Riding the E&O Line

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In This Issue

Leadership Notes

From the Chair

By Jonathan R. Harwood

When I wrote my previous message from the chair back in May, it was relatively early in the coronavirus process, and I was hopeful that we may have all returned to some sense of normality by the time this issue rolled around. Unfortunately, we are not there yet. However, my confidence back in May that our exceptional community of professionals is well equipped to deal with the situation, and the disruptions it has caused, has proven to be well founded. We have adapted, if not begrudgingly, to the virtual court appearances, depositions, client meetings, and all manner of things we used to do in person. In some ways, the virtual process has proved more efficient while, in others, it has been challenging. The members of our professional community have also, no doubt, suffered significant hardships during these times. Hopefully, the relationships developed from participating in the Professional Liability Committee has provided the resources to persevere during these hard times.

Unfortunately, due to the continuing effects of coronavirus neither the Summit nor our annual seminar will be able to proceed in person this year. However, that does not meant that all the hard work on both events was for naught. During the recent DRI Virtual Annual Meeting, we still presented a joint, virtual, session with Law Practice Management, Lawyers' Professionalism and Ethics, and Corporate Counsel entitled, "Protecting Our Professionals: Ethical Tips for Overall Well-Being." This panel addressed methods of identifying and helping co-workers and colleagues cope with the everyday difficulties of the practice of law. This information has taken on greater importance with the added stress caused by coronavirus and its impact on our personal and professional lives.

The committee has also continued its hard work on a pared down but still excellent program. While the final details have not been determined, and despite being disappointed that we cannot all be together in person to enjoy New York City in December, the seminar committee is busy planning an interactive virtual seminar for December 2. The condensed agenda will include diversity and ethics sessions, as well as an opportunity to review relevant trends in professional liability and interact with top claims professionals in the specialty. We hope you will join us as we discuss implicit bias in the practice of law, ethical issues in a virtual world, relevant case law and trends and all the things that are keeping claims professionals up at night in 2020.

We owe a continued debt of gratitude to Kim Noble of Thompson Flanagan and Laura Dean of Cranfill Sumner & Hartzog, LLP, the Chair and Vice Chair for this year's seminar, and Zandra Foley of Thompson Coe, who has been putting together our presentation for the Summit. Their tireless efforts have allowed us to provide a great set of resources to the broader professional community.

For now, please enjoy this issue of *Riding the E&O Line*. As usual, it is filled with excellent discussions of topics that touch on a broad of array of the concerns we all deal with on a regular basis. We trust you will find these articles to be educational and thought provoking.

In closing, I continue to be amazed at the great work this committee puts out under far less than optimal circumstances. As my first year as committee vice chair winds down, I look forward to seeing many of you in person soon.

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Feature Articles

COVID-19 and the Potential Wave of E&O Claims Against Insurance Producers

By Ryan J. Gavin

As the country braces for a possible "second wave" of COVID-19 infections, professionals in the insurance placement space may find themselves part of a second wave of litigation. COVID-19 has imposed a tremendous burden on businesses and, as reported across the country, many policyholders are suing their insurance carriers to overturn the denial of business interruption claims. If those claims and lawsuits are largely unsuccessful, insurance producers may be next in line for litigation. Fortunately, these cases should be defensible more often than not.

The COVID-19 pandemic led to thousands of American businesses limiting occupancy, reducing services, and physically closing pursuant to medical guidelines and government orders designed to minimize the spread of novel coronavirus transmission. In addition, even if a business could remain open, customer visits were often reduced to avoid exposure to the virus. The combination of government restrictions, limited customer traffic, and layoffs that reduced household income caused thousands of businesses to sustain substantial losses of revenue. Businessowners who submitted business interruption claims, however, are frequently finding their claims denied and left to wonder what is covered if not a pandemic. The two most frequently cited reasons are (1) absence of the "direct physical loss of or damage" to property required under business interruption coverage forms, and (2) explicit exclusions for losses caused by viruses. After these coverage claims make their way through their courts many unsuccessful claimants will look to their brokers as a substitute for missing insurance coverage.

