Nicoletti Hornig & Sweeney

ATTORNEYS and COUNSELORS-AT-LAW

Nooshin Namazi, Partner

Kevin J.B. O'Malley, Partner

www.nicolettihornig.com

(212) 220-3830

Marine Insurance Day
October 21, 2021

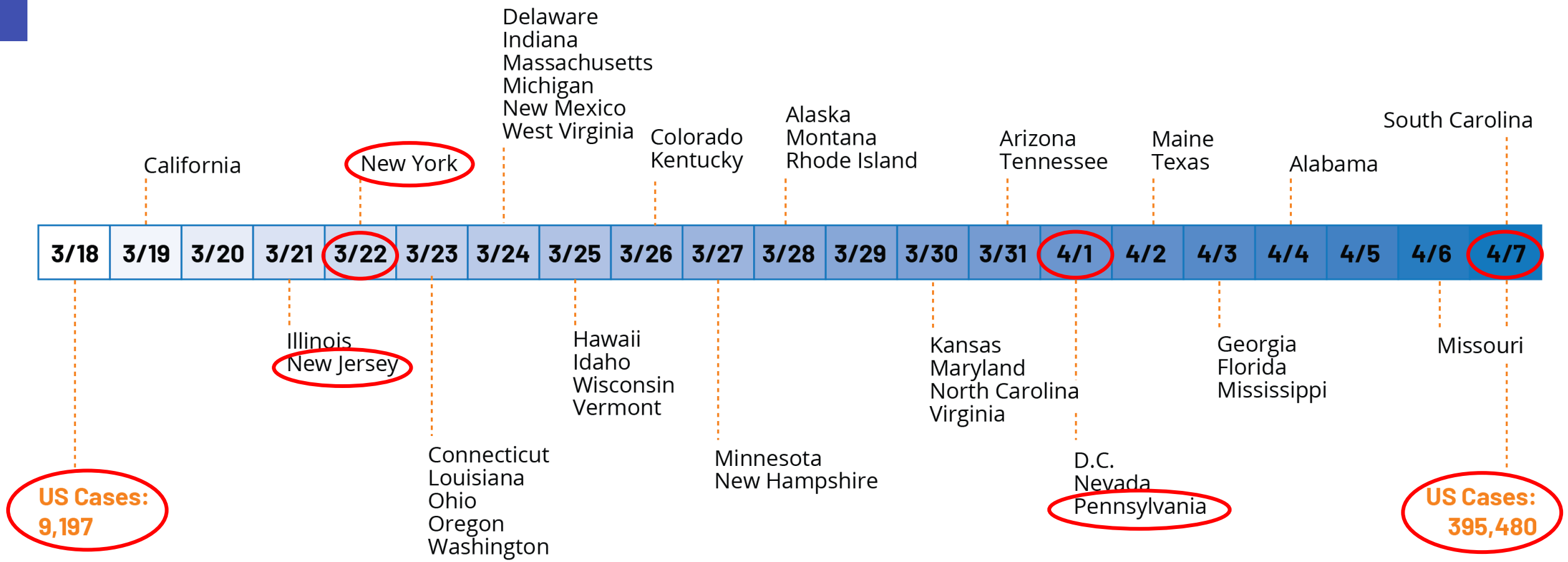
COVID-19

Nooshin Namazi, Partner

nnamazi@nicolettihornig.com

(212) 220-3833

