

# COVID-19 The Evolution of a Litigation Pandemic

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# Origins

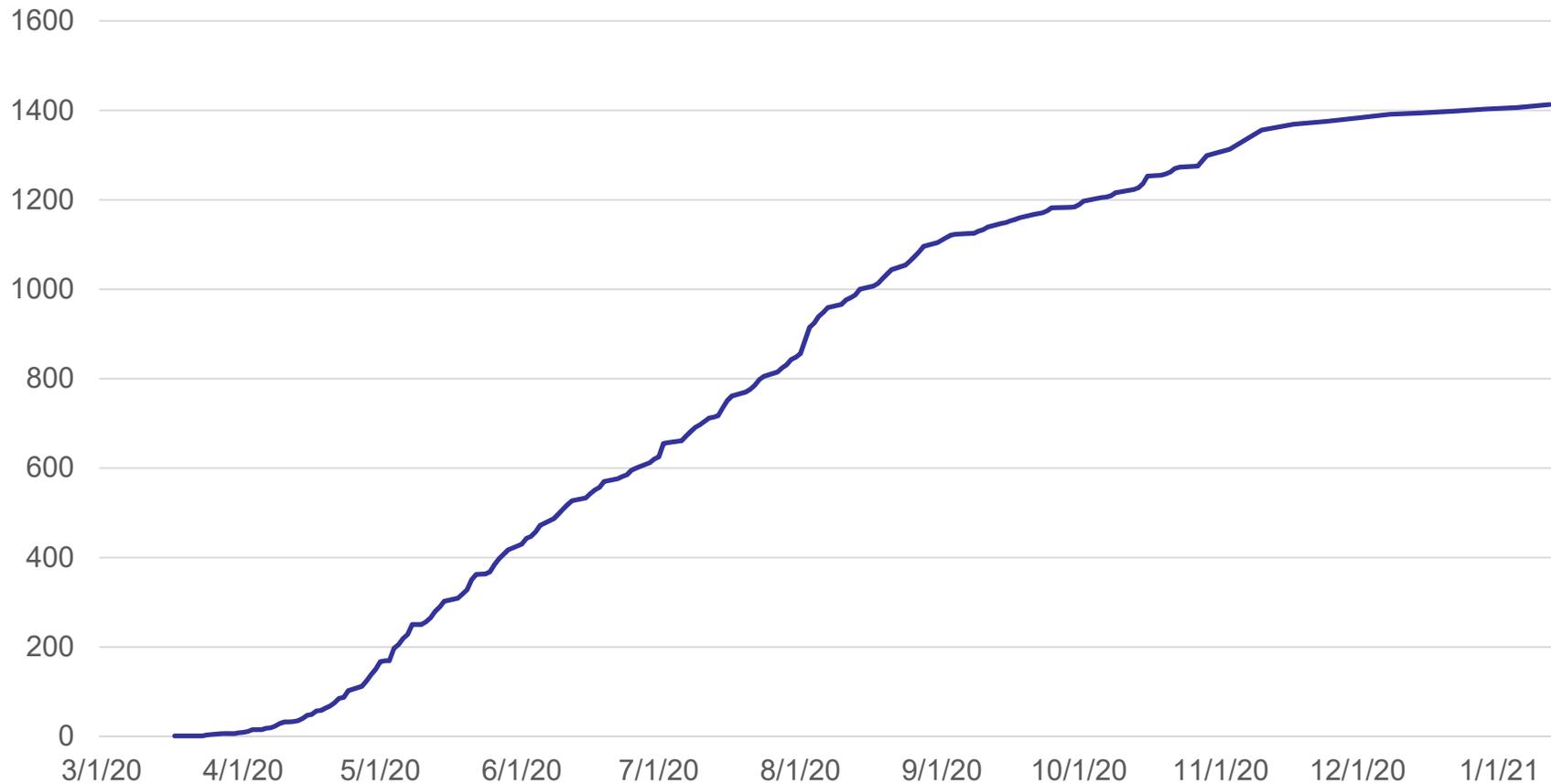
- The first COVID-19 DJ was filed by a New Orleans restaurant on March 16, 2020
- Other suits quickly followed as states implemented strict emergency orders.



# Litigation Status

- A year later, there are now over 1500 pandemic-related DJs pending in the United States.
- About a third are putative class actions.
- 
- Nearly all involve business interruption claims.

