

# COVID-19 Disruptions & Insurance Complications

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- What is the role of a broker?

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- What is a policyholder insurance attorney?

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# Overview of Discussion

- The Impacts of SARS-CoV-2 and COVID-19 (“COVID-19”)
- Potential Sources of Insurance Coverage
- Business Interruption Insurance
- Insurance industry Stance to Coverage for COVID-19
- The Policyholder Perspective on Coverage
- Current Coverage Litigation for COVID-19
- Legislative Efforts
- Next Steps

# What are the Impacts?

- Suspensions and Disruptions of Factory Operations and Supply Lines
- Cancellation of and Restrictions on Live Events, Including: Sporting Events, Concerts, Conferences, Attractions and Festivals
- Closings of Businesses and Schools
- Adoption of Temporary Telecommuting (“Work From Home”)

# What are the Impacts?

- Factory Closed For Months—Workers Idle But Still Paid
- Testing At the Facility, Sanitizing, Retesting
- New Sanitation Protocols
- Depressed Output
- Increased Costs-Extra Shifts and Overseas Parts

# Potential Sources of Insurance Coverage

- Property
- General Liability
- Event Cancellation
- Workers' Compensation and Employers Liability
- Environmental or Pollution
- Mitigation and Loss Prevention
- Others
  - Cyber
  - Directors and Officer
  - Employment Practices Liability
  - Errors and Omissions
  - Political Risk (including Trade Credit)

# Property Insurance

- Loss or Damage to Property?
- Civil Authority Coverage?
- Ingress/Egress Coverage?
- Business Interruption or Contingent Business Interruption?

# Property Insurance Coverage Grant

- “This Policy insures against all risks of direct physical loss or damage to property described herein . . .”
- “This Policy insures the interest of the Insured in . . . All Real and Personal Property of every kind and description”
- Note differences throughout in property referenced:
  - “Property insured hereunder”
  - “Property of the type insured hereunder”
  - “Property described herein”

# Business Interruption Insurance

- Business Interruption coverage is typically found within a Commercial Property Policy
- Designed to insure economic losses from loss or damage to property
- An example: “Loss due to the necessary interruption of business conducted by the Insured, whether total or partial including all interdependencies between or among companies owned or operated by the Insured caused by physical loss or damage insured herein during the term of this Policy to real and/or personal property.”



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# Contingent Business Interruption Insurance

- Insures economic losses from damage to property/premises of suppliers or customers
- Also referred to as “Dependent Property” coverage
- An example: “Property of the type insured at locations of direct or indirect suppliers of the Insured that prevents that supplier of goods and/or services to the Insured from rendering their goods and/or services, or property of the type insured at locations of direct or indirect customers of the Insured that prevents those customers of goods and/or services from the Insured from accepting the Insured’s goods and/or services.”



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# Business Interruption Extensions

- Civil Authority Coverage
  - "This Policy is extended to insure loss sustained during the period the premises of the Insured is untenable for occupancy as a direct result of physical loss or of time when, as a result of physical loss or damage by a peril insured to property of a type insured within five (5) miles of the affected insured property, access to such property of the Insured is impaired by order or action of civil or military authority, for a period not exceeding thirty (30), days from the date of such loss, damage or destruction."
- Ingress/Egress Coverage
  - "This Policy is extended to cover loss when as a result of physical loss or damage by a peril insured to property of a type insured within five (5) miles of the affected insured property, ingress to or egress from the premises of the Insured is prevented for a period not exceeding thirty (30) days from the date of such loss, damage or destruction."
- Extra Expense



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# COVID-19 Disruptions

"My business has been impacted. I have suffered a loss of income. I have Business Interruption Insurance. Don't I have coverage?"

- Policy language is not identical. Must review your specific policy language to determine possible coverage arguments.

