show that its claim against an insurer is within the policy's coverage”);
  - *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 245 F. Supp. 2d 563, 577 (D.N.J. 2001), *aff'd*, 311 F.3d 226 (3d Cir. 2002) (“Under a first-party property insurance contract, it is the insured's burden to establish that its loss is within the meaning of the insuring agreement”).

# THE POLICY

- Insurance contracts “must be interpreted according to common speech and consistent with the reasonable expectation of the average insured.” *Dean v. Tower Ins. Co. of N.Y.*, 19 N.Y.3d 704, 708 (2012)
  - *Wagner v. Am. Family Mut. Ins. Co.*, 569 F. App'x 574 (10th Cir. 2014) (“The strongest indication of the parties' reasonable expectations is the policy language itself...the Court's first step is to give effect to the plain and ordinary meaning of its terms...”) (citations omitted)
  - *Fleishour v. Stewart Title Guar. Co.*, 640 F. Supp. 2d 1088, 1092 (E.D. Mo. 2009).

# THE POLICY

- Courts must give effect “to the intent of the parties as expressed in the clear language of the contract,” unambiguous terms are afforded their plain meaning, and only if the policy is ambiguous will it be construed in the insured’s favor against the insurer. *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 42 (2d Cir. 2006); *Dean*, 19 N.Y.3d at 708.
  - *ALG Prop. Cas. Co. v. Cosby*, 892 F.3d 25, 27 (1st Cir. 2018) (“we construe an insurance policy under the general rules of contract interpretation ... beginning with the actual language of the policies, given its plain and ordinary meaning ... any ambiguities in the exclusion provision are strictly construed against the insurer”).
  - *Evanston Ins. Co. v. Haven S. Beach, LLC*, 152 F. Supp. 3d 1370 (S.D. Fla. 2015).
  - *Monarch Greenback, LLC v. Monticello Ins. Co.*, 118 F. Supp. 2d 1068, 1074 (D. Idaho 1999).
- Thus, under the laws of New York and several other states, ***the insured bears the initial burden of showing that the insurance policy covers the loss.***

# THRESHOLD COVERAGE QUESTIONS

- Is the loss a “direct physical loss of or damage to property?”
  - As addressed in Part III, the answer turns on whether a governmental shutdown order, or the presence of Covid-19 within insured premises, amounts to “direct physical loss of or damage to property.”
- Is there an applicable endorsement which specifically provides for coverage?
  - Extra Expense endorsement
  - Civil Authorities endorsements
  - Communicable Disease endorsements
- Is there an applicable exclusion which specifically excludes coverage?
  - Virus/Communicable Disease exclusion
  - Act or Decision exclusion
  - Ordinance or law exclusion

# ENDORSEMENTS

- **Extra expense**: this endorsement is often characterized as a “tagalong” to business income coverage – it applies if the business income coverage applies, and otherwise does not. *Michael Cetta Inc. v. Admiral Indem. Co.*, No. 20 Civ. 4612 (JPC), 2020 WL 7321405, at \*1 (S.D.N.Y. Dec. 11, 2020).
- **Civil Authorities**: this endorsement, when included in a property insurance policy, may insure against losses resulting from actions by civil authorities stemming from damage to nearby properties. For example, where a fire in a neighboring building results in the fire department shutting down an entire block. *Id.* at \*2; *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, No. CV 20-1869, 2020 WL 7395153, at \*4 (E.D. Pa. Dec. 17, 2020).
- **Communicable Disease**: this is a relatively unusual endorsement. When applicable, it insures specifically against the presence of communicable diseases in insured premises. *Baldwin Academy, Inc., et al. v. Markel Ins. Co., et al.*, No. 3:20-cv-02004-H-AGS, 2020 WL 7488945, (S.D. Cal. Dec. 21, 2020)

# EXCLUSIONS

Beyond the initial question of whether there is coverage for Covid-19 losses as some variant of “direct physical loss of or damage to property,” and whether a relevant endorsement, such as an extra expense, civil authorities or communicable disease endorsement applies, there is also the question of whether the losses in question are expressly *excluded* under the language of the policy, with an exclusion generally being a situation in which coverage that might otherwise be available is expressly barred.

