

***The Swine Flu Crisis:  
Insurance Coverage and  
Liability Issues***

**By**

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## **I. INTRODUCTION**

According to the most recent information provided by the Centers for Disease Control and Prevention, all 50 states have reported incidents of infection with the H1N1 virus, commonly known as the “swine flu.” As of June 7, 2009, 13,217 cases have been reported throughout the United States, with activity appearing to be highest right now in the Pacific Northwest and the Southwest. At least 37 deaths in the United States have been attributed to the swine flu virus.

As of June 8, 2009, the World Health Organization (WHO) has reported that the swine flu outbreak has sickened 25,288 people and caused at least 139 deaths worldwide. The current WHO phase of pandemic alert is 5. Phase 5 is characterized by human-to-human spread of the virus into at least two countries in one WHO region. While most countries will not be affected at this stage, the declaration of Phase 5 is a strong signal that a pandemic is imminent and that the time to finalize the organization, communication, and implementation of the planned mitigation measures is short. The WHO has predicted that up to 2 billion people could eventually be infected if the swine flu turns into a pandemic.

The swine flu crisis is likely to have a significant effect upon the insurance industry, both with regard to first-party claims brought under life, health, and property policies, and third-party claims for the defense and indemnification of lawsuits brought against parties who are alleged to have played a role in the spread of the virus. This paper highlights the potential theories of liability that may arise from the swine flu outbreak, as well as potential coverage issues relevant to both first-party and third-party claims.

## **II. LIABILITY CLAIMS**

Numerous industries are likely to face increased liability claims as a result of a swine flu pandemic. In turn, many forms of liability insurance coverage could be implicated, including general liability and directors & officers coverage. Successful lawsuits by injured parties could lead to significant adverse affects for liability insurers.

### **A. General Negligence Principles**

#### **1. Elements of Negligence**

While liability claims arising from the swine flu outbreak may take a variety of forms, most claims will rest upon basic theories of negligence. In a broad sense, negligence is the lack of ordinary or due care, or more simply, careless conduct. *AM. JUR. Negligence* § 5. However, for negligence to be actionable, there must be a duty the defendant owes to the plaintiff, a breach of that duty by the defendant, a causal connection between the breach and the plaintiff’s injury, and actual injury. In the absence of any one of these elements, no cause of action for negligence will lie. *See AM. JUR. Negligence* § 5.

**a. Duty**

The most important inquiry in analyzing a claim based upon negligence is whether the defendant owed a duty to the plaintiff. “Duty,” for negligence purposes, is a legally enforceable obligation to conform to a particular standard of conduct for the protection of such other person against unreasonable risks. All persons have a duty is to conform to the legal standard of reasonable conduct in light of the apparent risk and to conduct themselves in a manner that will not harm or endanger others or subject others to an unreasonable risk of harm. *See AM. JUR. Negligence § 75.*

The existence of a duty is not to be confused with details of the applicable standard of conduct or standard of care. Duty is a broad question of whether the defendant is under any obligation for the benefit of another. On the other hand, what the defendant must do, or must not do, is a question of the standard of conduct or standard of care required to meet the duty. *See AM. JUR. Negligence § 77.*

**b. Breach**

To demonstrate breach, a plaintiff must show the other person or entity failed to use due care: the care which an ordinary, reasonable and prudent person would have exercised under similar circumstances.

**c. Causation**

To recover for an allegedly negligent act or omission, the plaintiff must show that the wrongful conduct was the proximate cause of the injury suffered, not only to establish that the wrongdoer is liable, but also to establish the extent of such liability. *AM. JUR. Negligence § 409.*

Under principles of tort law, proximate cause is ordinarily used to describe or characterize a cause without which the accident could not have happened. *AM. JUR. Negligence § 410.* Proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient, intervening cause, produces the injury, and without which the result would not have occurred. *AM. JUR. Negligence § 411.*

Several jurisdictions have recognized that in order to establish that a negligent act or omission was the proximate cause of an injury it must be shown that the injury was foreseeable, or that it reasonably should have been foreseen, as the natural and probable result of the negligence. *AM. JUR. Negligence § 413.*

**d. Injury**

Finally, a plaintiff must show that he sustained actual damages, such as pain and suffering, permanent injury, medical bills, lost income. A negligent act which does not cause injury will not support the imposition of liability. *AM. JUR. Negligence § 130; O’Shaughnessy v. Besse, 7 Mass. App. Ct. 727, 389 N.E.2d 1049 (1979).*

## **B. Standard of Care**

Litigation arising from the swine flu epidemic will likely focus on whether a particular business or entity has implemented an appropriate standard of care for managing and dealing with a viral outbreak. The general, common law standard of conduct to be attained is that expected of the reasonable person: that is, “ordinary” or “reasonable” care under the circumstances. *AM. JUR. Negligence* § 132.

