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AN INSURANCE COVERAGE & REINSURANCE PRIMER ON CORONAVIRUS (COVID-19) CLAIMS

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Hinshaw & Culbertson LLP
151 North Franklin Street, Suite 2500
Chicago, IL 60606
312-704-3000

This primer is part of a series of guides prepared by
Hinshaw & Culbertson LLP for legal and insurance professionals.

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LEAD AUTHORS

Scott M. Seaman is Co-Chair of Hinshaw's Global Insurance Services Practice Group. He is nationally recognized as one of the leading attorneys in the United States representing insurers and reinsurers in a wide-range of complex property and casualty matters. During his 32-year career, he has had the privilege of serving as counsel in precedent setting cases involving some of the most challenging contemporary coverage and reinsurance issues confronting the insurance industry. He regularly counsels companies on emerging issues and matters impacting their portfolio interests. He is a prolific author and speaker on insurance and litigation issues. Full Biography

Judith A. Selby, a partner in Hinshaw's New York office, has over 25 years of complex insurance coverage litigation and international arbitration experience, handling large scale, complex first and third party matters. Her experience includes coverage opinions, all phases of coverage litigation through trial and appeal, and Bermuda Form international arbitrations. She has handled high stakes environmental, toxic tort, cyber/privacy, business interruption, pharmaceutical, and COVID-19 claims. Judy also assists with cyber product development and policy wordings, informed by a deep understanding of cyber and privacy laws, evolving technologies, and related liabilities. She is a prolific author and has been quoted in leading publications, including the Wall Street Journal, Business Insurance, and Law360. Full Biography

Kyle M. Medley is a Partner in Hinshaw's New York office, with over 15 years of insurance litigation experience. Kyle focuses his practice primarily in reinsurance and insurance coverage disputes. He has substantial experience in litigating, arbitrating, and mediating a wide variety of insurance disputes including those involving primary carriers, excess carriers, reinsurers, and Lloyd's syndicates in run-off. Kyle was recently seconded to a major Lloyd's syndicate in London, where he worked closely with the cyber and IP claims team. Full Biography

Matthew C. Ferlazzo is a partner in Hinshaw's Global Insurance Services Practice Group. In his 15-year career he has worked on a variety of issues important to the reinsurance and insurance industries, including allocation, trigger of coverage, number of occurrences, additional insured coverage, follow the settlements, loss sensitive insurance programs, and insurance coverage issues arising from the destruction of the World Trade Center and COVID-19 claims. He was twice named a New York Metro Rising Star by Superlawyers. Full Biography

This publication was prepared by attorneys of the Global Insurance Services Practice Group of Hinshaw & Culbertson LLP. For additional information, please feel free to contact any member of the Insurance Services Practice Group with whom you work.

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INTRODUCTION

The coronavirus disease ("COVID-19") pandemic is wreaking havoc across the globe, bringing with it panic, wide-scale morbidity and mortality, and economic disruption that has impacted virtually all industries and sectors. The pandemic and the resulting emergency declarations and stay-at-home orders have transformed the American way of life, at least temporarily, and are exacting a major toll on individuals and businesses. COVID-19 has resulted in unprecedent and wide-ranging governmental actions to slow the pandemic while at the same time trying to mitigate the economic hardships on individuals and businesses. Included in those efforts are proposals aimed at persuading and compelling insurers to provide coverage even where the insurance policy does not apply or coverage is expressly excluded under policy forms approved previously be regulators. *See generally* Seaman, S.M. and Selby, J.A., "Tracking The Flurry Of COVID-19 Related Legislative & Regulatory Activity Impacting Insurers" Mealey's Litigation Report: Catastrophic Loss, Vol. 15, No. 7 (April 2020).

Even as the pandemic spreads across America, insurers already have been inundated with COVID-19 related claims. Indeed, coverage and bad faith actions were filed in various jurisdictions throughout the United States beginning in March 2020, and the number of such actions will continue to mount, with business interruption claims leading the way. However, insurers will almost certainly face claims and exposures across the full range of lines of coverage and from policyholders across a variety of industries. Policyholder firms are beating the drums, expounding theories supporting coverage claims, and encouraging their clients to place insurers on notice and pursue coverage vigorously through direct communications, articles, seminars, and webinars. Even where losses are not covered and coverage actions ultimately not pursued, insurers will be peppered with precautionary notices by policyholders seeking to discharge fiduciary duties, and comply with claims-made requirements and notice conditions of their policies. Some claims may result in insurers incurring substantial defense costs under liability policies, but the major exposures at this point appear to be on the indemnity side.

As with all claims, coverage determinations will depend upon the application of governing law to the policy language and the claim-specific facts. With some of the proposed legislation in several states and actions of insurance regulators, the COVID-19 pandemic presents the prospect of coverage for non-covered claims through government fiat. *See generally*, Seaman, S.M. and Lenci, E.K., "Reinsurance Considerations Associated with the Coronavirus," *Law 360* (April 9, 2020).

This primer contains an overview of some of the lines of coverage that are likely to be impacted by COVID-19-related claims. The first ten chapters examine Commercial Property, Cyber, Directors & Officers Liability, Fiduciary Liability, Travel, Workers' Compensation and Employers' Liability, Employment Practices Liability, Commercial General Liability, Professional Liability, and Event Cancellation Insurance. In each of the chapters we provide examples of the types of claims that may be made under these lines of insurance and identify some of the key points and coverage issues that may be presented under these policy types. The eleventh chapter discusses Reinsurance issues. In the last chapter, we discuss some of issues raised by the COVID-19 related coverage actions that have been filed by policyholders to date.

The primer does not purport to examine all types of claims or all lines of coverage potentially impacted by COVID-19-related claims. For example, we do not address claims under Trade Credit, Health, Medical, Disability, Accident, Life, Auto, or Homeowner's insurance policies. Nor does the primer purport to identify all issues potentially presented.

There is case law and other authority in many jurisdictions for most of the principles and issues discussed below. Please feel free to reach out to your regular Insurance Services Practice Group contacts at Hinshaw with any questions or issues.

CHAPTER 1:

COMMERCIAL PROPERTY INSURANCE

A. Coverage Overview

Commercial Property Insurance covers businesses and organizations for damage to their physical structures and contents due to a covered loss. Relevant to potential COVID-19 claims, a commercial property policy may include business interruption or time element coverage, which may provide coverage for business income losses so long as the terms and conditions of the policy (such as the requirement of direct physical loss of or damage to property) are satisfied. Application of the policy terms, conditions, and exclusions should preclude coverage for most COVID-19-related business interruption losses. However, the scope and dynamics associated with this pandemic – including efforts by the legislature in several states – may result in coverage by government fiat and distorted constructions by some courts. Business interruption claims have lead the COVID-19 coverage litigation charge and have generated the most attention with respect to business losses.

B. Potential Commercial Property Claims

- **First-Party Property Business Interruption Claim** – One or more of a policyholder's employees are diagnosed with COVID-19, and testing reveals presence of coronavirus at the workplace (*e.g.*, on surfaces or inside its HVAC systems). A policyholder loses use of its commercial property due to virus contamination and is forced to close entirely or is impacted by the loss of use (*e.g.*, business is temporarily closed for decontamination).

- **Supply Chain Business Interruption Claim** – A policyholder may pursue contingent business interruption coverage where its supply chain was cut when a supplier closed due to a COVID-19 incident or ordinance and the policyholder can no longer obtain all the supplies or materials it needs to continue operations and supply its customers or clients.

- **Ingress/Egress Claim** – A policyholder's property falls within a quarantine zone and this lack of access has forced it to close.

- **Government-Ordered Shut Downs** – Many of the pending business interruption claims are predicated on loss of use and business interruption

claims based upon state or local governmental orders requiring businesses to shut down entirely or to limit operations (*e.g.*, restaurants allowed only to be opened by drive-through or carry-out orders).

C. Key Points And Select Issues

1. Business Interruption Coverage Policy Language.

The starting point for analysis of coverage for business income loss is the policy language. The ISO commercial property business income form generally states:

> 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 direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations….

2. Requirement Of Direct Physical Loss Of Or Damage To Property.

The requirement of direct physical loss or damage will be a significant hurdle for a policyholder to clear when seeking coverage for any alleged business interruption loss under a commercial property policy. COVID-19-related losses that businesses are experiencing to date are typically due to causes other than physical property damage – namely, businesses not producing goods and services because employees and staying home or businesses not remaining open voluntarily or due to government stay at home orders. Such losses are not physical damage to insured property.

Direct physical loss or damage generally requires a material change or alteration of the insured property which degrades or impairs its function. When addressing whether the presence of a contaminate amounts to direct physical loss or damage, the policyholder must show that contamination of the property is such that its function is nearly eliminated, destroyed, or rendered useless or uninhabitable. Under this standard, policyholders in most instances will not be able to prove that the virus actually existed on the surface of the building even if they are able to show when, where, and for how long any infected person was in the building. Further, even if the virus was shown to exist on a building's surface, the presence of COVID-19 does not materially change or alter its structure. The function of the building surface has not been degraded or impaired and within hours, the virus is no longer viable. Further, it can be readily eradicated within those hours by wiping or spraying the

surface with a disinfecting agent or soap. Where the surface of property can be cleaned such that the property was never altered, then a strong argument exists that it has suffered no direct physical damage. In order to constitute "direct physical" damage, there must be some permanency and not just a temporary impairment. Policyholders may rely upon cases involving intangible losses to property, such as smoke, odors, and gases, to support their claim that property potentially affected by the virus is physically damaged. However, courts appear to universally require the policyholder's property to be physically affected in some way. The facts will vary from claim to claim, and policyholders will undoubtedly advance creative arguments in support of their claims.

Some policies contain endorsements or provisions that cover non-physical damage for limited purposes such as crisis management coverage, coverage for interruption by communicable disease, or cancellation of events or bookings coverage. Any such provisions must be reviewed carefully to determine their breadth, including whether they may be extended to cover upstream or downstream losses due to closure of supplier or customer locations due to fear of infectious diseases. These provisions often provide that they apply only where there is actual – not suspected – presence of communicable diseases at the policyholder's location. Further, many such provisions contain sub-limits.

3. Even If The Presence Of The Virus Constitutes Damage To Property, Any Such Damage Would Be Fleeting.

On March 17, 2020, the NIH published a study of the COVID-19 virus that concluded that the virus may remain viable on surfaces from two hours to 72 hours depending upon the type of surface. Further, the virus cannot penetrate the skin of a person who touches a surface containing a droplet of the viable virus. The droplet of viable COVID-19 must enter the mouth, nose, or eyes to infect an individual. The limited viability period often would mean that there is no coverage whatsoever under policies that provide that the period of coverage or restoration does not begin for 72 hours after the time of direct physical loss or damage for business interruption coverage. Further, coverage usually ends when the property could reasonably be repaired or remediated, which presumably would be no later than the end of the 72-hour virus viability period, and likely much earlier – possibly within minutes or hours.

Further, even if coverage exists for a claim, coverage generally is only provided for the lesser of the cost to repair or replace the lost or damaged property. Accordingly,

where there is remediation, it would appear to be generally limited to cleaning surfaces and perhaps testing.

4. Policyholders Must Establish A Causal Relationship.

To establish a time element claim either for business interruption, civil authority, or ingress/egress, a policyholder must establish a causal nexus between covered physical damage and the loss of income. The civil authority order or lack of ingress/egress must have been due to physical damage of type insured in the policy, which prevents access to the business and which often times must have happened within a specified distance of the business. Similarly, for loss income or gross earnings coverage, the interruption of the business operations must have been necessarily caused by the covered physical damage.

5. Covered Peril.

Some property policies provide coverage only for specifically identified covered perils and, under such policies, the policyholder must establish that the loss resulted from one of those covered perils. Viruses and communicable diseases typically are not covered perils. We note, however, that health care endorsements may include communicable disease coverage. Care should be taken to determine whether communicable disease coverage has been added by endorsement. Such coverages are limited – containing, for example, sub-limits, apply to diseases defined with specificity – and usually require an order from a governmental health agency.

