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How COVID-19 Has Changed the Insurance Landscape from an Underwriting and Claims Perspective

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I. Introduction

The purpose of this session is to discuss how the worldwide pandemic involving the novel coronavirus known as COVID-19 has affected and is currently affecting the insurance market, including its effects on the property and liability markets, coverage issues associated with COVID-19 that have arisen over the past two years, and litigation. By way of background, Governor Gavin Newsom declared a State of Emergency in California based on the coronavirus outbreak on March 4, 2020.[1] Subsequently, the World Health organization declared COVID-19 a global pandemic on March 11, 2020. [2] Nearly two years later, the California State of Emergency, and similar declarations in some other states, remain in effect and more contagious variants, continuing mask mandates and political division make the pandemic a continuing issue of great consequence. Meanwhile, while most of us have all become far more accomplished at the use of Zoom than we had previously hoped, the pandemic continues to impact claims, coverage and litigation in consequential ways.

A. Ongoing Coronavirus Coverage Litigation

According to a complaint tracker maintained by the law firm Hunton Andrews Kurth LLP, there were 7,734 coronavirus-related complaints filed between January 30, 2020 and December 31, 2021, of which 1,535 have involved insurance.[3] Between January 1, 2021 and January 14, 2022 there were 5,766 coronavirus-related complaints filed, of which 445 involved insurance.[4] In addition, the University of Pennsylvania Law School maintains a COVID Coverage Litigation Tracker which

[1] https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf

[2] https://pubmed.ncbi.nlm.nih.gov/32191675/; WHO Director-General's opening remarks at the media briefing on COVID19 -March 2020

[3] https://www.huntonak.com/en/covid-19-tracker.html

[4] https://www.huntonak.com/en/covid-19-tracker.html

currently displays data from March 16, 2020 through December 12, 2021. The Coverage Litigation Tracker which reports that there have been a total of at least 2,120 coverage cases filed involving the novel coronavirus.[5]

II. How COVID-19 Has Affected The Insurance Markets

A. Property Insurance Market

1. Business Interruption Insurance

According to the University of Pennsylvania Law School's COVID Coverage Litigation Tracker, out of approximately 2,120 coverage cases filed from March 16, 2020 through December 12, 2021, 1,918 cases included "Business Interruption" claims as part of property policy coverage.[6]

a. Coverage Issue: Physical Loss "Of" Property Versus Physical Loss "To" Property

Many of the current business interruption cases continue to revolve around judicial interpretations of the applicable policy's fundamental insuring language which, like most property insurance policies, requires direct physical loss "of" or "to" property. In *Mudpie, Inc. v. Travelers Casualty Insurance Company of America,*[7] for example, District Court Judge Jon S. Tigar elaborated at some length on this difference. The policy language at issue in *Mudpie, Inc.* stated, in part:

> 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

[5] https://cclt.law.upenn.edu/

[6] https://cclt.law.upenn.edu/judicial-rulings/

[7] (N.D. Cal., Sept. 14, 2020, No. 20-CV-03213-JST) 2020 WL 5525171

> physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.
>
> (Emphasis added.)

Judge Tigar, relying on *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins.* Co.[8], distinguished between the loss "of" property as opposed to a loss "to" property, reasoning that " ' "loss of" property contemplates that property is misplaced and unrecoverable, without regard to whether it is damaged.' " Furthermore, "damage to" would render the latter part of the insuring language stating "or damage to" meaningless. Thus, coverage for "loss of" property could include the permanent dispossession of the property.

In its complaint, Mudpie alleged that compliance with state and local orders regarding the coronavirus "has caused direct physical loss of Mudpie's insured property in that the property has been made useless and/or uninhabitable; and its functionality has been severely reduced if not completely or nearly eliminated." Mudpie alleged that this was a "direct physical loss of" its property. However, Judge Tigar noted that Mudpie was not permanently deprived of its storefront, but rather only temporary dispossessed while "Stay-At-Home" orders were in effect. Thus, Judge Tigar concluded, Mudpie did not suffer a "loss of" their property.

Since *Mudpie* was decided in September 2020, much litigation has ensued and more and more cases are making their way to appellate courts. Notably, *Mudpie* was affirmed by the Ninth Circuit Court of Appeals on October 1, 2021.[9] Insurers have enjoyed favorable outcomes in a majority of courts

[8] (2010) 187 Cal. App. 4th 766.

[9] *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021).

throughout the country, often times successfully defeating suits in the pleading stage via a motion to dismiss as was the case in *Mudpie*.

According to the University of Pennsylvania Law School COVID Coverage Litigation Tracker, current data shows that of the motions for dismissal filed in federal courts by insurers, 84.4% have been granted as full dismissals with prejudice, 9.5% have been granted as full dismissals without prejudice, 1.3% have been granted as partial dismissals with prejudice, .4% have been granted as partial dismissals without prejudice, and just 4.5% have been denied.[10] In state courts, current data shows that of the motions for dismissal filed by insurers, 63.3% have been granted as full dismissals with prejudice, 5.8% have been granted as full dismissals without prejudice, 4.1% have been granted as partial dismissals with prejudice, .6% have been granted as partial dismissals without prejudice, and 23.3% have been denied.[11]

Similar to *Mudpie*, most decisions have concluded that governmental orders associated with the coronavirus do not amount to "direct physical loss of or damage to property" because the coronavirus does not physically alter property but rather, causes a temporary loss of use of property.[12] These decisions have reasoned that absent an actual physical alteration of property, there is no physical loss or damage.

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[10] https://cclt.law.upenn.edu/judicial-rulings/.

[11] https://cclt.law.upenn.edu/judicial-rulings/.

[12] *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, 499 F. Supp. 3d 1178, 1185 (S.D. Fla. 2020); *Southern Orthopaedic Specialists LLC v. State Farm Fire And Casualty Company*, No. CV 21-0861-WBV-DMD, 2022 WL 219056, at *7 (E.D. La. Jan. 25, 2022) (Orthopedic medical practice claimed loss of income and extra expense as a result of the actual presence of COVID-19 and government orders. The Court found that plaintiff's allegations failed "fail[ed]as a matter of law because it has failed to assert a connection to any tangible alteration or change to the property."); *Palmdale Est., Inc. v. Blackboard*, 510 F.Supp.3d 874, 876-77 (N.D. Cal. 2021) ("The majority view — including in this district — is that 'direct physical loss' provisions ... do not cover lost business income or expenses resulting from closure orders ..."); *Vandelay Hosp. Grp. LP v. Cincinnati Ins. Co.*, No. 3:20-CV-1348-D, 2021 WL 2936066, at *6 (N.D. Tex. July 13, 2021)

In *Ford of Slidell, LLC v. Starr Surplus Lines Ins. Co.*,[13] the District Court for the Eastern District of Louisiana granted Defendant insurer Starr Surplus Lines Insurance Company's ("Starr") Motion to Dismiss in a coverage dispute for, *inter alia*, loss of business income. In that case, several car dealerships in Louisiana ("Plaintiffs") obtained an all-risk commercial insurance policy with Starr. In response to COVID-19 government emergency orders issued in March and April 2020, Plaintiffs alleged that their business was affected directly and indirectly, even though they were classified as essential businesses. In particular, Plaintiffs alleged that the pandemic caused them to suffer "business interruption losses and extra expenses in March 2020." They also alleged that "the COVID-19 virus was either present at the covered locations or there was an 'imminent risk of on-site viral presence' during the pandemic" due to "'the level and reach of the pandemic in Southeast Louisiana,' and because employees working at the dealerships were diagnosed with COVID-19." Plaintiffs further alleged that they "'followed orders and guidelines to reduce the presence of the virus, including reducing working hours for non-essential personnel and for support staff, and limiting daily hours of operation, and controlling all work and business spaces so that there would be fewer people in all areas and departments'" and also cleaned and disinfected.

Starr denied coverage for loss of business income and extra expenses under the Policy's Business Interruption and Extra Expenses provisions. Starr contended that (i) the Policy's Pollution and Contamination Exclusion Clause applied; (ii) Plaintiffs had not suffered physical loss; and (iii) "Plaintiffs were not otherwise covered under the Policy, including under the Civil Authority provision and Ingress/Egress provision."

("Even if Vandelay has sufficiently alleged that COVID-19 was present in its restaurants, it has not adequately alleged that COVID-19 caused physical damage or loss.").

[13] No. CV 21-858, 2021 WL 5415846, at *1 (E.D. La. Nov. 19, 2021)

Regarding whether or not the Plaintiffs suffered a physical loss because of the coronavirus, the *Ford of Slidell, LLC* court noted that the Starr Policy did not define the phrase "physical loss or damage" within the Business Interruption and Extra Expenses provisions. Starr argued that "direct physical loss or damage" required a "'distinct, demonstrable, physical alteration of the property' or 'any actual physical change or injury to the property,'" while Plaintiffs argued the phrase should be interpreted "more broadly." Additionally, they claimed to have "adequately alleged direct physical loss or damage because the Emergency Orders" restricted their services and access to their premises. They further alleged that "the presence of COVID-19 on the insured premises caused property damage by making Plaintiffs' buildings 'uninhabitable and unusable' until they were cleaned." Plaintiffs also argued that "'physical loss or damage' does not require structural damage".

The *Ford of Slidell, LLC* court rejected Plaintiffs interpretation of "direct physical loss or damage" because they attempted to expand the "definition of 'physical loss or damage' to include non-structural damage," a definition previously rejected by the Fifth Circuit Court of Appeals. More specifically, the Court stated that "Fifth Circuit precedent is clear that tangible damages are necessary to satisfy the 'physical loss or damage' language of a policy, even when a policy provides coverage in cases of physical loss *or* damage." (Emphasis in original.) The Court relied on *Trinity Industries, Inc. v. Insurance Co. of North America,*[14] in which the Fifth Circuit "found that 'the language 'physical loss or damage' strongly implies that there was an initial satisfactory state that was changed by some external event into an unsatisfactory state—for example, the car was undamaged before the collision dented the bumper.'"

[14] 916 F.2d 267, 270–71 (5th Cir. 1990).

The *Ford of Slidell, LLC* court also relied on *Hartford Insurance Co. of Midwest v. Mississippi Valley Gas Co.*[15] in which the Fifth Circuit analyzed an insurance "policy that covered only 'direct physical loss of or damage to' insured property, found that '[t]he requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property."

