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by
Lawrence J. Bracken II,
Hunton Andrews Kurth LLP
Atlanta, GA

Michael S. Levine
Hunton Andrews Kurth LLP
Washington, DC

and

Jason M. Beach
Hunton Andrews Kurth LLP
Atlanta, GA

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Commentary

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Lawrence J. Bracken II,
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[Editor's Note: Lawrence J. Bracken II is a partner with Hunton Andrews Kurth LLP. Larry has more than 33 years of experience litigating insurance coverage disputes and other commercial cases. Michael S. Levine is a partner with Hunton Andrews Kurth LLP. Mike has more than 25 years of experience litigating insurance disputes and advising clients on insurance coverage matters. Jason M. Beach is a counsel with Hunton Andrews Kurth LLP. Jason represents clients in complex commercial litigation. Any commentary or opinions do not reflect the opinions of Hunton Andrews Kurth or LexisNexis®, Mealey Publications™.

Against the backdrop of an unprecedented global health pandemic, the Wall Street Journal reported that "[o]ne of the biggest legal fights in the history of insurance has begun." That fight concerns business interruption coverage claims. As COVID-19 infections in the United States surge, many businesses are contending with continued and crippling disruptions, including forced closures due to governmental shutdown orders. It is no surprise that over the last six months business interruption coverage lawsuits have been filed against insurers at a frenzied pace. In fact, the University of Pennsylvania's COVID-19 insurance coverage litigation tracker reported that over 1180 cases had been filed in federal and state courts as of mid-October, with over a quarter of those cases filed as putative class actions.

This article examines recent state coordination and federal multidistrict efforts in COVID-19 insurance coverage litigation, as well as certain class certification requirements that may present the most difficulties for putative class plaintiffs down the road. First, however, it is important to understand how the courts have resolved the earliest of these cases.

The Earliest Coverage Decisions Sided With Insurers, But Outcomes Are Changing

Although the earliest cases to reach decisions on initial dispositive motions favored insurers, policyholders have scored their fair share of victories, with one of the most recent and most significant rulings, *North State Deli v. The Cincinnati Ins. Co.*, squarely favoring the insureds.

For example, the earliest COVID-19 related insurance coverage decision occurred in a non-class case, *Social Life Magazine Inc. v. Sentinel Insurance Co.*, where the plaintiff sought business interruption coverage for financial losses allegedly sustained from suspending operations due to COVID19-related governmental orders. During a preliminary injunction hearing on May 14, 2020, the court rejected an argument that COVID-19 caused "property damage" as that term is understood under New York law. However, before the court was able to issue a written opinion, the plaintiffs voluntarily dismissed the case. The hearing transcript revealed a number of flaws in the policyholder's claim presentation, including an absence of any explanation as to how COVID-19 affected property and rendered affected property unsafe

and unusable. Indeed, since the beginning of the pandemic, medical science has consistently shown COVID-19 to have multiple modes of transmission. Transmission via affected surfaces and via airborne aerosol droplets are two such modes, and both involve the tangible, physical alteration of property. The composition of the property's surface and the circulation and level of filtration of the indoor air affect the duration of transmissibility; however, it is widely understood that the virus can remain on surfaces for days or weeks, and airborne droplets can contaminate indoor air for hours after an infected person has left the premises. None of this was raised in *Social Life Magazine*. Thus, because the policyholder carried a heightened burden on its request for a preliminary injunction, the court easily and summarily rejected the policyholder's unsupported position.

In another early non-class case, *Gavrilides Management Co. v. Michigan Insurance Co.*, the court addressed whether the insurer of a restaurant owner lawfully denied a business interruption claim related to COVID19 closure orders when the policy required "direct physical loss of or damage to the [insured's] property" to trigger coverage. Applying Michigan law, which has long-required a showing of physical alteration of property to trigger coverage under first party property insurance, the court ruled in favor of the insurance company on summary disposition. Central to the court's decision was the policyholder's argument that COVID-19 was not present at the affected restaurants, and that the closure orders were the only cause of loss at issue. Specifically, Judge Joyce Draganchuk ruled from the bench:

> [I]t is clear from the policy coverage that only direct physical loss is covered. Under their common meanings and under federal case law . . . direct physical loss of or damage to the property has to be something with material existence, something that is tangible, . . . something that alters the physical integrity of the property. The Complaint here does not allege any physical loss of or damage to the property.

