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# Asbestos

## The State Of COVID-19 Coverage Litigation In The United States: Insurers Are Prevailing In Coverage Cases, But COVID-19 Still Is Contributing To Social Inflation

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# Commentary

## The State Of COVID-19 Coverage Litigation In The United States: Insurers Are Prevailing In Coverage Cases, But COVID-19 Still Is Contributing To Social Inflation

**By**
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### Introduction

The issuance of various governmental orders requiring businesses to temporarily modify or close their operations during the COVID-19 pandemic led to an immediate avalanche of claims and lawsuits involving first-party commercial property policies. Suits relating to the pandemic have also involved, to a lesser extent, event cancellation policies, general liability policies, directors and officers liability policies, and other types of insurance policies. As resulting litigation and activity regarding these other policy types has been limited, the focus here will be on first-party commercial policies.

This article examines the current state of COVID-19 coverage litigation in the United States, where insurers have taken a commanding lead over policyholders. To date, trial court rulings have heavily favored insurers, and insurers have prevailed in the vast majority of appellate court decisions.

Next, the article briefly compares the insurance industry's early experience with COVID-19 claims against the legacy asbestos and environmental claims that have confronted the industry. Whenever any new, significant claim type emerges, one question that inevitably gets posed is "will this be the next asbestos?" Although asbestos and environmental coverage claims and COVID-19 coverage claims share some similarities, there are important differences in the claims presentations, the coverage issues involved, and the insurance policies purportedly impacted. The COVID-19 coverage wars are far from over, but so far insurers have fared better overall in pandemic-related coverage claims than in the legacy asbestos and environmental coverage claims arena.

Social inflation—like price level inflation—is a major focus for insurers and corporate policyholders alike. This article concludes by considering the impact of COVID-19 on social inflation.

### The State Of COVID-19 Coverage Litigation In The United States

We begin looking at the lack of overriding COVID-19 coverage legislation and the status of COVID-19 coverage litigation in the United States.

#### Legislation To Address COVID-19 Coverage Issues Has Been Proposed, But Not Enacted

Legislation has been proposed at the federal level that would establish a federal backstop for business

interruption and event cancellation losses resulting from a future pandemic or public health emergency.[1] Another bill would have had features similar to the Terrorism Risk Insurance Act.[2] The Business Interruption Relief Act of 2020 would have reimbursed insurers that voluntarily paid COVID-19 business interruption claims under policies that include coverage for civil authority shutdowns, but exclude virus-related loss.[3] These bills have not been enacted.

Perhaps more problematic for insurers were the legislative proposals in several states. Some of these proposals would have, by legislative fiat, retroactively required insurers to provide business interruption insurance under policies that expressly exclude coverage for virus claims and/or that do not apply due to lack of direct physical loss. These proposals would have faced substantial legal challenges if enacted, but to date no such proposals have become law. Accordingly, legislative declarations have not trumped insurance contract language agreed to by the contracting parties.

### COVID-19 Coverage Claims Are Proceeding As Individual Cases In The United States

In contrast to England, COVID-19 coverage issues are being resolved in individual cases in the United States. On August 12, 2020, the United States Judicial Panel on Multidistrict Litigation denied motions to centralize nearly 300 COVID-19 related business interruption coverage actions filed against over 100 insurers in various district courts across the country, including in the Northern District of Illinois and in the Eastern District of Pennsylvania.[4] The panel concluded that an industry-wide multidistrict litigation ("MDL") in this instance will not promote a quick resolution of these matters as the substantial convenience and efficiency challenges posed by managing a litigation involving the entire insurance industry outweighs the limited number of common questions.[5] The Panel also declined to create regional and state-based MDLs.[6] Though there has not been mass consolidation or global resolution, courts generally have resolved COVID-19 coverage cases expeditiously.

### An Avalanche Of COVID-19 Coverage Cases Filed Across The United States In A Compressed Time Period

According to the University of Pennsylvania Carey School of Law Covid Coverage Litigation Tracker, as of the end of May 2022, there were approximately 2,306 COVID-19 coverage cases filed in state and federal courts across the United States.[7] The pace of new filings had slowed until a slight uptick in the first part of 2022, as the two-year contractual limitations period for filing suit under many first-party policies approached.