Furthermore, the Court in *Ford of Slidell, LLC* also looked to other districts courts which have interpreted similar policy language and required "tangible damages" in the context of COVID-19 closure orders. The Court further observed that in *Q Clothier New Orleans, LLC v. Twin City Fire Insurance Co.*,[16] the plaintiffs also sought business interruption and extra expense coverage under an insurance policy that also "required 'direct physical loss of or physical damage to property.'" In that case, the plaintiffs argued that they incurred losses "due to the mandatory closure of their businesses in response to the COVID-19 pandemic." That district court dismissed the plaintiffs' claims because they failed to state a claim for physical loss or damage resulting from "'the pandemic and the governor's stay-at-home order" which "caused damage to its property which cannot be used for its intended use'." Furthermore, "the court held that '[a]bsent evidence that [their] property sustained physical and demonstrable alteration, [the plaintiffs'] damages do not meet the Fifth Circuit's definition of covered physical loss or damage.'"

In *Ford of Slidell, LLC,* the Court specifically noted that Plaintiffs' businesses did *not close* because of the emergency orders but "'remained open as businesses determined essential[ ] by the governing

[15] 181 F. App'x 465, 470 (5th Cir. 2006).

[16] No. 20-1470, 2021 WL 1600247, at *2 (E.D. La. Apr. 23, 2021)

authorities.'" As such the Court concluded that Plaintiffs, did not suffer "physical loss or damage" because of the emergency orders. The Court then turned to Plaintiffs argument that they suffered "physical loss or damage" because of the presence of COVID-19 on the insured premises. However, the Court concluded that this allegation likewise failed to adequately allege "physical loss or damage." In *Coleman E. Adler & Sons, LLC v. Axis Surplus Insurance Co.*,[17] the plaintiffs owned jewelry stores and a reception venue and claimed that because COVID-19 was present in the insured locations and prevented the use of the property, they suffered a "direct physical loss of or damage to" the insured property. The court in that case rejected this argument, holding that the plaintiffs lacked evidence showing that their properties "suffered from 'physical and demonstrable alteration,'" and therefore, they did not meet "the Fifth Circuit's definition of 'physical loss or damage' because COVID-19 harms people, not property.'" In addition, the Court noted that the *Q Clothier* court had held "that the possible presence of COVID-19 did not constitute 'direct physical loss' because 'effective health measures such as social distancing, capacity limitations, curbside pickup alternatives, and mask wearing allow for businesses to safely continue operation."

b. Coverage Issue: Physical Loss Must Be Caused By COVID-19

Courts have also carefully scrutinized whether commercial policyholders have actually alleged the physical presence of COVID-19 in their business as the cause of loss. In *Mudpie*, Judge Tigar noted that the plaintiff did not allege that the actual presence of COVID-19 caused a loss, but rather alleged that the loss was due to the business's compliance with a Stay-At-Home order.[18] Another District Court in Northern California likewise dismissed a complaint where the policyholder alleged

[17] No. 21-648, 2021 WL 2476867, at *1 (E.D. La. June 17, 2021)

[18] *Mudpie, Inc. v. Travelers Casualty Insurance Company of America* (N.D. Cal., Sept. 14, 2020, No. 20-CV-03213-JST) 2020 WL 5525171, at *6;

an "imminent threat" of coronavirus .[19] However, in some cases where the policyholder has been able to allege the actual presence of coronavirus in their business causing the business to close, courts have generally found that there has been a "physical loss" of the property.[20]

c. Coverage Issue: The "Virus Exclusion"

Many property insurance policies contain a so-called "virus exclusion" for loss resulting from a virus similar to the following:

> [L]oss or damage caused "directly or indirectly" by "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."[21]

Insurers appear to be winning the majority of coverage lawsuits brought based on the virus exclusion as shown by the table below:[22]

	Virus Exclusion in Policy	**No Virus Exclusion**
Motion to Dismiss Granted	451	210
Motion to Dismiss Denied	31	33
Insurer Motion for Summary Judgment Granted	31	16
Policyholder Motion for Summary Judgment Granted	4	7

[19] *Water Sports Kauai, Inc. v. Fireman's Fund Insurance Company* (N.D. Cal., Nov. 9, 2020, No. 20-CV-03750-WHO) 2020 WL 6562332, at *4 [alleging "imminent threat" of the coronavirus.]

[20] *Studio 417, Inc. v. Cincinnati Insurance Company* (W.D. Mo., Aug. 12, 2020, No. 20-CV-03127-SRB) 2020 WL 4692385 [alleging presence of coronavirus in salons and restaurants]; *Blue Springs Dental Care, LLC v. Owners Insurance Company* (W.D. Mo., Sept. 21, 2020, No. 20-CV-00383-SRB) 2020 WL 5637963 [same in dental offices].

[21] Mauricio Martinez, D.M.D., P.A. v. Allied Ins. Co. of Am., No. 2:20-cv-00401-FtM-66NPM, 2020 WL 5240218, at *2 (M.D. Fla. Sept. 20, 2020).

[22] https://cclt.law.upenn.edu/judicial-rulings/

One Federal district court has rejected an insurer's claim that a virus exclusion precluded coverage for business interruption insurance. In *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company*[23] the insured "neither alleg[ed] that there is a presence of a virus at the covered property nor that a virus is the direct cause of the property's physical loss" but rather alleged that the loss was due to the state's Stay-At-Home order. Further, the court noted that the plaintiff's property, a spa, was designated a "hotspot" for coronavirus and selectively restricted from reopening. These factors led the court to hold that the insurer failed to meet its burden in proving the "Virus" exclusion applies. In so holding, however, the court in *Elegant Massage, LLC* did not address the question of whether the virus exclusion is applicable to bar a COVID-19 claim.

Coverage disputes over virus exclusions continue to be decided largely in favor of the insurers. However, courts scrutinize policy language carefully and have pointed out to insurers that although they may be similar, not all virus exclusions are the same. In *Risinger Holdings, LLC v. Sentinel Ins. Co., Ltd.*,[24] the Plaintiff owned several orthodontic practices and was subject to coronavirus lockdown orders. Plaintiff suffered business losses. The insurer denied the claim and a suit followed. In response, the insurer, Sentinel, filed a motion to dismiss.

In support of its argument in favor of no coverage, Sentinel cited to the court in *Risinger Holdings, LLC* several decisions finding no coverage for claims arising out of the coronavirus and premised its argument on the contention that the exclusion in the policy at issue was a "similar" exclusion. However, the court rejected Sentinel's contention and noted that, in the cases cited, the exclusionary language was "substantially different" and defined the term "virus" as a virus "'capable of inducing physical distress, illness or disease.'" Therefore, the court did not follow the reasoning of the cited

[23] *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company* (E.D. Va., Dec. 9, 2020, No. 2:20-CV-265) 2020 WL 7249624.

[24] No. 1:20-CV-00176, 2021 WL 4520968, at *8–9 (E.D. Tex. Sept. 30, 2021)

cases and analyzed the scope of the exclusion in the policy and determined that the term "virus" was ambiguous.

The policy in *Risinger Holdings, LLC* limited bacteria or virus coverage by way of an endorsement which stated:

> A. Fungi, Bacteria or Virus Exclusions
>
> i. "Fungi", Wet Rot, Dry Rot, Bacteria And Virus
>
> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> (1) Presence, growth, proliferation, spread or any activity of "fungi," wet rot, dry rot, bacteria or virus.
>
> (2) But if "fungi," wet rot, dry rot, bacteria or virus results in a "specified cause of loss" to Covered Property, we will pay for the loss or damage caused by that "specified cause of loss.
>
> This exclusion applies whether or not the loss event results in widespread damage or affects a substantial area.

Sentinel argued that "the term 'virus' in the Exclusion should be construed to bar coverage for business losses caused by government lockdowns in response to COVID-19" as other courts have done. However, the court noted that in this Policy the term "virus" could be clouded by three different meanings within the policy because it appeared in different parts of the same policy. The court determined term "virus" could be grammatically construed differently and did not share "common quality" with the words it accompanied. Thus, the court found that because the term "virus" was susceptible to at least three distinct interpretations, it was ambiguous and "the Policy

must be construed 'liberally' in favor of the insured to provide coverage..." Thus, the court found that the exclusion did not bar coverage however, the court declined to decide whether the Plaintiff's losses were caused directly or indirectly by the lockdown order. Therefore, Sentinel's motion to dismiss was denied.

However, other district courts disagree with interpretations that do not apply the plain meaning of "virus" to the exclusion.[25]

d. Coverage Issue: Civil Authority Coverage

Businesses may likewise look to their civil authority coverage to recoup losses related to COVID-19. A typical civil authority coverage provision states, as follows:

> We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of a civil authority that prohibits access to the described premises due to direct physical loss

[25] *Cosm. Laser, Inc. v. Twin City Fire Ins. Co.*, No. 3:20-CV-00638 (SRU), 2021 WL 3569110, at *9 (D. Conn. Aug. 11, 2021) ("*Urogynecology*, which reached the opposite conclusion, has been repeatedly rejected by courts interpreting the same virus exclusion. *See, e.g., Sys. Optics, Inc.*, 2021 WL 2075501, at *5 ("Courts have consistently rejected the reasoning in *Urogynecology*."); *J & H Lanmark, Inc.*, 2021 WL 922057, at *3 ("[T]o the extent [ ] *Urogynecology* ... declined to assign 'virus' its plain meaning, the Court disagrees with that interpretation."); *Robert E. Levy v. Hartford Fin. Servs.*, 520 F.Supp.3d 1158, 1168 (E.D. Mo. 2021) (noting that "[t]he *Urogynecology* court declined to reach 'a decision on the merits of the plain language of the policy' because certain 'forms' referenced in the exclusion for loss caused by a 'virus' were not included in the policy or provided to the court" and remarking that, by contrast, "courts that have examined the entire policy have found the policy language unambiguous and reject *Urogynecology*'s conclusion") (quoting *Urogynecology*, 489 F. Supp. 3d at 1302–03); *Founder Inst. v. Hartford Fire Ins. Co.*, 497 F. Supp. 3d 678, 679 (N.D. Cal. 2020) ("[T]he district court in [*Urogynecology*] did not cite anything—from the complaint or elsewhere—that would support a conclusion that a business shutdown due to a pandemic falls outside the scope of the virus exclusion."). I join those courts: I do not find the analysis in *Urogynecology* persuasive.").

of or damage to property, other than at the describes premises, caused by or resulting from any Covered Cause of Loss.[26]

Generally, civil authority coverage is reactive and not prophylactic, meaning that a physical loss or damage must precede the civil action, not the other way around. Where a civil order is put in place to prevent or preclude damage from occurring, but before any damage has actually occurred, courts have repeatedly rejected claims that such orders have a causal link to trigger civil authority coverage.[27] Courts have found that government stay-at-home and closure orders resulting from the pandemic did not give rise to Civil Authority coverage.

