As Businesses Reopen, the Lawsuits Begin: The Landscape for the Post-COVID-19 Deluge of Lawsuits, the Intersection of Insurance and Using ADR for Expedited Resolution

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There's no way to predict whether, and if so, how many cases will actually arise out of the COVID-19 pandemic. Initially, disputes may arise about the scope of closures and the authority of states to order the closures. Other disputes might arise after the states open their economies when opening might be considered, by some, to be too early. Compounding the problem, in May 2020, the death of an African American man at the hands of police in Minneapolis resulted in protests and rioting during government enforced stay-at-home orders. Lawsuits over property and personal damage will rise because of the protests and riots, and COVID-19 may spread further to the extent that demonstrators did not follow Center for Disease Control (CDC) social distancing and face covering recommendations

Those matters not subject to pre- or post-dispute resolution clauses will be filed in court unless the parties agree to pre-litigation alternative dispute resolution (ADR). In 2019, the New York State courts adopted a presumptive ADR initiative for civil cases. That means that all cases filed in New York state courts will be subject to individual court rules that require the parties to use an ADR process soon after the filing of the case. Even federal courts that have not adopted a presumptive ADR program will develop case management programs to address the influx of cases. These case management programs will likely include many aspects of ADR.

What types of disputes are likely to arise? Will there be immunity from liability for specific classes of providers? In what forum will the cases be filed? Will the parties seek early resolution? The scope and depth of the types of disputes that will arise is unknown, but the following are predictable.

Business Interruption Insurance

The first wave of pandemic-related disputes involves disputes over first-party business interruption. Three months after the lock-down started close to three thousand insurance coverage lawsuits, including class actions, had been filed.[1] Many more will follow. The lawsuits will arise if a carrier determines that an exclusion precludes coverage under a particular insurance policy. The next wave will likely involve third-party claims.

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Under the terms of business interruption insurance policies, coverage is extended to the insured for loss of business, income, and extra expenses to continue, or resume, business resulting from direct physical damage or loss to property. Coverage may also include losses due to business interruption from an act or order of a "civil authority" that prohibits access to the insured's premises or coverage for lack of ingress to or egress from the premises.

Another coverage that may be afforded is "contingent business interruption." This coverage applies to lost business sustained by the insured as a result of losses suffered by critical suppliers and customers. This occurs in situations where the underlying cause of damage to the supplier or customer is covered by the insured's policy. Supply chain or trade disruption typically covers business interruption due to supply chain disruption or breakdowns in transportation. These coverages are triggered only by "direct physical loss of or damage" to relevant property.

Issues that will be in dispute between a policyholder and carrier include whether: a class action or multidistrict litigation is available to provide relief, as a procedural matter; SARS-COV-2 or COVID-19 causes "direct physical loss or damage"; exclusions, including the "Exclusion for Loss Due to Virus or Bacteria," are applicable; and Sublimits.

Down the line, there may also be issues with regard to the calculation of business interruption damages, some of which could end up in appraisal, an arbitration-like procedure.

Reinsurance disputes are likely to follow. Reinsurance claims will arise when it is alleged that a ceding company[2] paid claims outside the coverage of the policy or made claims determinations that could be considered allegedly unreasonable.

A number of states have proposed legislation that would, if passed, require insurers to afford coverage for COVID-19 business interruption claims as a result of the Pandemic on a retroactive basis, notwithstanding policy wording. These proposed bills are generally limited to an insured with fewer than 250 employees. There has been some discussion of enacting federal legislation, but that effort generally seems to be prospective towards the next crisis. Most discussion has centered on the Pandemic Risk Insurance Act[3], a form of the Terrorism Risk Insurance Act.

Businesses affected by COVID-19 may, on top of that, be facing claims for coverage in connection with recent reports of vandalism or looting. In addition, businesses forced to suspend operation due to rioting may have coverage for business interruption. There may be disputes in relation to the calculation of damages arising out of the confluence of COVID-19 and the recent reports of looting as insurers may argue that there was no income since businesses were already closed due to COVID-19.

Cyber-Security Related Claims

In order to comply with social distance requirements, employers moved their workforces out of office campuses with secure networks to home offices. If employees are not working on company sanctioned laptops or networks, there could be an increase in other security breaches as employees use their home computers. Such attacks compromise confidential information maintained by companies. There has been a rise in ransomware attacks on COVID-19 related medical facilities.

There may also be cyber insurance implication where policyholders seek to recover for these losses under cyber and other responsive insurance policies.

