



NJSIG's UPDATED FREQUENTLY ASKED COVID-19 COVERAGE QUESTIONS & ANSWERS (★denotes updated information)

NJSIG has prepared this material based on questions received from our members and our broker community. These questions and answers describe NJSIG's general approach to COVID-19 claims at this time, and should not be construed as legal advice, or as a coverage position on a specific claim. Each claim must be evaluated on its own merits, and the analysis will depend on the specific facts of a claim, as well as the state of the law.

1. Would a member school district have coverage if a student or parent claims that they contracted COVID-19 after being infected by the SARS-CoV-2 virus on school premises during the school day?

Answer: Yes, the member school district would likely have coverage under NJSIG's general liability ("GL") policy. There is no communicable disease exclusion or "pandemic clause" in NJSIG's 2019/2020, 2020/2021 or 2021/2022 GL policies. However, for the 2021/2022 GL policy, a sublimit of \$1,000,000 per occurrence with★ an annual pool-wide aggregate of \$9,000,000 applies to communicable disease claims.¹ Thus, NJSIG would pay for an attorney to defend the claim, and pay for any settlement or damages that result, consistent with the applicable policy language. However, the student or parent would have a difficult time overcoming the New Jersey Tort Claims Act, which immunizes public entities and public employees from claims alleging "injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community." N.J.S.A. 59:6-3. In addition, given how widespread the virus is, as well as how difficult it is to track, the student or parent would likely also have a hard time proving that they contracted the virus on school premises, during the school day.

2. If a member school district employee contracts COVID-19 and claims that they were infected by the SARS-CoV-2 virus on school premises during the school day, would workers' compensation apply?

¹ This sublimit and aggregate also apply to the automobile liability and school board leader liabilities ("SBLL", also referred to as "E&O") coverages as well. Defense costs are in addition to the \$1,000,000 per occurrence sublimit.



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Answer: As with all workers' compensation claims, this claim would first be investigated by NJSIG for compensability. In the case of a disease – here, COVID-19, caused by the SARS-CoV-2 virus – the investigation would focus on whether the employee's COVID-19 is a “compensable occupational disease” under N.J.S.A. 34:15-31. In the case of an infectious agent that causes a disease, the core inquiry is whether the employee was infected in the course of their employment, and thus contracted the disease in the course of their employment. See Bird v. Somerset Hills Country Club, 309 N.J. Super. 517, 521-22 (App. Div. 1998). Given how widespread the virus is, as well as how difficult it is to track, it may be difficult for the employee to prove that they contracted the virus on school premises during the school day. However, that would be the core inquiry of NJSIG's investigation. In the event the investigation indicated that the employee was infected with SARS-CoV-2 in the course of their employment, and thus contracted COVID-19 in the course of their employment, the claim would likely be accepted as compensable. In the event that the investigation indicated that the employee was not infected with SARS-CoV-2 in the course of their employment, and thus did not contract COVID-19 in the course of their employment, the claim would likely not be accepted as compensable. If the employee disagreed with the outcome of the investigation, they would have the option of contesting that compensability determination via the filing of a workers' compensation claim petition. NJSIG would then assign – and pay for – counsel to defend the member against that claim petition. In the event that a judge of the Division of Workers' Compensation determined that the employee was infected in the course of their employment, and thus contracted the disease in the course of their employment, the claim would likely need to be accepted as compensable, and adjusted accordingly.

For more information on this topic, click [here](#) for NJSIG's newsletter entitled “COVID-19 and Workers' Compensation Issues Facing School Boards,” prepared by John Geaney, Esq. of Capehart Scatchard.

- 3. If a member school district employee contracts COVID-19 and claims that they were infected by the SARS-CoV-2 virus on school premises, but during a time when the school building was closed to the public, would workers' compensation apply?**



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Answer: As above, this workers' compensation claim would first be investigated by NJSIG for compensability, under the same parameters outlined in the answer to question 2. That being said, in this case, it would likely be even more difficult for the employee to prove that they contracted the virus while on school premises, as the employee claims that they were infected when very few, if any, other people were in the building from whom the employee could have contracted the virus.

