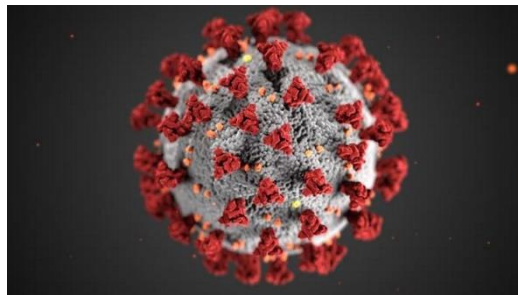


Coverage Considerations in a SARS-CoV-2/COVID-19 World:

National Commentaries on Select Coverage Issues



July 9, 2020

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ARTICLES:

An Overview of the Virus and the Disease: Selected Medical, Scientific and Regulatory Literature

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Novel Coronavirus and Property Insurance Coverage: Direct Physical Loss Requirements and Other Coverage Issues

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Legislative Response To Unavailability Of Insurance Coverage For Novel Coronavirus Losses

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Third-Party Coverage Considerations in Novel Coronavirus Cases

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Is the Novel Coronavirus A Pollutant? Assessing the Application of CGL Pollution Exclusions to SARS-CoV-2 Claims

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Do Multiple Suits Lead to Multiple Limits? Assessing Number of Occurrences For Covid-19 Litigation

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**AN OVERVIEW OF THE VIRUS AND THE DISEASE:
SELECTED MEDICAL, SCIENTIFIC AND
REGULATORY LITERATURE**

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**Primerus Webinar Series
July 9, 2020**

INTRODUCTION

The genesis of this overview of medical, scientific and regulatory articles on the SARS-CoV-2 virus and the COVID-19 disease is my work as part of a team defending two of the early targets in the asbestos litigation. In those days, lawyers willing to dig deep into the historic and evolving scientific, medical and regulatory literature regarding asbestos and its diseases had a distinct advantage when it came to trying asbestos medical and “state of the art” issues.

While the insurance industry has seen several “mass” exposures since the early days of asbestos (environmental, implants, pharmaceuticals, pesticides, etc.), the industry has not seen a coverage exposure threat having the potential to match or exceed asbestos until the novel coronavirus causing COVID-19. Therefore, now that the early days of Shutdown Orders has become reality once again, and the “new reality” continues to evolve now and likely over at least the next two years, it makes sense to examine the medical, scientific and regulatory literature to gain as much understanding of the virus, now designated as SARS-CoV-2, and the disease, designated COVID-19 to avoid confusion with the virus, as possible to guide clients and the courts through the still-evolving coverage issues which will be faced.

When this survey of medical, scientific and regulatory literature began on April 2, 2020, the search term “SARS-CoV-2” on PubMed yielded a daunting 852 hits. Just over three months later, as of July 6, 2020, the same search term yielded over ten times the number of hits (8,746). As a result, the following admittedly does not reflect an exhaustive search of the literature on all subjects of interest to the insurance industry. The following instead is an overview of selected articles touching on various subjects that likely impact not only first-party coverage disputes, but also likely impact how issues involving liability and coverage for that liability may be analyzed.

The cited articles are generally organized by topic, and include the articles' citation as well as a hyperlink to access the document (which, given the interest in the pandemic issues as of early July 2020, are almost all available on an "open access" basis). The article citations are accompanied by summary discussions of the article and selected passages which provide the reader with an overview of the article content without drilling down into complex medical, scientific or statistical concepts which are included in many of the articles. The intent in organizing the articles in this fashion is to allow the user to access the document and further investigate its content if it is of interest to the reader.

Finally, there are three caveats involved with citation to and discussion of these articles, including the recitation of limited passages from the articles. First, and most importantly, citation to and discussion of the articles, including recitation of brief passages from them, are intended to be educational to the reader. The assemblage of these materials is the result of research into the virus and disease during a time when the articles are available in an "open access" format. The reader's further use of the article or its content is expected to be part of the reader's further research or scholarship.

Second, the cited articles are but a sampling of articles pertinent to an analysis of the many scientific, medical and regulatory issues which will directly or indirectly impact the insurance industry in evaluating and litigating pandemic-related coverage matters. While many of the cited articles are "peer-reviewed" in the sense that they have been reviewed prior to publication, in reality many of the articles are either letters to journals, viewpoints or pre-prints which have yet to be peer-reviewed. There are no widespread epidemiologic studies which have been performed with regard to SARS-CoV-2 or COVID-19. A substantial additional number of articles will be generated in the coming months and years which will further add to the "state-of-

the-art” currently known about the virus and the disease. Members of the Primerus Defense Institute’s Insurance Coverage and Bad Faith Group will continue to follow the publications of major articles on the topics to allow the Group to appreciate the continued evolutions in how the virus and the disease impact insurance coverage issues.

Lastly, even a cursory review of the issues raised in the cited articles show the presentation of the articles’ substance at trial or otherwise will involve expert testimony. In light of this, several of the Insurance Coverage and Bad Faith Group members are moving forward to identify experts to provide insights needed to counsel, clients and the courts when addressing the medical and scientific implications of the virus and the disease.

The Primerus Defense Institute Insurance Coverage and Bad Faith Group appreciates your interest in this most-timely of topics.

THE SARS-CoV-2 VIRUS

The SARS-CoV-2 virus, also called the “novel coronavirus,” is one of seven human coronaviruses (HCoV) which have been identified since the 1960s. The CDC describes HCoVs as follows (<https://www.cdc.gov/coronavirus/types.html> (last accessed July 7, 2020)):

Human Coronavirus Types

Coronaviruses are named for the crown-like spikes on their surface. There are four main sub-groupings of coronaviruses, known as alpha, beta, gamma, and delta.

Human coronaviruses were first identified in the mid-1960s. The seven coronaviruses that can infect people are:

Common human coronaviruses

1. 229E (alpha coronavirus)
2. NL63 (alpha coronavirus)
3. OC43 (beta coronavirus)
4. HKU1 (beta coronavirus)

Other human coronaviruses

MERS-CoV (the beta coronavirus that causes Middle East Respiratory Syndrome, or MERS)

SARS-CoV (the beta coronavirus that causes severe acute respiratory syndrome, or SARS)

SARS-CoV-2 (the novel coronavirus that causes coronavirus disease 2019, or COVID-19)

People around the world commonly get infected with human coronaviruses 229E, NL63, OC43, and HKU1.

Sometimes coronaviruses that infect animals can evolve and make people sick and become a new human coronavirus. Three recent examples of this are [SARS-CoV-2], SARS-CoV, and MERS-CoV.

(Page last reviewed: February 15, 2020.)

The four “common” human coronaviruses are usually considered nuisance viruses which cause low grade conditions such as the “common cold” in otherwise health humans. Aboubakr HA, Sharafeldin TA, Goyal SM. Stability of SARS-CoV-2 and other coronaviruses in the environment and on common touch surfaces and the influence of climatic conditions: a review [published online ahead of print, 2020 Jun 30]. *Transbound Emerg Dis.* 2020;10.1111/tbed.13707. doi:10.1111/tbed.13707 [Aboubakr 2020] (<https://onlinelibrary.wiley.com/doi/epdf/10.1111/tbed.13707>) (last accessed July 7, 2020)). See also Ludwig S, Zarbock A. Coronaviruses and SARS-CoV-2: A Brief Overview. *Anesth Analg.* 2020;131(1):93-96. Doi:10.1213/ANE.0000000000004845 (published online 2020 Mar 31) [Ludwig 2020] (https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7173023/pdf/ane-publish-ahead-of-print-10.1213_ane.0000000000004845.pdf) (last accessed July 7, 2020)).

In February, 2020 the World Health Organization (WHO) published its “Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)” (<https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf>) (last accessed July 7, 2020)). Several passages in this Report are of note:

“On 30 December 2019, three bronchoalveolar lavage samples were collected from a patient with pneumonia of unknown etiology – a surveillance definition established following the SARS outbreak of 2002-2003 – in Wuhan Jinyintan Hospital. ... Alignment of the full-length genome sequence of the COVID-19 virus and other available genomes of Betacoronavirus showed the closest relationship was with the bat SARS-like coronavirus strain BatCov RaTG13, identity 96%.”

“Information on the epidemic was notified to WHO on 3 January, and whole genome sequences of the COVID-19 virus were shared with WHO on 10 January.”

“The virus found to cause COVID-19 was initially isolated from a clinical sample on 7 January.”

“COVID-19 is a zoonotic virus. From phylogenetics analyses undertaken with available full genome sequences, bats appear to be the reservoir of COVID-19 virus, but the intermediate host(s) has not yet been identified.”

“COVID-19 is transmitted via droplets and fomites during close unprotected contact between an infector and infectee. Airborne spread has not been reported for COVID-19 and it is not believed to be a major driver of transmission based on available evidence; however, it can be envisaged if certain aerosol-generating procedures are conducted in health care facilities. Fecal shedding has been demonstrated from some patients, and viable virus has been identified in a limited number of case reports. However, the fecal-oral route does not appear to be a driver of COVID-19 transmission; its role and significance for COVID-19 remains to be determined.”

“Symptoms of COVID-19 are non-specific and the disease presentation can range from no symptoms (asymptomatic) to severe pneumonia and death. As of 20 February 2020 and based on 55924 laboratory confirmed cases, typical signs and symptoms include: fever (87.9%), dry cough (67.7%), fatigue (38.1%), sputum production (33.4%), shortness of breath (18.6%), sore throat (13.9%), headache (13.6%), myalgia or arthralgia (14.8%), chills (11.4%), nausea or vomiting (5.0%), nasal congestion (4.8%), diarrhea (3.7%), and hemoptysis (0.9%), and conjunctival congestion (0.8%).”

People with COVID-19 generally develop signs and symptoms, including mild respiratory symptoms and fever, on an average of 5-6 days after infection (mean incubation period 5-6 days, range 1-14 days).”

“According to preliminary data from Guangzhou CDC as of 20 February, virus can initially be detected in upper respiratory samples 1-2 days prior to symptom onset and persist for 7-12 days in moderate cases and up to 2 weeks in severe cases.”

“Most people infected with COVID-19 virus have mild disease and recover. Approximately 80% of laboratory confirmed patients have had mild to moderate disease, which includes non-pneumonia and pneumonia cases, 13.8% have severe disease (dyspnea, respiratory frequency ≥ 30 /minute, blood oxygen saturation $\leq 93\%$, PaO₂/FiO₂ ratio < 300 , and/or lung infiltrates $> 50\%$ of the lung field within 24-48 hours) and 6.1% are critical (respiratory failure, septic shock, and/or multiple organ dysfunction/failure). Asymptomatic infection has been reported, but the majority of the relatively rare cases who are asymptomatic on the date of identification/report went on to develop disease. The proportion of truly asymptomatic infections is unclear but appears to be relatively rare and does not appear to be a major driver of transmission.”

On March 3, 2020, the Coronaviridae Study Group of the International Committee on Taxonomy of Viruses, which had preliminarily named the virus 2019-nCoV, officially

designated the virus as SARS-CoV-2. Coronaviridae Study Group of the International Committee on Taxonomy of Viruses. The species Severe acute respiratory syndrome-related coronavirus: classifying 2019-nCoV and naming it SARS-CoV-2. *Nat Microbiol.* 2020;5(4):536-544. doi:10.1038/s41564-020-0695-z

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7095448/pdf/41564_2020_Article_695.pdf

(last visited on July 7, 2020). On March 11, 2020, the World Health Organization declared the COVID-19 outbreak to be a pandemic. (<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen> (last accessed July 7, 2020)).¹

More recently, the CDC updated its website to add additional symptoms people may experience between 2 and 14 days after exposure to SARS-CoV-2:

- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

<https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (updated May 13, 2020) (last accessed July 7, 2020)). In this webpage, the CDC notes the list does not include all possible symptoms, and that the list will be updated as more is learned about COVID-19.

¹ This WHO webpage is the WHO's timeline of events with regards to the COVID-19 pandemic and therefore provides one view of the pandemic's "state of the art" over the six months starting with the date of the first report to the WHO on December 31, 2019.

Comparison to Prior Coronaviruses:

A recently-published article provides a succinct discussion of the two prior coronaviruses which emerged in late 2002 (SARS-CoV) and in 2012 (MERS-CoV) to cause significant human disease:

“The SARS-CoV-2 virus is genetically closely related to severe acute respiratory syndrome coronavirus (SARS-CoV), the first pandemic threat of a novel and deadly coronavirus that emerged in late 2002 and caused an outbreak of severe acute respiratory syndrome (SARS). SARS-CoV was highly lethal but faded out after intense public health mitigation measures. ... The SARS 2003 outbreak ceased in June, 2003, with a global total of 8098 reported cases and 774 deaths, and a case fatality rate of 9.7%, with most cases being acquired nosocomially. In comparison, the Middle East respiratory syndrome coronavirus (MERS-CoV)—another deadly coronavirus, but which is currently not presenting a pandemic threat—emerged in 2012, and has caused 2494 reported cases and 858 deaths in 27 countries and has a very high case fatality rate of 34%. Because MERS-CoV is widespread in dromedary camels, zoonotic cases continue to occur, unlike SARS-CoV, which emerged from wildlife and was eliminated from the intermediate host reservoir.”

Petersen Eskild, Koopmans Marion, Go Unyeong, Hamer Davidson, Petrosillo Nicola, Castelli Francesco, et al., Comparing SARS-CoV-2 with SARS-CoV and influenza pandemics, *The Lancet*, Published: July 03, 2020 doi.org/10.1016/S1473-3099(20)30484-9 [Peterson 2020] (<https://www.thelancet.com/action/showPdf?pii=S1473-3099%2820%2930484-9> (last accessed July 7, 2020)).

Incubation:

Early studies of the SARS-CoV-2 virus intimated the incubation period was roughly 5-6 days, with one study estimating a longer period of time. [Peterson 2020]

TRANSMISSION:

The literature recognizes a significant difference in how SARS-CoV-2 is transmitted as compared to SARS-CoV and MERS-CoV. As exemplified in Peterson 2020, MERS-CoV and

SARS-CoV viral loads were primarily in the lower respiratory tract and generally increased after symptom onset. In contrast, SARS-CoV-2 viral loads tend to be in both the upper and lower respiratory tracts, and are higher at symptom onset than in the days following symptom onset. This fundamental difference is significant for efforts to combat the transmission of COVID-19. Higher viral loads create greater ability to transmit the disease. If an individual can be quarantined after symptom onset before higher viral loads exist such as with SARS-CoV and MERS-CoV, an infected individual can be identified and isolated to limit the transmission of the disease. But, by the time COVID-19 symptoms appear, the infected individual already has high viral loads and is releasing SARS-CoV-2 (viral shedding) in large droplets and in smaller droplets (droplet nuclei or aerosol) in the few days before symptom onset. *See also* He X., Lau E.H.Y., Wu P. *et al.* Temporal dynamics in viral shedding and transmissibility of COVID-19. *Nat Med* **26**, 672–675 (2020). doi.org/10.1038/s41591-020-0869-5 (<https://www.nature.com/articles/s41591-020-0869-5.pdf> (last visited July 7, 2020)) (examination of temporal patterns of SARS-CoV-2 viral shedding in 94 patients showed highest viral load in throat swabs at time of symptom onset, thereby inferring infectiousness peaked on or before symptom onset, and estimating that 44% of secondary cases were infected during the index cases' presymptomatic stage).

Droplets:

The current CDC site states the following with regard to droplet spread of the virus:

Person-to-person spread

The virus is thought to spread mainly from person-to-person.

- Between people who are in close contact with one another (within about 6 feet).
- Through respiratory droplets produced when an infected person coughs, sneezes, or talks.

- These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs.
- COVID-19 may be spread by people who are not showing symptoms.

<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>

(Updated June 16, 2020; last visited July 7, 2020).

