

## Client Alert

# CORONAVIRUS Business Interruption Insurance Key Considerations for Commercial Property Policyholders

In recent weeks, we have seen that strong and proactive insurance coverage analysis can be more important than ever. We have advised a number of clients on how to advocate for and maximize their potential insurance recoveries relating to the coronavirus crisis under several forms of coverage. We have found that each client's situation is unique, both because they are experiencing different types of losses and because their insurance policies contain differing coverage provisions and exclusions.

In our experience, the question is not whether to file a claim for insurance, but how best to present that claim to maximize the recovery and/or the chances of ultimately persuading an insurer (or a court) that a loss is covered. While we will not be surprised to see many coverage denials over the coming months, there will often be strong arguments why the courts should reject insurers' positions and require them to pay significant coronavirus-related claims in a number of cases.

It is critical for policyholders to take steps now to ensure they preserve their claims. That is true even for policyholders that are not eager to be on the front lines of the litigation that may ensue.

### Principal Sources of Coverage

One of the principal sources of insurance coverage will be in commercial property policies, which, broadly speaking, coverage policyholders for damage to and loss of use of their property and for loss of business income from such damage. In our experience, there are three particularly important areas of potential coverage under these policies, though these are not necessarily exclusive.

#### 1. Direct Physical Loss

The first area in which coverage may be triggered is for direct losses from actual damage to property and the resulting lost income and/or additional expenses from those physical losses. Coverage for direct losses from physical damage to property can offer substantial dollar recovery. The recoverable losses include lost business income and extra expenses resulting from the damage and can be recovered for up to one year or possibly more, depending on policy language.

There is a strong argument that the presence of the coronavirus at a facility constitutes "direct physical loss" for purposes of triggering typical property damage and business interruption coverage clauses. For example, there are multiple cases that have found physical loss as a result of odors and fumes rendered a property unusable, giving rise to coverage. *See, e.g., W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (gasoline around building and vapors in building gave rise to direct physical loss); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993) (odors caused by former tenant constituted physical loss); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 803 (N.H. 2015) (odors caused by neighbor constituted physical loss); *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, 759 F. Supp. 2d 822, 833 (E.D. La. 2010) (gases from drywall constituted physical loss); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934, at \*6 (D.N.J. Nov. 25, 2014) (presence of ammonia gas constituted physical loss).

In the context of biological agents, one court found that the presence of bacteria (in that case, e. coli) may constitute a physical loss (the court held that it was a question for the jury to resolve). *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826-27 (3d Cir. 2005). California courts have held that the presence of “a harmful substance” (in that case, asbestos) in a building constitutes “physical injury . . . to tangible property” for purposes of general liability coverage, and we would expect a court to adopt similar reasoning under a first-party property policy. *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 94, 98 (1996). Another California court held that “physical loss” can occur even if the property was not physically damaged. *American Alternative Ins. Corp. v. Superior Court*, 135 Cal. App. 4th 1239, 1246 (2006) (physical loss includes the government’s seizure of property).

There is also a line of case law that suggests that there is coverage for losses whenever there is a *risk* of the coronavirus being present. The leading case is from New Jersey, which held that a policy covering “risks of direct, physical loss” provided coverage relating to expired consumer products that had become unsalable. The court emphasized that the policy provisions covering the “risk[]” of loss required the insurer to cover the loss even though the products did not suffer actual physical damage. *Customized Distribution Services v. Zurich Ins. Co.*, 373 862 A.2d 560, 565 (N.J. App. Div. 2004). This case may be persuasive outside New Jersey, and there is even a chance of persuading a court that New Jersey law applies if the policyholder, insurer, and/or any of the affected facilities are located in New Jersey. This case also demonstrates the importance of the particular wording used in a policyholder’s policy.

## 2. Civil Authority Business Interruption

The second area of coverage is “civil authority” coverage for loss of income that resulted if any government authorities have effectively shut down parts of operations through “shelter-in-place” or similar orders. These provisions vary significantly. Some policies provide coverage only if an adjacent or nearby property suffered actual property damage. Other policies provide coverage so long as any property – anywhere – suffered damage, so long as the government responded by barring access to one or more of the policyholder’s properties. Some policies even provide coverage whenever the government bars access to the policyholder’s property, regardless of whether any other properties suffered physical damage. The time period for this coverage varies from policy to policy, and is often limited to 30 days or fewer. In submitting a claim under “civil authority” coverage, it is important to gather the relevant information that establishes coverage, such as copies of the relevant government orders and documentation of the reasons for the closures of the affected properties.

## 3. Contingent Business Interruption

Third, if the virus has been found at any direct customers’ or suppliers’ properties, there may be “contingent” business interruption coverage for those losses. These type of claims may not immediately be apparent. It can be helpful to get input from individuals with knowledge about the affected customers and suppliers to help determine whether any of those third parties experienced losses that might qualify for this type of coverage.

## Other Coverage

These are not the only types of coverage that may be available. Depending on the circumstances, a policyholder may have a claim under a commercial property policy’s “ingress and egress” coverage, which provides business interruption coverage if an insured property cannot be physically accessed (such as, for example, a store located in a mall that has closed down). We have found that it can also be valuable to review additional policies other than a commercial property policy. Affected property can

also be covered under other types of policies, such as an inland marine policy or an environmental policy.

## Virus Exclusions

Some policies contain exclusions for microbes, viruses and/or diseases. We have found that the wording of these exclusions can vary significantly from policy to policy, and when a policy contains such an exclusion, it is critical to analyze the language carefully and establish the strongest factual and legal arguments for obtaining coverage. For example, policies that exclude coverage for microbes or bacteria, but do not specifically include viruses, may not apply to the coronavirus.

And even those policies that exclude, by name, viruses, may still provide coverage. A number of the “virus” exclusions were introduced by one or more standard endorsements (there was more than one variant) drafted by the Insurance Services Office (“ISO”). In a July 6, 2006 ISO Circular submitted to some state regulators, the ISO characterized the endorsement as merely being on par with the pollution exclusion, which gives policyholders a basis for arguing for a very narrow construction of the virus exclusion (as pollution exclusions are typically narrowly construed). Depending on the specific policy language at issue, it may be possible to highlight the specific evidence that brings the claim within the policies’ coverage.

## Claim Deadlines

Virtually all property/business interruption policies require policyholders to submit claims in a timely fashion, typically no later than 30 or 60 days after suffering a loss. When the loss is ongoing (as with current coronavirus-related losses), there are strong arguments why the deadline should not apply until after the loss event has run its course. But, we can imagine that some insurers will take the position that claims should be filed within the stated time period after the *inception* of the loss. The strength of this argument may depend on the specific wording of the policy. Ultimately, the best approach is to submit claims “early and often” to avoid any disputes about the timeliness of the claim.

## Loss Accounting

It is important to focus on the relevant coverage clauses when preparing a claim. We have found that it is helpful to establish separate accounting protocols early in the process to capture the losses that will comprise a business interruption insurance claim. Otherwise, it can be difficult to reconstruct which costs and lost profits are tied to the business interruption.

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