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# Hunton Andrews Kurth LLP: Coronavirus (COVID-19) Insurance Coverage Materials

May 2020

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# Client Alert

February 2020

## For Businesses Suffering From Coronavirus Losses, Insurance May Be the Remedy

The World Health Organization (WHO) has designated the coronavirus an international public health emergency. With nearly 500 people dead and nearly 25,000 infected across 27 countries, the outbreak increasingly looks like a pandemic. Hundreds of Americans have been evacuated from China, and the US Centers for Disease Control and Prevention (CDC) has issued a Level 3 travel warning, advising that all nonessential travel to China be avoided due to the ongoing outbreak.

In addition to the health concerns, world economies are on alert. Businesses worldwide have already been affected. Travel and events have been postponed or cancelled. Supply chains have been disrupted. For instance, 10 percent of the worldwide supply of flat panels for televisions and other electronic devices are manufactured in Wuhan, China, the virus's epicenter, suggesting an imminent impact on electronics manufacturing, among other sectors. Meanwhile, automaker Hyundai just announced that it will idle plants in South Korea, pointing to a shortage of components due to the coronavirus outbreak. In other sectors, retailers have simply closed their doors. For example, Starbucks announced the closure of more than 2,000 cafes in China, while McDonald's has closed 300 stores in Hubei Province. The financial impact is mounting and affected businesses are looking for ways to offset losses. Insurance may provide a source of relief, with a variety of coverages potentially responsive to losses associated with the outbreak.

### Business Interruption and Supply Chain Disruptions

Business disruptions due to the coronavirus can create financial problems for policyholders. Commercial property policies cover losses of business income. Typically, however, the interruption must be caused by physical damage to covered property. In certain instances, coverage may be available where the interruption is due to other causes, such as orders from a civil authority. For instance, access to the insured's business may be prohibited by federal emergency management directives, such as those provided under the Stafford Act, the Homeland Security Act of 2002 and the National Incident Management System. On the state level, disaster management directives, such as those provided under the Texas Disaster Relief Act and the powers of the Texas state government upon the declaration of "disasters," specific "public health disasters" and "emergencies," and similar statutes in and powers of other states, may trigger business interruption coverage. Even where the insured business is interrupted by a civil authority order, however, most but not all property policies require that the civil authority order result from some physical damage to property. Importantly, the law is not settled on what constitutes a "physical loss," as cases throughout the country hold that contamination and other incidents that render property uninhabitable or otherwise unfit for its intended use constitute a "physical loss" for the purpose of business interruption coverage. Whether there is "physical loss" must be determined on a case-by-case basis. Thus, while traditional physical property damage associated with the coronavirus may be unlikely, it is important to pay close attention to any action by civil authorities and the particulars of each case, and review the specific language of each policy since even subtle variations in policy wording can make a difference between a covered or uncovered claim. And, where civil authority coverage is not available, policyholders should carefully examine all other available insurance to determine whether coverage may be available there.

As noted above, supply chains are already feeling the impact of coronavirus as manufacturing of critical components in China ceases, transport of completed goods slows to a crawl and suppliers, transporters and customers face facility shutdowns, quarantines or other workforce disruptions. When facing losses caused by supply chain issues, policyholders may look to their contingent business interruption (CBI) coverage for relief. CBI coverage is typically purchased as a property insurance extension. The extension addresses “contingent” losses, or losses that involve third parties on whom the policyholder’s business is dependent. CBI coverage is generally triggered when a supplier or key customer suffers a direct physical loss, which, in turn, disrupts the business operations of the policyholder, without any requirement that the policyholder itself suffer physical damage. CBI insurance can be an important risk management tool in the face of a public health emergency like the coronavirus.

## **Event Cancellation Insurance**

Many businesses and organizations hosting events, particularly those involving attendees, performers or presenters from China, may cancel or postpone events due to concerns about the virus. Impacted businesses may be able to recover under event cancellation insurance policies for, among other things, lost profits and revenue; amounts paid to reimburse vendors, ticketholders or other third parties due to the cancelled event; and additional amounts that must be spent to host the event at an alternate time or place. Coverage is also potentially available for out-of-pocket or unexpected costs, lost advertising, lost ticket sales or other contractual obligations a business must pay as a result of the cancelled event. However, policyholders should be on the lookout for policy exclusions for communicable or reportable diseases, and for restrictions limiting coverage to necessary cancellations caused by government order.

## **General Liability Insurance**

Commercial general liability (CGL) policies provide coverage for liability to third parties for bodily injury and property damage, as well as claims concerning privacy and other personal injuries. With thousands suffering bodily injury due to the coronavirus, the procedures that businesses implement to warn and protect against exposure to the virus may become a potential liability. For instance, businesses in the retail, travel, entertainment and hospitality businesses may face claims by customers alleging that the companies were negligent in failing to warn of or protect against the risk of exposure to the outbreak. These businesses may look to their CGL policies to provide coverage for such claims. Insurers may seek to rely on exclusions for exposure to viruses, bacteria or pollutants but such exclusions must be evaluated on a case-by-case basis and a myriad of arguments are available to policyholders to overcome such exclusions.

## **D&O Insurance**

In addition to third-party claims targeting businesses directly, a company’s directors and officers may be subjected to shareholder suits alleging that unreasonable actions (or inaction) in response to the coronavirus caused the company economic loss. For example, federal securities laws may require certain disclosures by publicly held companies potentially affected by the spread of coronavirus. As a result, there is a risk that shareholders may allege executives and management failed to disclose risks posed by the coronavirus to the business’s financial performance, failed to observe protocols recommended by authorities or failed to develop adequate contingency plans. Directors and Officers (D&O) policies may provide coverage for these types of costs and liabilities. Although D&O policies generally exclude claims for bodily injury, such exclusions should not preclude coverage for shareholders’ economic loss claims that allegedly stem from management-level decisions. As with other potentially implicated coverage, the availability of coverage may turn on the precise wording of the policies at issue.

\* \* \*

Insurance coverage may be available for coronavirus-related losses under many types of policies. In

addition to the policies discussed in this alert, other potentially applicable coverages include insurance for cyber risks and data breaches, product recalls, worker's compensation, employment practices, professional liability, travel-related risks and other exposures. For each policy, coverage will turn on the specific language of the policy and the factual circumstances at issue. Policy conditions, such as the timing of notice to the insurer, should be carefully evaluated as events develop. For businesses suffering losses and looking to navigate or obtain coverage for the coronavirus, having experienced coverage counsel can be invaluable.

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# Lawyer Insights

## Policy Provisions Bolster State Biz Interruption Laws

By Patrick McDermott and Syed Ahmad  
Published in Law360 | April 30, 2020



Some commentators have panned the legality of legislators' efforts to protect businesses by ensuring business interruption coverage for losses involving COVID-19. For the most part, those criticisms raise concerns based on the contract clause in the U.S. Constitution.

According to those authors, legislation that requires insurers to provide coverage under previously issued insurance policies would violate that clause. However, that theory overlooks the specific language of many insurance contracts, which provides for adjusting the policy provisions when there are changes in state law.

The contract clause states that "No State shall ... pass any ... Law impairing the Obligation of Contracts." The first part of the "two-step test for determining when such a law crosses the constitutional line" found in that clause is "whether the state law has 'operated as a substantial impairment of a contractual relationship.'"<sup>1</sup>

Relevant factors include "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights."<sup>2</sup> Applying this test must be done with reference to the specific insurance contract at issue.

The actual policy language can undermine insurers' abilities to meet the first part of the constitutional test. In fact, at least two clauses can support the constitutionality of these proposed laws.

First, policyholders can rely on liberalization clauses. As one example, those clauses can state:

If during the period that insurance is in force under this Policy, any filed rules or regulations affecting the same are revised by statute so as to broaden the insurance without additional premium charge, such extended or broadened insurance will inure to the benefit of the Insured within such jurisdiction, effective the date of the change specified in such statute.<sup>3</sup>

Under these provisions, "filed rules and regulations affecting" the policy that are "revised by statute ... so as to extend or broaden" coverage will benefit the insured. Thus, policyholders can argue that any state law ensuring coverage for business interruption losses involving COVID-19 does not substantially impair the contractual relationship because the policy itself contemplates the possibility of such a law and affirms that it would benefit the policyholder.

Because of the liberalization clause, the law would not undermine the contractual bargain or interfere with a party's reasonable expectations. Indeed, the contractual bargain recognized and approved of post-contracting governmental changes and the party's reasonable expectations would have been consistent



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with that language.

Second, policyholders can rely on provisions conforming policies with state law. One such provision states:

Any provisions required by law to be included in policies issued by the Company shall be deemed to have been included in this Policy.

If the provisions of this Policy conflict with the laws of any jurisdictions in which this Policy applies, and if certain provisions are required by law to be stated in this Policy, this Policy shall be read so as to eliminate such conflict or deemed to include such provisions for Insured Locations within such jurisdictions.

Based on provisions like this, policyholders can contend that the insurance contract specifically incorporates any state laws that conflict with the policy, at least with respect to insured locations within that particular state. Thus, the proposed statutes would not run afoul of the contracts clause because they would not operate "as a substantial impairment of a contractual relationship." Instead, the policyholder and insurer agreed to modify their contract, i.e., the policy, to incorporate and conform to any state law that is contrary to the policy provisions.

In addition to these arguments related to potential state legislation, federal action to ensure business interruption coverage for losses involving COVID-19 would not even raise the same constitutional issues. The contract clause is expressly limited to actions by a state.<sup>4</sup> And, the [U.S. Supreme Court](#) has recognized that the contract clause does not apply to federal actions.<sup>5</sup> Thus, any constitutional challenge to federal government action in this regard would not involve the contract clause.