The concept of droplet transmission of infectious diseases is hardly a new concept. In fact, routes of respiratory infectious diseases between persons were developed in the 1930s as part of research on tuberculosis transmission. Bourouiba, L., Turbulent Gas Clouds and Respiratory Pathogen Emissions: Potential Implications for Reducing Transmission of COVID-19 *JAMA*. 2020;323(18):1837-1838. doi:10.1001/jama.2020.4756 [Bourouiba 2020] (<https://jamanetwork.com/journals/jama/fullarticle/2763852> (last visited July 7, 2020)). As this author details, scientific advances at the time determined that the concept of “droplet transmission,” first recognized in 1897, not only involved exhalation of “large” droplets, but also involved smaller droplets (roughly 5 to 10 μm in size, but generally considered to be smaller than 5 μm), referred to as either “droplet nuclei” or “aerosols,” which could also transmit disease. “Such dichotomies continue to underly current risk management, major recommendations, and allocation of resources for response management associated with infection control, including for COVID-19.” *Id.*

Aerosols in the New Reality:

As noted in Bourouiba 2020, above, the author described the dichotomy of large v. small droplets (droplets v. droplet nuclei) which has served as the model for infection disease transmission since the 1930s. However, Bourouiba 2020 postulates that a new model for respiratory omissions is needed, especially in light of the COVID-19 epidemic. Specifically:

“Recent work has demonstrated that exhalations, sneezes, and coughs not only consist of mucosalivary droplets following short-range semiballistic emission

trajectories but, importantly, are primarily made of a multiphase turbulent gas (a puff) cloud that entrains ambient air and traps and carries within it clusters of droplets with a continuum of droplet sizes. The locally moist and warm atmosphere within the turbulent gas cloud allows the contained droplets to evade evaporation for much longer than occurs with isolated droplets. Under these conditions, the lifetime of a droplet could be considerably extended by a factor of up to 1000, from a fraction of a second to minutes.”

Id. (citations and references omitted). This “gas cloud” emitted from an infected individual is visually represented by a video published with the paper (<https://edhub.ama-assn.org/jn-learning/video-player/18357411>) (last visited July 7, 2020). As the video shows:

“Owing to the forward momentum of the cloud, pathogen-bearing droplets are propelled much farther than if they were emitted in isolation without a turbulent puff cloud trapping and carrying them forward. Given various combinations of an individual patient’s physiology and environmental conditions, such as humidity and temperature, the gas cloud and its payload of pathogen-bearing droplets of all sizes can travel 23 to 27 feet (7-8 m). Importantly, the range of all droplets, large and small, is extended through their interaction with and trapping within the turbulent gas cloud, compared with the commonly accepted dichotomized droplet model that does not account for the possibility of a hot and moist gas cloud. Moreover, throughout the trajectory, droplets of all sizes settle out or evaporate at rates that depend not only on their size, but also on the degree of turbulence and speed of the gas cloud, coupled with the properties of the ambient environment (temperature, humidity, and airflow).”

Id. (citations omitted).²

² An additional interesting correspondence discussing the potential for droplet nuclei transmission of SARS-CoV-2 is Anfinrud P, Stadnytskyi V, Bax CE, Bax A. Visualizing speech-generated oral fluid droplets with laser light scattering. Correspondence [published online April 15, 2020]. *N Engl J Med* 2020; 382:2061-2063; DOI: 10.1056/NEJMc2007800 (<https://www.nejm.org/doi/pdf/10.1056/NEJMc2007800?articleTools=true> (last visited July 7, 2020)) which begins:

“Aerosols and droplets generated during speech have been implicated in the person- to-person transmission of viruses, and there is current interest in understanding the mechanisms responsible for the spread of Covid-19 by these means. The act of speaking generates oral fluid droplets that vary widely in size, and these droplets can harbor infectious virus particles. Whereas large droplets fall quickly to the ground, small droplets can dehydrate and linger as “droplet nuclei” in the air, where they behave like an aerosol and thereby expand the spatial extent of emitted infectious particles. We report the results of a laser light-

Aboubakr 2020 summarizes studies examining “[t]he persistence of various CoVs in aerosols at different environmental conditions” The authors discuss two aerosolization studies involving SARS-CoV-2:

“The first study compared the decay rates of SARS-CoV-2 and SARS-CoV-1 within [3 hours] aerosolization time at room temperature (21-23°C) and a fixed relative humidity (RH) of 65%; both viruses were detectable after [3 hours] of aerosolization. The median half-lives were 1.09 and 1.18 [hours] for SARS-CoV-2 and SARS-CoV-1, respectively.”³

and

“In another study, aerosolized SARS-CoV-2 retained its infectivity for a period of [16 hours] at room temperature and the authors concluded that the virus can be considered as an airborne pathogen.”⁴

In addition to these studies, other papers have discussed the potential for SARS-CoV-2 to be transmitted through aerosols, including:

scattering experiment in which speech-generated droplets and their trajectories were visualized.”

(Citations omitted.) The video accompanying this correspondence can be seen at: <https://www.nejm.org/doi/full/10.1056/NEJMc2007800?referringSource=articleShare> (last visited on July 7, 2020).

³ van Doremalen N, Bushmaker T, Morris DH, et al. Aerosol and surface stability of HCoV-19 (SARS-CoV-2) compared to SARS-CoV-1. *Letter. New Engl J Med.* [published online March 17, 2020]. DOI: 10.1056/NEJMc2004973 (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7121658/pdf/NEJMc2004973.pdf> (last accessed July 7, 2020)); *N Engl J Med.* 2020;382:1564-1567 (<https://www.nejm.org/doi/pdf/10.1056/NEJMc2004973?articleTools=true> (last accessed July 7, 2020) [van Doremalen 2020]. van Doremalen 2020 studied the comparative persistence and decay rate of SARS CoV 1 and SARS-CoV-2 in a laboratory environment)

⁴ Fears AC, Klimstra WB, Duprex P, et al. Comparative dynamic aerosol efficiencies of three emergent coronaviruses and the unusual persistence of SARS-CoV-2 in aerosol suspensions. Preprint. *medRxiv.* 2020;2020.04.13.20063784. Published 2020 Apr 18. doi:10.1101/2020.04.13.20063784 (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7217084/pdf/nihpp-2020.04.13.20063784.pdf> (last visited July 7, 2020)) (testing aerosolized SARS-CoV-2 < 5 µm and leading the authors to conclude “that individuals infected with SARS-CoV-2 have the capacity to produce viral bioaerosols that may remain infectious over long periods of time after production via human shedding an airborne transport.”).

Liu Y, Ning Z, Chen Y, et al. Aerodynamic analysis of SARS-CoV-2 in two Wuhan hospitals. *Nature*. 2020;582(7813):557-560. doi:10.1038/s41586-020-2271-3 (<https://www.nature.com/articles/s41586-020-2271-3.pdf> (last visited July 7, 2020)) (“Although we have not established the infectivity of the virus detected in these hospital areas, we propose that SARS-CoV-2 may have the potential to be transmitted through aerosols. Our results indicate that room ventilation, open space, sanitization of protective apparel, and proper use and disinfection of toilet areas can effectively limit the concentration of SARS-CoV-2 RNA in aerosols. Future work should explore the infectivity of aerosolized virus.”); and

Sima Asadi, Nicole Bouvier, Anthony S. Wexler & William D. Ristenpart (2020) The coronavirus pandemic and aerosols: Does COVID-19 transmit via expiratory particles?, *Aerosol Science and Technology*, 54:6, 635-638, DOI: 10.1080/02786826.2020.1749229 (<https://www.tandfonline.com/doi/pdf/10.1080/02786826.2020.1749229?needAccess=true> (last visited July 7, 2020)) (“Clearly there are many complicated unknowns, which in general have stymied definitive assessment of the role of aerosols in airborne disease transmission. But given the large numbers of expiratory particles known to be emitted during breathing and speech, and given the clearly high transmissibility of COVID-19, a plausible and important hypothesis is that a face-to-face conversation with an asymptomatic infected individual, even if both individuals take care not to touch, might be adequate to transmit COVID-19.”);

Most recently, Morawska and Milton published a paper (signed on to by 239 other scientists) calling for the recognition of the potential for airborne spread of SARS-CoV-2. Lidia Morawska, Donald K Milton, It is Time to Address Airborne Transmission of COVID-19, *Clinical Infectious Diseases*, ciaa939, doi.org/10.1093/cid/ciaa939.⁵ In this open letter, the authors state:

⁵ Available at:

https://watermark.silverchair.com/ciaa939.pdf?token=AQECAHi208BE49Ooan9kKhWErcy7Dm3ZL_9Cf3qfKAc485ysgAAApwwggKYBgkqhkiG9w0BBwagggKJMIChQIBADCCAn4GCSqGSIb3DQEHATAeBgIghkgBZQMEAS4wEQQMezhfwRMA-vagtDDOAgEQgIICT9EjxSM8xydbheOzepKDsXc9oK8Cw6Lbr7LfQa7LDAJjfYU2EUf6t1Y7JVTUUtWgLXtlxlTodveV4DHbDjNZ2ZJrDusIIUZNFNLDjRmYZtdu8tvZR8rZzcCBc9XH0wnoarhBC81OQhC-OSMfi3a9A FWLEKr1bjEqKDeOKMyliFHd17Y8vnOPt3LOyfFe3GieA8CMCh3guHpXPJ_olvTwyLU6Q7GEPd6wIRw0D0yybpVCK7PULjvOKdH_6CLW184cL4NIPQELQDIzlfdsXzjfHtT3z2ZF8Pmy_961zCt2eQHsiGtcRLM6q0CG-Q5tfpkEFNwOxR5x9SIYv5KIVr9aKamAr1WotZ0p0h_aNBHuSRKIvo-Xuv-NKk1pf5nx703zTWL9tMdET4kKe2JbH48hbCQ2_ThFTJRJla2PVCN8veXaZIUGa4f21VCLf3j

“There is significant potential for inhalation exposure to viruses in microscopic respiratory droplets (microdroplets) at short to medium distances (up to several meters, or room scale), and we are advocating for the use of preventive measures to mitigate this route of airborne transmission.”

*Id.*⁶

Fomite:

The CDC site provides the following information on other ways the virus may be spread:

The virus may be spread in other ways

It may be possible that a person can get COVID-19 by **touching a surface or object that has the virus on it** and then touching their own mouth, nose, or possibly their eyes. This is not thought to be the main way the virus spreads, but we are still learning more about how this virus spreads.

(Updated June 16, 2020)

<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited July 7, 2020) (emphasis in original).

Early on, in an article cited by several policyholder counsel in business interruption Complaints, Moriarty, et al. reported on initial public health responses aboard the Diamond Princess cruise ship. Moriarty LF, Plucinski MM, Marston BJ, et al. Public Health Responses to

[Gvm1wFetkEQnzbRfvqIQvN6pIklCuUCQXRrkjDO5uTMUhSJ_OkGmqp3mZCppS71oEbziUcT-O-1 BXUya01jeis4LR_IYoFpeiJh2B7WRqI1mjSxx1qSleI8pGiQ8T2hBwk12JqA-Lzh_F8H0C46HRASHNhzeOA0K8WoiW4LMo7gv3c_gFKhB64_L7vaUKwyIZowhVo4k-6JKQkPicnbwyPf0nPO6USPmH-PGOB5BHEOsIFNEQYV9oUPda68uqKW7n4Q8Rdh05PHmQMhD3Y1VgMuuoZGUoFzpKvUT9OaK_eZJgweAD4TbGQW-VilhM6kDq3ZqMFpXIGVkd3LRTDZruA](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html) (last visited July 7, 2020).

⁶ This article recognizes that superspreaders may be transmitting disease through aerosols emitted from ordinary activities such as singing by citing to Shelly L Miller, William W Nazaroff, Jose L Jimenez, Atze Boerstra, Giorgio Buonanno, Stephanie J Dancer, Jarek Kurnitski, Linsey C Marr, Lidia Morawska, Catherine Noakes, Transmission of SARS-CoV-2 by inhalation of respiratory aerosol in the Skagit Valley Chorale superspreading event, *medRxiv* 2020.06.15.20132027; doi.org/10.1101/2020.06.15.20132027 (<https://www.medrxiv.org/content/10.1101/2020.06.15.20132027v2.full.pdf> (last visited July 7, 2020)).

COVID-19 Outbreaks on Cruise Ships — Worldwide, February–March 2020. *MMWR Morb Mortal Wkly Rep* 2020;69:347-352 dx.doi.org/10.15585/mmwr.mm6912e3 (<https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6912e3-H.pdf> (last visited July 7, 2020)).

A passage in that paper was stated:

“SARS-CoV-2 RNA was identified on a variety of surfaces in cabins of both symptomatic and asymptomatic infected passengers up to 17 days after cabins were vacated on the Diamond Princess but before disinfection procedures had been conducted (Takuya Yamagishi, National Institute of Infectious Diseases, personal communication, 2020). Although these data cannot be used to determine whether transmission occurred from contaminated surfaces, further study of fomite transmission of SARS-CoV-2 aboard cruise ships is warranted.”

Id. However, omitted from the passage and the article was any indication the SARS-CoV-2 RNA remained viable and capable of transmission – a proposition likely not true given fomite studies already underway at the time this article was released were showing the virus was no longer viable long before 17 days.

In another article cited by several policyholder counsel in business interruption complaints, Kampf, et al. reviewed 22 studies on non-SARS-CoV-2 HCoV-229E and Veterinary CoVs and the persistence of these coronaviruses on inanimate surfaces, as well as to determine the effectiveness of inactivation strategies with biocidal agents used for chemical disinfection in locations such as hospital facilities. Kampf G, Todt D, Pfaender S, Steinmann E, Persistence of coronaviruses on inanimate surfaces and their inactivation with biocidal agents, 104 *J. Hosp. Infection*, Issue 3, P246-251, March 1, 2020 [Kampf 2020]

(<https://www.journalofhospitalinfection.com/action/showPdf?pii=S0195-6701%2820%2930046-3> (last visited July 7, 2020)). The paper comes to two conclusions. First, Non-SARS-CoV-2 HCoV-229E “can persist on inanimate surfaces like metal, glass or plastic for up to 9 days[.]” Second, “[s]urface disinfection with 0.1% sodium hypochlorite or 62-71% ethanol significantly

reduces coronavirus infectivity on surfaces within 1 min[ute] exposure time. *We expect a similar effect against the SARS-CoV-2.*” *Id.* (emphasis added).

In Aboubakr 2020, the authors summarize several scientific studies examining CoVs’ infectivity on surfaces. The authors preface the summaries by stating:

“In general, the persistence of a given virus in the environment outside its host is essential to allow its spread. However, the characteristic of the virus, the characteristics of the biotic or abiotic environmental surface it contaminates, and the environmental conditions are important factors that determine the infectivity retention and extent and speed of the spread of the virus. Therefore, when an emerging respiratory virus such as SARS-CoV-2 is widespread, its long-time persistence on environmental surfaces and fomites is postulated.”

(Citations omitted.) Aboubakr 2020 goes on to discuss two papers which sample SARS-CoV-2 on various surfaces to determine the length of time the virus remains viable on the surfaces:

van Doremalen et al., 2020 (see above):

Finding SARS-CoV-2 exponentially decayed on all surfaces where applied, and further determining:

- no viable SARS-CoV-2 was measured on copper surfaces 4 hours after application;
- no viable SARS-CoV-2 was measured on cardboard surfaces 24 hours after application;
- viable SARS-CoV-2 was detected up to 72 hours after application on plastic but at substantially reduced levels, with a half-life of 6.8 hours; and
- no viable SARS-CoV-2 was detected up to 72 hours after application on stainless steel but at substantially reduced levels after 48 hours, and with a half-life of 5.6 hours.

and

Chin, Stability of SARS-CoV-2 in Different Environmental Conditions, *The Lancet Microbe* doi: 10.1016/S2666-5247(20)30003-3 (Correspondence)

(<https://www.thelancet.com/action/showPdf?pii=S2666-5247%2820%2930003-3>

last visited July 7, 2020)):

Testing the persistence of SARS-CoV-2 on various surfaces and fomites to find SARS-CoV-2 persistence, and time of complete decay, on various surfaces were as follows:

	<u>Persistence:</u>	<u>Time to Complete Decay:</u>
• Plastic:	4 days	7 days
• Stainless Steel:	4 days	7 days
• Glass:	2 days	4 days
• Surgical Mask (Outer Layer):	7 days	--
• Surgical Mask (Inner Layer):	4 days	7 days
• Paper:	30 minutes	3 hours
• Tissue Paper:	30 minutes	3 hours
• Banknote Paper:	2 days	4 days
• Wood:	1 day	2 days

Of note, this writer has yet to find a medical or scientific article which establishes or postulates that SARS-CoV-2 penetrates surfaces so as to alter the basic composition of the object on which the virus lands. Instead, the literature, like Kampf 2020, consistently discusses surface disinfection to remove the SARS-CoV-2, such as the following:

“The WHO has recommended that cleanliness be done with water and detergents to ensure environmental cleanliness, and then the use of common environmental disinfectants, such as sodium hypochlorite. The most well-known methods of surface disinfection to remove SARS-CoV-2 virus are, in short, the use of ethyl alcohol (62–70%), or hydrogen peroxide (0.5%) or sodium hypochlorite (0.1%, dilution ratio 1 to 50) with a contact time of 1 min.”