6. Civil Authority Coverage.

Some property insurance policies provide business interruption coverage if lost income results from an order of a civil authority prohibiting access to an area or to property. Policyholders may argue that various government stay-at-home orders implicate such coverage where they are unable to conduct business at their premises due to such orders. The first requirement for such coverage is that there must be damage to property other than the subject property (this usually requires the other property to be within a mile of the subject property). If there is damage, the resulting loss to the subject insured must be "caused by" an order of the civil authority that prohibits access to the described premises. If, for example, the governmental order allows restaurants to continue operations with a drive-through, delivery, or carry-out, then there is no access prohibition. Additionally, the access to the area immediately surrounding the damaged property must be prohibited by civil authority as a result of such damage. Generally, the coverage for circumstances in

which the action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property. The various government orders, however phrased, are issued not because of any actual property damage, but rather to prevent the spread of disease from person to person. Property policies generally require that the civil authority prohibit access to the "area" where the damage exists and that such prohibition is the result of the damage itself and not for the purpose of minimizing the transmission of a communicable disease. Coverage is not triggered by orders that prohibit access to specific businesses, but to the general area where those businesses are located. This is simply not the case with the COVID-19 governmental orders that have been issued thus far – even such orders that include a reference to "damage," most likely at the insistence of an attorney familiar with property coverage. Moreover, many of the COVID-19-related orders do not preclude operation of essential businesses. Policyholders that are deemed to be within the category of "essential businesses" are not precluded from operating their businesses.

Additionally, Civil Authority Coverage for Business Income, under many policies, will not begin until 72 hours after the time of the first action of civil authority that prohibits access to the described premises and only apply for a period of up to two or four consecutive weeks from the date on which such coverage began.

7. Ingress/Egress Claims.

Some policies have extensions of coverage for ingress/egress. Such extensions typically cover the policyholder's loss due to the necessary interruption of the policyholder's business on account of the prevention of ingress to or egress from the policyholder's property, whether or not the policyholder's property was damaged. Policyholders must establish that their property cannot be accessed due to actual physical loss or damage. Policyholders will have a difficult time demonstrating that any ingress/egress is prevented due to physical damage.

8. Exclusions May Limit Or Bar Coverage.

Most commercial property policies contain exclusions that may bar coverage for COVID-19-related claims. Here are some typical exclusions that should be reviewed and considered.

- **Virus Or Bacteria Exclusion.** These exclusions began appearing more frequently in commercial property policies after the SARS and Ebola virus epidemics, and specifically exclude coverage for any virus-related losses.

- **Pollution Exclusion.** The applicability of this exclusion will turn on whether a virus will be considered a pollutant. This analysis will depend on how "pollutant" is defined in the policy and also how the relevant jurisdiction has interpreted the scope of "pollutant." Jurisdictions vary as to how narrow or broadly a pollution exclusion is interpreted.

- **Government Action Exclusion.** This exclusion is typically limited to the government's seizure and destruction of property. Whether exclusions of this type may apply will depend on close scrutiny of factual circumstances and policy language.

- **Ordinance Or Law Exclusion.** Ordinance or Law coverage concerns costs for repairing, rebuilding, or constructing a property when physical damage to the structure by a covered cause of loss triggers an ordinance or law. As with the Government Action Exclusion, whether exclusions of this type may apply will depend on close scrutiny of factual circumstances and policy language.

9. Sue And Labor.

Some policies may contain coverage for sue and labor to cover expenses incurred by the policyholder in the event of eminent physical loss or damage covered by the policy. Policyholders must establish that the physical damage was of the type insured by the policy and caused by a covered peril. Policyholders will likely have a difficult time demonstrating they were attempting to prevent covered physical damage.

10. Lawmakers In Some States Have Proposed Legislation To Impose Coverage For Business Interruption Claims Not Covered By The Policies.

Given the scope of the potential business interruption during the COVID-19 crisis, especially for small to medium enterprises that might not be able to weather a substantial and prolonged business disruption, legislators in some states are attempting to require coverage by government fiat. Legislation already has been introduced in several states, including New Jersey, Massachusetts, New York, Ohio,

Louisiana, and Pennsylvania. Although the proposed legislation varies by state, they generally seek to mandate that insurers indemnify insureds, subject to the limits under the policy, for any loss of business or business interruption for the duration of the COVID-19 heath emergency. Expect there to be extensive lobbying and debate on this issue, because, if passed, such legislation would have a massive impact on the insurance industry and could threaten the solvency of insurers. *See generally* Seaman, S.M. and Selby, J.A., "Tracking The Flurry Of COVID-19 Related Legislative & Regulatory Activity Impacting Insurers" Mealey's Litigation Report: Catastrophic Loss, Vol. 15, No. 7 (April 2020).

In fact, the Global Federation of Insurance Associations warned that the financial stability of the insurance industry could be at risk if governmental entities order policies to be changed retroactively to coverage disruption caused by COVID-19 and result in insurers being unable to pay other types of claims.

CHAPTER 2:

CYBER INSURANCE

A. Coverage Overview

Cyber Insurance policies provide first and third party coverages to policyholders in the event of a cyber or privacy event. Unfortunately, the risk of those events has soared as companies and organizations scramble to remain operational in the face of government shutdown orders and other COVID-19-related disruptions. The massive shift to work-from-home for many employees has increased exponentially their reliance on a wide variety of technologies to communicate and continue working remotely, which vastly expands the attack surface for cyber criminals. In addition, remote employees may utilize personal devices and be more inclined to adopt workarounds and bypass mandated business processes in favor of easier, but less secure, tools. Cyber criminals are further exploiting the situation by tailoring phishing scams specifically aimed at remote workers, and by posing as COVID-19 resource centers and charities. In addition to cyber-specific policies, policyholders often seek coverage for cyber-related claims under crime policies and under traditional commercial property and commercial general liability policies looking for so-called silent cyber coverage.

B. Potential Cyber-Related Claims

- A remote employee is tricked into providing his network credentials by a caller pretending to be with his company's technical support team, resulting in a ransomware or data breach event.

- An employee working on a home computer and utilizing a personal email account that auto-populates addressees inadvertently sends confidential personal health information concerning employees with COVID-19 to the wrong recipients.

- A business wires money to a foreign bank account after receiving fraudulent emails purporting to be from a vendor, advising the business of its new bank account.

C. Key Points And Select Issues

1. Notice And Claims-Made Issues Relating To Cyber Claims.

Late notice of cyber and privacy claims can significantly prejudice insurers by, among other things, potentially increasing the cost and severity of the event as well as the risk of destruction of forensic evidence. It also can reduce the chances of intercepting a wire transfer and pursuing subrogation claims. The potential for late notice may be increased by disruption caused by work-from-home situations.

2. Compliance With Policy Requirements.

Cyber policies often require the insured to obtain the insurer's written consent before expending funds or retaining professionals to respond to an incident. The instinct of many insureds, however, is to take matters into their own hands and try to immediately address the situation on their own (often retaining less experienced, and non-approved vendors/agents), and, in doing so, incur significant costs before putting the carriers on notice. Many policies also have requirements concerning utilization of pre-approved incident response professionals and verification of requests to transfer funds. Insurers should examine all such policy requirements in connection with any claim.

3. Carefully Review All Policy Terms, Including Definitions.

There is wide variation in coverages under cyber policies due, in part, to the absence of standardized forms and the widespread use of manuscript policies and endorsements. Depending on the terms of the policy at issue, for example, coverage for regulatory claims may be limited to data breach or security events. In some polices, coverage for breach of a third-party holding the policyholder's confidential information may depend on the status of the third-party as an independent contractor or its contractual relationship with the policyholder. In addition, some policies limit coverage to events arising out of computer systems and any associated devices or equipment operated by and either owned or leased to the insured organization. It is crucial, therefore, to carefully review the entire policy including endorsements when considering any COVID-19 claim.

4. Cyber Exclusions And Limitations In Commercial Property And Liability Policies.

As mentioned above, policyholders sometimes seek coverage for cyber claims under traditional commercial property and general liability policies. These claims are often referred to as "silent cyber" claims, since the policies may not affirmatively grant or exclude coverage for cyber and privacy claims.

Over the years, insurers have introduced various exclusions to address silent cyber claims that were not intended for coverage under non-cyber policies. For example, CGL policies typically exclude coverage for bodily injury and property damage claims for damages arising from any "access to or disclosure of any person's or organization's confidential or personal information, including . . . trade secrets, . . . customer lists, . . . credit card information, health information or any other type of nonpublic information . . . ." For Personal and Advertising Injury Liability, coverage may be excluded on claims arising from any access to or disclosure of non-public information. For first-party property policies, the 2012 ISO Businessowners Policy ("BOP") form excludes computer-related losses that, by definition, includes malicious code, and the 2012 BOP form excludes loss caused by viruses or malware. Some insurers also have recently asserted that silent cyber claims might be excluded under War Exclusions in connection with ransomware events under commercial property policies.

Non-cyber policies may be endorsed with coverage grants for social engineering or business email compromise events. Those coverages typically are subject to sublimits and may contain internal verification requirements as a condition precedent to coverage.

Policyholders, however, have had some success in seeking coverage for silent cyber claims under non-cyber policies. Insurers should therefore carefully examine choice of law considerations in connection with their consideration of COVID-19-related silent cyber claims.

CHAPTER 3:

DIRECTORS AND OFFICERS LIABILITY INSURANCE

A. Coverage Overview

Subject to their terms, conditions, and exclusions, Directors and Officers ("D&O") liability insurance covers directors and officers for claims made against them while serving on a board of directors and/or as an officer from managerial decisions that have adverse financial consequences. Throughout this unprecedented COVID-19 pandemic, officers and directors have had to make myriad decisions about critical issues, including business operations, staffing, and public disclosures concerning the financial impact of the situation on the enterprise. These decisions and representations are likely to be scrutinized and second-guessed (with the benefit of hindsight) by plaintiffs' attorneys and shareholders, resulting in claims against directors and officers. Steps taken and not taken prior to the pandemic also will be under scrutiny.

B. Potential D&O Claims

- Inaccurate disclosures in financial statements concerning the current and future impact of COVID-19 on business operations and financial performance.

- Event-driven claims arising from the board's oversight of risks related to COVID-19, such as failure to plan for the risk of a pandemic and increased cyber and privacy exposures arising from implementation of work-from-home protocols and procedures.

- Claims for failure to procure insurance or sufficient insurance for virus-related losses under various policy forms or properly pursue coverage under policies.

- Failure to make decisions or take actions that would have prevented the spread of disease.

- Investor claims asserting a lack of response (or inadequate response) led to a reduction in share price.

- Claims relating to failure to ensure the adequacy of supply chains and compliance with contractual and supply-related obligations.

- Claims resulting from a data breach involving the disclosure of employee health information (*e.g.*, COVID-19 outbreak), and which resulted in a stock drop, reputational harm, and incident response and litigation costs.

C. Key Points And Select Issues

1. Social Inflation Is a Factor in D&O Activity.

Social inflation factors have fueled shareholder litigation in recent years and we expect that to continue and to impact D&O activity generally. *See generally*, Seaman, S.M., Burke, K.J., Selby, J.A., and Hernandez, P.E. "The Legal Trends Behind 'Social Inflation' In Insurance," *Law360* (February 21, 2020). The combination of social inflation and dramatic volatility related to the COVID-19 pandemic in many industries may create a perfect storm for D&O claims.

2. Pay Attention To Exclusions.

D&O policies often contain "bodily injury" exclusions, which may come into play given the nature of risks presented by some COVID-19-related claims. But attention should be paid as to whether any such exclusion is broadly worded (*e.g.*, "based upon, arising out of, or attributable to" any bodily injury), or applies a more narrow exclusion (*e.g.*, excluding only claims "for" bodily injury). D&O policies also likely exclude coverage for willful violations of law. Such an exclusion may come into play, if the timing of a board's actions are set against the timeline of restrictions imposed in response to the COVID-19 crisis. Many D&O policies also contain property damage, contract, pollution, and other exclusions.

3. Potential For Increased Exposure For Sudden, Unexpected Working Conditions.

Companies and organizations were forced into sudden, unconventional mass working adjustments due to the COVID-19 crisis, the scope of which companies may not have prepared for in advance. For example, many companies instructed all or most of their employees to work from home due to COVID-19 restrictions. This potentially increased cyber liability exposure, given the spike of employees working *en masse* on personal devices, and using new and unfamiliar platforms and programs (*e.g.*, Zoom) to stay connected and working.