Virus or Communicable  
Disease Exclusion

Act or Decision Exclusion

Ordinance or Law  
Exclusion

# IN SUM - PART I: THE POLICY

Whether a policy covers Covid-19 losses thus boils down to the answers to the following three questions, which, as discussed in Part III, courts across the country have been called upon to answer:

- Is the loss in question a direct physical loss of or damage to property?
- Does the policy include a relevant endorsement, such as for extra expenses, civil authorities, or communicable diseases?
- Does the loss relate thereto, and is the loss specifically excluded from coverage under a communicable disease/virus, act or decision, or ordinance or law exclusion?



# **COVID-19 BUSINESS INTERRUPTION LEGISLATION**

## **PART II**



# PART II: COVID-19 BUSINESS INTERRUPTION LEGISLATION

A number of states, and the federal government, have sought to introduce legislation that would seek to provide an avenue for recovery for Covid-19 business interruption losses under property insurance policies.

- At the federal level, the Business Interruption Relief Act of 2020, H.R. 7412, 116th Cong. (2020), styled “A BILL TO establish a temporary voluntary program for support of insurers providing business interruption insurance coverage during the COVID-19 pandemic, and for other purposes,” was introduced on June 29, 2020, and subsequently referred to the House Committee on Financial Services, where it currently remains. The focus of H.R. 7412 is to provide a financial incentive for insurers to settle certain Covid-19 property insurance claims early.
- At the state level, several states have introduced relevant legislation:

# LEGISLATION INTRODUCED BY STATES

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**California** introduced Assembly Bill 1552, Reg. Sess. (Cal. 2020)

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**Louisiana** introduced Senate Bill SB477, reg. Sess. (La. 2020)

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**Massachusetts** introduced B. S.2655, 191st Leg. (Mass. 2020)

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**Michigan** introduced H.B. 5739 (Mich. 2020)

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**New Jersey** introduced Assembly Bill 3844 (N.J. 2020)

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# LEGISLATION INTRODUCED BY STATES

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**New York** introduced Assembly Bill A-10226B

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**Ohio** introduced House Bill 589, 133rd Gen. Assemb. (Ohio 2020)

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**Pennsylvania** introduced H.B. 2372, Reg. Sess. 2019-2020 (Pa. 2020)

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**Rhode Island** introduced H.B. 8064, 2020 Reg. Sess. (R.I. 2020)

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**South Carolina** introduced S. 1188, 123rd Sess. (S.C. 2020)

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# **BUSINESS INTERRUPTION LITIGATION**

## **PART III**

# PART III:

## BUSINESS INTERRUPTION LITIGATION

**Background:** overview of Multi-District Litigation (“MDL”) efforts

Early attempts were made to obtain MDL status for Covid-19 business interruption cases, and consolidation thereof, before single judges in the Eastern District of Pennsylvania, and the Northern District of Illinois.

Ultimately, on August 12, 2020, the U.S. Judiciary Panel on MDL (the “Panel”) rejected both petitions. *In re COVID-19 Bus. Interruption Prot. Ins. Litig.*, No. MDL 2942, 2020 WL 4670700, at \*3 (U.S. Jud. Pan. Mult. Lit. Aug. 12, 2020).

In denying the request for MDL treatment nationally, the Panel also rejected a request for MDL treatment by geographic region, leaving open the question of whether MDL treatment might be permissible on an insurer by insurer basis.

Since then, the Panel has issued several decisions. **In all but one, it concluded that MDL treatment on an insurer-by-insurer basis was not warranted.**

# DETERMINATIONS OF THE US JUDICIARY PANEL ON MDL

## The Panel thus determined that:

- Certain Covid-19 claims against Society Insurance Company warranted MDL treatment, and ordered the pending Covid-19 property insurance claims against Society Insurance Co., identified on a schedule to the decision, to be transferred to the Northern District of Illinois and consolidated.  
*[Society Ins. Co. COVID-19 Business Interruption Protection Ins. Litig., MDL No. 2964, 2020 WL 5887444, at \*3 (J.P.M.L. Oct. 2, 2020).]*
- Conversely, the Panel concluded that “centralization ... is not warranted,” denying the request for MDL treatment of the claims against Lloyds of London, Hartford, Cincinnati Insurance Company, and Travelers.  
*[Certain Underwriters at Lloyd’s, London, COVID-19 Business Interruption Prot. Ins. Litig., MDL No. 2961, 2020 WL 5887416 (J.P.M.L. Oct. 2, 2020); In re Hartford COVID-19 Business Interruption Prot. Ins. Litig., MDL No. 2963, 2020 WL 5884782 (J.P.M.L. Oct. 2, 2020); In re Cincinnati Ins. Co. COVID-19 Business Interruption Prot. Ins. Litig., MDL No. 2962, 2020 WL 5884791 (J.P.M.L. Oct. 2, 2020); In re Travelers COVID-19 Business Interruption Prot. Ins. Litig., MDL 2965, 2020 WL 5884785 (J.P.M.L. Oct. 2, 2020).]*

