CARLTON FIELDS

COVID-19 Insurance Coverage Class Actions

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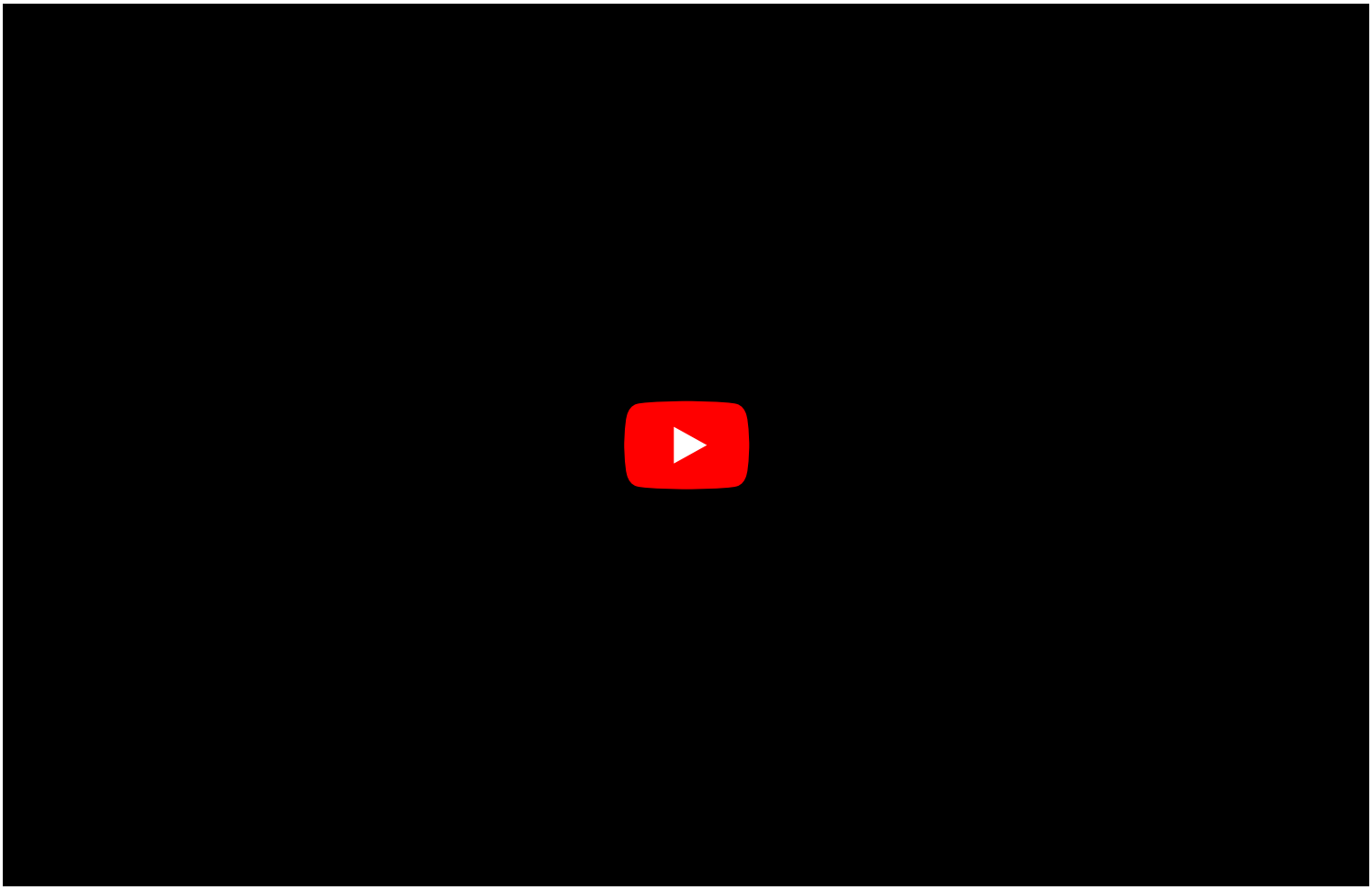

Over the last month, there have been numerous lawsuits across the country by policyholders seeking insurance coverage for losses they claim are resulting from the COVID-19 pandemic.

In the last two weeks, the new trend has been to file these claims as class actions. Several of the nation's top plaintiff-side class action law firms have filed class action lawsuits seeking coverage for nationwide classes of policyholders. These cases have been filed all over the country and against a wide range of property and casualty insurers. There is also a pending motion for the creation of a

federal multidistrict litigation to send all these federal cases to one district.

In this podcast, Carlton Fields' property and casualty and class action attorneys address:

- COVID-19-related insurance claims, including claims for property damage, business interruption, and others
- Potential issues with addressing COVID-19-related insurance coverage issues in the context of class actions

Transcript:

Steve Brodie: Thank you everyone, my name is Steve Brodie. I am co-chair of our national insurance practice group. I would like to thank all of you for joining us today in our webinar COVID 19 Insurance Coverage Class Actions.

Before we start with our program I would like to make a few comments. First, on behalf of our firm, our attorneys, consultants, staff and our families, we would like to reach out to all of you, your colleagues, family and friends. We hope all our well, safe and positive during these challenging times. There will be a light at the end of this tunnel. I am sure a new norm connecting us, enabling us to work together. We look forward to that new time.

