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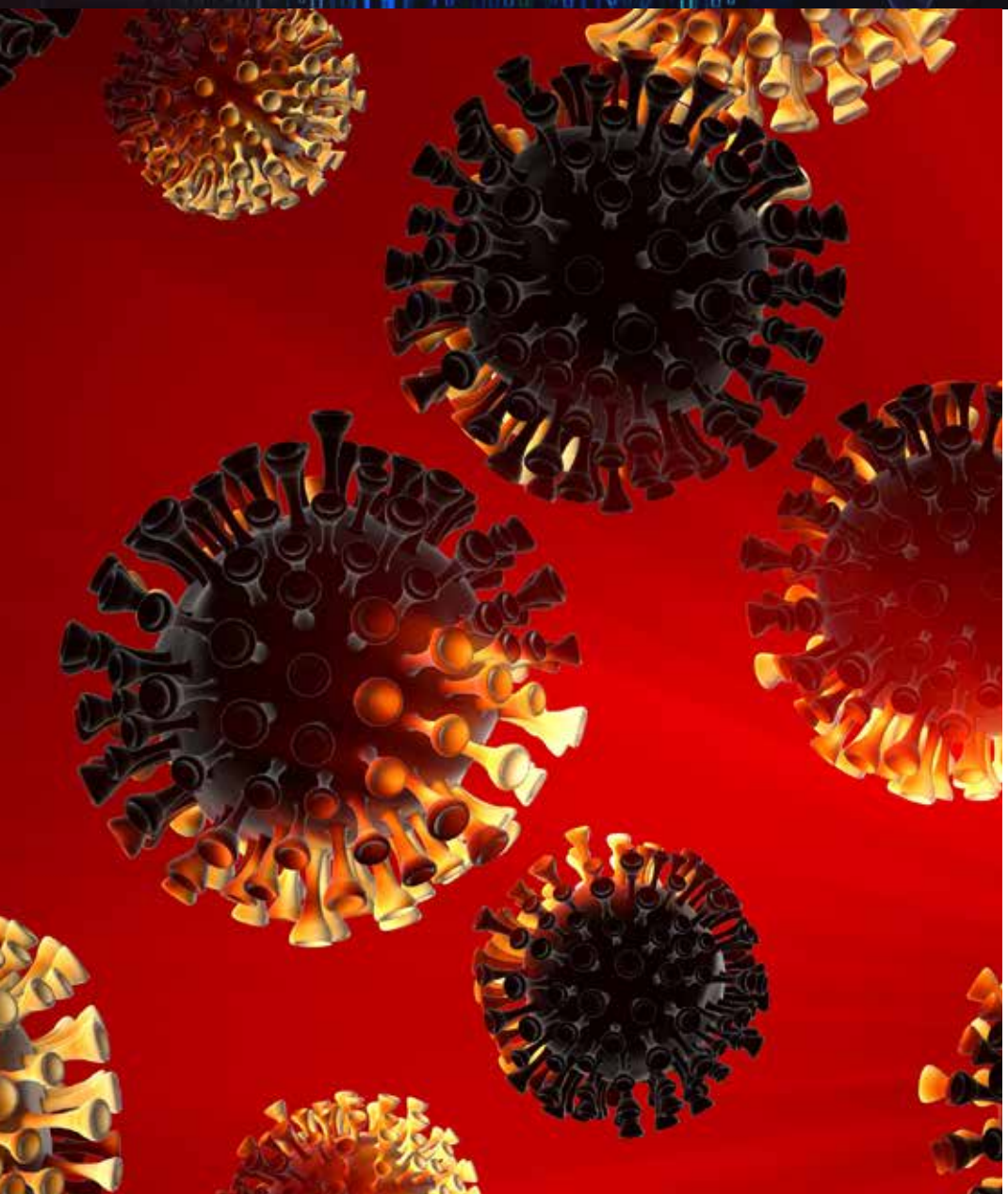

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ADAMS AND REESE LLP®

Novel Approach? Property and Liability Insurance Coverage Issues Presented by COVID-19

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Introduction BY JERRY WALLIS, IRUA EXECUTIVE DIRECTOR

Welcome to our first and, hopefully, last – but we are not holding our (masked) breath - issue of the Coronavirus/COVID-19 pandemic era. Despite all the ongoing disruptions, we are pleased to present four articles of interest with two being especially relevant to today's situation. With the worldwide impact of the pandemic, the other two articles could also very likely be considered relevant with reputation risks being elevated based on reactions and responses to the developing underlying situation. The ongoing effects on agricultural production and techniques could also be significant as lockdowns have radically altered food demand and marketplace. The pandemic is a global phenomenon not sparing almost any aspect of human activity.

Setting aside, but by no means ignoring or belittling the terrible personal tragedies, the massive disruption to economic activity has, inevitably, led to early challenges to insurance policy wordings. Coverage issues will likely be argued and debated for a considerable time to come and Susan Mack, a partner at Adams & Reese LLP, explores in detail policyholders' and insurers arguments arising from the ISO standard Commercial Property and Comprehensive General Liability forms. Her article is entitled: **Novel Approach? Property and Liability Insurance Coverage Issues Presented by COVID-19** and provides expert guidance in a topic that will be with us for a considerable period of time. In addition to her role at Adams & Reese, we are delighted to have her as a member of our Industry Advisory Panel of the JOR Committee. Also, we are pleased to welcome the firm as our first advertiser!.

