

# General Liability Insurance & COVID-19

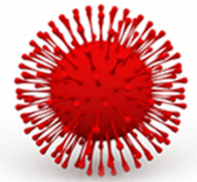


Fred L. Shuchart  
2021 Construction Law  
Symposium

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# Third-Party Claims

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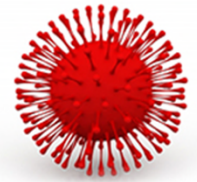
Failure of the insured to exercise reasonable care in implementing, preventing, enforcing, or warning of the risk of potential exposure to COVID-19 which caused a third-party harm.

Examples could include claims based on the insured's:

- Failure to properly sanitize or make sanitation tools readily available for use
- Failure to close and/or quarantine, and subsequently re-open, in the appropriate time, speed, or manner
- Failure to socially distance or require such distancing among consumers and/or employees
- Failure to require employees/customers face coverings or other protective measures
- Failure to require employees properly report any illness and respond safely thereto
- Failure to otherwise prevent the spread of COVID-19

# Commercial General Liability (“CGL”)

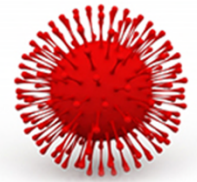
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- Always begin with the language of the policy.
- Policies of insurance are contracts and the rules of contract construction apply.
- If clear and unambiguous, the language is enforced as written.
- If ambiguous, insured's interpretation will be adopted

# COVERAGE GRANT

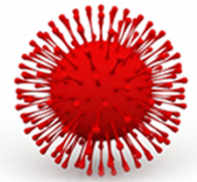
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We will pay those sums which the insured is legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

# BODILY INJURY

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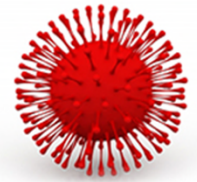


“Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting therefrom.

1. Actual symptoms are bodily injury
2. Does fear of catching Covid-19 constitute “bodily injury?”

# BODILY INJURY

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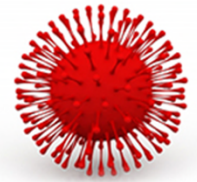


## Trinity Universal Ins. Co. v. Cowan (Tex. 1997)

- Facts:
- Defendant made extra copy of risqué photos
  - Showed photos to friends
  - Plaintiff discovered that photos were shown
  - Sued for Intentional Infliction of emotional distress
  - Pleading just alleged mental anguish
- Holding:
- Did not allege “bodily injury” because no allegation of physical manifestation of the mental anguish

# PROPERTY DAMAGE

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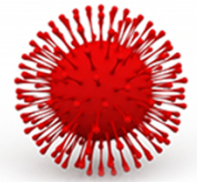
Property Damage means:

- a. Physical injury to tangible property, including all resulting loss of use of that property or
- b. Loss of use of tangible property that is not physically injured.

Definition applies to property of others and therefore no real likelihood of claim under CGL coverage.

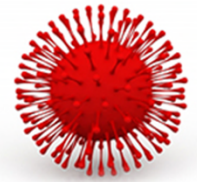
# Occurrence

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“Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

# Occurrence



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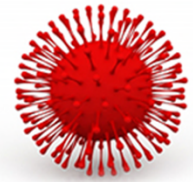
## Trinity Universal Ins. Co. v. Cowan (Tex. 1997)

Facts: Defendant made extra copy of risqué photos  
Showed photos to friends and told them not to tell Plaintiff  
Plaintiff discovered that photos were shown  
Sued for Intentional Infliction of emotional distress  
Testified that he not intend for Plaintiff to discover and did not intend to hurt Plaintiff

