

Welcome to Primerus!

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

National Commentaries on Select Coverage Issues

July 9, 2020

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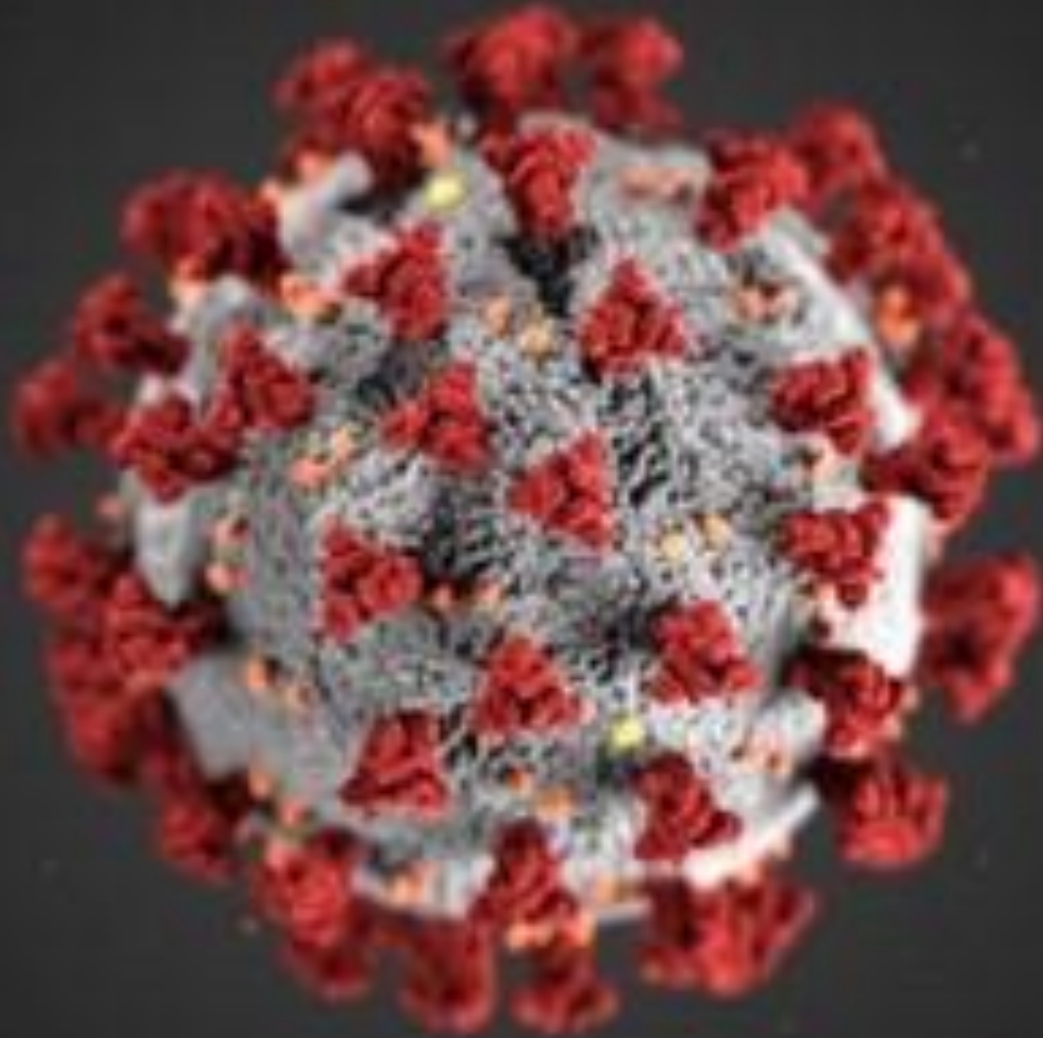
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ARTICLE PRESENTATIONS

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

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

*Legislative Response To Unavailability Of Insurance
Coverage For Novel Coronavirus Losses*

Third-Party Coverage Considerations in Novel Coronavirus Cases

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

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

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

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HUMAN CORONAVIRUSES (HCoVS)

Seven Types Identified Since the 1960s;

Four Relatively Harmless;

Three Are Deadly:

SARS-CoV (likely to be called SARS-CoV-1) (2002)

MERS-CoV (2012)

SARS-CoV-2 (2019)

SARS-CoV-2

Genetically Closely Related to SARS-CoV:
Outbreak Ceased in June 2003 (Why?);
8,098 Cases; 774 Deaths (9.7%);

Also Genetically Related to MERS-CoV:
Ongoing (dromedary camel transmission);
2,494 Cases; 858 Deaths (34%);

SARS-CoV-2

Origin:

Wuhan's Huanan Seafood Wholesale Market;

Jumped from a bat to an intermediary animal to
humans;

(or was it a superspreader event?)
(fomites?)

