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Road Map to Insurance Coverage for COVID-19 Business Interruption Losses

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Introduction

Roughly three thousand years ago, King Solomon was asked for a maxim that was true in both good and bad times. He offered, "This, too, shall pass away." Most businesses will readily admit that, because of the presence of COVID-19, they are in the midst of some dismal times. The presence of coronavirus has rendered business premises unsafe and unusable for their intended purposes. Governmental closure orders have forced many companies to shutter or drastically reduce their operations. In addition, COVID-19 has prevented access to business premises and disrupted the supply chain. Businesses are losing billions of dollars due to the pandemic. These are the exact kinds of risks that "all risks" insurance policies are designed to cover. Yes, this too shall pass, and if history is a barometer of things to come, insurance payments will be part of the solution, not part of the problem.

From the start, insurance carriers recognized that their universally sold "all risks" commercial property insurance policies could provide business income protection for COVID-19 losses. They were rightly concerned that their many policy forms might cover coronavirus-related losses. Given the risk, insurance carriers reserved billions to pay for COVID-19 losses.[1] But rather than pay, the insurers have circled their wagons, leaving policyholders wondering how they can secure coverage for COVID-19 losses.

Given how insurance carriers are adjusting COVID-19 losses, recovery for many policyholders may prove to be difficult. Some insurance carriers initially denied COVID-19 claims without investigation, only to be sued for bad faith.[2] Now, most insurance carriers are holding off on rapid denials in the hopes that policyholders will unwittingly compromise their claims. This adjustment process is designed to entice policyholders to make admissions against coverage that can later be used to deny claims. Unfortunately, the tactics being employed to minimize coverage can be difficult to spot. As a result, the road to recovery will likely be littered with businesses that unwittingly fell prey to expertly devised insurance company tactics.

Although insurance carriers have a road map for denials of coverage, most policyholders do not have a corresponding road map to recovery. While no two policies are exactly the same, "all risks" policies are standard form. Many of the COVID-19 issues raised by insurance carriers today, such as whether "physical loss or damage" has occurred or whether Civil Authority provisions require a complete prohibition of access to the insured premises, have been addressed before, and most of the case law on these issues is positive for policyholders. But not all businesses will recover. Some have difficult policy language. Others will unwittingly support insurance carrier denials by improperly responding to questions and information requests. Still others will make strategic errors in presenting and pursuing their claims.

To prevent these kinds of errors, policyholders need to understand the issues and devise a plan for recovery. This article addresses the issues that corporate policyholders need to consider in developing their specific road maps to coverage.

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[1] David Hood, *Analysts Unfazed as Insurers Boost Loss Reserves by Billions*, BLOOMBERG TAX (June 1, 2020, 4:46 AM), https://news.bloombergtax.com/daily-tax-report/analysts-unfazed-as-insurers-boost-loss-reserves-by-billions.

[2] *See, e.g.*, Compl., Mace Marine Inc. v. Tokio Marine Specialty Ins. Co., No. 105911474, ¶¶ 40, 56-61 (Fla. Cir. Ct. Apr. 6, 2020) (asserting statutory bad-faith claims).

Background

A. Coverage Provided Under "All Risks" Property Policies

The most common form of property insurance policy is the "all risks" property insurance policy. In contrast to more limited "named peril" policies that cover only specifically listed perils, "all risks" policies cover every conceivable risk of loss.[3] The insuring agreement for property damage (PD) in an "all risks" policy typically provides that the insurer will pay for "all risks of physical loss *or* damage to property" (emphasis added). In addition to covering all risks of physical loss, the policy also covers all risks of damage. Despite what insurance carriers have argued, there is no requirement of physical damage to property in order to trigger coverage.

"All risks" policies also provide coverage for lost business income (BI) resulting from, for example, the risk of damage caused by coronavirus. BI coverage also includes coverage for extra expenses; namely, expenditures required to bring revenues back to normal after a calamity such as a pandemic. In addition, "all risks" policies typically contain numerous additional BI coverage for, among other things, ingress and egress (i.e., the inability to enter the premises due to the presence of coronavirus), civil authority (i.e., governmental order preventing use of the property due to coronavirus), and contingent business interruption (i.e., loss of income due to coronavirus impacts to customers and suppliers). Likewise, physical damage to property is not required under either standard BI coverage or any of the various BI coverage extensions in order for coverage to apply.

B. Setting the COVID-19 Narrative

When coronavirus became an issue in March of this year, the insurance industry immediately responded, stating that insurance policies do not cover pandemics.[4] They argued that coronavirus losses would bankrupt the insurance industry, and that this

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[3] *See, e.g.*, Cincinnati Ins. Co. v. Banks, 610 F. App'x 453, 457 (6th Cir. 2015) ("[A]n all-risk policy automatically covers any loss unless the policy contains a provision expressly excluding the loss from coverage.").

