

**BARCLAY DAMON** LLP

**COVID-19's Impact  
on Liability and  
Coverage Claims in  
New York State**

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**» COVID-19: Liability and Insurance Coverage Claims**

- » Overview
- » General Liability Claims
- » Workers' Compensation Claims
- » Legislative Proposals and Executive Orders
- » Insurance Coverage for COVID-19 Losses and Trending Litigation
- » Best Practices for Businesses

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**» COVID-19: General Liability Claims**

- » Businesses and other organizations may face an influx of personal injury and wrongful death claims arising from COVID-19.
- » Health care facilities, grocery stores, restaurants, and other “essential” companies operating during crisis are the initial targets.
- » All employers and companies interfacing with customers may have potential liability.

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**» Negligence and Premises Liability**

- » Duty owed
- » Breach of duty
  - › Failure to adopt (or timely adopt) measures to prevent spread, such as installing glass shields at cash registers, requiring facemasks, taking employee temperatures, maintaining social distancing, proper sanitization, etc.
- » Injury
- » Proximate cause
  - › Difficult to prove due to widespread and easy transmission of COVID-19
- » Premises liability: Actual or constructive notice too

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**» Proximate Cause Issues**

- » *Petitt v. Celebrity Cruises*, 153 F. Supp. 2d 240 (SDNY March 28, 2001)
- » Class-action lawsuit brought by passengers who sustained food-borne illness during cruise
- » Cruise line granted summary judgment since no reasonable jury could conclude the illness was caused by the cruise line’s negligence as opposed to another source
- » Defendant’s evidence included an epidemiologist who discussed incubation periods and potential sources of illness
- » Plaintiffs could not demonstrate that, during the incubation period, the cruise line was the only potential source of illness

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**» COVID-19: Product Liability Claims**

- » Products: Diagnostic testing, experimental drugs, medical devices, health and hygiene products, PPE
- » Defendants: Product manufacturers, suppliers, distributors
- » Issues: Failure to properly warn, alleged breach of warranties, failure of device to prevent transmission

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**» COVID-19: General Liability Defenses**

- » Third-party claims
  - > Proximate cause burden on defendant
- » Joint and several liability
  - > Apportionment of liability among joint tortfeasors
- » Plaintiff's comparative fault
  - > E.g., ignoring social-distancing rules and other health and safety guidelines

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**» COVID-19: Workers' Compensation**

- » Employers and WC insurers may face an influx of claims from workers claiming they contracted COVID-19 on the job.
  - > Workers' Compensation Law § 2(7) defines "injury" and "personal injury" as "only **accidental injuries** arising out of and in the course of employment **and such disease or infection** as may naturally and unavoidably result therefrom."
  - > Exposure alone, without contraction, is likely not enough to result in a compensable claim.

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**» COVID-19: Workers' Compensation (cont'd.)**

- » Occupational disease claims
  - › Derived from the nature of employment and result from generally recognized risks incident to a particular occupation
- » Case law from tuberculosis epidemic in 1970s:
  - › *Nathan v. Presbyterian Hospital*, 66 A.D.2d 933 (3d Dep't 1978): Affirming board's decision that a nurse contracted tuberculosis as a result of her exposure to a tubercular patient and concluding the work exposure to which all nurses are subjected is sufficient to meet the essential tests of occupational disease
- » Medical professionals may have stronger claim for "occupational disease," but what about other "essential" services being exposed to disease on an ongoing basis?