Directors and Officers (D & O) Liability Claims

Shareholders might bring suits against the officers and/or boards of publicly held companies alleging a failure to properly prepare for the pandemic and the precipitous drop in stock prices as a result of such alleged negligence.[4] Allegations might extend to not properly valuing into financial projections the impact that COVID-19 would have and its effect on profitability and share prices. Certain industries that have been hard hit, i.e. airlines and manufacturing, could be exposed to more specific industry directed D&O actions based on significant impact to shareholder value.

Representation and Warranty Claims

Investors might allege claims over representations made in the course of an acquisition about the profitability or viability of the company being sold or the stability of its workforce that turned out not to be accurate due to what happened during the COVID-19 crisis.

Securities Disputes

As they see the value of their brokerage accounts go down, investors will question the suitability of trading and holdings in their accounts. Claims may be brought against their brokerage firms for fraud and misrepresentation with respect to suitability of the investment as well as other claims. Many broker dealers are self-insured for losses incurred but there may be other applicable insurance policies.

The vast majority of cases naming brokerage firms and their registered representatives are subject to pre-dispute arbitration agreements and will be required to be filed at the Financial Industry Regulatory Association or FINRA. Investors who assert claims against their investment advisors, however, will have broader options for where to file claims. If there is a pre-dispute arbitration agreement, the parties might elect the American Arbitra-

tion Association or another forum. In all instances, the parties can voluntarily agree to mediation.

Contract and Commercial Disputes

There will be a burst of breach of contract and commercial disputes that arise because people and businesses are not able to perform on contracts. The disputes might involve leases, delivery of services or goods, or other performance issues. While these disputes will be initially filed in court or arbitration, these types of disputes are excellent candidates for mediation because parties might be very open to alternative terms for resolution that cannot be achieved in court or arbitration.

Student Disputes

When the pandemic hit, many colleges and universities sent students home for fear of massive spread within the student body. The schools quickly converted to online classes.

There have been a number of class actions already filed by students against colleges and universities seeking to recover tuition reimbursements or rebates on the ground that the quality of online courses is not the same as in person classes. Other actions demand reimbursement of housing fees and other costs because students were sent home mid-semester.

Cruise Line Disputes

Early newspaper reports told stories about passengers who were taking the vacation of their dreams but instead were quarantined on ships after an outbreak of coronavirus. On March 9, 2020, the first dispute was filed for passengers on the Grand Princess.[5] This and subsequent lawsuits allege negligence on the part of cruise lines for not providing safe lodgings. The success of these lawsuits will turn on the type of harm and whether the carrier exercised reasonable care.

Investor State Disputes

There have been past instances where overwhelming circumstances have triggered a series of lawsuits or investor claims against governments. In these cases, investors seek to avoid financial commitments no longer possible to pay or benefits that were lost because of restrictions placed by governments to protect the public health. Investors will look to investor/state arbitration to secure this relief. Investment tribunals will grapple with the reasonableness of the challenged state action. Mediation may provide an alternative to arbitration since many of these cases are time sensitive.[6]

Bankruptcy Claims

Bankruptcy filings due to the coronavirus business closures are on the rise. These may be related to D&O claims. Bankruptcy courts are using mediation to settle creditor claims.

Employment Disputes

Employment disputes may arise in a variety of contexts related to COVID-19 including workers' compensation claims, discrimination, and whistleblower cases.

Employees who go back to work and find out that their co-worker(s) have or had the virus, and then get the virus, might bring a worker's comp claim based on negligence. Employees who contracted COVID-19 from a co-employee before a shutdown, or who were forced to work during the shutdown and got COVID-19, will allege failure to provide a safe place to work. Employees working from home during the pandemic may also sustain injuries due to poor ergonomics or trips and falls, with the home determined to be the employees' prime office.

Worker's compensation claims normally are addressed through state workers compensation systems. Some states such as California permit workers and contractors to establish an ADR compensation program for injuries on the job.[7]

Workers brought a lawsuit against Smithfield Foods, Inc. for failure to provide adequate workplace safety. That lawsuit was dismissed by a U.S. district judge in Missouri[8] on the ground that federal agencies are more equipped to determine whether the company complied with adequate health standards during the COVID-19 crisis. It is unclear whether this decision will impact other similar cases filed elsewhere.

