

U.S. Covid 19 Insurance Litigation and the Future of Business Income Protection

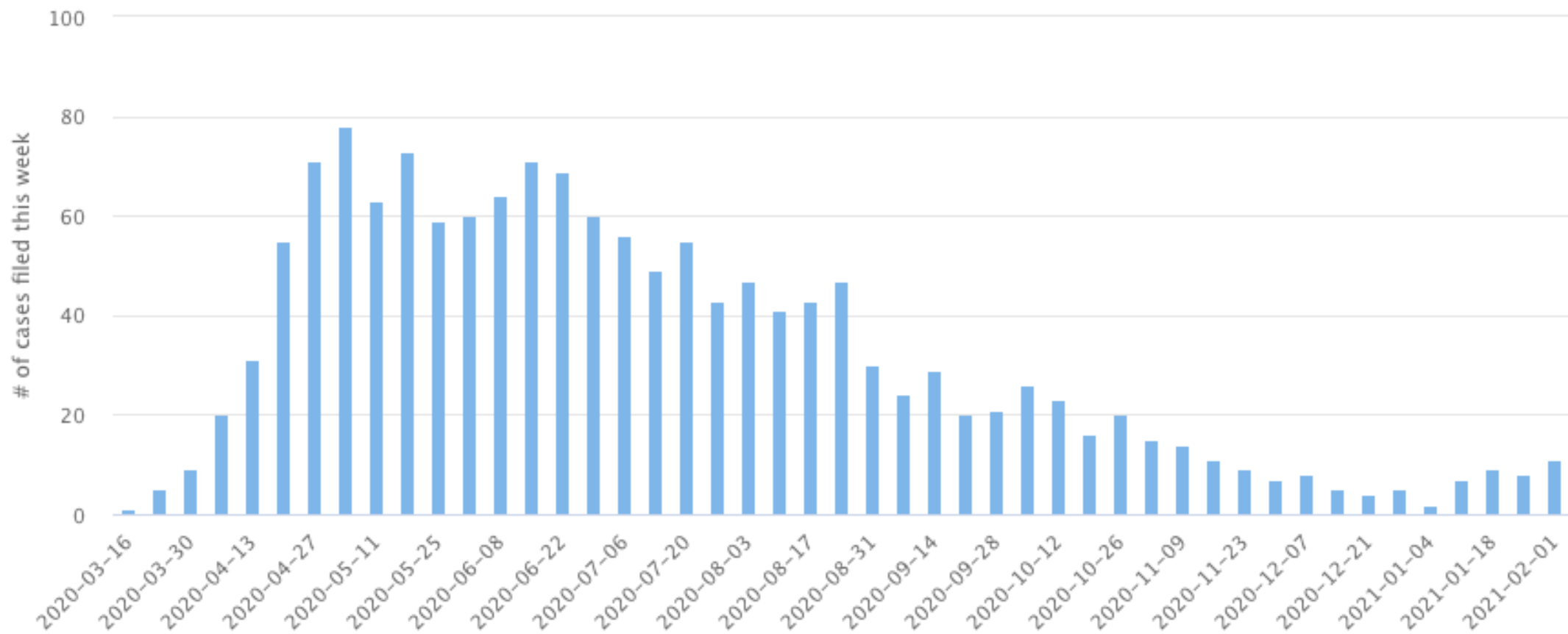