The duty to exercise reasonable care is a standard designed to protect society’s members from unreasonable exposure to potentially injurious hazards, and negligence is generally recognized as conduct that falls short of the reasonable-care standard. *AM. JUR. Negligence* § 132.

The basic reasonable-person standard takes into account the physical characteristics of the particular defendant. *AM. JUR. Negligence* § 134. Under the “eggshell plaintiff” rule, the defendant takes the victim as found. This rule protects the rights of individuals whose preexisting condition(s) makes them increasingly susceptible to injury. Therefore, under the rule, when a defendant’s tortious conduct harms a person with a preexisting physical or mental condition, and the harm is of a greater magnitude or different type than might reasonably be expected, the defendant is nevertheless liable for all harm caused by the tortious conduct.

Issues of liability regarding a pandemic are likely to involve areas or industries that contain significant amounts of close interaction amongst people, including schools, hospitals, hotels, universities, restaurants, and the event industry. An entity that fails to plan adequately for a pandemic could face legal consequences if others are put at risk. The failure or refusal of an entity to adequately prepare, respond and recover from a viral outbreak may amount to a deviation from the standard of care and lead to tort exposure for a business or organization. Further, if the deviation causes bodily injury or property damage, it may give rise to a claim under a liability policy.

In times of pandemic crisis, the standard of care for any business entity will be grounded in three specific entities: 1) preparation; 2) response; and 3) recovery. Each of these will be discussed in turn.

### **1. Preparation**

Preparation is best described as the planning of a response should a swine flu pandemic affect a particular organization. In the context of liability, the most important inquiry is the determination of the level of preparedness that is sufficient to avoid liability in times of pandemic crisis.

Depending upon the particular industry affected by the crisis, proper preparation may involve planning how to respond in the event a disaster occurs, and may include the establishment of an effective emergency operations plan, educating and training employees, and identification of back-up supply and service providers. Proper preparation may also involve establishing emergency work locations in the event of a surge of patients, communications training, and simulation exercises that test the ability to implement these measures.

## **2. Response**

The Response phase refers to taking action to provide assistance to victims of the event and/or reduce the likelihood of secondary damage. This phase also involves the monitoring of the potentially hazardous condition.

## **3. Recovery**

The Recovery phase refers to actions taken to restore the organization to the condition prior to the emergency. This may include providing continuing care, addressing the particular needs of the staff, obtaining extended services and supplies, performing facility repairs, and replenishing emergency supplies.

## **C. Potential Liability Scenarios**

Insurance industry analysts have identified three potential scenarios that could lead to allegations of liability in the event of a viral pandemic. In each of these scenarios, a plaintiff would likely have to show that a defendant business or entity had a duty of care, and that the duty was breached when the business failed to meet the standard of care, thereby causing injury to the affected parties.

The first scenario concerns the decision of concert organizers to host a planned event at the outset of a pandemic when other events are being cancelled, following the organizers' decision that it is safe to hold such an event. Later, concert attendees claim that they contracted the swine flu at the event.

In the second scenario, several airlines have cancelled all flights due to a pandemic outbreak out of concern of people being in such close proximity. Some of these travelers complain of flu-like symptoms but are reassured that they are safe. Several of the passengers develop the swine flu, resulting in a class action lawsuit against the airline.

In the third scenario, a catering company is responsible for food preparation for an airline. After various airline passengers become ill, it is learned that the virus can be spread on packaging. It is subsequently learned that a company employee had the virus, leading to charges that the company's health procedures were inadequate.

The above scenarios represent a mere fraction of factual scenarios that may lead to liability claims based upon an entity's purported failure to implement the appropriate standard of care in a time of pandemic crisis. This section examines the industries that are most likely to face liability claims in the event of a swine flu epidemic, and analyzes the fact patterns that are most likely to lead to such claims.

## **1. Schools/Child Care Providers**

It is not difficult to envision liability arising from a school or child care facility's failure to implement appropriate policies and procedures regarding the management of communicable diseases. In particular, it is easy to imagine a lawsuit seeking damages for bodily injury to a student as a result of a school's failure to implement important infection control procedures that resulted in the spread of a communicable disease such as the H1N1 virus. Potential liability could also arise where a teacher infected with a communicable disease sues a school for a failure to implement appropriate infection control procedures.

