

## CGI Coverage and Coronavirus: Is Causing Exposure an “Occurrence”?

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*Insurance Coverage and Bad Faith*

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There is only one thing that can be said for sure about the extent of consequences — human and economic — of the new coronavirus outbreak. Nobody knows. But, as things stand now, minor, and even moderate, have left the barn.

History shows that, in the wake of widespread injuries and financial losses, focus often turns to the possible role of insurance to mitigate the damages. The new coronavirus — COVID-19 — will be no exception. Indeed, lots of lawyers have already published articles discussing the issue. History also teaches that, when novel claims arise, not everyone sees eye-to-eye on if or how insurance policies apply.

As policyholder lawyer Kirk Pasich put it in *The Wall Street Journal* last week: “There is no guesswork here: There will be insurance-coverage disputes.” He added that “[t]here is so much money at stake and strong differences of opinions as to whether insurance applies.”

Most of the coronavirus-insurance chatter so far has focused on possible coverage under business interruption policies. That makes sense. A business that has suffered a financial downturn, on account of the impact of the virus, would certainly describe it as an “interruption.” But Business Interruption policies typically require that there be direct physical loss of or damage to the insured property. And most business losses will likely be the result of a general decline in economic activity and not physical loss or damage to a structure.

But expect to see disputes over satisfaction of this requirement if a business is disrupted because the virus was present on its premises, say, in the HVAC system. Some policyholder-counsel are already beating this drum.

Other potential business interruption issues being bantered-about involve coverage for the consequences of supply chain disruptions and if a business is closed on account of a government mandate.

Coverage questions are likely to arise under a variety of other policies, including event cancellation. *The Wall Street Journal* reported that the South By Southwest festival in Austin is uninsured for its cancellation as its policy does not cover a shut-down caused by a disease.

According to the *Journal*, on account of its losses, the future of the mega-gathering is up in the air. The Chief Executive of SXSW told the paper: “We’ve had to show our insurance policy to all kinds of people, and nobody ever said, ‘Hey, there’s a big hole here.’”

### Enter the Plaintiffs’ Lawyers

Another history lesson: Injuries and financial losses are often followed by an assessment of blame. This is the tort system. Enter the plaintiffs’ lawyers. Some in the business of seeking compensation, for those that have been harmed, may be thinking that someone must pay for all this chaos.

Of course nobody here can expect to be sued for causing the coronavirus. But the same may not be said for those who allegedly failed to prevent others from becoming infected. Consider schools that did not close and its students became infected, conferences that did not cancel, stores and restaurants that should have shut down, sporting events that should not have gone on. The list is long. Some businesses, and employees, may be forced for reasons of economic necessity — survival even — to put financial interests ahead of safety.

Consider the suit filed on March 9<sup>th</sup> by Ronald and Eva Weissberger, passengers on the Grand Princess cruise liner, which was docked off the coast of California for several days on account of passengers and crew infected by the coronavirus. In their California federal court complaint, the couple alleges that Princess Cruise Lines had actual knowledge that two passengers, who had previously disembarked, had symptoms of the coronavirus. In addition, 62 passengers now on board were allegedly exposed to them. Yet, despite all this, the suit alleges that the ship still sailed, on account of the cruise liner choosing “to place profits over the safety of its passengers.”

Needless to say, there will be proximate cause challenges to tying one’s infection to another’s conduct. After all, the exposure could have happened in umpteen locations. There will also be duty of care issues that look at whether the business satisfied its obligations to invitees or others on the premises.

Such suits would presumably be reserved for those seriously injured or who succumbed to the virus. [Think egg-shell plaintiff for those who died and had other underlying illnesses.] So far that is not most people. Although those with minor injuries may still want lost wages, which is because of bodily injury. So how prevalent these suits are remains to be seen. But ruling them out entirely would be premature.

And what about if one’s conduct, in conjunction with taking coronavirus measures or not, causes another business to shut down. [The CGL definition of “property damage” usually includes “loss of use” of property.]

## Coronavirus and CGL Coverage

Claims that seek to hold people responsible for causing others to contract coronavirus will put insurance in the spotlight. A business facing such a suit will turn to its commercial general liability policy. Despite the availability of defenses against these premises liability claims, the duty to defend does not consider the merits of the suit.

How might insurers respond to such suits?

Many CGL policies contain a Fungi or Bacteria exclusion. While it is often colloquially called the Mold exclusion, is it more than that. The endorsement typically also excludes coverage for “bodily injury” “which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any bacteria on or within a building or structure,” et seq. But COVID-19 is a viral infection and not bacterial.

There is a liability policy exclusion for communicable diseases. In *Koegler v. Liberty Mutual Insurance Company*, 623 F. Supp. 2d 481 (S.D.N.Y. 2009), the court held that no liability coverage was owed to an individual, for claims that he transmitted the human papillomavirus and herpes virus to his girlfriend and her daughter. The court held that the communicable disease exclusion, which excluded coverage for bodily injuries arising out of the “transmission of a communicable disease, virus, or syndrome,” precluded coverage. But the Communicable Disease exclusion is not seen often in CGL policies.

The pollution exclusion? Policyholders will maintain that, even states that apply it broadly, won't go that far.