The Covid Coverage Litigation Tracker breaks down the coverage claims as follows: 2,086 involve business interruption; 1,885 involve extra expense; 1,792 involve civil authority; 240 involve ingress/egress; 122 involve contamination; 97 involve event cancellation; 91 involve sue and labor; 41 involve premium relief; 22 involve liability; and 228 are characterized as "other."[8] Approximately 475 cases have been filed as putative class actions and 820 cases include allegations of bad faith.[9]

The Covid Coverage Litigation Tracker also reports that the top industries involved in the litigation by case number are: food and drink (750); ambulatory health care (273); accommodation (151); personal and laundry services (121); amusement, gambling, and recreation (115); real estate (106); professional, scientific, and technical services (82); clothing and accessories (78); performing arts and spectator sports (73); educational services (41); and hospitals (41).[10]

### Insurers Have Racked Up Victories In The Majority Of Decisions On Motions To Dismiss, Motions For Summary Judgment, And Have Prevailed In The First Two Trials

At the trial court level, through the end of April 2022, insurers have prevailed in more than 79 percent of the 203 rulings on motions to dismiss in state courts across the country and in more than 95 percent of the 638 rulings in federal courts.[11] These victories have been predominately obtained on the following grounds: (1) the virus claims do not involve "direct physical loss or damage" to property as required by the language contained in most U.S. first-party policies; (2) governmental orders do not constitute loss of property; and (3) virus or other exclusions preclude coverage.[12] Insurers have prevailed in approximately 63 summary judgment rulings (with partial summary judgment granted to insurers in another 14 cases), while policyholders have prevailed in whole or in part in just 11.[13] Insurers

have also prevailed in the first bench trial and in the first COVID-19 jury trial.[14] While policyholders have voluntarily dismissed many suits, many more cases remain pending. The score card is subject to daily change, but insurers have, for the most part, continued to obtain favorable rulings.

### Insurers Hold A Commanding Lead In Appellate Court Level Decisions

Until mid-June 2022, insurers had prevailed in every appellate court decision on COVID-19 coverage issues rendered on the merits by both federal and state court. Insurers had run the table in each of the decisions rendered by the United States Circuit Courts of Appeal so far, with the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits having ruled for insurers under the laws of multiple states.[15] Although the Third Circuit has not rendered any rulings, there are numerous appeals on its docket.

After federal courts began rendering decisions in favor of insurers on COVID-19 coverage issues, policyholder advocates complained that the issues were matters of state contract law that should be decided by state appellate courts. Such sophistry was nothing more than an attempt by policyholder advocates to deprive insurers of a federal forum for resolving coverage disputes. Federal court judges obviously are capable of readily ascertaining and applying state contract law, are frequently called upon to do so, and are vested with diversity jurisdiction to decide such matters. Not surprisingly, federal courts largely have declined to defer or delay resolving appeals on their dockets and, instead, have simply proceeded to resolve the COVID-19 coverage cases before them promptly. Occasionally, a case has been stayed. For example, the Ninth Circuit recently stayed a case pending a decision in a case before the Washington Supreme Court.[16] Washington is one state where policyholders are hoping to obtain better results.

Many state appellate courts have yet to render decisions. Early results suggest that policyholder appeals of COVID-19 coverage rulings will not fare significantly better before state appellate courts, as policyholders they have lost the first 20 plus state appellate court COVID-19 coverage decisions. To date, the high courts in Iowa, Massachusetts, and Wisconsin have rendered COVID-19 coverage decisions in favor of insurers. Intermediate appellate courts in California, Florida, Illinois, Indiana, Maryland, Michigan, New York, and Ohio have rendered decisions in favor of insurers.[17] Policyholders secured their first appellate court win in a COVID-19 coverage decision on June 15, 2022.[18] This case, decided by the Louisiana Court of Appeal, was accompanied by two dissents. In light of these dissents and the perhaps somewhat questionable reasoning in the decision, many believe the case may be headed to the Louisiana Supreme Court for reversal.

Additionally, in another recent case, a policyholder was able to secure an affirmance of a trial court's denial of a motion to dismiss on its contingent business interruption clams under a Pollution Legal Liability Policy, where the insurer acknowledged that COVID-19 constitutes a "pollution incident" as defined by the policy and the insurer failed to establish at the motion to dismiss stage that contingent business interruption was only available where the policyholder was denied complete access to its property.[19]

### The COVID-19 Coverage Wars Will Wage On For Some Time

A limited number of policies may afford some coverage for the COVID-19 business interruption cases. However, where any coverage is afforded it is usually quite limited in scope and often subject to low limits of liability and/or sub-limits.

Notably, the litigation realities have caused some policyholders to voluntarily dismiss their claims. Yet, given the high stakes, many policyholders will continue to pursue coverage for their COVID-19 losses notwithstanding their disappointment in the results. Indeed, there is a long way to go in the COVID-19 coverage wars, as many appeals remain pending. There are over 160 appeals pending in federal court and at least 65 pending in state court. Many cases are still pending at the trial court level.

