



*Navigating a Pandemic:
Advising Clients On Business
Interruption Insurance
Coverage For COVID-19
Claims*





Copyright © 2020

Printed in the United States of America. All rights reserved. No part of this monograph may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, except for citation within legal documents filed with a tribunal, without permission in writing from the publisher.

Disclaimer: The views expressed herein are not a legal opinion. Every fact situation is different and the reader is encouraged to seek legal advice for their particular situation.

The Apex Jurist, www.ApexJurist.com is
Published by ApexCLE, Inc.
www.ApexCLE.com

119 South Emerson St., # 248
Mount Prospect, Illinois 60056

Ordering Information:

Copies of this monograph may be ordered direct from the publisher for \$64.95 plus \$4.25 shipping and handling. Please enclose your check or money order and shipping information. For educational, government or multiple copy pricing, please contact the publisher.

Library of Congress Cataloging-in-Publication Data

ApexCLE, Inc.

1. ApexCLE, Inc. 2. Law-United States – Guide-books.
3. Legal Guide 4. Legal Education.



© Copyright 2020, All Rights Reserved.

About the Presenter

Daniel A. Cotter

Daniel A. Cotter is Attorney and Counselor at Howard & Howard Attorneys PLLC. Dan focuses his practices in a variety of areas of corporate law and litigation, including insurance law, complex business disputes and counseling, employment law, corporate transactions, corporate governance and compliance, and cybersecurity and privacy law. His clients benefit from his diverse professional experience, which – in addition to his years serving as trusted outside counsel – includes positions as a corporate accountant and an in-house attorney. He spent 14.5 years in-house at insurance organizations, where he focused on insurance, regulatory, technology, IT, compliance and transactional matters.

Dan served as President of The Chicago Bar Association for the 2014-2015 bar year and is former Chair of The Young Lawyers Section of the CBA. Dan was an adjunct professor at The John Marshall Law School, and has taught Insurance Law, Accounting for Lawyers and SCOTUS Judicial Biography.

Dan graduated summa cum laude from The John Marshall Law School and received his B.A. in Accounting from Monmouth College, magna cum laude. Dan is a frequent writer and presenter on various substantive topics, including technology and privacy, and in 2019, his book, “The Chief Justices,” was published.”

Email Address: dac@h2law.com

Website: <https://howardandhoward.com/>

Mailing Address: 200 S. Michigan Ave., Suite 1100, Chicago, IL 60604

Phone Number: 312-456-3674



Table of Contents

Contents

Table of Contents	4
Course Description	6
Course Learning Objectives and Outcomes	7
Timed Agenda:.....	8
Course Material	9
The Covid-19 Pandemic and Business Interruption and Other Coverages	9
A Major Caveat	9
Agenda.....	10
Would Begin with This Statement	11
What Is Insurance?	11
Certain Practical Limitations and Obstacles in Insurance Contract Formation.....	11
A Word on McCarran- Ferguson and Insurance	11
Insurance Policy Is Fundamentally a Contract	12
Proce.....	12
Policy Issuance.....	12
Few Principles in the Insured’s Favor	12
Supply Chains and Workers—Bi	13
Basic Language of Commercial Policies.....	13
Business Interruption	13
Common Features of Business Interruption	14
Proposed Legislation and Policies’ Liberalization Clauses.....	14
New Jersey Legislature	14
Language in New Jersey Bill.....	15
Ohio Legislature.....	15
Other States?	15
New York Department of Financial Services	15
Federal Level.....	16
No Easy Answers	16
Insurers’ and Policyholder’s’ Perspective.....	16
Insurance for COVID-19: Business Losses & Liabilities	16
Business Interruption/Time Element Coverage	17
What Is Direct Physical Loss?	17
Cajun Conti, LLC, ET Al. V. Certain Underwriters at Lloyd’s London, ET Al....	17
Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America, No. 12-cv-04418, 2014 U.S. Dist. LEXIS 165232 (D.N.J. Nov. 25, 2014)	17
Second Set of Suits — Oklahoma	18



