



ACC BALTIMORE
CHAPTER

Live Webinar
September 14, 2020
1:00 pm – 2:00 pm

COVID 19: YOUR
INSURANCE COMPANY
DENIED YOUR CLAIM,
SO NOW WHAT?



Disclaimer

The views expressed by the participants in this program are not those of the participants' employers, their clients, or any other organization. The opinions expressed do not constitute legal advice, or risk management advice. The views discussed are for educational purposes only, and provided only for use during this session.

SPEAKER:



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Rhonda D. Orin is the managing partner of the firm's Washington, D.C. office. Rhonda represents policyholders in coverage cases nationwide, including cyber liability, third-party tort and environmental liability claims, first-party property damage and business interruption claims, directors & officers liability, errors & omissions liability, fidelity bonds and alternative risk transfer arrangements, including for employee benefit plans.

Rhonda has served as lead counsel in multiple jury and bench trials, argued before the highest courts of several states, and appeared in two cases before U.S. Supreme Court. Through jury verdicts, summary judgment decisions, confidential settlements and resolutions without litigation, she has recovered more than a billion dollars for policyholders, including nine-figure recoveries.

Rhonda is a Fellow of the American Bar Foundation, an honor given to less than 1% of attorneys. Her skills are recognized by Chambers, the Legal 500, the D.C. Women's Bar Association, Best Lawyers, Super Lawyers and others. She also is the author of "Making Them Pay: How to Get the Most from Health Insurance and Managed Care" (St. Martin's Press 2000).

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Daniel J. Healy is a partner in Anderson Kill's Washington, D.C. office. He served over five years as a Trial Attorney with the U.S. Department of Justice, Tax Division, appearing as lead trial counsel in federal and state courts across the country. He received numerous Outstanding Attorney awards and served as the E-Discovery Coordinator for the Tax Division.

Dan currently is the Co-Chair of Anderson Kill's Cyber Insurance Recovery Practice Group, and a member of the firm's Technology, Media and Distributed Systems.

Dan has been selected by his peers for inclusion in The Best Lawyers in America for Insurance Litigation since 2018, recognized by Super Lawyers as a Super Lawyer for Insurance Coverage since 2018 and was elected into the American College of Coverage Counsel.

He represents policyholders seeking insurance coverage. He has experience obtaining coverage under a variety of insurance policies relating to directors and officers liabilities, business interruptions, environmental liabilities, health benefits, property damage, asbestos products, title insurance liabilities, and intellectual property disputes. He has represented railroads, banks, financial service providers, consulting companies, manufacturers, retailers, technology companies and food and beverage providers.

COVID-19 VIRUS – CHANGING EVERYTHING

Oil & Gas Industry Global petrol demand to plunge as US stops driving

Refineries set to shut as consumption falls to levels from 1970s Nixon era

FGE, an energy consultancy, said petrol demand in the US alone would fall almost 5m barrels a day next month, equivalent to a 5 per cent drop in global oil demand. **World oil demand is forecast to fall** by an unprecedented 20m-25m barrels a day, a quarter of normal daily consumption.

“It’s like the entirety of Europe, Africa and the Middle East combined stopped driving,” said Cuneyt Kazokoglu, FGE’s head of oil demand, about the drop in petrol usage in the US.

Capital markets + Add to myFT

CMBS investors seek relief from the Federal Reserve

Yields on private-label deals have moved higher in recent weeks, sparking anxiety

Insurance industry could be ‘in jeopardy’ over virus claims, warns Lloyd’s chair

US and UK urge groups to pay out even though many policies do not cover outbreak

Insurance ✓ Added

Life insurers braced for hit as bond market buckles

Rising death toll is not biggest issue facing sector as coronavirus outbreak worsens

FTfm M&G Investments PLC + Add to myFT

M&G under pressure as investors flee flagship bond fund

Richard Woolnough’s Optimal Income fund has shrunk about a fifth in coronavirus sell-off

The highest-rated triple A tranches of US CMBS have blown out to a yield of 3.6 percentage points above benchmark swap rates, from below 1 percentage point at the start of the year, according to data from Trepp. Lower-rated, triple B tranches have risen from less than 4 percentage points above swaps, to over 11 percentage points.

One B-rated tranche of a CMBS deal backed by a Hilton hotel in Honolulu has fallen from over 100 cents on the dollar at the start of the month to about 43 cents on the dollar on Thursday. “Clearly no one is going to a hotel at this point unless they have to,” said John Sim, an analyst at JPMorgan.

Where Do Things Stand with Your Claim?

CONDITIONS TO COVERAGE

Coverage can be forfeited if the policyholder fails to fulfill the following conditions:

- Timely notice of claim.
- Cooperation with insurers' investigation.
- Timely filing of sworn proofs of loss.
- Timely filing of a coverage lawsuit.