When State Stay-at-Home Orders Due to Coronavirus Went into Effect



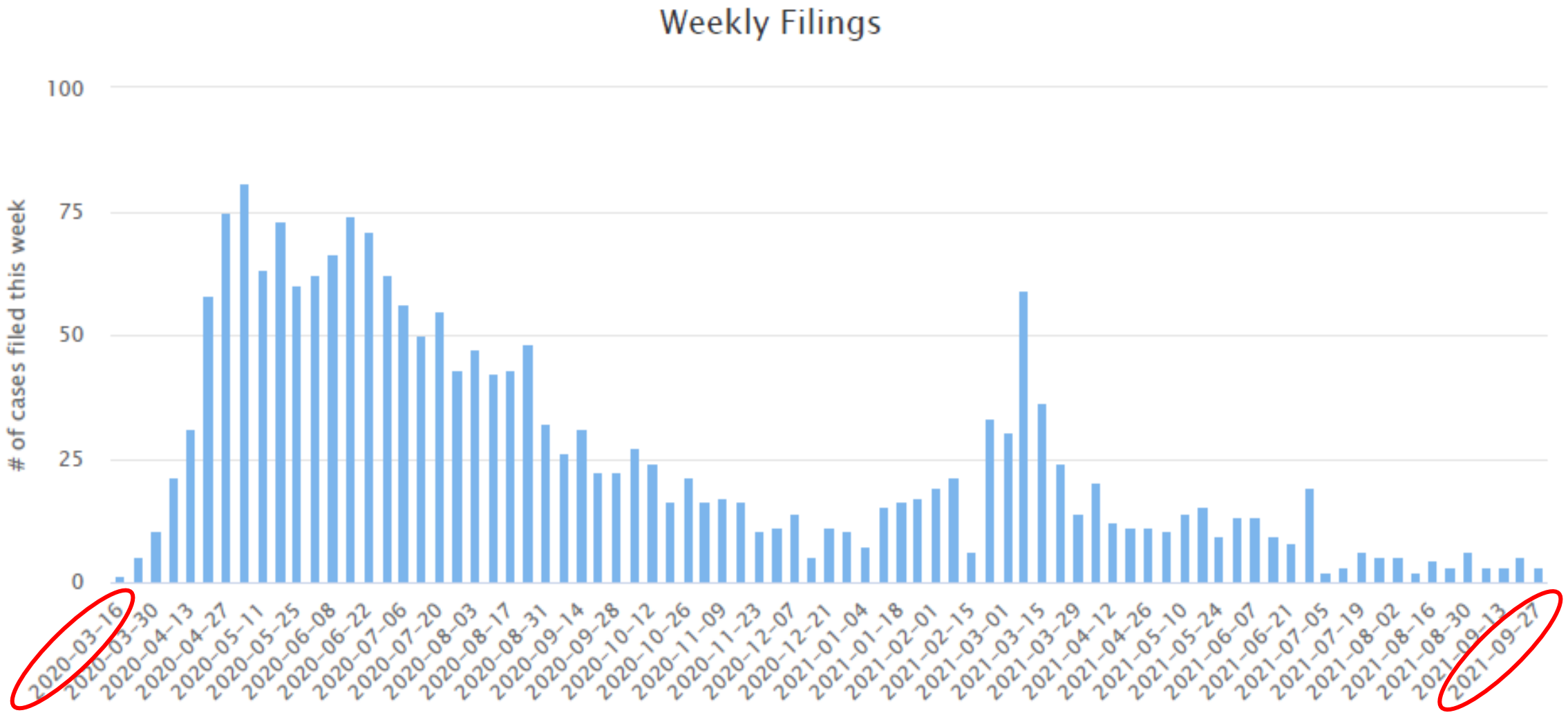
SOURCE: KFF, State Data and Policy Actions to Address Coronavirus, https://www.kff.org/health-costs/issue-brief/state-data-and-policy-actions-to-address-coronavirus/#note-3-10 and state government websites.

