

LIFE SCIENCES CLAIMS AND DEFENSES: Coverage Issues and COVID-19-Related Claims

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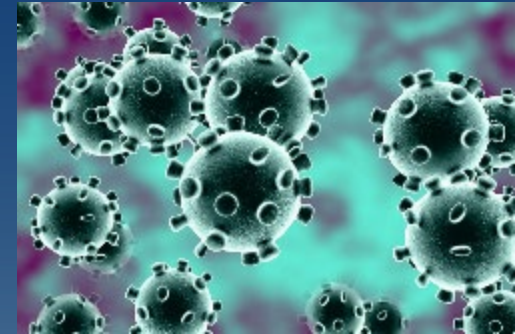
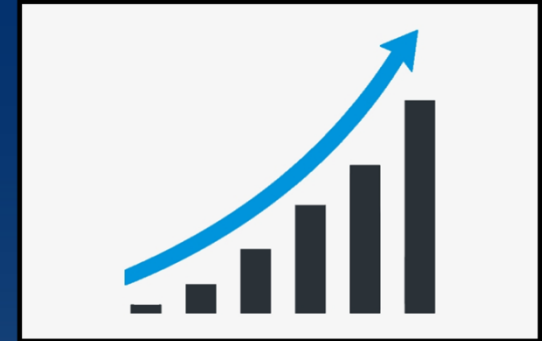
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Insurance Coverage Implications: Three Key Facts

1. Exponential Growth
2. It's Not the Flu
3. Social Distancing is the Only Proven Effective Measure



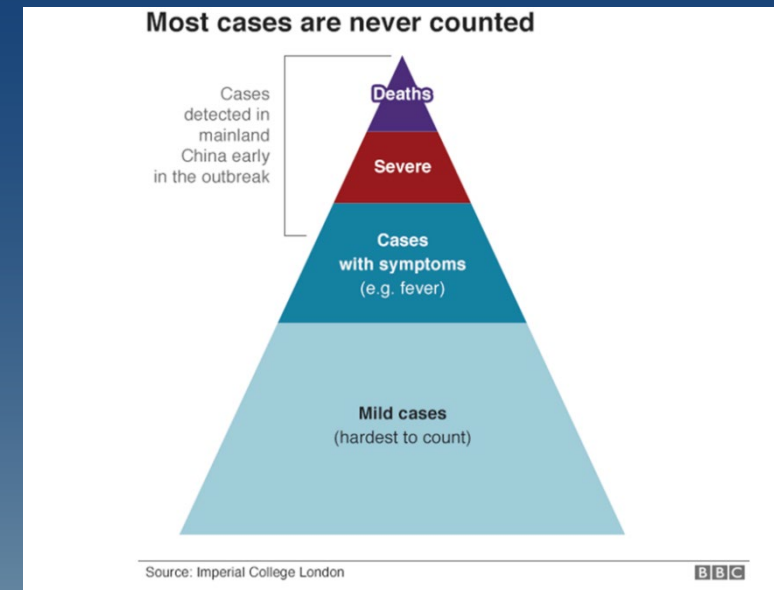
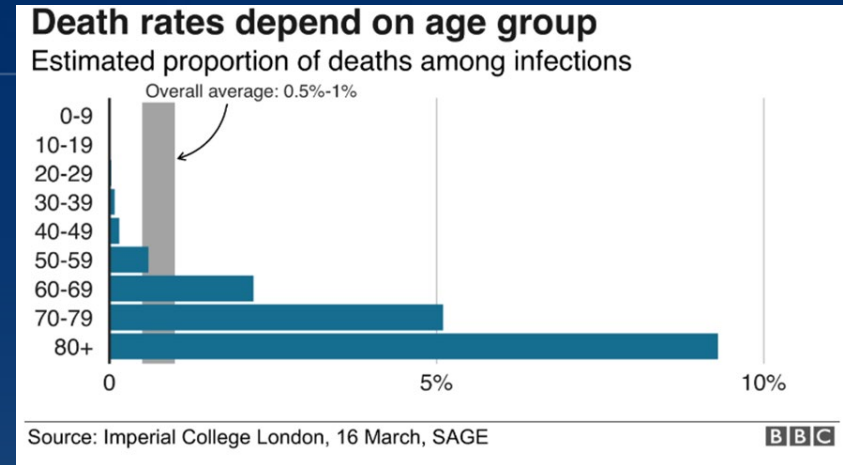
Mouk, Yascha, *The Atlantic*, "Cancel Everything" (March 10, 2020)

Exponential Growth

| DATE | March 11, 2020 | March 31, 2020 | April 15, 2020 | August 13, 2020 | October 19, 2020 |
|--------------------------|--|---|---|--|--|
| SPREAD | 114 Countries | 180+ Countries | 210+ Countries | 210+ countries | 210+ countries |
| COUNTRIES | China, Korea, Italy and Iran lead infections | United States leads infections | United States leads infections | United States leads infections (Brazil / India / Russia) | USA—8.2M India—7.6M Brazil—5.2 M Russia—1.4 M |
| INFECTED | 113,584 cases (USA: 604—sluggish testing) | 858,785 cases* (189,035 USA—still sluggish) *Over 1 million April 2 | 2,034,425 cases (619,607 USA—still sluggish) | 20.7 million (5.2 million USA) | 40.4 million (8.2 million USA) |
| DEATHS Global and USA | 4,291 Deaths | 42,139 Deaths (3,900 USA) | 133,261Deaths (27,760 USA) | 751,033 (166,483 USA) | 1,117,539 (220,110 USA) |

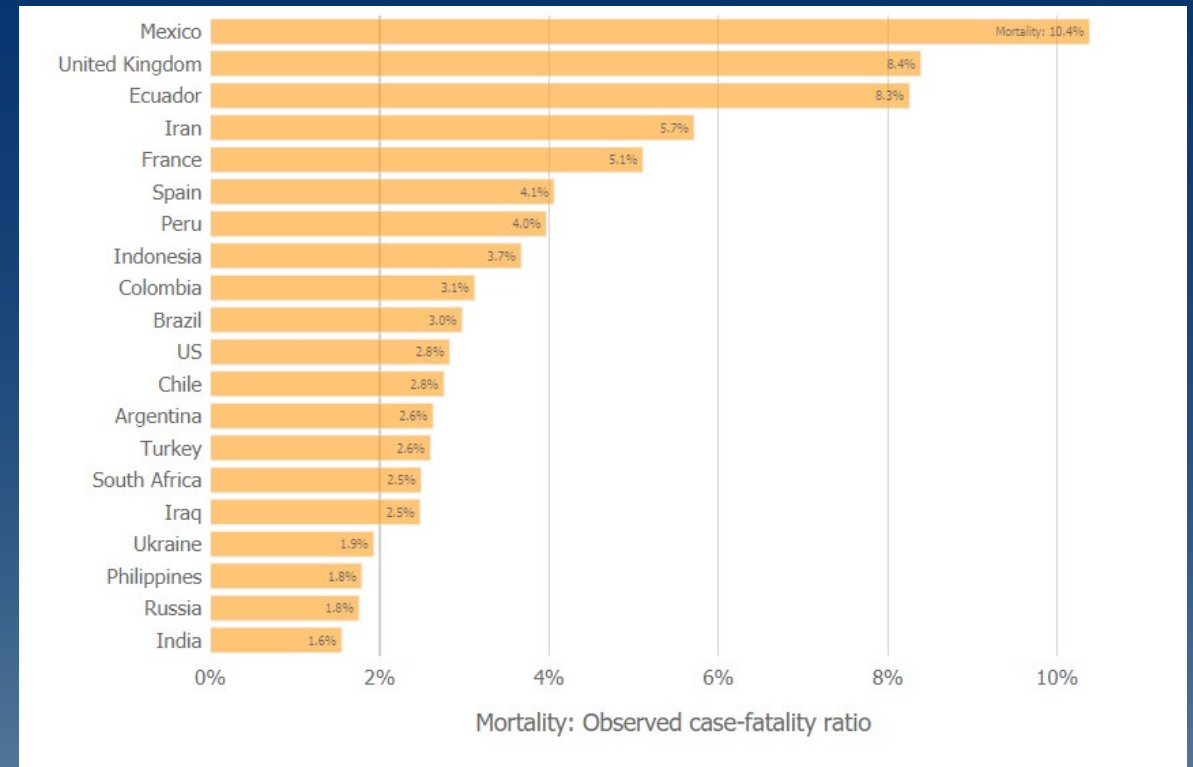
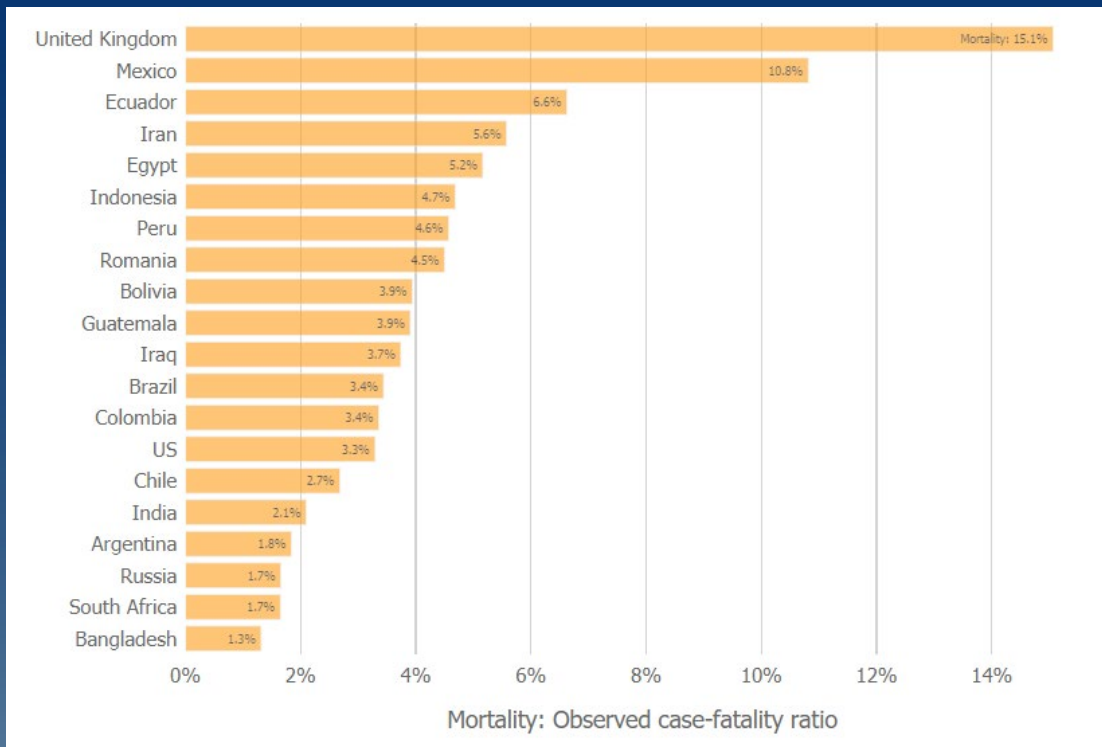
It's Not the Flu