SARS-CoV-2

12 Days According to Early WHO Report:

December 30, 2019: First Patient Samples;

January 3, 2020: WHO Notified;

January 7, 2020: Virus Isolated;

January 10, 2020: Genome Sequence Shared;

But Symptomology was Exhibited in Patients
at Least a Month Earlier;

COVID-19 SYMPTOMS

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

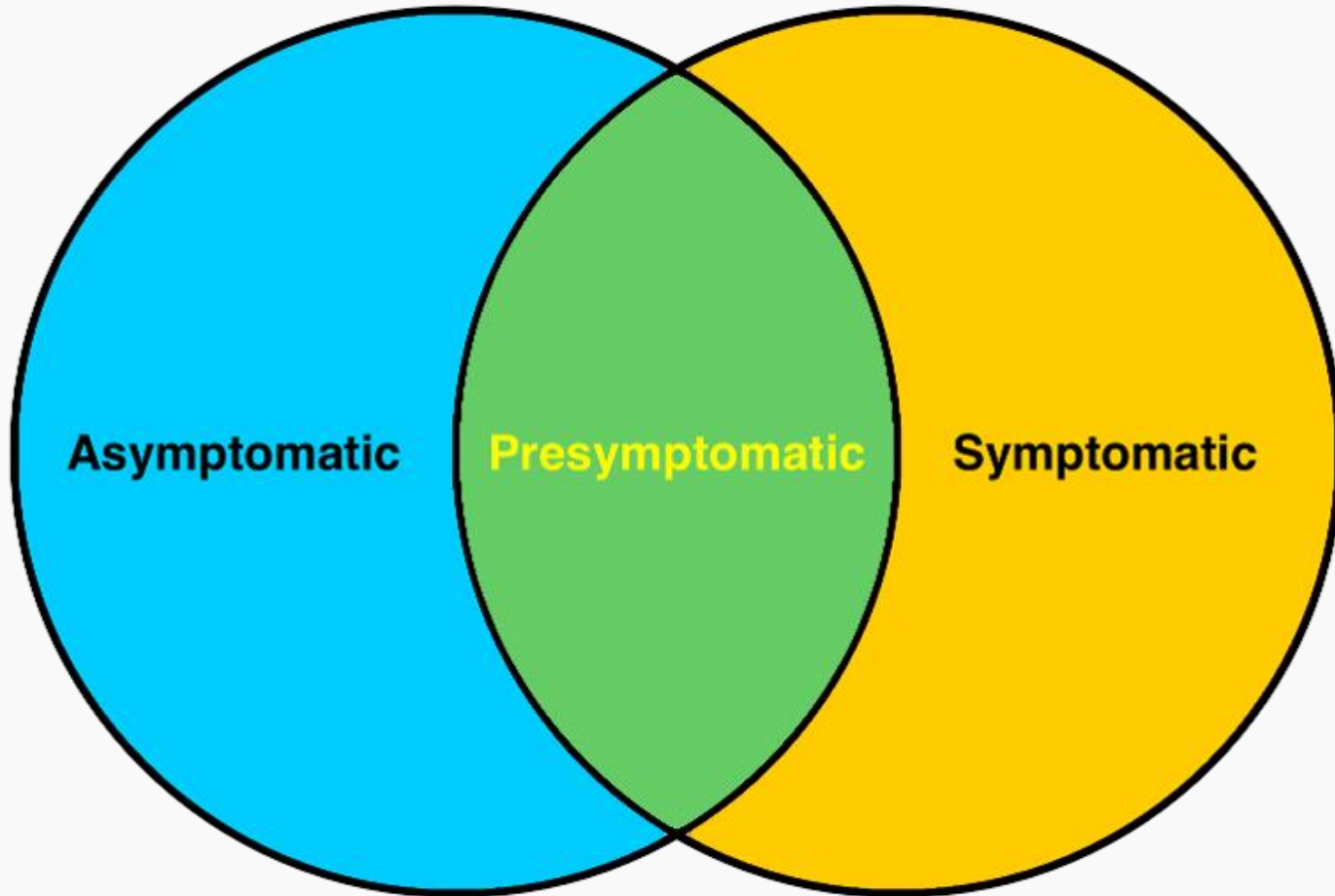
Diarrhea

INCUBATION / TRANSMISSION

Roughly 5-6 Days from Infectious Exposure to Symptomology (Can be Longer);

Transmissibility Capability 2-3 Days Before Symptomology;