Eslami H, Jalili M. The role of environmental factors to transmission of SARS-CoV-2 (COVID-19). *AMB Express*. 2020;10(1):92. Published 2020 May 15. doi:10.1186/s13568-020-01028-0 (https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7226715/pdf/13568_2020_Article_1028.pdf (last visited July 7, 2020)).

Water:

The current CDC posting states:

Can the virus that causes COVID-19 spread through treated drinking water?

The virus that causes COVID-19 has not been detected in treated drinking water. Water treatment plants use filters and disinfectants to remove or kill germs, like the virus that causes COVID-19. The Environmental Protection Agency regulates water treatment plants to ensure that treated water is safe to drink.

Currently, there is no evidence that the virus that causes COVID-19 can be spread to people by drinking treated water. COVID-19 is spread mainly through close contact from person-to-person.

* * *

Can the COVID-19 virus spread through sewerage systems?

The virus that causes COVID-19 has been found in untreated wastewater. Researchers do not know whether this virus can cause disease if a person is exposed to untreated wastewater or sewerage systems. There is no evidence to date that this has occurred. At this time, the risk of transmission of the virus that causes COVID-19 through properly designed and maintained sewerage systems is thought to be low.

(Updated July 3, 2020)

https://www.cdc.gov/coronavirus/2019-ncov/faq.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fphp%2Fwater.html#Water (last visited July 7, 2020)).

However, water and wastewater systems in the United States typically utilize chemicals which would destroy SARS-CoV-2. But this does not mean SARS-CoV-2 cannot be viable in water or wastewater. As stated in a recent yet-to-be-peer-reviewed article:

“We quantify SARS-CoV-2 virus survivability within water and the risk of infection posed by faecal contaminated water within 39 countries. We identify that the virus can remain stable within water for up to 25 days, and country specific relative risk of infection posed by faecal contaminated water is related to the environment.”

Jamie Shutler, Krzysztof Zaraska, Thomas M Holding, Monika Machnik, Kiranmai Uppuluri, Ian Ashton, Lukasz Migdal, Ravinder Dahiya, Risk of SARS-CoV-2 infection from contaminated water systems, *medRxiv* 2020.06.17.20133504; doi.org/10.1101/2020.06.17.20133504

(<https://www.medrxiv.org/content/10.1101/2020.06.17.20133504v1.full.pdf> (last accessed July 7, 2020)). While this paper readily acknowledges “detection of SARS-CoV-2 virus in the aquatic environment does not necessarily translate into the presence of viable virus”, it still postulates the presence of the virus in the environment has potential to transmit disease.

Food:

The current CDC posting states:

“Coronaviruses are generally thought to be spread from person to person through respiratory droplets. Currently, there is no evidence to support transmission of COVID-19 associated with food. Before preparing or eating food it is important to always wash your hands with soap and water for at least 20 seconds for general food safety. Throughout the day use a tissue to cover your coughing or sneezing, and wash your hands after blowing your nose, coughing or sneezing, or going to the bathroom.”

[https://www.cdc.gov/coronavirus/2019-](https://www.cdc.gov/coronavirus/2019-ncov/faq.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fphp%2Fwater.html#Water)

[ncov/faq.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fphp%2Fwater.html#Water](https://www.cdc.gov/coronavirus/2019-ncov/faq.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fphp%2Fwater.html#Water) (Updated July 3, 2020; last visited July 7, 2020). See also,

Desai AN, Aronoff DM. Food Safety and COVID-19. *JAMA*. 2020;323(19):1982. doi:10.1001/jama.2020.5877 (<https://jamanetwork.com/journals/jama/fullarticle/2764560> (last visited July 7, 2020)) (“SARS-CoV-2 is primarily transmitted from person to person through respiratory droplets that enter the mouth, nose, or eyes by contaminated hands. There is no current evidence that SARS-CoV-2 is transmitted through food consumption.”)

However, at least one article examining SARS-CoV and MERS-CoV consider those viruses as having the potential for foodborne transmission. Greening G.E., Cannon J.L. (2016) Human and Animal Viruses in Food (Including Taxonomy of Enteric Viruses). In: Goyal S., Cannon J. (eds) *Viruses in Foods. Food Microbiology and Food Safety*. Springer, Cham. doi.org/10.1007/978-3-319-30723-7_2 (https://link.springer.com/content/pdf/10.1007%2F978-3-319-30723-7_2.pdf) (last visited July 7, 2020).

Mutations:

Early on, Tang, et al. wrote about dividing SARS-CoV-2 into two major lineages denoted as “L type” and “S type.” Tang X, Wu C, Li X, et al. On the origin and continuing evolution of SARS-CoV-2. *Natl Sci Rev.* 2020; nwaa036. Published 2020 Mar 3. doi:10.1093/nsr/nwaa036 (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7107875/pdf/nwaa036.pdf> (last accessed July 7, 2020)) (<https://academic.oup.com/nsr/article/7/6/1012/5775463> (last accessed July 7, 2020)). In the online version of the article, the authors considered whether the S type was a newer version of the virus and whether it has a higher transmission rate. However, these considerations appear to have been removed from the online version when it was published in the National Science Review.

More recently, Zhang, et al. and Hu, et al., in papers currently undergoing peer review, have written about a D614G mutation in the SARS-CoV-2 spike protein which has the potential of increasing the infectivity of the virus. Zhang L, Jackson CB, Mou H, et al. The D614G mutation in the SARS-CoV-2 spike protein reduces S1 shedding and increases infectivity. Preprint. *bioRxiv.* 2020;2020.06.12.148726. Published 2020 Jun 12. doi:10.1101/2020.06.12.148726 (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7310631/pdf/nihpp-2020.06.12.148726.pdf> (last visited July 7, 2020)); Jie Hu, Chang Long He, Qingzhu Gao, Gui Ji Zhang, Xiao Xia Cao, Quan Xin Long, Hai Jun Deng, Lu Yi Huang, Juan Chen, Kai Wang, Ni Tang, Ai Long Huang, The D614G mutation of SARS-CoV-2 spike protein enhances viral infectivity. *bioRxiv* 2020.06.20.161323; Published 2020 Jul 6. Doi: 10.1101/2020.06.20.161323 (<https://www.biorxiv.org/content/10.1101/2020.06.20.161323v2.full.pdf> (last visited July 7, 2020)). This mutation, originally seen in Italy and New York, now seems to be the prevalent

mutation in a growing majority of test results. It may not yet be known whether the increased infections seen in recent weeks are as a result of this mutated version of the virus.

Dose-Response Relationship:

In early May, 2020, Erin S. Bromage, Ph.D., an Associate Professor of Biology at the University of Massachusetts Dartmouth, published an online article entitled “The Risks - Know Them - Avoid Them” (<https://www.erinbromage.com/post/the-risks-know-them-avoid-them> (last visited July 7, 2020)). This Internet article is not peer-reviewed and is not published in any journal. In this article, Dr. Bromage postulates a calculation of a minimal dose of infectious virus particles needed to contract COVID-19 (estimated at 1,000 SARS-CoV-2 particles). Based on this number, Dr. Bromage extrapolates that an infected person’s cough or sneeze could release sufficient virus particles to almost immediately infect another person. This is contrasted with speaking with an infected person where five minutes of face-to-face discussion could be enough time to allow the infected person to release an infectious dose of the virus capable of being inhaled by the other person and the conversation. Dr. Bromage further extrapolates that even general breathing could be sufficient to infect another person if the individuals were in proximity for approximately 50 minutes.

Most recently, Zhang, et al., in an article yet to be peer-reviewed, have attempted to analyze the dose-response relationship involved with the transmission of COVID-19. Xiaole Zhang, Jing Wang, Deducing the Dose-response Relation for Coronaviruses from COVID-19, SARS and MERS Meta-analysis Results, medRxiv 2020.06.26.20140624; doi.org/10.1101/2020.06.26.20140624 (<https://www.medrxiv.org/content/10.1101/2020.06.26.20140624v1.full.pdf> (last visited July 7, 2020)). In this article, the authors cite to Chu, et al. as indicating “that the anticipated probability

of viral infection is about 12.8% within 1 m[eter] and about 2.6% and a further distance through a systematic review and meta-analysis.” See Chu DK, Akl EA, Duda S, et al. Physical distancing, face masks, and eye protection to prevent person-to-person transmission of SARS-CoV-2 and COVID-19: a systematic review and meta-analysis. *Lancet*. 2020;395(10242):1973-1987. doi:10.1016/S0140-6736(20)31142-9

[https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(20\)31142-9.pdf](https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(20)31142-9.pdf) (last visited July 7, 2020)) (based on 172 observational studies involving SARS-CoV, MERS-CoV and SARS-CoV-2, virus transmission was lower with physical distancing of 1 meter or more, and face masks could result in a large reduction in, but not elimination of, risk of infection).

THE COVID-19 DISEASE

It is likely that both first-party and third-party insurance coverage issues, to the extent they are influenced by the virus or the disease, will turn on the characteristics of the SARS-CoV-2 virus and not the resulting COVID-19 disease. However, the motivating factor behind tort claims will be the extent of the injury created by the disease. Therefore, while liability may turn on an ability to establish causation with regard to the transmission of the virus, damages will turn on an ability to establish the extent of physical and non-physical injury has been inflicted because of the disease.

To date, it appears non-wrongful death tort actions are usually asserting claims for damages relating to the time frame between onset of disease and recovery. In other words, the “personal injury” involved with these non-wrongful death claims would usually encompass a time frame between 14 days and perhaps as long as eight weeks. The question, however, is whether there are more long-lasting physical or non-physical (emotional, psychological, etc.) consequences caused by a contraction of the disease which would enhance the amount of damages being sought in the tort action from an entity purportedly responsible for the claimant contracting the disease.

Whether a claimant will be able to establish causation is beyond the scope of this paper. However, the non-epidemiological medical literature generated to date does identify potential long-term physical and/or possibly psychological damage from COVID-19 which could motivate the assertion of tort claims. For example, Mao, et al. in a limited study examined 214 patients with COVID-19 (88 with severe infection and 126 with nonsevere infection) to determine their neurologic manifestations of the disease. Mao L, Jin H, Wang M, et al. Neurologic

Manifestations of Hospitalized Patients with Coronavirus Disease 2019 in Wuhan, China. *JAMA Neurol.* 2020;77(6):683–690. doi:10.1001/jamaneurol.2020.1127

(<https://jamanetwork.com/journals/jamaneurology/fullarticle/2764549> (last visited July 7, 2020)).

Of the 214 patients, 78 had neurologic manifestations. “Patients with more severe infection had neurologic manifestations, such as acute cerebrovascular diseases (5 [5.7%] vs 1 [0.8%]), impaired consciousness (13 [14.8%] vs 3 [2.4%]), and skeletal muscle injury (17 [19.3%] vs 6 [4.8%]).” “Central nervous system symptoms were the main form of neurologic injury” Specific neurological symptoms included loss of sense of smell or taste, myopathy, and stroke; nonspecific neurological symptoms apparently included headache, depressed level of consciousness, dizziness, and possibly seizure. At autopsy, it was reported that COVID-19 patients showed “brain tissue was hyperemic and edematous and some neurons degenerated.”

The study’s conclusion noted the following:

“SARS-CoV-2 may infect nervous system and skeletal muscle as well as the respiratory tract. In those with severe infection, neurologic involvement is greater, which includes acute cerebrovascular diseases, impaired consciousness, and skeletal muscle injury. Their clinical conditions may worsen, and patients may die sooner. This study may offer important new clinical information on COVID-19 that would help clinicians raise awareness of its involvement of neurologic manifestations. It is especially meaningful to learn that for those with severe COVID-19, rapid clinical deterioration or worsening could be associated with a neurologic event such as stroke, which would contribute to its high mortality rate.”

Zhou, et al. have recently posted an on-line paper on the neurological characteristics of COVID-19 which discusses how SARS-CoV-2 might invade the central nervous system. Zhou Z, Kang H, Li S, Zhao X. Understanding the neurotropic characteristics of SARS-CoV-2: from neurological manifestations of COVID-19 to potential neurotropic mechanisms [published online ahead of print, 2020 May 26]. *J Neurol.* 2020;1-6. doi:10.1007/s00415-020-09929-7

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7249973/pdf/415_2020_Article_9929.pdf (last visited July 7, 2020). This paper notes COVID-19 patients have presented with a wide variety of neurological symptoms ranging from headache, dizziness, hyposmia and hypogeusia to more severe acute cerebrovascular disease (acute ischemic stroke, cerebral venous sinus thrombosis, cerebral hemorrhage, subarachnoid hemorrhage), as well as meningitis/encephalitis, acute necrotizing hemorrhagic encephalopathy, and acute Guillain–Barré syndrome (citing to papers describing these observations). The paper discusses potential pathways the virus may take to impact the central nervous system such that SARS-CoV-2 may be a neurotropic virus as was determined with SARS-CoV. In conclusion, this paper states:

“Both the structural basis of SARS-CoV-2 and several indirect and direct evidence mentioned above have provided proof to support the theory of neurotropic involvement of SARS-CoV-2. Thus, considerably more attention should be paid to the risk of neurological involvement in patients with COVID-19. We must keep the diagnosis of SARS-CoV-2 infection in mind when patients presented specific or nonspecific neurological symptoms during the pandemic.”

In addition to neurologic involvement, there is discussion in the literature of the potential psychiatric and neuropsychiatric manifestations of the disease. Rogers, et al. recently conducted a meta-analysis of literature databases to identify 65 peer-reviewed studies and seven pre-prints to utilize in assessing the psychiatric and neuropsychiatric presentations of SARS (the disease caused by SARS-CoV), MERS (the disease caused by MERS-CoV) and COVID-19. Rogers JP, Chesney E, Oliver D, et al. Psychiatric and neuropsychiatric presentations associated with severe coronavirus infections: a systematic review and meta-analysis with comparison to the COVID-19 pandemic. *Lancet Psychiatry*. 2020;7(7):611-627. doi:10.1016/S2215-0366(20)30203-0

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7234781/pdf/main.pdf> (last visited July 7, 2020)). The authors believe the effort is the “first systematic review and meta-analysis of the psychiatric consequences of coronavirus infection.”

This paper noted more than 15% of patients who had recovered from SARS and MERS reported sleep disorder, frequent recall of traumatic memories, emotional lability, impaired concentration, fatigue, and impaired memory for as long as 39 months after recovery, but that these findings may not necessarily correlate to COVID-19 given the lack of data developed to date. Data on diagnoses of depression, anxiety, post-traumatic stress disorder, and fatigue in patients with COVID-19 are stated as being preliminary or unpublished.

“We found only three cases of SARS-CoV-2-related psychiatric symptoms that were explicitly linked to hypoxic or encephalitic brain injury; this finding is consistent with the rarity of case reports that have associated detection of coronaviruses in the CNS with acute encephalitis or encephalomyelitis (mainly in immunocompromised or immunodeficient children).”

