# 'Take-Home' COVID And Emerging Liability Insurance Issues

By **Melissa D'Alelio and Michael Collier** (April 14, 2022, 4:36 PM EDT)

Melissa D'Alelio

Michael Collier

Much like the virus itself, legal theories regarding COVID-19 continue to mutate. While property insurers still face the brunt of virus-based lawsuits in the form of business-interruption coverage disputes, the landscape may be shifting with an increase in litigation around so-called take-home COVID-19. This time, insureds and their commercial general liability insurers are in the crosshairs.

**Take-Home Liability Is Not Novel**

Take-home liability is not a novel concept. Indeed, it garnered prominence through lawsuits filed by persons who contracted mesothelioma after members of their households purportedly brought home asbestos-covered clothes from their place of employment.

Take-home COVID-19 is based on a similar theory. It allegedly occurs when employees contract COVID-19 at their workplace, and then subsequently bring the virus home — knowingly or unknowingly — exposing their family members.

Typically, employees are barred from suing their employers for illness contracted at the workplace due to workers' compensation statutes. But some employees and their families are asserting negligence causes of action against employers for failing to prevent employees' COVID-19 exposure at work, claiming they then transmitted the virus at home, which resulted in the illness or death of family members.

In cases of severe COVID-19, the alleged damages for a take-home action could be substantial — especially where hospitalization and death result. With the U.S. counting around 4.6 million hospitalizations and around 984,000 deaths related to COVID-19 as of the time of publication, the pool of potential plaintiffs may be substantial.[1]

Severe COVID-19 was the subject of an illustrative take-home litigation in the U.S. District Court for the District of Maryland. In Estate of Madden v. Southwest Airlines Co., a plaintiff flight attendant alleged that she contracted COVID-19 at a mandatory Southwest training event.[2]

The plaintiff claimed she then transmitted the virus to her husband, who later passed away from it. She asserted four negligence-based causes of action against Southwest, alleging it was Southwest's failure to exercise proper COVID-19 mitigation measures that caused her husband's death.

Although the court ultimately dismissed the case in December 2021 because Southwest had no duty toward the husband, Madden is representative of many take-home COVID-19 cases, which all share some variation of this basic fact pattern.

Cases similar to Madden are being increasingly filed.[3] Since the start of the pandemic,

several take-home COVID-19 cases have been filed against employers in a number of states, including California, Illinois, Maryland, New York, Texas and Wisconsin. Many of these cases have been dismissed.

Nonetheless, in December 2021, a California court of appeals handed take-home plaintiffs a win in See's Candies Inc. v. Superior Court of California for County of Los Angeles.[4]

In that case, an employee allegedly caught COVID-19 while working in close-quarters conditions at a candy factory. The employee then brought the virus home to her husband, who eventually died from COVID-19. The candy company moved to dismiss the claim under the derivative injury doctrine, arguing the husband's take-home COVID-19 was directly traceable to — i.e., derivative of — the employee's own injury, and was thus barred by the Workers' Compensation Act.

The court rejected this argument, reasoning that take-home claims are not so connected to the employee's own injuries as to be derivative of them — as opposed to loss of consortium, wrongful death and emotional distress claims.

The dichotomy between the See's Candies ruling and other courts' apparent willingness to dismiss similar cases demonstrates that judicial opinions of take-home COVID-19 are somewhat in flux, and, in some courts, the viability of these claims remains an open question.

In the months or years it takes to create precedent on this front, employers and their liability insurers could be left defending these potentially costly lawsuits.

**Shield Laws Take Center Stage**

Several states have responded to COVID-19 by passing shield laws. Shield laws operate to protect businesses from COVID-19-based claims, potentially eliminating any civil liability arising out of the virus.

At least 36 states and the District of Columbia have already passed some form of shield law, although the laws vary greatly in the amount of protection offered to employers. Conversely, other states have declined to pass shield laws, including California, Delaware and Illinois.

