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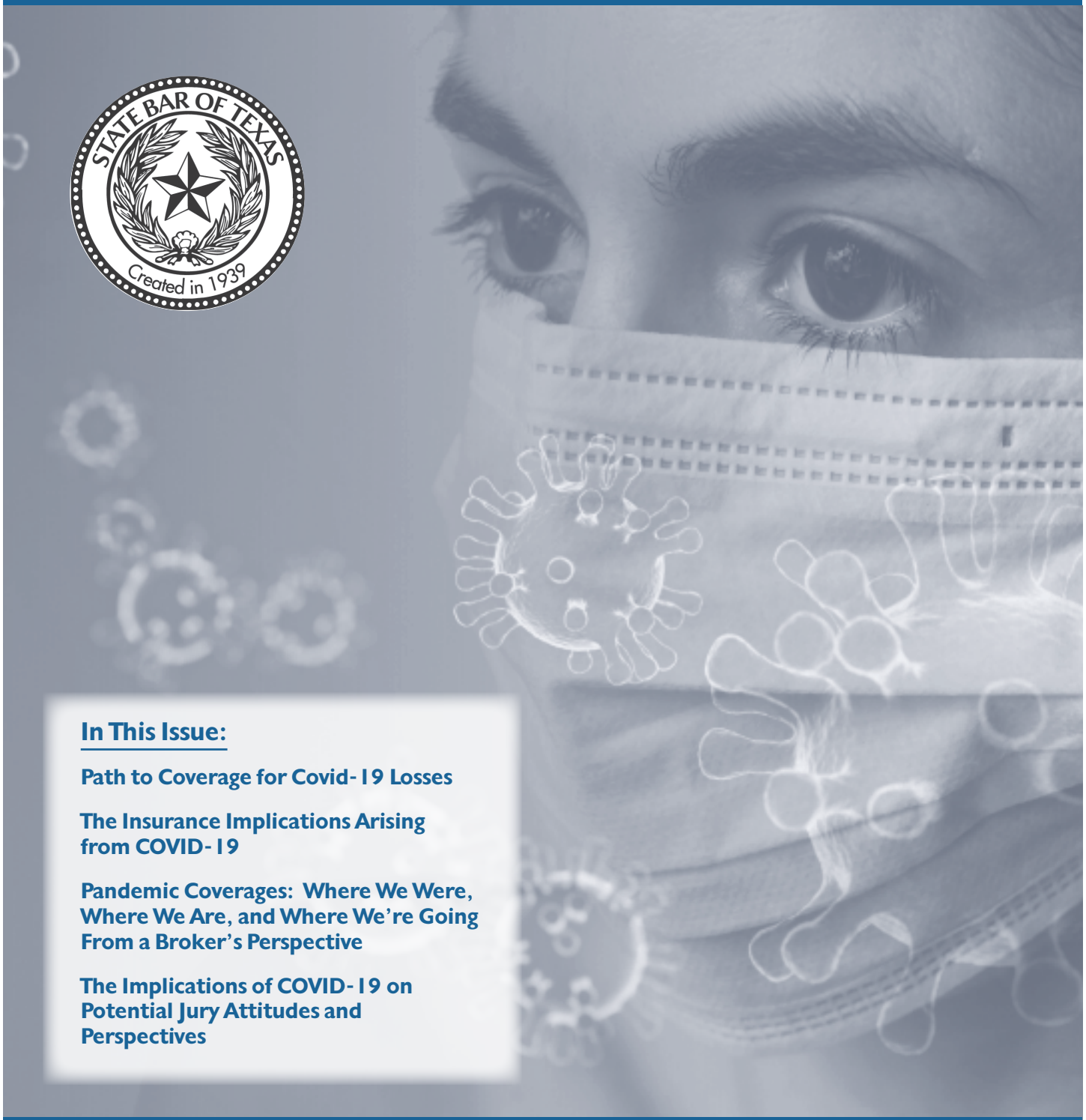

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The Journal of Texas Insurance Law is published by the Insurance Law Section of the State Bar of Texas. The purpose of the ***Journal*** is to provide Section members with current legal articles and analysis regarding recent developments in all aspects of Texas insurance law and convey news of Section activities and other events pertaining to this area of law.

Anyone interested in submitting a manuscript for publication should contact Rebecca DiMasi, Editor In Chief, at (512) 685-1400 or by email at rebecca@shidlofskylaw.com. Manuscripts for publication must be typed and double-spaced with endnotes. Replies to articles published in the ***Journal*** are welcome.

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MISSION STATEMENT

The Insurance Law Section serves to promote the understanding and development of Texas insurance law by providing high quality educational resources to the bench, bar, and public and by promoting collegiality among those with an interest in insurance law.

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Comments

FROM THE EDITOR

By Rebecca DiMasi
Shidlofsky Law Firm PLLC

In light of recent events, this entire edition of the Journal is dedicated to issues raised by COVID-19 from various insurance perspectives. Two articles provide detailed analyses of COVID-19 insurance claims, including summaries of recent case law addressing such claims, coverage issues that those claims raise, and consideration of policies that may provide coverage. We have included articles from authors who represent policyholders and authors who represent insurance carriers in order to provide both perspectives. We have also included an article from an insurance broker discussing the types of policies that may be implicated and where coverage could be found in the future. Finally, this edition of the Journal includes an interesting analysis of the potential for jury nullification in connection with COVID-19 insurance cases prepared by an experienced insurance trial attorney and a trial psychologist. We hope that these articles provide guidance on insurance issues that are likely to be moving through the courts for years to come.

Thanks to the authors and to Managing Editor Jason McLaurin for his invaluable assistance. Thanks also to all of the volunteer editors for their excellent editing skills.

The Journal is always open to publishing articles relating to Texas insurance law for the benefit of the bench and bar. If you have an article to submit, or a proposed topic, feel free to send me an email at rebecca@shidlofskylaw.com.

Rebecca DiMasi
Editor In Chief

Comments

FROM THE CHAIR

By Pamella Hopper, Chair

The Insurance Law Section has been hard at work this year on a number of projects on which we are pleased to report.

The Section has initiated a new scholarship program: a statewide law student writing competition. We received six submissions for our first year of the competition and hope to significantly increase the number of entries next year.

We have offered five webinars over the last few months, including a pro bono program on storm insurance claims, with attendance ranging from forty-five to over two hundred. Section members receive a discount, so be on the lookout for upcoming webinars. If there is a topic you would like to see or present, please let us know.

The Section is also in the process of creating a specialization in Insurance Law. The application has been drafted and we will soon be collecting the required signatures to present the application to the State Bar of Texas. Keep your eye out for more information on this effort.

Last, the Section has been working to keep us connected during this unprecedented time through "virtual happy hours," which specifically seek to include our young lawyers and actively engage our newest members in our Section happenings.

I would like to extend my sincere gratitude to the Council and Section members alike for all you do. You make this Section great! I look forward to the day we can meet in person again.

Sincerely,

Pamella Hopper
Chair of the Insurance Law Section of the State Bar of Texas

By Ernest Martin, Jr. and Natalie DuBose With Co-Authors Storm Lineberger and Andrew Martin

PATH TO COVERAGE FOR COVID-19 LOSSES

Introduction

In 2019, over a million people gathered together in New York City's Times Square to celebrate the coming of a new year—none of whom could have possibly foreseen that the world would soon be subject to a global pandemic and the lives of people would be unexpectedly upended. This pandemic, COVID-19, has been responsible for not only altering the way we interact with people but has pushed hospitals past their limits and forced countless businesses to close or come to the brink of financial disaster.

As a result, policyholders have looked to their insurance policies for relief and many have been racing to the courts in the hopes of recouping their business income losses due to this pandemic. As most courts have yet to come to a consensus on available coverage for COVID-19 business loss claims, the question remains whether policies will ultimately provide much-needed coverage for COVID-19 claims.

No two policies are exactly the same. Thus, a determination of coverage, in large part, is made on a case-by-case and policy-by-policy basis. Therefore, despite any one court's determination of coverage under a specific policy, a different policy may lead to a different result. Nonetheless, common issues prevail in the quest for coverage. This article provides a roadmap for potential business interruption coverage under property policies, as well as an overview of potential liability coverage for COVID-19-related third-party claims.[1]

I. "Physical Loss" and Virus-Related Exclusions: The Two Major Hurdles on the Path to Commercial Property Coverage

While it is well known that the effects of COVID-19 have precipitated significant industry-wide business income loss, the remedies to recover this lost income are not nearly as popularized. Business owners and policyholders are likely wondering whether their commercial property policy applies to COVID-19 related losses. As a threshold matter, an insured must overcome two major hurdles that are germane to business loss claims. First, do these claims implicate "physical loss" or "physical damage"? Second, does a virus-related exclusion bar coverage? Naturally, the path to coverage begins here.

A. Understanding Rules of Policy Interpretation

The rules of policy interpretation govern the determination of policy meaning when questions arise over the meaning of policy wording. Thus, before reviewing the relevant provisions that may determine coverage for COVID-19 claims, it is important to be familiar with the rules of policy interpretation that are beneficial to policyholders. An understanding of these rules will significantly aid the insured in navigating around troublesome exclusions.

First, in construing the policy's language, the court "must give effect to all contractual provisions so that none will be rendered meaningless."[2] "No one phrase, sentence, or section of a contract should be isolated from its setting and considered apart from the other provisions."[3] Implicitly, these rules require a court to refrain from defining a policy word in a manner that would make it redundant.[4] Additionally, if a policy word is not defined, the court must use the word's generally accepted, ordinary meaning.[5]

Second, courts must construe exclusions more stringently than the other parts of an insurance policy.[6] "An intent to exclude coverage must be expressed in clear and unambiguous language."[7]

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Third, if a policy is worded so that it is subject to two or more reasonable interpretations, the policy is ambiguous, and the court "must resolve the uncertainty by adopting the construction that most favors the insured . . . *even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent*."[8]

Finally, an insurance company bears the burden of proving the application of any exclusion to coverage.[9] Note, however, that should the insurance company meet its burden of proving that a particular exclusion applies, the burden shifts back to the policyholder to prove that an exception to that exclusion applies.[10]

B. Explaining "Physical Loss or Damage" Caused by COVID-19

With the exception of communicable disease coverage, grants of coverage under commercial property policies require a showing of "direct physical loss or damage" to trigger coverage for COVID-19-related claims. This *de facto* threshold requirement presents an area of hotly disputed interpretation. For policyholders seeking to recover losses due to COVID-19, "direct physical loss or damage" may present an obstacle on the path to coverage.

Most policies utilize the language "direct physical loss *or* damage." However, some policies contain grants of coverage that require physical damage to property. Thus, the question being argued in court in COVID-19-related business loss claims is what constitutes the "physical loss" or "physical damage" on which the business losses are predicated.

In answering this question, the rules of policy interpretation are implicated. Virtually without exception, the terms "physical loss" or "physical damage" are not defined in the policy. Thus, the parties must use the plain and ordinary meaning of the words but cannot interpret them in a way that makes them redundant with other policy terms. The ISO business income loss coverage form provides a clear example of this rule in action: "[t]he 'suspension' [of business] must be caused by direct *physical loss* of or *damage* to property at [the] premises."

The purpose of the "plain and ordinary meaning" interpretive rule becomes axiomatic when interpreting the ISO language. There, the plain and ordinary meaning of *physical loss* and *damage* overlap if taken out of context. "Damage" may have a broad plain and ordinary meaning that includes both physical loss and physical damage. In fact, Commercial General Liability (CGL) policies define "property *damage*" in two distinct ways: (1) as physical injury to tangible property, including all resulting loss of use of that property and (2) as loss of use of tangible property that is *not* physically injured. However, in the context of the commercial property ISO language, the broad CGL definition of "property *damage*" would render "physical *loss*" superfluous. That is, the ISO language would read: "direct physical *damage* or *damage*." That absurd result underscores the need to limit the plain and ordinary meaning of "damage" to the extent that it would not overlap with the plain and ordinary meaning of "physical loss." Therefore, a discussion of the plain and ordinary meaning of "physical loss" is necessary.

First, courts have held that direct physical loss of property is not limited to "tangible" injury to physical structures such as buildings; rather, courts have held that physical loss includes loss of use and functionality of the property.[11] Thus, the policyholder should argue that there is support for a plain and ordinary meaning of "physical loss" that includes intangible injury—loss of use and functionality.

A North Carolina state court, in *North State Deli, LLC v. Cincinnati Insurance Co.*, recently held that "physical loss" did not require structural alteration because "then the term 'physical damage' would be rendered meaningless."[12] The court found that the ordinary meaning of "direct physical loss" in the context of the policy "describe[d] the scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property." The court found that "[t]his [was] precisely the loss caused by the Government Orders." The court reasoned that the government decree restricted access and blocked the policyholder from "putting their property to use for the income-generating purposes for which the property was insured." Finding that the "decrees resulted in the immediate loss of use and access," the court concluded that "this loss is unambiguously a 'direct physical loss,' and the [p]olic[y] afford[s] coverage."[13]

Second, policyholders could argue, assuming their policy does not contain a virus-related exclusion, that the presence of COVID-19 causes injury within the scope of physical loss. In fact, courts have already responded positively to this argument. In *Studio 417,*

Inc. v. Cincinnati Insurance Co., the court held that the plaintiffs "adequately alleged a direct physical loss" when they included in their complaint "alleg[ations] that COVID-19 is a highly contagious virus that is physically 'present . . . in viral fluid particles,' and is 'deposited on surfaces or objects.'"[14] In addition to facts similar to those asserted in *Studio 417*, in *Blue Springs Dental Care, LLC v. Owners Insurance Co.*, the plaintiffs also "explain[ed] how COVID-19 is physically transmitted by air and surfaces through droplets, aerosols, and fomites that remain infectious for extended periods of time."[15] In both cases, the plaintiffs alleged facts that referenced scientific research supporting the claim that COVID-19 was present on the property in a way that rendered the property unusable, damaging its functionality.[16] Thus, the policyholder could argue that the presence of COVID-19 renders the property unusable and causes damage to the function of the property.