More Suits	18
JDL, Inc., ET AL., v. Valley Forge Insurance Company.....	18
Treasure Island, LLC v. Affiliated FM Ins. Co.....	19
Recent Cases Give Each Side Hope.....	19
Contingent Business Interruption Coverage	19
Civil or Military Authority Coverage	19
Key Issue: Is There “Direct Physical Loss”?.....	20
Virus Exclusions	20
ISO Filing	20
ISO Filing—Memo Language	21
Other Exclusions.....	21
Event Cancellation Coverage.....	21
Applicable Liability Coverage.....	22
Preserving Claims; Recovery of Insurance Proceeds.....	22
New Cottage Industry.....	23
First Case of Kind	23
BIG	23
Broker E&O.....	23
New Theories.....	24
Workers’ Compensation.....	24
Most Cases	24
Illinois Workers’ Compensation Commission.....	24
Developments	25
Illinois Not Alone	25
Vandalism and Looting	25
Damage.....	25
Central Camera.....	26
Generally Covered	26
Nevada DOI.....	26
Concluding Thoughts	26
Program Transcript.....	27
Resources	27
Resources Specific to this Course.....	27
Resources for the Legal Professional	27

Course Description

The unprecedented challenges of COVID-19 and the impact that social distancing and shelter in place and closure of non-essential businesses are impacting businesses in every industry and on businesses of every size. As the pandemic continues, businesses are looking at their various insurance programs they have in place to determine what coverage might apply. As businesses moves to reopen, various insurance issues will be at play, including contingent business interruption and business income. Join Dan Cotter as he provides information on business interruption insurance and discusses other insurance potentially invoked.

Course Presentation

This course provides an in-depth examination of contracts and insurance for any attorney.

Course Material

This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.



Course Learning Objectives and Outcomes

This course is designed to provide the following practice tips: understanding how property policies work and being able to assess a policy and read one.

The ability to understand the duties, roles and responsibilities of counsel in situations involving advising their clients on business interruption claims; understanding the insurer's perspective; navigating insurance issues in the pandemic.

Participants will develop an understanding about business interruption and coverages and limitations to advise their clients.

Participants will gain practical skills in the area of insurance contract analysis.

Upon completion of the course, participants should be able to apply the course material; improve their ability to research, plan, synthesize a variety of sources from authentic materials, draw conclusions; and demonstrate an understanding of the theme and concepts of the course by applying them in their professional lives.



Timed Agenda:

Presenter Name: Daniel A. Cotter

CLE Course Title: Navigating a Pandemic: Advising Clients On Business Interruption Insurance Coverage For COVID-19 Claims

Time Format (00:00:00 - Hours:Minutes:Seconds)	Description
00:00:00	ApexCLE Company Credit Introduction
00:00:20	CLE Presentation Title: Business Interruption Insurance Coverage for Covid19
00:00:32	CLE Presenter Introduction
00:00:46	CLE Substantive Material Presentation Introduction
00:03:14	Topics Analyzed in this Program
00:05:42	Coverage And Insurance Basics
00:07:10	What is Insurance
00:08:54	U.S. v. South-Eastern UW Assoc., 322 U.S. 533, 64 S.Ct. 1162 (1944)
00:12:50	Principles in the Insured's Favor
00:13:13	Contract Construction
00:13:42	contra proferentem
00:14:14	Reasonable Expectations
00:15:01	Supply Chains and Workers
00:18:38	Business Interruption
00:28:14	Federal Level Actions
00:37:40	Direct Physical Loss
00:52:30	Event Coverage
00:58:15	First Impression
01:06:53	Presenter Closing
01:08:04	Closing Credit Rolling
01:08:11	End of Video



Course Material

The Covid-19 Pandemic and Business Interruption and Other Coverages

Industry know-how and a unique culture make us the law firm of choice for business.

From our founding above a blacksmith shop in 1869 to the full- service national and international practice we've become in the 150 years since, we have consistently sought to earn each client's trust by always keeping one eye on the finish line and the other on the bottom line.