Schools should work with local health departments, school health services programs, and local child care authorities to implement appropriate policy and thereby minimize the chance of liability. Some infection control measures that a school should seek to implement to comply with the standard of care include the following:

- Proper handling of soiled equipment and other items;
- Use of masks, eye shields, protective gloves;
- Implementation and mandating of hand washing;
- Proper environmental cleaning;
- Isolation of students who are infected with a potentially communicable disease.

In addition, a school should exclude students who are potentially infected with communicable diseases and whose health would potentially jeopardize the safety and well-being of other students and/or teachers/staff.

The Texas Department of State Health Services has recently issued a report to provide guidance to teachers and child care providers regarding prevention of the swine flu. This report provides important insight regarding the practices and procedures that may reflect a school/child care provider's duty of care with regard to the swine flu outbreak.

The report advises that all health care providers and children should use soap and water to wash their hands frequently. Further, a school or health care provider should have an alcohol-based cleaner available if other hand-washing amenities are not accessible. The report also recommends that child care providers clean frequently touched items and surfaces daily, and when visibly soiled.

The report also recommends that schools and day care providers monitor all children for signs of respiratory illness to prevent exposure to non-infected children. Children who are sick should immediately be sent home. Children with symptoms of respiratory illness should be reported to the local health department or health authority.

The report also advises that children and child care providers who are still sick 7 days after they become ill should continue to stay home from child care until at least 24 hours after symptoms have improved and there has been no fever for 24 hours without taking fever-reducing medicines. A child care facility that allows a worker who is known to be ill to be exposed to children may face a significant risk of liability.

As noted above, there is the potential for liability when a school fails to exclude a child or faculty member infected with swine flu from school. On the other hand, liability may also arise from excluding individuals suspected of swine flu infection without sufficient basis. For example, the state of New Jersey has promulgated various statutes regarding the public health interest in keeping students, faculty, and staff free from contagious diseases.<sup>1</sup> Thus, in each instance where a child infected with disease or afflicted with illness has been prevented from attending school, there must be a careful examination to determine whether the exclusion was proper.

## **2. Hospitals and Health Care Providers**

U.S. healthcare facilities must be prepared for the rapid pace and dynamic characteristics of pandemic influenza. All hospitals should be equipped and ready to care for: 1) a limited number of patients infected with a pandemic influenza virus, or other novel strains of influenza, as part of normal operations; and 2) a large number of patients in the event of escalating transmission of pandemic influenza.

Clearly, the failure of health care providers to undertake reasonable precautions to prevent the spread of swine flu to uninfected patients will likely give rise to significant liability claims against such providers. State statutes and regulations may play an important role in determining the extent of such a duty of care. An important question with regard to the health care industry is whether an heightened standard of care may be applicable in the time of a pandemic crisis. Following the swine flu outbreak and other recent viral outbreak (such as the SARS crisis), many experts are beginning to conclude that such a heightened standard of care may be necessary to appropriately address such crises.

## **3. Hotel Industry**

There are two main examples of situations pertaining to swine flu in the hotel industry that could potentially give rise to legal liability. First, a hotel could potentially face liability from a guest who has become ill during his or her stay at a hotel. Generally, there is an underlying legal obligation that lodging operators have to protect their other guests.

Accordingly, the law in California and most other jurisdictions recognizes that hotel operators have a right to refuse accommodations to those who have an infectious disease. In

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<sup>1</sup> See, e.g., N.J.S.A. 18A:38-26 (prohibiting the temporary or permanent exclusion from school of any child “except as explicitly otherwise provided by law”); N.J.S.A. 18A:40-7 (according principals the right to exclude from their schools pupils evidencing a “departure from normal health” upon recommendation of the school physician or nurse); N.J.S.A. 18A:40-8 (according principals the right to exclude from their schools, upon recommendation of the school physician or nurse, any pupil who has been exposed to communicable disease or whose presence in school has been certified as detrimental to the health of other pupils); N.J.S.A. 18A:40-10 (requiring admission to school of a teacher or child who is a member of a household in which a person is ill with a “contagious or infectious disease” upon certification from the “board of health, or from the physician attending such person” that all danger of communicating disease by the teacher or pupil has passed); N.J.S.A. 26:4-6 (giving those “having control of [a] public school” power to “prohibit the attendance of any teacher or scholar” for a specified time to prevent the spread of communicable disease); N.J.S.A. 26:4-2 (requiring local school boards to abide by the determinations of the Department of Health in matters pertaining to the communicability and quarantine of persons infected with communicable disease).

fact, California law requires innkeepers who know that a guest has a contagious or infectious disease to notify local health officials. The law specifically provides that “[a]ll physicians, nurses, clergymen, attendants, owners, proprietors, managers, employees, and persons living with, or visiting any sick person, in any hotel, lodging house . . . building, office, structure, or other place where any person is ill of any infectious, contagious, or communicable disease, shall promptly report that fact to the health officer, together with the name of the person, if known, the place where he or she is confined, and the nature of the disease, if known.” CAL. HEALTH AND SAFETY CODE § 120250. This suggests that hotel operators should err on the side of caution if a guest or employee appears to be ill in a manner that suggests possible infection with a communicable disease.