Next up we have an excellent article by Peter Gerken, Senior Vice President and Denise Williamee, Vice President, Corporate Services at Steel City Re. Their article is entitled: **Entering the Reputation Risk Management and Insurance Marketplace: A Solution for 2020.** Mr. Gerken gave a highly interesting presentation to the IRUA – oh so long ago in January. It's getting harder to remember in-person meetings but this one was also streamed as a webinar. Mr. Gerken, and his firm, have developed innovative solutions to one of the greater risks that commercial insureds face. Not only does it involve coverage for reputation risks but the firm offers practical risk management solutions in loss prevention and risk management. A worthy read.

Our third article entitled: **The Perfect Storm: COVID-19 Meets Social Inflation** was originally conceived as, primarily, a social inflation piece but was rapidly updated as the impact of COVID-19 became apparent. Damon Vocke and Mark Bradford, both partners at Duane Morris LLP, explain the growth in social inflation of claims resulting from several modern phenomena and concludes with a somber sentence: *Insurers will need to be ever more vigilant in closely evaluating the emerging property and liability exposures arising from the COVID-19 pandemic.*

Finally, we have IRUA'S 2019 second-place Scholars program winner, Nadezhda Karkelanova with her catchy titled article: **"Meet Meat: How New Innovations in Agriculture Could Affect the (Re) Insurance World"**. Ms. Karkelanova interned at Munich Reinsurance America's in Princeton, New Jersey and graduated from Rutgers University late in 2019 and has returned for a Masters of Business and Science specializing in Analytics and Data Science.

Cultured meat is a reality and has wide implications for the environment, human health and adequacy of the meat supply. In her paper, she discusses many aspects of this growing market and the possible effects this might have on our industry in the future.

IRUA News

As detailed in our previous issue, our 2020 series of education & networking events started out exceptionally well and the balance of the year was shaping up equally as interesting to our members and non-members alike. The remote working environment has obviously put our regular events on hold while we work on new virtual events.

The first of these was held on **April 3** with a webinar entitled: **Coronavirus – Insurance Implications Arising from Pandemic**. IRUA was invited to join with BRMA on the presentation by Paul White, of Wilson Elser, and a superb turnout listened and watched his excellent session.

On **June 2**, we held a gathering with good attendance (virtually, of course) of the Reinsurance Networking Group. Mike Davis, Yoav Griver & Bruce Goodman of Zeichman Ellman & Krause presented Important 2020 Updates in Arbitration Law. To encourage networking, time was built in for several small groups to meet and chat in "video breakout rooms".This worked well and was well enjoyed.

On **June 25**, we presented a Zoom session on **COVID-19 & Its Impacts on the (Re)Insurance Industry.** This was a "Virtual Round Table" with a panel discussion featuring a team of insurance, reinsurance, legal & regulatory experts.

With the continued absence of in-person events, our new **"IRUA Virtual Mini-Series"** has been launched. Short events are planned from late July through the Fall and in the planning stage are **Implications of Reviver Statutes on Casualty Markets; Reinsurance Audits from a Claims Perspective; Reps & Warranties Coverage & Issues; Innovation & Its Effects on Insurance and Reinsurance** and **Lloyd's in the 2020s.** All of these sessions are being designed as time-efficient one-hour sessions. As they become available, details will be posted on the IRUA website at ***www.irua.org***.

Our **Annual Meeting & Conference** was, of course, cancelled but will now be held on **April 12-13, 2021** at the Marriott Harbor Beach Resort in Fort Lauderdale, Florida. This is the same location where our 2019 Annual Meeting & Conference was held and where our 2020 was slated for. The excellent 2020 program will be updated and we fully expect that it will be a special event.

For those who want to know more about the IRUA, visit our website. And, if you are not receiving our weekly e-mails and popular IRUA Newsletter, please let us know and we will add you to our subscription mailing list.

As always, we remind you that all member company persons, individual members and Journal subscribers can access, free of charge, all articles published since 1993 by following the ***JOR*** Archive link on the website homepage.

Be well and be safe.

Best regards,

Jerry Wallis, IRUA Executive Director

Novel Approach? Property and Liability Insurance Coverage Issues Presented by COVID-19

BY SUSAN E. MACK

About the Author:

Susan E. Mack serves as a partner within the Jacksonville, Florida office of Adams and Reese LLP, an Am Law 200 law firm. The majority of her practice involves representing clients as insurance regulatory, reinsurance transactional and cybersecurity counsel, while a significant minority consists of appointments as an arbitrator in complex insurance, reinsurance and other financial services disputes. She also serves as a reinsurance expert witness in both state and federal courts.

Prior to entering private practice, Susan enjoyed leadership roles as General Counsel, Head of Claims and Head of Contracts for property/casualty and life and health insurers and reinsurers

Susan is a founding director of ARIAS-US, the arbitration society specializing in insurance and reinsurance dispute resolution. She was the first woman to ever serve on the ARIAS-US Board. Currently, she holds ARIAS-US certifications as an umpire and arbitrator and is also a qualified mediator. The author acknowledges her indebtedness to the skillful research efforts of Thomas White and Billy Wright of Adams and Reese LLP.

Abstract:

This article explores policyholders' and insurers' arguments regarding coverage for first-party property and third-party liability claims arising from COVID-19 exposures. The analysis concentrates on business interruption claims and liability claims presented by businesses' customers for bodily injury alleged to have resulted from the businesses' negligence. While acknowledging that coverage results can differ for insurers' proprietary policies, the author frames the business interruption discussion in view of the ISO Commercial Property "all risks" and "named peril" forms, as well as forms covering loss of business income, extra expense and civil authority coverage. The liability coverage analysis is framed in terms of the ISO Comprehensive General Liability (CGL) form. The applicability of the ISO virus exclusion and pollution exclusion is examined.