Second, the statements we make today and the presentations should not be deemed to be legal advice nor should they be attributed to any of our clients or any insurance companies. It is clear that there will be years of insurance related litigation with respect to COVID 19. As of Friday, last week there were 34 class actions, 2 motions seeking MDL proceedings and numerous other individual coverage cases filed across the United States.

Our team has worked hard to put this program together. It is intended to identify many of the questions that should be asked and provide think pieces as to those answers. However, it is likewise clear that there will be many more questions asked and further answers and strategies to address these questions as time goes on. I would like to thank our colleagues Heidi Raschke, Matt Allen and Aaron Weiss who worked with me in putting this program together.

Before we get started we hope to reserve 10 minutes at the end of the program to answer any questions you may have. Now I would like to turn it over to my partner Heidi Raschke who will address COVID 19 claims under different types of insurance policies. Heidi?

Heidi Raschke: Thank you, Steve. And if you can advance to the COVID 19 claims under different types of policies slide. We are just going to hold this slide here for a second and talk a little bit about

the state of the world so to speak. As Steve sort of referenced, we all have been impacted by COVID 19 and we are all attending this presentation virtually where in another time and place we would be in the same room together. And we are still very much getting a sense of how the world is going to come out and what is going to happen. But as people and entities, organizations are assessing the financial impact of COVID 19, they are looking for sources of recovery and inevitably they turn to insurance companies. So I think we are going to see claims under many lines of coverage. It is going to be one of those things where if you can dream it the claim may well come.

Under worker's compensation policies that will likely be claims by injured workers claiming to have contracted the virus at their place of business. Event insurance is going to see all kinds of claims and one of the questions that might arise there particularly for events that were cancelled before any stay at home orders were in place is maybe were things cancelled because of the virus or were things cancelled because of the assumption that nobody was going to come. Wedding insurance, travel insurance, personal income protection all of these types of policies are inevitably going to see claims. But, we are really here today to talk more about the commercial type claims that we are likely to see.

If you could advance the next slide. It is very possible that we are going to see claims under commercial general liability policies, professional liability, errors and omissions, and employment practices, directors and officers. And of course, we have already seen any number of lawsuits - a huge number of lawsuits under commercial properties all risks coverage policies. Before we move on to speak about that, which is really the focus of our presentation today, we just want to raise these issues. As Steve said a lot of this is just raising the questions because it is way too soon to know the answers of what is going to be impacted, what claims are going to be made under these types of policies. Under the commercial general liability we may well see customers of businesses making claims if they believe that they have contracted the virus at a particular place. Under professional liability polices healthcare workers might see claims.

Now, encouragingly we have had legislation that has been entered in various states where they are giving immunity to healthcare workers who has diagnosed or treated COVID 19. And that is great, but you might also see claims arising out of the impact of COVID 19. For example, elective surgeries were put on hold in many places. And, what if someone claims a complication as a result of not having timely surgery? Or what if someone went to the hospital for a normal procedure or something that was unrelated and believes that they contracted the virus? There is any number of potential professional liability type claims we might see. Directors and officers insurance may well see claims. We are already seeing lawsuits that could potentially impact those types of policies. For example, lawsuits against the cruise line alleging that the company employed false sales tactics for providing customers assurances to try to get them to come on cruise lines. Lawsuits against pharmaceutical companies for perhaps making overly ambitious claims about the availability of vaccines. This

morning I saw a suit against flights, or airlines for cancelled flights. Those are things that might end up turning into claims against insurance policies.

Now historically pandemics haven't really contributed to claims under a lot of these policies but this is a whole new world. And the focus, like I said, here today and the lawsuits that have been filed to date have really been on the business interruption front. So many people hear about business interruption polices - you can go ahead and advance the slide please - and they want to make claims under business interruption, extra expenses, contingent business interruption, and civil authority. All of these are components of property all risk policies that provide coverage for business interruption expenses or extra expenses that are incurred as a result of an interruption in business. But what not everyone seems to appreciate is that while in a vacuum they might say business income coverage, it is part of a property policy and there is a precondition to coverage which is physical loss or damage.

Please advance the slide. So, business income and extra expense coverage form, the ISO coverage form, is a great place to start. This is standard language and may be manuscripted in different policies but most lawsuit that are being filed are relying on the ISO forms predominately. The business income coverage provides coverage for the actual loss of business income you sustain due to a necessary suspension of your operations during the period of restoration. The suspension must be caused by direct physical loss or damage to property at the premises. Now suspension under the ISO form means a slowdown or cessation of your business activity. So a slowdown does meet the criteria for a suspension but again there is still this direct physical loss or damage component to the coverage. And the period of restoration expects that because the period of restoration begins 72 hours after the time of direct physical loss or damage and it ends when the property could be repaired.

Now that's significant here because one of the major questions that is going to be at the forefront of this litigation is whether the presence of the virus is physical loss or damage. Now we are not going to make a decision about that today but I will say that cases have held that construction dust, for example, that could be cleaned off of the surface is not physical loss or damage. Cases that have found something is physical loss or damage might be more like ammonia that had made a facility unfit for habitation for a specific period of time. Or, asbestos in the air can make something unfit. To the extent that policyholders wants to analogize that to the presence of the virus, in many instances the businesses that are making claims are still able to go into their places of business. They just can't have people there because there is a concern of people bringing the virus. So, like I said, I think a huge obstacle for the policyholders in determining whether there has in fact been physical loss with damage if they can even demonstrate that there was the virus at the physical location.