It is difficult to state the number of policies containing virus exclusions. An analysis of the policies subject to rulings on motion practice suggests approximately 65% contain exclusions. We suspect very few commercial first-party policies issued after the pandemic were issued without virus exclusions.

No one expected that insurers would remain essentially undefeated in COVID-19 coverage actions at the appellate court level. Some policyholder advocates are claiming that the tide has turned with the

single Louisiana Court of Appeals decision. Still, at this junction, it seems fair to say that policyholders are beginning to run out of arguments as well as jurisdictions with respect to first-party COVID-19 business interruption coverage claims.

**COVID-19 Coverage Litigation Compared To Legacy Asbestos And Environmental Coverage Litigation**

Over the past four or five decades, insurers, policyholders, and their counsel frequently have compared various emerging claims areas against asbestos and environmental ("A&E") claims, which have been the "mother-of-all-claim" types in the United States.

At the outset of the COVID-19 coverage litigation, many policyholder advocates predicted victory in their overall quest for coverage similar to the success they enjoyed in asbestos coverage litigation. As one Bloomberg Law commentator stated:

> However, history also tells us that the overall scorecard on coverage litigation favors policyholders and, over time, policyholders will succeed more often than not. We do not mean to imply that on a case-by-case basis policyholders always prevail. But we can say that the insurance industry does not succeed in its narrative that certain risks are per se uninsurable; policyholders have repeatedly defeated such notions.[20]

Policyholders and their advocates may have hoped that the profound losses sustained by their businesses would garner judicial sympathy and result in policy construction and rulings favorable to policyholders, particularly in light of losses experienced as a result of government shutdown orders. While businesses have engendered sympathy from courts, such sympathy has not translated into wide-scale, tortured policy construction in favor of policyholders.

To be sure, there are some similarities between COVID-19 coverage claims and A&E claims. COVID-19 losses, like asbestos and environmental losses, involve a large number of coverage actions and declaratory judgment costs. COVID-19, like asbestos, is capable of producing respiratory and similar symptoms.[21]

Yet, there are significant differences between A&E claims and COVID-19 claims. Notably, A&E claims are long-tail claims, while COVID-19 claims typically are not. The bulk of A&E claims involve litigation under general liability policies. Although some COVID-19 coverage claims presented to date have implicated general liability policies and more are expected, the bulk of the COVID-19 coverage claims have involved first-party property policies (e.g., all risk and BOP policies). These first-party policies do not present the same issues or involve the duty to defend or defense cost issues associated with general liability policies containing defense obligations. The policies involved in COVID-19 coverage litigation are of more recent vintage than those involved in legacy A&E losses. Further, the current wave of COVID-19 coverage lawsuits likely will be limited in time by the one or two-year contractual suit limitations period contained in many first-party policies.

As the rulings demonstrate, insurers have been very successful in defeating coverage for COVID-19 claims to date. For the most part, policyholders have not been able to establish the necessary "direct physical loss or damage" component required to bring the claims within the terms of coverage. Courts have continued to uphold the plain meaning (and time-tested requirement) of "direct physical loss or damage." Policyholders have advanced every conceivable argument and have employed creative pleading in pursuing their claims for coverage. They have shifted positions and have included with greater frequency allegations in their complaints of the presence of people with COVID-19 or the presence of COVID-19 itself on the premises in an effort to plead "direct physical loss or damage." Policyholders have been disappointed that such allegations generally have not succeeded in avoiding dismissal of their claims.

In the context of environmental claims, insurers have experienced mixed success, particularly concerning such issues as whether clean-up costs constitute "damages," whether a potentially responsible party letter constitutes a "suit," and whether there is an "occurrence" under general liability policies. Many courts rendered pro-policyholder rulings on these and other issues. Judicial decisions in the context of A&E claims sometimes stretched concepts such as "trigger of coverage" and "allocation" of losses in favor of policyholders. Virus and other exclusions have held

up well in the context of COVID-19 claims. In the legacy A&E claims context, pollution exclusions have produced mixed rulings, sometimes favoring insurers and other times favoring policyholders. Policyholders have enjoyed general success in legacy asbestos coverage cases.

The difference in claims and policy types undoubtably accounts for part of the difference in outcomes. In some respects, insurers have learned from their A&E claims experience, including by drafting tighter policy language, employing more sound underwriting practices, avoiding taking improvident or myopic coverage positions, and limiting inter-insurer disputes.

