



**Lowenstein Sandler's Insurance Recovery Podcast:
Don't Take No For An Answer**

**Episode 29 -
Out With a Bang: Current State of Play on Coverage for
COVID-Related Losses**

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Lynda Bennett: Hi, welcome to Don't Take No For An Answer. I'm your host, Lynda Bennett, Chair of the Insurance Recovery practice group here at Lowenstein Sandler. And as we are winding down 2021, we thought it was a good time to pause and take stock of where things stand on the COVID-19 business interruption claims as well as looking at ways that COVID has intersected with other coverage lines. As we all know, 2020 was the first year of the pandemic and our world was turned upside down. And in the insurance recovery practice, we were largely evaluating our policies, making claims and receiving knee jerk denials from insurance companies. And then 2021 became the year of coverage litigation, primarily over COVID-19 business interruption claims. I mean, what we really have spent the year doing is watching for trends to develop, doing some refinement to the approaches in terms of how the claims were framed and the complaints that were filed.

And we were starting to get some early returns on what the appellate efforts are going to look like. So as this year comes to a close, it seems like now is a good time to pause, assess where things stand in court, review some of the novel approaches that were suggested in the immediate days following the pandemic, and forecast where we're going to be heading into 2022. So I'm very pleased today to be joined by my partner and Eric Jesse and senior counsel, Joe Saka. These two gentlemen are the folks, the brains behind the organization here at Lowenstein that was leading the effort, the COVID cases that we pursued on behalf of clients. So Eric and Joe, welcome.

Eric Jesse: Pleasure to be here. Thank you.

Joe Saka: Yeah, thank you for having me.

Lynda Bennett: All right. So let's just dive right into it and I'll throw it out there up for grabs. Who's winning the battle in court on these COVID-19 cases and why?

Joe Saka: Would you want the optimistic answer or the realistic answer right now?

Lynda Bennett: Go ahead, Joe. Take it away however you'd like to do it.

Joe Saka: Fair enough. So, it's still a little bit early to predict what the ultimate outcomes going to be, but the tea leaves right now are not very favorable for policy holders. To date we've seen about 700 negative decisions where courts have either granted summary judgment to the insurers or granted early dispositive motions in favor of insurers versus only about 70 decisions that have come out in favor of policyholders. And when I say in favor of policyholders, that may just mean that they've survived an early motion dismiss and still have to go through the effort of proving their case through summary judgment or through trial.

Lynda Bennett: All right, great. Eric, tell me what are the two or three key coverage issues? Where's the rubber meeting the road on these claims?

Eric Jesse: Yeah. So, many policy holders had virus exclusions and the courts enforced those. Policy holders tried to make creative arguments saying the virus exclusion was ambiguous or the loss was actually caused by governmental orders, but unfortunately, courts weren't buying that. Another key coverage issue that we were seeing is that a lot of coverages that are available under business interruption policies require that there be in the magic phrase is, physical loss or damage, and the courts have universally, almost universally said that that requires a structural alteration and the insurers argued that COVID is something you can just wipe away. And it's not a structural alteration. So unfortunately that these courts have not always applied the pre COVID precedent that was out there in favorable to policy holders that found that a loss of use without a structural alteration could be sufficient to satisfy that policy language.

Lynda Bennett: So Joe, you and Eric have painted a little bit of a grim picture for us. What do you think the prospect is going to be on appeal? Are there any early returns that are giving us a sense of where appellate courts are headed on these important issues?

Joe Saka: Well, there's about 300 appeals pending. To date there have been 10 decided and all of them have come out in favor of insurers to date, but most of them have not addressed the billion dollar question as to whether the presence of COVID-19 on property can in theory, constitute physical loss or damage to property.

Lynda Bennett: So what is their basis then? What are they really sticking with in upholding a denial of coverage down below? And as I understand it, a few of the few victories that policy holders secured also have fallen by the wayside on appeal. What is the top line reason cited?

Joe Saka: So one is affirming that the virus exclusion does apply to bar coverage as Eric mentioned. And then the other is that loss of use, as Eric mentioned, is not sufficient. So the cases that have come in have tried to argue that mere closure orders that prevented policyholders from being able to use their facilities constituted physical loss or damage, and the appellate courts so far have been universally held that that at least is not sufficient.

Eric Jesse: And just to add onto that, there was one case where there was a petition to the US Supreme Court that was just recently denied, not surprisingly. So the

Supreme Court has indicated that it has no intention to really get into and weighed into these issues. So the buck will ultimately stop probably with the federal appellate courts for the federal cases.

