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In-Depth Roundtable: Hottest Issues, Perils, and Pitfalls for Contractors and Carriers

One thing is clear: COVID-19 will continue to play a major part in insurance coverage litigation trends in the new year. Until now, the focus has been on claims for lost business income due to shutdowns under various types of policies, commonly referred to as "business interruption" claims. That focus will likely continue through at least the first part of the year, as filings, decisions, and now trials in such cases have and will continue to shape the landscape of similar litigation for some time.

In mid-December 2020, a state court in Louisiana conducted a trial over coverage for a restaurant group's losses due to diminished dining capacity. Plaintiffs brought a now familiar claim — that the "all risk" insurance policy they purchased provided coverage for the COVID-19 virus's presence on the physical surfaces of their premises because that presence constituted property damage. The insurer countered, arguing that the term "physical damage" did not include the effects of the COVID-19 virus because those effects could be cleaned off and therefore could not constitute damage.

Although a decision has yet to be issued in the Louisiana case, to date, about 100 decisions have been issued in state and federal court relating to similar lawsuits. Of these, most decisions have trickled down on the side of the insurers, with about 70% of decisions concluding that there cannot be or is not coverage for alleged losses due to the COVID-19 virus. These results are especially clear where the policy in question contains a virus exclusion — policyholders thus far have been extremely unsuccessful at surviving motions to dismiss under such policies.

Policyholders have had some success, however. Approximately 20 cases have proceeded past motions to dismiss and into the discovery phase. Some judges reason that "loss" and "damage," where undefined, have distinct meanings. Thus, the "physical loss" required for coverage could be satisfied even without specifically identifiable physical damage.

A few insureds have been even more successful, winning summary judgment against their insurers. The first decision affirmatively holding that there was coverage was issued in North Carolina state court, where a group of restaurants sued alleging that the meaning of "direct physical loss" did not require physical alteration and could instead be triggered by loss of use. The judge favored this argument, and the case is currently pending on appeal.

Additionally, there will be several COVID-19 related business interruption multidistrict litigation suits in the forthcoming months. The Judicial Panel on Multidistrict Litigation has created certain insurer-specific MDLs for claims based on loss of business income, as well as an MDL to handle travel insurance cases. The JPML declined to create a nationwide, industry-wide MDL to centralize all lost business income cases, however, recognizing that (1) questions of coverage are issues of state law, and (2) variations in policy language matter in deciding such questions.

As COVID-19 continues to dominate the news and people's lives, it is possible that other coverage trends will emerge if insureds believe their policies should cover additional claims related to the pandemic. All signs indicate that decisions in business interruption cases will continue to shape coverage litigation for the foreseeable future, however, whatever other trends might emerge.

In the construction industry, the COVID-19 pandemic drastically impacted the construction industry, affecting jobsite and business guidelines by way of state regulations emphasizing cleanliness and strict safety protocols. The industry is also witnessing a rise of machines capable of identifying common safety issues and eliminating those threats one at a time. Wearable innovations are making their way to the jobsite with work boots that connect to Wi-Fi and alert others if a person has fallen, material moving "mules" transporting heavy materials, and robots construct scaffolding autonomously. These robots are changing the jobs humans do — in most cases, they are augmenting human decision-making (like deciphering and translating data findings into actionable insights) and making room for different, higher-level jobs.

The biggest differentiator for business owners and fleet managers this year is likely to be technology in construction — specifically, the innovations that can enhance efficiency. The COVID-19 pandemic is causing increased reliance on construction technology, which will only increase in popularity through 2021 and beyond. For example, smart contracts offer all organizations in a project a shared system to do business, allowing them to track and pay for services. Rather than getting contracts and tracking deliverables from separate parties, business owners can use smart contacts as an all-in-one tracking system where rules and deadlines are set and the blockchain enforces them. This system will make for faster closeouts, increased security, better project tracking, and an automated supply chain.