However, hotel operators may also be exposed to liability for wrongfully identifying someone as having an infectious disease and excluding the person from the hotel. Under the Americans with Disabilities Act (“ADA”), “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182. The ADA has been interpreted to apply to transient lodging, such as hotels and motels. *See Nicholls v. Holiday Panay Marina, L.P.* 93 Cal.Rptr.3d 309 (Ct. App. 2 Dist. 2009).

Therefore, when a hotel operator wrongfully excludes an individual from a hotel under suspicion of communicable disease, a determination of liability may require courts to carefully balance the operator’s obligation to accommodate the disabled individual while still fulfilling his/her obligation to protect the other guests in the hotel.

#### **4. Airline Industry**

As noted above, airlines may face significant liability arising from allegations that they negligently contributed to the spread of the swine flu virus by failing to properly screen passengers, and/or by allowing workers infected with the virus to come into contact with passengers. However, as with hotels and health care facilities, airlines or other common carriers may also be exposed to liability for improperly denying an individual the right to travel because he or she is infected with the flu. While there is no case law directly on point regarding this issue, but *Ibrahim v. Department of Homeland Security*, 538 F.3d 1250 (9th Cir. 2008) could be instructive. In *Ibrahim*, the United States Court of Appeals for the Ninth Circuit dismissed claims against an airline for notifying police when a passenger identified as being on the Transportation Security Administration’s No-Fly List attempted to board. While this decision was based upon a narrow point of law (namely, the rule in California that reporting suspected criminal activity to authorities constituted a privileged communication not actionable in tort), it could be cited as general support for the argument that an airline should not be exposed to liability for compliance with federal and/or state standards protecting the safety of passengers.

#### **D. Additional Considerations**

##### **1. Potential Liability under Directors and Officers Policies**

According to insurance experts, over 75% of companies have inadequate plans for coping with a flu pandemic. Approximately one-third of businesses have no strategy for dealing with a flu pandemic, while a mere 14% have rudimentary contingency plans. Approximately one-third of executives are unaware of how their companies intend to deal with the threat, while only 22% are comfortable that they are prepared.

When a company's negligent failure to take reasonable steps to respond to a swine flu outbreak has a negative financial impact upon the company, its directors and officers may be sued for loss of shareholder value. Specifically, a plaintiff could contend that directors and officers acted negligently by 1) failing to develop a reasonable plan for responding to a swine flu outbreak; 2) developing a plan was inadequate or incomplete; 3) failing to properly disseminate the plan; and 4) conceding that an adequate plan exists, but alleging there was a failure to follow it.

## **2. Potential Litigation surrounding the FMLA**

In addition to claims arising from conduct alleged to have contributed to the spread of the H1N1 virus, litigation may also arise against an employer who fails to grant time off under the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* Under the FMLA, covered employers must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

- for the birth and care of the newborn child of the employee;
- for placement with the employee of a son or daughter for adoption or foster care;
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;
- to take medical leave when the employee is unable to work because of a serious health condition; or
- for qualifying exigencies arising out of the fact that the employee's spouse, son, daughter or parent is on active duty or call to active duty as a member of the National Guard or Reserves in support of a contingency operation.

To be eligible for FMLA benefits, an employee must work for a covered employer; have worked for the employer for a total of 12 months; have worked at least 1,250 hours over the previous 12 months; and work at a location in the United States or in any territory or possession of the United States where at least 50 employees are employed by the employer within 75 miles.

