COVID-19

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When State Stay-at-Home Orders Due to Coronavirus Went into Effect

- Delaware
- Indiana
- Massachusetts
- Michigan
- New Mexico
- West Virginia
- Alaska
- Montana
- Rhode Island
- Arizona
- Tennessee
- Maine
- Texas
- Alabama
- South Carolina
- California
- New York
- Illinois
- New Jersey
- Connecticut
- Louisiana
- Ohio
- Wisconsin
- Vermont
- Hawaii
- Minnesota
- New Hampshire
- Kansas
- Maryland
- North Carolina
- Virginia
- D.C.
- Nevada
- Pennsylvania

**US Cases:** 9,197

**US Cases:** 395,480

<table>
<thead>
<tr>
<th>State/territory</th>
<th>State of emergency declared</th>
<th>Stay at home ordered</th>
<th>Face coverings required in public</th>
<th>Gatherings banned</th>
<th>Out-of-state travel restrictions</th>
<th>Schools</th>
<th>Daycares</th>
<th>Bars &amp; sit-down restaurants</th>
<th>Non-essential retail</th>
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</thead>
<tbody>
<tr>
<td>Washington</td>
<td>February 29</td>
<td>March 23</td>
<td>Yes</td>
<td>All</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Florida</td>
<td>March 1</td>
<td>April 3</td>
<td>No</td>
<td>10 or more</td>
<td>Limited quarantine / Screened</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>California (government response)</td>
<td>March 4</td>
<td>March 19</td>
<td>Yes</td>
<td>All</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Hawaii</td>
<td>March 4</td>
<td>March 25</td>
<td>Yes</td>
<td>11 or more, and public gathering in public places</td>
<td>Mandatory quarantine</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Mississippi</td>
<td>March 4</td>
<td>April 3</td>
<td>No</td>
<td>All</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>West Virginia</td>
<td>March 4</td>
<td>March 23</td>
<td>Yes</td>
<td>All</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Maryland</td>
<td>March 5</td>
<td>March 30</td>
<td>Yes</td>
<td>10 or more</td>
<td>Mandatory quarantine</td>
<td>Yes</td>
<td>Yes</td>
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<td>Indiana</td>
<td>March 6</td>
<td>March 25</td>
<td>Yes</td>
<td>All outside, and 11 or more inside a household</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Kentucky</td>
<td>March 6</td>
<td>March 26 (advisory)</td>
<td>Yes</td>
<td>10 or more</td>
<td>Mandatory quarantine</td>
<td>Yes</td>
<td>Yes</td>
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<td>Pennsylvania</td>
<td>March 6</td>
<td>April 1</td>
<td>No</td>
<td>10 or more (recommended)</td>
<td>Limited quarantine</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<td>Utah</td>
<td>March 6</td>
<td>Regional</td>
<td>Yes</td>
<td>10 or more</td>
<td>No</td>
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<td>New York (government response)</td>
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<td>March 22</td>
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<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<td>Oregon</td>
<td>March 8</td>
<td>March 23</td>
<td>Yes</td>
<td>All</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Restricted</td>
<td>Yes</td>
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<td>Illinois</td>
<td>March 8</td>
<td>March 21</td>
<td>Yes</td>
<td>All</td>
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<td>Yes</td>
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<td>Iowa</td>
<td>March 9</td>
<td>No</td>
<td>No</td>
<td>10 or more</td>
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<td>Kansas</td>
<td>March 9</td>
<td>March 30</td>
<td>Yes</td>
<td>10 or more</td>
<td>Limited quarantine</td>
<td>Yes</td>
<td>Yes</td>
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<td>New Jersey</td>
<td>March 9</td>
<td>March 21</td>
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The University of Pennsylvania Law School (https://cclt.law.upenn.edu)
## Appeal Status - Federal Cases = 209

