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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
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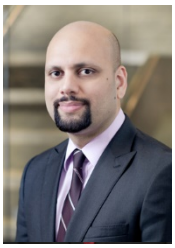
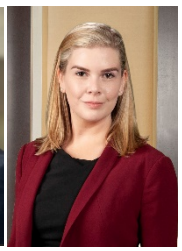

A policy's insuring agreement sets out the scope of coverage. It should be the starting point for any coverage analysis, especially when confronted with claims likely to arise from COVID-19. For instance, if a general liability (GL) policyholder faces liability for the negligent provision of services 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:

> [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

> 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

contra proferentem, the court construed the policy in the insured's favor to provide coverage for □re 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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