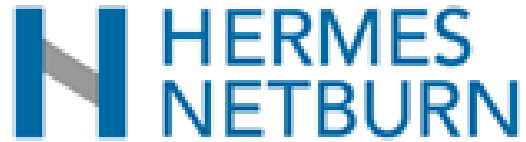
The paper concludes by stating:

“[A]lthough there are many ways in which mental health might be adversely affected by a pandemic, this review suggests, first, that most people do not suffer from a psychiatric disorder following coronavirus infection, and second, that so far there is little to suggest that common neuropsychiatric complications beyond short-term delirium are a feature. Clinicians must be aware of the possibility of depression, anxiety, fatigue, post-traumatic stress disorder, and rarer neuropsychiatric syndromes in the aftermath. The quality of studies to date has been variable, and ongoing surveillance is essential.”

THE TAKEAWAY: **HOW LONG WILL THIS LAST?**

“Historical evidence from influenza pandemics which occurred in the past century shows us that pandemics tend to come in waves over the first 2–5 years as the population immunity builds-up (naturally or through vaccination), and then the number of infected cases tends to decrease. This observation is the most likely trajectory for the SARS-CoV-2 virus. However, the near future will require a transition to a new normal, in which a combination of physical distancing, enhanced testing, quarantine, and contact tracing will be needed for a long time.”

Peterson 2020. See also Kissler SM, Tedijanto C, Goldstein E, Grad YH, Lipsitch M. Projecting the transmission dynamics of SARS-CoV-2 through the postpandemic period. *Science*. 2020;368(6493):860-868. doi:10.1126/science.abb5793 (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7164482/pdf/abb5793.pdf> (last accessed July 7, 2020)) (modeling COVID-19 disease up to 2024 based on seasonal coronaviruses assuming R_0 of 2.2 during winter and 1.3 during summer).



**NOVEL CORONAVIRUS AND
PROPERTY INSURANCE COVERAGE:
DIRECT PHYSICAL LOSS REQUIREMENTS
AND OTHER COVERAGE ISSUES**

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**Primerus Webinar Series
July 9, 2020**

As the COVID-19 pandemic first struck and then spread across the United States, news reports from across the globe – China, Italy, Iran and other early pandemic hotspots – showed grim images of the pandemic’s effect and the potential for it to overwhelm available health care resources. To limit the extent of the public health disaster threatening the United States, state and city governments responded by issuing orders designed to limit contact among people, curtail or slow the rate of infection and, thereby, prevent the pandemic from overwhelming the capacity of our domestic health care systems. A key element of most of these orders were provisions limiting the extent to which businesses could continue to operate in their “brick and mortar” locations. For those business permitted to continue operate in their physical locations, potentially disruptive “social distancing” and other protective measures were required.

Severe economic impacts have resulted. Not surprisingly, insurance coverage claims and lawsuits have followed. The first COVID-19 related coverage suit was filed in Louisiana state court on March 16, 2020.¹ Hundreds of additional coverage suits have followed. Generally, the suits look to the coverage for business income losses and other expenses available under the business interruption and civil authority coverages offered by many first party property insurance policies. This section of the paper discusses the merits of claims like these under commonly used policy wording.

Direct Physical Loss or Damage Requirement

Under most policies, a threshold issue for the existence, or not, of first party property insurance coverage, whether for damage to covered property, loss of business income, the impact of civil authority orders or extra expense, is whether a “direct physical loss of or damage to”

¹ *Cajun Conti, LLC, et al. d/b/a Oceana Grill v. Certain Underwriters at Lloyd’s, London* (La. Dist. Ct., Orleans Parish).

property has taken place as a result of a “covered cause of loss.” This requirement is stated in either the coverage grant itself or in the incorporated definition of “covered cause of loss.” Commonly used policy wordings in forms drafted by Insurance Services Organization, Inc. (“ISO”)² include the following:

Covered Property

We will pay for *direct physical loss of or damage to* covered property at the premises described in the Declarations caused by or resulting from any covered cause of loss.

Business Interruption

We will pay for the actual loss of Business Income you sustain due to the necessary “suspension” of your “operations” during the “period of restoration.”

The “suspension” must be caused by *direct physical loss of or damage to property* at premises which are defined in the Declarations. The loss must be caused by or result from a covered cause of loss.

Extra Expense

We will pay necessary extra expense you incur during the “period of restoration” that you would not have incurred, if there had been no *direct physical loss or damage to* property at the described premises. The loss or damage must be caused by or result from a covered Cause of Loss.

Civil Authority

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

² The policy wordings listed herein come from the following commonly used ISO forms: CP 00 30 10 12 (Business Income and Extra Expense Coverage Form), CP 00 10 10 12 (Business and Personal Property Coverage Form), CP 10 30 09 17 (Causes of Loss – Special Form) and BP 00 03 07 13 (Business Owners Coverage Form). Emphasis is added. While these are commonly used forms, many insurers have developed their own proprietary forms that may have materially different terms.

(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

The term “covered cause of loss” also incorporates the direct physical damage requirement.

A typical definition included in ISO drafted policy forms is “direct physical loss unless the loss is excluded or limited in the policy.”

By an overwhelming margin, cases addressing the direct physical damage or loss requirement hold that coverage is available only if the property damage is actual tangible and physical damage to or alteration of covered property (in the case of business income and extra expense coverage) or other nearby property (in the case of civil authority coverage). As a leading insurance treatise summarizes the law on this issue:

The requirement that the loss be “physical,” given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to exclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.

Couch on Insurance, Third Edition §148:46. Bedrock rules of insurance policy and contract construction—such as the requirement that words used in a policy be given their ordinary and usual meaning—mandate this result. The word “physical” is defined as limited to the tangible and material: “of, or relating to, or involving material things; pertaining to real, tangible objects.” Black’s Law Dictionary (10th Ed., 2014).

Courts across the country repeatedly and consistently have agreed that “direct physical loss of or damage to property” requires a distinct physical alteration of the structure or components of the building at issue. The following examples are instructive:

- Asbestos building materials: In *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3rd Cr. 2002), the court addressed the issue of whether the presence of asbestos within a build’s structure was direct physical loss. The court held it was not and, quoting Couch, explained “In ordinary parlance and widely accepted definition, physical damage to property means a distinct, demonstrable and physical alteration of its structure.” *Id.*, at 236. The fact that the presence of the materials required the insured to perform maintenance to prevent human exposure to asbestos did not make the loss a direct physical loss. *Id.*;
- Odors, mold and bacterial growth: In *Universal Image Productions, Inc. v. Chubb Corp.*, 703 F. Supp.2d 705, 710 (E.D. Mich. 2010), affirmed 475 Fed. Appx. 569 (6th Cir. 2012) the court held that odors, mold and bacterial growth resulting from water seepage or leakage into a building is not a direct physical loss, unless it rises to the level that renders the building uninhabitable, even with cleaning or maintenance;
- Power outages: In *Newman, Myers, Kreines, Gross, Harris, P.C. v. Great Northern Inc. Co.*, 17 F. Supp.3d 323, 330-331 (S.D.N.Y. 2014) the court address a loss of access to a building caused by a power outage, holding that not direct physical loss was present because there was no “compromise of the physical integrity of the workspace;
- Intangible losses: In *Crestview Country Club, Inc. v. St. Paul Guardian Ins. Co.*, 321 F. Supp.2d 260 (D. Mass. 2004), the difficulty level of a hole was diminished by the loss of a tree. The policyholder sought coverage, as a direct physical loss, for the cost of reconstructing the hole to restore its level of difficulty. The court held that this sort of intangible loss was not a direct physical loss. *Id.*, at 264.

Instead, what is required is an actual damage or change to the property, as a result of some fortuitous event, rendering it unfit for use or requiring repairs in order for the property to be restored to its prior condition. *See, e.g., MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.* 187 Cal. App. 4th 766, 779 (2nd Dist. 2010) (A direct physical loss “contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so”).

Is The Presence of Novel Coronavirus Direct Physical Loss or Damage?

Core common allegations in most of the COVID-19 pandemic related coverage claims being asserted by policyholders are the claims that their property has been physically damaged by the presence of novel coronavirus on building surfaces or otherwise within their insured premises or, in the case of civil authority coverage, that the governmental pandemic related orders were the result of such physical damage to other, nearby property. Under the majority rule as stated above—that direct physical loss of or damage to property requires structural or other tangible and physical injury to property—novel coronavirus does not cause such loss or damage. As discussed in detail in the program paper prepared by Dale Thornsjo, novel coronavirus causes no alteration or damage to the structure or components of a building or its contents. It is a fragile pathogen that in the space of a few hours, or at most a few days, outside of a human host will die of its own accord or can readily be killed immediately by disinfection or cleaning of surfaces – ordinary maintenance -- leaving no change, alteration or damage of or to the insured or other property whatsoever.

Such circumstances do not amount to direct physical loss. In *Mastellone v. Lightning Rod Ins. Co.*, 175 Ohio App.3d 23 (2008), the court considered a property insurance claim based upon the presence of mold contamination and resulting staining on the exterior siding of a building. The policy required direct physical damage. The court rejected the claim for coverage on the grounds that temporary conditions that could be removed by cleaning and “did not alter or otherwise effect the structural integrity of the siding” were not direct physical loss. *Id.*, at 41-42. *See also*, *Universal Image Prods., Inc. v. Federal Ins. Co.*, 475 F. Appx. 569, 573-4 (6th Cir. 2012) (cost of cleaning mold from heating, ventilation and air conditioning ducts is not due to direct physical loss); *Mama Jo’s, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, at *9 (S.D. Fla. 2018) (dust

conditions caused by nearby construction work requiring frequent cleaning did not constitute direct physical loss or damage).

As with other forms of microscopic level contaminants, the mere presence of novel coronavirus particles at a property, without actual physical damage to property, does not meet the requisites for property coverage. In *Columbiaknit, Inc. v. Affiliated FM Insurance Co.*, 1999 WL 619100 (D. Or. 1999), the court described what was necessary in the context of claims arising out of odors caused by microscopic level contamination:

The recognition that physical damage or alteration of property may occur at the microscopic level does not obviate the requirement that physical damage need be distinct and demonstrable. In the methamphetamine odor damage cases, the physical damage is demonstrated by the persistent, pervasive odor. In the absence of such odor, no physical damage could be found. The mere adherence of molecules to porous surfaces, without more, does not equate physical loss or damage.

Id., at *7.

In pressing their claims for coverage, policyholders likely will rely on the clear minority of cases that ignore or avoid the policy language and find non-physical and non-structural conditions or types of damage to qualify as “direct physical loss of or damage” to property. However, for multiple reasons, even application of those holdings is unlikely to save the type of claims under discussion.

First, those cases are extremely limited in scope, applying only when the condition at issue renders the insured property uninhabitable or unfit for its intended use. For example, in *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. Appx. 823 (3d Cir. 2005), a property insurer sought a declaration that persistent bacterial contamination of a drinking water well that caused bodily injury to inhabitants did not constitute direct physical loss of or damage to the policyholder’s home. In reversing the district court’s ruling in favor of the insurer and remanding the case, the Court held that if the “functionality of the ... property was nearly eliminated or destroyed” or the “property

was made useless or uninhabitable,” the direct physical loss element of coverage could be met. *Id.* at 826-7. *See also, Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of America*, 2014 WL 6675934 (D.N.J. 2014) at *8 (ammonia release resulted in direct physical loss for the time period during which it rendered property uninhabitable). Because of its transient characteristics and the ease with which it can be cleaned from surfaces, the mere presence of novel coronavirus on surfaces within a building space does not render property uninhabitable or unfit for its intended use.³

Second, the argument for coverage relating to the impact of the COVID-19 orders ignores that the damages at issue must be caused by the direct physical loss of or damage to property. Here, the closure orders are not directed at or intended to address any such damage. To the contrary, they are intended to “flatten the curve” of infection by limiting person to person contact and proximity and thereby reducing the risk of and rate at which the disease spreads.⁴

Finally, even if the novel coronavirus could on a theoretic level cause direct physical damage, the claims currently being presented to insurers by impacted businesses are not based upon the actual presence of the virus at a relevant location. In most of the cases that have been filed there is not even an allegation made that the particular property at issue is contaminated by or has even been tested for presence of the virus. The properties at issue in the claims have not been subject to closure orders or rendered uninhabitable based upon the actual presence of any

³ Indeed, if the mere presence or possible presence of the virus within space rendered business property uninhabitable or unfit for use, the reopening of businesses now happening in certain areas of the country would not be possible.

⁴ Some of the orders issued do include reference to the presence of the virus constituting damage to property, an apparent attempt to assist policyholders establish coverage where none otherwise would exist.

such viral contamination. Instead, the orders are preventative orders designed not to keep people away from contaminated property, but to keep people away from infected people.

Courts have begun reaching the direct physical loss or damage issue in the novel coronavirus/COVID-19 related coverage cases. As of July 8, 2020, there have been two such decisions, both of which strictly enforced the requirement. The first such decision, from the Southern District of New York, was in *Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd.* C.A. No. 1:20-cv-03311—VEC (S.D.N.Y.). There, the insured, a seasonal magazine, faced an inability to print and publish its upcoming edition due to COVID-19 pandemic related “stay at home” orders issued by the State of New York. To avoid what it characterized as irreparable harm, Social Life sought an injunction ordering the insurer to pay, under its property insurance coverage, the expenses associated with making alternate printing and publishing arrangements. At oral argument, the Court zeroed right in on the direct physical loss element of coverage, repeatedly asking counsel to identify the damage to the policyholder’s property. The magazine’s counsel pointed to the alleged or potential presence of novel coronavirus in the premises and to the state orders limiting access as a result of the COVID-19 pandemic. The Court did not agree that the physical damage requirement had been established, denied the motion and held, “...New York law is clear that this type of business interruption [coverage claim] needs some damage to the property to prohibit you from going [to the property]. You get an A for effort, you get a gold star for creativity, but this is just not what is covered under these insurance policies.” *Id.*, ECF No. 24-1 at p. 15.

The second decision, an oral ruling made from the bench by a Michigan state trial court judge, was in *Gavrilides Mgmt. Co., LLC v. Michigan Ins. Co.*⁵ This case involved a restaurant

⁵ Ingham County Circuit Court, C.A. No. 20-258-CB-C30 (July 1, 2020).

owner's claim for loss of \$650,000 in business income suffered after the State of Michigan issued orders limiting its two restaurants to take-out and delivery services. The insured claimed that the direct physical loss or damage requirement was met because dine-in services were physically restricted. The insurer filed a motion to dismiss the complaint. At the hearing on the motion, emphasizing that (1) no cases of COVID-19 had been traced to either restaurant, (2) no employees had tested positive and (3) the complaint filed by the insured affirmatively alleged that no novel coronavirus was present at either property, the Court called this argument "simply nonsense." She held that direct physical loss or damage must be "something with material existence ... that alters the physical integrity of the property." Apply that law to the allegations made, she granted the insurer's motion to dismiss.

While whether or not two trial court decisions represent a trend in the law is debatable, the early returns support the conclusion that courts will continue to require insureds to show tangible, physical alteration of relevant property to satisfy the direct physical damage requirement for property insurance coverage.

Other Issues

While the focus of this section of the paper is on whether the insurance coverage claims under discussion meet the direct physical loss or damage element required for coverage under all typical first party property coverages and policies, other coverage issues are presented with respect to some or all of these claims. As with any coverage matter, the particulars of each claim, each policy and the applicable law need to be considered and taken into account.

- **Do Governmental Orders Prohibit Access Sufficiently to Trigger Civil Authority Coverage?**

One example of such an issue, presented under typical Civil Authority coverage, is whether the government order or orders relevant to a particular claim actually "prohibits access" to the

policyholder's premises. It is well established that governmental action that partially prohibits or limits access to the insured premises is not sufficient to satisfy this element of Civil Authority coverage. *See, e.g., S. Hospitality, Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1139-41 (10th Cir. 2004); *Schultz Furriers, Inc. v. Travelers Cas. Ins. Co. of America*, 2015 WL 13547667, at *6 (N.J. Super. July 24, 2015). The orders issued across the country generally ***do not include*** total access prohibitions. Instead, they include varying restrictions on operations at places of business that differ based upon the type of business at issue.