Drawing from their vast qualifications and business backgrounds, our attorneys pool their talents into cross-disciplinary teams, combining creativity, practicality, and a cost-conscious approach to better serve each client as a whole. Because our lawyers are sound businesspeople, we operate more efficiently and entrepreneurially. We're the firm our clients respect, want to work with, and choose to retain over the long term.

Regardless of where you are in the business life cycle and whether your needs involve transactions, disputes, regulatory compliance, or intellectual property, Howard & Howard is the law firm of choice.

DISCLAIMER

The materials in this presentation are intended to provide a general overview of the issues contained herein and are not intended, nor should they be construed, to provide specific legal or regulatory guidance or advice. If you have any questions or issues of a specific nature, you should consult with appropriate legal or regulatory counsel to review the specific circumstances involved. Views expressed are those of the speakers and are not to be attributed to their firm, the courts, or their clients.

A Major Caveat

COVID-19 is unlike anything anyone has seen. The facts and statistics are fluid. From preparation of slides for this webinar to the airing of same, much may have changed. We give no assurances that the facts addressed in this webinar are accurate as of when you are viewing the same. Reach out if you would like to discuss.



Agenda

Introduction/Overview

- Coverage and Insurance Basics

Business Interruption Basics

- The Pandemic and Introduction to Business Interruption
- Legislative and Other Non-claims Approaches

The Policyholder and Insurer's Perspective

- Reviewing the Facts and Policy Language
- Drafting the Claim Notice
- Documenting the Evidence
- Theories of Coverage
- Virus Exclusion
- Direct Physical Loss
- Civil Authority
- Other Defenses
- Looting and Other Vandalism

Would Begin with This Statement

Insurance policies:

- What the front page giveth...the back pages taketh away.

What Is Insurance?

States vary in definitions (CT. 38a-1 v. CA Insurance Code 22 v. New York Insurance Law Ins. 1101), but for two requirements:

- Risk of loss
 - Contingent or unknown event
 - Fortuitous event
- Distribution of risk among similarly situated persons

Have those two, might have insurance, but not always

I analogize insurance similar to that of a casino-like event

Certain Practical Limitations and Obstacles in Insurance Contract Formation

State regulated

- Each state's insurance code is different
 - Lines of business may be different
 - Language and definitions may be different

Contract of adhesion

- Unless the biggest of the big, your policy language is not changing
 - For extremely big risks, some states have form and rate relief

Misrepresentation

Admitted versus surplus lines

A Word on McCarran- Ferguson and Insurance

United States v. South-Eastern Underwriters Association, 322 U.S. 533, 64 S.Ct. 1162 (1944)

- Insurance subject to regulation by Congress and its anti-trust laws

In 1945, McCarran-Ferguson enacted



- “subject to the laws of the several states which related to the regulation or taxation of such business”

Been challenged, and some in current Congress threatened to remove, but remains in place

Insurance Policy Is Fundamentally a Contract

Another major challenge of insurance policy:

- Typical, parties exchange performance and receive benefits simultaneously
- Insurance relationship:
 - Insured pays premium
 - Insurer only obligated to perform if some event triggers the policy performance obligations
- Also, as noted, contract of adhesion—insured typically not active participant in drafting or negotiating the terms

Proce

SS

- Application
- Binder
- Evaluation/Underwriting
- Issuance
 - Likely an agent or broker

Policy Issuance

- World Trade Center case
 - At time of loss, binder given but not final policy

Few Principles in the Insured’s Favor

Contract construction



- Courts rarely apply “Four Corners” approach to interpret insurance policy terms

Doctrine of contra proferentem

- Meaning: preferred, which operates against the party who supplies the words

Doctrine of reasonable expectations

- Ambiguities should be resolved to accord with the reasonable interpretation given the challenged provision by the policyholder or reasonable expectations of policyholder

Supply Chains and Workers—Bi

- Gyms and fitness
- Restaurants and bars
- Movies
- Concerts
- Airlines
- Hotels
- Gambling
- NOT MANY INDUSTRIES NOT IMPACTED

