



ACCNJ LEGAL & INSURANCE UPDATE

TRACKING COVID-19 INSURANCE LITIGATION

Not surprisingly, insurance litigation has ramped up as carriers and insureds sort through a myriad of coverage issues related to COVID. The initial wave of litigation saw policyholders and carriers filing competing motions to have coverage disputes resolved in their favor. Courts have finally started to render decisions on these motions and the coverage landscape is beginning to take shape.

To help businesses monitor the latest developments, UPenn Law launched its [COVID Coverage Litigation Tracker](#), which contains data for property insurance cases related to the pandemic. Here are some notable observations from UPenn's tracker:

- Claim filings peaked in early May, decreased slightly in July, and have remained steady since.
- Motions to dismiss indicate insurers are most commonly relying on (1) no physical loss/damage, (2) failure to meet access requirements for civil authority coverage, and (3) virus exclusion clauses.
- The food services industry continues to lead the way for the highest number of reported insurance litigation claims. Construction is not currently listed in the top 10.

UPenn's tracker confirms the "no physical loss/damage" debate rages on. This has been arguably the most central theme in property insurance litigation. Courts have been asked to decide whether the presence of COVID-19, in and around physical structures, constitutes a "direct physical loss or damage" to covered property. In the month of August, courts have come down both ways on this issue.^[1] A New Jersey court has yet to weigh in.

Fortunately for the construction industry, property insurance litigation remains less active than in other industries. A review of [active insurance litigation cases](#) produced some claims filed by truckers,^[2] as well as manufacturers and fabricators whose plants suffered shutdowns or reduced activity.^[3] Many of these cases remain in preliminary stages. ACCNJ will continue to monitor new developments in the insurance sector, especially as it relates to COVID litigation.

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^[1] **Ruling in favor of insurer:** Rose's 1, LLC et al. v. Erie Ins. Exch., No. 2020-CA-002424-B (D.C. Super. Ct. Aug. 6, 2020); **Ruling in favor of policyholder(s):** See [Studio 417, Inc. v. The Cincinnati Insurance Company](#), 6:20-cv-03127-SRB (W.D. MO, So. Div., Aug. 12, 2020).

^[2] **Trucking Company:** L&L Logistics and Warehousing Inc. v. Evanston Insurance Co., 2020 WL 2213290 (E.D.Va.)

^[3] **NY Steel Fabricator** (Sullivan County Fabrication, Inc. v. Selective Insurance Company of America, 2020 WL 4253047 (S.D.N.Y.); **PA Metal Fabricator**, C.A. Spalding Co. v. Selective Insurance Group Inc. et al., case number 2:20-cv-01967, (E.D.P.A.); **OH Metal Fabricator**, [Steelial Welding & Metal Fabrication Inc. v. The Cincinnati Insurance Company](#)

NY FEDERAL COURT RULING COULD LEAVE EMPLOYERS 'HANGING' THIS SCHOOL YEAR

On August 3, 2020, a U.S. District Judge issued a decision in the [State of New York v. U.S. Department of Labor, et al.](#), No. 1:20-cv-03020 (S.D.N.Y. Aug. 3, 2020), which vacated several portions of the U.S.

Department of Labor's ("DOL") regulations concerning the Families First Coronavirus Response Act ("FFCRA"). Among them, was the requirement that an employee secure employer consent for intermittent leave. This could have a significant impact on employers because many school districts intend to operate on a "hybrid" model, in which students will receive a combination of in-person and remote instruction.^[1] Employers will likely see increased requests for intermittent leave for the days an employee's child is scheduled to stay home. Under prior [federal guidance](#), parents requesting leave on an intermittent basis needed the consent of their employer. This is no longer the case in New York and other jurisdictions could follow suit. Employers outside of New York may not be immediately affected by the August 3rd decision because: (1) the New York ruling did not include a nationwide injunction, thus calling into question whether it has nationwide application; and (2) the DOL is expected to appeal.^[2] On August 27, the DOL published [FAQs 98-100](#), which clearly indicate intermittent leave is possible for days a child is not permitted to attend in-person instruction. Notably, the FAQs did not address employer consent and, as of the date of this update, the DOL has not issued any further guidance or taken steps to amend its Interim Final Rule to address the court's opinion.

ACCNJ will continue monitoring the DOL's next steps. For more information on family leave and school closures, please be sure to reference our [August 28th circulation](#) which contained guidance on this topic.

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^[1] [NJ COVID Hub - Will schools open next year?](#)

^[2] [HR Daily Advisor - NY Court Expands FFCRA Paid Leave, but Ruling May Not Be Last Word](#)

GOVERNOR MURPHY EXTENDS NEW JERSEY'S PUBLIC HEALTH EMERGENCY IN EXECUTIVE ORDER 180

On August 27th, Governor Murphy issued [Executive Order 180](#), which extended the Public Health Emergency ("PHE"). The PHE was originally declared by Executive Order 103 on March 9, 2020. Under the Emergency Health Powers Act ("EHPA"), a declared PHE expires after 30 days unless renewed. EO 180 extends all: (i) Executive Orders issued under the Governor's authority pursuant to the EHPA, and (ii) other actions taken by Executive Branch departments and agencies in response to the PHE. The order acknowledges that rates of new cases continue to decrease, however, "the ongoing risks presented by COVID-19 mean that many of the State's current measures must remain in place, both to reduce additional new infections and to save lives." A link to Governor Murphy's executive orders can be found [here](#).

ACCNJ'S LEGAL & INSURANCE WEBINAR SERIES

ACCNJ's free Webinar Series kicked off earlier this summer. It features Associate Members presenting on timely insurance and legal topics impacted by COVID-19. Each presentation has offered valuable insight and perspective on challenging issues faced by construction professionals throughout the pandemic.

In Week 1, Construction Risk Partners provided a [Coverage Analysis](#) on COVID related insurance claims. Risk management was rounded out in Weeks 2 and 3 by Peckar & Abramson, on the topic of [Document Control](#), and Arthur J. Gallagher & Co., on the insurance [Claims Process](#). In August, we turned our focus to payment mechanisms, where Peckar & Abramson returned in Week 4 with a presentation on [Lien Law](#) and Connell Foley discussed [Prompt Pay](#) in Week 5. September will feature the firm of Susanin, Widman & Brennan with presentations on Labor & Employment (Sept 15) and Workers' Compensation.

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