Finally, the two provisions identified above can also undermine any reliance on substantive due process or the takings clause. To establish a due process violation, the opponent of the law must show that the legislature has acted in an arbitrary and irrational way. Insurance policy provisions that contemplate incorporation of post-contract changes in the law (like those above) support that any such post-contract changes in the law would not be arbitrary or irrational.

Reliance on the takings clause should fare no better. To begin with, legislatures routinely modify the economic relationship between parties without violating the takings clause.<sup>6</sup> Even ignoring that, the two provisions above support that the legislation being considered would not violate the takings clause.

The Supreme Court has identified these three particularly significant factors in evaluating whether a taking in this circumstance would be forbidden by the Fifth Amendment: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action."<sup>7</sup>

Here, the policy provisions identified above specifically allow for modification of the contract based on post-contract changes in the law. Thus, any economic impact would be consistent with the parties' contract and there would be no interference with the parties' expectations.

Of course, none of this is to say that many policies do not already cover business interruption losses involving COVID-19. But, if a particular policy does not provide that protection already, these proposed statutes may very well help policyholders obtain that much-needed coverage.

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### Notes

1. [Sveen v. Melin](#), 138 S. Ct. 1815 (2018) (quoting [Allied Structural Steel Co. v. Spannaus](#), 438 U.S. 234, 244 (1978)).
2. Id.
3. See also [Magnolia-Broadway Corp. v. Fire Ass'n of Philadelphia](#), 137 N.Y.S.2d 918, 922 (N.Y. City Ct. 1955) (involving policy that provided: "If during the period that insurance is in force under this policy, the policy, any authorized endorsements or filed rules and regulations affecting the same, are revised by statute or otherwise, so as to extend or broaden this insurance without additional premium charge, such extended or broadened insurance shall inure to the benefit of the insured hereunder.").
4. See Art. I, Sec. 10, Clause 1 ("*No State shall* enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.").
5. See [Pension Ben. Guar. Corp. v. R.A. Gray & Co.](#), 467 U.S. 717, 733 n. 9 (1984) ("It could not justifiably be claimed that the Contract Clause applies, either by its own terms or by convincing historical evidence, to actions of the National Government.").
6. See, e.g., [Connolly v. Pension Ben. Guar. Corp.](#), 475 U.S. 211, 223 (1986) ("Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.").
7. [Connolly](#), 475 U.S. at 225.

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# Hunton Insurance Recovery Blog

Updates, Analysis and Breaking News for Commercial Policyholders

## No Mask, No Service – Evolving COVID-19 Orders May Support Insurance Coverage for Retailers' Losses

By [Yaniel Abreu](#), [Syed S. Ahmad](#) & [Sergio F. Oehninger](#) on April 28, 2020

As previously discussed in a Hunton Retail Law Resource [blog post](#), many recent government orders require “nonessential” businesses to close due to COVID-19, resulting in massive financial losses for many retail businesses. The orders also change how “essential” retailers do business. For instance, Miami-Dade County’s mayor issued an [executive order](#) requiring people who visit or work at, among other places, grocery stores, restaurants and pharmacies to use face coverings. Los Angeles County issued a similar [order](#). These orders may result in businesses’ turning away noncompliant customers, which will cause further financial harm. Regardless of the jurisdictions where your retail business is located, it is likely that there is a governmental order affecting its operations. Your business is likely sustaining or will sustain substantial losses as a result, and incur additional expenses to comply with evolving requirements and guidelines and in resuming operations as soon as possible.

Most commercial property policies cover loss of business income and often require some type of physical loss of or damage to covered property. How the loss or damage requirement in many policies is satisfied with COVID-19 exposures will be the subject of debate. Many courts have found, and at least one insurer has conceded, that the mere presence of substances or agents on property may constitute physical loss for insurance purposes. See, e.g., *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App’x 823, 824-26 (3d Cir. 2005) (E. coli bacteria that caused homeowners respiratory illness and skin conditions could qualify as physical loss if the property’s function as a home was “nearly eliminated or destroyed” and the home was “useless or uninhabitable”); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at \*6 (D.N.J. Nov. 25, 2014) (release of ammonia inside packaging plant constituted “direct physical loss of or damage to” property because it “physically transformed” the air into an unsafe environment); *Cooper v. Travelers Indem. Co. of Illinois*, 2002 WL 32775680, at \*1, \*5 (N.D. Cal. Nov. 4, 2002) (tavern closure due to a bacteria-contaminated water well qualified as direct physical damage to property); *Widder v. La. Citizens Prop. Ins. Corp.*, 82 So. 3d 294, 296 (La. Ct. App. 2011) (dust from lead paint rendering a home unusable or uninhabitable qualified as a “direct physical loss”); *Curtis O. Griess & Sons, Inc. v. Farm Bureau Ins. Co. of Nebraska*, 528 N.W.2d 329, 331 (Neb. 1995) (insurer conceded that insured sustained physical loss when a wind-driven virus infected the insured’s swine herd).

In certain instances, coverage may be available even when the interruption is not due to physical damage to the insured’s property. That coverage can be implicated by orders from a civil authority such as a state or county that impairs or hinders access to the insured’s premises. For example, recent orders by the governor of Virginia ([here](#)) and the Los Angeles Department of Public Health ([here](#)) could trigger civil authority coverage.

Similar to civil authority coverage, attraction property coverage pays for losses incurred due to physical loss or damage to property within a certain distance from an insured location that attracts business to the insured location. This may include closure of airports, convention centers, amusement parks, hotels and other attractions that are adversely impacted by COVID-19 or related orders, resulting in loss of revenue at the insured location.



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In addition, most commercial property policies provide “extra expense” coverage, which applies to necessary and reasonable costs incurred to temporarily continue business operations as normal as practicable. This may include extra costs to temporarily relocate business operations using properties or facilities of the insured or of others, as well as costs incurred to transition employees from offices to work-from-home arrangements in an effort to maintain normal business operations, among a variety of other expenses.

Aside from coverage for losses from the presence of COVID-19 at the insured’s locations, at an attraction property or to other property covered by a civil authority order, retailers may also have coverage for losses from disruptions to their supply chain. For instance, if a supplier of raw materials or finished goods is unable to provide goods due to a disruption to its operations from COVID-19, the loss of business income sustained by the retailer from that delay may be covered by contingent business interruption or dependent properties insurance.

Commercial property policies also often provide coverage for the expenses incurred by the insured in taking reasonable and necessary actions for the temporary protection and preservation of insured property due to actual or imminent physical loss or damage. This may cover the cost of prophylactically cleaning and decontaminating retail locations to prevent any patrons or employees from contracting COVID-19.

Another important issue is that although the period of indemnity generally ends when the insured’s operations return to normal, your policy might include an extended period of indemnity endorsement. That endorsement is critical because it extends the period during which your business is entitled to indemnity beyond the time it takes to recover from the loss. Essentially, the purpose of an extended period of indemnity is to protect the insured from a prolonged decline in revenue and consequential lost profits.

As described above, there are many avenues to insurance recovery for retailers and other businesses impacted by the economic downturn precipitated by COVID-19. The coverages described above are not exhaustive, but rather represent the kinds of losses and expenses most commonly implicated by COVID-19 claims. But no two policies are the same. It is critical, therefore, for retailers and all other policyholders to carefully analyze their policies in view of the particulars of their losses. Knowing the specific terms of your policy will allow you to identify the steps necessary to pursue all available coverage.

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# Lawyer Insights

## D&O Insurance Issues Arising from the COVID-19 Crisis

By Lawrence J. Bracken, Geoffrey B. Fehling, and Lorelie S. Masters  
Published in The D & O Diary | April 15, 2020



Much of the attention concerning insurance coverage for COVID-19 issues understandably has focused on business interruption coverage. The most immediate issue facing most businesses has been the loss of revenues and profits because of a sharp slowdown or suspension of business, as well as the attendant extra expense to continue or resume operations. For that reason, coverage under first-party property policies has been front and center. In the longer

term, however, American companies can expect to deal with a broader range of claim scenarios resulting from the current circumstances, many of which implicate directors & officers liability, management liability, fiduciary liability, and related insurance issues. Because the relevant terms in directors and officers, management liability, and fiduciary liability insurance are generally the same, we refer in this article to these coverages as “D&O.” We outline below a number of D&O insurance issues companies should be focusing on now.

We have already begun to see some lawsuits filed alleging that companies and their directors and officers and other executives and employees breached their duties to the company or violated securities laws in the context of Covid-19 exposures. Depending on a company’s circumstances, lawsuits alleging breaches of duties or misleading disclosures relating to COVID-19 may allege the following claims and costs, all of which could implicate D&O insurance:

- Government investigations, particularly those arising from a company’s activities in response to COVID-19 issues and its applying for government loans and grants.
- Securities law claims and lawsuits arising out of COVID-19-related disclosure obligations and management issues.
- Claims by creditors, shareholders, trustees, and other company stakeholders relating to possible insolvency or bankruptcy.
- Fiduciary claims arising from the company’s decisions relating to employee benefit plans and employee stock option (ESOP) and pension plans.
- False Claims Act and qui tam claims relating to federal and state funds received from various COVID-19 government programs.
- Antitrust investigations and suits for alleged price-gouging and price-fixing through communications with competitors.

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- Cyber-related claims from shareholders or customers for alleged failure to comply with cybersecurity standards or breach notification laws in the event a security event, social engineering, or other fraud is perpetrated by hackers trying to exploit COVID-19-related vulnerabilities.

In addition, the COVID-19 pandemic presents unusual challenges for companies in the renewal of their D&O policies, as well as in the timing of notices they may be required to provide insurers. Each of these issues is discussed in greater detail below.

### **Government Investigations**

Many D&O policies contain a coverage extension for expenses incurred to respond to government investigations, including subpoenas and requests for documents, among other things. In most D&O policies affording this coverage, the coverage is available only if an individual insured receives a formal request from the government or is the target of the investigation, regardless of whether the company also is named. This coverage typically is sublimited well below the general per-claim limits of the D&O policy.