[4] Leslie Scism, *Companies Hit by Covid-19 Want Insurance Payouts. Insurers Say No*, WALL ST. J. (June 30, 2020, 10:24 AM), https://www.wsj.com/articles/companies-hit-by-covid-19-want-insurance-payouts-insurers-say-no-11593527047.

would not be good for policyholders or society.[5] When a number of states introduced bills to force insurers to pay, insurance company lobbyists quickly jumped in to stop advancement of those bills.[6] Teams of insurance company lawyers and lobbyists were employed, and the argument was developed that it was unconstitutional to make insurance companies pay;[7] but, even if it was not unconstitutional, their lawyers would tie payment up for years.[8] According to the insurance company lobbyists, the most efficient way to help businesses was to do so with taxpayer money.[9] Congress agreed, reasoning that it was better for taxpayers to pay for coronavirus losses than to fight with insurers,[10] but the President of the United States countered that he did not see the basis for many COVID-19 insurance coverage denials.[11] Then, in a classic move to turn lemons into lemonade, the insurance industry obtained backing from Congress to support coverage for future pandemics using the Federal Government as reinsurance

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[5] Bethan Moorcraft, *Retroactive Business Interruption Measures Could Bankrupt US Insurers in Two Months*, INSURANCE BUSINESS AMERICA (June 15, 2020), https://www.insurancebusinessmag.com/us/news/breaking-news/retroactive-business-interruption-measures-could-bankrupt-us-insurers-in-two-months-225240.aspx.

[6] Mark A. Packman, *Legislation Enabling Policyholders to Obtain Insurance Coverage for Coronavirus Claims is Constitutional Part 1*, NAT'L L. REV. (July 23, 2020), https://www.natlawreview.com/article/legislation-enabling-policyholders-to-obtain-insurance-coverage-coronavirus-claims.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Joseph N. DiStefano, *Insurers: We Can't Pay Coronavirus Business Losses; That's Taxpayers' Job*, THE PHILADELPHIA INQUIRER (May 27, 2020, 5:00 AM), https://www.inquirer.com/business/phillydeals/coronavirus-business-interruption-insurance-claims-20200527.html.

[11] Jim Sams, *Trump Tells Insurers to Pay Virus Claims If Pandemics Not Excluded*, INSURANCE JOURNAL (Apr. 14, 2020), https://www.insurancejournal.com/news/national/2020/04/14/564744.htm.

for future losses.[12] It appears that a business-friendly legislative approach to secure payments from insurers for coronavirus losses is no longer a viable option for policyholders.

The insurance industry also attempted to enlist the help of corporate insurance brokers, with some success. In certain instances, insurance companies point-blank told insurance brokers to deny COVID-19 claims.[13] In other instances, either to support insurance carriers, or on their own accord, a number of prominent insurance brokers discouraged policyholders from filing coronavirus claims.[14]

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[12] Zachary Warmbrodt, *Insurers Face Off with Congress over Pandemic Coverage*, POLITICO (May 21, 2020, 6:08 PM), https://www.politico.com/news/2020/05/21/insurers-face-off-with-congress-over-pandemic-coverage-274063.

[13] Letter from Christopher J. Boggs, Exec. Dir. Risk Mgmt. & Educ., BIG I RISK MGMT., to State Executives/CEOs, State E&O Directors, & Agency Managers (Mar. 23, 2020) ("Recently we were made aware that insurance carriers are directing their agencies to deny certain claims related to the COVID-19/coronavirus; most specifically, business income claims."), https://www.independentagent.com/resources/SiteAssets/Pages/coronavirus/Claim%20Denials.pdf.

[14] *See, e.g.*, *Pandemic Claim Reporting Guidelines: Coronavirus (COVID-19)*, USI (Apr. 20, 2020) ("Most losses will not result from direct physical damage at an insured location."), https://www.usi.com/content/downloads/Pandemic_Claim_Reporting_Guidelines.pdf; Joseph C. Peiser, *Willis Towers Watson North America COVID-19 Early Market Commentary*, WILLIS TOWERS WATSON (Mar. 26, 2020) ("For most, not all, COVID-19 may not be a covered event."), https://www.willistowerswatson.com/assets/documents/COVID-19_Insurance_concerns_and_marketplace_conditions.pdf; *COVID-19: Initial Insurance Market Impact Assessment of the Pandemic*, AON (Mar. 19, 2020) ("Most property policies, including ISO, specific insurer forms and most manuscript policies, do not cover a loss resulting from a virus."); *but see Outbreaks, Epidemics, & Pandemics: Preparedness & Response Strats.*, MARSH & MCLENNAN COS. (Jan. 2020) ("In the event of a loss, organizations should begin to gather data for a potential claim filing."), https://www.mmc.com/insights/publications/2020/Jan/outbreaks--epidemics--and-pandemics--preparedness-and-response-s.html (follow "Download PDF" link).

The opening narrative was set by insurers, and it was not favorable to policyholders.