There is little uniformity among existing shield laws. For example, Alabama's shield law protects businesses and other covered entities from lawsuits if they comply with, or "reasonably attempt to comply with," public health guidance related to COVID-19.[5] Under Alabama's law, such protection is rescinded only if the business engages in wanton, willful or intentional misconduct in regard to COVID-19 mitigation.

On the other hand, the New York shield law, which has since been repealed,[6] only granted immunity to health care-related entities, theoretically leaving every other type of employer potentially subject to take-home COVID-19 liability.

Meanwhile, Michigan shields businesses from COVID-19 liability only if they exhibit "compliance with all federal, state, and local statutes, rules regulations, executive orders, and agency orders related to COVID-19"; trivial deviations are permitted under Michigan's law, but mere "good faith" or "reasonable attempt" compliance is not enough.[7]

Therefore, despite the existence of shield laws in the majority of states, various exceptions

and limitations may allow take-home COVID-19 claims to persist.

**Take-Home COVID-19 and a Liability Insurer's Duty to Defend and Indemnify**

While the existence of shield laws in many states may deter take-home COVID-19 litigation at the outset, some litigation will move forward, and much remains untested about liability coverage for such take-home COVID-19 claims.

It appears few courts have yet been asked to address whether take-home COVID-19 lawsuits trigger a duty to defend or indemnify under a commercial general liability policy.[8] As such, the coverage implications of take-home COVID-19 cases are still unknown. That said, it is possible to envision some of the coverage arguments that could arise.

Consider the duty to defend, which in many states is determined by comparing the allegations in the complaint with the language of the insurance policy, also known as the four-corners rule.[9]

Since the typical take-home case is based on negligence and other tort-based causes of action like wrongful death, such complaints may trigger a duty to defend.

Notably, this duty is broad, and courts typically resolve all doubts as to whether a duty to defend exists in favor of the insured.[10] Questions regarding whether illness from COVID-19 satisfies the Insurance Services Office Inc. commercial general liability form's definition of "bodily injury" are sure to arise.

"Bodily injury" in the 2012 ISO form is defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." Consider: Does having asymptomatic COVID-19 qualify as bodily injury, sickness or disease? Can mental anguish from testing positive for COVID-19, though asymptomatic, amount to bodily injury?

Other policy terms raise questions regarding the duty to defend. In particular, the employer's liability exclusion — designed to exclude coverage for the injuries of the employee and his or her family — applies to "bodily injury" to the "spouse, child, parent, brother or sister of that 'employee,'" which seemingly excludes most potential take-home plaintiffs although not all.[11]

There is also the workers' compensation exclusion, which precludes coverage for "any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law."[12]

In terms of the policy period, yet another question is when bodily injury from COVID-19 occurs — during the asymptomatic incubation period, the first onset of symptoms or at a different point?

Even if, ultimately, there is no duty to indemnify take-home COVID-19 claims, the duty to defend them will likely be substantial. Unlike property insurance COVID-19 business-interruption cases, take-home cases do not lend themselves readily to resolution through early dispositive motion.

It is foreseeable that fact and causation issues will abound regarding when and where the employee and the take-home plaintiff were infected, making determination through an early dispositive motion challenging.

As COVID-19 is incredibly widespread, plaintiffs will likely rely on expert testimony to prove they contracted the virus from their family member who, in turn, contracted it from their employer. Additionally, some plaintiffs have drafted their pleadings in a way that prevents quick dismissal based on most shield laws, such as by claiming a defendant employer was intentional or willful in its refusal to implement COVID-19 mitigation strategies.

This allegation, however, cuts both ways. An allegation in a complaint that an employer intentionally ignored COVID-19 risks may trigger the expected or intended injury exclusion, which precludes coverage for "'bodily injury'... expected or intended from the standpoint of the insured."[13]

Certain aspects of take-home COVID-19 suggest protracted litigation is a real possibility. Considering that the duty to defend is broad, these cases could be expensive to defend, even where there is ultimately no duty to indemnify.

