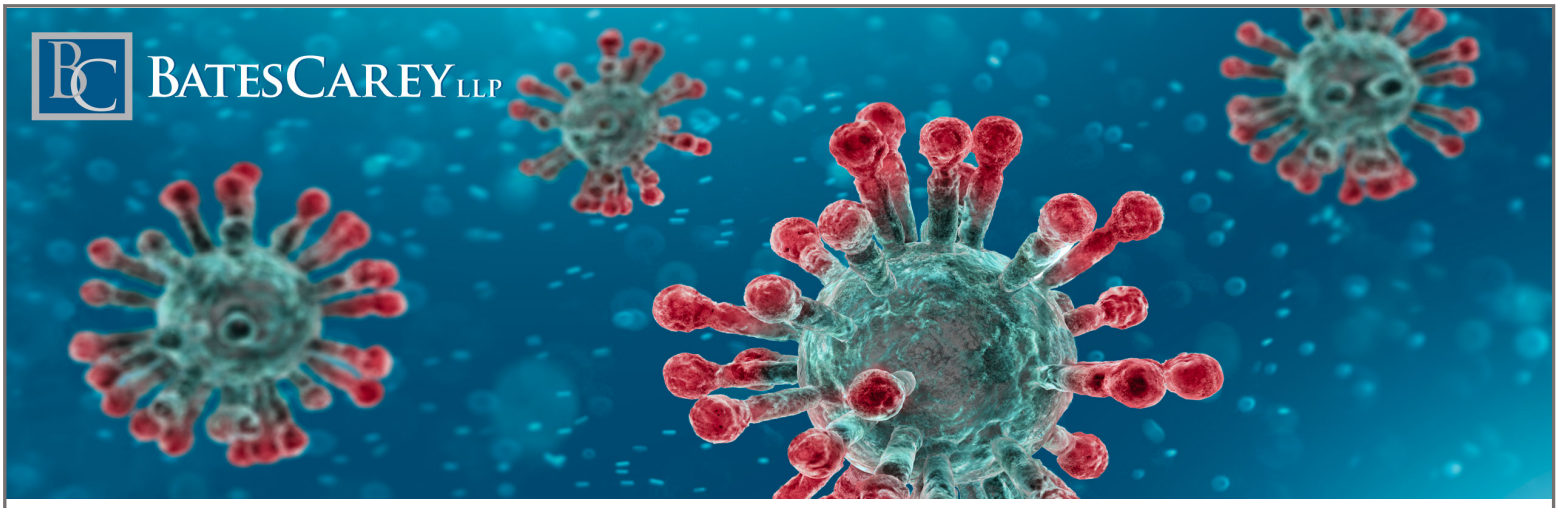

COVID Team Update March 10, 2022

Is COVID-19 Contamination Considered Pollution Under Liability Policies?

While the insurance industry has seen voluminous first-party claims erupting from the coronavirus, this article will explore the almost certain influx of third-party liability claims expected from the pandemic. More specifically, this article explores what third-party claims are expected and how the COVID-19 virus might be treated under liability provisions that specifically intend to exclude pollution claims or those provisions that specifically intend to cover environmental and pollution claims.

Anticipated General and Professional Liability Claims

Third-party liability insurers can expect to see suits filed by individuals against businesses for failure to take proper precautions to mitigate the spread of COVID-19 or suits claiming that individuals contracted COVID-19 while on the premises of a business. By way of example, cruisegoers on the Princess Cruise Lines recently filed suit in early March 2020 claiming the company knew "at least one of its passengers from the prior voyage . . . had symptoms of coronavirus, and yet it made the conscious decision to continue sailing the voyage that began February 21, 2020 with another three thousand passengers on an infected ship." The cruisegoers complain that the cruise line was negligent in failing to ensure that passengers would not be exposed to coronavirus, failing to have proper COVID-19 screening protocols prior to passengers boarding the ship, and failing to adequately warn the cruisegoers about the potential exposure to COVID-19 prior to boarding the ship. *Weissberger v. Princess Cruise Lines Ltd.,* No. 2:20-cv-02267 (C.D. Cal., Mar. 9, 2020).

Third-party liability insurers can also expect to see suits filed by COVID-19 infected individuals against businesses in the specialized cleaning or decontamination industry. Such claims may arise from negligence in failing to properly sanitize a building or sterilize equipment after a COVID-19 exposure. Insurers have certainly seen similar claims of this ilk. By way of illustration, a deadly national meningitis outbreak was attributed to New England Compounding Pharmacy, which faced numerous tort claims arising out of its tainted steroid medications. The compounding pharmacy allegedly failed to follow standard procedures to keep its facility clean and its products sterile.