WHEN TRANSMISSIBLE



TRANSMISSION / VIRAL SHEDDING

Traditional Understanding

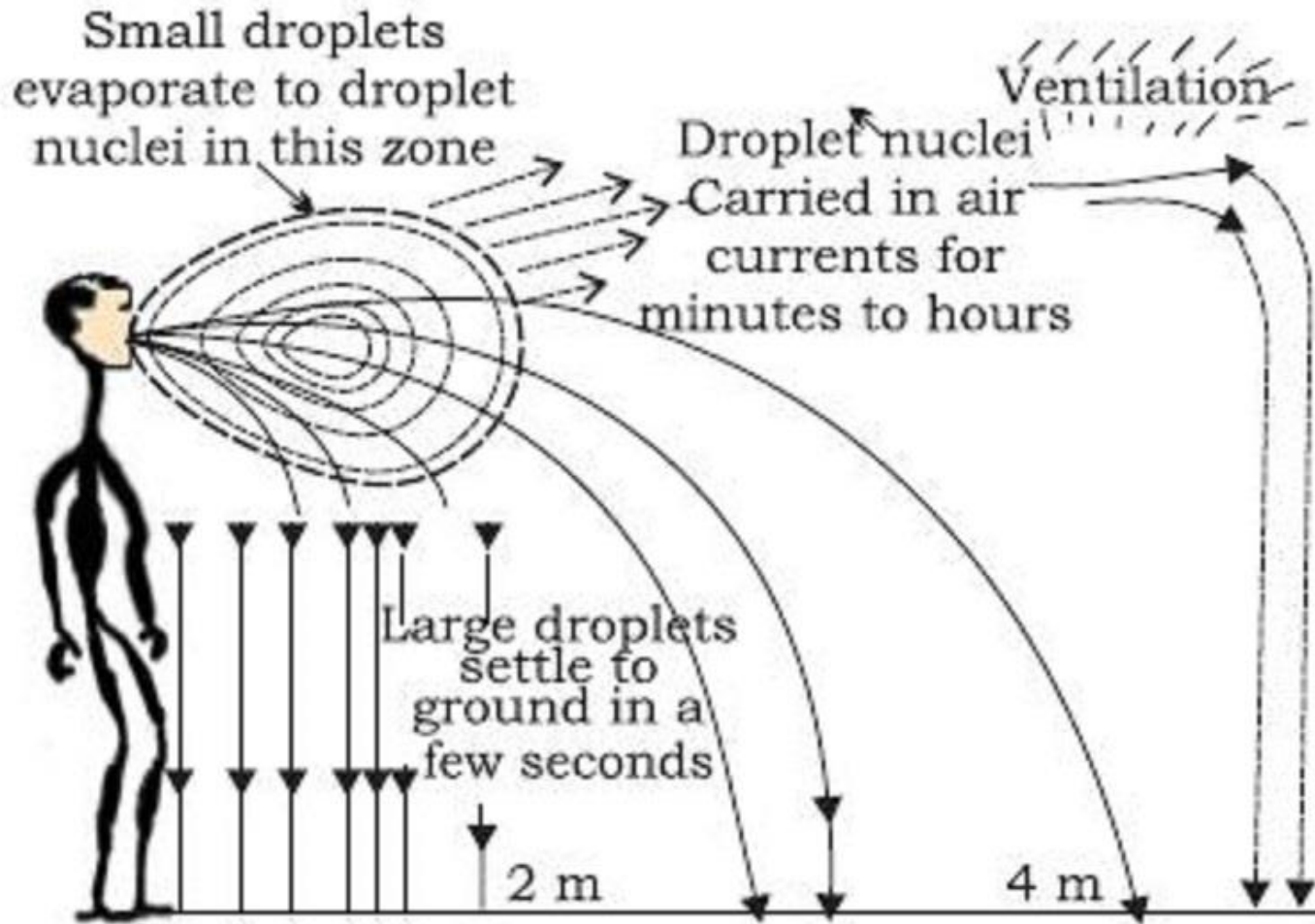
Virus is “Shed” (Transmitted) by:

Respiratory Droplets;

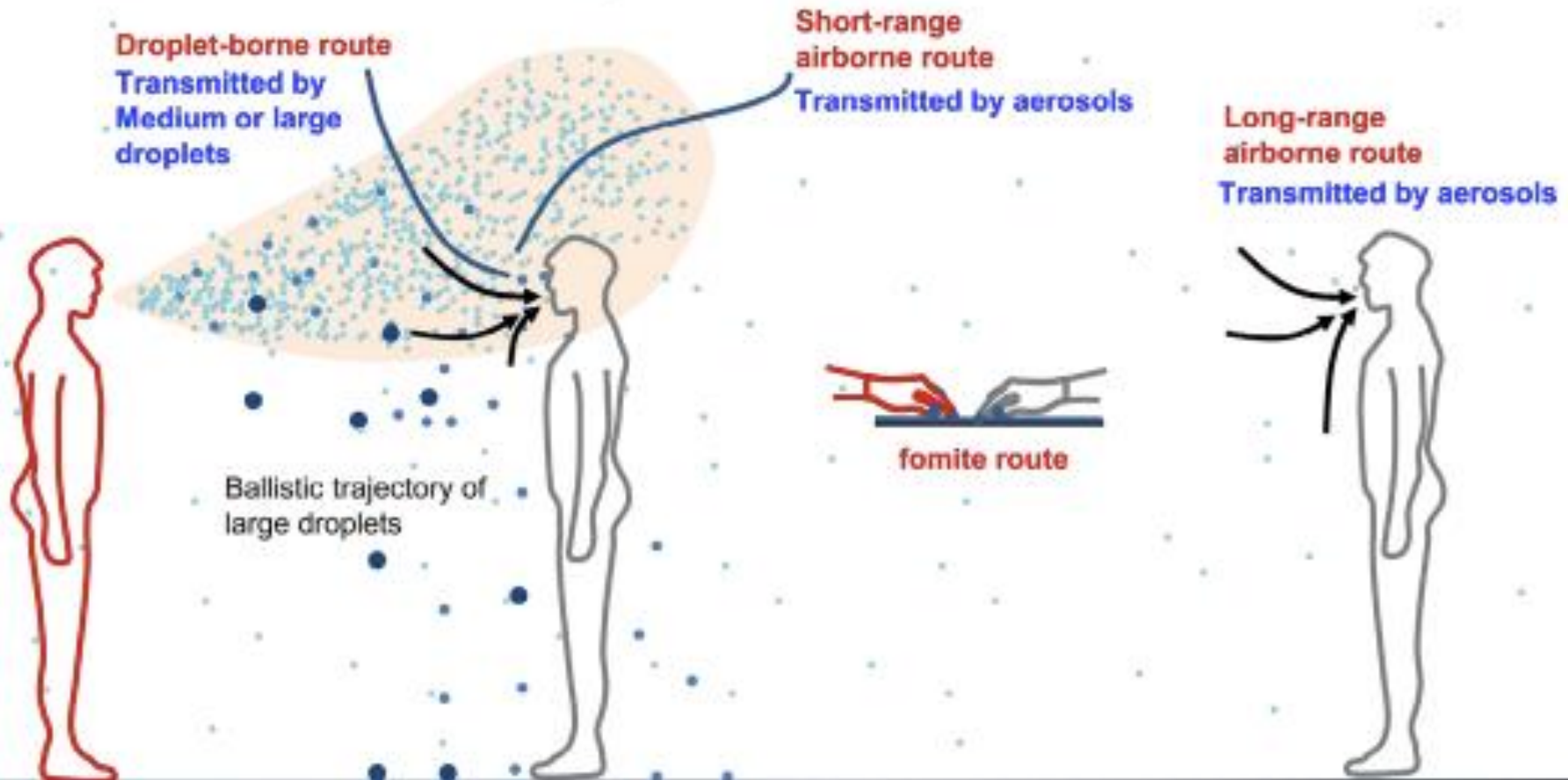
Surface Contact Transferred by Hand to Nose, Eyes, Mouth;