A typical example is the March 23, 2020 COVID-19 related "stay at home" order issued in the Commonwealth of Massachusetts. That order included a multipage list of types of businesses and organizations deemed essential that could remain fully or partially open. Those business types included many of the business types that currently are asserting claims for recovery of business income and extra expense under civil authority coverages, including without limitation, restaurants and bars, hotels, medical facilities (including dental practices) and professional services firms, such as accountants and lawyers. Any analysis of the existence of Civil Authority coverage requires close review of exactly what the relevant orders provide and how the orders apply to the particular policyholder asserting the claim.

- **Virus and Bacteria Exclusion**

Another example of the other coverage issues presented is the virus or bacteria exclusion included by endorsement in many policies.⁶ For the reasons stated above, consideration of the exclusion rightfully never should be reached because the direct physical loss or damage

⁶ ISO Form Nos. CP 01 40 07 05 (Commercial Property Exclusion of Loss Due to Virus or Bacteria) and BP 06 01 01 07 (Business Owners Exclusion of Loss Due to Virus or Bacteria).

requirement cannot be met. However, in the event a claim advances past the direct physical loss issue, the virus or bacteria exclusion will be a significant defense to coverage on policies that include it. The endorsement states, in part:

We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.

The application of this exclusion does not appear to be the subject of reported court decisions⁷, but there is little reason to believe it will not be applied as written. Similar exclusions in property insurance policies have been enforced to apply to claims arising out of direct physical damage to property caused by microorganisms such as fungi or bacteria. *See, e.g. Certain Underwriters at Lloyd's, London v. Creagh*, 563 Fed.App'x 209 (3rd Cir. 2014) (microorganism exclusion applied to claim for direct physical damage arising out of bacterial contamination caused by a decomposing body). Cases addressing application of similar exclusions in liability insurance policies have applied them as written. In *Clarke v. State Farm Florida Ins. Co.*, 123 So. 3d 583 (Fla. Ct. App. 2012), the court applied a similar exclusion to preclude coverage for liability claims arising out of the alleged negligent transmission of a virus.⁸

The significance of the exclusion to the on-going COVID-19 related coverage litigation may relate more to claims under policies that do not contain the exclusion. The complaints that have been filed frequently contain variations of the argument that the development of the exclusion

⁷ The trial court in the *Gavrilides* cases discussed above also commented from the bench on the application of the virus and bacteria exclusion, indicating that even if the direct physical loss requirement had been met, the exclusion was not ambiguous and would apply to bar coverage.

⁸ Use of liability insurance cases to support application of property insurance exclusions should be approached with caution. In some jurisdictions, concurrent causation rules can limit the application of property policy exclusions. In the context of the types of claims at issue and the virus exclusion, that does not appear to be a concern.

2006, in the wake of earlier viral disease outbreaks, shows that the insurance industry considered viral outbreaks to trigger property coverage under one or more of the coverage grants included in the policy forms. In other words, if the original standard policy wordings did not provide coverage for property losses related to viral infections, why was it necessary to develop and offer an exclusion for that loss?

While perhaps a clever debating point, arguments along this line should fail because they get the principles and order of insurance policy interpretation exactly backwards. The first step in establishing coverage is that the policyholder must meet its burden of proof to show a claim within the coverage grant. Only once that burden has been met do policy exclusions – which the insurer must prove apply – have any relevance whatsoever. To the extent the intent behind the development of the exclusion becomes relevant in any coverage dispute, ISO published clear guidance with the issuance of the exclusion endorsement form demonstrating that the intent of the exclusion was to clarify that pandemic related losses are not and never were covered by property policies:

While property policies have not been a source of recovery for losses involving contamination by disease causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.

See, ISO, Commercial Fire and Allied Lines Forms Filing CF-2006-OVBEF, at p. 2.



**LEGISLATIVE RESPONSE TO UNAVAILABILITY OF
INSURANCE COVERAGE FOR NOVEL CORONAVIRUS
LOSSES**

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**Primerus Webinar Series
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INTRODUCTION

In the face of the SARS-CoV-2 (“novel coronavirus”) pandemic and ensuing economic shutdown, numerous businesses turned to their various policies of insurance seeking coverage for their financial losses. Subsequently many of these insureds were surprised to learn their policies did not afford coverage for losses due to viruses like the novel coronavirus. The unavailability of coverage for such losses was generally due to two factors. First, the policies at issue – typically business interruption policies – frequently contained virus exclusions. Second, many insureds failed to realize that policies designed to address business interruption losses are typically property-based or have a “property damage” component, requiring there be *direct physical loss of or damage to covered property* - arguably not met by contamination with the novel coronavirus.

The incorporation of virus exclusions in policies of insurance is largely a result of the 2003 Severe Acute Respiratory Syndrome pandemic, which caused an estimated \$40-\$50 billion in global losses. Efforts to include such a provision in policies commenced in 2006 and are exemplified by the Insurance Services Office, Inc.’s July 6, 2006 Circular titled “New Endorsements Filed To Address Exclusion of Loss Due to Virus or Bacteria.” In this Circular, ISO noted in relevant part:

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.

...

In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.

Separately, the American Association of Insurance Services echoed ISO’s concerns and reasoning underlying the need for such an exclusion:

Property policies have not been, nor were they intended to be, a source of recovery for loss, cost, or expense caused by disease-causing agents. With the possibility of a pandemic, there is concern that claims may result in efforts to expand coverage to create recovery for loss where no coverage was originally intended.

As noted above, because policies providing business interruption coverage are generally property-based, even in the absence of a virus exclusion, coverage typically has not been available for coronavirus losses due to the requirement of “property damage” – *direct physical loss of or damage to covered property*. Accordingly, many business owners arguing to the contrary have sought assistance from the courts. While the meaning of “property damage” is provided in the policy’s definitions, the courts have traditionally provided guidance on the interpretation of policy terms. The numerous lawsuits filed to date include class action suits and multi-district litigation against insurers seeking recovery of business interruption losses from the novel coronavirus. However, because these lawsuits are very fact specific, involve different states’ laws and will not produce meaningful decisions for years to come, they are of minimal assistance in the short term and ultimately may be of limited judicial precedent. As a result, the millions of businesses across the country in dire need of immediate economic assistance have increased the pressure on their respective state governments and the federal government to force insurers to pay claims for business losses caused by the novel coronavirus pandemic. All of the resulting legislative efforts discussed below implicitly recognize that existing policies do not cover virus-related losses.

STATE ACTION

Initially 8 states - Louisiana, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania and South Carolina - submitted legislation to retroactively force insurers to cover small business losses caused by the novel coronavirus, notwithstanding policy terms. Both Louisiana and New Jersey subsequently dropped their legislative efforts, and the remaining bills

are stalled in committee with no action currently planned. If enacted, the bills would effectively override coverage defenses to the novel coronavirus, including virus exclusions.

The bills proposed in Michigan and Ohio focus on insureds with fewer than 100 full-time employees. In Massachusetts and South Carolina, the focus is insureds with fewer than 150 full-time employees. In New York, the focus is on insureds with fewer than 250 full-time employees and in Pennsylvania the focus is on those companies meeting the United States Small Business Administration's criteria for a "small business." Specifics of the various bills are set forth below:

- **Massachusetts SD 2655:** "Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, notwithstanding the terms of such policy (including any endorsement thereto or exclusions to coverage included therewith) which includes, as of the effective date of this act, the loss of use and occupancy and business interruption in force in the commonwealth, shall be construed to include among the covered perils under such policy coverage for business interruption directly or indirectly resulting from the global pandemic known as COVID-19, including all mutated forms of the COVID-19 virus."
- **Michigan Bill 5739:** "An insurer that delivers, issues for delivery, or renews in this state a business interruption insurance policy shall include in the business interruption insurance policy coverage for business interruption due to the novel coronavirus (COVID-19)."
- **New York Bill A-10226B:** "Notwithstanding any provisions of law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes, but is not limited to, the loss of use and occupancy and business interruption, shall be construed to include among the covered perils under that policy, coverage for business interruption during a period of a declared state emergency due to the coronavirus disease 2019 (COVID-19) pandemic."

"Every policy of insurance or endorsement thereto... shall be construed to include among the covered perils under that policy, coverage for contingent business interruption during a period of a declared state emergency due the coronavirus disease 2019 (COVID-19) pandemic."

"Any clause or provision of a policy of insurance insuring against loss or damage to property, which includes, but is not limited to, the loss of use and occupancy and business interruption and contingent business interruption, which allows the insurer to deny coverage based on a virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress shall be null and void."

- **Ohio Bill 589:** “Notwithstanding any other law or rule to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption, in force in this state on the effective date of this section, shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic during the state of emergency.”
- **Pennsylvania Bill 1114:** “Notwithstanding any other law, rule or regulation, a policy of insurance insuring against a loss related to property damage, including the loss of use and occupancy and business interruption, shall be construed to include among the covered perils coverage for loss or property damage due to COVID-19 and coverage for loss due to a civil authority order related to the declared disaster emergency and exigencies caused by the COVID-19 disease pandemic.”

"Property damage." In a building, office, retail space, structure, plant, facility, commercial establishment or other area of business activity, the direct physical loss, damage or injury to tangible property, as a result of a covered peril, including, but not limited to: (1) The presence of a person positively identified as having been infected with COVID-19. (2) The presence of at least one person positively identified as having been infected with COVID-19 in the same municipality of this Commonwealth where the property is located. (3) The presence of COVID-19 having otherwise been detected in this Commonwealth.”

- **South Carolina Bill 1188:** “Notwithstanding any provision of law to the contrary, every policy of insurance in force in this State insuring against loss or damage to property, notwithstanding the terms of the policy and including any endorsement thereto or exclusions to coverage included therewith, that includes a loss of use and occupancy, or business interruption, shall be construed to include, among the covered perils under the policy, coverage for loss of use and occupancy, or business interruption, directly or indirectly resulting from the global pandemic known as COVID-19, including all mutated forms of the COVID-19 virus.”

While all of the proposed legislative bills rewrite the policies to provide blanket coverage for novel coronavirus business losses, only Pennsylvania takes the added approach of broadening the term “property damage” to include the presence of the novel coronavirus. Aside from Pennsylvania, efforts to equate “contamination” from the novel coronavirus with “property damage” appear to have primarily taken place on the local level, with municipalities linking the terms in their various emergency/shut down declarations in an attempt to assist businesses with insurance coverage.

The foregoing legislation is drafted to have retroactive application to policies currently in effect. Some of the states provide a framework by which insurers can seek reimbursement for some or all of the payout from that state, subject to a surcharge on future policies which subsequently could be passed on to customers.

Upon enactment, the legality of the bills will be immediately challenged by insurers in court, testing whether the bills violate state constitutions and the U.S. Constitution, including the Contract Clause [Article I, Section 10, Clause 1 precluding states from “impairing the obligations of contract.], the Taking Clause [Fifth Amendment prohibiting “private property be taken for public use without just compensation] and Due Process [Fifth and Fourteenth Amendments.]

Insurers have strong arguments that forcing them to pay billions of dollars for an event they did not agree to cover – indeed in many instances expressly excluded -- and for which they received no premium, substantially interferes with their expectations under the policies, impairs their rights, amounts to a public taking of assets and violates due process.¹ These arguments, however, do not end the analysis, as the proposed bills may still be constitutionally valid if the States can identify a significant and legitimate public policy justifying the action taken and demonstrating the reasonableness of same.

Anticipating constitutional challenges, the preamble to the Pennsylvania bill states:

Inherent in the police powers of the legislature is the ability to enact laws that are necessary for the good of the public. Those laws may result in an impairment of contract rights when the legislature has a significant and legitimate public purpose, such as remedying a social or economic problem.

¹ Courts in New York and South Carolina have struck down legislation that retroactively modified coverage under policies as unconstitutional. (*Health Ins. Ass'n of Am. v. Harnett*, (1978), 44 N.Y.2d 302, 376 (New York) [legislature retroactively required addition of maternity coverage.]; *Harleysville Mut. Ins. Co. v. State* (2012) 401 S.C. 15, 29 (South Carolina) [legislation mandated all CGL policies be retroactively amended to include a new statutory definition of “occurrence.”])

And:

Permitting coverage for business losses during the COVID-19 disease pandemic and Statewide outbreak is necessary to prevent further economic disruption and allow businesses to remain functioning in the face of continued and uncertain closures.

Here, the States may run into difficulty showing a legitimate public policy exists and that their actions were reasonable. Notwithstanding the use of self-serving language regarding the legitimacy of the proposed bills, the States do not assert that the policy terms they seek to override are illegal or unenforceable.

Nor does the shifting of losses from one group of private businesses to another solve a societal problem, especially where the group chosen to shoulder the losses explicitly intended and planned for no such involvement. In addition, where legislation favors one group and not a basic societal interest, it does not appear to be enacted for the public good. (*See Allied Structural Steel Co. v. Spannaus*, (1978) 438 U.S. 234, 248–49 [U.S. Supreme Court finding unconstitutional a Minnesota Private Pension Benefits Protection Act narrowly focused on private employers with at least 100 employees designed to protect a narrow class and not a broad societal interest.] While the stated purpose of the bills is to protect “businesses” in general, the bills, are narrowly tailored to “small businesses” and exempt larger businesses. Further, with the exception of Pennsylvania, the employee-size limitations in the bills do not reflect the U.S. Small Business Administration’s classifications for a “small business,” which, depending on the industry, can range from a few hundred employees to a few thousand. Consequently, the States will have to show how narrowly favoring certain “small business” interests protect a basic societal interest.²

² Some larger businesses not entitled to the benefits of the bills may that take issue with them as well.

Further, States may be hard pressed to empirically show that payment of business interruption losses will keep businesses afloat during the novel coronavirus crisis, given that the duration of and/or fall-out from the crisis may greatly exceed the term of business interruption coverage in effect and current losses are likely to vastly exceed available policy limits.

Lastly, business interruption losses are estimated to be in the hundreds of billions of dollars. Specifically, the American Property Casualty Insurance Association (“APCIA”) estimates that “[s]urplus for all of the U.S. home, auto, and business insurers combined to pay all future losses is roughly \$800 billion, with the combined capital of the top business insurance underwriters representing only a fraction of that amount.” It warns that “[a]ny action to fundamentally alter business interruption provisions specifically, or property insurance generally, to retroactively mandate insurance coverage for viruses by voiding those exclusions...threatens [insurance industry] solvency and the ability to make good on the actual promises made in existing insurance policies.” As such, the States would have to explain how rendering insurance markets insolvent would promote a legitimate public policy or is reasonable.

Not surprisingly, this last point has been the subject of much commentary from the insurance industry, as well as other branches of the various state governments and federal government. Insurance industry trade groups have warned that forcing insurers to pay business interruption claims would wipe out insurers’ \$800 billion surplus, rendering insurers unable pay other kinds of covered claims. David A. Sampson, president and CEO of APCIA estimates that novel coronavirus related business interruption losses for businesses with less than 100 employees is between \$255 billion to \$431 billion per month. If businesses with fewer than 500 employees are included, estimated losses climb to between \$393 billion to \$668 billion per month. He further expects that the number of business interruptions claims would be at least 10 times greater than

the 3 million combined claims made in 2005 for Hurricanes Katrina, Rita and Wilson, which is the highest number of claims for an annual period.

Echoing these concerns, on May 5, 2020, AM Best cautioned that “forcing insurers to pay for novel coronavirus related business interruption claims, despite any specific policy exclusions, could threaten many insurers’ solvency and reap disastrous consequences for the U.S. property/casualty insurance industry.” Standard & Poor’s, the leading provider of independent credit ratings since 1860, similarly forewarned it would “likely present a solvency issue for the sector.” The U.S. Treasury Department, on May 8, 2020, advised Senator Ted Budd that it is “aware of a number of state legislative efforts to retroactively change the terms of insurance contracts and compel coverage of Covid-19 business interruption losses” and has “concerns that these proposals fundamentally conflict with the contractual nature of insurance obligations and could introduce stability risks to the industry.”