Many employers were forced to make difficult decisions to terminate employees when business dried up. Some employees may bring claims under federal and state anti-discrimination laws. The former employee might challenge the reason the employee was terminated and argue that the loss of business was solely a pretext for a discriminatory reason. Discrimination claims might also arise as employers determine who to hire first once businesses start to rehire employees.

In another twist, employees have filed several complaints alleging whistleblower retaliation on the ground that the employees were terminated for expressing concerns about the adequacy of safety precaution steps taken by their employer.[9]

Consumers

Consumers might bring claims against storeowners for unsafe conditions when another shopper or an employee coughs and the complaining customer then gets coronavirus. These are hard cases to prove because the customer must show that the store is where he/she got the virus.

Medical Providers

Claims against medical providers will be subject to a new Article 30-D of the Public Health Law, which is entitled the Emergency or Disaster Treatment Protection Act (EDTPA). This act immunizes medical providers for COVID-19 related claims in the absence of gross negligence or recklessness. Congress and states are also considering legislation to protect health care providers.

Medical malpractice claims might arise where surgeries or other procedures considered non-essential are delayed because of the virus. Malpractice might be alleged because a medical provider did not raise urgency of the procedure. Medical providers face a double-edged sword. For example, someone being treated for cancer with chemotherapy might have had treatment halted to avoid compromised immunity but might also die from not receiving treatment.

Nursing Homes

Nursing home residents who get sick or die from coronavirus can no longer raise health and safety claims alleging negligence in New York. The nursing homes and their staff will be exempt by virtue of the EDTPA unless a claimant can prove gross negligence or recklessness by the nursing home.

Care Providers Bring Action Against Hospitals

On April 20, 2020, the New York State Nurses Association filed three lawsuits challenging the failure of the New York State Department of Health (DOH) and two hospitals, Montefiore Medical Center and Westchester Medical Center, to protect the health and safety of nurses treating COVID-19 patients.[10]

The lawsuit against DOH was filed in New York Supreme Court, New York County, under Article 78 – seeking an injunction for multiple failures to protect the health of nurses, patients and the public.

Montefiore was sued in the United States District Court for the Southern District of New York on behalf of the 3,000 RNs at the hospital, seeking injunctive relief under the Labor Management Relations Act to honor its contractual obligations. This injunctive action seeks to restore safe working conditions for nurses and their patients.

The action against Westchester Medical Center was filed in New York Supreme Court, Westchester County, on behalf of the 1,600 RNs seeking an injunction against hazards that cause or are likely to cause death or serious physical harm to nurses. Among the causes of action: intimidation of RNs who have spoken out publicly about deficiencies in the hospital's responses to COVID-19.

The lawsuits seek protective respirators, gowns that are fluid resistant, as well as testing for COVID-19 and antibodies.

Ordinarily the actions would be brought in arbitration because the nurses union and the hospitals are subject to collective bargaining that covers the requirement of hospitals to provide safe conditions but, in this case, the nurses sought court intervention on the ground that there is an urgent need to prevent irreparable harm. One issue that the courts will explore is the obligations of the hospitals to provide safe work conditions.

Immunity from Legal Liability

There is a movement from business for legal protection against negligence claims. It is generally not an adequate defense to negligence that you did what the law required. There are some examples where Congress/legislatures have created protections. The September 11th Victim Compensation Fund[11] was adopted by Congress to compensate the victims of the September 11th attack, or their families, in exchange for their agreement not to sue the airline corporations involved. The fund was expanded to provide for funds to compensate first responders for illnesses related to the attack. In 1986 the National Childhood Vaccine Injury Act[12] was passed to eliminate the potential financial liability of vaccine manufacturers due to vaccine injury claims. The intent of the legislation was to ensure a stable market supply of vaccines and to provide cost-effective arbitration for vaccine injury claims. Most recently, Congress provided liability protection to volunteer health care professionals providing health care services during the current public health emergency under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act").[13] The CARES Act exempts volunteer health care professionals from liability under federal or state law for any harm caused by an act or omission, unless the harm was caused by willful or criminal misconduct, gross negligence, reckless misconduct, conscious flagrant indifference, or being under the influence of alcohol or intoxicating drugs, in providing health care services during the public health emergency with respect to the coronavirus. This provision preempts state or local laws that provide such volunteers with lesser protection from liability.