**The Impact Of COVID-19 On Social Inflation**

Social inflation continues to be a major concern to insurers and their corporate policyholders.[22] The first aspect of social inflation involves abuses in the tort system, which impacts both corporate policyholders and insurers. Corporate policyholders feel the effects insofar as they are subjected to large verdicts and defense costs for which they are self-insured and, to some extent, in the form of higher costs of doing business. As insurers are required to provide a defense and/or indemnify under policies issued to businesses and other entities, the impact of social inflation directed to their policyholders is also felt among insurers. Accordingly, as to this component of social inflation, the interests of corporate policyholders and insurers generally are aligned. Many of the means to controlling this aspect of social inflation—such as damage limitations, tort reform, requiring full disclosure with respect to litigation funding, and dialing down the abuses in the tort system—may be best achieved through cooperative efforts of the defense bar, businesses, and insurers.

The second aspect of social inflation is aimed directly at insurers. This facet includes an expansive reading of policy coverages and rulings by courts in coverage litigation, shifting of policyholder attorney's fees in coverage litigation, independent counsel fees, and some legislative and regulatory pronouncements. With respect to this component of social inflation, the interests of corporate policyholders and insurers often diverge. We previously addressed the sources of social inflation, some of which are endemic to the U.S. civil tort system and others of which are a function of legal and societal developments.[23]

In 2020, the impact of court closures and litigation delays associated with COVID-19 and governmental shut down orders appear to have been a short-term social inflation reduction or delaying factor, as progress in cases had been hampered and the number of verdicts had been reduced. Data released in January 2022 shows that the number of bench trials dropped by 39% and jury trials dropped by 64% in 2020. At least some antidotal reports suggest the delay in cases moving forward has resulted in some plaintiffs' settlement demands being more reasonable. In such instances, justice delayed may actually be justice achieved.

The activities of legislators in several states attempting to create business interruption insurance by abrogating applicable exclusions and requirements in first-party property policies by legislative fiat, if passed, would have spurred additional social inflation. Fortunately, so far, none of these proposed bills have become law and, as such, this does not appear to have contributed to social inflation. Similarly, the proposed federal legislation has not been enacted and, as drafted, would have been directed to prospective pandemics and any insurer participation would have been voluntary.[25]

As detailed above, the current record of decisions suggests that COVID-19 has not added to the second prong of social inflation as the court rulings have not expanded construction of insurance contracts in a pro-policyholder manner to date at least in COVID-19 coverage litigation itself.

Yet, the evidence in 2021 suggests social inflation has returned with a vengeance and is on the rise significantly. The volume of coverage litigation related to COVID-19 itself fueled social inflation, particularly with respect to first-party property insurance claims. Fitch Ratings expected social inflation to accelerate again in 2021.[26] Mega verdicts have also returned. Social inflation is widely considered to be the driving cost factor in the commercial liability market, with billions reported in business interruption and event cancellation claims. Many believe that significant pandemic-related liability claims have yet to be reported and additional lines of coverage are expected to be impacted.

Until recently, the United States economy had not experienced significant price level inflation in nearly

four decades. The Consumer Price Index ("CPI") rose 6.2% in the 12 months ending October 2021. The CPI has continued to rise in 2022 increasing 8.6% in May 2022 from the prior year, reaching 40 year highs. It is undeniable that economic inflation contributes to the social inflation experienced by insurers. For example, supply chain constraints have produced shortages of lumber and other building materials, driving up the costs of property repairs. Shortages of microchips also increase costs to build and repair properties and other goods that incorporate chips. The medical CPI, in particular, is outpacing the overall CPI and liability insurance losses are influenced by medical costs for injured plaintiffs. Although recent advances in medical treatments for trauma victims (such as skin grafts for burn victims, robotic exoskeletons, and advanced prosthetics) have extended longevity and improved patients' quality of life, they have also been known to increase the cost of care.[27]

Julian James of Sompo International recently pointed out the adverse impact of price inflation on claims payouts and insurer financial security. He stated:

> Looking at the economy, we're entering a period of high inflation and if we think about what that means, it means the cost of claims is going to increase, it means the cost of rebuilding basic things is going to increase, and it means that companies themselves are going to have to weather the impact of those inflationary demands. . . .[28]

He also referenced the impact high inflation will have on insurers themselves in terms of their own solvency requirements amidst times of high inflation.[29]

Insofar as events attributable to COVID-19 have contributed to supply shortages and price level inflation, COVID-19 has contributed significantly to social inflation. ■

## Endnotes

1. *See* Pandemic Risk Insurance Act of 2021, 117 H.R. 5823, 117th Cong. (2021).

2. 85 Fed. Reg. 71588 (Nov. 10, 2020).

3. *See* Business Interruption Relief Act of 2020, 116 H.R. 7394, 116th Cong. (2020).

4. *In re Soc'y Ins. Co. COVID-19 Bus. Interruption Protection Ins. Litigation*, 482 F. Supp. 3d 1360, 1361 (J.P.M.L. 2020).