C. Policyholder Response

Policyholders did not take kindly to the narrative set by insurers, or the wholesale denials of coverage. More than 800 COVID-19 insurance coverage lawsuits were filed in the first four months of the coronavirus pandemic.[15] The vast majority of these lawsuits were filed by a relatively small group of plaintiffs' lawyers to address small businesses impacted by governmental orders requiring closure of restaurants and other businesses. With a few notable exceptions, the vast majority of large business claims have not yet progressed to litigation.[16]

COVID-19 Insurance Coverage Issues

A. "Physical Loss of or Damage" to Covered Property

The insurance companies' main argument against coverage is that coronavirus does not physically injure property. Strangely, its main argument against coverage is not supported by insurance policy language. A typical "all risks" property ensuring agreement provides that, "we [the insurer] will pay for all risks of ***direct physical loss or damage*** by a covered cause of loss to covered property." Covered causes of loss include "all risks," and "all risks" means every possible kind of risk, unless specifically excluded.[17] Similarly, business interruption insuring agreements cover, for example, loss of income caused by "***direct physical loss of or damage to*** property." "All risks" policies do not require physical injury to property. Rather, they are specifically triggered by either (1) a risk of physical loss to property, or (2) a risk of damage to property.

Case law interpreting this "physical loss or damage" requirement similarly holds that property is appropriately damaged in a way as to trigger coverage if it is either

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[15] *Covid Coverage Litigation Tracker*, PENN LAW, https://cclt.law.upenn.edu/ (last visited July 23, 2020).

[16] *See, e.g.*, Compl., Circus Circus LV, LP v. AIG Specialty Ins. Co., No. 2:20-cv-01240 (D. Nev. July 2, 2020); Compl., Treasure Island, LLC v. Affiliated FM Ins. Co., No. 2:20-cv-00965 (D. Nev. May 28, 2020).

[17] *See, e.g.*, Banks, 610 F. App'x at 457.

rendered unsafe to use or cannot be used for its intended purpose.[18] For example, in *First Presbyterian Church*, the Supreme Court of Colorado held that "physical loss" occurred when gasoline seeped into the soil under a church, rendering it uninhabitable and making further use of the building highly dangerous.[19] Similarly, in *Widder*, the court held that the presence of lead paint dust in the policyholder's home constituted "direct physical loss," because it rendered the home unusable and uninhabitable.[20] In *Sentinel*, the court also held that asbestos contamination constituted direct physical loss and that structural damage to the insured property was not required after asbestos dust rendered a building unsafe, triggering "all risks" coverage absent physical injury to property.[21] Finally, in *Trutanich*, the smell of methamphetamine in a drug house was sufficient to trigger coverage.[22] In all these cases, and more, courts unequivocally held that "all risks" policies do not require physical injury to property. The presence of a harmful substance that renders property unsafe to use is sufficient to trigger coverage.

Although the science on coronavirus is not completely settled, experts agree that coronavirus attaches itself to workplace property, rendering use of that property unsafe, unless appropriately decontaminated.[23] This is exactly the kind of disaster that triggers coverage.

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[18] *See, e.g.*, W. Fire Ins. Co. v. First Presbyterian Church, 437 P.2d 52, 55 (Colo. 1968) (gasoline fumes under church); Widder v. La. Citizens Prop. Ins. Corp., 82 So. 3d 294, 296 (La. Ct. App. 2011) (lead paint dust rendered a home uninhabitable); Sentinel Mgmt. Co. v. N.H. Ins. Co., 563 N.W.2d 296, 300 (Minn. Ct. App. 1997), *aff'd in part, rev'd in part sub nom.* Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co., 615 N.W.2d 819, 825-26 (Minn. 2000) (asbestos dust contamination); Farmers Ins. Co. v. Trutanich, 858 P.2d 1332, 1335 (Or. Ct. App. 1993) (methamphetamine smell damaged the house); Murray v. State Farm Fire & Cas. Co., 509 S.E.2d 1, 17 (W.Va. 1998) (property rendered unusable or uninhabitable due to the threat of rockfall).

[19] First Presbyterian Church, 437 P.2d at 55.

[20] Widder, 82 So. 3d at 296.

[21] Sentinel Mgmt., 563 N.W.2d at 300.

[22] Trutanich, 858 P.2d,

[23] *How COVID-19 Spreads*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 16, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.

Despite this established body of case law, insurance companies have seized on the idea that business interruption coverage is not afforded absent structural damage to the insured property. In their view, because coronavirus does not actually alter the structural integrity of the insured property, there is no "direct physical loss or damage" and thus no coverage.[24] Insurers had some early success with this argument (combined with pleading deficiencies by the policyholders), but the tide is beginning to turn. For example, in *Gavrilides Mgmt. Co. v. Mich. Ins. Co.* (the first reported coronavirus coverage decision), an insured restaurant sought coverage under its "all risks" insurance policy for lost business income due to the ongoing pandemic.[25] The insurer moved for summary judgment, arguing that, for the policy's business income coverage to apply, there must be "direct physical loss or damage to the insured property," meaning that a contaminant must "actually alter the structural integrity of the property in order to trigger coverage."[26] The insurer argued that because COVID-19 does not alter the structural integrity of property, there was no "physical loss or damage" causing the suspension of the insured's operations and loss of business income, and therefore, no coverage.[27] The court agreed and granted the insurer's motion for summary judgment, noting that "physical loss of or damage to" insured property "has to be something with material existence, something that is tangible"—in other words, "something that alters the physical integrity of the property."[28]

