



## Potential Avenues to Insurance Coverage for COVID-19 Losses

By Kristy Larsen (4/17/20)

**Depending on the specific policy language, insurance coverage may be available for a variety of COVID-19 related losses for corporate policyholders of all types despite insurance commentators' early opinions that there is simply no coverage.**

Many businesses have suffered massive financial losses due to the COVID-19 pandemic. In an attempt to survive the economic turmoil and mitigate the devastating losses, many businesses are turning to their insurers for as much badly needed insurance coverage as they can provide. Although many different types of insurance policies may be implicated by this crisis, business interruption coverage under a commercial property insurance policy will be the focus of this article. Several commentators addressing the potential availability for this type of coverage have been quick to conclude that there is no coverage and numerous insurance carriers have issued blanket denials. The insurers and commentators note that business interruption coverage requires physical loss or damage to property and that many policies contain exclusions for contamination caused by viruses and bacteria.

However, recent lawsuits filed by businesses that have been forced to shut down or limit their operations due to COVID-19, existing case law, and the unique circumstances surrounding this pandemic, demonstrate a potential path forward for coverage of losses due to the coronavirus. Additionally, at least four state legislators (New Jersey, Ohio, Massachusetts and Pennsylvania) have introduced bills to retroactively mandate that commercial business interruption policies include COVID-19 as a covered loss. While these efforts demonstrate the widely held belief that insurance should provide coverage for COVID-19 claims, the bills may be unnecessary in the event courts in the forefront of this litigation address these issues and declare that under certain policy language there is indeed coverage.



## A. Business Interruption Coverage

Business interruption coverage is commonly sold as a component of commercial property insurance policies to provide relief to an insured for lost profit and extra expenses when its business operations are disrupted by “direct physical loss or damage” to insured property. Insurers are denying claims on the basis that closing a business due to a threat of exposure or spread of COVID-19 is not “direct physical loss or damage” to insured property. Establishing physical loss or damage when there is no easily visible damage to property therefore will be the first hurdle policyholders will have to overcome. However, the phrase “direct physical loss” is not defined in most policies and courts across the country have not settled upon a uniform rule for determining when insured property has suffered a “physical loss.”

While courts have not considered whether viruses or pandemics constitute direct physical loss, some courts have found that direct physical loss or damage does not have to be structural or obvious. *See e.g., Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at \*5 (D.N.J. Nov. 25, 2014) (“New Jersey courts and the Third Circuit have also found that property can sustain physical loss or damage without experiencing structural alteration.”); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 803 (N.H. 2015) (“[W]e conclude that ‘physical loss’ need not be read to include only tangible changes to the property that can be seen or touched . . . .”); *Yale University v. Cigna Ins. Co.*, 224 F.Supp.2d 402 (D. Conn. 2002) (noting a ‘substantial body of’ case law in which a variety of contaminating conditions have been held to constitute ‘physical loss of or damage to property’); *Matzner v. Seaco Ins. Co.*, 1998 WL 566658 (Mass. Super. Aug. 12, 1998) (“direct physical loss” was an ambiguous term, thus carbon monoxide contamination would come under definition); *BellSouth Telecomm., Inc. v. W.R. Grace & Co.*, 77 F.3d 603 (2d Cir. 1996) (asbestos contamination (not causing structural damage to premises) was event triggering coverage).

There is also some support in the case law for coverage arising out of the inability to use the property for its intended purpose. Under this line of cases, if a policyholder suffers a loss due to, for example, a harmful substance rendering the property unusable or uninhabitable, even temporarily, that might be sufficient to satisfy the physical loss or damage requirement. *See, e.g., Widder v. La. Citizens Prop. Ins. Corp.*, 82 So.3d 294, 296



(La. Ct. App. 2011) (intrusion of lead made house “unusable and uninhabitable”). *TRAVCO v. Ward*, 715 F.Supp.2d 699 (E.D. Va. 2010) (physical damage to building not needed when it was rendered unusable by sulfur gas); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W.Va. 1998) (“Losses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property.”); *Mellin*, 115 A.3d at 805 (“Evidence that a change rendered the insured property temporarily or permanently unusable or uninhabitable may support a finding that the loss was a physical loss to the insured property.”); *Sentinel v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (asbestos contamination case wherein court recognized that physical loss “provisions require only that a covered property be injured, not destroyed”).

