



## Insurance Litigation in Challenging Times

As the coronavirus pandemic has led to the closing of many businesses, companies have started to turn to their insurance providers to cover coronavirus-related losses. This will lead to a rapid increase in insurance litigation. Lex Machina's data for March is already showing a marked increase in case filings.

Watch our moderator Joshua Harvey, Meghan Ruesch from Lewis Wagner, and Ron Porter insurance data expert at Lex Machina for this 30-minute webcast recording, as they explored the impact of the pandemic on insurance litigation. Learn what Lex Machina can do to help you better understand trends and insights that will help you craft winning strategy in troubled times.

### Speakers:



Joshua Harvey  
Manager of the CSM Team  
Lex Machina



Ron Porter  
Legal Data Expert  
Lex Machina



Meghan Ruesch  
Partner  
LewisWagner LLP

Joshua Harvey ([00:04](#)):

Hello everyone. Welcome to our webcast about Insurance Litigation in these Challenging Times. By challenging times that of course means insurance litigation initiated as a result of COVID-19. I'm Joshua Harvey and I lead the Customer Success Team here at Lex Machina. Those of you who aren't familiar with Lex Machina, we're legal analytics. We help lawyers make data driven decisions by uncovering actionable insights in a matter of seconds.

Joshua Harvey ([00:30](#)):

We help lawyers learn things like how a judge might behave in a specific scenario or what your opposing counsel might do in a case like yours. In short, we help lawyers win, we help you win more business and win more cases. Joining me for this webcast today are Meghan Ruesch and Ron Porter. Meghan is a Partner at Lewis Wagner's Litigation Group, focusing on insurance coverage, reinsurance issues and bad faith issues. Meghan represents companies, businesses, and individuals at all aspects of complex civil litigation.

Joshua Harvey ([01:03](#)):

Welcome, Meghan, we're happy to have you with us.

Meghan Ruesch ([01:06](#)):

I'm happy to be here. Thanks for having me.

Joshua Harvey ([01:09](#)):

Sure. And we also have Ron Porter. Ron is a Legal Data Expert at Lex Machina. He leads our product liability insurance team. Prior to coming to Lex Machina he was an attorney for 30 years at General Motors and handled a variety of complex and high exposure litigation cases. Welcome Ron.

Ron Porter ([01:28](#)):

Thank you, Joshua.

Joshua Harvey ([01:31](#)):

Thanks for joining us. So obviously COVID-19 has impacted almost every person in the world in some way or another. It certainly had a negative impact on businesses and business dealings in this country. I mean, that's because of these things, the stay at home orders, the shelters in place and businesses just haven't been able to operate the way they're used to. Inevitably when there's this drastic change in business operations, there's going to be spikes in litigation. So at Lex Machina we've been tracking litigation that's brought on by COVID-19. And one of the areas that's been most impacted is, of course, insurance litigation. So let's go ahead and jump right into the data. So Ron, since this pandemic has started to really impact the United States, have you seen a significant increase in litigation by looking at the data in Lex Machina?

Ron Porter ([02:22](#)):

Well, COVID-19 has really impacted the activity in the federal courts in a couple of different ways and the data really bears that out. So, there's two things that we look at. The first is case filings. And you can see from the chart here, that case filings are down in certain areas, but not significantly, across the federal courts.

Ron Porter ([02:51](#)):

But when you look at insurance, you can see the case filings are actually up in April compared to last year. And they're about the same as they were in April of 2018. So, I guess the takeaway there is case filings are down when you look at it across the board and in insurance, they really aren't down. The other data we look at is activity in the federal courts.

Ron Porter ([03:18](#)):

And there, as everybody knows, courtroom activity is down because most of the courthouses are not conducting civil hearings or trials right now. So, courtroom activity is definitely down. And if you look at the next chart, you can see that compared to the last two years, this April has significantly fewer summary judgments, summary judgment on the pleadings, default judgments, consent judgements. Trials are all down significantly in April compared to the last two years. So that's the big picture, but to look at specifically how COVID has affected insurance cases, let's talk for a minute about case filings in federal court, new insurance cases.