# A Wave of Coverage Litigation



# Litigation Status

- There is litigation in every state except Alaska and Wyoming.
- For the most part, however, the litigation is concentrated in a handful of states, notably California, Florida, Illinois, New Jersey, Ohio and Pennsylvania.

# Current “Hot Spots”

– Pennsylvania	(208)
– California	(183)
– Florida	(155)
– Illinois	(146)
– New Jersey	(122)
– New York	(117)
– Ohio	(112)
– Texas	(90)
– Washington	(84)

# Venue

- Most cases are being filed in or removed by insurers to federal district courts.
- Insurers are doing much better in federal court
- Insureds have sought to remand these cases
  - Most courts are denying remand motions based on inclusion of state actors (e.g. Governors)
  - Some have declined to exercise jurisdiction where state law on coverage issues is so uncertain.

# The Evolution of the COVID-19 Insurance Coverage Litigation

- As yet, nearly all of the litigation continues to involve commercial property coverage for business interruption losses.
- Over time, however, the nature of these suits, as well as the law firms and businesses bringing them, has evolved.

# Phase I: Enter the Little Fish

- During the Spring of 2020, the earliest suits were mainly brought by small businesses, especially restaurants and beauty parlors.
- Most suits were filed by small, local law firms.
- Large law firms either lacked a connection to these small businesses or were unwilling to take representations on a contingent basis.

# Phase II: Enter the Sharks

- In mid-April, national law firms entered the fray. These firms were specialized in class action cases but had limited insurance experience.
  - Geragos & Geragos (Los Angeles, CA)
  - Golomb & Honik PC (Philadelphia, PA)
  - Lanier Law Firm Pc (Houston, TX)
  - Levin, Sedran & Berman LLP (Philadelphia)
  - Podhurst Orseck, PA (Miami, FL)



# MDL Consolidation?

- These firms immediately filed competing proposals to consolidate all federal COVID-19 insurance DJs in Miami or Chicago.
- On August 12, the Joint Panel on Multi-District Litigation denied their application:
  - MDL would not be efficient.
  - Hundreds of parties and conflicting strategies.
  - Numerous different policy wordings.
  - Very few common fact questions.

# But Wait!

- The JPMDL subsequently considered whether insurer-specific MDLs might make sense.
- On October 2, 2020, the Panel declined consolidation for The Hartford, Cincinnati Insurance, Travelers and Lloyds.
  - Insufficient commonality
  - Cases too numerous and complex to handle efficiently.
- Insurer-specific MDLs were permitted for the suits against Society Insurance and Erie Insurance.
  - Only a few states at issue; identical policy forms, few enough claims to make them manageable.