Note, however, that recent COVID-19-related cases indicate a developing jurisdictional split on whether the presence of COVID-19 is *prima facie* evidence of direct physical loss or damage.[17] For example, in contrast to *Studio 417* and *Blue Springs Dental*, the court in *Diesel Barbershop, LLC v. State Farm Lloyds*, rejected the argument that direct physical loss included the kind of intangible injury sustained from the presence of COVID-19.[18] There, the court consolidated cases from multiple jurisdictions, ultimately holding that the plaintiff had not asserted facts sufficient to show that direct physical loss was caused by COVID-19.[19] It should be noted, however, that the plaintiff's policy in *Diesel Barbershop* included a broad virus exclusion that barred coverage regardless of the court's determination on direct physical loss.[20]

Some policies, however, contain "loss of use" exclusions that may seem inconsistent with a definition of "physical loss," which focus on intangible injury—loss of use and functionality. It is difficult to see how those exclusions apply to coverage for business losses when those business losses are premised on the loss of use of the insured's property. Some policies provide that such an exclusion applies unless "covered elsewhere in the policy" suggesting that the exclusion is not intended to apply to business income coverage.

Policies that contain the more restrictive "damage" requirement face a greater obstacle for coverage. Indeed, courts, as in *Maluabe, LLC v. Greenwich Insurance Co.*, have interpreted these policies to mean that the business interruption "must be caused by some *physical problem* with the [relevant] property" in order to show "direct physical loss or damage"; that is, that the "damage *must be actual*" not just the pure economic loss resulting from the loss of use due to Stay-At-Home orders.[21] However, in *Maluabe*, *Diesel Barbershop*, and *Seifert v. IMT Insurance Co.*, the courts have either expressly or impliedly stated that a showing that "COVID-19 was a highly contagious virus that was *physically present* [on the premises] in viral fluid particles and deposited on surfaces and objects" similar to *Studio 417*, would be sufficient to show a "clear failure . . . to perform its function" that constitutes actual damage to the property.[22] Therefore, the arguments set out in *Studio 417*, as discussed above, could satisfy the stricter "damage" requirement.

There may yet be a third argument hidden in the distinction between coverage grants that contain the language "physical loss or damage *to* property" and those that contain "physical loss *of* or damage *to* property." The 2011 iteration of the standard ISO business income coverage form, "CP 00 30 10 12," contains the latter language and provides greater support for the contention that physical loss is inescapably distinct from physical damage. The sample ISO language reads as follows:

> 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 loss *or* damage must be caused by or result from a Covered Cause of Loss. With respect to loss *of* or damage *to* personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises. ISO Form CP 00 30 10 12 (emphasis added).

As discussed above, neither "physical loss" nor "physical damage" are defined in the vast majority of policies. Thus, the rules of policy interpretation mandate the use of the terms' plain and ordinary meanings when

construing the provision. As shown in the ISO sample, the phrase "loss *of* or damage *to*" is repeated multiple times, which further supports their distinct meanings. Therefore, a plain and ordinary reading of this language creates two separate instances of injury that may trigger coverage: (1) "physical loss *of* . . . property" and alternatively (2) "physical . . . damage *to* property."

While "physical loss or damage to" has been interpreted by many courts, including those addressing COVID-19-related claims, few courts have interpreted the "physical loss *of* or damage *to*" iteration. In fact, courts that rejected arguments that "physical loss *to* property" includes the loss of functionality or physical use of the property have suggested "loss *of*" would support such an interpretation.[23] In *Turek Enterprises, Inc. v. State Farm Mutual Automobile Insurance Co.*, the Court found that "loss" interpreted to mean "inability to use [c]overed property . . . ultimately renders the word 'to' meaningless" but noted that the policyholder's interpretation would be plausible if, instead, the term at issue were "physical loss *of*" property.[24]

A similar argument in a COVID-19-related case has successfully survived a motion to dismiss in Texas state court. In *Lombardi's Inc. v. Indemnity Insurance Co.*, the policyholder with the exact ISO language shown above quoted *Turek* and a similar Eighth Circuit case, *Source Food Tech, Inc. v. U.S. Fidelity & Guaranty Co.*,[25] in support of a loss of functionality or physical use interpretation of "physical loss *of*."[26] The trial court denied the carrier's motion to dismiss.

The first batch of cases involving COVID-19-related coverage claims are only just reaching the earliest phase where courts have the opportunity to give an indication of the viability of those claims. There have already been positive results for policyholders, as evidenced by the holding in *Lombardi's Inc.* Courts in multiple jurisdictions have denied motions to dismiss with complaints alleging "direct physical loss" or "direct physical loss or damage" due to the presence of COVID-19. Discussion by the courts invariably involved whether the complaints sufficiently alleged facts to support the assertion that COVID-19 caused direct physical loss or damage to relevant property.

In cases where courts denied motions to dismiss, the asserted facts of "direct physical loss or damage" from COVID-19 fall within four general categories. In addition to attaching the relevant policies as an exhibit, complaints assert facts regarding the following: (1) language of the civil authority order (when seeking civil authority coverage) and the information used as support; (2) local geographic COVID-19 data; (3) scientific findings regarding the virus's transmissibility and its ability to attach and linger on surfaces, suspend in the air for extended periods, and travel distances; and (4) guidance from reputable agencies, officials, and international organizations.[27] Though, this list is not exhaustive, it indicates the kind of information that has been used to plausibly allege that COVID-19 caused direct physical loss or damage.

An important takeaway from the first batch of cases is that the policyholder must assert facts that include the "[a]ctual physical contamination of the insured property"[28]—or adjacent property in the case of civil authority coverage. Moreover, a policy that is interpreted as requiring the stricter damage requirement or one that is in a jurisdiction with a broad interpretation of "direct physical loss" may be triggered by COVID-19.

C. Avoiding Problematic Virus Exclusions

Once it has been determined that the presence of physical loss or damage has been found, a policyholder must then determine whether an exclusion applies. It is the insurer's burden to prove whether a particular exclusion precludes coverage.

Of the various exclusions relied upon by insurers to preclude coverage for COVID-19-related business losses, the predominant ones are the virus-related exclusions. There are several virus-related exclusions that must be considered. They include (a) the titled Virus exclusion, (b) the Pollution exclusion, (c) the Contaminant exclusion, and (d) the Microbe exclusion. These will be addressed below.

In addition to considering the various types of virus-related exclusions, a policyholder must also consider the scope of each exclusion. The scope of the exclusion (*i.e.*, how broadly it will be applied) will depend on the language used in the exclusion. Broadly speaking, exclusions have at least three *tiers* of expanding applicability that could be present in a property policy: direct causal link; direct or indirect causal link; or any causal link no matter how remote. The language indicating the applicable scope of the exclusion may be contained in the exclusion provision itself or as lead-in language at the beginning of the "Exclusions Section". Some policies, however, contain endorsement exclusions set apart from the exclusion section. The location of the exclusion is very important because it

often determines whether "Exclusion Section" lead-in language affects the scope of the exclusion.

The broadest type of exclusion is one that contains an anti-concurrent causation (or "ACC") clause. ACC clauses serve as a bar to coverage where the business loss or property damage can be attributed to an excluded cause, no matter how attenuated the causal link may be or in what sequence the excluded cause took place. Put another way, if nine out of ten causes are covered and one is excluded, there is no coverage. Thus, if the policy exclusion contains an ACC clause, such an exclusion may be difficult to overcome. However, the two narrower virus exclusions may present opportunities for coverage depending on the language and structure of the exclusion in a particular policy.

1. The Titled Virus Exclusion

The most obvious virus exclusion is the "titled" virus exclusion. In 2006, the ISO proposed the first virus exclusion in response to the SARS epidemic and the concerns for the insurance industry it posed. While not typically present in the coverage form itself, the titled virus exclusion usually manifests itself as an endorsement. The ISO form "applies to all coverage under all forms and endorsements . . . that cover business income, extra expense or action of civil authority":

> B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.
>
> However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.
>
> C. With respect to any loss or damage subject to the exclusion in Paragraph B., such exclusion supersedes any exclusion relating to "pollutants".

Arguably, the ISO virus exclusion using "caused by or resulting from" language may be the least bothersome virus exclusion, especially if the actual presence of the virus is not on the insured's premises. That is so because most insureds' business losses are not caused by or resulting from the virus on the insured's premises but instead are caused by or resulting from the civil authority orders precluding businesses from conducting normal operations or the overall societal anxiety about being in public spaces during an unprecedented global pandemic. To the extent the insured has the actual presence of the virus on its property, the virus exclusion will most likely preclude, in part, grants of coverage other than civil authority or contingent business income, because business interruption will most likely be considered to have been caused by the presence of COVID-19 on insured covered property.

Some virus exclusions contain language requiring that the loss be caused "directly or indirectly" by the virus. This presents a more troublesome virus exclusion because it may be difficult to argue that the loss was not caused indirectly by the virus, regardless of the grant of coverage at issue.

If the titled virus exclusion is contained *within* the "Exclusions Section," the section's lead-in language may broaden the exclusion's scope. For example, in most ISO Businessowners Property forms (a commercial property-type policy for small businesses), the "Virus or Bacteria" exclusion is located within the Exclusions section and is thus subject to the following lead-in language:

> We will not pay for loss or damage *caused directly or indirectly* by any of the following. Such loss or damage is excluded *regardless of any other cause or event that contributes concurrently or in any sequence* to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

An insurer with a titled virus exclusion, subject to the above direct-or-indirect causal language and the broad ACC clause will most likely bar coverage under any grant of coverage. For example, even if the policyholder could show that a Stay-At-Home order—not the presence of COVID-19—caused damage to the insured property, the insurer will likely argue that the ACC clause broadens the exclusion to include (1) the presence of COVID-19 on adjacent property caused the issuance of the civil authority order or (2) that there is no showing that COVID-19 was not present on the insured property.

While the second argument could be solved by alleging facts that COVID-19 was not present on the covered property, the first argument may only be defeated by an exception to the exclusion. In order to trigger any coverage for COVID-19 claims, the policyholder must allege facts that COVID-19 caused loss or damage to property. Thus, in the context of an ACC clause, the alleged facts are self-defeating because the policyholder would effectively be admitting that COVID-19 played some role either concurrently or within the sequence of events that led to the business interruption.

The strongest arguments for circumventing this type of exclusion will be under civil authority or communicable disease coverages which are discussed below. However, if the exclusion is subject to ACC language, it is unlikely that coverage will be triggered.

2. The Pollution Exclusion

The "pollutant" exclusion may be the most common exclusion without "virus" in the title that may affect coverage for COVID-19 claims. Here is an example of a Pollution exclusion:

> We will not pay for loss or damage caused by or resulting from any of the following:
>
> . . .
>
> Discharge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss".

In the ISO business income loss coverage forms, "pollutant" is defined as "any solid, liquid, gaseous or thermal irritant *or contaminant*, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed." However, the term "contaminant" within the "pollutant" definition is not defined. Insurers may argue that contaminant's plain and ordinary meaning includes virus.

Based on the rules of policy interpretation, the policyholder has a strong argument that "contaminant" does not include virus. The interpretive rule known as *ejusdem generis*, says that a generic term at the end of a list should be construed to mean something similar and consistent with the previous terms in the list. Moreover, policy exclusions are to be construed narrowly and strictly against the insurer. Thus, the policyholder should argue that a virus is not similar to "smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste" and thus is not included in the exclusion. Furthermore, courts that have actually dismissed COVID-19 coverage claims support construing contaminants in this way. In *Seifert*, while the court found there was no coverage on other grounds, it found that the insurer's "attempts to place the coronavirus in the same category of pollutants as 'smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste' was unavailing."[29] Additionally, where "pollutant" is used but *not defined*, the *ejusdem generis* argument discussed above should be used by the policyholder as well.

If the term "pollutant" is defined as including virus, the policyholder can still argue that the terms "discharge, dispersal, seepage, migration, release or escape" are terms generally associated with environmental pollution, not communicable diseases. And because exclusions must be strictly construed against the insurer, policyholders may successfully challenge an insurer's reliance on this exclusion.

3. The Contaminant Exclusion

The "Contaminant" exclusion can be incorporated into the "Pollution" exclusion or can be a stand-alone exclusion. Policies sometimes define the term "contaminant" and sometimes they do not. Sometimes the term is defined to include "virus."

When the "Contaminant" exclusion is incorporated into the "Pollution" exclusion—even where the term is defined to include "virus"—the policyholder can argue that the language of "discharge, dispersal, seepage, migration, release or escape" demonstrates that the exclusion was intended to bar only traditional environmental pollutants or contaminants. Where the "Contaminant" exclusion is a stand-alone exclusion, the policyholder must carefully review the language to determine the applicability of the exclusion to COVID-19-related claims. The FM Global policy provides the following "Contaminant" exclusion which defines the term to include any condition of property due to the actual or suspected presence of any . . . virus.

> *contamination*, and any cost due to *contamination* including the inability to use or occupy property or any cost of

> making property safe or suitable for use or occupancy. If *contamination* due only to the actual not suspected presence of *contaminant(s)* directly results from other physical damage not excluded by this Policy, then only physical damage caused by such *contamination* may be insured.

Given this language, the policyholder can argue that this exclusion does not bar coverage for COVID-19-related business losses because "contamination" is limited to a condition of property, not a person-to-person communicable disease, and, in any event, the exclusion applies only to costs (as opposed to business income losses) due to the "contamination."

4. Microbe Exclusion

Microbe exclusions generally preclude coverage for loss or damage caused by the presence of microbes. One policy provides the following Microbes exclusion:

> Fungi, Wet Rot, Dry Rot and Microbes,
>
> (1) The presence, growth, proliferation, spread or any activity of Fungi, wet rot, dry rot or Microbes, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy;
>
> (2) Any government or regulatory directive or request that the Insured or anyone acting under the Insured's direction or control test for, monitor, clean up, remove, contain, treat, detoxify or neutralize any Fungi, wet rot, dry rot or Microbes.

"Microbe" is thereafter defined as: "[a]ny non-fungal microorganism or non-fungal, colony-form organism that causes infection or disease. Microbe includes any spores, mycotoxins, odors, or any other substances, products or byproducts produced by, released by, or arising out of the current or past presence of microbes."

The policyholder facing the above exclusion has a compelling argument to rebut a carrier's reliance on this exclusion to bar coverage for COVID-19-related business losses. First, the definition of "microbes" does not include viruses. Second, viruses are not encompassed within other terms incorporated in the definition of "microbe" such as "microorganism." By definition, "microorganisms" are "living" beings. Most virologists, however, consider viruses to be "non-living."

5. Avoiding Problematic Virus Exclusions with Civil Authority Coverage

Civil authority coverage may be the best way for policyholders to argue coverage while avoiding problematic virus exclusions.