Ron Porter ([04:25](#)):

So here we see that there are about 130 insurance cases filed between March 27th and May 6th arising from the COVID-19 shutdown. And we arrived at that data by looking at all the new case filings in our insurance vertical during that time period and using keyword searches of the complaint to identify those that were based on activities caused by COVID-19 or the closure activities of most of the States.

Ron Porter ([05:04](#)):

Virtually all of these cases are arising out of business interruption coverage that is usually attendant to business property coverage policies. There are a few other cases. A few cases involving other coverage. There's one involving benefits under a travel insurance policy.

Ron Porter ([05:30](#)):

There is one involving a ski lift ticket, season ski lift ticket cancellation insurance policy for the commercial carrier, who had his commercial coverage terminated because of lack of payment of the premium. And there is litigation involving a homeowner's policy as well.

Ron Porter ([05:54](#)):

But other than that, all of the cases are involved with business interruption. And to give you some sense of the percentage of the cases that are filed in the insurance vertical that relate to COVID-19, I just picked May 8th and looked at the filings that day and 16 of the 58 newly filed insurance cases were related to COVID-19.

Ron Porter ([06:20](#)):

So, a substantial portion of the newly filed insurance cases relate to COVID. Turning to where these cases are, they are pretty much where you would expect in the major business centers of the United States. Most prevalent, the Northern District of Illinois in Chicago. I guess, perhaps not unexpectedly, the Western District of Washington in Seattle. There's also very well represented in the Southern District of Florida and New York City. So, all areas which have seen significant disruption due to COVID filings. So-

Joshua Harvey ([07:07](#)):

Sorry Ron, go ahead. Let's move on to a quick question for Meghan. Meghan have you seen an uptick in cases in your practice area that are COVID related so far?

Meghan Ruesch ([07:23](#)):

Absolutely. I mean, as soon as the COVID-19 situation came to the U.S. and across the country, stay at home and shelter in place orders began being implemented, I think there was just an awareness across the industry that these COVID-19 claims, particularly as it relates to the impact that they've had on businesses, were going to come down the pike. And I'm in Indianapolis, but we work with a lot of insurance companies that have a nationwide presence. And we've been in almost daily contact with clients, and other attorneys across the country, to address the situation. And as Ron noted, within, as of May 8th I believe, in federal court alone, there were 130 cases, I believe, with other filings across the country. In state court as of last week, there were an additional 40 to 50 state court filings that we're aware of across the country. And that's almost doubled in the course of a week.

Meghan Ruesch ([08:51](#)):

And from our perspective, it's only going to continue to increase as more businesses and more policyholder attorneys connect with these businesses to understand the nature of their business, the type of losses that they're experiencing in order to craft complaints that will be swiftly put together and filed. So it's only going to increase from here. I think we're just seeing the tip of the iceberg as it were.

Joshua Harvey ([09:28](#)):

Yeah, that's truly interesting, Meghan. So we've talked a bit between... Both you and Ron had mentioned, we're seeing a lot of business interruption cases. Do you think that business interruption cases resulting from COVID are going to be dealt with or handled significantly different than say other types of interruption cases, like arising out of hurricane or some other natural disaster?

Meghan Ruesch ([09:52](#)):

Absolutely. One of the things that everyone across the country is dealing with, but particularly in addressing these insurance claims for business interruption arising out of COVID-19, is the impact of the COVID-19 pandemic is completely unprecedented for our lifetime. It's different from a business interruption claim, arising from a hurricane or some other isolated incident for a number of reasons.

Meghan Ruesch ([10:30](#)):

One is the fact that a hurricane or a tornado or something that some sort of disaster that might shut down a business or cause damage to a business, there is a pinpointed period of time when the incident occurs. And there's an actual incident that is causing that potential loss. The difference with COVID-19 is the biggest issue that will have to be addressed in the courts is that coverage for these business interruption claims is triggered by direct physical loss or physical damage to property.

Meghan Ruesch ([11:18](#)):

What we're seeing with the COVID-19 claims is that business closures are the result of social distancing restrictions and guidelines that are being put in place by state, local, federal authorities. It's a completely different ballgame in that respect because there are only, at least what we've experienced so far, a limited number of circumstances where a business or other entity that's making a business interruption claim has experienced any type of quote unquote "direct physical loss" arising out of a COVID-19 claim.