On August 6, 2020, the Superior Court for the District of Columbia likewise granted summary judgment to an insurer, holding that government shutdown orders due to COVID-19 did not constitute "direct physical loss" sufficient to trigger policy coverage. As in *Gavrilides*, however, the court relied on a finding that the "Plaintiffs offer no evidence that COVID-19 was actually present on their insured properties at the time they were forced to close. And the [DC] mayor's orders did not have any effect on the material or tangible structure of the insured properties."

More recent and better-reasoned decisions have reached an opposite conclusion, both in the context of class action lawsuits and in lawsuits by individual or consolidated groups of plaintiff-policyholders. In the class action context, two cases from one federal judge in Missouri: *Studio 417 Inc. et al. v. The Cincinnati Insurance Co.* and *Blue Springs Dental Care v. Owners Insurance Co.*, demonstrated how a proper analysis of the allegations coupled with a correct application of the burdens arising under an all-risk insurance policy require that policyholders' claims be allowed to proceed to discovery. In *Studio 417*, on August 12, 2020 the court refused to grant the insurer's motion to dismiss this putative class action because, among other reasons, the policyholders had adequately alleged they suffered a covered "direct physical loss." The court recognized that the all-risk policies at issue failed to define "physical loss" or "physical damage." The court refused to accept the defendants' interpretation that "direct physical loss requires actual, tangible, permanent, physical alteration of property," at least at the motion to dismiss stage. In this vein, the court also recognized that the policies "do not include, and are not subject to, any exclusion for losses caused by viruses or communicable diseases," which is increasingly rare after the spread of SARS in the early 2000s. The ruling appears to be the first putative class asserting a COVID-19 related business interruption claim to survive a motion to dismiss.

Building on *Studio 417*, the same judge again refused to grant an insurer's motion to dismiss in *Blue Springs Dental Care* in what it called a "a nationwide flood of insurance-related litigation." The court found the policyholders adequately alleged direct physical loss, as they had alleged the presence of COVID-19 on and around insured property. The court noted that, similar to the *Studio 417* case, there was no virus exclusion at issue. The court allowed the claims for civil authority and Sue and Labor coverage to continue, and rejected the insurer's argument that a suspension

in business, as necessary for business interruption coverage, required a total cessation of operations. *Blue Springs Dental Care* also denied the insurer's motion to strike the class allegations. The court stated such motions are rarely granted because it is seldom possible to resolve class issues based on the pleadings. This reinforces that class certification will be an extremely important point in the litigation for insurers and the putative class members.

Most recently, and certainly most significantly, a North Carolina court ruled in *North State Deli* that "all-risk" property insurance policies cover the businessinterruption losses suffered by 16 restaurants during the COVID-19 pandemic. This is the first judgment in the country to find that policyholders are, in fact, entitled to coverage for losses of business income resulting from the COVID-19 pandemic. Equally important, the decision illustrates that a proper analysis of the operative policy provisions requires this result.

The *North State Deli* court held that government orders mandating the suspension of business operations and prohibiting "all non-essential movement by all residents" caused "physical loss" of the policyholders' property under the policies. The policies at issue promised to pay for loss of "business income" and for "extra expenses" caused by "direct 'loss' to property . . . caused by . . . any Covered Cause of Loss." They defined "loss" as "accidental physical loss or accidental physical damage" to property. The policyholders moved for partial summary judgment that their losses were covered because the government orders caused them to lose the physical use of and access to their restaurants.

