



Insurance Coverage for Business Interruption Losses

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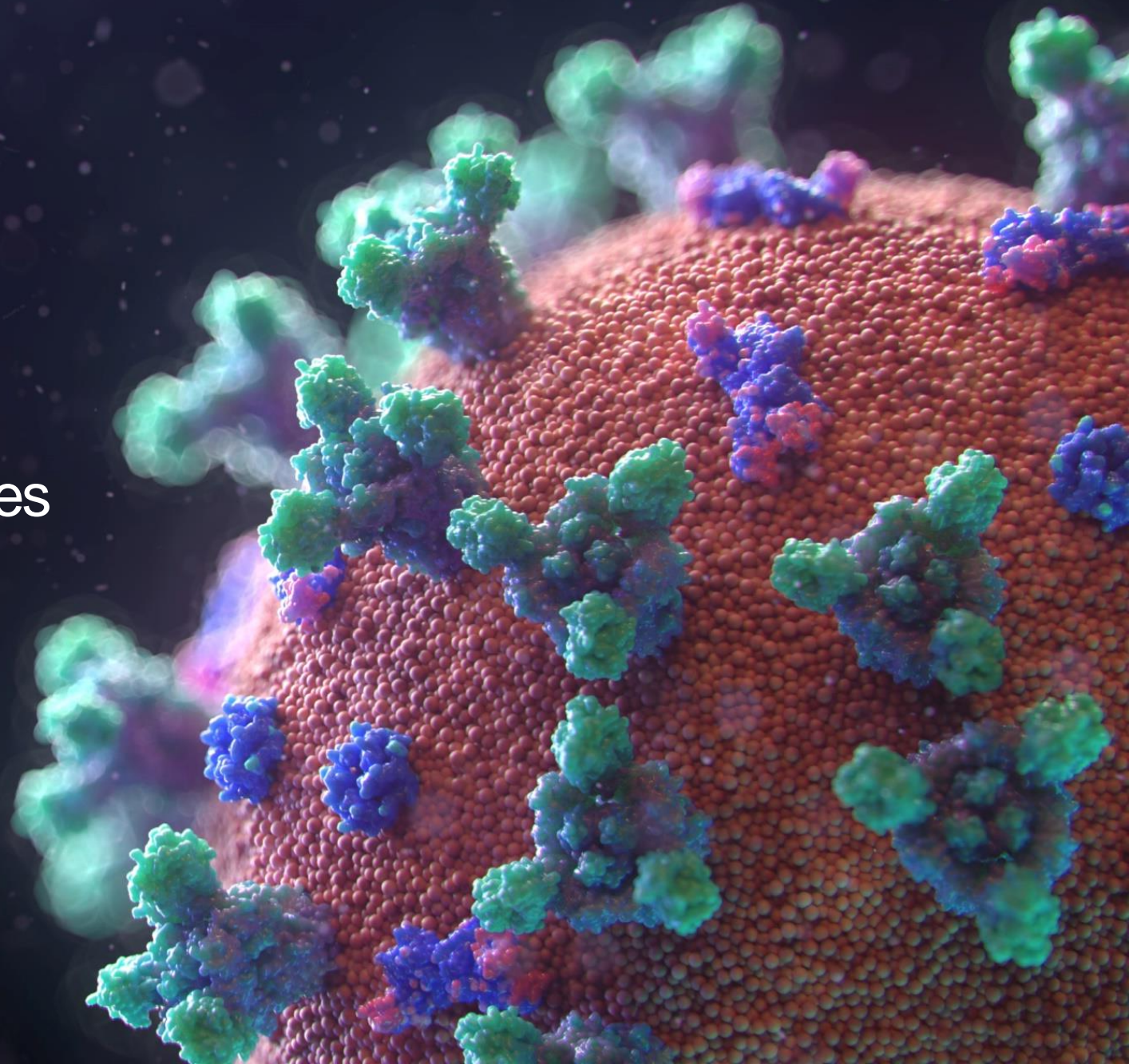