A policyholder might argue that it was the presence of the *disease* in a person living at the neighboring property that was the direct physical loss that caused loss or damage to the adjacent property. That is, the disease and the virus are distinct, and that distinction could be significant with regard to coverage. The ISO's 2006 guidance regarding viruses lends some support for this construction.[30] The ISO implicitly states that disease spread is what changes property's "quality or substance" not the virus itself and discusses how a virus simply *enables* the disease. The ISO's guidance suggests that but-for the disease manifesting itself, the damage would not necessarily occur. Thus, depending on the language used in the order, a policy containing a virus exclusion with direct or indirect causal links may not necessarily bar coverage if it can be argued that the disease caused the damage, not the virus. For this argument to succeed, however, the policyholder must review the policy to determine whether a separate exclusion for the disease would apply.

A federal district court in the Western District of Texas has responded positively to a similar argument, where it denied an insurer's motion to dismiss. In *Independence Barbershop v. Twin City Fire Insurance Co.*, the policy in question provided limited coverage for virus similar to ensuing loss exceptions but contained a virus exclusion that otherwise precluded coverage for loss caused by virus.[31] Notably, the virus exclusion was subject to the very broad ACC language discussed above. The policyholder argued that the virus exclusion did not apply because COVID-19 is the disease that results from SARS-CoV-2 and the two are distinct.[32] While the insurer argued that the ACC clause precluded virus coverage, the court did "not agree with the [insurer's] conflation of COVID-19 and the 'virus.'"[33] In denying the insurer's motion to dismiss, the court noted that it "might be receptive to arguments that SARS-CoV-2, COVID-19, the COVID-19 pandemic, and government shutdowns related to COVID-19

Pandemic are four separate things."[34] Such an interpretation may be the key to piercing these broad exclusions and carving out coverage.

II. Triggering Coverage under a Commercial Property Policy

Once both hurdles of physical loss and policy exclusions have been cleared, policyholders have a much clearer path to coverage under their commercial property policy. Nevertheless, policyholders should carefully read their policies, in light of the unique facts and circumstances of their case, to determine which path works best. In pursuit of this objective, this section will explore key policyholder considerations under Business Interruption Insurance ("BI insurance" or "BI") and its various supplemental coverages (*e.g.*, Communicable Disease, Civil Authority, Contingent Business Interruption, and Extra Expense).

A. Business Interruption Insurance and the Extended Period of Liability

BI insurance allows the insured to recover business income loss attributed to any "physical loss or damage" on the insured's property. Although the language may vary, BI provisions require that the insured establish the following six elements: "(1) physical loss or damage to (or physical loss of or damage to), (2) covered property, (3) caused by a covered peril during the policy period, (4) resulting in an actual loss of income, (5) due to necessary suspension of operations, (6) during the period of restoration."[35]

A typical BI insurance provision reads:

> This Policy insures TIME ELEMENT loss, as provided in the TIME ELEMENT COVERAGES, directly resulting from physical loss or damage of the type insured:
>
> 1) to property described elsewhere in this Policy and not otherwise excluded by this Policy or otherwise limited in the TIME ELEMENT COVERAGES below;
>
> 2) used by the Insured, or for which the Insured has contracted use;
>
> 3) while located as described in the INSURANCE PROVIDED provision or within 1,000 feet/300 meters thereof, or as described in the TEMPORARY REMOVAL OF PROPERTY provision; or
>
> 4) while in transit as provided by this Policy, and
>
> 5) during the Periods of Liability described in this section, provided such loss or damage is not at a contingent time element location.

Assuming that physical loss or damage is established, policyholders should be aware that, generally, BI insurance only covers the business losses incurred until the property is repaired or replaced and, at best, this may mean removing the presence of COVID-19 from the insured property.[36] Realistically, this could amount to mere days dedicated to sanitizing tables, equipment, and other affected property present at the insured location. Assuming the virus is ubiquitous, this could also mean constantly cleaning to remove the presence of the virus from the premises. In many cases, however, business income loss exceeds the cost of simply removing the virus from the insured location.

As noted above, for some policyholders facing business losses due to COVID-19, the repair of the affected property is nothing more than the sanitization of the property infected. For them, the standard period of liability provided under a general BI provision may prove insufficient to address their losses. Consequently, policyholders should look to the extended period of liability provision to provide adequate recovery for their business losses. Although courts have held that the period of liability pertains to the condition of "building and equipment," the extended period of liability concerns the condition of the business.[37] Such provisions vary in length of time from policy to policy and extend the period of liability "for such additional length of time as would be required with the exercise of due diligence and dispatch to restore the insured's *business* to the condition that would have existed had no loss occurred."[38] Such language, if present in the policy, could drastically increase the amount of coverage owed to the policyholder for business income loss. Practically speaking, taking advantage of the extended period of liability may provide the coverage required to restore the business to its pre-virus equivalent.

B. Communicable Disease Coverage

If your client is in the healthcare, hospitality, or food

industry, odds are its commercial property insurance contains communicable disease coverage. Such coverage, depending on the language, provides recovery for the cleanup and sanitation expenses associated with the communicable disease; costs associated with public relations; and actual loss of income sustained throughout the period of liability.[39]

Typically, communicable disease coverage pays when two conditions are met. First, the communicable disease must be "actually" present at a location owned, leased, or rented by the insured.[40] Second, access to the insured location must be "limited, restricted, or prohibited" by either (1) an order of an authorized governmental agency or, in some instances, (2) a decision of an officer of the insured issued to regulate the actual, not suspected, presence of a communicable disease.[41]

As an example, the communicable disease provision may read:

> If a *location* owned, leased or rented by the Insured has the actual not suspected presence of *communicable disease* and access to such *location* is limited, restricted or prohibited by:
>
> 1) an order of an authorized governmental agency regulating the actual not suspected presence of *communicable disease*; or
>
> 2) a decision of an Officer of the Insured as a result of the actual not suspected presence of *communicable disease*,
>
> this Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY at such location with the actual not suspected presence of communicable disease.

The language and nature of the communicable disease provision above present the policyholder with three main issues to be considered.

1. Was the actual presence of a communicable disease detected?

A policyholder must first show that the property owned, leased, or rented by the insured has the actual, not suspected, presence of the communicable disease. Insurers will likely expect the policyholder to provide evidence that an employee, customer, patient, or invitee of the insured property has tested positive for COVID-19 or that the virus has been detected on the property.[42] Thus, businesses need to be aware of any employees, customers, patients, or invitees of the insured property who have been diagnosed with COVID-19 at or prior to any events that limited, restricted, or prohibited access to the insured location.

However, before disclosing information concerning positive COVID-19 tests, employers should ensure that they remain compliant with HIPAA regulations regarding employer permitted disclosures. For example, an employer who obtains information through a self-insured health plan, as opposed to information voluntarily disclosed by the employee, becomes a "Covered Entity" and is subject to disclosure restrictions under HIPAA.[43] Thus, understanding how the information of COVID-19-positive employees was obtained is critical for an employer determining its obligations under HIPAA.

As an alternative to providing evidence of COVID-19-positive employees, environmental monitoring for the virus may also be an acceptable means of showing an actual presence of the communicable disease.[44] Companies, such as Eurofins, provide businesses with easy-to-use toolkits that test for the presence of coronavirus on surfaces and objects—such as door handles, phones, and common touchpoints—utilizing environmental swabs that are sent off to U.S. labs and analyzed.[45] Given the nature of these tests, positive results would likely go a long way in proving the existence of the virus within an insured's facility.

2. Is an order or decision to limit, restrict, or prohibit access to an insured location required to mention that it was in response to the actual presence of the communicable disease at the Insured location?

Next, a policyholder must show that the insured location has been either limited, restricted, or prohibited by an order of an authorized governmental agency regulating the communicable disease or a decision of an Officer of the Insured as a result of the actual presence of a communicable disease. The insurer may argue that the government order or decision to limit, restrict or prohibit access must specifically reference the insured location. As a corollary to this proposition, insurers may also argue that the presence of the actual virus at

the insured location must precede any order or decision regulating access to that location. Nevertheless, these interpretations likely conflict with the plain language of the typical communicable disease provision and may be contrary to recent civil authority orders signed throughout the country.

A reasonable interpretation of the communicable disease provision, shown above, suggests that the government orders, issued to slow the spread of COVID-19, do not need to pertain solely to the insured location. There is nothing in the provision which requires a nexus between the order and the presence of the virus at the insured location. Instead, the language of the provision merely provides that the order limit, restrict, or prohibit access to the insured location. At a minimum, this interpretation is a reasonable one, and therefore a court should resolve any perceived ambiguity by adopting the construction that most favors the insured, even if the insurer offers a different and more reasonable interpretation.[46]

Furthermore, the insured may be able to lean on the favorable language found in civil authority orders to show that the civil authority orders in question pertained to all locations within the county, including the insured location. For example, Dallas County Judge Clay Jenkins' Stay-At-Home orders contain language that is favorable to policyholders:

> WHEREAS, pursuant to Texas Government Code Section 418.108, Dallas County Judge Clay Jenkins issued a Declaration of Local Disaster for Public Health Emergency on March 12, 2020, due to a novel coronavirus now designated SARS-CoV2 which causes the disease COVID-19;
>
> WHEREAS, this Emergency Order is necessary because of the propensity of the virus to spread person to person and *also because the virus is physically causing property damage due to its proclivity to attach to surfaces* for prolonged periods of time;
>
> THEREFORE, . . . All businesses operating within Dallas County, except Essential Businesses as defined in below in Section 2, are *required to cease all activities at facilities located within the County* . . . .[47]

As emphasized, the language describes COVID-19 as being present and "physically causing property damage" and as a result "all businesses operating *within Dallas County*, except Essential Businesses," must "cease all activities at facilities located within the County."[48] Similarly, Harris County Judge Linda Hidalgo issued a "Stay Home, Work Safe" order on March 24, 2020, claiming that the "virus causes property loss or damage due to its ability to attach to surfaces for prolonged periods."[49] Here, a policyholder can argue that both orders acknowledge the actual presence of the virus on the property and, therefore, satisfies the terms of the policy.

Regardless of how a court interprets a civil authority order, a decision from an officer of the insured to limit, restrict, or prohibit access to the insured location as a response to the actual presence of the virus on the insured location will also trigger the coverage and may be much easier to show. For instance, a decision from an officer to restrict the use of hospital beds to COVID-19 patients—to comply with a government mandate—should have clear grounds for coverage under a communicable disease provision. In support of this claim, an affidavit of the officer, outlining that the officer was limiting operations due to the actual presence of the virus will be difficult to attack. Thus, even under an insurer's narrowest interpretation, a decision from an officer, such as the one described, would likely be covered, assuming the facility also had the "actual presence" of COVID-19 at the facility.

As previously mentioned, insurers may also argue that the actual presence of a communicable disease must first be identified and predate regulations inhibiting the insured location. This argument, however, assumes that a nexus exists between identifying the actual presence of the communicable disease on the insured location and the regulation that limits, restricts, or prohibits access to the insured location. Yet, the language of the policy suggests that no such nexus exists. Regardless, even if such a connection existed, it could be argued that each new civil authority order that extends restrictions on businesses provides policyholders with new opportunities to trigger this coverage.

First, the typical communicable disease provision does not contain any language that would suggest that a finding of an actual presence of the communicable disease must precede a civil authority order or decision by an officer of the insured. The language merely suggests that both events must occur. Regardless, policyholders should read their policies carefully to ensure that no language exists to the contrary.

Even if such language exists, policyholders may still have a path to coverage. On March 22, 2020, Governor Greg Abbott signed Executive Order GA-09, which mandated that "all licensed health care professionals and all licensed health care facilities . . . postpone all surgeries and procedures that are not immediately medically necessary . . . ."[50] The order was only valid for one month—ending April 21, 2020, 11:59 PM.[51] However, on April 17, 2020, Governor Abbott signed another executive order, GA-15, which allowed any surgery or procedure to be performed in a licensed health care facility that: (1) "reserve[d] at least 25% of its hospital capacity for treatment of COVID-19 patients," and (2) agreed to not "request any personal protective equipment from any public source . . . for the duration of the COVID-19 disaster."[52] Notably, GA-15 became effective on April 21, 2020, 11:59 PM, and continued through May 8, 2020, 11:59 PM.[53] Although GA-15 extended restrictions on health care facilities through May 8, 2020, the exception added in GA-15, which allowed any surgery or procedure to be performed under certain conditions, suggests that each executive order is unique and not merely an extension of the previous order. Thus, even under the narrowest interpretation of the communicable disease provision, policyholders may be able to find coverage through an executive order issued at a later date.

3. Will the limits under the communicable disease provision allow the policyholder to recover all the policyholder's business income loss?

Lastly, policy limits play a crucial role in determining how much can be recovered under a communicable disease provision and may not be sufficient to fully recover from COVID-19-related business income losses. Thus, policyholders should diligently review their property policy to determine whether the communicable disease coverage includes a separate sub-limit (which is common), and the amount of this limit.[54] Once the limit is reached, the policyholder's remaining losses will have to be submitted under another coverage grant, such as civil authority, discussed below, or via the general business interruption, or contingent business interruption coverages under the policy. As a final note, some insurers may argue that granting recovery under a communicable disease provision precludes other grants of coverage, but the policy must unequivocally contain this language to bar other grants of coverage under the policy.

C. Civil Authority Coverage

Policyholders who own a business affected by Stay-At-Home orders in Texas may find a path to recovery of lost business and extra expenses under civil authority coverage provisions. Many of the recent insurance claims related to COVID-19 have come as a result of Stay-At-Home orders affecting access to an insured's property. Property policies often provide coverage for business income loss and extra expenses resulting from government actions that restrict access to the insured's premises.

Though most civil authority coverages are triggered by similar general requirements, a policyholder should determine which requirements are present in the policy and to what extent those requirements are imposed. Additionally, coverage is sometimes subject to a monetary sublimit, a duration limit (*e.g.*, 30 days), and a distance from the insured property limit (*e.g.*, 5 miles). These limits are located either on the Declarations page or within the civil authority provision itself.

"The general rule is that '[c]ivil authority coverage is intended to apply to situations where access to an insured's property [or "covered property"] is prevented or prohibited by an order of civil authority issued as a direct result of physical [loss or] damage to other premises in the proximity of the insured's property.'"[55] Thus, most policies require a causal link between prior physical loss or damage and the civil authority order. As discussed under the communicable disease section, policyholders should review the Stay-At-Home orders affecting their property that establishes or indicates a causal link to COVID-19.

