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INSURANCE AND REINSURANCE COMMITTEE

DOES YOUR BUSINESS HAVE THE FLU?
Impacts and Solutions
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Well, after watching and listening to that video, does Tom Cruise think his business has the flu? Did you hear the impacts of this pandemic that he was railing about? He had to "stay up at night talking to studios, producers, *insurance companies,* etc..." He commented about the people back home who were depending upon the success of their efforts to finish this film. "The industry" was watching them. People's jobs and families were depending on their success. His solution: fire the non-compliant employees if he ever observed such conduct in the future.

This is just the film industry. But the flu has affected every industry, profession, trade, job, work or occupation whether white collar or blue collar in some way, shape or form. We are all impacted by Covid-19 including the judicial system, lawyers and, in no small part, the insurance industry. So where do we go from here? It is our hope that some of what we impart in this presentation today, which looks back, present and forward, will give you some reason to think about the advice and counseling we offer our clients. First, however, a bit of good news – a glimmer of hope for the audience perhaps – according to recently announced CDC guidelines, there are various Tiers for qualifying to receive the approved vaccines. It is up to the various states to determine how or whether to follow those guidelines but most seem content to do so and some governors have already announced their intent to do so. As you might expect, Tier 1(a) is comprised of the doctors, nurses and other front line workers who have and will continue to expose themselves to the highest degree of risk for contracting this disease. Tier 1(b) is made up of nursing home residents, individuals over the age of 65 and individuals over the age of 16 with medical conditions compromising their immune systems (lupus, Lyme disease, etc.). Then, in Tier 1(c), among other classes of essential workers, are those whose occupation centers upon the functioning of the judicial system and, specifically, lawyers. Although the CDC predicts vaccines for Tier 1(c) recipients should be accomplished by April of 2021, we predict (given the speed at which government bureaucracy moves), it will probably be June. Stay tuned to your state's position on adopting the CDC recommendations or modifying them in some fashion.

But let's return to the topic. Does your Business have the Flu? If you own a business, I'm sure your answer is "yes." Whether you are a pizza restaurant, tavern, hotel chain, airline or cruise line. This meeting was scheduled to occur in Miami. Miami is probably one of the biggest hubs for the Cruise Line industry in the world and Carnival Cruise Lines, for example, is based here. The 1/12/21 Wall Street Journal reported that Carnival posted their 4th quarter losses for the year ending 11/30/20 at $2.2 Billion Dollars. Carnival has $9.5 Billion in reserves and they are planning to sell off approximately 15% of their fleet to offset losses but, unless they can begin operations again, 2021 could be their death knell. And since we are talking about our meeting in Florida, consider how the flu has affected Disney, Universal and Sea World, not to mention all the little tchotchke tourist traps along the Interstate highways running up and down the east and west coasts of Florida whose sales of plastic palm trees for your dashboard, guava and orange flavored jelly, pirate hats and eye patches for your children, and stuffed manatees for the kids to snuggle when you arrived at the hotel would never be visited for sales.

These businesses had and have the flu. But what about insurance companies? Do they have the flu? Based upon a simple look at the Greek goddess of justice, Dike, who holds the scales of justice, it would appear, at least in the U.S., the industry is suffering more from a bad cold or a bad case of the sniffles than the flu. Yes, many are facing challenges over the Business Interruption Loss provisions and the Civil Authority Clause, but the industry's foresight back in 2006 to introduce a virus exclusion and the requirement for physical damage to your property for the first provision, and the requirement for physical damage to property other than your property which makes your property inaccessible for the second provision, have largely been upheld in the courts. So, on balance, it would appear the scales are tipped in favor of the insurers and they are not suffering as badly as the insureds. (For a good discussion of the Business Interruption provision, the Virus Exclusion and the Civil Authority Provision, we would recommend a review of the following articles: "The ISO Virus Exclusion Meets Covid-19 Business Interruption Suits" *DRI, For the Defense, December 2020*; and "Covid-19 – When the Civil Authorities Take Over, Are You Covered?" *Int'l Risk Mgmt Inst., March 2020*.) But, there are downsides for the insurers as well. Some of the larger or specialty lines carriers with access to significant re-insurance reserves, wrote pandemic coverage. And some of them have paid handsomely for the insureds who had the coverage. And as we all know, there are two sides to every coin, so let's briefly look at some examples below.