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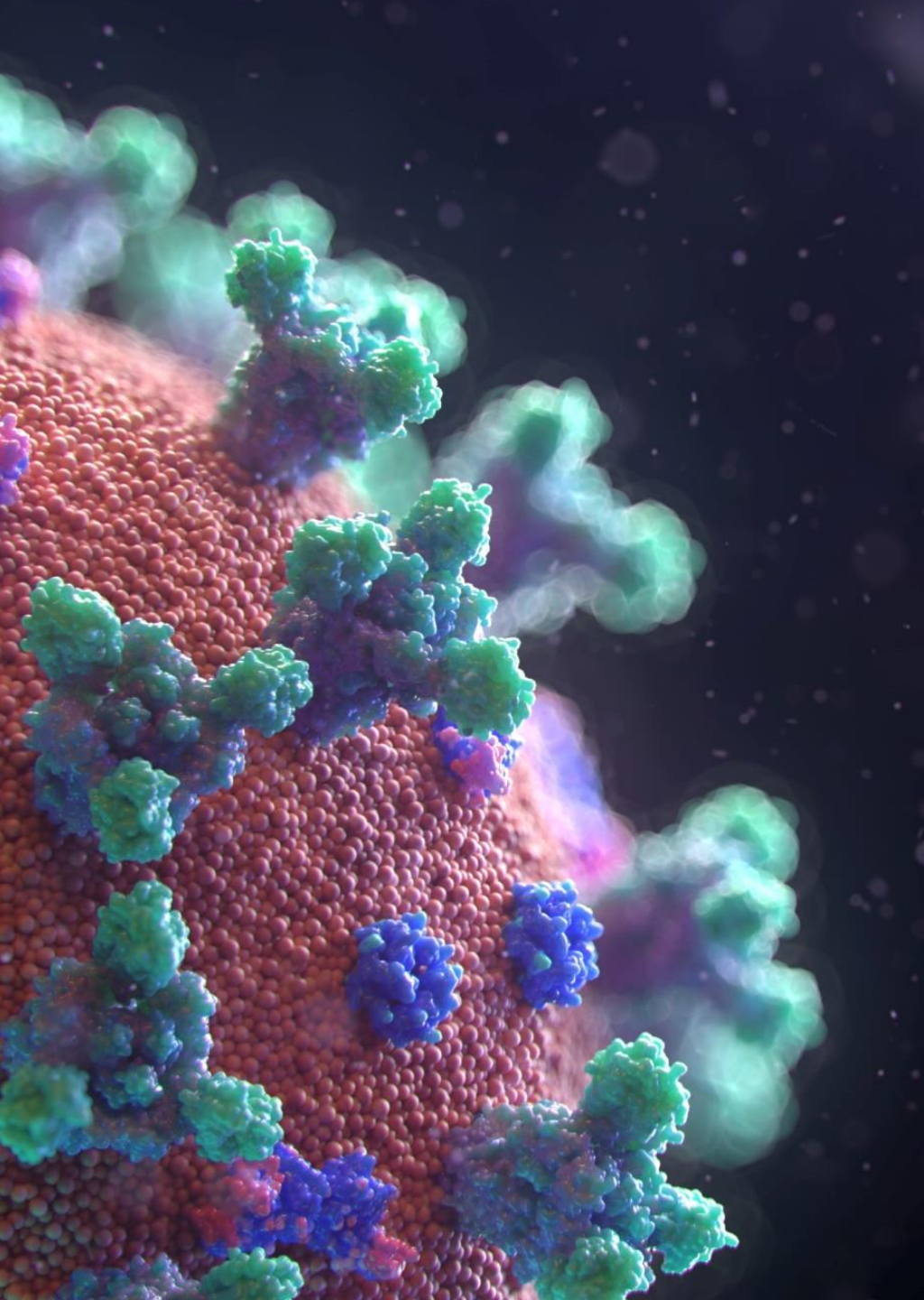
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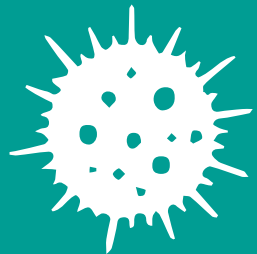