One of the most noticeable construction trends of the past few years is a vast increase in the demand for labor. However, quality labor is expensive and competitive. Moving forward, we will need more educated workers to manage and interpret the data produced by new technology. Fortunately, women are stepping in to fill more competitive roles. According to the Bureau of Labor Statistics, women occupy only 10.9 percent of construction industry jobs, and industry hiring trends show a 94 percent growth in female-owned construction firms from 2007 to 2018. Additionally, 30 percent of construction companies promoted a woman to a senior position in 2018. The industry is also targeting Generation Z, born between 1995 and 2010, in recruiting efforts. In the past, negative perceptions of trade schools were detrimental to efforts to hire new talent in construction. The COVID-19 pandemic caused a shift in attitudes toward alternative education options and resulted in increased positive attitudes toward trade school, positioning rental and construction businesses to show off the career growth potential in their industries and the abundant opportunities to experiment with new technologies.

Mobile applications in the construction industry allow worksite access like never, including real-time inspections, on-site accountability, and accurate measurements taken from a mobile phone camera. COVID-19 mandated that teams continue to collaborate without physical access to equipment, customers, materials, spaces, or even other teammates. Those without complete mobile connectivity will be at a productivity and sales disadvantage going forward.

Comprehensive construction management software is a vital tool for remaining competitive, building a valuable business, and mastering operational efficiency. While each software service differs slightly in features and offerings, the best tackle end-to-end needs from RFIs to compiling data, sharing files with mobile teams, budgeting, document storage, payroll and HR, and inventory monitoring. Choosing the right construction management software is important for your business. Begin with looking at ease of use and integration with other existing software. Look for scalable software that fits right now yet will help manage your needs as those needs multiply. Evaluate customization options, upgrades, and additional features, and check for availability of support and training to get up-and-running. By adopting new practices, leveraging new technologies, and investing in new projects, business owners can reduce risk, win more customers, and enjoy profitability. As we know, 2020 was an anomaly for statistics in the construction industry, but looking forward, the outlook is largely positive. After a tepid year, an upswing in construction is expected throughout 2021 as the U.S. economy recovers from the pandemic and new economic centers continue to develop and grow.

In just one year, the price of lumber has increased 377%—reaching a record high of $1,635 per 1,000 bd ft. For context, lumber has historically fluctuated between $200 to $400.

After a brief stint above $600 in April 2018, lumber quickly tumbled down to sub $250 levels, causing a few sawmills to shut down. The resulting decreases in production capacity (supply) were estimated to be around 3 billion board feet. Once COVID-19 emerged, labor shortages cut production even further, making the lumber market incredibly sensitive to demand shocks. The U.S. government has since reduced its tariffs on Canadian lumber, but these measures appear to be an example of too little, too late.

Lockdowns in early 2020 delayed many home purchases until later in the year, while increased savings rates during the pandemic meant Americans had more cash on hand. The demand for homes was further amplified by record-low mortgage rates across the country. Existing homeowners needed lumber too, as many Americans suddenly found themselves requiring upgrades and renovations to accommodate their new stay-at-home lifestyles.

As lumber prices continue to set record highs, the National Association of Home Builders (NAHB) has reported that the cost to build a single family home has increased by $36,000. Most of this cost can be passed down to the consumer, but extremely tight supplies mean homebuilders are unable to start more projects.

Wrap-Up Insurance policies have been available on large construction projects for many years and provide a single project specific policy to cover the owner, general contractor and subcontractors as named insureds for liabilities that arise out of construction at the project. Typically, wrap policies offer reduced premiums for the single project policy that consolidates general liability, workers' compensation, and excess/umbrella coverages for those working on the project. The most common form of Wrap policy is the Owner-Controlled Insurance Program (OCIP).

OCIP policies offer advantages over individual contractor policies by generally providing greater limits of coverage for project specific concerns and allow for streamlined claims processing and defense of claims if matters proceed to litigation. Also, risks of litigation are lessened as the entities performing the construction work are all covered by the same policy. OCIP policies can also afford coverage to contractors for construction of multi-unit projects (condominium and townhome) that may be excluded from the contractor's standard commercial general liability (CGL) policies.

