

## In The News

# Why Litigation Fears Mean Firms' Phones Are Still Ringing

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Law360 (April 16, 2020, 11:13 AM EDT) -- Courts and many businesses are closed, but DLA Piper's U.S. restructuring practice group has been so busy advising its clients that it has had to train and bring in more attorneys from other areas to help, according to the group's U.S. Chair Tom Califano.

"It's a full day for me of just contingency planning," he said. "In a month or two, I expect there will be an explosion of filings."

The novel coronavirus has halted a lot of work and thrown every industry into flux, sending clients flocking to law firms seeking legal answers and battle plans on the topics of restructuring, insurance, employment, contracts and general liability.

"The problem is that there's more uncertainty around this crisis than there was over the ones in the past," Califano said. "Here, nobody really knows how long this is going to last, what the impact is going to be, and also what society's going to look like on the other end."

All of this uncertainty — and the planning it requires — heralds a boom in litigation and other actions weeks or months down the line, according to attorneys and legal industry watchers.

Here are some of the practice areas that clients have been leaning on since the pandemic began.

### Insurance

Insurance law has been particularly busy, and the work doesn't seem poised to dry up anytime soon. Corporate policyholders facing billions of dollars in business interruption losses are descending upon law firms in droves to get expert scrutiny of their policies, according to Ty Childress, practice leader for insurance recovery at Jones Day.

"The Fortune 500 certainly wants to know what their policies are all at once," he said.

Next, he said, policyholders will file insurance claims and, later, possibly sue insurers.

For its part, the insurance industry doesn't seem eager to pay out coronavirus-related claims, citing virus exclusions written into policies. David Sampson, president and CEO of the American Property Casualty Insurance Association, said in a prepared statement that many commercial insurance policies won't cover COVID-19.

"Pandemic outbreaks are uninsured because they are uninsurable," he said in the April 6 statement. Any attempt at forcing insurers to foot the hundreds of billions of dollars in losses suffered by businesses "threatens solvency and the ability to make good on the actual promises made in existing insurance policies."

The coming insurance battles will most likely be complicated and highly variable.

Childress said that there are several different general forms of virus exemptions that he has seen written into contracts. Beyond that, they vary greatly in how they apply to individual insurance policies, how they were added to the policy, how different state laws interact with the facts of each claim and local, state and federal actions taken to fight the pandemic.

Michael Huddleston, chair of the insurance recovery practice group at Munsch Hardt Kopf & Harr PC, said that this variability makes it essential to pick over each and every word of individual policies.

"The main thing we're trying to tell policyholders is, 'For God's sake, look at the specific language in your policy,'" Huddleston said. "As we do that, obviously there are numerous hurdles insurance companies are starting to roll out."

Huddleston, a board member for the American College of Coverage Counsel, said that many different types of coverage will likely be tested as businesses try to recoup some of their losses, including pollution and civil authority coverage.

Insurance providers, meanwhile, face a dilemma of their own.

They will need to carefully sort through what are likely to be millions of claims. Blanket or knee-jerk denials might ultimately prove particularly costly to them, as the damages could increase dramatically if a wrongful denial ends up putting a policyholder's company out of business, Huddleston said.

## Restructuring

Stroock & Stroock & Lavan's 50-attorney restructuring practice group saw its best year ever in 2019. But since the coronavirus hit, that year seems a little slow in comparison, said practice group leader Kris Hansen.

The group's billable hours in February were up 10% year-over-year, and jumped another 12% in March as businesses sought access to advisers, he said.

"That's a crazy surge, especially in a group our size," Hansen said. "When these times hit, the volume of work that comes in is incredible. We have to triage constantly."

Some of the hardest-hit industries include transportation, hospitality and elective health care, but even some food producers are suffering as coronavirus infections shutter factories. Commercial real estate is in trouble as restaurants and retailers have failed to pay rent in many regions since the closures hit, said DLA Piper's Califano.

At DLA Piper, Califano said his group is working long hours to advise businesses and prepare them for bankruptcy filings.

"It's the arc of a case that you usually are talking to people for a few months before they file, so looking at that, we would probably be twice as busy as we were for the bankruptcy preparation and filing," he said.

Businesses have swarmed restructuring attorneys for advice and planning, though they are largely opting to wait to see what's going to happen before moving ahead with restructuring plans, Califano said. Banks are also liberally granting waivers at the moment.

Califano doesn't doubt there will be some dark days ahead. But he wonders whether the recovery will be U-shaped or V-shaped.

Immediately, it's clear that the hospitality and travel industries are in deep trouble because of social distancing rules and the oil and gas industry is also in pain for some of the same reasons.

But other industries could be drawn in as the pandemic progresses. Even when it lets up, it remains to be seen whether people would return to their usual routines. Would they go back to eating out at restaurants? Would they buy airplane tickets and go back to theme parks?

"If there's a serial impact on different industries, then you could be dealing with one industry and then another, then another," he said. "If everyone hits the wall at the same time, that would be different."

## Employment

Liz McRee, Jones Day's labor and employment practice leader, said that while there isn't much clarity out there for anyone in employment law at the moment, her group is significantly busier than it was before the pandemic.

Litigation may have slowed because of the shuttered courts, but companies' need for counseling has more than balanced that out.

The line between essential and nonessential workers is blurry in areas. Complicated federal aid packages are rapidly being hashed out as businesses grapple with enacting furloughs and layoffs. For on-site workers who are still on the job, government guidelines are constantly shifting and sometimes conflicting, she said.

"The issue changes from day to day," McRee said. "Every week, there's a new issue or trend or type of question you're seeing, and that's challenging to stay abreast of all of these issues."

And those questions, she said, don't fall neatly into one bucket. McRee said her group has had to pull in attorneys from other areas, such as life sciences, real estate, regulatory issues, health care and general litigation, among others.

The Coronavirus Response Act spurred one round of questions. Changes to unemployment insurance spurred another. Employers have needed experts on the Health Insurance Portability and Accountability Act and the Worker Adjustment and Retraining Notification Act.

But there's also the question of what businesses need to provide to their employees in order to be on the right side of the law — for instance, face masks. The Centers for Disease Control has issued changing guidance that in some cases differs from guidance from local authorities. Companies are left to sort through the ever-changing government advisories to decide the best course to protect their employees and themselves from risk.

"We're in uncharted territory," McRee said. "A lot of it is about providing measured, reasoned advice for threading that needle of the unknown, and how to be prudent but protect your important business interests at the same time."

## Contracts

Victoria Lee, DLA Piper's global co-chair for its technology sector, has been working furiously to advise clients on commercial contracts during the coronavirus crisis.

The questions have generally boiled down to either how to hold people accountable for their financial obligations, or how to get out of performing the contract, she said. Lee and her team have been asked to comb

through contracts for ways to adjust or enforce them, including perhaps rescheduling orders that have been impossible to fulfill during the pandemic.

But beyond that, she said, the crisis is sure to cause clients to rethink the structure of future contracts.

“Should we be revisiting the force majeure clause?” she said. “How do we tweak that to include pandemics or illness?”

Lee said she believes most contractual issues won’t end up in litigation. Companies will most likely spend a lot of time negotiating ways to salvage the contract with amendments.

“I think there’s a general sense of ‘We’re all in this together,’” she said, “and the last thing anyone wants to do is spend a bunch of time in court and pay lawyers to fight it out.”

To read more, [click here](#).

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