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COVID-19 Business Interruption Coverage Overview

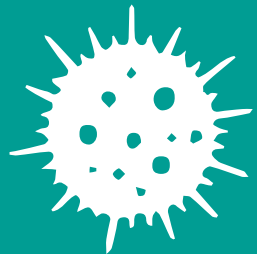


Topics

First-Party Commercial Property Policy

- Business Interruption
- Contingent Business Interruption, *e.g.*, Supply Chain & Trade Disruption Coverage
- Civil Authority
- Communicable Disease Coverage

COVID-19 Business Interruption Coverage Overview



More Topics

- Legislative and Regulatory Developments
- Event Cancellation Coverage
- Travel Interruption Coverage
- Third-Party Liability Coverage

Commercial Property Policy



Business Interruption Coverage

Most commercial property policies provide some form of business interruption loss coverage.

“We will pay for the actual loss of Business Income you sustain due to the necessary “suspension” of your “operations” during the “period of restoration.” The “suspension” must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations....”

Language varies

Business

Interruption Coverage



Coverage Issues

- “All Risk” or “Named Peril” Policy
- “Direct physical loss or damage”
- Virus exclusion

“Type of Policy”



“All risk” — covered unless excluded

Named Peril — coverage only for enumerated losses

**“direct
physical loss”**



CDC has opined that COVID-19 spreads through aerosol droplets and, perhaps, by contact with contaminated surfaces

Is either a “direct physical loss”?

“direct
physical loss”



Some decisions required structural damage

Mama Jo's, Inc. v. Sparta Ins. Co., No. 17-cv-23362, 2018 U.S. Dist. LEXIS 201852 (S.D. Fla. Jun. 11, 2018)

Rembrandt Enter., Inc. v. Illinois Union Ins. Co., 269 F. Supp. 3d 905, 906 (D. Minn. 2017)

Universal Image Prods., Inc. v. Federal Ins. Co., 475 Fed. Appx. 569 (6th Cir. 2012)

Source Food Tech., Inc. v. U.S. Fidelity & Guar. Co., 465 F.3d 834 (8th Cir. 2006)

United Air Lines v. Insurance Co. of the State of Pennsylvania, 439 F.3d 128 (2d Cir. 2006)

“direct
physical loss”



Some decisions—physical loss includes airborne contaminants, odors, and bacteria

Mellin v. N. Sec. Ins. Co., 167 N.H. 544, 115 A.3d 799 (2015)

Gregory Packaging, Inc. v. Travelers Prop. Cas. Co., No. 2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014)

Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co., No. 1:15-CV-01932, 2016 WL 3267247 (D. Or. June 7, 2016), *vacated*, No. 1:15-CV-01932, 2017 WL 1034203 (D. Or. Mar. 6, 2017)

Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co., 406 N.J. Super. 524, 968 A.2d 724 (App. Div. 2009)

Sullivan v. Standard Fire Ins. Co., 956 A.2d 643 (Del. 2008)

Motorists Mut. Ins. Co. v. Hardinger, 131 F. App'x 823, 828 (3d Cir. 2005)

Cooper v. Travelers Indem. Co., No. C-01-2400, 2002 WL 32775680 (N.D. Cal. Nov. 4, 2002)

Matzner v. Seaco Ins. Co., 9 Mass. L. Rptr. 41 (Super. Ct. 1998)

**“direct
physical loss”**



Outcome—Fact and Law Dependent

- Policy language
- Governing law
- Facts related to the property at issue
- Scientific consensus on the virus and its transmission
- Causation

Virus Exclusion



Many standard commercial property policies include an “exclusion of loss due to virus or bacteria”

Endorsement (ISO CP 01 40).

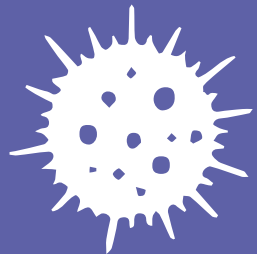
Virus Exclusion



Excludes coverage 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.”

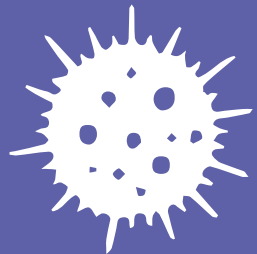
Virus Exclusion



Applies to

“coverage under all forms and endorsement 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.”

