

Commercial Property Insurance Coverage and Coronavirus

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No modern disease has dominated the news and affected the world-wide economy on such a scale as coronavirus (COVID-19). Coronavirus's impact is widespread across almost all business sectors. Governments are shutting down whole regions and cities to quarantine and contain the outbreak. Workers are being urged to stay home for weeks, rather than days, to avoid contagion or spread of the disease.

These prophylactic and reactive governmental actions, and individual actions taken by businesses, are having a huge impact on businesses' bottom lines. The ripple effects of shutdown factories and an absent workforce are being felt across many different business sectors. The disruption of supply chains from Chinese factories, for example, is affecting businesses like [Apple](#), Microsoft, Toyota, and Samsung. [Pharmaceutical](#) companies are also facing potential shortages due to disruptions in the drug supply chain. Hospitality and travel-based industries such as [airlines](#), [hotels](#), and car rentals, not to mention local economies driven by tourism, are also facing cancellations and ongoing losses as a result of this disease. Many companies have restricted business travel. Conferences, festivals, marathons, and other events have been cancelled. Even more significantly, workers and managers are concerned with the potential exposure to this virus. People are contacting their employers, looking for alternative work arrangements. Schools and daycares may close for extended periods of time, leaving [working parents scrambling](#) for alternative child care.

Based on these substantial economic challenges, companies will undoubtedly look for ways to recoup or at least minimize their business income losses. Many may look to their property insurance policies for assistance. But unless the policies contain specific provisions for non-physical damage coverage, these companies are unlikely to find relief within the four corners of their policies.

A. Commercial Property Insurance Policies' Business Interruption Coverage is Tied to Insured Physical Property Damage

The policy language is key. While articles that provide a general analysis are useful, ultimately, the specific policy language at issue, in concert with the facts, will determine whether coverage is triggered by coronavirus and its impacts.

Generally, most property policies that offer business interruption coverage require a causal connection between insured physical loss or damage and the loss of income.

For example, the ISO commercial property business income form generally states:

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by **direct physical loss of or damage to property** at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations...

The issue both insurers and insureds will face, therefore, is whether the insured's lost business income was the direct result of physical loss or damage. This will be a key issue in considering coverage for coronavirus-related claims. Coronavirus-related losses that businesses are experiencing to date are typically due to causes *other than physical property damage* – e.g., people are staying home from work – they are not producing necessary goods and services for other businesses, they are not traveling, and they are not purchasing goods and services to the same degree. None of these causes of economic loss are related to physical damage to insured property.

1. What is insured physical damage?

Creative policyholders and their attorneys may try to link the virus and physical property damage. As always, the specific policy language at issue is key and should be thoroughly analyzed in the event an insured submits a claim under their property insurance policy arising out of any coronavirus event. Ultimately, the key factual issue is whether the insured property was actually physically altered and/or affected by the virus.

a. Physical loss or damage generally requires an alteration of the property.

Importantly, there appears to be a split in jurisdictions as to what actually constitutes “physical loss or damage.” Some courts restrict their analysis to require tangible changes resulting in material damage to property.¹ Others more liberally find “physical loss” due to changes that cannot be seen or touched as long as there is a demonstrable alteration of the insured property.²

One court analyzed whether property exposed to high humidity, mold, and mildew from wet air constituted direct physical loss or damage.³ The court determined there must be a distinct and demonstrable physical change to the property necessitating some remedial action to demonstrate physical loss or damage. “The recognition that physical damage or alteration of property may occur at the microscopic level does not obviate the requirement that physical damage need be distinct and demonstrable. In the methamphetamine odor damage cases, the physical damage is

¹ *Universal Image Productions, Inc. v. Chubb Corp.*, 703 F.Supp.2d 705, 710 (E.D. Mich. 2010) (holding that even though mold and bacteria permeated a floor, because the entire premises did not need to be vacated, and the insured could not meet its burden to show it suffered any structural or any other tangible damage to the property, there was no direct physical loss to property); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App.3d 23, 41 (Oh. Ct. App. 2008) (holding that mold staining on exterior wood siding did not rise to the level of “physical injury” because it was only temporary and could be cleaned by using a solution of bleach and trisodium phosphate. The court concluded, “the presence of mold did not alter or otherwise affect the structural integrity of the siding. The experts all agreed that the mold was present only on the surface of the siding and could be removed without causing any harm to the wood. Absent any specific alteration of the siding, the [insureds] failed to show that their house suffered any direct physical injury as required by the homeowners’ policy.”).

