

NAIC

NATIONAL
MEETING
FALL
2021



NAIC Legal Division

Continuing Legal Education Session

December 11, 2021 – San Diego, California

NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

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2021 NAIC Amicus Briefs: Long-Term Care Rate Approval and Data Marketing Partnership

Jennifer McAdam, NAIC Senior Counsel

December 11, 2021

Gunn v. CNA: Long-Term Care Rate Approval

***Gunn v. Cont'l Cas. Co.*, Case No. 18-cv-3314 (N.D. Ill.) (on remand from *Gunn v. Cont'l Cas. Co.*, 968 F.3d 802, 813 (7th Cir. 2020))**

Plaintiff Gunn argues:

- Breach of contract when premium rates increase
- D.C.'s lower rate applies because employer located in D.C. (Gunn resides in Washington state)

NAIC supported CNA:

- Washington OIC properly exercised authority by approving CNA's rate request
- The filed-rate doctrine recognizes authority of Washington OIC to approve premium rates
- Choice of Law analysis is inapplicable.
- Other amicus brief: ACLI & APCIA



Data Marketing Partnership v. DOL: ERISA

U.S. Dept. of Labor, et al. v. Data Marketing Partnership, et al., No. 20-11179 (5th Cir.)
Data Marketing Partnership, LP v. U.S. Dept. of Labor, 2020 WL 5759966 (N.D. Tex., 2020)

NAIC supported DOL:

- Health plan is not an ERISA plan and is governed by state law
- DMP is not an “employer” and its “limited partners” are not employees or “working owners” within the meaning of ERISA
- DMP's health plan is a scheme to avoid regulatory oversight
- Other amicus briefs: PA & other DOIs, State AGs, BCBSA, LLS & ACS, Public Citizen

Oral argument set for January 5 at 9:00 am





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Credit Scoring Update and Discussion

Kay Noonan, NAIC General Counsel

December 11, 2021

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Air Ambulance Update

Casey McGraw, NAIC Senior Counsel

December 11, 2021

“It’s déjà vu all over again.” -Yogi Berra

Air Evac Ems., Inc. v. James A. Dodrill, 2:21-cv-003101

Chief Judge, Thomas E. Johnston

U.S.D.C. for the Southern District of West Virginia



Airline Deregulation Act of 1978 (“ADA”)

ADA Preemption of state law:

The ADA expressly preempts state efforts to regulate the prices, routes, and services of certain air carriers.

See 49 U.S.C. § 41713(b)(1)

The Supreme Court has ruled that this provision is very expansive and is to be construed broadly.



ADA – Its Purpose and Impact

At the time of the ADA's passing, its purported goal was to remove U.S. Federal Government control over such things as fares, routes and market entry of new airlines, introducing a free market in the commercial airline industry and leading to a great increase in the number of flights, a decrease in fares, and an increase in the number of passengers and miles flown.



ADA and its Impact on Air Ambulances

News reports and government studies over the past several years have shown that the average cost of an air ambulance transport has significantly increased leaving unsuspecting consumers to be left with exorbitant charges even after certain insurance payments have been applied.



State Efforts to Protect Air Ambulance Patients

Numerous states have taken various steps over the past few years to pass legislation intended to protect air ambulance patients from these large bills while also seeking to rein in the arguably unimpeded ability of air ambulance carriers to continue charging these large fees.

North Dakota's Efforts

2 attempts at legislation, 2 resulting lawsuits

Arguments by North Dakota and others that the McCarran-Ferguson Act reverse preempts the ADA's preemption clause have by and large been unsuccessful.

FAA Reauthorization Act of 2018

- This legislation created the Air Ambulance and Patient Billing Advisory Committee (signed October 5, 2018).
- Required the Secretary of Transportation, in consultation with the Secretary of Health and Human Services, to establish an advisory committee to review options to improve the disclosure of charges and fees for air medical services, better inform consumers of insurance options for such services, and protect consumers from balance billing.
- Among the required members of this new Committee was a representative of state insurance regulators.