In the context of COVID-19, product liability cases will also be a concern to third-party liability insurers. Insurers will see claims against businesses for failing to warn that an employee with the COVID-19 virus handled a given product that was later sold to a customer, who was later infected. Indeed, the ubiquitous Amazon recently shut down a distribution center that processes returns in Kentucky after three workers tested positive for coronavirus. Other Amazon warehouses across the United States and Europe have confirmed cases of the virus, but remain open on the basis that the company is delivering essential goods to those confined to their homes.

And businesses that allegedly fail to follow their own safety, cleaning and investigation protocols while operating during shutdown also run the risk of claims from COVID-19 infected customers. Grocery stores have upped their efforts at disease control by implementing sanitation protocols, requiring employee screenings, limiting numbers of customers in store at a given time and following social distancing guidelines. Shopping carts have long been known to be a key concern with respect to germs or disease at grocery stores, even before COVID-19. Many grocery chains have provided sanitizing wipes for the carts, but those chains could face claims if those wipes – a part of their sanitization protocols – are unavailable, empty or poorly monitored, much like any premises liability claim.

Does COVID-19 Fit within Pollution Provisions in Liability Policies?

Many of the general liability and professional liability policies under which such anticipated COVID-19 claims will be made have pollution exclusions that insurers must review to determine if the COVID-19 claims are akin to excluded pollution claims. By the same token, many contractor's pollution policies or similar liability products have pollution provisions that provide coverage to the extent that the COVID-19 liability could be deemed a covered "pollution condition." There are two key inquiries to analyze when determining if something like a COVID-19 claim falls within a typical liability pollution provision: 1) does the provision treat a virus like COVID-19 as a "pollutant"? and 2) does the pollution provision at issue apply if the contamination is caused by something other than natural environmental factors?

1. Is COVID-19 a "Pollutant"?

Some liability policies specifically exclude coverage for dispersal of "pollutants" *Firemen's Ins. Co. v. Kline & Son Cement Repair, Inc.,* 474 F. Supp.2d 779, 783 (E.D. Va. 2007). Other policies specifically cover claims arising from "pollution conditions." *URS Corp. v. Zurich Am. Ins. Co.,* 979 N.Y.S. 2d 506, 507 (Sup. Ct. 2014). Other policies contain one coverage grant that excludes pollution, and one coverage grant that covers pollution. *See, e.g., Rockhill Ins. Cos. v. CSAA Ins. Exch.,* No. 3:17-cv-00496, 2019 WL 3767466, *2 (D. Nev. Aug. 9, 2019) (policy contained both Contractor's Pollution Liability Form agreeing to pay for "property damage" caused by an "occurrence" that results from a "pollution condition," and it contained a Commercial General Liability Coverage Part excluding coverage for damage arising out of pollution or mold).

For purposes of examining how COVID-19 claims may fit within any of these provisions, insurers need to examine how policies typically define "pollutant":

> [A]ny solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, alkalis, chemicals and waste. Waste includes materials to be recycled, conditioned or reclaimed.

See First Specialty Ins. Corp. v. GRS Mgmt. Assocs., Inc., No. 08-81356-CIV, 2009 WL 2524613, *2-3 (S.D. Fla., Aug. 17, 2009).

Certain policies exclude "pollution hazards," which are defined as:

> [A]n actual exposure or threat of exposure to the corrosive, toxic or other harmful properties to any solid, liquid gaseous or thermal pollutants, contaminants, irritants or toxic substances, including smoke, vapors, soot, fumes, acids or alkalis, and waste materials consisting of or containing any of the foregoing.

Id.

Other policies cover "pollution conditions," which are defined as:

> [T]he discharge, dispersal, release or escape of smoke, vapors, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials, or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water which results in bodily injury or property damage.

URS Corp., 979 N.Y.S. 2d at 507-08.

The varying definitions of "pollutant," "pollution hazard," or "pollution condition" all typically give rise to the issue of whether the COVID-19 virus could fit within the terms "contaminant" or "irritant." Both "contaminant" and "irritant" are undefined in the policies, thereby leaving their interpretation in the hands of courts. COVID-19 as a living and organic microbe also presents a challenge in categorizing the virus as a solid, liquid or gas. It is undisputed that COVID-19 is both undesirable and hazardous, which of course may move the virus closer into the type of "pollutant" not intended to be covered.