As discussed below, both entities and individual insureds may face claims and allegations arising out of the unique circumstances of the COVID-19 crisis. Among the claims that could involve related governmental investigations are:

- False Claims Act claims in connection with a company's application for loans or other assistance under the recently enacted Coronavirus Aid, Relief, and Economic Securities (CARES) Act and other programs specifically designed to respond to the COVID-19 pandemic.
- Antitrust and unfair trade practice claims arising out of alleged violations of price-gouging laws, price-fixing laws, and unfair competition through coordination with competitors.
- Whistleblower claims relating to federal and state funds received from government programs.
- Investigations by the US Securities and Exchange Commission (SEC) and its state counterparts into inadequate disclosure of a company's financial situation and other circumstances arising out of COVID-19 stresses on a company.
- Investigations by the SEC and the US Department of Justice (DOJ) into potential violations of the Foreign Corrupt Practices Act (FCPA), as certain industries become exposed to increased bribery risks resulting from the difficult economic landscape caused by COVID-19. These risks will be amplified because travel restrictions and mandatory quarantines geared toward curbing the spread of COVID-19 will result in postponed internal investigations and reduced efforts to prevent corporate misconduct and enforce compliance standards.
- Investigations by other government entities regulating financial services companies, such as the Financial Industry Regulatory Authority (FINRA), Office of the Comptroller of the Currency (OCC), and similar agencies, investigating alleged unsafe or unsound business practices, claims of public fraud, or other breach of fiduciary duties by regulated entities and licensed individuals operating in sub-optimal conditions as a result of COVID-19.

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This is a good time for companies to analyze the availability of coverage under all of their D&O policies for costs associated with responding to government investigations, particularly if the company is availing itself of loans or grants under the CARES programs. Some companies are consulting with their brokers about increasing sublimits for government investigations. Insurance policies proposed for upcoming renewal should be carefully reviewed because insurers are now proposing to add very broad “virus” or “communicable disease exclusions” and other provisions, even on D&O and other kinds of policies, in light of COVID-19. While the markets are hardening, policyholders should be vigilant about reductions in coverage and whether insurers are taking those reductions into account in their pricing.

### **Securities Law Claims**

D&O policies may respond to securities lawsuits arising out of COVID-19-related disclosure obligations. This is of particular concern to public companies, which typically are covered for securities claims and suits under most D&O policies’ “entity” coverage. With global stock markets now in bear market territory, investors will be asking whether steps could have been taken to avoid substantial losses in value. Federal regulators such as the SEC, as well as their state counterparts, impose various disclosure obligations on public companies in annual reports, securities offerings, and other filings. The SEC already has emphasized that it will be looking closely at COVID-19 disclosures by public companies about risk factors and the effect on their financial statements. Consequently, publicly traded businesses must contend not only with recouping direct losses from diminished business operations, but also with potential enforcement actions and securities lawsuits relating to the alleged failure to disclose actual or potential COVID-19 concerns.

Directors and officers face particular exposure from derivative suits for alleged failure to manage the effects of COVID-19 issues on their companies. This exposure can arise from a wide variety of management failures to act, to disclose information or to establish board-reporting processes. Last year, applying the Delaware Chancery Court’s *Caremark* duty of loyalty standard, the Delaware Supreme Court reaffirmed director liability where a board of directors fails to establish a reporting process for essential compliance and governance matters. See *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019). Although adherence to that standard will vary from company to company, the *Marchand* court held that “directors have a duty ‘to exercise oversight’ and to monitor the corporation’s operational viability, legal compliance, and financial performance.” *Id.* at 809. This is particularly true of single-product businesses, such as the ice cream company involved in *Marchand*. *Id.*

As frequently occurs when a company’s stock price drops for other reasons, plaintiffs’ law firms are searching for grounds to allege missing or inadequate disclosures about impending financial losses resulting from COVID-19 issues. Similarly, those firms will bring related Employee Retirement Income Security Act (ERISA) claims against the companies on behalf of the beneficiaries of various employee retirement and benefit programs.

In addition, because of the recent market volatility and economic disruptions, COVID-19 may have a significant impact on pending mergers, acquisitions, IPOs, and other business transactions. These fluctuations can lead to both increased (where potential buyers may take advantage of decreased stock prices) and decreased (such as postponing or scuttling deals involving impacted companies) financial transactions, all of which can lead to more claim activity from shareholders, buyers and other potentially impacted parties. From an insurance perspective, this is of particular interest to private companies, which

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typically have more expansive entity coverage and definitions of “wrongful acts” than in public company policies.

### **Claims Arising Out of Potential Insolvency or Bankruptcy**

An uncomfortably large number of companies, especially those in the hospitality, retail, travel, real estate, and real estate finance sectors, are facing immediate and dire liquidity and credit crunches. Those companies’ circumstances may well lead to insolvency or bankruptcy in the not-too-distant future. In the event of insolvency or bankruptcy, there is a substantial risk that the company and its officers and directors will face claims by creditors, shareholders, the bankruptcy trustee (particularly in the case of a Chapter 7 liquidation), and other stakeholders. It is especially important that there is sufficient D&O coverage for the individual insureds, whose personal assets may be at risk if the company’s D&O policy provides insufficient coverage, either in the form of too-low limits or limited coverage scope in the event of a bankruptcy or insolvency.

Most modern D&O liability insurance forms contain a broad range of protections for individual insureds in the event of a company’s bankruptcy or insolvency. For example, it is common for D&O policies to contain provisions stating that so-called “Side-A” coverage (i.e., insurance affording direct coverage to an organization’s directors and officers) cannot be rescinded and that the policy will remain in effect even if the company goes into bankruptcy. Other protections include: (i) the carve-out if a bankruptcy trustee or receiver from the insured-vs-insured or entity-vs-insured exclusion; (ii) a priority of payments provision; and (iii) excess Side-A/difference-in-conditions (DIC) coverage (designed to fill in any gaps in coverage to provide broader protections to individual insureds only). These and other policy terms are intended to prioritize protections for individual insureds, including but not limited to situations in which the company is unable to indemnify the directors and officers due to bankruptcy or insolvency.

Although the coverage and related protections available for companies and individual insureds do not uniquely apply to the COVID-19 crisis, for many companies the current circumstances present sudden and unprecedented reasons to examine those protections. Accordingly, even those companies that are not on the brink of a financial crisis would do well to analyze the coverage that would be available to the company and its individual insureds in the event of insolvency or bankruptcy and work with their coverage counsel and brokers to shore up any missing or sub-par protections.

### **Fiduciary Claims**

In the COVID-19 context, large stock drops and reductions in value of pension plans or the bankruptcy or insolvency of a company could give rise to related fiduciary liability claims. Many management liability policies include both D&O liability and fiduciary liability coverages. Fiduciary liability coverage is designed to protect individuals responsible for creating, implementing, administering, or managing their company’s employee benefit plans, including pension, ESOP, workers’ compensation, and health insurance plans. When a company is in financial distress or insolvency, as is arising now in connection with the COVID-19 crisis, two types of fiduciary claims are common.

First, there is the corollary of shareholder class action or directive claims against directors and officers and trustees of benefit plans for mismanagement or failures to disclose that lead to an unexpected drop in the company’s stock price. Many employee benefit plans include company stock as part of retirement



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The D & O Diary | April 15, 2020

plans and ESOPs, among others. Accordingly, when a company's stock price drops, fiduciaries of those plans can be the target of ERISA and other claims for mismanagement and breach of fiduciary duties with respect to plan beneficiaries. Enron and United Airlines are two of the most prominent examples of company stock options being targeted in securities class actions, and those same risks in ESOPs are heightened by COVID-19 and its potential impact on stock prices.

Second, when a company files for bankruptcy, particularly a Chapter 7 liquidation, fiduciaries of company benefit plans may be exposed to claims by the bankruptcy trustee or others for failing to maintain adequate cash balances for payment of unemployment premiums, payroll taxes and other amounts that are required under the Bankruptcy Code. The rapidity with which companies in certain industries are falling into financial distress, as well as the debt burdens many of those companies have, poses a genuine risk to many plan administrators and other fiduciaries.

As with any other potential set of claims against a company and its individual insureds, it is imperative that the company and its individual insureds review their fiduciary coverage to ensure there are sufficient limits both for the defense against fiduciary claims and for indemnification of any settlement or judgment against the fiduciaries.

### **Antitrust Claims**

Many D&O liability policies contain an "antitrust exclusion," but increasingly, particularly in private company policies, the antitrust exclusion has been limited or removed entirely. When it is present, it often is overbroad and, perhaps more importantly, applied by insurers to try to preclude coverage outside what most policyholders understand to be its intended reach. Some companies have purchased coverage specifically to apply to often specific antitrust concerns or exposures. Because antitrust regulators are targeting individual defendants in antitrust enforcement actions, it is particularly important in the current environment to be aware of the degree to which D&O coverage is available for potential antitrust claims. See Sarah Downey, Amanda Wait & Lorelie Masters, [Optimizing Antitrust Coverage in Private Company D&O Policies](#), Marsh Newsletter (Dec. 2018).

In the COVID-19 context, there are several potential avenues toward antitrust investigations and claims. First, both regulators and the public are increasingly sensitized to apparently opportunistic pricing, and enforcement agencies are pursuing companies for alleged price-gouging. A related risk is that of price-fixing through coordination with one's competitors to provide products in short supply and, in some instances, to coordinate manufacturing and distribution. Again, these are classic anticompetitive activities that might be excluded by an antitrust exclusion.