Without belaboring the subject, we all get emails from industry sources or colleagues every day regarding a suit or court decision dealing with a new type of attack upon insurance coverage related to Covid-19 or a decision granting or denying an insured's attempt to trigger coverage. I'll bet each of you could look on your iPhone right now and see 5 or 6 such notifications you received today. The suits range from small mom & pop stores, restaurants like The French Laundry in Napa Valley, wig shops, movie theaters, and barber shops to proposed Class Actions. The coverage challenges go both ways with most favoring the insurers, but not always. Interestingly, there are two proposed class actions pending in South Florida against Lloyds and Chubb respectively. The classes are deigned to be slightly different based on the class representatives, but the one thing in common is that the defendant carriers did NOT have the ISO virus exclusion in their policies. And that is what is driving the claims. Stay tuned. These suits have been on somewhat of a hiatus because of efforts to consolidate such claims in an MDL proceeding and, as of the time of this writing, I am not sure that question has yet been answered. The Chubb suit should be interesting because the CEO of the company, Evan Greenberg, authored an op-ed in the Wall Street Journal shortly after the CDC and governmental agencies had declared this emergency in which he, basically, asserted that Chubb was going to fight to the end and, even though some of their policies did not have the virus exclusion, commercial insurance was never intended to cover world-wide pandemics in the first place. By contrast, shortly after that, Chubb came out with a proposed program for pandemic coverage discussed below. Again, stay tuned. As for Lloyds, will the recent U.K. ruling affect the Lloyds policies issued in the U.S.A.? Who knows? But, in the meantime, here are a handful of examples of persons or businesses claiming to have the flu and how they have been impacted or not.

<u>Las Vegas</u>: The lessor of an open air mall along the strip, with 35 restaurants and shops, alleged it was "highly likely Covid-19 virus was present on the premises leased to the shops and restaurants, thus damaging the property leased to them." The Court said the complaint sufficiently alleged losses stemming from direct physical loss and/or damage to property as a result of Covid-19 to trigger the Business Interruption clause or the Civil Authority clause. Notably, the carrier did NOT have the standard ISO virus exclusion but the policy did have a pollution exclusion which contained the "undefined" word "virus." The court said that, under the circumstances, it was reasonable to interpret the alleged loss as being the result of a "naturally occurring communicable disease" and, therefore, the fact the insurer mentioned virus in its pollution exclusion was of no consequence and the insurer's motion to dismiss was denied.

Pittsburgh: A corporation's Associate General Counsel working overseas contracted Covid-19 and was unable to return to the office. He and his family were, however, able to secure residence in Miami while in quarantine where he could work remotely, allegedly approved by his employer, from a relative's apartment for a short while during his recuperation from the effects of the disease. But that living arrangement ceased, so he arranged to take has family to Serbia, where his wife was from and they had accommodations allowing him to continue working remotely because they had excellent internet access. Shortly thereafter, however, he was advised by the General Counsel (who had allegedly said it was OK to work remotely), that his services with the company were no longer needed. So, the individual, now former, Associate General Counsel recently filed suit against his former employer for violating the FMLA and the ADA for failing to accommodate him during his recovery. The suit, as far as we know, is pending and it will be interesting to see how the EPLI carrier responds to this suit and, particularly, to see if they have anything in the policy language specifically or expressly excluding claims based on a "virus."

Miami: On January 12, 2021, a federal judge in the Southern District of Florida dismissed a catering company's suit seeking recovery under the business interruption and civil authority provisions of the insured's policy. The court noted that even though the insured had alleged it suffered a loss in the form of spoiled food stored in its warehouse, the virus did not cause physical loss or damage to plaintiff's property and, therefore, the virus exclusion applied. And with respect to the civil authority provision, there was no damage to other property (the spoiled food didn't fall in that category) preventing the insured from accessing their premises. The judge relied upon a string cite of other similar decisions from across the country finding in favor of the carrier, including the 11th Cir., M.D. Fla., N.D. Ill., D. Minn., E.D. Pa., C.D. Cal., W.D. Tex.,and M.D.N.C., all basing their rulings on similar reasons and rationale.