I. INTRODUCTION

This article will explore if there remains anything "novel" about policyholders' arguments for and insurers' arguments against property and liability insurance coverage connected to novel coronavirus (hereinafter "COVID-19") impacts. Keying in on the nature of the lawsuits that have been filed as of the publication date, our principal focus will be upon:

- Business interruption claims presented by such diverse organizations as restaurants, auto dealers, medical centers, law firms, and beauty salons; and
- Casualty claims presented by businesses' customers because they contracted COVD-19 as an alleged result of the businesses' negligence.[1]

What is undisputedly "novel" is COVID-19's potential to plunge the global economy into a continuing recession, given the pandemic's effects on virtually all business sectors. COVID-19 may catastrophically impact the overall financial outlook for property/casualty insurers on a worldwide basis as well as the property/casualty industry's future ability to respond to claims of whatever sort. Citing the "growing uncertainty of business interruption coverage," UBS has now estimated a potential of $60 billion in global COVID-19-related claims.[2]

While Marsh McLennan has developed and marketed specific pandemic-caused business interruption cover in conjunction with reinsurer Munich Re and technology firm Metabiota, not a single company purchased this cover prior to COVID-19's onset.[3] The claims that many policyholders and insurers are now so heatedly disputing relate to more traditional policies purchased by U.S. businesses. Many of the U.S. business interruption claims relate to first-party coverage under (i.) the ISO Commercial Property Causes of Loss-Special Form (the all risks form) (i.e. CP 10-30-10-12);(ii.) the ISO Commercial Property Form-Basic Form and Causes of Loss-Broad Form (the named perils form) (i.e. CP 00-10-10-12) and the (iii.) Business Owners Policy Form (i.e. BP 00-03-01-10). As to third-party liability coverage, ISO Comprehensive General Liability Policy Form (i.e. CG 00 01 04 13) will most likely be impacted. In each

instance, the presence or absence of ISO virus and other applicable exclusions will also be the cause of heated debate by policyholders and insurers.

Of course, many insurers issue proprietary commercial policy forms, which may differ from the ISO standard language. To the extent that these policies contain unique terms, the coverage arguments and ultimate dispute results may deviate from those for the ISO form policies.

While most *Journal of Reinsurance* readers are based in the United States, analogous coverage disputes are fast developing with respect to U.K. policies. Hence, U.K. trends will be cited where illustrative of common issues.

II U.S. BUSINESS INTERRUPTION COVERAGE ISSUES

A. The Current Litigation Landscape

Based upon allegedly wrongful denial of business interruption claims, policyholder lawsuits are daily proliferating throughout the different states, including Florida, Louisiana, New York, New Jersey, Pennsylvania, California, Illinois and Oklahoma. Two of the earliest filed lawsuits–*Cajun Conti LLC and Cajun Cuisine LLC dba Oceana Grill v. Certain Underwriters at Lloyd's, London*, No. 20-02558 (La. Civ. Dist. Ct., Mar. 16, 2020) and *French Laundry Partners LP v. Hartford Ins. Co.* (Calif. Super. Ct.; March 25, 2020)–seek a declaration as to the scope of "all risks" insurance coverage. From the pleadings, it is clear in these and certain other "all risks" policy cases, there was no applicable virus exclusion. *See also Atma Beauty Inc. v. HDI Global Specialty SE,* No. 1:20-cv-21745 (S.D. Fl., April 23, 2020).

In one interesting case development, following a policyholders' suit, an insurer has itself petitioned a court for declaratory judgment. The insurer states that no business interruption coverage is applicable to a law firm's claim due to the absence of covered property damage and the presence of an applicable exclusion. *See Travelers Cas. Ins. Co. of America v. Geragos & Geragos, P.C.*, No. 2:20-cv-03619 (C.D. Calif., Apr. 20, 2020).[4]

Citing that the "availability of business interruption insurance in light of the novel coronavirus would be a key question requiring a uniform answer as the country deals with the economic fallout of the pandemic," two Philadelphia restaurants have promoted establishing new multi-district litigation on this subject by approaching the U.S. Judicial Panel on Multi-District Litigation.[5] Putative class actions against insurers have also been filed, including six filed in U.S. District Courts from California to New York by a group of law firms on behalf of diverse business clients. [6] *See, e.g., Gio Pizzeria & Bar Hospitality LLC and Gio Pizzeria Boca v. Certain Underwriters at Lloyd's London,* No. 1:20-cv-03107 (S. D. N.Y., Apr. 17, 2020) and *Bridal Expressions LLC v. Owners Insurance Co.*, No, 1:20-cv-00833 (N.D. Ohio, April 17, 2020).

B. BASIC PRINCIPLES

1. "All Risks" ISO Form Insuring Agreement and Direct Property Damage

The ISO Commercial Property Causes of Loss Form-Special Insuring Agreement states as follows:

A. Covered Causes of Loss: When Special, is shown in the Declarations, Covered Causes of Loss means Risks of Direct Physical Loss unless the loss is excluded or limited in this policy.

Many proprietary policies contain the following grant of coverage:

Subject to the terms and conditions of this Policy, we will pay for all risks of direct physical loss or damage to a covered cause of loss to covered property at a covered location.