Meghan Ruesch ([11:59](#)):

There's a lot of discussion on many levels, and even at the legislative level, as to whether or not the COVID-19 restrictions are due to some sort of direct physical loss or physical damage to property. And so that's going to

be the most hotly litigated issue with these lawsuits that are being filed. That's going to be the first hurdle that we all have to overcome before we can even get down into the nuts and bolts, I think, of other aspects of coverage for these types of business interruption cases.

Joshua Harvey ([12:40](#)):

Thanks, Megan, that's really interesting to hear about some of the specific issues that the courts are going to be looking at. So Ron, when you've been looking through this data, what types of companies or individuals are the insureds in this litigation and who are the actual players that are the insurers that you've seen so far?

Ron Porter ([13:05](#)):

Well, the insureds are a wide variety of mostly small and medium-sized businesses as you'd expect. Many of the plaintiffs are restaurants, theaters, bars, retail stores of all varieties, professionals, dentists, law firms, marketing professionals, a wide variety of small and medium sized businesses so far. There is one case involving one large owner of commercial real estate for equities, which appeared to be the largest business insured, filing a claim for business interruption insurance. But most, almost all, the businesses are very small or medium sized businesses. And then as to who are the insurers involved, it's all the major, it seems like all the major business property insurers. All names that everyone is familiar with. Allstate, Chubb, Lloyds, Travelers, Hartford, virtually any of the large insurers have these cases, which I think really speaks to Meghan's point earlier that this is a very substantial and large exposure to the entire industry really.

Joshua Harvey ([14:54](#)):

Thanks Ron. It's interesting to hear the different players obviously. So Meghan, I'm going to... I think you've kind of alluded to this a little bit in your own rants or advisement. I want to dig in a little bit deeper. We're still really early in this process. It's just been, while it may seem like we've all been quarantined for a year at this point, it's only been really a couple of months and the COVID has really been impacting our daily lives and litigation. Do you expect to see a big spike down the road or are companies just kind of waiting to see how things go, they're still counting their cards before they make big moves and when do you think that spike might occur downwind?

Meghan Ruesch ([15:40](#)):

I think we can certainly expect there to be a spike in cases that, at some point... The cases are going to come in in the bell curve. And we're, like I said, really early in the process. And can I predict when we might see that spike? Not necessarily. But I think this is something that is going to be played out in the courts for years to come, like any type of mass loss, again like a hurricane or any other type of natural disaster. Those suits sometimes are played out over the course of years. The economic impact of the COVID-19 is going to be devastating. It is devastating already. There will likely be a push for some resolution early on, but I think at the outset, what's really going to happen is we're going to see a lot of procedural questions that are raised, particularly with a number of class action lawsuits being filed. There are a couple of MDLs potentially pending. And so those are the issues that are going to be faced on the front end before we can even get into the nitty gritty of the coverage issues.

Joshua Harvey ([17:14](#)):

Right. And that leads me to my next question, which is how do you think the MDL is going to impact the course of the business interruption cases? And that's for both you and Ron. Interested to hear what both of you have to say about the MDL issue at this point.

Meghan Ruesch ([17:35](#)):

This is Megan. I think there are going to be a lot of questions in the MDL, and also in some of these class action suits that are being filed across the country, of whether this is the appropriate method for addressing these insurance coverage issues. Historically speaking, insurance coverage actions, even when there is coverage litigation that has a nationwide kind of impact, you think of class actions arising from medical device litigation, asbestos litigation. There's always mass coverage litigation that follows that.

Meghan Ruesch ([18:27](#)):

The coverage litigation itself though is rarely, if not never, addressed in an MDL or class action. And the reason for that is, is there's so much variance in state law for one thing, on insurance coverage issues that... My personal opinion, and I think an opinion that is shared by many practitioners, is that an MDL or class action is just not an appropriate or practical means of addressing insurance coverage issues. Another issue that arises within both an MDL and class action context is the question of the commonality of the claims. Each individual business is suffering losses. Yes, we understand based on the shelter in place and the stay at home orders, but each business is impacted differently.

Meghan Ruesch ([19:26](#)):

And there are a lot of questions that are specific to that business. Did they close down permanently? Is it a restaurant that only dine-in services were restricted, but they could still do curbside or take out, carry out or delivery? Is it an essential business? Is it a non-essential business? And then the policies themselves, across the board, are different too. And so I think there's going to be, at the front end, a lot of litigation practice that is going to have to answer these questions of whether an MDL or a class action is the appropriate method of addressing these coverage issues. And so that's going to, I think, take a while for the courts to wrap their heads around and get a grasp on.