And the 72 hour waiting period associated with business interruption becomes very interesting in that respect because the current science, as I understand it, is that the longest the virus lives on various hard sources is 72 hours. Now it apparently lives for a much shorter period of time on

different surfaces but some surfaces it can live up to 72 hours. Well if you have a 72 hour waiting period then presumably right about the time your waiting period is over if you had any physical loss or damages, it is arguably no longer present. So there are obstacles. There are certainly going to be points of dispute with respect to whether the virus is physical loss or damage, whether there is coverage in the first instance for business interruption in its sort of basic form, business interruption as a result of physical loss or damage at the insured premises.

So the next place that policyholders are looking and the next sort of dispute is going to be about the civil authority. So civil authority - please advance the slide - is coverage that is provided when there is damage to property other than the insured property and an action of civil authority prohibits access to the insured premises as a result of that damage to other property. Now in order for civil authority coverage to apply, again based upon the ISO business and income and extra expense coverage form, access to the area immediately surrounding the damaged property must be prohibited and that has to be within a mile of the damage - excuse me, the insured property needs to be within a mile of the damaged property. And the action of civil authority needs to be take in response to a dangerous physical condition. That, again, those are going to be very important components for these lawsuits going forward because even those - well, as a preliminary matter most of the orders or at least the original orders as they came down did not mention physical loss or damage. They mentioned social distancing, they mentioned stopping the spread between human contact, limiting the number of people in any kind of place because of the human-to-human contact. Some orders of authority, I think, recognizing the coverage hurdle have started putting sort of gratuitous statements about the virus being spread and causing physical damage. But they don't identify this, orders do not identify where is this physical damage. And they don't really indicate that the action of civil authority is necessary as a result of the dangerous physical condition. Instead, they seem to indicate that, again ,it's to stop human-to-human spreading.

So I think it is worth noting that there is some precedent that it's inevitably going to come to play as these lawsuits move forward and that is from, unfortunately, 9/11. Following 9/11 there were a number of interruption claims because you might remember that the airports were closed for a period of time following the terrorist activity. There was not civil authority coverage for the closure of the airports because they were not the result of physical loss or damage in the area of the airport. In fact, they were, closures were due to the fear of additional attacks. So there was no coverage there. You obviously can compare and contrast that to Southern Manhattan where closures were required due to physical damage in the vicinity. So that is going to be another dispute that is going to be had, another obstacle to coverage that insureds are going to have to get over with respect to demonstrating the civil authority coverage could potentially come into play. As part of the lawsuits that have been filed, like I said, the claims have been under business income, extra expense, civil authority.

Another type of coverage that could come up is contingent business interruption which provides coverage when an insured doesn't experience damage but one of those suppliers does. Had this virus stayed in Asia and only those businesses were impacted, we could have had businesses here in the United States claiming contingent business income losses because they couldn't get their manufacturing supplies from Asia. Because of the worldwide aspect of this Coronavirus, it is not going to be necessary to look for contingent business income because everybody is experiencing loss and the closures as a result of the various governmental orders.

What we have also seen in addition to business income, extra expense and civil authority claims for coverage in the lawsuits that have been filed to date are some allegations of bad faith. If you could please advance the slide. Bad faith has been alleged in a couple of the lawsuits. Obviously it's very early for those kind of claims to be asserted. But a question that is going to inevitably arise in the context of this litigation is what constitutes a reasonable investigation? And if the courts determine that there is no coverage, which is what I as I sit here, not giving anybody legal advice but just my sort of gut reaction from doing this work in the industry for so long, is that there shouldn't be coverage for this. Does is a categorical denial of a claim evidence a general practice of bad faith? There are going to be these type of allegations. And if there is a finding of bad faith, what type of exposure could be insurers see as a result of that? These are some of the issues that we are going to have to fight through because it seems like whenever there is a claim for coverage, there is an accompanying bad faith claim in many instances.

So, if you have been following the lawsuits that have been filed at all a lot of talk has been around a virus exclusion that was introduced in 2006. If you could please go to the next slide. So, in 2006 ISO introduced another exclusion that was for virus. And some of the lawsuits that have been filed have wanted a declaration that, in the absence of this exclusion this endorsement being added to policies, there must be coverage. But before you can jump to that conclusion you need to understand the purpose of the virus exclusion when it was added and the preconditions to coverage that we have already talked about. The existence of the exclusion doesn't mean there is coverage if there is not physical damage that triggers the coverage under the policy. And that's, I think, is very important, well, it is going to be important for the courts to understand and it is going to be important for people to understand in this context.

At the time that ISO introduced the circular in 2006 they pointed to the fact that there was already a pollution exclusion in the policies and that contaminant is part of the definition of pollution and pollutants that are intended to be excluded under these policies. But they recognized that courts weren't necessarily consistently applying that and that there could be different types of contamination that might not be appreciated as a pollution event. Examples they gave were bacterial contamination of a product like the growth of listeria bacteria in milk. They also appointed to viral bacterial contaminant such as rotavirus, SARS and influenza, the avian flu. This was in 2006 before a lot of our H1N1 and various other pandemics have happened in the later 2010s, or 2000s, I guess.