Basic Language of Commercial Policies

Insurance Services Office

American Association of Insurance Services

- Most insurers use these services
- Most insurers don’t change basics
 - Known language
 - Everyone using
- But can be own proprietary language
 - More common in property

Business Interruption

- Generally part of a property or business owners policy (BOP)



- If someone exposed to COVID-19 at a business, questions of general liability/liability policies might come into play

Common Features of Business Interruption

- **Waiting period**
- **Must document income**
 - Examples of not doing so
- **Exclusions?**
 - Force majeure?
 - Others?
- **Physical loss***
- **Civil authority***
- **Partial closures**

Proposed Legislation and Policies' Liberalization Clauses

Recently proposed business interruption insurance legislation:

- New Jersey, Massachusetts, Ohio, New York, Louisiana, Pennsylvania, and South Carolina
- Typical liberalization clause
 - "If during the period that insurance is in force under this Policy, any filed rules or regulations affecting the same are revised by statute so as to broaden this insurance without additional premium charge, such extended or broadened insurance will inure to the benefit of the Insured within such jurisdiction, effective the date of the change specified in such statute."

New Jersey Legislature

- Bill to override ISO exclusion:



- <https://www.coverageopinions.info/Vol9Issue2/NewJerseyCOVID.html>
- Raises contractual issues and perhaps constitutional issues

Language in New Jersey Bill

“Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption in force in this State on the effective date of this act, shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic... concerning the coronavirus disease 2019 pandemic.”

Ohio Legislature

“Every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption,” in force on the effective date, “shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic during the state of emergency.”

Other States?

- PA/MA
- NY introduced recently
- Industry response
 - NAMIC, one response:

Monitoring to “ascertain any appetites to develop bad public policy situations in a misguided attempt to address COVID-19 impacts.”

New York Department of Financial Services

Special Data Call:

- [file:///C:/Users/cotter/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/195LFPYW/businessinterruptionsec3082020%20\(002\).pdf](file:///C:/Users/cotter/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/195LFPYW/businessinterruptionsec3082020%20(002).pdf)



California followed suit

- Also issued reminder bulletin about good faith investigation

Federal Level

- **Backstops**
- **Reinsurance mechanisms**

No Easy Answers

Natural disaster situation

- A geographic area impacted
 - Contained

Pandemic situation

- Everyone impacted
 - No industry left untouched

Costs of insurance versus exposure

- Often asked about reinsurance

Insurers' and Policyholder's' Perspective

Each side has taken positions, diametrically opposed.

Insurance for COVID-19: Business Losses & Liabilities

- Potentially available insurance for business losses and liabilities
- Claim preservation, including notices to the insurer and documenting statements/proofs of losses
- Coverage litigation
- Coverage will depend on policy language, the specific circumstances, and applicable state law
- Filing a notice of claim and proof of loss to protect rights
- Future events may impact claims for coverage



Business Interruption/Time Element Coverage

Protects the insured against losses of business income resulting from “physical loss or damage” to insured property by a covered peril

- Typical business income insurance clause:

“We will pay for the actual loss of business income you sustain due to the necessary suspension of your ‘operations’ during the period of ‘restoration.’ The suspension must be caused by the direct physical loss, damage, or destruction to property. The loss or damage must be caused by or result from a covered cause of loss.”

- Case law instructive on meaning of “physical loss”

What Is Direct Physical Loss?

The first coverage case for COVID-19 was filed on Tuesday, March 17, 2020, in Louisiana. The case involves a restaurant, Oceana Grill. [Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd’s London, et al., Civil District Court for the Parish of Orleans, Louisiana.] The case argues the Civil Authority provision of its insurance policy is invoked because of restrictions and bans put in place by the local authorities.

Cajun Conti, LLC, ET AL. V. Certain Underwriters at Lloyd’s London, ET AL.