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**» COVID-19: Workers' Compensation (cont'd.)**

- » Accidental injury claims
  - › Require clear connection between condition and specific traumatic event
  - › Determined based on the "commonsense viewpoint of the average man" (*Claim of Masse v. James H. Robinson Co.*, 301 N.Y. 34 (1950))
- » Thorough investigation required
- » Claimant bears burden of proof

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**» COVID-19: Workers' Compensation (cont'd.)**

- » Contraction of communicable diseases in the course of employment
- » *Matter of Donato v. Taconic Corr. Facility*, 143 AD3d 1028 (3d Dep't 2016): Claimant failed to establish that acute bronchitis and a reactive airway disease resulted from an infection contracted while transporting a prisoner aboard a commercial flight; physician conceded the infection could have been contracted anywhere
- » *Matter of Spoerl v. Armstrong Pumps, Inc.*, 251 AD2d 915 (3d Dep't 1998): Claimant failed to establish the bacteria responsible for a staph infection was contracted on business trip to England, which is common in both countries, and the source of entry into the body was not established with any medical certainty

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**» COVID-19: Workers' Compensation**

- » Other potential workers' compensation issues
  - > Mental stress claims without contraction
    - A housekeeper at a nursing home was awarded benefits as the employee responsible for cleaning the isolation room and being subjected to stress "greater than normal work environment"
  - > Employer's compliance (or failure to comply) with government guidance regarding protective measures
  - > Work-at-home issues

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**» Early COVID-19 Claims**

- » Illinois wrongful death action filed by a former Walmart employee alleging the store wasn't properly cleaned and employees weren't provided appropriate protective equipment
  - > Alleges "willful and wanton" misconduct as exception to workers' compensation bar
- » Smithfield Foods, a large pork processor, was sued in federal court in Missouri by a worker advocacy group for allegedly failing to protect workers by having them work "shoulder to shoulder" during the pandemic.
- » Several suits against cruise lines for continuing to operate after positive tests on board, including some passengers who died
- » Suits in Washington and Georgia against nursing homes for failing to protect residents, several of whom died as a result of COVID-19

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**» Early COVID-19 Claims (cont'd.)**

- » NY nurses union lawsuit against Montefiore Medical Center (Bronx, NY) for alleged failure to provide N95 respirators and other protective measures dismissed
- » Federal class-action lawsuit against Purell for allegedly exaggerating the hand sanitizer's ability to prevent illness
- » Cities of Costa Mesa, CA and San Antonio, TX suing US government for wrongful release of quarantined cruise passengers
- » Medical staffing agency suing US Citizenship & Immigration Services for delaying review of H-1B visas for foreign medical professionals

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**COVID-19: Legislation and Executive Orders Impacting Liability Claims**

- » NY Executive Order 202.10
- » Grants medical professionals immunity from civil liability arising out of COVID-19 treatment
- » Exception only where conduct constitutes “gross negligence”
- » Constitutionality may be challenged in future medical malpractice claims

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**COVID-19: Legislation and Executive Orders Impacting Liability Claims (cont'd.)**

- » US Dep't of Health & Human Services issued “PREP Act”: Preempts state laws
- » Provides immunity to certain individuals and entities arising from manufacturing, distributing, administering, or using “covered countermeasures”
- » Broadly defined to include any drug, diagnostic test, or device to treat, diagnose, cure or prevent COVID-19
- » Exception only for “willful misconduct”

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**COVID-19: Legislation and Executive Orders Impacting Liability Claims (cont'd.)**

- » NY Executive Orders 202.8, 202.14 and 202.18
- » Tolls statute of limitations period from March 20 to May 15 (currently, 56 days)
- » Passed pursuant to Executive Law giving the governor the power to suspend or “issue any directive” in response to a disaster emergency (passed days before COVID-19 emergency declared)
- » Current orders don't just toll statute of limitations period for claims expiring between March 20 to May 7, but extends all claims accruing during this period
- » Impact on claims years after disaster may be challenged as beyond scope of powers

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**» COVID-19: Business Interruption**

- » Insurance is an important risk-management tool for businesses to help mitigate losses.
- » “Business interruption” (or “business income”) coverage compensates the business for these losses (e.g., lost profits, rent)

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**» COVID-19: Business Interruption (cont'd.)**

- » “Extra expense” coverage is similar but provides a different benefit – covers increased expenses beyond normal operating expenses due to the loss (e.g., having to pay higher rent to use temporary space so the business can continue to operate)
  - › Significantly, there is a time element for the length of this coverage, which can be negotiated.