**The Future of Take-Home COVID-19 Litigation: Uncertain**

Take-home COVID-19 litigation is a developing phenomenon that should be watched carefully. Even if plaintiffs face an uphill battle, the claims they bring and the unlikelihood of early resolution on dispositive motion, put the possible duty to defend — and its significant associated costs — in context.

Causation issues may make for protracted litigation. While we can be hopeful that the pandemic is slowing, or at least, that many have gotten used to the new normal, the legal ramifications of COVID-19 in the liability insurance context is just beginning to unfold.

---

*Melissa D'Alelio is a partner and chair of the insurance and catastrophic loss practice group at Robins Kaplan LLP.*

*Michael Collier is an associate at the firm.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] COVID Data Tracker, Centers for Disease Control and Prevention, https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions (last visited Apr. 5, 2022).

[2] Estate of Madden v. Southwest Airlines Co., No. 1:21-cv-00672-SAG, 2021 WL 2580119 (D. Md. Dec. 21, 2021).

[3] See, e.g., Ek v. See's Candies, Inc., No. 20STCV49673 (Cal. Super. Ct.); Elijah v. Pilgrim's Pride Corp., No. 5:21-cv-0047-RWS (E.D. Tex.); Garcia v. Swift Beef Co., No. 2:20-CV-263-Z-BR, 2021 WL 5997185 (N.D. Tex. Dec. 17, 2021), appeal filed, No. 22-10050; Gomez v. Logix Federal Credit Union, Inc., No. 21STCV15877 (Cal. Super. Ct.); Haywood v. County of Riverside, No. CVRI2200079 (Cal. Super. Ct.); Kuciemba v. Victory Woodworks, Inc., No. 3:20-cv-09355-MMC (N.D. Cal.), appeal filed, No. 21-15963; Kurtz v. Sibley Memorial Hospital, No. 4837587 (Md. Cir. Ct.); Lathourakis

v. Raymours Furniture Co., No. 59130/2020 (N.Y. Sup. Ct.); Palmer v. Amazon.com, Inc., 498 F.Supp.2d 359 (E.D.N.Y. 2020), appeal filed, No. 20-3989; Reynoso v. Byrne & Schaefer Electrical, No. 2020L000620 (Ill. Cir. Ct.); Ruiz v. Conagra Foods Packaged Foods, LLC, No. 2:21-cv-00387 (E.D. Wisc.).

[4] See's Candies, Inc. v. Superior Court of California for County of Los Angeles, 73 Cal.App.5th 66 (Cal. Ct. App. Dec. 21, 2021), review filed Jan 28, 2022.

[5] Ala. Code §§ 6-5-790 – 6-5-799.

[6] N.Y. Pub. Health §§ 3080-3082, repealed by L.2021, c. 96, § 1, eff. April 6, 2021.

[7] MCL 691.1451 – 691.1460.

[8] See, e.g., McDonald's Corp. v. Austin Mutual Ins. Co., 526 F.Supp.3d 346, 352 (N.D. Ill. 2021) (holding that insurer was obligated to defend an underlying take-home COVID case, and that "contraction of COVID-19 [is] an indisputable bodily injury.").

[9] See, e.g., Water Well Solutions Service Group, Inc. v. Consolidated Ins. Co., 881 N.W.2d 285, 295-96 (Wis. 2016) (discussing Wisconsin's adherence to the "four-corners rule" in determining the duty to defend); West Hills Development Co. v. Chartis Claims, Inc., 385 P.3d 1053, 1055 (Or. 2016) (discussing Oregon's adherence to the "four-corners rule").

[10] See, e.g., Trizec Properties, Inc. v. Biltmore Const. Co., Inc., 767 F.2d 810, 812 (11th Cir. 1985) ("All doubts as to whether a duty to defend exists are resolved against the insurer and in favor of the insured...and if the complaint alleges facts which create potential coverage under the policy, the duty to defend is triggered.").

[11] 2012 ISO Form.

[12] Id.

[13] Id.