



# Emerging Liabilities and How Insurance Can Help Limit Your Company's Exposure

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**Andrew Reidy**, Partner  
Lowenstein Sandler  
areidy@lowenstein.com  
202.753.3752

**Joseph Saka**, Senior Counsel  
Lowenstein Sandler  
jsaka@lowenstein.com  
202.753.3758

**Danielle Erkmann**, Senior Director, Corporate Counsel  
Wash Reit  
derkmann@washreit.com  
202.774.3218





# Placing Coverage and Submitting Claims

# ■ Placement

- Work with broker experienced in your industry
- Consider engaging a policyholder side law firm to review your policies and make suggestions to improve your coverage
- Understand the scope and impact of representations and warranties

# ■ Placement

- Annually discuss emerging liabilities
- Ask for coverage enhancements
- Consider ways noticed claims will influence future coverage
  - Possibility of new exclusions being added to policy
  - “Known loss” argument
  - May impact representations and warranties

# ■ Common Mistakes in the Claims Process

- Failing to provide timely notice
- Characterizing a claim or loss in a manner that is excluded
- Failing to file a proof of loss
- Whether you have to ask for a defense
- Whether a defending insurer can get recoupment of defense costs if there is no coverage
- Accepting an insurer's denial or reservation of rights without properly analyzing the denial or reservation of rights

# ■ Ways to Put Pressure on Insurers Without Litigation

1. Understand the strengths and weaknesses of your claim and which state's law applies
2. Educate the claims handler about your claim (highlight underwriting, marketing material, regulatory filings, and applicable case law)
3. Bring business relationships to the table
4. Utilize state insurance regulators – complaint process
5. “Evaluative” mediation



# The Current State of COVID-19 Insurance Claims

# ■ The Current State of COVID-19 Insurance Claims

The Loss of Life and Economic Costs of the COVID-19 Pandemic:

- As of April 26, 2021 more than 32 million people in the U.S. have been infected with COVID-19. More than 572,000 people have died.
- A November 2020 USC study projects that the U.S. will lose \$3 trillion to \$4 trillion over the next few years due to COVID-19 related business closures.
- Many businesses are evaluating whether insurance can help mitigate their losses.



# ■ The Current State of COVID-19 Insurance Claims

## Property Insurance – Scope of Coverage:

- Property Damage (*i.e.*, direct physical loss or damage to property)
  - Insured property
  - Dependent property
  - Civil authority
- Time Element Loss (*i.e.*, business interruption expense and extra expense)
- Loss Mitigation
- Communicable Disease Coverage

# ■ The Current State of COVID-19 Insurance Claims

## Property Insurance:

- Does COVID-19 satisfy property insurance policies' direct physical loss requirement?
- Some courts have said “no.”
  - In some cases, policyholders did not provide any facts to establish the presence of COVID-19 on their property.
  - In other cases, courts have found that COVID-19 doesn't physically alter property.
- The result will depend on the specific policy language, the jurisdiction, and the specific facts alleged by the policyholder.

# ■ The Current State of COVID-19 Insurance Claims

Property Insurance – Key Exclusions Asserted by Insurers:

- Virus Exclusions
  - Contamination Exclusions
  - Microbe Exclusions
  - Loss of Use Exclusions
- \* Of the COVID-19 coverage cases dismissed on insurer motions, more than 190 involved policies with virus exclusions.

# ■ The Current State of COVID-19 Insurance Claims

## Communicable Disease Coverage:

- Direct physical loss or damage to Insured Property caused by or resulting from a covered communicable disease event at a location
- “Communicable disease” may be defined as “any disease, bacteria, or virus that may be transmitted directly or indirectly from human or animal to a human”

# ■ The Current State of COVID-19 Insurance Claims

## Loss Mitigation Coverage:

- Coverage for costs incurred to “[m]itigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor, and assess the effects [of] the communicable disease”

# ■ The Current State of COVID-19 Insurance Claims

- Some courts have rejected the notion that the presence of the virus constitutes direct physical loss or damage to property.
  - *Baker et al. v. Oregon Mutual Insurance Co.*, No. 20-cv-05467-LB (N.D. Cal. Mar. 25, 2021) (“There are no allegations that an external force caused a physical change that required (for example) repairs that would be covered by the Business Loss provision. *Id.* That is because there was no property damage. Instead, the lost income and expenses resulted from the closure orders, which closed businesses because of the health risks to persons (as opposed to closing them because of property damage).”)
  - *Select Hospitality, LLC v. Strathmore Insurance Co.*, No. No. 20-11414-NMG (D. Mass. Apr. 7, 2021) (“Courts in Massachusetts that have had occasion to interpret the phrase ‘direct physical loss’ have done so narrowly, concluding that a covered claim requires some kind of tangible, material loss. . . . COVID-19 virus does not impact the structural integrity of property in a manner contemplated by the Policy and thus cannot constitute ‘direct physical loss of or damage to’ property.”)

