

A microscopic view of cells and viruses. The background is a dark blue gradient. On the left, there are large, irregularly shaped cells with a textured, almost crystalline appearance. In the center and right, there are several spherical virus particles with a distinct outer shell and a darker core. A white L-shaped bracket is positioned on the left side, pointing towards the text.

# Insurance Implications of the COVID-19 Pandemic

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**July 2, 2020**



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# Insurance Implications of the COVID-19 Pandemic

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HALEY K. KRUG



# COVID-19 Insurance Coverage Litigation

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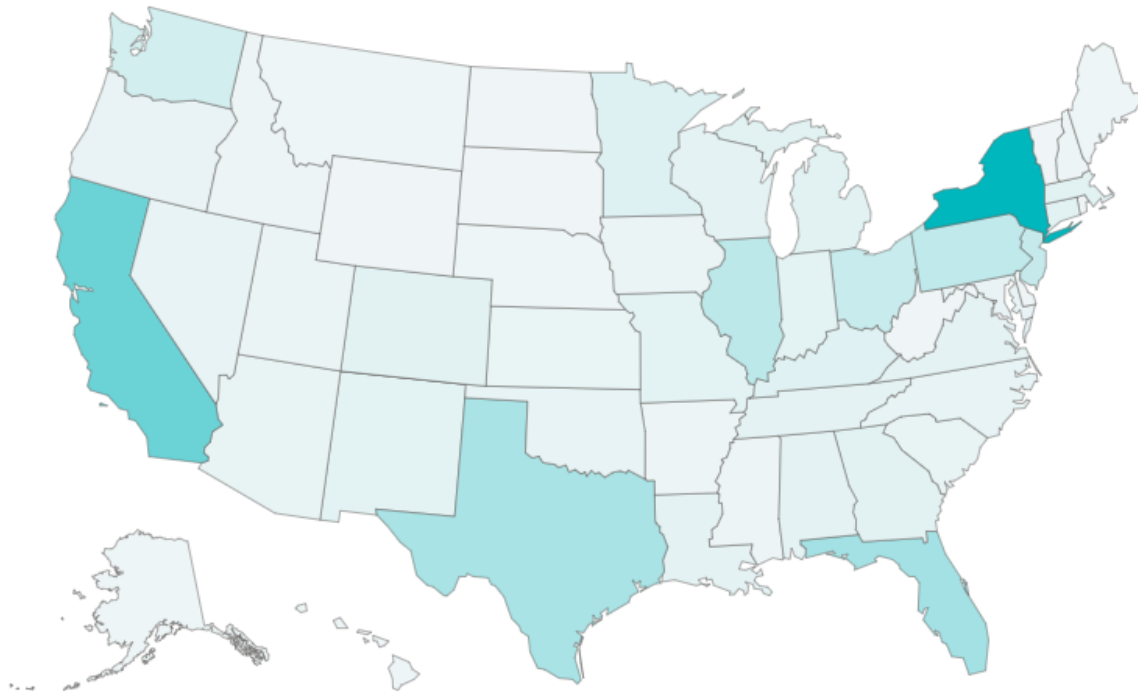
- As of June 30, 2020, Hunton Andrews Kurth’s “Complaint Tracker” shows **3144** Covid-19 related lawsuits filed in the United States  
[www.huntonak.com/en/covid-19-tracker.html](http://www.huntonak.com/en/covid-19-tracker.html)
- Of those, **770** are listed as “Insurance” cases—by far largest category
- 0 Covid-19 insurance coverage cases filed in Idaho
- 54 Covid-19 insurance coverage cases filed in Washington (favorable forum)
- 98 Covid-19 insurance coverage cases filed in Pennsylvania (home of current MDL efforts)

How can we help you?



Note: The COVID-19 Complaint Tracker displays best in desktop view

## COVID-19 Complaint Tracker



Complaints  
**3144**

Last Updated June 30 2020

### Filing Date

1/30/2020

6/29/2020



### States

State	Complaints
New York	733
California	406
Florida	233
Texas	214
Illinois	154
Pennsylvania	147
New Jersey	127
Ohio	119
Washington	87

Detailed Data



### Category

All

Category	Complaints
Banking/Financial services	59
Challenges against Foreign Sovereigns or NGOs	11

### Complaint by Filing Date

● Complaints ● Total Complaints

3K

0



# COVID-19 Insurance Legislation

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## New Jersey:

- Passed general assembly, pulled before reaching senate in March
- Focused on small businesses (less than 100 employees)
- Provided that property policies would be construed as providing coverage for business interruption due to global virus transmission or pandemic
- Insurers able to apply for reimbursement via fund established by NJ insurers
- Similar bills introduced in Ohio, Massachusetts, New York, Louisiana, Pennsylvania, South Carolina, D.C., Wyoming

## California:

- Notice and Request for Information issued to insurers
- Sought data about number of policies insuring business interruption, containing virus exclusions, issued to small businesses
- Similar task force proposed in Illinois

# COVID-19 Insurance Legislation

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## Idaho:

- DOI issued Bulletin 20-08 on April 23, 2020 to answer consumer questions and provide guidance to carriers about “the Department’s expectations about how business interruption claims should be handled.”  
<https://doi.idaho.gov/DisplayPDF?Id=7792>
- Basic education on key terms
- Tells insurers they cannot report negative claims activity for inquiries about COVID-19 related losses and reminds carriers to “act in good faith”
- Other DOI activity centered on health insurance

*State of Idaho*  
**DEPARTMENT OF INSURANCE**

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**DEAN L. CAMERON**  
Director

**BULLETIN NO. 20-08**

DATE: April 23, 2020  
TO: All Property or Casualty Insurance Companies, Agents, Consumers, and Other Interested Parties  
FROM: Dean L. Cameron, Director  
SUBJECT: Applicability of business interruption coverage to COVID-19 related claims

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The Department has received significant questions and concerns about whether business property insurance policies that cover business interruption losses apply to businesses that have been closed as a result of the COVID-19 emergency.

This Bulletin provides a general overview of this type of coverage and the types of policy provisions that consumers have the most questions about. This Bulletin also provides guidance to property and casualty agents and carriers about the Department's expectations about how business interruption claims should be handled.

This Bulletin is not an exhaustive discussion of issues related to business interruption coverage. Additionally, the Department may issue additional bulletins on this topic as issues arise. Furthermore, the Department has posted an FAQ on this subject on its website.

The Department encourages policyholders to review their policies and to contact their agent or carrier to discuss their coverages. If afterwards a policyholder still has questions or concerns, please contact the Department's Consumer Affairs team at (208) 334-4319 or (800) 721-3272 or at [doi.idaho.gov/consumer](https://doi.idaho.gov/consumer).

**Business Interruption Coverage**

The Department recognizes that all business interruption policies are not identical, and the coverage provided by a given policy depends on the specific wording of the contract. However, the following principles generally apply.

Business interruption insurance is typically an optional coverage that can be purchased to protect businesses against income losses incurred when the business is fully or partially shut down as a result of sustaining a covered loss. The policies typically pay when the following four elements are met:

1. The policyholder has sustained physical damage to insured property;
2. The damage is caused by a covered peril;
3. The damage results in quantifiable business losses; and



4. The losses take place during the time it takes to restore the property.

### **Virus or Communicable Disease Exclusions**

Some policies may expressly exclude payment for damage caused by viruses or communicable diseases. They may either contain clauses stating that viruses and communicable diseases are not a form of physical damage, or that viruses and communicable diseases are not a covered peril and therefore may not be covered. Any given policyholder's loss may warrant review to determine applicability of specific exclusion language.

### **Civil Authority Clauses**

In some cases, business interruption coverage contains a "civil authority" clause. Like other business interruption coverage, this clause may require physical damage to property caused by a covered peril, but not necessarily the insured's property or at the insured location. Dependent on the specifics of a given policyholder's situation and policy language, there may be coverage for closure of the business because of an action by a governmental entity (a "civil authority") because of health and safety concerns, so long as the covered physical loss or damage has occurred.

### **Instructions to Carriers Regarding the Reporting of Negative Claims**

Because of the magnitude and unprecedented nature of COVID-19 related losses, policyholders should not be penalized for attempting to determine the boundaries of their coverage. The Department instructs insurance carriers that they shall not report as negative claims activity or report as a claim denial when an insured or policyholder contacts the company or its agent or broker to ask about business interruption coverage for COVID-19 under its policy.

### **Due Diligence and Good Faith in the Evaluation of Claims**

The Department strongly encourages carriers to consider all the foregoing factors, at a minimum, when determining whether coverage exists in any given situation. Each situation must be considered on a case-by-case basis. The Department reminds carriers of their responsibility to act in good faith when dealing with their insureds.



# COVID-19 Insurance Legislation

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## **HR 7011, The Pandemic Risk Insurance Act of 2020:**

- Would establish a federal backstop for business interruption and event cancellation losses resulting from a future pandemic or public health emergency
- Would NOT apply retroactively to COVID-19 related losses
- National Association of Insurance Companies has proposed an alternative to be run by the Federal Emergency Management Agency (FEMA)

## **HR 6494, Business Interruption Coverage Act of 2020:**

- Similar to state counterparts, would construe business interruption coverages to include coverage for loss due to viral pandemic
- Voids exclusions
- Contains no provision for reimbursement of insurance companies

# Implicated Coverages

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## First-Party Coverages

- Commercial Property—Loss of Use
- Commercial Property—Business Interruption
- Event Cancellation
- Communicable Disease Response
- Ingress/Egress
- Contingent BI/Supply Chain
- Crisis Management
- Pollution/Contamination Response

## Third-Party Coverages

- CGL—Bodily Injury/Property Damage
- Employment Practices Liability
- Professional Liability
- Pollution Liability