Perhaps most troublesome, many "antitrust exclusions" in fact reach a much broader range of conduct than classic antitrust violations. The exclusions often exclude coverage for investigations and claims concerning unfair competition and unfair trade practices, which reach a wide range of conduct. In the current environment, where both enforcement agencies and consumers perceive unfair trade practices and other conduct at a time of financial distress, retailers and other companies may face more claims for violations of unfair trade practice statutes and their common-law corollaries. See Kevin LaCroix, [The Critical Issue of Private Company D&O Insurance Coverage for Competition Law Claims](#), The D&O Diary (Apr. 10, 2019). The typical state unfair and deceptive trade practice statutes, as well as the Uniform Deceptive Trade Practices Act (UDTPA), define unfair trade practices broadly and generally. For these

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reasons, a company and its individual insureds would do well to analyze not only the antitrust exclusions under its D&O coverage, but also whether the antitrust exclusion could reach conduct well beyond traditional antitrust violations.

### **Cyber-Related Claims**

While the world's attention is on COVID-19, cyberattacks, social engineering, and electronic fraud are on the rise as hackers try to exploit increased vulnerabilities, such as distracted workers, remote working, and IT and other personnel who are stretched thin. At the same time, executives and senior management are playing an important role in ensuring that their companies' cyber and data-security standards and action plans meet legal requirements and comply with any breach-notification laws. Failure to do so could result in actions by shareholders or customers alleging failure to comply with such standards and state or federal data privacy laws. D&O policies with cyber extensions or stand-alone cyber policies with D&O or fiduciary liability coverage extensions ought to be reviewed or considered to protect against such claims.

### **Renewal Considerations**

Even before the COVID-19 crisis, the D&O insurance markets had been tightening for several years. In particular, insurers have been increasing premiums, limiting coverage, and becoming less willing to take on as much capacity for an individual company. Now that the COVID-19 crisis has hit, it remains to be seen how insurers will respond. Unlike property and liability policies, which traditionally include a broad range of excluded risks and claims, D&O liability insurance policies have relatively few exclusions, particularly with respect to Side-A-only/DIC policies. Some exclusions are labeled as such, but many others may be found as "exceptions" to the crucial definition of "Loss." Many, but not all, of these exclusions go to the knowledge and conduct of the individual insureds themselves, not the perils or risks insured against. This is consistent with the purpose of D&O insurance, which primarily is designed to cover individual officers and directors for alleged "Wrongful Acts," so that qualified individuals will serve on corporate boards and in management and be protected against a wide range of alleged acts, errors or omissions.

Although few, if any, current D&O policies contain exclusions for claims arising out of losses due to "epidemics," "pandemics," "viruses," "communicable diseases," "pathogens," and the like, insurers may attempt to insert them into D&O policies during the current renewal cycle. In addition, insurers will attempt to broaden the interpretation of traditional "pollution" or "contaminants" exclusions and definitions to include viruses and other diseases. Policyholders should resist any such exclusions or limitations to the extent possible, as they are directly contrary to the purpose of D&O liability insurance to insure against a broad range of allegedly wrongful acts in the management of a company, particularly for individual insureds.

### **Notice and Other Policy Conditions**

The typical D&O policy requires an insured to give notice of a "Claim" when it receives "a written demand for monetary or non-monetary relief," including "injunctive relief"; a complaint or other legal process from a claimant; a request to toll the statute of limitations; or a demand or subpoena from a government agency for testimony, documents, or other information. If a company or individual insured receives such a demand or document relating to a COVID-19 issue, then, as with any other situation, the insured should

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give notice of the claim to its insurer. Most D&O policies also include a “notice of circumstances” provision, which allows an insurer to provide notice of circumstances that may lead to a claim against the insureds.

Unlike a notice of claim, which typically is permitted for a specified time after the policy expires, notice of circumstances usually must be given during the policy period. In addition to the more restrictive timing requirements, the insured usually is required to give certain additional, more specific information to the insurer, typically including the identity of potential claimants, the nature of the alleged wrongful act or omission, facts concerning the potential claim, and other details that are known to the policyholder at the time of the notice. If an insured satisfies all of these requirements and gives proper notice of circumstances, coverage is “locked in” with respect to future claims the company receives relating to the matters noted in the notice of circumstances. In addition, providing notice of circumstances now, even before a true “claim” arises, may prove beneficial by preserving more favorable coverage for claims under a company’s current policy in the event that insurers begin to narrow virus-related coverage or even add specific COVID-19 exclusions to future renewals.

A difficulty in the COVID-19 context arises, however, because not only are the full effects and duration of the crisis currently unknown, but also because it is equally difficult for a company to predict how the current macroeconomic environment—let alone future events—will affect the company’s finances and operations. As a practical matter, therefore, a company and its individual insureds should ascertain the expiration date of the in-force D&O policies, and evaluate at least several months in advance of expiration whether a notice of circumstances is warranted. Given the uncertainty surrounding COVID-19 and its implications, this evaluation should be done with the assistance of the company’s insurance coverage counsel and insurance broker.

As demonstrated above, although companies may first turn to first-party property and business interruption policies to mitigate lost business in the wake of COVID-19, the crisis also presents a host of important insurance issues under directors & officers liability, management liability, fiduciary liability, and other liability coverages. Consideration of these important D&O liability insurance coverages can play an important role in mitigating current and future COVID-19-related losses.

# HUNTON ANDREWS KURTH

## **D&O Insurance Issues Arising from the COVID-19 Crisis**

By Lawrence J. Bracken, Geoffrey B. Fehling, and Lorelie S. Masters  
The D & O Diary | April 15, 2020

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# Hunton Insurance Recovery Blog

Updates, Analysis and Breaking News for Commercial Policyholders

## Lorie Masters and Michael Levine Set the Record Straight About Insurance for COVID-19 Losses

By Hunton Andrews Kurth LLP on April 9, 2020

Hunton insurance coverage lawyers [Lorie Masters](#) and [Michael Levine](#) submitted the following “letter to the editor” in the April 7<sup>th</sup>, 2020 edition of the Washington Post to tell the other side of the story:

To channel Mark Twain, the reports of the death of insurance for COVID-19 are greatly exaggerated. As lawyers advising policyholders on insurance for their COVID-19 losses, we have read many expositions that quote insurers and insurance brokers who assert that “coverage will not apply,” relying on the same unrealistic facts.

So what are the real facts? Courts have concluded that “contamination” and other similar facts may constitute “physical loss.” Many commercial insurance policies protecting businesses against loss of business income and cancellation of conferences and other events contain no exclusion for “virus.” Others contain contradictory provisions that, under the law, must be construed in favor of coverage. And, of course, the terms of a specific insurance policy or program govern.

The moral of this story: Policyholders should read their insurance policies carefully and not simply “take ‘no’ for an answer.”

The original letter can be found [here](#).

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# Hunton Insurance Recovery Blog

Updates, Analysis and Breaking News for Commercial Policyholders

## Louisiana Joins Push to Ensure Insurance Coverage for COVID-19 Business Interruption Losses

By Michael S. Levine & Kevin V. Small on April 2, 2020

Louisiana joins a growing list of states, including New Jersey, Massachusetts, Ohio, and New York that are considering legislation, [here](#) and [here](#), that would require insurance coverage for the business interruption losses caused by COVID-19. We have discussed other legislative efforts [here](#) and [here](#). The Louisiana House and Senate have each put forth bills that would, like the other states' measures, require insurers to cover business interruption losses due to COVID-19 despite policy language that an insurer might try to rely on to argue otherwise. Unlike the other bills, however, the measure offered in the Louisiana Senate is not limited to small businesses (although the House bill is). Further, neither of the Louisiana measures provide a mechanism for the insurers to seek reimbursement for payments made pursuant to the law, which is unlike the other states' legislation. We will continue to monitor these measures. Stay tuned.

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# Hunton Insurance Recovery Blog

Updates, Analysis and Breaking News for Commercial Policyholders

## OH, MA, and NY Join Push to Ensure Insurance Coverage for COVID-19 Business Interruption Losses

By Lorelie S. Masters, Michael S. Levine & Kevin V. Small on March 31, 2020

Following New Jersey, where similar legislation remains under informal discussion, lawmakers in Ohio, Massachusetts, and New York have now introduced legislation that would provide relief to small businesses for COVID-19 business interruption losses. The legislation is conceptually identical to the legislation introduced in New Jersey, discussed [here](#) last week. Although the New Jersey bill was subsequently pulled for further consideration with insurance industry representatives, it does appear to have been the roadmap for the Ohio, Massachusetts, and New York measures. Indeed, the new bills would force insurers to cover business interruption losses arising from the COVID-19 crisis despite language in the policies that insurers would rely on to argue otherwise. As in the New Jersey bill, insurers would be able to seek reimbursement for payments made under the law. The measures still must obtain further approval before going into effect. Stay tuned.

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# Lawyer Insights

## Just Because? COVID-19 Coverage under General Liability Insuring Agreements

Potential damages flowing from the COVID-19 pandemic, similar to those flowing from the opioid crisis, will likely result in courts considering the plain meaning of these common coverage triggers.

By Syed S. Ahmad and Rachel E. Hudgins  
Published in Insurance Coverage Law Center | March 30, 2020



A policy's insuring agreement sets out the scope of coverage. It should be the starting point for any coverage analysis, especially when confronted with claims likely to arise from COVID-19. For instance, if a general liability (GL) policyholder faces liability for the negligent provision of services when short-staffed because of COVID-19-positive employees, would the employees' illness constitute "bodily injury" that triggers coverage for the negligent services, even if those services did not result in bodily injury or property damage? The answer depends on the specific policy language.

One concept that will likely be the focus is the phrase "because of" in a GL policy's insuring agreement:

"We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury'... to which this insurance applies." In most cases, "because of" does not merit any consideration at all.