- Flu affects 9.3 to 45 million in USA
- 140,000 to 800,000 U.S. hospitalizations
- 12,000 to 61,000 deaths in U.S.
- 37,000 deaths in USA in 2019
- Globally:
 - 600 million to 1.2 billion infected
 - 500,000 to 1 million deaths
 - 280 million immunizations



It's Not the Flu

Case Fatality / Mortality Ratio August 4 vs. October 5



Social Distancing: Headlines

Prognosis

Second U.S. Virus Wave Emerges With Texas Hitting Record

By Emma Court and David R. Baker

June 10, 2020 10:34 AM Updated on June 10, 2020 3:05 PM

- ▶ Covid-19 cases in Arizona, Florida, California rise sharply
- ▶ Experts say that surges can't be linked directly to reopening



Cyclists ride along the Venice Beach boardwalk on May 23. (Photograph: Arnold Solorzano/Getty Images)

Vox

How 2 weeks of protests have changed America

Nicole Hanau 4 hrs ago

The nationwide protests over George Floyd's death, police brutality, and systemic racism have made an immediate impact.



Los Angeles Times

Newsom says no turning back on reopening plans,...

Apple News+



Disneyland Targets July 17 Reopening Amid Coronavirus Pandemic

By Elaine Low



4:42

HUFFPOST AA

POLITICS 06/10/2020 05:36PM EDT

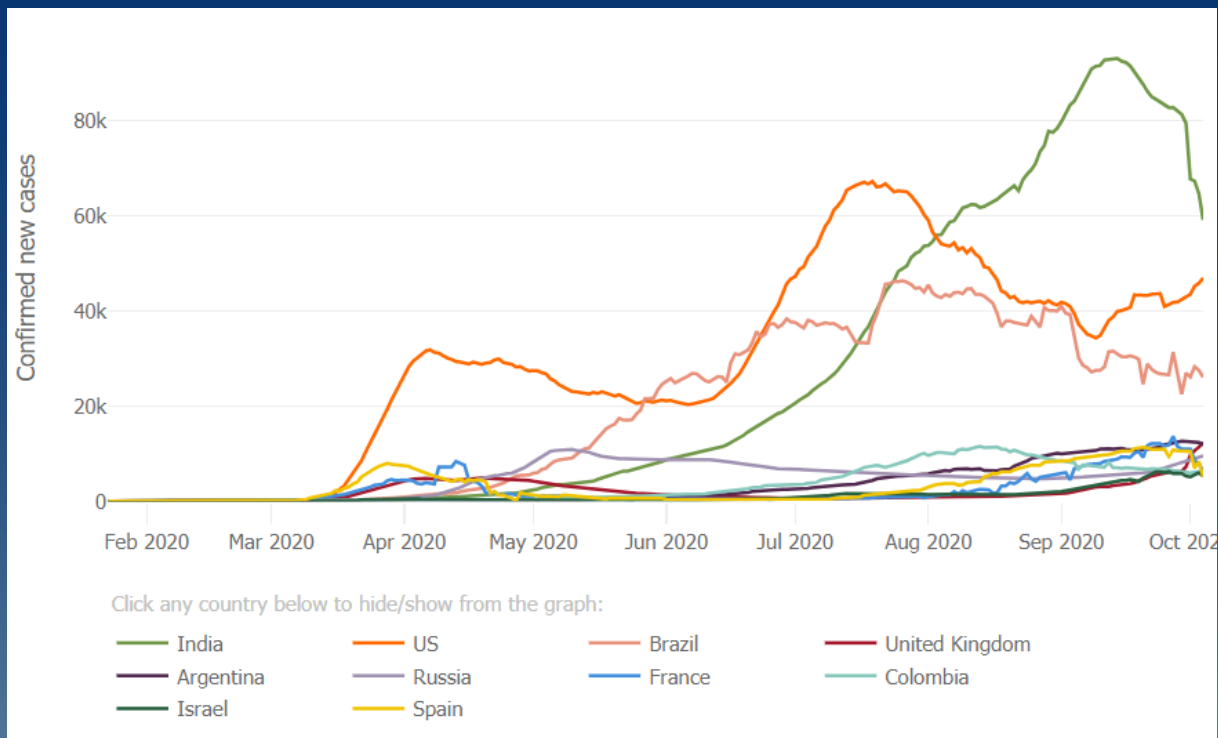
Donald Trump Is Acting Like The Coronavirus Is Gone. It Isn't.

The president is planning rallies and retreating from the fight against COVID-19 just as many states are experiencing their worst outbreaks yet.

Social Distancing is the Only Proven Effective Measure

John Hopkins University, Coronavirus Resource Center

Most Affected Countries October 5, 2020



| | |
|-----------|----------------|
| 7,453,582 | US |
| 6,623,815 | India |
| 4,915,289 | Brazil |
| 1,219,796 | Russia |
| 855,052 | Colombia |
| 828,169 | Peru |
| 813,412 | Spain |
| 798,486 | Argentina |
| 761,665 | Mexico |
| 682,215 | South Africa |
| 664,289 | France |
| 518,222 | United Kingdom |
| 475,674 | Iran |
| 471,746 | Chile |

Social Distancing: China October 19, 2020

Johns Hopkins Coronavirus Resource Center

- Total Cases: 91,006

- Deaths: 4,739

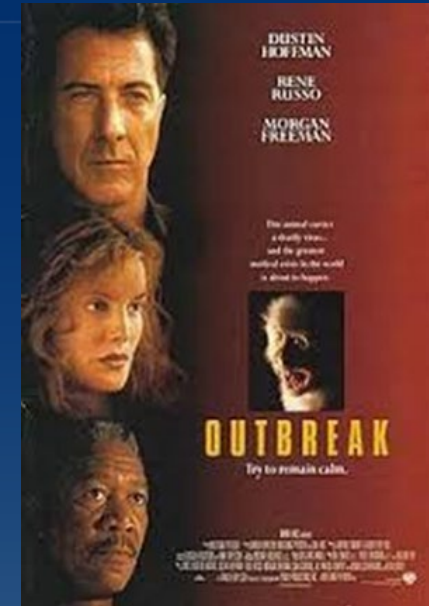
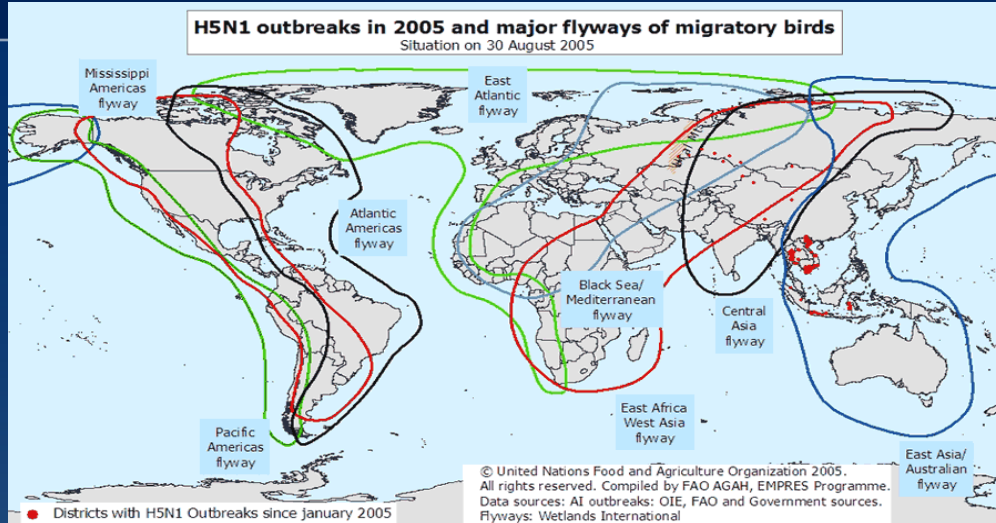


