

Maximizing Insurance Recovery for COVID-19 Liability Claims



ARDEN LEVY LAW PLLC
TRUSTED ADVOCACY. CREATIVE SOLUTIONS.



BIENSTOCK
PLLC

THE MAYERSON
FIRM PLLC

August 25th

4PM EST | 2 PM MST

Private Briefing for New Mexico Health Care Association



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Your Expert Panel

Arden Levy has successfully represented policyholders in insurance coverage disputes for almost twenty years, recovering tens of millions of dollars for clients in a wide range of industries. She formerly served in the U.S. Army Judge Advocate General's Corps, reaching the rank of Major and serving as a combat brigade lawyer, criminal prosecutor, defense appellate counsel, and civil litigation attorney, among other roles. She is a graduate of Northwestern University and the George Washington University School of Law.

Martin Bienstock has successfully represented hundreds of policyholders in litigation, arbitration, and mediation, including in cases involving tens of millions of dollars. He previously served as an Assistant Attorney General and Special Counsel to the New York State Department of Health, where he received multiple awards for outstanding service. He is a graduate of Brooklyn College and Yale Law School.

Marc Mayerson has represented policyholders in insurance-recovery matters and insurance counseling for nearly thirty years. He is recognized as one of ten "Leading Lawyers" in Washington, DC, regarding insurance law, and teaches the insurance-law courses at both Georgetown's and George Washington University's law schools. He is a graduate of the University of Michigan and Harvard Law School.

OVERVIEW

- Evaluating Risks
- Potential Claims
- Important Steps
- Responding to Insurers
- Selecting Defense Counsel
- Managing Limits and Deductibles
- Resolving the Underlying Suit
- Insurance Brokers



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Evaluating Risks: Methods

- Potential liability and general liability (PL/GL) risk trends.
- Risk management through risk quantification.
- Methods of quantifying risk:
 - Per bed
 - Per claim
 - Per year
- Look at industry's loss experience in past and as forecasted, and likelihood of suits, along with other risks.



Evaluating Risks: Quantification

- **Claim frequency** is the number of claims per 100 occupied beds.
 - **Indemnity claim frequency** is the number of claims per 100 occupied bed that resolve with a payment to the claimant.
 - **Expense only claim frequency** is the number of claims per 100 occupied beds that involve expenses to investigate/defend only.
- **Claim severity** is the average claim size.
- **Loss rate** is the annual amount per occupied bed required to defend, settle and/or litigate claims.



Pre-COVID-19 Forecasted Risks

(See e.g., 2019 Aon Professional and General Liability Benchmark for Long Term Care Providers - Actuarial Analysis.)

- **Overall claim frequency:** 1.08 claims per 100 occupied beds / increasing by 2% annually / more than 200 complaints filed against corporations related to COVID.
 - **Indemnity claim frequency:** 0.81 claims per 100 occupied beds / increasing by 2% annually.
 - **Expense only claim frequency:** 0.27 claims per 100 occupied beds.
- **Claim severity:** average claim estimated to be \$212,000 / increasing by 3% annually.
- **Loss rate:** projected to be \$2,300 to defend, settle and/or litigate claims in 2020 / increasing 5% annually.
- **Wide variation in states.**

Potential Claims

- Individual patient cases.
- Group cases from same facility.
- State-wide class actions.
- Facility guests and non-employee care providers.
- Workers' compensation and potential tort claims by workers.
- Government investigations.



Potential Claims - Insurance

- Liability coverage likely applies to all potential claims.
- Most facility insurance policies do not include “communicable disease” exclusions.
- Evaluating pure “mental distress” claims v. bodily injury claims.
 - Review allegations in demands or lawsuits with policy provisions.
 - Evaluate applicable law.

Important Steps for Coverage: Notice

- **Prompt notice**
 - Coverage may be jeopardized by late notice.
 - Likely no coverage for pre-notice defense costs.
 - Notice to highest level excess insurer.
- **Parts of notice**
 - Notice of occurrence.
 - Notice of claim.
 - Notice of circumstances.

Important Steps for Coverage: Defending Case

- **Prepare to defend the case**
 - Retain counsel (even if insurer denies coverage).
 - Coordinate with insurance company about retention where appropriate.
- **Preserve documents**
 - Paper and electronic.
 - Broad preservation.
 - Avoid accidentally creating a problem for your defense.
- **Identify witnesses**

Insurance Company Will Respond in One of Four Ways

- The insurance company may acknowledge its duty to provide coverage.
- The insurance company may deny coverage.
- The insurance company may ask for more information.
- The Insurance company may issue a reservation of rights.

When the Insurance Company Acknowledges Coverage

- **Congratulations!** You've won the lottery.
- The insurance company will appoint counsel to represent you and will pay any judgments or settlements up to the policy limits.
- Check the fine print:
 - Defense might be provided only up to the point where policy limits are exhausted.
 - Identify now the number of occurrences that the insurance company has agreed to pay for.

If The Insurance Company Denies Coverage

- **You may appeal without filing a lawsuit.**
 - Appeal to the claims handler for a re-determination, or to a supervisor;
 - Appeal to State Insurance Commissioner. In New Mexico, at <https://sbs.naic.org/solar-web/pages/public/onlineComplaintForm/onlineComplaintForm.jsf?state=NM&dswid=-514>
 - Continue to provide information to insurance company.

