


**Insurance Coverage For Emerging COVID-19 Claims Against Businesses**



**COVID-19**

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**Kristina Araya**

- Litigation attorney who focuses on complex commercial litigation and risk management
- Insurance experience includes insurance coverage disputes, product liability defense, banking and securities litigation
- Advises on risk management issues with insurance, indemnity and best practices

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**Jason Byrne**

- Litigation attorney who successfully handles insurance, tax and other commercial cases in state and federal courts, including appellate courts
- Advises clients on complex insurance and risk management issues, including high-stakes coverage disputes

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### Carly Zagaroli

- Litigation attorney who focuses on high-stakes litigation cases involving insurance, intellectual property and general corporate disputes
- Specializes in insurance law and provides advice on insurance policies, including risk analysis, proper insurance and the claims-making process (including dealing with insurance companies when claims are denied)

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### Categories of Trending Litigation

- Broken Down into 3 Categories:
  - Employment-Related Claims
  - Consumer Claims
  - Business Practice Claims
- Insurance Coverage Review Significant Claims in Each Category

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### Business Interruption Litigation Status

- Separate Trend – Litigation Against Insurers Related to Coverage for Disruption of Insureds' Business
  - Insureds Frequently Filing Claims to Preserve Rights
- 2 Principal Coverage Areas:
  - Business Interruption
  - Civil Authority
- Physical Loss/Damage Prerequisite
  - Potentially Applicable Exclusions

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### Business Interruption cont'd

- Litigation has Begun in Several States: California, Florida, Illinois, Indiana, Louisiana, Oklahoma, Texas
- Political Action
  - Federal Pressure: President Trump on April 10: "You have people that have never asked for business-interruption insurance and they have been paying a lot of money for a lot of years for the privilege of having it and then when they finally need it, the insurance company says 'We're not going to give it'...We can't let that happen."
  - State Legislation: New Jersey; Ohio; Massachusetts; New York; Louisiana; Pennsylvania; South Carolina

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### Employment-Related Claims

- Exposure/Illness Claims Made By Employees and Family Members
  - Alleging Negligence, Violation of Guidelines, Rules, Best-Practices etc.
  - Causation Issues
- Potential Continuing / Progressive Injury Issues
- Class Actions
- Existing Templates to Follow: Asbestos and other workplace toxic-exposure cases

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### Coverage Issues for Employment-Related Exposure Claims

- General Liability Policies – Excluded:
  - Arising out of employment by Insured (performing duties for insured)
  - Also excludes claims by family members

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**Coverage Issues for Employment-Related Exposure Claims**

- Workers Compensation: Ordinary Disease vs. Occupational Disease
  - “[a]n ordinary disease of life to which the public is generally exposed outside of the employment is not compensable.”
  - First Responders
- Suits Generally Barred with Exceptions:
  - Intentional Tort
  - Actions Based on Statute/Contract
  - Retaliation
  - Self-Insured

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**Coverage Issues for Employment-Related Exposure Claims**

- Employers' Liability Insurance
  - Gap-Filling Companion Product
    - Not covered by Workers Comp
    - Third Party, Loss of Consortium, Family
  - Subject to Limits / Exclusions
    - Intentional Injury etc.

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**Issue Spotting – Other Employment-Related Claims**

- Claims:
  - Whistleblowing
  - Conditions
  - Pay
- Policies:
  - Employment Practices Liability
  - Directors & Officers

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**Consumer Claims - Exposure**



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**Consumer Claims - Exposure**

"Your negligence caused my illness"

- Failure to notify of employee/patron exposure
- Failure to provide proper protective gear to workers while customers are around
- Failure to follow sanitization/screening guidelines
- Failure to close following a government order

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**Coverage Issues**

General Liability

- Protects against third-party claims for bodily injury, property damage, and personal and advertising injury.
- "We will defend against claims and pay sums that you are legally obligated to pay as damages because of bodily injury . . . unless otherwise excluded in this policy"

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**Coverage Issues**

General Liability Exclusions

- Communicable Disease Endorsement
  - Viral / Bacterial Infection
- Pollution
  - Open Question Under Michigan Law
- Expected or Intended Injury
- Violations of Law

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**Consumer Claims – Related Areas**

- False Advertising 
  - Personal and Advertising Injury Coverage?
    - Disparagement/Competitive injury requirements
    - Failure to Conform exclusion
  - Specialized Media Liability Coverage
- Price Gouging 
  - Violation of Law exclusion
  - Anti-competition exclusion

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**Consumer Claims – Related Areas**

- Failure to Refund 
  - Arise in contract
  - Contract Exclusion
- Privacy 
  - Specialized Cyber and Privacy Insurance
  - Intentional Conduct exclusion
  - Violation of Law

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**Business Practice Claims**

- Negligence or failure to deliver because of COVID-19
- Error in product due to conditions relating to COVID-19
- Shareholder claims for failure to handle COVID-19 properly

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**Coverage Issues for Business Practice Claims**

Directors and Officers Liability Insurance Side C Entity Coverage

**Private Companies:**

- Entity coverage is broader and may include coverage for negligence-based claims relating to COVID-19 risk mitigation, preparedness, response measures, etc.

**Public Companies:**

- Entity coverage is limited to securities claims (e.g. shareholder class action relating to adequacy of COVID-19 risk disclosures)

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**Coverage Issues for Business Practice Claims**

Errors and Omissions Liability Policies

Protects a business for claims of errors and omissions in providing a professional service or failing to deliver a service.

Examples:

- Failed to deliver a service due to COVID-19
- Gave incorrect advice relating to COVID-19

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**Coverage Issues for Business Practice Claims**

Potential Exclusions:

- Bodily Injury
- Pollution
- Intentional/Deliberate Conduct
- Contractual Liability
- Professional Services (in D&O policies)

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**Emerging Issues for Business Practice Coverage**

Shareholder class actions

- Coverages A & B
- Claims against directors and officers for breach of fiduciary duties in handling or preparing for COVID-19
- Securities Claims for misleading disclosures

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**Upcoming Warner Webinars**

- **May 1:** Managing your Supply Chains After COVID-19
- **May 6:** Employment Litigation after COVID-19
- **May 7:** COVID-19 Strategies for Reducing Your Legal Spend
- **May 12:** Gaining Access to Government Data During COVID-19 with FOIA and OMA
- Visit WNJ COVID-19 Resource Center at [www.wnj.com/About-Us/COVID-19-Updates](http://www.wnj.com/About-Us/COVID-19-Updates)

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**Conclusion**



**COVID-19**

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