4. The SEC Set A Benchmark For Public Companies In Early March 2020.

Officers and directors of publicly-traded companies may be heavily scrutinized on what they did or said on or after March 4, 2020, when the SEC instructed companies to provide "investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from the coronavirus to the fullest extent practicable to keep investors and markets informed of material developments." The timing of reporting may be extended, but neither the SEC nor private claimants are likely to forgive inadequate or inaccurate disclosures.

5. Historic Stock Market Fluctuation Combined Along With Confusion On How To Best Respond To The COVID-19 Crisis May Drive Up Claim Activity.

Although other recent health crises may not have led to an abundance of D&O claim activity (*e.g.*, SARS), the massive slide in the stock market across industries, combined with potentially (and when considered with the benefit of hindsight) alleged slow-moving, and/or unclear responses from many companies and organizations may be fertile grounds for class-action shareholder claims. Historically, extreme market volatility and rapid stock drops generally lead to increased shareholder (and regulatory) scrutiny and litigation. Simply stated, the pandemic and its fallout are unprecedented in modern times.

6. Broad Scrutiny Of Actions, Policies, And Inaction.

Investors and their counsel likely will scrutinize a wide-range of topics in search of shareholder claims, including the adequacy of the internal or external resources directors and offices utilized to stay informed, the adequacy of protocols with respect to continuity planning, contingency planning for unavailability, sickness, or death of senior management, provisions to protect medically-vulnerable management from risks of viral infection, and disclosure obligations with respect to continuity planning issues. Issues such as balancing HIPAA obligations to employees with notice obligations to other employees regarding positive COVID-19 employee tests, or the onsite presence of an individual who has been exposed to other COVID-19-positive individuals may be examined. Executive compensation and stock buy-backs also will be subject to scrutiny.

7. Claims-Made Issues.

D&O policies are written on a claim-made basis. In addition to satisfying notice provisions, policyholders must comply with the claims-made and/or claims-made and reported requirements of the policies. Policyholders' counsel are advising their clients to review the definition of "claim" in their policies, to err on the side of providing notice, and are in some instances encouraging policyholders to seek coverage under existing policies out of concern that renewals may include exclusions and more limited coverage.

CHAPTER 4:

FIDUCIARY LIABILITY INSURANCE

A. Coverage Overview

Fiduciary liability insurance policies typically cover employers for errors and omissions in administering employee benefit plans. COVID-19-related changes to health insurance plans, including the elimination of costs related to testing and the waiver or elimination of deductibles and co-payments, may trigger requirements for employers to amend plans and notify employees. This quickly-evolving situation may give rise to fiduciary liability claims arising from the alleged improper administration or management of benefit plans.

B. Potential Fiduciary Liability Insurance Claims

- Improper administration of claims arising out of the implementation of COVID-19-related mandatory health plan changes.
- Claims asserting mismanagement of retirement savings following declination in the value of employer stock.
- Allegations of mismanagement of benefits and plan contributions in connection with layoffs.

C. Key Points And Select Issues

1. Claims For Benefits Due Under The Employee Benefits Programs Are Not Covered.

Insurers should be sure to evaluate claims to determine whether what is at issue are benefits due under the program. Those benefits are not covered by fiduciary liability insurance, *i.e.*, the insurance does not guaranty the benefits owed under the program.

2. Other Exclusions May Apply.

Fiduciary liability policies typically exclude coverage for dishonest acts and alleged failure to fund plans in accordance with ERISA. Insurers must scrutinize claims to determine if these exclusions apply.

3. Where Insurers Have A Duty To Defend, Defense Costs Generally Erode Policy Limits.

Many policies include a duty to defend, which may be implicated by the allegations in the complaint against the policyholder even if the insurer believes an exclusion may apply. Defense costs, however, usually reduce the policy limits.

4. The Date Claims Are Asserted May Determine Whether There Is Coverage.

Fiduciary liability policies are often claims-made policies. Thus, the date claims are asserted against the policyholder will determine whether the policyholder may be entitled to coverage. This is of particular importance for new policies issued in the coming months. In other words, compliance with claims-made requirements must be satisfied.

CHAPTER 5:

TRAVEL INSURANCE

A. Coverage Overview

The COVID-19 pandemic has brought global travel to a near standstill. With many trips cancelled, interrupted, or delayed, claims related to COVID-19 are being submitted to travel insurers. Travel insurance policies typically provide several types of coverage. Most provide reimbursement for unrefunded payments to the carrier, or additional costs incurred by the policyholder-traveler, if a trip is canceled, interrupted, or delayed because of certain defined covered events. The covered events, which may include "quarantine," must be unforeseen at the time the policy was purchased. Thus, in considering whether or not there is coverage, dates and the timeline considerations may be important.

Many travel insurance policies also provide coverage for medical expenses and travel costs incurred if the traveler is injured or becomes ill while traveling. Often times other coverages are also included, such as for lost baggage or missed connections. Policies also almost always include exclusions for pollution and/or contamination, and many exclude epidemics and pandemics.

B. Potential Travel Insurance Claims

- Travelers who cancelled their trip because they voluntarily self-quarantined or out of fear of COVID-19.

- Travelers whose trips were cancelled by cruise lines that have temporarily ceased operations because of the COVID-19 pandemic.

- Travelers who were delayed from completing their trip and returning home because their cruise ship is denied the right to dock because of concerns that someone on the ship has COVID-19.

C. Key Points And Select Issues

1. COVID-19 May Be An Uncovered Foreseeable Event.

Travel insurance does not cover events that were foreseeable when the traveler purchased the policy. COVID-19 started impacting travel as early as mid-January, when the United States Centers for Disease Control and Prevention issued a travel alert related to Wuhan, China, and began screening travelers from that city. Thus, a traveler who purchased travel insurance after mid-January may not be entitled to coverage because, at that point, travel disruption due to the disease was foreseeable. The date may vary by travel region.

2. Travelers Who Voluntarily Self-Quarantined May Not Be Entitled To Coverage.

Many policies cover trips that are cancelled because the traveler is "quarantined." Some policies define "quarantined" as a mandatory isolation or restriction on where a person can go. Other policies do not define "quarantined," but the plain and ordinary meaning of the word is a limitation on a person's activities, or separation from the community, compelled by law. In contrast, a "self-quarantine" is usually understood as a voluntary action. If the policy defines "quarantined" as a mandatory restriction, or the term is accorded its plain and ordinary meaning, a traveler would not be covered if they cancel their trip because they voluntarily "self-quarantined."

3. Travelers Whose Cruise Lines Voluntarily Ceased Operations May Not Be Covered.

Many cruise lines have voluntarily ceased operations for weeks or months. Based on the language of most travel insurance policies, a carrier's voluntary decision to stop operations typically would not qualify as a covered trip cancellation. Thus, travelers whose cruise lines have stopped operations will have to look to the cruise line for reimbursement.

4. Exclusions May Apply And Bar Coverage.

Depending on the wording of the policy, travelers may be entitled to coverage if their trip is delayed because their ship is denied entry to a port as a result of concerns that someone on board has COVID-19. But insurers should be sure to check the facts of the claim against the exclusions in the policy. Some policies contain epidemic and/or pandemic exclusions that may bar coverage. Policies also often contain

pollution and/or contamination exclusions that may apply if a trip is cancelled, delayed, or interrupted because the ship or aircraft is determined to be contaminated with the virus that causes COVID-19.

5. Check Policy/Plans Terms And Conditions.

As with all coverage issues, reference to the terms and conditions of travel plans and policies is required. Many policies cover only enumerated events. Some insurers offer "trip cancellation for any reason" coverage, that provides broader, but not unlimited, coverage. Policy deadlines, such as cancelling trips a stated number of hours or days before scheduled departure, must also be considered. Reimbursement is subject to limits. Under some coverages, where traveling companions contract COVID-19 or are physically quarantined while coverage is in effect, trip cancellation or trip interruption coverage may apply. Whether there is coverage may depend upon various factors including the relationship of the traveling companion to the policyholder.

6. Statutory Changes May Impact Travel Insurers.

COVID-19 is changing the statutory and regulatory insurance landscape on an almost daily basis. Travel insurers will need to keep their eyes on this area. For example, a bill pending in the New York legislature would require that travel insurers refund the premiums paid by travelers whose trips are cancelled because of COVID-19.

CHAPTER 6:

WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE

A. Coverage Overview

The COVID-19 pandemic is likely to cause an uptick in claims under workers' compensation and employers' liability policies ("WC/EL policies"). WC/EL policies generally provide two types of coverage. Pursuant to Part One of the policy, the insurer usually agrees to pay the benefits the insured-employer is required to pay by state workers' compensation law for bodily injury by accident or disease. The primary workers' compensation insurer also generally agrees to defend insured-employer against claims for workers' compensation benefits. In Part Two of the policy, the insurer typically agrees to defend and indemnify the insured-employer against certain non-workers' compensation claims for damages because of bodily injury to employees. The coverage under Part Two is subject to exclusions.

B. Potential WC/EL Claims

- Employees at healthcare facilities who allege they contracted COVID-19 as a result of their work at the facility.

- Covered first responders who allege they contracted COVID-19 while providing emergency services.

- Employees who allege they contracted COVID-19 as a result of their frequent contact with the public (such as retail establishments, pharmacies, and grocery stores).

- Employees who allege that they were absent from work because of a self-quarantine as a result of their belief that they were exposed to the virus that causes COVID-19 at the workplace.

- Employees who have been deemed essential who allege they contracted COVID-19 as a result of their work.

- Employees who allege that they sustained an injury when working from home.

C. Key Points And Select Issues

1. Coverage Applies Only To Covered Accidents.

In nearly all states, the accident and resulting injury for which coverage is sought must "arise out of and in the course of employment." This requires that the employee establish a causal link between the employment and the injury, as well as that the accident took place when and where they were working. Depending on the jurisdiction, the causal link may be established by showing (i) a particular causal event, (ii) that the employment placed the employee at a greater risk of injury than the general public, (iii) that the employment placed the employee at risk of the injury (without regard to the risk to the general public), or (iv) that the injury would not have occurred but for the fact that the employment placed the employee in the position where he or she was injured. Many employees will have difficulty establishing either a causal link or when and where they were exposed to the virus. It may be easier to establish "arising out of and in the course of employment" for an employee who was directly sneezed or coughed on and subsequently contracts COVID-19.

2. For Many Employees, COVID-19 Will Not Be A Covered Occupational Disease.

Employees unable to establish that they contracted COVID-19 as a result of a covered accident, may assert that COVID-19 is an "occupational disease." In numerous jurisdictions, there is no coverage for "ordinary diseases of life" – diseases to which the public is generally exposed – unless the employee has a greater risk of contracting the disease when performing their job or the risk is peculiar to the occupation. Considering the extent of the spread of COVID-19, most employees will not have an increased risk of exposure at their jobs as compared to the general public. As with point 1, above, healthcare workers and first responders will likely be able to establish that their jobs placed them at greater risk than the general public.

3. An Employee May Not Be Covered For An Absence From Work Because Of Quarantine If The Employee Does Not Contract COVID-19.

Generally, employees are entitled to benefits (lost wage payments and reimbursement to their healthcare providers) only if they are diagnosed with a compensable injury or disease. Employees may miss work because they self-quarantine after they believe they have been exposed to the virus that causes

COVID-19 at work. If those employees do not contract COVID-19, they may not be entitled to workers' compensation benefits for the lost wages during the period of self-quarantine. Quarantined employees, however, may be entitled to paid leave benefits established by the federal Families First Coronavirus Act and similar state laws.

4. Compliance With Policy Terms And Conditions.

WC/EL policies impose conditions and duties upon policyholders. These may include: providing immediate medical and other services as required by the applicable workers' compensation law; providing the insurer with the name and contact information of the injured employee; providing prompt notice of any demands or legal claims made; and cooperating with the insurer and assisting in the defense of any claim. These policies may also contain applicable exclusions.

5. The Last Day Of Employment May Be Important.

Keep in mind that if an employee is claiming an occupational disease, the last day of an employee's employment is often used to determine which policy is triggered, as opposed to the date of injury or death. This may be an issue for policies that have expired in recent months, or will expire in the coming months.

6. Closely Examine Injuries Sustained At Home.

With many employees now working from home, there likely will be claims for injuries allegedly sustained while working at home. Insurers will need to closely examine the facts and governing law to determine if those injuries are covered.

