



COVID-19 Team Update

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## Coronavirus, Courts, and Coverage

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Millions of people across the world are on lock down as government restrictions on travel and “social distancing” expand to slow the coronavirus (COVID-19) outbreak. The United States’ Center for Disease Control and Prevention (CDC) [predicts](#) that the situation will get worse before it improves. According to the CDC, as of March 19, 2020, there have been [more than 7,000 total cases](#) spread across 54 U.S. states and territories. Incidences of infection are increasing exponentially, and it is anticipated that between 160 million and 214 million Americans could ultimately be infected before the virus runs its course.

As the pandemic brings crushing consequences to a broad range of businesses, this week saw a wave of the first litigation involving the coronavirus. This article provides an overview of: 1) the litigation from the past week; 2) the key insurance endorsements expected to be implicated by coronavirus claims; 3) the regulatory actions that may impact coverage, and; 4) the science with which claims handlers must soon become familiar.

### **Coronavirus in the courts**

In recent days, numerous coronavirus lawsuits have been filed across the nation, including two securities class action lawsuits, an insurance coverage declaratory judgment action, and a general tort suit:

- [Patrick McDermid, et al. v. Inovio Pharmaceuticals, Inc., et al. Case No. 20-cv-01402 \(E.D. Pa.\)](#). On March 12, 2020, a securities class action lawsuit was filed in the Eastern District of Pennsylvania against Inovio Pharmaceuticals and its CEO, J. Joseph Kim, alleging that Inovio made a series of misleading statements to investors about the Company’s development of a purported vaccine for the coronavirus, which artificially inflated the value of the Company’s shares and resulted in significant investor losses. According to the complaint, a two-day stock drop represented a 71% decline from the class period high and a \$643 million loss of market capitalization.
- [Eric Douglas, et al. v. Norwegian Cruise Lines, et al., Case No. 20-cv-21107 \(S.D. Fla.\)](#). On March 12, 2020, a securities class action lawsuit was filed in the Southern District of Florida against Norwegian Cruise Lines and several company officers. According to the Lawsuit, the company made false and/or misleading statements and/or failed to disclose that: “(1) the Company was employing sales tactics of providing customers with unproven and/or blatantly false statements about COVID-19 to entice customers to purchase cruises, thus endangering the lives of both their customers and crew members; and (2) as a result, Defendants’ statements regarding the Company’s business and operations were materially false and misleading and/or lacked a reasonable basis at all relevant times.” According to the complaint, the company’s share price dropped more than 60% based upon these misleading statements.



- [\*Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd's London, et al., Civil District Court for the Parish of Orleans, Louisiana.\*](#) On March 16, 2020, a New Orleans restaurant facing operating restrictions due to the coronavirus pandemic filed suit against its insurer seeking a declaratory judgment that its “all risk” insurance policy provides coverage for business interruption losses.
- [\*Ronald Weissberger, et al. v. Princess Cruise Lines, Ltd. Case No. 20-cv-02267 \(C.D. Cal.\)\*](#). On March 9, 2020, a passenger aboard the Grand Princess cruise line, which was quarantined as a result of an onboard coronavirus outbreak, filed suit against the cruise line accusing it of placing profits above the safety of its passengers.

As a result of this growing trend of coronavirus lawsuits, the insurance industry soon will be grappling with difficult decisions on how to interpret and apply traditional insurance products to expanding coronavirus claims.

### **Insurance Products Implicated by Coronavirus Claims**

As outlined above, the coronavirus pandemic has already spawned litigation by and against businesses that have been negatively impacted by the virus. Business insurers will almost certainly be asked to foot the bill for this global crisis. However, communicable disease coverage for businesses can be limited.

For instance, one of the most highly reported commercial impacts of the coronavirus is supply chain disruption and the resulting interruption in business operations. Business interruption insurance may seem like a natural fit to cover costs associated with supply chain disruption or forced business closures due to coronavirus. Companies hoping to access business interruption coverage, however, will likely need to demonstrate that the virus caused “direct physical loss” to their business.