Consistent with well-settled principles of insurance policy interpretation, which require that undefined terms must be given their ordinary meanings, the court turned to the dictionary for definitions of "direct," "physical," and "loss." The court then determined that the government decrees caused an "immediate loss of use and access without any intervening conditions." As the court concluded, this "is precisely the loss caused by the Government Orders":

> "[D]irect physical loss" describes the scenario where business owners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government Orders. Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. These decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a 'direct physical loss,' and the Policies afford coverage.

Central to the court's conclusion was its adherence to the axiom that various terms in an insurance policy must be "harmoniously construed," according every word its commonly understood meaning. Here, as the court explained, the policies covered "accidental physical loss ***or*** accidental physical damage." The court found the use of the disjunctive "or" especially significant, because it supports "at the very least – that a reasonable insured could understand the terms 'physical loss' and 'physical damage' to have distinct and separate meanings."

As the court recognized, the parties "sharply dispute[d]" the meaning of "direct physical loss," with the insurer insisting that the policies required "some form of physical alteration to property." In rejecting that argument, made by insurers universally in these lawsuits, the court specifically relied on the black-letter principle that ambiguity exists when there is more than one reasonable meaning of the policy terms at issue: "[e]ven if Cincinnati's proffered ordinary meaning is reasonable, the ordinary [dictionary] meaning . . . is also reasonable, rendering the Policies at least ambiguous." The court therefore gave "the ambiguous terms the reasonable definition which favors coverage," holding that "the phrase 'direct physical loss' includes the loss of use or access to covered property even where the property has not been structurally altered."

State Coordination And Federal Multidistrict Litigation Efforts Thus Far Have Largely Failed

Many plaintiffs around the country apparently see strength in numbers and have sought to centralize cases for coordinated proceedings. In the state court context, the plaintiff in *Joseph Tambellini Inc. v. Erie Insurance Exchange* applied directly to the Supreme Court of Pennsylvania for emergency relief. The plaintiff specifically petitioned the court

to assume control of his COVID19related business interruption insurance coverage case and decide the coverage issues on an expedited basis. Notably, the plaintiff stated, "Many individual and class actions have been filed . . . against insurers for the losses, damages and expenses caused by the COVID-19 pandemic and the related governmental Orders." The plaintiff therefore asked Pennsylvania's high court to exercise "extraordinary jurisdiction . . . in a fashion not unlike that utilized by the [f]ederal [c]ourts pursuant to 28 U.S.C. § 1407 and Rules of Procedure of the Judicial Panel on Multidistrict Litigation." The court summarily denied the application in a per curiam order.

Federal multidistrict litigation efforts to centralize insurance litigation regarding COVID-19 business interruption claims on an industry-wide basis likewise have been unsuccessful. On August 12, 2020, the JPML rejected the efforts to centralize federal business interruption claims of the fifteen actions before it, while noting that "the Panel has received notice of 263 related actions. Collectively, these actions are pending in 48 districts and name more than a hundred insurers." *In re: COVID-19 Business Interruption Protection Insurance Litigation*. The JPML refused to transfer the cases for centralized proceedings, stating:

> After considering the arguments of counsel, we conclude that the industry-wide centralization requested by movants will not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation. The proponents of centralization identify three core common questions: (1) do the various government closure orders trigger coverage under the policies; (2) what constitutes "physical loss or damage" to the property; and (3) do any exclusions (particularly those related to viruses) apply. These questions, though, share only a superficial commonality. There is no common defendant in these actions—indeed, there are no true multidefendant cases, as the actions involve either a single insurer or insurer-group (i.e., related insurers operating under the same umbrella or sharing ownership interests). Thus, there is little potential for common discovery across the litigation. Furthermore, these cases involve different insurance policies with different coverages, conditions, exclusions, and policy language, purchased by different businesses in different industries located in different states. These differences will overwhelm any common factual questions.