Gavrilides illustrates one of the biggest errors being made by policyholders. In that case, the complaint did not even allege that the insured property had suffered physical loss or damage due to the presence of coronavirus.[29] In fact, the complaint stated that "at no time" did COVID-19 enter the two insured restaurant locations through any

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[24] *See, e.g.*, Br. in Supp. of Mot. for Partial Summ. J., Ind. Repertory Theatre, Inc. v. Cincinnati Cas. Co., No. 49D01-2004-PL-013137, at 12 (Ind. Super. Ct. June 25, 2020); Ind. Repertory Theatre, Inc. v. Cincinnati Cas. Co., No. 49D01-2004-PL-013137, ¶ 22 (Ind. Super. Ct. Apr. 3, 2020).

[25] Gavrilides Mgmt. Co. v. Mich. Ins. Co., No. 20-258CB (Mich. Cir. Ct. July 1, 2020), available at https://www.youtube.com/watch?v=Dsy4pA5NoPw&feature=youtu.be.

[26] *Id.*

[27] *Id.*

[28] *Id.* (citing Universal Image Prods., Inc. v. Chubb Corp., 703 F. Supp. 2d 705, 710–11 (E.D. Mich. 2010)).

[29] *Id.*

employee or customer and that the virus had never been present at either location.[30] This pleading deficiency is the reason why the court ruled in favor of the insurance company.[31]

In the similar *Social Life Magazine* case, the insured magazine sought a preliminary injunction requiring its insurer to pay its insurance claim, to save its seasonal summer business.[32] During a teleconference upon the court's order to show cause, the judge expressed skepticism that COVID-19 can cause "direct physical loss of or damage to" property, stating on the record that the virus "damages lungs," not printing presses, and that "New York law is clear that this kind of business interruption needs some damage to the property to prohibit [the insured] from going [to the insured premises]."[33] The presence of coronavirus alone does damage property. There, the court fixated on the fact that people could enter the premises. It was not made clear to the court that, under the policy, there is no requirement for access to be completely prohibited. For example, there may be a fire in a building, but the fact that people can access the building, or not, is immaterial to coverage. There is no policy requirement for the premises to be completely off limits. After the district court denied the motion for a preliminary injunction, the magazine appealed to the Second Circuit Court of Appeals,[34] but the parties later filed a stipulation withdrawing the appeal.[35] *Social Life Magazine* thus did not create bad law on this issue.

Policyholders scored a major victory in the *Studio 417, Inc. v. Cincinnati Ins. Co.* decision.[36] After a group of insured hair salons and restaurants filed suit for coronavirus-related business income losses, their insurer moved to dismiss their

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[30] *Id.*

[31] *Id.*

[32] Emergency Mot., Social Life Magazine Inc. v. Sentinel Ins. Co., No. 20-1587, ¶ 2 (2d Cir. May 19, 2020).

[33] *Id.* at 15.

[34] *Id.*

[35] Order, Social Life Magazine Inc. v. Sentinel Ins. Co., No. 20-1587 (2d Cir. May 22, 2020).

[36] Order, Studio 417, Inc. v. Cincinnati Ins. Co., No. 20-cv-03127 (W.D. Mo. Aug. 12, 2020).

complaint, arguing that the insureds failed to adequately plead a "physical loss."[37] The court rejected the insurer's argument that the policies required "actual, tangible, permanent, physical alteration of the property," noting that the policies expressly covered "physical loss ***or*** physical damage" and reasoning that "physical loss" must mean something different from "physical damage."[38] Otherwise, interpreting the "physical loss" to mean "physical damage" would render one of the terms superfluous and fail to give meaning to both terms, in violation of a universal canon of policy construction.[39]

The *Studio 417* policyholders also overcame the pleading deficiencies that doomed the *Gavrilides* plaintiff, specifically alleging that customers, employees, and/or other visitors infected the insured properties with the virus and that the presence of the virus rendered "physical property in their vicinity unsafe and unusable."[40] The *Studio 417* decision thus represents the first major coverage win for policyholders, with more sure to follow.

B. Civil Authority Coverage

Civil Authority coverage is another important coverage provided by "all risks" commercial property insurance policies. A typical Civil Authority provision states:

> We will pay the actual business income loss sustained by you and extra expense if an order of civil or military authority limits, restricts or prohibits access to property not insured under this Policy provided that…such property sustains direct physical loss or damage by a covered cause of loss.

Again, Covered Causes of Loss are typically defined as "risks of direct physical loss." Taken together, these provisions mean that, for the insured to have coverage, a civil authority order must prohibit access to the insured's premises and come as the result

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[37] *Id.* at 7.

[38] *Id.* at 9.