When an insured has suffered actual business losses and extra expenses due to an order or action by a civil authority, most policies require varying degrees of the following triggering requirements: (1) property *not insured by the policy* (or "adjacent property") sustains "direct physical loss or damage" by a "covered cause of loss"; (2) the adjacent property is either adjacent to or within a specified geographical proximity to the insured's covered property; and (3) the action or order limits, restricts, or prohibits access to the insured's covered property.

Common language used by insurers in civil authority coverage provisions is within the ISO's Business Income (and Extra Expense) Coverage Form.[56] The following is the civil authority provision as it appears in one of the recent ISO forms:

In this Additional Coverage, Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.

When a Covered Cause of Loss causes damage to property other than property at the described premises ["adjacent property"], *we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises* ["covered property"], provided that both of the following apply:

> (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
>
> (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.

Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end:

> (1) Four consecutive weeks after the date of that action; or
>
> (2) When your Civil Authority Coverage for Business Income ends;
>
> whichever is later.

Damage at the adjacent property is thus a prerequisite for triggering civil authority coverage under the form above. Other forms, however, will use the language "physical loss or damage." Unlike other grants of coverage, the insured property need not be damaged or even have COVID-19 present to trigger civil authority coverage. Assuming the policyholder can show direct physical loss or damage as discussed above, the next questions are whether the adjacent property was within the requisite proximity trigger coverage and whether the access must be completely or partially restricted.

1. The Adjacent Property (or Proximity) Requirement

The policyholder must show that adjacent property—or within a specified proximity—suffered physical loss or damage (or under some policies just physical damage). Absent language requiring the relevant order be specifically directed at the covered premises or the affected neighboring properties, a policyholder should be able to show that the contaminated or affected adjacent property is within the provision's proximity requirement. Fortunately, COVID-19 Stay-At-Home orders have been broadly applied to large geographic locations. As long as the relevant order contains language that the loss or damage occurred at large areas of uninsured property, any property within the scope of the order should satisfy this requirement.

In the above ISO example, the adjacent property must be "not more than one mile" from the covered property for coverage to be triggered. Proximities of one or five miles are most common when the adjacent property does not need to be *actually* adjacent. While many policies include the proximity language in the civil authority provision itself, some policies provide that language on the Declarations page. Thus, policyholders should review both for any information that might affect proximity.

2. The Access Requirement

The policyholder needs to show that the order restricted access to the covered property in a manner consistent with the requirements under the provision. Policies will require either partial or complete restriction of access to the covered location.

Some provisions may have different access requirements for the affected adjacent property as compared to the covered property. Policyholders should review the restrictions under the order to make sure access restriction is consistent with access restriction in the civil authority provision. Note, however, many Stay-At-Home orders do not totally restrict access. Rather, the use of the property has been totally restricted by customers or non-essential business personnel. Courts, however, have construed the total restriction of customer foot-traffic as a partial restriction sufficient to trigger the coverage.[57]

The above ISO provision includes the term "prohibits" to describe the access restriction to the covered property which may create an ambiguity. However, courts have construed "prohibits access" as not necessarily requiring a showing that access was completely prohibited.[58] Thus, allegations that "plausibly allege that access was prohibited to such a degree" that "the level of business was dramatically decreased" are sufficient to survive the motion to dismiss.[59]

D. Triggering Contingent Business Interruption Insurance

Contingent Business Interruption ("CBI") insurance provides a policyholder coverage for business income loss that is derived from the physical loss or physical damage to the property of the insured's suppliers or customers. CBI insurance contains the same elements as BI insurance except for one key distinction: a CBI grant of coverage requires a physical loss or physical damage to occur to the property of a policyholder's suppliers or customers.[60] Typically, this coverage carries with it a sublimit. Unsurprisingly, the definition of "supplier" and "customer" varies from policy to policy and is often tailored to the business of the insured.

Although some versions of CBI provisions provide coverage to both "direct" and "indirect" suppliers and customers of the insured, other CBI provisions limit coverage to those suppliers and customers in privity of contract with the insured.[61] Thus, policyholders should keep a watchful eye on whether the CBI provision in their policy limits recovery to only those suppliers and customers in direct privity of contract with them. If so, CBI claims should only be filed for losses incurred *via* the physical loss or damage to a customer or supplier in privity of contract with the insured.

E. Triggering Extra Expense Insurance

As an add-on to the paths to coverage found within a commercial property insurance policy, policyholders should also seek recovery under extra expense provisions. These provisions can be found alongside the recovery of business income loss within the communicable disease, civil authority, BI, and CBI provisions.

A typical Extra Expense provision reads as follows:

> The recoverable EXTRA EXPENSE loss will be the reasonable and necessary extra costs incurred by the Insured of the following during the PERIOD OF LIABILITY:
>
> (1) extra expenses to temporarily continue as nearly normal as practicable the conduct of the Insured;
>
> (2) extra costs of temporarily using property or facilities of the Insured or others; and
>
> (3) costs to purchase finished goods from third parties to fulfill orders when such orders cannot be met due to physical loss or damage to the Insured finished goods, less payment received for the sale of such finished goods.

Most notably, coverage under extra expense requires that the expense be "necessary."[62]

Courts have held that an extra expense is "necessary" when it "would not have been incurred had there been no physical loss or property damage."[63] Practically speaking, this suggests that the costs for masks, gloves, sanitizing equipment, and remote working expenses to "temporarily continue as nearly normal" should be covered under an extra expense provision. For policyholders, such as hospitals, who already purchase these supplies, extra expense covers those costs above what would typically be spent. Since the costs of these supplies can be costly, policyholders should not overlook this provision in their policy.

IV. Coronavirus Legislation

While more judicial decisions in the coming months will play an important role in determining whether commercial property insurance applies to COVID-19-related business income losses, policyholders

should also keep a watchful eye on relevant federal and state legislation. In response to blanket denials from insurers on COVID-19-related claims, federal and state governments have attempted to enact legislation that would provide businesses with compensation for business income loss due to viral pandemics. The effect of this legislation ranges from providing insurers with financial incentives for voluntarily covering business income loss to voiding virus exclusions and forcing insurers to pay business interruption claims.[64]

Assuming this legislation is signed into law, violations of the Contracts Clause of the United States Constitution would likely be alleged. Insurers would likely argue that the Contracts Clause prohibits states from passing laws that impair the "Obligations of Contracts." However, judicial precedence suggests that legislation designed to provide policyholders with relief is constitutional. Specifically, courts have rejected contract clause challenges to state laws that respond to natural disasters.[65] For example, courts have upheld legislation that extended the statute of limitations for policyholders to sue insurers because it held a legitimate purpose.[66] Likewise, it can be argued that legislation to help businesses recover their COVID-19-related business income loss also serves a legitimate purpose. Certainly, if courts are willing to uphold laws affecting contracts in the context of natural disasters, it would not be so farfetched to assume that courts would also uphold similar legislation aimed at reducing the effects of a global pandemic on millions of business owners across the United States.

V. Coverage for Liability Claims

In addition to first-party claims under commercial property policies, policyholders may have coverage for third-party claims arising from issues related to the COVID-19 pandemic under various liability policies.

A. D&O Coverage

As the pandemic continues its effect on the market, COVID-19-related D&O claims are on the rise. Unlike the claims under property policies, these claims do not follow a standard narrative.

D&O coverage commonly provides three types of coverage related to the "wrongful acts" of directors and officers (and sometimes the company) in the management of the company. Side A covers the directors and officers directly against alleged wrongful acts when they are not indemnified by the company, Side B covers the company for the indemnification of the directors and officers for alleged wrongful acts, and Side C covers the company's wrongful acts. A "wrongful act" is typically broadly defined to include any error, misstatement, misleading statement, omission, breach of duty, or neglect of an officer or director of the company as well as the company.

COVID-19 related D&O claims do not follow a particular pattern, as in the case of property claims, and can take many different forms, for example:

- claims involving a COVID-19 outbreak at the company's facilities (such as cruise lines, meat-packaging plants, or other essential businesses) and poor management decisions in response to those outbreaks;

- claims alleging that companies that have experienced operational disturbances as a result of the pandemic (the inability to meet projections, the loss of essential customers) and downplayed those concerns to investors;

- claims involving allegations of misrepresentation about the company's ability to benefit from the pandemic (such as vaccine makers or diagnostic testing companies);

- allegations of insider trading as stock prices continue to fall as a result of the pandemic.

Importantly, most D&O policies do not contain a virus or communicable disease exclusion that is sometimes found in other liability coverages. However, most D&O policies do contain an exclusion for bodily injury and property damage, which typically excludes bodily injury, mental anguish, emotional distress, illness, disease, or death of any person. These policies generally include a carve-out, though, for securities claims arising out of bodily injury. A prudent policyholder will review the allegations in detail to determine the breadth and potential application of any bodily injury exclusion.

B. EPL Coverage

As businesses begin asking or requiring their remote employees to return to work, COVID-19-related suits may increase concerning companies' alleged insufficient health and safety measures to prevent the spread of COVID-19. Wage and hour claims may also arise regarding decisions concerning furloughs, reductions-in-force, layoffs, or hazard pay. Whether any of these are covered under the company's employment practices liability ("EPL") coverage depends on the specific language in the policy, as EPL coverage is not written on a standard form and can vary greatly.

EPL coverage is typically triggered by an "employment wrongful act," which usually includes claims for harassment, discrimination, invasion of privacy, defamation, or retaliation for FMLA (although the FMLA violation itself is typically excluded). These claims may become more common in the post-return-to-work environment in which many companies now find themselves.

Wary practitioners should look out for bodily injury exclusions, which are common in EPL policies. EPL terms are not written on a standard form, so it is important to review these terms carefully to determine how the policy might respond to an employee claim. For example, there is a big difference between an exclusion for claims "for bodily injury" and an exclusion for claims "arising out of bodily injury." The latter is much broader and is more problematic to argue against if, for example, the claim involves inadequate health or safety measures which led to a COVID-19 outbreak on the premises.

Additionally, the coverage for wage and hour claims varies broadly from one policy to the next and may be excluded entirely or sub-limited, so it is important to check the policy for these exclusions to determine whether or not an EPL policy would respond to a wage and hour claim related to COVID-19.

Finally, it is important to remember that one of the lesser-touted benefits of EPL coverage is the ability to obtain pre-claim legal advice concerning the company's policies and procedures related to return-to-work decisions, testing employees, pay concerns, layoffs, and other areas of concern as of late. Be sure to check the policy to see if this coverage benefit exists.

C. CGL Coverage

Although causation will be difficult to establish, it is likely we will see liability claims against companies increase as a result of the COVID-19 pandemic, including, for example, claims that the business did not protect its customers from becoming exposed to COVID-19. Although liability may be difficult to establish, these claims are costly to defend.

Luckily, commercial general liability ("CGL") insurance generally provides the company both a duty to defend and a duty to indemnify against claims of bodily injury or property damage (among other coverages) caused by a business's operations or products or on a business' premises. In addition to its own coverage, the company may also be added as an "additional insured" on a number of supplier, partner, or subcontractor policies.

Although not standard, some CGL policies exclude viruses or "communicable disease" liability, so be sure to review the policy for this troublesome exclusion.

Because tort claims often include a variety of different theories and causes of action, it is important to remember that under Texas' "eight corners" rule, an insurer is required to defend its insured if, after comparing the factual allegations in the four corners of the underlying pleading and the four corners of the insurance policy, the allegations *potentially* state a claim covered under the policy.[67] "The eight corners rule is to be applied liberally in favor of the insured, with any doubts resolved in favor of the insured. If *any* allegation in the pleading is *even potentially* covered by the policy then the insurer has a duty to defend its insured."[68] Further, "[i]f an insurer has a duty to defend any portion of a suit, the insurer must defend the entire suit."[69]

1 For the purpose of illustration, policy language from the Insurance Services Office (ISO), the American Association of Insurance Services (AAIS), AIG™, and Travelers™ coverage forms are utilized. These represent the most common policy language.

2 *Tex. Indus., Inc. v. Factory Mut. Ins. Co.*, 486 F.3d 844, 846 (5th Cir. 2007) (quoting *Am. Mfrs. Mut. Ins. Co. v. Schaefer,* 124 S.W.3d 154, 157 (Tex.2003)).

3 *Nassar v. Liberty Mut. Fire Ins. Co.*, 508 S.W.3d 254, 258 (Tex. 2017) (quoting *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994) and *Guardian Trust Co. v. Bauereisen*, 132 Tex. 396, 121 S.W.2d 579, 583 (1938)).

4 *See Tex. Indus., Inc.*, 486 F.3d at 846.

5 *Nassar*, 508 S.W.3d at 258.

6 *Harken Exploration Co. v. Sphere Drake Ins. P.L.C.*, 261 F.3d 466, 475 (5th Cir. 2001); *see also Am. States Ins. Co. v. Bailey*, 133 F.3d 363, 369 (5th Cir. 1998) ("Exceptions and limitations in an insurance policy are strictly construed against the insurer.").

7 *Evanston Ins. Co. v. Atofina Petrochemicals, Inc.*, 256 S.W.3d 660, 668 (Tex. 2008) (quoting *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex.1991)).

8 *RSUI Indem. Co. v. Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015) (emphasis added) (quoting *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 811 S.W.2d at 555); *Nassar*, 508 S.W.3d at 258.

9 *See Home Assur. Co. v. Cat Tech L.L.C.*, 660 F.3d 216, 220 (5th Cir. 2011); *see also* Tex. Ins. Code Ann. § 554.002 ("The insurer . . . has the burden of proof as to any avoidance or affirmative defense that the Texas Rules of Civil Procedure require to be affirmatively pleaded. Language of exclusion in the contract or an exception to coverage claimed by the insurer . . . constitutes an avoidance or affirmative defense.").

10 *Travelers Indem. Co. of Conn. v. Presbyterian Healthcare Res.*, No. 3:02-CV-1881-P, 2004 WL 389090, at *2 (N.D. Tex. Feb. 25, 2004) (mem. op., unpublished) (citing *Guaranty Nat'l Ins. Co. v. VIC Mfg. Co.*, 143 F.3d 192, 193 (5th Cir. 1993)).

