

2020.08.12_Baker_CCLT

[00:00:04] Welcome to Case in Point, produced by the University of Pennsylvania Carey Law School. I'm your host, Matt Merin, the Multimedia Coordinator from the Communications department. With me today is Professor Tom Baker, the William Maul Measey Professor of Law. He joins us today to talk about his new project, The COVID Coverage Litigation Tracker, which tracks COVID-related insurance claims in state and federal court.

[00:00:27] Tom, thank you for joining us today on a case in point. My pleasure. So, could you first explain to the audience what is the CCLT and what is the ultimate goal of the project?

[00:00:37] Sure. Well, so the COVID Coverage Litigation Tracker, or the CCLT, is two things.

[00:00:45] One, it's a public service designed to help people keep track of the hundreds of cases being filed in court involving insurance coverage for losses related to the pandemic. And then the other thing it is, it's a way for me to productively deal with all my anxiety around the situation that we're in at the end of the day.

[00:01:09] I mean, what is all of this data going to be used for, all of this aggregation?

[00:01:15] What do you want to call it? What is the goal? One goal is to be useful real-time. In other words, you know, it's a lot of work to keep track of it. And there's no reason that every single law firm or court that is doing this should be doing this over again individually. So it's really an effort to kind of do it for everybody. And so that's that like public service aspect of it. And the other thing that it is, this is the biggest insurance litigation event of certainly my career, and possibly even ever, in terms of it happening all at once.

[00:01:57] We've got close to nine hundred in our database and we know that we are not getting all the state cases.

[00:02:04] And so, you know, that's just an enormous number of cases. And we can see them from beginning to end, you know, as a project. And so, you know, there's are tons of things that we can, you know, learn about it. Like, you know, there's interesting federalism questions. You know, when do people sue in state court? How do they stay in state court if they want to be there? There is, you know, complex litigation management questions that come up. You know, should these cases be consolidated? If so, where? And so we'll be observing, you know, all of that real time and, you know, collecting, you know, a lot of documents and other information that we'll be able to use, you know, when it's all done, to kind of make sense of it in a way that, you know, we can't, you know, as we're going through it. I was reading an obituary of Bernard Bailyn, famous historian, the other day, and there was something in it that just really struck out...struck me, which was that, you know, he said that it's very important for a historian to keep in mind and for us looking back to realize the uncertainty of life, you know, we know how it worked out, how it ended. The people living through it didn't. So, you know, we don't know how this litigation, let alone the situation that this is my to Heidi dealing with, but we don't know how the litigation is going to work out, but we're going to be able to collect information in a way that's kind of easier because it's still here, it's still happening, than it will be, you know, five years from now.

[00:03:39] And given the data that you've collected to this point, how do you kind of see this data can be used to kind of shape litigation in the future? What are the pitfalls and litigation between parties in the court system now and what can this research kind of help with?

[00:03:52] I mean, you're asking me a little bit to kind of look into the crystal ball, but the things that we've seen already that seem quite interesting are different strategies in relation to state and federal court that the defendants in these cases, which are insurance companies, look like they have a strategy of removing cases to federal court. I mean, you know, their state case gets filed a state court. And then if it's under certain circumstances, you have a matter of right. You can move the case to federal court and the plaintiffs are policyholders, you know, many of them don't want that to happen. And so they're kind of constructing, they're doing things to keep them in state court. One thing that they're doing is they're identifying what jurisdiction the insurance company is located in. And then they're suing the insurance company in that jurisdiction. So therefore, there's been no diversity. Another thing that they're doing, it's called declaratory judgment. And it turns out, and I didn't notice that declaratory judgment, diversity jurisdiction is discretionary in federal courts. And so there's already been one federal court, that one judge in a federal court in Pennsylvania that has remanded, means sent back to state court, a case that the insurance company removed. So I think we got to see some things about that. And then we'll also see different strategies that different courts or different court systems will take to manage large numbers of cases all at once. And you know, I expect that we'll be able to say something useful about which different strategies seem to be better and that's something. And then, you know, from an insurance coverage perspective, you know, I think that this is a model for how you could relatively quickly get a handle on what the meaning of early decisions are for the portfolio of policies that an insurance company has. Because one of the things that we're doing, and I don't think anyone has ever done this, is that we are taking the insurance policies that are actually the contracts at issue in the litigation and coding them up. And, you know, there are differences. I mean, the differences are manageable, but there are differences. And so we will know, for instance, there was just a motion to dismiss denied today in Western Missouri. And we know what the insurance part, we know what the forms were in the insurance policy. And, you know, and we also know which other cases in our database use those same forms or forms that are basically identical. And so that decision will be better precedent for those cases than for ones that use different forms. And this kind of like real-time fine-grained coding of cases in relation to the insurance policies hasn't, I think, ever been done before.