The Grill alleges that the virus meets the definition of physical loss as “the global pandemic is exacerbated by the fact that the deadly virus physically infects and stays on the surface of objects or materials, ‘fomites,’ for up to twenty-eight days, particularly in humid areas below eighty- four degrees.” Further, the complaint states that it is “clear that contamination of the insured premises by the Coronavirus would be a direct physical loss needing remediation to clean the surfaces of the establishment.”

Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America, No. 12-cv-04418, 2014 U.S. Dist. LEXIS 165232 (D.N.J. Nov. 25, 2014)



The case relied upon by the Grill for the argument that the virus meets the “physical loss” requirement of a standard business interruption coverage, such as you have as a franchisee, and can be used is Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America, No. 12-cv-04418, 2014 U.S. Dist. LEXIS 165232 (D.N.J. Nov. 25, 2014). In Gregory, an issue of release of excess ammonia from a refrigeration unit was present. The court determined that, while structural alteration provides the most obvious sign of physical damage, a property can sustain physical loss or damage without experiencing structural alteration. The court concluded that ammonia, a dangerous gas, which rendered Gregory Packaging’s buildings uninhabitable, constituted a “direct physical loss,” sufficient to trigger coverage under the Travelers’ policy.

Second Set of Suits — Oklahoma

Chickasaw Nation Department of Commerce v. Lexington Insurance Co. et al., case number cv-20-35, in the District Court of Pontotoc County, Oklahoma, <https://www.courthousenews.com/wp-content/uploads/2020/03/CC20032400000 319.pdf>, and Choctaw Nation of Oklahoma v. Lexington Insurance Co., case number cv-20-42, in the District Court of Bryan County, Oklahoma (identical suit, trying to find complaint).

More Suits

- French Laundry—CA
- Big Onion Tavern Group, LLC, et al.
 - Northern District of Illinois
- Dozens now

JDL, Inc., ET AL., v. Valley Forge Insurance Company

- United States District Court, Northern District of Illinois— CM/ECF LIVE, Ver 6.3.2 (Chicago) CIVIL DOCKET FOR CASE #: 1:20- cv-02681
- Class action
- Suspend or reduce business operations
- Specialty Property Coverage Form
- “Partial or complete cessation”



Treasure Island, LLC v. Affiliated FM Ins. Co.

- Case 2:20-cv-00965-JCM-EJY, filed May 28, 2020
- Alleges insurer:

"has doubled down on a calculated claims handling strategy designed to limit or altogether deny Treasure Island from the recovery it is entitled to receive under an insurance contract it has long-relied on as protection against unforeseen loss or damage and resulting loss of income."

Recent Cases Give Each Side Hope

- Friends of Danny DeVito v. Wolf—PA SCT
 - Good language for physical loss
- Social Life Magazine Inc. v. Sentinel Insurance Co. Ltd., case number 1:20-cv- 03311, in the U.S. District Court for the Southern District of New York.
 - Judge Caproni: "I feel bad for your client. I feel bad for every small business that is having difficulties during this period of time. But New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going. You get an A for effort, you get a gold star for creativity, but this is just not what's covered under these insurance policies."
 - Interlocutory appeal to 2nd Circuit—withdrawn!

Contingent Business Interruption Coverage

- Contingent business interruption coverage: Who must be affected?
 - E.g., supplier?
 - Customer? Etc.
- Supply chain coverage: What is covered?
 - Named products or services?
 - Goods or services from a named supplier or company

Civil or Military Authority Coverage

Covers business income loss during the time in which access to its premises is prohibited by order of civil authority following damage to the property of others



- Typically limited by amount and time
- Typically applies on an order-by-order insured location-by-location basis
- Recent COVID-19-related case law instructive on civil authority orders

Key Issue: Is There “Direct Physical Loss”?

- Does the policy contain a requirement for physical damage or loss?
- Type of damage or loss sufficient for coverage:
 - Will contamination related to a pandemic constitute physical damage or loss suffice?
 - If property surfaces are contaminated by the virus, does this constitute the necessary “physical loss”?
 - Is contamination that renders property uninhabitable enough to trigger coverage?
- Hypotheticals: asbestos; smoke; ammonia

Virus Exclusions

- ISO in 2006 promulgated a virus exclusion for use in business interruption policies:

“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.”