But they were sort of foreseeing that this could happen. And when they described the current conditions they gave rise to the desire to add the virus exclusion endorsement. They talked about the fact that although building and personal property could arguably become contaminated, often temporarily - again, what we talked about with the virus, as far as we know, it only lasts for up to 72 hours - by viruses, the nature of the property itself would have a bearing on whether there is actual property damage. Again, there is no presumption in this that there is property damage. But, they recognize, ISO recognized that there could be a point of disagreement. And they talk about the fact that while property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of a pandemic or something that was hitherto unconsidered could find insurers who have these types of policies facing claims by policyholders in efforts to expand coverage and create sources of recovery for such losses contrary to policy intent. I think that's very important because, again, this circular and the addition of the virus exclusion, which if you advance the next slide, is quoted, or recited, rather. The addition of this exclusion for loss or damage caused by or resulting from any virus, bacterium, or microorganism that induces or is capable of inducing physical distress, onus, or disease, the addition of this exclusion does not mean that in the absence of this exclusion there was coverage or ever intended to be coverage. And I think that's going to be a dispute that we will see played out through this litigation that's been filed.

If you could please advance the next slide. Steve sort of forecasted this for you. Now at the time that we put together this image, there were about 60 lawsuits that had been filed, half of them class actions. Since then there have been about 9 more filed. So between Friday and today at this time, we've already seen about 9 more. Iowa is now represented with 2 so we would have a little green state on there if we had done the graphic today instead of Friday. So we see that these things are growing in leaps and bounds.

But one other piece of sort of, I think, instructive or interesting developments is on the legislative front. And I'm not going to speak about it in great detail, but I think it again demonstrates that there is a lack of intent for coverage here because, as many of you likely know, New Jersey, Ohio, Massachusetts, Louisiana, Pennsylvania, and South Carolina have all introduced some type of legislation that would require insurers to provide business interruption coverage for COVID 19 losses. There are variations to them. Some of them, most of them limit it to smaller businesses. But, the fact that they're trying to legislatively require retroactive coverage for this type of loss, again demonstrates that's not what the policy actually covers. And, of course, there's a huge constitutional concern with trying to force insurers to cover something that they did not contractually agree to cover.

On the flip side of that, the departments of insurance in a few states have stepped up and issued affirmative statements. Arkansas, North Carolina, Maryland, West Virginia, Georgia, and Kansas have all come forward with affirmative statements that a business property policy is unlikely to provide coverage for this. One of them talks about the fact that mandating coverage for this size and type of

loss while cancelling existing exclusions in the policies would end the very existence of business interruption insurance market as we know it. Another one says the potential loss cost from such perils like COVID 19 are so extreme that providing coverage would jeopardize the financial solvency of property insurers. And, of course, that's what everyone here in this virtual room knows. That at the time that the risks were assessed and premiums were charged, a loss like this was never contemplated to be covered. And it could be detrimental if the courts find any coverage. So we've got the coverage hurdles to get over.

But now, as we've indicated, about half of these lawsuits have come in as purported class actions. So we look to our colleagues in the class action practice group to speak to the impact of the class allegations.

Matt Allen: Thank you, Heidi. I'm Matt Allen and I'm going to cover the basics of class certification, and then my colleague, Aaron Weiss, will address some of the specific issues in more detail.

As I'm sure you know, class actions in federal court are governed by Federal Rule of Civil Procedure 23. Most states have analogues that essentially track the same language. While some COVID 19 class complaints may attempt to limit the claims to those within a single state in order to try to avoid federal court, we expect that most cases will be filed in federal court or be removable to federal court pursuant to the Class Action Fairness Act. The Class Action Fairness Act, or CAFA as it's known, permits removal of class actions that involve more than 100 putative class members, minimal diversity, which means at least 1 class member as a citizen of 1 state and a defendant is a citizen of another state, and more than $5 million in the aggregate in controversy. We're going to focus on the federal rule since, as I said, we think most of these cases will ultimately end up in federal court. Can we go to the next slide?

So you see here the Rule 23(a) requirements, the prerequisites to a class action. They are commonly known as numerosity, commonality, typicality, and adequacy. Each of these requirements must be satisfied for plaintiffs to obtain certification of a class. Go to the next one.

You see on this slide the Rule 23(b) subsections plaintiffs must satisfy only one of these subdivisions. Now, subsection (b)(1) permits certification of a mandatory class. Under (b)(1)(a), a class can be certified if the adjudication of separate actions would create the risk of inconsistent results [*inaudible*] incompatible standards of conduct for the defendant. And the key word here is incompatible. Some of the complaints, the COVID 19 coverage complaints seek class certification under this subsection, but I think they ignore the fact that the possibility of inconsistent or conflicting court decisions alone isn't enough to obtain certification under this subsection, even with respect to the same policy form. This subsection shouldn't apply if a defendant is asked to do different things or even inconsistent things regarding different insureds. Under (b)(1)(b), a class can be certified if there is a limited fund available to pay claims. The bottom line on these two

subsections, subsection (b)(1)(a) and (b) is they're rarely used. Most courts have ruled that if plaintiffs seek money damages or if there is no limited fund scenario at play, class certification is not available under (b)(1).

Now subsection (b)(2) is designed for classes seeking injunctive or declaratory relief. It was originally designed for civil rights cases where the defendant is accused of discriminating against a class as a whole. For a class to be certified under this subsection, it has to be so cohesive and homogenous that the claims apply equally to all members of the class as a whole. Many of the COVID 19 coverage class complaints that have been filed seek a declaratory judgment that the business interruption losses are covered. I'll come back to this subsection in a minute because whether it applies to COVID 19 coverage class actions is likely to be a heavily disputed issue.