Pandemics: Projections

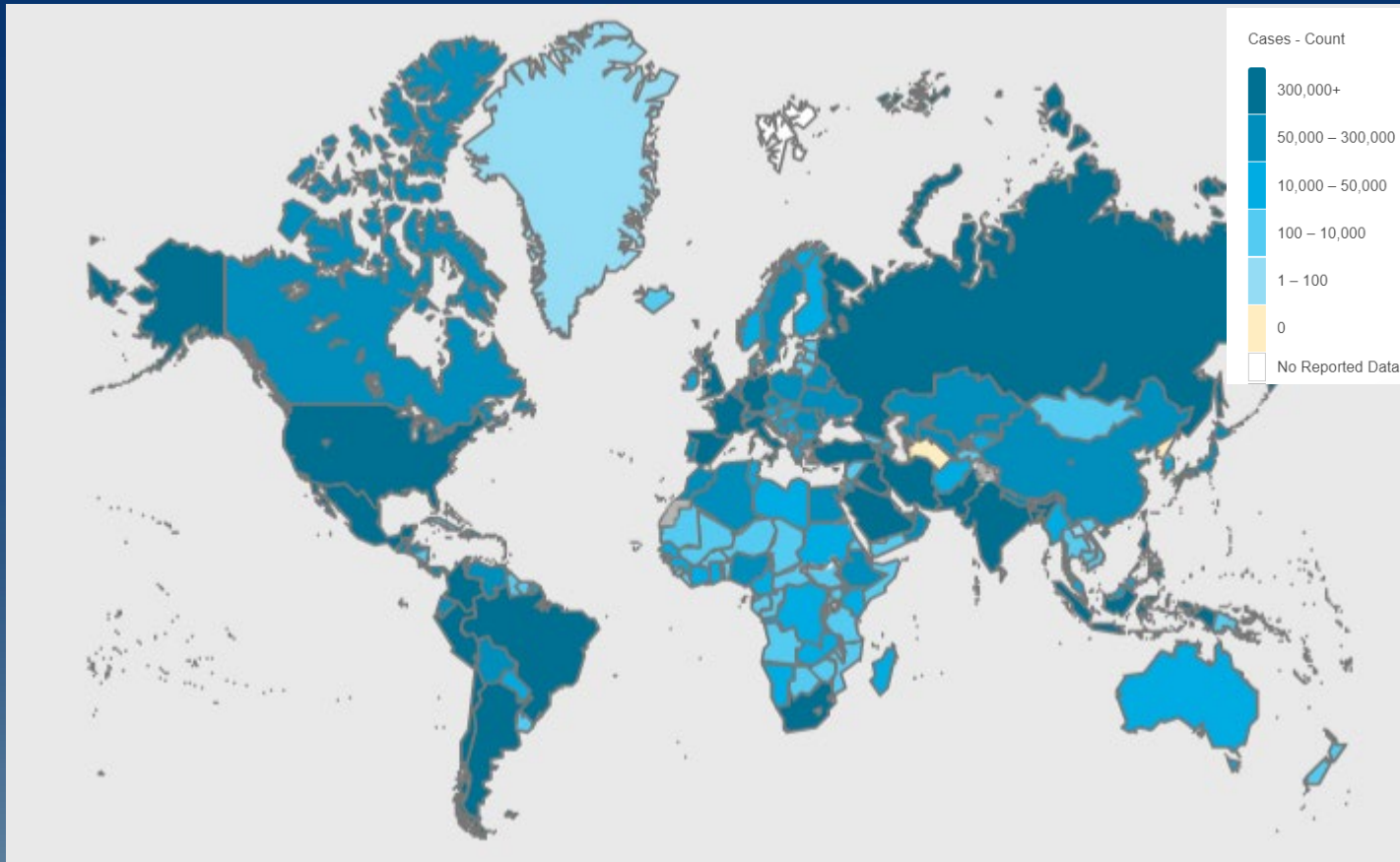
- Epidemiologists say a fast-moving airborne pathogen could kill more than 30 million people in less than a year.”
 - *Bill Gates*
 - *Munich Security Conference (February 17, 2017)*
 - *Gatesfoundation.org*
- “Epidemics on the other side of the world are a threat to us all. No epidemic is just local.”
 - *Dr. Peter Piot*
 - *Director, London School of Hygiene & Tropical Medicine*
- “We live in the most connected century ever. Air travel, population growth, and urbanization make the world increasingly susceptible to pandemics. Outbreaks of viruses like H1N1, for which there is no vaccine, can spread rapidly across vast areas.”
 - *Gatesfoundation.org/yearinreview/pandemics (last visited April 4, 2020)*

| YEAR | EVENT |
|---------|---|
| 1918 | Spanish Flu: 40-50 million die; global population was 1.75 billion |
| 1957–68 | “Milder” pandemics: 1-4 million die worldwide |
| 1976 | Ebola: high fatality; 21-day incubation; widespread west African nations |
| 1997 | Bird flu: Poultry to human; 33% fatality (6 of 18); 1.5 million chickens in Hong Kong (mutant strain kills 3-year-old boy) |
| 2003 | SARS: Spreads globally from Hong Kong hotel. Infects 8,000 in 29 countries. 800 die—10% fatality |
| 2004 | Mutated bird flu: 140 cases; 70 deaths—50% fatality. 150 million birds destroyed. Billions in economic loss. |
| 2005 | Bird flu H5N1: carried via migratory birds throughout world |
| 2006 | H5N1 humans; 251 cases, 148 deaths—59% fatality |
| 2009 | H1N1/09; Swine flu: 11-21 percent of population of 6.8 billion (700 million to 1.4 billion) contracted illness. Fatalities: 12,000-18,000. But nine member of CDC estimated 150,000 to 575,000 possible fatalities. WHO declares over in August 2010. |
| 2014 | Ebola: USA has first diagnosis |
| 2015 | HPAI HF (mutated bird flu) hits commercial poultry. 48 million birds destroyed. |
| 2016 | Zika virus: WHO: “a highly significant and a long-term problem.” Microcephaly |

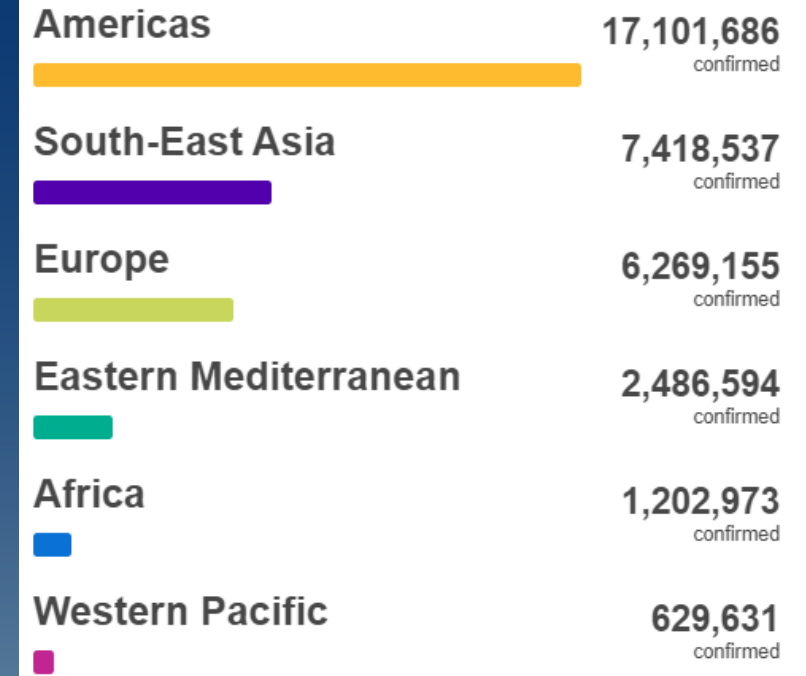
Pandemics: Fact, Fear, and Fiction



World Health Organization: October 5, 2020



Situation by WHO Region



Pandemics: Insurance

COMMERCIAL PROPERTY

- Commercial property
- Contingent business interruption
- Specialized business interruption
- Civil authority coverage