7. Claims Make Take Longer To Be Resolved.

A covered workers' compensation claim typically resolves when the employee receives treatment and returns to work. There is no known cure for COVID-19, and the amount of time needed to recover from the disease may vary from between one to six weeks. Further, under the current circumstances, many healthcare providers have limited capacity, which may limit the ability of those suffering from COVID-19 to receive care and promptly recover from their illness. It is also unknown at this time if there are any long-term or lingering effects of the virus.

8. Keep An Eye On Statutory And Regulatory Changes.

In some jurisdictions, statutory and regulatory changes may impact whether workers' compensation claims for COVID-19 are covered or otherwise may impact the parties' rights and obligations. For example, an industry group in New York was concerned that as part of the state budget negotiations, New York's Workers' Compensation Law would be amended to create a presumption that COVID-19 is an occupational disease.

CHAPTER 7:

EMPLOYMENT PRACTICES LIABILITY INSURANCE

A. Coverage Overview

The COVID-19 pandemic has forced employers to rapidly make numerous and important decisions concerning their work force. New policies and procedures addressing work-from-home, layoffs, furloughs, pay cuts, workplace conditions, and other issues – against a backdrop of hastily enacted COVID-19-related employment laws and regulations – may give rise to claims under Employment Practices Liability ("EPL") insurance policies.

B. Potential EPL Claims

- Discrimination claims based on inconsistently-applied remote work policies, layoffs, and pay cuts.

- Harassment and retaliation against employees who refuse to report to work because the workplace has not been decontaminated.

- Claims arising from requests for reasonable accommodations pursuant to the Americans with Disabilities Act in response to COVID-19.

- Emotional distress claims for failing to provide adequate protective gear to employees who are required to enter third party locations or deal with the public as part of their job responsibilities.

- Claims arising from employer policies to protect other employees from COVID-19, such as mandatory temperature screening or wearing facemasks.

- Privacy claims arising from the disclosure of the names of employees who have contracted COVID-19.

- Harassment and discrimination of employees based on their perceived spreading of COVID-19.

C. Key Points And Select Issues

1. Notice May Be An Issue With Respect To Some Claims.

Timing of notice may be an important coverage consideration in light of issues concerning what constitutes a claim, including verbal communications with employees, in the context of EPL policies as may satisfaction of claims-made requirements.

2. Exclusions May Apply.

In addition to bodily injury exclusions, wage and hour, WARN Act, violation of OSHA regulations, and other exclusions may be relevant.

3. Possible Claims-Made Issues.

As with some of the other coverages discussed above, EPL policies typically are written on a claim-made basis. Thus, prior notice and reporting may be an issue.

CHAPTER 8:

COMMERCIAL GENERAL LIABILITY INSURANCE

A. Coverage Overview

Commercial general liability policies provide both defense and indemnity coverage for third party property damage and bodily injury claims caused by an occurrence, typically defined as an accident. CGL policies also provide coverage for personal injury offenses, including invasion of privacy and false arrest or detention. Excess and umbrella liability policies generally provide indemnity coverage and vary as to whether and how they cover defense costs. Although much needs to be learned about how COVID-19 is transmitted, third party bodily injury and property damage claims under CGL forms are likely to emerge. It would not be surprising for policyholders to cast a broad net over the lines of coverage they provide notice to and seek coverage from, and general liability policies may be embroiled in more claims and coverage actions than may otherwise be expected.

B. Potential CGL Claims

- A third party bodily injury claims following visits to the policyholder's premises or interacting with the policyholder's employee at a different location.

- Invasion of privacy claim due to the disclosure of personal information concerning a third party who has contracted COVID-19.

- Family members of deceased nursing home residents claim that the facility was negligent in taking care of their family members and in training and supervising personnel.

C. Key Points And Select Issues

1. Coverage Issues And Defenses May Vary Considerable Depending Upon The Claim.

In view of the wide range of claims for which policyholders may seek coverage under commercial general liability and excess and umbrella liability policies, the relevant policy provisions, conditions, and exclusions will vary considerably.

Insurers should examine their portfolio of policyholders to assess the types of claims they are likely to face and to develop consistent coverage positions. With respect to particular claims, insurers will be required to examine the claim-specific facts and coverage issues under the controlling law.

2. Look For Key Exclusions.

Certain exclusions should be considered in connection with COVID-19-related claims, including:

- **Pollution**. There are different variants of pollution exclusions currently in use, but they typically preclude coverage for claims arising from pollutants. Whether COVID-19-related claims fall within the scope of any pollution exclusion will depend on a variety of factors, including scientific evidence concerning the transmission of COVID-19 and how pollution exclusions are construed in the relevant jurisdiction.

- **Fungi/Bacteria**. The precise wording of the exclusion must be examined. Although COVID-19 is a virus, as opposed to a bacteria, it may fall within the terms of certain exclusions.

- **Communicable Disease**. This exclusion typically applies to "loss or damage caused by or resulting from any virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease." It is likely that this type of exclusion will preclude coverage for many COVID-19 claims.

3. Evidentiary Hurdles May Impact The Underlying Claims.

Plaintiffs will almost certainly face difficult evidentiary hurtles when attempting to prove that they contracted COVID-19 from any specific person or location. In some instances this may involve expert opinion and testimony.

4. Duty To Defend May Be An Issue For Many Suits.

Despite issues concerning causation and ultimate determinations of indemnity, bodily injury, personal injury, and property damage claims against a policyholder may give rise to a duty to defend under primary policies. In view of the broad scope of the duty to defend and the consequences for breaching the duty to defend, insurers must critically evaluate claims prior to declining to defend.

5. Whether Or Not There Is An "Occurrence."

Whether any alleged bodily injury claim constitutes an occurrence may turn on the timing of the incident. What was known at the time about COVID-19 may be a significant issue for some claims.

6. Application Of, And Compliance With, Applicable Policy Terms, Conditions, and Definitions.

As with all claims, examination of applicable policy terms and provisions is required, including review of notice provisions, voluntary payment prohibitions, and compliance with claims-made and reported requirements. Additional policy terms, including various definitions, the duty to cooperate, and "Other Insurance" provisions, should be examined when responding to COVID-19 claims.

7. Responding To Claims And Notices.

Insurers must have procedures in place to ensure that they are receiving claim notices and suits and properly responding in a timely manner. This may be particularly challenging in the environment of office closures, employees working at home, and communication and transportation difficulties for insurers, insurance intermediaries, and departments of insurance that may be agents for service of process and notice of claims. In jurisdictions involving time-limit demands and hammer letters from other insurers, insurers must be focused on addressing those issues.

CHAPTER 9:

PROFESSIONAL LIABILITY INSURANCE

A. Coverage Overview

Professional Liability insurance provides coverage for claims arising out of errors and omissions in connection with the policyholder's provision of professional services. Such claims generally do not fall within the scope of general liability policies and/or are excluded from such policies. With regard to COVID-19 claims in particular, healthcare providers and insurance brokers are examples of policyholders that may be subject to professional liability claims. Claims may also be asserted against architects and engineers, accountants, lawyers, and a wide-range of professionals. Below are just a few examples of such claims.

B. Potential Professional Liability Claims

- Claims against insurance brokers for failure to procure business interruption coverage for pandemic or virus exposures, failure to provide timely and sufficient notice to insurers of COVID-19 claims, or failure to advise a client to purchase extended reporting periods under claims-made policies in light of emerging COVID-19 exposures.

- Malpractice claims against medical professionals for failing to administer proper care or failing to recognize symptoms of COVID-19 patients.

- Claims against cyber security vendor for misconfiguring security settings for its client's work-from-home employees, leading to a ransomware event.

- Claims arises from alleged negligence of hospital volunteers, including retired healthcare professionals, when treating COVID-19 patients.

C. Key Points And Select Issues

1. Determining Whether A Claim Falls Within The Scope Of Coverage.

Coverage generally is limited to claims arising out of the provision of the specific professional services designated in the policy. Claims by other insureds under the

policy or claims arising out of services provided under the name of any other business, charities, or organization that is not named in the policy are likely not covered.

2. Examine Policy Exclusions.

Professional liability policies typically contain a variety of potentially applicable exclusions, including those for bodily injury, discrimination, and employment-related claims. Malicious, dishonest, criminal, or illegal acts, including the intentional violation of any law, regulation, statute, or ordinance, are generally excluded.

3. Compliance With Notice, Claims-Made And Other Conditions.

Professional liability policies are generally written on a claims-made basis. Insurers should review the policy's claims-made requirements and notice provision, in light of any retroactive coverage date, in connection with notice of COVID-19 claims. Insurers also should ensure that claims tendered during any extended reporting period relate to losses that occurred during the relevant policy period.

4. Evaluation Of The Individual That Allegedly Committed The Error Or Omission.

Insurers should confirm that the error or omission giving rise to a claim was performed by an individual who comes within coverage under the policy. For example, a policy may require that retired healthcare professionals provide their professional services for no fee, salary, or other compensation, other than expenses incurred in the delivering those services, to fall within the policy's coverage.

CHAPTER 10:

EVENT CANCELLATION INSURANCE

A. Coverage Overview

Event cancellation insurance typically covers losses arising from the cancellation of one-off events. Professional sporting events, festivals, concerts, and conventions may be costly to plan and host. Event cancellation policies commonly indemnify the policyholder for losses arising from the unavoidable cancellation, curtailment, postponement, removal to alternative premises, or abandonment of an event, and for any enforced reduced attendance. Some policies provide cover for cancellation due to any reason beyond the control of the event organizer (*e.g.*, covering events that "were necessarily Canceled, Postponed, Abandoned, or Relocated, which necessary Cancellation, Postponement, Abandonment, or Relocation is the sole direct result of any non-excluded cause beyond the control of the Assured"), while others cover only cancellations for specifically enumerated reasons set forth in the policy. If a lawful order prohibits attendance by some or all attendees, some policies may respond in the absence of an applicable exclusion; others will not.

The amount of the loss covered by an event cancellation policy will generally fall into one of two categories. The first category is the sum of expenses incurred from the event, less gross revenue retained after refunds, and less any savings the insured was able to obtain by mitigating its loss. The second category of loss under an event cancellation policy is typically the net profit the insured would have earned had the event occurred. Event cancellation policies will generally calculate loss based on one of these two categories, or calculate loss as the greater the two categories, but examination of the particular policy language is required.

B. Potential Event Cancellation Claims

- An industry association cancels its annual convention based on fears that COVID-19 may spread to the United States.

- Insured company cancels its employee retreat after the governor of state in which the retreat was scheduled issued a stay-at-home order.

- Insured company cancels its annual shareholders' event when flight cancellations and social distancing mandates would make it difficult or impossible for many shareholders to attend the event.

C. Key Points And Select Issues

1. Timing Generally Is An Important Consideration.

Coverage may depend upon when the policyholder purchased the event cancellation policy. Insurers should consider whether the policyholder knew or should have known about the potential impact of COVID-19 at the time the policy was issued or renewed.

2. Whether Cancellation Was Compelled.

Insurers should confirm that the event was cancelled due to factors beyond the control of the policyholders or the attendees. Claims arising out of voluntary non-attendance due to a generalized fear of infection may not fall within the terms of the policy. Given the varying "stay at home," social distancing, and travel restrictions across the United States, and the wide range of the timing of such restrictions, a fact-intensive analysis and comparison to the policy language will be necessary, particularly if a policyholder submits a claim involving multi-state participants/attendees.

3. Exclusions.

Many event cancelation policies contain exclusions for communicable or contagious diseases. For example, some policies exclude coverage for losses:

> Directly or indirectly arising out of, contributed to by, or resulting from . . . any communicable disease which leads to (a) the imposition of quarantine or restriction in movement of people or animals; (b) any travel advisory or warning being issued by a national or international body or agency; and in respect of a. or b. above any fear or threat thereof (whether actual or perceived).

Some policies define "communicable disease" as one that the World Health Organization (or other relevant authority) has declared an epidemic or pandemic. In this case, WHO declared COVID-19 a pandemic on March 11, 2020. Other policies define "communicable disease" more broadly or more specifically.

In addition, specific COVID-19 exclusions were introduced by some insurers recently.