While an actual infection on the premises may meet the definition, businesses forced to close their doors in an effort to prevent the spread of infection or “flatten the curve” of coronavirus infections may have difficulty demonstrating actual “direct physical loss.” See, e.g., *Mama Jo’s, Inc. v. Sparta Ins. Co.*, 2018 U.S. Dist. LEXIS 201852 (S.D. Fla. Jun 11, 2018) (restaurant did not sustain direct physical loss when dust and debris from nearby roadwork could be remediated by cleaning); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130 (Ohio Ct. App. 2008) (mold which could be remediated by cleaning was not direct physical loss); *Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass’n*, 793 F. Supp. 259 (D. Or. 1990) (asbestos contamination is not a physical loss), *aff’d*, 953 F.2d 1387 (9th Cir. 1992).

Depending upon the nature of the coronavirus-related claim being asserted, companies’ Directors and Officers (“D&O”) policies may also be implicated. As noted in the stock drop cases cited above, D&O insurers could be asked to provide coverage for the costs and liabilities arising from shareholder lawsuits alleging that the company acted unreasonably in response to the coronavirus pandemic, e.g., failing to properly disclose financial risk or misrepresenting vulnerabilities to business disruptions associated with the pandemic.

Additionally, environmental insurance policies may potentially cover expenses associated with cleanup, disinfection and decontamination coverage as a result of, among other things, a discharge, dispersal, release or escape of bacteria and viruses. Despite the inclusion of affirmative coverage for disinfection expenses in certain policies, there may be limitations for coronavirus coverage depending on specific policy wording.

### **Virus-Specific Endorsements Past and Present**

Indeed, this is not the insurance industry’s first experience with a viral epidemic (e.g., SARS, H1N1, Ebola, etc.), and many policies now contain specific exclusions for damages and injuries arising from viral or bacterial-



related losses. In 2006, the Insurance Services Office (“ISO”), a leading source of insurance policy wording, released a dedicated policy exclusion (Form No. CP 01 40 07 06 © ISO Properties, Inc., 2006) that bars first-party property coverage for “loss or damage caused by or resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease.” The form specifically states that it applies to bar coverage for business interruption caused by viruses.

For carriers that have incorporated that exclusionary language into their commercial property policies, their exposure to Coronavirus-related claims may be limited. See *Sentinel Ins. Co., Ltd. v. Monarch Med Spa, Inc.*, 105 F.Supp.3d 464, 472 (E.D.Pa. 2015) (fungi, bacteria, virus exclusion unambiguously barred coverage for bodily injury claims arising from patient exposure to Group A Streptococcus bacteria at medical spa); *Clarke v. State Farm Fla. Ins.*, 123 So.3d 583, 585 (Fla. App. 4 Dist. 2012) (“an insurer may deny coverage where a policy expressly denies coverage for bodily injury ‘arising out of’ the transmission of communicable diseases.”); *Plaza v General Assur. Co.*, 244 A.D.2d 238 (N.Y. App. Div. 1997) (“policy’s exclusion for bodily injury arising out of transmission of “communicable disease” by insured precluded coverage.”)

More recently, in February 2020, [ISO developed and released two optional endorsements](#) for use with commercial property forms to provide limited business interruption coverage for coronavirus disruptions — (1) “Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus”; and (2) “Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus (Including Orders Restricting Some Modes of Public Transportation).” These forms generally provide coverage for actual loss of business income or necessary extra expenses incurred because a civil authority ordered quarantine to prevent infection by or spread of a coronavirus, even if the action is taken based on suspicion of a risk of contagion, rather than an actual infection.