Judging from the lawsuits filed to date following business interruption claim denials under these policy coverage grants, one of the most pervasive policyholders' arguments promoting insurance indemnification for business interruption losses centers about the provision of "all risks" coverage. Policyholders reason that insurers' indemnification obligations naturally follow, because they have bargained and paid for expansive coverage carved out by only specific exclusions and limitations. Policyholders argue that they are therefore entitled to claim indemnification in instances in which the more narrow ISO Broad Form terms do not provide coverage. By contrast, insurers state that the "all risks" moniker is a misnomer and that the threshold requirements for policyholder indemnification indicate that the nature of the coverage is "open peril" or "special peril."[7]

Whatever the policies are called, COVID-19 related business interruption coverage disputes based on these policies' terms reveal a dynamic tension. Policyholders rely on the broad nature of coverage and, by contrast, insurers insist that no loss of business income coverage can be had without satisfying the threshold determination that income loss has been caused by direct physical damage to property.

The appeal of the policyholders' rationale is that, absent exclusion or limitation, expansive coverage is granted. The limitations of the policyholders' rationale are, that in the context of an airborne virus such as COVID-19, definitions of physical damage can likely not be met. Based on case law, insurers will reason that, absent a transformative physical change to the covered premises, indemnification obligations are not called into play. In short, where the COVID-19 virus can be eradicated from surfaces within the covered property by thorough cleaning and disinfecting, insurers will claim that the presence of the contaminant does not equate to the property damage that the policy terms contemplate.

An instructive case supporting the insurers' argument is *Universal Image Prods., Inc. v. Chubb Corp*., 703 F. Supp. 2d 705 (E.D. Mich. 2010), aff'd sub nom. *Universal Image Prods., Inc. v. Fed. Ins. Co.,* 475 F. App'x 569 (6th Cir. 2012). The insurer was granted summary judgment on the grounds that the "all risks" policy did not cover business interruption since no "direct physical loss" had occurred. In a parallel to COVID-19 related claims against "all risks" policies, the Universal court considered the policyholder's claims that strong odors and mold/bacteria were enough to constitute property damage. That rationale was rejected, as such intangibles that did not alter the structural integrity of commercial property leased by the insured. Hence, the contaminants did not constitute the threshold "direct physical loss." Policyholders may counter that, certain courts have equated loss of use to "direct physical loss or damage," see *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 968 A.2d 724 (App. Div. 2009) (all risks policy; alleged damage to power grid causing power outage to be indemnified under consequential damage coverage rather than business interruption coverage). But there is scant published case authority equating loss of use with "direct physical loss or damage" in the commercial property policies' business interruption context.

2. "Extra Expense" Coverage and Direct Property Damage

Whether or not "all risks" or "named perils" coverage comes into play, other ISO policy forms underscore that direct physical damage to property is the necessary predicate to coverage. Moving to the ISO Business Income and Extra Expense Form, the Extra Expense covered by the insurer in the context of business interruption is described as follows:

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Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss. We will pay Extra Expense (other than the expense to repair or replace property) to: (1) Avoid or minimize the "suspension" of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.

More succinctly, coverage is provided for the business' inability to continue its normal operations and functions for the period of restoration so long as that suspension was caused by direct physical damage or loss to property.

Where an excluded peril; namely, defective design, was held to be the cause of the policyholders' damages rather than "direct physical loss or damage," the Extra Expense clause was found to preclude coverage. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Texpak Grp. N.V.*, 906 So. 2d 300 (Fla. Dist. Ct. App. 2005). Also, in a case involving a power outage rather than demonstrable structural damage, Extra Expense coverage was not triggered. *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co*., 17 F. Supp. 3d 323 (S.D.N.Y. 2014).

3. "Civil Authority" Coverage

The ISO Business Income and Extra Expense Form also provides for additional Civil Authority coverage for business income loss:

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

The coverage for Business Income will begin 72 hours after the time of that action and will apply for a period of up to three consecutive weeks after coverage begins.

Traditionally, this time-limited coverage grant relates to blocked access to a commercial building when other nearby properties are closed due to fire or other events that caused physical damage. Where, instead, businesses have been closed by state Executive Order relating to COVID-19, the following issues are raised by the above-cited language:

- What constitutes the "direct physical loss of or damage to property, other than the described premises?"
- Is access to the business specifically prohibited by the civil authority action?
- Is there a requisite causal connection between the property damage or loss and the prohibited access?

As mentioned above, there is considerable authority for insurers' contentions that no physical damage is caused by COVID-19 (first bullet). Also, case authority supports the absence of the requisite causal connection, because the state Executive Order contemplates only future contamination by COVID-19 (third bullet). Under similar Civil Authority wording, the Federal Court of Appeals for the Fifth Circuit held that business owner policyholders could not recover for business loss resulting from an evacuation order for anticipated Hurricane Gustav. *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683 (5th Cir. 2011). The policyholders urged that the hurricane in the Caribbean caused the physical loss, but the court rejected that argument. The court held that the policyholder "failed to demonstrate a nexus between any prior property damage and the evacuation order."

In countering these arguments, it is likely that policyholder will rely on *Southlanes Bowl, Inc. v. Lumbermen's Mut. Ins. Co*., 46 Mich. App. 758, 208 N.W.2d 569 (1973). This per curiam decision held that business interruption coverage existed, where the policyholders' entertainment venues sustained business losses due to riot-related curfews in the wake of Dr. Martin Luther King's assassination. The court held that property damage was not a condition precedent to coverage. Due to the summary nature of the opinion, it is difficult to determine whether the involved policy terms included the property damage proviso contained in the current ISO wording.

4. ISO Virus Exclusion

The ISO standard virus exclusion reads as follows:

We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

Where this exclusion is present in either property or liability policies, policyholders are hard pressed to argue for coverage. The importance of the exclusion—and what happens in its absence—are further discussed in **IV. U.S. Liability Coverage Issues**.