- “Communicable” or “infectious disease” exclusions
- Policies may include other “virus exclusions”
 - May be general (for “virus”) or specific (for SARS, anthrax, etc.)
 - May be in an “omnibus exclusion” (for mold, fungus, dry rot, etc.)

ISO Filing

- When ISO submits to states new forms for its subscribers or members, it files a memo explaining the reasons for the language.
- For this ISO exclusion, filed LI-CF-2006-175
 - Memo refers to rotavirus, SARS, influenza (such as avian flu), legionella, and anthrax



ISO Filing—Memo Language

- Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case. In addition, pollution exclusions are at times narrowly applied by certain courts.
- While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.
- In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.

Other Exclusions

- “Pollution exclusion”
 - Compare definition of “pollutant”
 - May include “bacteria”
- “Contamination exclusion”
- “Mold,” “dry,” or “wet rot” exclusions
 - “Virus” may be separated from “bacteria”
 - “Virus” included in “mold exclusion”?
- “Delay or loss of market” exclusions
- Last but not least: “pandemic exclusions”

Event Cancellation Coverage

Does it provide coverage for losses from a cancelled event because of COVID-19?

- Example language: “We will indemnify you for your loss as a direct result of cancellation, abandonment, curtailment, postponement, or relocation of the insured event to which this insurance applies.”



- Before purchasing special event coverage in the future, one needs to review the policy as insurers have started placing exclusions that will preclude losses from a cancellation based on COVID-19

Applicable Liability Coverage

General liability

- General liability insurance covers liability for bodily injury and property damage
- The insurance also typically provides a defense obligation

Directors & officers (D&O) insurance

- Potential claims arising out of stock drops, public disclosures, and fiduciary issues
- Securities class actions or shareholder derivative claims alleging officers and directors mismanaged or failed to act in response to the COVID-19 outbreak

Workers' compensation

- Workers' compensation insurance covers employees who
- suffer injury or illness in the workplace
- This coverage extends to injuries "arising out of or in the course of employment," meaning that claims for compensation must allege work-related losses

Preserving Claims; Recovery of Insurance Proceeds

Notice to carrier

- Provide notice to the insurance company "promptly" or "as soon as practicable" in the event of loss

Proofs/statements of loss

- Establish a timeline, including the issuance dates and durations of civil authority orders and supplemental orders that limited or prohibited access

Coverage litigation

- Policyholder may find it prudent to initiate its own coverage action in an appropriate forum to preserve and pursue insurance recoveries



New Cottage Industry

Coverage disputes

- When facing catastrophic destruction of business, potentially never to reopen, look to every potential source
 - Analogy to the Hurricane Katrina coverage fights and flood exclusion
 - Absolute pollution exclusion and asbestos
 - Other instances

Insurers do not have capacity to pay for all business interruption

- Argue never intended to cover such an event

First Case of Kind

Bella Vista LLC v. People's Republic of China (D. Nev. Mar. 23, 2020)—U.S. class action alleging that the government of China engaged in an intentional cover-up by misleading the international community about the health and economic consequences of COVID-19

BIG

We are BIG

- <https://werbig.org/>
- Nonprofit
- Organized by Wolfgang Puck, others

Broker E&O

- Ja-Del Inc. v. Zurich American Insurance Co., Lovell Sagebrush Insurance Group Inc. and R-T Specialty LLC, filed in state court in Kansas City
- Broker allegedly breached duty:
 - “by communicating inaccurate information as to what the Policy covered and/or not procuring a policy that fully covered Plaintiff’s business income losses.”