11 *See Mellin v. N. Sec. Ins. Co., Inc.*, 167 N.H. 544, 546 (2015) (holding that insureds were not required to prove "tangible physical loss" where the smell of cat urine from a neighboring apartment caused direct physical loss because it rendered the property uninhabitable); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418-WHW, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) (unpublished) (noting that under New Jersey law "property can sustain physical loss or damage without experiencing structural alteration" and that property's "temporary and non-structural loss of function is recognized as direct physical loss or damage"); *see also Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 90–92 (1996) (holding that "the mere presence of [asbestos]" within the premises was property damage that constituted "physical injury" because the asbestos was a hazard to the occupants' health with "the *potential for future releases*") (emphasis added).

12 No. 20-CVS-02569, 2020 WL 6281507, at *3–4 (N.C. Super. Ct., Durham Cnty., N.C. Oct. 9, 2020).

13 *Id.* at *3.

14 *See Studio 147, Inc. v. Cincinnati Ins. Co.*, --- F. Supp. 3d ----, No. 20-CV-03127-SRB, 2020 WL 4692385, at *6 (W.D. Mo. Aug. 12, 2020) (quoting Pl. Am. Compl. ¶¶ 47, 50) (noting later that "Plaintiffs expressly allege physical contamination"); *see also Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963, at *4 (W.D. Mo. Sept. 21, 2020) ("Plaintiffs allege that 'it is likely customers, employees, and/or other visitors to the insured properties over the recent month were infected with the coronavirus,' they 'suspended operations due to COVID-19 to prevent physical damages to the premises by the presence or proliferation of the virus and the physical harm it could cause persons present there,' and that 'customers cannot access the property due to the Stay at Home Orders or fear of being infected with or spreading COVID-19.' Plaintiffs also explain how COVID-19 is physically transmitted by air and surfaces through droplets, aerosols, and fomites that remain infectious for extended periods of time." (quoting Pl. Compl. ¶¶ 17, 70, 18) (citations omitted)).

15 *See Blue Springs Dental*, 2020 WL 5637963, at *4.

16 *See id.*; *Studio 147*, 2020 WL 4692385, at *6.

17 *Compare Blue Springs Dental*, 2020 WL 5637963 at *4 (finding that the insured sufficiently stated a claim that COVID-19 caused physical loss or damage) *with Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 47724305, at *5 (W.D. Tex. Aug. 13, 2020) (finding that the line of cases construing "direct physical loss" as "requiring tangible injury to property" to be more persuasive).

18 *See Diesel Barbershop*, 2020 WL 47724305, at *5; *Blue Springs Dental*, 2020 WL 5637963, at *4; *Studio 147*, 2020 WL 4692385, at *6.

19 *See Diesel Barbershop*, 2020 WL 47724305, at *5–6.

20 *See id.*

21 No. 20-22615-Civ-Torres, 2020 WL 5051581, at *7–9 (S.D. Fla. Aug. 26, 2020); *see also Seifert v. IMT Ins. Co.*, No. 20-1102-JRT, 2020 WL 6120002, at *3 (D. Minn. Oct. 16, 2020) (holding that while "Minnesota caselaw does not require a showing of structural damage," a showing of contamination of the relevant property that constitutes actual damage, in the very least, is required to show "direct physical loss or damage"); *Diesel Barbershop*, 2020 WL 57724305 at *5 (finding that pleading mere economic loss from loss of use was not a plausible claim).

22 *See Maluabe*, 2020 WL 5051581, at *7–9 (discussing why *Studio 417* was distinguishable, yet provided an adequate showing of actual damage); *Seifert v. IMT Ins. Co.*, 2020 WL6120002, at *3; *supra* note 14.

23 No. 20-11655, 2020 WL 5258484, at *6 (E.D. Mich. Sept. 3, 2020).

24 *Id.*

25 465 F.3d 834, 838 (8th Cir. 2006) ("Source Food's argument might be stronger if the policy's language included the word 'of' rather than 'to,' as in 'direct physical loss *of* property' or even 'direct loss *of* property.'").

26 Pl.'s Resp. in Opp'n to Def. Am. Rule 91(a) Mot. to Dismiss at 21, *Lombardi's Inc. v. Indem. Ins. Co. of N. Am.*, No. 20-05751 (14th Dist. Ct., Dallas Cnty., Tex. Oct. 15, 2020).

27 *See supra* notes 14, 16, 20 and accompanying discussion.

28 *Seifert*, 2020 WL 6120002 at *3.

29 *Id.* at *4 n.6 (quoting the plaintiff's policy exclusion language from an ISO Businessowner Property form).

30 Ins. Servs. Office, Amendatory Endorsement – Exclusion of Loss Die to Virus or Bacteria, at 1 (2006).

31 No. A-20-CV-00555, 2020 WL 6572428, at *3 (W.D. Tex. Nov. 4, 2020).

32 *Id.*

33 *Id.*

34 *Id.*

35 John DiMugno, *The Implications of COVID-19 for the Insurance Industry and Its Customers*, 32 No. 5 Cal. Ins. L. & Reg. Rep. NL 1, 4 (2020).

36 In *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, the court found physical loss when ammonia was released inside on the the insured's facilities. No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *1 (D.N.J. Nov. 25, 2014). Here, the insured hired a third-party cleaning service in order to make the facility safe for occupancy. *Id.*

37 *Retail Brand All., Inc. v. Factory Mut. Ins. Co.*, 489 F. Supp. 2d 326, 331 (S.D.N.Y. 2007).

38 *Id.*

39 Class Action Complaint & Demand for Jury Trial, *Rockhurst Univ. v. Factory Mut. Ins. Co.*, No. 4:20-CV-00581-BCW (W.D. Mo. filed July 23, 2020) 2020 WL 4226747, at *12–13.

40 *Id.* at *12.

41 *See id.*

42 *Id.* at *20.

43 Ryan T. Seihr, Covid-19: What Employers Need to Know About HIPAA, X Nat. L. Rev. 274, 274 (2020).

44 Eurofins, Environmental Monitoring for Coronavirus on Workplace Contact Surfaces 4 (2020).

45 Eurofins, *Coronavirus Surface Monitoring*, https://www.eurofinsus.com/food-testing/services/testing-services/microbiology/coronavirus-surface-monitoring/ (last visited Jan. 4, 2021).

46 *RSUI Indem. Co.*, 466 S.W.3d at 118.

47 Amended Order of County Judge Clay Jenkins, The County of Dallas, https://www.dallascounty.org/Assets/uploads/docs/covid-19/orders-media/041520-DallasCountyOrder.pdf (emphasis added).

48 *Id.*

49 Order of County Judge Lina Hidalgo, Harris County, https://agenda.harriscountytx.gov/2020/03-24-20StayHomeWorkSafe.pdf.

50 Executive Order GA-09, Texas Office of the Secretary of State, https://gov.texas.gov/uploads/files/ press/EO-GA_09_COVID-19_hospital_capacity_IMAGE_03-22-2020.pdf.

51 *Id.*

52 Executive Order GA-15, Texas Office of the Secretary of State, https://gov.texas.gov/uploads/files/press/ EO-GA-15_hospital_capacity_COVID-19_TRANS_04-17-2020.pdf.

53 *Id.*

54 Vince Capaldi, *Ebola and Beyond: Protecting Self-Insured Work Comp Plans* (October 22, 2014), https://www.insurancethoughtleadership.com/tag/communicable-disease-endorsement.

55 *Dickie Brennan & Co., Inc. v. Lexington Ins. Co.*, 636 F.3d 683, 686–87 (5th Cir. 2011) (quoting Clark Schirle, *Time Element Coverages in Business Interruption Insurance*, 37 The Brief 32, 38 (2007)).

56 Ins. Servs Office, Business Income (and Extra Expense) Coverage Form 1 (2011) (Form No. CP-00-30-10-12), https://www.northstarmutual.com/UserFiles/Documents/forms/policyforms/Current/CP%2000%2030%2010%2012.pdf.

57 *See Blue Springs*, 2020 WL 5637963, at *7; *Studio 147*, 2020 WL 4692385, at *7.

58 *See, e.g.*, *Studio 417*, 2020 WL 4692385, at *7.

59 *See id.* (quoting *TMC Stores, Inc. v. Federated Mut. Ins. Co.*, No. A04-1963, 2005 WL 1331700, at *4 (Minn. Ct. App. June 7, 2005)).

60 John DiMugno, *supra* note 42, at 12.

61 *Id.* at 12–13.

62 William N. Erickson & Alexander G. Henlin, *Understanding Extra Expense*, 45 Tort Trial & Ins. Prac. L.J. 1, 21 (2009).

63 *Butwin Sportswear Co. v. St. Paul Fire & Marine Ins. Co.*, 534 N.W.2d 565, 567 (Minn. Ct. App. 1995).

64 *See generally* COVID Justice and Accountability Act, H.R. 7020, 116th Cong. (2020); Business Interruption Insurance Coverage Act of 2020, H.R. 6494, 116th Cong. (2020); Never Again Small Business Protection Act of 2020, H.R. 6497, 116th Cong. (2020); Business Interruption Relief Act of 2020, H.R. 7412, 116th Cong. (2020); Pandemic Risk Insurance Act of 2020, H.R. 7011, 116th Cong. (2020); HB NO. 858, HLS 20RS-1270, Reg. Sess. (La. 2020).

65 *State v. All Prop. & Cas. Ins. Carriers Authorized & Licensed To Do Bus. In Louisiana*, 937 So. 2d 313, 327 (La. 2006).

66 *Id.* at 316.

67 *St. Paul Fire & Marine Ins. Co. v. Green Tree Fin. Corp.-Texas*, 249 F.3d 389, 391–93 (5th Cir. 2001).

68 *Id.*

69 *Harken Exploration*, 261 F.3d at 474.

By Paul S. White and Siobhán A. Breen

THE INSURANCE IMPLICATIONS ARISING FROM COVID-19

On December 31, 2019, China reported an outbreak of a new coronavirus called SARS-CoV-2 (Severe Acute Respiratory Syndrome Coronavirus-2) that was detected in Wuhan City, Hubei Province, China. This new coronavirus was deemed responsible for the disease in humans now called COVID-19 (i.e., Coronavirus Disease 2019). In a matter of weeks, COVID-19 brought the world to a standstill, prompting the World Health Organization (WHO) to declare a global pandemic on March 11, 2020. At the time COVID-19 was declared a pandemic, there were a reported 113,584 cases globally—604 in the United States—and a total of 4,291 deaths. As of December 15, 2020, over 73 million people had been infected with the virus in at least 191 countries and over 1.6 million people had died from the virus.[1] COVID-19 has dealt a similarly lethal blow to the global economy amounting to trillions of dollars in losses, and resulting in quarantines, curfews, closed or limited access to business, unprecedented unemployment, stock market volatility, travel restrictions, public gathering limitations or prohibitions, and the suspension or interruption of day-to-day life for practically every individual, business, and industry in the world. Indeed, some economic leaders predict a worldwide recession or depression.[2]

The repercussions of COVID-19 on the insurance industry are significant, and the financial and liability exposures arising from a global crisis of this magnitude prompt an analysis of a myriad of complex insurance risks under a variety of products, extending coverage for first-party property and business interruption benefits, event cancellations, and liability claims. This article explores the emergence of COVID-19, its influence on the health and economies of the world, and the resulting effect on insurance risks.

Coronaviruses

Coronaviruses are not new to either the animal or human populations. There are hundreds of coronaviruses, and they are common in many different species of animals, including camels, cattle, cats, and bats. Animal coronaviruses rarely infect people or spread between people. However, coronaviruses are zoonotic, meaning they can be transmitted between animals and people, which is called a spillover event.

What Is Coronavirus or COVID-19?

COVID-19 is believed to have originated with bats, which transmitted it to another host animal—suspected to be a pangolin—in a Wuhan, China market where live animals were sold. In turn, the host animal is believed to have transmitted the disease to one or more humans. Ultimately, COVID-19 transmitted from human to human in exponential fashion, resulting in the global crisis humanity now faces.

In humans, there are seven known types of coronaviruses. The name "corona," i.e., crown, is a reflection of the halo of spiked proteins visible in a coronavirus similar to the spikes in a crown. Four of the human coronavirus infections regularly circulate, causing mild to moderate upper respiratory tract infections often associated with common colds.

Three coronaviruses, however, have jumped from animal hosts to humans and have led to more severe diseases such as acute respiratory infections, pneumonia, respiratory distress, organ failure, and even death. Two of these are MERS (Middle East Respiratory Syndrome), which emerged in 2012 and remains in circulation in camels, and SARS (Severe Acute Respiratory Syndrome), which emerged in late 2002/early 2003 and disappeared by 2004. Detailed investigations found that SARS was transmitted from civet cats to humans and MERS from dromedary camels to humans. The third is the virus responsible for our current global crisis, SARS-CoV-2, also known as COVID-19. Notably, COVID-19 is a mutation of the original SARS. COVID-19 had not been identified in humans prior to late December 2019.

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Public Health Threat

The public health threat posed by COVID-19 is reflected in its exponential spread. The WHO declared COVID-19 a pandemic on March 11, 2020. By March 20, 2020, COVID-19 had infected more than 330,000 people and killed some 14,500 since first being reported on December 31, 2019. By December 15, 2020, global infections exceeded 73 million and global deaths exceeded 1.6 million. Nor does COVID-19 discriminate among nations. This conclusion is reflected by the fact that the United States—with one of the best health-care systems in the world—has been the epicenter the disease for months and currently reports over 16.6 million people infected and 302,689 dead.[3]

COVID-19's Economic Implications

Notwithstanding that social distancing can significantly slow the spread of COVID-19,[4] it brings with it a significant economic toll. Investors worldwide have been spooked by the rapid spread of COVID-19, with stock markets around the globe sharply lowering in its wake.[5] COVID-19 does not discriminate and has affected the largest and smallest of businesses. As these effects escalate, so, too, will insurance claims.[6]

Since the WHO's announcement of a pandemic, neither the effort to thwart COVID-19, or its economic fallout, has been limited to countries with weaker health care systems. It is not an exaggeration to say that the financial effect of COVID-19 has affected, and will continue to affect, the world more than any event since the Great Depression. In the United States, cities and states have issued lockdown, shelter-in-place, or stay-at-home orders (or variations thereof), and the United States government has provided and considered stimulus packages in the trillions of dollars. Other countries have similarly sought to provide aid to their citizens and businesses at levels never seen before.

The Specter and Realization of Pandemics

By definition, a pandemic is a global disease outbreak that occurs when a new virus emerges for which people have little or no immunity and for which there is no vaccine. A flu pandemic occurs when a new influenza virus emerges that can infect people easily and spread from person to person in an efficient and sustained way.[7] As previously referenced, prior major pandemics include (1) the Spanish Flu in 1918, (2) SARS in 2003, (3) the bird flu in 2006, and (4) Ebola in 2014.