4. Mitigation.

Event cancelation policies typical require the policyholder to take steps to mitigate the financial impact of a cancellation. The amount of recovery for a loss may depend on the reasonableness of the policyholder's actions in that regard.

CHAPTER 11:

REINSURANCE

COVID-19 claims will present challenges to insurers and reinsurance that will take many years to resolve. Broadly speaking, reinsurers should promptly review their assumed portfolios thoroughly to determine their potential exposures, as multiple lines of coverage are implicated. Moreover, many of the insurance coverage issues will be imported into resulting reinsurance cessions.

Any determination of whether a particular COVID-19 cession is covered by a reinsurance treaty or facultative certificate begins with an analysis of whether the underlying claims were covered by the ceding company's insurance policy or policies. The next level of evaluation of a cession involves application of the terms, conditions, and exclusions of the particular reinsurance treaty or facultative certificate. Each cession will be considered on its own merits. Below are some of the general considerations that may be involved in COVID-19 related cessions.

A. Whether Insurance Claims Paid Are Covered Under The Insurance Policy Issued By The Ceding Company

Where ceding insurers pay COVID-19-related claims based upon pressure from governmental entities or policyholders, reinsurers may examine whether such claims are covered by the insurance policy or constitute *ex gratia* payments. This may depend upon the application of follow-the-fortunes or follow-the-settlements principles discussed below.

B. Whether The Reinsurance Contract Contains A Follow-The-Fortunes Or Follow-The-Settlements Provision

Many reinsurance contracts contain express follow-the-fortunes or follow-the-settlements provisions. Where a ceding company must pay otherwise uncovered business interruption claims due to legislation or a judicial ruling, they generally can be expected to argue that their reinsurers are required, in turn, to pay resulting cessions based upon follow-the-fortunes or follow-the-settlements provisions in the reinsurance contracts. *See generally A Primer on Reinsurance Law & Principles* (Hinshaw & Culbertson 2016); S.M. Seaman, and J.R. Schulze, *Allocation of Losses In Complex Insurance Claims* (8th ed. West Thomson Reuters 2019-20). The issue

could arise whenever other legislative of regulatory actions impact policy provisions.

C. Application Of Follow-The-Fortunes Or Follow-The-Settlements Principles

Ceding companies face a greater challenge where there is no follow-the-fortunes or follow-the-settlements provision in the reinsurance contract. In such instances, ceding companies may argue that, as a matter of custom and practice or course of dealings, principles of follow-the-fortunes or follow-the-settlements exist and apply to require the reinsurer to pay. Where they are unsuccessful with this argument, ceding companies generally will be required to establish that the claim was actually covered by their insurance policies.

D. Proper Credits

Reinsurers may inquire as to whether proper credits were given for other policyholder recoveries and governmental relief or subsidies, and also whether subrogation rights were pursued.

E. Application Of Reinsurance Contract Terms, Conditions, And Exclusions

Even where a COVID-19-related claim is covered by the insurance policy issued by the ceding company, application of the terms, conditions, and exclusions of the reinsurance contract is required to determine whether and to what extent the cession is covered by the reinsurance contract. Follow-the-fortunes and follow-the-settlements provisions do not override the terms, conditions, and exclusions of the reinsurance contracts. Accordingly, determination of whether a cession is reinsured requires consideration and application of the terms, conditions, and exclusions of the reinsurance contract itself.

Issues concerning the ability of a ceding company to aggregate payments made to one or more policyholders or account of one or more claims or occurrences may be presented with respect to COVID-19 claims. This may impact whether retention levels have been satisfied by the ceding company, how much of a loss is covered, and issues regarding the reinsurance limits applicable to COVID-19 cessions. Treatment of defense costs associated with COVID-19 claims under the terms of reinsurance contracts may also become issues. For example, there may be an issue as to whether the language of a facultative certificate included expenses within

assumed limits of the certificate. *See generally* Lenci, E.K. and Seaman, S.M., "The Bellefonte Cap Returns," *Best's Review*, August 2016; *Global Reinsurance Corp. of America v. Century Indemnity Co.*, No. 13 Civ. 6577 (LGS) (S.D.N.Y. Mar. 2, 2020).

CHAPTER 12:

COVID-19 COVERAGE LAWSUITS

COVID-19 insurance coverage lawsuits are being commenced across the country. So far, those lawsuits have been filed by businesses – often restaurants, theaters, and retailers – seeking coverage under commercial property forms for business losses associated with COVID-19 related disruptions and/or governmental shutdown orders. Although we are at the earliest stages of coverage litigation, several common themes and theories have begun to emerge, including the following:

- Some lawsuits have been filed prior to the policyholders submitting claims to the insurer.

- At least one complaint cites a governmental order stating that the presence of COVID-19 causes physical damage to property.

- Policyholders often allege that the absence of a virus exclusion in their policy means that the policies provide coverage for their COVID-19 losses.

- Many complaints contain bad faith allegations. Some policyholders have asserted statutory and common law bad faith claims based on so-called "blanket" claim denials, sometimes sent to the insureds within hours of receipt of their claims, without performing an investigation as required by the applicable insurance law.

- In at least one case containing statutory and common law bad faith claims, the policyholders cited to a memo by the insurer concerning the issue of whether COVID-19 causes direct physical damage or loss to property.

- In support of its statutory and common law bad faith claims, at least one plaintiff has asserted that the insurer made material misrepresentations concerning its policy provisions and requested production of the insurer's claim file.

- Most of the lawsuits have been filed in state courts. In two state court cases, the policyholders expressly disavowed that their claims were based on federal law.

The variety of entities bringing coverage lawsuits will expand as the coverage litigation proliferates as will the theories, causes of action, and relief sought. We are closely monitoring the litigation for trends and insights.

APPENDIX

The Legal Trends Behind "Social Inflation" In Insurance, *Law 360* (February 21, 2020)

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Legal Trends Behind 'Social Inflation' In Insurance

By **Scott Seaman, Kevin Burke, Judith Selby, and Pedro Hernandez**
(February 21, 2020, 5:14 PM EST)

Scott Seaman

Kevin Burke

Judith Selby

Pedro Hernandez

The phrase "social inflation" has been trending in the insurance industry recently. The phrase generally refers to the increasing costs of insurance claims (defense and indemnity) resulting from societal trends such as litigious proclivities, large defense costs, mega jury awards, broad insurance policy interpretation and a plaintiff-friendly and policyholder-friendly environment.

The Wall Street Journal recently described it in insurance industry parlance as referring to "an upward creep in perceptions by an injured party of what they are owed, their willingness to pursue that via the legal system, and what that means for insurance policies covering companies' liabilities."[1]

Social inflation is a concept that, in many respects, is something borrowed. It is endemic within the United States civil justice (tort) system. It has been a fundamental reality throughout the 32 years that I have had the privilege of representing defendant companies, insurers and reinsurers. It has been the dynamic driving tort reform efforts by the defense bar and insurers spanning decades.

In 1977, Warren Buffet referred to social inflation as "a broadening definition by society and juries of what is covered by insurance."[2] Yet, many aspects of social inflation are new and evolving. It is fueled by more recent developments such as litigation funding, social media, and modern attitudes and movements.

To be sure, for insurers, social inflation also is something blue, impacting risks and costing the industry plenty of green in the form of defense and indemnity costs.

The Traditional Components of Social Inflation

Although other countries such as Australia, Canada and the U.K. may experience impact from social inflation, the effects of social inflation undoubtedly are felt most heavily in the U.S. due to our civil justice system. It's results can be measured in large settlements, jury verdicts and defense costs.

The myriad of underpinnings in the U.S. civil justice system fostering social inflation, include:

- An organized, well-funded plaintiffs bar;
- The availability of punitive/exemplary damage awards;
- Class action and multidistrict litigation;
- Securities and shareholder derivative litigation;
- The availability of juries in civil actions;
- A system of state and federal law with differing procedural rules, substantive laws, standards and available damages and other relief;
- Extensive pretrial discovery and disclosures (including interrogatories, document requests, requests for admission, physical and medical examinations, depositions of fact witnesses, corporate representative witnesses, and experts witnesses);
- The use of contingent fees in bodily injury cases;
- The American Rule on attorney fees (which generally works against corporate defendants);
- Fee-shifting statutes that, when applicable, usually benefit policyholders and some underlying claimants;
- Junk science and lax evidentiary standards;
- Forum shopping and carpetbagger claims;
- The disparate impact of res judicata and collateral estoppel against corporate defendants; and
- Increased regulatory requirements that either provide for private causes of action or create litigation generating publicity or evidence.

These realities have been the targets of the protracted battle for tort reform. Although some meaningful tort reform measures have improved affairs in some jurisdictions, they have not had a meaningful impact in other jurisdictions. Suffice it to say, tort reform has not been a panacea. At least from the perspectives of defendants and insurers, the civil justice system remains highly flawed.

The Current Environment Has the Potential to Constitute Social Inflation on Steroids

Apart from the ineffectiveness and erosion of tort reform, there are several factors in modern society driving social inflation in the U.S. We examine some of them below.

Litigation Funding

Companies and insurers are familiar with the large costs of defending law suits. Traditionally, the availability of contingency fees allowed plaintiffs to pursue bodily injury claims that would not be pursued if plaintiffs were required to pay lawyers an hourly fee concurrently and in the absence of recovery. The costs of prosecuting such cases and risks of no recovery at least acted as a modest check

on the willingness of plaintiff counsel to take on some representations.

The concept of litigation funding and litigation financiers have altered this balance. Under this arrangement, companies agree to cover all or some of the costs of litigation or arbitration in return for a share or percentage of the proceeds, whether from a jury verdict or settlement. The growth and mainstreaming of litigation funding — which by many accounts has more than doubled since 2012 — is one factor of social inflation.

It results in an increase in the volume of cases that are being pursued. It also enhances the ability of plaintiffs to take cases further and pursue larger recoveries, increasing the litigation timeline, the costs of defense and the potential for more and larger verdicts. It also has the potential to alter litigation control and leverage.

Attorney Advertising

The proliferation of attorney advertising has created awareness of and access to the civil litigation system to most segments of society. Simply stated, media advertising and social media are potent recruiting tools for plaintiff lawyers and they have employed these tools masterfully. They not only generate claimants, they have created great expectations for recovery.

Jurisdiction-Specific Issues Such as Florida's AOB Crisis

Related to litigation funding are various state initiatives that alter the litigation playing field between policyholders and insurers. Florida, for example, has an assignment-of-benefits, or AOB, law that not only allows a policyholder, without insurer consent, to assign benefits to a third party, but permits plaintiffs attorneys (but not insurers) to collect their fees when they prevail in AOB litigation.

This fee-shifting, like litigation funding, has paved the way for a high increase in the filing of claims and lawsuits. In 2018 alone more than 153,000 AOB lawsuits were filed in Florida, representing a 94% increase over a five year period of time.

Although a measure signed into law by Gov. Ron DeSantis in 2019 somewhat curbs the AOB litigation crisis by putting new requirements on contractors and permitting insurers to offer policies with limited AOB rights, it is only a partial remedy as it only impacts future underwriting and only affects certain third parties and AOB claims (e.g., the bill excludes auto glass repairs).

Lawyering Up

An increased propensity for claimants to retain counsel and for them to assert claims and file suit factors into social inflation as well.

Anti-Corporate and Anti-Insurer Sentiment

Hostility toward and distrust of large companies is hardly a new development — it always has been something the plaintiffs bar has exploited adroitly. Still, anti-corporate sentiment seemingly has amped up in recent years due, among other things, to residuals from the financial crises, the so-called Occupy Wall Street movement and various protests. Social media provides a platform for corporate haters to gather and for negative public sentiment about companies to proliferate. Similarly, trust in institutions and individuals has declined in recent years as has trust in elected officials and business leaders.

Political Discourse Factors Into Jurors' Mindset

Notions of socialism, social justice, wealth and income disparities, and wealth distribution that abound on the airwaves and political discourse in general may not be admitted into evidence, but nonetheless influence the thought process of jurors. This fosters an environment in which juries are more inclined to render awards with less emphases on fault, greater emphasis on company reputation, and perhaps more important based upon the perceived ability of companies to absorb losses. On the whole, millennials appear to be more wired in this direction. Political polarization and disagreeable discourse may not be exempt from the jury deliberation room.

