

## Best's Insurance Law Podcast

### [The Impact of COVID-19 on Claims in Brazil - Episode #173](#)

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**Guest Attorney:** Marcelo Mansur Haddad of Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados

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**John Czuba:** Welcome to "Best's Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Insurance Professional Resources*.

Thank you all for joining us for "Best's Insurance Law Podcast." We're pleased to have with us this morning Attorney Marcelo Mansur from the law firm Mattos Filho, Veiga Filho, Marrey Jr. and Quiroga Advogados in Brazil. Marcelo is a partner at the firm. He counsels insurance, reinsurance, and pension companies on regulatory, transactional, and claims matters.

He has also authored several books and articles on insurance and reinsurance, and Marcelo is also involved in the most recent significant transactions and claims matters taking place in Brazil. Marcelo, thank you so much for joining us this morning.

**Marcelo Mansur:** John, thank you very much. It's my pleasure to be here with you.

**John:** Today's discussion is on the impact of COVID-19 on Brazilian insurance and claims. For our first question this morning, Marcelo, can you tell us a little bit about the current status of COVID-19 and its impact on Brazil?

**Marcelo:** Yes, for sure, John. We have reached a point here in Brazil that may be a little bit different from what we see in Europe, but that is very similar to what we see in America.

We didn't have what people normally call waves. We have a plateau, so we began our increase of people being infected and unfortunately deaths, and we stayed for that for a long period. Now we're beginning to see a small reduction.

In terms of numbers, we are currently reaching the number of 5 million infected people, and unfortunately the number of 150,000 people who died of the disease.

Currently, in Brazil we are resuming slowly non-essential activities. People are back to the offices, but in some cases with very, very few people, but there is one particular point that we have to talk about Brazil that may also apply to other countries in the Americas.

Due to our economic and social situation, we have a lot of informal work, and for people who have informal work, they cannot stay at home because they depend on their work for everyday earnings. The help from the government was very important, but it took some time to start.

We had a very chaotic beginning of the pandemic with different signals and different messages, and people having to go to the streets. That is unfortunately where we ended. That's why different from other countries, we are on a plateau situation, not on a wave situation. That's a general report of COVID-19 in Brazil.

**John:** Thanks, Marcelo. Are there any discussions on the refund or payback of insurance premium or other types of benefits to insureds?

**Marcelo:** John, that's an interesting question. We have seen that happening in other countries, but we didn't see that very strong in Brazil. We can think about auto insurance.

The first important piece of information to understand the Brazilian market is that even though in some major cities and most of the capitals you're going to see a high number of insured vehicles, generally, in Brazil only thirty percent of the fleet is insured.

Of course, when you think about that, and you think about the people that have their cars insured or using their cars to move inside Brazil -- especially people that try to go to the countryside, trying to get out of the big cities, because they thought that things were getting worse in the cities, you don't see many people asking for refunds.

We didn't see associations fighting for this cause. It's something that actually didn't pick up in Brazil.

**John:** Marcelo, on property lines, is BI coverage subject to material damages, and what is the status of COVID-19 discussions in Brazil in this regard?

**Marcelo:** In Brazil, for the time being, BI coverages are linked to material damages. The traditional concept that we have always used is that there must be a machine breakdown, a collapse, a damage, so that you can see that it was destroyed by fire or something like that, to trigger business interruption.

That has always been the case in Brazil. Policies are drafted like that. However, we have to say that we are facing something that's totally new here. We see voices in Brazil trying to raise the argument, picking up from other countries, that the material damage that is behind the coverage is the usefulness of the property. If it's not useful anymore, if I cannot use it anymore, even though there is no material damage. I'm not saying it's a lot of voices, but rather some small voices trying to raise the argument that this would trigger BI coverages.

However -- just to come back to the beginning -- this is not what we have today, and this is not what regulators have said. Regulators have said that "what's covered is covered", there's no reason to increase coverage because of the pandemic. And we are not seeing these discussions in the courts.

We don't see that in courts because, differently from other countries, BI coverage is not spread in Brazil. What we're going to have in BI coverage is normally from big business, normally operational insurance or big property from factories.

Really, we are talking about, for instance, fires and other types of accidents, but we don't have, like you see in other countries, a midsize, even small or big chain food restaurant having BI coverage. That's why we don't see that kind of discussion very much in Brazil, although we can hear some noises trying to change a concept that's well-established in Brazil.