COVID-19 is the latest in a list of illnesses to hit the world over the past two decades, burdening humanity with the threat of a global contagion accompanied by disease and death and presenting worldwide economies with the specter of a global supply chain shut down and social distancing policies that preclude or limit workforce operations.[8]

Indeed, like predecessor viruses such as Ebola, SARS, and the avian flu, coronavirus reads like a Hollywood disaster movie: a mutated variant of SARS; no available vaccination; tens of millions of people worldwide quarantined, giving a ghost-town feel to some of the most populous centers in the world; over 73 million people infected in at least 191 countries; over 1.6 million people dead; global businesses shut down or operating under significant restrictions; and health experts projecting this outbreak could linger for years, notwithstanding that in December 2020, vaccinations were approved and distribution initiated.

Historically, pandemics have warranted the attention now being given to the coronavirus. Although far from exhaustive, the events listed in Figure 1 highlight how actual or threatened pandemics have confronted humanity for the past 100 years:

Figure 1

YEAR	EVENT
1918	Spanish Flu: 40-50 million die; global population was 1.75 billion
1957 / 68	"Milder" pandemics: 1-4 million die worldwide
1976	Ebola: high fatality; 21-day incubation; widespread west African nations
1997	Bird flu: Poultry to human; 33% fatality (6 of 18); 1.5 million chickens in Hong Kong (mutant strain kills 3-year-old boy)
2003	SARS: Spreads globally from Hong Kong hotel; infects 8,000 in 29 countries; 800 die—10% fatality
2004	Mutated bird flu: 140 cases; 70 deaths—50% fatality. 150 million birds destroyed. Billions in economic loss.
2005	Bird flu H5N1: carried via migratory birds throughout world
2006	H5N1 humans: 251 cases; 148 deaths—59% fatality
2014	Ebola: USA has first diagnosis
2015	HPAI HF (mutated bird flu): hits commercial poultry; 48 million birds destroyed

Insurance and Pandemics

Early on in the pandemic, a *Law360* article reported that insurance companies were being warned by their lawyers and loss adjusters to expect a jump in claims under business interruption policies as the repercussions of the spread of COVID-19 began to cut into business activity.[9] In fact, insurance claims and lawsuits arising from COVID-19 have reflected the spread of the disease itself.

Although vaccinations are now being distributed, it remains to be seen whether we are in the infancy of this outbreak or the beginning of the end. The effect of COVID-19 on human life and economies throughout the world is fluid, and a myriad of unknowns remain. What is apparent, however, is that individuals and businesses alike are questioning whether insurance will be available to aid those whose businesses are affected by COVID-19. As with any insurance question, the answer is to read the policy. This article will address insurance questions arising as a result of this crisis. We emphasize, however, that this article focuses on *possible* claims and coverage issues that could arise, and we recognize that additional factors, specific facts, and specific policy language must be reviewed with respect to any specific claim.

Property Insurance and Business Interruption

COVID-19 has prompted inquiries into whether commercial policyholders will be able to recoup all or part of their economic or business income losses from the "business interruption" or "contingent business interpretation" coverage in commercial property policies. Business interruption coverage addresses lost profits caused by damage to the policyholder's own property, while contingent business interruption coverage addresses a policyholder's losses resulting from interruption of suppliers' or customers' businesses because of their property damage. As with losses arising from prior viral events, policyholders are likely to discover that their standard form policies have coverage restrictions that may preclude or significantly limit any financial recovery.

Specified Perils

Commercial businesses often procure business interruption coverage as part of their commercial property policies, the scope of which can vary by policy. Many commercial property policies that include business interruption coverage designed to assist a policyholder that suffers financial losses in their operations, only extend coverage if a loss arises from a designated cause or specified peril. For example, some may limit coverage to such designated causes as fire or earthquake. Most standard form property policies that insure against specified perils do not include viruses or pandemic events as designated perils. In circumstances where the policy requires a designated peril as a condition precedent to coverage, but the loss does not qualify, business interruption coverage generally will not be available.

The nature of a property insurance policy is to provide an insured with benefits for accepted risks of loss in exchange for the receipt of premiums. Property insurance policies generally insure either (1) "all risks" of physical loss, unless perils are specifically excluded or (2) "named perils" such as losses from specifically identified causes, e.g., fire or earthquake. The typical "all-risk" policy begins with a broad insuring provision that states that the policy covers "direct physical loss or damages to Covered Property." The insurer then specifies which risks it will not assume by listing those causes of loss as policy exclusions.[10] In other words, "the insurer promises to pay money to the insured on the happening of an event, the risk of which has been insured against."[11]

Direct Physical Loss

Commercial property policies also typically require "direct physical loss" to the property and proof of causation. In the event of a claim for coronavirus-related business interruption, questions may arise regarding whether this "physical loss" requirement has been met. In particular, in circumstances where a business has been closed as part of a mandatory or voluntary closure—but is otherwise is still habitable and uncontaminated—it probably has not suffered a direct physical loss since infectious diseases arising from human-to-human transmission generally will not qualify as property damage.

Generally speaking, "direct physical loss" does not include consequential or resulting economic loss.[12] In contrast, if a property has become physically contaminated and uninhabitable due to coronavirus, there may be a basis for a policyholder to claim a direct physical loss has occurred. For example, if tangible property is contaminated with the virus, the contamination of physical property may qualify as direct physical loss to property.

The economic fallout from COVID-19 appears predominantly to be based on economic slowdown or cessation due to societal adoption of social distancing in an effort to thwart exponential spread of the disease. However, prophylactic measures to protect against future contamination, or shutdown due to fear of contamination, generally will not qualify as direct physical loss to property.

A widely cited decision from the United States Court of Appeals for the Eighth Circuit explains the "direct physical loss" requirement. In *Source Food Technology, Inc. v. U.S. Fidelity & Guaranty Co.*, the insured argued that the closure of the U.S.-Canada border to its imported beef due to "mad cow" disease concerns qualified as "direct physical loss" since it was unable to transport its product.[13] The insured relied on *General Mills, Inc. v. Gold Medal Insurance Co.*[14] and *Marshall Produce Co. v. St. Paul Fire & Marine Insurance Co.*[15] to support its position that the impairment of function and value of a food product caused by government regulation is a direct physical loss to insured property. The Eighth Circuit found that the two cases were distinguishable and that coverage in those cases was triggered by actual physical contamination of insured property.[16] The court disagreed with the insured's argument, finding that Source Food's inability to transport its beef product across the border did not constitute product that was physically contaminated or damaged and to hold otherwise would render the word "physical" meaningless.[17]

In the face of COVID-19, policyholders have repeatedly asserted that the unpublished decision of *Gregory Packaging, Inc. v. Travelers Property and Casualty Co. of America,* supports an argument that the presence of the virus in a building will satisfy the direct physical loss requirement.[18] Notably, however, in *Gregory Packaging,* the presence of ammonia in the building made the building uninhabitable. In contrast, the cessation of business operations arising from COVID-19 is the result of government authorities working to eliminate or decrease the person-to-person spread of the disease, rather than identifying a physical property as contaminated or uninhabitable. Moreover, other published cases support the premise that property that may be cleaned has not suffered direct physical loss.[19]

Further, well-established Texas law requires direct physical loss.[20] Within the Fifth Circuit, the loss needs to have been a "distinct, demonstrable physical alteration of the property."[21] Similarly, a federal district court for the Northern District of Texas held that the term "physical loss" "cannot fairly be construed to mean physical loss in the absence of physical damage."[22] "[D]irect physical loss" requires a "'distinct, demonstrable, physical alteration of the property'" and "exclude[s] alleged losses that are intangible or incorporeal," thereby precluding claims "when the insured merely suffers a detrimental economic impact."[23]

In Texas, examples of direct physical loss include structural damage from hurricane winds,[24] hailstorms,[25] and ice storms.[26] The cases all involve some form of physical alteration of the structural integrity or nature of property. As such, the court in *Vandelay Hospitality Group LP d/b/a Hudson House v. The Cincinnati Insurance Company, et al.*, granted an insurer's motion to dismiss with leave to replead, holding that a virus, which does not physically alter the structural integrity or nature of property, does not constitute direct physical loss.[27] The Northern District of Texas ruled that allegations in the amended complaint were "factually conclusory and/or legal conclusions" that did not plausibly plead that the restaurants had suffered physical loss or damage that would be covered by the policy, and without such an allegation, they cannot allege a breach of contract on the insurer's part.[28] Similarly, in *Diesel Barbershop, LLC v. State Farm Lloyds*, the Western District of Texas granted an insurer's motion to dismiss, holding that there was no direct physical loss.[29]

It is unlikely that the coronavirus will allow for a one-rule-fits-all conclusion when it comes to a determination of whether an insured has suffered a direct physical loss. Rather, it is more likely that each claim will be investigated and evaluated based on its specific facts.

To date, policyholders have filed over 1,400 declaratory relief actions against their insurers in the United States, most of which involve some question regarding physical loss. The economic impact of these rulings is so significant that multiple publications and web sites are now tracking them.[30] While it is still early in the litigation process, there have already been a significant number of rulings in favor of insurers.[31] Conversely, at least one court has concluded that a shutdown order issued to contain COVID-19 qualifies as a "physical loss."[32] And other courts, focused on specific allegations and assuming the allegations are true for purposes of ruling on a motion to dismiss, have concluded that insureds have stated plausible claims for a business income loss.[33]

Contingent Business Interruption

Some policies may provide *contingent* business interruption coverage arising from disruptions between an insured and its supplier or customer. Generally, such coverage still may require that the underlying cause fall within a designated cause of loss or peril and arise from direct physical loss to property—similar to the policyholder's own coverage for a first-party business interruption loss. For businesses with essential reliance on supply chain production, contingent business interruption coverage often provides coverage when a supplier suffers a direct physical loss to its property that impairs its ability to provide delivery of goods or materials.

Insureds in the businesses of manufacturing, hospitality, and health care are some of the more common policyholders for this product line. Of note, many contingent business

interruption insurers also require that affected suppliers be specifically identified or scheduled in the insured's policy in order for coverage to exist. Contingent business interruption policies also are likely to include the same exclusions found in a standard form first-party policy.

Civil Authority Coverage

Some policies extend business interruption coverage for losses arising from "civil authority" orders that impair or prohibit access to an insured's property. The scope and limitations of business interruption coverage under such endorsements vary. Such coverage may or may not be included as part of the insurer's standard form; the coverage itself may vary based on whether a "direct physical loss" will be required. Insurers also may issue civil authority coverage on a manuscript basis, addressing specific needs based on expenses, geography, disease, calendar year, voluntary or mandatory orders, direct physical loss, a designated risk, or other criteria.

In the case of COVID-19, governments throughout the world have followed China's lead and restricted certain operations, travel, imports, and exports. For this reason, some commercial policyholders may look to the civil authority provisions in their policies for lost income and extra expense coverage.

If civil authority coverage is included as part of an insured's business interruption coverage, however, it often has significant prerequisites and is commonly written on a manuscript or bespoke basis. For example, such coverage may be limited to a waiting period following the "first action of civil authority"and may apply for a limited period following the civil authority action, such as a period of a few consecutive weeks or to the period when the civil authority coverage ends. This coverage may also require an occurrence resulting in physical loss to the property or within a one-mile radius.

Form CP0030 exemplifies such prerequisites:

> When a Covered Cause of Loss causes damage to property other than at the described premises, we will pay for the actual loss of Business Income you sustain and the necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both apply:
>
> 1. Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
>
> 2. The civil authority takes action in response to dangerous physical conditions resulting from the damage, or continuation of the Covered Cause of Loss that caused the damage, or the civil authority takes action to enable a civil authority to have unimpeded access to the damaged property.

Significantly, civil authority coverage is generally designed to provide insurance following physical damage to property and a subsequent civil authority action taken in response thereto, "as opposed to an action by a civil authority taken in anticipation of, and to prevent, possible damage in the future."[34] In *Dickie Brennan & Co. Inc. v. Lexington Insurance Co.*, the U.S. Court of Appeals for the Fifth Circuit explained that, "[t]he general rule is that civil authority coverage is intended to apply to situations where access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property."[35] By way of further example, a federal district court in Louisiana found that the FAA's closure of airports after September 11, 2001, did not "prohibit access" to the policyholder's hotels as required under the clause and the FAA did not "prevent" customers from going to the hotel.[36] Similarly, a New York court has held that "vehicular and pedestrian traffic in the area was diverted, (but) access to the restaurant was not denied," resulting in no recovery for the policyholder.[37]

Virus Exclusions

In response to COVID-19, policyholders have already raised the question of whether circumstances may exist where the presence of the virus in a physical structure will satisfy the policy requirement of direct physical loss to property. While attorneys and experts may line up to address this issue, as a practical matter, it may be moot. Many standard form business interruption policies contain exclusions that preclude coverage for losses arising from a virus. Such exclusions have existed for at least fifteen years and are clear in precluding coverage under any provision in the policy for any loss arising from a virus.

For example, Insurance Services Office (ISO) form CP 01 40 07 06 provides in pertinent part:

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

> A. The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
>
> B. 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. …

Significantly, when ISO submitted the exclusion to state regulators in July 2006, its circular LI-CF-2006-175 expressly identified SARS—*the virus from which COVID-19 mutated*—as a type of virus that the exclusion is designed to address. The ISO circular stated: [E]xamples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella and anthrax. The universe of disease-causing organisms is always in evolution."

The circular further stated:

> Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case. In addition, pollution exclusions are at times narrowly applied by certain courts. In recent years, ISO has filed exclusions to address specific exposures relating to contaminating or harmful substances. Examples are the mold exclusion in property and liability policies and the liability exclusion addressing silica dust. Such exclusions enable elaboration of the specific exposure and thereby can reduce the likelihood of claim disputes and litigation.
>
> While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.
>
> In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.

Thus, there cannot be coverage for lost business income if the policy excludes coverage for a loss arising from a virus, even if the lost income resulted from damage to property.[38]

Virus exclusions have similarly been the focus of coverage litigation in response to COVID-19. Several cases have already determined that virus exclusions apply to preclude coverage for business income claims arising from coronavirus.[39]

Specialized Business Interruption

The insurance industry does offer specialized insurance policies and extensions of coverage to standard property insurance policies. In some circumstances, the policy may not require direct physical loss to property. This coverage is most common among policyholders in the hospitality and health care industries, who may elect to purchase insurance coverage for losses caused by "communicable or infectious diseases."