# ■ The Current State of COVID-19 Insurance Claims

- But not all courts agree:
  - *Boardwalk Ventures LLC v. Century-National Insurance Co.*, No. 20STCV27359 (Cal. Super Ct. Mar. 18, 2021) (denying an insurer's motion for judgment on the pleadings because policyholder sufficiently alleged physical loss or damage based on COVID-19 by pleading, among other things, that "[t]he presence of the Virus particles renders items of physical property unsafe, and impairs its value, usefulness and normal function")
  - *Lombardi's, Inc. et al v. Indemnity Insurance Company of North America*, No. DC-20-05751 (14 Dist. Ct. Tex. Oct. 15, 2020) (rejecting an insurer's motion to dismiss finding that policyholders' allegations that "disruptions to their ability to physically access and utilize portions of the properties were necessary to prevent the spread of COVID-19" sufficiently alleged physical loss)

# ■ The Current State of COVID-19 Insurance Claims

- State / Federal Court Dichotomy
  - Federal courts have dismissed approximately 90% of COVID-19 related lawsuits.
    - 233 granted – 18 denied
    - 165 of the granted motions involve policies with virus exclusions.
    - 68 of the granted motions involve policies with no virus exclusions.
  - State courts have dismissed approximately 50% of COVID-19 related lawsuits.
    - 30 granted – 27 denied
    - State courts have denied the vast majority of early motions to dismiss for claims involving policies without virus exclusions (16 denied - 7 granted).



# ■ The Current State of COVID-19 Insurance Claims

- **For policies without virus exclusions, state courts have granted more than 50% of policyholders' motions for summary judgment.**
  - *Perry Street Brewing Co., LLC v. Mut. of Enumclaw Ins. Co.*, 2020 WL 7258116, at \*3 (Wash.Super.) – “one reasonable interpretation of “direct physical loss of property at premises is that the interruption of PSBC's business operations as a result of the proclamations was a direct physical loss of PSBC's property because PSBC's property could not physically be used for its intended purpose, i.e., PSBC suffered a loss of its property because it was deprived from using it.”
  - *North State Deli, LLC v. The Cincinnati Ins. Co.*, 2020 WL 6281507, at \*3 (N.C.Super.) – “the ordinary meaning of the phrase ‘direct physical loss’ includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions. In the context of the Policies, therefore, ‘direct physical loss’ describes the scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property.”

# ■ The Current State of COVID-19 Insurance Claims

## Arguments For Coverage

- At the Rule 12 Motion stage, allegations in the pleadings should be accepted as true and construed in favor of the non-movant.
- Ambiguities are construed in favor of policyholders.
- Insurance companies had broad virus exclusions that they could have added if they intended to bar coverage for pandemic-related losses.
- Many insurance companies are now adding broad communicable disease exclusions during renewals.
- Split of authority is evidence of ambiguity.
  - “We are reluctant to afford a different meaning to the provisions of an insurance policy than it has been given in another circuit in the absence of a clearly erroneous construction by that circuit.” *St. Paul Mercury Ins. Co. v. FDIC*, No. 14-56830 (9th Cir. Oct. 19, 2016)

# ■ The Current State of COVID-19 Insurance Claims

- To date:
  - Nine COVID-19 related coverage lawsuits have been filed in the District of Columbia
  - Nine COVID-19 related coverage suits have been filed in Maryland
  - Thirteen COVID-19 related coverage suits have been filed in Virginia