For more information on this topic, click [here](#) for NJSIG's newsletter entitled "COVID-19 and Workers' Compensation Issues Facing School Boards," prepared by John Geaney, Esq. of Capehart Scatchard.

4. If a member school employee trips, falls and is injured in a school building during a time when the school building is closed to the public due to the pandemic, would workers' compensation apply?

Answer: As with all workers' compensation claims, this claim would first be investigated by NJSIG for compensability. An injury will only be compensable under workers' compensation when it "is caused to an employee by [an] accident arising out of and in the course of his employment[.]" N.J.S.A. 34:15-1. Notably, "[a]n employee need not actually be working in order to meet the 'course of employment' test." Coleman v. Cycle Transformer Corp., 105 N.J. 285, 289 (1986). However, the claimant must establish "that the work was at least a contributing cause of the injury and that the risk of the occurrence was reasonably incident to the employment." Id. at 290. In this scenario, if the employee needed to enter the school building in order to accomplish some task that was reasonably related to their employment, the injury would more likely be compensable. On the other hand, if the employee was in the school building in order to retrieve personal items, see Zahner v. Pathmark Stores, Inc., 321 N.J. Super. 471, 481 (App. Div. 1999), or if the employee had specifically been instructed not to enter the school building, see Robertson v. Express Container Corp., 13 N.J. 342 (1953), it is less likely that the injury would be compensable.

For more information on this topic, click [here](#) for NJSIG's newsletter entitled "COVID-19 and Workers' Compensation Issues Facing School Boards," prepared by John Geaney, Esq. of Capehart Scatchard.



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- 5. If, during a time when school buildings are closed to the public due to the pandemic, a school gym teacher trips, falls and is injured at home while teaching a gym class remotely, would workers' compensation apply?**

Answer: As with all workers' compensation claims, this claim would first be investigated by NJSIG for compensability. An injury will only be compensable under workers' compensation when it "is caused to an employee by [an] accident arising out of and in the course of his employment[.]" N.J.S.A. 34:15-1. The definition of "employment" includes situations in which an employee is physically away from the employer's premises but is still "engaged in the direct performance of duties assigned or directed by the employer[.]" N.J.S.A. 34:15-36; see Cooper v. Barnickel Enters., Inc., 411 N.J. Super. 343, 346 (App. Div. 2010). In this scenario, because school buildings were closed due to the pandemic, the gym teacher was instructed by the district to teach gym remotely from home. The gym teacher's job was to teach gym. Assuming that that is what the teacher was doing when they were injured, this claim would likely be deemed compensable, regardless of the fact that the injury occurred at home.

For more information on this topic, click [here](#) for NJSIG's newsletter entitled "Coverage for Home Injuries in New Jersey," prepared by John Geaney, Esq. of Capehart Scatchard.

- 6. Would a member school district have coverage if a student trips, falls and is injured at home while engaging in exercise that was assigned by a school gym teacher or coach?**

Answer: Yes, the member school district would likely have coverage under NJSIG's general liability ("GL") policy. Thus, NJSIG would pay for an attorney to defend the claim, and pay for any settlement or damages that result, consistent with the policy language. However, the student would likely have a difficult time proving that the school is liable in such a case. While a school has a duty to exercise reasonable care for a student "in its custody," a student receiving virtual education from home is not in the school's custody. Jerkins v. Anderson, 191 N.J. 285, 289, 306 (2007) ("A school district's responsibility has temporal and physical limits, and its obligation to act reasonably does not diminish the responsibilities that parents or guardians have to their children."). Moreover, this claim may also be barred by certain immunities in the New Jersey Tort Claims Act. See N.J.S.A. 59:6-3.



