

**CLAIMS HANDLING DURING COVID-19:
NOVEL CHALLENGES AND PITFALLS FOR INVESTIGATORS &
EMERGING LEGAL TRENDS IN INSURANCE-RELATED COVID-19 LITIGATION**

**OAMIC Cold Weather Catch Up
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How is Social Inflation Impacting COVID-19 Bodily Injury/Wrongful Death Claims?

- A term used by insurers to describe the rising costs of insurance claims resulting from things like increasing litigation, broader definitions of liability, more plaintiff-friendly legal decisions, and larger compensatory jury awards.
 - Social inflation is driven by corporate mistrust, the reptilian theories that plaintiffs are using, the erosion of tort reform, which seems to just gone out the window, and litigation funding.
- Claimant attorneys are attempting to shift the focus of the case theme to emotion and away from fact.
- Nuclear/explosive verdicts and settlements could continue to trend within the context of COVID-19 related claims.

How have the Courts Impacted COVID-19 Claims?

- Courts across the nation, both state and federal, including the U.S. Supreme Court, have closed for unprecedented durations and significantly modified how they administer litigation.
- Courts uniformly recognize the threat of transmission that can arise from business as usual at the courthouse.
- Jury trials have yet to resume in any meaningful sense, aside from sporadic criminal trials and a few ill-fated Zoom civil trials.
- Resumption of jury trials and the usual administration of litigation is challenging if not impossible while heeding social distancing guidelines.
- The resulting litigation gridlock is causing many claimants to rethink their views on case value and approach to claim resolution.

What Types of Claims are Emerging from COVID-19?

- “Novel coronavirus” means novel claims
 - Bodily Injury/wrongful death tort claims;
 - Business interruption claims.

Bodily Injury/Wrongful Death Tort Claims Generally

- The first wave of injury/wrongful deaths lawsuits have involved employees either asserting claims on their own behalf or through a family member. They are suing their employers for damages as a result of contracting COVID-19 while on the job.
- The targets of most of these early lawsuits have been large big box stores and grocery stores; businesses that serve large portions of the population that have largely remained opened during the pandemic.
- Manufacturers who employ large numbers of workers on the production floor of large plants are also seeing COVID-related claims.

Bodily Injury/Wrongful Death “Take Home” Claims

- Instead of employees filing claims for their own damages, third parties such as the employees’ relative, are filing claims alleging that the employee brought COVID-19 home and infected them.
- These lawsuits borrow elements from “take home” asbestos litigation and avoid caps on liability for workplace injuries, exposing business to costly pain and suffering damages, even though the plaintiff never set foot on their premises.
- Since the claimant is a third party and not an employee, the employer is not entitled to protection from the worker’s compensation system.
- *Iniguez v. Aurora Packing Company, Inc.*, Circuit Court of Kane County, Illinois, case no. 2020 L 000372.

What Allegations Does a COVID-19 Tort Claim Involve?

- The allegations originate from a standard general negligence claim: defendant owed a duty of ordinary care to guard against injuries naturally flowing as a reasonable and foreseeable consequence of actions/inactions related to a COVID-19 outbreak on its premises.
- Despite this duty, the defendant, directly or by and through its employee/agent, was negligent in the following manner:
 - (1) failing to provide employees with a safe place to work;
 - (2) failing to properly train employees about contracting COVID-19 at work;
 - (3) failing to timely provide PPE to employees;

What Allegations Does a COVID-19 Tort Claim Involve?

continued

- (4) failing to conduct contact tracing;
 - (5) failing to test employees for COVID-19;
 - (6) failing to timely quarantine decedent and other employees who had been exposed to COVID-19;
 - (7) failing to apply social distancing measures for employees;
 - (8) failing to properly clean areas;
 - (9) failing to warn employees of the dangers of contracting COVID-19 at work;
 - (10) failing to medically treat the decedent; and
 - (11) failing to follow its own safety rules, practices, and procedures.
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- *Evans v. Walmart, Inc., et al.*, Circuit Court of Cook County, Illinois, case no. 2020 L 003938.

Immunity from COVID-19 Bodily Injury/ Wrongful Death Claims

- Currently, there is no federal statute that provides immunity from COVID-19 liability other than the protections now afforded to healthcare workers.
- Approximately a dozen states have passed legislation providing immunity to various degrees.
- The scope of immunity depends on the state:
 - Healthcare facilities and workers;
 - All persons and businesses

Ohio House Bill 606

- Ohio businesses will enjoy state-law immunity from civil actions brought by customers, employees, or others “for damages for injury, death, or loss” related to “the exposure to, or the transmission or contraction” of the novel coronavirus “unless it is established that [the exposure, transmission, or contraction] was by **reckless conduct or intentional misconduct or willful or wanton misconduct** on the part of the person against whom the action is brought.”
- The law extends protections to all Ohio entities, including schools, nonprofit and for-profit entities of any size, governmental entities, religious entities, colleges, and universities.