EVENT CANCELLATION

LIABILITY INSURANCE

- General liability
- Errors & omissions
- Directors & officers

EMPLOYER LIABILITY / WORKERS COMPENSATION



The Dollars At Issue

- **Organization for Economic Cooperation and Development**

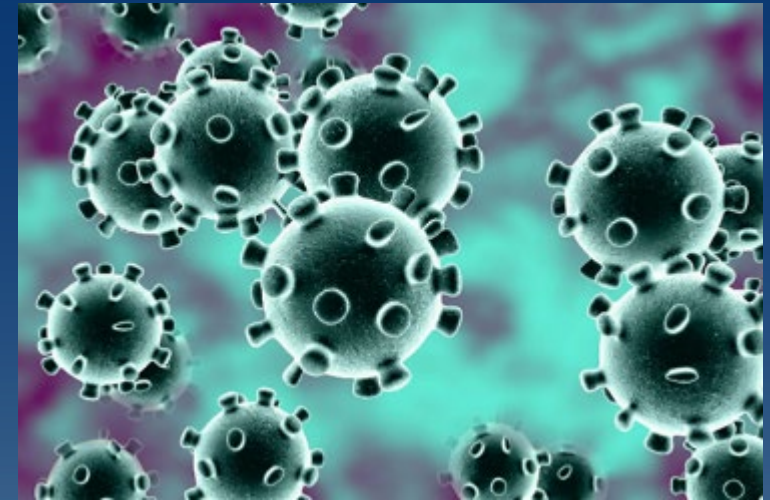
- Global growth could be cut in half, to 1.5 percent for the year instead of the 2.9 percent the Paris-based research group had forecast before the epidemic took off.
- Global output was \$86.5 trillion in 2019
- \$1.5 trillion could be lost to the disease
- A 1 in 100 year event
 - *See, Advisen.com “Coronavirus will Cost Billions. Insurance May Not Help (March 6, 2020)*

- **American Property Casualty Insurance Association**

- Estimates losses for businesses with 100 or fewer employees could cost between \$220 billion and \$383 billion per month.
- *Reuters, “Pressure mounts on U.S. Insurers to Pay Pandemic Business Loss Claims,” reuters.com (March 27, 2020)*

Direct Physical Loss: *Physical Damage*


- “The word 'physical' is defined as 'of or relating to material nature, or to the phenomenal universe perceived by the senses; pertaining to or connected with matter; material; opposed to psychical, mental, spiritual.” *Patel v. Am. Econ. Ins. Co.*, No. 12-CV-04719-WHO, 2014 WL 1862211, at *5 (N.D. Cal. May 8, 2014) (court held feng shui consultant fees were not covered business income expense and defined “direct physical loss.”)
- Air may qualify as a physical thing: “Certainly air is not mental or emotional, nor is it theoretical.” *Oregon Shakespeare Festival Ass’n. v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247 at *9 (D. Or. June 7, 2016), vacated, No. 1:15-CV-01932-CL, 2017 WL 1034203 (D. Or. Mar. 6, 2017) (Court held structural damage to theater, which closed due to ambient wildfire smoke and poor air quality, was not required for there to be a physical loss since theater had to be cleaned and filters replaced).



Direct Physical Loss: *Actual or Feared?*

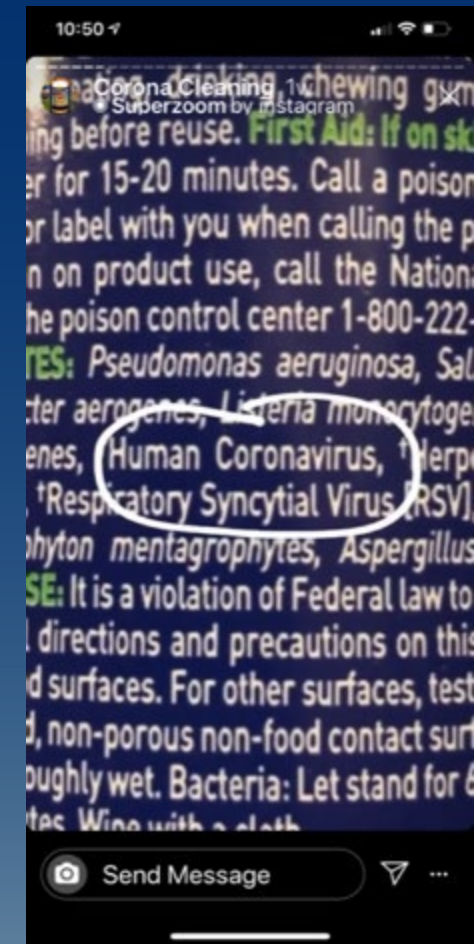
- ***Foster Poultry Farms v. Certain Underwriters at Lloyd’s, No. 14-953 (E.D. Cal. Oct. 9, 2015)***
- \$12 million claim for destruction of poultry due to salmonella contamination at processing plant covered under Accidental Contamination and Governmental Recall provisions of product contamination policy.
- Policy did not require insured to prove “actual contamination” of its products in light of evidence that insured’s products consistently tested positive for salmonella at very high rates. Policy only required a “reasonable probability” that contaminated products would result in bodily injury if not recalled and triggered “product recall” coverage.
- ***In Source Food Tech., Inc. v. U.S. Fidelity & Guar. Co., No. 06-1166 (8th Cir. Oct. 13, 2006)***
- Source Food’s inability to transport its truckload of beef product across the U.S. Canadian border did not constitute product that was physically contaminated or damaged in any manner and to characterize an inability to transport such beef product across the border due to closure based on closure due to concerns over mad cow disease would render the word “physical” meaningless.
- Court granted summary judgment in favor of an insurer: Source Food did not experience direct physical loss to property.

Direct Physical Loss: *Uninhabitable Property?*

- Policyholder counsel have repeatedly asserted that the unpublished decision of *Gregory Packaging, Inc. v. Travelers Property and Casualty Co. of America*, No. 12-CV-04418, 2014 U.S. Dist. LEXIS 165232 (D.N.J. Nov. 25, 2014) supports an argument that the presence of the virus in a building will satisfy the direct physical loss requirement. Notably, however, in *Gregory Packaging*, the presence of ammonia in the building had made the building uninhabitable.
- *Cooper v. Travelers Indem. Co. of Illinois*, 2002 WL 32772680 at *3 (N.D. Cal. Nov. 4, 2002) (court concluded that tavern forced to close by health department due to water contaminated with e-coli qualified as direct physical loss, although policyholder failed to prove losses and costs).
- *Motorists Mut. Ins. Co. v. Hardinger*, 131 F.App'x. 823, 828 (3d Cir. 2005) (court determined issue of whether a well contaminated with bacteria constituted a direct physical loss was question of fact for jury).
- *Matzner v. Seaco Ins. Co.*, 1998 WL 566658 (Mass. Super. 1998) (court held that carbon monoxide levels that left apartment building uninhabitable qualified as direct physical loss).
- *Sullivan v. Standard Fire Ins. Co.*, 956 A.2d 643 (Del. 2008) (court concluded that mold contamination qualified as physical loss).
- *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (noxious fumes from neighbor's meth lab deemed to have physically damaged property).
- *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 543 (App.Div. 2009) (property need not be altered to have physical damage if it loses essential functionality).

Direct Physical Loss: *Clean or Remediate?*

- In contrast, the cessation of business operations arising from COVID-19 is the result of government authorities working to eliminate or decrease the person-to-person spread of the disease rather than identifying a physical property as contaminated or uninhabitable.
- Other published cases support that direct physical loss includes a structural element; or hold that property that may be cleaned or remediated has not suffered direct physical loss.
- SARS-Co-V-2 (COVID-19) is one of seven known coronaviruses to infect humans. Four cause common colds or flu. The other three are deadly: SARS; MERS; SARS-Co-V-2.



Direct Physical Loss: *May Property be Cleaned or Remediated?*

- *Franklin Fed. Sav. & Loan Ass'n*, 793 F. Supp. 259 (D. Or. 1990) (court held that presence of asbestos in a building is not direct physical loss to the property since the building has not changed), *aff'd*, 953 F.2d 1387 (9th Cir. 1992).
- *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 U.S. Dist. LEXIS 201852 (S.D. Fla. Jun 11, 2018) (court held that a restaurant did not sustain direct physical loss due to roadwork dust and debris that could be remediated by cleaning).
- *Mastellone v. Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130 (Ohio Ct. App. 2008) (court held that mold could be removed by cleaning and was not physical damage since it did not alter or otherwise affect the structural integrity of the building's siding).
- *Universal Image Prods. v. Chubb Corp.*, 703 F. Supp. 2d 705 (E.D. Mich. 2010), *aff'd* sub nom. 475 F.Ap'x 569 (6th Cir. 2012) (court held that intangible harms, including odors or the presence of mold and bacteria in an HVAC system did not constitute physical damage to property).

Commercial Property Insurance: Civil Authority

- Damage arose from civil authority action or order
- Impair or prohibit access
- Direct Physical Loss to Property Other Than Described Premises
- Contagious or infectious disease (hospitality and health care)
- Waiting Period (72 hours)
- Restrictions on time / policy sublimit
- Restrictions on geography (one-mile radius)

Commercial Property Insurance: Civil Authority

September 11, 2001 Terrorist Attack

United Air Lines, Inc. v. Ins. Co. of State of Pa., 439 F.3d 128 (2d Cir. 2006) (court determined airline was not entitled to civil authority coverage because airport was shut down before the attack and not “as a direct result of damage” to adjacent property as policy required.)