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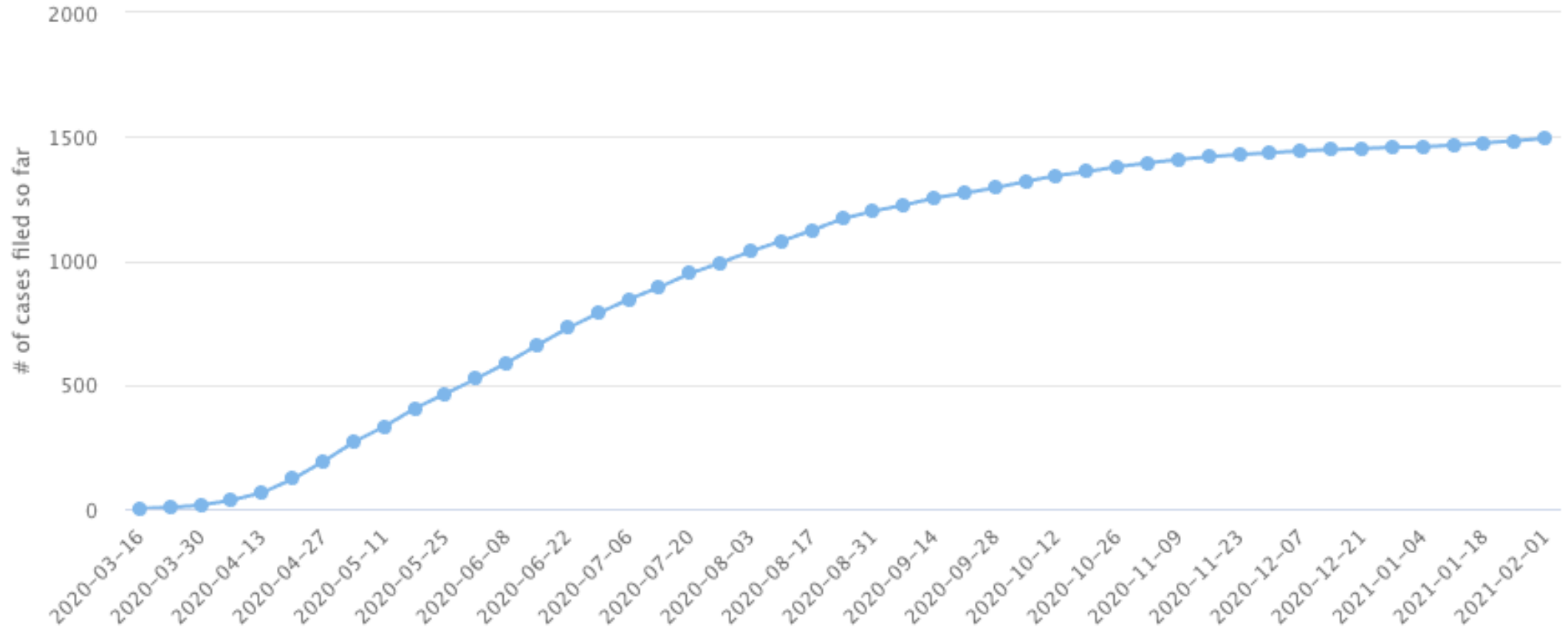
The talk