However, the JPML left the door open for future "insurer-specific" MDLs. (This is because proposals for insurer-specific MDLs "were made midway through the briefing on the industry-wide motions, and no motion for an insurer-specific MDL was filed.") Perhaps foreshadowing a warmer reception for this type of MDL, the JPML stated "the arguments for insurer-specific MDLs are more persuasive" because they would be limited to a single insurer or group of related insurers, thus reducing the managerial problems of an industry-wide MDL. The JPML also noted that insurer-specific MDLs "are more likely to involve insurance policies utilizing the same language, endorsements, and exclusions. Thus, there is a significant possibility that the actions will share common discovery and pretrial motion practice." The JPML carried this a step further by ordering four insurers or groups of related insurers to show cause why those actions should not be centralized. It stated that "centralization may be warranted to eliminate duplicative discovery and pretrial practice" for these specific entities.

At a later hearing session on September 24, 2020, the JPML considered the issue of insurer-specific MDLs. Specifically, the JPML separately heard oral argument for such "mini" MDLs regarding Lloyd's, London (26 actions); Cincinnati Insurance Company (70 actions); The Hartford (130 actions); Society Insurance (24 actions) and Travelers (45 actions that were added to the hearing list via a separate order.) Most of the Plaintiffs' lawyers argued that insurer-specific policy language and relevant state law were effectively the same for all the cases. Additionally, most argued that addressing motions to dismiss around the country would be inefficient, lead to conflicts, drive up costs, and unnecessarily prolong litigation overall. Although a majority of plaintiffs' attorneys were aligned on coordination, they had differing thoughts on the potential transferee courts, often proposing specific judges.

For the defense, most of the attorneys noted differences not only with the policies (e.g., use of manuscript policies, different endorsements, multitudes of variations of pathogen, virus, and microorganism exclusions, pandemic coverage grants, etc.) and critical differences in state law, but also that policies centered on property damage could mean different things to different policyholders (a restaurant, a dentist office, or hardware store). One defense attorney noted that if the current rate of dismissal continues, approximately 75% of relevant cases could be dismissed. Consequently, immediate consolidation would not promote efficiency. Some judges expressed skepticism of the consolidation request, stating that pure questions of law, which seem to be at issue here, are rare for MDL treatment. Other judges expressed that insurer-specific MDLs would be the most efficient path given apparent similarities in the policies and state law.

Consistent with the quick timing between the prior July 30, 2020 hearing session and resulting August 12, 2020 order, the JPML reached a swift decision on the insurer-specific MDLs. On October 2, 2020, the JPML denied transfer for the actions concerning Lloyd's of London, Cincinnati Insurance Company, The Hartford, and Travelers. The reasoning of the denial orders was similar. Although acknowledging that the "[c]entralization of these actions presents a close question," each order stated that the proposed insurer-specific MDLs "will not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation." Despite the presence of many common legal and factual questions, the JPML stated that "[t]his litigation demands efficiency." "Efficiency here is best obtained outside the MDL context," due to the laborintensive nature of creating a complex pretrial structure, applying the laws of multiple jurisdictions to resolve core policy issues, and dealing with discovery (much of which would be plaintiff- and property-specific). The JPML did, however, stress to the courts overseeing these cases "the importance of advancing these actions towards resolution as quickly as possible." In that vein, it noted that where multiple cases in one district were pending before different judges, administrative transfer to a single judge may be appropriate.

Cases filed by policyholders against Society Insurance Company, which included individual as well as putative nationwide and statewide class actions, had a different fate under an order also entered on October 2, 2020. The JPML stated that unlike the other business interruption insurance cases it considered for insurer-specific MDLs, "we find that centralization presents the most efficient means of advancing these actions toward resolution." The JMPL recognized that there were "34 total actions pending in six nearby states, the majority in one district. This suggests to us that this litigation presents a manageable controversy that can best be streamlined by proceeding before a single judge." Rejecting arguments that plaintiff- and property-specific discovery weighed against transfer, the JPML explained that "[w]hat sets this litigation apart is the defined geographical scope of these actions, which implicates only six state insurance laws." This is much more easily managed. The JPML transferred the cases to the Northern District of Illinois, the "obvious center of gravity of this litigation." Chicago "lies at the heart of Society's regional business," 22 of the total 34 cases are pending in that district, and the forum is accessible. Judge Edmond E. Chang, "who has not yet had the opportunity to preside over an MDL," will oversee the cases.