[39] *Id.* ("Defendant conflates both 'loss' and 'damage' in support of its argument that the Policies require a tangible, physical alteration. However, the Court must give meaning to both terms.").

[40] *Id.* at 4, 11–12 n.5 ("*Gavrilides* is distinguishable, in part, because the court recognized that 'the complaint also states a[t] no time has Covid-19 entered the Soup Shop of the Bistro . . . and in fact, states that it has never been present in either location.'").

of a risk of direct physical loss to property in the immediate area of the insured's "scheduled premises."

Key issues presented by coronavirus-related insurance coverage claims are *who* must be prohibited from accessing the insured premises and whether a complete prohibition of access is required. Insurers have taken the position that Civil Authority provisions require a complete prohibition of access, meaning no one may enter the premises as a result of the Civil Authority order. Insureds, such as restaurants, have countered by arguing that many Civil Authority orders prohibit people from accessing part of the premises for sit-down or dine-in service.[41] A complete prohibition of access is not required, as this adds non-existent language to the policy; a partial prohibition of access to part of the premises should suffice.[42] The *Studio 417* court made this precise point in its decision, noting that the policies required that the "civil authority prohibits access, but does not specify 'all access' or 'any access' to the premises."[43]

Several Civil Authority orders issued by state and municipal governments specifically state that coronavirus physically infects and contaminates surfaces, and restaurants and other gathering spaces were closed because of this risk.[44] For example, Indiana Governor Eric Holcomb's March 23, 2020 Executive Order No. 20-08 specifically notes "the virus's propensity to physically impact surfaces and personal property."[45] New York City Mayor Bill de Blasio's March 16, 2020 Emergency

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[41] Pl.'s Br. in Supp. of Its Opp'n to the Cincinnati Ins. Co.'s Mot. to Dismiss, Vandelay Hosp. Grp. LLC v. Cincinnati Ins. Co., No. 3:20-CV-01348-D, p. 29 of 32 (N.D. Tex. July 3, 2020).

[42] *Id.*

[43] Studio 417, at 14.

[44] *See, e.g.*, Compl., Sandy Point Dental PC v. Cincinnati Ins. Co., No. 1:20-cv-02160, ¶¶ 20, 44 (N.D. Ill. Apr. 6, 2020) (citing Illinois Governor Pritzker's Mar. 20, 2020 Executive Order 2020-10 as ordering non-essential operations to cease as a response to the spread of coronavirus throughout the greater Chicago area); Compl., Big Onion Tavern Grp., LLC v. Soc'y Ins., Inc., No. 1:20-cv-02005, ¶¶ 50-51 (Mar. 27, 2020) (citing same as finding that frequently used surfaces in public settings, including bars and restaurants, posed a risk of exposure to coronavirus and "was made in direct response to the continued and increasing presence of the coronavirus on property or around Plaintiffs' premises").

[45] *See* IND. EXECUTIVE ORDER 20-08 (Mar. 23, 2020).

Executive Order 100 similarly notes that the order was given "because the virus physically is causing property loss and damage."[46] New Orleans Mayor LaToya Cantrell[47] and Dallas County Judge Clay Jenkins[48] also issued similar orders. These orders should suffice to meet the necessary requirements to trigger Civil Authority coverage.

C. Ingress/Egress

"All risks" commercial property policies also typically provide ingress/egress coverage. A typical ingress/egress provision states, "This policy covers loss sustained during the period of time when, as a direct result of a peril not excluded, ingress to or egress from real and personal property not excluded hereunder, is thereby prevented."

In the seminal *Fountain Powerboat* decision, the court held that the ingress/egress provision covered the insured's inability to access its facility due to a hurricane; the policy did not require physical damage to the property.[49] There, the policyholders' factory was located on a barrier island. A storm came through, creating washed-out areas north and south of the factory. Certain employees, those with high ground clearance trucks, could come to work, but others were unable to cross the washed-out areas. As a result, the factory could not run at full capacity, and its revenues decreased. The factory itself, however, suffered no damage whatsoever.

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[46] *See* CITY OF NEW YORK EMERGENCY EXECUTIVE ORDER No. 100 (Mar. 16, 2020).

[47] *See* Mayoral Proclamation to Promulgate Emergency Orders During the State of Emergency Due to COVID-19, No. 2020-02602 (La. Civ. Dist. Ct. Mar. 16, 2020) (noting that COVID-19 may be spread amongst the population by various means of exposure, including "the propensity to attach to surfaces for prolonged periods of time, thereby spreading from surface to person and causing property loss and damage in certain circumstances")

[48] *See* Am. Order of Cty. Judge Clay Jenkins, Dallas Cty., Mar. 31, 2020 ("WHEREAS, The COVID-19 virus causes property loss or damage due to its ability to attach to surfaces for prolonged periods of time.").

[49] Fountain Powerboat Indus., Inc. v. Reliance Ins. Co., 119 F. Supp. 2d 552, 556–57 (E.D.N.C. 2000).