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**» COVID-19: Business Interruption (cont'd.)**

- » Myths vs. reality
- » Fiction:
  - › No coverage whatsoever for lost revenue resulting from pandemic
  - › Policies categorically exclude coverage for loss based upon a virus exclusion

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**» COVID-19: Business Interruption (cont'd.)**

» **Facts:**

- > Every insurance policy is different and should be examined.
  - Which insurer issued the policy?
  - Which coverages were selected?
- > Some policies may provide coverage.
- > If there is a possibility of coverage, businesses will consider submitting a claim.

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**» COVID-19: Business Interruption (cont'd.)**

» Sample insuring agreement language:

**A. Coverage**

We will pay for **direct physical loss of or damage** to Covered Property at the premises described in the Declarations caused by or resulting from any **Covered Cause of Loss**.

Covered Causes of Loss means **direct physical loss** unless the loss is excluded or limited in this policy.

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**» COVID-19: Business Interruption (cont'd.)**

» Business interruption coverage typically requires “direct physical loss” to property

- > Term is usually not defined in policy
- > COVID-19 may or may not involve any such physical damage
- > Question: Was the property exposed to the virus?
- > E.g., Louisiana lawsuit filed March 12: Restaurant seeking business interruption coverage argues **potential** contamination of property by virus is sufficient to trigger coverage

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**» COVID-19: Business Interruption (cont'd.)**

- » E.g.: Lawsuit by a group of theaters and restaurants in Chicago seeking BI coverage
  - › Filed on March 27 seeking coverage for losses caused by shutdowns due to COVID-19 **and** alleges bad faith for insurer's failure to investigate claims before denying coverage
  - › Insureds claim that, under Illinois law, presence of dangerous substance on property is sufficient to trigger coverage for "direct physical loss"
  - › To be determined ...

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**» COVID-19: Business Interruption (cont'd.)**

- » Some courts have found that contamination of property is "direct physical loss"
  - › *Gregory Packaging Inc. v. Travelers Prop. Cas. Co. of Am.*, Civ. No. 2:12-cv-04418 (WHW)(CLW), 2014 WL 6675934, at \*6 (D.N.J. Nov. 25, 2014)) (building rendered uninhabitable due to ammonia)
  - › *Port Auth. of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002) (asbestos)
  - › *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52 (Colo. 1968 (gasoline vapors); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 709 (E.D. Va. 2010), *aff'd*, 504 F.App'x 251 (4th Cir. 2013) (vapors from defective drywall)
  - › *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor)

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**» COVID-19: Business Interruption (cont'd.)**

- » Other courts have found that contamination of property is **not** "direct physical loss"
  - › *Universal Image Prods., Inc. v. Chubb Corp.*, 703 F. Supp. 2d 705, 709-10 (E.D. Mich. 2010) (mold contamination)
  - › *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App. 3d 23, 40-41, 884 N.E. 2d 1130 (Oh. Ct. App. 2008) (mold damage)
  - › *Great Northern Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n*, No. 90-35654, 1992 WL 16749, at \*1 (9th Cir. Jan. 31, 1992) (asbestos)

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**» COVID-19: Business Interruption (cont'd.)**

- » Virus and bacteria exclusions
  - › Even if coverage in the first instance, many policies now have an exclusion for loss caused by an outbreak such as COVID-19
  - › Response by insurers following outbreak of SARS in 2000s
  - › E.g.: *Sentinel Ins. Co. v Monarch Med Spa, Inc.*, 105 F. Supp. 3d 464, 465 (ED Pa 2015) (exclusion enforced in third-party liability case where cause of injury was bacteria)

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**» COVID-19: Business Interruption (cont'd.)**

- » Virus and bacteria exclusions – example:
  - › ISO form CP 01 40 07 06 “Exclusion for Loss Due to Virus or Bacteria”
    - “We will not pay for loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness, or disease.”
    - Question: Does the exclusion apply if a virus didn’t cause the loss, but a government-mandated shutdown did?