Pandemics involving the swine flu or other communicable diseases could raise questions pertaining to whether the FMLA cover an employee or an employee's family member who is an asymptomatic patient subject to quarantine or isolation. In so doing, courts would likely consider whether an asymptomatic patient could be said to be suffering from a "serious health condition" under the FMLA. The term "serious health condition" is defined under the FMLA as "an illness, injury, impairment, or physical or mental condition that involves ... inpatient care ... or

continuing treatment by a health care provider.” 29 U.S.C. § 2911(11). Regulations have further defined a “serious health condition” under the FMLA as:

- Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical-care facility, including any period of incapacity (i.e., inability to work, attend school, or perform other regular daily activities) or subsequent treatment in connection with such inpatient care; or
- Continuing treatment by a health care provider, which includes:
  - (1) A period of incapacity lasting more than three consecutive, full calendar days and any subsequent treatment or period of incapacity relating to the same condition, that also includes:
    - treatment two or more times by or under the supervision of a health care provider (i.e., in-person visits, the first within 7 days and both within 30 days of the first day of incapacity); or
    - one treatment by a health care provider (i.e., an in-person visit within 7 days of the first day of incapacity) with a continuing regimen of treatment (e.g., prescription medication, physical therapy); or
  - (2) Any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence; or
  - (3) Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visits (at least twice a year) to a health care provider, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence; or
  - (4) A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Only supervision by a health care provider is required, rather than active treatment; or
  - (5) Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three days if not treated.

In the event of a swine flu outbreak, the question of whether a quarantine due to the risk of swine flu infection qualifies as a “serious health condition” is likely to be the subject of one or more court decisions.

### **III. FIRST-PARTY COVERAGE ISSUES**

A large-scale swine flu outbreak is likely to lead to a significant number of claims not only under liability insurance policies, but under a wide variety of first-party insurance policies. This section analyzes the forms of coverage that may be affected by such an outbreak.

### **A. Workers' Compensation**

Of all types of first-party insurance, workers' compensation insurance is likely to face the most significant exposure from a swine flu epidemic. In recent viral pandemics (such as the SARS virus that affected 30 countries in 2003), the majority of workers' compensation claims were brought by health care workers who contracted the virus while treating infected patients.

In determining whether coverage exists for such claims, the primary issue is whether the illnesses were work-related. In other words, workers' compensation coverage will only exist when there is a clear nexus between acquisition of the disease and one's employment. Accordingly, employees will need to demonstrate that exposure occurred while on the job. This will obviously be easier to establish when claimants are health care workers charged with caring for infected patients, or when an infected co-worker brought the virus into a closed work environment.

More difficult cases include instances in which employees may have contracted the virus on an airplane or train while in the course of business travel. The primary challenge in analyzing such claims will be the determination of how and when the claimant contracted the virus. In the earlier stages of a pandemic, this may be relatively simple, as health agencies will be able to track the spread of the virus and identify infected parties, including their recent whereabouts. However, as the pandemic continues to spread, the ability of health agencies to track particular cases of the virus may become compromised.

### **B. Event Cancellation**

The initial outbreak of the swine flu virus led to the mass cancellation of public events in Mexico. Similar outbreaks in the future are likely to lead widespread cancellations of public events until the outbreak subsides. This may lead to a sharp increase in claims brought under event cancellation policies.

Under the majority of such policies, coverage will be contingent upon whether the cancellation was necessary and beyond the control of the policyholder. Therefore, situations in which municipal authorities have temporarily banned public gatherings would present the strongest grounds for coverage under such policies. Depending upon the specific policy language at issue, an insurer may have a basis for denying coverage in situations where an event is canceled simply due to poor ticket sales or expected absences arising from a flu outbreak.

### **C. Travel Insurance**

Given the impact that the swine flu virus has had upon vacation destinations such as Mexico, it is no surprise that sales of travel insurance policies have increased 300% since the first reported cases of the H1N1 virus. Depending upon the particular language of the policy at issue, the coverage analysis will likely concern the reason for the trip cancellation.

Travel insurance policies will ordinarily provide coverage if the policyholder is forced to cancel or terminate a vacation due to infection with swine flu virus. Such policies will also ordinarily provide coverage for medical expenses incurred on a vacation (provided that the expenses did not pertain to a pre-existing condition), including expenses incurred due to the swine flu. However, unless the policyholder purchases “cancel for any reason” coverage (which ordinarily entails an additional premium), most travel insurance policies will not provide coverage for the cancellation or termination of a vacation due to the mere fear of contracting the H1N1 virus.

## **D. Property Coverage**

### **1. Contamination of Insured Property**

While at first glance, it appears difficult to conceive of how an outbreak of the swine flu virus could support first-party property insurance claims, it is reasonable to expect policyholders to attempt to assert such claims. Coverage under such policies is ordinarily contingent upon a “direct physical loss” to the property. The mere fact that an infected individual has been present in the property is unlikely to be tantamount to a “direct physical loss” to the property itself. Therefore, property claims arising from the swine flu virus will most likely concern a potential contamination of an insured building with the virus, to the extent that the property has become uninhabitable or otherwise useless. *See, e.g., Port Authority v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002) (holding that mere presence of asbestos in building does not trigger coverage under property insurance policy unless asbestos is in such quantity that building has become uninhabitable or useless, or there exists an imminent threat of release of asbestos fibers). While unlikely to succeed, policyholders may also argue that a reduction in market value due to contamination of property constitutes a “direct physical loss” for purposes of coverage, even if the property is otherwise habitable.