### **Efforts at Legislation to Increase Coronavirus Coverage**

In response to concerns about an inability to absorb the mounting financial losses from this crisis, some states are eyeing legislation to force property insurers to provide businesses with interruption coverage for coronavirus-related shutdowns, regardless of whether their policies exclude “virus” claims. For example, on Monday March 16, 2020, the New Jersey legislature introduced [Assembly Bill 3844](#), which aimed to shift the financial obligation of business interruption claims onto property insurers. In a [statement](#) to the committee assembly, the bill’s sponsors described the bill’s purpose as follows:

The bill provides that every policy of insurance for loss or damage to property, which includes the loss of use and occupancy and business interruption, in force on the date of the executive order, shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic, as provided in the Governor’s executive order

This legislative mandate would effectively eliminate ISO’s “Virus” exclusion (which was previously approved by state legislators) from many policies. Though this New Jersey bill was ultimately removed from consideration in its current form before final vote, similar legislation is expected in other states.

Additionally, last week, the New York Department of Financial Services (NYDFS) mandated that all property/casualty insurers “provide certain information regarding the commercial property insurance it has written in New York and details on the business interruption coverage provided in the types of policies for which it has ongoing exposure.”

Citing the “potential impact of COVID-19 on business losses,” NYDFS issued a [letter](#) instructing all property





and casualty insurers that provide business interruption and related coverage in New York to send a “clear and concise explanation of benefits” to all commercial policyholders. The explanation must include the following information:

- A description of the policyholder’s commercial property insurance or related coverage.
- Whether the policy covers “business interruption” and a list of the covered perils under the policy.
- Whether the policy includes “civil authority” coverage, the type of damage or loss required for coverage.
- Whether the policy includes “contingent business interruption” coverage and a list of the “covered perils” under the policy.
- Whether the policy includes “supply chain” coverage and whether such coverage is limited to named products or services from a named supplier.
- The required waiting periods under the policy and the amount of time coverage remains in effect once it becomes active for a given incident.

The letter also instructs insurers to provide copies of each explanation of benefits to NYDFS. Insurers that does not write commercial property insurance in New York need not comply. However, those exempt insurers must still certify to NYDFS that they do not write such insurance “in a statement signed by an officer or other authorized representative of the Insurer.”

These actions by legislators and regulators in New Jersey and New York are examples of states attempting to control, or at least comprehend, the extent to which insurance will be available to respond to the looming financial blowback from coronavirus disruptions. It is reasonable to expect similar legislative action in other states as the virus progresses across the nation.

### **Navigating Coronavirus Claims Through Science**

The intersection of science and claims handling will be necessary to evaluating coverage for coronavirus claims. For example, to determine whether business interruptions are caused by “direct physical loss” (*i.e.*, actual infection on the company’s premises rather than preventative measures) as necessary to trigger business interruption coverage, it may be necessary to pinpoint the credibility of a “claim of contamination” or the precise moment of infection or contamination. This may require claims handlers to know and understand how long the virus could live on different surfaces, or how long it takes for the virus to be transmitted from person to person.

For example, a recent study published in the March 2020 [Journal of Hospital Infection](#) indicates that the virus can persist on inanimate surfaces like metal, glass or plastic for up to 9 days, but can be efficiently inactivated by surface disinfection procedures with 62–71% ethanol, 0.5% hydrogen peroxide or 0.1% sodium hypochlorite within 1 minute.

Infectious disease researchers at The University of Texas at Austin published a [study](#) on March 16, 2020 concerning the method and speed in which transmission occurs. The researchers concluded that the time between cases in a chain of transmission is usually less than one week, and that more than 10% of patients are infected by somebody who has the virus but does not yet have symptoms.

Because research indicates that transmission can potentially occur through people who are not yet symptomatic, it may be difficult to trace the roots of infection back to one establishment or encounter. As a result, it will be important for insurers to stay abreast of scientific developments regarding coronavirus.



## Conclusion

International efforts to mitigate the transmission of the coronavirus have resulted in unprecedented losses to the global economy caused by viral infections, business disruptions, and market volatility. It is only a matter of time before insurers are asked to bear the brunt of coronavirus' financial fallout. Effectively managing risks associated with coronavirus claims, however, will require a comprehensive understanding of various insurance products, applicable case law interpreting those policy provisions, and evolving science.

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