In *Inns-by-the-Sea v. California Mut. Ins. Co.*,[28] the Fourth District Court of Appeal affirmed the trial court's order sustaining the insurer's Demurrer without leave to amend in resolving various coverage issues related to coronavirus lockdown orders. Inns-by-the-Sea ("Inns"), which operates four lodging facilities in the Bay Area, was forced to practically shut down as a result of County orders in response to the coronavirus as it was not an essential business. As a result, Inns filed a claim with its insurer, California Mutual Insurance Company ("California Mutual"), which denied

[26] CP 00 30 04 02.

[27] *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-0756 FMS, 1995 WL 129229, at *2-3(N.D. Cal. Mar. 21, 1995) [holding that curfew orders imposed after the Rodney King verdict were imposed "to prevent 'potential' looting, rioting, and resulting property damage" thus a theater owner was not entitled to civil authority coverage]; *see also United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 129, 134 (2d Cir. 2006) (affirming the district court's denial of coverage under a similar civil authority provision where the government's decision to halt airport operations on September 11, 2001 "was based on fears of future attacks" rather than prior physical damage to an adjacent property); *Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP v. Chubb Corp.* (E.D. La., Oct. 12, 2010, No. CIV.A. 09-6057) 2010 WL 4026375, at *3 [rejecting civil authority coverage for mandatory evacuation orders preceding Hurricane Gustave; "[r]eading the Civil Authority section as a whole, it is clear that it was not written with the expectation that a civil authority order prohibiting access would issue before the property damage that forms the basis of the order actually occurs. The direct nexus between the damage sustained and the order that the policy requires suggests that the Policy was designed to address the situation where damage occurs and the civil authority subsequently prohibits access"].)

[28] 71 Cal. App. 5th 688, 712 (2021).

the claim and suit followed. Analyzing the exact civil authority coverage provision cited above, the court concluded "that government stay-at-home and closure orders resulting from the pandemic did not give rise to Civil Authority coverage." More specifically, the court found that the coronavirus "Orders were issued to prevent the spread of the pandemic, not because of any direct physical loss of or damage to property." The court also supported its findings by citing to a string of cases similarly so holding.[29]

Again, insurers and government entities should carefully scrutinize a plaintiff's claim to determine the triggering event and whether an government order was issued preventatively or reactively to the COVID-19 outbreak.

e. State Appellate Decisions Re COVID-19 Coverage Disputes

As we approach the end of the second year of the COVID-19 pandemic, state appellate court decisions are being issued with increasing frequency. In *Indiana Repertory Theatre Inc. v*

[29] *Inns-by-the-Sea v. California Mut. Ins. Co.*, 71 Cal. App. 5th 688, 712 (2021) ("Numerous district court opinions have made the same observation in concluding that government stay-at-home and closure orders resulting from the pandemic did not give rise to Civil Authority coverage. (*Mudpie, Inc. v. Travelers Casualty Ins. Co. of America* (N.D.Cal. 2020) 487 F.Supp.3d 834, 844 [plaintiff was not entitled to Civil Authority coverage because "the government closure orders were intended to prevent the spread of COVID-19" rather than being based on any "prior property damage"]; *Mortar and Pestle Corp. v. Atain Specialty Ins. Co.* (N.D. Cal. 2020) 508 F.Supp.3d 575, 582 ["it is apparent from the plain language of the cited civil authority orders that such directives were issued to stop the spread of COVID-19 and not as a result of any physical loss of or damage to property"]; *Baker v. Oregon Mutual Ins. Co.* (N.D.Cal., Mar. 25, 2021, No. 20-cv-05467-LB) 2021 WL 1145882, at p. *5 ["the shutdown orders were issued to stop the spread of COVID-19 and were not about loss of or damage to property"]; *Muriel's New Orleans, LLC v. State Farm Fire and Casualty Co.* (E.D.La., Apr. 26, 2021, No. 20-2295) 535 F.Supp.3d 556, 573 [coverage under the Civil Authority provision was not invoked because "the Closure Orders were intended to prevent the spread of COVID-19" and therefore "were preventative and lack[ed] the requisite nexus with prior property damage"]; *Hair Studio 1208, LLC v. Hartford Underwriters Ins. Co.* (E.D.Pa., May 14, 2021, No. 20-2171) —– F.Supp.3d ——, ——, 2021 WL 1945712, at p.*10 ["the Closure Orders were issued to *prevent* the spread of the COVID-19 virus to any of these properties. That fact brings this claim outside the coverage of the Civil Authority endorsement."].)".)

Cincinnati Casualty Company,[30] the Indiana Court of Appeals affirmed the trial court's denial of Plaintiff's motion for summary judgment and the grant of defendant insurer's motion for summary judgment, holding that loss of use of the theater because of State coronavirus orders, was not enough to satisfy the "physical loss or damage" requirement in the policy. The appellate court held that plaintiff's theater building did not suffer any damage or alteration but "was unusable for its intended purpose because of an outside factor." Thus, there was no business income coverage afforded under the policy.

In *Sanzo Enterprises LLC v. Erie Insurance Exchange*,[31] the Ohio Court of Appeals affirmed the trial court's dismissal of plaintiff's lawsuit, agreeing with the 6th Circuit's decision in *Santo's Italian Café LLC v. Acuity Insurance Company,*[32] where the appellate court found "that overage for 'direct physical loss' of 'property' required showing that the insured had suffered tangible and concrete deprivation of the property itself" because "the plaintiff-restaurant still had access to the physical property and could make use of the property, even when it could not be used for its intended purpose, the plaintiff could not demonstrate a loss of property under the policy."

[30] *Indiana Repertory Theatre v. Cincinnati Cas. Co.*, No. 21A-PL-628, 2022 WL 30123, at *1 (Ind. Ct. App. Jan. 4, 2022).

[31] 2021 -Ohio- 4268, 2021 WL 5816448, at *6 (Ohio App. 5 Dist., 2021).

[32] 15 F.4th 398, 404 (6th Cir. 2021).

f. Federal Appellate Decisions Re COVID-19 Coverage Disputes

The 2nd,[33] 5th,[34] 6th,[35] 7th,[36] 8th,[37] 9th,[38] 10th[39] and 11th[40] Circuit Court of Appeals have all affirmed dismissals of lawsuits seeking coverage as a result of COVID-19 shutdowns. The federal appellate courts all agreed that loss of use does not amount to direct physical damage or loss.

The 1st and 3rd Circuit Court of Appeals have not decided a COVID-19 related matter on the merits of business interruption coverage. However, according to the University of Pennsylvania Law School COVID Coverage Litigation Tracker, current data shows that there are approximately six (6) appeals pending before the 1st Circuit and 47 appeals pending before the 3rd Circuit, any of which can be related to business interruption coverage as a result of COVID-19 shutdowns.[41]

Currently, neither the United States Supreme Court nor a State Supreme Court have issued any decisions regarding business interruption insurance coverage surrounding COVID-19 shutdowns. However, on January 7, 2022 the Massachusetts Supreme Judicial Court was the first highest state

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[33] *10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.*, 21 F.4th 216 (2d Cir. 2021) (brick-and-mortar art gallery and dealership).

[34] *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, 22 F.4th 450 (5th Cir. 2022) (restaurant).

[35] *Santo's Italian Café LLC v. Acuity Insurance Company*, 15 F.4th 398 (6th Cir. 2021) (restaurant); *Dakota Girls, LLC v. Philadelphia Indemnity Insurance Company*, 17 F.4th 645 (6th Cir. 2021) (preschools).

[36] *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327 (7th Cir. 2021) (development/hotels).

[37] *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1143 (8th Cir. 2021) (medical practice).

[38] *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021) (children's store).

[39] *Goodwill Indus. of Cent. Oklahoma, Inc. v. Philadelphia Indem. Ins. Co.*, 21 F.4th 704, 708 (10th Cir. 2021) (retailer).

[40] *Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co.*, No. 21-11046, 2021 WL 3870697, at *1 (11th Cir. Aug. 31, 2021) (dentist).

[41] https://cclt.law.upenn.edu/appeals/.

court to hear arguments in *Verveine Corp. et al. v. Strathmore Insurance Co. et al.*,[42] regarding business interruption claims under a standard all-risk commercial property policy involving COVID-19 related losses.[43] The court took the matter under advisement. Based on the oral argument and the Justice's questioning, legal experts opine that the Court will rule in favor of the insurer.[44]

g. Legislative Responses to Business Interruption Coverage

Since 2021, at least 11 states, which include California, Illinois, Maine, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Texas, and Washington, have had Legislators propose legislation that would require insurers to provide business interruption coverage for claims arising out of the coronavirus.[45] In California, Assembly Bill 1552 ("AB 1552") was introduced in the 2019-2020 legislative session but was withdrawn on June 30, 2020 after being revised.[46] On February 16, 2021, the revised version of AB 1552 was reintroduced to the legislature as AB 743.[47] As written, AB 743 would have created three rebuttable presumptions:

- With respect to coverage for general business interruption and extra expenses, a rebuttable presumption applies that COVID-19 was present on the insured's

[42] Supreme Judicial Court case number SJC-13172.

[43] https://www.law360.com/articles/1453009/mass-justices-hint-past-insurer-wins-may-sway-virus-suit?copied=1.

[44] https://agencychecklists.com/2022/01/18/sjc-hears-first-covid-19-business-interruption-coverage-appeal-and-insureds-eo-claim-against-its-agency-56411/.

[45] https://www.ncsl.org/research/financial-services-and-commerce/business-interruption-insurance-2021-legislation.aspx

[46] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1552.

[47] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB743.

property and caused physical damage to that property which was the direct cause of the business interruption.

