

# The Long Tail of Pandemic-Related Global Insurance Disputes

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*By Rebekah Ratliff and Charles Gordon*

**A**s the COVID-19 pandemic began to spread around the world last year, businesses faced unprecedented certainty and disruption, leading to a wave of insurance coverage disputes. Roughly a year and a half later, we are beginning to get some clarity over how courts will decide some of those issues. But it hardly means that we've seen the last of pandemic-related insurance disputes or that uncertainty over those claims has been extinguished.

Past crises have taught us that the resulting insurance disputes have a long tail. They can continue for many years after the initial shock.

That's the bad news. The good news is that it means insurers and policyholders have a chance to get ahead of their disputes and proactively manage them. It's perhaps ironic that a global pandemic—which gave rise to so many insurance disputes—also helped make dispute resolution more efficient through virtual and hybrid proceedings. Parties today have more options than ever to resolve their disputes quickly and efficiently.

## **First wave cresting**

The first wave of COVID-19 insurance disputes appears to be cresting. Shortly after the onset of

the pandemic, hundreds of businesses—from restaurants to minor league baseball teams—brought claims or joined class-action lawsuits for business interruption coverage for their Covid-related losses. In the United States, many lower courts have ruled in favor of insurance companies. Those disputes are now making their way to the appellate courts.

In a closely watched appeal, the 8th U.S. Circuit Court of Appeals in July affirmed a lower court's ruling that losses suffered by an oral surgeon's office due to mandatory closures were not covered by its insurance policy. It was the first fed-

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eral appeals court ruling to address those claims.

The United Kingdom's highest court has also spoken on business interruption claims. In January, the U.K.'s Supreme Court ruled for policyholders in a test case brought by the Financial Conduct Authority. The court rejected the arguments made by the insurers that losses caused by local infections were covered by their policies but not losses covered by the pandemic.

Despite these important rulings, plenty of uncertainty for insureds and insurers remains. We've seen insurance companies take a wide range of approaches to these disputes, which will likely continue. Those approaches are often influenced by the language in their policies and their general appetite for litigation. The various approaches also may be influenced by the coverage insurance companies expect from their insurance carriers.

These different approaches explain, at least in part,

why we'll continue to see litigation. In the U.S., for example, 188 federal appeals remain pending, according to Covid Coverage Litigation Tracker at the University of Pennsylvania Carey Law School. And there are additional some 58 pending matters in state appellate courts, according to the tracker.

The situation in the U.K. is different, but also similarly fluid. With a unitary legal system, there is no possibility of splits among appeals courts that are common in the U.S. But that doesn't mean that the U.K.'s Supreme Court decision in January is the final word on pandemic-related insurance disputes. Due to the nuances and wording of underlying insurance contracts, we continue to see insureds bring claims seeking coverage for the pandemic-related losses. Some issues, like whether the pandemic was one event or a series of events, are still being worked out.

Companies are also continuing to bring cas-

es against their insurance brokers. Because they found that their policies did not cover losses from the pandemic—and now that the supreme court has found that some policies cover them—some companies are blaming their brokers. In response, the brokers argue that since few expected an event like the pandemic, buying an insurance policy protecting against such an event was not a priority for most companies.

### **New ripples forming**

While the most pressing and obvious pandemic-related disputes have been raised and are working their way to resolution, we expect a steady stream of stream new conflicts to emerge.

Inevitably, following the onset of a crisis, direct insurance claims are disputed first. But after that initial wave, we can expect arguments between insurers and reinsurers to emerge. Those fights often involve questions around how many “events” constitute the

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crisis, which can have huge ramifications for coverage.

We also are bracing for an increasing number of claims against directors and officers if bankruptcies and insolvencies tick upward. While bankruptcies and insolvencies did not dramatically increase over the last year, there are reasons not to expect that trend to continue. Government assistance in the U.K. and the U.S., as well as forbearance by creditors, have allowed some struggling companies to survive for the short term, but that cannot continue indefinitely. And when companies fail, investors and creditors often blame those individuals who were in charge.

More tangentially pandemic-related claims may also be on the rise. Take, for example, the area of employment. Throughout the pandemic, we've seen a seismic shift in how companies view diversity, equity and inclusion (DEI) initiatives. Just a few years ago, amid the #MeToo movement, companies focused

most of their efforts on gender diversity. But since the onset of the pandemic, which coincided with historic protests in the U.S. over racial injustices, companies have broadened their view of diversity to attract and retain talent.

Many companies have taken their DEI steps even further. Whereas they once viewed DEI programs through a moral lens or as simply hallmarks of good corporate citizenship, they now view them as fundamental to their risk management operations. They realize that strong DEI infrastructure can help protect their reputation and limit their liabilities. And that's why companies are investing heavily in attracting the right DE&I personnel.

It's an encouraging trend, but it has not stanch employment claims of discrimination. Recently, there has been an uptick in allegations of disability discrimination by employees experiencing mental health challenges during the

pandemic. Cases of mental illness have increased in relationship to the stress brought on by isolation, food insecurity, housing insecurity and other personal crises brought on by COVID-19 and variants.

The pandemic has also created the conditions for a host of new employment claims. The return to the office is just one example. We've already seen employees voice concern over their safety and contest vaccine mandates. As companies implement their plans, we expect to see a steady rise in employment disputes.

Interestingly, the arguments are coming from different angles. Some employees returning to work are concerned about being in an office with people who are not vaccinated, while others want to be able to go back to work without being forced to take the vaccine. Employers have an uphill battle wedged between these two positions. Where mutual interests exist, maybe one solution is to approach

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these disputes from a team-building dispute resolution standpoint. There may be an opportunity for ADR professionals to leverage the expertise of other colleagues with strategic co-mediation to foster a sense of mutual gain and goodwill, while facilitating dispute resolution. We will need to be creative as dispute resolvers.

Cybersecurity claims are also likely to emerge. The threat of data breaches and other cybercrimes was increasing well before the pandemic. But after the pandemic forced employees to work from home, those threats have grown dramatically. In the U.S., for example, the FBI's Internet Crime Complaint Center received 791,790 complaints of suspected internet crime in 2020—a nearly 70 per-


cent increase from 2019—and reported losses exceeding \$4.2 billion.

In the remote working environment, employees are often using personal computers and wireless routers. If a company suffers a cyber intrusion, it could give rise to questions about whether coverage is included. Another potential sticking point could come from data breaches or other security failures that occur while employees are using their company devices for personal use.

### **The pandemic's impact on ADR**

The pandemic's legacy has already been far-reaching, but we may be just beginning to see its impact. In addition to giving rise to a wide range of new disputes,

it will invariably impact how the insurance industry addresses other existential threats like climate change.

The pandemic is also likely to leave an indelible mark on alternative dispute resolution. Over the last year and a half, as government shut-down orders forced businesses to operate remotely, the ADR industry rose to the challenge. With an internet connection, far-flung parties can now meet remotely to settle their disputes. To their credit, many insurance companies and policyholders have embraced virtual and hybrid ADR, finding its speed, cost-effectiveness and flexibility attractive. So while the pandemic has created unprecedented challenges, it has also created new opportunities and waves to ride. 

#### ***About Rebekah Ratliff and Charles Gordon***

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