² In *Mellin v. Northern Security Ins. Co.*, 167 N.E. 544 (N.H. 2015), the New Hampshire Supreme Court found that cat urine odor emanating from a neighboring condominium constituted “physical loss.” The court determined that an insured may suffer physical loss “from a contaminant or condition that causes changes to the property that cannot be seen or touched.” *Id.* at 549. Importantly, however, even the *Mellin* court recognized that “physical loss” should not be interpreted overly broadly. It concluded that the term “physical loss” requires a distinct and demonstrable alteration of the insured property.” *Id.* at 550. For the *Mellin* court, this included changes perceived by the sense of smell.

³ *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. CIV. 98-434-HU, 1999 WL 619100, at *7 (D. Or. Aug. 4, 1999).

demonstrated by the persistent, pervasive odor. In the absence of such odor, no physical damage could be found. **The mere adherence of molecules to porous surfaces, without more, does not equate to physical loss or damage.**⁴

Here, policyholders are likely to argue that the physical impact of a virus from an infected person's coughing or sneezing physically damages property. But some courts appear to reject the notion that a simple sneeze or cough physically alters or changes property such to cause "physical loss or damage." The fact that the virus may be cleaned without essentially altering the property is evidence that there is no initial damage. And the insured bears the burden to meet the threshold issue that there is physical loss or damage.⁵ Nevertheless, it is not wholly clear whether all jurisdictions would follow this analysis and the facts in each case may be determinative.

b. The property must actually be physically affected by coronavirus.

While policyholders will use cases discussing intangible losses to property such as odors and gases to support their claim that property potentially affected by the virus is physically damaged, it is important to be aware which jurisdiction's law applies and the facts of the case. Regardless, courts appear to universally require the insured's property to be, in some way, physically affected.

Therefore, there needs to be investigation to confirm that the virus did, indeed, touch the property. Courts **actually require physical damage, rather than the supposition of damage.** Courts have rejected insureds' claims for loss when a federal authority prohibits import due to suspected contamination without a showing of actual physical damage.⁶ Courts recognize that although property may be *treated as if it were physically contaminated* by disease and lost its function, insurance policies specifically require a physical loss. To characterize an insured's inability to transport its product across the border and sell the product in the United States as direct physical loss to property, without showing actual damage, renders the word "physical" meaningless.⁷

Therefore, to the extent a company may seek damages because product may come from a region affected by coronavirus, or even from a location where an infected person worked, without a demonstration of physical damage (*i.e.* confirmation of coronavirus's presence), it should not be covered.

Notably, the virus is thought to be spread from person-to-person through droplets (*i.e.* sneezes and coughing). While there may be spread from contact with infected surfaces or objects, [this is not considered the primary way the virus is spread](#). Therefore, whether a company that shuts down to clean surfaces potentially impacted by the virus actually sustained physical loss or damage, rather than just suspected damage, is an important consideration.

⁴ *Id.* (emphasis added).

⁵ *Id.* (recognizing it is the insured's burden to show that a covered loss has occurred and the property was physically damaged).

⁶ *Source Food Technology, Inc. v. U.S. Fidelity and Guar. Co.*, 465 F.3d 834 (8th Cir. 2006).

⁷ *Id.* at 838.

c. Other policy hurdles.

Even if coronavirus contamination could be considered physical damage to property, other policy terms and conditions may limit or preclude coverage.

First, an insurer is typically only liable for the lesser of the cost to repair or replace the lost or damaged property. The question is, then, what is the cost to remediate coronavirus from the property? Is it simply washing down surfaces with soapy water and testing? While the information concerning remediating the virus from surfaces is still new and likely developing, most experts agree that cleaning surfaces with [soap and water, bleach, or vinegar will kill the virus](#). Moreover, there is evidence that the virus [only lasts on surfaces between 2 hours and nine days](#). In fact, in at least one case, an office in [Kuala Lumpur](#) was closed for thorough cleaning following the confirmation of infection of an employee. That closure, however, was expected to last only one day.

Other coverage questions are also implicated. For example, most policies tie deductibles to the number of occurrences. How many occurrences of the virus may be triggered? Is it an occurrence each time an infected person sneezes or distributes particles of the virus on property? Similarly, if the property is cleaned, and someone re-infects the location, is that a separate occurrence triggering a new deductible?

Another factor is that business interruption coverage is tied to a policy's period of restoration (aka period of indemnity or period of liability). In some ISO forms, the period of restoration has a waiting period, such as 72 hours, before coverage begins. And the period lasts only as long as it *should* take to repair the physical loss or damage using due diligence and dispatch. If the "physical damage" is the particles of virus on surfaces of a building, how long should it reasonably take to use soap and water, or bleach, to clean those surfaces?