NOTICE AND COOPERATION

- Give notice without delay even if you are not sure you have a valid claim or do not know the amount.
- Comply with information requests as information becomes available.
- If information requests are burdensome, comply anyway to the extent information is available.
- But consider asking for a coverage determination early you don't waste time if it is going to be denied no matter what you provide.

COMPLY WITH DEADLINES

- Proofs of Loss – Get written extensions if necessary.
- Deadline for filing suit – May become important if you decide to let the law develop before filing.
 - Periods specified in your policy may be overridden by state law.

RESERVATIONS OF RIGHTS

- Ask for a coverage determination early.
- If the response is a reservation of rights, it probably will not say much of value.
- Demand a full explanation of the insurers' position.
 - It may contain valuable admissions.
 - It may help you to evaluate the strength of your claim.

DEALING WITH CLAIM DENIALS

- Most Covid claims will start out with denials.

- The policyholder then has four choices:
 - Give up.
 - Try to negotiate or mediate.
 - Sue the insurer.
 - Wait to see how the law develops before deciding.

GIVING UP

Even if you are certain that you have no coverage:

- Monitor developments in the courts.
- Coverage will be decided under every state's law.
- It may take a few years before the law applicable to your claim is fully developed.

NEGOTIATE OR MEDIATE NOW

- You may be able to negotiate with your insurer in response to a written denial.
- At most, that may lead to a small settlement – but that would be better than nothing and the legal costs would be minimal or nil.
- Remember that insurers have a number of defenses to any claim – and they will want to test your resolve before paying you anything.

SUE SOONER?

Possible advantages of suing sooner:

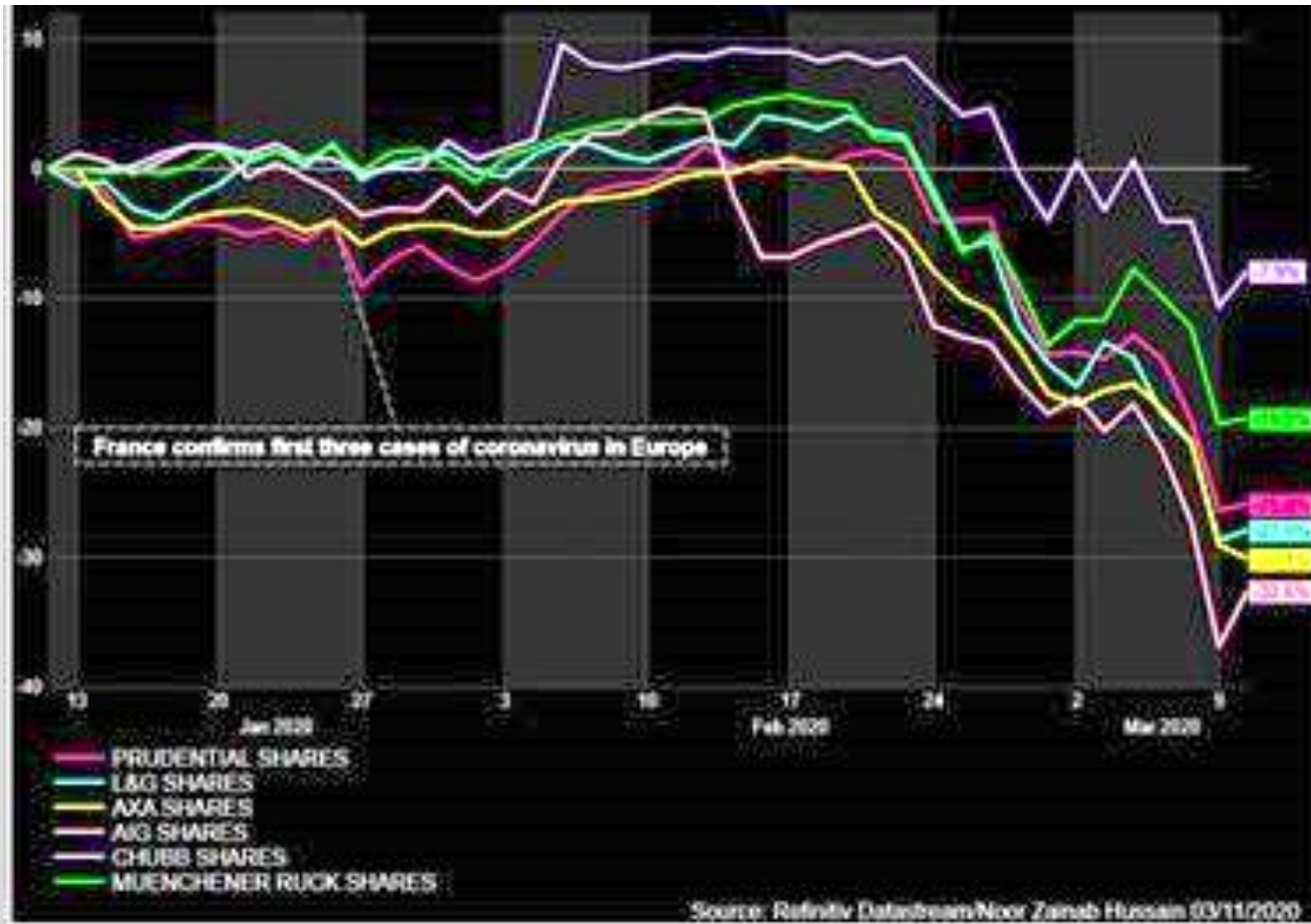
- Earlier recovery by judgment or settlement.
- An opportunity to try to make law based upon the best arguments, before cases with bad facts and bad lawyering make bad law.
- You may be able to pick a favorable jurisdiction if you sue before the insurer sues you.