## Is Causing People to Contract Coronavirus an Accident?

While the possible role of exclusions come to mind, they are only reached if a claim first satisfies the relevant terms of the policy's insuring agreement: "bodily injury" caused by an "occurrence," usually defined these days as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

And that's where the fight over the availability of general liability coverage, for insureds that allegedly caused others to contract coronavirus, is likely to take place: the gateway to the policy, its insuring agreement. Was the "bodily injury" caused by an "occurrence"/ accident? [Coverage B — "personal and advertising injury" — does not require an "occurrence." But only false detention or imprisonment — think wrongful quarantine — would seem relevant here.]

In general, whether there has been an accident, for purposes of securing insurance, is the oldest and most litigated of all coverage issues. The first "accident" coverage case that I know of goes back to 1835 — *Howell v. Cincinnati Insurance Company* (Ohio Sup. Ct.).

An interesting "accident" case from way, way back is *Schneider v. The Provident Life Insurance Company* (Wis. 1869). A man was killed when he fell under a slow moving train while attempting to board it. The push and pull in *Schneider*, over whether his death was caused by an "accident," reads like the opinion was written last week. When an issue has been debated for nearly 200 years, and the arguments haven't changed much, it would be fair to call it vexing.

There may be no better description of this confounding issue than how it was put by the Pennsylvania Supreme Court in *Brenneman v. St. Paul Fire & Marine Insurance Company* (1963). Nearly 60 years ago Justice Musmanno made this observation:

What is an accident? Everyone knows what an accident is until the word comes up in court. Then it becomes a mysterious phenomenon, and, in order to resolve the enigma, witnesses are summoned, experts testify, lawyers argue, treatises are consulted and even when a conclave of twelve world-knowledgeable individuals agree as to whether a certain set of facts made out an accident, the question may not yet be settled and it must be reheard in an appellate court.

So is "bodily injury," on account of an insured's failure to prevent exposure to coronavirus on its premises, caused by an accident?

At the outset, the standard for determining if bodily injury has been caused by an accident differs substantially between states. Even within states the standards are sometimes all over the board. Throw in that the cases can be wildly different factually. And there also seems to be an element of I-know-an-accident-when-I-see-one in the decisions. Did I mention that courts have been trying to figure out what's an accident since Andrew Jackson was in the White House?

*Liberty Mutual Insurance Company v. Estate of Bobzien*, 377 F. Supp. 3d 723 (W.D. Ky. 2019) provides guidance on whether "bodily injury," on account of an insured's failure to prevent exposure to coronavirus, was caused by an accident?

Michael Bobzien sued his deceased father, Hugo Bobzien, for various injuries and conditions caused by exposure to second-hand smoke while Michael was a minor living in his father's house. Hugo was insured under a series of homeowners' insurance policies issued by Liberty Mutual. Each of the policies defined an occurrence as "an accident, including continuous and repeated exposure to substantially the same general harmful conditions, which results, during the policy period...in 'bodily injury.'"

In the coverage case, the court concluded that Michael failed to allege an “accident” under the Liberty Mutual policies, as his complaint alleged that: (1) Hugo intentionally smoked in the presence of his children, and (2) Michael’s injuries and conditions were a direct, natural and foreseeable result of Michael’s exposure to second-hand smoke.

The court in the very recent decision of *Campanella v. Northern Properties Group, LLC*, No. 19-171 (D. Minn. Feb. 28, 2020) saw the accident issue differently. Matthew Campanella rented a residence from Northern Properties. Unfortunately it contained toxic levels of chicken feces. Campanella claimed he contracted histoplasmosis on account of Northern Properties carelessly and negligently failing to clean and maintain the residence. Histoplasmosis is a serious infection caused by a fungus in the environment, particularly in soil containing large amounts of bird or bat droppings.

Northern Properties sought coverage for Campanella’s suit under a CGL policy issued by Auto-Owners. At issue was whether the bodily injury was caused by an “occurrence,” defined as an accident.

As Auto-Owners saw it, no way, no how could Campanella’s injury have been caused by an accident: “[I]t is difficult to imagine any scenario in which the accumulation of chicken feces in a residential dwelling to a ‘toxic level’ due to a failure to clean the premises would be accidental.”

But the court disagreed: “Even if Northern Properties intentionally allowed a toxic build-up of chicken feces on the premises, Auto-Owners cannot point to any facts suggesting that any party foresaw Campanella contracting histoplasmosis. In fact, Auto-Owners admits that ‘most people who breathe in the [histoplasma fungi] spores don’t get sick.’ In other words, Campanella contracting histoplasmosis was unexpected and unforeseen—an ‘accident’ as both Minnesota and Wisconsin have defined it.”

Whether “bodily injury,” on account of an insured’s failure to prevent exposure to coronavirus, is caused by an accident, will generally turn on whether the insured foresaw the claimant’s injury. Given the vast warnings, about the need to take action to prevent exposure to coronavirus — not to mention if the insured had reason to know of a risk — some courts may answer this question in the affirmative and conclude that the bodily injury was not caused by an accident.

## Conclusion

For sure there are legal and factual challenges to bringing suits against entities for failing to prevent exposure to coronavirus on their premises. And such hurdles may be what keeps the extent of efforts low.

But the duty to defend determination does not take the merits of a claim into consideration. In addition, while such “bodily injury” may not have been caused by an “occurrence,” that determination may not be possible at the complaint stage based on how the allegations are pleaded. Therefore, insurers may find themselves defending claims that their insureds failed to prevent others from contracting coronavirus.

These are strange times. And coronavirus coverage cases will be strange too. But despite their novelty, insurance coverage jurisprudence has long been in place to sort them out.

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As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

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