Subsection (b)(3) is designed for money damages cases. If your case involves breach of contract claims or as Heidi mentioned a few bad faith claims, it's likely seeking certification under (b)(3) where common issues have to predominate over individualized issues and the class action devise must be superior to individualized adjudication.

Now the courts have also added an unwritten ascertainability requirement. Under this requirement, the class must be adequately defined and clearly ascertainable. Some courts have said this means that plaintiffs must demonstrate that there is an administratively feasible method to identify class members. Given that COVID 19 coverage cases are going to be brought on behalf of insureds, ascertainability is probably not going to be a contested point in these cases. Next slide, please.

So, let's go back and take a deeper dive into these requirements as they might apply to COVID 19 coverage cases, and we'll start with numerosity. Numerosity is likely not to be heavily contested in most of these cases. The standard for showing numerosity varies a bit by circuit, but we can boil it down to saying that plaintiffs must show that there are a minimum between 20 and 50 class members. You see the Nuberg treatise says 40 or more raises the presumption that numerosity is satisfied. And even in the cases that limit the class to a specific type of insured, such as restaurants or bars in a specific local, will probably satisfy this minimum threshold. Next slide.

Adequacy. Quick word about adequacy. There are three inquiries that usually go into the adequacy question: is there any sort of conflict of interest between the named plaintiffs and the absent class members or a significant subset of absent class members? Is there anything unique about the named plaintiffs that would disqualify them from serving as class representatives? For example, a personal or financial tie or sometimes courts will look at criminal records, close relationship to class counsel. Is there something also disqualifying in class counsel, either an ethical or competence issue or a close relationship to the named plaintiff? These are typically areas that require discovery so we can't and don't want to make generalized comments on adequacy beyond simply identifying the general areas of inquiry set forth on the last slide.

Now here you see the standard for Rule 23(a) to commonality. We believe this will be an important flash point for COVID 19 coverage class actions. Before 2011, it was common for defendants challenging class certification to stipulate to commonality and to move directly to the more stringent predominance requirement of Rule 23(b)(3). But in 2011 in Walmart v. Dukes, a landmark case, the Supreme Court breathed new life into the commonality requirement. The Court reversed a nation-wide class of female employees of Walmart alleging that the retail giant had discriminated against them in pay and promotion decisions. And the Court ruled that because pay and promotion decisions are made at the local level, there was no glue that held the class together. In so ruling, the Court emphasized that what matters with respect to commonality is not the raising of one or more allegedly common questions, but whether those questions generate common answers - and this is important - that have the potential to drive the resolution of the litigation. That's contrary to the prior understanding of many courts and litigates.

So what does this mean for COVID 19 coverage cases? It means the defendants are likely going to focus on the individualized questions that don't generate common answers. Now what are some of those individualized questions? Heidi mentioned the ISO form, but depending on how the complaint is structured, the governing policy language itself may vary among customers. Is there a communicable disease, virus, or pandemic exclusion? And if so, which customers have it? Even if not, is the loss defined as a direct loss or a physical loss or physical damage? Does the material language vary among policies? These would be areas that we would recommend policies with companies immediately begin exploring. Is there a business interruption? How does the policy define that? Does it require a cessation of business activity or just a slowdown? How much of one? What's the basis for the business interruption? Does the interruption flow directly from the coronavirus or only because the civil authority has closed down the business even though there is no physical damage, that is no actual coronavirus contamination on the property? Is there a government order requiring the business to shut down? Which government? Which order? They will vary from state to state and from local authority to local authority. We've all seen that in our federal system different states and different local governments have pursued different approaches. Some or more strict, some are less strict. In addition there also may be an emerging split with regard to how aggressive different states and localities will be about lifting restrictions and reopening areas for business. Is the business shut down because of the presence of the virus on the property? That's a different type of case than one where there is no actual physical damage to the property. Some of the complaints argue that because , according to the WHO the incubation period for the corona virus is at least 14 days, it is likely that some customers or employees who have visited the property were infected and therefore infected the property. Now setting aside whether the science is even right on that, that's easy to allege but it seems to me it's hard to prove even for an individual property, let alone as a generalize matter across all properties in a proposed class.

Another important question will be choice of law. Many of these cases have been filed as nationwide class actions, which will involve the laws of all 50 states. This creates a substantial class certification

defense because courts regularly deny class certification of claims involving the laws of multiple states. My partner, Aaron Weiss, will say more about this in a few minutes. Let's go to the next slide.

Word about typicality. 23(a)(3) Typicality. Typicality is very similar to both adequacy and commonality. It asks whether there is something unique or special about the named plaintiffs' claims that would make it different from the claims of absent class members. The requirement really merges together analytically speaking with commonality and adequacy. The plaintiffs will likely argue that their claims are typical of other class members because everyone has suffered losses because of the COVID 19 pandemic and resulting government shutdowns. They'll argue that everyone so affected believes their insurance policy should cover these losses, and the insurance company has uniformly refused to do so. So they'll try to keep the inquiry simple and high level. For their part, the insurance companies will want to get granular and focus on any unique factors that distinguish the named plaintiff from other putative class members and they'll focus on the individualized factors I've already mentioned such as varied state laws, government orders, choice of law questions, and other specific facts unique to specific locales. Let's go to the next slide.