New Theories

- **Civil Authority**
 - “due to” —language not equivalent to “caused by”
- **Pennsylvania Supreme Court**
 - DeVito v. Wolf
- **“Sue and labor”**
- **Pandemic endorsement**

Workers’ Compensation

First session, we discussed:

- Two tests must be satisfied before any illness or disease qualifies as occupational and thus compensable under workers’ compensation:
 - The illness or disease must be “occupational,” meaning that it arose out of and was in the course and scope of the employment; and
 - The illness or disease must arise out of or be caused by conditions “peculiar” to the work

Most Cases

- No coverage
- Mentioned potential for health care, first responders

Illinois Workers’ Compensation Commission

Emergency Rule on April 16, 2020:

- https://www2.illinois.gov/sites/iwcc/news/Documents/15APR20-Notice_of_Emergency_Amendments_CORRECTED-clean-50IAC9030_70.pdf
- “the exposure will be rebuttably presumed to have arisen out of and in the course of the petitioner's COVID-19 First Responder or Front-Line Worker employment and, further, will be rebuttably presumed to be causally connected to the hazards or exposures of the petitioner's COVID-19 First Responder or Front-Line Worker employment.”



- “The term ‘COVID-19 First Responder or Front-Line Worker’ means any individuals employed as police, fire personnel, emergency medical technicians, or paramedics and all individuals employed and considered as first responders, health care providers engaged in patient care, corrections officers, and the crucial personnel identified under Section 1 Parts 7, 8, 9, 10, 11, and 12 of Executive Order 2020-10 dated March 20, 2020.”

Developments

April 27—repealed emergency rule

- Followed a Sangamon County judge blocking rule on April 23

May 22

- Legislature passed compromise bill

Creates COVID-19 workers' compensation protection for certain workers considered "essential" under the Governor's order. The bill: "the exposure and contraction shall be rebuttably presumed to have arisen out of and in the course of the employee's first responder or front-line worker employment and the injury or occupational disease shall be rebuttably presumed to be causally connected to the hazards or exposures of the employee's first responder or front-line worker employment."

Illinois Not Alone

- Numerous other states have enacted similar laws
- Will see how this one holds up
- Questions of if WC not applicable, tort law potential?

Vandalism and Looting

- Not directly related to COVID-19
- However, at tail end
 - Just as ready to reopen, many businesses impacted

Damage



Central Camera

Generally Covered

- Auto: comprehensive coverage (optional)
- Home: fire, riot, civil commotion
- Most BOP policies
 - Contents under personal property
- Business interruption
 - Not your property
 - ❖ But if had to close, reduced hours, etc., potential coverage
- Check policies for theft and vandalism

Nevada DOI

Link to NAIC statement on BI:

https://content.naic.org/article/statement_naic_statement_congressional_action_relating_covid_19.htm

- “Business interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID- 19 and therefore include exclusions for that risk.”

Concluding Thoughts

- Everyone in chain impacted
 - Solutions?
 - Reopening?
 - Mitigation?
- Unprecedented times
- Will evolve and will be litigated
 - Plaintiffs on verge of BR/out of business
 - Defendants exposure significant
 - ❖ Contract defenses/interpretation arguments/science



Program Transcript

The following is a computer generated voice recognition transcript of the video presentation. This is an automatically generated transcript and not a verbatim transcript of the program. This is provided only for general reference and there may be portions that have not been accurately computer generated. If there are any inconsistencies, please refer to the video for clarification.

Resources

Resources Specific to this Course

In addition, please see the resources cited within the material.

Resources for the Legal Professional

ABA Center for Professional Responsibility - www.abanet.org/cpr
Chicago Bar Association - www.chicagobar.org
Commission on Professionalism - www.2civility.org
Judicial Inquiry Board - <http://www.illinois.gov/jib>
Illinois Board of Admissions to the Bar - www.ilbaradmissions.org
Illinois Department of Financial and Professional Regulation - www.idfpr.com/default.asp
Illinois Lawyers' Assistance Program, Inc - www.illinoislap.org
Illinois State Bar Association - www.isba.org
Illinois Supreme Court - www.state.il.us/court
Lawyers Trust Fund of Illinois - www.ltf.org
MCLE Program - www.mcleboard.org