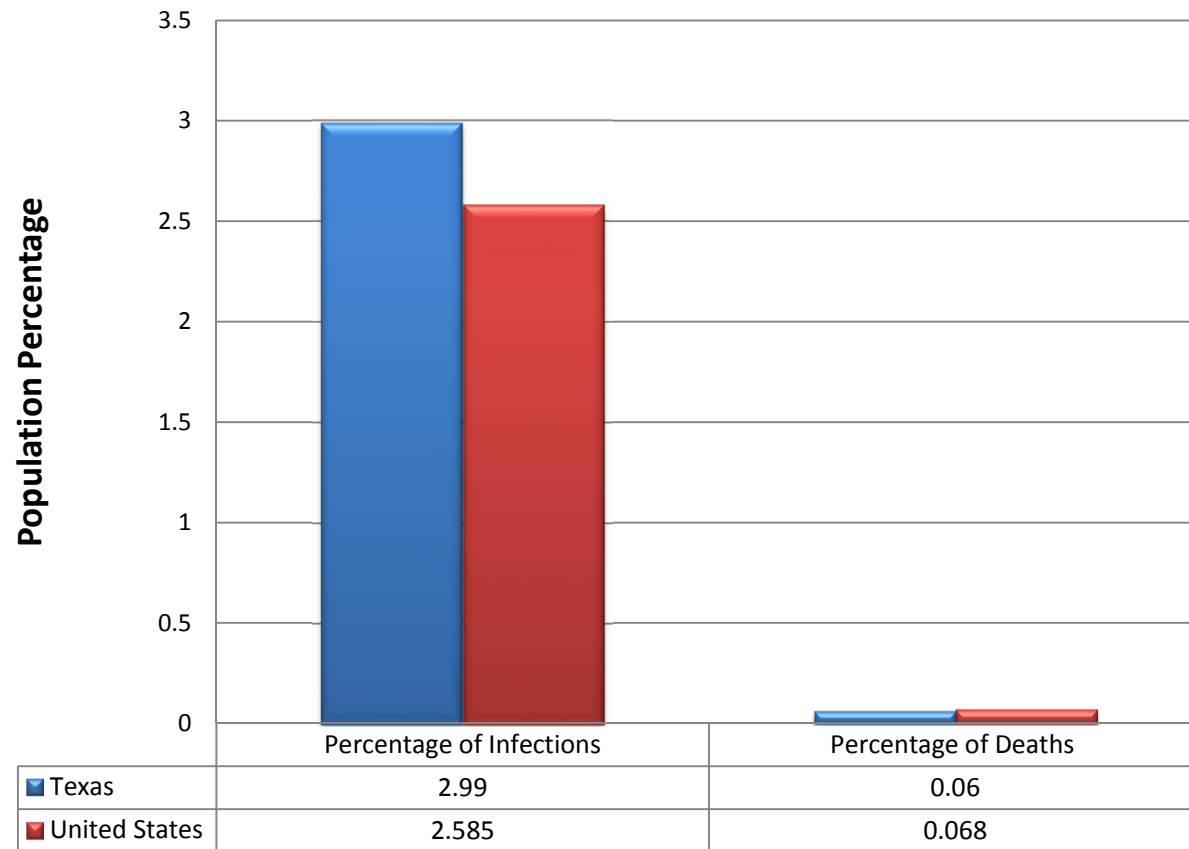
Holding: Is not an occurrence.

Intentional activity for which the damages are a natural and predictable result is not an “occurrence.”

# Occurrence

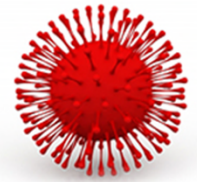


## COVID-19 Infection and Death Rates



# EXPECTED OR INTENDED INJURY

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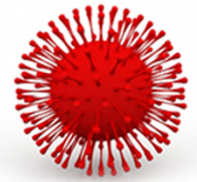


“Bodily injury” or “property damage”  
expected or intended from the standpoint of  
the insured.

Mirror image of the occurrence requirement.

# EXPECTED OR INTENDED INJURY

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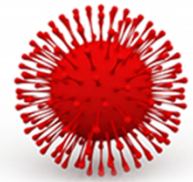


State Farm Fire and Casualty Co. v. S.S. (Tex.1993)