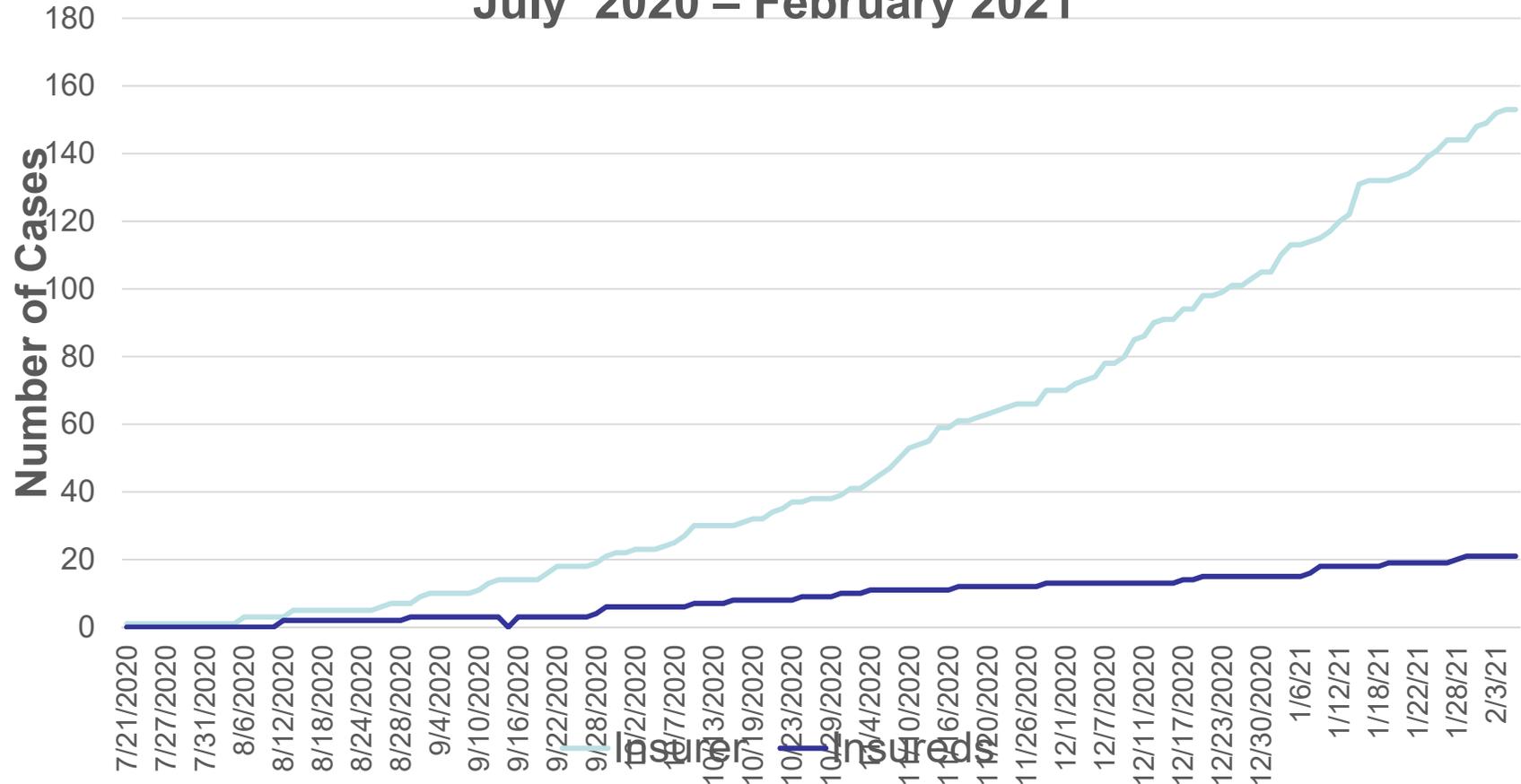
# State Consolidation?

- Apart from the MDL, state courts have their own procedures for case consolidation.
- A state judge in Pittsburgh has ordered that all pending state suits against Erie Insurance be consolidated in his court.
- Individual federal courts may also coordinate or consolidation litigation in their Districts.
- Consolidation is only likely if a substantial number of cases survive early dispositive motions and require coordination of discovery.

# Motion Practice

- While the MDL petitions were filing, many courts held off deciding cases that they might not be keeping jurisdiction over.
- Once it was clear that they would retain jurisdiction, federal judges began releasing opinions dismissing these suits.
- Since Labor Day, a trickle of rulings has become a flood.

