

Best's Insurance Law Podcast

[How the Rollout of 5G Could Affect Insurance Claims - Episode #182](#)

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Hosted by: John Czuba, Managing Editor

Guest Attorney: Mike Watza of [Kitch Drutchas Wagner Valitutti & Sherbrook](#)
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John Czuba: Welcome to "Best's Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Insurance Professional Resources*.

Today, we're speaking with Michael Watza. Mike is chair of the governmental regulatory practice group at [Kitch Drutchas Wagner Valitutti & Sherbrook](#), a full service law firm based in Detroit with offices in Lansing, Marquette, Mt. Clemens, Chicago, Illinois, Toledo, Ohio, and Honolulu, Hawaii.

Mike's practice provides litigated, legislative, and regulatory solutions on behalf of municipal, healthcare, and private sector clients concerning legislation, complex litigation, governance issues, telecommunications including cable and cell towers, pipelines, energy insurance, and gaming.

Mike also serves as general counsel to PROTEC, a governmental consortium of over 100 cities across Michigan focusing on municipal rights of way concerns. Michael, thanks so much for joining us today.

Mike Watza: John, thanks for having me.

John: Today, we'll be discussing how the rollout of 5G could affect insurance claims. Michael, first off, tell our audience a little bit about yourself and your practice.

Mike: As you described in part from my bio, I spent the first half of my practice years doing insurance, defense litigation for the most part, representing a whole variety of entities, municipalities being one of those consistently in the group.

Then the second half of my career, I was asked actually by some of the municipal clients to get involved with some of the regulatory issues that they were facing in the rights of way, which is where the utilities operate. That's where municipalities and the utilities meet. It's usually a friendly, mutually helpful relationship but not always. I've spent the last 15, 20 years tussling, I suppose, with AT&T, Comcast, Verizon, DTEs, all the large utilities out there, on behalf of local government and local communities.

John: That leads well into our first question, Mike. What's exactly involved in the 5G rollout?

Mike: 5G really did develop in response to the Obama administration when he rolled out the need for a broadband plan, and that is basically to improve our access to the Internet. The industry responded in large part with 5G. There were two ways they could have responded. One was to build fiber connections to everyone.

Arguably, maybe a better approach, but the industry has responded with upscaling its wireless product. This is referred to as 5G. The result is that they are attempting to add millions of new antennas, broadcast, and receiver, to their current stock and put those right down at the rights of way level right in the streets, and alleys, and public places.

John: What exactly is the timing of the rollout?

Mike: The industry would love to have had it done last week, but over the last 10 years, there's been a lot of work at the FCC, in Congress, and the NTIA, federal agencies, and then that's gone out to the States and then the local governments. The courts have been involved. That regulatory process all seems to have wound its way pretty well to a conclusion where the industry is starting to ramp up and actually start to build these things. We're seeing more and more discussions about the appearance of these so called small cells in the rights of way because they're showing up in front of folks' homes.

John: What are some of the associated risks with this?

Mike: What I refer to as "rights of way cell towers" or "small cells", are the industry adaptation from traditional facilities that transmit all of our connections to and from our cell phones and other wireless devices, mounted on Macro Towers, which are 100 to 200 foot towers out in the middle of Farmer Brown's cornfield or some other somewhat remote location, and their reach is several miles.

The new technology to try and densify the bandwidth and get up to speeds that 5G is advertising, requires that these small cell towers be put very close to the consumer. The user of the bandwidth. The intent is to get these right down at street level including in front of our houses, or behind our houses, or on a utility pole, perhaps sitting at a point in the street where the kids are waiting for the school bus.

That is the concern. Because now, these transmitters that used to be several 100 feet in the air and maybe a mile away or more are right over our heads. They're transmitting right through us, essentially. There's been a lot of concern about what that means.

There are a couple studies that have been done recently, one report in 2018 by the US government. NTP, National Toxicology Program, issued a study that found exposure to these bandwidths could cause...I'm just going to read, John, if you don't mind, a few lines because I'm not a doctor. I don't remember these terms if I don't see them.

The study found that these bandwidths and frequencies, referred to as radiofrequency radiation, could cause and did cause in rats over a two year study cardiomyopathy, malignant schwannoma in the heart, malignant glioma in the brain, adenomas in the pituitary gland, adrenal cytomas in the liver, malignant glioma in the prostate, and a significant increase in DNA damage in the hippocampus cells of male rats.

So the medical experts out there who conducted or peer reviewed this study, the conclusion is that there appears to be some possible connection between these cell related frequencies and at least pre-cancerous developments. I won't say that it's been confirmed, but it raises concerns. Most recently, July of this year, the environmental groups, one of them in particular, The Environmental Working Group or EWG, issued a study result that confirmed or tracked some of these same results.

