

COVID-19 CLASS ACTIONS AND MDLS:
EMERGING AND EXPECTED REALITIES FOR
INSURANCE COVERAGE, TORT, AND
EMPLOYMENT LITIGATION

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ATTORNEYS AT LAW

INTRODUCTIONS



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JEFF MARKOWITZ
APPELLATE AND
EMPLOYMENT LAW

COVID-19 TASK FORCE


www.arthurchapman.com/areas/covid-19-task-force

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News

- > [Plan not Panic: Join us this week for two webinars on the changing legal landscape related to COVID-19](#)
- > [COVID-19: Plan not Panic](#)
- > [COVID-19: FAQ's for Employment, Coverage, and Workers' Compensation](#)

Resources

- > [ACKSP 2020 Families First Coronavirus Response Act Alert](#)
- > [ACKSP 2020 COVID-19 Resources](#)

May 5, 2020

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UPCOMING WEBINARS

- Tuesday, May 12, 2020
 - Coverage related issues to COVID-19 Claims
- Monday, May 18, 2020
 - COVID-19: Product Liability and Tort Claims

OVERVIEW OF CLASS ACTION LITIGATION

MIKE NORTH

COVID-19

INSURANCE COVERAGE CLAIMS

BETH PROUTY

INSURANCE COVERAGE CLAIMS

Business Interruption Gri... X
Secure | <https://werbig.org>
if insurers do not start paying insurance business claims, we will bring BIG legal action in every state.

“We are banding together to launch BIG legal action in every state against insurers who deny funds for civil authority coverage. Immediate payment is due on policies that do not contain a virus exclusion. We are willing to support federal subsidies for insurers who cooperate with us, but the window for a solution is closing fast.”

JOHN HOUGHTALING

JOHN HOUGHTALING
GENERAL COUNSEL

8:30 AM
5/4/2020

CLASS ACTIONS — PROPOSED CLASS

Billy Goat Tavern N.D. Illinois

Proposed Class: All Illinois businesses offering food or beverages for on-premises consumption that: (1) are covered under Society Insurance “all-risk” insurance policies containing policy form number “TBP13 05-15”; (2) have made a claim for lost business income as a result of COVID-19 and Executive Orders 2020-07 and 2020-10; and (3) been denied coverage.

El Novillo Restaurant S.D. Florida

Proposed Class: All entities who have entered into standard all-risk commercial property insurance policies with the Underwriter Defendants, where such policies provide for business income loss and extra expense coverage and do not exclude coverage for pandemics, and who have suffered losses due to measures put in place by civil authorities to stop the spread of COVID-19.

CLASS ACTIONS – PROPOSED CLASS

Egg Works District of Nevada

Proposed Class :

(a) All persons and entities with **Business Income coverage** under a Commercial Package Policy issued by Defendant that suffered suspension of business due to COVID-19, and for which Defendant has denied a claim for the losses or have otherwise failed to acknowledge, accept as a covered loss, or pay for the covered losses (the “Business Income Coverage Class”).

(b) All persons and entities with **Extra Expense coverage** under a Commercial Package Policy issued by Defendant that sought to avoid or minimize the suspension of business caused by COVID-19, and/or the actions of civil authorities in response to COVID-19, and for which Defendant has denied a claim for the expenses or have otherwise failed to acknowledge, accept as a covered expense, or pay for the covered expenses (the “Extra Expense Coverage Class”).

CLASS ACTIONS – PROPOSED CLASS

Egg Works District of Nevada

Proposed Class :

(c) All persons and entities with **Civil Authority coverage** under a Commercial Package Policy issued by Defendant that sought to avoid or minimize the suspension of business caused by COVID-19, and/or the actions of civil authorities in response to COVID-19, and for which Defendant has denied a claim for the losses or have otherwise failed to acknowledge, accept as a covered expense, or pay for the covered loss (the “Civil Authority Coverage Class”).

PROPOSED MDL

In re: COVID-19 Business Interruption Insurance Coverage Litigation

Case MDL No. 2942 - April 20, 2020

Therefore, Movants seek the transfer and assignment of the Actions, which all seek a finding that the Governmental Orders trigger coverage under the plaintiffs' business interruption insurance policies, to the Eastern District of Pennsylvania, as well as any actions subsequently filed involving similar facts or claims.

PROPOSED MDL

In re: COVID-19 Business Interruption Insurance Coverage Litigation

Case MDL No. 91 - April 20, 2020

Movants seek transfer and assignment of all pending Actions¹ against those insurers who have wrongfully denied coverage for business interruption due to the COVID-19 pandemic as listed in the Schedule of Actions, as well as any subsequently-filed actions involving similar facts or claims, to the Honorable Matthew F. Kennelly, United States District Court for the Northern District of Illinois.

PROPOSED MDL

ARGUE A COMMON FACT PATTERN

Case MDL No. 91 - April 20, 2020

- The insured purchased a property policy or a similar insurance policy from the defendant insurance company.
- The property policy provides coverage for all risks of physical damage or loss to covered property.
- The insured suffered property damage and/or business interruption losses occasioned by COVID-19.

PROPOSED MDL

ARGUE A COMMON FACT PATTERN

Case MDL No. 91 - April 20, 2020

- The insurer owes coverage to the insured under one or more of the insuring agreements typically found in the standard-form property insurance policies issued in the United States, such as:
 - The business interruption insuring agreement
 - The civil authority insuring agreement
 - The Extra Expense insuring agreement
 - The Sue and Labor insuring agreement
 - The ingress and egress insuring agreement
 - The preservation of property insuring agreement.
- The insurer has breached its obligation to provide coverage, or there is a dispute as to what that coverage obligation is.
- The policyholder is entitled to payment or to a declaration of coverage.