# DISPOSITIVE MOTIONS: July 2020 – February 2021

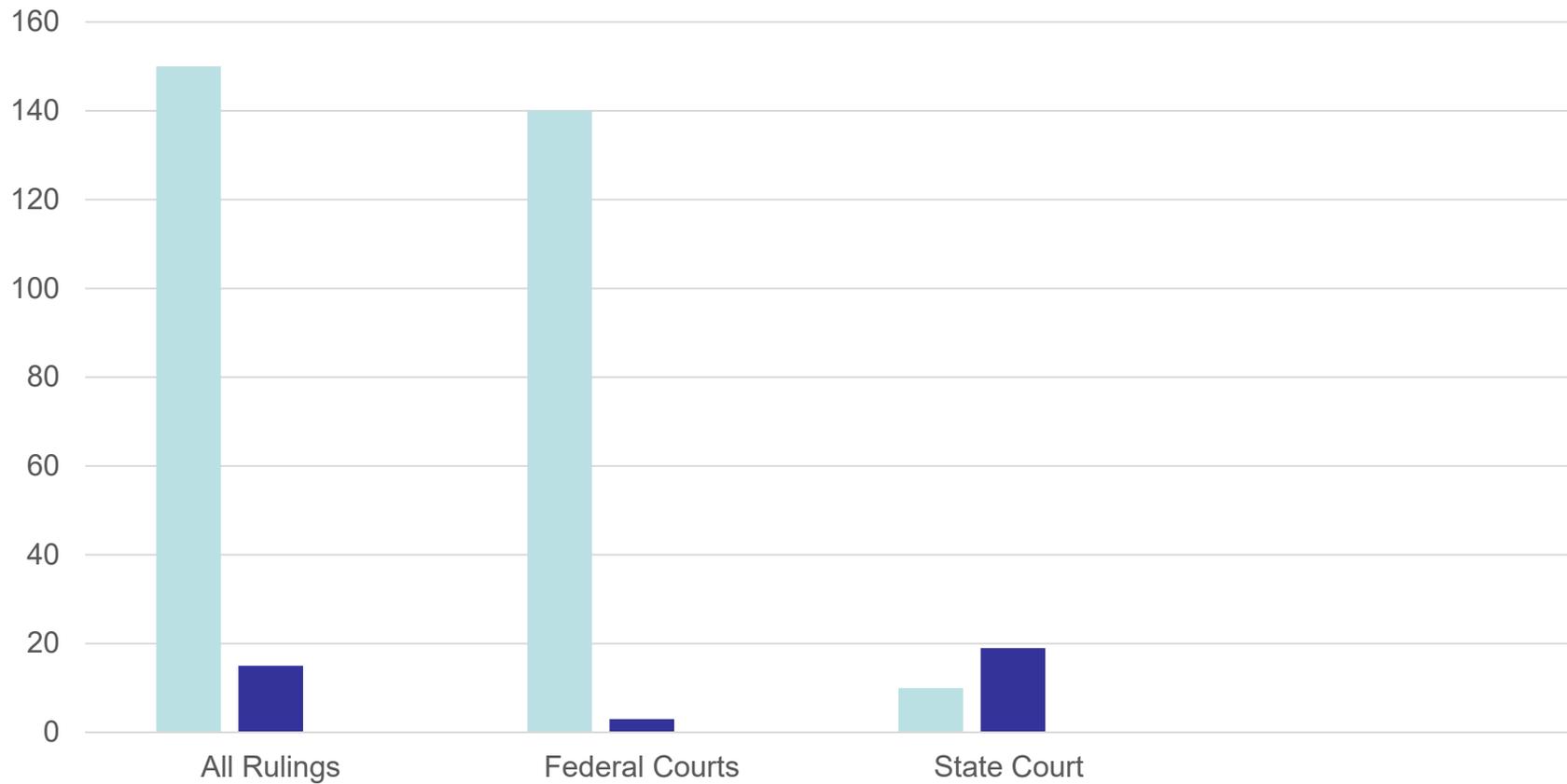


# The Policyholder Counterattack

- Emboldened by a successful summary judgment victory in North Carolina, policyholders are increasingly seeking to preempt insurer motions to dismiss by filing early dispositive motions of their own.

# Insurers Are Doing Well So Far

Court Rulings On Motions to Dismiss



# Insurers Are Winning More Cases With Virus Exclusions

- Insurers have won 83% of cases when policy has a virus exclusion (93% in federal courts) but only 53% without.
- State court judges seem to be more influenced by virus exclusions than federal judges. In cases without virus exclusions, insurers won 89% of the time in federal court but only prevailed in 12% of state cases.

# Trial Practice

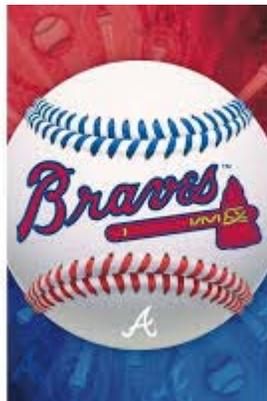
- To date, a few judges (especially in Ohio) have denied motions to dismiss.
- Will these cases ultimately go to trial?
- The *Cajun Conti* case, which was the first COVID-19 DJ when it was filed on March 16, 2020, was tried to a New Orleans judge in January 2021.



# Appellate Practice

- Several dozen cases are now on appeal, especially in the Third and Ninth Circuits.
  - Will the Third Circuit entertain policyholders' proposal to consolidate all pending COVID-19 appeals before it?
- Will any of these issues be certified to state Supreme Courts?
- Both the California and Pennsylvania Supreme Courts have denied efforts to accelerate their involvement.