730 Bienville Ptnrs, Ltd. v. Assurance Co. of Am., 2002 WL 31996014 (E.D.La. Sept. 30, 2002) (court held civil authority coverage inapplicable to hotel losses following attack since access to the hotel was not “prohibited” by any order).



Direct Physical Loss: *Evacuation*

- **Georgia**: business income loss related to an evacuation in expectation of a hurricane was a covered loss because civil authority determined that buildings needed to close to protect against expected harm due to hurricane.
- **Texas**: threat of damage did not meet the policy requirements of direct physical loss.
- **South Dakota**: where a town was *evacuated* due to approaching wildfire, the civil authority order to evacuate the town would have been covered as anticipating physical loss (had it not been for a 72 hour waiting period in the policy), *but not the days after the order was lifted* where many roads were still closed, as there was no order prohibiting customers from coming to the business.
- **Various 9/11**: Businesses made claims for business income interruption due to civil authorities shutting down the airlines. Courts uniformly held that the link was too tenuous. The civil orders grounding flights did not prohibit people from visiting the businesses seeking coverage.
- See Law360, “Don’t Assume ‘Physical Loss’ Language Bars Virus Coverage (April 1, 2020), citing *Assurance Co. of Am. V. BBB Serv. Co.*, 265 Ga.App. 35, 36 (2003); *By Devl, Inc. v. United Fire & Cas. Co.*, 2006 WL 694991 at *6 (D.S.D. Mar. 14, 2006), aff’d sub nom. 206 F. App’x. 609 (8th Cir. 2006).

Commercial Property Insurance: Exclusions

- Virus
- Pollutants or Contaminants
- Micro-organisms or other substances that threaten human health and life
- Acts or decisions of government bodies
- Arising from enforcement or compliance with any law
- “Property damage” arising from exposure to land, water, air

Commercial Property Insurance: Virus Exclusion

- ISO form CP 01 40 07 06 provides in pertinent part:
- **EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA**
- The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- *We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease. ... (Emphasis added)*

Commercial Property Insurance: Virus Exclusion

- When ISO submitted the exclusion to state regulators in July 2006, its circular LI-CF-2006-175 expressly identified SARS—*the virus from which COVID-19 mutated*—as a type of virus that the exclusion is designed to address. The ISO circular stated: [E]xamples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella and anthrax. The universe of disease-causing organisms is always in evolution.”
 - “While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.

In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.” *Id*

Commercial Property Insurance: Virus Exclusion

- In *Koegler v. Liberty Mutual Insurance Company*, 623 F. Supp. 2d 481 (S.D.N.Y. 2009), the court held that a communicable disease exclusion, which excluded coverage for bodily injuries arising out of the “transmission of a communicable disease, virus, or syndrome” was plain and clear in excluding coverage for claims an insured transmitted the human papillomavirus and herpes virus to his girlfriend and her daughter.
- In *Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.*, 218 F. Supp. 3d 1034, 1037-38 (D. Neb. 2016), the insurer expressly excluded loss or damage caused by “the actual or suspected presence or threat of any virus, organism or like substance that is capable of inducing disease, illness, physical distress or death, whether infectious or otherwise, including but not limited to any epidemic, pandemic, influenza, plague, SARS, or Avian Flu.”

Commercial Property Insurance: Pollution Exclusion

- **Pollution Exclusions (Pollutant not defined): Courts are split--**
 - Virus can be a pollutant. See *First Specialty Insurance Corp. v. GRS Management Associates, Inc.*, No. 08-81356, 2009 WL 2524613, at **3, 5 (S.D. Fla. Aug. 17, 2009).
 - *Westport Insurance Corp. v. VN Hotel Group, LLC*, 761 F. Supp. 2d 1337, 1343-44 (M.D. Fla. 2010) (Court determined legionella bacteria are not pollutants; pollution exclusion did not apply).
 - *Johnson v. Clarendon National Insurance Co.*, No. G039659, 2009 WL 252619, at **2, 13 (Cal. Ct. App. Feb. 4, 2009) (pollution exclusion did not apply to mold and likely would not apply to viral infections; court interpreted in favor of coverage).
- **Many Policies Exclude Pollutants and Contaminants**
- **Many Policies Define Pollutant or Contaminant to Include Virus**

Declaratory Relief Litigation

| <u>Case Name and Number</u> | <u>Date</u> | <u>Jurisdiction</u> | <u>Ruling in Favor of Insurer/Insured</u> |
|--|--------------------|--|--|
| <i>Wilson, et al. v. Hartford Casualty Co. et al.</i> , Case No. 2:20-cv-03384 | September 30, 2020 | USDC, ED Pennsylvania | Motion to Dismiss: Court found for insurer and dismissed case with prejudice. |
| <i>Franklin EWC, Inc. et al. v. The Hartford Financial Services Group, Inc. et al.</i> , Case No. 3:20-cv-04434 | September 22, 2020 | USDC, ND California | Motion to Dismiss: Granted with leave to amend |
| <i>Sandy Point Dental PC v. The Cincinnati Insurance Co., et al.</i> , Case No. 1:20-cv-02160 | September 21, 2020 | USDC, ND Illinois | Motion to Dismiss: Court found for insurer and dismissed case. |
| <i>The Financial Conduct Authority v. Arch Insurance, et al.</i> , Case No. FL-2020-000018 | September 15, 2020 | London High Court, Queen's Bench Division | Motion to Dismiss: Court found for insured and entered judgment in favor of insured. |
| <i>Mudpie, Inc. v. Travelers Casualty Ins. Co. of America</i> , Case No. 3:20-cv-03213 | September 14, 2020 | USDC, ND California | Motion to Dismiss: Court found for insurer, but granted leave to amend. |
| <i>Pappy's Barber Shops, Inc. v. Farmers Group, Inc. et al.</i> , Case No. 20-CV-907-CAB-BLM | September 11, 2020 | USDC, SD California | Motion to Dismiss: Court found for insurer and dismissed with prejudice. |
| <i>Turek Enterprises, Inc. dba Alcona Chiropractic v. State Farm</i> , Case No. 20-11655 | September 3, 2020 | USDC, ED Michigan | Motion to Dismiss: Court found for insurer and dismissed with prejudice. |
| <i>Martinez v. Allied Ins. Co.</i> , Case No. 2:20-cv-00401 | September 2, 2020 | USDC, MD Florida | Motion to Dismiss: Court found for insurer and dismissed with prejudice. |
| <i>10E LLC v. Travelers Indemnity</i> , Case No. 2:20-cv-04418 | August 28, 2020 | USDC, CD California | Motion to Dismiss: Court found for insurer and dismissed the case. |
| <i>Malaube LLC v. Greenwich Insurance Company</i> , Case No. 1:20-cv-22615 (NOT COVID—Dust and debris arising from construction deemed cleaning expense—uncovered) | August 26, 2020 | USDC, SD Florida | Motion to Dismiss: Court found for insurer and recommended that action be dismissed. |
| <i>Mama Jo's Inc. v. Sparta Ins. Co.</i> , Case No. 18-12887 | August 18, 2020 | Eleventh Circuit | Motion for Summary Judgment: Eleventh Circuit affirmed the District Court's ruling granting summary judgment in favor of insurer. |
| <i>Diesel Barbershop, LLC, et al. v. State Farm Lloyds</i> , Case No. 5:20-cv-461 | August 14, 2020 | USDC, WD Texas | Motion to Dismiss: Court found for insurer and dismissed the case. |
| <i>Optical Services USA / JCI, et al. v. Franklin Mutual Ins. Co.</i> , Case no. BER-L-3681-20 | August 13, 2020 | Bergen County Superior Court, NJ | Motion to Dismiss: denied. |
| <i>Studio 417, Inc., et al. v. The Cincinnati Ins. Co.</i> , Case No. 20-cv-03127 | August 12, 2020 | USDC, WD Missouri | Motion to Dismiss: Court found for <u>insured</u> and dismissed insurer's motion to dismiss. |
| <i>Rose's I, LLC v. Erie Ins. Exchange</i> , Case No. 2020 CA 002424 B | August 6, 2020 | Superior Court, District of Columbia | Court granter insurer summary judgment |
| <i>The Inns by the Sea v. California Mutual Insurance Company, et al.</i> , Case No. 20CV001274 | August 6, 2020 | Superior Court of California, Monterey Country | Court sustained demurrer without leave to amend |
| <i>Gavrilides Management Company vs. Michigan Insurance Company</i> , Case No. 20-258-CB-C30 | July 1, 2020 | Michigan Circuit Court | Motion for Summary Disposition: Court found for insurer and dismissed the case. |
| <i>Boutros v. Sentinel Ins. Co., Ltd. et al.</i> , No. 4:20-CV-01541 | May 26, 2020 | USDC SD Tex. | Motion to Dismiss: Granted |
| <i>Manigold v. AXA</i> , Paris Commercial Court, RG 2020017022 | May 22, 2020 | France | Interim relief: (1) urgency; (2) absence of a serious challenge to the claim. Court ordered two months of business interruption losses paid. |
| <i>Social Life Magazine, Inc. v. Sentinel Ins. Co.</i> , Case No. 20-cv-03311 | May 14, 2020 | USDC, SDNY | Motion to Dismiss: Court found for insurer and dismissed the case. |

Commercial Property Insurance: Declaratory Relief Litigation

- **New York: *Social Life Magazine, Inc. v. Sentinel Ins. Co.***
 - “I feel bad for your client. I feel bad for every small business that is having difficulties during this period of time. But New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going. You get an A for effort, you get a gold star for creativity, but this is just not what's covered under these insurance policies.” (May 14, 2020, hearing)
- **California: *Franklin EWC, Inc. et al. v. The Hartford Financial Services Group, Inc. et al.*, Case No. 3:20-cv-04434 (USDC ND Cal. September 22, 2020)**
 - Court referred to policyholder argument as “nonsense.”
- **Michigan: *Gavrilides Mgmt. Co., et al. v. Michigan Insurance Co.*, Case No. 20-258-CB-C30**
 - Restaurants sought Civil Authority coverage based on Governor’s closure order
 - Court concluded policy was clear and only covered direct physical loss of or damage to property, which has to be something that alters the physical integrity of the property—and held there was none.
 - Court held virus exclusion would apply to preclude coverage, even—*assuming arguendo*—that there had been direct physical loss of or damage to property.