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7. **Would a member school district have coverage if a school hosted a daycare program for the school staff's children on school premises, during the school day, and: (1) one of the children trips, falls and is injured while attending the daycare? (2) one of the children contracts COVID-19 and claims that they were infected by SARS-CoV-2 on school premises during the school day?**

Answer: Yes, the member school district would likely have coverage under NJSIG's general liability ("GL") policy in both scenarios. As to scenario (1), NJSIG would pay for an attorney to defend the claim, and pay for any settlement or damages that result, consistent with the policy language, just as it would for any other third party that suffered a trip and fall injury on school premises during the school day. As to scenario (2), as outlined above, there is no communicable disease exclusion or "pandemic clause" in NJSIG's 2019/2020, 2020/2021 or 2021/2022 GL policies. However, for the 2021/2022 GL policy, a sublimit of \$1,000,000 per occurrence with an annual pool-wide aggregate of \$9,000,000 applies to communicable disease claims.² Thus, NJSIG would pay for an attorney to defend the claim, and pay for any settlement or damages that result, consistent with the applicable policy language. However, the child would likely have a difficult time overcoming the New Jersey Tort Claims Act, which immunizes public entities and public employees from claims alleging "injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community." N.J.S.A. 59:6-3. In addition, given how widespread the virus is, as well as how difficult it is to track, the child would likely have a very difficult time proving that they contracted the virus on school premises during the school day. ★

8. **Would a member school district have coverage if it re-opened its outdoor basketball courts to the public, or permitted other school districts to use its athletic fields, and someone were to claim that they were infected by**

² This sublimit and aggregate also apply to the automobile liability and school board leader liabilities coverages as well. Defense costs are in addition to the \$1,000,000 per occurrence sublimit.



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the SARS-CoV-2 virus, and contracted COVID-19, as a result of using those facilities?

Answer: Yes, the member school district would likely have coverage under NJSIG's general liability ("GL") policy. As outlined above, there is no communicable disease exclusion or "pandemic clause" in NJSIG's 2019/2020, 2020/2021 or 2021/2022 GL policies. However, for the 2021/2022 GL policy, a sublimit of \$1,000,000 per occurrence with an annual pool-wide aggregate of \$9,000,000 applies to communicable disease claims.³ Thus, NJSIG would pay for an attorney to defend the claim, and pay for any settlement or damages that result, consistent with the applicable policy language. However, the claimant would likely have a difficult time overcoming the New Jersey Tort Claims Act, which immunizes public entities and public employees from claims alleging "injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community." N.J.S.A. 59:6-3. In addition, given how widespread the virus is, as well as how difficult it is to track, the claimant would likely also have a very difficult time proving that they contracted the virus on school premises.

9. Would a member school district have coverage under their environmental liability policy or otherwise that would pay for cleaning, disinfecting, or decontamination of a school building if a person who was on school premises is later diagnosed with the SARS-CoV-2 virus?

Answer: The 2020/2021 Ironshore Specialty Insurance Company environmental policy, which is provided to NJSIG members as a pass-through coverage, provides coverage for "disinfection expenses" that arise out of "disinfection event[s]," as those terms are defined in the policy. For the 2020/2021 policy year, there is a \$50,000 member deductible on this coverage part. If a claim was made under this coverage part during the 2020/2021 policy year, Ironshore, rather than NJSIG, would conduct an investigation in order to determine coverage, and coverage would depend on the

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specific details of the claim. Note, however, that for the 2021/2022 policy year, Ironshore has imposed a COVID-19 exclusion on this coverage part. Thus, if this type★ of claim were to be made in the 2021/2022 policy year, it would likely be denied by Ironshore as falling under the COVID-19 exclusion.

10. What COVID-19-related waivers does NJSIG recommend or require that member districts have completed by students, parents, staff, or visitors?

Answer: NJSIG does not require or recommend that its members have students, parents, staff, or visitors execute COVID-19-related waivers at this time. Part of the benefit of waivers is that they put potential litigants on notice of certain risks. However, considering that COVID-19 has been declared a worldwide pandemic by the World Health Organization, a national emergency in the U.S., and a state of emergency and public health emergency in New Jersey, it is unclear how much protection, in terms of risk acknowledgement, a waiver could really provide. Moreover, not all waivers are enforceable, and in some cases, they may even be prohibited. For example, in response to claims that school districts were “requiring parents or guardians to waive certain legal rights or give written consent for services as a condition for receipt of special education or related services,” the New Jersey Department of Education (NJDOE) issued guidance prohibiting the practice as violative of both the Individuals with Disabilities Education Act (IDEA) and NJDOE regulations. To read the full NJDOE memo, click [here](#).