Reptilian Strategy

The plaintiffs bar is seizing the moment by turning to reptilian psychological techniques calculated to activate jurors' survival instincts and make them more likely to rule in favor of plaintiffs based on emotional stimuli, rather than facts presented in evidence.

Beliefs Over Facts

A national survey conducted by Sound Jury Consulting in 2019 found three-quarters of respondents eligible for jury service stated they would decide a case based on their own personal beliefs of right or wrong if those beliefs conflicted with the law as instructed by the judge. The number is higher for millennials.

Impact of the Information Age

Limiting jurors' access to information other than evidence admitted into evidence at trial always has been challenging. However, absent complete sequestration it is an virtually an impossible undertaking in the information age with instant access to the internet and social media.

The civil justice system places great importance on jury instructions and the rule of law depends, in large part, upon jurors following the judge's instructions. According to the 2019 Sound Jury Consulting study, 57% of respondents say they would ignore a judge's instructions to avoid internet research on the case if they believe they could obtain important information, 52% say they would not take the time to look at the jury instructions during deliberations if they believed they understood the issues in the case and 75% say they would disregard the judge's instruction to ignore inadmissible testimony if they believed the testimony was important. We do not vouch for this particular study, but its results are concerning.

The Normalization of Mega Verdicts

Frequent media reports of multimillion and multibillion dollar verdicts has desensitized jurors and, to some extent, has normalized such awards. This has resulted in awards in excess of policy limits and the impacting of umbrella and excess policies that, absent social inflation, would not have been impacted.

Expanded Liability and Disappearing Defenses

Unwarranted expansion of liability theories such as public nuisance (e.g., the California lead paint litigation), state legislation suspending or abolishing statutes of limitation (e.g., for sexual abuse/assault cases), and the abolition of or limitation on nondisclosure agreements adds fuel to social inflation.

Similarly, an expanding universe of potential plaintiffs with government entities and others seeking recovery on tort theories has had an impact as well.

Aggressive Governmental Agencies

State attorneys general and other state and federal governmental entities have become increasingly aggressive in investigating and taking action and seeking relief in various forms against companies and insurers and in seeking resources to offset government deficits. Even where not directly implicating insurance coverage or creating private causes of action, these investigations often trigger private lawsuits and losses and result in public disclosure of evidence that will be used in private litigation.

Pro-Policyholder Rulings

Unduly broad interpretation of insurance coverage by some courts and liberal application by jurors adds mightily to the social inflation factor. Efforts such as the policyholder advocacy piece which is masquerading as the American Law Institutes' Restatement of the Law of Liability Insurance threatens to distort insurance law.

Technology and Globalization

The increased geographical scope and rapidity of liability due to technology and globalization produces claims under first-party and third-party coverages and contribute to social inflation.

Large Defense Costs Exposures

Defense costs exposures have surged over the decades due to an increase in the number and severity of claims, inflated claims and claimant expectations, and to counter well-funded plaintiffs. Sophisticated policyholders' counsel have been more aggressive and successful in having insurers pay for independent counsel. This contribute substantially to the high costs of defending lawsuits.

Large Settlements

Upward pressure on settlement values, in part, has resulted from the desire to avoid random mega jury awards and doctrines in many states allowing claimants to set up insurers with time-sensitive settlement demands. The consequences associated with breach of the duties to defend and settle can be substantial and potential bad faith exposures may be large.

A Random Universe

Today, the potential for isolated statements and activities — as well as systemic practices — to result in liability seems ever present. In the age of #MeToo, political correctness and social media, it is hard to predict what will become viral and trigger litigation and liability.

Adjustor Liability

Recently, there have been some efforts to hold adjustors personally liable for violation of claims handling statutes and alleged bad faith.

Addressing Social Inflation

The impact of social inflation has been felt across multiple lines of coverage including commercial auto, medical malpractice and professional liability coverages, umbrella and excess coverage, and directors and officers liability coverage.

Insurance plays a vital role in the economy — fostering entrepreneurial risk-taking, research, product development, the availability of goods and services, and risk sharing. The unavailability of insurance would bring the economy to a halt. Yet, this critical sector of the economy constantly is under siege from claimants, policyholders, courts, governmental regulators and media.

Fortunately, insurers employ bright and talented people who find ways to meet the challenges presented. Insurers have several tools to address social inflation.

Among other things, they may assess and better quantify the risks, raise premiums to account for the risks, lower limits and include sublimits where appropriate, draft policies with appropriate terms, conditions and exclusions to contain the risks, exercise underwriting discipline, employ artificial intelligence and technology on both the claims and underwriting sides, train personnel, and retain skilled counsel and experts.

Insurers will work with policyholders to employ cogent loss control, safety and best practices to avoid and limit liability even in an environment supercharged with social inflation.

Scott Seaman, Kevin Burke, Judith Selby and Pedro Hernandez are partners at Hinshaw & Culbertson LLP.

[1] "The Specter of Social Inflation Haunts Insurers," The Wall Street Journal (Dec. 27, 2019).

[2] Id.

Tracking The Flurry Of COVID-19 Related Legislative & Regulatory Activity Impacting Insurers, Mealey's Litigation Report: Catastrophic Loss, Vol. 15, No. 7 (April 2020)

MEALEY'S® LITIGATION REPORT
Catastrophic Loss

Tracking The Flurry Of COVID-19 Related Legislative & Regulatory Activity Impacting Insurers

by
Scott M. Seaman

Hinshaw & Culbertson LLP
Chicago, IL

and

Judith A. Selby

Hinshaw & Culbertson LLP
New York, NY

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Commentary

Tracking The Flurry Of COVID-19 Related Legislative & Regulatory Activity Impacting Insurers

By
Scott M. Seaman
and
Judith A. Selby

[Editor's Note: Scott M. Seaman is a Chicago-based partner with the national law firm of Hinshaw & Culbertson LLP and Co-Chair of the firm's global Insurance Practice Group. He focuses on complex first- and third-party insurance coverage and reinsurance law. Judith A. Selby is a New York-based partner of Hinshaw & Culbertson LLP. She focuses on complex first- and third-party insurance coverage litigation. The commentary is provided for general informational purposes only and is not intended to constitute legal advice. Any commentary or opinions do not reflect the opinions of Hinshaw & Culbertson, LLP, their clients, or LexisNexis ®, Mealey Publications™. Copyright © 2020 by Scott M. Seaman and Judith Selby. Responses are welcome.]

I. The Coronavirus Pandemic

The coronavirus (COVID-19) pandemic continues to wreak havoc across the globe and in the United States, bringing with it panic, sickness, and mass mortality. The U.S. health care system is under strain and the situation is expected to worsen in coming weeks. The pandemic and the resulting emergency declarations and stay at home orders have transformed the American way of life, at least temporarily, and are taking a major toll on the economy.

At the federal level, the third major relief bill—providing $2.2 trillion in financial relief to individuals and businesses impacted by the virus and injecting an additional $4 trillion in liquidity into the economy—was passed by Congress and signed by the President. The Coronavirus Aid Relief and Economic Security Act known as the CARES act is the largest economic bill ever enacted. Governmental entities have imposed unprecedented travel, movement, and gathering restrictions, and limited or prohibited for a period of time various activities. Exigent circumstances arm governmental entities with greater powers and legitimately require government action. Yet, impacted constituencies are urged to exercise vigilance to protect their rights and prevent government overreach associated with governmental actions, no matter how well-intended.

For insurers in particular, there has been a recent frenzy of legislative proposals and regulatory activity some of which give rise to considerable concern. Insurance is an important engine fueling the economy. Short-sighted initiatives that undermine the sanctity of insurance contracts and interfere with the risk assumption and transfer mechanisms pose a threat to the insurance industry. Ultimately, they will be detrimental to both insureds and the economy.

II. Congressional Appeal To Insurers

In a March 18, 2020 letter to insurance industry and broker associations, a bi-partisan group of United States Congress Members urged commercial property insurers to provide business interruption coverage for COVID-19-related losses. The letter signed by 16 members of Congress, referenced current and prospective shelter-in-place orders and curfews and stated:

> Business interruption insurance is intended to protect businesses against income losses as a result of disruptions to their operations and recognizing income losses due to COVID-19

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> will help sustain America's businesses through these turbulent times, keep their doors open, and retain employees on the payroll. During times of crisis, we must all work together. We urge you to work with your member companies and brokers to recognize financial loss due to COVID-19 as part of policyholders' business interruption coverage.

In a joint response, the American Property Casualty Insurance Association, the Council of Insurance Agents and Brokers, the Independent Insurance Agents & Brokers of America, and the National Association of Mutual Insurance Companies stated:

> Standard commercial insurance policies offer coverage and protection against a wide range of risks and threats and are vetted and approved by state regulators. Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19. The U.S. insurance industry remains committed to our consumers and will ensure that prompt payments are made in instances where coverage exists.

The response was appropriate.

In a pro-insurer plea this week, Pennsylvania State Representative Michael Driscoll (D) requested that the Pennsylvania House of Representatives draft a resolution urging Congress to reimburse insurers for voluntarily paid COVID-19-related business interruption claims as part of the federal COVID-19 relief package.

This dialogue, standing alone, does not pose an active threat to the insurance industry unless they result in legislative action.

III. Proposed State Legislation

Legislative bodies in at least three states are entertaining extraordinary legislation that would force insurers to provide coverage for claims, even where such claims do not meet the terms of coverage or are expressly excluded under insurance policies. Such retroactive nullification of contract represents an unwarranted assault on the insurance industry and on parties' freedom to contract. Additionally, these measures threaten to undermine the insurance regulatory structure as many of these contract provisions were subjected to the regulatory process and approved by insurance regulators. What's more, these proposals also fail to account for potential reinsurance ramifications.

A. The New Jersey Bill

For a variety of reasons, insured entities likely will face an uphill battle when seeking coverage for COVID-19 losses under most commercial insurance policies. Perhaps, in recognition of this reality, the New Jersey legislature is considering extraordinary legislation, Assembly Bill 3844, which would rewrite property insurance policies to provide coverage for COVID-19 business interruption losses—even policies that contain a virus exclusion.

AB 3844, introduced on March 16, 2020, would apply to property policies that were in effect on March 9, 2020 and issued to insureds with less than 100 eligible employees in New Jersey. An eligible employee is a full-time employee who works 25 hours or more in a normal work week. The costs for any paid claims would ultimately be passed on to all insurers operating in New Jersey, except for life and health insurers. The bill is working its way through the legislative process.

B. The Ohio Bill

H.B. No. 589, introduced in the Ohio legislature on March 24, 2020, is intended to require insurers offering business interruption insurance to cover losses attributable to COVID-19. The bill provides: "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 [Ohio] on the effective date of this section, 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."

Further, "[t]he coverage required by this section shall indemnify the insured, subject to the limits under the policy, for any loss of business or business interruption for the duration of the state of emergency.

The "state of emergency" refers to Executive Order 2020-01D issued on March 9, 2020.

By its express terms, this bill applies only to policies enforced as of the effective date issued to insureds located in Ohio that employ 100 or fewer eligible employees.

The bill would allow an insurer who pays for applicable COVID-19-related losses to request from the Ohio Superintendent of Insurance "relief and reimbursement from funds collected and made available" for the purpose of the bill. Further, the bill would require the Superintendent to establish procedures for insurers to submit reimbursement claims, and pay the claims either from such funds as are available to the Superintendent and to create a "Business Interruption Fund" and charge an assessment to insurers in the necessary amount required to recover amounts paid to insurers that submit claims for reimbursement.

C. The Massachusetts Bill

Massachusetts bill S.D. 2888 appears to go further than the New Jersey and Ohio bills. It provides: "[E]very policy of insurance insuring against loss or damage to property, notwithstanding the terms of such policy (including any endorsement thereto or exclusions to coverage included therewith) which includes, as of the effective date of this act, the loss of use and occupancy and business interruption in force in the commonwealth, shall be construed to include among the covered perils under such policy coverage for business interruption directly or indirectly resulting from the global pandemic known as COVID-19, including all mutated forms of the COVID-19 virus.

Further, no insurer in Massachusetts: "may deny a claim for the loss of use and occupancy and business interruption on account of (i) COVID-19 being a virus (even if the relevant insurance policy excludes losses resulting from viruses); or (ii) there being no physical damage to the property of the insured or to any other relevant property."