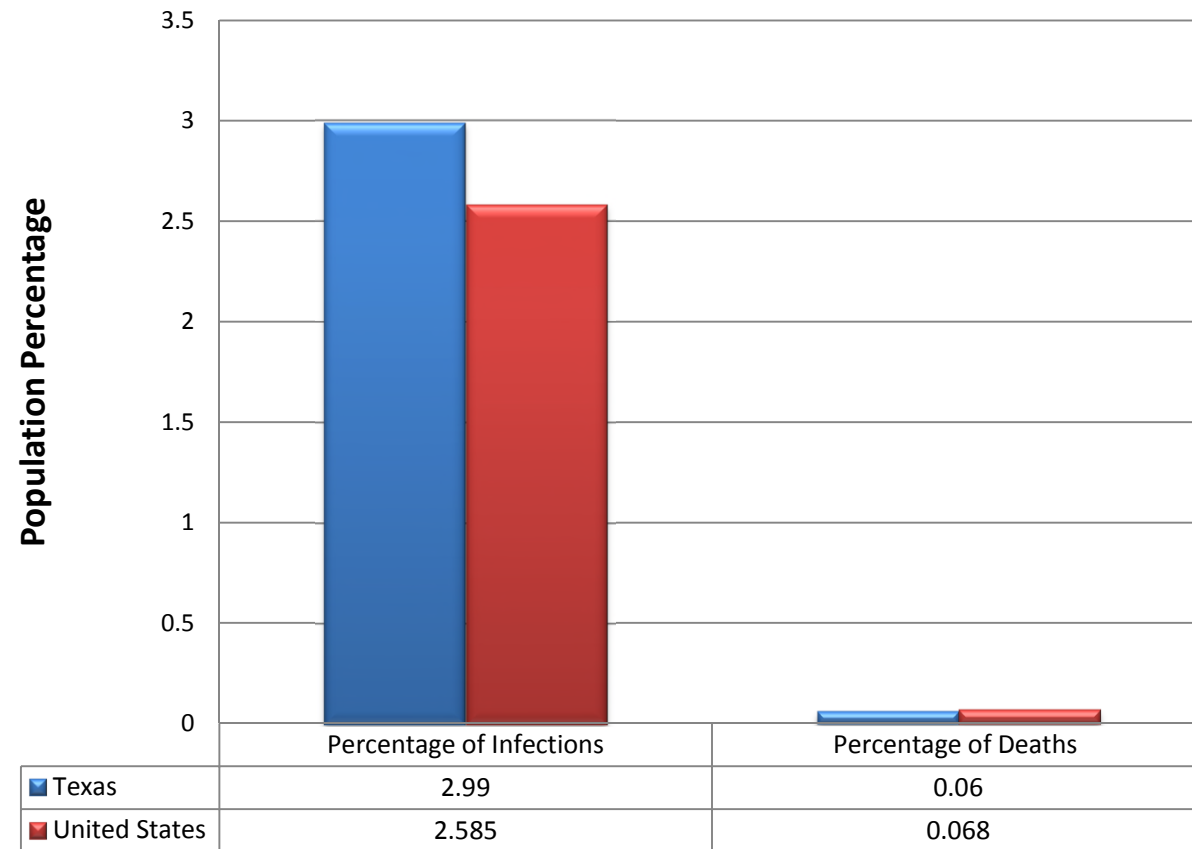
Facts:            Consensual sexual relations  
                     Transmitted herpes  
                     No evident signs of outbreak  
                     Did not think he could transmit

Holding:          Not excluded.  
                     Excludes where the injury is intentional or  
                     reasonably certain to occur from the  
                     standpoint of the insured

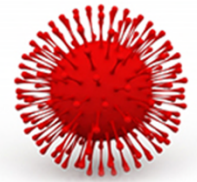
# EXPECTED OR INTENDED INJURY



## COVID-19 Infection and Death Rates



# Pollution Exclusion

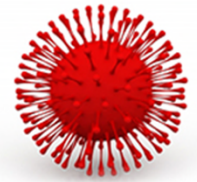


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Generally precludes coverage for damages arising from (1) the actual, alleged or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants under any of the factual circumstances the particular version of the absolute pollution exclusion specified; and (2) loss, cost, or expense arising from requests, demands, or orders that anyone investigate, respond to, and remedy pollution, and claims and suits by government authorities who sought investigation, response, and remediation costs concerning pollution.

'Pollutants' mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

# Pollution Exclusion



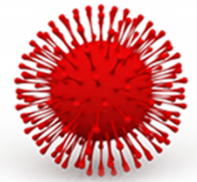
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The scope of a pollution exclusion as defined in the policy will control its applicability to COVID-19 claims.

Fifth Circuit has generally given a very broad interpretation of the exclusion but just recently held that there must have been an alleged move of a pollutant requirement under the pollution exclusions. *Canal Indem. Co. v. Caljet*, 2020 WL 5745821 (S.D. Tex. Sep. 8, 2020). Touching a pollutant on an object does not trigger exclusion.