KFF
HENRY J KAISER FAMILY FOUNDATION

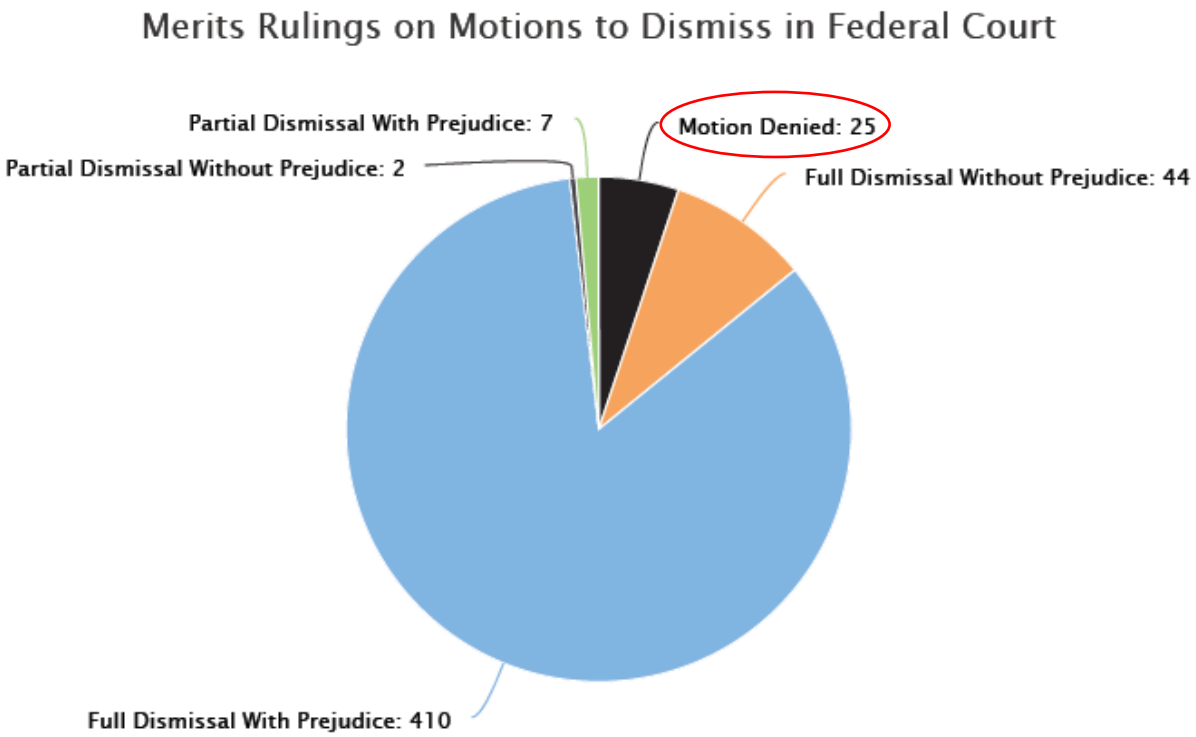
Sample State Government Orders' Impact on Retail and Service Business