Many of these policies or policy endorsements are manuscript or bespoke in nature. As such, insuring clauses may be specific in the identification of designated contagious or infectious diseases. Similarly, these policies may contain exclusions that preclude coverage for specific viruses or diseases, or may preclude coverage for all viruses, bacteria, or contagious and infectious diseases not otherwise identified in the insuring agreement.

Pandemic and Virus-Specific Coverage or Exclusions

As indicated in the above provisions, the existence of contagious and infectious diseases, as well as the growing threat of potential pandemics, prompted the insurance industry to be more specific in excluding certain diseases or pandemic events.

Notwithstanding such exclusions, however, some insurers offer specialized coverage for pandemic events. In May 2018, for example, the *Insurance Journal* reported that Marsh, in collaboration with Munich Re and epidemic risk modeler Metabiota, had announced the launch of PathogenRX, a fully integrated pandemic coverage product. "Using triggers like Metabiota's new Pathogen Sentiment Index, which provides extensive analytics into infectious disease outbreaks, businesses can model their potential financial loss from an outbreak and protect against the threat through an insurance policy underwritten by Munich Re. The policy is customizable and can be tailored to provide coverage for specific expenses, geographies, types of disease, or portions of a calendar year."[40]

Other insurance products may respond with an exclusion or coverage for specific pandemic threats. For example, the Ebola crisis prompted various insurers to preclude coverage expressly for Ebola-related claims, particularly for policyholders with foreign travel exposure to certain African countries where Ebola-loss exposures were present. In contrast, in October 2014, the London Market offered specific business interruption coverage to facilities such as hospitals, hotels, airports, shopping centers, restaurants, theaters, gyms, or any other business that might be forced to shut its doors because of an Ebola outbreak.

Event Cancellation and Nonappearance Insurance

One of the great wake-up calls to the world regarding the serious threat COVID-19 presents to humanity was the mass cancellation of public events that occurred in March of 2020. Worldwide, headlines repeatedly identified the suspension of all U.S.-based professional sports seasons and the cancellation of Broadway shows and major concert tours, and the list continues to expand. Many provide coverage for the cancellation of events will be subjected to careful review as policyholders and insurers alike evaluate whether insurance coverage is available for the economic losses arising from such cancellations.

Generally, event cancellation and contingency nonappearance insurance policies extends coverage for cancellation-related perils that are beyond the control of the insured, the event organizer, and the attendees when such identified perils result in cancellation, abandonment, postponement, or enforced reduction in attendance. Coverage under an event cancellation policy often is manuscript in nature and specific to an event or venue but may provide coverage for financial losses such as lost ticket sales, out-of-pocket expenses, contractual guarantees to others, and possibly even reimbursement to attendees for their purchased tickets.

Perils

Specified perils in an event cancellation policy may include death, accident, or illness, unavoidable travel delay, venue damage, and inclement weather. Similar to business interruption coverage, event cancellation policies generally will not extend coverage if cancellation is due to the attendees' or event organizers' fear of traveling or being infected with COVID-19. In such circumstances, the cancellation of an event may not be beyond the control of the event organizer or its attendees.

Exclusions

Event cancellation policies often preclude coverage for cancellation due to lack of interest or support for an event, preexisting conditions, terrorism, breach of contract, financial failure of a venture, and even viruses or communicable diseases. For example, the Communicable Disease exclusion precludes coverage where a loss arises out of fear of any world epidemic determined by the WHO. While this exclusion may exist in some event cancellation policies, coverage still may be available in some circumstances where, for instance, the insured purchased civil authority coverage, and the venue where the event was scheduled to take place was closed under the order of a government authority due solely to a communicable disease that manifested within the venue.

Conditions

Event cancellation also obligates an insured to mitigate any losses. Mitigation measures may include reasonably seeking to postpone or reschedule an event to a different time or location.

The significance of event cancellation insurance has been highlighted by the Olympics scheduled for June 2020 in Japan. In a call with investors, Swiss Re, which reportedly insures about 15 percent of the event cancellation market, reported that it could face a $250 million exposure if the summer Olympics were cancelled.[41] Moreover, "Financial analyst company Jefferies said at the start of the month that it estimates the insured cost of the 2020 Olympics, including TV and sponsorship, to be as high as $2 billion."[42] However, and as noted by *Law 360*, "most event cancellation insurance policies do not cover losses from communicable diseases like the coronavirus, except where such coverage is sold as an add-on. Moreover, that coverage is often only triggered when the government stops the event from going ahead, rather than when the organizer decides to cancel or attendees drop out."[43]

General Liability Insurance

As a result of the rapid spread of COVID-19, insurers are likely to confront general liability claims in the context of property damage or bodily injury. Specifically, businesses increasingly may find themselves as the target of claims alleging that their negligence led to the exposure and infection of clients and, in turn, insurers may find that their general liability policies are targeted. The potential for and creativity behind such claims is almost unlimited. For example, such claims could include:

- A policyholder's failure to warn or protect others;
- Exposure resulting in bodily injury or property damage;
- Negligence involving visitors to businesses or other locations such as offices, daycare centers, or places of worship;
- Negligence suits brought against the poultry industry (in fact, liability suits against poultry growers, meat packers, processors, retailers, and restaurants may be inevitable);
- Product liability related to air filtration and recirculation, particularly in situations involving airplanes and hospitals;
- Personal injury involving occurrences such a wrongful eviction or imprisonment;
- Constitutional claims involving the quarantine or restriction of infected or exposed persons and the "taking" of property;
- Negligence or other liability suits against a company or organization that fails to implement a pandemic contingency plan;
- Professional negligence claims based on a medical professional's failure to diagnose or treat;
- Claims against government entities for an unconstitutional "taking" arising from a civil authority order or other directive from a government authority;[44] and
- Negligence or strict liability claims against vaccination or drug manufacturers or distributors related to the effectiveness or side effects of a given treatment.

Commercial general liability (CGL) policies generally are written pursuant to forms provided by ISO. The ISO Commercial General Liability Coverage Form states that each carrier "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' . . . caused by an 'occurrence.'" "Property damage" is defined to include both "[p]hysical injury to tangible property, including all resulting loss of use of that property" and "[l]oss of use of tangible property that is not physically injured." Under the first prong of the definition, to be "property damage," there must be "an alteration in appearance, shape, color or in other material dimension."[45] Damages such as cracked sheetrock and stone veneer have qualified as "property damage."[46]

The "damages because of . . . 'property damage'" provision in a CGL includes recovery sought for economic losses, such as diminution in value, that are "attributable" to property damage, and allegations of such damages trigger an insurer's duty to defend.[47] Moreover, loss of use of property that is tied to covered "property damage" also constitutes "damages because of . . . 'property damage'" under the standard-form CGL insuring agreement.[48]

Under the insuring agreement, the "property damage" must be caused by an "occurrence," which is defined as an accident.[49] Even a deliberate act, if performed negligently, is an accident for purposes of a general liability policy, if the effect is not the intended or expected result.[50] An intentional tort, on the other hand, is not an accident and, thus, not an "occurrence" regardless of whether the effect was unintended or unexpected.[51] Consistent with the insuring agreement and the definition of an "occurrence" (and an applicable policy exclusion), there cannot be any evidence that the "property damage" was expected or intended by the insured. Further, the CGL grant of insurance coverage is subject to several policy exclusions.

Errors and Omissions Insurance

Errors & omissions (E&O) coverage comes in a variety of packages. Litigation targets in any health or pharmaceutical crisis context often include:

- E&O Coverage for Medical Professionals;
- E&O Coverage for Pharmacies; and
- E&O Coverage for Businesses That Fail to Implement a Pandemic Contingency Plan.

A coronavirus pandemic may inevitably lead to litigation premised on theories that a coronavirus outbreak could have been prevented or substantially mitigated.

E&O Coverage for Medical Professionals

E&O policies for medical professionals often extend coverage for medical incidents, typically defined as any act or omission arising out of provision of or failure to provide professional medical services. E&O policies for hospitals define medical incidents to mean any act or omission in the provision of or failure to provide professional health care services to patients, including providing or dispensing medications in connection with such services. Such E&O policies generally will exclude coverage for bodily injury to employees arising during the course of their employment (*e.g.*, an employee's exposure to an infectious or contagious disease) but may respond to claims that a health care professional acted or failed to act in a manner that led to a patient (nonemployee) contracting COVID-19.

E&O Coverage for Pharmacies

E&O policies for pharmacists similarly provide coverage for liability arising out of acts and omissions in providing professional services. The role of pharmacists has evolved beyond the mere filling of prescriptions to patient consultation and counseling, prescription evaluation, and drug product selection.

Directors and Officers Insurance

COVID-19 has roiled stock markets worldwide, resulting in significant losses for shareholders and decreasing valuations for global and local enterprises. The turmoil in the market appears to be premised, at least in part, on whether the market perceives that the COVID-19 crisis is being managed appropriately and what the reverberations will be on the global supply chain and business revenue. Shareholder actions against directors and officers have become an increasingly common response to market valuations alleged to have dipped unreasonably. Ultimately, how a company responds to COVID-19 may subject its directors' and officers' handling of the crisis to the scrutiny of the company's shareholders. Disputes also may arise between companies and their directors and officers (D&O) over whether the company was adequately prepared for the risks associated with the pandemic or whether appropriate steps were taken in response to the crisis.

Most D&O insurance policies expressly exclude claims for bodily injury "based on, directly or indirectly arising out of, or relating to actual or alleged bodily injury." While the language may vary by insurer or policy form, the intent is to preclude coverage for any claim, even for economic loss, if it is based on, arising out of, or related to bodily injury.

Shareholder actions against directors and officers often allege various degrees of misconduct as a basis for recovery. In this respect, insurers and policyholders also should examine the scope of their D&O insurance policies' "conduct exclusions." Many D&O insurance policies exclude coverage for certain misconduct by the insured, which can include deliberate fraud, dishonesty, and willful violations of the law. The particular language of these "conduct exclusions" can become significant if company management's response to coronavirus risk becomes the subject of shareholder litigation. Certain D&O policies require only that the proscribed conduct occur "in fact," while others provide that the exclusion applies only if the insured's misconduct is established by "final adjudication."

Employment Practices

Employment practices liability (EPL) insurance policies mainly provide coverage to employers for claims made by employees alleging discrimination based on sex, race, age, or disability (among others), and wrongful termination or harassment. EPL insurance also may be implicated if employees allege that they were mistreated when suspected of being infected. Some employment practices liability policies expressly cover alleged discrimination based on national origin and medical status.

Workers' Compensation

Workers' compensation insurance covers employees who suffer an injury in the workplace or an illness contracted in the workplace. This extends coverage to injuries "arising out of or in the course of employment," meaning that claims for compensation must allege work-related losses. Coverage claimed for work-related losses is analyzed based on the time the loss occurred, the place where the loss occurred, the specific activity the claimant was engaged in when the loss took place, and the specific nature of the loss. Workers' compensation claims similarly often focus on the issue of whether the claim is truly work related. Thus, employees and employers whose work is related to COVID-19 should maintain careful records identifying details related to potential exposures.

Legislative Action

On March 16, 2020, the New Jersey Legislature proposed a bill seeking to force insurers to pay COVID-19 business interruption claims notwithstanding the "Virus or Bacteria" exclusion, discussed *supra*. The law was to apply to existing insurance policies as of March 9, 2020, that insured businesses with fewer than 100 eligible employees (full-time who work 25 or more hours per week) in New Jersey. The draft bill specifically provided:

> Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption in force in this State on the effective date of this act, shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic . . . concerning the coronavirus disease 2019 pandemic.

As discussed above, in 2006, property insurers adopted a mandatory exclusion for their business interruption policies designed to preclude coverage expressly for losses related to viruses or bacteria. Specifically, the Insurance Services Office exclusion, CP 01 40 07 06, "Exclusion for Loss Due to Virus or Bacteria," precludes first-party coverage for "loss or damage caused by or resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease."

The New Jersey Legislature sought to eliminate the virus exclusion from policies, which would require property insurers covering risks in New Jersey to pay for business interruption losses due to coronavirus, even if their policies expressly excluded coverage for losses due to viruses. In proposing such a bill, New Jersey sought to create coverage for COVID-19 losses, even under policies where coverage is specifically excluded, based on the legislature's concern about the virus exclusion in the policies. The legislature was essentially attempting to force private insurers to provide coverage and financial resources to small businesses that purchased insurance policies containing a virus exclusion.

On or about March 19, 2020, New Jersey's proposed bill was "held indefinitely"; however, on March 24, 2020, it was announced that the bill would proceed to vote on March 25. Irrespective of the outcome, it is worth noting that such a bill poses potential violations of the Contracts/Impairments Clause of Article I of the United States Constitution, which provides "[*n*]*o state shall . . . pass any . . . Law impairing the Obligation of Contracts.*"[52] In essence, the proposed law would require insurers to provide coverage for business interruption losses in circumstances where relevant contracts do not cover, and expressly exclude, such losses arising from a virus. On its face, such a law would appear to impair the rights and obligations of the parties to such a contract substantially in violation of Article I of the United States Constitution. One of the few limitations on state power embedded directly in the text of the Constitution, the Contracts Clause was designed to preclude states from enacting laws that abridge contracts as "contrary to the first principles of the social compact, and to every principle of sound legislation."[53]

To address such issues, the Supreme Court has employed a two-part test to determine the constitutionality of proposed state laws that mandate the eradication of policy provisions and exclusions.[54] First, the Court examines whether the state law has operated as a "substantial impairment" of a contract. Unless this showing is made, the Court will uphold the statute and will not proceed to the second step. The second step is a review of the "purpose and necessity" of the state law. Other jurisdictions may attempt to issue a similar mandate on insurers, either through legislative efforts or through a directive from the department of insurance.

On a related note, in a letter dated March 18, 2020, eighteen members of the U.S. House of Representatives requested that the leaders of various insurance companies, specifically, the American Property Casualty Insurance Association, the National Association of Mutual Insurance Companies, the Independent Insurance Agents & Brokers of America, and the Council of Insurance Agents and Brokers, retroactively recognize financial losses relating to COVID-19 under commercial business interruption coverage for policyholders. The letter stated that "[d]uring times of crisis, we must all work together. We urge you to work with your member companies and brokers to recognize financial loss due to COVID-19 as part of policyholders' business interruption coverage."[55]

In response, the four companies rejected the Houses' request, but indicated that they are working to provide relief to policyholders. In their response, the companies specified that "[s]tandard commercial insurance policies offer coverage and protection against a wide range of risks and threats and are vetted and approved by state regulators. Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19."[56] The companies further asserted that the insurance industry remains committed to its consumers that they will ensure that prompt payments are made in instances where coverage exists.