“Aerosols” ($\leq 5 \mu\text{m}$);

TRANSMISSION



TRANSMISSION



TRANSMISSION / VIRAL SHEDDING

Traditional Defenses to Transmission:

Social Distancing (6');

Hand Washing and Other Hygiene Measures;

Quarantining When Symptomatic;

TRANSMISSION / VIRAL SHEDDING

Approaches Worked Well with SARS (caused by SARS-CoV) and MERS (caused by MERS-CoV):

High Viral Loads (to then Shed) Existed After Becoming Symptomatic;

With COVID-19, the Individual's Highest Viral Loads to Shed Appear to be 2-3 Days *Before Symptom Onset*;

SNEEZE



From: **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

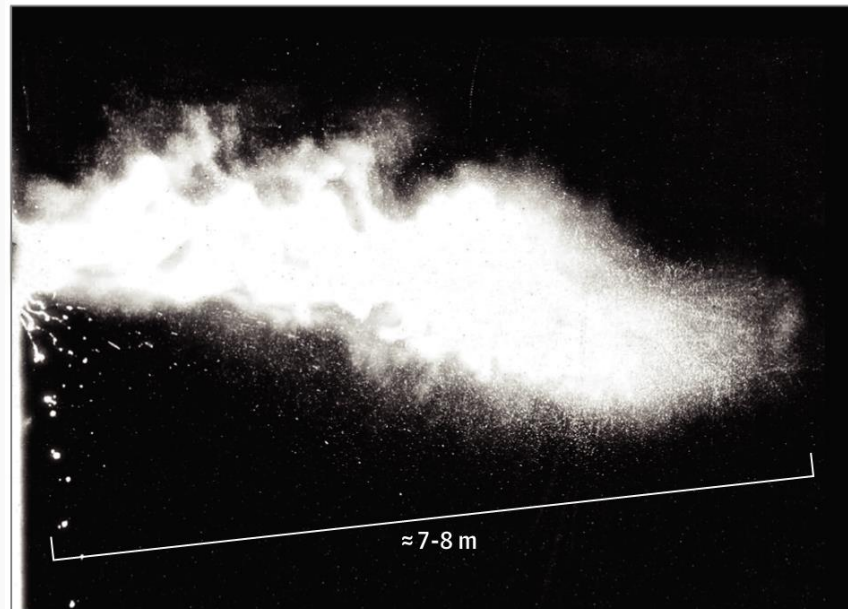
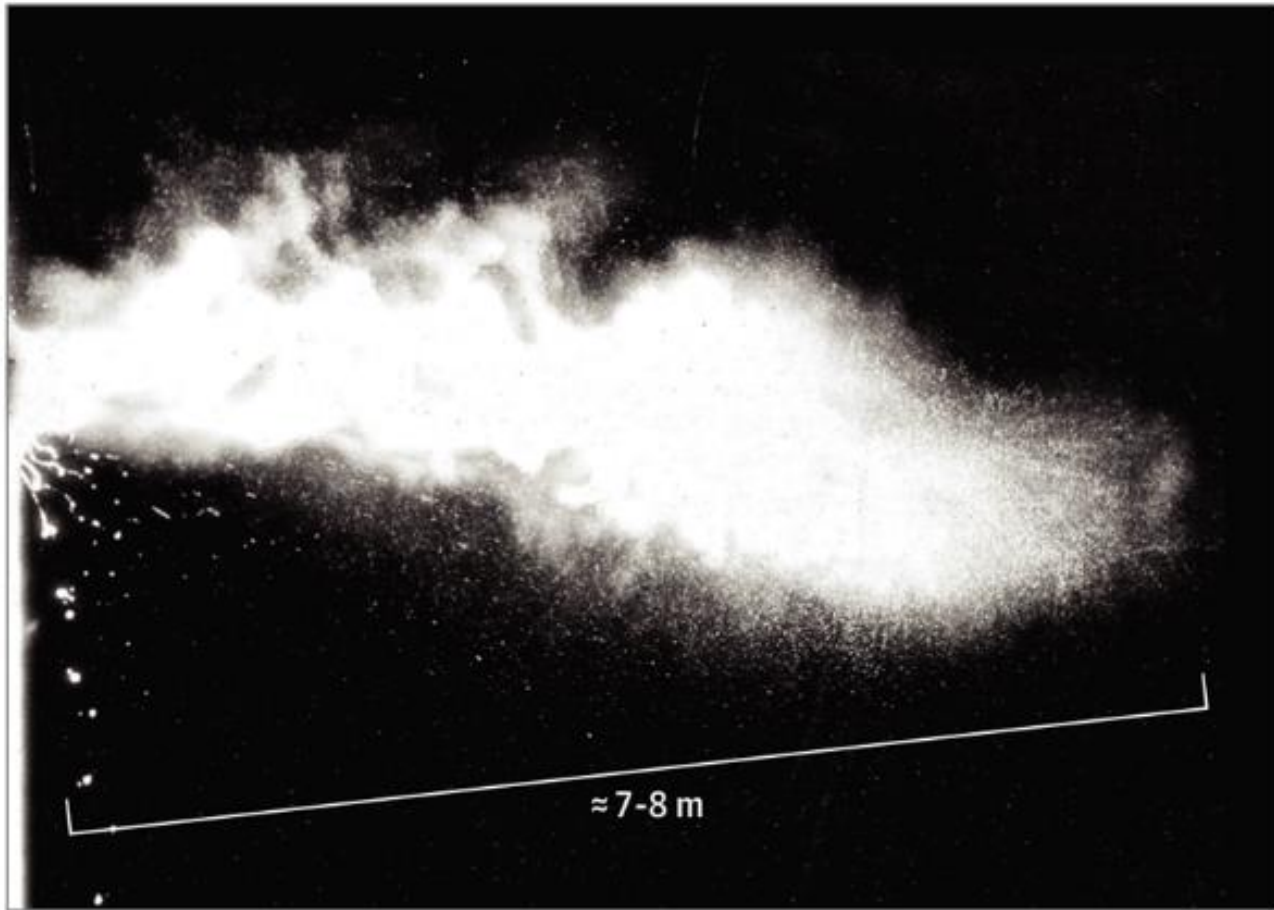


Figure Legend:

Multiphase Turbulent Gas Cloud From a Human Sneeze

SNEEZE



AEROSOL TRANSMISSION



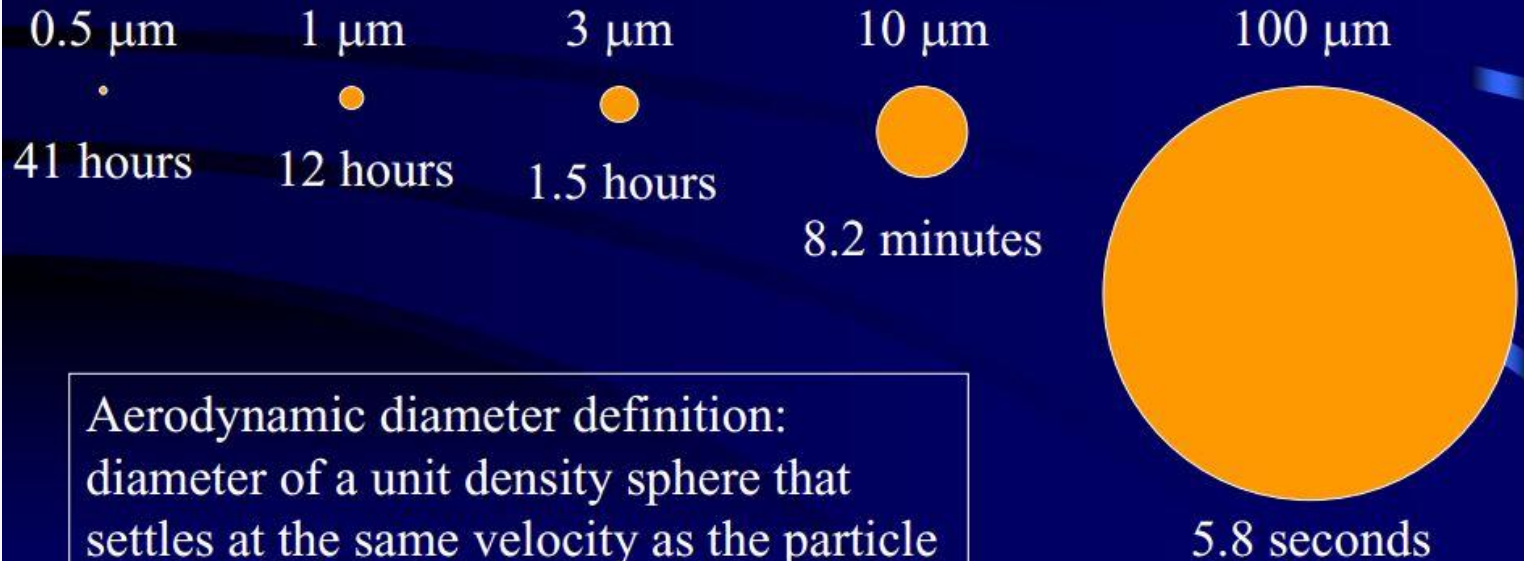
STAY HEALTHY



DROPLET / AEROSOL SETTLING

Particle Settling in Still Air

Time to settle 5 feet by unit density spheres

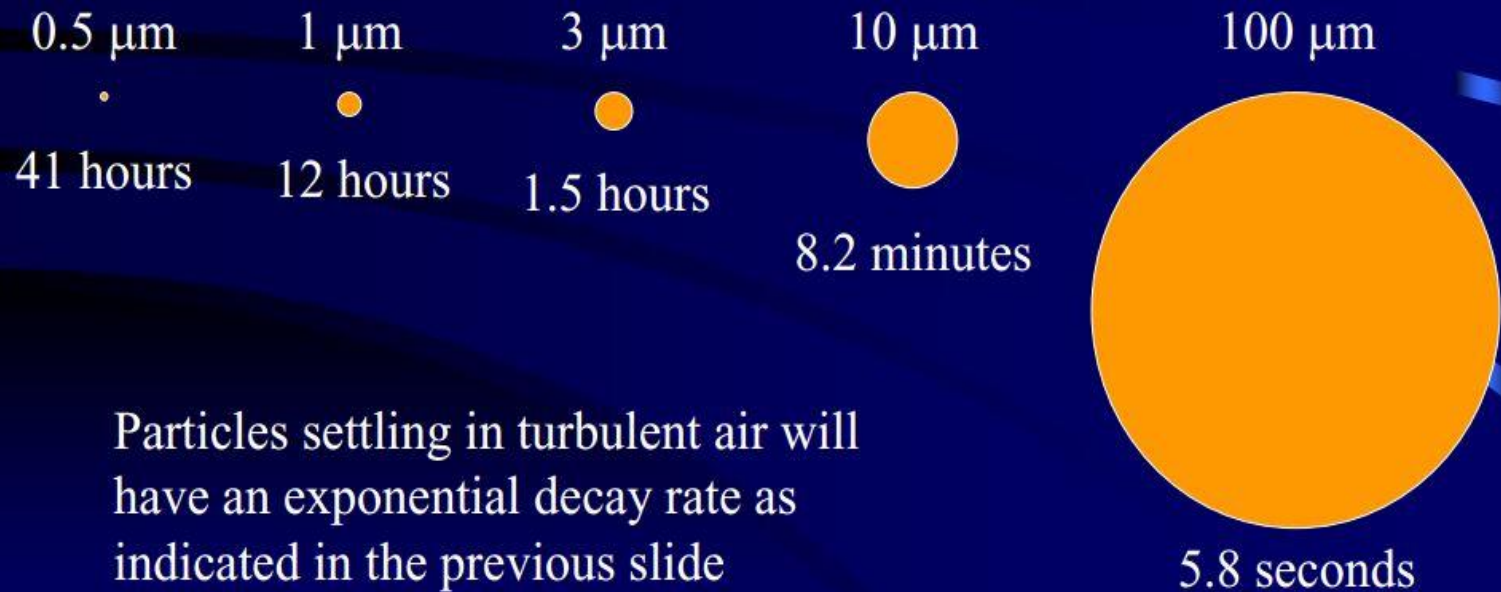


Aerodynamic diameter definition:
diameter of a unit density sphere that
settles at the same velocity as the particle
in question

DROPLET / AEROSOL SETTLING

Particle Settling in Turbulent Air

Half-life of particles in 8 foot high room



FOMITE TRANSMISSION

Viruses “Can” Be “Caught” from Contaminated Surfaces Which are Transferred from Hand to Nose, Mouth and Eyes;

Translate to Early Unqualified Reports of the “Virus:”

Moriarty, et al.; Kampf, et al.;

FOMITE TRANSMISSION

Scientific Examination of Virus Stability/Viability:

Van Doremalen, et al.;

Chin, et al.;

CDC Backing Off on Fomite Transmission as a Major Source;

FOMITE TRANSMISSION

Two Coverage-Critical Points:

No Study Seen by Presenter to Date Showing the Virus Embeds Itself INTO the Surface Where it Lands;

The Virus is “Inactivated” (Killed) Within Minutes When the Surface is Disinfected With Common Cleaning Products;
e.g. Kampf, et al.; Eslami, et al.;

TRANSMISSION

If COVID-19 is Considered a Respiratory
Illness, Can the Virus Be Transmitted by :

Water;

Food;