If The Insurer Requests More Information

- Insurer has the right to investigate,
- Insurer may have the right to require an “Examination Under Oath.”
- Always be truthful.
- Communications with Insurance Company may not be privileged.

The Insurer May Issue a “Reservation of Rights”

A reservation of rights is when the insurer agrees to pay for defense counsel, but:

- i. Reserves the right to stop paying the defense,
- ii. Reserves the right to not cover a settlement or judgment;
- iii. May reserve the right to demand reimbursement of defense costs.
- iv. Reservations of rights are fairly typical.

Reservation of Rights Puts You and Insurance Company in Potential Conflict

- Insurance company hopes that if you lose the case, you will lose on an uncovered ground, leaving you to pay the judgment or settlement on its own.
- A settlement or verdict might be based on circumstances that are not covered under the policy.

For example:

- Intentional misconduct (“intended or expected from the standpoint of the insured”); or
- Punitive damages.

The Potential Conflict of Interest Will Affect How Your Counsel Is Chosen

- **A court may either:**
 - Allow you to pick your own defense counsel at the insurer's expense or
 - Impose "extra" ethical obligations on defense counsel selected by the insurance company.
- Depending on the circumstances, you may be stuck with the lawyer hired by the insurance company.

Managing Insurance Policy Limits and Deductibles

- **Understand deductibles/retentions**
 - Per occurrence/per claim.
 - Aggregate deductible.
 - Group risk retention groups/captives.
 - Additional assessments/loss history.
- **Defense Costs**
- **Supplementary Payments**

Managing Insurance Policy Limits and Deductibles

- **Framing underlying case and coverage for number of claims/occurrences**
 - Policyholder may be able to shape coverage.
 - One v. multiple claims may be better for policyholder depending upon the circumstances.
- **Policyholder should refer to occurrence limits and deductibles to help shape strategy for coverage**

Getting the Insurance Company to Open Its Wallet

- **Persistence Pays!**

- No matter how the insurer previously responded, keep notifying insurance company of any settlement opportunities and request that the insurer protect your interests, including by paying for a reasonable settlement.
- Provide plaintiffs and their lawyers copies of all primary and excess insurance policies.
- When plaintiffs make settlement offer within policy limits, extra incentive on insurance company to settle.
 - Encourage settlement to protect your interests
 - Offer is reasonable relative to amount of potential recovery and strength of plaintiff's case

Risk to Insurer that Refuses to Settle

- **If settlement turned down, case is tried, and insured loses:**
 - Insurance company might be liable for the entirety of the verdict, even if it is in excess of policy limits.
 - Hindsight helps show that the insurance company acted unreasonably when it turned down settlement offer from plaintiff and elected to proceed to trial.
 - **However,**
 - Insurance company has privilege to reasonably refuse to settle.
 - It can turn down offer, things can go awry at trial, and the insurance company will be liable only to the extent its policy applies and subject to policy limits.
 - You need to help build the record that no reasonable insurance company (or defendant) would refuse the plaintiff's settlement offer.
 - Strength of plaintiff's case and amount of potential damages.

Insurance Company Options Faced With Settlement Offer

- Unequivocally accept and pay.
- Accept subject to insured's agreement to Repay Once Insurance Company Sues You (if it shows there was never coverage).
- Pay Settlement Without Your Agreement and Sue to Recover Amounts Paid to Plaintiff.
- Seek some financial contribution from the insured to help cement the settlement and resolve coverage questions.

If Insurer Refuses to Settle, but Insured Wants to – Working with Plaintiff?

- Unless the insurance company defends the lawsuit and promises to pay any resulting judgment (no matter the amount or basis of liability), the insured always may settle the case against it.
- Insured's settling out from under the insurance company does not itself breach the insurance policy.
- One can do a deal with the plaintiffs directly.

Working with Plaintiffs to Settle

- **The insurance claim itself has value, even if the insurance company presently contends coverage does not apply or otherwise is limited.**
- **Transfer the insurance claim to be prosecuted in your name by plaintiffs with agreement as to insurance proceeds (if any).**
 - Plaintiffs promise not to go after any assets other than the insurance company's money.
 - Plaintiffs pick up the ball with the insurance company, and you're out!
 - Will you have to contribute fresh money upfront?
 - What if there is no coverage under the policy?
 - No re-opener, but can agree to back-end payment.
- **Transfer prosecution of any "bad faith" claim to plaintiffs.**

If There is No Settlement

- **If there is an adverse verdict,**
 - Duty to appeal at insurer's expense, including posting bond.
- **If there is a final judgment, insurance may be allowed to refuse to pay all or part of verdict.**
 - Proper reservation of rights
 - Conduct defense in good faith
 - Subject to policy limits
 - Deductibles/retentions
 - Number of "Claims" or "Occurrences"

You Don't Want to Settle, but Insurer Does

- **If the insurance company wants to accept plaintiff's offer, and you don't**
 - Interest in protecting reputation
 - Confidence in case
- **"Hammer" Clause**
 - Insurer returns defense to control and thereafter expense of insured
 - Insurer will pay same amount as settlement turned down
 - Some policies continue to pay portion of defense (80/20)

Working with Your Insurance Agent/Broker

- Your agent/broker may be helpful as a claim advocate.
- Agents/brokers are not lawyers and the question of coverage is ultimately a legal dispute.
- Assume conversations with agent/broker are not confidential.
- Beware of introduction of communicable-diseases, virus, and Covid19 exclusions.

Questions?



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