Under well-established contract interpretation principles, this policy language – like most others – is interpreted according to its plain meaning. That is true for liability claims that are common and straightforward and also for claims that arise less often. However, as commentators have noted, while the underlying contract interpretation principles do not change, the nature of the liability claim may bring into focus the significance of certain terms used in insurance policies. *See, e.g.,* Kenneth S. Abraham, *Plain Meaning, Extrinsic Evidence, and Ambiguity: Myth and Reality in Insurance Policy Interpretation*, 25 Conn. Ins. L.J. 329, 350 (2019) ("However, when a claim for coverage of an unconventional form of liability arises – for example, when the party seeking to recover damages from the policyholder that are the consequence of bodily injury is not the same party who suffered the bodily injury – then the courts must become more explicit [about] what these words mean.").

Some courts "interpret the phrase 'because of bodily injury' more broadly" than insuring agreements providing coverage "for" bodily injury. *See, e.g., Medmarc Cas. Ins. Co. v. Avent Am., Inc.*, 612 F.3d 607, 616 (7th Cir. 2010). This makes sense given that the "because of" trigger is broad. The Medmarc court illustrated the difference with an example:

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[A]n individual has automobile insurance; the insured individual caused an accident in which another individual became paralyzed; the paralyzed individual sues the insured driver only for the cost of making his house wheelchair accessible, not for his physical injuries. If the insured driver had a policy

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## Just Because? Potential COVID-19 Coverage under General Liability Insuring Agreements

By Syed S. Ahmad and Rachel E. Hudgins

Insurance Coverage Law Center | March 30, 2020

that only covered damages “for bodily injury” it would be reasonable to conclude that the damages sought in the example do not fall within the insurer’s duty. However, if the insurance contract provides for damages “because of bodily injury” then the insurer would have a duty to defend and indemnify in this situation.

*Id.* The Seventh Circuit Court of Appeals cited this logic in *Cincinnati Ins. Co. v. H.D. Smith LLC*, 829 F.3d 771, 777 (7th Cir. 2016).

In *H.D. Smith*, the insured pharmaceutical distributor allegedly provided West Virginia citizens prescription opioids in quantities so large that the insured should have known the drugs were being used illicitly. *Id.* at 773. West Virginia sued the insured for amounts it spent caring for drug-addicted citizens, and the insured sought a defense under its GL policy. *Id.*

The court found the claimed damages were due, in part, “because of bodily injury,” and therefore within the scope of coverage. In so deciding, the Seventh Circuit provided its own illustration:

Suppose a West Virginian suffers bodily injury due to his drug addiction and sues [the distributor] for negligence... [S]uch a suit would be covered by its policy. Now suppose that the injured citizen’s mother spent her own money to care for her son’s injuries... [H]er suit would be covered too... The mother’s suit is covered even though she seeks her own damages (the money she spent to care for her son), not damages on behalf of her son (such as his pain and suffering or money he lost because he missed work).

*Id.* at 774 (emphasis original).

A Kentucky federal court, considering a similar lawsuit, disagreed with this conclusion in *dicta*. *Cincinnati Ins. Co. v. Richie Enter. LLC*, No. 1:12–CV–00186, 2014 WL 3513211 (W.D. Ky. July 16, 2014). That citizens suffered physical harm or death due to prescription drugs, the court began, was not necessary to prove the state’s claim. *Id.* at \*5. The alleged bodily injury “only explain[ed] and support[ed] the claims of the actual harm complained of: the economic loss to the State.” *Id.* The state was “not seeking damages ‘because of’ the citizens’ bodily injury; rather, it [was] seeking damages because it has been required to incur costs due to ... drug distribution companies’ alleged distribution of drugs in excess of legitimate medical need. This distinction, while seemingly slight, is an important one.” *Id.* at \*6.

That analysis ignores the significance of the actual policy terms. The court’s conclusion that the state was “not seeking damages ‘because of’ the citizens’ bodily injury” is undermined by the fact that individuals had suffered bodily injury, the state paid amounts to deal with that injury, and the state sought reimbursement of those amounts. Those facts should satisfy the “because of” trigger. That the state sought damages due to the distribution of drugs should not change the analysis. The policy language required only that the liability alleged be “because of” bodily injury, not that there be no other basis for liability. Tellingly, the court did not cite any authority supporting the “seemingly slight” distinction it relied on.

Furthermore, even if the *Cincinnati* court’s interpretation was reasonable, that would render the “because of” phrase ambiguous. When there are two reasonable interpretations of a policy provision, the ambiguity is resolved in favor of coverage. In fact, at least one court found the “because of” language ambiguous, since the insurer and the insured provided two different—though reasonable—interpretations of the phrase. *State v. Am. Family Mut. Ins. Co.*, 693 N.W.2d 79, 82 (Wis. Ct. App. 2005). Applying the rule of

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*contra proferentem*, the court construed the policy in the insured's favor to provide coverage for fire suppression costs charged by the state. *Id.*

These cases highlight the importance of just one or two words in an insurance policy – “because of” versus “for”. The *H.D. Smith* suit, which is on appeal, may result in coverage for the \$3.5 million settlement between West Virginia and the drug distributor. Potential damages flowing from the COVID-19 pandemic, similar to those flowing from the opioid crisis, will likely result in courts considering the plain meaning of these common coverage triggers.

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# Hunton Insurance Recovery Blog

Updates, Analysis and Breaking News for Commercial Policyholders

## California Insurance Commission Issues Notice to Business Interruption Insurers Related to Covid-19

By Lorelie S. Masters & Michael S. Levine on March 30, 2020

Following on the heels of the directive issued to business-interruption eruption, insurers by the New York Department of Financial Services, Ricardo Lara, the Insurance Commissioner for the State of California, issued a “request for information,” about business interruption and related coverages so that the State can address “public policy options” and “understand the number and scope of business interruption type coverages in effect” in California and “the approximate number of [such] policies that exclude viruses such as COVID-19.”

As stated in the [Notice](#), Commissioner Lara issued this Notice and “Business Interruption Survey (BIS-2020)” because the “expanding prevalence of COVID-19 within California and recent social distancing and ‘shelter in place’ directives from local governments and the Governor to reduce the continued rapid spread of the virus have left California businesses and the State facing uncertainty and weighing public policy options.” Because of those uncertainties and to address “public policy options,” the California Department of Insurance is directing insurers to respond to an “urgent data survey” by providing data in the four categories below regarding Business Interruption Coverage, Civil Authority Coverage, Contingent Business Interruption Coverage, and Supply Chain Coverage:

1. How many policies are covered under each of the coverages identified above?
2. Out of these policies, how many policies fall under businesses with more than 500 employees, or alternatively, meet your definition of large business?
3. Out of these policies, how many policies fall under businesses with less than 500 employees, or alternatively, meet your definition of medium-size business?
4. Out of those with less than 500 employees, how many policies fall under businesses with less than 100 employees, or alternatively, meet your definition of small business?

Reponses, to be submitted in an Excel Workbook, are due by April 9, 2020. We will continue to monitor developments.

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# Hunton Insurance Recovery Blog

Updates, Analysis and Breaking News for Commercial Policyholders

## First Houston-Area Lawsuit Filed Over COVID-19 Business Interruption Losses

By Lorelie S. Masters, Michael S. Levine & Leah B. Nommensen on March 30, 2020

A Houston-area wig store filed the first Texas COVID-19 lawsuit concerning business interruption losses Thursday in a state court in Harris County. The plaintiff, Barbara Lane Snowden DBA Hair Goals Club, filed suit, a copy of which can be found [here](#), against Twin City Fire Insurance Company, a Hartford Insurance company. The lawsuit alleges that plaintiff has sustained and will continue to sustain covered losses during the COVID-19 outbreak and subsequent Harris County Stay Home Order. The lawsuit further alleges that plaintiff already sought coverage for its business interruption costs under the Twin City policy, but that claim was denied. Accordingly, plaintiff has alleged breach of contract, unfair settlement practices, violation of the Prompt Pay Act, and breach of the duty of good faith and fair dealing for Twin City's wrongful denial of the claim.

This lawsuit has three practical implications. First, the wave of COVID-19 business interruption claims has only just begun – these claims will soon become the new normal in Texas, where Stay Home Orders have only recently begun to be issued but are having wide-ranging and significant impacts on local businesses. Second, insurance companies are responding to COVID-19 insurance claims, so it is important for policyholders to take prompt action to notify insurers in the event a claim arises. Finally, while the lawsuit does not reference the specific insurance policy language at issue or Twin City's basis for denying the claim, the seemingly quick denial of coverage is evidence that insurance companies will readily deny COVID-19-related claims with little investigation. As we previously explained [here](#), insurers have been vocal against the insurability of resulting financial loss under policies affording business interruption coverage. It is imperative, therefore, that policyholders engage experienced coverage counsel to review their policies and their specific circumstances.

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# Hunton Insurance Recovery Blog

Updates, Analysis and Breaking News for Commercial Policyholders

## COVID-19 Impacting Cyber Security; Attacks on the Rise

By Michael S. Levine & Daniel Hentschel on March 27, 2020

While COVID-19 occupies most of the world's attention, cyber-criminals continue to hone their trade. Consequently, with attention diverted and business-as-usual changing daily, the recent rise in cyber-related attacks comes as no surprise. Analysts have found that companies with an increased number of employees working remotely as a result of the coronavirus pandemic have witnessed a spike in malicious cyber-attacks. For example, the United States Health and Human Services Department experienced two separate cyber-attacks since the onset of COVID-19, with the attacks aimed at sowing panic and overloading the HHS servers.<sup>[1]</sup> These attacks, however, are not limited to the United States, as they have been reported across the globe. For instance, hackers launched a cyber-attack on a hospital in the Czech Republic, stalling dozens of coronavirus test results, only days after the government declared a national emergency.<sup>[2]</sup>

Pandemic and other distractions aside, businesses must remain vigilant and, as business models evolve to keep pace with workplace closures and stay-at-home orders, enhance their offsite security and support to protect from malicious access to their computer systems. Business owners should also make sure their cyber insurance coverage is up to date and appropriate for their specific new business models and risk profiles. Experienced coverage counsel can help to ensure that cyber-related losses will be covered by insurance and, equally important, ensure that an appropriate breach response protocol is approved and in place for immediate mobilization when an event occurs.