MUTATIONS

“L” Type / “S” Type;

The D614G Mutation Viral Infectivity
Enhancement;

DOSE-RESPONSE RELATIONSHIP

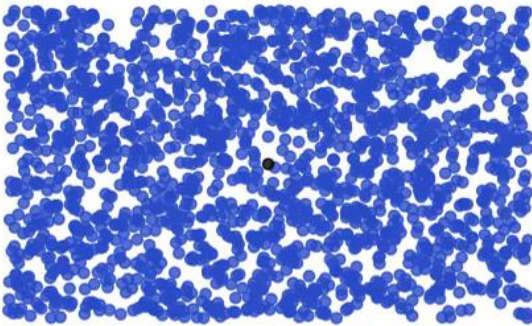
The Bromage Hypothesis;

Zhang, et al.

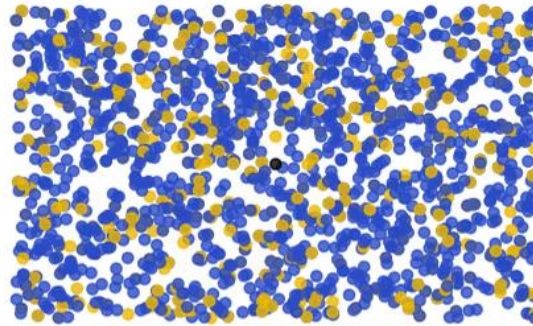
HERD IMMUNITY

Herd Immunity: How It Works

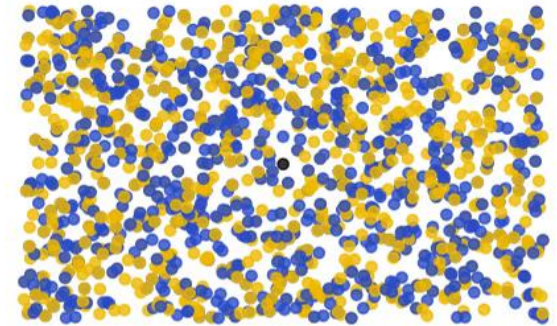
Percent Vaccinated: 0%



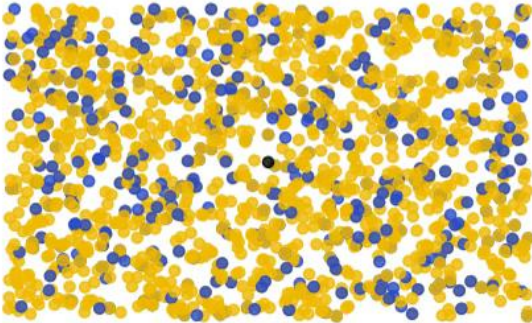
Percent Vaccinated: 25%



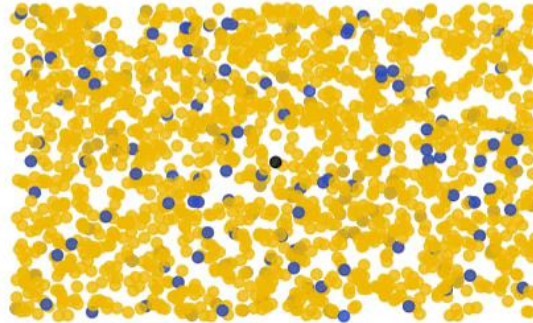
Percent Vaccinated: 50%



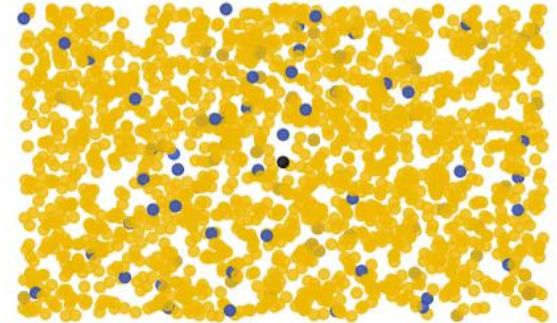
Percent Vaccinated: 75%



Percent Vaccinated: 90%



Percent Vaccinated: 95%



• Infected • Unvaccinated • Vaccinated

LONG TERM EFFECTS OF COVID-19

Central Nervous System Involvement;

Mao, et al.;

Zhou, et al.;

Psychiatric / Neuropsychiatric Involvement:

Rogers, et al.;

“ARE WE THERE YET?”

Prior Pandemics:

2-5 Years;

Modeling Shows R_0 s of 2.2 During Winter and 1.3 in Summer Through 2024;

Dr. Michael Osterholm:

“In the Second Inning of a Nine Inning Game”

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

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DIRECT PHYSICAL LOSS OR DAMAGE – POLICY TERMS

Covered Property Definition

Covered Cause of Loss Definition

Business Interruption Coverage

Extra Expense Coverage

Civil Authority Coverage

DIRECT PHYSICAL LOSS OR DAMAGE – THE LAW

Couch on Insurance, Third Edition §148:46:

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.

Port Authority of New York and New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226, 236 (3rd Cir. 2002):

“In ordinary parlance and widely accepted definition, physical damage to property means a distinct, demonstrable and physical alteration of its structure.”