Declaratory Relief Litigation

- **Missouri: *Studio 417, Inc., et al. v. The Cincinnati Insurance Company*, Case No. 20-cv-03127-SRB (W.D. Mo. August 12, 2020)**
- Judge Bough first held that plaintiffs adequately alleged a direct “physical loss” under the policies because relying on the plain meaning of physical loss, plaintiffs alleged a causal relationship between COVID-19 and their alleged losses. Judge Bough agreed with plaintiffs’ arguments that the complaint alleged COVID-19 “is a physical substance,” that it “live[s] on” and is “active on inert physical surfaces,” is also “emitted into the air,” and had attached to and damaged plaintiff’s property in a manner that left it unsafe. Based on these allegations, the Court held that plaintiffs plausibly alleged a “direct physical loss” based on “the plain and ordinary meaning of the phrase” sufficient to withstand the insurer’s Rule 12(b)(6) motion to dismiss.
- Motion to Dismiss—not a ruling on the merits.
- **Ohio: Cincinnati Insurance Company moved to certify to Supreme Court of Ohio whether presence of a virus constitutes direct physical loss to property.**

Declaratory Relief Litigation

- ***In re COVID-19 Business Interruption Protection Insurance Litigation (MDL No. 2942)***
 - Plaintiffs in ED PA focus on direct physical loss;
 - Plaintiffs in ND IL focus on civil authority
 - On August 12, 2020, the judicial panel on MDL rejected two petitions to centralize hundreds of cases filed by businesses seeking coverage for losses during the COVID-19 pandemic, but indicated centralization may yet be appropriate for cases against four insurers facing a high volume of cases (rather than the over 100 insurers named in suits).
 - (Hartford Financial, Cincinnati, Lloyd's of London, and Society)
 - On October 2, 2020, the panel centralized over 30 suits vs. Society Insurance, but declined to create MDLs vs. Hartford, Travelers, Cincinnati Ins., Co., and Lloyd's of London Underwriters.

Declaratory Relief Litigation

- **France: *Manigold v. AXA* (May 22, 2020)**
 - A Paris court ruled that insurer AXA must pay a restaurant owner two months' worth of coronavirus-related revenue losses.
 - Potentially opens the door to a wave of similar litigation.
 - Court advised policy did not include “direct physical loss” requirement
 - **French insurers estimate \$21.8 billion per month**
 - **AXA as reportedly agreed to pay over 200 COVID-19 related claims**
 - **Swiss insurer Helvetia Insurance announced that most policyholders in hospitality industry accepted settlements following coverage disputes for COVID-19 business interruption losses (policyholders in Switzerland, Austria, and Germany)**
 - **Germany: Government and group of insurers reached an agreement whereby government pays 70 percent of business interruption losses for policyholders in hospitality industry and insurers pay for half of business interruption losses not covered by the government**

- **United Kingdom: *FCA v. Hiscox et al.* (September 15, 2020)**
 - On June 1, 2020, Financial Conduct Authority said it selected eight insurers to participate in High Court test case scheduled for July that will determine whether business interruption insurance covers losses from UK-wide lockdown during COVID-19 pandemic. Eight insurers—will impact 700 policy types, 60 insurers, 370,000 policyholders.
 - Aims to provide clarity and certainty
 - Selected representative policy language and wordings in order to provide guidance for many other business interruption policy forms
 - July 3: Briefing Complete; July 20-23 / 27-30: Eight-day court hearing
 - September 15, 2020: Judgment
 - Direct Physical Loss not an issue (paragraph 80)
 - Disease clause cover extensions (or hybrids). Court determined COVID-19 in UK is an occurrence
 - Insurers likely to appeal directly to Supreme Court

Commercial Property Insurance: DOI Commentary

- Arkansas
- Georgia
- Kansas
- Maryland
- North Carolina
- West Virginia
- North Carolina:
 - *“Standard business interruption policies are not designed to provide coverage for viruses, diseases, or pandemic-related losses because of the magnitude of the potential losses.”* It was further stated that *“[i]nsurability requires that loss events are due to chance and that potential losses are not too heavily concentrated or catastrophic.”* Lastly, the Insurance Commissioner highlighted the fact that recent estimates show that business continuity losses from COVID-19 for small businesses of 100 employees or fewer could amount to between \$220 billion to \$383 billion per month. Meanwhile, the total reserve funds for all of the U.S. home, auto, and business insurers combined to pay all future losses is only \$800 billion. The Insurance Commissioner stressed that *“[t]his type of loss could cripple the insurance industry causing many companies to fail, which would put the protection of homes, automobiles, and businesses at risk.”*

Commercial Property Insurance: Legislative Intervention

- New Jersey
 - Ohio
 - Massachusetts
 - New York
 - Louisiana
 - Pennsylvania
 - Washington, D.C.
 - Michigan
 - South Carolina
-
- California: State legislature asks insurance commissioner to require insurers to pay COVID-19 business interruption claims *irrespective of policy language*.
 - Global efforts to intervene



Commercial Property Insurance: Legislative Intervention

- Legislators proposing a law that requires insurers to cover losses for business income arising from COVID-19, irrespective of the policy language.
- Legislators who are not completely ignoring contract language, but propose law that that would deem the existence of COVID-19 in the workplace to be “property damage” or direct physical loss to property, thus creating a path for coverage under most policies.
- Legislators in NY and MA that have a stated intent to force carriers to pay Business Income losses for COVID-19, but the carriers can seek reimbursement from the state for the losses paid. (Who will then levy an assessment to recoup the losses) This would operate similar to certain state wind pool programs where the carrier still bears the burden of adjudication and claim payment.

Commercial Property Insurance: Legislative Intervention

- Retroactive imposition of contractual obligations
- Absence of Underwriting
- Absence of Premium
- Constitutional Challenges
- Contracts/Impairments Clause of Article I of the United States Constitution:
 - “[n]o state shall ... pass any ... Law impairing the Obligation of Contracts.” (U.S. Constitution, Art. I, § 10, emphasis added.)
 - Takings Clause
 - Due Process Clause

Commercial Property Insurance: Legislative Intervention

- On March 18, 2020, eighteen (18) U.S. House members requested insurance companies and associations to cover financial losses relating to COVID-19.
- Response: “[s]tandard commercial insurance policies offer coverage and protection against a wide range of risks and threats and are vetted and approved by state regulators. Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19.”
- **There are several proposals at the federal level.**
- *HR 7412 (June 29, 2020): Business Interruption Relief Act of 2020*
 - Reimbursement for insurers that voluntarily pay COVID-19 BI claims under policies with civil authority coverage but virus-related exclusions
 - No reimbursement under policies that do not include a virus exclusion

Commercial Property Insurance: Legislative Intervention

- Pandemic Risk Insurance Act (“PRIA”)
 - May 26, 2020: Provides a backstop for insurers offering business interruption policies that cover losses due to a pandemic and federal emergency declaration after January 1, 2021
 - Voluntary Participation
 - Participating insurers responsible for first \$250M of BI losses
 - Thereafter, US Treasury fund would cover 95 percent of losses up to \$750 billion in a single year with remaining 5 percent spread among insurers
 - Modeled after Terrorism Risk Insurance Act

Commercial Property Insurance: Lloyd's Proposal of July 1

- 1. Restart:** Insurers provide non-damage business interruption cover to businesses against possibility of a second wave of the virus.
 - Significant risk
 - Insurers spread risk by offering cover across several industries or countries
 - May: expects \$107 billion in global underwriting losses, with insurer seeing a further \$96 billion shaved off investment results
- 2. Recover Re:** provides small and mid-sized business struggling with losses with “after the event” cover. It would be backed by a government credit risk guarantee, ensuring an “efficient way to inject commercial and government funds into the economy.”
- 3. Black Swan Re:** Operates similar to government-backed terrorism reinsurer, Pool Re. Industry pools capital to provide reinsurance for cover for commercial business interruption for future systemic risks with a government guarantee to pay out if the pool ever had insufficient funds to provide cover for claims. Also similar to Totus Re, and acts as reinsurer for “super perils.”