- With respect to coverage for business interruption due to an order of civil authority, a rebuttable presumption applies that COVID-19 was present on property located within the geographical location covered by the order of civil authority and caused physical damage to that property which was the direct cause of the insured's business interruption.

- With respect to coverage for business interruption due to impairment of ingress and egress, a rebuttable presumption applies that COVID-19 was present on the property of a third party and caused physical damage to that property which was the direct cause that prevented ingress and egress to the insured's property and resulted in the insured's business interruption.[48]

AB 743 further provided that while it was not intended to affect the "applicability of any policy provision, including any language addressing loss or damage caused by a virus. However COVID-19 shall not be construed as a pollutant or contaminant for purposes of any exclusion within a commercial insurance policy unless viruses are expressly included in that exclusion policy language." No action has been taken by the California legislature on AB 473.[49]

[48] 2019 California Assembly Bill No. 1552, California 2019-2020 Regular Session, 2019 California Assembly Bill No. 1552, California 2019-2020 Regular Session.

[49] 2019 California Assembly Bill No. 1552, California 2019-2020 Regular Session, 2019 California Assembly Bill No. 1552, California 2019-2020 Regular Session.

2. The Number Business Interruption Insurance Claims May Trend Downward Moving Forward

It is highly likely that the overwhelmingly favorable decisions for insurers have deterred insureds from filing complaints seeking business interruption coverage as a result of the coronavirus. As discussed above, complaint filings involving insurance coverage claims related to the coronavirus have trended downward between 2020 and 2021. In 2022, the trend continues downward. As an example, according to the University of Pennsylvania Law School's COVID Coverage Litigation Tracker, in January 2021, 49 complaints were filed and in January 2022 so far, only four (4) have been filed.

B. Liability Insurance Market

1. Motor Vehicle Insurance

a. There Are Less Cars On The Road

According to the Federal Highway Administration total cumulative travel for 2021 has increased by 11.2% or 298.1 billion million vehicle miles. The cumulative annual estimate for 2021 is 2,960.3 billion vehicle miles traveled compared to a cumulative 2,351.9 billion vehicle miles traveled in 2020.[50] The Freight Transportation Services Index, which measures commercial vehicle travel on the roads and can act as an economic performance indicator, reported a 4.6% decline in freight traffic in 2020 but a 2.6% increase in 2021 as the economy begins to rebound from the coronavirus pandemic.[51] Experts expect the index to rebound to pre-pandemic levels in 2022.

[50] https://www.fhwa.dot.gov/policyinformation/travel_monitoring/20octtvt/

[51] https://www.ibisworld.com/us/bed/freight-transportation-services-index/112652/#:~:text=The%20US%20freight%20transportation%20services,waterway%2C%20pipeline%20and%20airfreight%20carriers.

b. Auto Insurance Premiums Decreased in 2020

Travel, previously impacted by the pandemic in the tail end of 2020, has since seen a resurgence in 2021. Per a report from the U.S. Department of Transportation, travel on all roads and streets is up 12.3%, or 29.2 billion vehicle miles, as compared to November 2020. [52] Although travel is returning to pre-pandemic levels, the number of collisions remain 15% below 2019 levels according to a report by CCC Intelligent Solutions.[53] Additionally, according to CCC, the percentage of collision claims where the vehicle was rendered non-drivable was greater in every month of 2021 compared the same month in 2020 and 2019. The number of non-drivable accidents is also correlated with more severe bodily injury claims. Relatedly, CCC reports that the average total loss claim cost climbed from slightly less than $8,000 in 2010 to slightly less than $10,000 in 2020, then jumped to more than $12,000 in 2021. However, this cost increase is likely caused by supply chain issue which may or may not resolve in the future. The CCC reports that supply chain disruptions have increased the costs of replacement parts and have made it harder to find necessary parts.[54]

As a result of less travel in 2020, insurers experienced less claims which led to massive income gains for insurers such as Progressive which reported a net income for April and May 2020 of $1.3 billion.[55] The combination of excess collections and reduced losses such as that reported by Progressive likely led insurers to issue premium refunds to their insureds in 2020.[56] The California

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52 https://www.fhwa.dot.gov/policyinformation/travel_monitoring/21novtvt/

53 https://227gsr5ihx54be8by2hxnudd-wpengine.netdna-ssl.com/wp-content/uploads/2021/10/10-Oct-Trends.pdf

54 https://www.claimsjournal.com/news/national/2021/10/18/306563.htm

55 https://chicago.suntimes.com/2020/7/3/21311409/automobile-insurance-coronavirus-refunds-progressive-state-farm-allstate-geico-illinois-michigan

56 https://www.propertycasualty360.com/2020/10/06/a-look-at-auto-insurers-responses-to-the-first-covid-19-wave/?slreturn=20210005111354; https://www.iii.org/insuranceindustryblog/insurers-respond-to-covid-19-6-05-2020/

Department of Insurance has reported that California automobile insurers returned $1.03 billion in premium relief to 18 million policy holders for the months of March, April, and May in 2020.[57]

However, premium refunds for auto insurance have ended and in 2022, those premiums are expected to increase an average of 5% nationally.[58] The premium increase is said to be related to both rising nationwide inflation and the higher traffic fatality rate in 2021.

c. Declining Overall Claims Leads To Increase In Customer Satisfaction

According to the J.D. Power 2021 U.S. Auto Claims Satisfaction Study, the nationwide surge in used vehicle prices and advancements in "straight-through-processing" ("STP"), drove customer satisfaction to a record high.[59]

- Customer satisfaction, measured on a 1,000 point scale, has increased 8 points from 872 to 880, a record high.
- Claimants that had their entire claim processed via a low-touch experience (STP) resulted in high levels of satisfaction (915 on a 1,000 point scale) whereas, claimants that interacted more manually and with three or more representatives during the claims process had the lowest levels of customer satisfaction.
- The lowest overall customer satisfaction scores were for claimants with at-fault status disputes[60]

[57] https://www.insurance.ca.gov/0400-news/0100-press-releases/2020/release056-2020.cfm

[58] https://www.cnbc.com/2022/01/04/auto-insurance-climbing-5percent-in-2022-where-its-most-least-expensive.html

[59] https://www.jdpower.com/business/press-releases/2021-us-auto-claims-satisfaction-study

[60] https://www.jdpower.com/business/press-releases/2021-us-auto-claims-satisfaction-study

d. Traffic Fatalities Are Increasing

The Insurance Information Institute reported that nationally in 2021 there was a 18.4% increase in traffic fatalities which represents approximately 20,160 individuals.[61] In addition, the National Highway Traffic Safety Administration ("NHTSA") reported that the number of people killed in the first half of 2021 represented the highest number of fatalities since 2006 as well as the highest increase ever recorded.[62] Additionally, in the first half of 2021, the overall miles traveled increased by about 173.1 billion miles, or about 13%.[63] The number of overall miles traveled rose from 1.28 deaths per 100 million vehicles miles traveled in 2020 to 1.34 in 2021.[64]

According to an article published by *Forbes* in September 2021, the surge in fatalities came despite a decrease in driving in 2020 on account of the coronavirus and is attributed to changing driving patterns and behaviors due to "drivers engag[ing] in more risky behavior, including speeding, failing to wear seat belts, and driving under the influence of drugs or alcohol."[65] NHTSA reported the following data in 2020:

- Vehicle fatalities involving alcohol increased to 26.9% by mid-July from 21.3% in March 2020

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[61] https://www.iii.org/fact-statistic/facts-statistics-highway-safety; https://www.nhtsa.gov/press-releases/usdot-releases-new-data-showing-road-fatalities-spiked-first-half-2021

[62] https://www.iii.org/fact-statistic/facts-statistics-highway-safety

[63] https://www.nhtsa.gov/press-releases/usdot-releases-new-data-showing-road-fatalities-spiked-first-half-2021

[64] https://www.propertycasualty360.com/2021/01/14/americans-are-driving-more-recklessly-in-the-pandemic-data-shows/?enlcmp=nltrplt2&kw=Americans%20are%20driving%20more%20recklessly%20in%20the%20pandemic%2C%20data%20shows&utm_campaign=dailynews&utm_content=20210114&utm_medium=enl&utm_source=email&utm_term=pc360

[65] https://www.forbes.com/sites/tanyamohn/2021/09/06/crash-stats-traffic-deaths-spiked-in-early-2021/; https://www.claimsjournal.com/news/national/2021/01/14/301480.htm

- The presence of marijuana was seen in 21.4% of fatal accidents in March and increased to 31.2%.
- Opioid-related incidents also increased from 7.6% to 12.9%
- 65% of drivers tested positive for one or more active drugs in their system; before the COVID-19 pandemic, this number was 50.8%.

The NHTSA also reported that "increases in sales of alcohol and marijuana are indicators of social changes that could have traffic safety implications."[66]

e. Dynamic Pricing Models Gain Traction

Dynamic pricing, also known as time-based or data-driven pricing, is one of the strategies being used more frequently by businesses to set flexible prices for their products based on current market feedback. Dynamic Pricing is very common in industries like transportation, entertainment and retail, but less so in insurance, in part due to more extensive regulations. In the insurance context, an insurer can potentially modify the premium being charged up or down depending on data gleaned from telematics indicating how safely or recklessly a driver is operating a vehicle. Based on a recent survey by Arity, an insurance telematic platform, drivers are more receptive to data-driven policies.[67] In early 2021, nearly 2,000 licensed drivers over the age of 18 were surveyed and indicated that their insurance premium should be based on factors such as: previous driving records, the number of miles they drive, and how safely they drive.

[66] https://www.nhtsa.gov/sites/nhtsa.gov/files/2021-10/Traffic-Safety-During-COVID-19_Jan-June2021-102621-v3-tag.pdf

[67] https://www.arity.com/move/what-lies-ahead-the-ultimate-predictor-for-insurers/

If a competitive and sustainable data-driven dynamic pricing model is successful moving forward, insureds might put pressure on data-driven policies in other sectors of the insurance market outside of the automobile insurance industry.

Although telematics has seen some moderate traction in the auto insurance industry, it has not yet gained widespread acceptance. This is likely due to the pricing paradox it creates: if you charge too much with the promise of reductions for good driving no one will sign up, but charge too little and the company will make no profit.[68] Further, the telematics pricing fails to take into account the context of some driving habits. For example, driving above the speed limit on a sunny day with no traffic might be labeled as "dangerous" whereas driving under the speed limit but well above the "natural" flow of traffic on a snowy road may be labeled as "safe." If telematics providers can provide a more realistic model, this system may see greater acceptance moving forward.