Rule 23(b)(3) predominance. The plaintiff must show that common issues those subject to generalized proof predominate over those issues that only apply to individualized class members. Put another way, predominance is satisfied if the issues to be tried in the case are subject to generalized proof so that whatever key legal points and evidence that applies to the named plaintiffs' claims at trial will apply equally to absent class members. Now there is obviously substantial overlap between the commonality requirement of Rule 23(a)(2) and the (b)(3) predominance requirement. However, predominance is far more demanding or rigorous than commonality. In the context of COVID 19 coverage class actions, as I've already mentioned, the defendants will likely focus on the facts that create differences among the claims, including different policy forms, different orders by state and local governments requiring different actions by insured businesses, and different choice of law considerations. In cases where money damages are sought, predominance is where the case will be won or lost. Next slide.

Superiority. The second aspect of Rule 23(b)(3) along with predominance is superiority. The inquiry is basically whether from a case management perspective the courts and the parties are better off deciding the issues, or deciding the dispute in one fell swoop as a class action or in a series of individual cases. Superiority usually tracks predominance. If individual issues predominate over common issues, it doesn't make sense to try it as a class action. Conversely, if common issues will predominate over individualized issues, the class action generally will be deemed superior. You see on the slide the factors that courts look at. One consideration involves the size of the claims. Generally speaking, courts are more sympathetic to trying lower value claims as class actions because it doesn't make economic sense for plaintiffs to file individual lawsuits over low dollar claims. In the insurance coverage context, some courts have held that class action is not superior

when the value of each individual claim is likely to be relatively high and therefore allegedly agreed policyholders have an incentive to bring their own individualized claims. Next slide please.

Now I mentioned earlier that Rule 23(b)(2) gives plaintiffs the option of seeking a class that only seeks declaratory relief or injunctive relief. Some of the COVID 19 coverage complaints take this approach and under it plaintiffs can avoid the rigorous predominance and superiority analysis that often dooms Rule 23 (b)(3) class actions. Even if the complaint includes money damages claims, most COVID 19 coverage complaints that we have seen so far at least include a request for declaratory relief and (b)(2) certification. We expect, though, that the suitability of declaratory only relief will be a hotly disputed issue. In the Supreme Court's landmark Walmart decision that I mentioned a few minutes ago, the Court ruled that (b)(2) certification is not available when the predominant relieve sought in the lawsuit is money damages. For a (b)(2) class to be certified, any monetary relief sought must be merely incidental to the declaratory or injunctive relief. When what businesses really want is money, however, this requirement likely will not be satisfied. In other insurance contexts, we've seen plaintiffs attempt to limit the relief they seek in the class suit to just declaratory relief only to then turn around and file follow on lawsuits in which they seek money damages based on the declaration they received in the class action. In one 2019 case in the 11th Circuit, AA Suncoast Chiropractic v. Progressive the 11th Circuit rejected this approach as a slight of hand because the ultimate result requested in the class action was money damages, not a declaratory judgment. Next slide.

One more issue that may come up is the idea of an [*inaudible*] class. Can the court certify a single issue for adjudication in the class action leaving all the individualized issues for adjudication in later follow on suits? Some circuits to varying degrees have accepted this idea and these are the 2nd, 3rd, 6th, 7th, and 9th circuits. The 5th and 11th circuits have said no that you have to satisfy predominance in order to certify an issue class, predominance of the case as a whole, that is. And in the context of COVID 19 coverage class actions, in a favorable jurisdiction a plaintiff could ask, for instance, that the court certify on the specific issue of whether the COVID 19 related lockdowns have caused him to suffer a loss as identified by their policies. But even in those circuits which have accepted the idea as a general matter or a theoretical matter, a pivotal question is whether the certification of the issue will materially advance the disposition of the litigation as a whole. If it won't, no issue class should be certified. Arguably if money damages are still to be determined based on choice of law determinations they remain individualized or other key questions to be litigated remain individualized, the answer will be that resolution of a policy interpretation issue won't materially advance the litigation as a whole and no issue class should be certified. This is something to keep an eye on.

I now want to turn the program over to Aaron who will address in more detail some of these battle ground issues that I've highlighted.

Aaron Weiss: Before I get started with my remarks, just a public service announcement: the attorney affirmation code, we do have CLE available. I believe we're getting it for Florida and that will be reciprocity [*inaudible*] where our folks can help you with that. But the announcement is on the screen and if you're not watching the PowerPoint it is P31ek82g7A. That's the code for CLE. So if we could advance the slides?

As Matt alluded to, perhaps the most significant issue that is going to come into play in these cases is the fact that for the most part the class actions that we have seen so far are fought as nationwide classes. So that means all of your policyholders who have - they're also applied very broadly in terms of which policies are at issue, but they all are seeking class treatment on behalf of all the policyholders in the whole nation. And because we, of course, know this is a nationwide issue, the plaintiffs' counsel want to look at this as very simply, oh it's the same problem in the whole country so we can have a nationwide class. Any insurance cases in class actions, it's not that easy. In fact, there's a case that was issued within the last month from the 5th circuit down in Texas and New Orleans that made clear - and I think I put some of that language where it talks about in a class action where you're governing by the laws in multiple states, variations in state law may swamp, and often do, the common issues and defeat predominance. So that's the commonality and predominance issues that Matt just talked about. And what a party seeking certification of the nationwide class has to do, the named plaintiff has to come forward typically with a 50 state survey and indicate to the court on why different variations in state law will not overwhelm the court. So occasionally you'll see, a court will say, "OK, well if you can identify maybe there's only two particular variations" so maybe one group of states accepts a particular affirmative defense and another group of states doesn't - and, again, I'm not limiting that to the insurance context - maybe that's a way that a court could say, "You know what? There's not that much variation." But when there's an overwhelming amount of potential variation, courts have often said, "No, I'm not going to certify a class on that basis." So if we can move forward to the choice of law concerns and then we'll get back to how we determine them.