Contingent Business Interruption

– Contingent Business Interruption Extensions

- **Supply Chain Production:** supplier suffers direct physical loss to property that impairs ability to provide deliver of goods or materials. Insured's suffers business loss as a result. Likely insureds: manufacturers; hospitality; health care.
- **CBI extensions are not standard form.** They are manuscript (bespoke) and limited in scope. May be limited to specified perils; may include exclusions for material damage, bacteria, viruses, contagious or infectious disease; suppliers may need to be specifically identified; civil authority orders may be limited geographically.

Specialized Business Interruption

- **Hospitality and Health Care—For Communicable and Infectious Diseases**
 - Shutdown of operation, in some circumstances without requiring physical loss to property
 - Likely insured: health care and hospitality industries
 - Losses caused by “communicable or infectious diseases”
 - Circumstance/peril specific
 - May be manuscript form
 - May be limitations or exclusions regarding specific diseases, viruses, bacteria, pandemics

Specialized Business Interruption

–Pandemic Specific Coverage or Exclusions

- **Specific language:** Pandemics and pandemic scares have prompted the insurance industry to offer **specific coverage and exclusions for pandemic events.**
- **Virus or bacteria.**
- **Ebola:** Insurers offered coverage endorsements; insurers expressly excluded. Others offered business interruption coverage for specific facilities such as hospitals, hotels, airports, shopping centers, restaurants, theaters, and gyms.
- **Pandemics:** May 2018, Marsh, in collaboration with Munich Re and epidemic risk modeler Metabiota, launched PathogenRX, a fully integrated pandemic coverage product.
 - Metabiota utilizes a Pathogen Sentiment Index that provides analytics into infectious disease outbreaks and allows businesses to model potential losses from outbreak.
- **COVID-19 language:** Outbreak has prompted inquiries into business interruption coverage for pandemics. Reports are that brokers are backlogged and insurers are expressly excluding COVID-19.

Event Cancellation & Contingency Nonappearance Insurance

– Swiss Re / Olympic Games:

- March 20, 2020: Swiss Re in an investor call advises it would face a \$250 million loss if Tokyo Olympics are canceled because of the coronavirus pandemic as well as a “mid-three-digit” exposure to other events being canceled this year.
 - IOC spent \$468 million on Rio Summer Olympics, *including \$12 million on insurance premiums*
 - Financial analyst company Jefferies: estimated insured cost of 2020 Olympics, including TV and sponsorship, to be as high as \$2 billion
- 15 percent global market share of event cancellation cover

– Sporting events and concerts

- Likely cancellation of UEFA Euro 2020
- College and Professional Football
- Infographic by London insurer Beazley indicates mega event like World Cup in 2014 could have been insured up to \$1.25 billion for event cancellation

Event Cancellation & Contingency Nonappearance Insurance

– Event Cancellation / Non-Appearance Insurance

- Coverage for the insured for a public or private event, nonappearance of key person(s) is triggered when the event does not take place for a reason that is beyond the control of:
 - Insured
 - Organizer of event
 - Attendees
- Events can include
 - Family Wedding
 - Athletic events
 - Concerts
 - Theater
 - Olympic Games
- Purpose:
 - Indemnify in circumstances leading to cancellation, postponement, curtailment, abandonment, or enforced reduced attendance.

Event Cancellation & Contingency Nonappearance Insurance

- Fear of traveling or fear of spreading/catching coronavirus will generally not qualify.
- Specific travel restrictions, quarantine orders, actual coronavirus illness may qualify.
- Policyholder usually has obligation to mitigate losses by reasonably seeking to postpone or reschedule an event to a different time or location.
- Policy may address specific financial losses:
 - Lost-ticket sales
 - Out-of-pocket expenses
 - Contractual guarantees to others
 - Possibly reimbursement to attendees for purchased tickets

Event Cancellation & Contingency Nonappearance Insurance

Event Cancellation/Non-Appearance Coverage: Exclusions

- Lack of interest
- Pre-existing condition
- Terrorism
- Breach of contract
- Financial failure of venture
- Communicable disease
 - Some policies may expressly exclude coverage for loss that arises out of fear of world epidemic determined by WHO.
 - Other policies may expressly include coverage for loss that arises out of fear of world epidemic determined by WHO where event closed under government order (public or local) due solely to communicable disease that manifested within the venue

Event Cancellation & Contingency Nonappearance Insurance

- *Penton Media v. Affiliated FM Ins. Co.*, 2005 WL 8171363 (N.D. Ohio E.D. Sept. 30, 2005)
- “The difficult situation the parties faced regarding the events to be held at the Javits Center following the 9/11 attack. However, it was [plaintiff]’s choice not to purchase broad Event Cancellation Insurance that would have covered it in the absence of an order of civil authority. The coverage it did purchase, even if the Javits Center were a described location, only applies when there is an actual order of civil authority blocking access to a venue. There was no such order in this case.”
- *Info. Mgmt. Network v. Certain Underwriters at Lloyd’s. Co.*, 2004 NYLJ LEXIS 4607 (SC of NY. Oct. 15, 2004)
- Summary judgement granted to certain underwriters dismissing the case due to the event not having to be necessarily canceled.

Event Cancellation & Contingency Nonappearance Insurance

- **Communicable Diseases:** “Most event cancellation insurance policies do not cover losses from communicable diseases like the coronavirus, except where such coverage is sold as an add-on. Moreover, that coverage is often only triggered when the government stops the event from going ahead, rather than when the organizer decides to cancel or attendees drop out.”
 - *Law360UK*, “Swiss Re Faces \$250M Loss if Olympics Canceled,” (March 20,2020)
- **Generally:** communicable or infectious diseases are not included as specified perils in standard event cancellation policies.
 - See, e.g., “Coronavirus and Event Cancellation Insurance,” Washington State Office of the Insurance Commissioner,” <https://www.insurance.wa.gov/coronavirus-and-event-cancellation-insurance> (last visited April 4, 2020)

Liability Insurance: GL / E&O / D&O

- Experts project millions of lawsuits probable
 - Approximately 4,300 COVID-19 complaints to date
- Liability theories abound
- Causation will be plaintiff's burden
- Multi-district litigation—industry or company specific

Liability Insurance: GL / E&O / D&O

- Banking / Financial Services
- Challenge vs. Foreign Sovereigns or non-government organizations
- ***Civil Rights (796)***
- Consumer cases
- Contract Disputes
- Education
- General court administrative orders re COVID-19
- ***Habeas / Confinement / Prisoner (601)***
- Health / Medical
- ***Insurance (1021)***
- Intellectual Property
- ***Labor & Employment (429)***
- Miscellaneous Tort
 - Libel, Slander, Defamation
 - Other
 - ***Wrongful Death / Personal Injury (other than employment / consumer / healthcare) (4)***
- ***Real Property (305)***
- ***Securities Litigation (29)***

General Liability Insurance

- Duty to Defend
 - Allegations that create a potential for coverage
 - Four corners / eight corners test
 - Extrinsic evidence
- Duty to Indemnify
 - Actually covered
- Duty to Settle

General Liability Insurance

- Bodily Injury
- Property Damage
- Occurrence = Accident
 - Allegations of gross negligence
 - Allegations of intentionally disregarding warnings
 - Allegations of failure to comply with civil authority directives
 - Statutory Violations are not accidents

General Liability Insurance

- Manuscript exclusions:
 - Pandemic
 - Professional liability
 - Virus or bacteria
 - Communicable disease
 - Pathogenic Organism
 - Micro-organism
- Form exclusions:
 - Pollution exclusions
 - Employer liability / Workers Compensation

General Liability Insurance: Immunity

– Via Legislation or Executive Order

- Iowa
- Arkansas
- Louisiana
- Kansas
- Oklahoma
- North Carolina
- Wyoming
- Alabama
- Utah

Pending Legislation

- North Carolina
- Georgia
- Mississippi
- Ohio

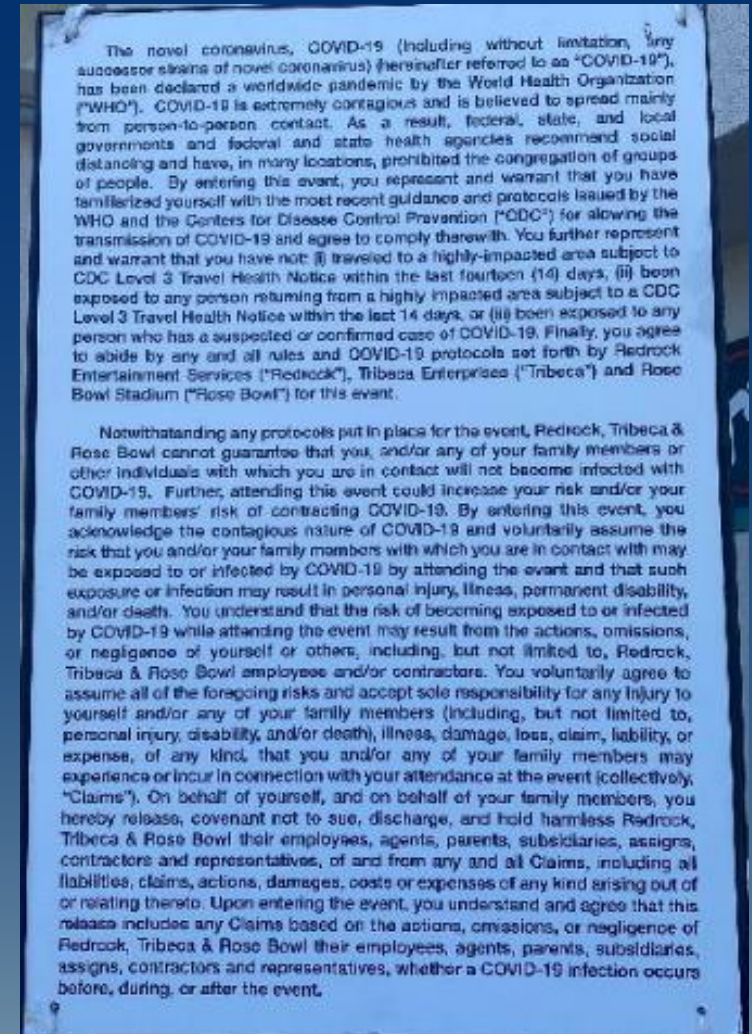
General Liability Insurance: Fear of Disease