Outside the box: I have heard rumors of plaintiffs' counsel looking to trigger coverage for their clients (particularly hotels) under the "Crisis Management" provisions of the umbrella policies. One such carrier, for example, provides $250,000 in coverage with an additional $50,000 to be paid to the marketing or law firm retained to repair the damage to the insureds' reputations so clientele will not be put off by staying at the insured premises. This is a follow form policy to a business auto policy and the underlying policy has no virus exclusion. Moreover, the Crisis Management coverage may be viewed as a completely separate and distinct line of coverage, like the Employers Liability coverage (gap coverage –

Coverage B) in a workers comp policy, and, therefore, not premised upon being triggered only when the underlying coverage for the liability policy is exhausted. In addition, in the world of Commercial Master Policies for Companies with global operations and subsidiaries all over the world, many of those master policies have what is known in the industry as a Financial Interest Clause which protects the Parent corporation from financial losses it may suffer as a result of the liabilities imposed upon their subsidiaries. So take, for example, a Parent company in New Zealand where there is a very low exposure rate to the virus and the Parent company is doing very well economically. But it also has 5 or 6 subsidiaries in India and they all sustain financial losses impacting the investment the parent company had in those subsidiaries. The Parent company, in order to recoup the financial losses it sustained due to the liabilities imposed by the subsidiaries, may try to make a claim under the Financial Interest clause, if appropriate. These are just some of the things I have heard in discussions with our counterparts representing policy holders.

Returning to the topic, how are the carriers faring who wrote Pandemic coverage? Lloyds, Munich Re and Swiss Re, in particular, are three of the larger insurers of which I am aware. Prior to March 2020, for the right price to satisfy the premium rate, large corporations and businesses could purchase Pandemic Coverage which paid out in the event of a virus that caused the business to suffer a loss or damages. Three examples of insurers paying out upon Pandemic coverage or Event Cancellation endorsements (with no exclusions for a pandemic virus) are the 2020 Wimbledon Tennis Tournament at the All England Tennis Club. For the last 17 years, the AETC had been paying a premium for pandemic coverage. Upon the tournament being cancelled this year due to the virus, the AETC received a payout of $141 Million. Similarly, the British Open Golf Tournament at the Royal St. George Golf Course, upon cancellation due to the virus in 2020, received a handsome sum because they, too, had the foresight to purchase Pandemic coverage. Lastly, you may recall that the Tokyo Olympics had to be cancelled last summer and moved to this summer. The organizing committee has incurred an additional $2.8 Billion dollars over budget in costs to prepare the facilities on account of the virus. These costs have been borne by sponsors and insurance. The only consolation there being that the insurer did not have to bear the full brunt of the claimed overrun costs.

So, as you can see, the impact of Covid-19 has affected insureds and insurers in many different ways. Overall, depending on which side the coin lands and how the insurance policy is written, you could say it has been good or bad. But, this has not been a situation like Y2-K. It is more of a situation like the terrorist attacks of 9/11. What, if any, solutions are there to deal with the next pandemic and the questions and concerns raised by this one?

First, let's ask whether there are any winners. For the short term, 2020 and 2021, in addition to the uncovered claims of lost income, the answer is probably a big "NO." Premium rates are reportedly going to rise in virtually every category including Property, Commercial General Liability (Excess and Primary), D&O, EPL, Primary Auto, Products Liability, Professional Liability and Workers Comp. Some rates will see increases of as much as 50 to 100 percent with Workers Comp (probably due to more people working from home) seeing the lowest increases. Of course, a great deal of the underwriting consideration will focus upon the size of the insured and the risk being insured. Long term, the answer is a "DEFINITE MAYBE." Consider the "fact," and it is a "fact" that world-wide pandemics are looked upon as "100 year events." Insurers factor "facts" like this into their underwriting algorithms. Who would have thought Florida would be hit by 5 hurricanes in back to back years? Who would have thought California would be burned to a crisp in back to back years? These "100 year events" are only supposed to occur once in a hundred years. As a matter of fact, when was the last world-wide pandemic? 1918, the Spanish flu. And although it was actually 103 years ago, for purposes of looking at pandemics, they don't happen that often. But when they do, the results can be devastating. And now insurers are asking themselves, what can we do about pandemic coverage? According to a recent report, Lloyds and Munich Re have made the decision that they will no longer offer Pandemic coverage. Period. So, what are we to do? Well our friends in Switzerland at Swiss Re and even here in America where the CEO of Chubb first opined they would fight to the end, are discussing ideas which may offer some relief to everybody concerned. Options are being considered whereby the insured will be provided coverage, the insurer will not have to bear the entire risk and the government, the key to making any of this work, will not have to increase the National Debt as much by issuing loans and personal assistance checks to businesses and individuals because some of those amounts will be paid by insurers. How will all this work you may ask? Public-Private Partnerships. Look at just about any policy issued today. There is a one page Terrorism Endorsement. I don't know the exact figure because I do not pretend to be an underwriter, and I do not know the process by which the details of the program function, but assume 1/10th of 1% of the insured's annual premium goes to a government run Terrorism Insurance Fund. Those funds are invested in government guaranteed bonds yielding a certain interest rate. If, God forbid, another certified terrorist attack were to occur, then under the Terrorism Risk Insurance Act of 2002, the insured could collect the agreed upon amount (or nothing if the coverage was rejected) from the insurer who only pays a percentage in combination with the government, who bears the remaining portion of the payment. This is an example, albeit simplified, of a Public-Private Partnership.