Putative Business Interruption Claim Classes Are On The Rise

In addition to multidistrict and other coordinated proceedings, some policyholders have elected to file class actions, just as the *Tambellini* plaintiff noted. Indeed, as stated above, over a 25% of the COVID-19 insurance litigation cases are putative class actions. To the extent putative class actions for business interruption claims can withstand early dismissal motions, class certification will present another challenge because of the requirements of Federal Rule of Civil Procedure 23 and state corollaries.

Class Action Requirements

Although Federal Rule of Civil Procedure Rule 23 imposes no specific deadline to move for class certification, some local rules do set such deadlines. Plaintiffs often push to resolve class certification as early as possible. Indeed, class certification can be considered the most critical litigation stage for putative class complaints because, if a court refuses to certify a class, it "may sound the 'death knell'" for a representative action.

Like any other plaintiff seeking class treatment, putative class plaintiffs with business interruption coverage claims must satisfy Federal Rule of Civil Procedure 23

in federal court, or the applicable analog in state court. Federal Rule 23(a) has four specific prerequisites, generally referred to as: (1) numerosity ("the class is so numerous that joinder of all members is impracticable"); (2) commonality ("there are questions of law or fact common to the class"); (3) typicality ("the claims or defenses of the representative parties are typical of the claims or defenses of the class"); and (4) adequacy of representation ("the representative parties will fairly and adequately protect the interests of the class"). In addition, the class must fit within and satisfy one of the subsections in Rule 23(b). In general terms, these are: (1) the potential risk of inconsistent results in separate actions; (2) the need for classwide injunctive relief; (3) and/or the predominance of common questions of fact or law and the superiority of the class action over separate actions.

Commonality Can Present Challenges

Commonality is satisfied when "there are questions of law or fact common to the class." As the Supreme Court of the United States has emphasized, what matters "is not the raising of common questions—even in droves—but rather, the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

In COVID-19 insurance litigation cases, plaintiffs may argue that what they consider to be "form" insurance policies will satisfy commonality. Although courts disagree on the effect of such issues, the commonality bar can be relatively low when dealing with form insurance contracts.

Although not a class certification decision, the recent JPML decision is insightful. It stated, "[T]here are many such 'standardized' forms in circulation, and any form used by a given insurer will have been modified in a unique way. While the policy language for business income and civil authority coverages may be very similar among the policies, seemingly minor differences in policy language could have significant impact on the scope of coverage." Class actions against a single insurer may ease some of this burden, but if the policy documents are not uniform, even within a single insurance company, commonality may be harder to demonstrate. Many policies, particularly those issued to larger companies, will contain endorsements modifying, limiting, or expanding coverage. Additionally, representations that insurers and brokers make to policyholders can create individualized issues, especially where the named plaintiffs are concerned.

Individualized causation questions also may cause commonality problems. For instance, policyholders with business interruption claims may contend that even if seemingly straightforward coverage exclusions apply facially to loss caused directly by virus, business interruptions caused by governmental orders, pandemic, and the COVID-19 communicable disease, among other distinct causes of loss, nevertheless still equate to covered physical loss or damage. But was the interruption due to the virus, or was it caused by government shutdown orders, changed customer behavior resulting from elevated risks, general societal unrest/political movements, mismanagement of the business, or a host of other factors? Likewise, should an insurer be estopped from applying an otherwise preclusive exclusion because that insurer or its industry representatives misrepresented the exclusion's scope and purpose to state regulators? These issues and dissimilarities may preclude the generation of common answers to purported common causation questions.