# Industry Response

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- Industry publications within hours of first shutdown orders tried to spread the word: No coverage under “standard” property insurance policy for business interruption caused by coronavirus/COVID-19
  - Physical damage trigger
  - Virus exclusions
- Insureds form alliances, seek results via collective action:  
<https://www.youtube.com/watch?v=FLNM--wHVm8&feature=youtu.be>
- Case by case approach:
  - “Standard” policy is a myth
  - Trigger analysis is nuanced
  - By some estimates, only 20% of commercial property policies contain virus exclusions
  - Specialty coverages abound



# Commercial Property— Insuring Clause



## ISO INSURING CLAUSE

### 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.

## CONSIDERATIONS

- “Physical” requirement may be met by presence of contaminants in air or on surfaces.
  - Testing currently not widely available
  - Use scientific studies—lives on surfaces, etc.
- Insures against Loss OR Damage
  - Contamination that renders the building unusable or uninhabitable is a “loss”
    - Asbestos
    - E-coli in the well
    - Smoke in theater from nearby fire

# Commercial Property—Business Interruption Trigger



ANDERSEN  
SCHWARTZMAN  
WOODARD  
DEMPSEY

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are

described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of the site at which the described premises are located.

With respect to the requirements set forth in the preceding paragraph, if you occupy only part of the site at which the described premises are located, your premises means:

- (a) The portion of the building which you rent, lease or occupy; and
- (b) Any area within the building or on the site at which the described premises are located, if that area services, or is used to gain access to, the described premises.



# Commercial Property—Business Interruption Civil Authority



## 5. Additional Coverages

### a. Civil Authority

In this Additional Coverage -- Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

# Commercial Property—Exclusions

## **EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA**

**THIS DOCUMENT IS AN ENDORSEMENT THAT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

This endorsement modifies insurance provided under the following:

### COMMERCIAL PROPERTY COVERAGE PART

- A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B. 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.  
  
However, this exclusion does not apply to:
  - 1. Loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy;
  - 2. The Communicable Disease Business Income and Extra Expense Coverage in the Additional Coverages of the Building and Personal Property Coverage Form.
- 3. The Contaminated Food Business Income and Extra Expense Coverage in the Additional Coverages of the Building and Personal Property Coverage Form.
- C. With respect to any loss or damage subject to the exclusion in Paragraph B., such exclusion supersedes any exclusion relating to "pollutants".
- D. The following provisions in this Coverage Part or Policy are hereby amended to remove reference to bacteria:
  - 1. Exclusion of "Fungus", Wet Rot, Dry Rot And Bacteria; and
  - 2. Additional Coverage -- Limited Coverage for "Fungus", Wet Rot, Dry Rot And Bacteria, including any endorsement increasing the scope or amount of coverage.
- E. The terms of the exclusion in Paragraph B., or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

# Commercial Property—Exclusions



- ISO Circular post-SARS  
<https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf>
- Contamination or Pollution exclusions that do not mention viruses do not exclude viruses.
- Exclusions that refer only to “bacteria” or “microbes” do not exclude viruses. Bacteria and microbes are living things. Viruses are non-cellular strands of DNA that are not known eat, reproduce, etc., and therefore are not considered living things.
- Pollution exclusion requires “release, discharge, escape, disposal” —question whether that applies to virus pandemic.

# Bad Faith in Times of Crisis



## **I.C. s. 41-1329 Reminder:** Unfair Claims Settlement Practices include:

- Misrepresenting facts or policy provisions. Insurer has a duty to tell you what coverage you have.
- Failing to act reasonably promptly upon communications.
- Failing to adopt and implement reasonable standards for prompt investigation of claims.
- Refusing to pay without conducting a reasonable investigation.
- Failing to affirm or deny claims within a reasonable time after proof of loss.
- Lowball offers.
- Requiring repeat submissions of information.
- Failing to settle claims under one coverage to induce settlement under another coverage.

# Bad Faith in Times of Crisis



Large-scale catastrophes present unique opportunities for insurance companies to engage in bad faith. Examples:

- Policy of standard denial. Occurs when an insurance company instructs its adjusters to deny policyholders' first claim to gauge their willingness to negotiate. Strategy employed to eliminate proportion of claims at the outset.
- Change in handling practices. After hurricane Katrina in 2005, State Farm drafted a memo to its adjusters instructing them to require the insured to prove the cause of loss. This placed on homeowners the impossible burden of proving whether their homes were destroyed by wind (covered) or water (not covered).
- Policy of delay. Multiple inspections of the damage necessary because insurers use biased engineering companies. Homeowner forced to insist on another inspection. Holdbacks for overhead, replacement cost, etc. all contribute to delay in rebuilding.
- Underpayment. Take advantage of policyholders' need for quick money by offering lowball settlements.
- Use of same biased firm for all claims. Pretextual investigations, cookie cutter reports, outcome-oriented. Katrina example—wind vs. water. Insurance company's hired engineers to blame damage on water, resulting in National Flood Insurance program being responsible for most of the claims.

# What to Do Now

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- Gather policies
- Make the claim!
- Document!
  - Pre-COVID net income vs. Post
  - Expenses
  - Timing of closures
- Use Idaho Insurance Department Guidance
- Watch legislation
- Consider forum