2. Employment Claims

Employment litigation claims related to COVID-19 continue to trend upward since 2020.[69] There was a 59% increase in newly filed lawsuits in the first eight months of 2021 compared to those filed in the last eight months of 2020.[70] Further, an employment law litigation tracker, which has collected data since March 12, 2020, notes the following:

- There have been 5,017 lawsuits filed nationally in response to COVID-19

[68] https://www.dig-in.com/opinion/telematics-failing-how-to-perfect-the-science-behind-driving-rates

[69] https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-litigation-summer-2021.aspx.

[70] https://www.usatoday.com/story/money/2021/01/05/covid-19-lawsuits-pandemic-spawned-over-1-000-workplace-lawsuits/4135280001/.

- Of this total, 4,458 cases have been filed by individuals and 559 cases have been filed as class actions.

- California is the epicenter of litigation with 1,528 total cases filed [71] .

According to an employment law litigation tracker, the types and number of lawsuits filed in California are, as follows:

Type of Case	Federal	State	Shared Parental Leave	Class Action
Unspecified	6	72	52	26
Arbitration	17	5	22	0
Background Checks	0	1	0	1
Benefits – non-ERISA	11	12	21	2
Breach of Contract	12	22	34	0
Constitutional Claims	240	85	250	75
Discrimination	1,086	1,378	2,389	75
ERISA	29	1	23	7
Labor Litigation	1	1	2	0
Labor Relations	61	47	102	6
Leaves of Absence	874	439	1,276	37
Other Civil Litigation	365	941	1,232	74
Privacy Rights	70	45	87	28
Retaliation	930	1,369	2,250	49
Tax	1	2	2	1
Unfair Competition	7	19	19	7

[71] https://www.littler.com/covid-19.

Wage/Hour	372	716	748	340
WARN	21	3	8	16
Workplace Safety	305	812	1,039	78
Total	4,488	6,010	9,668	829

a. Legislative Responses To Coverage For Essential Workers

Generally, COVID-19 would not qualify as a compensable workers' compensation injury because routine illnesses like a cold or the flu are not directly tied to the workplace and thus, not covered by workers' compensation insurance. However, in addition to the attempted enactment of AB 1552 and AB 743, relating to Business Interruption Coverage mentioned above, California Senate Bill 1159 ("SB 1159") was enacted on September 17, 2020 regarding workers' compensation claims. SB 1159 codifies and supersedes Governor Newsom's Executive Order N-62-20, by establishing two rebuttable presumptions: 1st, that an "injury," which includes illness or death resulting from the novel coronavirus, "arose out of and in the course of the employment," and 2nd, that this "injury" is compensable.[72] SB 1159 is currently in effect as California Labor Code §§ 3212.86, 3212.87, and 3212.88 and is set to expire on January 1, 2023. The presumptions of SB 1159 apply to employees in the following ways:

- All employees injured between May 19, 2020 and July 5, 2020
- Active firefighters, police, and healthcare workers injured after July 6, 2020
- All employees injured after July 6, 2020 who test positive during an "outbreak" and whose employer has five or more employees.

[72] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB1159

Except under limited exceptions, California's Labor Code bars an employee injured while working from filing a lawsuit against their employer.[73] Thus, the combination of the presumptions and the exclusive remedy under workers' compensation will undoubtedly lead to an increase in workers' compensation claims. Accordingly, there will likely be an increase in insurance premiums for workers' compensation insurance for these employers and government entities moving forward.[74]

In addition to California, at least 27 other states and Puerto Rico have taken action to extend workers compensation coverage to include COVID-19 as a work-related illness.[75] Some legislation creates a presumption of coverage for various types of workers while others limit the coverage to first responders and health care workers, or essential workers. California and Wyoming are the only states so far to extend coverage to all workers.

b. Exceptions To The Exclusive Remedy Rule

Employers and government entities should be aware of the following exceptions to the exclusive remedy rule, which could be applicable to cases involving COVID-19 and, if applicable, would allow an employee to file a civil suit against their employer:

(i) Statutory Exceptions[76]

- Physical Assault: an employee, or the employee's dependents in the event of the employee's death, may sue the employer for damages when the employee's injury or death is proximately caused by a willful physical assault by the employer.[77]

[73] Labor Code § 3600.

[74] https://www.lexology.com/library/detail.aspx?g=63a683f9-13fa-42eb-bf7c-12429fe94681

[75] https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx.

[76] There are additional exceptions for failure to provide a guard on a power press [Labor Code § 4558] and uninsured employers [Labor Code § 3706]

[77] Labor Code § 3600(b)(1).

However, a prior California appellate decision has previously held that concealment of known, unsafe working conditions and failure to provide protective equipment does not constitute an "assault" under the California Labor Code.[78]

- Fraudulent concealment: an employee may bring an action for an injury or disease which is aggravated by the employer's fraudulent concealment of the injury or disease and its connection with the employment.[79] Employers are not liable for an initial injury or infection but rather aggravation of an injury. However, as many employees have underlying conditions or comorbidities, this exception may be more prevalent moving forward.

- Fair Employment and Housing Act: FEHA prohibits an employer from, among other things, discriminating against a person in compensation or in terms, conditions or privileges of employment because of race.[80] There has been at least one class-action lawsuit has been filed against Amazon alleging that it discriminated against employees based on race by, among other things, failing to provide adequate PPE to African-American employees as compared to Caucasian employees.[81] The CDC reports that African-Americans make up 12.5% of coronavirus cases and 13.8% of deaths.[82]

[78] *Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal. App. 4th 710, 726.

[79] Labor Code § 3600(b)(2).

[80] (Gov. Code, § 12940, subd. (a)

[81] *Smalls v. Amazon*, N.Y. (E.D.N.Y. 2020) Case No. 1:20-CV-05492

[82] https://covid.cdc.gov/covid-data-tracker/#demographics

- Whistleblower: employees in California may not be retaliated against for disclosing suspected violations of state or federal law to a government agency, law enforcement, or a regulatory agency. According to Federal Whistleblower data, there were 6,148 Federal OSHA claims filed in 2021 compared to 4,344 claims filed in 2020.[83]

- Dual Capacity: an employee may sue their employer where the employer manufactures a product which is "sold, leased, or otherwise transferred" to a third party and the product is subsequently provided to the employee.[84] Because this exception requires employers to manufacture a product, it will likely have very limited application. However, entities which manufacture personal protective equipment ("PPE") should be aware of this potential exposure.

- Uninsured Employers: an employee or their dependents may sue an employer who fails to procure workers' compensation insurance.[85]

(ii) Trends Related to Employment Law Cases

Employment lawsuits for retaliation claims represent more than 50% (2,798 out of 5,017 lawsuits) of the lawsuits filed against employers since March 12, 2020 involve.[86] Claims for discrimination due to a disability are the second most frequently filed lawsuits representing about 30% of the total lawsuits or 1,701 out of 5,017 claims.

[83] https://www.whistleblowers.gov/covid-19-data

[84] Labor Code § 3600(b)(3).

[85] Lab. Code, § 3715

[86] https://www.littler.com/publication-press/publication/covid-19-labor-employment-litigation-tracker

- Leave and Retaliation: In *Kofler v. Sayde Steeves Cleaning Service, Inc.*,[87] an employee who requested time off under the newly-enacted Families First Coronavirus Relief Act ("FFCRA") due to children's school closures as a result of the coronavirus and was subsequently terminated could maintain an action under the enforcement provision of the Fair Labor Standards Act ("FLSA") incorporated into the FFCRA.[88]

  In *Gomes v. Steere House*,[89] an employee who requested time off under FMLA after contracting the coronavirus and was subsequently terminated could maintain an action for retaliation against her employer.

- Discrimination and Reasonable Accommodations: In *Bess v. District of Columbia*,[90] an employee with the District of Columbia Department of Corrections alleged that her diabetes put her at higher risk for coronavirus but the department assigned her to a medical unit housing inmates suspected to have the disease. Further, in *Peeples v. Clinical Support Options, Inc.*,[91] the court granted a plaintiff preliminary injunction request to work from home for 60 days. The plaintiff suffered from mild asthma and had previously worked from home but had subsequently been required to return to work, although their employer did provide KN95 masks and other PPE.

[87] No. 8:20-CV-1460-T-33AEP, 2020 WL 5016902 (M.D. Fla. Aug. 25, 2020)

[88] 29 C.F.R. § 826.150(b)(2); 29 U.S.C. 216, 217

[89] 504 F. Supp. 3d 15, 20 (D.R.I. 2020).

[90] No. 19-CV-3152 (JEB), 2020 WL 4530581 (D.D.C. Aug. 6, 2020)

[91] No. 3:20-CV-30144-KAR, 2020 WL 5542719 (D. Mass. Sept. 16, 2020)

In *Lin v. CGIT Sys., Inc.*,[92] an employee requested to continue working from home after employer requested all employees to return to work following a closure of non-essential businesses due to the coronavirus. The employee alleged he was entitled to such an accommodation because had a medical history of high blood pressure and lived with his elderly mother who was considered a high risk of COVID-19. The employer denied the accommodation and terminated the employee for refusing to return to work. The Court denied defendant's motion to dismiss the complaint for disability and age discrimination but granted dismissal on a count for race/national origin discrimination.

- Wage and Hour Claims: In *Emery v. Home Caregivers of Cookeville, LLC*,[93] the court employees notice of certification for failure to pay overtime pay for "24/7" work during the COVID-19 pandemic holding, "[n]othing in the plain text of the FLSA suggests that a DOL-supervised settlement proceeding and a district court collective action cannot proceed at the same time."

- Safe Work Environment: In *Brooks v. Corecivic of Tennessee LLC*[94], an employee alleged that her employers failure to maintain a safe working environment by "adequately" responding to the coronavirus constituted a constructive discharge of her employment. The Court granted employer's motion to dismiss as to employee's claims for negligent supervision and intentional infliction of emotional distress, but did not dismiss employee's wrongful constructive termination claims.

[92] No. CV 20-11051-MBB, 2021 WL 4295863 (D. Mass. Sept. 21, 2021)

[93] No. 2:20-CV-38, 2020 WL 7240159 (M.D. Tenn. Dec. 9, 2020).