The Massachusetts bill provides that the required coverage shall cover the insured for any loss of business or business interruption until such time as the emergency declaration dated March 10, 2020 and designated as Executive Order 591 is rescinded by the governor.

Insurers would not be liable for any payments beyond the "monetary limits of the policy," and would be subject to "any maximum length of time set forth in the policy for such business interruption coverage."

The Massachusetts bill would apply to insureds with 150 or fewer full-time equivalent employees in Massachusetts. Similar to the New Jersey and Ohio bills, it provides that insurers who are required to pay COVID-19-related losses "may apply to the commissioner of insurance for relief and reimbursement from funds collected and made available for such purpose as provided" in the proposed law. The insurance commissioner would be required to establish procedures for the submission and qualification of claims by insurers for reimbursement and pay those claims with funds collected from "assessments" imposed "against licensed insurers in [Massachusetts] that sell business interruption insurance as may be necessary to recover the amounts paid, or estimated to be paid, to insurers" seeking reimbursement. The bill subjects insurers making these mandatory payments to Mass. Gen. Laws Ch. 176D, which provides a list of acts and omissions by insurance companies that constitute "unfair claim settlement practices."

D. The New York Bill

On March 27, 2020, Assembly Bill No. A10226 was introduced. The bill is similar to the other bills discussed above.

Section 1 of the bill provides, at subsections (a) through (c):

> Notwithstanding any provisions of 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, shall be construed to include among the covered perils under that policy, coverage for business interruption during a period of a declared state emergency due to the coronavirus disease 2019 (COVID-19) pandemic.
>
> The coverage required by this section shall indemnify the insured, subject to the limits under the policy, for any loss of business or business interruption for the duration of a period of a declared state emergency due to the coronavirus disease 2019 (COVID-19) pandemic.
>
> This section shall apply to policies issued to insureds with less than 100 eligible employees [full time employees working 25 hours a week or more] in force on the effective date of this act.

Sections 2 and 3 provide that an insurer may apply to the superintendent of financial services for reimbursement by the department from funds collected and

authorizes the superintendent of financial services to charge insurance and make distributions to insurers for this purpose.

This act purports to take effect immediately and to apply to insurance policies in force on March 7, 2020. The proposed act is hardly a model in draftsmanship and suffers from the same deficiencies as the other proposed bills.

E. The Louisiana Bills

On March 31, 2020, Louisiana became the fifth state to enter the fray of potentially mandating insurance coverage losses due to COVID-19. Bills were introduced in the Louisiana state senate and in the house of representatives to require insurers to pay for COVID-19 related business interruption loss regardless of policy requirements and applicable exclusions. Neither bill contains a funding mechanism like those proposed in other states. While the house bill (H.B. 858) is limited to small businesses (meaning 100 or less full time employees in the state) the senate bill (S.B. 477) is not so limited.

House Bill 858 provides:

> Notwithstanding any other provisions of law 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 such a policy, coverage for business interruption due to global virus transmission or pandemic, as provided in the Emergency Proclamation Number 25 JBE 2020 and the related supplemental proclamations concerning the coronavirus disease 2019 pandemic.

House Bill 858 further provides that its provisions "shall be given prospective and retroactive application and shall be applied retroactively to March 11, 2020" to relevant insurance policies in force on that date. Senate Bill 477 contains substantially similar provisions.

It is difficult to predict the prospects of such bills becoming law or what amendments may be made to the proposed legislation along the way, but it is important that insurers engage with legislators to ensure they understand the adverse consequences associated with these bills, the troubling precedent they present, the likely unintended consequences should these bills become law, and require coverage for which a premium was not paid. Effective education of legislators and advocacy will be particularly challenging in view of social distancing policies currently in place.

These bills, and their abrogation of express contractual provisions and purported application to policies previously priced and executed present a host of legal and constitutional issues. Further such bills, if enacted, could threaten the solvency of insurers.

Requiring insurers to pay claim not covered by insurance policies by government fiat is nether sound nor sustainable public policy. Subjecting insurers to such mandates – even with provisions for reimbursement through pools created through state insurance industries – would not provide an efficient mechanism to respond to the fallout from a pandemic.

There have been reports of discussions between insurance industry representatives, government officials, and others about the prospect of establishing a multi-million dollar federally back program similar to the system implemented to compensate victims of the September 11 terrorist attacks to provide a mechanism to compensate businesses for business interruption losses.

IV. Regulatory Activity

COVID-19 has generated considerable regulatory activity as well. We provide some examples below.

A. The Wisconsin Commissioner

The Wisconsin Commissioner of Insurance encouraged insurers to offer flexibility to insureds experiencing economic hardship because of the public health emergency related to COVID-19, including offering non-cancellation periods, deferring premium payments, instituting premium holidays, and accelerating or waiving underwriting requirements. Further, during this period no insurer form filings will be approved absent express action by the Commissioner of Insurance office.

On March 23, 2020, the Wisconsin Office of the Commissioner of Insurance ordered that insurers cannot deny a claim under a personal auto policy solely because the insured was engaged in deliver food on behalf of a restaurant, until restaurants resume normal operations.

Further, general liability insurers were required to notify restaurant-insureds that hired and non-owned auto coverage is available and, if requested, insurers must provide this coverage.

B. The California Commissioner

On March 18, 2020, the California Insurance Commissioner sent a notice to admitted and non-admitted insurance companies providing life, health, auto, property, casualty, and other types of insurance in California requesting they give their insureds at least a 60-day grace period to pay insurance premiums in light of COVID-19 and related response measures. The notice also urged steps to eliminate the need for in-person payments, including that "all insurance agents, brokers, and other licensees who accept premium payments on behalf of insurers take steps to ensure that customers have the ability to make prompt insurance payments," such as through online payments.

On March 26, 2020, the California Department of Insurance issued an "urgent data survey" to all admitted and non-admitted insurance companies, seeking information about coverage for COVID-19 business interruption exposures. In the notice, entitled "Request for Information: Business Interruption and Related Coverage in California," the Department stated that recent events "have left California business and the state facing uncertainties and weighing public policy options." In order to understand "the number and scope of business interruption type coverages in effect, and the approximate number of policies that exclude virus such as COVID-19," the Department posed several questions regarding the number of employees of policyholders to which such policies were issued. Responses must be submitted by April 9, 2020.

C. The New York Department Of Financial Services

In light of anticipated losses arising from the outbreak of COVID-19, New York State's Department of Financial Services (NYDFS) has instructed property/casualty insurers to prepare explanations for their policyholders concerning "commercial property insurance" written in New York that might be implicated by coronavirus-related losses. NYDFS considers commercial property insurance to include business owners, commercial multiple peril, and specialized multiple peril policies, along with substantially similar insurance. Insurers were required to provide each policyholder a detailed explanation for each policy type, including business interruption, contingent business interruption, civil authority, and supply chain coverage, and explain whether those coverages are implicated by a contamination-related pandemic. insurers are specifically required to explain what types of damage or loss constitutes "physical loss or damage" under various policy forms and to describe the workings of applicable waiting periods.

NYDFS acknowledges that the coverages implicated by COVID-19 may change as the situation evolves, but noted that it considers insurers' "obligations to policyholders a heightened priority." NYDFS also stated that it is important for insurers "to continue to assist policyholders with the [required] information as developments concerning COVID-19 unfold."

In responding to this and other requests by regulators and policyholders – and in evaluating their exposures – insurers should carefully consider their analyses and explanations of coverage issues in light of the exact policy wordings at issue as well as the relevant facts and applicable law.

V. National Association Of Insurance Commissioners Public Session

On Friday, March 20, 2020, the National Association of Insurance Commissioners held a video conference public session during which state insurance regulators, insurance industry members, and consumer representatives discussed insurance issues arising from the COVID-19 pandemic. Insurance industry representatives urged state regulators to coordinate their various requests for information and data to avoid taxing insurer resources in responding. Insurance industry representatives expressed confidence that, due to adequate reserving, insurers will be able to adequately respond both to health and property-casualty insurance claims related to COVID-19. However, they warned that this may not be the case if states mandate that insurers cover virus-related claims, especially for "business interruption" coverages. Regulators and insurer representatives agreed it is important for legislators to include the insurance industry in discussions about insurance-based solutions to the economic effects of the pandemic.

There was discussion about the need for some regulatory and operational deadlines to be adjusted due to the

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pandemic's widespread impact on operations, such as extending premium payment dates and insurer financial reporting deadliness.

VI. Developments In The United Kingdom

Similar developments are taking place in the United Kingdom. For example, the parliamentary Treasury Committee has written to the Association of British Insurers requesting extensive data on how its members plan to approach claims for losses in connection with COVID-19.

The Treasury Committee has requested detailed data from insurers about their response to the crisis, including how many companies have stopped offering some products during the crisis or changed their terms; how much they expect to pay out in COVID-19-related claims; their approach to addressing claims under policies providing business interruption insurance; details about communications with policyholders regarding the insurance implications of COVID-19. The committee warned insurers it expects a swift response and will be making all data it receives publicly available.

The Association of British Insurers said insurers in Britain could be hit with $329 million in claims over the crisis, the highest pay-out on record for passenger flight cancellations. Britain's Financial Conduct Authority wrote to insurers on Thursday urging them to show fairness and flexibility when assessing claims related to the coronavirus.

Meanwhile, Lloyd's of London reports that it expects coronavirus claims to impact up to 14 different business lines this year.

VII. The Coverage Litigation Begins

Against this remarkable political, legislative, and regulatory backdrop, the first COVID-19 insurance coverage actions have been filed in the United States. At least eight COVID-19 coverage actions have been commenced in six different states: Louisiana, Texas, Illinois, Oklahoma, California, and Florida. Coverage is sought for business income losses under property insurance forms, some of which allegedly provide Business Interruption, Interruption by Civil Authority, Limitations of Ingress/Egress, and Extra Expense coverages. Links to the complaints in each action are provided below. Although we are likely to see many more filed lawsuits in coming weeks, some interesting trends and theories of coverage have begun to emerge from these early lawsuits.

Two of the eight actions were filed in federal court, while the remaining six were filed in state courts. *Billy Goat Tavern*, filed in federal district court in Illinois by a local restaurant chain, also seeks relief on behalf of a proposed class of all Illinois businesses offering food or beverage for on-premises consumption that were insured by the same insurer under the same all-risk form and were denied coverage for their COVID-19 related business loss claim.

The plaintiffs in six of the pending actions are restaurants/bars. One of those six lawsuits was also filed on behalf of theater owners. The two Oklahoma lawsuits were brought by Native American Tribe Nations for losses sustained by "multiple commercial businesses and services." In both of those complaints, the Nations seek to preempt any attempt to remove the lawsuits to federal court, stating that they "expressly disavow[ ] any federal claim or question as being part" of their lawsuits, and that the "claims are based in contract and insurance laws under Oklahoma law."

Six of the complaints alleged that various governmental orders impacted their businesses. One of those seems to be seeking coverage for COVID-19 related losses incurred both prior to and after the issuance of the relevant government order.

Several of the complaints contain no allegations that the insureds tendered claims to their insurers in advance of filing their lawsuits. In other cases, the carriers' denials of tendered claims have given rise to statutory and common law bad faith allegations. For example, in *Big Onion*, the plaintiffs alleged that the insurer "issued blanket denials to Plaintiffs for any losses related to Closure Orders – often within hours of receiving Plaintiffs' claims—without first conducting any meaningful coverage investigation, let alone a 'reasonable investigation based on all available information' as required by Illinois law." The *Big Onion* plaintiffs also cited a memorandum from the CEO of the insurer that had been circulated to its "agency partners" prior to some of the claims being tendered, "acknowledging that states, such as Illinois, had 'taken steps to limit operations of certain businesses,' but prospectively concluding that [the insurer's] policies would likely not provide coverage

for losses due to a 'governmental imposed shutdown due to COVID-19 (coronavirus).'"

In *Hair Goals Club*, the plaintiff alleged that the insurer's claim denial violated Texas Insurance Code section 541.061, Misrepresentation of Insurance Policy, as well as other Insurance Code sections concerning the Prompt Payment of Claims. The plaintiff also asserted a claim for breach of the common law duty of good faith and fair dealing, and alleged that the insurer's acts were done "knowingly," as that term is defined in the Texas Insurance Code. In addition to seeking coverage for losses under the policy, the plaintiff seeks attorney's fees and interest, calculated at the statutory amount of 18% per annum. The plaintiff also asked the court to order production of the insurer's claim file and communication with agents, adjusters, and other concerning the claim.

