# Third-Party Coverage Considerations in Novel Coronavirus Cases

By: Clay Crawford
Foland, Wickens, Roper, Hofer & Crawford, p.c.

## 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 property 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 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

[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).

[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)).

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 injury arising out of exposure to silica, asbestos, fungi, bacteria, or lead are all commonly excluded by endorsement. 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

[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.

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, fugus, and bacteria exclusions. Some policies also include "Pathogenic Organisms Exclusionary" endorsements, which bar coverage for damage or injury resulting from any bacteria, yeasts, mildew, 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]

---

[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.*
[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.

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]

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 pollution exclusion as applicable 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

[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.

[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).

[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).

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 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 reportedCOVID-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.

[18] *Id.* at *5 (citing e.g. *Waserstein* at 1333-1334).
[19] https://microbiologysociety.org/why-microbiology-matters/what-is-microbiology/viruses.html

[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.*