

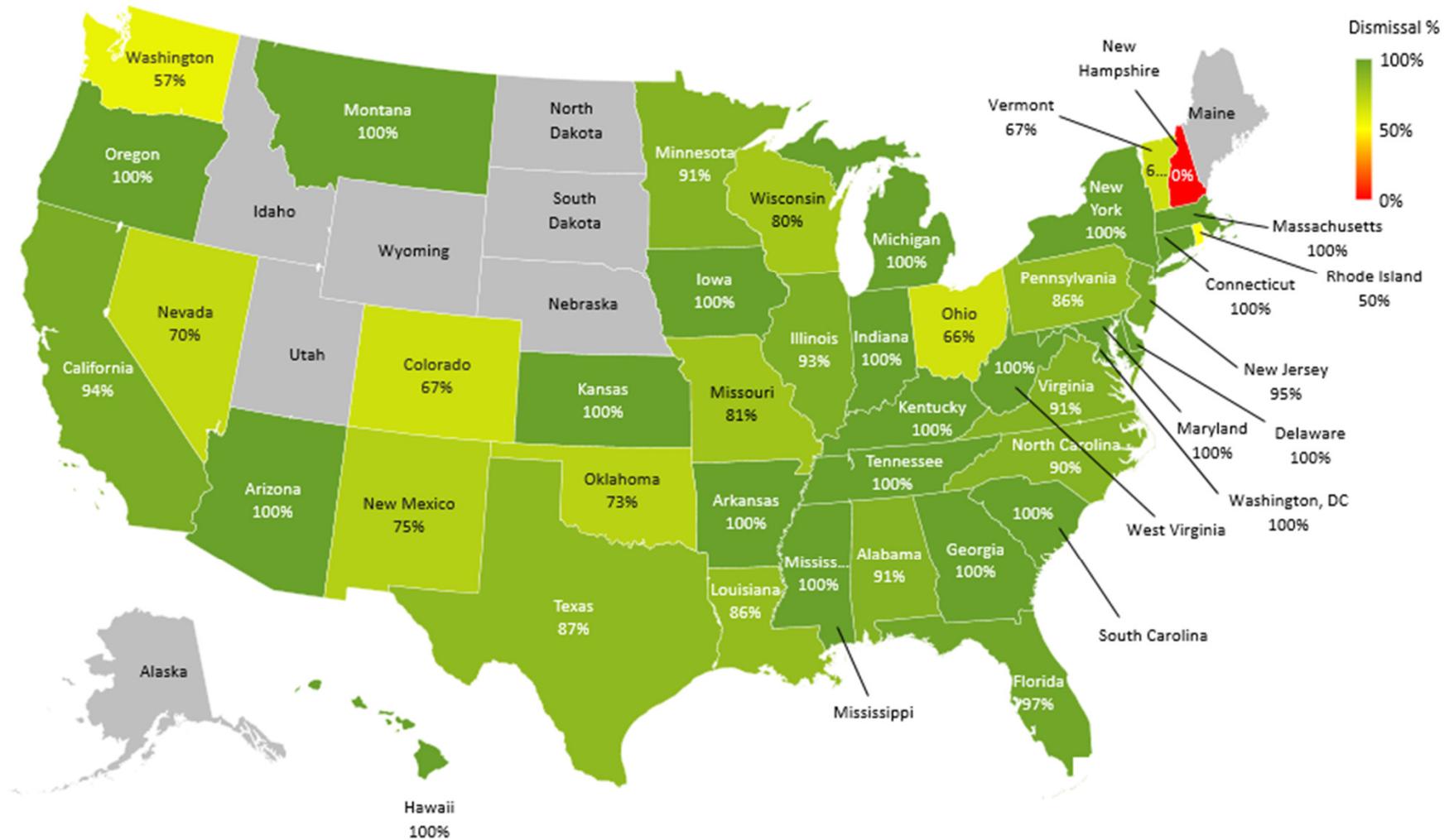
COVID-19 U.S. Insurance Coverage Disputes