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<tr>
<th>Appellate District</th>
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<th>Appellate District</th>
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<td>– Guam</td>
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<td>7th Circuit</td>
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<td>15</td>
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<td>Alabama</td>
<td>19</td>
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<td>– Florida</td>
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<td>– Missouri</td>
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<td>– South Dakota</td>
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The University of Pennsylvania Law School (https://cclt.law.upenn.edu/appeals)
COVID Cases – Appeals Decided

PROPERTY CASES, BI COVERAGE, VIRUS AND/OR CONTAMINATION EXCLUSIONS

1. Oral Surgeons (8th Cir.) Gatekeeper To Cover: “direct physical loss or physical damage” i.e., a physical alteration, physical contamination, or physical destruction, misplacement, misdelivery or unexplained loss, not losses that are intangible or incorporeal (diminution in value).

2. Mudpie, Inc. (9th Cir.) “the efficient cause,” i.e., the one that set others in motion . . . was . . . the spread of the virus throughout California not the governmental orders.

3. Gilreath Fam. & Cosm. Dentistry (11th Cir.) The shelter in place order did not damage or change the insured property in any way that required its repair or precluded its future use for dental procedures. “We do not see how the presence of those [COVID] particles would cause physical damage or loss to the property.”

4. Santo’s Italian Cafe (6th Cir.) pandemic-triggered government order, barring in-person dining at a restaurant, not “direct physical loss of or damage.”
The FC&S Warranty

➢ **PARAMOUNT WARRANTIES:**
The following warranties and clauses shall be paramount and apply except to the extent they may be amended or replaced by superseding clause(s) or endorsement(s).

➢ **FREE OF CAPTURE AND SEIZURE WARRANTY:**
This insurance is warranted free from loss, damage or expense caused by or resulting from:

- capture, seizure, arrest, restraint, detainment, confiscation, preemption, requisition or nationalization, and the consequences thereof or any attempt thereat, whether in time of peace or war and whether lawful or otherwise.
Q: WHAT IS RESTRAINT?

- In absence of definition, the ordinary meaning of “restraint”: “a means of restraining” and “restraining” is “to prevent from doing, exhibiting, or expressing something.”

*Olivera v. Union Ins. Co.*, 16 U.S. 183 (1818)

“What, then, . . . is the meaning of the term "restraint?" Does it imply that the limitation, restriction, or confinement must be imposed by those who are in possession of the person or thing which is limited, restricted, or confined, or is the term satisfied by a restriction created by the application of external force? If, for example, a town be besieged and the inhabitants confined within its walls by the besieging army, if in attempting to come out they are forced back, would it be inaccurate to say they are restrained within these limits? . . . when a port is blockaded, that the vessels within are confined or restrained from coming out. The blockade force is not in possession of the vessels [e]nclosed in the harbour, but it acts upon and restrains them.”

“THE CLAUSE DOES NOT REQUIRE THAT THE INSURED ITEM SPECIFICALLY BE DETAINED, IF THE SHIP CARRYING THE CARGO IS DETAINED AND THAT DETENTION IS THE PROXIMATE CAUSE OF THE LOSS. WHERE THE INSURED PROPERTY IS DETAINED, NOT BY GOVERNMENT ACTION SPECIFICALLY DIRECTED AT THAT PROPERTY, . . . BUT BY FORCIBLE MEANS WHICH HAVE THE SAME CONSEQUENCES, THAT ALSO CONSTITUTES THE OPERATION OF A RESTRAINT.”

The FC&S Warranty …

➢ REQUIRES ACTION BY A GOVERNMENTAL AUTHORITY, NOT A PRIVATE ACTOR

➢ APPLIES TO ACTION BY GOVERNMENTAL AUTHORITIES DURING PEACE TIME, NOT JUST DURING WARTIME

➢ OPERATES AS AN EXCLUSION
Subrogation and Large/Complex Claims

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SUMMARY

01 Claim → Subrogation → Recovery
02 Early Involvement of Subrogation Team
03 Subrogation Receipt
04 Notice of Claim / Time Bar
05 Service Contracts and Similar Agreements
06 Limitations on Recovery Potential
1. Claim → Subrogation → Recovery
Subrogation Primer

- Applies to All Types of Policies
  - Not just first-party property losses
- Equitable and Contractual Subrogation
- Purely Derivative of Insured’s Rights and Claims
Claim → Subrogation → Recovery

1. First Notice of Loss
2. Investigation and Adjustment of Claim
3. Payment of Claim
4. Referral to Subrogation Team
5. Informal Recovery Process
6. Formal Recovery Process
2. Early Involvement of Subrogation Team
Why Bring In Subrogation Team Early?