Joshua Harvey ([20:22](#)):

Sure. So Ron, I know you've practiced many years dealing with MDLs and class actions in your former life. Do you have any additional insights on that question?

Ron Porter ([20:35](#)):

Well, you've got the MDL side. I agree with Meghan that it's a little difficult to see how a court, the JPML specifically, could fashion a MDL to handle the wide variety of state law issues that arise from all of these lawsuits in different jurisdictions with different substantive laws, different policy language. It seems like a MDL probably is not well suited to that type of litigation, but my crystal ball is spotty, so I don't have the highest degree of confidence in that prediction.

Ron Porter ([21:33](#)):

Shifting to the class action arena, about half the cases filed to date purport to be class actions. And I think there, there might be more fertile ground for a mass resolution of claims, simply because classes could be narrowed to certain policyholders in certain states with certain types of coverage. And there's a wide variety of judges will be determining whether to certify a class which will allow a class action to proceed. So there is, right now, if half the cases are asking for class certification, that means somewhere between 75 and 100 potential classes there. And it seems more likely to me that some of those might go ahead as class actions than that the JPML would certify or create a nationwide multi-district litigation forum these kinds of cases.

Joshua Harvey ([22:53](#)):

Sure. Yeah, that's really fascinating. But it sounds like just as such an unprecedented moment in history that there's a lot of issues that we're really going to be facing for the first time. And so with that said Meghan, how do you think having a tool like Lex Machina, that does legal analytics, that provides insight that you can't get in other places, how do you think that would help someone in your place or in practice dealing with these types of issues moving forward?

Meghan Ruesch ([23:27](#)):

I think something like Lex Machina is a pretty invaluable tool for this type of situation really because what we're seeing on both sides of the coin, both policyholder attorneys and industry attorneys and the insurance companies themselves, they're monitoring the nationwide cases that are being filed. They're trying to look into what are the claims that are being asserted, what are the policies that are being impacted and where are these being filed? And I think it's this monitoring that's going to help. I think in the long run, provide for some clarity of where we go in the future, because as decisions start being made in various jurisdictions, that's going to impact potentially... What happens in Pennsylvania is going to have an impact on what somebody tries to argue in California, even though the laws may be substantially different. But all of these decisions that are coming through the pipeline, or that will eventually come through the pipeline, they're going to impact the decisions in other jurisdictions and the arguments that are raised in other jurisdictions, just because the claims across the country are fairly identical.

Meghan Ruesch ([25:02](#)):

The situation that all of these businesses are facing is fairly identical. And so trying to get a grasp of how this plays out with any type of consistency, if that's even possible, is really going to, I think, assist the process again for both sides, for both policyholders and the insurance industry across the board.

Joshua Harvey ([25:33](#)):

Yeah. It's real interesting Meghan, you used the term monitoring a couple of times in your response there, and I agree that's going to be key with these issues. So Ron, in Lex Machina is there something that you're doing that's allowing you to kind of get updates anytime there's a new COVID related insurance case filed in the U.S. District courts?

Ron Porter ([25:56](#)):

Yes. I'm using the daily alert feature in Lex Machina which allows you to construct a search that is run every day. And you get an email every morning that tells you what cases were found as a result of your search. Lex Machina crawls all the federal court dockets every day. And so your results are based on what was happening, what was found from the dockets in every federal court, yes, from the day before. So I have a search set up to look at every complaint filed in an insurance case in all the federal courts and Lex Machina allows you to do a keyword search on those complaints.

Ron Porter ([26:52](#)):

So as you can see on the screen, or maybe you can't, it's kind of small, but my keywords are Corona or COVID. So anytime either of those words is used in a complaint filed in federal court, I get an email the next morning. Here you can see the email, or actually this is the results, what you look at if you click on the search results in the email from last week. And it gives you each case that met the search term in the complaint and shows you the context of the search term in the complaint. So you can look and quickly determine which ones are the ones you want to look at in more depth. So it's a very, very handy tool to monitor new filings everyday in federal court.