While the situation created by a once in a century global pandemic is unique, the questions to be asked in analyzing potential E&O claims are not. The first question is what duty is owed by the broker or agent to his or her client. The answer to this question is controlled by state law. In the context of customary insurance transactions, the most commonly recognized obligation of the insurance producer is to use reasonable skill and diligence to procure the insurance requested or, if unable to do so, timely notify the client. *See, e.g. Emerson Electric Co. v. Marsh & McLennan Companies, 362 S.W.3d 7, 13* (Mo. 2012); *Murphy v. Kuhn*, 682 N.E.2d 972, 974 (N.Y. 1997). Further, there is typically no duty—either at the time of the transaction or continuing after delivery of the policy—to advise the client regarding available coverages. *Id.* In this scenario, the question of the producer's duty will be determined by comparing the coverage the customer requested to the policy actually delivered. In those states where an insured has a duty to review its policy, insurance brokers may be afforded additional protection from liability even if the delivered policy provided lesser coverage than was requested.

In some cases, policyholders will attempt to expand the liability of the insurance producer by alleging the existence of a "special" or fiduciary relationship. This may sometimes be the product of more favorable law in a particular jurisdiction concluding that insurance brokers serve as more than a mere conduit through which the insurance transaction passes. Alternatively, this type of relationship can also be created by the parties through a historic course of dealing or written fee for service agreement where the broker agrees to advise the client—a situation becoming more frequent as producers expand how they lure and serve clients. In these cases, the duty imposed on the producer is more expansive and potentially create defense challenges. *See, e.g. Tiara Condominium Ass'n, Inc. v. Marsh, USA, Inc.*, 991 F.Supp.2d 1271, 1280 ("special relationship" between policyholder and broker gives rise to a duty to advise about needed coverage). Instead of defending the claim by showing that the client did not request the disputed coverage, the broker may be held liable for failing to satisfy a higher duty requiring she recommend certain coverages or explain those which are absent. However, broader business interruption coverage or elimination of the virus exclusion are but two of thousands of potential custom coverage options a policyholder could negotiate with an insurer. It would not be reasonable to hold a producer liable for either (a) not advising of every single potential policy modification, or (b) not having the foresight to realize that in the year 2020 a pandemic was the one obscure risk for which coverage should have been secured.

The next issue is causation—can the policyholder prove that the alleged negligence of the producer caused it to sustain damages. A common causation question is whether

alternative coverage that would have protected the insured was available in the marketplace. Historically, property insurance has not been designed or intended to cover large scale catastrophes as evidenced by common exclusions for flood, terrorism, and viruses. As such, it must be asked and investigated whether there actually was a carrier who, at the time of policy acquisition or renewal, would have written coverage that protected against pandemic losses and, if so, at what cost. To the extent it can be proven that alternative coverage protecting against pandemic related loss of income exists only as a unicorn-like non-ISO custom form or endorsement, the ability of the policyholder to recover from the producer becomes questionable. In addition, even if coverage availability can be substantiated by evidence or expert testimony, it must also be demonstrated that no other policy exclusion or limitation would serve to bar coverage.

Finally, the policyholder must also prove that the allegedly negligent conduct of the producer caused it to sustain damages. In other words, if business interruption coverage had been secured and did not exclude viruses, the policyholder must prove what amount of loss the hypothetical insurer would have paid. Business interruption coverage is not limitless under the most commonly used ISO forms. Under these forms, coverage is commonly provided for the sum of lost net income and incurred normal operating expenses caused by a slowdown or cessation of operations until such time as the premises are restored to their pre-loss condition. *See* ISO CP 00 30 04 02. If the suspension of business operations is caused by perceived contamination of the premises by the novel coronavirus, it then stands to reason that the loss period is the time reasonably necessary to clean and disinfect the location—not the length of the pandemic. Careful investigation must therefore be conducted into the scope and specific terms of any coverage that may have been available.

Insurance producers with appropriate risk management and documentation practices should typically be in a good position to prevail on these claims. As is always the case, documentation of coverages requested, offered, accepted, and rejected goes a long way to establishing that the defendant insurance producer acted reasonably and responsibly.

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COVID-19 Liability Protection and Business Best Practices

By Jason J. Campbell

In response to an anticipated wave of COVID-19 exposure claims, a patchwork of COVID-19 liability protection laws and executive orders have been implemented at the federal and state level. This article will discuss current COVID-19 immunity legislation and executive orders along with the existing hurdles and defenses to potential tort liability for COVID-19 exposure claims even where no immunity otherwise exists. Next this article will discuss anticipated theories plaintiffs may use to pursue COVID-19 tort claims and suggested "best practices" for businesses to limit exposure to COVID-19 claims.