In conjunction with the insured's obligation to show actual physical damage, these other examples demonstrate that an insured will face numerous hurdles to recovery under a typical property policy.

2. Exclusions may apply to preclude coverage.

If the insured can demonstrate that product or property was damaged by coronavirus, policies may also contain exclusions that preclude coverage.

Typically, policies exclude coverage for contamination and pollution. Many such policies include the words "bacteria" and "virus" in those provisions. If the policy explicitly excludes viruses, "damage" arising from coronavirus is not covered.

The contamination exclusion may also apply to preclude coverage. The language of the policy and the specific exclusion will be important. Also important is whether the virus is actually present to cause damage. For example, if an insurer seeks to rely on the contamination exclusion to preclude

coverage for “damage” caused by the coronavirus, courts may require the insurer to demonstrate the property was actually contaminated by the virus.⁸

Some courts are loathe to expansively apply the contamination exclusion. They apply the term “contamination” contextually, and find it is a question of material fact for the jury to determine its ultimate meaning.⁹ Many courts have expressed concern on the seemingly “limitless” application the term “contamination” may encompass. Therefore, the context of the contamination exclusion as a whole must be considered when applying it to coronavirus.

Accordingly, certain exclusions may apply to preclude claims for alleged property damage from coronavirus, but those exclusions must be analyzed closely in the context of the policy and the facts.

B. Some Special Coverages and Policy Provisions May Have Non-Physical Damage Coverage Extensions

Typical property insurance coverage forms require the property to actually sustain physical loss or damage. Notably, however, some policies have expanded coverage to include non-physical types of loss. And certain insurance programs write coverage for cancellations specifically relating to epidemics.

A prudent insurer should look for endorsements or provisions within a policy that carve out and cover non-physical damage. This may include crisis management coverage, **coverage for interruption by communicable disease**, or cancellation of bookings coverage.

These provisions must be reviewed carefully to determine their breadth, including whether they may be extended to cover upstream or downstream losses due to closure of supplier or customer locations due to fear of infectious diseases. Many of these provisions make clear that they apply when there is actual, not suspected, presence of communicable diseases at the insured’s location.

These provisions also often have limitations such as sublimits and waiting periods that may affect the insured’s claim. Nevertheless, the provisions should be considered in the context of the policy as whole to determine whether coverage exists and how the policy responds.

C. Specific Business Interruption Provisions Require the Income Loss to Directly Result from Insured Physical Loss or Damage

Property policies often provide business interruption coverage arising out of damage to the insured’s property. If there is no direct damage to the insured’s property due to the virus, however, the insured may look to extensions of coverage for indirect losses arising from the virus. This policy language must also be closely reviewed, however, because these provisions typically also require physical loss or damage to property to trigger coverage.

⁸ *Duensing v. Traveler’s Companies*, 257 Mon. 376, 849 P.2d 203 (Mont. 1993).

⁹ *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 45 (2d Cir. 2006).

1. There must be a causal connection between the property damage and the business interruption loss.

If an insured seeks business interruption coverage due to “damage” at its property arising from coronavirus, the insured’s loss of business must still be **causally connected** to the physical loss or damage. For example, an insured’s business may sustain losses due to causes other than insured physical loss or damage to property, such as a lack of workers, a decline in tourism, or a reduction in aggregate demand for goods and services as people stay home and businesses close. Property policies provide coverage for business interruption losses directly resulting from insured property damage. Courts interpreting the language “directly resulting from” as requiring the insured to demonstrate that there is a causal link between insured property damage and the claimed time element loss.¹⁰

Therefore, to the extent there are other non-covered causes of an insured’s loss, those must be assessed and considered in the evaluation of any claim. Losses that are not causally connected to physical loss or damage to the insured’s property may not be covered.

2. The Period of Restoration may limit coverage.

Moreover, property policies do not provide business interruption coverage for an unlimited period of time following damage. Rather, business interruption coverage is limited to the Period of Restoration (also called Period of Indemnity and Period of Liability). Policies typically define a Period of Restoration as:

the period of time that:

- a. begins with the date of accidental direct physical loss caused by an insured loss at the described premises; and
- b. ends on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality.