DIRECT PHYSICAL LOSS OR DAMAGE – SARS-CoV-2

Is the presence of coronavirus in a building or on building surfaces a “direct physical loss” or “direct physical damage”?

Mastellone v. Lightning Rod Ins. Co., 175 Ohio App.3d 23 (2008)

Universal Image Prods., Inc. v. Federal Ins. Co., 475 F. Appx. 569, 573-4 (6th Cir. 2012)

Mama Jo’s, Inc. v. Sparta Ins. Co., 2018 WL 3412974, at *9 (S.D. Fla. 2018)

Columbiaknit, Inc. v. Affiliated FM Ins. Co., 1999 WL 619100 (D. Or. 1999)

DIRECT PHYSICAL LOSS OR DAMAGE – SARS-CoV-2

Decisions in COVID-19 Pandemic Cases

Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd. C.A.,
No. 1:20-cv-03311—VEC (S.D.N.Y.)(May 19, 2020).

Gavrilides Mgmt. Co., LLC v. Michigan Ins. Co., Ingham
County Circuit Court, C.A. No. 20-258-CB-C30 (July 1,
2020).

OTHER PROPERTY INSURANCE ISSUES

Civil Authority Coverage – Access limitations vs. access prohibitions

Does the relevant civil authority order actually prohibit access?
Typically it does not.

Virus and Bacteria Exclusion

*Legislative Response To Unavailability Of Insurance
Coverage For Novel Coronavirus Losses*

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LYNBERG & WATKINS

BUSINESS INTERRUPTION INSURANCE

VIRUS EXCLUSION

ISO 7/6/2006 Circular

American Association of Insurance Services

PROPERTY DAMAGE

PROPOSED STATE LEGISLATION

EFFORTS TO RETROACTIVELY RE-WRITE POLICIES

Massachusetts SD 2655

Michigan Bill 5739

New York Bill A-10226B

Ohio Bill 589

South Carolina Bill 1188

Pennsylvania Bill 1114

EFFORT TO RE-DEFINE “PROPERTY DAMAGE”

Pennsylvania Bill 1114

CONSTITUTIONAL ISSUES WITH PROPOSED STATE LEGISLATION

Contracts Clause

Takings Clause

Due Process

BEHIND THE SCENES

Insurance Industry Lobbying Efforts

Message

Image

PROPOSED FEDERAL LEGISLATION

H.R.6494, the “Business Interruption Insurance Coverage Act of 2020”

H.R.6497, the “Never Again Small Business Protection Act”

H.R.7011, the “Pandemic Risk Insurance Act of 2020”

“The Business Continuity Protection Program”

CHALLENGES TO FEDERAL LEGISLATION

Funding

Affordability

CONCLUSION

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;*

Do Multiple Suits Lead to Multiple Limits?

Assessing Number of Occurrences For COVID-19 Litigation

Eric R. Brenneman

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San Francisco, CA 94104



EXAMPLES OF LIABILITY CASES IMPLICATING THIRD-PARTY LIABILITY COVERAGE

Retailer/Commercial Property Owner:
Evans v. Wal-Mart

Nursing Home:
Grohman v. Brighton Gardens

THRESHOLD COVERAGE ISSUES

Insuring Agreement:

Occurrence:

“Everyone knows what an accident is until the word comes up in court.”

Multiple Occurrences – more on that later

Bodily Injury:

Physical injury

Emotional Distress

“PATHOGEN” EXCLUSIONS

Specific Virus and related exclusions:

“Pathogenic Organisms Exclusion”

(Focus on the virus)

“Communicable Disease” (CG 21 32 05 09):

(Focus on the result of the virus, i.e. COVID-19)

Cases to know:

e.g. Clark v. State Farm Fla. Ins. 123 So.3d 583

LESSONS FROM EARLIER VIRUSES

Other viruses have resulted in coverage actions primarily under personal lines policies:

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

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

POLLUTION EXCLUSIONS

Two Key Elements:

Does the substance constitute a “pollutant”:

“Other irritants or contaminants”

*Is there a “discharge, disbursal, release,
or escape” of that pollutant:*

POLLUTION EXCLUSIONS

Majority Approach:

Applies to matters commonly thought of as pollution events

Minority Approach:

Unambiguously applies to all forms of contamination events

POLLUTION EXCLUSIONS

Bacteria as an “irritant or contaminant”

Minority jurisdictions:

Phrase encompasses living organisms and microbial populations

Majority jurisdictions:

E-Coli leaching from septic tanks/ odors from composting facility

Cocksackie virus from swimming pool

First Specialty Ins. Corp. v. GRS Management Associates, Inc.,
2009 WL 2524613 (S.D. Fla. 2009)

ONE OCCURRENCE PROVISIONS

“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

Intended to limit an insurer’s liability for covered
events

MULTIPLE OCCURRENCES

Analysis focuses on cause of injuries:

Mead Re. v. Granite State Ins. Co., 873 F.2d 1185 (9th Cir. 1988)

Failures of policies/procedures to prevent exposure:

Clean/sterilize facilities

social distancing

Development of Response Plan

Failure to warn, hire, train, and monitor

Fundamental policy vs implementation

Thank You!

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