The importance of this decision in the coronavirus context is that ingress/egress coverage is independent of other coverages requiring physical loss or damage to property. No damage to a policyholder's property is required in order to trigger coverage, and a slowdown in operating capacity is covered absent a complete shutdown of operations.

D. Contingent Business Interruption

Contingent Business Interruption provisions cover the loss of earnings due to damage to the property of any supplier of goods or services to the insured. These provisions typically state:

> If direct physical loss or damage by a covered cause of loss to property of the type insured under this Policy is sustained by your direct ***supplier*** or your direct ***customer***, anywhere in the world, and any such loss or damage:
>
> (1) Wholly or partially prevents your direct supplier from supplying their goods and/or services to you; or
>
> (2) Wholly or partially prevents your direct customer from accepting your goods and/or services:
>
> Then we will pay the actual business income loss and extra expense sustained by you….

Archer-Daniels-Midland (ADM) is the leading case on contingent business interruption.[50] There, ADM made a contingent business interruption claim because its suppliers and farmers could not provide food products for processing and shipment. The Mississippi river flooded, impacting farmers who supplied goods to ADM. The insurers seized on the fact that ADM had no damage to its insured property and argued that a physical loss or damage concept must be read into the provision with respect to ADM's property. The Court disagreed, holding that the policy did not require any damage to the policyholder's own property.

The impact of this decision on COVID-19 claims is that policyholders need not demonstrate that coronavirus damaged their property in order to trigger coverage. This

[50] *See* Archer-Daniels-Midland Co. v. Phx. Assurance Co. of N.Y., 936 F. Supp. 534, 540–43 (S.D. Ill. 1996).

opens the door to proof into customer and supplier damage caused by COVID-19, making it considerably more difficult for an insurance company to disclaim coverage.

E. Potential Exclusions That Insurers Claim Apply to COVID-19 Losses

Unlike coverage provisions, which are construed broadly and in favor of the policyholder, policy exclusions are interpreted narrowly and against insurance companies.[51] In addition, the doctrine of *contra proferentem* holds that ambiguous provisions are interpreted in favor of the policyholder and construed against the insurers, because insurance companies draft the policies.[52] Under an "all risks" policy, the insured has the initial burden of proving that a loss covered by the policy has occurred; once the insured meets this initial burden, the burden shifts to the insurer to prove that a specific exclusion clearly applies to bar coverage.[53]

1. Virus Exclusions May Not Apply

Insurers also argue that virus exclusions were designed to prevent COVID-19 claims. However, many commercial property policies do not contain virus exclusions, as several policyholders have emphasized in their filings.[54] For policies without virus exclusions, the insurers' inclusion of virus exclusions in other policies means that viruses must cause "direct physical loss or damage" to covered property; otherwise, the insurers

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[51] Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 999 (2d Cir. 1974).

[52] Christopher C. French, *COVID-19 Business Interruption Losses: The Cases for and Against Coverage*, 27 CONN. INS. LAW J. 1, 12 (2020); *see also* Meridian Leasing, Inc. v. Associated Aviation Underwriters, Inc., 409 F.3d 342, 346–47 (6th Cir. 2005).

[53] Fajardo Shopping Ctr. v. Sun Alliance Ins. Co. of P.R., Inc., 167 F.3d 1, 7 (1st Cir. 1999).

[54] *See, e.g.*, Compl., Sandy Point Dental PC v. Cincinnati Ins. Co., No. 1:20-cv-02160, ¶ 22 (N.D. Ill. Apr. 6, 2020); Compl. for Declaratory J., Ind. Repertory Theatre, Inc. v. Cincinnati Cas. Co., No. 49D01-2004-PL-013137, ¶ 24 (Ind. Super. Ct. Apr. 3, 2020); Compl., Big Onion Tavern Grp. v. Soc'y Ins., Inc., No. 1:20-cv-02005, ¶ 10 (N.D. Ill. Mar. 27, 2020); Compl. for Declaratory J., French Laundry Partners, LP v. Hartford Fire Ins. Co., ¶ 30 (Cal. Super. Ct. Mar. 25, 2020); Pet. for Declaratory J., Oceana Grill v. Certain Underwriters at Lloyd's, London, No. 20-02558, ¶ 15 (La. Civ. Dist. Ct. Mar. 16, 2020).

would not have needed to include them.[55] Moreover, the insurance carriers could have included virus exclusions, but if they did not, they did so intentionally, expecting that coverage would be provided for coronavirus-related business interruption losses.[56]

Even with policies that do contain virus exclusions, coverage may still be provided for coronavirus-related losses. Policy wording must be considered. For example, some insurers have claimed that a Biological or Chemical Materials Exclusion bars coverage. This exclusion states:

> It is agreed that this Insurance excludes loss, damage, cost, or expense of whatsoever nature directly or indirectly caused by, resulting from, or in connection with the actual or threatened malicious use of pathogenic or poisonous biological or chemical materials, regardless of any other cause or event contributing concurrently or in any other sequence thereto.