5. *Id*. at 1363.

6. *Id*.

7. *See Covid Coverage Litigation Tracker*, University of Pennsylvania Carey Law School (last visited June 15, 2022). Readers should keep in mind that the COVID-19 case scorecard changes on a daily basis and tracking cases particularly at the trial court level is not an exact science.

8. *Id*.

9. *Id*.

10. *Id*.

11. *Id*.

12. *Id*.

13. *Id*.

14. *Id*.

15. *See, e.g., Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. 21-1202, 2022 U.S. App. LEXIS 15359 (1st Cir. June 3, 2022) (applying Massachusetts law); *SAS Int'l, Ltd. v. Gen. Star Indem. Co.*, No. 21-1219, 2022 U.S. App. LEXIS 15366 (1st Cir. June 3, 2022) (applying Massachusetts law); *10012 Holdings Inc. v. Sentinel Ins. Co. Ltd.*, 21 F.4th 216 (U.S. 2d Cir. 2021) (applying New York law); *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, No. 21-1082-cv, 2022 U.S. App. LEXIS 2655 (2d Cir. Jan. 28, 2022) (applying New York law); *SA Hospitality Group, LLC v. Hartford Fire Ins. Co.*, No. 21-1523-cv, 2022 U.S. App. LEXIS 7139 (2d Cir. Mar. 18, 2022) (applying New York law); *Br Rest. Corp. v. Nationwide Mut. Ins. Co.*, No. 21-2100-cv, 2022 U.S. App. LEXIS 9460 (2d Cir. Apr. 8, 2022) (applying New York law); *Abbey Hotel Acquisition, LLC v. National Sur. Corp.*, No. 21-2609, 2022 U.S. App. LEXIS 14646 (2d Cir.