**John:** Marcelo, is COVID-19 force majeure on the Brazilian law, and what is its impact in surety bonds? Would it be force majeure for future policies?

**Marcelo:** This is an important point as well. For sure, COVID-19 falls into the definition of force majeure in Brazil. It's something that we could not predict or foresee. It's unexpected and we cannot avoid it.

It fills all the requirements, but one thing is to be a force majeure, and the other thing is to be a force majeure event that exempts someone from the duty to fulfill a given obligation. Here is where we have to make a detailed assessment, especially for surety bonds.

The fact behind that is that even though COVID-19 may be considered force majeure, when we make an assessment of surety bonds, which, by the way, normally exclude force majeure events, we have to understand, first of all, what is the impact of that force majeure in the obligation that has not been fulfilled.

We have to make a step-by-step analysis to see, firstly, whether such obligation was in default before COVID-19 hit it. Secondly, we need to see whether such obligation became impossible or simply burdensome. Then, depending on the case, we are going to apply different type of theories, the hardship theory or force majeure theory.

Finally, we have to establish very clear link between the impossibility of that obligation and the COVID-19. It may be that COVID-19 had no actual impact in the fact that the obligation became impossible, and the impossibility comes from other reasons.

This relation between COVID-19, which is a force majeure event, and the impossibility of fulfilling a certain obligation has to be clearly established so that we have a force majeure event allowing you to use it as argument that you cannot lawfully fulfill the obligation.

For future policies, we can say today that COVID-19 is not force majeure, because it is not unexpected. What is expected today is that people will have fallback plans or emergency situation studies so that, whenever we have a second hit or something like that, companies will be prepared to deal with that. First of all, they need to be prepared to deal with COVID right now. Secondly, they need to be prepared if there is a second hit or something like that.

In case there is something out of the extraordinary, such as a new type of virus that nobody could expect and hits strongly, we could even argue that there is a second force majeure. Once the event of COVID-19 is there, it's difficult that it would be force majeure for the purpose of contract obligations and insurance.

**John:** Marcelo, how are COVID-19 claims aggregated for reinsurance purposes?

**Marcelo:** We have seen in Brazil very few discussions about that, but there are, and they are not easy to deal with. First of all, because the discussions on aggregation varies a lot, depending on the type of coverage that you're talking about; if it's life, if it's property, if it's BI, if it's liability or casualty. This is the first thing.

Secondly, we have to understand what we are talking about. We are talking about a region, a country, what timeframe we are trying to encapsulate here. There are lots of things that you have to consider when aggregating claims for reinsurance purpose.

Just to give an example. Maybe we can aggregate hospital liability discussions when, for instance, in the beginning of the pandemic the hospitals didn't take the right measures to protect their own employees, and people that were going to the hospitals to receive treatment.

Maybe we can aggregate all these policies triggering from the event that they know that COVID happened, it reached the country, but they were not fully prepared to deal with that.

On the other hand, we cannot aggregate things that are happening in other parts of the country, because this is a disease that comes bit by bit, and there is a huge variation from different cities and different states here in Brazil.

If you remind what happened, first of all, the COVID hits countries that were receiving people that were coming from outside the country. People that lived in cities that were airports hubs. Then, it started to spread inside the country in different ways and with different severities.

With that, it makes very complicated to make aggregation tests or aggregation analysis. The recommendation here is to try to analyze on a case-by-case basis considering different types of coverage you are talking, and what happened actually in the country, in the state, or even in the city to take into consideration geographical areas and the time that we are considering.

**John:** Marcelo, what's the position of lawmakers and regulators, and what are the tendencies of some of the local insurance players in Brazil?

**Marcelo:** I'll begin with regulators. We have a regulator currently that has a very liberal approach. They simply said, "It's covered what's covered, you have to read your policy, I'm not going to get involved on that." That's their tendency.

We had in the past some regulators that were more consumer-driven. It's not the case at all today. Of course they are concerned about consumer protection, but we have a consumer protection code. That's not necessarily the duty of the insurance regulator, but that was the position of regulators so far.

On the lawmaking area, in the very beginning of the pandemic, lawmakers were concerned about two things, health and life. On the health side, the regulators simply said on day one, "It doesn't matter what happens, COVID is covered." It was very clear.

You have to understand that in Brazil, the health regulator is one. It regulates health insurance companies that we generally name as health plan operators, because they are not all insurance companies. The insurance regulator is another one.