Furthermore, at least in the context of commercial recreational facilities, New Jersey courts will not enforce “pre-injury” waivers signed by parents purporting to release liability for their child’s potential future injuries. Hojnowski v. Vans Skate Park, 187 N.J. 323, 338 (2006). Moreover, with very little exception, agreements that seek to prospectively deprive employees of workers’ compensation benefits are void as against public policy. Vitale v. Schering-Plough Corp., 231 N.J. 234, 255-256 (2017). Finally, and more generally, if a waiver is deemed to be a “contract of adhesion,” i.e., if it is “presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the ‘adhering’ party to negotiate except perhaps on a few particulars,” a court “may decline to enforce it if it is found to be unconscionable.” Id. at 246 (internal quotations omitted). With this in mind, districts considering COVID-19-related waivers may want to consult with board counsel first.



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11. Does NJSIG have any recommendations or requirements with regard to ★ school operations in light of COVID-19?

Answer: NJSIG does not have any specific recommendations or requirements with regard to school operations in light of COVID-19, other than to follow the guidance issued by federal, state and local officials. NJSIG is cognizant of how challenging it is to provide a safe and productive learning environment for students at this time, and we strive to support our members in any way that we can. To that end, we have compiled a number of useful COVID-19-related resources for schools on our website, which can be accessed at: njsig.org/covid-19.

12. Would a member school district have medical malpractice coverage if it entered into an agreement with a pharmacy to administer COVID-19 tests ★ to employees on school premises, if the district's school nurses collected the samples?

Answer: Yes, under these circumstances, the member school district and the school nurse would likely have coverage for incidental medical malpractice under NJSIG's general liability ("GL") policy. As outlined above, there is no communicable disease exclusion or "pandemic clause" in NJSIG's 2019/2020, 2020/2021 or 2021/2022 GL policies. However, for the 2021/2022 GL policy, a sublimit of \$1,000,000 per occurrence with an annual pool-wide aggregate of \$9,000,000 applies to communicable disease claims.⁴ Thus, NJSIG would pay for an attorney to defend the claim, and pay for any settlement or damages that result, consistent with the policy's "incidental medical malpractice liability coverage" language.

13. Would a member school district have medical malpractice coverage if the district's school nurses administered COVID-19 vaccines to the general ★ public, on school premises, under the direction of the local municipality and/or the local board of health?

⁴ This sublimit and aggregate also apply to the automobile liability and school board leader liabilities coverages as well. Defense costs are in addition to the \$1,000,000 per occurrence sublimit.



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Answer: No, under these circumstances, it is unlikely that either the member school district or the district's school nurses would have coverage for medical malpractice under NJSIG's general liability ("GL") policy. Since the vaccine would be administered to the general public at the direction of, and under the supervision of, the local municipality and/or board of health, rather than the board of education, the activity would likely be deemed outside the scope of the school nurses' normal duties as board of education employees. Therefore, this exposure would be beyond the scope of the GL policy's "incidental medical malpractice liability coverage."

Although NJSIG's policy would be not be triggered in these circumstances, it is worthwhile to note that the member school district's liability in this scenario may be limited by the New Jersey Tort Claims Act, which immunizes public entities and public employees from claims alleging "injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community." N.J.S.A. 59:6-3. Furthermore, in certain circumstances, federal law also immunizes the "administration or use of countermeasures to diseases," including COVID-19. Specifically, the Public Readiness and Emergency Preparedness Act (PREP Act), 42 U.S.C. 247d-6d, "authorizes the Secretary of the Department of Health and Human Services to issue a PREP Act declaration," which "provides immunity from liability (except for willful misconduct) for claims: of loss caused, arising out of, relating to, or resulting from administration or use of countermeasures to diseases, threats and conditions, determined by the Secretary to constitute a present, or credible risk of a future public health emergency, to entities and individuals involved in the development, manufacture, testing, distribution, administration, and use of such countermeasures." Click [here](#) for more information on the PREP Act and the U.S. Department of Health and Human Services' declarations thereunder as to COVID-19.