Recently, on May 18, 2020, the Attorney Generals of Oklahoma, Alabama, Alaska, Indiana, Nebraska, South Carolina and Texas wrote President Trump, advising:

The risk of pandemics is typically not included in the price of business interruption insurance policies. ... Our concern is that certain parties are trying to alter the terms of these clear business interruption policies. We believe that a legal system must honor the contractual aspect of any insurance policy to protect the availability of insurance at affordable prices for everyone. If a business paid for pandemic coverage, we would not hesitate to hold accountable any insurance company that unfairly avoided paying the amount owed under the contract. But if a business paid for a policy that excluded pandemic coverage, government officials should not force insurance companies to give that business a benefit it did not purchase under the contract. ... A critical aspect of the rule of law in our society is creating the stability that comes from knowing that laws and contracts will be enforced as written, not according to what we wish they said after-the-fact. Altering insurance law to cover all pandemic claims under business interruption policies would devastate the capital stores for paying other insurance claims.³

³ Interestingly, the South Carolina Attorney General is a signatory to the letter, signaling there is a fundamental disagreement between the South Carolina executive and legislative branches on the legality of the proposed South Carolina bill.

The National Association of Insurance Commissioners (“NAIC”) and other insurance trade associations have vigorously lobbied against efforts to retroactively obtain business interruption coverage for the novel coronavirus, with NAIC “caution[ing] against and oppos[ing] proposals that would require insurers to retroactively pay unfunded COVID-19 business interruption claims that insurance policies do not currently cover.” NAIC warns:

Business interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19 and therefore include exclusions for that risk. Insurance works well and remains affordable when a relatively small number of claims are spread across a broader group, and therefore it is not typically well suited for a global pandemic where virtually every policyholder suffers significant losses at the same time for an extended period. While the U.S. insurance sector remains strong, if insurance companies are required to cover such claims, such an action would create substantial solvency risks for the sector, significantly undermine the ability of insurers to pay other types of claims, and potentially exacerbate the negative financial and economic impacts the country is currently experiencing.

In federal disclosure reports filed in April 2020, the insurance industry’s five main trade associations have spent about \$3 million for lobbying in the first quarter of 2020. Lobbying efforts have been effective and appear to have influenced Louisiana and New Jersey’s lawmakers to abandon their legislation. APCI was instrumental in thwarting a proposal by the District of Columbia requiring insurers to pay business interruption claims, mounting “a fierce lobbying campaign.” Lobbyists have also taken aim at softening lawmakers’ perceptions that the insurance industry has not stepped up to the plate. For example, the Insurance Information Institute and AM Best have highly publicized \$10.5 billion in premium refunds, discounts and credits provided by automobile insurers and \$430 million (\$280 million domestic and \$150 million international) in charitable donations made by insurers to causes tied to the novel coronavirus crisis.

With regard to the future of the 6 pending bills, we believe that none will ultimately emerge from committee or proceed to an actual vote. The bills were an initial knee-jerk reaction to the devastating economic toll taken on constituents from the novel coronavirus crisis. However, as

the dust begins to settle, legislators are quickly realizing there will be costly, protracted legal battles over enactment with little certainty of success and potential jeopardy to the solvency of the insurance industry. In this vein on May 4, 2020, Standard & Poor's, issued a statement indicating it believes the various proposed bills will fail, remarking "[w]e are taking the initial standpoint that these political efforts to retroactively change policy language will not materialize." Presently, Standard & Poor's does not see the pending legislative action as affecting insurer credit ratings.

FEDERAL ACTION

In the wake of business closures and early indications that insurers would not cover losses from the novel coronavirus, on March 18, 2020 a bipartisan group of members from the House of Representatives sent a letter to NAMIC, APCA, Big I (the "Independent Insurance Agents & Brokers of America, Inc.") and the Council of Insurance Agents and Brokers urging "[the associations] to work with [the associations'] member companies and brokers to recognize financial loss due to COVID-19 as part of policyholders' business interruption coverage," citing the fact that "[b]usiness interruption insurance is intended to protect businesses against income losses as a result of disruptions to their operations and recognizing income losses due to COVID-19 will help sustain America's businesses through these turbulent times, keep their doors open and retain employees on the payroll." That same day, the four trade industry organizations swiftly responded, advising that "[b]usiness interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19."

A day later, the "Problem Solvers Caucus, a bipartisan group of 48 House members, called upon the President and Congress to "legislatively declare the coronavirus a public health crisis, and, as such, a qualifying event for all existing force majeure contract provisions and business

interruption insurance policies.” Further comments by President Trump during an April 10, 2020 White House Coronavirus Task Force Daily Briefing suggested he might favor legislative action requiring insurers to pay for novel coronavirus business interruption claims:

You have people that have never asked for business interruption insurance, and they’ve been paying a lot of money for a lot of years for the privilege of having it, and then when they finally need it the insurance company says ‘we’re not going to give it.’ We can’t let that happen.

This concern was lessened by President Trump’s appointment of Chubb CEO Evan Greenberg, an ardent critic of efforts to force insurers to pay novel coronavirus business interruption losses, to the “Financial Services” group of the White House’s “Great American Economic Revival Industry Groups.”⁴

Numerous members of Congress, the Senate Banking Committee and the U.S. Treasury have publicly denounced any legislative measure to force insurers to retroactively pay novel coronavirus business interruption claims, citing to NAIC’s warnings that such proposals jeopardize the insurance industry’s solvency and would leave policyholders bare for other claims. As such, it is no surprise that the three federal acts currently under consideration to address pandemic losses are not retroactive in scope. One act, similar to the State legislation, forces insurers to provide coverage for business interruption losses for “major events” like a pandemic. Another act mandates that insurers must provide some amount of “additional coverage” for business interruption losses during a national emergency for which they may charge a premium, but requires a federal backstop mechanism to cover excessive losses. The third act is a voluntary reinsurance program patterned after the Terrorism Risk Insurance Act, whereby the federal government serves

⁴ Chubb Chairman and CEO Evan Greenberg has vowed to fight “tooth and nail” efforts in the courts and elsewhere to force retroactive business interruption coverage for novel coronavirus losses.

as a financial back stop once losses to insurers hit a certain threshold.⁵ Lastly, not to be overlooked, NAMIC, APCA and the Big I have proposed their own plan, which is an entirely government sponsored program similar to the National Flood Insurance Program.

- H.R. 6494, the “Business Interruption Insurance Coverage Act of 2020,” was introduced in April 2020. The Act voids any provisions in business interruption or property insurance policies excluding coverage for novel coronavirus related losses and losses resulting from certain other “major events”. The legislation would apply to businesses of all sizes and would preempt any conflicting state laws permitting insurers to exclude such coverage. The legislation also redefines “business interruption insurance coverage” to be coverage available for losses resulting from periods of suspended business operations. Significantly, there is no reimbursement provision included in this legislation for insurers paying COVID-19 related claims -- only the possibility of a potential reinstatement of exclusions upon failure to pay an increase in premium. This bill conflicts with recently proposed with H.R. 7011, discussed below.

H.R. 6464 does not have a federal backstop and places the entire risk on insurers. In addition to possible due process violations, if enacted, the legislation would jeopardize the solvency of the insurance marketplace should there be a “major event,” which members of Congress, the Senate Banking Committee and the U.S. Treasury have noted would have a deleterious effect on the U.S. economy. For this reason, we do not see this Act as garnering congressional or insurer-industry support and/or make it out of committee discussion.

- H.R. 6497, the “Never Again Small Business Protection Act,” was also introduced in April 2020. The Act requires insurers offering business interruption insurance to make available additional coverage to keep small businesses afloat during national emergencies, including business shutdowns lasting 30 days or longer due to a local, state, or federal government order. The “additional coverage” to be provided is not addressed. H.R.6497 is not limited to pandemics or other communicable diseases. Benefits, however, would not be paid to any business involuntarily terminating the employment or health insurance of any employee during the national emergency. Insurers would only be able to exclude coverage for national emergencies if they have received a written statement from the policyholder affirmatively authorizing the exclusion, or if the policyholder fails to pay premiums associated with the additional coverage. The Act requires a federal backstop to “reinsure insurers for

⁵ The term “backstop” refers to when the federal government stands behind the insurance program financially, but much of the risk, especially in the first instance, is borne by the insurance industry.

excessive losses” but fails to provide any details on the backstop, only mandating that a study on a backstop mechanism be commissioned.

H.R.6497 is somewhat of a hybrid of H.R. 7011, discussed below. Unlike H.R. 7011, it requires that insurers make available business interruption insurance for certain national emergencies. Like H.R. 7011, there is no discussion of affordability for small businesses or how premiums would be determined. The act is nebulous and contains vagaries making serious consideration by Congress or insurers as drafted difficult. Specifically, pandemics by their nature are widespread, with losses likely to be measured in the trillions, not billions, of dollars. The amount of income lost by businesses varies widely. While previously an exceedingly rare event, pandemics or other national emergencies may become less infrequent. Pricing premiums will be a challenge.

- H.H.7011, the “Pandemic Risk Insurance Act of 2020” (“PRIA”), was introduced by Congresswoman Carolyn Maloney on May 26, 2020 along with 20 co-sponsors. PRIA is a federal backstop patterned after the Terrorism Risk Insurance Act (“TRIA”), created in response to the September 11, 2001 terrorists attack.⁶ Unlike TRIA, PRIA is currently voluntary. Participating insurers would offer pandemic-related business interruption and event cancellation coverage. Insurers would pay an upfront reinsurance premium, whereas in TRIA there was no similar premium. No losses would be paid under the program until aggregate industry insured losses exceed a \$250 million aggregate trigger. The federal share of losses would be 95% of insured losses above each insurer’s deductible. The insurer deductible is defined as “the value of the participating insurer’s direct earned premiums during the immediately preceding calendar year, multiplied by 5 percent.” The term “covered public health emergency” means any outbreak of infectious disease or pandemic—

⁶ Prior to the September 11 attacks, coverage for losses from such attacks was normally included in general insurance policies without additional cost to policyholders. In the aftermath of the attacks, insurers and reinsurers ceased to insure the terrorism risk in the United States, and by February 2002 commercial exclusions for terrorism were approved for use in 45 states. Some observers feared the unavailability of terrorism insurance would have a wider negative economic impact, because such insurance is required to consummate a variety of transactions (e.g., real estate and loan security). Under TRIA, the federal government shares the losses on commercial property and casualty insurances should a foreign terrorist attack occur, with potential recoupment of the loss sharing after the fact. TRIA requires insurers to make terrorism coverage available to commercial policyholders but does not require policyholders to purchase the coverage. Once aggregate losses for a certified terrorist event exceed a \$200 million threshold limit and insurer deductibles in a given year, insurers and the federal government will then reimburse 80% of losses up to \$100 billion. TRIA has yet to be tested, since there has not been a certified terrorist act since its enactment.

(i) for which an emergency is declared, on or after January 1, 2021, under the Public Health Service Act; and (ii) that is certified by the Secretary of Health and Human Services, as a public health emergency.

There is some concern that modeling PRIA after an untested insurance program may not be sound. Insurer participation in PRIA is currently optional presumably because the insurance industry has been largely unwilling underwrite the risk of losses caused by a virus or pandemic event since 2006, except in exchange for substantial premiums. Trying to entice insurers to participate may be challenging, given the potential of staggering losses, the enormous difficulty in pricing premiums, uncertainty regarding the timing/frequency/quality of other pandemics, and the difficulty in recouping lost capital paid on claims.

Shortly before PRIA was formally introduced, the Casualty Practice Council of the American Academy of Actuaries sent Congresswoman Maloney a May 11, 2020 letter, advising:

The commercial insurance model does not work well for events like pandemics when the potential cost is large with no clear maximum and occurs very infrequently. The reasons include the following:

- The expected cost is difficult to determine. Insurers' modeling techniques include significant uncertainty in the estimation of the frequency or severity of potential pandemic-related losses.
- The estimated costs for adding coverage of pandemic risk to BI policies could far outstrip the annual premium for all other aspects of the insured risk, thereby reducing the affordability of the primary coverage.
- Commercial reasons make it impractical for insurers to charge a high, unaffordable premium and to set aside sufficiently large amounts of capital and assets to support the exposure.
- Pandemic losses are correlated with declines in the value of assets. As a result of the economic shocks that accompany a pandemic event, the value of the assets set aside to pay the claims could be impaired as part of the event. (Such correlation is illustrated by thinking about why it is not wise to write fire insurance on a building where the insurer has a mortgage investment. In the event of a fire, the insurer would have to pay out a claim at the same time that the value of its assets declined.)

- Geographic risk diversification, as already mentioned, is not possible due to the global nature of the event.

The Association concluded that “loading the estimated full cost of pre-funding payment of claims for business interruption in the next pandemic event—including the proposed new Pandemic Risk Reinsurance Program—onto the BI insurance contract would grossly distort the cost of that product and make it impractical for consumers.”

- “The Business Continuity Protection Program” (“BCPP”) was introduced on May 21, 2020 by NAMIC, APCIA and Big I in anticipation of PRIA. It is described as a federally-back “pandemic solution.” According to Charles Chamness, NAMIC’s president and CEO, “Pandemics simply are not insurable risks; they are too widespread, too severe, and too unpredictable for the insurance industry to underwrite.” Unlike PRIA, BCPP is a solution that:

. . . can work for everyone—customers of all sizes and structures—to provide protection against widespread economic shutdowns due to a future viral outbreak. Much of the dialogue to date has involved a program modeled after the Terrorism Risk Insurance Program, created after the 9/11 terrorist attacks under the Terrorism Risk Insurance Act (TRIA). However, a TRIA-like program, with an industry financial role, does not square with the fundamental notion that pandemics are not insurable risks. The risks are too fundamentally different in nature and scope.

Under the BCPP, similar to the National Flood Insurance Program managed by the Federal Emergency Management Agency, short-term “revenue replacement assistance” would be made available through the federal government. Businesses could purchase a desired level of protection for 3 months relief for up to 80% of payroll (excluding highly compensated employees), employee benefits, and operating expenses. Participation in the program would be facilitated through state-regulated insurance entities. Little congressional support has been shown for BCPP to date. Indeed, with respect to the future of BCPP, Congresswoman Maloney remarked that it is “not going to pass [through Congress].”

CONCLUSION

There is currently intense pressure on Congress from the public to create a safety net for businesses against future pandemics. That pressure is intensified by worries of a second wave of

the novel coronavirus. Notwithstanding this pressure, there are numerous issues and likely constitutional challenges to certain of the legislation currently under consideration.

We do not believe the legislation proposed by Massachusetts, Michigan, New York, Ohio, Pennsylvania and South Carolina to force insurers to retroactively pay business interruption losses for the novel coronavirus will be successful. Should any of the bills be enacted, the State legislators will face costly litigation with unknown certainty of success, and they risk the solvency of the insurance industry.

There also appears to be little congressional or insurer support for H.R. 6464, and we would expect insurers to raise constitutional challenges if it were enacted. H.R. 6497, as presently drafted, is incomplete, contains numerous uncertainties and is overshadowed by PRIA. BCPP seems fated to be a “no-go”, as it only provides partial relief for any pandemic/disaster and does so fully on the government’s dime. Although congressional support for PRIA seems to be growing, participation by insurers in the Act is currently voluntary, and it appears financially risky for those that do participate. Indeed, it remains to be seen whether the small businesses most hurt by pandemics will be able to afford the high premiums for coverage afforded under PRIA.



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THIRD-PARTY COVERAGE CONSIDERATIONS IN NOVEL CORONAVIRUS CASES

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I. Introduction

While first-party actions have dominated the early filings and literature since the novel coronavirus initially reached the United States, third-party coverage litigation is sure to follow. Some early bodily injury liability claims and lawsuits have targeted low hanging fruit, such as retailers and nursing homes. These actions include a Wal-Mart employee's suit alleging he contracted the virus at work and several actions against nursing homes. Typically, claimants allege that the insured negligently failed to implement sufficient safeguards to protect against transmission of the virus. This article will focus on the coverage implications of actions against retailers, healthcare facilities, and other businesses that may be blamed for deaths and illnesses caused by novel coronavirus.