At the present time, medical experts generally agree that flu viruses, including the H1N1 virus, cannot survive outside the human body for more than 24 hours. However, the potential always exists that the H1N1 virus may be found to have a longer survival period. If litigation arises regarding coverage under property insurance policies for contamination with the H1N1 virus, such cases may lead to “battles of the experts” regarding this issue. If a policyholder is able to establish “direct physical loss” to an insured building as a result of contamination, the insurer may be liable for the costs of remediation, depending upon the applicability of exclusionary clauses.

### **2. Business Interruption/Civil Authority Coverage**

If the policyholder is a business and has purchased business interruption coverage, the insurer may also be required to pay claims under such coverage for the loss of business income and extra expenses related to the interruption of operations. Under standard policy forms, such coverage would be available only if the policyholder has a necessary suspension of operations caused by direct physical loss to property on the premises, which in turn was caused by or resulting from a covered cause of loss. In many such policies, coverage for loss of income is available only during the “period of restoration,” which begins 72 hours after the time of direct physical loss. Such coverage would most likely apply to swine flu claims only if the contamination of a building by the swine flu virus forces the temporary suspension of operations while the remediation process takes place. Accordingly, business interruption coverage would not exist for loss of business due to community-wide illness, or even for a temporary closure of a business due to widespread community absences.

Many business interruption policies also provide coverage for the loss of income due to a suspension of operations at “dependent properties” due to a covered loss. “Dependent properties” are typically defined as “property operated by others whom you depend on to ... [d]eliver materials or services to you ... [a]ccept your products or services ... [m]anufacture products for delivery to your customers ... [or] [a]ttract customers to your business.” A business interruption claim under such policy language would therefore arise if a major supplier is forced to cease operations due to swine flu contamination in circumstances pertaining to a covered cause of loss. However, simply restricting customer access to property is ordinarily insufficient to invoke coverage under the “dependent property” language. *See Southern Hospitality, Inc. v. Zurich American Ins. Co.*, 393 F.3d 1137, 1142 (10th Cir. 2004) (coverage for business interruption to “dependent property” does not apply to loss of income sustained by a hotel due to suspension of air travel following September 11, 2001 terrorist attacks).

A related form of coverage frequently offered on commercial insurance policies is “civil authority” coverage, which provides coverage for loss of business income and extra expenses arising when a civil authority prohibits access to insured premises due to a direct physical loss to property that is not at the insured premises, and is in turn the result of a covered cause of loss. For example, coverage may be invoked under this provision when swine flu contamination forces the closure of an office building or shopping mall in which the policyholder’s operations are located. As with many standard business interruption coverage provisions, most “civil authority” coverage provisions provide coverage only for loss of income beginning 72 hours after access has been prohibited. If access to an insured property is not entirely prohibited by a civil authority, merely restricting access will not be sufficient to invoke coverage under this provision. *See, e.g., Southern Hospitality*, 393 F.3d at 1141-42 (no coverage under standard “civil authority” provision for loss of income to hotel caused by suspension of air travel following September 11, 2001 terrorist attacks, as Federal Aviation Administration’s order merely “stopped airplanes from flying; it did not close hotels”).

### **3. Potentially Applicable Coverage Exclusions**

Insurers are expected to cite standard pollution exclusions as a defense to first-party property claims arising from swine flu contamination. An initial consideration in determining whether swine flu claims fall within such an exclusion is whether a virus can be deemed a “pollutant” under the terms of the policy. The term “pollutants” is typically defined as “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.” At the present time, no court appears to have analyzed whether a virus may be considered a “pollutant” for purposes of applying a standard pollution exclusion. However, at least one court has held that “indoor allergens” may be considered a “contaminant” for purposes of applying a pollution exclusion in a commercial general liability policy. *See Nova Cas. Co. v. Wasserstein*, 424 F. Supp. 2d 1325, 1334 (S.D. Fla. 2006).

Another standard policy exclusion that could apply to swine flu claims pertains to losses caused by faulty, inadequate, or defective maintenance. If a policyholder asserts a claim arising from the contamination of insured property by the swine flu virus, this exclusion could be asserted if the contamination was due to the policyholder’s failure to clean or maintain the property.