Joshua Harvey ([27:59](#)):

All right, well, thank you. I appreciate you kind of walking through that. I think it would be helpful for obviously people to know the types of resources we have available at Lex Machina.

Joshua Harvey ([28:11](#)):

So we're coming close to the end of our time. We do have a couple questions that were submitted so that we can kind of go ahead and go through those. So, the first one, and Meghan I'll let you hit this one first, is how many of these cases... Well actually I'm going to say Ron, you do the first part and Meghan maybe you can answer the second. So the first part is Ron, how many of these cases are declaratory judgment or declaratory judgment actions brought by the insured and then Meghan, kind of how do you expect... Do you expect to see more of those declaratory judgments? And Ron, how many of those have you seen?

Ron Porter ([28:45](#)):

I've seen just one declaratory judgment. It was brought by Travelers in Los Angeles federal court against Mark Geragos and his law firm and the complaint sought a declaratory judgment that his business interruption policy was not applicable to provide business interruption coverage in this circumstance. That is the only one I'm aware of.

Joshua Harvey ([29:19](#)):

Okay. And so Meghan, do you expect to see many more of those or do you think it's going to be pretty rare?

Meghan Ruesch ([29:25](#)):

I want to say, I think that that's kind of a... An insurance company in this situation, proactively seeking declaratory judgment action, I think it's going to be the exception to the general rule. I think the majority of the claims, or the lawsuits, are going to be filed by the insureds. However, that's with the acknowledgement that in some situations, in some states, insurance companies may have an obligation imposed, either by statute or the case law, that if there is a denial of coverage, particularly if there's any type of liability and a duty to defend underlying that, then the insurance company is required to proactively sometimes bring a declaratory judgment action to enforce their denial of coverage. But I think across the board for these types of claims, I would say the insurance companies proactively seeking declaratory judgment is going to be much more of the exception than the rule.

Joshua Harvey ([30:51](#)):

Gotcha. Yeah, that makes sense. So Meghan, I think in other words, do you expect to see, or do you see force majeure clauses having any effect on this insurance litigation?

Meghan Ruesch ([31:06](#)):

I think, yes. I think that force majeure clauses in any contracts or policies that exist are going to come up in insurance coverage litigation. However, I think that that is an issue that may be secondary to some of what I'm going to say are the initial primary questions that are being addressed right now. And that really concerns the question of one, whether or not the COVID-19 situation results in a direct physical loss or property damage that triggers business interruption coverage in the first instance. And the second big question is whether civil authority coverage that exists in the majority of ISO forms and a lot of these business property pack policies, whether that would operate as a separate trigger of coverage for the business interruption claims.

Meghan Ruesch ([32:17](#)):



I think those are the first two hurdles that the courts are going to have to face and before they address some of the other issues. But it's very possible that the force majeure clauses are going to come up at some point. I haven't seen it as much in some of the questions that have been raised by, or the claims that have been submitted to, companies we represent, but it's a distinct possibility. Yes.

Joshua Harvey ([32:52](#)):

Okay. Well, thank you for answering these questions. We're a little bit over our time, but I think it was well worth it. I think this has been just a fascinating conversation to have. Megan, Ron, thank you so much for your time today. Like I said, it was really interesting to hear what both of you have had to say about all of these issues. It was cool to hear that most of these cases arising out of COVID, for the most part what we're seeing in the business interruption cases is most of the insureds are small businesses. The insurers are of course, kind of the typical players. But what we know is the stakes have never been higher and that's for both the insurance industry and the insured. And so obviously it's important that everyone is monitoring the situation and important that both sides are using all the resources at their disposal to deal with the effects of this pandemic.

Joshua Harvey ([33:47](#)):

So with Lex Machina, obviously you can track what's happening day by day. You can get insight to help you make the right decisions and ultimately to help you win, whether it's win business and clients in this situation or win the actual litigation that you might be involved in. So Megan, Ron, again, I thank both of you so much for your time. Thank you for your insights. And I hope that everyone has a great day and thanks to everyone for joining us.

Ron Porter ([34:19](#)):

Thanks Joshua.

Meghan Ruesch ([34:20](#)):

Thank you Joshua.

Joshua Harvey ([34:21](#)):

Awesome. Thank you. Bye-bye.