Courts, policyholders and insurers alike have yet to encounter COVID-19 and its status as a "pollutant" in general and professional liability policies. Nevertheless, we can obtain insight as to whether the COVID-19 virus could be a "pollutant" by looking at courts' analyses of whether other viruses, bacteria, or mold constitute "pollutants."

Viruses

In *First Specialty Ins. Corp. v. GRS Mgmt. Assocs., Inc.,* No. 08-81356-CIV. 2009 WL 2524613, *5-6 (S.D. Fla., Aug. 17, 2009), the court held that an individual's contraction of Coxsackie virus from ingesting contaminants in pool water maintained by the insured was barred by the pollution exclusion. The court reasoned that the definition of "pollutant" in the policies at issue precluded coverage for claims arising from any "contaminant." *Id.* at *5. The court likened the Coxsackie virus to other contaminants and microbes, such as raw sewage, battery acid, living organisms, and microbial populations, all of which have been held to fit within the definition of "contaminant" and were excluded from coverage under the pollution exclusion. *Id.* Therefore, the court held that "the substance in the swimming pool was a viral contaminant and a harmful microbe. Thus, the pollutant exclusion applies here." *Id.* Under a similar analysis, the COVID-19 virus would also likely be found to be a "contaminant" within the meaning of a pollution exclusion.

Bacteria

In *Connors v. Zurich Am.Ins. Co*., 872 N.W.2d 109, 116, 119-20 (Wis. Ct. App. 2015), the court found that a standard pollution exclusion would have excluded coverage for a suit by an employee alleging exposure to the bacteria that causes Legionnaires' disease by reasoning that the bacteria are an uncommon and undesirable "contaminant" within the definition of "pollutant." The court explained that a contaminant makes something impure or unclean by contact or mixture. *Id.* at 118-19. The facts in *Connors* showed that the employee inhaled aerosolized droplets of bacteria in the air. *Id.* at 119-20. However, because the policy in *Connors* involved non-standard policy form, the court remanded a grant of summary judgment in the insurer's favor.

However, similar instances of contamination were determined not to involve a "pollutant" in *Paternostro v. Choice Hotel Int'l Servs., Corp.,* No. 1-0662, 2014 WL 6460844, *14 (E.D. La., Nov. 17, 2014). In *Paternostro*, the court held that the nature of Legionnaires' disease is "bacteria, not pollutants as is 'generally understood.'" *Id.* at *14, *quoting Doerr v. Mobil Oil Corp.,* 774 So.2d 119, 135 (La. 2000). The *Paternostro* court did, however, hold that the bacteria exclusion applied to unambiguously exclude coverage as it was undisputed by the parties that Legionnaires' disease is caused by Legionella bacteria. *Id.* at *12-13. The court reasoned that Legionella bacteria are significantly different than a typical environmental pollutant such as asbestos or gasoline and are not dispersed by a polluter, but rather are "simply microorganisms existing in a natural environment." *Id.* at *14.

A second case similarly found that bacteria which cause illness are not within the intended definition of a "pollutant." In *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 13 P.3d 785, 790 (Ariz. App. 2000), the court held that the pollution exclusion as well as public policy barred application of the pollution exclusion to injuries sustained by fecal coliform bacteria in contaminated water. The court noted that water-borne bacteria do not "fit neatly" within the definition of "pollutant," because the bacteria are "*living, organic* irritants or contaminants which defy description under the policy as 'solid,' 'liquid,' 'gaseous,' or 'thermal' pollutants." *Id.* at 789 (emphasis in original). Courts following this approach may be less likely to fit the COVID-19 virus within the "pollutant" definition.

Mold

By contrast, mold was indeed determined to be a "pollutant" under Florida law because "microbial populations" and "indoor allergens" would fit the ordinary definition of "contaminant." *Nova Cas. Co. v. Waserstein,* 424 F. Supp.2d 1325 (S.D. Fla. 2006). Taken further, the *Nova* court held that "living organisms," "microbial populations," "airborne and microbial contaminants" and "indoor allergens" are contaminants and excluded from coverage under the pollution exclusion. Such a conclusion would likely move COVID-19 claims out of coverage and within the scope of most pollution exclusions.