# Phase IV: Enter the Big Fish



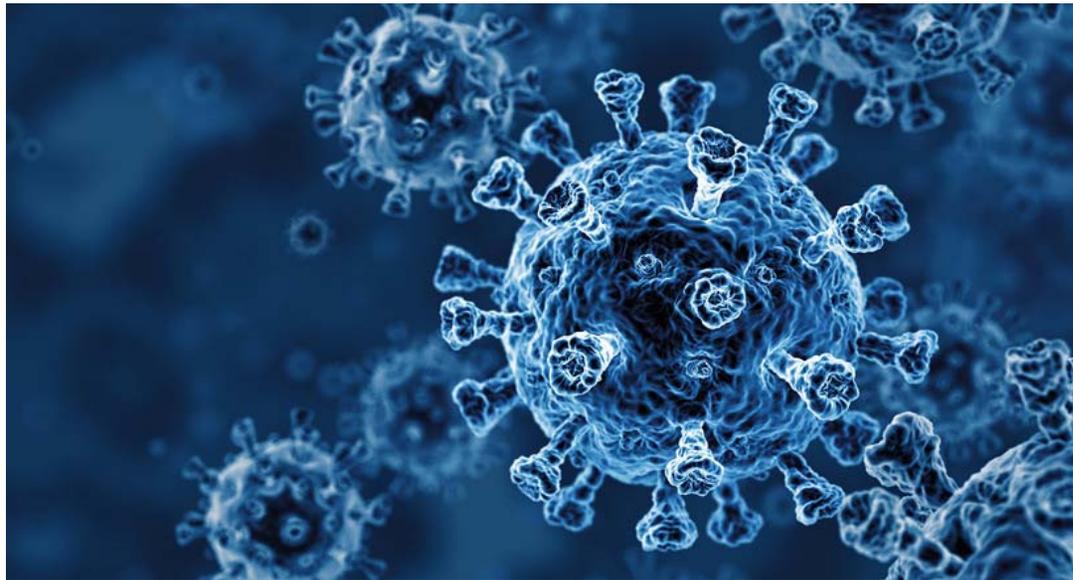
# The Big Fish

- More and more new DJs are being filed by Fortune 500 companies with enormous losses.
  - Entertainment conglomerates
  - Hotel chains
  - National retail chains
  - Sports teams
- These insureds are represented by major law firms with broad insurance experience.
- Many “little fish” have voluntarily dismissed their suits rather than respond to 12(b)(6) motions.

# Cartel Claims

- Some national firms have also developed “cartel” suits representing diverse entities in one suit to share the cost of litigation.
  - *Chattanooga Professional Baseball, LLC, et al v. Philadelphia Ins. Ind. Co.*, (E. D. Pa., filed June 23, 2020)(McKool Smith sued on behalf of 18 different minor league sports team).
  - In early August, Jenner & Block filed two separate suits in state court in IL and NY on behalf of dozens of individual small businesses, museums and non-profits.