While there are courts that have held “physical loss” does require a structural component, the above cases cited nevertheless support the proposition that direct physical property damage is not necessarily required when a dangerous condition exists on the premises, which renders it unusable for its intended purpose. Thus, there is certainly a basis for arguing that a potentially deadly virus in the building constitutes a physical loss. This is especially true when the state and local governments have come to the same conclusion and ordered most businesses to be closed.

Finally, while many property policies contain exclusions for contamination by bacteria, viruses or communicable disease, not all policies do. Some policies with such exclusions may not define their key terms, thus opening the door to a narrow interpretation of the exclusion by the courts. Other policies may define these terms or phrase the exclusions in a way that does not bar coverage for all coronavirus-related losses. For example, some policies have contamination exclusions with exceptions that preserve coverage for loss “caused directly by physical damage to the property covered ... by a peril not excluded in this policy.” In some policies, this includes communicable disease coverage. Other policies, rather than purporting to exclude contamination as a cause of loss, may apply lower sublimits to such losses.

A close examination of the specific policy language and the particular facts of each case will be necessary in determining whether an insured can overcome the “physical loss” obstacle. Hopefully the foregoing analysis, however, demonstrates that the hurdle is not necessarily insurmountable.



## **B. Other Avenues for Coverage Under Contingent Business Interruption, Civil Authority and Ingress or Egress Coverage Extensions**

Another avenue for coverage for losses sustained by businesses due to COVID-19 is under contingent time element coverage that provides for business losses sustained by the policyholder due to direct physical damage sustained by a supplier or customer. As stated above, the presence of coronavirus at any location would likely satisfy the requirements of physical loss or damage. For example in *Archer–Daniels–Midland Co. v. Phoenix Assur. Co.*, 936 F.Supp. 534, 543 (S.D.Ill.1996), the U.S. District Court for the Southern District of Illinois held that the policyholder, a food processor, was entitled to contingent business interruption coverage because of property damage sustained by the Army Corps of Engineers, which operated the flooded Mississippi River boat channels, and farmers who lost crops that would have indirectly been sold to the plaintiff through intermediaries.

In addition, coverage extensions found in many property insurance policies provide coverage when access to the insured's property is prohibited due to a governmental order, or because the manner of ingress and egress to the property is inaccessible. Depending on the policy language, a coronavirus-based quarantine order imposed on a particular locality that prevents access to an insured location might trigger this coverage, even in the absence of virus contamination or other physical damage to the insured property itself.

Business interruption claims after evacuations provide insight into how courts may view COVID-19 claims in the context of the orders forcing many businesses to close or operate at reduced capacity. While court rulings have varied widely across the country, the following cases may prove helpful to policyholders. *See, e.g., Assurance Company of America v. BBB Service Co., Inc.*, 593 S.E.2d 7 (Ga. App. 2003) (Georgia Court of Appeals held that business income loss related to an evacuation in expectation of a hurricane was a covered loss, as a civil authority determined that buildings needed to close to protect against expected harm as seen in other areas first hit by the hurricane). Similarly in *By Development, Inc. v. United Fire & Cas. Co.*, 2006 WL 694991, \*2 (D.S.D. Mar. 14, 2006), a court in South Dakota held that where a town was evacuated due to approaching wildfire, the civil authority order to evacuate the town would have been covered as anticipating physical loss (had it not been for a 72 hour waiting period in the policy), but not the days after the order was lifted where many roads were still closed, as there was no order prohibiting customers from coming to the business.



Because virtually every business is suffering losses due to some kind of contingent business interruption or city and state governmental orders, which have forced many businesses to close or operate at a reduced capacity, the foregoing coverage extensions could provide coverage for losses due to the coronavirus pandemic. Bear in mind, however, that civil authority coverage may require that the order be based on physical loss of or damage to other property. Again, any determination of coverage requires a careful analysis of the precise policy language at issue and the wording of any stay at home or shelter in place governmental orders or directives.

### C. Lawsuits to Watch

A growing number of businesses have taken their insurers to court over denials of business interruption coverage stemming from the COVID-19 pandemic. While many declaratory judgment actions have been filed to date, the following lawsuits illustrate the arguments for overcoming the physical loss requirement mentioned above and other possible avenues for coverage.