SUE LATER?

- Let someone else incur the cost of making the law on Covid coverage.
- However, be sure to keep suit limitation periods in mind.

What Is the Big Picture Nationwide?

INSURANCE INDUSTRY REELS AMID CORONAVIRUS-LED MARKET BLOODBATH



(“Insurers face double whammy from coronavirus crisis,” *Reuters* (March 11, 2020))

“CNA REPORTS LARGE UNDERWRITING LOSSES FROM COVID, CIVIL UNREST”

- Published in Business Insurance on August 3, 2020.
- “COVID-19 significantly impacted underwriting results for CNA Financial Corp., resulting in pretax net catastrophe losses of \$301 million in the second quarter, the Chicago-based insurer reported Monday.”

“COVID-19, CIVIL UNREST IMPACT HARTFORD EARNINGS IN SECOND QUARTER”

- Published in Business Insurance on July 31, 2020.
- “Hartford Financial Services Group Inc. reported \$248 million in catastrophe losses in the second quarter, including \$110 million from civil unrest and losses related to the COVID-19 pandemic, according to earnings statement released Thursday.”

COVID CASES SO FAR

- A lot of bad rulings for policyholders, dismissing badly worded complaints that should not have been brought.
- A number of settlements, handled quietly, for certain policyholders – mostly with event cancellation claims.
- Nearly 800 COVID-19 lawsuits have been filed (*ABA Journal*) across the country, with no rulings yet from shuttered or limited courthouses.

COVID CASES SO FAR

- Recently, the Judicial Panel on Multidistrict Litigation rejected two petitions to centralize hundreds of cases for business interruption coverage in either:
 - Northern District of Illinois (Chicago); or
 - Eastern District of Pennsylvania (Philadelphia).

- But it is still under consideration for four insurers:
 - The Hartford.
 - Various Underwriters at Lloyd's, London.
 - Cincinnati Insurance Co.
 - Society Insurance Co.

NOTABLE EARLY DECISIONS

- Last month, court found no possibility of coverage for pandemic-related lockdowns for barbershops in Texas.
 - No “accidental, direct physical loss”
 - In any event, virus exclusion bars coverage
Diesel Barbershop LLC et al v. State Farm Lloyds (S.D. Tex. -- San Antonio; 8/13/20)

NOTABLE EARLY DECISIONS (CONT'D)

- The week before, court found the same for pandemic-related lockdowns for restaurants in D.C.
 - No “direct loss” because the mayor’s edict did not actually harm property
 - No “physical damage” because no proof of virus at the restaurants
 - Loss of use, without physical damage, is not enough.
Rose’s 1, LLC., et al. v. Erie Insurance Exchange
(D.C. Super. Ct.; 8/11/20)

NOTABLE EARLY DECISIONS (CONT'D)

- But two days later -- the exact opposite . . .

- Potential coverage for pandemic-related lockdowns, in action filed by restaurants and hair salons in Missouri

- Court denied motion to dismiss filed by insurance co.
 - Plaintiffs have adequately pled “physical loss”
 - The property was unusable
 - Structural alteration is not required

Studio 417, Inc. v. Cincinnati Ins. Co.
8/12/20 -- W.D. Mo. (Southern Div.)

WHY THE DISCORD?

- First, insurance companies (which are exempt from antitrust laws) organized their strategy and presented a unified front.
- Second, the early Covid actions have been filed by lawyers inexperienced with insurance coverage.
- Third—and most important—the policy language varies widely and often is not clear!!!

PROBLEMATIC POLICY LANGUAGE

- “Physical damage” is undefined, so it can be (and is being) interpreted in different ways.
- Parties disagree about whether there is a difference between “loss” and “damage” in clauses like: “Loss of or Damage to.”
- “Virus” exclusions were tossed liberally into policies after the SARS epidemic – in ways that make no sense.