[94] No. 20CV0994 DMS (JLB), 2020 WL 5294614 (S.D. Cal. Sept. 4, 2020).

c. Decreases In Premium Incomes For Policies Calculated Based On Payroll

Workers' Compensation insurers, including California insurers, which use payroll as a factor in calculating premium rates, may expect to see a drop in premiums moving forward. According to the U.S. Bureau of Labor Statistics, the unemployment rate between November 2018 to February 2020 had remained around 4%.[95] After February 2020, the unemployment rate spiked at over 14%. As of December 2021, the total nonfarm unemployment rate declined to 3.9%.

d. Adjusting to the Work-From-Home Model

According the Keith Goddard, the Director of the Directorate of Evaluation and Analysis of the U.S. Department of Occupation Safety and Health, "[i]njuries and illness that occur while an employee is working at home, including work in a home office, will be considered work-related if the injury or illness occurs while the employee is performing work for pay or compensation in the home and the injury or illness is directly related to the performance of work…."[96] Mr. Goddard provided the following examples of what is and is not work related:

> For example, if an employee drops a box of work documents and injures his or her foot, the case is considered work-related. If an employee's fingernail is punctured by a needle from a sewing machine used to perform garment work at home, becomes infected and requires medical treatment, the injury is considered work-related. If an employee is injured because he or she trips on the family dog

[95] https://www.bls.gov/news.release/pdf/empsit.pdf

[96] https://www.osha.gov/laws-regs/standardinterpretations/2009-03-30#:~:text=Injuries%20and%20illnesses%20that%20occur,to%20the%20performance%20of%20work

> while rushing to answer a work phone call, the case is not considered work-related. If an employee working at home is electrocuted because of faulty home wiring, the injury is not considered work-related.[97]

Since the beginning of the pandemic, there has been an increase in claims related to working from home due to a lack of ergonomic equipment in home offices. The goal of ergonomic practices is to reduce the risk of musculoskeletal disorders.[98] Because individuals working from home may work on their kitchen tables, couches or beds, their bodies suffer from lack of support and appropriate postures. As a result, medical practitioners have seen a rise in back-related injuries, shoulder sprains and strains, injuries to rotator cuffs, pinched nerves in the neck and cervical spine, eye strain, wrist pain, and carpal tunnel syndrome.[99]

Recently, a German court ruled that a man could file an claim on his employer's insurance when he slipped on his stairs "commuting" from his bedroom to his home office.[100] Although former OSHA Chief of Staff Debbie Berkowitz states it would be "unlikely" that a United States Court would rule the same way , this tends to suggest the evolving approach to the modern working

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97 https://www.osha.gov/laws-regs/standardinterpretations/2009-03-30#:~:text=Injuries%20and%20illnesses%20that%20occur,to%20the%20performance%20of%20work

98 https://osg.ca/7-simple-tips-for-improving-workplace-ergonomics/

99 https://www.iwpharmacy.com/blog/work-from-home-injuries-may-be-next-workers-comp-trend

100 https://www.treasuryandrisk.com/2021/12/20/workers-comp-must-cover-remote-employees-injury-suffered-during-commute-411-26195/?slreturn=20220031131729

conditions.[101] According to Apollo Technical, more than 4.7 million people work remotely at least one-half the time in the United States, and globally 16% of companies are fully remote.[102]

e. COVID-19 Vaccine Employer Mandates

In response to President Joseph Biden's announcement on September 9, 2021 that he planned to increase vaccinations among Americans by requiring employers with at least 100 employees "to ensure their workforces are fully vaccinated or show a negative test at least once a week", the federal Occupational Safety and Health Administration ("OSHA") issued an Emergency Temporary Standard ("ETS") requiring all employers with at least 100 employees ensure all workers are fully vaccinated against COVID-19 or submit to weekly COVID-19 testing.[103] The ETS required that either all employees be vaccinated unless the employee qualifies for a medical or religious exemption, in which case the exempt employees were required to participate in weekly testing and wear face coverings; or employees could either show proof of vaccination status or participate in weekly testing.[104]

Numerous legal challenges were filed against the ETS across the country. On November 12, 2021, the Fifth Circuit Court of Appeals issued an order staying enforcement of the ETS. Other legal challenges were consolidated for review before the Sixth Circuit Court of Appeals which then

[101] https://www.wbur.org/hereandnow/2022/01/07/injury-work-from-home

[102] https://www.apollotechnical.com/statistics-on-remote-workers/

[103] https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf.

[104] https://www.littler.com/publication-press/publication/federal-osha-issues-long-awaited-vaccine-or-test-emergency-regulations.

dissolved the Fifth Circuit's stay of the ETS on December 17, 2021. Several emergency appeal applications were then immediately filed with the U.S. Supreme Court.[105]

On January 13, 2022, the U.S. Supreme Court once again stayed the implementation of the ETS in a 6-3 decision, holding that the challengers were likely to succeed on their argument that OSHA lacked the statutory authority to publish the ETS. In its decision, the U.S. Supreme Court noted that OSHA is empowered to "set *workplace* safety standards, not broad public health measures."[106] (Emphasis in original). The Court reasoned that "[a]lthough COVID–19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most[]" because "COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather."[107] (Emphasis in original). The Court further reasoned that COVID–19 is a "universal risk [] no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases."[108] Therefore, the Court concluded that "[p]ermitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization."[109] Subsequently, on January 25, 2022, OSHA announced its withdrawal of the ETS.[110]

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105 https://www.littler.com/publication-press/publication/federal-osha-withdraws-its-vaccine-or-test-ets-whats-next.

106 https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf.

107 https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf.

108 https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf.

109 https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf.

110 https://www.littler.com/publication-press/publication/federal-osha-withdraws-its-vaccine-or-test-ets-whats-next.

The U.S. Supreme Court's decision blocking OSHA's vaccine mandate for large employers has created confusion for employers which have implemented the mandate or would like to do so. Legal professionals are of the opinion that the Court's ruling does not prevent private employers from implementing a vaccine mandate in their businesses. However, employers should be cautious regarding whether they require an employee to be vaccinated to return to work or strongly encourage vaccination. A mandatory vaccination policy may have potential workers compensation implications if a worker experiences any health complications as a result of the vaccine.[111] Thus, choosing to mandate or strongly encourage getting the vaccine may pose some benefit, but may also will lead to increased exposure. The Equal Employment Opportunity Commission offers guidance about employer-mandated vaccine programs.[112]

f. Frequency And Industries Affected By Employee Lawsuits Due To The Coronavirus Pandemic

The employment litigation tracker maintained by Fisher Phillips, collecting data between January 30, 2020 through January 27, 2022, shows the following trends in California:

- Companies with 50 or fewer employees make up 29.46% of all cases.
- The healthcare industry has the highest case filings representing 19.2% of all cases.
- The retail industry has the second highest case filings representing 11.7% of all cases.

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111 https://www.businessinsurance.com/article/20210106/NEWS06/912338898/Mandatory-vaccine-policies-may-have-workers-comp-implications

112 https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?mkt_tok=eyJpIjoiWW1VMk4yUTBOakV4TmpRMyIsInQiOiJEemxoTmhtUmNDaGI5VjVcL3dXTXA2VmF1TjZhZEJUYUNteGRkWUVYc2JGZUtUYjFBaHBaOG82c1orVUVwSnI4ejFINFN3ckt3QzcwRjdUS1hzVnRwbVF4SXBmTW0wcWVXOWZ0ZU1lQ2Q3YVVFbytKeEExdjdvN0RlVHVWbXpKTkQifQ%3D%3D

g. Potential Changes In Costs Of Cases

The coronavirus pandemic will present various issues with respect to costs and settlement of workers' compensation claims.

- Increased prevalence of tele-healthcare and virtual physical therapy will likely impact rehabilitation times of workers, and probably not for the good.

- As hospital capacity continues to be stretched to accommodate patients infected with the coronavirus, elective surgeries for joint and back-related work injuries will likely be delayed and increase the risk of injury aggravation or medical complications.

- Insurers likely can expect a decrease in medical payments claims while anticipating an increase in wage replacement and pharmaceutical costs claims.

- In states which allow settlement for worker's compensation claims, there will likely be an increase in plaintiffs willing to settle claims earlier.

C. Other Considerations

1. Premium Refunds May Not Be Confined to the Auto Industry

Although auto insurers were the catalyst for insurance premium refunds in 2020, other segments of the insurance industry may have to follow suit.

- On April 13, 2020, California Insurance Commissioner Ricardo Lara issued Bulletin 2020-3[113] which ordered insurers[114] to make initial premium refunds for the months of March and April.

- On May 15, 2020, Bulletin 2020-3 was extended to the month of May by Bulletin 2020-4.[115]

- Subsequently, Commissioner Lara issued an Order[116] on July 1, 2020, which mandated insurance companies to re-compute premium charges for workers' compensation insurance, consistent with Bulletins 2020-3 and 2020-4.

Policyholders are now seeking similar premium refunds under commercial insurance policies for the time period in which non-essential businesses were shut down by way of emergency orders in 2020 due to the coronavirus pandemic. Most recently, in *Alissa's Flowers, Inc. v. State Farm Fire & Cas. Co.*,[117] the Eighth Circuit Court of Appeals affirmed the dismissal of a Missouri class action lawsuit brought by a flower shop against its insurer seeking a refund of a portion of the premium paid during the coronavirus shutdowns.

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[113] https://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/upload/Bulletin_2020-3_re_covid-19_premium_reductions-2.pdf

[114] Bulletin 2020-3 listed private passenger automobile insurance, commercial automobile insurance, workers' compensation insurance, commercial multiple peril insurance, commercial liability insurance, medical malpractice insurance, and "any other line of coverage where the measures of risk have become substantially overstated as a result of the pandemic."