# ■ The Current State of COVID-19 Insurance Claims

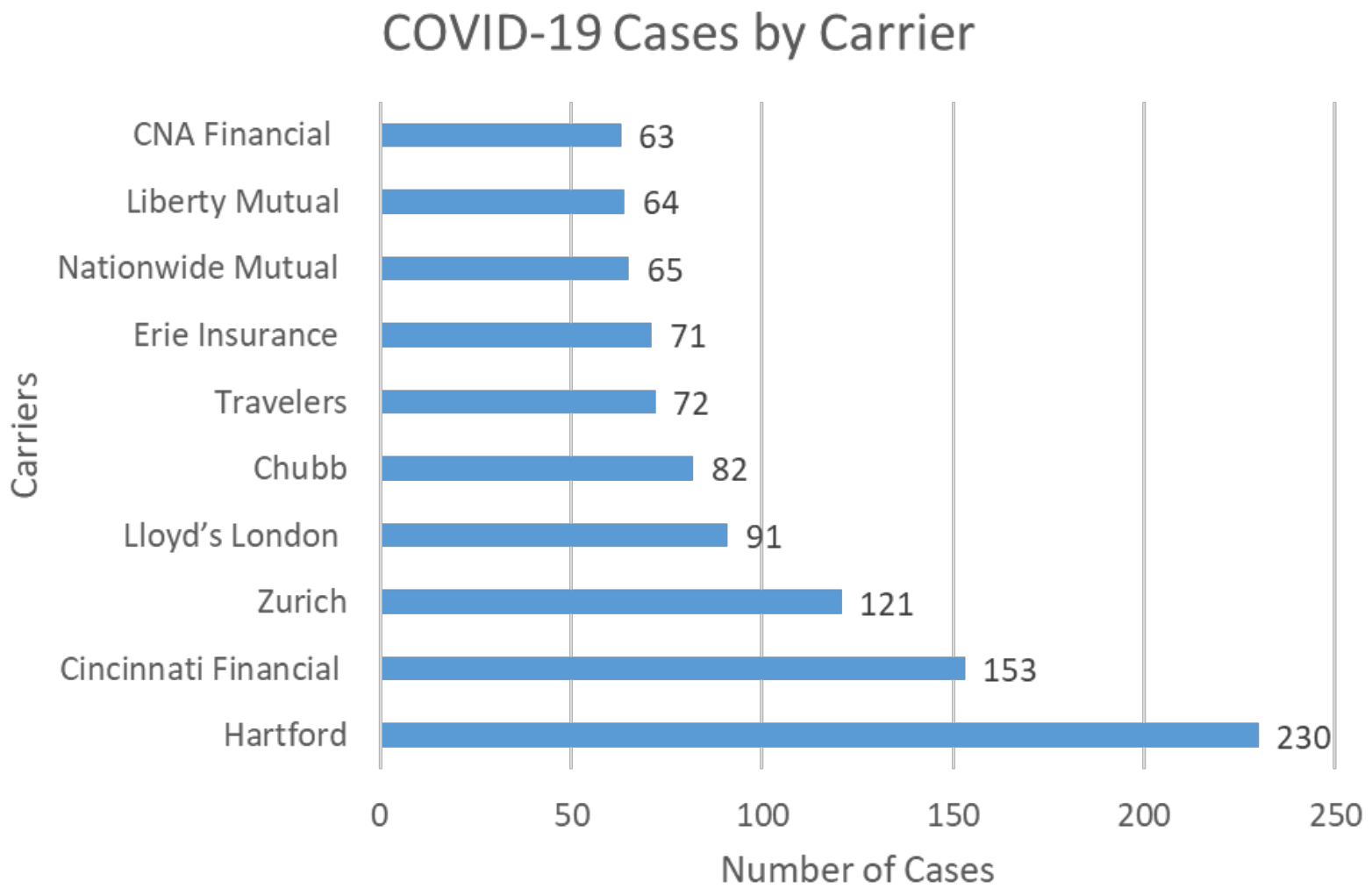
- District of Columbia:
  - *Rose's 1, LLC v. Erie Insurance Exchange*, No. 2020-CA-002424 (D.C.) (insurer's motion to dismiss granted).
- Maryland:
  - *Bel Air Auto Auction, Inc. v. Chubb Limited*, No. 1:20-cv-02892-RDB (D. Md.) (insurer's motion to dismiss granted).
- Virginia:
  - *Skilletts LLC v. Colony Insurance Co.*, No. 3:20-cv-00678 (E.D. Va.) (applying Florida law) (insurer's motion to dismiss granted because policyholder did not suffer direct physical loss as a result of COVID-19 or the closure orders).
  - *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Co.*, No. 2:20-cv-00265-RAJ-LRL (E.D. Va.) (finding that COVID-19 satisfied direct physical loss requirement and denying insurer's motion to dismiss).
  - *Barroso Inc. v Twin City Fire Insurance Co.*, No. 1:20-cv-00632-LMB-MSN (E.D. Va.) (finding that virus exclusion clearly barred coverage and granting insurer's motion for summary judgment).