# Review

## POSSIBLE AREAS OF COVERAGE

- Loss or Damage to Property
- Business Interruption
- Contingent Business Interruption
- Civil Authority
- Ingress/Egress
- Extra Expense

## COVERAGE TRIGGERS

- Covered Location
- Physical Loss/Damage
- Covered Peril

# Insurance Industry Positions & Arguments

- The introduction of a virus does not constitute direct physical loss or damage to insured property nor is it a covered peril.**
- Business interruption policies do not, and were not designed, to provide coverage against communicable diseases such as COVID-19.**
- Paying out insurance claims for COVID-19 would bankrupt the insurance industry.**
- Any virus, disease or contaminant exclusions are clear that coverage is excluded for COVID-19 related losses.**

# The Policyholder Perspective

## Interpreting Policy Language

- Insurance policies generally are to be interpreted as understood by a layperson. Therefore, if the “ordinary” person would consider COVID-19 to be a “sickness” rather than a “disease” (much as people do with a cold or the flu), a technical interpretation to the contrary should not be adopted when it would limit coverage.
- *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 821 (1990): “The ‘clear and explicit’ meaning of [policy] provisions, interpreted in their ‘ordinary and popular sense,’ unless ‘used by the parties in a technical sense or a special meaning is given to them by usage’ controls judicial interpretation.”
- Thus, while the differences among a “virus,” a “sickness,” and a “disease” might not seem important, for insurance purposes, such distinctions may determine the availability and scope of coverage.

# The Policyholder Perspective

## Is There Damage to Loss Or Use of Property: THE LAW

- *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at \*9 (D. Ore. June 7, 2016): Business interruption coverage for cancellation of performances at theatre due to air quality and health concerns as result of smoke infiltration from wildfires; “The smoke that infiltrated the theatre caused direct property loss or damage by causing the property to be uninhabitable and unusable for its intended purpose.”
- *Sentinel Mgt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997): “Although asbestos contamination does not result in tangible injury to the physical structure of a building, a building's function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants. . . . Under these circumstances, we must conclude that contamination by asbestos may constitute a direct, physical loss to property under an all-risk insurance policy.”
- *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826-27 (3d Cir. 2005): Question of fact as to “whether the [insureds’] property was nearly eliminated or destroyed, or whether their property was made useless or uninhabitable” by E.coli bacteria contamination

# The Policyholder Perspective

## Recovery of Mitigation Costs

- *Globe Indem. v. California*, 43 Cal. App. 3d 745, 751 (1974): We cannot “conceive as a reasonable rule of law that which would encourage an insured property owner not to report that neighboring property was being destroyed by reason of his negligence in permitting a fire to escape from his property because his insurance would cover him for the property damage but not for the fire suppression costs.”
- *Leebov v. United States Fid. & Guar. Co.*, 401 Pa. 477, 481 (1960): “It is folly to argue that if a policy owner does nothing and thereby permits the piling up of mountainous claims at the eventual expense of the insurance carrier, he will be held harmless of all liability, but if he makes a reasonable expenditure and prevents a catastrophe, he must do so at his own cost and expense.”
- *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 833 (1990): Environmental response costs “incurred largely to prevent damage previously confined to the insured’s property from spreading to government or third party property . . . are ‘mitigative’ in nature . . . [and] constitute[] ‘damages’ . . .”
- *Hakim v. Mass. Insurers’ Insolvency Fund*, 424 Mass. 275, 280 (1997): “[W]here, as here, there was contamination of adjacent property, the costs of remedial efforts to prevent further contamination of that property are not excluded from coverage by the owned property exclusion.”

# The Policyholder Perspective

## Property Insurance Mitigation Provisions

- **Expenses to Reduce Loss:** “This Policy also covers expenses as are necessarily incurred by the Insured for the purpose of reducing any loss under this Policy. But in no event shall the Company be liable for an amount greater than that for which they would have been liable had the Insured been unable to make up any lost production or to continue any business operations or services.”
- **Sue and Labor:** “In case of actual or imminent loss or damage covered by this Policy . . . , it shall, without prejudice to this Policy, be lawful and necessary for the Insured, its factors, servants, or assigns to sue, labor and travel for, in and about the defense, the safeguard, and the recovery of property or any part of the property insured hereunder . . . . The Company shall pay the expenses so incurred.”