- Investigation for Recovery Purposes / Recognize Third-Party Liability
  - Insured’s interests may not be the same as underwriter’s interests
- Coordinate Surveys, Response and Cooperation with Other Interested Underwriters
- Preservation of Evidence
  - But beware of what you undertake
- Comply with Notice of Claim Requirements
- Preserve Time Bar
3. Subrogation Receipt
Why Get a Subrogation Receipt?

- Evidences Claim Amount and Payment by Underwriter
- Identifies Insured with Recovery Rights (hopefully)
- Memorializes Insured’s Agreement to Cooperate and to Not Release Any Parties
- Obtain Additional Rights Through Assignment
What Should Be on Subrogation Receipt?

- Best to Match Insured Receiving Payment to Party with Recovery Rights
- Adequately Describe the Loss
- Acknowledgment of Payment and Underwriter’s Subrogation Rights
- Undertaking That Insured Has Not and Will Not Release Any Party
- Assignment of Insured’s Rights to Extent Allowed by Law
  - Excepting deductible? Is there policy language?
- Insured’s Agreement to Cooperate With Recovery Process
- Don’t Rely on Standard Receipt for Large / Complex Losses
It Depends …

- **Release of Further Claims Under Policy**
  - May be a breach of duty of good faith and fair dealing
  - Is there a dispute as to coverage, quantification, valuation, etc.?

- **Waiver / Modification of Made Whole Rule**
  - May be prohibited by state law
  - Is there policy language concerning subrogation?
4. Notice of Claim / Time Bar
Time Waits For No One

- Large / complex losses take time to investigate and to adjust ... but time continues to run

- Preserving timeliness of claim may not be insured’s priority

- Don’t wait too long to refer to subrogation counsel
  - If no response to first five demand letters, unlikely to respond to sixth
  - Delayed investigation
  - Evidence disappears or can be destroyed
  - Suit may need to be filed in a foreign jurisdiction

Notice of Claim and Time Bar Are NOT the Same Thing
Types of Notice of Claim

- Statutory
  - Federal
    - e.g., COGSA – “Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.”
    - e.g., Carmack Amendment – minimum of nine months
  - State
    - e.g., tort claim against municipality
- Contractual
Types of Time Bar

- Statutory
  - Federal
    - e.g., COGSA ("within one year after delivery of the goods or the date when the goods should have been delivered"); Carmack Amendment (minimum of two years)
  - State
    - e.g., contract, tort
- Contractual
  - May shorten or extend statutory time bars in some instances
- Laches
5. Service Contracts and Similar Agreements
A Contract Can …

- Modify Time Bars (in certain circumstances)
  - Extend or reduce

- Modify Limits of Liability (in certain circumstances)
  - Increase or decrease

- Create or Waive Defenses
6. Limitations on Recovery Potential
- Uninsured Losses / Made Whole Rule
- Insured Value versus Recoverable Damages
  - e.g., agreed hull value or CIF + 10% versus market value
- Inadequate / Incorrect Insurance of Liable Party
- Excess Underwriter’s Priority Over Primary Underwriter
- Release / Waiver of Subrogation by Insured
- Service Contract or Similar Agreement
Questions?

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Marine Insurance Day Seminar 2021

A Collaborative Effort of:

The American Institute of Marine Underwriters (AIMU)
American Marine Insurance Forum (AMIF)
Association of Average Adjusters of the U.S. and Canada
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