# ■ The Current State of COVID-19 Insurance Claims

## ■ Appeals:

- In *Rose's 1, LLC v. Erie Insurance Exchange*, No. 20-cv-0535, the policyholders appealed the D.C. Superior Court's decision granting the insurer's motion to dismiss. The parties have completed briefing and are awaiting a date for oral argument.
- On March 10, 2021 Skillet's LLC filed a notice of appeal (see *Skillet's LLC v. Colony Insurance Co.*, No. 21-1268 (4th Cir.)). The parties are in the process of briefing the appeal.
- On April 14, 2021 the Eighth Circuit heard oral argument on an Iowa dental clinic's claim for coverage for COVID-19 related losses in *Oral Surgeons PC v. The Cincinnati Insurance Co.*, No. 20-3211 (8th Cir.). The Eighth Circuit is the first appellate court to hear oral argument on a COVID-19 coverage dispute.
- On April 14, 2021 the Ohio Supreme Court agreed to consider whether COVID-19 causes property damage insured by property insurance in the lawsuit captioned *Neuro-Communication Services Inc. v. Cincinnati Insurance Co. et al.*, No. 2021-0130.

# ■ The Current State of COVID-19 Insurance Claims



# ■ The Current State of COVID-19 Insurance Claims

## Property Insurance – Key Takeaways:

- Policies generally fall within two buckets: (1) policies with virus exclusions; and (2) policies without virus exclusions.
- To preserve any possibility of coverage, we recommend reporting losses and following notice/proof of loss requirements.
- Some insurers have agreed to tolling agreements so both parties can wait for the law to develop.
- Generally carriers have rejected requests to mediate or settle.

# ■ The Current State of COVID-19 Insurance Claims

Property Insurance - Tips to Maximize Coverage:

- Pay attention to sub-limits associated coverages, such as communicable disease coverage, civil authority coverage, or loss mitigation
- Comply with any proof of loss requirements and contractual limitations
- Gather all your government orders and communications regarding COVID-19
- Preserve information about damages
- Preserve evidence regarding the actual presence of COVID-19 at company property
- Formulate your claim so that it fulfills the elements of coverage



# ■ The Current State of COVID-19 Insurance Claims

## Commercial General Liability Insurance:

- In *McDonald's Corp. et al. v. Austin Mutual Insurance Co.*, Case No. 1:20-cv-05057 (N.D. Ill.), a district court in Illinois recently rejected an insurer's motion to dismiss finding that the underlying lawsuit included allegations potentially covered by a CGL policy (including that underlying plaintiffs contracted COVID-19 and that McDonald's customers are continuously exposed to the virus).

# ■ The Current State of COVID-19 Insurance Claims

## Employment Practices Liability Insurance:

- COVID-19 raises various employment issues – some of which may be covered by EPL insurance
- EPL insurance commonly covers claims like discrimination, harassment, and wrongful termination
- Unique claims resulting from COVID-19 may include:
  - Failure to provide the requisite notice under the WARN Act prior to conducting layoffs
  - Discriminating against employees who demand safe workplace
  - Wrongful termination due to a refusal to come to work or work from home when required

# ■ The Current State of COVID-19 Insurance Claims

Directors and Officers' Liability Insurance:

- Securities class actions, shareholder derivative lawsuits, and SEC enforcement actions related to COVID-19 related disclosures may trigger coverage
  - Sona Nanotech
  - Norwegian Cruise Line
  - Cheesecake Factory
- If your COVID-19 related disclosures could result in a claim or if you otherwise face COVID-19 liability, consider preparing a notice of circumstances letter



# Latest Developments in D&O Insurance

# ■ Latest developments in Directors and Officers' Liability Insurance

Recent developments impacting D&O insurance:

- The change in administrations means that we will probably see an increase in SEC enforcement actions
- In 2020, California passed A.B. 979 requiring companies listed on U.S. exchanges and headquartered in California to have a minimum of one director from an “underrepresented community”
- Special Purpose Acquisition Companies (“SPAC”) has at least partially displaced the traditional IPO market

# ■ Language Review

An important component to your coverage is the definition of “Loss”:

- Is there a “Loss” within the meaning of the policy?
- Common carve outs from the definition of “loss” include:
  - “Uninsurable” amounts that the insured is legally obligated to pay;
  - Fines, penalties, or taxes imposed by law; and
  - Costs the insured incurs complying with an order for non-monetary relief.