Virus Exclusion



Insurers likely will argue that, even if coverage is otherwise triggered under the insuring agreement, this endorsement excludes all damage due to the coronavirus.

COVID-19 Business Interruption Lawsuits



Big Onion Tavern Group, LLC v. Society Ins., Inc.,
No.1:20-cv-02005 (N . D. Ill. Mar. 27, 2020)

- Restaurant and theater owners in Chicago sued their insurer for business interruption coverage based on Illinois COVID-19 order.
- Insurer allegedly denied because presence of coronavirus does not constitute direct physical loss.
- Complaint alleges that plaintiff's policies do not include a virus exclusion

Contingent Business Interruption



CBI: Extension of Business Interruption Coverage

- Provides coverage for domino effect of physical damage to property that is not insured's
- Coverage for, e.g., supplier problems, purchasing business disruptions, neighboring "leader property"
- Example:
 - Insured manufactures mobile devices that are dependent on a chip made by a supplier
 - Supplier's plant burns down in a fire
 - Insured can't get chips or is placed on an allocation of the product OR
 - Insured can get chips but at increased cost from a different supplier

Contingent Business Interruption



CBI Provides the Following Kinds of Coverage:

- Replace lost income/revenues
- Reimburse additional expenses
- Loss mitigation expenses

- Back to example (Insured who can't get chip)
 - Lost revenues from sales
 - Increased costs to buy from alternative supplier
 - Payments to buyers to terminate contracts (if cheaper than lost revenues claims)

Contingent Business Interruption



Triggers for CBI Coverage

- Requires the same kind of damage to the upstream property as is required for the insured's own business interruption coverage (usually "direct physical damage" or "direct physical loss or damage")
- Policy language rules: some policies cover all loss caused by an insured peril or a non-excluded peril
- Potential exclusions pertinent to Coronavirus: Viruses (thanks, SARS), pandemics, "biological agents," pollution exclusions

Contingent Business Interruption



Limitations and Things to Watch Out For

- Sublimits and deductibles
- Waiting periods may apply / period of recovery limited (30-60 days common)
- Time element coverage (insures only for period of time needed to repair damaged property)
- Actual damage or prophylactic measure?
- When does your policy expire/renew? Insurers are starting to insert exclusions for virus; insurance market is hardening. Consider strategy of timing of notice
- Documentation requirements (more voluminous, challenging to document (quantify and link))

Civil Authority



ENDORSEMENT

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority



REQUIRES:

- An order that
 - Prohibits access to the insured premises;
 - As a result of damage to other property not more than one mile from the insured premises; and
 - Issued in response to dangerous physical conditions from damage or covered peril, *or* to enable government to have unimpeded access to damaged property
- Denial of access causes loss

Civil Authority



ALTERNATIVE ENDORSEMENT

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

Required:

- An order that
 - Prohibits access to the insured premises;
 - As a result of a direct physical loss or damage to other property caused by a covered peril
- Denial of access causes loss

Civil Authority



ANOTHER ALTERNATIVE

This policy is extended to cover the loss sustained during the period of time when, as a result of a peril not excluded, access to real or personal property is prohibited by order of civil or military authority.

Required:

- An order that
 - Prohibits access to the insured premises;
 - As a result of a covered peril
- Denial of access causes loss

Not required: Property damage

Civil Authority



CONSIDERATIONS

- Was there an order?
 - Mandate v. recommendation
- Was access prohibited?
 - All of the people some of the time v. some of the people all of the time
- Was the order a result of property damage?
 - Actual v. expected
 - Any property v. nearby property
- Was the damage caused by a covered peril?
- When did the order begin and end?

Ingress/Egress Coverage



- Covers loss for suspension of access
- May be limited to lack of access caused by a physical impediment
- But not necessarily

Loss of Ingress or Egress: This policy covers loss sustained during the period of time when, as a direct result of a peril not excluded, ingress to or egress from real and personal property not excluded hereunder, is thereby prevented.