Transference of Covid by touch would not be excluded but transmission through the air would probably be excluded

# **“Mold” Exclusion**



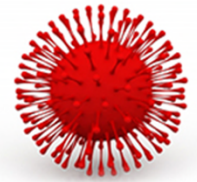
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Generally precludes coverage for damages arising out of, or in any way related to any form of “organic pathogens,” whether or not such actual, alleged or threatened existence, discharge, dispersal, release or escape is intentionally caused, or whether or not such injury, damage, devaluation, cost or expense is expected or intended from the standpoint of the insured.

No case law. If “organic pathogens” is construed broadly, exclusion may preclude coverage

# Virus/Communicable Disease Exclusion

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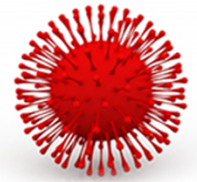


Generally precludes coverage for damages which would not have occurred in the absence of one or more of the following excluded events. Damages thereunder are not recoverable regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

- Fungi, Virus Or Bacteria
  - Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease.

# Virus/Communicable Disease Exclusion

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## General Thoughts:

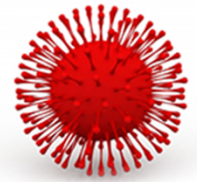
Many CGL policies will not cover insureds' losses resulting from COVID-19 under the exclusion of communicable diseases or viruses. Pandemic outbreaks are uninsured because they are uninsurable. Press Release, Am. Prop. Cas. Ins. Ass'n, APCIA Releases New Business Interruption Analysis (Apr. 6, 2020)

If the policy exclusion actually contains the word "virus"-it is reasonably expected to be upheld against COVID-19 claims. *PBM Nutritionals LLC v. Lexington Insurance Co.*, 724 S.E.2d 707, 711 (Va. 2012).

If the exclusion only contains the words "communicable disease," the definition in the policy will control. If there is no definition in the policy, medical science is unclear as to a definite understanding of COVID-19 as communicable disease or a non-communicable disease ("NCD").

# Virus/Communicable Disease Exclusion

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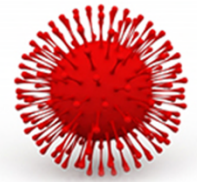
*Diesel Barbershop, LLC v. State Farm Lloyds*, (W.D. Tex. Aug. 13, 2020).

Plaintiff as the owner of a barbershop, was required to temporarily shut down his business during the pandemic because it was considered non-essential per the state mandate. He then made a claim on his insurance policy for business interruptions losses. The Court examined the Policy and found that:

Even if Plaintiff had properly asserted damages which were covered by his policy, it also contained a virus exception which would have precluded any policy coverage for his claim.

# Case Law Under CGL

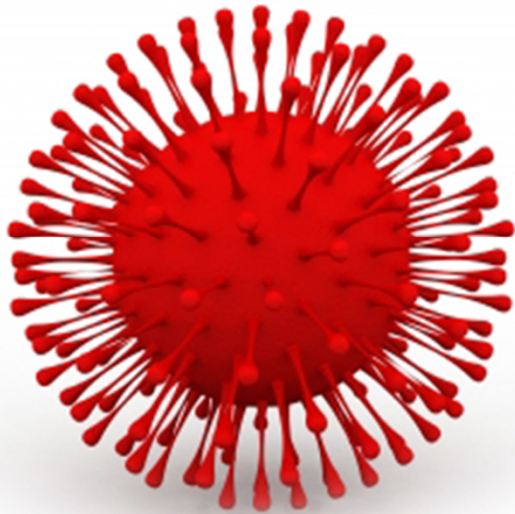
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*Toney v. Walmart, Inc.*, 2020-L-003938 (Ill. Cir. Ct., Cook Cty., April 6, 2020)

Family of deceased employee brought wrongful death and negligence suit against Defendant Employer for failure to properly protect and screen workers from COVID-19. Specifically, they alleged: (1) employer did not properly clean the store; (2) employer did not give employees masks, gloves, antibacterial wipes, or other protective equipment; and (3) another employee at the same store died four days later of complications from the virus.

Case is still pending



THANK YOU