Lynda Bennett:

Yeah. And I'll just add, I think one of the concerns that I have, even if policy holders do secure some wins on appeal, is it really going to be a win on appeal? Because I mean, I think one of the things that the three of us have talked about several times as we've handled these cases is there's a little bit of intellectual dishonesty going on with the courts when they are summarily dismissing these cases on a motion to dismiss standard. As we know that is usually supposed to be an incredibly high standard where the trial court is obligated to accept as true all of the allegations in the complaint. And Eric and Joe, as you've just highlighted, a lot of these decisions from courts are not following that mandate of accepting the allegations and the complaints is true. They're really jumping to the final question and saying, yeah, I just have a high degree of skepticism that the science is going to support what you're saying, that the virus does physically attach to property within the premises and therefore make it inaccessible to be used as intended.

So one concern that I think all of us share is that even if some of these cases, as they get up through the appellate courts, get a favorable remand back to the trial courts, it's going to be a remand or a win with strings, I'll call it, which is just, you live to fight another day. And there's a real risk going into 2022 that we're not going to get guidance on that billion dollar question, as Joe said, or multi-billion dollar question about whether the coverage is ultimately going to prevail here. So just quickly, do you think that there's going to be a difference in how the federal or state courts are going to come out on this? We've seen a little bit of that unfolding over 2021.

Eric Jesse:

Yeah. I mean, I think the federal court statistics, at least from Law360, do not bode well for policy holders. They report that about 1300 federal court cases have been filed. Now 40% have not been decided yet. 41% have been dismissed by the court and 18% have been voluntarily dismissed. And I went to law school because I'm not good at math, but when I add that up, that leaves 1%, which are presumably the only wins that are happening in the federal court.

I think there is certainly in general, in the coverage community, a perception that state court is usually going to be better for policy holders. And that's where there have been most of the few wins by policy holders on COVID-19 claims. And part of that can be that state court judges may be bound by that precedent that we were talking about earlier that allow loss of use to satisfy the physical loss or damage requirement, which federal courts aren't necessarily bound by. I mean, it can also just be the general perception that policyholders fare better in state court. But don't get too excited if you're in state court because state court judges I think, overall are still not hesitating to grant motions to dismiss.

Lynda Bennett:

Yep. No doubt about it. A long expensive road ahead if you're going to stick in there and fight. So Joe, let me turn to you. In the very early days as the pandemic was unfolding, we heard an awful lot about federal and state legislation that was being introduced to try to manage this worldwide problem

as many policy holders in their moment of need turned to their carriers and were very surprised and unhappy to see that they had a virus exclusion or a carrier very quickly denying their claim. So what was the legislation about and where did it go?

Joe Saka: Yes. Some of the legislation was going to retroactively state that COVID-19 did cause physical loss or damage, but essentially all the places that we saw proposed legislation, they went nowhere. And I think that the public relations arm of the insurance industry did a very effective job at saying that one, you'd be modifying preexisting contracts, which raises constitutional concerns. But beyond that, that it could have the impact of bankrupting the insurance industry. So that probably was a bit overstated, but ultimately the legislation's gone nowhere. If you believe the insurance industry, some of them think that there could be something on a prospective basis where in the event of another pandemic, there's some sort of backstop, but anything retrospectively has not gone anywhere.

Lynda Bennett: Yeah. It seemed to us, I think in the early days, largely this was a politician's gambit to put something out there. Most of the legislation was geared toward small businesses, restaurants, those businesses that were really hit hardest in the very early days of the pandemic. But Eric, I'm curious, I thought that there could have been some vantage there on the federal legislation, as we saw after nine 11 and TRIA being passed, there was a positive path to follow and a model to follow where the federal government did step up when the damage was so widespread. So can you comment on what was tried and more importantly, is there something in the future that could be done along that line?

Eric Jesse: Yeah. I think the practical insurance solution for pandemic related coverage, it's going to require a solution at the federal level. In the last Congress, right after COVID started to hit us there was legislation introduced by a Congresswoman from New York to take a similar approach to flood or terrorism where the federal government would backstop pandemic coverage, much like it does for flood, for terrorism today. However, that legislation ended up going nowhere in the last Congress and I don't believe it's been reintroduced today. So people are going to be on their own going forward in the future it looks like, unfortunately.

Lynda Bennett: All right. So before we move on to forecasting a bit of what's going to happen in the future, let me just put out there quickly, have any insureds been paid for COVID related claims?

Eric Jesse: So overall I would say no, and sometimes insurers are even resisting settlements because they want to make their mark in court and establish the lack of coverage when they're certainly emboldened by their wins. Now the policy holders that are succeeding and getting paid here are those policy holders, that policies that provided bespoke coverage for pandemic or communicable disease. And that obviously is going to be the easiest access to coverage here, but even then sometimes it's not easy because we have clients that have communicable disease coverage, but the insurers like to parse words and try and resist providing coverage, even then when the coverage exists in the policy.