# EMERGING DECISIONS

Following the denial of MDL treatment against all but Society Insurance Co., many of those cases for which MDL treatment had been unsuccessfully sought proceeded to motion practice, and decisions in these and other cases pending around the country are now emerging with regularity.

Such decisions have varied considerably, but can generally be broken down into three categories:

1. Cases in which the losses alleged result solely from a governmental shutdown order, as opposed to the presence of Covid-19 within insured premises, and the applicable policy contains a virus exclusion.
2. Cases in which the losses alleged result solely from a governmental shutdown order, as opposed to the presence of Covid-19 within insured premises, and the policy in question does not contain a virus exclusion.
3. Cases in which at least some portion of the losses alleged result from the presence of Covid-19 within the insured premises, and the policy does not contain a virus exclusion.

# DECISIONS

- **Category 1 Cases** (those involving losses solely from governmental shutdown orders, where the policy contains a virus exclusion)
  - The majority of the cases that have been decided to date have concluded that business interruption coverage under an all-risk property insurance policy is generally **not** available, and have generally upheld decisions by insurance companies to deny such coverage.
- **Category 2 Cases** (those in which the losses alleged result solely from a governmental shutdown order, and the policy in question does not contain a virus exclusion)
  - Most cases to date have generally conclude that business interruption coverage is also **not** available.
- **Category 3 Cases** (those in which at least some portion of the losses alleged result from the presence of Covid-19 within the insured premises, and the policy in question does not contain a virus exclusion)
  - These cases have gone both ways.



# CATEGORY ONE

DECISIONS

# CATEGORY ONE DECISIONS

- Cases involving losses *solely* from governmental shutdown orders, where the policy *contains* a virus exclusion.
- Cases **upholding** insurance company decisions to deny coverage:
  - *Gavrilides Mgmt. Co. LLC, et al. v. Michigan Ins. Co.*, No. 20-258-CB, 2020 WL 4561979 (Mich. Cir. Ct. July 21, 2020).
  - *Michael Cetta Inc. v. Admiral Indem. Co.*, No. 20 Civ. 4612 (JPC), 2020 WL 7321405, at \*1 (S.D.N.Y. Dec. 11, 2020).
  - *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020).
  - *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, No. 20-CV-04434 JSC, 2020 WL 5642483 (N.D. Cal. Sept. 22, 2020).

# CATEGORY ONE DECISIONS

- *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-CIV, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020).
- *Mudpie v. Travelers Cas. Ins. Co. of Am.*, No. 20-cv-03213-JST, 2020 WL 5525171 (N.D. Cal. Sept. 14, 2020).
- *Pappy's Barber Shops v. Farmers Grp.*, No. 20-CV907-CAB-BLM, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020).
- *Plan Check Downtown III, LLC v. AmGuard Ins. Co.*, No. CV 20-6954-GW-SKX, 2020 WL 5742712, at \*1 (C.D. Cal. Sept. 10, 2020).
- *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-CV-00087-KS-MTP, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020).

# CATEGORY ONE DECISIONS

- *Seifert v. IMT Ins. Co.*, No. CV 20-1102 (JRT/DTS), 2020 WL 6120002 (D. Minn. Oct. 16, 2020).
- *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020).
- *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-AS, 2020 WL 5359653, at \*1 (C.D. Cal. Sept. 2, 2020).
- Cases **rejecting** insurance company decisions to deny coverage:
  - *Humans & Resources, LLC v. Firstline Nat'l Ins. Co.*, No. 20-CV-2152, 2021 WL 75775 (E.D. Pa. Jan. 8, 2021).
  - *Elegant Massage, LLC v. State Farm Mut. Auto. Ins., Co.*, C.A. No. 2:20-cv-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020).