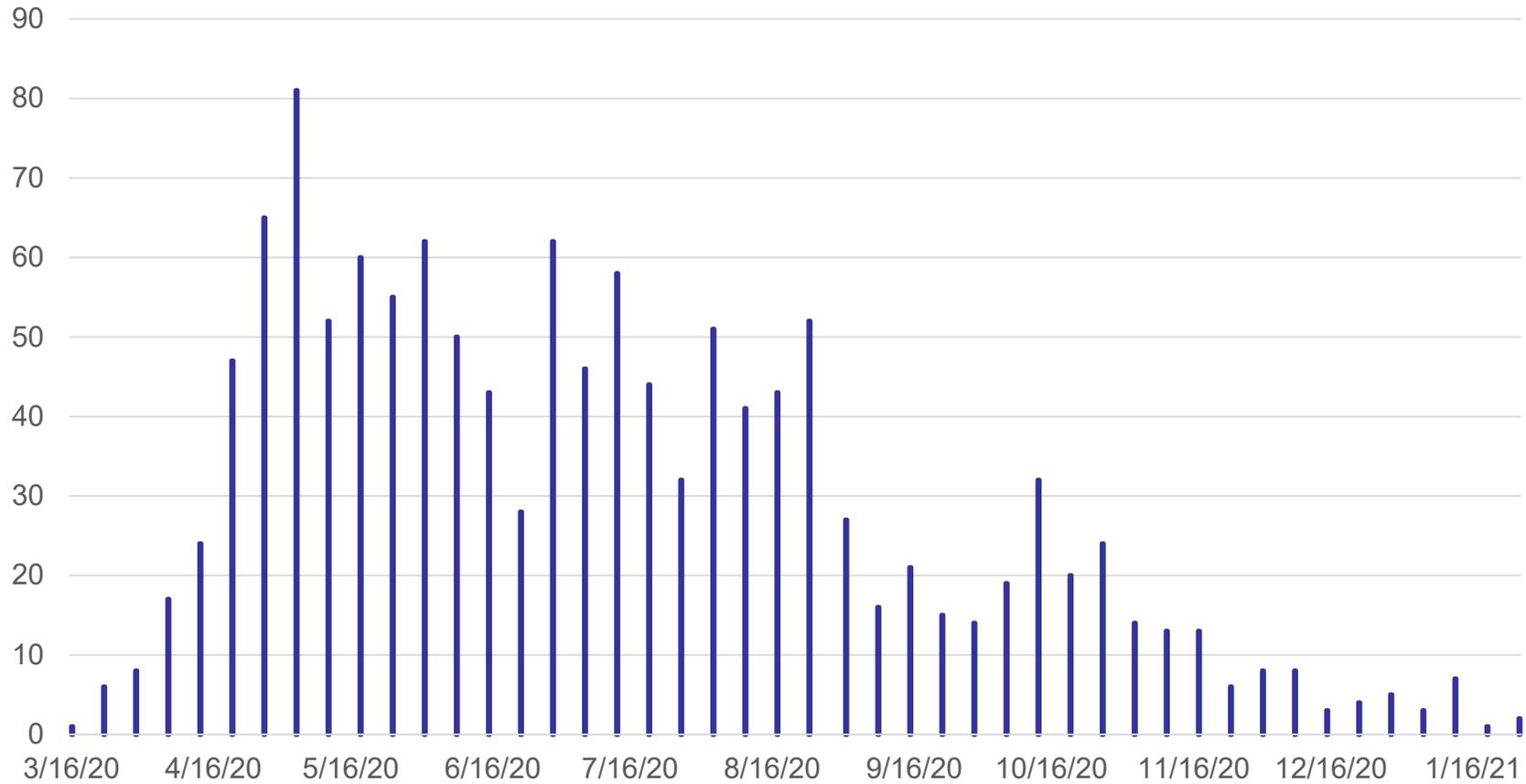
# Prognosis for a Litigation Pandemic?



# The Size of the Litigation

- Insurer concerns in 2020 that they might face an endless onslaught of coverage litigation seem, at least for now, to be unfounded.
- DJ filings were artificially inflated during the run up to the MDL proceedings in 2020.
- Since Labor Day, new filings have dropped
  - Class action lawyers no longer see a “cash cow”
  - “Smaller fish” are discouraged by pro-insurer rulings dismissing cases.

# Weekly DJ Filings



# The Shape of the Litigation

- The early cases were something of a mis-match:
  - Insurer counsel were more experienced and better prepared to seize the initiative.
- The wave of early pro-insurer rulings made it easy for other federal judges to follow suit.
- However, recent policyholder victories have created a counter-narrative that courts may follow if they want to defer ruling or find coverage.

# The Future of the Litigation

- The overwhelming rate of success that insurers have enjoyed in getting these cases dismissed will be meaningless if these victories cannot be sustained on appeal.
- As with the environmental coverage wars of the 1980s and 1990s, the ultimate fate of this litigation will depend on how state Supreme Courts rule on key coverage issues.
- Insurers have won the opening battles but the outcome of the war is still uncertain.

# “Direct Physical Loss of or Damage to” Requirement

## A. Coverage

### 1. Business Income

We will pay for the actual loss of Business Income you sustain due to the necessary “suspension” of your “operations” during the “period of restoration”. The “suspension” must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.

# Evolving Insurance Law Responses to the Global Pandemic: Exclusions

**American College of Coverage Counsel  
& Seton Hall University School of Law**

**Law School Webinar**  
February 16, 2021

Lorelie S. Masters, Hunton Andrews Kurth LLP  
Joyce C. Wang, Carlson Calladine & Peterson



# Exclusions: What's in a Name?

- “Virus exclusion”: 2006 ISO exclusion and variants
- “Pollution exclusion”
  - Compare definition of “pollutant”
  - May include “bacteria”
- “Contamination exclusion”
- “Mold,” “dry” or “wet rot” exclusions
  - “Virus” may be separated from “bacteria”
  - “Virus” included in “mold exclusion”?
- “Delay or loss of market” exclusions
- Last but not least: “Pandemic exclusions”

# 2006 ISO and AAIS Virus Exclusions

- ISO's 2006 virus exclusion states:
  - We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.
  - However, this exclusion does not apply to loss or damage caused by or resulting from fungus. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.
- AAIS promulgated a similar exclusion which states:
  - "We" do not pay for loss, cost, or expense caused by resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress.
  - This exclusion applies to, but is not limited to, any loss, cost, or expense as a result of:
    - a. any contamination by any virus, bacterium, or other microorganism; or
    - b. any denial of access to property because of any virus, bacterium, or other microorganism.