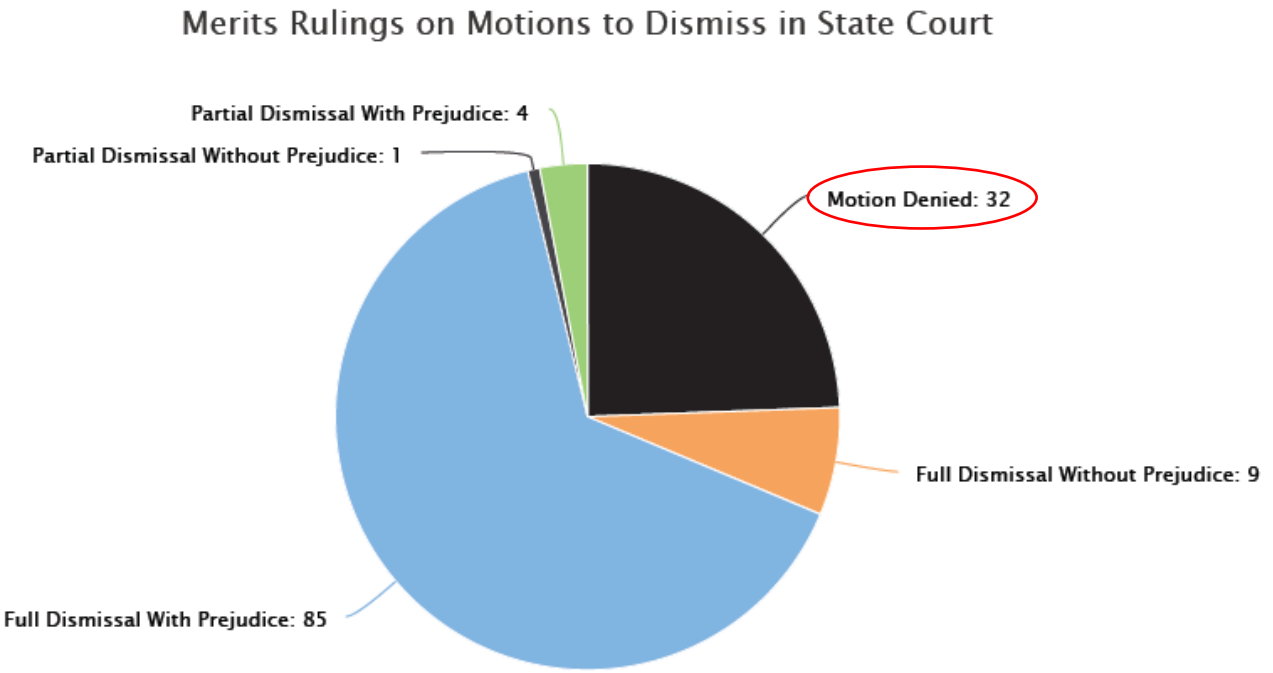
State/territory	State of emergency declared	Stay at home ordered	Face coverings required in public[8]	Gatherings banned	Out-of-state travel restrictions	Closures ordered			
						Schools	Daycares	Bars & sit-down restaurants	Non-essential retail
Washington	February 29	March 23	Yes	All	No	Yes (remainder of term)	Yes	Yes	Yes
Florida	March 1	April 3	No	10 or more	Limited quarantine / Screened	Yes (remainder of term)	Yes	Yes	Yes
California (government response)	March 4	March 19	Yes	All	No	Yes (remainder of term)	Yes	Yes	Yes
Hawaii	March 4	March 25	Yes	11 or more, and public gathering in public places	Mandatory quarantine	Yes (remainder of term)	Yes	Yes	Yes
Mississippi	March 4	April 3	No	All	No	Yes (remainder of term)	No	Yes	Yes
West Virginia	March 4	March 23	Yes	All	No	Yes (remainder of term)	Yes	Yes	Yes
Maryland	March 5	March 30	Yes	10 or more	Mandatory quarantine	Yes (remainder of term)	Yes	Yes	Yes
Indiana	March 6	March 25	Yes	All outside, and 11 or more inside a household	No	Yes (remainder of term)	Yes	Yes	Yes
Kentucky	March 6	March 26 (advisory)	Yes	10 or more	Mandatory quarantine	Yes (remainder of term)	Yes	Yes	Yes
Pennsylvania	March 6	April 1	No	10 or more (recommended)	Limited quarantine	Yes (remainder of term)	Yes	Yes	Yes
Utah	March 6	Regional	Yes	10 or more	No	Yes (remainder of term)	Yes	Yes	Regional
New York (government response)	March 7	March 22	Yes	All	No	Yes (remainder of term)	Yes	Yes	Yes
Oregon	March 8	March 23	Yes	All	No	Yes (remainder of term)	Yes	Yes	Restricted
Illinois	March 9	March 21	Yes	All	No	Yes (remainder of term)	Yes	Yes	Yes
Iowa	March 9	No	No	10 or more	No	Yes (remainder of term)	Yes	Yes	Yes
Kansas	March 9	March 30	Yes	10 or more	Limited quarantine	Yes (remainder of term)	No	Yes	Yes
New Jersey	March 9	March 21	Yes	All	No	Yes (remainder of term)	Yes	Yes	Yes

Weekly Filings of Suits Nationwide



The University of Pennsylvania Law School (https://cclt.law.upenn.edu)





The University of Pennsylvania Law School (https://cclt.law.upenn.edu)

Appeal Status - Federal Cases = 209

Appellate District	Number of Appeals Pending	First Oral Argument Date
1st Circuit	6	2021-10-04
2nd Circuit	9	2021-09-02
3rd Circuit	43	2021-04-28
4th Circuit	9	
5th Circuit	8	
6th Circuit – Kentucky – Michigan – Ohio – Tennessee	17	2021-09-16
7th Circuit	14	2021-09-10
8th Circuit – Arkansas – Iowa – Minnesota – Missouri – Nebraska – North Dakota – South Dakota	15	
9th Circuit – Alaska – Arizona – California – Guam – Hawaii – Idaho – Montana – Nevada – Northern Mariana Islands – Oregon – Washington State	68	2021-08-11
10th Circuit	1	
11th Circuit – Alabama – Florida – Georgia	19	

The University of Pennsylvania Law School (https://cclt.law.upenn.edu/appeals)

COVID Cases – Appeals Decided

PROPERTY CASES, BI COVERAGE, VIRUS AND/OR CONTAMINATION EXCLUSIONS

1. *Oral Surgeons* (8th Cir.) Gatekeeper To Cover: "direct physical loss or physical damage" i.e., a physical alteration, physical contamination, or physical destruction, misplacement, misdelivery or unexplained loss, not losses that are intangible or incorporeal (diminution in value).

2. *Mudpie, Inc.* (9th Cir.) "the efficient cause," i.e., the one that set others in motion . . . was . . . the spread of the virus throughout California not the governmental orders.