Swine flu claims may also be subject to “ordinance or law” exclusions, which typically exclude coverage when: (1) enforcement of an ordinance or law requires alteration of property in the absence of a covered peril; or (2) when an insured suffers a loss by a covered peril and enforcement of an ordinance or law increases the cost of repair. While it is unlikely that such exclusions will be readily applicable to swine flu claims, such an argument could be made in the event of claims arising from a mandated clean-up of property by civil authorities.

First-party property claims arising from the H1N1 virus may also be subject to an exclusion for “governmental action,” which bars coverage for “seizure or destruction of property by governmental authority.” With regard to the swine flu virus, such an exclusion would most likely be applied in cases involving the government-ordered destruction of food products contaminated with the virus. It should be noted that courts have typically interpreted this language narrowly, and have held that the exclusion does not apply when civil authorities merely order the recall of products or limit their distribution. *See, e.g., Townsends of Arkansas, Inc. v. Millers Mut. Ins. Co.*, 823 F. Supp. 233 (D. Del. 1993) (applying Arkansas law) (governmental action exclusion did not apply to losses sustained as a result of government-ordered recall of contaminated poultry); *Duensing v. Travelers Ins. Co.*, 849 P.2d 203 (Mont. 1993) (governmental action exclusion did not apply to government-ordered embargo of contaminated candy, as governmental agent did not take possession of the candy).

While not yet in widespread use, ISO introduced an endorsement in July 2006 that eliminates property coverage for losses due to “any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” Although no courts appear to have examined this provision to date, at least two courts have enforced (without detailed analysis) liability provisions excluding coverage for communicable disease. *See Koegler v. Liberty Mut. Ins. Co.*, No. 08-CV-7645(CM), 2009 WL 1176612, at \*3 (S.D.N.Y. Apr. 21, 2009) (enforcing exclusionary clause pertaining to “[p]ersonal injury or property damage which arises out of the transmission of a communicable disease, virus, or syndrome by any insured”); *Alexis*

*v. Southwood Ltd. Partnership*, 792 So. 2d 100, 102 (La. Ct. App. 4 Cir. 2001) (enforcing exclusionary clause pertaining to bodily injury, ‘property damage,’ ‘personal injury’ or ‘advertising injury’ arising out of the transmission of or alleged transmission of any communicable disease”).

#### **D. Farm/Livestock Coverage**

Although the H1N1 virus is widely believed to have originated in the swine population, the virus has not yet had a significant impact upon the health of swine or other livestock. If the virus ultimately leads to large-scale losses in farmed swine, this may lead to numerous claims under standard farm policies, which typically cover such losses.

### **III. THIRD-PARTY COVERAGE ISSUES**

As set forth above, a large-scale swine flu outbreak is likely to lead to numerous liability actions against parties accused of negligence in treating and/or contributing to the spread of the virus. These parties will consequently seek defense and indemnification under liability insurance policies. This section addresses potential coverage issues raised by such claims.

#### **A. Scope of Coverage**

Standard commercial general liability policies provide coverage for “those sums that an insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies.” To fall within the scope of coverage, the bodily injury or property damage at issue must be “caused by an occurrence and it must occur within the policy period.” “Occurrence” is typically defined as “an accident, including continuous and repeated exposure to substantially the same general harmful conditions.”

As commercial general liability policies typically have a per-occurrence coverage limit as well as an aggregate limit, the determination of whether swine flu contamination constitutes single or multiple occurrences will be highly significant to an assessment of the insurer’s coverage obligations. In analyzing this issue, a helpful recent decision is *Appalachian Ins. Co. v. General Elec. Co.*, 863 N.E.2d 994 (N.Y. 2007), in which the New York Court of Appeals rejected the argument that over 400,000 liability claims brought against General Electric regarding exposure to asbestos in turbines constituted a single “occurrence.” General Electric specifically contended that these claims should be considered one occurrence because they all arose from a single act of negligence: namely, GE’s failure to warn of the presence of asbestos in its turbines.

The Court rejected this argument, noting that relevant factors in determining whether a loss resulted from a single occurrence or multiple occurrences is “whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum, without intervening agents or factors.” *Appalachian Ins. Co.*, 863 N.E.2d at 999. As the “incident that gave rise to liability was each individual plaintiff’s ‘continuous or repeated exposure’ to asbestos,” the Court concluded that these incidents constituted multiple occurrences, as they “differ[ed] in terms of when and

where exposure occurred, whether the exposure was prolonged and for how long, and whether one or more GE turbine sites was involved.” *Id.* at 1001.