II. Examples of Actions Presenting Third-Party Coverage Issues

A. The *Wal-Mart* case

One of the earliest novel coronavirus third-party liability actions was filed in Cook County, Illinois by the estate of Wando Evans. Mr. Evans was a Wal-Mart employee who allegedly contracted the virus at work and died. His estate filed suit against Wal-Mart and "J2M-Evergreen", owner of the retail shopping center that housed the Wal-Mart where Mr. Evans worked. The suit includes nineteen separate allegations of willful and wanton misconduct against Wal-Mart. Those range from the alleged failure to close or sterilize the store, to the failure to provide an adequate personal protective equipment ("PPE"), to the failure to test employees before allowing them into the workspace. The allegations against J2M focus on its failure to cease operations and failure to follow CDC guidelines.

B. The *Brighton Gardens* (nursing home) case

Other target defendants sure to experience significant novel coronavirus litigation are nursing homes and similar senior care facilities. In Kansas, the family of Gordon Grohman, Sr., a resident of Brighton Gardens, a senior living and skilled nursing facility, sued its owners, operators, and director for bodily injury, lost chance of survival, and wrongful death. The suit alleges Mr. Grohman died several days after he stopped eating and one day after he finally tested positive for the virus. Within 18 days of Mr. Grohman's death, 75 other cases and 13 deaths were reported at Brighton Gardens. Among other claims, the Grohman petition alleges the decedent was "cut off" from his family and, therefore, completely reliant upon the nursing home's staff for his well-being. The specific allegations of negligence include:

- The defendant failed to follow "proper infection protocols" to prevent an outbreak in its facility;

- The defendant failed to prevent its workers from working while symptomatic (7 staff tested positive one week before the decedent's death);
- The defendant failed to properly train staff on PPE;
- The defendant failed to effectively quarantine symptomatic residents;
- The defendant failed to adhere to social distancing guidelines;
- The defendant failed to monitor and assess, re-assess, and document the decedent's condition;
- The defendant failed to notify the decedent's family or physician of his change in condition; and
- The defendant failed to seek timely emergency treatment for the decedent.

Many of the allegations against Brighton Gardens are peculiar to nursing homes, given their duties to monitor and care for residents, but similar allegations could be made against other businesses. For instance, allegations of failure to implement "proper infection protocols" could be leveled at any public accommodation, delivery service, or retail outlet alleged to have exposed a claimant to the virus. Specifically, the failure to implement or enforce effective disinfectant, PPE, and social distancing guidelines could form the basis for a claim against any almost any business, based on allegations that the claimant was exposed and contracted the virus on an insured premises or from an insured employee.

C. Other similar claims

Once the actions against obvious hotspots or deep-pocketed target defendants have been filed, claims against bars, restaurants, and other high-density public accommodations may follow. The nature and substance of the claims against retailers, restaurants, commercial property owners, and nursing homes will turn in large part on the science surrounding the risks of contracting and dying from novel coronavirus. The means of transmission, i.e. direct physical contact, surface contact, ingestion, or inhalation will all bear on the strength of any given claim. For purposes of our coverage discussion, however, those important facts will take a back seat to other legal and scientific arguments. These materials focus on the insurance coverage aspects of actions resulting from the first pandemic of this scale in our modern litigious society.

III. CGL and Business Liability Coverage Considerations

A. Insuring agreement

1. Occurrence

At first blush, the basic coverage requirement of an accidental “occurrence” seems to be present for many of the allegations in the Wal-Mart and Brighton Gardens lawsuits. Failure to train and supervise employees are common allegations in bodily injury cases against commercial insureds. Likewise, the failure to implement reasonable policies and procedures to guard against bodily injuries to others are frequently alleged covered causes of loss. For instance, if a restaurant fails to implement and enforce sanitation protocols for its kitchen and a patron suffers food poisoning, a covered claim may result. Similarly, if a contractor fails to implement and enforce procedures to protect those who come into contact with its jobsite and a person is injured after being struck by equipment or construction material, a covered lawsuit is almost sure to follow. How, then, is the novel coronavirus different?

Nearly all general liability policies are written on an “occurrence” basis, requiring that bodily injury or property damage arise from an accidental occurrence. As one court explained, however, “[e]veryone knows what an accident is until the word comes up in court.”¹ In other contexts, insurers have successfully argued that the transmission of a disease is not an accident. For example, the Southern District of New York court, deciding coverage under an accidental death policy, reached back to an opinion by Justice Cardozo in a worker’s compensation case to support its conclusion that the acquisition of a “community spread” strep infection was not an “accident.”² The threshold finding of an accidental “occurrence” may not be a foregone conclusion in claims involving novel coronavirus infections.

By way of comparison, courts have almost uniformly concluded that the transmittal of sexually transmitted disease is a reasonably expected consequence of sexual assault or sexual contact by an insured who knows he or

¹ *Brenneman v. St. Paul Fire & Marine Ins. Co.*, 411 Pa. 409, 192 A.2d 745, 747 (1963).

² “Germs may indeed be inhaled through the nose or mouth, or absorbed into the system through normal channels of entry. In such cases their inroads will seldom, if ever, be assignable to a determinate or single act, identified in space or time. For this as well as for the reason that the absorption is incidental to a bodily process both natural and normal, their action presents itself to the mind as a disease and not an accident.” *Svensson v. Securian Life Ins. Co.*, 706 F. Supp.2d 521, 528 (S.D.N.Y. 2010).

she is infected.³ A similar analysis may be applied to an insured, who is a known or presumptive positive and fails to self-isolate or protect others from transmission of novel coronavirus. Could a court conclude that violating social distancing or mask guidelines by someone who has tested positive for the virus is akin to someone initiating sexual contact with knowledge that they have herpes or are HIV positive?

These issues have been argued previously in various contexts. For instance, a federal district court in New York held, with very little analysis, that transmission of the herpes and HPV viruses, even by a known carrier, is still an “accident” for purposes of liability coverage.⁴ Given that most general liability and business policies define “bodily injury” to include “sickness or disease”, often subject to various exclusions, it seems likely that many courts will conclude that the transmission of such a sickness or disease as novel coronavirus is an accidental occurrence, if transmitted via an alleged act of negligence.⁵

2. “Bodily injury” Issues

As indicated above, most commercial general liability and business liability policies include “sickness or disease” in their definition of “bodily injury” to one degree or another. Specific types of illnesses are often expressly excluded, however. For instance, bodily injuries arising out of exposure to silica, asbestos, fungi, bacteria, or lead are all commonly excluded by endorsement.

³ See e.g. *Travelers Commercial Ins. Co. v. Ancona*, No. 14-CV-04379-RS, 2015 WL 13376709, at *6 (N.D. Cal. Apr. 6, 2015); *State Farm Fire & Cas. Co. v. Scarinci*, 931 F.2d 897 (9th Cir. 1991); *Merced Mut. Ins. Co. v. Mendez*, 213 Cal.App.3d 41, 50, 261 Cal.Rptr. 273, 280 (Cal.App. 1989). *Mid-Century Ins. Co. v. L.D.G.*, 835 S.W.2d 436, 438 (Mo. Ct. App. 1992) (“[F]oreseeability is not to be measured by what is more probable than not, but includes what is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct.”) (quoting *Rogger v. Voyles*, 797 S.W.2d 844, 847 (Mo.App. 1990)).

⁴ The Southern District of New York summarily rejected the argument that a known carrier’s transmission of the herpes and HPV viruses was intentional as a matter of law. “The plaintiffs in the Underlying Action allege both intentional and negligent transmission of the herpes and HPV viruses. A reasonable trier of fact could certainly conclude that Koegler's alleged conduct amounted only to negligence, even if he knew that he carried the viruses.” *Koegler v. Liberty Mut. Ins. Co.*, 623 F. Supp.2d 481, 483–84 (S.D.N.Y. 2009).

⁵ We note, for purposes of commercial auto liability coverage, outcomes may differ. Commercial auto policies typically require an “‘accident’ ...resulting from the ownership, maintenance or use of a covered ‘auto.’” Transmittal of novel coronavirus by a driver or occupant may not be deemed to result from the use of the vehicle. Whether other courts would reach similar conclusions in the face of allegations a claimant contracted COVID-19 from improper maintenance of a bus, taxi, or other form of public transportation remains to be seen.

In cases such as those against Wal-Mart and Brighton Gardens, where the claimants actually contracted the disease COVID-19, the bodily injury element of the insuring agreement should be easily satisfied.

Other claims may arise, however, for the emotional distress caused by “near misses”, if a claimant is potentially exposed to novel coronavirus but never infected, yet experiences emotional distress as a result. Imagine the other residents of Brighton Gardens watching 76 of their fellow residents become infected, knowing the high incidence of death among seniors who contract COVID-19 and the risk they face. It seems likely those residents could state claims for emotional distress, fear of contracting the disease, and witnessing deaths of their fellow residents as they are effectively trapped in a contaminated facility. Is the entirety of an adult living facility on lockdown due to a novel coronavirus outbreak potentially within the “zone of danger”?

Courts have employed a number of approaches and analyses to determine whether stand-alone emotional distress constitutes “bodily injury”, as that term is defined in most commercial policies. Courts have struggled with the concept of coverage for emotional distress claims independent of any physical injury, sickness, or disease.⁶ Whether mere exposure to the novel coronavirus might suffice to establish “bodily injury” as defined by a typical CGL or business liability policy is unclear. In other contexts, however, exposure to harmful substances has been deemed to meet the definition of “bodily injury”, even in the absence of symptoms. For example, “the New Jersey Supreme Court has found that exposure to harmful substances, even when that exposure is not immediately accompanied by physical symptoms, can be ‘bodily injury’ under a CGL policy.”⁷ Likewise, “exposure to asbestos, even without accompanying symptoms, was ‘bodily injury’ due to the increased likelihood of causing or contributing to disease.”⁸

B. Exclusions

1. Specific virus and related exclusions

Many modern CGL Business policies include specific “virus” exclusions or lump viruses in with mold, fungus, and bacteria exclusions. Some policies also include “Pathogenic Organisms Exclusionary” endorsements, which bar coverage for damage or injury resulting from any bacteria, yeasts, mildew,

⁶ See e.g. *Am. Fire & Cas. Co. v. BCORP Canterbury at Riverwalk, LLC*, 282 F. App'x 643, 652 (10th Cir. 2008); *Liberty Corp. Capital Ltd. v. Peacemaker Nat'l Training Ctr., LLC*, 348 F. Supp.3d 585, 592 (N.D. W. Va. 2018); *ERA Franchise Sys., Inc. v. N. Ins. Co. of New York*, 32 F. Supp.2d 1254, 1259 (D. Kan. 1998), aff'd, 208 F.3d 225 (10th Cir. 2000).

⁷ *Baughman v. U.S. Liab. Ins. Co.*, 662 F. Supp.2d 386, 395–96 (D.N.J. 2009).

⁸ *Id.*

virus, fungi, mold or their spores, mycotoxins or other metabolic products. Other exclusions focus on the end result of exposure to a virus, i.e. the disease. For instance, the ISO “Communicable Disease Exclusion” – CG 21 32 05 09 limits coverage for:

“Bodily injury” or “property damage” arising out of the actual or alleged transmission of a communicable disease.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the:

Supervising, hiring, employing, training or monitoring of others that may be infected with and spread a communicable disease;
Testing for a communicable disease;
Failure to prevent the spread of the disease; or
Failure to report the disease to authorities.⁹

Application of these and similar exclusions would seem more likely under circumstances where transmission and infection by virus is inherently “pathogenic”.¹⁰ Since the novel coronavirus is a strain of influenza, it meets the common definition of a “communicable disease”.¹¹ The battle for application of these types of exclusions will likely focus on specific policy language. For instance, various uses of the terms “resulting from”, “because of”, or “arising out of” may dictate the scope and application of these exclusions in cases alleging injury from the transmission or failure to protect against the transmission of novel coronavirus.¹²

⁹ For an example of the broad application of a similar exclusion, see *Fe-Ma Enterprises v. James River Ins. Co.*, No. CV M-08-373, 2009 WL 10693571, at *4 (S.D. Tex. Nov. 30, 2009).

¹⁰ “Pathogenic”: causing or capable of causing disease.” <https://www.merriam-webster.com/dictionary/pathogenic> (last visited July 8, 2020).

¹¹ “Communicable disease”: an infectious disease (such as cholera, hepatitis, influenza, malaria, measles, or tuberculosis) that is transmissible by contact with infected individuals or their bodily discharges or fluids (such as respiratory droplets, blood, or semen), by contact with contaminated surfaces or objects, by ingestion of contaminated food or water, or by direct or indirect contact with disease vectors (such as mosquitoes, fleas, or mice).” <https://www.merriam-webster.com/dictionary/communicable%20disease> (last visited July 8, 2020).

¹² See e.g. *Clarke v. State Farm Fla. Ins.*, 123 So.3d 583, 584 (Fla. Dist. Ct. App. 2012) (addressing the scope of a communicable disease exclusion in the context of HSV virus).

2. Pollution exclusions

One term frequently associated with novel coronavirus is “contamination”. This description brings various pollution exclusions into play. In other similar contexts, courts have assessed the term “contaminants” and its application to “organic matter”, such as *Listeria* bacteria, which causes “flu-like” symptoms.¹³ As applied to a policy’s property coverage, the Wisconsin Court of Appeals concluded that a commercial pollution exclusion effectively barred coverage for organic contamination of the insured’s product.¹⁴

In the context of liability coverage, the Southern District of Florida has examined the application of a pollution exclusion to claims against an insured for exposing plaintiffs to “living organisms”, “microbial populations”, and “airborne and microbial contaminants”.¹⁵ The court was persuaded to look to the plain, ordinary meaning of contaminant to conclude “‘living organisms,’ ‘microbial populations,’ ‘microbial contaminants,’ and ‘indoor allergens’ fit the ordinary definition of a ‘contaminant,’ and, as alleged in the underlying state court complaints, had a ‘contaminating’ effect.”¹⁶

In another case from the Southern District of Florida, the court found no duty to defend a homeowners association from allegations that a guest contracted Coxsackie virus from a contaminated pool.¹⁷ The court relied upon previous decisions finding airborne microbial matter to fall within the common definition of “contaminant” for purposes of applying the pollution exclusion.¹⁸ According to The Microbiology Society, viruses are the smallest of all microbes.¹⁹ Various decisions holding that “microbial populations” fit the definition of contaminant

¹³ *Landshire Fast Foods v. Employers Mut. Cas. Co.*, 269 Wis.2d 775, 676 N.W.2d 528 (2004).

¹⁴ *Id.*

¹⁵ *Nova Cas. Co. v. Waserstein*, 424 F. Supp.2d 1325, 1334 (S.D. Fla. 2006).

¹⁶ *Id.* at 1334; *but see Westport Ins. Corp. v. VN Hotel Group, LLC*, 761 F.Supp.2d 1337 (M.D. Fla. 2010) (expressly disagreeing with the holding and finding that *Legionella* bacteria are not “pollutants”).

¹⁷ *First Specialty Ins. Corp. v. GRS Mgmt. Assocs., Inc.*, No. 08-81356-CIV, 2009 WL 2524613, at *4-5 (S.D. Fla. Aug. 17, 2009).

¹⁸ *Id.* at *5 (citing e.g. *Waserstein* at 1333-1334).

¹⁹ <https://microbiologysociety.org/why-microbiology-matters/what-is-microbiology/viruses.html> (last visited July 8, 2020)

for purposes of applying the pollution exclusion will no doubt form the basis for coverage defenses in third-party novel coronavirus cases as they develop.