PROPOSED MDL

ARGUE COMMON FACT ISSUES

Case MDL No. 91 - April 20, 2020

- Whether the phrase “all risk of physical damage or loss of property” includes the risk of disease and virus;
- Whether the insurance industry understood at the time it was selling insurance policies that virus and disease could cause physical damage or loss to property;
- Whether a safer-at-home or self-quarantine order based on the presence of COVID-19 in surrounding property is sufficient to trigger the civil authority coverage in property insurance policies;
- At what point the period of restoration (which determines the amount of business interruption loss) begins and ends in connection with a safer-at-home or self quarantine order by a civil authority;

PROPOSED MDL

ARGUE COMMON FACT ISSUES

- Whether the expenses incurred by closing a business or reducing services in response to a safer-at-home or self-quarantine order by a civil authority constitute “extra expenses” covered by a property policy;
- Whether the expenses incurred by closing a business or reducing services in response to a safer-at-home or self-quarantine order by a civil authority constitute “sue and labor” expenses covered by a property policy; and
- Whether the expenses incurred by closing a business or reducing services in response to a safer-at-home or self-quarantine order by a civil authority constitute “preservation of property expenses” covered by a property policy.

PROPOSED MDL CONVENIENCE & EFFICIENCY

According to the Manual for Complex Litigation, the following four factors govern whether transfer will facilitate the convenience of the parties and promote the just and efficient conduct of the transferred cases:

1. The elimination of duplicative discovery;
2. The avoidance of conflicting rules and schedules;
3. The reduction of litigation cost; and
4. The conservation of the time and effort of the parties, attorneys, witnesses, and courts.

Manual for Complex Litigation (Fourth), § 20.131, at 219.

COVID₁₉ TORTS
EMERGING AND EXPECTED CLASS
ACTIONS AND MDL LITIGATION
JEFF MARKOWITZ



COVID-19 CLASS ACTIONS

EMERGING TORT LITIGATION

- *Turner v. Costa Crociere, Costa Cruise Lines*, No. 1:20-cv-21481, Compl. 4/7/20
 - Costa Luminosa (2,000+ pass)
- *Archer v. Carnival Corp*, No. 4:20-cv-02381, Compl. 4/8/20
 - Grand Princess (2,000+ pass)
- *Nedeltcheva v. Celebrity Cruises*, No. 1:20-cv-21569, Compl. 4/14/20
 - “vessels” (crew members)

COVID-19 CLASS ACTIONS

EMERGING TORT LITIGATION

- **First notice** *Diamond Princess* (2/2020)
- **Passenger Cases** (*Turner, Archer*): seek ship-specific classes, negligence and gross negligence
- **Crewmember Case** (*Nedelcheva*): seek class of all Celebrity employees, maritime claims: Jones Act and “unseaworthiness”

COVID19 PRODUCT LIABILITY EMERGING AND EXPECTED CLASS ACTIONS AND MDL LITIGATION

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COVID-19 CLASS ACTIONS

PRODUCT LIABILITY – HAND SANITIZER

- *Haas v. Vi-Jon d/b/a Germ-X*, No. 20-cv-0424, S.D.Cal,
- Complaint Filed 3/25/20
- Consumer Protection Claims;
 - misrepresented efficacy
 - “no reliable studies”
 - FDA Letter
- Voluntarily Dismissed ***Without*** Prejudice: 4/9/20

COVID-19 CLASS ACTIONS

PRODUCT LIABILITY – PPE

- Prediction: it's coming
- Ebola Gown Case:
 - *Bahamas Surgery v. Kimberly-Clark Corp.*, No. 14-cv-8390
 - Sold defective medical gowns
 - CA Class certified (persons + entities)
 - \$4 mil. compensatory damages
 - \$450 mil. pun. damages (reduced, \$20 mil.)

COVID19 EMPLOYMENT CLAIMS EMERGING AND EXPECTED CLASS ACTIONS AND MDL LITIGATION

Lawyers Predict a 'Huge Explosion' in Worker Class Actions Over COVID-19

The Coming Tsunami of Employment- Related COVID-19 Litigation



COVID-19 CLASS ACTIONS

EMPLOYMENT – SICK LEAVE

- *Verhines v. Uber*, No. 3:20-cv-01886, N.D. Cal., Compl. Filed Fed.Ct. 3/17/20
- Failure to Provide Paid Sick Leave, Cal. Lab. Code Sec. 246
- Based On Old Theory: Misclassification



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COVID-19 CLASS ACTIONS

EMPLOYMENT – FLSA

- *Olsen v. Ratner Co.*, No. 1:20-cv-03760, D. N.J., Compl. Filed 4/7/20
- Hair Stylist Plaintiff
- Narrow Class: EE not paid from March 15-21, 2020
- ER was “waiting for federal funding”



May 5, 2020

COVID-19 CLASS ACTIONS

EMPLOYMENT – WARN ACT

- *Seales v. Hooters*, No. 8:20-cv-00882, M.D. Fl., Compl. Filed 4/16/20
- Layoff Without WARN Notice
- Possible Defense: Unforeseeable Business Circumstances
- **High Likelihood of Copy Cat Cases**

OTHER EXPECTED EMPLOYMENT CLASS ACTIONS

- Disparate Impact Layoffs (age discrimination)
- Employee Safety (e.g., PPE cases)
- Employee Medical Privacy
- FFCRA Paid Leave Violations

THANK YOU



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