5. Associated Concepts in the United Kingdom

Given that U. K. policyholders have also filed lawsuits against their insurers, the Financial Conduct Authority (U.K. regulator) is seeking an authoritative declaratory judgment to determine whether business interruption coverage exists.[8] The regulator's staff intends to submit a variety of different policy wordings for the courts' consideration.

III. BUSINESS INTERRUPTION COVERAGE: STATE LEGISLATURES STEP IN

A. Pending Legislation May Impose Coverage by Fiat for Smaller Policyholders – Developments in Louisiana, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, and South Carolina

Reinsurance intermediary Willis Re has expressed concerns that, if there is "retroactive cover," the U. S. property/casualty industry's existing $800 billion in reserves could be quickly depleted.[9] This reference to "retroactive cover" addresses certain state legislatures' efforts to pass statutes mandating that, for certain smaller policyholders, business interruption claims may not be denied on the basis of policy language.[10]

As of this article's publication date, hot news exists in that at least 14 states, including Illinois and Minnesota, have enacted laws or issued executive orders that first responders are presumed to have contracted COVID -19 in the course of their employment for workers' compensation purposes.[11] As shown below, proposed state laws to expand business interruption coverage (regardless of applicable policy wording) are pending only in the following states and, with just Louisiana as the one current exception, apply only as to policyholders employing limited numbers of staff:

- Louisiana (H. B. 858 – companies of 100 employees or fewer) and (S. B. 477- no limit on number of employees in company)
- Massachusetts (S. B. 2888) (150 employees or fewer)
- Michigan (H.B. 5739) (100 employees or fewer)
- New Jersey (A-3844) (100 employees or fewer)

- New York (A.10226) (250 employees or fewer)
- Ohio (H.B. 589) (100 employees or fewer)
- Pennsylvania (H.B. 2372) (100 employees or fewer)

and

- South Carolina (S.1188) (150 employees or fewer).

All these bills make provision that, either on the date of the state's declaration of emergency or on the date of the prospective statute's enactment, a policy covering business income loss or business interruption loss shall be construed to encompass business interruption coverage occasioned by COVID-19[12] . South Carolina's, New York's and Massachusetts' proposed legislation also explicitly provide that any ostensibly applicable virus exclusion in the policy shall be considered null and void. Massachusetts S.B. 2888 goes very far in re-writing any existing policy by stating that no insurer in the state may deny a claim either because (i.) the relevant policy excludes losses resulting from the applicable policy's virus exclusion or (ii.) because of the insurer's contention that there has been no physical damage to the policyholder's property. South Carolina's S. 1188 goes even farther, in that (i) it applies to all property coverage, not just specifically business interruption coverage, (ii.) claim denial cannot be premised on a virus exclusion, (iii.) claim denial cannot be premised on exclusions for governmental orders and (iv.) claim denials cannot be premised on the insurer's contention that there has been no physical damage.

So, given these state developments, what's an aggrieved insurer to do? If an insurer lobbies the state legislatures to assure these far-reaching prospective statutes are not enacted into law, one possible means of challenge is the Contracts Clause of the U.S. Constitution to the effect that "no state shall pass any law impairing the obligation of contracts."[13] Hence, if a policyholder and insurer have entered into an insurance policy, that contract cannot be varied after its effective date by the state legislature. If confronted by this argument, policyholders will likely argue that the state legislature's power to enact these statutes falls within the Constitution's reservation of police power to the states. Policyholders would also argue that once enacted, "liberalization" clauses in the policies themselves will conform the terms of the policies to these coverage-expanding statutes. Such clauses typically provide that if the policy terms are in conflict with the statutes of the state in which the policy was issued, then the policy terms are amended to conform to the applicable statute.

IV. U.S. LIABILITY COVERAGE ISSUES

A. The Current Litigation Landscape

Policyholders have and will continue to seek liability coverage, based on lawsuits in which claimants allegedly suffer from COVID-19 due to the policyholders' negligent actions or omissions. The potential exists for any business to be sued by individuals alleging that they contracted COVID-19 as a result of that business' negligence. So far, the most publicized legal actions have been filed against cruise lines.

Now pending in the U.S. District Courts in California are lawsuits filed by Princess Cruise Lines passengers, *see e.g. Chao v. Princess Cruise Lines Ltd.*, No. 2:20-cv-3314 (C.D. Calif. April 9, 2020). At least one class action has been filed alleging gross negligence that caused physical injury and emotional distress. *Archer v. Carnival Corporation and Princess Cruise Lines Ltd*., No. 3:20-cv-02381 (N.D. Calif. April 8, 2020). The putative class consists of individuals on the Grand Princess' February 21st -March 2nd roundtrip to Hawaii, taking place after the ship made an ill-fated voyage to Mexico. One individual from the Mexico trip disembarked in San Francisco while allegedly infected with the COVID-19 virus and later died. Grand Princess passengers from the Mexico cruise stayed on for the Hawaii cruise. The ship was quarantined when it returned to California after the Hawaii voyage. Ultimately, five people from the Hawaii trip died and 131 tested positive for COVID-19.[14]

Filed on May 19, 2020 in the U. S. District Court for the Southern District of Florida is a putative class action named *Kantrow v. Celebrity Cruises, Inc.* No. 20-CV-21997-JAL.[15] The proposed class consists of passengers who either contracted or were exposed to COVID-19 on the Celebrity Eclipse between March 1 and March 30, 2020. All passengers on this Celebrity ship were ultimately denied disembarkation in Chile, as scheduled, and the ship was diverted to San Diego, California.