Eric Jesse: And one thing I'll add is policy holders need to do the same thing in parsing words, parsing the policy language because I read about a recent case where a Broadway show that was seeking business interruption coverage was actually able to overcome and insurers motion to dismiss because there was an exclusion of the case for communicable disease. If it led to restrictions imposed by national or international authorities. So the Broadway show is able to argue that state of New York is not a national or international authority so.

Lynda Bennett: Yep. It goes to reinforce one of the bedrock principles here at Don't Take No For An Answer, which is that you actually have to read your policies and the facts of each claim and the words of each policy need to be laid against each other to determine the scope of coverage available. So Joe, tell us what changes policy holders are seeing on renewal. We're more than a year into this and many of our clients have gone through at least one renewal or maybe two. So what are some of the changes that have come about?

Joe Saka: Sure. For your property insurance policies, you're likely seeing the addition of an exclusion for pandemics or exclusion for viruses. And I've seen insurance do some things that are cute by half by saying, even though this was not already covered, by the way, there's still an exclusion for it. So purportedly making double clear that it's not covered. And then that hasn't really been limited just to property insurance policies. We've also seen more restrictive terms being added to D&O policies, cyber policies, CGL policies.

Lynda Bennett: Yeah. And that's, I mean, it's a very typical knee jerk reaction from the insurance industry. When they get hit with a large wave of claims, you start to see exclusionary language and narrowing of coverage grants across every coverage line. And so I'll reinforce yet again, be uber careful and always be reading your policies when they come in for renewal, don't assume that any renewal is wrote and particularly after a major event like this. Now, Eric, we've spent a lot of time talking about business interruption losses, because that's what most of our listeners have been reading about in The New York Times and other news outlets. But what are some of the other coverage lines that have been impacted by COVID-19?

Eric Jesse: Yeah, it's across the board. I mean, so Joe mentioned D&O and cyber and that's certainly true here as COVID began and continues to persist, D&O insurers are changing the way they underwrite these policies. The underwriting process is a lot more intensive where underwriters want to speak directly with management about how they weathered COVID and what procedures and policies they have in place going forward. The cyber market has been incredibly tight throughout the pandemic. And one thing policyholders need to make sure here is that their excuse me, that their policies are customized to the work from home environment, which many policies were not before the pandemic. And then in the reps and warranty space, we've also seen the impact of COVID. Underwriters are particularly interested in this area. They are adding COVID exclusions that can range from just the failure to prevent the transmission of COVID to much broader exclusions that speak to the company's operations and supply chain issues. And then unfortunately, today for policyholders, we're also seeing, what are becoming increasingly standard exclusions for PPP loans and for CARES Act relief.

Lynda Bennett: All right, Joe and Eric, we've got just a couple of minutes here left, so I want you to give me your very best prediction. I'm going to put my money, my chips up on the table, based on what you tell me is coming down the pipe for 2022. Where is this all going to finish out on coverage for COVID claims in 2022? Joe, go ahead.

Joe Saka: Well, I have a generally negative outlook, but I actually am optimistic that there will at least be a couple of outlier states that will find that the presence of communicable disease can in theory, constitute physical loss or damage, and it'll be up to policy holders with good facts to establish that coverage.

Eric Jesse: Yeah. What I suspect may happen in 2022 is that a lot of these cases that are dealing with virus exclusions or physical loss or damage are going to fall by the wayside. And so you're going to see coverage battles really where there's the potential for coverage because there's pandemic coverage or communicable disease coverage. And then the fight will be over parsing those words, as well as whether the coverage funnels into a supplement where you can access the higher limits that are available in the policy.

Lynda Bennett: Yeah. I agree with Joe, I think there are going to be a couple of states where these cases are going to come back to life on appeal, and it's going to be fascinating to watch the science battle unfold when we get to the actual merits of the very well-pled complaints that have been and put in by several policy holders. All right. Well, thank you both for sharing your insights. We'll probably get the band back together in June 2022, so we can see if our predictions were correct. But before signing off, I'd like to thank our listeners for joining us on this exciting journey this year of having launched the podcast. It's been a lot of fun discussing the hot topics of the day in the insurance base and providing our listeners with some practical and actionable advice about how to maximize the value of their insurance assets and how to smoothly navigate the claims process. We're excited to continue the conversation in 2022 and wish all of our listeners, a very happy holiday season and a prosperous and healthy new year.

Eric Jesse: Absolutely. Thank you for having us. It's been great.

Lynda Bennett: All right. See you in 2022.

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