Ohio House Bill 606, continued

- The law provides for a complete bar of class actions based in whole or in part on allegations that a health care provider, business, government entity, or person caused “exposure to, or the transmission or contraction of” COVID-19.
- The law prevents claimants from construing government COVID-19 orders as creating new causes of action beyond ordinary negligence;
- The law is retroactive to the date of the declared state of emergency in Ohio, March 9, 2020, and will expire on September 30, 2021.

What Constitutes Intentional, Reckless, or Wanton Conduct?

- Heedless indifference for the consequences of one's behavior.
- Basically, whatever a jury or factfinder believes is sufficiently reckless conduct at either the point in time when the infection occurred or when the case is decided.
- Public attitudes about the pandemic are constantly in flux, so we should expect a jury's view of the legal obligations of individual and businesses to be no different.

Possible Examples of Intentional, Reckless, or Wanton Conduct

- A defendant fails to establish and/or follow its own safety rules, practices, and procedures.
- A defendant becomes aware that an employee tests positive for COVID-19 either before or after being on the premises and fails to take steps to mitigate the risk to others.
- A defendant's supervisors or managers ignores an employees' COVID-19 symptoms, instructs employees to continue reporting to work despite exhibiting symptoms, and places wagers with others on the number of employees who become infected for a winner-take-all prize.

A Claimant Attorney's Perspective

- While COVID-19 immunity laws may provide immunity from liability, they do not provide immunity from suit.
- Intentional, reckless, and wanton conduct is difficult to prove.
- Throw everything against the wall and see what sticks.

A Defendant Organization's Perspective

- These claims should not be looked at as random one-off claims against a single organization's location (store, plant, etc.) but an attack on the entire business endeavor;
- Defendants can expect intensive and far-reaching discovery inquiries that seek to capture all facets of an employer's response to pandemic concerns, including financial, health and safety measures to protect employees, business invitees and customers.
- Early lawsuits will seek to generate information to be used to refine claims to be brought in future lawsuits.

Successfully Defending COVID-19 Bodily Injury/Wrongful Death Claims

- **Defendants should seek to lay the strongest possible foundation through their safety efforts for the argument that all reasonable steps were taken to protect those at risk.**
 - Safety protocols must be documented, communicated, and followed;
 - Keep those at risk informed of your efforts to maintain safety as guidelines continue to be in flux;
- A thoughtfully-planned internal investigation should be conducted early on;
- Claims handlers/insurers should consider creating investigative checklists specific to COVID-19 injury/wrongful death claims.

Successfully Defending COVID-19 Bodily Injury/Wrongful Death Claims, continued

- Collecting statements based on questions directly related to infection and the spread of the virus;
- Identifying actions that the employer took to reduce spread of infection (such as implementing employee hygiene practices, increasing workplace cleanliness and sanitation, supplying PPE and installing appropriate signage);
- Gathering documentation from the claimant, including medical records, timelines, proof of location and receipts.

Tips to Avoid COVID-19 Bodily Injury/Wrongful Death Claims

- Start with formulating and documenting a safety plan;
 - Designate a safety officer
 - Utilize OSHA's and CDC's most recent guidelines
- Educate employees and engage with them;
- Inform employees of confirmed cases of COVID-19 in the workplace;
- Monitor current and evolving safety guidelines;
- Liability Waivers;
- Don't forget about empathy.

Another Trend in COVID-19 Claim Litigation: Business Interruption Losses

- **Business interruption claims:** businesses who have suffer catastrophic financial losses because of COVID-related business closures.
- After the SARS pandemic of 2003, most insurers incorporated “virus exclusions” into their policies to exclude coverage for business losses arising from pandemics.
- Do pandemic closures qualify as “direct physical loss? Does a virus exclusion apply?

Current Results of Business Interruption Claims

- Insurers are winning overwhelmingly when their policies have virus exclusions.
- Insurers are losing, at least at the motion to dismiss stage, when their policies do not have virus exclusions.
- The National Association of Insurance Commissioners said its analysis showed that 83% of policies have exclusions for virus, bacteria, and pandemics, and 98% require a physical loss for a claim;
- U.S. insurers have received 201,285 claims for business-interruption losses caused by coronavirus orders. Of those, 164,178 were closed without payment, 34,106 remained open and 3,001 were paid.

Social Impact of Favorable Business Interruption Rulings

- In the short term/narrow sense, great news for the insurance industry. Policies plainly do not contemplate coverage for these losses, and insurers did not price their policies in consideration that they would owe coverage for these claims. B.I. claims could bankrupt much of the industry.
- In the long term/broader sense, these results will pollute public perception of the industry. Consumers view these declinations and decisions as ordinary consumers, not coverage attorneys. **These consumers may be your judges and jurors one day.**

Potential Juror Views of Business Interruption Claims

- Earlier this year, Law 360 conducted a national online survey of jury-qualified individuals regarding their attitudes and opinions on insurance and business interruption policy provisions.
 - 63.8% of respondents believe that a businesses' reduced operation or lost profits from a COVID-19 outbreak constitutes a direct physical loss or damage to the property; and
 - 51.9% of respondents believe that an insurer should cover **all** of a businesses' financial losses during the pandemic regardless of what the insurance policy says.

Questions?

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