Another commonality issue may arise with policies that contain arbitration clauses or waivers of class action procedures requiring plaintiffs to pursue their claims individually. "In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." Although not in the insurance context, at least one federal court has held that that California's "public injunction" exception, which various courts have found was *not* preempted by the FAA, does not apply to a putative class action, even with the overlay of the COVID-19 pandemic. Determining whether potential members of the class are subject to binding arbitration may destroy commonality (as well as typicality) of the class.

Plaintiffs seeking to certify a nationwide class may encounter yet another obstacle as well. In the United States, insurance law has been developed on a state-by-state basis. In other words, there is no national law of insurance. Even assuming all policyholders in a certain industry have "uniform" policies with identical relevant coverage language and exclusions—which is unlikely—different states interpret and apply many

key policy terms and phrases differently. Moreover, states differ even in their respective rules for interpreting insurance policies and contracts in general. The substantive and procedural variations in state law militate strongly against certifying a nationwide class or attempting to manage the claims of policyholders from dozens of jurisdictions.

Problems nevertheless can arise even if a putative class is limited to a single state. It is axiomatic that the specific language of a policy drives whether there is coverage for a policyholder's particular claim or loss. Consequently, even if a class were limited to a particular state's policyholders and the only applicable law was of that state, the facts and policy terms underpinning each insured's claim can vary significantly. For example, recent decisions treat insureds alleging the actual presence of COVID-19 on their premises differently from those that merely allege loss of use of property because of civil authority orders. Some insureds will make this showing, while others may not. In fact, the vast majority of COVID-19 business interruption cases that have been dismissed involve claims that fail to allege any causal connection to the presence of COVID-19 or SARS-CoV-2. Likewise, many of the cases to be dismissed involve policies containing virus exclusions yet no allegations that challenge the legitimacy of those exclusions or misrepresentations by the defendant insurers in obtaining state regulatory approval for their use.

For those insureds who allege only civil authority orders affected their operations, such orders too might vary based on locality. Athens-Clarke County in Georgia, for example, issued much stricter stay-at-home mandates than the surrounding counties. Further, certain material exclusions, such as a virus or pandemic exclusion, may not be common to every class member's policy, and exclusionary language may not be materially identical from policy to policy. Overall, given the specificity of policy language and the frequency with which identical policy forms are modified by endorsement, it likely will be difficult to find commonality among the policy terms covering all policyholders that purchased a particular insurance product.

Further, class action certification in the insurance context generally involves numerous, low-value claims. That is not the case for business interruption claims because many insureds' lost income claims not only are likely to be substantial, but also may involve significant accounting issues, which may further decrease the commonality arguments.

Difficulties Under Rule 23(b)

Depending on which type of class action is pleaded under Rule 23(b), would-be class plaintiffs may face additional arguments opposing class certification. For businesses seeking to weather the pandemic, the recovery of specific money damages under a particular insurance policy is the most critical goal. However, actions seeking to recover predominately individualized money damages generally do not qualify for certification under Rule 23(b)(2) (addressing classwide injunctive relief). Rule 23(b)(1) class actions (potential risk of inconsistent results in separate actions) are not common and often involve the presence of a limited fund or indivisible injunctive relief, not situations involving allegedly similar contract terms. Further, potential due process concerns about monetary damages in such cases tend to drive them into the Rule 23(b)(3) category.

Predominance And Superiority Hurdles

If plaintiffs seek certification of a Rule 23(b)(3) class (in which common questions of fact or law must predominate and the class action must be superior to separate actions), they also must satisfy the predominance and superiority requirements by showing that common questions "predominate over any questions affecting only individual members; and class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy." Predominance is tougher to prove than commonality, and if commonality is not met, then predominance will be a problem.

As with the commonality requirement under Rule 23(a)(2), a nationwide class seeking redress for business interruption claims may encounter predominance issues if a court must apply materially differing state laws that would govern the claims presented. For example, predominance in form contract cases may be defeated "if individualized extrinsic evidence bears heavily on the interpretation of the class members' agreements," or if "there may be considerable variation in the state law under which any extrinsic evidence would have to be scrutinized."