¹⁰ See, e.g., *Fresh Express Inc. v. Beazley Syndicate 2623/623 at Lloyd’s*, 199 Cal.App.4th 1038, 1056, 131 Cal.Rptr.3d 129 (Cal. App. 2011) (rejecting an insured’s claim for business loss due to the FDA’s Advisory to consumers regarding potential E. coli in spinach and the subsequent reduction in the insured’s earnings because there was no causal link or nexus between the business loss and an event covered by the policy); *Commonwealth Enterprises v. Liberty Mut. Ins. Co.*, 101 F.3d 705, 1996 WL 660869 (9th Cir. 1996) (rejecting the insured’s claim for lost business income under California law, even though a fire initially caused the insured’s interruption, because that interruption was primarily caused by the discovery of asbestos contamination, not fire damage); *Syufy Enterprises v. Home Ins. Co. of Indiana*, No. 94-0756, 1995 WL 129229, * 2 (N.D. Cal. 1995) (excluding coverage for business interruption loss due to curfews following the Rodney King trial because the loss was not a direct result of damage to or destruction of property and, therefore, the insured could not demonstrate the requisite causal link necessary for involving coverage); *Pacific Coast Eng. Co. v. St. Paul Fire & Marine Ins. Co.*, 9 Cal.App.3d 270, 274, 88 Cal.Rptr. 122 (Cal. App. 1970) (finding that a property policy only provides business interruption coverage for losses directly resulting from interruption of the operations at the insured’s property, not merely from the interruption of the work being done at the insured’s location at the time of the loss).

Courts interpret this language to mean “the time by which an insured acting ‘as quickly as possible’ would have completed repairs to its property. This is a theoretical calculation reflecting ‘the length of time required with the exercise of due diligence and dispatch to rebuild, repair or replace the damaged premises. Where the actual restoration period exceeds the theoretical period or where the premises are not restored, the theoretical period becomes the computation period.’”¹¹

Therefore, if the business interruption coverage is tied to the theoretical period of time it should take an insured, acting with due diligence and dispatch, to clean the property to remove traces of coronavirus, the Period of Restoration is likely to be relatively short. Companies may experience prolonged periods of delays, potential shutdowns, and loss of productivity due to employee illness or other issues unrelated to physical damage to their property that do not fall within coverage or the Period of Restoration.

3. Civil authority coverage generally should not apply.

Because many companies are not likely to have a direct claim for damage to their property, they may look to other coverages in their business interruption policies. The most obvious type of business interruption coverage that policyholders may look to in making a claim arising out of coronavirus is their business interruption civil authority coverage.

Civil authority coverage generally does not require physical damage to the insured’s property. Rather, the coverage is based on the interruption of the insured’s business, when an order of civil or military authority impairs access to the insured’s property as a result of insured physical damage. Therefore, coverage is generally contingent on actual physical property damage, rather than fear of contagion.

Many civil authority provisions are reactive and do not provide coverage for prophylactic measures. Courts addressed this issue following 9/11 and rejected claims arising from the FAA’s closure of airspace.¹² One court determined the government’s order to shut down all air traffic was not the direct result of property damage, but rather was “based on the fear of future attacks.”¹³ “The Airport was reopened when it was able to comply with more rigorous safety standards; the timetable had nothing to do with repairing, mitigating, or responding to the damage caused by the attack on the Pentagon.”¹⁴ Based on this, the court determined the insured’s loss was not the “direct result” of damage to adjacent premises.

¹¹ *G&S Metal Consultants, Inc. v. Cont'l Cas. Co.*, 200 F. Supp. 3d 760, 769 (N.D. Ind. 2016). See also *Steel Products Co. v. Millers Nat. Ins. Co.*, 209 N.W.2d 32, 38 (Iowa 1973); *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 398 (2d Cir.2005); *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Properties, LLC*, No. 01 CIV. 9291, 2005 WL 827074, at *3–4 (S.D.N.Y. Feb. 15, 2005) (collecting cases).

¹² *United Air Lines, Inc. v. Insurance Co. of the State of Pennsylvania*, 439 F.3d 128 (2d Cir. 2006).

¹³ *Id.* at 134.

¹⁴ *Id.* at 135.

In locations subject to damaging weather events, such as hurricanes, courts have applied policies as written, and rejected insureds' attempts to seek coverage when orders are issued before property damage occurs.¹⁵ One court noted:

The Policy's plain language requires that the civil authority prohibit access as a "direct result of direct physical loss or damage to property" within one mile of the [insured's] premises. The Policy does not insure against impairment of operations that occurs simply because a civil authority prohibits access unless the civil authority order meets the requirements of the policy—one of those requirements is a nexus between the order and certain physical damage. Reading the Civil Authority section as a whole, it is clear that it was not written with the expectation that a civil authority order prohibiting access would issue before the property damage that forms the basis of the order actually occurs. The direct nexus between the damage sustained and the order that the policy requires suggests that the Policy was designed to address the situation where damage occurs and the civil authority subsequently prohibits access.