Air Ambulance and Patient Billing Advisory Committee

- Actual formation of the Committee did not occur until September 12, 2019, nearly one year after the President signed the FAA Reauthorization Act.
- 13 members were appointed to the Committee, including North Dakota State Insurance Commissioner Jon Godfread as the state insurance regulator representative.



Commissioner Jon Godfread

- Experience with air ambulance litigation.
- Experience with the Air Ambulance and Patient Billing Advisory Committee – Report issued in January 2021.
- Thoughts on what the future may hold.





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Business Interruption Litigation Update

Olivia Myers, NAIC Legal Counsel

December 11, 2021

What is Business Interruption Insurance?

Insurance coverage that can supplement business income if the business cannot operate due to a covered loss.

Types of Business Interruption Coverage

- **All Risk Policies**-These policies cover all perils, unless specifically excluded. These may require direct physical loss or damage to the property for the coverage to apply. After the SARS outbreak in the early 2000s, many of these policies have specific exclusions for pandemics, epidemics, and viruses.
- **Named Perils Policies**-These policies cover loss caused by specific perils name in the policy. For example, a fire, tornado, or hurricane.

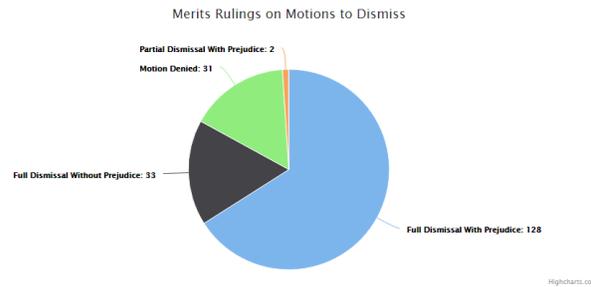
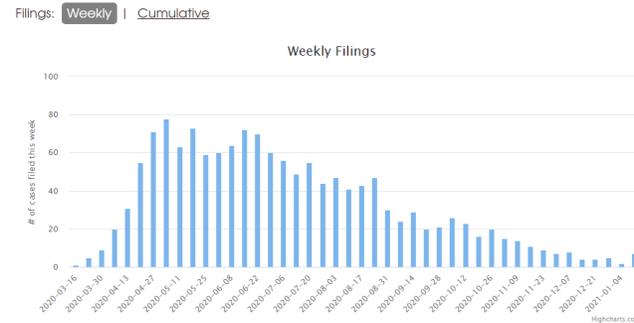
COVID-19 Business Interruption Litigation

- Due to the COVID-19 pandemic, many state and local governments issued stay-at-home orders, closing non-essential businesses and limiting essential businesses operations.
- The affected businesses subsequently filed business interruption claims with their insurance companies to recoup losses caused by COVID-19 and the government orders that suspended or severely diminished their operations.
- Insurers deny coverage asserting that the businesses have failed to show that they suffered a “direct physical loss” to the insured property. Some policies have a specific virus exclusion and do not cover losses associated with viruses.
- Many lawsuits were then filed by businesses for insurance coverage. Most businesses are seeking coverage for business income, extra expenses, and civil authority.



Tracking COVID-19 Business Interruption Litigation

- <https://cclt.law.upenn.edu/>



Judicial Rulings on the Merits in Business Interruption Cases »

Tracking COVID-19 Business Interruption Litigation

- <https://www.law360.com/insurance-authority/covid-map>

COVID-19 Case Tracker
 Since the pandemic began, more than 1,200 lawsuits have been filed in federal court against insurers seeking coverage for COVID-related losses. **UPDATED November 29, 2021**

Number of cases: **1,296**

Click to filter by outcomes:

- Dismissed
- Insurer MJP denied
- Insurer MJP/MSJ granted
- Motion to dismiss denied
- Judgment for insurer
- Remanded