[00:07:01] In which industries are we seeing the most cases? And is there anything that surprised you or did you kind of expect the certain trends that you saw?

[00:07:10] By far the most cases involve restaurants, bars, things like that. And one of the things that we're doing is we're coding the policyholders by something called the NAICS code. Second is a category that's called the ambulatory medical services or ambulatory health care services, which means, which people should understand as basically being dentists' offices, for the plurality of those are dentist offices. You know, both of those make great sense, right? I mean, restaurants had shut down. People are scared about going to the dentist. From a dentist perspective, they're sort of most at risk of any other professional in terms of catching it because of how close they are in contact with so many patients.

[00:07:52] And so those shut down, and then really, every other industry that you might imagine. And then, you know, the other thing about the reason why there's so many cases

is that both the, you know, restaurants and bars and dentists offices are not very consolidated industries. So if you look at, you know, like retail, you know, the Gap, you know, has run a lawsuit and, you know, they've got tons of stores so that, you know, they would just, almost by definition, there will be fewer numbers of cases involving very large organizations.

[00:08:29] And so those industries that are not very consolidated will be ones where there's more cases.

[00:08:34] And then are there any particular trends you're noticing in terms of coverage sought, policy provisions, and other areas of insurance acquisition?

[00:08:41] Yeah, and so, one of the things that we're seeing, and this isn't surprising, it was, you know, it's being reported in the press, too, is that by far the most number of cases so far are involving what are called business interruption losses, which is where the, you know, the real harm is not going to be the cost of cleaning up the property or, you know, rebuilding it or anything like that. It's the fact that the property shut down. And a lot of people don't know this, but the property insurance policies, going back all the way into the late 19th century, began covering not just the damage to the building and structure, but also the income that the owner was lost, lost while the structure was, you know, while they didn't have use of it. And so that's the first wave, is overwhelmingly those cases.

[00:09:36] There's also cases involving event cancellation insurance. There's a few cases involving ski ticket cancellation insurance. It turns out that if you buy a ski pass, you often can buy an insurance policy that, you know, pays, that basically refunds the ski pass if certain things happen, and so there's a couple of class actions involving ski pass cancellation insurance. There aren't yet many cases involving liability insurance because, you know, liability insurance disputes don't really roll out until after the underlying tort claim or whatever has kind of played out. So there's not those. And then what? Now, what people are looking for in the business interruption cases is both business interruption coverage, but then also, property insurance policies also have coverage for what is called civil authority events. And in that, you know, the original idea of civil authority coverage was there was a fire happening in a part of the city and the governor, the mayor wouldn't let anyone go in there and they had to shut down their business in order to make, so the fire trucks and so forth could get access, and that kind of, and that would cause someone to lose business because they wouldn't be able to open their store or whatever. And there's that kind of coverage available. And therefore, because so many businesses shut down because of the governmental orders related to the coronavirus, their policyholders are asking for that civil authority coverage as well. Great.

[00:11:13] And do you have any views on virus exclusion clauses being used for a basis to dismiss a case like this.

[00:11:23] Yes, I mean, I. I definitely do. And you know, what I would say with the virus exclusions is it's been a key teaching moment for me and will be used as a teaching moment for my students in the future, which is that there are, turns out there are several different flavors of virus exclusions and they're definitely not all the same.

[00:11:48] There is one that I know that is the strongest one, let's say from the insurance industry perspective, which applies to losses from viruses that can cause sickness or disease. But then it turns out that there there's all kinds of virus exclusions. There's the computer virus exclusion, which obviously COVID-19 is not a computer virus. There's a

virus exclusion that is really a kind of pollution or contamination exclusion that I think the policyholders will have strong arguments. It doesn't apply here. There's a virus exclusion that looks like it's really directed at wood that then decays and rots, apparently, I think there's viruses that can infect wood. So I think the policyholders will have a good claim about that. And then there's exclusions for sort of microbes and bacteria that, you know, I'm sure that the policyholders will also have a good time with those because, you know, I'm not a medical person, but I understand that whatever a microbe is, a virus doesn't qualify. So, you know, and then there's the kind of interesting question that, you know, we'll have to see as some of the restaurant owners are claiming that, you know, that the reason they shut down is not the virus. The reason is the governmental order and there are any variety of ways that the government could have dealt with this situation that didn't involve them shutting down.