- Introduce the U.S. Covid BI litigation
- Introduce the CCLT project
- Identify key legal issues and early results
- Discuss what the Covid 19 coverage litigation teaches us about protecting the economy from future pandemics

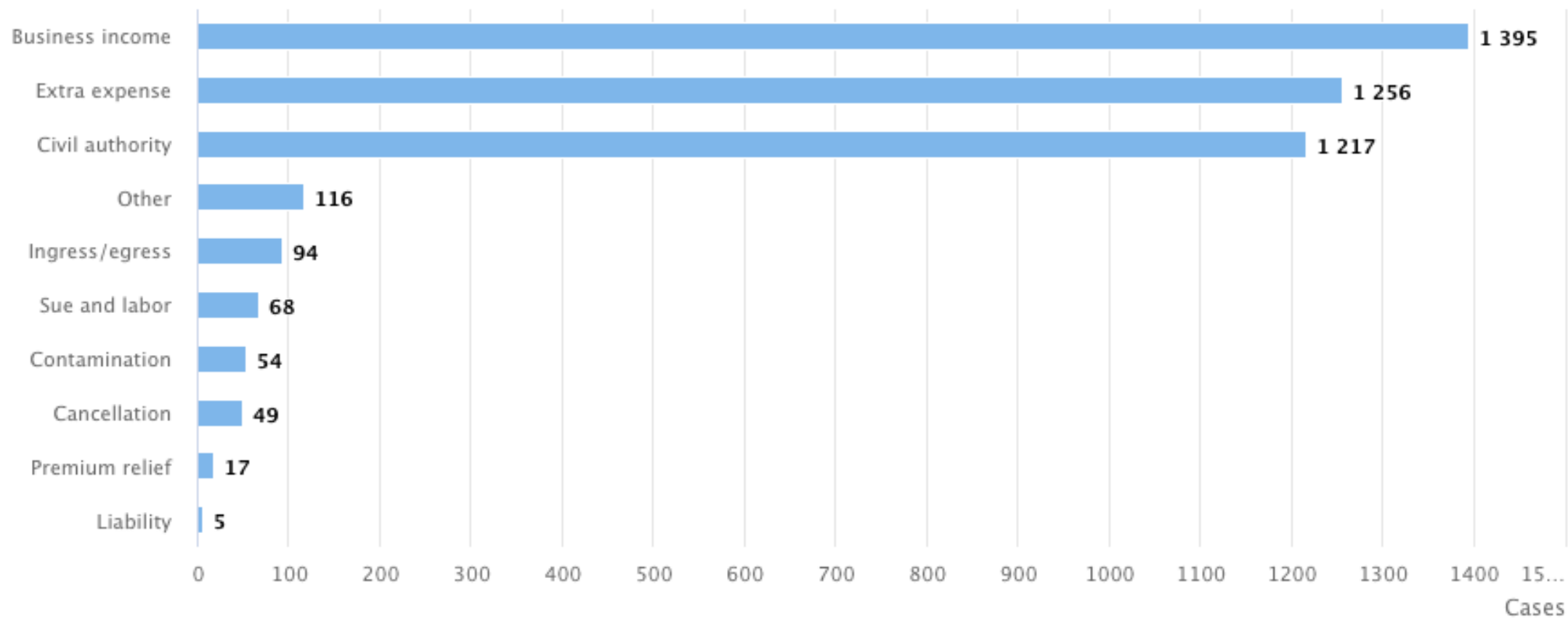
Weekly Filings



Cumulative Filings



Coverage Sought



Insurance Termination Summary

	# of Cases	
Voluntarily dismissed	211	
Dismissed by court order without prejudice	42	
	On the merits	Not on the merits
	22	20
Dismissed by court order with prejudice	118	
	On the merits	Not on the merits
	104	14

CCLT Research objectives

- Develop new methods to identify, track, and understand emerging “case congregations” in real time.
- Provide objective, reliable information about this case congregation – Covid 19 insurance coverage litigation – to judges, lawyers, the press.
- Some specific research topics:
 - Identify and compare court-based methods for managing case congregations
 - Develop methods to identify “Bayesian updating events” in real time and retrospectively, and to track the updating process
 - Develop methods to evaluate, and update the evaluation of, portfolios of cases within an emerging case congregation
- Ancillary but important: document the reluctance of private insurers to provide this protection and, perhaps, help motivate them to support an optimal government backstop

Data we are collecting:

- Data you can get from other places, too (PACER, state court electronic dockets & services that resell that information):
 - Docket info: court, docket number, judge(s), law firms, key events
 - Documents from the case: complaints, removals, remand motions/orders, MTD, SJ motions, merits orders, appeals
- Our contribution: identification of state cases from multiple sources, extraction of wheat from chaff from within the sources of data for the identified cases, following of cases across courts/electronic services, uniform coding of data independent of original data source, real time crowd sourcing of judicial rulings.
- Hand coded data not captured anywhere else:
 - Coverage sought, whether bad faith alleged
 - Proposed classes
 - Insurance policies identified, downloaded, and broken into insurance forms, which are coded. (Found in complaints, answers, exhibits to motions.)
 - State of issue of insurance policy
 - Brokers captured from the policies
 - Zip code and NAICS of policyholders
 - Insurance companies coded by parent group

Key legal issues

- Is there “physical loss of or damage to property ... caused by or resulting from risks of direct physical loss”?
- Do exclusions apply?
- Procedural issues