[1] <https://abcnews.go.com/Health/facing-coronavirus-pandemic-us-confronts-cyber-attacks/story?id=69653329>

[2] <https://www.healthcareitnews.com/news/europe/cyberattack-czech-hospital-forces-tech-shutdown-during-coronavirus-outbreak>

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# Hunton Insurance Recovery Blog

Updates, Analysis and Breaking News for Commercial Policyholders

## Two More Lawsuits Filed Over COVID-19 Business Interruption Losses

By Michael S. Levine on March 25, 2020

Two more lawsuits were filed yesterday concerning business interruption losses resulting from the COVID-19 pandemic. The plaintiffs, the Chickasaw and Choctaw nations, filed their lawsuits, copies of which can be found [here](#) and [here](#), in Oklahoma state court against a litany of property insurers, led by AIG. The lawsuits seek an order that any financial losses suffered by the nations' casinos, restaurants and other businesses as a result of the coronavirus pandemic are covered by the nations' insurance policies.

According to the complaints:

On or about March of 2020, the United States of America became infected by COVID 19 resulting in a pandemic. As a result of this pandemic and infection, the Nation's Property sustained direct physical loss or damage and will continue to sustain direct physical loss or damage covered by the policies, including but not limited to business interruption, extra expense, interruption by civil authority, limitations on ingress and egress, and expenses to reduce loss. As a direct result of this pandemic and infection, the Nation's Property has been damaged, as described above, and cannot be used for its intended purpose.

According to the Chickasaw and Choctaw nations' websites, both have temporarily closed their casinos, restaurants and other businesses to help stem the spread of the coronavirus.

The hospitality industry, including hotels, restaurants and casinos, and related travel industries like cruise lines, airlines and other industries dependent on large crowds, have been especially impacted by the pandemic. Insurers have been vocal against the insurability of resulting financial loss under policies affording business interruption coverage. However, insurers' positions may be based on overly broad assumptions about policy wording and applicable law. In fact, many business interruption losses are covered, and affected policyholders should engage experienced coverage counsel to review their policies and their specific circumstances.

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# Hunton Insurance Recovery Blog

Updates, Analysis and Breaking News for Commercial Policyholders

## New York Orders Property Insurers to Explain Their Business Interruption Coverages

By Michael S. Levine & Lorelie S. Masters on March 19, 2020

In what may be entirely unprecedented, the New York Department of Financial Services (NYDFS), the insurance regulatory body for insurers operating in New York, has ordered that all property and casualty insurers authorized to issue policies in New York to provide details on the business interruption coverage provided in the types of policies for which it has ongoing exposure for [COVID-19](#) related losses. A copy of the NYDFS March 10, 2020 Order (Order) can be found [here](#).

The Order recognizes the substantial impact that policyholders are likely to experience from the COVID-19 pandemic. To facilitate the handling and payment of claims, the Order requires that insurers “explain to policyholders the benefits under their policies and the protections provided in connection with COVID-19.” Specifically, the Order required that each insurer do the following by March 18, 2020, with respect to the policies each has written:

1. Identify the volume of business interruption coverage, civil authority coverage, contingent business interruption coverage and supply chain coverage effective as of March 10, 2020;
2. Examine its policies and provide a clear, concise and policyholder-friendly explanation of each coverage as it may apply to COVID-19 losses, both presently and in anticipation of future related developments (e., is there any potential for coverage as a result of COVID-19);
3. Provide each policyholder a written explanation of:
  - a) The type of commercial property insurance held by each policyholder;
  - b) Whether the policy provides “business interruption” coverage and, if so, the “covered perils” under the policy, whether the policy contains a requirement for “physical damage or loss” and whether contamination related to a pandemic may constitute “physical damage or loss;”
  - c) A description of the type of damage or loss sufficient to trigger coverage under the policy;
  - d) Whether the policy provides “civil authority” coverage and, if so, the type of damage or loss sufficient to trigger that coverage, any relevant limitations under the policy, and whether a civil authority order prohibiting or impairing the policyholder’s access to its covered property in connection with COVID-19 is sufficient for coverage under the policy;
  - e) Whether the policy provides “contingent business interruption” coverage and, if so, the type of damage or loss sufficient to trigger coverage, a list of the “covered perils” under the policy, whether the policy contains a requirement for “physical damage or loss” and whether contamination related to a pandemic may constitute “physical damage or loss;” and
  - f) Whether the policy provides “supply chain” coverage and, if so, whether such coverage is limited to named products or services from a named supplier or company, whether the policy contains a requirement for “physical damage or loss” and whether contamination related to a pandemic may constitute “physical damage or loss.”

Finally, for each coverage described above, insurers must provide the applicable waiting period under the policy as well as the duration that each coverage will last once it has been implicated. Policyholders in New York should be on the lookout for notices from their insurers.



# Hunton Insurance Recovery Blog

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The NYDFS Order is likely only the beginning of the extraordinary steps regulators will be taking to manage the widespread losses that will result from the COVID-19 pandemic. Insurers have long-marketed so-called “multi-peril” and “all risk” commercial property policies based on their broad scopes of coverage. It is comforting that regulators are proactively taking steps to hold insurers to their obligations. How insurers respond to the Order will be telling and should provide early insight to the challenges that lie ahead for businesses in need of their insurance recoveries.

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# Hunton Insurance Recovery Blog

Updates, Analysis and Breaking News for Commercial Policyholders

## First Suit to Enforce Business-Interruption Coverage Filed

By Lorelie S. Masters & Michael S. Levine on March 18, 2020

On Monday, Oceana Grill, a restaurant in New Orleans, Louisiana, became the first to file a lawsuit over coverage for [COVID-19](#) business interruption losses. The lawsuit, styled [Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd's of London, et al.](#) (La. Dist. Court, Orleans Parish), seeks a declaratory judgment that an “all risks” property insurance policy issued by Lloyd’s of London must cover losses resulting from the closure of the restaurant following an order by the Governor of Louisiana restricting public gatherings and the Mayor of New Orleans’ order closing restaurants.

The Lloyds’ policy, like most first-party property insurance policies, affords coverage for business-interruption losses and contains an “extension of coverage in the event of the businesses closure by order of Civil Authority.” Specifically, the lawsuit seeks a declaration that “the policy provides coverage to plaintiffs for any future civil authority shutdowns of restaurants in the New Orleans area due to physical loss from Coronavirus contamination and that the policy provides business income coverage in the event that the coronavirus has contaminated the insured premises.” Furthermore, according to the complaint, “[t]he policy does not provide any exclusion due to losses, business or property, from a virus or global pandemic.”

As the complaint implies, an important issue will be whether the novel coronavirus constitutes the requisite “direct physical loss or damage” under the policy. Understanding COVID-19, its manner of transmission and its ability to live beyond a host organism helps support a conclusion that COVID-19 does indeed amount to the required direct physical loss or damage.

According to the CDC, the novel coronavirus is believed to spread mainly from direct contact with an affected person. However, COVID-19 also is understood to remain on surfaces. The duration can last at least three-weeks, depending on the type of surface material. This supports the conclusion that the presence of COVID-19 on business personal property, such as desks, computers and other office equipment, kitchen worktables and appliances, and dining room furniture and tableware can constitute direct physical loss or damage. This is especially so where the insurance policy contains no limiting language or definitions, as is often the case.

But findings of “direct physical loss or damage” as a result of some pathogen or irritant are not unique to COVID-19. For example, in *Motorists Mutual Ins. Co. v. Hardinger*, the U.S. Court of Appeals for the Third Circuit held that the presence of E. coli bacteria in the well of a house, which made the inhabitants of the house ill with respiratory, viral, and skin conditions, could constitute physical loss or damage to a structure. The issue turned on “whether the functionality of the [ ] property was nearly eliminated or destroyed, or whether th[e] property was made useless or uninhabitable.”

This issue unfolds in the light of case law in other fact situations in which courts have confirmed that airborne contamination also can qualify as “physical loss.” For example, a federal court in New Jersey concluded in *Gregory Packaging Inc. v. Travelers Prop. Cas. Co. of Am.*, that “courts considering non-structural property damage claims have found that buildings rendered uninhabitable by dangerous gases or bacteria suffered direct physical loss or damage.” From there, the court found that an ammonia discharge in a building inflicted direct physical loss of, or damage to, the insured’s facility because the release, which made the air unsafe, rendered the facility unfit for occupancy until the ammonia dissipated.

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As we discussed on the [blog](#) Monday, the first event-driven securities lawsuit to arise from COVID-19 was filed last week. This week, the first suit to enforce business interruption coverage is on the books. What next week holds remains to be seen in what is now the “new normal.” No matter what the loss, however, policyholders should consider their insurance when quantifying losses resulting from COVID-19. Where covered, prompt action to notify insurers, mitigate loss, and properly categorize and quantify potential claims is critical.

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# Hunton Insurance Recovery Blog

Updates, Analysis and Breaking News for Commercial Policyholders

## All Aboard! COVID-19 Securities Suit Sets Sail, Implicates D&O Insurance

By Lorelie S. Masters, Michael S. Levine & Geoffrey B. Fehling on March 16, 2020

In a [prior post](#), we predicted that novel coronavirus ([COVID-19](#)) risks could implicate D&O and similar management liability coverage arising from so-called “event-driven” litigation, a new kind of securities class action that relies on specific adverse events, rather than fraudulent financial disclosures or accounting issues, as the catalyst for targeting both companies and their directors and officers for the resulting drop in stock price. It appears that ship has sailed, so to speak, as Kevin LaCroix at *D&O Diary* [reported](#) over the weekend that a plaintiff shareholder had filed a securities class action lawsuit against Norwegian Cruise Line Holdings, Ltd. alleging that the company employed misleading sales tactics related to the outbreak.

