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Disaster 2020: Managing Insurance Claims, Coverage Disputes and Renewals in Today's Hard Market

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This presentation is provided for informational purposes and does not constitute legal advice.

Overview

- Insurance Market
- Litigation Environment
- COVID-19 Litigation Against Insurers
- Claims Issues
- Renewal Considerations

HELP US MAKE THIS PRESENTATION INTERESTING TO YOU

- Not here to talk about technical coverage issues
- Want to address your questions
- Please ask
- If you have a question, others probably have the same one
- Feel free to interrupt us at any time
- Or send a question in the chat
- Or wait until the end
- Or contact us after the program



Insurance Market - Pricing

- Global commercial insurance prices rose significantly in the third quarter of 2020, up 20% -- the largest year-over-year increase since the beginning of Marsh's Global Insurance Market Index in 2012.
- Q3 marked 12th quarter of consecutive price increases
- Globally, rate increases in the financial and professional lines showed the most upward growth at an average 40%, up from 37% in Q2.



"I can't carry this much cash for the premium without bringing security."

Insurance Market - Pricing

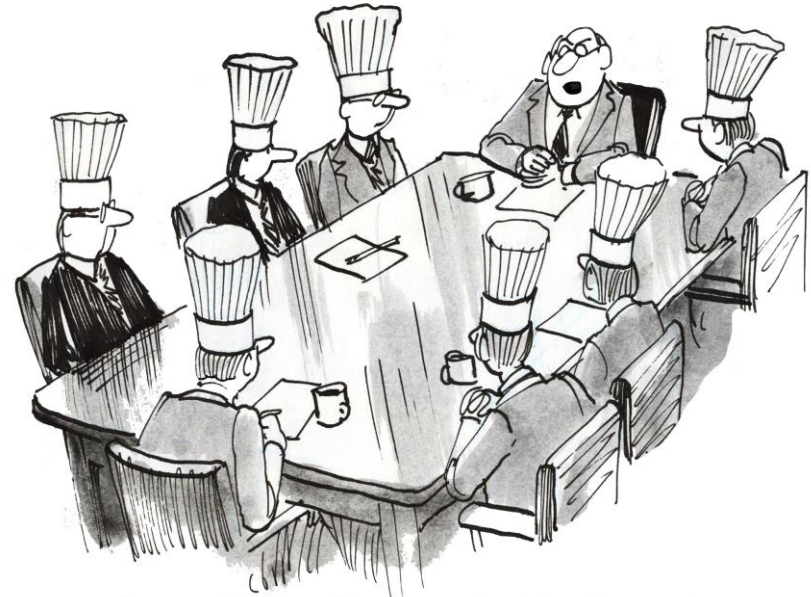
- Increases for property insurance hit an average 21%.
- Average 6% increase for casualty coverage.
- Larger, complex umbrella and excess risks continue to experience increases ranging typically between 30% and 60%, but sometimes higher.
- Financial and professional liability prices showed a higher average increase at 28%, mainly due to D&O coverage.
- More than 90% of clients saw average increases of over 50%.
- Cyber insurance prices showed their largest average increase since 2016 at 11%.
- Expected to remain challenging through at least first half of 2021



Litigation Environment

- Between January and August, 3,362 cases were caused by COVID-19 (directly caused by COVID-19 and related societal changes or have fact patterns that were exacerbated by the pandemic).
- Case filings caused by COVID-19 have decreased since May.
- Insurance, contracts, and employment practice areas have the most cases caused by the pandemic.
- Insurance saw the most cases caused by COVID-19 with 692 cases.

Source: <https://lexmachina.com/blog/an-updated-analysis-of-litigation-caused-by-covid-19/>



“As you know, with new product development, the litigation is baked right in.”

Litigation Environment

- Types of claims
 - Contracts
 - Consumer class actions
 - Impossibility and force majeure
 - Insurance
 - Largely COVID-19 business interruption litigation
 - More than 1100 to date



Litigation Environment

- Types of claims
 - Employment
 - Legislation - Examples
 - AB 685: Employer notice, reporting and other accountability measures.
 - Notice of possible exposure to employees
 - Notification to local public health agencies
 - Imminent hazard notice at the workplace
 - SB 1159: Rebuttable presumption that employee's COVID-19 illness was workplace related



"I'm OK with a non-compete, but this give-up-and-quit clause..."

COVID-19 Litigation Against Insurers

- Coverage issues
 - Policy language can be very individualized
 - Read the contract
 - Is physical damage to property required?
 - Is loss of use without physical damage enough?
 - Is the presence of the virus “physical damage”?
 - Does civil authority or contingent business interruption coverage require physical damage to property?
 - Is there a virus exclusion in the policy?



Insurance Market - Reaction

- Pricing challenges in the market have led clients to take on higher retentions, reducing limits, and changing other policy conditions, according to Marsh.
 - Over 15% of buyers increased their retentions.
 - 20% reduced their limits.
 - Larger accounts tended to see higher prices.
- Claims handling
 - Slow(er) to pay
 - Is this even possible?

Perennial Claims Issues

- Scenario #1: 48-year old employee (essential), history of absences and chronic underperformer. Out for months claiming to have contracted COVID-19. Reports he has given it to his wife and children as well. Receive demand letter from an attorney asking to toll statute of limitations on any claim against the company.
 - Which insurance?
 - Worker's compensation
 - Employer's liability
 - Employment practices liability

Perennial Claims Issues

- Scenario #2: Letter arrives as company is heading into its renewals. Mandate is to cut costs, including by lowering EPL limits and increasing retention next year.
 - Reporting
 - Is the letter a Claim?
 - Why does it matter?
 - Reporting deadlines in claims made and reported policies
 - Report anyway as a circumstance?
 - Pros and cons

Perennial Claims Issues

- Scenario #3: Employee and spouse file civil lawsuit and employee files worker's compensation action. Allegations of fraud, and insurer agrees entitled to independent counsel in civil action. You have employment counsel you have worked with for years but carrier says that under California Civil Code section 2860 ("Cumis statute"), it will only pay \$195/hour for partners and \$150/hour for associates. The paralegal at your outside counsel's firm alone charges \$450/hour. What to do?
 - Independent counsel – how it works and what the law says
 - Rate negotiations

Renewal Considerations

- Renewal Considerations
 - Reporting of claims/circumstances
 - Disclosure requirements in applications
 - Alternative to traditional markets
 - Captives
 - Self-insured retentions
 - Fronting policies

Conclusions

- Talk to your broker
- Talk to coverage counsel
- Questions



Questions + Contact Information



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