# ■ Language Review

Definition of “Claim”:

- a written demand for non-monetary relief
- “a civil proceeding commenced by service of a complaint or similar pleading”
- “ a formal administrative or regulatory proceeding, commenced by a filing of charges, formal investigative order, service of summons, or similar document”
- the service of a subpoena on an Insured Person identified by name if served upon such person pursuant to a formal administrative or regulatory proceeding

# ■ Language Review

## Policy Exclusions:

- Personal conduct exclusions – specify “final nonappealable adjudication” language:
- As an example, an Illegal Profits/Deliberate Acts exclusion may provide the following:

The Insurer shall not be liable to pay Loss in connection with any Claim made against any Insured based upon or arising out of:

- a. the gaining of any profit, remuneration or financial advantage to which any Insured was not legally entitled; or
- b. the committing of any deliberate fraudulent or deliberate criminal act by any Insured,

if established in a final non-appealable adjudication in any action or proceeding, other than an action or proceeding initiated by the Insurer to determine coverage under this policy.



# ■ Coverage for Subpoena or Warrant

- Coverage for Defense Costs for responding to subpoenas, orders of investigations, and search warrants.
- Examples of covered Claims run the gamut.
- Favorable facts for coverage are (1) where the demand is issued by investigative agency; and (2) where the demand relates to an investigation of the insured OR contains a threat of redress if there is non-compliance.
- The language that most frequently has been favored to cover subpoenas and warrants is “a written demand for monetary or non-monetary relief” or “any proceeding brought or initiated by a federal, state or local governmental agency.” See *Onvoy, Inc. v. Carolina Cas. Ins. Co.*, 2006 WL 1966757 (D. Minn. July 11, 2006).

## ■ Coverage for FCA Liability

- An FCA settlement is a covered loss. *Gallup, Inc. v. Greenwich Ins. Co.*, 2015 WL 1201518 (Del. Super. Ct. Feb. 25, 2015); see also *U.S. Liability Insurance Company v. Sigmatek, Inc.*, 2015 WL 801504 (N.D. Ill. Feb. 20, 2015).
- Many courts held FCA claims are not covered. See, e.g., *IberiaBank Corp. v. Illinois Union Ins. Co.*, 953 F.3d 339, 346 (5th Cir. 2020) (applying Louisiana law); *Zurich American Insurance Co. v. O'Hara Regional Center for Rehabilitation*, 529 F.3d 916 (10th Cir. 2008).

# ■ Delaware - A Corporate Safe Haven

- In the event of D&O coverage dispute, any corporation incorporated in Delaware may get the benefit of broad coverage for losses that may be “uninsurable” in other jurisdictions.
- **Choice of law:**
  - Recent Delaware D&O cases have applied Delaware law if the insured was incorporated in Delaware, even if the policy was issued to the policyholder at its headquarters outside of Delaware.
  - Delaware courts explain that when the insured risk is the directors and officers' honesty and fidelity to the corporation and its stockholders and investors, and the choice of law is between headquarters or the state of incorporation, the state of incorporation has the most significant interest.

# ■ Delaware - A Corporate Safe Haven

- *Sycamore Partners Management, L.P. v. Endurance American Insurance Co.*, 2021 WL 761639 (Del. Super. Feb. 26, 2021):
  - “[I]n Delaware, losses are uninsurable as-against public policy only if the legislature so provides. As the Supreme Court has cautioned, public policy is the General Assembly’s domain, and judges should avoid the temptation to legislate from the bench. Following these instructions, this Court has declined invitations to apply judicially-fashioned policy limitations. Consistent with that precedent, the Court will not hold that restitution or disgorgement is uninsurable as a matter of Delaware public policy unless a Delaware statute commands it to do so.”
- Restitution and disgorgement are insurable in Delaware.

# ■ Delaware - A Corporate Safe Haven

- *RSUI Indemnity Co. v. Murdock et al.*, 2021 WL 803867 (Del. Mar. 3, 2021):
  - “[T]he Delaware General Assembly enacted Section 145 authorizing corporations to afford their directors and officers broad indemnification and advancement rights and to purchase D&O insurance ‘against any liability’ asserted against their directors and officers ‘whether or not the corporation would have the power to indemnify such person against such liability under this section,’ it expressed the opposite of the policy RSUI asks us to adopt [i.e. the uninsurability of intentional acts].”
  - Delaware public policy does not prohibit the insurability of losses occasioned by fraud.