Construing this exclusion narrowly, as the law requires, this exclusion does not apply to typical coronavirus losses. Even if coronavirus is a "pathogenic or poisonous biological or chemical material," there was no "actual or threatened malicious use," so the exclusion cannot apply. The precise wording of virus "exclusions" is thus critical. Many exclusions cited by insurers simply do not apply.

Lastly, even policies with explicit virus exclusions may not preclude coverage. Pursuant to the doctrines of regulatory estoppel and regulatory fraud, if insurance carriers misrepresent coverage when filing for approval of policy exclusions from state regulators, they may be estopped or prevented from later taking a contrary position.[57] The insureds in *1 S.A.N.T.* have made this argument, claiming that their insurers misrepresented coverage when they applied for regulatory approval of virus

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[55] *See, e.g.*, Br. in Supp. of Mot. for Partial Summ. J., Ind. Repertory Theatre, Inc. v. Cincinnati Cas. Co., No. 49D01-2004-PL-013137, at 10–11, 30 (Ind. Super. Ct. June 25, 2020); Compl., Sandy Point Dental PC v. Cincinnati Ins. Co., No. 1:20-cv-02160, ¶ 22 (Apr. 6, 2020); Compl., Big Onion Tavern Grp., LLC v. Soc'y Ins., Inc., No. 1:20-cv-02005, ¶ 9 (N.D. Ill. Mar. 27, 2020).

[56] *Id.*

[57] *See, e.g.*, Wysong & Miles Co. v. Emp'rs of Wausau, 4 F. Supp. 2d 421, 427 (M.D.N.C. 1998).

exclusions.[58] Specifically, when the insurers sought approval for the virus exclusion in 2005,[59] they represented to state regulators that property policies were not "a source of recovery for losses involving contamination by disease-causing agents," meaning that adding a virus exclusion would not reduce coverage because the policies did not cover virus-related losses anyway.[60] Instead, they asserted that the virus exclusion would merely "clarify" that property policies do not cover virus-related losses.[61] According to the *1 S.A.N.T.* policyholders, when the insurance industry sought approval for the virus exclusion in 2006, "courts had repeatedly found that property insurance policies covered claims involving disease-causing agents, and had held on numerous occasions that any condition making it impossible to use property for its intended use constituted 'physical loss or damage to such property.'" [62] Because insurers made these misrepresentations during the approval process, they were able to reduce coverage provided without lowering premiums.[63] Due to this misconduct, insurance carriers should be stopped from enforcing virus exclusions.[64]

The doctrines of regulatory estoppel and regulatory fraud may apply with respect to virus exclusions, as they have in the past with respect to "sudden and accidental" pollution exclusions in Commercial General Liability (CGL) policies, as discussed below.[65]

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[58] *See,* Class Action Compl., 1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc., No. 2:09-mc-02025, ¶¶ 47–54 (W.D. Pa. June 11, 2020); *see also* Christopher C. French, *COVID-19 Business Interruption Losses: The Cases for & Against Coverage*, 27 CONN. INS. LAW J. 1, 28–29 (2020).

[59] Insurance Services Office ("ISO") Form CP 01 40 07 06.

[60] Class Action Compl., 1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc., No. 2:05-mc-02025, ¶¶ 49–50 (W.D. Pa. June 11, 2020).

[61] *Id.* at ¶ 51.

[62] *Id.* at ¶ 52.

[63] *Id.* at ¶¶ 53–54.

[64] *Id.* at ¶ 53.

[65] *See, e.g.*, Morton Int'l, Inc. v. Gen. Accident Ins. Co. of Am., 629 A.2d 831 (N.J. 1993); Sunbeam Corp. v. Liberty Mut. Ins. Co., 781 A.2d 1189 (Pa. 2001); Joy Techs., Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493 (W.Va. 1992).

2. Pollution Exclusions Do Not Apply

Finally, insurers have also denied coverage on the ground that pollution exclusions bar coverage for coronavirus-related losses. A typical pollution exclusion bars coverage for the release, discharge, dispersal, seepage, migration, release, or escape of "pollutants." Many policies define "pollutants" to include "any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste." Some insurance carriers have argued that coronavirus is a "pollutant" and thus excluded by the Pollution Exclusion.[66]

Insurers have taken contrary positions on whether coronavirus is a pollutant. For environmental policies, several prominent insurers have argued that coronavirus is not a pollutant, because viruses are not traditional pollutants, and are thus not contemplated within the irritant or contaminant language. These same insurers argue that the same language, when used in "all risks" policies, contemplates coronavirus as a pollutant.