# The Policyholder Perspective

## Exclusions: Key Terms to Check

- “Virus” v. “disease” v. “communicable disease” v. “micro-organism” v. “contaminant” v. “pollutant” v. ????
- Check definitions
- Compare alternatives in other policies—that insurer’s or in the marketplace
- Policy terms are to be interpreted to avoid surplusage and, if ambiguous, in favor of the insured’s reasonable interpretation even if the insurer has a more reasonable interpretation

# Sample Exclusions

“We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.”

CP 10 40 07 06 (ISO Properties, Inc., 2006)

# Sample Exclusions

“This Insurance does not cover any loss directly or indirectly arising out of, contributed to by, or resulting from any loss, expense, or liability directly or indirectly arising out of, attributable to or resulting from Severe Acute Respiratory Syndrome (SARS) and/or Atypical Pneumonia and/or Avian Flu and/or Swine Flu and/or any other flu variant recognized as a pandemic, whether phase 1,2,3,4,5 or 6 as determined by the World Health Organization or the threat or fear thereof (whether actual or perceived) . . .

Lloyd's Policy Wording, GC (NAC) (U.S.A. & Canada), NMA 2746  
(Amended Jan. 24, 2017)

# Conditions

- View as potential traps
- Notice “as soon as practicable”
- Claims-made and claims-made-and-reported
- Examinations Under Oath
- Examination of Records
- No voluntary payments or admissions or payments/consent or approval
- Contractual suit limitations

# General Liability Insurance

- “We will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’[or ‘personal and advertising injury’] to which this insurance applies.”
  - Bodily Injury: “Bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.”
  - Property Damage: “a. Physical injury to tangible property, including all resulting loss of use of that property. . . . b. Loss of use of tangible property.”
  - Personal and Advertising Injury: a. “False arrest, detention or imprisonment. . . . c. The wrongful eviction from, wrongful entry into or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor.”
- Until suits are filed, the mitigation doctrine may be the key

# Current Coverage Litigation

- **Business Interruption**
  - Multiple coverage actions brought by restaurants, nightclubs, retail stores and law firms, among others.
  - Trends: Class Actions, Insurer Declaratory Judgments and MDL
  - *Rising Dough, Inc. v. Society Ins.*, No. 2:20-cv-00623 (E.D. Wis. Apr. 17, 2020).
    - Rising dough, a bakery, filed a class action seeking damages for breach of contract and a declaration that losses resulting from closure of its and other policyholders' businesses due to the coronavirus and related government orders are covered under its property policy.



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# Current Coverage Litigation

- ***Café Int'l Holding Co. v. Chubb Ltd., No. 1:20-cv-21641 (S.D. Fla. Apr. 20, 2020)***
  - Suit by a restaurant chain seeking coverage under Business Income, Civil Authority, and Extra Expense provisions.
- ***Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos APC, No. 2:20-cv-03619 (C.D. Cal. Apr. 20, 2020).***
  - Geragos & Geragos filed multiple complaints against Travelers, including on its own behalf, alleging that Travelers has wrongfully denied coverage under all-risk policies covering business losses arising from physical loss or damage to property. Travelers seeks a declaration that its policy does not cover Geragos & Geragos's losses, because the presence of the coronavirus has not caused "physical loss or damage" to the insured's property. Travelers takes the position that the civil authority provision is similarly inapplicable because it requires physical loss or damage to property nearby.



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# Legislative Actions

- Several jurisdictions are considering taking legislative or regulatory actions against Insurers.
  - Congressional Letter (and Response)
  - Massachusetts, S.D. 2888
  - New York Department of Financial Services – Information Request
  - New York, A.10226
  - New Jersey, Bill A-3844
  - Ohio, H.B. 589



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# Next Steps

- Document the Loss
  - Record all loss, even if coverage is in question
  - Maintain all financial and other records
- Review all Potentially Applicable Insurance Policies
- Give Notice



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