# ■ Delaware - A Corporate Safe Haven

Delaware case is still developing:

- Will the Delaware courts' rationale apply beyond D&O cases?
- Will this case law apply to contracts with Delaware choice of law provisions?
- How will the courts apply the choice of law rules?
- Will cases be filed earlier in the dispute process to secure forum?

# ■ Tips to Maximize Coverage

- New carriers are entering the market, and you may be able to use these new entrants to negotiate lower premiums and broader coverage.
- Ask what coverage enhancements are available – focus on coverage grants that can be broadened and exclusions that can be narrowed.
- Memorialize marketing/procurement material – this material may be useful discovery if you have to litigate a coverage dispute.
- Follow notice requirements.



# Recent Developments in Cyber Insurance



# ■ Changes in the Cyber Insurance Market

- Incidents of cyber attacks continue to rise.
- Cyber attacks may be sponsored by government entities (e.g., SolarWinds attack) or other actors looking to profit from a breach.
- A 2019, Hiscox Cyber Readiness Report estimates that cyber attacks costs business an average of \$200,000 (60% of businesses go out of business within six months after experiencing a cyber attack).
- The impact of COVID-19 on the cyber insurance market.

# ■ The Application Process

- Changes in the application process
  - Detailed cyber application
  - Most recent financials
  - Vendor contracts
  - Most recent third party security audit
  - PCI Reports and Certifications
  - Record count
  - Claims/Breach Response Costs
- Representations during the underwriting process can lead to coverage disputes

# ■ Cyber Insurance – Coverage Grants

- First Party Coverage:
  - Breach Response Costs
  - Business Interruption
  - Data Restoration
  - Cyber Extortion/Ransomware
  - Cyber Crime
- Third Party Coverage
  - Privacy and Network Security Liability
  - Payment Card Loss
  - Regulatory Fines and Penalties
  - Media Liability
  - Defense Costs

# ■ Cyber Insurance Limitations

- What is excluded under your cyber insurance policy?
  - Dishonest or fraudulent acts exclusions – excludes losses caused by fraudulent or illegal conduct
    - *Tip: for the most favorable language, the exclusion should only apply after a “final, non-appealable adjudication in the underlying proceeding”*
  - Other Insurance exclusions – bars coverage if the loss is covered by another policy
    - *Tip: try to negotiate these exclusions so they are as narrow as possible; focus on eliminating key phrases like “arising out of”*
  - Civil fines and penalties
    - *Tip: try to limit to “criminal” fines and penalties and confirm defense coverage for regulatory claims*
  - Acts of war or terrorism exclusion
    - *Tip: given nature of many attacks, insureds should seek deletion of terrorism by state-actors and/or limit application to kinetic war*

# ■ Traditional Insurance May Provide Coverage for Cyber Claims

- **Crime Insurance:** *G&G Oil Co. of Indiana, Inc. v. Continental Western Insurance Co.*, No. 49D06-1807-PL28267 (Ind. Mar. 18, 2021) (crime policy's computer fraud provision may provide coverage for losses from a ransomware attack)
- **E&O Insurance:** *SS&C Tech. Holdings, Inc. v. AIG Specialty Ins. Co.*, 2019 WL 7816253 (S.D.N.Y. Nov. 6, 2019) (“dishonest, fraudulent, criminal, or malicious acts” exclusion in professional liability policy did not bar coverage for social engineering losses)
- **Property Insurance:** *Nat'l Ink and Stitch, LLC v. State Auto Prop. & Cas. Co.*, 435 F.Supp.3d 679 (D. Md. 2020) (the loss of a computer system as a result of a ransomware attack is covered by a businessowner's policy with a “Special Form Computer Coverage” endorsement)

# ■ Privacy / Cyber Trends

- Proliferation of ransomware attacks
- Contingent business interruption claims under cyber insurance policies
- Liability from new biometric privacy laws
  - *W. Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.*, 2020 IL App (1st) 191834, *appeal allowed*, 154 N.E.3d 804

# ■ Cyber Checklist

- Look for policies with a broad “computer system” definition
- Are you covered for social engineering attacks and invoice manipulation losses?
- Does your policy provide coverage for GDPR violations and violations of new state privacy laws?
- Do you have retroactive coverage for full prior acts?
- Consider dependent business interruption coverage as an enhancement to your cyber policy
- Remember to pay attention to sub-limits to coverage
- Review potential coverage under your “traditional” insurance policies and/or business agreement
- Seek coverage for liability for data that is publicly available