Congress has yet to enact broad based immunity legislation to protect all health care professionals or businesses from COVID-19 liability. The Coronavirus Aid, Relief, and Economic Security "CARES" Act of 2020 provides immunity only for *volunteer* healthcare professionals who provide COVID-19 related healthcare during the COVID-19 pandemic. S. 3548, 116th Cong., 2d Sess. (2020) (enacted). https://www.congress.gov/bill/116th-congress/senate-bill/3548/text. The Public Readiness and Emergency Preparedness "PREP" Act, as amended in 2020, provides limited COVID-19 immunity to health care providers, government administrators, manufacturers, distributors, and other groups against negligence claims *arising from the use of COVID-19 "covered countermeasures,"* including personal protective equipment (PPE). The Public Readiness and Emergency Preparedness Act, 42 U.S.C. §247d-6d, 247d-6e (2006), amended in spring 2020 (the Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198 (Mar. 17, 2020))

As of the time this article was submitted for publication, roughly half of all states have enacted legislation or issued executive orders to provide *healthcare workers, and healthcare facilities* with some form of immunity from COVID-19 claims or suits. The immunity legislation and orders differ greatly in terms of the scope of immunity protection. Some states including Arizona, Connecticut, Illinois, Kentucky, Massachusetts, Michigan, New Jersey, New York, Nevada, Rhode Island, Vermont, and Wisconsin have expanded immunity to encompass premises liability protection for COVID-19 claims due to exposure in nursing homes and other long-term care facilities.

Several states including Arkansas, Alabama, Georgia, Iowa, Kansas, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, Utah and Wyoming have further expanded COVID-19 tort immunity either for all businesses or "essential businesses." Most states that have broadly applied COVID-19 immunity protection require a showing that "safety rules" or guidelines were followed at the time of the alleged exposure and the exposure did not result from "reckless or intentional conduct." This approach essentially codifies traditional common law "assumption of risk" defenses.

The state immunity legislation and executive orders are generally applied retroactively such that immunity applies for any exposure incident occurring after the state's initial pandemic emergency declaration. Similarly, most state COVID-19 immunity provisions contain "sunset" provisions such that immunity protection ends whenever the corresponding state pandemic emergency declaration is lifted or until further legislative review.

In those states without COVID-19 liability immunity provisions, exposure claims may still face significant liability hurdles under traditional common law. In states recognizing the "exclusive remedy doctrine," most employee exposure claims would be barred unless the plaintiff could prove an exception to the doctrine such as intentional conduct. Moreover, the virus' highly contagious nature and lengthy incubation period from exposure date until onset of symptoms would presumably make it difficult for plaintiffs to prove the necessary elements required for negligence or premises liability actions. While exposure claims involving confined or custodial settings such as fitness centers, schools or nursing homes would theoretically be easier to prove, even those claims may be subject to common law defenses including "assumption of risk," "act of god," or "*ferae naturae*."

In attempting to overcome the perceived hurdles to COVID-19 tort liability, plaintiffs are expected to use state and federal safety regulations and guidelines as a sword to establish liability. While federal or state administrative guidance generally does not give rise to a private cause of action in tort, plaintiffs are nevertheless attempting to argue regulatory noncompliance to establish claims for public nuisance and to establish breach of duty to protect the health and safety. Lawsuits have been filed in several jurisdictions alleging that businesses "knowingly" or "intentionally" disregarded regulatory COVID-19 guidance or safety provisions. These suits attempt to overcome COVID-19 immunity laws by alleging either reckless or intentional conduct to take advantage of the intentional tort immunity exceptions.

In terms of recommended guidance, The most obvious way for professionals and businesses to limit the risk of a COVID-19 claim is to thoroughly review and adopt the recommendations and guidance offered by the Centers for Disease Control and Prevention (CDC), and local state health departments in attempting to prevent or control the spread of the virus. Those resources provide specific steps businesses should consider taking to protect both employees and visitors to their premises. Implementation of these protocols in a procedures manual together with posted warnings about the risks of COVID-19 at points of entry may establish evidence to support a presumption of compliance for immunity protection and application of the "assumption of risk" defense in the event of a COVID-19 related lawsuit. Additionally, subject to existing state laws and enforcement executed liability waivers should be requested as a condition of entering the business premises.