# **CATEGORY TWO**

DECISIONS

# CATEGORY TWO DECISIONS

- Cases in which the losses alleged result *solely* from a governmental shutdown order, and the policy in question does *not* contain a virus exclusion
  - Cases **upholding** insurance company decisions to deny coverage:
    - *Rose's I, LLC et al. v. Erie Ins. Exchange*, No. 2020 CA 002424, 202 WL 4589206 (D.C. Super. Ct. Aug. 6, 2020).
    - *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, No. 20 CV 2160, 2020 WL 5630465 (N.D. Ill. Sept. 21, 2020).
    - *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Know as Syndicate PEM 4000*, No. 8:20-cv-1605-T-30AEP, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020).

# CATEGORY TWO DECISIONS

- Cases **rejecting** insurance company decisions to deny coverage:
  - *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*, Kings Cty. Super. No. 20-2-07925 (Wash. Super. Nov. 13, 2020).
  - *Perry St. Brewing Co. LLC v. Mut. of Enumclaw Ins. Co.*, No. 20-2-02212-32 (Wash. Super. Nov. 23, 2020).

# CATEGORY THREE

DECISIONS



# CATEGORY THREE DECISIONS

- Cases in which at least some portion of the losses alleged result from the presence of Covid-19 *within the insured premises*, and the policy in question does *not* contain a virus exclusion.
  - **Cases concluding that the plaintiff had stated a claim under the applicable policies:**
    - *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020).
    - *Blue Springs Dental Care, LLC v. Owners Insurance Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020)

# CATEGORY THREE DECISIONS

- **Cases concluding that the plaintiffs were not entitled to insurance coverage under similar policies:**
  - *Plan Check Downtown III, LLC v. AmGuard Ins. Co.*, No. 20-CV-6954-GW-SKX, 2020 WL 5742712 (C.D. Cal. Sept. 10, 2020).
  - *Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd.*, 1:20-cv-03311-VEC (S.D.N.Y. 2020).
  - *Tappo of Buffalo, LLC, et. al., v. Erie Ins. Co.*, No. 20-cv-754V(Sr), 2020 WL 7867553 (W.D.N.Y. Dec. 29, 2020). (A Report and Recommendation which, as of the time of the drafting of these written materials, had not yet been approved by the District Court judge).
  - *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 2:20-CV-00401, 2020 WL 6436948, at \*3 (S.D.W. Va. Nov. 2, 2020).

# BEYOND THE FOREGOING CATEGORIES

- **There is also another notable decision, which illustrates how a court might proceed in the somewhat unusual scenario where the policy contains a communicable disease endorsement:**
  - *Baldwin Academy, Inc., et al. v. Markel Ins. Co., et al.*, No. 3:20-cv-02004-H-AGS, 2020 WL 7488945, (S.D. Cal. Dec. 21, 2020)

# CONCLUSION

**On the legislation front**, although various bills have been introduced at the state and federal level, nothing has yet been enacted.

**On the litigation side**, the language of the policy is of critical import. Cases have begun to emerge which are shedding light on how courts across the country are handling Covid-19 business interruption claims litigation. These decisions are far from uniform, but can be grouped into three primary types of decisions:

1. Those in which the claims arise under a policy with a virus exclusion where the loss relates solely to a governmental order;
2. Those where the loss relates solely to a governmental order, but the policy does not have a virus exclusion; and
3. Those where the loss relates to the presence of Covid-19 in insured premises, and the policy does not contain a virus exclusion.

# CONCLUSION

- The majority of the cases in the first category have held that the insurance policy does **not** cover the Covid-19 loss alleged.
  - Of the two cases, to date, that have concluded otherwise, *Humans & Resources* was decided under a “reasonable expectations” doctrine that has yet to be litigated in this context in any other jurisdiction as of the date of this writing, and *Elegant Massage* is not readily reconciled with the other cases within this factual scenario.
- The majority of the cases in the second category have held that the insurance policy does **not** cover the Covid-19 losses alleged.
- It is the third category which presently remains most open for debate, with a number of decisions from various jurisdictions coming out on both sides of this issue on substantially similar fact patterns.

***In the absence of any decision by the federal Circuit Courts or the US Supreme Court, the jurisdiction in which one commences such litigation takes on significant import, and the foregoing divergence may give rise to forum-shopping.***

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