May 27, 2022) (applying Florida law); *Farmington Village Dental Associates, LLC v. Cincinnati Ins. Co.*, No. 21-2080-cv, 2022 U.S. App. LEXIS 15853 (2d Cir. June 8, 2022) (applying Connecticut law); *Uncork and Create v. Cincinnati Ins. Co.*, 27 F.4th 926 (U.S. 4th Cir. 2022) (applying West Virginia law); *The Cordish Companies, Inc. v. Affiliated FM Ins. Co.*, No. 21-2055, 2022 U.S. App. LEXIS 10169 (4th Cir. Apr. 14, 2022) (applying Maryland law); *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, No. 21-1493, 2022 U.S. App. LEXIS 16357 (4th Cir. June 14, 2022) (applying Maryland law); *Q Clothier New Orleans LLC et. al v. Twin City Fire Ins. Co.*, 29 F.4th 252 (U.S. 5th Cir. 2022) (applying Louisiana law); *Terry Black's Barbecue, LLC v. State Auto Mut. Ins. Co.*, 22 F.4th 450 (U.S. 5th Cir. 2022) (applying Texas law); *Aggie Inv., LLC v. Continental Cas. Co.*, No. 21-40382, 2022 U.S. App. LEXIS 393 (5th Cir. Jan. 6, 2022) (applying Texas law); *System Optics, Inc. v. Twin City Fire Ins. Co.*, No. 21-3556, 2022 U.S. App. LEXIS 5731 (6th Cir. Mar. 2, 2022) (applying Ohio law); *Bridal Expressions LLC v. Owners Ins. Co.*, No. 21-3381, 2021 U.S. App. LEXIS 35676 (6th Cir. Nov. 30, 2021) (applying Ohio law); *The Brown Jug, Inc. v. Cincinnati Ins. Co.*, 27 F.4th 398 (U.S. 6th Cir. 2022) (applying Michigan law); *Estes v. Cincinnati Ins. Co.*, 23 F.4th 695 (U.S. 6th Cir. 2022) (applying Kentucky law); *Dakota Girls, LLC v. Phila. Indem. Ins. Co.*, 17 F.4th 645 (U.S. 6th Cir. 2021) (applying Ohio law); *In Re Zurich Am. Ins. Co.*, No. 21-0302, 2021 U.S. App. LEXIS 29440 (6th Cir. Sept. 29, 2021) (applying Ohio law); *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, 15 F.4th 398 (U.S. 6th Cir. 2021) (applying Ohio law); *Goodwood Brewing LLC v. United Fire Group*, No. 21-5759, 2022 U.S. App. LEXIS 5794 (6th Cir. Mar. 3, 2022) (applying Kentucky law); *Depasquale et al v. Nationwide Mut. Ins. Co.*, No. 21-3467, 2022 U.S. App. LEXIS 9243 (6th Cir. Apr. 5, 2022) (applying Ohio law); *Renaissance/The Park, LLC v. Cincinnati Ins. Co.,* No. 21-6016, 2022 U.S. App. LEXIS 13725 (6th Cir. May 20, 2022) (applying Kentucky law); *Troy Stacy Enterprises v. Cincinnati Ins. Co.*, No. 21-4008, 2022 U.S. App. LEXIS 15881 (6th Cir. June 8, 2022) (applying Ohio law); Sandy Point Dental, P.C. v. Cin. Ins. Co., 20 F.4th 327 (U.S. 7th Cir. 2021) (applying Illinois law); *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.*, 19 F.4th 1002 (U.S. 7th Cir. 2021) (applying Illinois law); *Mashallah, Inc. v. W. Bend Mut. Ins. Co.,* 20 F.4th 311 (U.S. 7th Cir. 2021) (applying Illinois law); *Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.*, 20 F.4th 303 (U.S. 7th Cir. 2021) (applying Illinois law); *Paradigm Care & Enrichment Center LLC et al v. West Bend Mut. Ins. Co.*, 33 F.4th 417 (7th Cir. May 3, 2022) (applying Illinois and Michigan law); *East Coast Entertainment of Durham, LLC v. Houston Cas. Co.*, 31 F.4th 547 (7th Cir. Apr. 12, 2022) (applying Illinois and North Carolina law); *Green Beginnings, LLC v. West Bend Mut. Ins. Co.*, No. 21-2186, 2022 U.S. App. LEXIS 14623 (7th Cir. May 27, 2022) (applying Illinois law); *ABC Diamonds Inc. v. Hartford Financial Services Group, Inc.*, No. 22-1026, 2022 U.S. App. LEXIS 15336 (7th Cir. June 3, 2022) (applying Illinois law); *Bauer v. AGA Service Co.*, 25 F.4th 587 (U.S. 8th Cir. 2022) (applying Missouri law); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, No. 20-3211, 2021 U.S. App. LEXIS 19775 (8th Cir. July 2, 2021) (applying Iowa law); *Monday Restaurants LLC v. Intrepid Ins. Co.*, 32 F.4th 656 (8th Cir. Apr. 22, 2022) (applying Missouri law); *Glenn R. Edwards Inc. v. Travelers Companies Inc.*, No. 21-3035, 2022 U.S. App. LEXIS 12905 (8th Cir. May 13, 2022) (applying Missouri law); *Planet Sub Holdings, Inc. v. State Auto Prop. & Casual Ins. Co.,* Inc., No. 21-2199, 2022 U.S. App. LEXIS 15505 (8th Cir. June 6, 2022) (applying Kansas, Missouri, and Oklahoma law); *Baker v. Oregon Mut. Ins. Co.*, No. 21-15716, 2022 U.S. App. LEXIS 6769 (9th Cir. Mar 16, 2022) (applying California law); *Levy Ad Grp., Inc. v. Fed. Ins. Co.*, No. 21-15413, 2022 U.S. App. LEXIS 6954 (9th Cir. Mar. 17, 2022) (applying Nevada law); *Mudpie, Inc. v. Travelers Cas. Ins. Co.*, 15 F.4th 885 (U.S. 9th Cir. 2021) (applying California law); *Selane Prods. v. Cont'l Cas. Co.*, No. 21-55123, 2021 U.S. App. LEXIS 29633 (9th Cir. Oct. 1, 2021) (applying California law); *Chattanooga Prof'l Baseball LLC v. Nat'l Cas. Co.*, No. 20-17422, 2021 U.S. App. LEXIS 29632 (9th Cir. Oct. 1, 2021) (applying Arizona, Texas, and Virginia law); *Circus LV v. AIG Specialty Ins. Co.*, No. 21-15367, 2022 U.S. App. LEXIS 10298 (9th Cir. Apr. 15, 2022) (applying Nevada law); *Rialto Pockets, Inc. v. Certain Underwriters at Lloyds London*, No. 21-55196, 2022 U.S. App. LEXIS (9th Cir. Apr. 20, 2022) (applying California law); Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co., 21 F.4th 704 (U.S. 10th Cir. 2021) (applying Oklahoma law); *Gilreath Family & Cosmetic Dentistry,*

