



# Episode 1: Healthcare Professional Liability Exclusions – COVID-19

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SPEAKER 2: Welcome to the Willis Towers Watson podcast, Vital Signs Risk and Insurance for Health Care. Where we discuss the risk management, and insurance trends, and issues facing the US healthcare industry. We'll speak with our industry experts and clients, in search of ways to improve your risk and insurance vital signs.

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MARYANN MCGIVNEY: Welcome everyone to Willis Towers Watson's podcast Vital Signs, Risk and Insurance for Health Care. I'm very excited because today's podcast kicks off series 1, episode 1. And in this series, we are looking at HPL coverage issues in a hard market. My name is Maryann McGivney, and I head up Willis Towers Watson's Healthcare Industry Practice. I'm joined today by Joanne Kowalczyk who is one of our expert Placement Professionals for HPL. Welcome Joanne.

JOANNE KOWALCZYK: Thank you Maryann. I'm glad to be here.

MARYANN MCGIVNEY: I asked you to join me today, Joanne, because I wanted to pick your brain regarding one of the most questioned exclusions in the HPL coverage form, today. And I bet you can guess what it is. But it's the one topic on everyone's mind, right now. What do you think that is?

JOANNE KOWALCZYK: My hunch would be that, it would be COVID-19.

MARYANN MCGIVNEY: absolutely, it sure is. So tell me, from an HPL perspective, what types of claims are arising out of COVID, that our clients are seeing?

JOANNE KOWALCZYK: Maryann, the number one area where we expect to see litigation is failure to prevent transmission of the virus. Other areas could include failing to diagnose, failing to manage, supervise, and properly credential the providers of health care services, failing to obtain protective equipment or supplies, that would be lab tests, masks, ventilators, failing to follow guidelines in terms of safe practicing and reporting requirements.

We also may see claims alleging failure to properly clean the premises in order to remediate the virus. And while it's not necessarily a direct COVID claim, we may see litigation surrounding the rationing or withholding of care, such as postponing elective surgeries.

MARYANN MCGIVNEY: Sure. I bet rationing of care will be the next big wave that we're going to look at in terms of claims. So Joanne tell me, when we look at these types of claims are they differing between subsectors of healthcare are the carriers looking at those different types of healthcare differently?

JOANNE KOWALCZYK: Well, I believe that they will. Several reports indicate that senior living will be the most affected for a few reasons. One is that they're an easy target, particularly for facilities that are located in states with limited immunity protection. We expect those facilities will be hit very hard. There's been a tremendous amount of national attention which is going to give incentives for plaintiff firms to focus on the nursing home communities.

There were clusters of outbreaks in a short period of time in a localized area. There were media reports citing family call for information, those calls were not being answered or returned. Plaintiff firms have been taking out television and newspaper ads that will likely prompt suits as well.

Another area that also serves the senior community is home health. We expect that they'll also see litigation. They have minimally trained staff, federal regulations require that home health aides have only 75 hours of training, add in the lack of access to protective equipment, and I think that that's another area which should be very much impacted by lawsuits and litigation.

MARYANN MCGIVNEY: Sure. Yeah, I would imagine home health is a particularly challenging situation. As you're entering people's homes, and you don't really know what to expect, you're not in a controlled environment.

JOANNE KOWALCZYK: Yes.

MARYANN MCGIVNEY: So if a carrier is going to attach an exclusion or a limitation, what would that look like?

JOANNE KOWALCZYK: Well, Maryann, I think that we can place the carriers responses into five main categories, somewhere along these lines. First, is having no exclusion at all for COVID. However, we have to be mindful of how the knowledge wording will apply. And by that I mean at the time of binding cover, was the health care facility aware of any incident that could give rise to a claim? If they were aware, were any of these incidents reported to the incumbent carrier? And also, what was revealed about COVID, if anything, in the application for coverage?

Second category would be a COVID-19 limitation. And that could range from carving out coverage under the umbrella program for employers liability, or transmission of the virus just under the Professional Liability coverage part to broader limitations for transmitting, rationing care, vicarious liabilities for entities that don't have government immunities. As far as the limitations go though, most of the policies that we've reviewed with COVID-19 limitations maintain cover for the treatment of patients infected with COVID-19.