“PHYSICAL LOSS OR DAMAGE”

- Usually require “physical loss or damage” to trigger coverage.
- Insurers will argue physical damage = structural damage.
- This will be a key issue that the courts will need to address.



CORONAVIRUS AS PHYSICAL DAMAGE

- “Physical damage” = carpet fumes, carbon monoxide leaks, asbestos fibers, etc.
- *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-04418, 2014 WL 6675934, at *7 (D.N.J. Nov. 25, 2014) (an ammonia discharge in a manufacturing facility constituted “direct physical loss of or damage to” the facility because it “physically rendered the facility unusable for a period of time”).
- *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App’x 823, 825 (3d Cir. 2005) (bacteria contamination of a home’s water supply could constitute a direct physical loss where the “functionality” of the property is “nearly eliminated or destroyed,” or when it renders the property “useless or uninhabitable”).

CORONAVIRUS AS PHYSICAL DAMAGE (CONT'D)

- *Oregon Shakespeare Festival Association v. Great American Insurance Company*, 2016 WL 327247 (D. Ore. June 7, 2016) (business entitled to BI coverage when it had to cancel performances at a theater due to smoke from wildfires that infiltrated the premises).
- *Port Auth. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (the presence of large quantities of asbestos in the air of a building may constitute “physical loss or damage”).
- *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709 (E.D. Va. 2010), *aff’d*, 504 F. App’x 251 (4th Cir. 2013) (finding “direct physical loss” where “home was rendered uninhabitable by the toxic gases” released by defective drywall).

CORONAVIRUS AS PHYSICAL DAMAGE (CONT'D)

- *Mellin v. Northern Sec. Ins. Co.*, 167 N.H. 544, 550-51, 115 A.3d 799, 805 (N.H. 2015) (responding to plaintiffs' argument that "physical loss encompasses pervasive odors," the court concluded that "physical loss may include not only tangible changes to the insured property, but also changes that . . . exist in the absence of structural damage").

COUNTERVENING AUTHORITY

- Other cases will be relied upon by insurers to argue that the presence of a virus is not physical damage.
- E.g. *Source Food Tech., Inc. v. U.S. Fidelity & Guar. Co.*, (8th Cir. 2006) (policyholder's inability to transport its beef products across the U.S./Canada border due to concerns over mad cow disease did not trigger coverage resulting from physical damage).

DISPUTE OVER “PHYSICAL LOSS OF”

- Insurer view: “loss of” is limited to circumstances when property is physically missing or stolen.
 - It cannot mean “loss of use” because that is a damages concept, addressed by the Business Interruption provisions.
- Policyholder view: “loss of” means when the use of property is impaired, such that it can no longer perform its ordinary function.
 - It must be given its plain meaning, and “loss of” is different from “damage to.”

VIRUS EXCLUSIONS

- They come in all shapes and sizes.
- The ISO exclusion has sweeping wording – but it makes no sense, in comparing viruses to fungus.
- Some don't apply when viruses come from Specified Causes of Loss, like fire or lightning.
 - When do viruses come from fire or lightning?

“CIVIL AUTHORITY” EXTENSION

“This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability if an order of civil or military authority prohibits access to a location provided such order is the direct result of physical damage of the type insured *at a location or within five (5) statute miles of it.*”*

* Emphasis supplied

“COMMUNICABLE DISEASE” EXTENSION

“If a described location owned, leased or rented by the Insured has the *actual not suspected presence* of communicable disease and access to such described location is limited, restricted or prohibited by:

- a) An order of an authorized governmental agency regulating such presence of communicable disease; or
- b) A decision of an Officer of the Insured as a result of such presence of communicable disease,

This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability *at such described location with such presence of communicable disease*”*

* Emphasis supplied

CONTINGENT BI COVERAGE

- Contingent BI: covers lost profits stemming from covered PD at upstream supplier or downstream distributor or customer.
- Often coverage applies to multiple tiers of suppliers and customers.
 - “Supplier” could be interpreted broadly. *See Archer - Daniels Midland Co. v. Phoenix Assurance Co*, 936 F.Supp. 534 (S.D. Ill. 1996) (holding that policyholder, a food processor, was entitled to CBI coverage because of PD sustained by the Army Corps of Engineers, which operated the flooded Mississippi River boat channels, and farmers who lost crops that would have indirectly been sold to the plaintiff through intermediaries).
 - CBI may extend to PD at “leader” or “attraction” properties.
 - *E.g.*, hotel nearby large amusement park
 - Significant in light of government closures of public and private gathering places

QUESTIONS?



THANK YOU.



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