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**» COVID-19: Alternative Coverages**

- » So, what alternative coverages might exist in your company’s insurance policy?
- » Special endorsements for business interruption and related expenses caused by:
  - › Fungus
  - › Pollutant cleanup
  - › “Communicable disease” endorsement
  - › Civil-authority shutdown (e.g., city, county, state)
  - › Contingent business interruption

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**» COVID-19: Fungus Coverage**

- » Fungus
  - › Some property policies may contain a sublimit of coverage for costs related to “fungus” cleanup.
  - › No requirement of “direct physical loss”
  - › E.g. definition of fungus:
    - “Mildew, mold, or other fungi [or] other microorganisms”
  - › Could be avenue to coverage for cleanup expenses and other damages

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**» COVID-19: Pollution Coverage**

- » Pollutant cleanup
  - › Similarly, property policies may contain a sublimit of coverage for costs related to “pollutants” cleanup.
  - › Again, no requirement of “direct physical loss”
  - › E.g. definition of “pollutant”
    - “Solid, liquid, gaseous, or thermal irritant or contaminant”
  - › Costs and expenses related to virus may be covered

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**» COVID-19: Communicable Disease Coverage**

- » Communicable disease endorsement sample:
  - › Typically purchased as an add-on coverage

**COMMUNICABLE DISEASE COVERAGE**

Subject to the Annual Aggregate for Communicable Disease, we will pay actual business income loss sustained by you and communicable disease extra expense and crisis response expenses incurred by you, during the period of indemnity due to an order of the health authority during the policy period that results in a partial or total suspension of your business operations at your covered location.

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**» COVID-19: Civil-Authority Shutdown Coverage/Exclusions**

- » Coverage generally only triggered where civil authority:
  - > Prohibits access to the insured premises
  - > Caused by physical damage to property **other than the insured premises**
  - > Damage to other property must be caused by covered peril
- » Thus, unlikely to provide coverage
- » Exclusions may also exist that specifically prohibit coverage for “acts or decisions ... of any person, group, organization, or governmental body”

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**» COVID-19: Contingent Business Interruption**

- » Contingent business interruption coverage:
  - > Protects against losses by the insured as a result of disruption of the insured’s suppliers or customers
  - > E.g.: Shipment of a critical part delayed due to covered event overseas, causing interruption of the insured’s operations
  - > Generally requires that the supplier sustains a triggering event or loss (i.e., direct physical loss to its property)

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**» COVID-19: Legislative Proposals Impacting Coverage**

- » Proposed legislation:
  - > NJ, OH, NY, MA, and LA introduced bills since the outbreak seeking to compel insurance companies to cover claims by business owners for damages resulting from interruption of their operations due to the COVID-19 emergency
  - > Tabled in most states (no federal bill yet)
  - > Raises constitutional issues such as due process, violation of “takings clause” of Fifth Amendment, and violation of “contracts clause” of Article I

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**» COVID-19: Business Interruption**

- » Bottom line
  - > Every policy is different and should be examined
  - > Depending on facts, law of jurisdiction, and court hearing the case, coverage may exist
  - > Monitor proposed legislation

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**» COVID-19: Best Practices**

- » Locate and have all insurance policies reviewed
  - > First-party property policies such as property, pollution, etc.
  - > Liability policies such as CGL, business owners, etc.
- » Identify relevant policy language
  - > Insuring agreement
  - > Exclusions? Conditions?
  - > Policy endorsements

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**» COVID-19: Best Practices (cont'd.)**

- » Investigate claims
  - > For first-party claims:
    - Identify type of loss or expense and which policy may apply
    - Assemble financial documentation pertaining to damages
  - > For third-party claims:
    - Identify which policy coverages may apply
    - Investigate source of exposure – timelines are key

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## Questions?



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