Virus Coverage



Hospitality Industry Specialty Coverage

We will pay for the actual loss of Business Income you sustain as a result of having your entire “operations” temporarily shut down or suspended by an order from any local, state or federal Department of Health having jurisdiction over your “operations.” Such shutdown must be the direct result of an outbreak at the insured premises of a “communicable disease” such as, but not limited to, Meningitis, Measles, or Legionnaire's Disease, or to a “food contamination” caused directly by infectious or bacterial organisms such as, but not limited to, infectious Hepatitis, E.Coli bacteria, or Salmonella. An actual business shutdown must occur

Virus Coverage



Hospitality Industry Specialty Coverage

“Communicable disease” often defined broadly.

Some policies define “communicable disease” to mean diseases that are transmissible from human to human

Communicable Disease Policy



Marsh and Munich Re

PathogenRx

Developed in 2018

Not clear whether any company purchased this coverage

Virus Coverage



New ISO Coronavirus Endorsements

- In February 2020, ISO drafted two new endorsements.
- Add limited business income or extra expense coverage for loss suffered if the insured's business is ordered closed.
- Public transportation endorsement also adds coverage for loss suffered if a civil authority orders the closure or restricted usage of a public transportation.
- No requirement of direct physical loss to covered property.
- Unlikely that insurers willing to use the endorsements now.

Legislative and Regulatory Developments



FEDERAL

- Recovery Fund
 - Program to distribute funds to businesses to cover BI losses from COVID-19
 - Insurers, agents and brokers would help with application filing and review
- Pandemic Risk Insurance Act
 - Similar to TRIA
 - Prospective only

Legislative and Regulatory Developments



STATE

- Expansion of BI coverage
 - States: RI, MA, NJ, NY, OH
 - Retroactive
- Legal challenges
 - Constitutional
 - Contractual
 - Extra-territorial
- Practical challenges
 - E.g., NY: “covered perils” include “coverage for business interruption” during a declared state of emergency due to pandemic
 - Applicability of other provisions

Event

Cancellation Coverage



Coverage for Events

- Stand-alone coverage
- Designed to cover concerts, athletic/sporting events, consumer shows, fairs, etc.
- Usually specifies trigger for coverage, e.g., adverse weather, labor disputes, terrorism, nonappearance of performers or teams.
- “All Cause” policies rare
- Exclusions may include pandemics or government-issued quarantines
- Communicable disease rider: might provide coverage if outbreak in event area, but attendee cancellation may not be covered

Travel Insurance



TYPES

- “Cancel for any reason” policies may provide coverage
- Enumerated events
 - Some insurers — coronavirus is a “foreseeable event”
 - Cancellations for fear of travel generally will not be covered
 - Some of policies may cover claims for if policyholder’s plans are disrupted by a diagnosis of COVID-19

Economic and Consumer Policy Subcommittee of the House Oversight and Reform Committee activity

Third-Party Liability Coverage



- Bodily Injury/Failure to Prevent Virus from Spreading Coverage
- Discrimination/Retaliation Coverage
- Shareholder Claims D&O Coverage

Third-Party Liability Coverage



Commercial General Liability Coverage

- Third party claims for property damage or bodily injury
- Damage must be caused by an “accident”
- Exclusions:
 - Pollution (claims arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of pollutants)
 - Communicable Disease Exclusion (excluding coverage for claims or suits based on, or directly or indirectly arising out of, or resulting from any form of communicable disease, including the failure to perform services either intended to or assumed to prevent communicable diseases or their transmission to others)

Third-Party Liability Coverage



Discrimination/Retaliation Coverage

- Employee alleges discrimination and adverse action based on protected status
 - Ex.: Disabled employee is terminated after he declines to work in the office due to COVID-19 risk
 - Ex.: Employer furloughs employees 65 and older due to COVID-19 risk
- Claims based on alleged denial of service due to COVID-19 risk

Potential COVID-19 D&O Coverage Issues



- Potential lawsuits against directors or officers that they mismanaged COVID-19 related activities or failed to disclose pertinent facts.
- D&O policies typically cover claims against directors and officers for their wrongful acts — error, omission, misstatement, breach of duty