- 14. Would a member school district have medical malpractice coverage if the district's school nurses administered COVID-19 vaccines to the district's students and/or employees, on school premises, as a part of a vaccination program approved by the board of education, for the sole benefit of the board of education's students and/or employees?★**



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Answer: Yes, under these circumstances, the member school district and the school nurses would likely have coverage for medical malpractice under NJSIG's general liability ("GL") policy. As outlined above, there is no communicable disease exclusion or "pandemic clause" in NJSIG's 2019/2020, 2020/2021 or 2021/2022 GL policies. However, for the 2021/2022 GL policy, a sublimit of \$1,000,000 per occurrence with an annual pool-wide aggregate of \$9,000,000 applies to communicable disease claims.⁵ Thus, NJSIG would pay for an attorney to defend the claim, and pay for any settlement or damages that result, consistent with the "incidental medical malpractice liability coverage" policy language.

15. If a member school district employee is exposed to COVID-19 during the course of their work and has been told to self-quarantine by a healthcare★ provider or public health authority, would workers' compensation apply?

Answer: No, this claim would not likely be compensable under workers' compensation. In order for a claim to be considered compensable under workers' compensation, there has to be a work-related injury, illness or disease. An employee directed to self-quarantine, as a result of a potential exposure to COVID-19, who is not actually sick with COVID-19, would not be covered under workers' compensation, since the employee does not have an actual injury, illness, or disease. This is true even if the potential COVID-19 exposure occurred in the workplace, as long as the quarantining employee does not actually contract COVID-19. On the other hand, the claim would likely become compensable if this same employee was found to have contracted COVID-19 as a result of the same workplace exposure that lead to the quarantine.

For more information on employee leave time related to COVID-19, please click [here](#) to access NJSIG's updated FAQ's on COVID-19-related employment issues, prepared by the law firm of Cleary, Giacobbe, Alfieri & Jacobs, LLC. Also included are updated proposed forms related to school reopening and leave accommodation requests, which NJSIG members are free to use and edit as needed. In addition, NJSIG members with school board leader liabilities ("SBL", also referred to as "E&O") coverage can email nepha@cgajlaw.com or call 1-201-623-1223 to reach NJSIG's Employment Practices

⁵ This sublimit and aggregate also apply to the automobile liability and school board leader liabilities coverages as well. Defense costs are in addition to the \$1,000,000 per occurrence sublimit.



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Hotline Attorney, aka the NEPHA hotline, which is administered by Cleary, Giacobbe, Alfieri & Jacobs, LLC. NJSIG's SBLI/E&O members can use this hotline to get answers on prospective employment actions they are considering, including those related to COVID-19. *(NOTE: This service is included with NJSIG's SBLI/E&O coverage and is available at no additional cost to SBLI/E&O members. We ask that only superintendents, business administrators, or human resource managers make inquiries to this hotline.)*

16. Would a member school district have coverage if, due to childcare issues related to COVID-19 closures, school staff were permitted to bring their children to work with them, on school premises, during the school day,★ and: (1) one of the children trips, falls and is injured while on school premises during the school day? (2) one of the children contracts COVID-19 and claims that they were infected by SARS-CoV-2 on school premises during the school day?

Answer: Yes, the member school district would likely have coverage under NJSIG's general liability ("GL") policy in both scenarios. As to scenario (1), NJSIG would pay for an attorney to defend the claim, and pay for any settlement or damages that result, consistent with the policy language, just as it would for any other third party that suffered a trip and fall injury on school premises during the school day. As to scenario (2), as outlined above, there is no communicable disease exclusion or "pandemic clause" in NJSIG's 2019/2020, 2020/2021, or 2021/2022 GL policies. However, for the 2021/2022 GL policy, a sublimit of \$1,000,000 per occurrence with an annual pool-wide aggregate of \$9,000,000 applies to communicable disease claims.⁶ Thus, NJSIG would pay for an attorney to defend the claim, and pay for any settlement or damages that result, consistent with the applicable policy language. However, the child would likely have a difficult time overcoming the New Jersey Tort Claims Act, which immunizes public entities and public employees from claims alleging "injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community." N.J.S.A. 59:6-3. In addition, given how widespread the virus is,

⁶ This sublimit and aggregate also apply to the automobile liability and school board leader liabilities coverages as well. Defense costs are in addition to the \$1,000,000 per occurrence sublimit.



