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Can Fear or Emotional Distress Associated With COVID-19 Be a "Bodily Injury"?

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With the United States now having the highest number of confirmed infections in the world, the nation now finds itself in the throes of the COVID-19 pandemic. In this blog post, we continue to explore potential COVID-19 insurance coverage issues, this time focusing on whether fear of contracting COVID-19 alone or emotional damages caused by a change of employment may constitute a "bodily injury" under insurance policies. Additionally, we examine related issues of "emotional distress" from fear of contracting a virus and claims for medical monitoring of a potential condition to see whether mental injuries prompted by COVID-19 may be considered cognizable injuries under tort law.

Liability policies typically provide coverage for third-party claims against an insured for bodily injuries. For example, the Commercial General Liability ("CGL") ISO CG00010413 form states:

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

ISO CG00010413 also defines "'Bodily injury' [to] mean[] bodily injury, sickness or

disease sustained by a person, including death resulting from any of these at any time." Some policies, however, do not define the term "bodily injury" at all; other policies that do define that term expressly include shock and mental anguish in the definition. As always, it is critical to focus on the actual language of the policy and especially the definition of "bodily injury," and apply the actual facts to those provisions.

Existing case law and analogous materials suggest a fear of contracting COVID-19 is likely not a "bodily injury" under most policies. For example, a court held that fear of contracting the HIV virus was not by itself sufficient to constitute a "bodily injury" under a motor vehicle insurance policy, even when actual exposure to HIV-positive blood had occurred. In *Transamerica Insurance Co. v. Doe*, 840 P.2d 288 (Ariz. Ct. App. 1992), the insureds were directly exposed to HIV-positive blood while giving emergency assistance to the victims of a car accident. The insureds were then subjected to a year of diagnostic blood testing. Although that testing did not reveal the presence of HIV in their blood, because of limitations of the testing methods, the insureds could not "be absolutely certain they w[ould] not contract AIDS from exposure to the passenger's blood."

The insureds sued for coverage under their motor vehicle policy based on their fear of having contracted AIDS. While that policy provided coverage for "damages which a covered person is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury sustained by a covered person and caused by an accident," it did not define "bodily injury."

The court found the insureds did not suffer "bodily injury." The fear of contracting AIDS was not a bodily injury because "[b]odily injury encompasses only physical injuries, impairment of physical condition, sickness, disease, or substantial pain," none of which the insureds experienced. The court also found the extensive blood tests performed to determine whether the insureds contracted HIV were not a "bodily injury." The court stated:

> Appellants have provided no authority to support the proposition that a litigant can transform the threat of future harm into present bodily injury by undergoing common diagnostic testing, and we are aware of no such authority. We could conclude that diagnostic testing, utilized to determine whether bodily injury occurred, is itself bodily injury only by extending the meaning of "bodily injury" far beyond its accepted bounds. Such a conclusion would invite the very inequities to both plaintiffs and defendants that we avoid by requiring manifestation of bodily injury, rather than exposure to a threat of future injury, to support a claim for damages resulting from bodily injury. We therefore decline to expand the meaning of "bodily injury" to encompass common diagnostic testing intended to determine whether bodily injury occurred.

Emotional Damages Over Employment Status as a "Bodily Injury"

For many, loss of employment can be a traumatic event causing significant emotional disruption. In the context of COVID-19, an issue is whether the emotional toll of losing employment may constitute a "bodily injury" under a general liability

policy. Some courts have concluded that the emotional stress of lost employment is not a "bodily injury," primarily because of the absence of physical injury.

In *SL Industries v. American Motorists Insurance Co.*, 607 A.2d 1266 (N.J. 1992), a former vice-president sued the insured, his former employer, alleging age discrimination and fraud stemming from the circumstances leading to his departure from the company. The former vice-president claimed the insured, through its chief executive officer, suggested he accept an early retirement package because the company was eliminating his position. He filed suit after the company hired a new executive, which he claimed was his replacement for the position he was told would be eliminated. He alleged he suffered a loss of sleep, declining self-esteem, humiliation, irritability, and that he received treatment for "emotional pain and suffering."