Let's continue by looking at Chubb's message to the insurance purchasers in the future. In July 2020 (after Mr. Greenberg's op-ed in the WSJ), Chubb published a paper on its webpage entitled "Pandemic Business Interruption Program." It is based upon a Public-Private Partnership in which the insured, the insurer and the federal government all share in the risk. Risk is calculated on the size of the insured (small, medium or large business) and the amount of insured risk the insured is willing to assume. All of this depends, however, on the federal government (i.e. – the U.S. Treasury Department) participating in the program and backing the participating insurers. Some of the benefits touted by Chubb in this forward thinking program anticipating the next pandemic are: (a) affordability and certainty for small businesses about the amount of financial support available; (b) quick and efficient payment of a pre-determined sum to small businesses without having to adjudicate claims; (c) an incentive to keep people employed; (d) a market oriented program for larger businesses that will support and stimulate the private market for pandemic coverage; and (e) insurance industry risk sharing with the federal government. Swiss Re likewise jumped on the Public-Private Partnership Train. In a May 4, 2020 interview entitled: "Public-Private Partnerships the Only Viable Option We Have To Tackle Pandemics" in *Reinsurance News*, Ms. Veronica Scotti, chair of a team dedicated to public-private partnerships, stated these partnerships "…truly matter when they are answering questions which otherwise you can't answer." In the end, there are "fairer distributions and more opportunities for everyone." And although it would not appear that any answers have ultimately arrived, there are clearly sophisticated individuals and companies out there looking for ways to find the answer to the question we can't otherwise answer.

Besides the Public-Private Partnerships (which I personally think is the way to go for future pandemics – a 100 year event that none of us are likely to see in our lifetimes), what other options are there in light of the insurance market turning its back on the notion of Pandemic Insurance? In my review of the materials for this topic, I came across one idea that I didn't quite understand (and I'm not sure if I do now) but it sounded very interesting, almost intriguing. Like the feeling you might have when you switch over from your gasoline powered car to a Tesla. So, here you go. Ponder this. Traditional, insurance companies and reinsurance companies make money by accepting a premium and investing in the market which, at the end of the day, ideally results in a profit for the carrier because it exceeds the premium they invested. The returns on those investments are not occurring with the same frequency as they did in the past. Among other things, besides Covid-19, just consider the fact that the US Federal Reserve Bank and the European Central Bank have cut the knees out of the old way of making money by setting interest rates at or near zero. However, the captive insurance market may be an option because they offer the potential for high yield returns or dividends on the investments and are able to guarantee a parametric solution – a predetermined amount based upon a predefined event (e.g. – a pandemic). There are pension and hedge funds lurking out there who may be interested in a high-risk/high-yield investment. Using systemic investment programs (SIP) invested in by the captives on behalf of their members, utilizing mathematical, financial analysis of the market and blockchain technology, it is possible to protect against pandemic risks for every investor in the program. If the investor is a large or mid-size company, for example, and a small percentage of each investor's contribution is allocated to this SIP, much the same as an employer may do with a matching percentage of a 401K program, then if a pandemic ever comes around again, the corporate investors of this program will be able to recover for claims from the captive and a traditional insurance company is not even involved. The captive may have to draw on its reserves or declare dividends (which may be taxable) but payment for the defined event is available to offset what otherwise may be an uninsured loss of business income. Blockchain is not new to the insurance industry and it is used in a great number of products offered to insureds including cyber, fraud, healthcare, and other data resource rich entities. However, with few exceptions, the traditional insurance industry is not presently willing to get dirty in the pandemic pool again. But, if we look at the pandemic as a 100 year event, there is a lot of money to be invested and made during that amount of time. I predict, like Chubb and Swiss Re, other carriers will eventually come back to the table and begin to develop products to deal with this issue. But, again, I think the safest and most conservative approach (hence the most comfortable to the risk averse traditional insurance industry) will be the Public-Private Partnership point of view.

