

McKool Smith Insurance Ace Robin Cohen Previews Coronavirus Insurance Battles

“It’s not to say it won’t be extremely expensive, but they’re in the business of insuring risk—and who better to evaluate risk” than an insurance company? said McKool Smith insurance recovery practice head Robin Cohen.

By Jenna Greene
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Law firms are in for some belt-tightening, but at least one practice area is likely to stay busy: insurance coverage litigation.

I had a chance on Wednesday to catch up with Robin Cohen, who heads McKool Smith’s insurance recovery practice and is widely heralded as a leader in the practice area. (Recent honors include being named “Insurance Lawyer of the Year” by Benchmark Litigation for the third consecutive year in 2019.)

In between commiserating about our children—we both have high school seniors who’ve lost out on end-of-year milestone events, and college kids who now are home for the semester—we talked about what’s on the horizon for insurance coverage litigation.

The short answer: A lot.

Cohen said she’s already been contacted by more than 100 clients across a range of industries who have asked her to review their policies and advise on coverage.

The first round of disputes are likely to focus on property insurance policies, she said.



Robin Cohen, McKool Smith (Photo: Courtesy Photo)

The flood of lawsuits won’t happen quite yet—insurers typically require policy holders to follow their claims handling process, and to provide proof of their losses (still a moving target).

“Most property policy carriers will argue [businesses] need to show that the virus caused ‘direct physical loss or damage,’” Cohen said. “There’s going to be a huge debate whether the virus caused a direct physical loss.”

She argues that it does—that it attaches to ceilings and walls and counters, for example, and that makes a building uninhabitable. But she also

acknowledged that “the insurance industry is going to push back hard and say it doesn’t cause direct physical loss.”

Prior litigation involving E. coli could provide helpful precedents for policy holders, she said. “Courts have found that if a hazardous substance makes a building uninhabitable, that’s sufficient to trigger” a claim for physical loss.

Already, at least one coronavirus test case is pending in Louisiana state court—a suit by a New Orleans restaurant, the Oceana Grill, which sued its insurer Lloyds of London seeking a declaratory judgment that its insurance policy provides coverage for the hit to its business.

“The virus is physically impacting public and private property, and physical spaces in cities around the world. Any effort by Lloyd’s to deny the reality that the virus causes physical damage and loss would constitute a false and potentially fraudulent misrepresentation that could endanger policyholders and the public,” states the complaint by Gauthier Murphy & Houghtaling. “It is clear that contamination of the insured premises by the coronavirus would be a direct physical loss needing remediation to clean the surfaces of the establishment.

Cohen said insurance carriers will also argue that their policies were never designed to cover losses stemming from a pandemic. And while some policies do specifically exclude coverage for viruses,

“the language is all over the map,” Cohen said. “There will be a lot of litigation over what a virus exclusion means.”

But if insurance carriers are forced to pay out a large number of claims—and we’re talking billions of dollars—could it wipe them out?

Cohen is skeptical. “After 9/11 and Superstorm Sandy and Hurricane Katrina, insurers made the argument that if they paid all the claims, they’d go bankrupt,” she said. They didn’t.

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Cohen suspects there may be legislative intervention, noting that several states are already weighing plans that would require carriers to pay business loss claims for businesses with 250 employees or less, and then seek reimbursement from the government.

“The insurance industry is fighting proposed legislation in the states,” she noted.

But if there’s no legislative fix, insurers might not like the alternative much better: They can expect to see her and other policyholder lawyers in court.

Jenna Greene is editor of The Litigation Daily and author of the “Daily Dicta” column. She is based in the San Francisco Bay Area and can be reached at jgreene@alm.com