In subsequent coverage litigation over the underlying plaintiff's claims, the court found there was no insurance coverage for the insured's alleged emotional distress because it did not constitute "bodily injury" under the insurance policy. The policy defined "bodily injury" as a "bodily injury, sickness or disease." In denying coverage, the court concluded,

> . . . in the context of purely emotional injuries, without physical manifestation, the phrase "bodily injury" is not ambiguous. Its ordinary meaning connotes a physical problem. Because [the executive's] emotional claims lacked physical manifestations, [the insured] will not be able to recover for its liability to [the executive] under the bodily-injury policy.

In another case, the court found that emotional distress caused by involuntary termination of employment was not a "bodily injury" under a comprehensive business policy. In *National Casualty Co. v. Great Southwest Fire Insurance Co.*, 833 P.2d 741 (Colo. 1992), a former police officer sued his city, alleging, *inter alia*, wrongful termination. The former police officer and the city reached a settlement, which an insurer paid. That insurer then filed a contribution suit against other insurers. The relevant policy defined "bodily injury" as "bodily injury, sickness, or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom." Ultimately, Colorado's Supreme Court affirmed that "emotional distress did not constitute bodily injury within the meaning of the policy" because the former police officer "did not allege any physical injury, physical contact, or pain."

Finally, one court concluded that physical ailments allegedly caused by emotional distress did not constitute "bodily injury" under a policy that defined it as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." In *Legion Indemnity Co. v. CareStat Ambulance, Inc.*, 152 F. Supp. 2d 707 (E.D. Pa. 2001), the insured was a private ambulance company. The insurer filed a declaratory suit regarding the alleged professional negligence of a 911 operator whose violation of protocol set into motion a series of events that culminated in a man's death. The deceased's family filed suit, alleging, *inter alia*, negligent infliction of emotional distress. Because of her husband's death, the deceased's wife alleged that she experienced "difficulty sleeping, hyperventilat[ing], and a skin condition due to the stress of having watched her

husband die as a result of the negligence of [the insured]."

Drawing its analysis from a case where a court had concluded that Posttraumatic Stress Disorder, anxiety attacks, a driving phobia, and globus hystericus, did not constitute bodily injury, the *Legion* court found that the deceased wife's alleged symptoms likewise did not constitute bodily injury.

Emotional Distress Based on Fear of Contracting a Virus

Outside of the insurance context, several courts have addressed issues in the context of tort claims that may provide guidance as to whether alleged fear or emotional distress associated with COVID-19 may constitute "bodily injury" under a general liability policy. The most analogous are cases evaluating whether a fear of contracting HIV constitutes "emotional distress," and whether that in turn constitutes a cognizable injury.

Many courts addressing fear of contracting HIV have concluded that fear itself does not constitute "emotional distress," and thus does not constitute a cognizable injury. Instead, these courts generally require a physical injury, such as testing positive for the virus.

For example, in *K.A.C. v. Benson*, 527 N.W.2d 553 (Minn. 1995), the plaintiff sued for negligent infliction of emotional distress after her gynecologist, who knew he was HIV-positive, examined her. The gynecologist suffered from skin lesions and wore two pairs of rubber gloves while examining the plaintiff. The plaintiff did not test positive for HIV. The court rejected the plaintiff's claim because the plaintiff was required to allege actual exposure to HIV, and the "[t]ransmission of HIV from [the gynecologist] to plaintiff was, fortunately, never more than a very remote possibility." The court noted that its finding was in line with the "majority of jurisdictions" and stated:

> Although our decision is based upon existing Minnesota case law, we note that it is consistent with the majority of jurisdictions that have addressed the issue of emotional distress damages arising from a plaintiff's fear of contracting HIV. The majority of courts that have decided fear of HIV exposure cases hold the plaintiff must allege actual exposure to HIV to recover emotional distress damages. We concur with the majority of jurisdictions and reject plaintiff's claim in this case. In an action for damages based solely upon plaintiff's fear of acquiring AIDS, without allegation of actual exposure to HIV, no legally cognizable claim exists under Minnesota law.