In some lawsuits, the plaintiffs seem to allege that the absence of an exclusion for a particular cause of loss means that the loss is covered. In *Cajun Conti*, for example, the plaintiffs seek a declaration that "because the policy provided by Lloyd's does not contain an exclusion for a viral pandemic, the policy provides coverage to plaintiffs for any future civil authority shutdowns of restaurants in the New Orleans area due to physical loss from Coronavirus contamination." In *French Laundry*, the plaintiffs ask the court to declare that the relevant governmental order "triggers coverage because the policy does not include an exclusion for a viral pandemic and actually extends coverage for loss or damage due to virus." *See also Prime Time* ("Loss of business Income and operating expenses is specifically covered under the policy, and governmental suspension as a result of COVID-19 is not specifically excluded.")

None of the plaintiffs seems to allege that insured premises have been contaminated by COVID-19. The plaintiffs in *Cajun Conti*, however, have asked for a declaration that "the policy provides business income coverage in the event that the coronavirus has contaminated the insured premises," and the plaintiffs in *Big Onion* alleged that the insurer's "conclusory" statement in its denial letter that the actual or alleged presence of the coronavirus does not constitute direct physical loss "is contrary to the law in Illinois." The plaintiff stated that "Illinois courts have consistently held that the presence of a dangerous substance in a property constitutes 'physical loss or damage.'" In *French Laundry*, the plaintiffs alleged that COVID-19 "is physically impacting public and private property, and physical spaces in cities around the world and in the United States. Any effort by [the insurers] to deny the reality that the virus causes physical loss or damage would constitute a false and potentially fraudulent misrepresentation that could endanger policyholders and the public."

List of Complaints in COVID-19 Coverage Cases

Barbara Lane Snowden DBA Hair Goals Club v. Twin Cities Fire Ins. Co.
https://www.hinshawlaw.com/assets/htmldocuments/Court%20Docs/Barbara%20Lane%20Snowden%20DBA%20Hair%20Goals%20Club%20v.%20Twin%20Cities%20Fire%20Ins.%20Co.pdf

French Laundry Partners v. Hartford Fire Ins. Co.
https://www.hinshawlaw.com/assets/htmldocuments/Court%20Docs/French%20Laundry%20Partners%20v.%20Hartford%20Fire%20Ins.%20Co.pdf

Cajun Conti LLC v. Certain Underwriters at Lloyd's of London
https://www.hinshawlaw.com/assets/htmldocuments/Alerts/Oceana%20%20Petition%20for%20Dec%20J.pdf

Onion Tavern Group, LLC, et al. v. Society Insurance, Inc.
https://www.hinshawlaw.com/assets/htmldocuments/Court%20Docs/Onion%20Tavern%20Group%20LLC%20et%20al.%20v.%20Society%20Insurance%20Inc.pdf

Chicsaw Nation Department of Commerce v. Lexington Insurance Company, et. al
https://www.hinshawlaw.com/assets/htmldocuments/Alerts/Chicksaw-v-Lexington.pdf

Choctaw Nation of Oklahoma v. Lexington Insurance Company, et. al
https://www.hinshawlaw.com/assets/htmldocuments/Alerts/Choctaw-v-Lexington.pdf

Billy Goat Tavern v. Society Insurance
https://www.hinshawlaw.com/assets/htmldocuments/Alerts/Billy-Goat-Tavern-v-Society-Insurance.pdf

Prime Time Sports Bar v. Certain Underwriters at Lloyd's London
https://www.hinshawlaw.com/assets/htmldocuments/Alerts/Prime-Time-Sports-Bar-v-Certain-Underwriters-Lloyds-London.pdf

VIII. Conclusion

Developments impacting insurers continue at a rapid pace. Insurers and their counsel must continue to monitor developments close On Friday, March 20, 2020, the National Association of Insurance Commissioners held a video conference public session during which state insurance regulators, insurance industry members, and consumer representatives discussed insurance issues arising from the COVID-19 pandemic. Insurance industry representatives urged state regulators to coordinate their various requests for information and data to avoid taxing insurer resources in responding. Insurance industry representatives expressed confidence that, due to adequate reserving, insurers will be able to adequately respond both to health and property-casualty insurance claims related to COVID-19. However, they warned that this may not be the case if states mandate that insurers cover virus-related claims, especially for "business interruption" coverages. Regulators and insurer representatives agreed it is important for legislators to include the insurance industry in discussions about insurance-based solutions to the economic effects of the pandemic.

There was discussion about the need for some regulatory and operational deadlines to be adjusted due to the pandemic's widespread impact on operations, such as extending premium payment dates and insurer financial reporting deadliness. ■

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1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215) 988-7728 1-800-MEALEYS (1-800-632-5397)
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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Reinsurers Must Prepare For Coronavirus-Related Claims

By **Scott Seaman and Edward Lenci** (April 9, 2020, 3:53 PM EDT)

Scott Seaman

Edward Lenci

The enormous economic losses resulting from COVID-19 — coupled with the unprecedented governmental orders imposing restrictions on travel, movement and assembly and requiring businesses to close or limit operations — likely will result in a tremendous volume of insurance claims and coverage lawsuits. In fact, some lawsuits already have been filed.

These claims and lawsuits will inevitably result in reinsurance cessions and, as night follows day, disputes between cedents and reinsurers.

The insurance industry survived the asbestos tsunami, which has not yet completely subsided. The sheer number of asbestos-related claims and the enormous defense and indemnity dollars paid, mostly as a result of judicial decisions stretching to find coverage for these claims, resulted in many insurer insolvencies, receiverships and liquidations, particularly in the late 1970s and the 1980s.

The subsequent hard work of the industry and regulators enhanced the financial stability and solvency of the insurance industry in the face of large claims and natural disasters that have followed.

Some recent initiatives demonstrate efforts on the part of some governmental entities to pressure insurers to pay noncovered COVID-19 claims.

For example, on March 18, 16 members of Congress, including members of both major political parties, wrote a letter to insurance industry and broker associations urging commercial property insurers to provide business interruption coverage for losses related to COVID-19 — whether covered or not. Such entreaties are emblematic of governmental forces pressuring insurers to pay claims that are not covered by their policies.[1]

More troubling are bills pending in various jurisdictions, including New York, New Jersey, Ohio and Massachusetts, that would mandate that insurers cover business interruptions claims that are not covered by property insurance policies. This represents unsound and inefficient public policy in response to a pandemic, abrogates rights under contracts previously executed and priced, undermine the integrity of the insurance regulatory process under which some of the impacted policy provisions previously were approved by regulators, and could even threaten insurer solvency.

Of course, any governmental efforts to rewrite policies along such lines will face legal and constitutional challenges. They also may factor into the examination by reinsurers of COVID-19 cessions.

As noted, COVID-19 coverage cases have already been filed. For example, French Laundry, a Napa Valley restaurant owned by chef Thomas Keller, filed suit against Hartford Fire Insurance Co., seeking a declaration of coverage for interruption of business due to the pandemic.[2] The complaint alleges that the "all risks" policy issued by Hartford provides coverage for lost business income and extra expenses due to prohibitions on access to restaurants imposed by local and state civil authorities.

The complaint further alleges coverage due to physical loss or damage under the Civil Authority coverage part of the policy based upon a March 19 government order. It alleges the policy does not include an exclusion for viral pandemic and the "policy's Property Choice Deluxe Form specifically extends coverage to direct physical loss or damage caused by virus."

Tellingly, in response to a statement that "unless policies specifically outline non-physical damage coverage, businesses 'are unlikely to find relief within the four corners of their policies,'" the restaurant's attorney said, "They're wrongfully denying us, which is going to cripple millions of people and their livelihoods."[3]

The foregoing, as well as the early and extensive COVID-19-related coverage advocacy of some policyholder firms, leaves little doubt that policyholders will be extremely aggressive in seeking coverage. They will seek to abrogate policy exclusions and attempt to enlist courts to construe away express policy requirements such as "direct physical injury" and make virus exclusions disappear.

Policyholders may attempt to exploit the sympathies associated with the pandemic and use all available resources, including the unabashedly pro-policyholder Restatement of the Law of Liability Insurance, to advocate that courts rewrite contracts and turn time-honored maxims of contractual construction on their heads even if the state legislation discussed above is not enacted.

COVID-19 claims will present challenges to insurers and reinsurers that will take many years to resolve. Broadly speaking, reinsurers should promptly review their assumed portfolios thoroughly to determine their potential exposures, as multiple lines of coverage are implicated. Moreover, many of the insurance coverage issues will be imported into resulting reinsurance cessions.

Any determination of whether a particular COVID-19 cession is covered by a reinsurance treaty or facultative certificate begins with an analysis of whether the underlying claims were covered by the cedent's insurance policy or policies. The next level of evaluation of a cession involves application of the terms, conditions and exclusions of the particular reinsurance treaty or facultative certificate in question. Each cession will be considered on its own merits. Here are some of the considerations that may be involved in COVID-19-related cessions:

Whether Claims Paid Are Covered Under the Insurance Policy

Where ceding insurers pay COVID-19-related claims based upon pressure from governmental entities or policyholders, reinsurers may examine whether such claims are covered by the insurance policy or constitute ex gratia payments.

Application of Follow-the-Fortunes or Follow-the-Settlements Provisions

Where ceding companies must pay otherwise uncovered business interruption claims due to legislation or a judicial ruling, they generally can be expected to argue that their reinsurers are required, in turn, to pay resulting cessions based upon follow-the-fortunes or follow-the-settlements provisions in the reinsurance contracts.[4]

Application of Follow-the-Fortunes or Follow-the-Settlements Principles

Ceding companies face a greater challenge where there is no follow-the-fortunes or follow-the-settlements provision in the reinsurance contract. In such instances, ceding companies may argue that, as a matter of custom and practice or course of dealings, principles of follow-the-fortunes or follow-the-settlements exist and apply to require the reinsurer to pay. Where they are unsuccessful with this argument, ceding companies generally will be required to establish that the claim was actually covered by their insurance policies.

Proper Credits

Reinsurers may inquire as to whether proper credits were given for other policyholder recoveries and governmental relief or subsidies, and also whether subrogation rights were pursued.

Whether the Cession Is Covered By the Terms of the Reinsurance Contract

Follow-the-fortunes and follow-the-settlements provisions do not override the terms, conditions and exclusions of the reinsurance contracts. Accordingly, determination of whether a cession is reinsured requires consideration and application of the terms, conditions and exclusions of the reinsurance contract itself.

Aggregation and Loss Occurrence Issues

Issues may be presented concerning aggregation of COVID-19 claims payments as well as loss occurrence issues.

Limits and Retention Issues

COVID-19 cessions may present issues regarding reinsurance limits as well as whether retentions have been satisfied. Treatment of defense costs associated with COVID-19 claims under the terms of reinsurance contracts may also become issues, including, for example, whether the language of a facultative certificate included expenses within assumed limits of the certificate.[5]

Scott M. Seaman and Edward K. Lenci are partners at Hinshaw & Culbertson LLP.

[1] In a joint response, the American Property Casualty Insurance Association, the Council of Insurance

Agents and Brokers, the Independent Insurance Agents & Brokers of America, and the National Association of Mutual Insurance Companies stated:

> Standard commercial insurance policies offer coverage and protection against a wide range of risks and threats and are vetted and approved by state regulators. Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19. The U.S. insurance industry remains committed to our consumers and will ensure that prompt payments are made in instances where coverage exists.

[2] https://www.cnn.com/2020/03/27/business/thomas-keller-lawsuit-coronavirus-losses/index.html

[3] Id.

[4] See generally A Primer on Reinsurance Law & Principles (Hinshaw & Culbertson 2016); S.M. Seaman, and J.R. Schulze, Allocation of Losses In Complex Insurance Claims (8th ed. West Thomson Reuters 2019-20).

[5] See generally E.K. Lenci and S.M. Seaman, "The Bellefonte Cap Returns," Best's Review, August 2016; Global Reinsurance Corp. of America v. Century Indemnity Co., No. 13 Civ. 6577 (LGS) (S.D.N.Y. Mar. 2, 2020).

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