C. Personal lines coverage for other viruses

Various courts' treatment of personal lines coverage for virus-related "bodily injury" liability claims also may be instructive. The Eighth Circuit, for instance, has enforced a virus exclusion embedded in the definition of "bodily injury" found in a personal lines policy.²⁰ The court reasoned that the exclusionary language applied to bar coverage for transmission of HIV, and declined to address whether exposure to HIV would have triggered the policy's "bodily injury" coverage, absent the exclusion.

Similarly, the Sixth Circuit examined transmission of the herpes virus in an unpublished but instructive opinion.²¹ In that case, the insured transmitted the herpes virus to his mistress. Despite the insured's insistence that he did not intend the transmission, the court found that the infection should have been reasonably expected from the conduct described in the underlying petition. The court explained, "transmission of disease, similarly, is the natural, foreseeable, expected and anticipated result of [making contact with someone while knowingly contagious]."²² The same arguments may arise in cases where a claimant alleges that infected insureds knowingly interacted with them in violation of social distancing guidelines or without PPE.

IV. Conclusion

As we enter the summer of 2020, the CDC, politicians, and others debate the significance of the uptick in reported COVID-19 cases and whether it constitutes a "second wave" of novel coronavirus infections. The second wave of novel coronavirus claims including third-party liability cases against business and their employees will be no less contentious. In those actions, basic coverage issues concerning the accidental nature of such exposures, various policy definitions, and the application of certain exclusions all will play a role. Lessons from previous cases involving other viruses, outbreaks, and health crises suggest claimants and policyholders will have to overcome multiple hurdles to prove coverage.

²⁰ *Lambi v. Am. Family Mut. Ins. Co.*, 498 F. App'x 655 (8th Cir. 2013).

²¹ *Allstate Ins. Co. v. Holt*, 932 F.2d 967 (6th Cir. 1991).

²² *Id.*



IS THE NOVEL CORONAVIRUS A POLLUTANT?

**ASSESSING THE APPLICATION OF
CGL POLLUTION EXCLUSIONS TO SARS-COV-2 CLAIMS**

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In a matter of months, the novel coronavirus (SARS-CoV-2) spread across the globe impacting our way of daily life and causing widespread injury and death as it contaminated locations and individuals. Conceptualizing the virus as a “contaminant” raises whether it would fall within pollution exclusions contained in general liability policies. This article assesses the majority and minority approaches to pollution exclusions and how those analyses apply to the impending wave of third-party liability claims arising out of SARS-CoV-2.

Pollution exclusions generally contain two key elements: (1) that the substance constitute a “pollutant;” and (2) the “discharge, disbursement, release, or escape” of that pollutant into the environment.¹

The term “pollutant” includes “smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials,” as well as “other irritants or contaminants.”² The terms “release” and “escape” connote some sort of freedom from containment.³ “Disbursement” is commonly used to describe the spread of pollution widely enough to cause it to dissipate.⁴ The term discharge typically means “to send forth” or “give outlet to.”⁵ How broadly these terms are construed depends on the choice of law.

The majority of jurisdictions interpret pollution exclusions to cover matters commonly thought of as traditional environmental pollutants in order to protect the reasonable expectations

¹ *MacKinnon v. Truck Ins. Exchange*, 31 Cal.4th 635, 643-645 (discussing historical evolution of Qualified and Absolute Pollution Exclusions in CGL policies and stating components thereto).

² *See ibid.*

³ *Id.* at pp. 650-51.

⁴ *Id.* at p. 651.

⁵ *Ibid.*

of the insured.⁶ Courts adopting this approach reason the exclusion was promulgated primarily to counter the explosion of environmental litigation that arose from anti-pollution laws enacted between 1966 and 1980.⁷ In contrast, a minority of jurisdictions rely on the plain language to hold the phrase is unambiguous and therefore “unequivocally cover[s] forms of contamination other than traditional environmental pollution.”⁸

Thus, in a majority jurisdiction, the normal spraying of pesticide around an apartment to kill yellow jackets does not fall within a pollution exclusion.⁹ However, in a minority jurisdiction, the exclusion applies to preclude coverage for liability arising from a renter’s ingestion and exposure to deteriorating lead paint.¹⁰

Courts following the broader, minority approach have ruled the phrase “irritant or contaminant” broadly encompassed “living organisms, microbial populations, airborne and microbial contaminants, and indoor allergens,” including *Listeria monocytogenes*.¹¹ It has also been applied to exclude coverage for a bodily injury claim for infection with the Coxsackie virus from a swimming pool.¹²

At least one majority jurisdiction has also applied the pollution exclusion to biological pathogens. The District Court for the Eastern District of California ruled a pollution exclusion

⁶ *Id.*; *Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628 (Minn. 2013).

⁷ *MacKinnon*, 31 Cal.4th at 645, 653.

⁸ *Id.* at 646.

⁹ *Id.* at 655-656.

¹⁰ *Peace v. Northwestern Nat’l Ins. Co.*, 228 Wis.2d 106 (1999).

¹¹ *Nova Cas. Co. v. Waserstein*, 424 F. Supp. 2d 1325, 1334 (S.D. Fla. 2006).

¹² *First Specialty Ins. Corp. v. GRS Mgm’t Assoc., Inc.*, 2009 WL 2524613 (S.D. Fla. 2009).

precluded coverage for claims arising from E-coli and other sewage borne bacteria leaching from septic tanks.¹³ A California court also ruled that noxious odors arising from a composting facility would fall within the scope of a pollution exclusion, consistent with the approach taken by other jurisdictions.¹⁴

A virus is fundamentally a microbe, which is a class of organisms that include bacteria.¹⁵ Therefore, decisions finding bacteria as a pollutant will support an insurer’s denial of coverage for SARS-CoV-2 claims based on the exclusion. Moreover, a virus enters its host and then replicates itself to greater numbers¹⁶, thereby “contaminating” the host within the plain meaning of that term.

The manner of transmission supports a finding that SARS-CoV-2 “releases,” “escapes,” or “discharges” into the environment. Black light studies have demonstrated how particulate matter exits an individual’s mouth while talking, coughing, or sneezing, thereby exposing others to infection.¹⁷ The way in which particulates exit in these videos show that a contaminated

¹³ *East Quincy Services Dist. v. Continental Ins. Co.*, 864 F.Supp. 976, 979 (E.D. Cal. 1994)

¹⁴ *Cold Creek Compost, Inc. v. State Farm Fire & Cas. Co.*, 156 Cal.App.4th 1469, 1480 (1st Dist 2007)

¹⁵ <https://microbiologysociety.org/why-microbiology-matters/what-is-microbiology.html> (last visited July 8, 2020).

¹⁶ <https://microbiologysociety.org/why-microbiology-matters/what-is-microbiology/viruses.html> (last visited July 8, 2020).

¹⁷ Anfinrud, P. et al, *Visualized Speech-Generated Oral Fluid Droplets with Laser Light Scattering*, Ltr. to Editor of New England Journal of Medicine (May 21, 2020). Available at: <https://www.nejm.org/doi/full/10.1056/NEJMc2007800?query=TOC> (last visited July 8, 2020). See also *Talking can generate Coronavirus droplets that linger up to 14 minutes*, The New York Times. Available at: <https://www.nytimes.com/2020/05/14/health/coronavirus-infections.html> (last visited July 8, 2020).

individual can “give outlet” to the virus, which then has some freedom of movement as it lingers in the area.

Insureds will argue SARS-CoV-2 does not “disperse” because the broad spread of the virus is not what causes it to disappear. Rather, it will naturally die out if it does not find a host to infect. However, the terms “discharge, disbursal, release, or escape” are written in the disjunctive. Thus, the pollution exclusion can apply if any one of these terms is satisfied.

Therefore, the nature of the virus and the manner of its transmission falls within the plain language of pollution exclusions. Insureds in majority jurisdictions will argue that it would be against their reasonable expectations to find SARS-CoV-2 claims within what is commonly thought of as environmental pollution because those claims typically relate to toxic chemicals.

Insurers will argue the global nature of the pandemic and the widespread injuries caused share many of the same characteristics as other pollution events. Like toxic waste spills and contaminants leaching into a drinking water supply, the novel coronavirus has affected a vast area and large class of people. Moreover, both traditional environmental pollution and SARS-CoV-2 require advanced precautions and cleaning protocols. Those similarities support the application of the pollution exclusion to the current pandemic.

In sum, pollution exclusions have application to SARS-CoV-2 exposure claims and viral pandemic events may become more widely accepted as traditional pollution events as they become more commonplace and preventative measures become more ingrained in society.



DO MULTIPLE SUITS LEAD TO MULTIPLE LIMITS?

ASSESSING NUMBER OF OCCURRENCES FOR COVID-19 LITIGATION

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The COVID-19 pandemic caused many institutions to close in order to avoid becoming the source of an outbreak overwhelmed local hospitals. However, some were allowed to remain open as so-called “essential services,” provided they adopt practices and procedures to minimize the risk of exposure. Many more institutions are now adopting similar policies and procedures as the country continues to re-open.

Early third-party litigation has focused on these policies and procedures as the basis for liability. Large institutions with multiple locations will likely face a multiplicity of suits, especially if the institution is the subject of a “hot spot” outbreak. Insurers and policyholders may find it advantageous to assess the number of occurrences presented in order limit exposure or maximize coverage. This article addresses issues pertaining to that analysis in the context of the wrongful death suit filed against Walmart.

Most CGL and D&O policies contain provisions stating that "repeated exposure to substantially the same general conditions" shall be treated as a single occurrence, or “a series of related or substantially similar acts” constitute a single wrongful act. These “one occurrence” or “one wrongful act” provisions are intended to limit an insurer’s liability for covered events.

However, a policyholder that retains significant risk may find it advantageous to erode a high self-insured retention by aggregating multiple claims. Alternatively, a policyholder may seek to have suits filed against it characterized as multiple occurrences, thereby allowing it to take advantage of more limits.

In analyzing the number of occurrences, courts will generally focus on the cause of the injury, provided it is not too remote for purposes of establishing liability. Differences between the injuries themselves, class of plaintiff, and time or location can become immaterial.

For example, in *Mead Reins. v. Granite State Ins. Co.*, 873 F.2d 1185 (9th Cir. 1988), the Ninth Circuit Court of Appeals applied California law to consider the number of occurrences presented by 12 separate civil rights lawsuits filed against the City of Oakland. In 11 of 12, the liability plaintiffs alleged a *Monell* claim based on similar patterns and practice of condoning excessive force. However, the 12th lawsuit did not contain a *Monell* claim and alleged only police harassment – not excessive force.

The Ninth Circuit held “the determinative factor was the similarity of the alleged municipal policy of condoning excessive police force, not the variance in injury, time, or class of plaintiff.” *Id.* at p. 1187. The 11 suits containing a *Monell* claim were a single occurrence, subject to a single self-insured retention and a single limit. The 12th suit alleging only police harassment was a separate occurrence, and subject to a separate retention and limit. In reaching its holding, the Ninth Circuit emphasized the nature of the *Monell* claim in its analysis, noting that it is based on an overall (i.e., single) “underlying municipal policy of condoning similar police acts.” *Ibid.*

Similarly, in *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56 (3d Cir. 1982), the court considered the number of occurrences presented by a class action suit seeking recovery for gender discrimination practices. Even though there were multiple plaintiffs and some alleging multiple injuries, the court held there was only one occurrence because the basis of liability for the insured in the underlying suit was the formal adoption of a policy that discriminated on the basis of sex.

At the same time, the adoption of a single policy can lead to multiple occurrences if the basis for liability rests on the implementation of those procedures. In *Eureka Federal Savings & Loan Assn’ v. American Cas. Co.*, 873 F.2d 229 (9th Cir. 1989), the court considered the number

of wrongful acts presented by the formal adoption of an aggressive lending strategy that led to 200 unprofitable loans. The court ruled that all 200 loans could not be considered a single wrongful act because “there were numerous intervening business decisions that required the exercise of independent business judgment” and those independent decisions were unique to each loan. At the same time, the court did “not foreclose the possibility that . . . loans to separate borrowers could be aggregated as a single loss in an appropriate factual situation.” *Id.* at pp. 234-35.

The case filed by the Estate of Wando Evans against Wal-Mart is the first known wrongful death suit as a result of COVID-19, which was filed in Cook County, Illinois. Mr. Evans allegedly contracted the virus during the course and scope of his employment with Walmart.

The complaint contains somewhat vague but important allegations as to the failures of various policies and procedures. Preliminarily, Walmart is alleged to have known or should have known of the dangers of COVID-19, given worldwide reporting and government action to combat the virus, which serves as a basis for alleging actual knowledge. The lawsuit then alleges a variety of failed policies and procedures, in sum as follows:

- Failure to cleanse and sterilize facilities and work spaces;
- Failure to implement and promote social distancing guidelines promulgated by government entities;
- Failure to provide Personal Protective Equipment (PPE) to employees;
- Failure to warn that employees, customers, and other individuals were experiencing symptoms of COVID-19;
- Failure to adequately address complaints of workers and patrons concerning COVID-19 safety concerns;
- Failure to develop an Infectious Disease Preparedness and Response Plan, as recommended by the CDC; and

- Failure to hire, train, and monitor employees on effective safeguards to prevent the transmission of the virus.

These types of general allegations will likely be repeated in lawsuits throughout the country. However, the actual policies and procedures in place, method of exposure, and the type of plaintiff each implicate the nature of the insured's liability, which dictates the multiple occurrence analysis.

While it is almost universally acknowledged that some effective safeguards need to be in place to protect employees and patrons from exposure, institutions may struggle to adopt appropriate, uniform guidelines while the nature of the virus remains unclear. Moreover, directives by local governments and the attitude of staff and patrons within a particular locale may also dictate what procedures are actually adopted.

For example, the Center for Disease Control has promulgated certain guidelines at the federal level, which include social distancing, wearing face masks, and industry-specific recommendations.¹ In California, the state has promulgated additional rules for re-opening.² Those have then been implemented at the local level with more detailed guidelines that

¹ See <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html> (CDC Website providing general guidelines for businesses to re-open, last visited July 8, 2020).

² See <https://covid19.ca.gov/industry-guidance/> (Setting forth State of California guidelines, last visited July 8, 2020).

institutions need to satisfy.³ Large institutions have also adopted corporate policies to ensure some uniformity across locations.⁴

Thus, to the extent that different policies are adopted at different locations, then that may lead to a finding of multiple occurrences. Conversely, a large institutional client that adopts a standard but fundamentally flawed policy over multiple locations may find itself facing several suits constituting a single occurrence, thereby subjecting it to a single limit.

The nature of the claimant's actual exposure is also important. While multiple lawsuits may allege the same general inadequate policies and procedures as a "shotgun" approach, each of those policies may not be a provable – or even possible – source of exposure. For example, the failure to regularly clean surfaces at one location may prove the source of infection, but the failure to require all patrons to wear masks may be the cause at another. Depending on what occurred, these conditions may not be "substantially similar" to constitute multiple occurrences.

Finally, while the class of plaintiffs is not determinative, it does shape the causes of action pleaded that forms the bases of liability. Employees may have different causes of action available, depending on exceptions to any exclusive remedy of a workers' compensation system. These causes of action will likely be different than what are pleaded by patrons. Moreover, the mechanism of exposure may be different for employees and patrons, which would lend itself to a finding of separate occurrences.

³ See <https://www.sfdcp.org/infectious-diseases-a-to-z/coronavirus-2019-novel-coronavirus/#1585590817821-d61484a1-5951> (City of San Francisco website setting forth CDC information and local requirements, guidelines, and information for various businesses, last visited July 8, 2020).

⁴ See e.g. <https://corporate.walmart.com/important-store-info> (Walmart website stating corporate policies for all stores during COVID-19, last visited July 8, 2020).

Given the political fight over the economy and the pressure to mitigate damages, institutions are facing increased pressure to re-open and those that do so prematurely risk exposing their employees and patrons, which could lead to a multiplicity of suits. Whether these suits present a single occurrence, or multiple occurrences, can have vast effects on the coverage limits available. Carriers and policyholders alike should recognize the decision cannot necessarily be made at the outset of litigation, given the focus on liability facts. Therefore, carriers may wish to specifically reserve their rights on this, so that it can be addressed.