Clear all filters

Case	Case Number	District	Court	Filing Date	Disposition	Disposition Date	Hover for details
Auburn Depot v. Cincinnati Ins. Co.	3:20-cv-00384	AL-M		6/5/2020	Dismissed	9/28/2021	<i>i</i>
Eagle Eye Outfitters v. Cincinnati Ins. Co.	1:20-cv-00335	AL-M		5/21/2020	Dismissed	9/28/2021	<i>i</i>
Pear Tree Group v. Cincinnati Ins. Co.	3:20-cv-00382	AL-M		6/5/2020	Dismissed	9/28/2021	<i>i</i>
Sneak & Dawdle v. Cincinnati Ins. Co.	3:20-cv-00383	AL-M		6/5/2020	Dismissed without prejudice	9/28/2021	<i>i</i>
Alabama Dermatology Associates PC v. Twin City Fire Insurance Company	7:21-cv-00414	AL-N		3/19/2021	Voluntarily dismissed	4/19/2021	<i>i</i>
Ascent Hospitality v. Employers Ins. Co.	2:20-cv-00770	AL-N		6/2/2020	Insurer MJP granted	5/5/2021	<i>i</i>

Sources: Lex Machina and the University of Pennsylvania Carey Law School



Glynn Hosp. Grp., Inc. v. RSUI Indem. Co.

- No. 21-cv-10744-DJC, 2021 WL 5281616, at *1 (D. Mass. Nov. 12, 2021)
- P., a restaurant operated purchased a policy from RSUI, D.
- The policy stated that D. would pay for the actual loss of business income due to the suspension of operations during the period of restoration and that the suspension must be caused by “direct physical loss of or damage to property.”
- P. filed a claim due to significant disruption to its businesses.
- D. denied P.’s claim because there was no direct physical loss of or damage to the insured properties, which was necessary to satisfy the policy.
- The court held that P. was not entitled to coverage because P. failed to allege facts showing that that there was tangible damage to its insured properties. The policy also had a pathogen exclusion that would preclude coverage.

K.C. Hopps, Ltd. v. Cincinnati Ins. Co., Inc.

- 4:20-cv-00437-SRB, (W.D. Mo. Sept. 21, 2021)
- First jury trial in a COVID-19 business interruption coverage lawsuit.
- P., K.C. Hopps is a restaurant operator that obtained a business interruption policy with Cincinnati Insurance Company, D.
- On September 21, 2021, District Court of Western Missouri ruled that jury should decide the case.
- The jury returned a verdict in favor of the Insurer.
- On November 24, 2021, P. filed a motion for new trial.

Sixth Circuit Decides Split Among District Courts

- *Henderson Road Rest. Sys. Inc. v. Zurich Am. Ins. Co.*, 513 F. Supp.3d 808 (N.D. Ohio Jan. 19, 2021)
- *Ceres Enter. LLC v. Travelers Ins. Co.*, 520 F.Supp.3d 949 (N.D. Ohio Feb. 18, 2021), *appeal docketed*, No. 21-3232 (6th. Cir. Mar. 10, 2021)
- *In Re: Zurich Am. Ins. Co.*, No. 21-0302, 2021 WL 4473398, at *1 (6th Cir. Sept. 29, 2021)
- *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. Sept. 22, 2021)



Pandemic Risk Insurance Act “PRIA”

- PRIA would establish a government-backed pandemic insurance program similar to the Terrorism Risk Insurance Act to protect against economic losses from any future pandemic business disruption.
- PRIA would require insurers to provide non-damage business interruption insurance coverage in their commercial property insurance policies or arrange coverage through an affiliate.

Questions

Kay Noonan – knoonan@naic.org

Jennifer McAdam – jmccadam@naic.org

Casey McGraw – cmccgraw@naic.org

Olivea Myers – omyers@naic.org