Aidan M. McCormack
DLA Piper LLP (US)

AIDA Europe Conference
Zurich – 6 October 2022



State Heat Map: Percentage of Insurer BI Victories



U.S. COVID-19 BI Trials

A Case Study on Contradiction

- Louisiana: Cajun Conti Bench Trial
 - Judge denied insurers' motions for summary judgment.
 - Following trial, Judge entered judgment in favor of insurers.
 - Court of Appeal of Louisiana, Fourth Circuit reversed judgment.
- Ohio: K.C. Hopps Jury Trial
 - Judge denied insurers' motions to dismiss.
 - Denied insurers summary judgment with respect to BI coverage.
 - Jury verdict in favor of insurers.
 - Insured's motion for new trial denied.
- Texas: Baylor College of Medicine Jury Trial
 - Jury verdict awarded insured \$48 million.



Communicable Disease Coverage Extensions

Coverage? Maybe, But Insured Must Meet its Burden

Spirit Realty Capital, Inc. v. Westport Ins. Corp., 568 F.Supp.3d 470 (S.D.N.Y. 2021)

- Insured is an office realty leasing company.
- Insured sought BI coverage and coverage under Communicable Disease Response and Interruption by Communicable Disease provisions.
 - Alleged actual presence of COVID-19 via “infected droplets” and “fomites” caused direct physical loss or damage.
 - Alleged employees who worked at headquarters contracted COVID-19.
- The Court held that “the Communicable Disease provisions would be inapplicable because Spirit does not sufficiently allege that its properties had the **‘actual not suspected presence’** of Communicable Disease’ and that access to such properties was ‘limited, restricted or prohibited by an order of an authorized governmental agency regulating the **‘actual not suspected presence’** of communicable disease’.”
- “Actual not suspected” is very heavy burden for insured to meet and difficult for insured to establish.
 - Insured did not allege employees became infected at work or were in headquarters while infectious.
 - Causation: Orders not based on “actual not suspected” presence of COVID-19 at property itself.
- Another emerging issue: Number of occurrences and application of sublimits.



Looking Back

- Event Cancellation Coverage
 - Very heavily hit line.
 - Main issue was true “legal inability” to proceed.
 - Some exclusions for SARs / Communicable Disease / Microorganism
 - Exceptions if declared pandemic by WHO prior to or simultaneous with loss arising.
 - Timing key. WHO declared pandemic on March 11, 2020.
 - Little press/no case law on those defenses / exclusions.



Looking Forward

- **Liability Claims**
 - Very low hit line – so far.
 - Main dispute has been in WC space.
 - Some broker E&O.
- **Securities Claims**
 - Minimal claims to date.
 - Failure to disclose impact of COVID-19 on business.
- **Reinsurance Claims**
 - Insurers now ceding COVID-19 losses to reinsurers.
 - Follow the fortunes, follow the settlements, and follow forum language all important.
 - Number of occurrences critical for direct and reinsurance aggregation.

Trends in the U.S.

Development Over Time

- **Early Cases**

- Notifications with no information.
- Early cases filed by small businesses represented by small firms.
- Often did not allege SARS-CoV-2 on property.
- Consistently alleged SARS-CoV-2 caused direct physical loss or damage.

- **Today's Cases**

- New notifications have died down.
- More robust loss estimate submissions provided before RFI responses.
- More requests for extension of suit limitation provisions.
- Newer cases filed by large businesses represented by larger and more sophisticated policyholder firms.
- Allege SARS-CoV-2 or those with COVID-19 on premises and attempt to tie to damage on premises through scientific means.
- More focus on communicable disease coverages.



Thank you!



Aidan M. McCormack
Partner, Litigation & Regulatory
Chair – Insurance Americas
DLA Piper LLP (US)
+1 212 335 4750
aidan.mccormack@dlapiper.com