[115] https://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/upload/Bulletin-2020-4-Premium-Refunds-Credits-and-Reductions-in-Response-to-COVID-19-Pandemic.pdf

[116] https://www.insurance.ca.gov/0400-news/0100-press-releases/2020/upload/nr052WCRatingRules06172020.pdf

[117] No. 20-3340, 2022 WL 319846 (8th Cir. Feb. 3, 2022)

The flower shop owner, on behalf of the class members, alleged that policyholders had "overpaid" premiums "in light of its 'significantly lower exposure rate due to COVID-19.'"[118] The District Court found, and the Court of Appeals agreed, that under statutory law, the policyholder had to first exhaust administrative remedies when challenging an insurers rate charges. The Court of Appeals also agreed with the District Court that the policyholder's contention that she overpaid premiums but did not contend that the amount of coverage should have also changed was the equivalent to challenging the rate. The District Court found that "the factual allegations 'presume[d] State Farm would have applied a lower rate which factored in COVID-19 in computing a lower premium.'"[119] Therefore, because policyholders had not exhausted administrative remedies, the Court did not have authority to grant relief.

However, in California two (2) other class action lawsuits make similar contentions, one of which has withstood dismissal. In *Rejoice! Coffee Company, LLC., v. The Hartford Financial Services Group, Inc.*,[120] a coffee shop owner represented a class of business owners in contending that the insurer "was obligated to refund premiums or make adjustments warranted by the reduction in business operations caused by the COVID-19 pandemic."[121] The insurer sought dismissal, arguing that the under California Insurance Code § 1860.1 the Insurance Commissioner had exclusive jurisdiction over "ratemaking." The District Court asked the Insurance Commissioner to submit a brief on whether or not it had exclusive jurisdiction as alleged by the insurer.

[118] No. 20-3340, 2022 WL 319846, at *1 (8th Cir. Feb. 3, 2022)

[119] No. 20-3340, 2022 WL 319846, at *2 (8th Cir. Feb. 3, 2022)

[120] No. 20-CV-06789-EMC, 2021 WL 5879118 (N.D. Cal. Dec. 9, 2021)

[121] No. 20-CV-06789-EMC, 2021 WL 5879118, at *1 (N.D. Cal. Dec. 9, 2021)

In response, the Insurance Commissioner opined "that a suit challenging 'an insurer's refusal to adjust its insurance premiums to account for the changed circumstances posed by the COVID-19 pandemic [did] not implicate California Insurance Code [§] 1860.1'" and any immunity under § 1860.1 was only available when: "(1) 'the insurer's activity must be affirmatively authorized by the relevant ratemaking statutes,' and (2) 'there must be concerted action by two or more insurers.'"[122] Furthermore, the Insurance Commissioner noted that immunity under § 1860.1, also extends to "actions or agreements made by insurers that are affirmatively authorized under chapter 9" of the California Insurance Code. Therefore, the Insurance Commissioner concluded that "'the rate and rating plan as applied to a policyholder's situation could result in a legal violation actionable under the UCL[]' and explicitly noted "that 'chapter 9 does not authorize excessive premiums, unfair practices, or the misapplication of approved rates' and therefore, 'immunity under section 1860.1 does not apply to claims against such unauthorized conduct.'"[123]

Interestingly, in this case the District Court noted that the policyholder relied on the Bulletin's discussed above issued by the California Insurance Commissioner in which it was "acknowledged…that projected loss exposures of many insurance policies have become overstated or misclassified as a result of the COVID-19."[124] The District Court further found that in this case, the policyholder was challenging "the *application* of approved rates/the rate plan, not the plan itself" and thus did not challenge an "action authorized by the Insurance Commissioner."[125] (Emphasis in original.)

[122] No. 20-CV-06789-EMC, 2021 WL 5879118, at *6 (N.D. Cal. Dec. 9, 2021)

[123] No. 20-CV-06789-EMC, 2021 WL 5879118, at *6 (N.D. Cal. Dec. 9, 2021)

[124] No. 20-CV-06789-EMC, 2021 WL 5879118, at *6 (N.D. Cal. Dec. 9, 2021)

[125] No. 20-CV-06789-EMC, 2021 WL 5879118, at *6 (N.D. Cal. Dec. 9, 2021)

Very similar arguments were made in the second class action suit pending in California *Boobuli's LLC, v. State Farm Fire and Casualty Company*.[126] The District Court in this case granted the insurer's motion to dismiss on a "technicality" and the plaintiff recently filed an amended complaint.[127] Other courts have refused to find "unfairness" on the part of insurers for allegations that premium refunds are owed because of the pandemic.[128]

2. Insurance Premium Rates Appear To Be Increasing Across The Industry

The Insurance Value Added Network Services ("IVANS") Index, which measures 120 million transactions from 32,000 independent insurance agencies and 400 insurers, released its Q4 and year-end report for insurance transactions in 2021.[129] The Q4 report shows that commercial auto, business owners, general liability, commercial property and umbrella policies insurance premiums were trending positively. However, workers compensation premiums continued to trend negatively.

[126] Case No. 20-cv-07074-WHO

[127] https://www.claimsjournal.com/news/national/2022/02/04/308454.htm

[128] https://www.jdsupra.com/legalnews/insurance-class-action-report-2021-6203272/ "(*G.O.A.T. Climb & Cryo, LLC v. Twin City Fire Ins. Co.*, 2021 WL 2853370 (N.D. Ill. July 8, 2021) (holding that "settled law holds that charging an unconscionably high price generally is insufficient to establish a claim for unfairness"; that where a plaintiff could freely shop for alternative products at a more acceptable price, "it is difficult to see how the premium that [an insurer] charged and that [an insured] freely paid could be 'unfair' under the ICFA"; and that "[a]n insurance contract cannot be called unfair under the ICFA simply because the purchase proved in hindsight to be a losing bet"); *Grossman v. GEICO Cas. Co.*, 2021 WL 5229080 (S.D.N.Y. Sept. 13, 2021) (dismissing action on filed-rate grounds because the plaintiff's insurance rates "were filed with NYDFS" and were "only allegedly 'excessive' in retrospect, and the fact that these rates were approved by NYDFS renders them per se reasonable and unassailable"); *Jones v. GEICO Cas. Co.*, 2021 WL 3602855 (D. Ariz. Aug. 13, 2021) (declining to find purportedly "unfair windfall" to be unconscionable and noting that "Plaintiff's argument ignores the inherent risk parties take on when entering into an insurance agreement" and that "[c]ourts do not rescind a contract just because the results appear unfair in hindsight")."

[129] https://interact.ivansinsurance.com/ivans-index-year-end-report-insurers/p/1

D. Unique Premises Liability Exposure Due to Government Purchases of Hotels as Homeless Shelter

The need to house homeless individuals during the coronavirus pandemic to provide shelter and practice social distancing led states such as California and Oregon to use federal emergency pandemic relief money to purchase hotels to use as homeless shelters.[130] In California, the State government will own and operate the units, while in Oregon, hotel units will be owned by nonprofit housing and social services providers. The housing programs first initiated as hotel room rentals for the homeless, but have now transitioned to hotel purchases. According to an executive officer for an organization that builds low-income housing in Oregon, buying hotels is "far less expensive…than to constantly pay rent."[131] As these housing programs continue to develop, they will most likely present unique exposures to premises and genera liability.

E. Anticipated Rise In Claims Under Employment Practices Liability Insurance (EPL)

The rise in employment discrimination lawsuits related to COVID-19 are expected to increase due to employer vaccine mandates, employee leave, accommodations for remote work, discrimination related to workplace adjustments or layoffs, and retaliation after an objection to unsafe work conditions.[132] This has led employers to tender more claims to their EPL carriers to help cover

[130] https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/12/04/prompted-by-pandemic-some-states-buy-hotels-for-the-homeless

[131] https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/12/04/prompted-by-pandemic-some-states-buy-hotels-for-the-homeless

[132] https://agentblog.nationwide.com/commercial-insights/general-industries/top-employment-practices-liability-trends-and-risk-management-considerations/

defense costs and awards.[133] According to Reuters, a Lloyd's of London insurer has indicated North America is a "'high exposure area'" for insurers.[134]

Insurers such as Lloyd's of London have started to remove EPL coverage that may have been offered as part of a general business policy. In addition, insurers are both restricting coverage in new or renewed policies and increasing premium rates. Since the coronavirus pandemic started, EPL insurers have seen a 22% increase in employers seeking coverage, despite an increase of 10-20% in premium rates.

F. Anticipated Changes in the Future

1. Prevalence Of Cyber Insurance As A Stand Alone Policy

As telecommuting and the work-from-home model become the new norm, governmental entities and businesses will be at an increased risk for cyber losses. Insurers or cyber insurers will likely begin to incorporate cyber insurance or create an entire standalone policy to insure against such losses.

According to Mordor Intelligence, the cyber security insurance market was valued at $7.36 billion in 2019 and is expected to have a compound annual growth rate of 24.30% between 2020 and 2025, reaching a projected valuation of $27.83 billion by 2025.[135] Likewise, the S&P Global Ratings

[133] https://www.reuters.com/business/insurers-worry-about-covid-19-discrimination-claims-workers-return-desks-2021-08-06/

[134] https://www.reuters.com/business/insurers-worry-about-covid-19-discrimination-claims-workers-return-desks-2021-08-06/

[135] https://www.mordorintelligence.com/industry-reports/cyber-security-insurance-market

estimates that cyber insurance premiums total about $5 billion currently, but expect a 20-30% increase in the coming years.[136]

2. Parametric Solutions

The lack of pandemic coverage in traditional insurance policies has been the topic of future insurance for pandemic type losses.[137] Parametric insurance covers certain perils and "pays out when a predefined loss event occurs and the loss event exceeds a specific dollar or index amount that was pre-agreed to in the policy."[138] Other countries such as the U.K. offer parametric coverage for flash floods. The coronavirus pandemic and other catastrophes have created an interest in parametric insurance as another way for insurers to provide coverage.

G. Property Loss Ratios Increased Due To CAT Losses

In the first half of 2021, the U.S. experienced approximately $40 billion in losses in weather related insured losses which represented a 25% increase in a 10-year average of $32 billion.[139] It is estimated that Winter Storm Uri alone caused approximately $15 billion in losses. In the second half of 2021, it is projected that Hurricane Ida likely added additional losses estimated between $31 billion and $44 billion.[140] Record high losses in 2021 have caused insurers to take different approaches when underwriting risks.