3. *Gilreath Fam. & Cosm. Dentistry* (11th Cir.) The shelter in place order did not damage or change the insured property in any way that required its repair or precluded its future use for dental procedures. "We do not see how the presence of those [COVID] particles would cause physical damage or loss to the property."

4. *Santo's Italian Cafe* (6th Cir.) pandemic-triggered government order, barring in-person dining at a restaurant, not "direct physical loss of or damage."

The FC&S Warranty

- PARAMOUNT WARRANTIES:

  The following warranties and clauses shall be paramount and apply except to the extent they may be amended or replaced by superseding clause(s) or endorsement(s).

- FREE OF CAPTURE AND SEIZURE WARRANTY:

  This insurance is warranted free from loss, damage or expense caused by or resulting from:

  capture, seizure, arrest, restraint, detainment, confiscation, preemption, requisition or nationalization, and the consequences thereof or any attempt thereat, whether in time of peace or war and whether lawful or otherwise.

Q: WHAT IS RESTRAINT?

- In absence of definition, the ordinary meaning of "restraint": "*a means of restraining*" and "restraining" is "*to prevent from doing, exhibiting, or expressing something*."

Archer-Daniels-Midland Co. v. Phoenix Assur. Co. of N.Y., 975 F. Supp. 1137, 1143 (S.D. Ill. 1997)

Olivera v. Union Ins. Co., 16 U.S. 183 (1818)

"What, then, . . . is the meaning of the term "restraint?" Does it imply that the limitation, restriction, or confinement must be imposed by those who are in possession of the person or thing which is limited, restricted, or confined, or is the term satisfied by a restriction created by the application of external force? If, for example, a town be besieged and the inhabitants confined within its walls by the besieging army, if in attempting to come out they are forced back, would it be inaccurate to say they are *restrained* within these limits? . . . when a port is blockaded, that the vessels within are confined or restrained from coming out. The blockade force is not in possession of the vessels [e]nclosed in the harbour, but it acts upon and restrains them."

- "THE CLAUSE DOES NOT REQUIRE THAT THE INSURED ITEM SPECIFICALLY BE DETAINED, IF THE SHIP CARRYING THE CARGO IS DETAINED AND THAT DETENTION IS THE PROXIMATE CAUSE OF THE LOSS. WHERE THE INSURED PROPERTY IS DETAINED, NOT BY GOVERNMENT ACTION SPECIFICALLY DIRECTED AT THAT PROPERTY, . . . BUT BY FORCIBLE MEANS WHICH HAVE THE SAME CONSEQUENCES, THAT ALSO CONSTITUTES THE OPERATION OF A RESTRAINT."

Commodities Reserve Co. v. St. Paul Fire & Marine Ins. Co., 879 F.2d 640 (9th Cir. 1989)

The FC&S Warranty …

- REQUIRES ACTION BY A GOVERNMENTAL AUTHORITY, NOT A PRIVATE ACTOR
- APPLIES TO ACTION BY GOVERNMENTAL AUTHORITIES DURING PEACETIME, NOT JUST DURING WARTIME
- OPERATES AS AN EXCLUSION

Marine Insurance Day
October 21, 2021

Subrogation and Large/Complex Claims

Kevin J.B. O'Malley, Partner

komalley@nicolettihornig.com

(212) 220-0394

SUMMARY

01

Claim → Subrogation → Recovery

02

Early Involvement of Subrogation Team

03

Subrogation Receipt

04

Notice of Claim / Time Bar

05

Service Contracts and Similar Agreements

06

Limitations on Recovery Potential

1.
Claim → Subrogation → Recovery

Subrogation Primer

- Applies to All Types of Policies
  - Not just first-party property losses
- Equitable and Contractual Subrogation
- Purely Derivative of Insured's Rights and Claims

Claim → Subrogation → Recovery

1. First Notice of Loss

2. Investigation and Adjustment of Claim

3. Payment of Claim

4. Referral to Subrogation Team

5. Informal Recovery Process

6. Formal Recovery Process

2.
Early Involvement of Subrogation Team

Why Bring In Subrogation Team Early?

- Investigation for Recovery Purposes / Recognize Third-Party Liability
  - Insured's interests may not be the same as underwriter's interests
- Coordinate Surveys, Response and Cooperation with Other Interested Underwriters
- Preservation of Evidence
  - But beware of what you undertake
- Comply with Notice of Claim Requirements
- Preserve Time Bar

3.
Subrogation Receipt

Why Get a Subrogation Receipt?

