COVID-19: Too Clever by Half Might Kill the Hard Market

The Treasure Island Casino Sues Affiliated FM Insurance for communicable disease coverage

The chief risk officer of Acme Inc. could be forgiven if he believed that his Advantage All Risk policy with Affiliated FM (part of the FM Global group and hereinafter "FM") covered property damage, public relations costs, and business interruption claims from the Ebola virus – at least up to the applicable 'communicable disease' sublimits. See the nearby sidebar for explanation.

Ebola is a virus and the novel coronavirus is, well, a virus. We're not coverage experts, but the CRO at Acme Inc. would seem to be on solid ground when submitting his claim for cleanup, business interruption and public relations costs. Perhaps coverage would be found for that fictitious company described in the corporate video, but in real life Las Vegas casino **Treasure Island** was not so fortunate. The company, holder of an 'all-risks' insurance policy issued by an affiliate of FM recently **filed suit against FM in the U.S. District court of Nevada** (Nevada District Court; 2:20-cv-00965**) for bad faith breach of contract and declaratory judgement seeking damages of $1.1 billion** related to damages caused by SARS-COV-2 and the communicable disease caused by it – COVID-19.

> *FM Global has been providing coverage for communicable disease claims since 2016. According to its website, the communicable disease coverage is 'among the broadest in the market'. Their example of how the policy would respond to the Ebola virus is illustrative – we recommend investing 2 minutes to watch their video. Scroll down to the video next to the Communicable Disease title.*

As noted, we're not coverage experts and therefore unable to handicap the outcome of this dispute. We've read the complaint and relevant parts of the policy sold to Treasure Island. **The policyholder believes the communicable disease sublimits do not apply while the insurer denies that coverage is even afforded under sublimited policy extensions meant, ostensibly, to cover communicable diseases**. Acknowledging that coverage cannot be predicated on 2-minute, animated corporate video, **we'd again encourage readers to see how FM described their (self-proclaimed) broad communicable disease coverage** (scroll down the video next to the Communicable Disease title).

The demand for P/C insurance is too frequently taken for granted

Regular readers will recognize this common refrain of ours, though **in the context of a hardening market it takes on a different meaning**. The hard markets of industry lore have two common ingredients: simultaneously shrinking capacity and rising demand (the latter most commonly catalyzed by a sudden shift in the perception of risk). Those ingredients are forming today and **in the absence of a federal grant of legal immunity** to Corporate America (from claims related to the pandemic...outside of gross negligence of course) **we expect a traditional hard market will form**. **However, P/C insurers should not assume that they face an entirely inelastic demand curve**. The Florida Hurricane Cat Fund has already pulled its private market reinsurance placement; apparently turned off by sharply rising prices and confident in its own financial condition. Similarly, **large corporate purchasers of insurance cannot be expected to blindly demand more coverage** (or, even the same limits of liability) **if experience tells them they have to sue their insurers for declaratory judgement every time they have a claim** – **not if there are alternative risk financing levers to be pulled**.

Policy interpretations that are too clever by half could kill the hard market before it begins.