In *Kerins v. Hartley*, 27 Cal. App. 4th 1062 (1994), the plaintiff underwent surgery to remove a tumor. Five days after the surgery, one of her surgeons tested positive for HIV. The plaintiff sued the HIV-positive surgeon and sought damages for "severe mental anguish and emotional distress" due to her fear of contracting HIV through the surgery. In support of her argument, the plaintiff cited a CDC report documenting the case of a dentist who had transmitted HIV to five of his patients. The court affirmed summary judgment for the surgeon, finding that the surgeon had complied with CDC guidelines for care that were current at the time of the plaintiff's

operation, and the plaintiff was not more likely than not to have contracted HIV through the surgery.

In *Pendergist v. Pendergrass,* 961 S.W.2d 919 (Mo. Ct. App. 1998), the plaintiff received a blood transfusion during an operation. Afterwards, he reported feeling angry, frustrated, helpless, distrustful, and paranoid. He also reported experiencing "bizarre dreams" and became afraid of contracting AIDS or Hepatitis B because of the blood transfusion. The court granted summary judgment to the defendants on the plaintiff's negligent infliction of emotional distress claim, finding that the plaintiff's mere fear of contracting either HIV or Hepatitis B was not sufficient. Specifically, the court stated:

> If fear is an unreasonable consequence of defendant's conduct, the defendant cannot be expected to recognize that its conduct could cause the distress. Absent proof of actual exposure to the HIV virus as a result of a defendant's negligent conduct, that is, proof of both a scientifically accepted method, or channel, of transmission and the presence of the HIV virus, the fear of contracting AIDS is unreasonable as a matter of law and, therefore, not a legally compensable injury.

Additionally, in *Kershak v. Pennsylvania Hospital*, No. 94-6829, 1995 U.S. Dist. LEXIS 1452 (E.D. Pa. Feb. 1, 1995), the plaintiff received an incompatible blood transfusion. The court struck "fear of [contracting] a blood borne disease" as an injury from a complaint. The court stated, "Pennsylvania generally does not permit recovery based on fear of contracting a disease," and cited a case where a court rejected a cause of action for "fear of AIDS" after the plaintiff received donated blood that tested positive for AIDS. *See* *Lubowitz v. Albert Einstein Medical Center*, 623 A.2d 3, 5 (Pa. Super. 1993).

When applied to COVID-19, cases evaluating whether a fear of contracting HIV may constitute "emotional distress" may serve as a useful analogy. In these cases, fear by itself was not a cognizable injury.

Medical Monitoring Claims

Finally, another issue analogous to COVID-19 concerns are claims to monitor for the development of a disease. Many courts have held that a claim for medical monitoring cannot be based solely on fear of contracting an illness. Under these cases, a medical monitoring claim requires a present physical injury.

For example, in *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1 (Miss. 2007), in response to a certified question from the Fifth Circuit concerning Mississippi law, the court declined to recognize a medical monitoring claim without a showing of physical damage. The plaintiffs in the federal action were a group of employees that requested medical monitoring to learn whether they contracted Chronic Beryllium Disease due to their alleged exposure to beryllium. The court stated:

> The possibility of a future injury is insufficient to maintain a tort claim. Recognizing a medical monitoring cause of action would be akin to recognizing a cause of action for fear of future illness. Each bases a claim for damages on the possibility of incurring an illness with no present

> manifest injury. There is no tort cause of action in Mississippi without some identifiable injury, either physical or emotional . . . it would be contrary to current Mississippi law to recognize a claim for medical monitoring allowing a plaintiff to recover medical monitoring costs for mere exposure to a harmful substance without proof of current physical or emotional injury from that exposure.

The requirement of a present physical injury for a medical monitoring claim may serve as useful guidance for COVID-19 claims.

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