Congress chose not to extend liability protection to non-volunteer health care professionals, affording no widespread federal protection to those employed or contracted professionals treating patients during the emergency. Good Samaritan laws adopted in some states might protect these medical providers, but such laws are not uniform. Some states have extended liability protection to employed or contracted health care professionals through state orders. For example, the New York State legislature passed a bill that waived specific state laws to provide immunity from civil liability to certain health care professionals, hospitals, nursing homes professionals and nursing homes for any injury or death alleged to have been sustained directly as a result of any COVID-19 related treatment act or omission by such professional in providing medical services during the pandemic, unless

such injury or death was caused by the professional's gross negligence.

How about liability immunity around testing? Sen. Benjamin Sasse, R-Neb., introduced a bill that would grant broad legal immunity for those health care providers who provide testing or treatment outside of their specialties to patients with COVID-19 for the duration of the national health emergency.[14] The legislation protects health care providers from federal, state and local civil liability if they are: (1) using or modifying a medical device for unapproved use or indication; (2) practicing without a license or outside of an area of specialty if instructed to do so by an individual with such a license or within such an area of specialty; or (3) conducting the testing of, or the provision of treatment to, a patient outside of the premises of standard health care facilities. Regulators at both the state and federal level are also likely to take steps to address liability concerns to help ensure that available health care providers, regardless of specialty, are encouraged to step forward to assist in caring for COVID-19 patients.

Will Early Settlement Occur?

New York Governor Andrew Cuomo issued Executive Order 202.39[15] on March 7, 2020. The Executive Order, among other things, suspends statutes of limitations during the health emergency. This order and the statute of limitations provision was extended to July 6, 2020. One impact of the suspension of the statute of limitations is permitting delay in filing lawsuits arising because of COVID-19 related injuries.

In the insurance coverage context, carriers seek delays in cases for several reasons. Insurance coverage is based on the contract between policyholders and carriers. Ambiguities in contracts might require court intervention on critical contract interpretation before settlement negotiations or mediation can start in related cases. Under the terms of insurance contracts notice is required to initiate the claims process. The completeness or lack thereof of notice, will either accelerate or delay the resolution of a claim including early settlement. In third-party insurance cases there is a strong possibility of mediation being successful with insurers at the table.

Will lawyers look for early settlement? In the commercial setting where money is short, there might be a desire to delay resolution. But it is hard to predict whether lawyers would look for early settlement if a workplace experienced a huge number of employees or customers' sickness. In some cases, the employer will seek early resolution to avoid damage to its brand that would occur because of extended litigation. The needs of the litigant should be paramount and, if that is the case, there would be a motivation for early resolution through mediation.

Conclusion

This article attempts to summarize the types of disputes that have or may arise from the COVID-19 and the civil unrest that followed shortly thereafter. It is difficult to predict how successful these cases will be or whether legislation will limit liability. What we do know is that ADR will be part of the dispute resolution continuum addressing these cases.

Endnotes

1. *See* Hunton Andrew Kurth COVID-10 complaint tracker for the latest data at https://www.huntonak.com/en/covid-19-tracker.html..
2. A ceding company is an insurance company that passes a portion or all of the risk associated with an insurance policy to another carrier. The ceding company passes the risk against undesired exposure to losses.
3. *See* HR 7011 Pandemic Risk Insurance Act of 2020.
4. Peter A. Halprin, Pamela Woods and Vincent Xu, *The Coming COVID-19 Coverage Fight: Insured Versus Insured Exclusions and Collusion*, New York Law Journal (May 21, 2020).
5. https://www.mercurynews.com/2020/04/09/grand-princess-passengers-sue-cruise-line-for-negligence-over-covid-19-outbreak/.
6. For a further discussion including comparable past action see https://www.imimediation.org/2020/06/03/covid-19-and-mediation-of-investor-state-disputes-a-way-forward/.
7. *See* https://parma.com/sites/default/files/files/images/conference/c3_alternative_dispute_resolution.pdf for the history of the California workers compensation ADR program.
8. https://www.law360.com/articles/1270737/attachments/0.
9. *See* https://leftcoastlaw.com/files/2020/04/Kristopher-King-v.-Trader-Joes-East.pdf and https://leftcoastlaw.com/files/2020/04/Norris-v.-Schoppenhorst-Underwood-Brooks-Funeral-Home-LLC.pdf.
10. *See* https://www.nysna.org/press/2020/nys-nurses-association-files-three-lawsuits-protect-nurses-health-and-safety#.Xtux9mpKjyU.
11. *See* https://www.justice.gov/civil/vcf#:~:text=SEPTEMBER%2011TH%20VICTIM%20COMPENSATION%20FUND,%3A%20www.vcf.gov.
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