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136 https://www.spglobal.com/ratings/en/research/articles/200902-cyber-risk-in-a-new-era-insurers-can-be-part-of-the-solution-11590046?utm_campaign=corporatepro&utm_medium=contentdigest&utm_source=Insurance

137 https://www.propertycasualty360.com/2021/02/23/what-is-parametric-insurance-and-why-should-we-care/

138 https://www.propertycasualty360.com/2021/02/23/what-is-parametric-insurance-and-why-should-we-care/

139 https://woodruffsawyer.com/wp-content/uploads/2021/11/PC-Looking-Ahead-Guide-2022.pdf

140 https://deloitte.wsj.com/articles/insurers-poised-to-accelerate-growth-in-2022-01643814770?mod=Deloitte_riskcompliance_wsjarticle_h1&tesla=y#:~:text=Press%20release%2C%20%E2%80%9CSevere%20weather%20events,Institute%2C%20August%2012%2C%20202

III. PRACTICAL CONSIDERATIONS FOR THE INVESTIGATION OF CLAIMS

Insurers, businesses, and governmental entities should be cognizant of the practical considerations of claim investigation and management moving forward. Because of the ongoing and persistent nature of the coronavirus pandemic, and its ability to be transmitted through the air and by other means, the manner in which claims are investigated, evaluated and resolved is significantly impacted.

- **Field investigations**

  Consideration must be given to the risks posed to the adjusters, investigators and others as well as the risk to the public at large. Many insurers, claim adjusters, adjusting and investigation firms, risk consultants or managers and other allied parties have banned or severely restricted in performing field adjustments and investigations.

- **Witness interviews**

  Witness who might otherwise be fully cooperative are more likely to decline cooperation out of concern for exposure, violation of public health orders, child care issues and a host of other limitations associated with the manner in which the coronavirus pandemic has upended society. Remote interviews and statements may

1.&text=Press%20release%2C%20%E2%80%9CRMS%20Estimates%20US,RMS%2C%20September%2016%2C%202021.

be available via Zoom and other applications, but the issue then becomes one of the effectiveness of a remote interview or statement.

- **Ability or willingness of members to cooperate**

  Employees and staff of members are likely to be working remotely or otherwise have limited availability because they are quarantining, recovering from illness, caring for family members, unavailable due to child care commitments, etc. The net effect is delay, lack of cooperation, less effective investigation and an overall reduction in the expediency and effectiveness of handling a claim.

- **Availability of governmental, law enforcement, and consultant resources**

  Notwithstanding the essential nature of government services, law enforcement and expert consultants in various fields, such providers are likely to be understaffed (for all the same reasons affecting other employers) or offering reduced services. Again, the net effect is delay.

- **Governmental regulations and directives**

  Regulators, such as Insurance Commissioners, have issued requests, recommendations and orders impacting the handling and resolution of claims during the coronavirus pandemic. These range from reminding insurers of the need to be vigilant and cooperative in working with claimants who may be adversely impacted, to outright orders prohibiting denials of coverage under certain circumstances until any state of emergency order associated with the coronavirus pandemic has been lifted.

Insurers should be familiar with the laws governing insurance commissioners and the authority given to them by law in order to properly determine whether a notice is advisory or mandatory. For example, under California law, "[n]o state agency," including CDI, "shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule . . . unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to" the extensive rulemaking procedures of the Administrative Procedures Act. (Cal. Gov. Code, § 11340.5(a).)

In addition, a Notice effective date may trail the termination date of a State of Emergency proclamation which may be governed by Statute. For example, Cal. Gov. Code § 8629 provides that a "state of emergency" can be terminated in one of two ways: "by proclamation of the Governor or by concurrent resolution of the Legislature declaring it at an end." Therefore, if the Governor of California does not make a proclamation terminating the "state of emergency" or the Legislature does not make a concurrent resolution, the "state of emergency" will be ongoing, making the request in the Notice also ongoing by its terms, until the end of the "state of emergency". However, it is important to note that the request may only apply in the case of a policyholder whose circumstances are such that the "statewide 'state of emergency' or other 'state of emergency'" impacts that "specific policyholder."

Below are examples of three Notices issued by the California Department of Insurance ("CDI") in response to the handling of claims during the coronavirus pandemic:

- CDI Notice Dated March 18, 2020: Commissioner Ricardo Lara "intends to consider the extraordinary circumstances relating to the COVID-19 outbreak and the resulting disruptions to normal business operations when evaluating whether insurers and other Department licensees have complied with their respective legal and commercial obligations during the COVID-19 pandemic."

- CDI Notice Dated March 18, 2020: Commissioner Lara "requested" that "all admitted and non- admitted insurance companies that provide any insurance coverage in California including, life, health, auto, property, casualty, and other types of insurance" provide their insureds with "at least a 60-day grace period" to pay their premiums.

- CDI Notice Dated April 3, 2020: Commissioner Lara indicated all licensees "should not attempt to enforce policy or statutory deadlines on policyholders until ninety (90) days after the end of the statewide "state of emergency" or other "state of emergency" that impacts a specific policyholder."

- CDI Notice Dated May 14, 2020: Commission Lara had received reports that various insurers were "unfairly taking advantage of the COVID-19 crisis" by "unjustifiably low settlement offers knowing financial need is high and recourse to the civil court system in the state is currently severely limited." This notice set forth several practices that constitute unfair methods of competition under the California Unfair Practices Act, codified as California Insurance Code section 790.03(h), and informed insurers that Commissioner

Lara and the CDI would be pursuing all available remedies against any person in violation of this Act.

- **Access and travel**

  Many states and jurisdictions have limited travel, access to services and imposed quarantine requirements. The limitations and rules can vary widely from city to city, county to county and state to state, and must also be taken into account in considering the most appropriate manner in which to handle a claim.

- **Claim resolution**

  Conversely, settlement opportunities may be presented which can result in saving business relationships or future costs. Thus, remote mediations and other remote dispute resolution proceedings appear to be more widely accepted and will most likely become more common in the future.

IV. LITIGATION CONSIDERATIONS REGARDING INSURANCE CLAIMS

In 2020 and 2021, the coronavirus pandemic led to court closures and delays in the justice system causing backlogs of cases.[141] With new variants of the coronavirus emerging as highly contagious strands such as the Omicron variant, it is expected that court closures and delays will continue in 2022 both in federal courts and state courts.[142] In September 2021, the California Legislature

[141] The law firm Paul Hastings maintains a database of US Courts regarding coronavirus orders (https://www.paulhastings.com/about-us/advice-for-businesses-in-dealing-with-the-expanding-coronavirus-events/u.s.-court-closings-cancellations-and-restrictions-due-to-covid-19); information regarding California state courts can be found by consulting a superior court's website (https://www.courts.ca.gov/find-my-court.htm?query=browse_courts).

[142] https://www.abajournal.com/news/article/federal-appeals-courts-go-remote-amid-covid-19-surge; https://www.abajournal.com/news/article/as-omicron-surges-courts-pause-jury-trials.

enacted Assembly Bill 242 ("AB 242") known as the "2021 Court Efficiency Act" to permit California courts to continue hosting remote hearings in civil proceedings through July 1, 2023 in order to keep the judicial process moving forward.[143] However, some counties in California are still suspending trials and delaying deadlines due to the surge caused by Omicron.[144]

Thus, as the potential for trials decreases and financial concerns put pressure on plaintiffs and their counsel, there may be a growing trend to settle claims more quickly or below policy limits moving forward. Conversely, when the pandemic subsides and courts resume full operation, risk managers should expect a flood of activity with some Judges pushing parties and counsel hard to litigate and try cases swiftly in order to reduce the backlog.

The coronavirus is also materially impacting litigation in other ways.

- Otherwise tech-reluctant lawyers are being forced to develop an awareness of how telework, videoconferencing, paperless processes, and securely handling and transferring client data files can make life easier and save costs.

- Litigators have historically resisted anything other than in-person, face-to-face depositions, mediations, arbitrations and trials. It is also indisputable that the pandemic, and associated public health orders, have forced litigators to face the reality of a Zoom-controlled litigation practice. Questions remain about the effectiveness of arguments held via computer where lawyers and Judges may find it difficult to communicate both because of technological issues and because of not

[143] https://www.abajournal.com/web/article/california-to-permit-remote-court-hearings-through-at-least-mid-2023;
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB241.

[144] https://calmatters.org/justice/criminal-justice/2022/01/covid-california-court/.

being in the same location with the non-verbal cues that human-to-human contact allows. In addition, the ability to assess the credibility of a witness over a computer or phone is generally regarded as less than ideal.

- Lingering concerns remain, moreover, about the difficulty of managing document-intensive cases, avoiding inadvertent disclosure and whether jurors are paying attention or engaging in texting, emailing, net surfing and other distractions. Remote, virtual trials have taken place and continue to occur in increasing numbers. Lawyers who have participated in such trials have, for the most part, deemed the process and the result acceptable. Nevertheless, litigators continue to harbor reservations about virtual trials in complex or high exposure cases.

- In the federal court system, overall case filings (excluding product liability cases) for the first 9 months of 2021 were down 3% from 2020.[145]

- Through 2020 and 2021, Bankruptcy cases have seen a big decrease in case filings. In 2020, there was a 44% decrease in filings, and in 2021 case filings again dropped off by 29%.[146] This finding confounds the prediction early during the pandemic that bankruptcy filings would increase dramatically. However, many observers expect more pandemic-related bankruptcy and torts cases to make their way into the federal courts in the coming years.

- Federal District Courts are using a variety of measures to minimize, as much as possible, the inevitable delay in caseload disposition. The vast majority of the 94

[145] https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

[146] https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

U.S. District Courts have elected to restrict public access to courthouse facilities, halt jury trials, and/or encourage or require the use of teleconferences for hearings for certain proceedings. Many such orders mention exemption from the Speedy Trial Act which mandates that criminal trials begin at a certain time and cannot be delayed.[147]

- Courts in some of the most seriously affected areas are using teleconferencing, email, and phone calls to deal with cases in which defendants are constitutionally entitled to a speedy trial.[148]

- The U.S. Supreme Court began holding oral argument by telephone in 2020 for the first time in its venerated history. However, in September 2021, the Supreme Court returned to in-person oral arguments, although restricting courtroom access to justices, attorneys, essential personnel and journalists.[149]

147 https://www.paulhastings.com/insights/practice-area-articles/u-s-court-closings-restrictions-and-re-openings-due-to-covid-19.

148 https://www.paulhastings.com/insights/practice-area-articles/u-s-court-closings-restrictions-and-re-openings-due-to-covid-19.

149 https://www.cnn.com/2021/09/08/politics/supreme-court-oral-arguments-in-person/index.html.; https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_12-06-21.