*Inc. v. Cincinnati Ins. Co.*, No. 21-11046, 2021 U.S. App. LEXIS 26196 (11th Cir. Aug. 31, 2021) (applying Georgia law); *Ascent Hospitality Mgmt. Co. LLC v. Employers Ins. Co. of Wausau*, No. 21-11924, 2022 U.S. App. LEXIS 1161 (11th Cir. Jan. 14, 2022) (applying New York law); *SA Palm Beach LLC v. Certain Underwriters at Lloyds London*, 32 F.4th 1347 (U.S. 11th Cir. 2022) (applying Florida law); *Cafe Int'l Holding Co. LLC v. Chubb Limited*, No. 21-11930, 2022 U.S. App. LEXIS 12902 (11th Cir. May 13, 2022) (applying Florida law); *Gio Pizzeria & Bar Hospitality, LLC v. Certain Underwriters at Lloyd's*, No. 21-12229, 2022 U.S. App. LEXIS 13268 (11th Cir. May 17, 2022) (applying Florida law); *First Watch Restaurants, Inc. v. Zurich Am. Ins. Co.*, No. 21-10671, 2022 U.S. App. LEXIS 13913 (11th Cir. May 24, 2022) (applying Florida law); *Left Field Holdings III LLC v. Colony Ins. Co.,* No. 21-12124, 2022 U.S. App. LEXIS 13917 (11th Cir. May 24, 2022) (applying Florida law); *Royal Palm Optical Inc. v. State Farm Mut. Automobile Ins. Co.*, No. 21-11335, 2022 U.S. App. LEXIS 14208 (11th Cir. 2022) (applying Florida law); *Town Kitchen LLC v. Certain Underwriters at Lloyd's*, No. 21-10992, 2022 U.S. App. LEXIS 14683 (11th Cir. May 27, 2022) (applying Florida law); *Frontier Development, LLC v. Endurance Am. Specialty Ins. Co.*, No. 21-13449, 2022 U.S. App. LEXIS 14976 (11th Cir. June 1, 2022) (applying Florida law); *PF Sunset View, LLC v. Atlantic Specialty Ins. Co.*, No. 21-11580, 2022 U.S. App. LEXIS 15702 (11th Cir. June 2, 2022) (applying Florida law); *Dukes Clothing LLC v. The Cincinnati Ins. Co.,* No. 21-11974, 2022 U.S. App. LEXIS 15504 (11th Cir. June 6, 2022) (applying Alabama law); *Rest. Group Mgmt., LLC. v. Zurich Am. Ins. Co.*, No. 21-12107, 2022 U.S. App. LEXIS 15452 (11th Cir. June 6, 2022) (applying Georgia law).

16. *Hillbro LLC v. Or. Mut. Ins. Co.*, No. 21-35810 (9th Cir. June 14, 2022) (applying Oregon law).

17. *See, e.g., Inns-by-the-Sea v. Cal. Mut. Ins. Co.,* 286 Cal. Rptr. 3d 576 (Ct. App. 2021); *Musso & Frank Grill Co, Inc. v. Mitsui Sumitomo Ins. USA Inc.*, 77 Cal. App. 5th 753 (Ct. App. 2022); *United Talent Agency LLC v. Vigilant Ins. Co.*, 77 Cal. App. 5th 821 (Ct. App. 2022); *Commodore, Inc. v. Certain Underwriters at Lloyd's*, No. 3D21-0671, 2022 Fla. App. LEXIS 3262 (Ct. App. May 11, 2022); *Sweet Berry Café, Inc. v. Soc'y Ins., Inc.*, 2022 IL App (2d) 210088; *Lee v. State Farm Fire & Cas. Co.*, 2022 IL App (1st) 210105; *Firebirds Int'l LLC v. Zurich Am. Ins. Co.*, 2022 IL App (1st) 210558; *GPIF Crescent Court Hotel LLC v. Zurich Am. Ins. Co.*, 2022 IL App (1st) 211335-U; *Ortiz Eye Assocs., P.C. v. Cincinnati Ins., Inc.*, 2022 IL App (1st) 211312-U; *Ind. Repertory Theatre v. Cincinnati Cas. Co.*, 180 N.E.3d 403 (Ind. Ct. App. 2022); *Jesse's Embers LLC v. Western Agricultural Ins. Co.*, 973 N.W.2d 507 (Iowa 2022); *Wakonda Club v. Selective Ins. of America,* 973 N.W.2d 545 (Iowa 2022); Verveine Corp. v. Strathmore Ins. Co., 184 N.E.3d 1266 (Mass. 2022); *GPL Enterprise LLC v. Lloyds of London*, No. 302, 2022 Md. App. LEXIS 378 (App. May 24, 2022); *Gavrilides Mgmt. Co., LLC v. Mich. Ins. Co.*, No. 354418, 2022 Mich. App. LEXIS 632 (Ct. App. Feb. 1, 2022); *Three Won Three Corp. v. Property-Owners Ins. Co.*, No. 356791, 2022 Mich. App. LEXIS 2851 (Ct. App. May 19, 2022); Massage Bliss, Inc. v. Farm Bureau Gen. Ins. Co., No. 356445, 2022 Mich. App. LEXIS 2829 (Ct. App. May 19, 2022); *Gourmet Deli Ren Cen Inc v. Farm Bureau Gen. Ins. Co. of Michigan*, No. 357386, 2022 Mich. App. LEXIS 3032 (Ct. App. May 26, 2022); *Consolidated Restaurant Operations Inc. v. Westport Ins. Corp.*, 205 A.D.3d 76 (N.Y. App. Div. 2022); *Sanzo Enters., LLC v. Erie Ins. Exch.*, 2021-Ohio-4268 (Ohio App.); *Nail Nook, Inc. v. Hiscox Ins. Co.*, 2021-Ohio-4211 (Ohio App.); *Colectivo Coffee Roasters v. Society Ins.,* 2022 WI 36. At the time of publication, we learned that the New Jersey intermediate appellate court in the MacProperties Group appeal affirmed dismissals of complaints in six consolidated cases based upon the absence of direct physical loss or damage and the applicability of virus exclusions. It also rejected the policyholders' requests to replead to assert regulatory estoppel claims.