According to the complaint in this matter, at least two passengers died from COVID 19 and at least 45 passengers and crew tested positive for COVID-19 as a result of their voyage. The gravamen of the causes of action against the cruise line center about the observations that, by the time of sailing in early March, the cruise line should have known of the imminent threat of COVID-19. Cited to support that proposition are the Center for Disease Control's February 13, 2020 publication of *Interim Guidance for Ships on Managing Suspected Coronavirus Disease 2019* and the February 2020 COVID-19 issues aboard the Diamond Princess, a cruise liner owned by Princess Cruise Ltd. (which is presented with other issues as cited above). Alleging negligence, negligent failure to warn, negligent infliction of emotional distress, "negligent boarding," and "negligent management of infectious disease" on the part of Celebrity Cruises, Inc., the complaint focuses on the fact that cruise business supposedly continued as usual. Group entertainment, parties, and buffet dining are alleged to have occurred, as opposed to social distancing and quarantining of affected individuals.

B. The Comprehensive General Liability Coverage Grant and Relevant Exclusions

With respect to businesses–other than cruise lines–that may soon be sued in connection with their customers' or other individuals' infection by COID-19, the Comprehensive General Liability ("CGL") Insuring Agreement provides, in relevant part:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

. . . .

This insurance applies to "bodily injury" and "property damage" only if: (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory."

Insurers may be motivated to deny policyholders claims on the basis that a claimant's infection by the COVID-19 virus was not caused by an occurrence (later defined in the policy as an "accident"). Policyholders

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will quickly remind insurers that such arguments were unavailing with respect to the many bodily injury claims arising from the asbestos crisis. Even though the inhalation of airborne fibers could be seen to have arisen from an "occurrence" in the traditional sense, the fact that asbestosis and mesothelioma could also be categorized as occupational diseases did not impact the fact of coverage under occurrence-based policies. *See, e.g., Commercial Union Ins. Co. v. Porter Hayden Co*., 116 Md. App. 605, 698 A.2d 1167 (1997).

If present, insurers will rely on the plain language of the ISO virus exclusion. In the event that the relevant CGL policy contains only a pollution exclusion, analogous existing case law supports that coverage for COVID-19 related bodily injury may be excluded by virtue of such exclusion. In *First Specialty Ins. Corp. v. GRS Mgmt. Assocs., Inc.*, No. 08-81356-CIV, 2009 WL 2524613 (S.D. Fla. Aug. 17, 2009), an individual contracted the Coxsackie virus after entering a swimming pool maintained by the defendant. The court held the pollution exclusion precluded coverage, on the basis that the virus was a contaminant like others barred by the pollution exclusion. There is contrary law in other jurisdictions. See *Paternostro v. Choice Hotel Int'l Servs. Corp*., 309 F.R.D. 397 (E.D. La. 2015) (concluding bacterium was not excluded by a pollution clause). Given the diversity of judicial opinion on this subject, the issue of whether a pollution exclusion serves to exclude COVID-19 related bodily injury will depend on the court examining the issue.

V. FEDERAL BACKSTOP TO BE IMPLEMENTED?

A. U. S. Progress to Date

Chubb Chief Executive Officer Evan Greenburg has suggested the following solution to pandemic coverage-related battles between insurers and policyholders:

…potential way to handle pandemic risks in the future would be to create a public-private partnership, where insurers could start covering that risk for a proper price and government could take on the tail risk exposure.[16]

As of May 26, 2020, Representative Carolyn Maloney of New York and 20 co-sponsors have introduced 2019 CONG HR 7011, entitled the Pandemic Risk Insurance Act of 2020.[17] This bill pending in the U.S. House of Representatives has been endorsed by the Risk and Insurance Management Society, Inc. ("RIMS"), but opposed by the National Association of Mutual Insurance Companies ("NAMIC") and the American Property Casualty Insurers Association ("APCIA").[18] The introduction of this draft legislation follows other preliminary proposals for a pandemic backstop which were merely floated earlier in the year.

The *Pandemic Risk Insurance Act of 2020* would apply to future pandemics, not COVID-19's current emergence. Insurers' participation would be voluntary, but any such insurers would have to offer pandemic coverage if they are to provide business interruption coverage. The insurance market would be responsible for the first $250 million of coverage, but thereafter and up to $750 billion of losses, a U. S. Treasury fund would indemnify on a 95% basis. The remaining 5% would be spread among participating insurers.

Foreshadowing this development, California Representative Maxine Waters earlier distributed a memorandum alluding to a federal backstop bill, which would provide for federal government payments to insurers once a stated $250 million threshold is to be reached.[19] Butler University's risk manager also proposed an amendment to the existing Terrorism Risk Insurance Act which would provide a backstop and risk pool for losses related to pandemics and associated perils of quarantine, government-ordered repatriation and border closings. This draft specified that the amendment would be backdated to encompass payments related to the current COVID-19 pandemic.

B. Analogous Progress in the United Kingdom

Dating from the early 1990's, Pool Re, a U.K. government-backed reinsurer, was established to act as a backstop to terrorism. The U.K. trade association for the leisure and entertainment industries has now stated that the government should release the equivalent of $8.1 billion in funds from Pool Re to compensate business hard-hit by COVID-19. This move follows the expressed sentiment of certain senior executives who wish to form a pandemic reinsurer.[21] As in the United States, it is difficult to predict how and when these early efforts will unfold.

VI. REINSURANCE IMPLICATIONS?

Reinsurers have now introduced reinsurance treaty exclusions for COVID-19 in the London market at April 2020 renewals.[22] But for treaties and facultative certificates without any such exclusion, what are the prospects for coverage disagreements between reinsurer and ceding company?