As I said, once we establish that there may be some material variation in the state, it becomes incumbent upon the court to determine whose state law applies. And just for a moment, how do we determine if there's going to be variation? And I'll talk a little more about this in a moment. But as Heidi was saying in her remarks, we just don't know. That's somewhat of the problem because in so much of this is we're writing on a blank slate. And we do have some precedence, but a lot of this we're going to see what the courts will do with these specific issues related to the business interruption, related to the science of the issues. And as Heidi mentioned, even from some of the state regulators we're seeing some difference. So the point is, this is not something where we have a group of plaintiffs who was plowing over well-tread, for instance a product liability situation where everyone sort of knows how the different states would deal with an exploding lawnmower. We just don't know how that's going to be. So it becomes very difficult for the policyholder plaintiffs to come forward and to say, "Well, there's no variation in state law because we absolutely know Nebraska,

Iowa, Maine, Vermont, and everywhere in between are going to decide a particular issue the same way." There's just not enough track record to say that.

But once that's established where there's enough potential variation, this is to me one of the issues that can be very compelling and this is the choice of law issue. As Matt indicated and Heidi indicated, most of these cases are being filed, at least the class actions, in federal court for all the reasons that Matt mentioned. There's the CAFA's statutes that came into play about 15 years ago and the short of it that makes a big nationwide class action like this basically most of those wind up in federal court. So in federal court, if you have a suit, for instance, where we are here in Florida. The federal court in Florida says, "OK. I am going to apply the rules in Florida to determine whose state law would govern the dispute." And that's very important. So the plaintiffs, the very easy way of looking at it without getting too sophisticated, you almost want to think of well, we're dealing with these commercial all risk policies. We're generally talking about premises. OK, well if it's a premise in Nebraska, premise in Iowa that must be the state law that applies. That's not the case and it's not that easy and in fact, the choice of law issue gets really complicated. And the question of choice of law matters each particular policyholder. So it's not just the named class plaintiff. The class plaintiff will have to show that it can be established that there's different potential state law, the class plaintiff will have to show that there is a way to determine what state law would apply to each member of the class.

And I think I'm going to demonstrate in a moment if we could advance why that could be particularly hard. Depending on the state, so this is where the case will be filed, there's three or four major different tests and some of them could lead to results that aren't intuitive. So there's what they call the *lex loci* approach. That's where the contract was deemed to be formed. We happen to be, all four of us, in Florida now. And Florida has somewhat of an idiosyncratic approach on that that it could be as granular as where was the broker who happened to accept even make the last yes, that's good, we're all in agreement? We've had situations where sometimes that could be. The broker happened to be on vacation in New Hampshire and because of that you wind up with a state law that you don't think has anything to do with the case but that's where the contract was deemed formed. Florida and a few others fall into that.

Some others have the most significant relationship. That's probably the most common test, but it by no means is it the overwhelming test. And even with that, different states look at it differently. So that's more of a holistic approach that sort of looks at a number of factors and says, OK which state has the biggest concern over this issue. Now in a premise with one particular location in a most significant relationship analysis, that's most likely to be where the premise is located. But just think about it. In some of these class actions, the members of the class, even if they're not the named class member are going to be policyholders who have policies that cover risk in multiple states. Think of fast food franchises, movie theaters, people who have all different locations. So once you get into that multi-state situation most significant relationship becomes very hard.

Governmental interest, that's sort of mostly in California. That's sort of another hybrid-type test that basically says do we have a rule that if we apply one state's law it would render recognizing another state meaningless? That's not that common of a test, but California's a big state. And then even so you have a couple oddballs like North Dakota and South Carolina. No offense if anybody is from those jurisdictions on our call. I'm not calling the states oddballs, just calling the choice of law test oddball. But that's the point. There's so many different choice of law analyses that it becomes very difficult in this type of case to even determine what law would govern each policyholder. So if we move on.

The factual variation - and Heidi and Matt have both touched on this - but again, this will be a big difference. Some of the ways that policyholders, these plaintiffs have tried to define the classes are very broad. Things like all holders of policies not containing a pandemic exclusion. That's sort of in [*inaudible*] that's difficult to certify something like this. But the point is if the definition were that broad, there's going to be dozens and dozens, hundreds if not of different policy forms. So, yeah, there may be, you could determine, OK here's all our policyholders who don't contain a pandemic exclusion. But as Heidi talked about, there's going to be, even within a particular insurance and a particular category of insurance, category of policy, there's going to be a whole bunch of different forms. Now would be a major factor against commonality, typicality, and predominance. Now if the plaintiffs are smart in these, we noticed some of the [*inaudible*] plaintiffs' lawyers and even some more common defense lawyers who do represent policyholders are getting into doing it. They're very smart. The policyholders have good lawyers and they will know how to narrow their classes to find ways to limit them to target specific areas. But as I did mention, one thing why it's important, the choice of law issue becomes very important because if the cases do start to get narrowed, even if you said, OK well the choice of law issue is going to overwhelm so if we said, OK everybody, all Tennessee policyholders, the reason why the choice of law issue is significant because even if everybody is located in Tennessee for instance just as an example, you still don't even know what the choice of law would be because you could have your different issues, your multi-state locations. You could have a situation where it's the *lex loci* where the contract is formed. So that's why it really becomes important to keep focusing on that choice of law issue at the outset because you don't want to give that one up. That could be very important. If we could move on.