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Back to Contents

Managing Your Law Practice Risk in the COVID-19 Era

By Gawain Charlton-Perrin and Seth Laver


The current coronavirus pandemic ("COVID-19") has caused unprecedented disruption to the practice of law, some temporary and some possibly permanent. This disruption may lead to increased legal malpractice and disciplinary exposure. Attorneys face increased health dangers and personal obligations caused by the virus. However, attorneys have the same ethical and client obligations as prior to the pandemic. COVID-19 has had an immediate impact on the use of technology by attorneys. The economy and the stock market have been incredibly volatile. Routines have been significantly changed. Deadlines have been changing as the courts and government adapt to shut-downs with the extensions of discovery and statutes of limitations due to the virus. COVID-19 has put pressure on attorneys to balance client and ethical obligations with personal obligations. The following are some risk management strategies to help avoid and mitigate the increased professional liability risks caused by the COVID-19 era.

Staying Informed

Successfully avoiding malpractice claims in the COVID-19 environment will require legal practitioners to stay informed of any developments which may impact the well-being of clients, colleagues, and their practice; to stay up-to-date with firm policies and procedures; and to stay well—physically, mentally, and emotionally.

An attorney is obligated to provide "competent representation to a client." See, ABA Model Rule 1.1: Competence. This includes the obligation to monitor and comply with new rules arising from COVID-19. Courts and offices may be closed, deadlines are uncertain, calendars and statutes of limitations are in flux. Thus, attorneys must review applicable court orders regarding closures, continuances and schedule changes and ensure effective communication. This includes consideration and addressing the increased risks of miscommunication that will arise in remote working scenarios. Missed deadlines are a leading cause of malpractice claims, even under routine circumstances.

Understanding Technology in COVID-19 Era

Comment 8 to Rule 1.1 notes that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

As such, attorneys must now understand how to manage working remotely with online collaboration or video conferencing with clients and the courts. Attorneys know that they are bound by the obligation to maintain client confidences. This mandate is complicated by the virtual environment where attorneys may struggle to preserve confidentiality, and without the option of face-to-face contact, communication may be confined to less secure technology. For instance, the ease of use of some virtual meeting programs may permit unwelcomed intruders to participate in attorney–client meetings anonymously. Similar to an in-person meeting, attorneys must be mindful of their surroundings when discussing sensitive client information in a virtual setting.

Attorneys can no longer bury their head in the sand when it comes to understanding how to manage the cyber risks and breaches. An attorney does not have to be an IT expert, but an attorney must understand the risks and take steps to protect confidential client information. In the COVID-19 era, this is become more difficult due. Attorneys may reach out for help from IT professionals or other vendors to help with this process as long as the vendor understands the obligations of protecting the confidential client information kept by the attorney.

Creating or Updating Succession Plans

Succession plans have been an important risk management tool for years, especially for sole practitioners. In a 2019 annual report by the disciplinary commission that regulates Illinois attorneys, 75.20 percent of Illinois sole practitioners indicated that they did not have a succession plan. In this COVID-19 Era, a succession plan is even more important in the event of the unexpected death, disability, long-term

health of a sole attorney firm or even for a larger law firm. The succession plan should also include a proviso for pandemic response.

Law firms should also draft or update internal policies—on subjects including such as working remotely, sick leave, and security—to reflect what we have already learned from the pandemic and to accommodate the realities of social distancing and other disruptions to the rhythms and routines of work. Policies should be transparent and readily available. Be mindful of the need for flexibility and to identify a point-person virtually accessible to employees to address questions or concerns. Likewise, business continuity and succession planning may be necessary to avoid problems down the road.

Staying Healthy and Well

The stresses of the practice of law take a toll on many of our peers, clients, and colleagues. Reportedly, even before the COVID-19 outbreak, one in three practicing attorneys were considered "problem drinkers," over 25 percent suffered from depression, and nearly 20 percent showed symptoms of anxiety. Many malpractice claims arise from an attorney's mental health or substance abuse struggles. Such problems may intensify in times of increased stress. Be mindful of the pressures caused by this pandemic and how it has impacted your routine and your state of mind. There are countless resources available to help establish a healthier work-from-home approach and to help prioritize breaks, healthy eating, and social interaction through virtual sources.

Given the uncertainty surrounding COVID-19, and the particularly high contagion rate, attorneys should also plan for the possibility of physical incapacity. Update any contingency and succession plans and review such policies with attorneys and staff. Attorneys are ethically obligated to implement transition plans to account for representation on short notice in the event of unavailability.

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