When considering enrolling in a project's OCIP program, it is very important for the contractor have the proposed OCIP insurance policy reviewed to determine its critical features that may impact coverage on the contractor. On residential projects, entities that provide a OCIP policy for a project are required to disclose, among other things, the policy limits, scope of coverage, policy term, the basis upon which a deductible or occurrence is triggered and an estimate of the remaining policy limits which will allow the contractor to assess the benefits and risks of enrolling in a project OCIP.

Wrap policy deductibles are typically the responsibility of the sponsor of the plan, usually the owner. Satisfaction of the deductible is a condition to coverage under the policy. The construction contract or subcontract typically requires the enrolled contractor to pay a portion of the deductible and defines how the deductible is to be paid and its amount before there is coverage for a claim. It is critical to understand policy deductible terms and who is responsible for their payment.

It is also important to make sure the Wrap policy limits are sufficient for the potential risks associated with the construction project. These limits also include the excess/umbrella coverage over the primary Wrap policy that is typically triggered only after the primary Wrap policy is exhausted.

Wrap policies must also be closely reviewed to determine whether it is a "burning limits" policy wherein the costs of defense of a claim are deducted from the limits of liability for the policy. Multiple claims on a policy with burning limits can exhaust the policy leaving a contractor without coverage for a claim on an OCIP project.

In addition, most contractor CGL policies exclude coverage for projects where the contractor is an insured under the Wrap policy leaving the potential for uncovered claims in the event of Wrap policy exhaustion or a denial of a claim. It is important to analyze whether enrolling in the Wrap policy makes sense for the contractor or whether an endorsement to the contractors CGL policy should be sought affording specific coverage for a project that offers a Wrap policy.

Obtaining information about the proposed Wrap policy is important to allow the contractor to obtain critical information about the policy to make an informed decision whether to enroll in the Wrap program. It is critical for the Wrap policy to be reviewed by an attorney to ensure that policy limits, deductibles and coverages are understood and explained to avoid potential lack of coverage scenarios and gaps in insurance and whether it makes sense to enroll in a project OCIP.

Finally, Cyber attacks are a very real and growing concern. Below are ways to combat cyber-attacks.

One of the most common ways cyber criminals get access to your data is through your employees. They will send fraudulent emails impersonating someone in your organization and will either ask for personal details or for access to certain files. Links often seem legitimate to an untrained eye, and it is easy to fall into the trap. Therefore, employee awareness is vital.

One of the most efficient ways to protect against cyber-attacks and all types of data breaches is to train your employees on cyber-attack prevention and inform them of current cyber-attacks.

Often cyber-attacks happen because your systems or software are not fully up to date, leaving weaknesses. Hackers exploit these weaknesses, so cybercriminals exploit these weaknesses to gain access to your network. Once they are in – it is often too late to take preventative action. To counteract this, it is smart to invest in a patch management system that will manage all software and system updates, keeping your system resilient and up to date. Leaf offer patch management as part of their managed security solution.

There are so many different types of sophisticated data breaches and new ones surface every day and even make comebacks. Putting your network behind a firewall is one of the most effective ways to defend yourself from any cyber-attack. A firewall system will block any brute force attacks made on your network and/or systems before it can do any damage, something we can help you with.

In the event of a disaster (often a cyber-attack) you must have your data backed up to avoid serious downtime, loss of data and serious financial loss.

Believe it or not, one of the attacks that you can receive on your systems can be physical, having control over who can access your network is important. Somebody can simply walk into your office or enterprise and plug in a USB key containing infected files into one of your computers allowing them access to your entire network or infect it. It is essential to control who has access to your computers. Having a perimeter security system installed is a very good way to stop cybercrime as much as break ins!

Every employee needs their own login for every application and program. Several users connecting under the same credentials can put your business at risk. Having separate logins for each staff member will help you reduce the number of attack fronts. Users only log in once each day and will only use their own set of logins. Greater security is not the only benefit, you will also get improved usability.

One of the risks as a business owner and having employees is them installing software on business owned devices that could compromise your systems. Having managed admin rights and blocking your staff installing or even accessing certain data on your network is beneficial to your security. It is your business, protect it!