[00:13:31] And so, therefore, the efficient proximate cause of the shutdown is not the virus and therefore the virus exclusion shouldn't apply.

[00:13:39] There's an interesting pie chart on the CCLT webpage that shows good and bad faith allegations. Could you provide an example of a good and a bad faith allegation? What's an example of each?

[00:13:53] Yes. So the way that I would think about that is separating a case that says, you know, the insurance company denied my claim, they shouldn't have denied the claim, but you know what?

[00:14:12] It was something that at a reasonable insurance company could take a shot at. This is a new thing. We don't really know what the answer is. And so they didn't do anything wrong in any kind of deeply moral sense. They're, you know, they're wrong, their policyholder would say. I mean, I'm entitled to being paid, but like, it's just a regular, you know, good faith effort to avoid paying a claim. And then a bad, they claim would be, wait a minute, you know, they denied my claims so fast, I can tell they didn't investigate it.

[00:14:43] Then, you know, they sent me this lame questionnaire asking me questions about my property that I've then answered and you know, spent a lot of time answering, and they ignored all that information and they denied it anyway. And you know what, they're not behaving in a way that insurance companies are supposed to behave. And so that'd be the example of a kind of bad faith allegation. And the significance of that is that there can be additional damages awarded if the policyholder proves that the insurance company denied a claim or didn't process a claim in good faith. Great. Thank you.

[00:15:21] And what advice do you have for businesses going forward from this point? I mean, clearly we're still in this, and I mean, even we're going to be experiencing fallout post-COVID, if there ever is a post-COVID. What would you say to businesses or what should businesses be considering as they go forward?

[00:15:38] Well, I mean, in terms of their insurance rights, I mean, I think if I were a business right now, I wouldn't be running out to sue.

[00:15:47] I'd be waiting to see, because I think it's very clear that unless there's some kind of specific pandemic or virus coverage in the policy, which there are policies that do have this, that absent that, insurance companies are not paying for COVID losses under property insurance policies, and they're not going to pay unless they're sort of made to

pay. And so, and there's plenty of cases out there already, so unless, you know, you have some, you know, pressing need to get a quick answer for you specifically,

[00:16:31] I would wait, I would wait. Let other people do the work and, you know, and then see how it all plays out. And you can watch the COVID Coverage Litigation Tracker to get information about how it's all playing out. And so we will eventually, you know, there hasn't been, there's been, I would say, two and a half rulings so far of note, and so not enough to really make up any kind of, you know, quantitative analysis of, but, you know, within a few months, I think we'll be having some results so we can report the numbers on it. People can look at it. And, you know, I would talk to, there's plenty of lawyers now who are advertising that they're doing this litigation, and if I were a business owner, I'd certainly want to talk to a lawyer and get my name on a list and make sure that, you know, that that lawyer let me know when the statute of limitations was going to end so that I would make a choice that I want to file or not. But I think I would just sit and let someone else spend that litigation money right now.

[00:17:33] Fair enough. Is there anything else you'd like to share while we have you here on the podcast?

[00:17:37] Sure. Just one little tidbit. This is kind of deep into the website, but we have blog posts, and one of my favorite blog posts compares the business interruption claims that came out of the hurricane since 2009 with the COVID litigation claims.

[00:17:58] And one of the things that we show is that, we established kind of what a baseline of business interruption claims is when there's not some kind of major disaster, and that the number of COVID cases filed in court is already many multiples of all the excess claims from Hurricane Harvey, Superstorm Sandy, Hurricane Ike. And so this just is a way of showing graphically what a major litigation this event is, at least for the property casualty insurance industry. I also noticed that there is an article or a blog post about Katrina as well?

[00:18:37] Yes. Yeah. I mean, the problem with Katrina is we don't have data, because it goes back to before our source of data. But Katrina, I mean, Katrina did a lot of things that are interesting. You know, one of which is that there were some policyholders that had some early, what I would say, kind of improbable winds about things not really being flood-related that made it seem like there would be coverage, but in the end, the appellate courts did, you know, what I think most law professors would have expected, which is to say that a flood's a flood, and this was a flood, and therefore, you know, if you don't have flood insurance, you're out of luck.

[00:19:14] Great. And where can people find all this information? I mean, what's the web site for the project?

[00:19:19] Oh, great. Yeah. The Web site is cclt.law.upenn.edu, or you can just Google CCLT and Penn and it'll pop right up.