Additionally, while business interruption claims do not involve plaintiffs with small or negligible value claims,

this does not mean class treatment lacks superiority. As business interruption cases continue to swell, plaintiffs seeking class treatment may have stronger arguments that litigating in a representative capacity through the class action device is better than a flood of individual cases, particularly from a manageability perspective.

Other manageability issues, however, may exist that can prevent class certification. In most instances, the wide variation of insurance contracts and specific facts underlying potential claims for physical loss/damage make these classes unmanageable. This problem can arise from claim-by-claim reviews, which could be necessary for many of the reasons stated above.

In the multidistrict litigation context, the JPML noted the "managerial and efficiency concerns" with an industry-wide MDL, such as a problematic pre-trial structure and discovery that would differ from insurer to insurer. The JPML also identified a practical timing concern with implementing a pretrial structure. "[T]ime is of the essence in this litigation. Many plaintiffs are on the brink of bankruptcy as a result of business lost due to the COVID-19 pandemic and the government closure orders. An industry-wide MDL . . . will not promote a quick resolution of these matters."

Finally, lawsuits being pursued by large corporations or businesses with operations spread across multiple jurisdictions, or even countries, are going to be pursued individually, and the plaintiffs in such suits are almost certain to opt out of any sort of consolidated proceeding. Indeed, the Houston Rockets basketball team filed their business interruption lawsuit under a policy containing limits in excess of $400 million in the insurer's home-state court in Rhode Island for the apparent strategic purpose of avoiding consolidation in any federal consolidation of lawsuits involving their insurer, Affiliated FM Insurance Company. Given the magnitude of the losses and the unique nature of the Rockets' and other large Affiliated FM policyholders' operations, consolidation in proceeding with other insureds in other industries, such as clothing and retail, gaming and hospitality, and commercial real estate investment, would raise far more disparate issues than it would resolve.

With the COVID-19 pandemic far from under control in the United States, and as an increasing number of business interruption coverage lawsuits dodge motions to dismiss, counsel must start thinking strategically about class certification. It is arguably the most critical next step on the litigation horizon and, perhaps, where this legal war will be substantially won.

Endnotes

1. *see* https://cclt.law.upenn.edu/
2. *Id.*
3. No 20-CVS-02569 (N.C. Sup. Ct., Cty. of Durham, Oct. 9, 2020).
4. 1:20-cv-03311-VEC (S.D.N.Y.).
5. No. 20-258CB (Mich. Cir. Ct. 2020).
6. *See* https://www.youtube.com/watch?v=Dsy4pA5NoPw
7. *Rose's 1, LLC v. Erie Insurance Exchange*, No. 2020 CA 002424 (D.C. Super. Ct. Aug. 6, 2020).
8. Order at 5.
9. No. 6:20-CV-03127-SRB, 2020 U.S. Dist. LEXIS 147600, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020).
10. No. 20-CV-00383-SRB, 2020 U.S. Dist. LEXIS 172639, 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020).
11. (Emphasis in original.).
12. No. 52 WM 2020 (Pa.).
13. MDL No. 2942, Order at 1 (Aug. 12, 2020).
14. *Id.* at 3.
15. *Id.* at 4.
16. *Id.*
17. *See, e.g.*, LR 23.1(B), N.D. Ga. (stating in relevant part that "[t]he plaintiff shall move within ninety (90) days after the complaint is filed for a

determination under Fed. R. Civ. P. 23(c)(1) as to whether the suit may be maintained as a class action").

18. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 154, 162 (3d Cir. 2008); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005).

19. Fed. R. Civ. P. 23(a).

20. *See* Fed. R. Civ. P. 23(b)(1)(3).

21. Fed. R. Civ. P. 23(a)(2).

22. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (internal quotation marks omitted).