Absent enactment of the pending state legislation expanding COVID-19 coverage, we can safely predict that the real COVID-19 coverage fight will be between policyholders and insurers, rather than those insurers and their reinsurers. If a follow-the-settlement provision is included in the reinsurance contract, the following holds true with respect to COVID-19 verdicts or settlements:

> The follow-the-fortunes [or follow-the-settlements] principle does not change the reinsurance contract, it simply requires payment where the cedent's good-faith payments is at least arguably within the scope or the insurance coverage that was reinsured.
>
> *Aetna Cas. & Sur. Co. v. Home Ins. Co*., 882 F. Supp. 1328 (S.D.N.Y. 1995) citing *Mentor Ins. Co. (U.K.) v. Brannkasse,* 996 F.2d 506 (2d Cir. 1993).

In the event of states' enactment of statutes providing COVID-19 coverage without regard to policy wording, the prospect for alignment between reinsurer and cedent is less clear. Reinsurers have successfully challenged coverage in instances in which cedents have been seen to themselves expand reinsured policy coverage. *see, e.g. State Auto. Mut. Ins. Co. v. Am. Re-Ins. Co.*, 748 F. Supp. 556 (S.D. Ohio 1990) (finding that a reinsurer cannot be held liable beyond the terms of the contract merely because the primary insurer has agreed to expand the underlying primary agreement). Where state legislatures move to expand underlying coverage, and the resulting laws survive constitutional challenge, it is less likely that a reinsurer may avoid liability. Should the statutes be passed, each applicable reinsurance contract will have to be scrutinized to determine whether the specific terms clarify the reinsurer's obligations in the face of coverage broadened by law.

VII. CONCLUSION: HOW NOVEL ARE THE THRUSTS FOR AND AGAINST COVERAGE?

Necessarily, policyholders and insurers will rely on established case law precedents to establish or reject insurance coverage for COVID-19 property and casualty claims. Litigants will address the traditional insurance coverage issues of "physical loss and damage" and causation in the factual context of the COVID-19 virus contaminant. The most "novel"[23] aspect of the COVID-19 coverage analysis will be, instead, the application of peculiar facts to the law where judges are keenly aware of the extraordinary and pervasive harm suffered by policyholders and claimants. Forum selection—and determining the likely judicial sympathies—will therefore constitute a key aspect of each COVID-19-related coverage fight. ◀

REFERENCES

1 Besides business interruption and third party liability claims, potential claims may be presented to (i) event cancellation coverage; (ii) an employer's workers compensation policy for a staff member's illness caused by workplace exposure, (iii) builders' risk policies for additional property taxes, additional financing costs and other expenses occasioned by COVID-19 delays and (iv) an errors and omissions policy and a directors and officers policy for alleged mistakes made by management in not appropriately executing enterprise risk management to minimize the harmful effects of COVID-19

2 "UBS Predicts Up to $60 Billion in Global Insurance Losses" Insurance (U.K.) Law 360 (April 27, 2020)

3 The pandemic insurance product is named Pathogen RX. See "National News," Insurance Journal (April 3, 2020)

4 "Travelers Sues Geragos Law Firm in Virus Coverage Dispute," Insurance Law 360 (April 22, 2020)

5 "Businesses Urge New MDL over Virus Interruption Coverage," Insurance Law 360 (April 21, 2020)

6 Lawyers File Multiple Class Actions Seeking Virus Coverage" Business Insurance (April 20, 2020)

7 ***https://www.irmi.com/term/insurance-definitioans/all-risks-coverage***

8 "FCA Heads to Court to Clarify Business Interruption Claims," Insurance (U.K.) Law 360 (May 4, 2020)

9 Retroactive Cover Poses Existential Threat, Reinsurer Warns," Insurance (U.K.) Law 360 (April 24, 2020)

10 New Bills Voiding Virus Exclusion (National Conference of State Legislatures). ***https://www.ncsl.org/research/health/state-action-on-coronavirus-acovid19.aspx***

11 H.F. 4537, inserting presumption in MINN. STAT. ANN. § 176.011 (subdivision 15 (West)). Subpart (f) (3) provides that the employer can only rebut the presumption by showing that the first responder's employment was not a direct cause of the disease. Illinois H.B. 2455 is similar

12 Introduced in the U.S. House of Representatives on April 14, 2020, 116 CONG HR 6494 mimics these state provisions, but appears to lack bipartisan support in Congress

13 U.S. Const. Art. 1., §10

14 "Cruises Set Sail Knowing the Risk" Wall Street Journal (May 2-3, 2020). The type of insurance policies issued to the cruise lines to cover third party liability actions by passengers is unknown, but presumably provide commercial marine liability coverage which will not be further analyzed here

15 Preceding (in time) the class action filed by Celebrity's passengers was another class action, filed pursuant to the Jones Act, alleging that crew members of the Celebrity Apex also sustained injury due to Celebrity Cruises' negligence. *Nedeltcheva v. Celebrity Cruises, Inc.,* No. 1:20-cv-21569 (S.D. Fla. 2020)

16 "Chubb CEO Greenburg Warns Retroactive Measures Would Bankrupt Insurance Industry," Insurance Journal (April 16, 2020)

17 Congress.gov.

18 "Reps Pitch Massive Reinsurance Plan for Future Pandemics," Insurance Law 360 (May 26, 2020). NAMIC and APCIA instead propose the Business Continuity Protection Program, a pandemic catastrophe fund to be administered by FEMA

19 "Proposed Backstop Would Cover Pandemic Business Interruption," Business Insurance (April 9, 2020)