18. *Cajun Conti, LLC v. Certain Underwriters at Lloyds, London*, No. 2021-CA-0343, 2022 La. App. LEXIS 939 (Ct. App. June 15, 2022).

19. *N.Y. Botanical Garden v. Allied World Assurance Co.*, 2022 NY Slip Op 03871 (App. Div. 1st Dept.); *see also Sunstone Hotel Inv'rs, Inc. v. Endurance Am. Specialty Ins. Co.*, No. 8:20-cv-2185 (C.D. Cal. June 15, 2022) (expansive site environmental impairment liability coverage).

20. Shulman, R. & Rose, C., *Insight: Insurance Will Cover Coronavirus If Asbestos Lessons Prevail,* Bloomberg Law (May 27, 2020), https://news.bloomberglaw.com/esg/insight-insurance-will-cover-coronavirus-if-asbestos-lessons-prevail.

21. Antonella Granieri, *et al.*, *Sars-CoV-2 and Asbestos Exposure: Can Our Experience With Mesothelioma Patients Help Us Understand the Psychological Consequences of COVID-19 and Develop Interventions?*, Frontiers in Psychology, (December 22, 2020), https://www.frontiersin.org/articles/10.3389/fpsyg.2020.584320/full

22. *See* S.M. Seaman & J.R., Schulze, *Allocation of Losses in Complex Insurance Coverage Claims*, Chapter 19 (Social Inflation And Sustainability/ESG) (Thomson Reuters, 10th Ed. 2021-22).

23. *See* S.M. Seaman, *et al.*, *The Legal Trends Behind "Social Inflation" in Insurance*, Law360, (Feb. 21, 2020), https://www.law360.com/articles/1245725/the-legal-trends-behind-social-inflation-in-insurance.

24. Cara Salvatore, *Pandemic Put Deep Freeze On State Trials, New Data Show*, Law360 (Jan. 12, 2022), https://www.law360.com/articles/1454943

25. *See* S.M. Seaman & J. Selby, *Tracking The Flurry Of COVID-19 Related Legislative & Regulatory Activity Impacting Insurers*, Mealey's Litig. Rep.: Catastrophic Loss, Volume 15, No. 7 (April 2020).

26. *Social Inflation Will Be Accelerated by Pandemic*, Fitch Ratings (Dec. 14, 2020), https://www.fitchratings.com/research/insurance/social-inflation-will-be-accelerated-further-by-pandemic-14-12-2020.

27. Insurers, as well as defense (and coverage) counsel, have to consider whether their practices/mind sets may contribute to social inflation. As one commentator suggests, "[t]o the extent that insurance company claims departments devote more attention to controlling defense expenditures with cost containment measures than to pushing back against swelling indemnity numbers, they may be penny wise and pound foolish." J. Theodorou, *The Scourge of Social Inflation*, R Street Policy Study No. 247 (Dec. 2021), https://www.rstreet.org/wp-content/uploads/2021/12/RSTREET247.pdf?hsamp_network=linkedin&hsamp=bHs2nbYsdw7Z

28. *Sompo Intl's James: Aggregation of systemic risks and inflation present ongoing challenges for industry*, The Insurer (June 7, 2022), https://www.theinsurer.com/tv/sompo-intls-james-aggregation-of-systemic-risks-and-inflation-present-ongoing-challenges-for-industry-/23193.article?utm_source=slipcase&utm_medium=affiliate&utm_campaign=slipcase

29. *Id.* ■

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