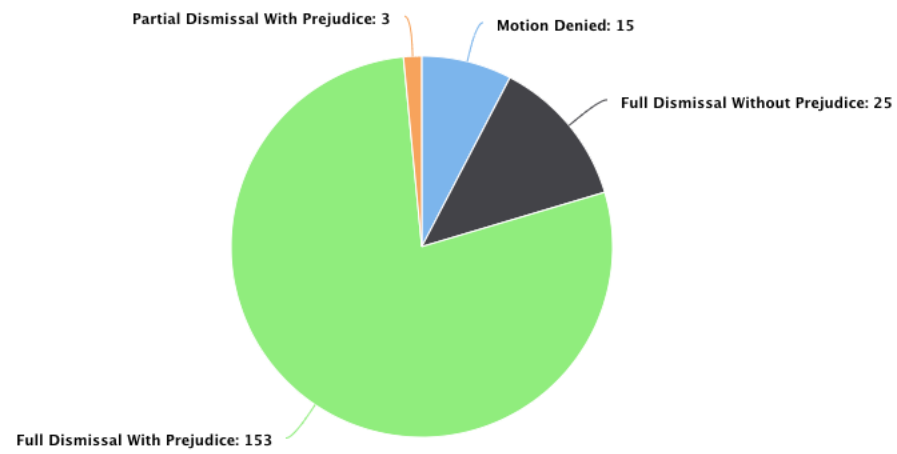
Physical loss of or damage to property

- Loss of use because of government orders designed to reduce the spread of the virus is “physical loss of ... property ... caused by or resulting from risks of direct physical loss or damage.” E.g. *In re Society MDL*
- Reduced use of property to prevent spread of virus on surfaces and through ventilation systems is “physical loss of or damage to property.” E.g., *Studio 417*
- “physical loss of or damage to property” requires structural alternation of the property, not the presence of an easily cleaned substance. E.g., *Terry’s Barbecue*
 - Do structural mitigation measures count? E.g., complaint in *Lettuce Entertain You*

Exclusions

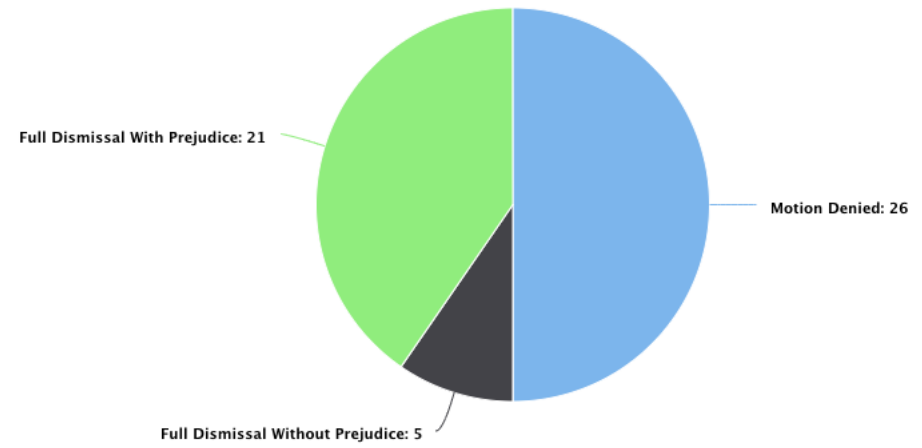
- Explicit virus exclusions:
 - ISO & similar
 - Hartford variation
- Microbe/microorganism exclusions that do/don't list virus
- Contamination exclusion that do/don't identify virus as a contaminant
- Pollution exclusions that do/don't identify virus as a pollutant

Merits Rulings on Motions to Dismiss in Federal Court



Winbets

Merits Rulings on Motions to Dismiss in State Court



	Virus Exclusion in Policy		No Virus Exclusion in Policy	
	State	Federal	State	Federal
MTD granted	18	125	7	56
MTD denied	11	5	15	10
SJ for insurer	1	4	3	2
SJ for insured	2	1	3	0

Procedural issues

- Consolidation/Aggregation
 - Early mega MDL unsuccessful
 - More limited MDLs approved
 - Class actions proceeding
- Venue
- Choice of law

Public policy implications

- Private market is not prepared to protect business income against pandemic losses
- We need a government backstop
- Insurance companies are well-suited to evaluate and pay claims that they agree are covered, providing much better targeting of relief \$ on the basis of losses
- Optimal program may be government reinsurance of business interruption insurance.
- **Lost opportunity to do this retrospectively.** That would have met Horst's criteria: proportionality, efficiency, equity and transparency.
- Litigation costs and losses may motivate insurers to support a backstop program. Not accidental that European insurers are supporting a gov't program more than US insurers.