The [lawsuit](#) alleges that the cruise line made false and misleading statements or failed to disclose in its securities filings sales tactics by the company that purported to provide customers with unproven or blatantly false statements about COVID-19 to entice customers to purchase cruises. Those allegations rely on two news articles reporting on the company sales practices in the wake of COVID-19: a March 11, 2020 *Miami New Times* [article](#) quoting leaked emails in which a cruise employee reportedly asked sales staff to lie to customers about COVID-19 to protect the company’s bookings; and a March 12, 2020 *Washington Post* [article](#) entitled, “Norwegian Cruise Line Managers Urged Salespeople to Spread Falsehoods about Coronavirus.” The lawsuit alleges that the company’s share price was cut nearly in half following these disclosures.

Most public companies targeted in securities litigation have some form of D&O or other management liability coverage. As with any event-driven securities claims, or really any insurance exposure, the ultimate coverage determination for lawsuits will turn on the specific policy language at issue. The good news for policyholders, however, is that D&O coverage is typically broad for securities-type claims like those alleged in the *Norwegian* lawsuit. The lawsuit is only a few days old, and it is unclear whether any of the claims will succeed. Regardless of whether any securities violations are proven, however, D&O policies can protect companies and individual insureds prior to any judgment or settlement by paying defense costs which can be substantial.

The allegations at issue in the recent lawsuit, while specific to the securities filings and alleged business practices of a particular company, are targeted at public communications, marketing efforts, sales practices, and corporate management that could be scrutinized in a variety of different industries impacted by COVID-19. In addition, it is possible that plaintiffs file suits based on other theories under federal securities laws, such as claims that a company misled investors about its exposure to the risk of a pandemic, its oversight and risk management practices, or the adequacy of its business continuity plans. As a result, this is the first but likely not the last event-driven lawsuit relating to the current situation. Having sufficient D&O coverage in place, and notifying the insurers and pursuing coverage for defense costs (or liability, if any), can be critical to mitigating risk of increased event-driven COVID-19 exposures. In addition, counsel for public companies should keep in mind the possibility of COVID-19-related securities law claims in reviewing past disclosures and in preparing future disclosures.

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# Hunton Insurance Recovery Blog

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## Workers Compensation, Insurance, and COVID-19

By Reilly C. Moore, Susan F. Wiltsie, Walter J. Andrews, Cary D. Steklof & Lorelie S. Masters on March 16, 2020

Workers' compensation provides the exclusive remedy for injuries and illness that employees suffer arising out of and within the course of their employment. In the early stages of this pandemic, work-related travel to high impact countries or work-related exposure in a case that was being tracked by public health authorities provided support for work-related exposure. In healthcare settings, work-related exposure will likely be established when exposure to infected patients occurs. But in other settings and as the diseases spreads in the United States, the analysis about whether an illness is covered by workers' compensation will be more difficult.

**Workers' Compensation and "Ordinary Diseases of Life":** Many states do not authorize workers' compensation coverage for "ordinary diseases of life." Employers should review their own state workers' compensation laws closely, but an ordinary disease of life is generally defined as an illness to which the general public is equally exposed, and is not a result of the peculiar or unique nature of an employee's job. At this stage of the pandemic within the United States, it is possible that state workers' compensation commissions may view COVID-19 as an ordinary disease of life because untraced community infection is widespread. In that case, an employee would not qualify for workers' compensation, and the employer's workers' compensation insurance might not apply.

When workers' compensation does not apply, obviously the exclusive remedy provision does not apply, and employees may sue their employers in tort. Employees also can sue even if workers' compensation does apply to their illness if they can claim that the exposure was caused by the willful act or omission of their employer. The definition of "willful" for workers' compensation purposes differs from state to state.

Employers are working diligently to put protocols in place to mitigate occupational exposure to COVID-19. If an employer follows a protocol that considers available public information from the WHO and the CDC and/or state and local health departments, and makes decisions that reflect the best available information, they should have good defenses to any tort suit.

**Insurance:** In addition to implementing precautionary workplace policies and procedures, employers should also consider how their insurance applies to pay for losses associated with COVID-19. Many employers already have Workers' Compensation and Employers' Liability Insurance which, as the title suggests, is designed to protect a business against two main liabilities. The first is money that the company is required to pay an employee under a given state's workers' compensation laws. This expressly includes liability for bodily injury by disease, so long as the disease is caused or aggravated by the conditions of employment. If state law points to workers' compensation as the exclusive remedy for any employee who may become infected by COVID-19, this coverage grant should squarely apply.

The second risk that this insurance covers is an employer's liability for any bodily injury claims that fall beyond the scope of workers' compensation laws. Numerous policy exclusions may apply in such a scenario, however, and the facts must be considered on an individual basis. Employers may also have unique issues to address based on the locations covered by the policy and whether the infected employee is based domestically or internationally. All of these considerations must be taken into account in evaluating the potential applicability of workers' compensation coverage.

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Critically, workers' compensation and employer liability insurance policies impose certain duties that must be met in order to preserve coverage. These typically include:

- (1) providing immediate medical and other services as required by the applicable workers' compensation law;
- (2) providing the insurer with the name and contact information of the injured employee;
- (3) providing prompt notice of any demands or legal claims made; and
- (4) cooperating with the insurer and assisting in the defense of any claim.

Finally, there may be situations in which other insurance may apply to liabilities arising out of COVID-19. For example, depending on the facts alleged and causes of actions asserted, commercial general liability ("CGL") insurance may apply, providing a duty to defend the policyholder and coverage for settlement or judgments (if any).

In the event an employee becomes infected by COVID-19, employers should consult their relevant insurance policies and provide notice to their insurers while being sensitive to privacy considerations. Skilled labor and employment and coverage counsel should be consulted from the outset to ensure that any unique circumstances can be addressed at the claim's inception.

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# Client Alert

March 2020

## COVID-19: Contract Cancellation and the Doctrines of Impossibility and Frustration of Purpose

Contracts are essential to business. They formalize obligations, eliminate risks, and provide a measure of certainty in what can be an uncertain world. The law expects parties to keep their bargains, and when they don't, damages are the typical remedy. But unexpected, supervening events happen, and they can profoundly affect the parties' obligations. The law has long accounted for this scenario—one which bears a close resemblance to the events unfolding today around the SARS-CoV-2 virus.

On March 11, the World Health Organization elevated the status of the novel coronavirus outbreak that causes COVID-19 to a "pandemic," and on March 13, the President of the United States declared the COVID-19 outbreak a [national emergency](#). As supply chains, public health, and economic stability are increasingly compromised, many businesses may find themselves in an unexpected position: either unable to perform a contract they agreed to before the outbreak, or concerned their contract partners may be unable to fulfill their contractual obligations.

Our previous [client alert](#) focused on force majeure clauses. Force majeure clauses are common commercial-contract provisions that excuse a party's non-performance under exceptional circumstances without penalty. But failure to perform may also be excused under the common-law defenses of impossibility and frustration of purpose. Businesses anticipating contract disputes should carefully consider whether these doctrines may apply to their agreements. It is important to note that these doctrines can *also* apply where parties have no force majeure provision in their written contract, or where they have only an oral contract. And special provisions may apply to contracts involving the sale of goods, both domestically (Uniform Commercial Code § 2-615) and internationally (United Nations Convention on Contracts for the International Sale of Goods Art. 79).

### Impossibility

The common law doctrine of impossibility provides that a party's contractual obligations are excused when supervening circumstances make the performance impossible or impracticable. Courts around the country routinely refer to the definition set out by the Restatement (Second) of Contracts § 261:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate to the contrary.

The doctrine contains several important requirements. Chief among them is that the parties must have shared a basic assumption that the supervening event would *not* occur. The supervening event must not have been reasonably foreseeable, nor is it enough that performance is more difficult or expensive than the parties had originally anticipated. The Restatement illustrates the "basic assumption" requirement as follows:

On June 1, A agrees to sell and B to buy goods to be delivered in October at a designated port. The port is subsequently closed by quarantine regulations during the entire month of

October, no commercially reasonable substitute performance is available (see Uniform Commercial Code § 2-614(1)), and A fails to deliver the goods. A's duty to deliver the goods is discharged, and A is not liable to B for breach of contract.

Courts also draw an important distinction between objective impossibility (performance *cannot* be done) and subjective impossibility (*I* cannot perform), requiring the defense to be premised upon the former but not the latter. And while the common law strictly limited the defense to instances of physical or legal impossibility, courts in more recent times have utilized a more lenient standard premised upon impracticability.

## Frustration of Purpose

Closely related to impossibility, frustration of purpose applies when a change in circumstances makes one party's contract performance worthless to the other party. See Restatement (Second) of Contracts § 265. The defense commonly contains three elements:

1. the party's principal purpose in making the contract is frustrated;
2. an event occurred whose non-occurrence was a basic assumption underlying the contract; and,
3. the party invoking the defense was not at fault.

The validity of the defense often turns on the first element. The principal purpose of a contract must be something which is so completely the basis of the contract that, without it, the transaction between the parties would make little sense. Thus, while impossibility is primarily concerned with "the nature of the event and its effect upon performance," frustration is concerned with "the impact of the event upon the failure of consideration."