Several courts have held that living, organic matter such as viruses defy description as being either "solid," "liquid," "gaseous," or "thermal" pollutants—terms typically reserved for inorganic matter, such as the enumerated examples of "smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste" within the definition of "pollutants."[67] Furthermore, the terms "irritant" and "contaminant" are "virtually boundless," as no substance of chemical in existence would not irritate or damage some person or property.[68] Construing pollution exclusions narrowly and against the insurers, as the law requires, pollution exclusions should not apply to bar coverage for coronavirus-

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[66] *See, e.g.*, Defs. Certain Underwriters at Lloyd's, London's Mot. to Dismiss the Compl. & Inc. Mem. of Law, El Novillo Restaurant v. Certain Underwriters at Lloyd's, London, No. 1:20-cv-21525, pp. 22–26 (S.D. Fla. June 22, 2020) (Underwriters asserted that "COVID-19 undoubtedly qualifies as a 'pollutant' and/or 'contamination.'").

[67] *See, e.g.*, Motorists Mut. Ins. Co. v. Hardinger, 131 F. App'x 823, 828 (3d Cir. 2005) (Ambro, J., concurring); Keggi v. Northbrook Prop. & Cas. Ins. Co., 13 P.3d 785, 790 (Ariz. Ct. App. 2000).

[68] Keggi, 13 P.3d at 790.

related losses.[69] Furthermore, if pollution exclusions truly barred coverage for viruses, bacteria, and other microorganisms, insurers would not have felt the need to subsequently add virus exclusions to their policies—but they did. The insurance industry's subsequent conduct (rather than its current protestations), in scurrying to add virus exclusions to their policies, reveals that pollution exclusions do not bar coverage for property damage caused by viruses.

Conclusions

2020 has resulted in widespread tragedy and financial ruin for many policyholders. Several companies have turned to their insurers to cover their losses due to the COVID-19 pandemic, only to receive either resounding denials of coverage or a colossal runaround in their hour of need.

Policyholders pursuing coronavirus claims should take three important factors into account. The first and most important is the policy language. For example, with respect to the insurance carriers' main coverage issue, that coronavirus does not physically injure property, no common policy language supports their argument. With policies that insure "all risks of physical loss or damage to property," a plain reading of coverage is that they cover both all risks of physical loss and all risks of damage. Many policies, though, make this even more clear, stating that they cover "all risks of physical loss of or damage to property." In these instances, there can be no doubt as to the two prongs of coverage, namely (1) risks of physical loss of property, and (2) risks of damage to property. Similarly, many coverage grants, like ingress/egress, contingent business interruption and civil authority operate independently of traditional PD and BI coverage grants. Unless these provisions specifically state that they require damage to property, no such injury is required.

The second issue for policyholders to consider is case law. That law varies from jurisdiction to jurisdiction. Pursuant to that law, some states will likely invalidate virus exclusions, but other states may not. Similarly, some states expressly hold that pollution exclusions are limited to traditional kinds of environmental pollutants, whereas other

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[69] At the same time, environmental/pollution policies—which specifically cover "pollutants," including "irritants" and "contaminants"—should also provide coverage for coronavirus losses, due to different canons of construction. Unlike exclusions, coverage provisions are construed broadly and in favor of the policyholder. *See, e.g.*, Flores v. Allstate Ins. Co., 819 So. 2d 740, 744 (Fla. 2002).

states have not addressed the issue. And finally, some courts have created policy language in favor of insurers that does not exist in the policy. Before filing a claim, policyholders need to know what forums may apply and what the law of those forums says with respect to every issue presented.

The third issue is how facts are presented and plead. Insurers are now asking for taped interviews. This is not required, yet some policyholders have agreed to such interviews. We obtained an outline for such COVID-19 interviews from a major insurance carrier, and it is clear that the questions to be asked are designed to support denial of COVID-19 claims. Similarly, some policyholders have incorrectly plead their claims, making them unnecessarily susceptible to dismissal. In many situations, policyholders should plead that the presence of coronavirus has damaged their property. Proof of damage should also be considered. Records of positive coronavirus tests need to be kept, and the taking of swipe samples should be considered.

Finally, policyholders should seriously evaluate their claims based on policy language, the law, and applicable facts. This is the best approach, and it is the approach taken by most sophisticated policyholders. What an insurance carrier says about a claim has no bearing on coverage. Nor does the opinion of an insurance broker. Although there are some overlapping issues, each claim is different, and each claim needs to be independently evaluated. In the end, not all cases will find coverage, but, if policy language and the law is followed, many will.

Mark Miller is a co-founder of Miller Friel, PLLC. For the last 25 years, Mr. Miller has practiced exclusively in the area of insurance recovery law, handling complex insurance claims for some of the world's most well-known companies. His experience ranges from settling some of the largest property damage and business interruption claims in the world, to litigating coverage for some of the biggest crime insurance losses ever suffered. Mr. Miller was a speaker at PLI's **Good News About Insurance Coverage for COVID-19** and **Cyber Insurance: What Case Law Teaches Us About Coverage** programs.

Tae Andrews litigates complex insurance disputes in both state and federal courts. He has represented a wide range of corporate policyholders in multiple industries, including retail clothing, tax, food and beverage, technology, banking, and project finance. Mr. Andrews' practice focuses on advising corporate policyholders on insurance coverage issues arising under commercial general liability, directors and officers, professional liability/errors and omissions, excess, umbrella, and others.
