

## Despite Questions of Coverage, Insurers Could Still Be Hit With Litigation Costs

By Renée Kiriluk-Hill

OLDWICK, N.J. - Whether or not they'll be on the hook for claims payments relating to COVID-19, one thing is certain. Insurer's legal costs will climb substantially as policyholders try their best to recover coronavirus-related damages.



Creative and aggressive policyholder attorneys sense opportunity and will file lawsuits, Zelle LLP Partner Steve Badger told Best's News Service.

Most litigation will arise under commercial insurance policies, notably those tied to loss of business income because of government-required shutdowns, he said.

"This is part of the social inflation that we see in the insurance claims world. Policyholder attorneys have identified this area as one where there is an opportunity for litigation and profit," said Badger.

As in most cases, the resolution will depend on the policy language, said Badger, who represents the commercial property industry in catastrophic and emerging risk exposures.

"Here the key question will be whether the existence of the coronavirus on the insured property constitutes physical loss or damage," he said, believing that could and should be on a case-by-case basis, depending on the facts of each property.

For the same reason, he thinks efforts to pursue class-action litigation should fail. "There is no commonality of issues," he said.

Although event cancellation insurance represents a very small percentage of overall property/casualty premium, the losses for carriers that write this line of business amid the COVID-19 outbreak still could be significant, according to a new Best's Commentary. Losses on this line of business could have a compounding effect as carriers navigate other lines of business exposed in the pandemic, such as business interruption, directors and officers and workers' compensation, as well as dealing with losses on assets, according to AM Best.

Communicable disease is not always a covered peril and the applicability of COVID-19 is uncertain, the commentary said. Broader interpretations of contract language by courts, which increasingly have become tied to social inflation, is a reality that insurers have already been dealing with in recent years. Given the global impact of event cancellations, these interpretations could dramatically impact the results of event insurance providers, AM Best said.

Observers say insurers, brokers and agents should be reviewing policy language and initiating candid talks about coverage.

## Despite Questions of Coverage, Insurers Could Still Be Hit With Litigation Costs (continued)

“Here you’ve got an occurrence that is so different from what we traditionally think of when we’re considering insurance claims,” said Jared Greisman, of Goldberg Segalla.

While underwriters added virus and bacteria exclusions after the 2003 SARS outbreak, it hasn’t been litigated in “any really meaningful way,” said Greisman. Litigation will climb because policyholders will say, “What do I have to lose? I have so much at stake here.”

At least one business already did that. Oceana Grill, a New Orleans restaurant normally open 17 hours a day, 365 days a year, with seating for 500, filed suit against underwriters at Lloyd’s London, Louisiana and the state’s governor after the state reduced gatherings to no more than 250, according to court documents.

Since then, a rapid rise in confirmed coronavirus cases led the state to become the ninth in the country to order residents to shelter in place, limiting restaurants to takeout and delivery services

In its petition for declaratory judgment by Gauthier Murphy & Houghtaling LLC, Oceana says its all-risk policy with Lloyd’s does not exclude losses, business or property, from a virus or global pandemic. Oceana said an extension of coverage include business closure by order of civil authority.

It seeks legal affirmation the policy fails to exclude viral pandemic, covers the restaurant for city authority shutdowns of restaurants “due to physical loss from coronavirus contamination” and provides business income coverage in the event of contamination.

Insurers traditionally review first-party property policies on an individual basis and events previously considered widespread were geographically confined to a town, state or region, said Greisman.

“This event is impacting the world at the same time. It’s going to be historic, as material (a loss) as we’ve ever seen,” he added. “Claims will come in at a pace carriers aren’t accustomed to seeing, resources could be very well stressed.”

Multi-district litigation would likely be consolidated to conserve insurance company resources and increase efficiency, said Greisman.

Wilson Elser Partner Mat Ross said policyholders should speak thoughtfully with agents and brokers now about what is and isn’t covered.

When claims are filed insurers are obligated, at the least, to be consistent, said Ross. A carrier that pays a \$25,000 claim but denies the same \$2 million claim from a different policyholder is acting in bad faith. “I’ll get that in discovery,” he said.

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However, insurers may settle claims to avoid litigation, which is different than covering one, Ross pointed out.

Specialized policies may require arbitration in the event of a disputed claim. If that fails, or isn't required, policyholders may find juries sympathetic to coronavirus victims but it will cost them.

Litigation can get very expensive for both sides, said Ross, with bills from hired experts such as scientists or forensic accountants adding to the legal charges.

He acknowledged that consistency can be challenging in areas such as business interruption because of rapidly evolving civil authority directives and individual circumstances. "I believe almost every BI policy requires a physical damage loss. The \$64,000 question is do you have that?"

A restaurant closed with no evidence of contamination — likely because of an increasing number of state-ordered bans on sit-down dining — presents a different claim than one where an employee was diagnosed with COVID-19, Ross said after the Oceana suit was filed.

Absent "irresponsible" legislative intervention, Badger said the insurance industry will weather the coronavirus exposure because it "underwrote and reinsured the risk."

There will also be some D&O and E&O claims "for bad decisions made by corporate boards. Any of that is dwarfed by commercial property insurance exposure, just like 9/11," said Badger.

"Litigation, particularly in this era of social inflation, has become a cost of doing business," he concluded.

To view AM Best analysis and commentary on the COVID-19 outbreak visit: <http://www.ambest.com/about/coronavirus.html>.

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