Other jurisdictions have taken the approach urged by General Electric, and have focused upon the alleged course of conduct rather than the incidents of loss in analyzing what constitutes an “occurrence.” For example, in *Appalachian Ins. Co. v. Liberty Mutual Ins. Co.*, 676 F.2d 56 (3d Cir. 1982), the United States Court of Appeals for the Third Circuit, analyzing Pennsylvania law, held that with regard to a policyholder’s alleged pattern and practice of engaging in discriminatory conduct, the “occurrence” was the single act of adopting the allegedly wrongful practices, rather than the individual incidents of discrimination. *Appalachian Ins. Co.*, 676 F.2d at 61-62.

In order to determine whether a loss occurred within a particular policy period, the date of loss must also be considered. As flu viruses generally run their course in a matter of months, this issue may be somewhat less significant to swine flu cases than cases involving incidents that took place over a prolonged period of time, such as asbestos exposure. However, it may still be a relevant consideration, particularly when a policyholder faces liability for incidents that occurred shortly after the policyholder obtained coverage from the current liability insurance carrier. In determining a date of loss, jurisdictions have adopted a variety of approaches, including “injury in fact” (when the injury actually occurred), the date of exposure, or the date that the injury manifested itself. When liability claims concern exposure to a substance over a prolonged period of time, several jurisdictions have adopted the “continuous trigger” approach, in which the date of loss for purposes of coverage is deemed to be the entire period from exposure to manifestation of injury. *See, e.g., Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974 (N.J. 1994).

In addition to providing indemnification for a loss, commercial general liability policies ordinarily provide coverage for the costs of defending a liability action brought against the policyholder that falls within the scope of coverage. Such policies also typically provide coverage for “medical expenses for bodily injury caused by an accident on the premises you own or rent so long as the accident occurred during the policy period and those expense[s] are incurred and reported within 1 year of the date of the accident.” In situations where a policyholder is faced with medical claims arising from the contamination of insured property by the H1N1 virus, this provision could be interpreted to require coverage regardless of whether the injured parties are able to prove their claims at trial.

## **B. Exclusions**

Several standard policy exclusions may apply to swine flu claims brought under a commercial general liability policy. First, such claims could be deemed to fall within comprehensive pollution exclusions that have been adopted by most CGL insurers in recent years. As noted above, this raises the issue of whether a virus may in fact be deemed a “pollutant” for purposes of such exclusions. It also raises the issue of whether a pollution exclusion should be interpreted to pertain to the discharge of any pollutants or contaminants, or whether the exclusion should be limited to the discharge of pollutants into the environment. Many courts have held that under the plain language of pollution exclusions, such exclusions apply “whenever a pollutant causes harm by a physical mechanism enumerated in the policy, irrespective of where the injury took place or whether the pollutant was released into the

environment.” *E.g.*, *Noble Energy, Inc. v. Bituminous Cas. Co.*, 529 F.3d 642, 649 (5th Cir. 2008) (applying Texas law). However, a minority of courts have interpreted standard CGL pollution exclusion clauses more broadly, holding that such clauses should be applied consistent with their apparent purpose of “exculpat[ing] insurance companies from liability for massive environmental cleanups required by CERCLA and similar legislation.” *E.g.*, *Kent Farms, Inc. v. Zurich Ins. Co.*, 988 P.2d 292, 295 (Wash. 2000).

Another standard policy exclusion that may apply to swine flu claims precludes coverage for “[b]odily injury” or “property damage” expected or intended from the standpoint of the insured.” Insurers may attempt to invoke this exclusion in cases where a policyholder is accused of engaging in conduct that a reasonable person knew or should have known would propagate the swine flu virus. However, courts have typically recognized that this exclusion applies only to intentional conduct by the policyholder, rather than negligent (or even grossly negligent) conduct. For example, in *Delta Pine & Seed Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395 (5th Cir. 2008), the United States Court of Appeals for the Fifth Circuit held that the “expected or intended” exclusion did not apply for a claim under a commercial general liability policy for defense and indemnification of a lawsuit pertaining to the purportedly negligent blending of old and new crop seeds sold by the policyholder, on the grounds that the underlying tort action did not allege “damages resulting from an intentional injury.” *Delta Pine & Seed*, 530 F.3d at 402.

Certain swine flu claims may also fall within a policy exclusion for “[d]amages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal, or disposal of” the policyholder’s product, “if such product ... is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy, or dangerous condition in it.” Such an exclusion may apply to liability claims arising from the recall of products believed to be contaminated with the H1N1 virus.

#### **IV. CONCLUSION**

At the time of publication, the swine flu epidemic is still in its earliest stages, and it is difficult to predict with certainty its potential impact upon the insurance industry. Regardless of the ultimate outcome, insurers would be well-served to prepare themselves for the potential onslaught of claims and litigation that may result from this public health crisis.