- Evidences Claim Amount and Payment by Underwriter
- Identifies Insured with Recovery Rights (hopefully)
- Memorializes Insured's Agreement to Cooperate and to Not Release Any Parties
- Obtain Additional Rights Through Assignment

What Should Be on Subrogation Receipt?

- Best to Match Insured Receiving Payment to Party with Recovery Rights
- Adequately Describe the Loss
- Acknowledgment of Payment and Underwriter's Subrogation Rights
- Undertaking That Insured Has Not and Will Not Release Any Party
- Assignment of Insured's Rights to Extent Allowed by Law
  - Excepting deductible? Is there policy language?
- Insured's Agreement to Cooperate With Recovery Process
- Don't Rely on Standard Receipt for Large / Complex Losses

It Depends …

- Release of Further Claims Under Policy
  - May be a breach of duty of good faith and fair dealing
  - Is there a dispute as to coverage, quantification, valuation, etc.?
- Waiver / Modification of Made Whole Rule
  - May be prohibited by state law
  - Is there policy language concerning subrogation?

4.
Notice of Claim / Time Bar

- Time Waits For No One
  - Large / complex losses take time to investigate and to adjust … but time continues to run
  - Preserving timeliness of claim may not be insured's priority
  - Don't wait too long to refer to subrogation counsel
    - If no response to first five demand letters, unlikely to respond to sixth
    - Delayed investigation
    - Evidence disappears or can be destroyed
    - Suit may need to be filed in a foreign jurisdiction
- Notice of Claim and Time Bar Are NOT the Same Thing

Types of Notice of Claim

- Statutory
  - Federal
    - e.g., COGSA – "Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery."
    - e.g., Carmack Amendment – minimum of nine months
  - State
    - e.g., tort claim against municipality
- Contractual

Types of Time Bar

- Statutory
  - Federal
    - e.g., COGSA ("within one year after delivery of the goods or the date when the goods should have been delivered"); Carmack Amendment (minimum of two years)
  - State
    - e.g., contract, tort
- Contractual
  - May shorten or extend statutory time bars in some instances
- Laches

5.
Service Contracts and Similar Agreements

A Contract Can …

- Modify Time Bars (in certain circumstances)
  - Extend or reduce
- Modify Limits of Liability (in certain circumstances)
  - Increase or decrease
- Create or Waive Defenses

6. Limitations on Recovery Potential

- Uninsured Losses / Made Whole Rule
- Insured Value versus Recoverable Damages
  - e.g., agreed hull value or CIF + 10% versus market value
- Inadequate / Incorrect Insurance of Liable Party
- Excess Underwriter's Priority Over Primary Underwriter
- Release / Waiver of Subrogation by Insured
- Service Contract or Similar Agreement

Questions?

nnamazi@nicolettihornig.com
(212) 220-3833

komalley@nicolettihornig.com
(212) 220-0394

New Jersey
505 Main Street, Suite 106
Hackensack, NJ 07061
(201) 343-0970

New York
Wall Street Plaza
88 Pine Street, Seventh Floor
New York, New York 10005
(212) 220-3830

Georgia
4555 Mansell Road, Suite 300
Alpharetta, GA 30022
(770) 521-4234

Marine Insurance Day Seminar 2021

A Collaborative Effort of:

The American Institute of Marine Underwriters (AIMU)
American Marine Insurance Forum (AMIF)
Association of Average Adjusters of the U.S. and Canada
Inland Marine Underwriters Association (IMUA)
Marine and Insurance Claims Association (MICA)

Disclaimer

The information provided in this presentation does not, and is not intended to, constitute legal advice; instead, all information, content and materials in this presentation are for general informational purposes only. Information in this presentation may not constitute the most up-to-date legal or other information.

Readers of this presentation should contact their attorney to obtain advice with respect to any particular legal matter. No reader of this presentation should act or refrain from acting on the basis of information in this presentation without first seeking legal advice from counsel in the relevant jurisdiction. Only your individual attorney can provide assurances that the information contained herein – and your interpretation of it – is applicable or appropriate to your particular situation. Nothing about or contained in this presentation creates an attorney-client relationship between the reader and the authors or Nicoletti Hornig & Sweeney.