2. Do Pollution Exclusions Apply to Individual COVID-19 Contamination Claims?

Across the country, courts vary in their treatment of whether a pollution exclusion applies only to "traditional" contamination of natural environmental resources or whether a "pollution exclusion" might apply to less environmentally-focused claims, such as to an individual contracting a disease or virus. *Compare American States Ins. Co. v Koloms,* 687 N.E.2d 72 (Ill. 1997) (pollution exclusion did not preclude coverage under Illinois law for injuries to tenants due to carbon monoxide emitted from a building's faulty furnace, agreeing with those courts which have restricted the exclusion's otherwise potentially limitless application to only those hazards traditional associated with environmental pollution), *with Reed v. Auto Owners Ins. Co.,* 667 S.E.2d 90 (Ga. 2008) (pollution exclusion precluded coverage under Georgia law for injuries to tenants from carbon monoxide poisoning allegedly caused by a landlord's failure to keep a rental in good repair, noting that nothing in the text of the exclusion supported a reading that the exclusion was limited to what is commonly considered environmental pollution).

Courts have yet to have an opportunity to address whether an individual's claim against a business for contracting COVID-19 from a contaminated product or an improperly sanitized premise is in the realm of a "traditional" or "nontraditional" pollution claim. Much like the analysis of "pollutants" above, we can deduce whether COVID-19 would fall within the sort of environmental harm expected within a pollution provision from case law across the country.

In *Johnson v. Clarendon Nat. Ins. Co.,* No. G039659, 2009 WL 252619, *1 (Cal. Ct. App. Feb. 4, 2009), the court concluded that negligent building maintenance that resulted in mold growth was not excluded by the pollution exclusion because the claim involving mold damage to a building was not the sort of claim "typically associated with pollution of the environment." Notably, the court posited a rhetorical query:

> Would the pollution exclusion apply to a doctor who accidently spilled a blood or urine sample from one patient and negligently infected another? Does a policyholder pollute the environment by sneezing and passing a virus to their neighbor? A layperson would not reasonably interpret the exclusionary language to apply to the above scenarios.

Id. at 13. This reasoning would seem to indicate that California courts would view COVID-19 contamination to individuals as outside the scope of the typical pollution exclusion.

Conversely, in *Nova,* 424 F. Supp.2d at 1333-34, the court applying Florida law declined to limit the pollution exclusion to apply only to industrial and environmental pollution in the absence of such limiting language in the policy. The *Nova* court held that the pollution exclusion applied to bar coverage for various plaintiffs' exposures to "living organisms," "microbial populations," "airborne and microbial contaminants" and "indoor allergens" while working inside an office building. *Id.* at 1340.

In the Absence of a "Pollutant" Definition which Includes Viruses, We Must Analyze and Analogize Other Pollution Coverage Cases Involving Similar Phenomena.

There are indeed some policies wherein the pollution provision is manuscript or non-standard and specifically include viruses within the definition of pollutant. For example, in *PBM Nutritionals, LLC v. Lexington Ins. Co*., 724 S.E.2d 707, 711 (Va. 2012), the policy contained the following definition: "CONTAMINANTS or POLLUTANTS mean any material which after its release can cause or threaten damage to human health or human welfare or cause or threaten damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, fungi, virus, or hazardous substances as listed in the Federal Water Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act, or as designated by the U.S. Environmental Protection Agency." In this instance, COVID-19 claims are highly likely to fall within the policy's definition of pollutant. Of course, policyholders will likely to argue that, if some policies specifically use the word "virus" in an exclusion, then those policies that fail to use the word must necessarily be intended to cover viruses. This enterprising argument was in fact raised in the past week in one of the country's first COVID-19 coverage suits. *See Big Onion Tavern Group, LLC v. Society Ins.*, Inc., No. 1:20-cv-02005 (N.D. Ill., Mar. 27, 2020).

However, the majority of pollution provisions do not specifically reference viruses. In those common instances, courts, policyholders, and insurers must examine whether COVID-19 claims involve a contaminant or irritant by resorting to guidance from those courts having engaged in similar analyses for other viruses, bacteria and even mold. Moreover, reference to whether individual contamination is the type of environmental harm expected to be within a pollution provision is imperative, but it is a subject over which courts across the country are not united. As COVID-19 liability claims arise, these issues will come to the forefront and collide with interests of legislators mandating insurance coverage for COVID-19 claims. Such legislative efforts are only now getting underway and are destined to face constitutional challenges if passed, especially with regard to the third party liability claims addressed herein.

For questions or more information regarding this article, please email BatesCarey's COVID-19 Team at COVID-19@BatesCarey.com.