The first [known COVID-19 business interruption coverage lawsuit](#) was filed by Oceana Grill, a well-known restaurant in New Orleans, *Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd's London, et al.* Oceana Grill alleged that its policy does not contain a virus or pandemic exclusion, and also sought a declaration that the policy covers lost business income (a) for civil authority shutdown of restaurants, and (b) if the virus had contaminated the restaurant. In an attempt to satisfy the policy's "direct physical loss" requirement, the restaurant alleged that the virus "physically infests and stays on the surfaces of objects or materials" for weeks, and that the contamination would constitute "a direct physical loss needing remediation to clean the surfaces of the establishment."

Similarly, Thomas Keller, famed chef/owner of Per Se, the French Laundry, Bouchon and more, filed suit against his insurance company, the Hartford Fire Insurance Company in the Superior Court of California, County of Napa, *French Laundry Partners, LP dba The French Laundry, et al. v. Hartford Fire Insurance Company, et al.* The suit alleges that their operations were shut down due to an order issued on March 18 by Napa County. The restaurants allege that they are insured under an "all risks" policy issued, which provides coverage for lost business income and extra expenses incurred if access to the restaurants



has been prohibited by an order of civil authority as a direct result of a covered loss in the immediate area. Plaintiffs claim that the policy provides coverage for any current or future civil authority closures in Napa County restaurants due to physical loss or damage from the coronavirus under the civil authority coverage part of the policy. Notably, the policy does not include an exclusion for viral pandemic and the “policy’s Property Choice Deluxe Form specifically extends coverage to direct physical loss or damage caused by virus.”

Likewise in *Big Onion Tavern Group, LLC et al. v. Society Insurance, Inc.*, the insureds – restaurants and movie theaters – maintain that their insurer’s denial of business interruption coverage was wrongful, noting the absence of a virus exclusion in the policy and arguing that, “if a virus could never result in a ‘physical loss’ to property, there would be no need for such an exclusion.” The policyholders also allege that, upon receipt of the claims, the insurer “immediately denied the claims (either verbally or through cursory emails) without conducting any investigation, let alone a ‘reasonable investigation based on all available information’ as required under Illinois law.” The Plaintiffs seek damages for statutory bad faith.

Two Native American tribes (The Choctaw and Chickasaw Nations) separately sued a group of insurers in Oklahoma state court demanding payment of business interruption claims for the closure of their Oklahoma casinos due to the COVID-19 pandemic. The Nations allege that their properties sustained physical damage as a result of COVID-19 and could not be used for their intended purposes, and sought an order declaring that the policies cover the Nations’ losses and expenses related to COVID-19.

Finally, just last week, a Chicago restaurant filed suit against its insurer in the Circuit Court of Cook County, Illinois, *Maillard Tavern LLC v. Society Insurance Inc.*, alleging that it wrongfully denied business interruption coverage after an order from the governor of Illinois seeking to stem the tide of COVID-19 shut its doors and left it with “devastating financial losses.” According to the complaint, the insurance policy that Maillard holds includes coverage for “physical loss” and for business interruption caused by orders from a civil authority, both of which the tavern owners say were triggered by the outbreak. Specifically, the suit alleges that because COVID-19 is a human pathogen, which can physically contaminate surfaces, its presence or potential presence in the restaurant is a “physical loss” of the property during the pandemic, which the restaurant said triggers



coverage in the policy. In addition, the policy allegedly includes coverage for loss of access to the building because of orders from a civic authority, such as the governor's shut-down orders.

## D. Conclusion

Whether or not coverage applies for any specific coronavirus losses will depend largely on the precise policy language, the specific fact patterns, and the applicable case law. Policyholders with COVID-19 or coronavirus-related losses or liabilities should carefully analyze their commercial property insurance policies given that coverage may very well exist for business interruption losses. It is never too early to retain coverage counsel to assist with the review of a policyholder's policies and the initial stage of any claims made to insurers in order to maximize any insurance coverage that might be available. Regardless of whether a policyholder hires coverage counsel, it is nevertheless critically important to provide prompt notice of claim or notice of circumstances of a situation that might develop into a claim to your insurer and/or insurance broker regardless of the size of loss or questions regarding coverage.



**Kristy M. Larsen** has successfully represented many companies in virtually every kind of insurance dispute, under every kind of insurance policy, to help policyholders maximize their insurance coverage.

Please contact Ms. Larsen at [klarsen@rqn.com](mailto:klarsen@rqn.com) or by phone [\(801\) 323-3311](tel:8013233311) regarding an initial review of your insurance policy for possible coverage of COVID-19 related losses under a flat fee arrangement.