Weisberger v. Princess Cruise Lines, Case No. 2:20-cv-02267-RGK-SK (July 14, 2020)

- Passengers allege negligent infliction of emotional distress based solely on proximity of passengers to individuals with COVID-19 and the resulting fear of contracting the disease while quarantined aboard the *Grand Princess* at Port of Oakland earlier this year.
- The Court agreed with Princess that the passenger-plaintiffs could not recover for NIED based solely on their proximity and fear of contracting the disease from others with COVID-19. The Court noted that if it were to adopt the plaintiffs' position, it would run afoul of a US Supreme Court decision leading "to a flood of trivial suits, and open the door to unlimited and unpredictable liability." It also expressed that the risk of exposing individuals to COVID-19 is not unique to cruise ships—"quite the contrary, in fact, as restaurants, bars, churches, factories, nursing homes, prisons, and other establishments across the country continue to report COVID-19 cases," and as such creating a "cruise-ship exception" was not warranted.
- The Court dismissed the case with prejudice finding that plaintiff-passengers could not state a claim that they were within the zone of danger to assert a NIED claim because they must allege they either contracted the disease or exhibited symptoms of it to recover for a disease-based emotional-distress claim.

COVID-19 Liability Waivers

- Inherent risk of exposure
- You represent that you are not infected and have not been in a highly impacted area that would expose you to someone infected
- Attending event could increase your risk of exposure
- Protocol in place to protect health and safety of guests
- Assumption of risk
- You provide a waiver and release and agree to hold harmless re liability claims arising from alleged or actual exposure to COVID-19



Errors & Omissions Insurance

- E&O coverage for medical professionals and managed care operations
- **Coverage:** Insuring clauses generally provide coverage for bodily injury to a patient arising out of acts, errors, or omissions in providing or failing to provide medical care or managed care.
- **Exclusions:** Policies generally exclude coverage for bodily injury to employees during the course of their employment (i.e., an employee being exposed to an infectious or contagious disease).



Errors & Omissions Insurance

- **Secretary of Department of Health and Human Services**
 - Declaration on February 4, 2020, to provide liability immunity to drug and medical device manufacturers, distributors and users relating to the implementation of countermeasures to COVID-19 pandemic.
 - *Parker v. St. Lawrence County Pub. Health Dept.*, 102 A.D.3d 140 (3rd Dep’t 2012) (New York appellate division reversed an order rejecting a federal preemption challenge regarding a claim based on the unconsented vaccination of a child in response to the H1N1 epidemic).
- Immunity for E&O Professionals / First Responders
- State of Illinois--Governor Pritzker “issued an executive order on April 1 granting ‘health care providers’ under the Illinois Emergency Management Agency Act immunity from civil liability for any injury or death that occurs while they provide health care services in response to the COVID-19 outbreak, unless the provider acts in a grossly negligent manner or engages in willful misconduct.”

Errors & Omissions Insurance

- Other: Industry Specific—rendering of “professional services”
 - Banking / Financial
 - Legal
 - Intellectual Property
 - Insurance claims handling
 - Securities
 - Pharmaceutical
- Generally:
 - Property damage excluded
 - Bodily injury excluded

E&O—Insurance Agents & Brokers

Standard of Care:

- **Reasonable Care:** Broker is required to obtain the requested insurance coverage with reasonable care, skill, and diligence—and to notify customer is unable to do so.
- **Special Circumstances Modification:** Reasonable, but: No duty to advise on specific insurance matters EXCEPT in special circumstances:
 - Broker represents the nature, extent, or scope of the coverage being offered or provided;
 - The customer request or inquires about a specific type of coverage; or
 - The broker assumes the additional duty by either express agreement or by “holding himself out” as having expertise in a given field of insurance.
- **Professional Standard:** General duty to use reasonable skill, care, and diligence to procure insurance requested and held liable for negligence just like other professionals such as doctors, attorneys, architects, and engineers.

E&O—Insurance Agents & Brokers

- *Sean Boutros, M.D., P.A. v. Sentinel Insurance*
 - Plastic surgery practice: “accepted [p]laintiff’s policy premiums with no intention of providing any coverage”; suggests broker played a role in claim denial.
- *Co. Ltd., John’s Grill v. The Hartford Financial Services Group, Inc.*
 - Eight causes of action, including injunctive relief to prevent defendants from taking same position on future claims.
 - Broker “made or approved materially false and misleading statements . . . and ‘joined in the denial’ of plaintiffs’ claim.”
- *Ybarra Investments, Inc. v. Scottsdale Insurance Company*
 - Broker failed to advise plaintiff that the policy’s virus exclusion would leave it without coverage for an outbreak like COVID-19 despite plaintiff’s request for “the best available policy with complete coverage for any catastrophic events.”

E&O—Insurance Agents & Brokers

- Broker has a limited duty—
 - Not a duty to predict pandemics
 - Not a duty to advise re particular insurance coverage nuances
- Policyholder must prove causation, “whether a plaintiff would have been injured but for a defendant’s conduct.”
- Brokers: Retail vs. Wholesale
- Policy conforms to requested coverage
- Policy conforms to broker representations
- Policyholder accepted and agreed to the policy as written
- Policyholder failed to object to policy’s insuring agreement, exclusions, or limitations
- An insured has a duty to promptly examine its policy to ensure it contains the terms of coverage desired or agreed upon and if the policy does not, to reject it by promptly notifying the insurer of its dissatisfaction therewith.

E&O—Insurance Agents & Brokers

Vandelay Hospitality Group v. The Cincinnati Ins. Co., Swingle Collins Co., LLC, Case No. 3:20-CV-1348-D

- Court grants Swingle Collins’ motion to dismiss
- Claim for Negligent Misrepresentation:
 - Court determined Vandelay could not seek “reliance damages” because they were not a measure of “out-of-pocket” expenditures “made towards the execution of the contract in order to restore the status quo before the contract.” Coverage measures Vandelay’s “benefit-of-the-bargain” damages, not anything paid “out-of-pocket” in reliance on Swingle Collins’ alleged misrepresentations.”
 - Vandelay’s declaratory relief action against Swingle Collins was duplicative of and will be resolved in Vandelay’s breach of contract action against Cincinnati. Moreover, Swingle Collins is not a proper party to declaratory relief cause of action.

Directors & Officers Insurance

- **COVID-19 has roiled stock markets worldwide.**
- Shareholder claims
- Claims may arise by and among companies and directors/officers as to whether:
 - company was sufficiently prepared for risks associated with epidemic illness; or
 - whether appropriate steps taken in response to the crisis.
- Failed mergers

- **Exclusions**
- Bodily Injury
- Property Damage

- *Absolute bodily injury exclusion:* “based directly or indirectly arising out of, or relating to actual or alleged bodily injury.” Intended to preclude coverage for any claim, even economic loss, arising out of or related to bodily injury. Such exclusions are being challenged in courts.

Employer Liability / Workers Compensation

- **Employer Liability**

- Employers—aggressive testing/failure to test
- Americans With Disabilities Act (ADA) and state-law discrimination claims
- Occupational Safety and Health Act claims (Workplace is to be free from “recognized hazards”)
- Affirmative injunctions requiring compliance with civil authority guidelines

Employer Liability / Workers Compensation

- Insurance Information Institute
 - Predicts workers' comp providers may be one of two categories of insurers to experience greatest impact.
 - Brunt of impact will be felt by hospital workers, EMTs, police officers, firefighters, “high-risk” sectors such as entertainment, manufacturing, transportation and retail.
- Claims may depend on whether employees' exposure is sufficiently tied to their work—the “work relatedness” test.
- First responders should be able to demonstrate work relatedness fairly easily, given their work with populations more vulnerable to infection.
- Workers in customer facing roles may have an uphill battle proving their exposure occurred at work.
- Generally, cases where an employee is exposed to COVID-19 on site may not be considered a comp case unless the exposure is sufficiently intertwined with the job. This is already true in situations such as an employee who catches a cold or the flu. It is difficult to trace the origin.
 - *Law360*, “4 Key Coronavirus Coverage Battlegrounds” (March 13, 2020)

Conclusion

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