So, from the health regulators perspective, COVID is fully covered. There was some discussions about testing, but most of the testings are covered right now.

On the law-making side, there is a bill in the Congress. It's not approved yet and the idea of the bill is to say that everything that's related to pandemic must be covered on life and on health as well.

It doesn't talk about property, it doesn't talk about casualty, it doesn't talk about BI. The lawmaker was exclusively focused on life and health protections. If approved, the law would have retroactive effect, it would affect existing contracts, but it's already too late.

Because the health regulator has already said it's covered. And what happened on life? Even for policies that had clear exclusions, the life players in the market decided to pay for COVID deaths for a multitude of reasons.

Firstly, it was very difficult to establish that the death was a death by COVID-19. We have to differentiate death by COVID-19 and death because of COVID-19, which are different. Most of the death certificates.

did not even mention COVID-19, because the physicians didn't even know for sure what was the cause of death. Normally it was a general statement.

Secondly, because the penetration of life insurance in Brazil is not high, it's low. Even paying losses that technically would not be covered, the loss ratio would not be huge.

Thirdly, there was an assessment that disputing this kind of exclusions would be very difficult because of the situation we had in Brazil. You couldn't deep assess what was the cause of death, you were going to expose people doing this assessment, sending them to the streets and the hospitals to make investigations, so the market took the approach that it's better to pay than to discuss. That's what's happening in the life.

The discussions by now is whether players would put a time period during which you cannot claim death for COVID. Even that has not been implemented yet. So far companies are living with that, and the tendency is to continue paying.

Maybe at some point in time this will change. It will change basically for future pandemics, not for this one. That's what we have seen in local players.

In short, if there is some tendency, maybe at some point in time we are going to see some more clear exclusion wordings, because people know what the disease is. Or maybe you're going to see some time periods during which you will not be able to claim a policy for death related to COVID-19.

**John:** Marcelo, are there any major cases under discussion in Brazil courts right now?

**Marcelo:** No. Differently from what we saw in France, differently from what we saw in Germany. We have FCA-UK discussions, and we have the discussions in the US as well.

In Brazil, because life players have dealt with the situation as I have described, because for health everything is covered, and because BI coverage are not common, we do not have major cases.

Amazingly, the only case that hit the press was in the film-making industry. Maybe because we have some famous cases in the US, and these cases are replicated in Brazil, and this gets publicly. They do not deal with the discussion on coverage, but basically the discussion on renewal.

All these film-making productions had to be postponed. Sometimes not only postponed, but also they had to be extended in time because, if they needed 6 months to do the shooting, because of the pandemic, maybe they will need 8 months, 10 months, a year, which increases budget as well.

The discussion we are having here in courts are much more focused on how insurance can be extended, if insurers can impose new conditions or not and how they deal with COVID-19 in the future. That's the discussion that we have seen in courts.

Otherwise, what we expect is that in the future, and you have to understand that this takes some time, we may see some surety bonds discussions based on what we have discussed before.

Surety bonds claims discussions in courts, if the parties do not agree, when allocating what is covered or not by COVID-19, what's the impact of force majeure, what's not a force majeure event and should be paid by the insurer. So, it's possible that in the future, we are going to have some discussions about surety bonds.

At this very time affected companies are trying to solve the problems and see if there is a claim to be argued. If there is a claim, and the claim is not paid, this will possibly go to court. You have to understand that the insurance piece is normally the last one to move.



Companies will try to understand what has happened. They will read their policies, they will reach the conclusion that they're possibly covered. They will ask for the payment of the claim, the claim will be adjusted or not, the claim will be paid or not.

Only after the claim has been adjusted and not paid, it is the time to go to court. We have a long tail here. That's why in court we have today basically discussion on renewals, because these are the first discussions that will come when facing COVID-19 insurance-related issues.

**John:** Marcelo, thank you very much for joining us today.

**Marcelo:** John, it was my pleasure talking to you.

**John:** That was attorney Marcelo Mansur, who's a partner at the law firm of Mattos Filho, Veiga Filho, Marrey Jr., and Quiroga Advogados in Brazil.

Special thanks to today's producer, Frank Vowinkel. Thank you all for joining us for Best's Insurance Law Podcast. To subscribe to this audio program, go to our web page [www.ambest.com/claimsresource](http://www.ambest.com/claimsresource).

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I'm John Czuba, and now this message.

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