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as well as how difficult it is to track, the child would likely have a very difficult time proving that they contracted the virus on school premises during the school day.

17. Would a member school district have coverage if it permitted an outside vendor to station its mobile COVID-19 testing unit on school property,★ and a member of the public trips, falls and is injured while getting tested at the mobile COVID-19 testing unit?

Answer: Yes, the member school district would likely have coverage under NJSIG's general liability ("GL") policy in this scenario, which means that NJSIG would pay for an attorney to defend the claim, and pay for any settlement or damages that result, consistent with the policy language, just as it would for any other business invitee that suffered a trip and fall injury on school premises. However, in order to mitigate the district's potential liability in this scenario, it is recommended that the district enter into an indemnification agreement with the vendor, consistent with the district's general use of facilities agreement. A district considering such an arrangement may also want to consult with board counsel prior to entering into any such agreement.

18. Does NJSIG recommend or require that school staff be tested and/or★ vaccinated for COVID-19?

Answer: No, NJSIG does not have any specific recommendations or requirements that school staff be tested and/or vaccinated for COVID-19, other than to follow the guidance issued by federal, state and local officials. The State has provided guidance [here](#) on questions related to COVID-19 testing for students and staff, such as, "Should school districts require daily testing of all students and staff?," which we encourage member districts to consider. The State has also provided guidance [here](#) on the question, "Can my employer require me to get the COVID-19 vaccine in order to enter my workplace?," which provides helpful information. Furthermore, as to vaccines, as the State's guidance indicates, "For employers with a unionized workforce, the applicable collective bargaining agreement already may vest the employer with the management right to unilaterally develop and implement a vaccine program." *Id.* Finally, this question may implicate certain anti-discrimination laws, including the New Jersey Law Against Discrimination, the Americans with Disabilities Act (ADA), the Rehabilitation Act, Title VII of the Civil Rights Act, and other federal, state, or local



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laws. For more information on protections from the U.S. Equal Employment Opportunity Commission, click [here](#) to review “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.” For more information on protections enforced by the New Jersey Division on Civil Rights, click [here](#) to review the New Jersey Attorney General’s “Civil Rights and COVID-19: Frequently Asked Questions.”

19. Would a member school district have coverage if it was sued by a parent in the Office of Administrative Law (OAL), alleging that a district's★ decision to teach virtually/remotely during the COVID-19 pandemic deprived their child of a free and appropriate education?

Answer: Yes, the member school district would likely have coverage under NJSIG’s school board leader liabilities (“SBLI”, also referred to as “E&O”) policy, under Coverage B, in this scenario. Coverage B provides for defense costs only, which means that NJSIG would pay for an attorney to defend this claim in the Office of Administrative Law – up to the applicable limit selected by the member⁷ – but would not pay for any settlement or damages that result.

This scenario implicates only Coverage B. There is no communicable disease exclusion or “pandemic clause” in NJSIG’s 2019/2020, 2020/2021, or 2021/2022 SBLI policies under either Coverage A or Coverage B. However, for the 2021/2022 SBLI policy, there is a Coverage A sublimit of \$1,000,000 per occurrence, with an annual pool-wide aggregate of \$9,000,000, on communicable disease claims.⁸

⁷ The available limits under Coverage B for 2021/2022 are: \$50,000 per occurrence/\$100,000 annual aggregate, or \$100,000 per occurrence/\$300,000 annual aggregate, with an annual pool-wide aggregate of \$9,000,000 for all communicable disease claims.

⁸ This sublimit and aggregate also apply to the general liability and automobile liability coverages as well. Defense costs are in addition to the \$1,000,000 per occurrence sublimit.