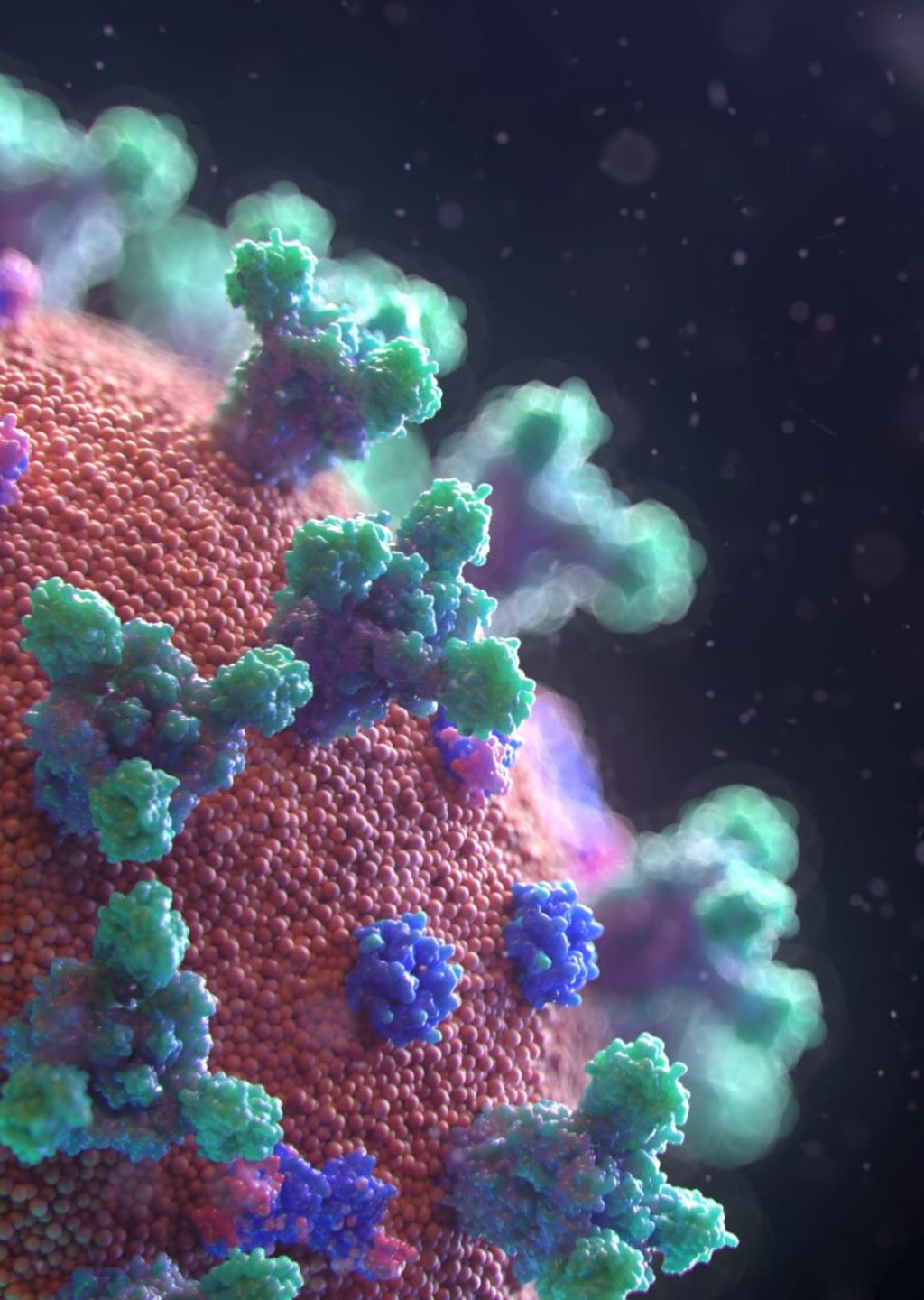
Potential COVID-19 D&O Coverage Issues



- D&O policies generally exclude coverage for bodily injury.
- Bodily injury exclusion may not apply to shareholder lawsuits that directors or officers failed to prepare for or mismanaged COVID-19 related issues or that the company's disclosures misled investors.



thank you



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