Accordingly, unless the insured can prove that an order of civil authority was directly due to property damage at or near the insured's location, the Policy's civil authority provision should not apply.

4. Contingent BI coverage generally should not apply.

Another potential avenue for coverage that an insured may look to is an insurance policy's contingent business interruption provision ("CBI"). CBI insures against a company's lost business in the event the insured's customer or supplier sustains insured physical loss or damage at their property. A typical provision provides:

This policy...is extended to cover the actual loss sustained by the Insured resulting from the necessary interruption of the business conducted by the Insured, whether partial or total, caused by loss, damage or destruction covered herein...to:

Property that directly or indirectly prevents a supplier of goods, services or information to the Insured from rendering their goods, services or information or property that directly or indirectly prevents a receiver of goods, services or information from the Insured from accepting or receiving the Insured's goods, services or information.

Therefore, if a business sustains a loss because its supplier is a factory in China, which is shut down due to coronavirus, then that business may attempt to seek coverage under the CBI provision.

¹⁵ *Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP v. Chubb Corp.*, No. CIV.A. 09-6057, 2010 WL 4026375, at *3 (E.D. La. Oct. 12, 2010).

But like the civil authority coverage, the supplier's shut down generally must be caused by insured physical loss or damage.

The insured bears the burden to show that "the claimed business loss was caused by damage to property that 'directly or indirectly prevent[ed]' a client from accepting or receiving [the insured's] services."¹⁶ If the insured cannot identify any interruption of its business due to property damage to a customer or supplier, there likely is no coverage.

Notably, it may be difficult to determine the reason behind the shutdown of suppliers' or customers' locations. Whether those shutdowns are due to actual physical damage, or (as is more probable) to quarantine and contain the spread of the virus from person-to-person, the insured bears the burden to produce evidence triggering coverage.

Even if the insured may be able to demonstrate there was damage at a supplier's or customer's location, other policy provisions may also affect coverage. Many policies have sublimits for CBI coverage, waiting periods, and high deductibles. These factors also must be considered when analyzing any CBI claim.

5. Ingress/Egress.

Some policies have extensions of coverage for Ingress/Egress, which covers the insured's loss due to the necessary interruption of the insured's business due to prevention of ingress to or egress from the insured's property, whether or not the insured's property was damaged. Again, insureds seeking coverage under their policies' ingress/egress provisions must show that their property cannot be accessed due to actual insured physical loss or damage.¹⁷ With respect to coronavirus claims, it may prove challenging to demonstrate that any ingress is prevented due to physical damage, rather than fear of bodily injury due to person-to-person contagion.

6. Other BI coverages.

Other typical BI coverages in policies may also be examined for coverage. For example, some policies provide coverage for Logistics Extra Costs or Attractive Property Coverages. Like civil authority, CBI, and Ingress/Egress provisions, however, these provisions generally tie the loss of income to insured physical loss or damage. Therefore, the insured typically still must prove that its lost income is due to actual physical damage. As discussed, the insured will likely have difficulty meeting this burden.

D. Conclusion

Businesses are unquestionably being affected by coronavirus. Companies are suspending travel for their employees. Some employees are being urged to work from home. Even the CDC is

¹⁶ *Arthur Andersen LLP v. Fed. Insurance Co.*, 416 N.J. Super. 334, 349, 3 A.3d 1279, 1288 (App. Div. 2010).

¹⁷ *See e.g. City of Chicago v. Factory Mut. Ins. Co.*, No. 02 C 7023, 2004 WL 549447, at *4 (N.D. Ill. Mar. 18, 2004) (holding "upon careful interpretation of each clause of the Ingress/Egress policy within the context of the contract as a whole, it becomes clear that the provision insures against business interruptions due to the prevention of ingress to or egress from the City's airports, provided that the prevention is the result of direct physical damage to property that is at or within 1,000 feet of the airport premises.").

recommending extended at-home stays when individuals suspect infection with the disease. The entire country of Italy is effectuating quarantine and curfew measures.

All of these actions will impact productivity and companies' bottom lines. But the majority of these measures relate to labor force protections rather than physical property damage. And without the trigger of physical loss or damage that causally causes the loss of income, property insurance policies are unlikely to respond to these losses.

If history is any guide, policyholders and their attorneys will attempt to advance creative arguments for coverage in response to coronavirus. The key to responding properly is a careful analysis of the specific policy terms and conditions at issue, informed by experience and relevant legal authority.

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