The famous "Coronation Cases" provide a royal example of frustrated purpose. In *Henry v. Krell*, a British court excused a defendant from his promise to pay fifty pounds to watch the coronation parade of King Edward VII from the plaintiff's flat when the coronation was abruptly cancelled due to the King's health. *Krell* demonstrates that frustration is not substantial when the disadvantaged party merely stands to gain less than the bargained-for performance. Rather, the frustration must be so total, and caused by an event so wildly unpredictable and outside the scope of either party's reasonable expectations, that it would be unfair to enforce the terms of the contract. The Second Circuit, for example, limits the doctrine to "virtually cataclysmic, wholly unforeseeable events."

## Key Considerations for Clients

- Determine whether the contract contains any provisions expressly excluding impossibility or frustration of purpose;
- Check the law in the jurisdiction that governs the contract, as state law may vary; and
- Document facts that show how the pandemic has affected the ability to perform.

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# Client Alert

March 2020

## COVID-19: Excusing Performance of Commercial Contracts due to 'Force Majeure'

On March 11, the World Health Organization identified as a “pandemic” the novel coronavirus outbreak that causes COVID-19. Businesses around the globe and in all sectors have felt the impact as operations and supply chains have been disrupted. These disruptions have left some businesses unable to fulfill contractual obligations or concerned that their contract partners will be unable to fulfill theirs. Clients should think about contractual force majeure clauses or the common law doctrine of frustration of purpose if they find themselves in one of these situations.

### What is a Force Majeure Clause?

Force majeure clauses define circumstances beyond the contracting parties' control that can render contractual performance too difficult or even impossible. The theory behind the clause is that at the time of contracting, neither party reasonably anticipated and priced into the agreement the risk of the “force majeure” event. The clause may operate to suspend performance by, or release from further performance, the party timely invoking it. The following sample is typical of language you may see in a force majeure clause:

**Force Majeure.** In no event shall XYZ Corp. be responsible or liable for any failure or delay in the performance of its obligations hereunder arising out of or caused by, directly or indirectly, forces beyond its control, including, without limitation, strikes, work stoppages, accidents, acts of war or terrorism, civil or military disturbances, nuclear or natural catastrophes or acts of God, and interruptions, loss or malfunctions of utilities, communications or computer (software and hardware) services; it being understood that the XYZ Corp. shall use reasonable efforts which are consistent with accepted practices in the industry to resume performance as soon as practicable under the circumstances.

These clauses can come in many varieties and should be carefully reviewed. For agreements without force majeure clauses, the common law doctrines of frustration of purpose or impossibility of performance may provide similar relief.

### Invoking and Interpreting the Force Majeure Clause

Many contracts require that the party invoking a force majeure clause provide prompt written notice of same to its contract partner. The failure to send such notice in a timely manner may result in waiver of the rights provided by the clause. Some contracts provide surprisingly strict notice provisions.

If parties to a contract dispute whether COVID-19 constitutes a force majeure event under their agreement, the issue will have to be decided by litigation or arbitration under the law applicable to the contract. Most jurisdictions in the United States construe force majeure clauses narrowly and according to their plain language. If the clause does not contain a catch-all provision like the sample clause above, the clause will likely be interpreted only to apply to the specifically enumerated list of events contained in the clause. Where clauses do contain a catch-all provision, courts may restrict the catch-all to events very similar to those specifically enumerated.



Generally, the party seeking to invoke the clause and suspend or avoid its contractual obligation must demonstrate the existence of a qualifying force majeure event, that the event directly caused its inability to perform, and that it was unable to fulfill its contractual obligation despite reasonable efforts to do so. Normally, the protections of a force majeure clause cannot be invoked simply because performance of contractual obligations has become more expensive or more difficult because of the occurrence of the force majeure event. For example, if Party A agreed to supply Party B with olives, but Party A's olive supplier in Italy was no longer able to ship because of COVID-19, Party A would have to try to source its olives from another location, even if that increased its costs. If the parties' agreement, however, required Italian olives specifically, and none could be had from any source, then Party A's performance obligations may be excused or suspended.

### Force Majeure Checklist for COVID-19

- Review critical contracts to assess what force majeure rights, remedies and requirements may apply if your or your contract partner's operations are disrupted.
- Identify the law applicable to those contracts and understand whether it has unique characteristics or requirements related to the application of force majeure clauses.
- Review relevant force majeure notice requirements under your agreement and apply them strictly.
- Assemble and retain documentation of the basis for your force majeure claim or the rejection of your counterparty's claim.
- Document efforts to comply with contract obligations or to identify alternative means of satisfying those obligations.
- Coordinate communications with your contract partners concerning force majeure claims so that the messages emerging from your business to counterparties are consistent, vetted and ideally reviewed in advance by counsel.

Evaluate whether a force majeure invocation by you or your major contract partners may trigger public reporting requirements or affect loan covenants or other agreements outside of the contract containing the clause.

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# Hunton Insurance Recovery Blog

Updates, Analysis and Breaking News for Commercial Policyholders

## Cancelled Due to COVID-19? Look Closely at your Event Cancellation Policy

By Lorelie S. Masters & Michael S. Levine on March 12, 2020

Timing is everything. Just as conference season is getting into full swing, COVID-19 has lashed out in force. In the past 24 hours alone, we have received numerous calls from clients about annual meetings, trade shows and speaking engagements they have been compelled to cancel, all on short notice, due to the novel coronavirus.

While there has been much discussion about the potential for business-interruption and other coverages for losses stemming from coronavirus-related cancellations, slowdowns, supply chain disruptions and the like, including on this [blog](#), many businesses have another front-line protection – event cancellation insurance – for the immediate losses occasioned by the necessary cancellations of many marquee events. Policyholders buy these specialized policies reasonably expecting that they will spring into action under these very circumstances, where a major event requiring extensive advanced preparation and investment suddenly must be canceled due to forces beyond the control of the stakeholders. Yet many seem to be downplaying (see [here](#) and [here](#)) the applicability of this coverage in the face of COVID 19. Insurers advertised these policies as providing protection for just these kinds of situations. While sensationalist headlines in some articles (e.g., about the South by Southwest Festival in Austin) have proclaimed that event-cancellation insurance “does not apply,” policyholders should not take that “no” for an answer. These policies often provide much broader coverage, with few or no applicable exclusions, making it critically important to carefully examine the wording of your event cancellation insurance. Our insurance coverage lawyers can assist with a quick review of your policies and advise on potential arguments favoring coverage under what may seem on a first read to be limited policies.

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# Hunton Insurance Recovery Blog

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## Three Key Insurance Issues to Consider In Securing Coverage for Coronavirus Losses

By Lorelie S. Masters, Michael S. Levine & Geoffrey B. Fehling on March 2, 2020

The CDC [reports](#) that, as of the end of last week, the coronavirus disease had spread through China and to 31 other countries and territories, including the United States, which has now seen its first two related deaths. The public health response in the United States has been swift and includes travel advisories, heightened airport screening, and repatriation and quarantine of potentially infected individuals. Outside the United States, countries like China, Italy, and South Korea have implemented more severe measures to combat the disease. From [smart](#) phones to [automobiles](#), coronavirus has major short- and long-term implications for public and private companies facing potentially significant supply chain disruptions, store and office closures, and other logistical issues. These business losses, however, may be covered by insurance. Below are several key insurance considerations for policyholders to contemplate when evaluating the availability of insurance coverage for coronavirus-driven losses.

### D&O

Directors' and officers' policies may respond to securities lawsuits arising out of coronavirus-related disclosure obligations. With global stock markets now in "correction" territory, investors will be asking whether steps could have been taken to avoid substantial losses in value. Federal regulators, such as the U.S. Securities and Exchange Commission, impose various disclosure obligations on public companies in annual reports, securities offerings, and other filings. As a result, business must contend not only with recouping direct losses from diminished business operations, but also with potential securities lawsuits related to the alleged failure to disclose actual or potential coronavirus concerns.

In addition, the recent market volatility and economic disruptions, coronavirus may also have a significant impact on pending mergers, acquisitions, IPOs, and other business transactions. These fluctuations can lead to both increased (where potential buyers may take advantage of decreased stock prices) and decreased (such as postponing or scuttling deals involving impacted companies) financial transactions, all of which can lead to more claim activity from shareholders, buyers, and other potentially impacted parties.

As with [other recent adverse events](#), these coronavirus scenarios can lead to so-called "event-driven" litigation triggering coverage under D&O or similar professional or management liability policies. Heightened government involvement in minimizing the public impact of coronavirus and increasing risk of unscrupulous individuals taking advantage of the public health emergency may also lead to an uptick in government investigations and regulatory scrutiny in the wake of coronavirus.

### Cross-Border

The large-scale economic, political, and social impact of coronavirus across the globe highlights numerous cross-border insurance concerns. For example, coronavirus losses may originate abroad or may result in claims against policyholders in foreign jurisdictions. For companies with international reach, does it matter where their loss occurred?

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Even if insurance policies provide worldwide coverage, government authority, political activity, and other regulatory environments related to coronavirus may vary greatly across jurisdictions and can complicate insurance coverage issues more so than other domestic public health emergencies. Companies may also have insurance policies affording repatriation or medical evacuation coverages for executives abroad who may be impacted by coronavirus.

## **Supply and Demand**

Finally, businesses should look to property and other first-party policies to determine whether they provide business interruption coverage for any coronavirus-related disruptions to supply chains or other business operations. Traditional business interruption coverage under those policies may cover not only lost income, fixed costs, and extra expense, but also losses due to forced closures because of government-mandated curfews, street closures, or quarantines or costs incurred in temporarily relocating operations to a new location.

Insurance known as “contingent business interruption” coverage (which we have [reported](#) on previously in the wake of [coronavirus](#) and other public emergencies) may also pay for loss of income due to coronavirus-driven disruptions to suppliers, customers, vendors, transporters, or other entities upon which a policyholder relies to operate its business.

Adopting strategies to address coronavirus-related exposures that include evaluating insurance considerations can help mitigate risk and maximize recovery in the event of a business loss or claim.

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