In closing, I thought it would be worthwhile to touch upon a few of the legislative developments since we first became acquainted with Covid-19. Before all the decisions began pouring out like water from a bucket, a Congresswoman from Washington State, Pramila Jayapal, sent a letter to the heads of all the leading carriers in the country expressing her concern that they were taking coverage positions that were devastating small and medium sized businesses who had paid hundreds of thousands of dollars in premiums for their commercial policies. Based on the tone of her letter, she believed the insurers should honor all Covid-19 related losses. The insurers, naturally, felt otherwise. But, not to let the topic die on the vine here, and because a letter was not going to move the insurance industry mountain, in May of 2020, Congresswoman Carolyn Maloney of New York introduced a bill to create a government back-stopped insurance program similar to the Terrorism Insurance Risk Act discussed above. Her bill, the Pandemic Risk Insurance Act of 2020 requires participating carriers to offer Business Interruption, including event cancellation, insurance for pandemics which is backed by a Pandemic Risk Reinsurance Program. The government backed reinsurance would trigger when the losses from a pandemic exceed $250,000,000. Once triggered the government's percentage would be 95% of the insured losses. There is a $750,000,000 cap for the federal compensation and if the losses exceed that amount the Treasury Secretary is authorized to determine a pro-rata share of the federal compensation beyond the cap. The bill has its supporters and opponents but it provides a means by which most insureds will not be left completely empty handed and, once triggered, the carrier won't have to bear the full weight of the loss. The carriers who participate, assuming modifications to the legislation before it ultimately passes, might be able to offer a variety of plans whereby an insured can reject the coverage, or select varying amounts depending upon what is available under the programs offered by the insurance market. The goal being that the insured wins, and the insurer (and its reinsurers) have a federally backed partner to carry a portion of the loss, depending upon what type of plan the insured has selected (e.g. – no deductible, varying SIRs, predetermined limits, etc.). Thus, depending upon the circumstances, it is possible to create a piece of legislation in which the insured, the insurer and the government are not left being the only sources of recovery. Rather, it is a shared risk but a covered risk. And, as discussed above, premiums paid for a 100 year event have the potential to produce a fair amount of return on their investment. This, coupled with the government back-stop, may bring the traditional carriers back to the table with less fear of a pandemic.

One last topic on the subject of current legislation is what is going on around the country. Many states have passed or are in the process of passing legislation providing some form of immunity to certain classes of employers and workers in order to shield them from liability claims involving Covid-19. Grocery stores, nursing homes, emergency medical personnel, premises owners, employers, product manufacturers, etc., all face varying forms of litigation as a result of Covid-19. And before I retire from this topic to bring you back to where we should all be – in Florida – I would like to suggest that you take a look at the DRI December 2020 article in *For the Defense* authored by Richard Tomich in which he examines the subject and looks at the legislative efforts in response to Covid-19 in North Carolina, Utah, Wyoming, Oklahoma, Kansas, Louisiana, Iowa, Mississippi, Georgia, Alabama and Arkansas. As for

Florida, on January 7, 2021, both the Florida House and the Florida Senate proposed virtually identical bills (the Senate bill left an exception for healthcare providers who would be addressed in a separate bill) that offered a broad range of protection for entities and individuals. The bills require that any suit for damages must "be pled with particularity." The complaint must also be accompanied by an affidavit of an active physician attesting that "within a reasonable degree of medical certainty, the alleged injuries or damages were the result of the defendant's acts or omissions." The court is obligated to dismiss the complaint without prejudice if either of those requirements are not met. In addition, the court is required to determine whether the defendant made a good faith effort to substantially comply with government issued health standards or guidelines. Such a finding will impart immunity upon the defendant from civil liability. If the court finds such efforts were lacking, however, the plaintiff must still show by clear and convincing evidence that the defendant was grossly negligent. Moreover, it is the plaintiff's burden to demonstrate a lack of good faith effort by the defendant. Lastly, Covid-19 civil actions must be filed within one year after the cause of action accrued. The application of this limitation period also applies retroactively, setting a limitation of one year from it becoming law for any claims that accrued prior to the effective date of the bills' passage. As you can see, therefore, this topic of immunity, even if limited, is hugely ingrained in the laws being proposed for Florida and, by reading the DRI article, your will see many of the other states feel the same way. If only we, as individuals along with our families, friends and neighbors, were immune from this virus. That, however, cannot be legislated.
Stay safe.

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