Third category I would say is the COVID-19 exclusion. This is often broad and it applies to all the coverage parts. And underwriters will often use wording along the, included but not limited to language, which broadens the exclusion even further.

The fourth category is an epidemic or pandemic exclusion. It tends to apply to all the coverage parts. And it excludes coverage for communicable diseases, but only those diseases that have been declared a public health emergency, an epidemic, or a pandemic. This exclusion is triggered by the declaration of a public health emergency from an official body, something like the World Health Organization, or a government entity. And even after the event is no longer considered a public health emergency, the exclusion may still apply.

And the final and most restrictive category is a communicable disease exclusion. That applies even without a declaration of a public health emergency, an epidemic or a pandemic. We tend to see this more in the senior care space. And it tends to be exceptionally broad, and it precludes coverage for a wide variety of diseases, in addition to COVID-19 or SARS. For example, it could apply to something like salmonella which is foodborne, or Lyme disease which is carried by ticks. So I know that was a lot, but there's a lot to say on this topic. And there are a lot of areas that we should be paying attention to.

MARYANN MCGIVNEY: Yeah, it does sound a bit complicated. But if you could help me for just a minute, Joanne. You used a couple of terms in there, I want to make sure that I understand. You talked about epidemics, you talked about pandemics, and you talked about public health emergencies. Can you give us a little clarification on the differences in some of those?

JOANNE KOWALCZYK: Absolutely. The definition that we're using for an epidemic is a rapid spread of a disease to a large number of people in a given population within a short period of time. An example of that is, I live in New Jersey. And just last year, there was a measles outbreak in a community about an hour away from me. A pandemic is an epidemic that has spread across a large region, multiple continents, or worldwide. And a public health emergency is any event that poses a risk of a spread of disease that may require a national response. Now, Maryann that's not necessarily a communicable disease, we could say that the Opioid Crisis was a public health emergency.

MARYANN MCGIVNEY: So it sounds like we have to really pay attention to what those exclusions or limitations look like in terms of the actual language they use, whether they call it a communicable disease exclusion, or a COVID exclusion, or a pandemic exclusion, those mean very different things?

JOANNE KOWALCZYK: Absolutely

MARYANN MCGIVNEY: Let's talk a little bit about what are some of the other challenges might be, other than if we have some language limiting, our coverage, that's concerning enough, but does that open up the door for other challenges when you're putting a program together?

JOANNE KOWALCZYK: Well, I think it does. One is capacity issues. On the professional liability side, several carriers are reducing their capacity to five million. And these same carriers, just about a year ago, were putting up 25 million dollars. So since coverages will need to be layered, we have to pay very careful attention to concurrency in language among the different layers of coverage. So for example, it's crucial that we keep the coverage wording consistent throughout the tower. What coverage parts are affected by COVID limitations? Is it just the professional liability? Is it the general liability? Are the definitions used in the policies consistent throughout the tower?

Also how do the retentions apply? Do they apply per patient? And if they do, that's likely to preclude the client's ability to batch coverage for the event. So these are all areas that we really need to pay close, close attention to.

MARYANN MCGIVNEY: Well, that's a lot to think about. And the crazy thing is, we've only touched on one type of exclusion in the HPL form. What are some of the other areas that cause you concern from a coverage perspective, relating to COVID, or even just the hard market?

JOANNE KOWALCZYK: Well, I think that there are a few areas that should be examined in more detail. And one would be mold exclusions under the professional or general liability coverage. And often the mold wording will bar coverage for virus related claims. I touched on it a little bit before. How does batch coverage or related acts exclusions apply to COVID? Is the definition of a COVID outbreak a per event? Or is it per patient? And as I said before, if it applies per patient that will limit the client's ability to batch coverage.

How do punitive damages apply? Will allegations of gross misconduct come into play? How about abuse, where would that coverage come into play? So I think that there's a lot of areas that should also be reviewed.

MARYANN MCGIVNEY: Looks like some further exploration may be needed, and something to think about for our next podcast. But Joanne, I want to thank you for joining me today. As always, I appreciate your time and your expertise.

JOANNE KOWALCZYK: Well, thank you. It was an absolute pleasure to be here.

MARYANN MCGIVNEY: I also want to thank our audience, and those that tuned in to our discussion. And we hope that you'll join us again next time. Thanks again for joining our podcast, Vital Signs Risk and Insurance for Healthcare.

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