So we have this concern. Of course, the issue will be: does the research pan out to show a clear connection? The environmental groups out there that are pushing this issue, are they going to be able to prove their case or not?

John: Mike, are there any preventative steps being taken? What should claims and risk managers, particularly in the local public sector, be concerned about?

Mike: On the frontend, of course, you want to try and locate these facilities, these shorter towers somewhere more remote industrial areas, commercial areas, and less in the residential districts but of course, the industry wants to be where the customer is, which is more residential. There's a fair amount of pushing back and forth going on there.

Next, to the extent the law will allow, and the FCC and other federal and state law is currently pretty restrictive of local government's ability to limit these devices, you certainly want to have some very strong indemnity language so that the industry or the installers in that chain will have the obligation to hold the cities harmless in this process. And then, of course, we will want to require significant insurance coverages to be provided by these providers and installers of these facilities.

John: Mike, are there any lessons that were learned from past experience that might be helpful, and what potential claims fallout do you see here?

Mike: Anybody who's been in the insurance industry for any length of time and who like me... practiced in the area of mass torts, which I and my firm still have a hand in, knows what happened with products like asbestos and tobacco.

If you're familiar with asbestos or tobacco in particular and you saw how that developed back in the '50s, '60s, and '70s I wasn't a lawyer back then, but I certainly read a lot of the material that was out there-- there were these same kinds of growing numbers of studies and warnings that developed into more specific concerns over the course of decades. All that of course then led to massive amounts of litigation.

To my mind, we have the risk, not only of the substantive result in a litigated matter where somebody can prove an injury related to these transmissions, but the other key concern and cost, is the cost of defense because, essentially, everyone across the country could be a plaintiff even if they aren't specifically named in multiple class actions.

That means, if you're familiar with class action litigation, that you get one person to step up as a representative of the class and you arguably have 320 million Americans included in that class. The cost of defending that can be overwhelming, and in many cases, certainly in the asbestos arena, led to the bankruptcy of not only many of the producers, but in some cases their insurers and many others in the chain of distributors and users of such products.

That's bad enough for the providers and their carriers, but for the potential municipal defendants who are at the end of the approval and installation process, it potentially leaves them holding the bag, so to speak, because notwithstanding indemnity language and notwithstanding insurers standing behind the providers and the installers, when those folks go to bankruptcy court, that's going to potentially leave local government holding the bag at the end of the line.

Of course, the local governments have various immunity defenses as well as the argument that under current federal and state law, they had no choice but to quickly and with minimal review, approve these facilities. And they are backed by the full faith and credit of the taxpayer; which is ironic, since the taxpayer, of course, is also the customers and users of these wireless service providers and facilities. It's an insidious circle. Those are some of the risks in my mind, and that's why we're talking.

John: Overall, where do you see this heading for the insurance industry, Mike?

Mike: I think the insurance industry's got to be very careful about where it provides coverage. There has been discussion. I have not seen it. I'm not presently serving in an underwriting capacity anywhere, but I have heard that some of the large wireless providers have had difficulty getting these issues insured. I don't know that, but I've heard that 3rd hand. It would make sense to me for insurers to at least ask a lot of good questions before they jumped in their line and took on that responsibility. Even with the various defenses all across the board.

And backing up a bit, another defense if I didn't make clear earlier, is the fact that the FCC which governs wireless issues across the country, has approved all of this build out of wireless facilities right over our heads, notwithstanding some of these studies I've mentioned, and, to the extent that they've said it's OK -that these bandwidths and frequencies are not causing these cancers, that's an important and available defense as well, and as I already mentioned, government entities have immunity. The feds have the Federal Tort Claims Act, which is very difficult to climb through, and then all the cities across all the states have some level of immunity.

Of course, the industry itself is the proponent of all this. So they and their carriers should be on the frontline, and they could potentially have the bankruptcy courts to run to as well, but that's what I see.

In conclusion, the environmentalists who have these concerns and who are pressing them, don't have to necessarily prove all this in stone. They just have to present enough to create interest in it, and to get a jury or just one a court thinking and opining, "Hey, this RFR might be a problem," and the next thing you know, you've got tens of thousands, even millions of claims filed. Then you get into that ultimate problem of how in the world do we finance the defense of this?

John: Michael, thanks so much for joining us today.

Mike: Thank you for having me, John. It was wonderful.

John: You've just listened to Michael Watza, Attorney from Qualified Member law firm, [Kitch Drutchas Wagner Valitutti & Sherbrook](#). Special thanks to today's producer, Anthony Palma. To subscribe to this audio program, go to our web page, www.ambest.com/claimsresource. If you have any suggestions for a future topic regarding an insurance law case or issue, please email us at lawpodcast@ambest.com.

I'm John Czuba, and now this message.

Transcription by CastingWords

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