As we said, states and localities have reacted differently. One thing to add to one of the points that Matt made, the voluntary compliance approach. So as we see some of these lockdowns starting to abate, just on CNN this weekend I happened to see there was a survey of different hairdressers in Georgia. I know that's been an issue that has gotten some attention and I'm just using this as an example. Some locations opened for business and they have customers coming in. And some folks have said, "You know what? I'm allowed to open but I don't want to open because I'm afraid of spreading the risk." Now how does that impact the insurance gets into a situation where is that voluntary or not. So that's again, these different factual variations will become very important and it will be very significant in my mind for the carriers to really keep in mind the different approaches and

the different timelines that different states and localities are taking as these issues have become important in the class certification process to show why this is the different issue from everybody.

So moving on, just the last thing I wanted to mention is an MDL. An MDL is a procedure where you could have a centralized location where all particular cases on a particular subject, basically they got funneled to one district court to handle all of the discovery. Typically in class action, is the district court who the cases would get transferred to does handle the certification motion. And then if the case is certified or not certified, they go back to the home district for the trial. There have already been two groups of plaintiffs, one in a class action, one in an individual case who have moved for an MDL so that sets up a procedure where there is now a motion. And a panel of federal judges will consider whether these cases, whether all the individual cases, all the class cases, some combination, will go to one judge in whichever district they pick - it could be anywhere - for the pretrial issues, which could include and likely would include class certification. MDLs are very complicated. They work well when it's one product. So everybody who bought so-and-so lawnmower, the lawnmower fails and you centralize them for discovery in one jurisdiction and then you weed them back out for the individual trials. For these multi-industry situations, MDLs can be very complicated. A lot of times the individual defendant's defenses get lost in the shuffle. We will see what, if there's a cohesiveness amongst the policyholders' lawyers. Just my own prediction is there's going to be some breakaway where there's going to be two schools of thought amongst the policyholders whether or not MDL is the way to go or not. But, as I said, a risk for insurers is if you start with an MDL, you really run the risks of the individual variations, the state law variations, the state fact variations, and the specific policyholder variations just getting lost in the shuffle. So that is something to think about.

So those are my thoughts and we'll turn it over to some questions and I'm sure Steve will want to have some closing remarks.

Steve Brodie: Yeah, let me just try to summarize real quick where I think we're at in this evolving process. The important thing when you think about insurance coverage obviously is that there has to be a grant of coverage. And Heidi quite accurately addressed the issue of the ISO exclusion, but we have to remember that because there's an exclusion it excludes coverage that is otherwise granted and the nonexistence of an exclusion is not proof in our view that in fact there's an affirmative grant of coverage. The fact that a lot of these businesses in which [*inaudible*] claims are also open for business, obviously they're not open to the extent they were before. Many of them do not have patrons accessing their places of business. But they are providing business for people who come and take out, for example, in the nature of a restaurant. But I also was of interest and I think that no one commented on it that in order to establish coverage you have to, the insured has a burden of proving that the virus actually attaches to or is on the property. And then there are facts that government social distancing orders or shutdown orders [*inaudible*] does not mean that the insured has met its burden of proof. I think what's really going on is that a lot of these stay at home owners

are to ensure social distancing. And the fact is when businesses reopen there will be no proof that there's not COVID 19 still in existence. But is that the restrictions on social distancing will be removed and people will gather back in some type of form of social distance. Businesses obviously will be up and running again.

On the class action side, we saw there's a significant amount of issues that the plaintiffs' lawyers will have to meet in order to establish conditions for a class cert. There's going to be a lot of interesting issues with respect to policy terms, conditions, and the laws that apply. And clearly there's going to be a lot of things happening over the next weeks and months and unfortunately I think years from now that will help answer these questions.

But before we close I'd like to open up to anyone who's participating. I'm sad to say that we are almost [*inaudible*] of over 200 people. So anyone on the line before we close, we'd love to answer any questions you may have. I think everyone is off mute or we could have a hand raise, whatever's best for our IT department.

Heidi Raschke: You can also type a question if you have it. One question we have that's not substantive but it's important procedurally for those of you who are seeking CLE credit. We do just have the one code. Had this been a longer presentation we might have had more, but just the one is what we'll be submitting with our CLE materials.

Steve Brodie: We had a question from Georgia where someone said even if the governor's opening up, I'm not going anywhere. So members in Georgia, stay safe. If there's not any questions, many of you have our contact information. Please feel free to reach out to us. We've attempted in a very short period of time… Questions: will PowerPoint slides be available? Yes, more likely than not they'll be available whoever sent that, send me an email. I'd be glad to provide you information. Again, this isn't meant to be rendering legal advice. We've attempted to do the best we can to identify questions that we think are relevant and provide answers that we think our present thinking of where a lot of these issues are going. But as I indicated, this clearly is a work in progress and we are doing everything we can to stay on top of the issues. Another question. Yes. Someone else asked for the PowerPoint. Yes, please send us an email. We'd be glad to forward the PowerPoint and information to anyone who would like it. Again, thank you all very much for participating in our webinar today. Please stay safe, stay well, and stay positive. We will all get through this together and look forward to connecting with our colleagues wherever they may be. Thank you all.

Matt Allen: Thank you.

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