20 ***https://www.riskandinsurance.com/covid-19-business-interruption-relief-legislation-drafted-by-butler-university-risk-manager***

21 "Leisure Businesses Eye 6.6 Pound Fund for Pandemic Claims," Insurance (U.K.) 360 (May 1, 2020)

22 "Retroactive Cover Poses Existential Threat, Reinsurer Warns," Insurance (U.K.) 360 (April 24, 2020)

23 The pervasive harm worked by COVID-19 is "novel," but not entirely unprecedented, given the asbestos crisis

SAVE THE DATES April 12-13, 2021

IRUA

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ALL ABOUT REPUTATION RISK EXPOSURES
LUNCH & LEARN/WEBINAR – January 8, 2020, Mayer Brown, NYC
Steel City Re's Peter Gerken presented this interesting topic, including plenty of Q&A. Prior to co-founding Steel City Re, Mr. Gerken headed the Intellectual Property practice at Marsh, Inc.

ALL ABOUT BIOMETRIC INFORMATION AND PRIVACY
LUNCH & LEARN – February 13, 2020, Trans Re, NYC
Lisa Ackerman of Wilson Elser's Chicago office did a great job explaining legal activity concerning individual privacy rights violation allegations and concluded with an outlook for the future.

CORONAVIRUS- INSURANCE IMPLICATIONS ARISING FROM THE PANDEMIC
April 3, 2020 Webinar
Paul White of Wilson Elser's Los Angeles office gave a comprehensive presentation that covered the virus itself & key issues for the (re)insurance industry. This event was a joint session with BRMA.

2020 ANNUAL MEMBERS MEETING & CONFERENCE
Postponed Until APRIL 12-13, 2021
Fort Lauderdale Marriott Harbor Beach Resort, Fort Lauderdale, FL
This is our marquee event. Sessions will include a "**Reinsurance Leaders"** and "**Market Buyers Roundtable**" as well as 4 Workshop Tracks each in Property & Casualty (including Claims).

IMPORTANT 2020 UPDATES IN ARBITRATION LAW
(Reinsurance Networking Group Meeting) - JUNE 2, 2020
Presented via Zoom (Incl. Networking Breakouts!)
Michael S. Davis & Yoav M. Griver, Partners and Bruce S. Goodman, Of Counsel of the Zeichner Ellman & Krause LLP firm, provided a comprehensive update of 2020 activity of interest to all engaged in arbitration, alternative dispute resolution, or claims disputes.

Introducing IRUA's Mini-Series

(Powered by Zoom)

COVID 19 & IMPACTS ON THE REINSURANCE INDUSTRY – JUNE 25, 2020
An industry panel of experts held a lively "Virtual Roundtable" discussion where the effects on the property & casualty industry were explored. First-party, third-party, professional liability and workers' compensation coverage, as well as regulatory challenges, and other issues, were examined.

IMPLICATIONS OF REVIVER STATUTES FOR CASUALTY MARKETS – JULY 29, 2020
Reviver statute emergence has significant ramifications for active casualty markets & especially legacy business acquirers. Receive the absolute latest news from legal expert, Robert DiUbaldo of Carlton Fields, P.A.

RE AUDITS FROM A CLAIMS PERSPECTIVE

Planned for September

Slimmed down to "Claims Only", our classic Reinsurance Audits session will focus on practical and useful issues. Both Insurer and Reinsurer perspectives will be addressed. Presenters are industry professionals for whom auditing, and being audited, is a significant part of their work so you will receive the most current and practical knowledge!

REPRESENTATIONS & WARRANTIES COVERAGE AND ISSUES

Planned for late September/Early October, 2020

Purchase of Reps & Warranties Insurance in corporate M&A transactions is becoming standard practice. Hear from industry experts what company representatives and outside M&A counsel have to say about the product and what the hot issues are right now.

LLOYD'S IN THE 2020's

Planned for October, 2020

Lloyd's is rapidly changing both internationally and externally. This special session will feature Lloyd's executives and reinsurance underwriters discussing both market conditions and appetites as well as how the Society is focusing on efficiencies to maximize policyholder value. Presented in co-operation with IRUA member – Lloyd's America Inc.

INNOVATION AND ITS EFFECTS ON INSURANCE/ REINSURANCE

Planned for October, 2020

Insurers and reinsurers are rapidly embracing innovation and have identified it as key to future business survival – especially in a post -COVID-19 environment. Learn from industry and legal experts how internal hurdles such as legacy systems, distribution models and company cultures need to welcome change.

IRUA 2020 SCHEDULE OF EVENTS END-NOTES

Please note that these sessions are currently planned but are subject to change

For more information on any of IRUA's events, or to register, visit the IRUA website at www.irua.org. Simply click on the "Events" tab on the top navigation bar and select the event you are looking for from the dropdown menu – either Seminars or Conference.

We wish to extend our sincere thanks to our host firms who have so generously donated their facilities space to the IRUA!

Interested in Sponsoring an IRUA Event? Contact Jerry Wallis at jwallis@irua.org

Vision

To facilitate a vibrant forum that encourages professional and personal development of member company personnel through educational excellence, the exchange of knowledge among industry constituents within the insurance and reinsurance marketplace and recognition for academic excellence for the next generation of reinsurance professionals. We accomplish this vision through focused educational offerings, a robust Scholars program, the publication of the *Journal of Reinsurance,* and an Annual Conference.

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The IRUA is a not-for-profit corporation, organized for the purpose of providing high-quality insurance and reinsurance education, meaningful networking opportunities, and the dissemination of topical publications and information relevant to the reinsurance industry.