Pandemonium in the Time of Pandemic: Potential Shift in Insurance Agent and Broker Standard of Care in the Wake of COVID-19

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Dana A. Gittleman

There has been an increase in recent coverage litigation resulting from COVID-19 business losses that could flood the courts in the weeks and months to come. Pennsylvania is one of many states faced with this new wave of litigation, including the recent filing of two lawsuits against Admiral Insurance Company in the United States District Court for the Eastern District of Pennsylvania in April 2020: *L.H. Dining, LLC d/b/a River Twice Restaurant v. Admiral Indemnity Company,* 2:20-cv-01869, and *New Chops Restaurant Comcast LLC d/b/a Chops v. Admiral Indemnity Company,* 2:20-cv-01949.

Each insured restaurant in these two cases seeks a declaration that the government's stay-at-home orders trigger coverage and that the exclusion of loss due to virus or bacteria does not apply to preclude coverage.

Notably, the *River Twice* and *Chops* lawsuits involve preemptive claims; there is no indication in the complaints that the restaurants' claims for business income interruption or civil authority coverage were denied. Rather, each insured seeks a declaration that coverage is triggered and that the virus exclusion will not apply to preclude coverage.

These complaints highlight the tension between business income interruption and civil authority clauses, generally intended to provide coverage for business closures or mandatory government closures due to perils, such as fire or natural disaster, and virus exclusions, which preclude coverage for loss or damage resulting from a virus or bacteria inducing or capable of inducing physical distress, illness, or disease.

It is premature to predict how insurers will respond to COVID-19 business income interruption or civil authority claims, especially with House Bill No. 2372 and House Resolution No. 842 pending in Pennsylvania and government pressure to cover these claims. Nonetheless, these affirmative, preemptive declaratory judgment actions—and anticipated coverage denials without government or legislative intervention—may ripen into insurance agent or broker errors and omissions claims. In the absence of coverage, insurance customers may look to their agent or broker for liability for failing to procure adequate coverage to cover business losses resulting from the pandemic, or failing to advise of the virus exclusion.

In Pennsylvania, the duty of care owed by an insurance agent or broker is that of a reason-

ably prudent insurance professional under the circumstances. Absent a special relationship, there is no affirmative duty to advise of types and amounts of coverage available, or to explain the policy and its coverages or exclusions.

However, with COVID-19's widespread economic effect on nearly every industry in the United States, the insurance agent or broker standard of care may shift. Armed with knowledge of the potentially devastating effects of the pandemic—and predictions that a second surge of COVID-19 could come in the fall—would a reasonably prudent insurance professional procuring coverage after March 2020 obtain pandemic coverage for his or her customers who are likely to be affected? That is an open question that the courts will need to address if errors and omissions claims arising out of insurance denials ripen. The objective "reasonably prudent" standard is likely to evolve as the pandemic continues and the coverage landscape develops.

March 2020 may become a dividing line: negligence claims against insurance professionals for failing to procure pandemic coverage before this date may be defensible, and claims against those who failed to do so after they had knowledge of the pandemic may be less defensible. Thus, going forward, agents and brokers should consider discussing pandemic coverage with their insurance customers, understanding that the "reasonably prudent" standard may shift. Documenting a customer's inquiries, including efforts to procure "pandemic coverage," or to eliminate exclusions that would preclude coverage for COVID-related losses, and memorializing the customer's insurance selection in light of these concerns, could go a long way in defending against potential errors and omissions claims arising out of purported failures to procure or advise.

Dana A. Gittleman is an associate in the professional liability department at Marshall Dennehey Warner Coleman and Goggin PC. Resident in the firm's Philadelphia office, she focuses her practice on the defense of claims and lawsuits brought against insurance agents and brokers, attorneys, financial entities, large product manufacturers, lenders, and other professionals. Dana may be reached at dagittleman@mdwcg.com.