# Pollution Exclusion

- We do not cover “loss” or damage caused:
  - By discharge, dispersal, seepage, migration, release or escape of “pollutants” unless the discharge, dispersal, seepage, migration, release or escape is itself caused by a peril insured against. But if “loss” or damage by a peril insured against results from the discharge, dispersal, seepage, migration, release or escape of “pollutants”, we will pay for the resulting damage caused by the peril insured against.
  - “Pollutants” means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

# Fungus, Wet Rot, Dry Rot Exclusion

- *Compare:*
  - We do not cover loss or damage caused by:
    - The presence, growth, proliferation, spread or any activity of fungi, wet rot, dry rot or bacteria.
- *With:*
  - We do not cover loss or damage caused by:
    - The presence, growth, proliferation, spread or any activity of fungi, wet rot, dry rot, bacteria or virus.

# Delay or Loss of Market/ Consequential Loss Exclusions

- The Company does not insure for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss of damage. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area:

\* \* \*

- 6. Delay, loss of market, or loss of use.
- 7. Indirect, remote, or consequential loss or damage.

# Communicable Disease Exclusion

- [T]his insurance excludes any loss directly or indirectly arising out of:
  - A. any actual or alleged transmission of the Coronavirus 2019-nCoV, including any mutation of the Coronavirus 2019-nCoV virus;
  - B. the non-appearance at your event of any person or group of persons that is attributable to the actual or alleged outbreak of Coronavirus 2019-nCoV, including being attributable to any mutation of the Coronavirus 2019-nCoV virus;
  - C. any reduction in attendance at your event that is attributable to the outbreak to the actual or alleged outbreak of Coronavirus 2019-nCoV, including being attributable to any mutation of the Coronavirus 2019-nCoV virus.

Notwithstanding the foregoing, it is understood and agreed this insurance does not cover loss(es) arising directly or indirectly from threat of fear of communicable disease (whether actual or perceived).

It is understood and agreed that in any claim and/or action, suit or proceeding to enforce a claim for a loss under this policy extension the burden of proof that the loss is covered by this insurance shall fall upon you.

Issued March 18, 2020.

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# Employment Practices Insurance

**Laura Hanson**  
**Meagher + Geer, P.L.L.P.**  
**Minneapolis, MN**

**Chris Mosley**  
**Sherman & Howard L.L.C.**  
**Denver, CO**

# COVID Claims Against Employers

- Health & Safety Practices
- Failure To Comply With Government Mandates
- Disclosure Of Personal Health Information
- Retaliation
- Discrimination (especially age)
- Paid Leave – Families First Coronavirus Response Act (paid leave)



# EPLI Policy Coverage

- Claims Made Policy
- Insuring Agreement
- Exclusions



# Advocating For Coverage

- Tender Timely
- Policy Language Controls
- Cases Where Coverage Should Exist
- Cases Where Coverage Questions Exist



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# Analyzing Coverage For COVID-19 Claims

- Claims Made Policy
- Insuring Agreement
- Exclusions



# Other Tips

- Policyholders: Applications – Be Thorough
- Insurer: Defense often required; exclusions can limit settlement obligations



# Evolving Tactics and Litigation Strategies in COVID-19 Insurance Coverage Cases

**American College of Coverage Counsel  
& Seton Hall University School of Law**

**Law School Webinar**  
February 16, 2021

Laura A. Foggan, Crowell & Moring LLP  
David B. Goodwin, Covington & Burling LLP



# Agenda

1. Introduction: Rethinking the “history” of COVID-19 Business Interruption Insurance Coverage Litigation
2. Forum: Consolidation of COVID-19 cases
3. How have insurers responded in the COVID-19 litigation?
4. What is the plaintiffs’ bar’s strategy in litigating the cases? The policyholders’ bar?
5. What will happen with COVID-19 insurance appeals?