23. *See Bally v. State Farm Life Ins. Co.*, No. 18-CV-04954-CRB, 2020 U.S. Dist. LEXIS 59308, 2020 WL 1643681, at *9 (N.D. Cal. Apr. 2, 2020) (finding commonality satisfied when putative class involved claims under standardized form insurance contract). *Contra Eisen v. Indep. Blue Cross*, 2003 PA Super 438, ¶ 8, 839 A.2d 369, 372–73 (2003) (finding commonality not satisfied under Pennsylvania class action law when health insurer used form provider agreements but contracts provided differing patient coverage, contained variations in service that were attributable to whether proposed treatments were considered medically necessary in given case, and evidence existed of significant variation in preliminary precertification decisions, recertification decisions, and decisions after appeal).

24. *In re: COVID-19 Business Interruption Protection Insurance Litigation*, MDL No. 2942, Order at 3 (Aug. 12, 2020).

25. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018).

26. *Capriole v. Uber Techs., Inc.*, No. 20-CV-02211-EMC, 2020 U.S. Dist. LEXIS 90687, 2020 WL 2563276, at *5 (N.D. Cal. May 14, 2020) (finding pubic injunction exception did apply to invalidate arbitration clause in putative class action brought by Lyft drivers).

27. *E.g., Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 776 (8th Cir. 2013) (noting holding by trial court that "[t]he existence of the arbitration requirement shatters the numerosity, commonality, and typicality prerequisites of Rule 23(a)"); *Johnson v. BLC Lexington, SNF, LLC*, No. CV 5:19064-DCR, 2020 U.S. Dist. LEXIS 114505, 2020 WL 3578342, at *6 (E.D. Ky. July 1, 2020) ("[D]etermining whether potential members of the class are subject to binding arbitration destroys commonality and typicality of the class.").

28. *Compare Studio 417, Inc. v. The Cincinnati Ins. Co.*, No. cv-03127-SRB (W.D. Mo. Aug. 12, 2020) (alleging the presence of virus on the insured property), *with Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-cv-461-DAE (W.D. Tex. Aug. 13, 2020) (plaintiffs affirmatively plead the lack of virus on their property).

29. *Compare* Athens-Clarke County, *Second Ordinance Declaring Local Emergency* (Mar. 19, 2020) (instituting a mandatory "shelter in place" policy), with Oconee County, *Local Emergency Order No. 1* (Mar. 26, 2020) ("strongly encouraging" residents to remain at home).

30. *WalMart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-63 (2011).

31. *2 Newberg on Class Actions* § 4:2 (5th ed.).

32. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 593 (1997) (internal quotation marks omitted).

33. *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176-77 (11th Cir. 2010).

34. *Mills v. Foremost Ins. Co.*, 269 F.R.D. 663, 679 (M.D. Fla. 2010) (denying certification and finding that claim-by-claim analysis in coverage case stemming from hurricane damage was unmanageable); Nat'l Sec. Fire & Cas. Co. v. DeWitt, 85 So. 3d 355, 385 (Ala. 2011) (reversing certification of class when the "case will potentially involve the introduction of evidence regarding thousands of individual claims" thus creating manageability issues).

35. *In re: COVID-19 Business Interruption Protection Insurance Litigation*, MDL No. 2942, Order at 3.

36. *Id.*

37. *See Clutch City Sports & Entertainment v. Affiliated FM Ins. Co.*, Case No. PC-2020-05137 (Super. Ct., Providence Cty.).

38. *(see, e.g., Ralph Lauren Corp. v. Affiliated FM Ins. Co.*, No. 20-cv-10167 (D.N.J.)).

39. *(see, e.g., Treasure Island, LLC v. Affiliated FM Ins. Co.*, No. 20-cv-00965 (D. Nev.)).

40. *(see, e.g., Thor Equities v. Factory Mutual Ins. Co.*, No. 20-cv-3380 (S.D.N.Y)). ■

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