Conclusion

The full significance of the effects of COVID-19 on our population remains unknown. It is certain, however, that related insurance claims are and will continue to be pursued. Such claims are likely to be varied and could arise under a number of insurance products. Consequently, it is

important to understand the relevant coverages, conditions, and exclusions. As evidenced by the foregoing discussion, policyholders, brokers, and insurers should review insurance policies to evaluate several factors related to coverage for COVID claims, including the terms, conditions and exclusions of coverage; the exposures and risks COVID-19 presents under different insurance product lines; which policyholders are most likely to be affected; whether prior virus-related claims exist and extrapolate insights; and the plan and strategy to triage claims to ensure that they are handled in the best interests of all involved.

1 Johns Hopkins University's Coronavirus Resource Center, coronavirus.jhu.edu (last visited on December 15, 2020).

2 *See, e.g.*, *The Worst Global Recession Since World War II: Deutsch Bank Just Unveiled a Bleak New Forecast as the Coronavirus Rocks Economies Worldwide*, Markets Insider, March 19, 2020.

3 Coronavirus.jhu.edu (last visited on December 15, 2020).

4 *See* Mounk, Yascha, *Cancel Everything*, The Atlantic (March 10, 2020).

5 *See, e.g.*, *Global Stock Markets Roiled as China's Coronavirus Spreads*, CNBC, https://www.cnbc.com (last visited on February 18, 2020).

6 *Insurers Braced for Claims Following Coronavirus Lockdown*, Law360 (February 3, 2020).

7 *Pandemic Influenza,* Centers for Disease Control and Prevention, https://www.cdc.gov (last visited on February 18, 2020).

8 *See also* White, Sheridan, & Carmel, *The Impact of a Global Avian Flu Pandemic on the Insurance Industry*, For The Defense (May 2007); White & Rowe, *Insurance Coverage and Pandemic Events: What Have We Learned from the Recent Ebola Outbreak?*, For The Defense (May 2015).

9 *Insurers Braced for Claims Following Coronavirus Lockdown*, Law360 (February 3, 2020), https://www.law360.com/articles/1239492/insurers-braced-for-claims-following-coronavirus-lockdown.

10 *See, e.g.*, *Lexington Ins. Co. v. Buckingham Gate, Ltd.,* 993 S.W.2d 185, 187 (Tex. App.—Corpus Christi 1999, no pet.) (noting that all-risk policy is one in which insurer undertakes risk for all losses of a fortuitous nature, which, in absence of the insured's fraud or other intentional misconduct, is not expressly excluded in agreement).

11 *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645 (1995); H. Walter Croskey & Ron Heeseman, *California Practice Guide: Insurance Litigation* § 6:200 (The Rutter Group, 2004).

12 *Travelers Indem. Co. v. Jarrett*, 369 S.W.2d 653, 655 (Tex. App.—Waco 1963, no writ) ("Direct physical loss" means "immediate" or "proximate," as opposed to remote or incidental causes).

13 *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006).

14 622 N.W. 2d 147 (Minn. Ct. App. 2001).

15 98 N.W. 2d 280 (Minn. 1959).

16 *Source Food Tech., Inc.*, 465 F.3d at 838.

17 *Id.*

18 *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).

19 *See, e.g., Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n*, 793 F. Supp. 259, 263 (D. Or. 1990) (holding the presence of asbestos in a building is not a direct physical loss to the property since the building has not changed), *aff'd*, 953 F.2d 1387 (9th Cir. 1992); *Universal Image Prods. v. Chubb Corp.*, 703 F. Supp. 2d 705, 713–14 (E.D. Mich. 2010) (the court concluded that odors or the existence of bacteria in an HVAC system were intangible and did not meet the policy requirement of physical damage to property.).

20 *See e.g., Fiess v. State Farm Lloyds,* 202 S.W.3d 744, 753 (Tex. 2006).

21 *See Hartford Ins. Co. of Midwest v. Mississippi Valley Gas Co.*, 181 F. App'x 465, 470 (5th Cir. 2006) ("The requirement that the loss be "physical," given the ordinary definition of that term is widely held to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." (citation omitted).

22 *Ross v. Hartford Lloyd Ins. Co.*, No. 4:18-cv-00541-O, 2019 WL 2929761, at *7 (N.D. Tex. July 4, 2019).

23 *Id.* at *7 (citation omitted); *see also J.O. Emmerich & Assocs., Inc. v. State Auto. Ins. Cos.*, No. 3:06-cv-00722-DPJ-JCS, 2007 WL 9775576, at *3 (S.D. Miss. Nov. 19, 2007) (same).

24 *JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 609 (Tex. 2015).

25 *State Farm Lloyds v. Kaip*, No. 05-99-01363-CV, 2001 WL 670497, at *2–3 (Tex. App.—Dallas June 15, 2001).

26 *Allianz Cornhill Int'l v. Great Lakes Chem. Corp.*, No. Civ. A. H-04-1668, 2006 WL 778618, at *6 (S.D. Tex. Mar. 24, 2006).

27 *See Vandelay Hosp. Grp. LP d/b/a Hudson House v. The Cincinnati Ins. Co., et al.*,No. 3:20-CV-1348-D, 2020 WL 5946863, at *1 (N.D. Tex. Aug, 18, 2020).

28 *Id.* at *2.

29 *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020).

30 *See, e.g.*, Penn Law COVID Coverage Litigation Tracker, cclt.law.upenn.edu (last visited on December 15, 2020).

31 *See Vandelay Hosp. Grp. LP v. Cincinnati Ins. Co.,* No. 3:20-CV-1348-D, 2020 WL 5946863, at *3 (N.D. Tex. Oct. 7, 2020) (dismissing complaint because the allegations were factually conclusory and did not plausibly plead that the restaurants suffered physical loss or damage that would be covered by the policy); *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.,* No. 1:20-CV-

2939-TWT, 2020 WL 5938755, at *7 (N.D. Ga. Oct. 6, 2020) (granting insurer's motion to dismiss and finding governmental directives did not create a direct physical loss of insured's dining rooms); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04423-AB-SK, 2020 WL 5938689, at *3 (C.D. Cal. Oct. 2, 2020) (holding that the insured failed to plausibly allege coverage was triggered because there was no loss of or damage to property); *Wilson v. Hartford Cas. Co.*, No. CV 20-3384, 2020 WL 5820800, at *9 (E.D. Pa. Sept. 30, 2020) (E.D. Penn. Sept. 30, 2020) (granting insurer's pre-answer motion to dismiss based on virus exclusion); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000,* No. 8:20-CV-1605-T-30AEP, 2020 WL 5791583, at *5 (M.D. Fla. Sept. 28, 2020) (holding that "there is simply no coverage under the policies if they require "direct physical loss of or damage" to property.")*; Sandy Point Dental, PC v. Cincinnati Ins. Co.,* No. 20 CV 2160, 2020 WL 5630465, at *3 (N.D. Ill. Sept. 21, 2020) (finding no direct physical loss of or damage to property and therefore coverage was not triggered); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.,* No. 20-CV-03213-JST, 2020 WL 5525171, at *7 (N.D. Cal. Sept. 14, 2020) (granting insurer's motion to dismiss finding no physical loss of or damage to property); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.,* No. 20-CV-907-CAB-BLM, 2020 WL 5500221, at *5 (S.D. Cal. Sept. 11, 2020) (granting insurer's motion to dismiss and finding no direct physical loss of or damage to property or civil authority coverage); *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.,* No. 20-11655, 2020 WL 5258484, at *8 (E.D. Mich. Sept. 3, 2020) (rejecting argument that inability to use property constituted a physical loss); *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.,* No. 220CV00401FTM66NPM, 2020 WL 5240218, at *2 (M.D. Fla. Sept. 2, 2020) (holding that virus exclusion barred coverage); *10E, LLC v. Travelers Indem. Co. of Connecticut,* No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653, at *5 (C.D. Cal. Sept. 2, 2020) (finding an "inability to use property do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase"); *Malube, LLC v. Greenwich Ins. Co.,* No. 1:20-cv-22615-KMW, 2020 WL 5051581, at *8 (S.D. Fla. Aug. 26, 2020) (granting insurer's motion to dismiss and finding that, where the insured had alleged no physical damage to the property other than "that two Florida Emergency Orders closed his indoor dining," such allegations "cannot state a claim because the loss must arise to actual damage" and "it is not plausible how two government orders meet that threshold when the restaurant merely suffered economic losses - not anything tangible, actual, or physical"); *Diesel Barbershop, LLC*, 2020 WL 4724305, at *5 (holding that in the Fifth Circuit, the loss needs to have been a "distinct, demonstrable physical alteration of the property"); *Rose's 1, LLC v. Erie Ins. Exch.,* No. 2020-CA-002424-B, 2020 WL 4589206 (D.C. Super. Ct. Aug. 6, 2020) (rejecting the argument that the stay-at-home orders caused direct physical loss).

32 *North State Deli, LLC dba Lucky's Delicatessen et al. v. The Cincinnati Ins. Co. et al.,* Case No. 20-cvs-02569 (N.C. October 9, 2020).

33 *See Studio 417, Inc. et al. v. The Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385, at *8 (W.D. Mo. Aug. 12, 2020) (denying the insurer's pre-answer motion to dismiss because the policy provided coverage for "accidental physical loss *or* accidental physical damage" and the judge held the carrier's focus on physical alteration in denying coverage gave no meaning to the term "physical loss").

34 Redfearn, Robert Jr., *Business Losses Due to Civil Authority Action: When Is There Coverage?* Insurance Journal (May 12, 2011).

35 636 F. 3d 683, 687 (5th Cir. 2011).

36 *730 Bienville Partners Ltd. v. Assurance Co. of Am.*, No. Civ. A. 02–106, 2002 WL 31996014, at *2 (E.D. La. 2002), *aff'd*, 67 Fed. Appx. 248 (5th Cir. 2003).

37 *54th St. Ltd. Partners L.P. v. Fid. & Guar. Ins. Co.*, 306 A.D.2d 67, 67 (N.Y. 1st Dep't 2003).

38 *See, e.g., Koegler v. Liberty Mut. Ins. Co.*, 623 F. Supp. 2d 481, 484 (S.D.N.Y. 2009) (the court held that communicable disease exclusion, which excluded coverage for bodily injuries arising out of "transmission of a communicable disease, virus, or syndrome" was plain and clear in excluding coverage for claims insured transmitted human papillomavirus and herpes virus to his girlfriend and her daughter).

39 *See, e.g., Turek Enters., Inc.*, No. 20-11655, 2020 WL 5258484, at *9-10 (holding that Virus Exclusion precluded business interruption coverage for COVID-19 losses); *Diesel Barbershop, LLC*, 2020 WL 4724305, at *6 (same).

40 Insurance Journal (May 22, 2018).

41 *Swiss Re Faces $250M Loss If Olympics Canceled*, Law 360 (March 22, 2020).

42 *Id.*

43 *Id.*

44 Prior lawsuits arising from bird flu infections highlight the constitutional claims that government-ordered destruction of poultry flocks constituted an unlawful taking of property. *See Reichley v. Pennsylvania Dep't of Agric.*, 427 F.3d 236, 240 (3d Cir. 2005) (The court held in favor of the PDA, stating that "[d ue] process does not require a pre-deprivation notice and hearing where there is an adequate scheme to compensate the property owner for the deprivation."), *see also Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1183 (Fed. Cir. 2004); *Yancey v. United States*, 915 F.2d 1534, 1536 (Fed. Cir. 1991). Questions and challenges may yet arise regarding whether the civil authority orders issued in response to COVID-19 may similarly be claimed as unlawful takings.

45 *Summit Custom Homes, Inc. v. Great Am. Lloyds Ins. Co.*, 202 S.W.3d 823, 828 (Tex. App.—Dallas 2006, pet. withdrawn) (explaining the meaning of "physical injury"), *abrogated on other grounds by Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008); *see also Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651, 678 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (same), *abrogated on other grounds by Gilbert Texas Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex. 2010).

46 *See Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 16 (Tex. 2007); *see also Great Am. Lloyds Ins. Co. v. Vines-Herrin Custom Homes, LLC,* No. 05-15-00230-CV, 2016 WL 4486656, at *6 (Tex. App.—Dallas Aug. 25, 2016, pet. denied) (citing *Lamar Homes* and recognizing that cracks in the ceiling of a home, bowing windows, and a sagging ceiling caused by defective construction work constituted "property damage"); *D.R. Horton, Inc. v. Am. Guar. & Liab. Ins. Co.,* 864 F. Supp. 2d 541, 553 (N.D. Tex. 2012) (noting "Texas appears to be firmly committed to the proposition that a liability insurance policy can cover claims made against a home builder arising out of defective work if the defective work, in turn, caused physical damage to parts of the home's structure.").

47 *See Mid-Continent Cas. Co. v. Acad. Dev., Inc.*, 476 F. App'x 316, 319 (5th Cir. 2012); *Nat'l Union Fire Ins. Co. v. Puget Plastics Corp.*, 532 F.3d 398, 403 (5th Cir. 2008) (Texas law).

48 *See Sigma Marble & Granite-Houston, Inc. v. Amerisure Mut. Ins. Co.*, No. CIV.A. H-09-3942, 2010 WL 5464257, at *11 (S.D. Tex. Dec. 28, 2010); *cf. Lamar Homes*, 242 S.W.3d at 10 ("faulty workmanship that merely diminishes the value of the home without causing physical injury or loss of use does not involve 'property damage'").

49 *See, e.g.*, *Crownover v. Mid-Continent Cas. Co.*, 772 F.3d 197, 207 (5th Cir. 2014) (holding that insured's faulty workmanship that caused portions of home to need repairs that amounted to "property damage" was an "occurrence"); *Lamar Homes*, 242 S.W.3d at 16 (holding that an insured's defective performance or faulty workmanship constitutes an "occurrence" when "property damage" results from the insured's performance or workmanship).

50 *See Lamar Homes*, 242 S.W.3d at 8.

51 *See id*.

52 U.S. Constitution, Art. I, § 10 (emphasis added).

53 James Madison, *No 44*, The Federalist Papers (1788).

54 *See El Paso v. Simmons*, 379 U.S. 497, 506–507 (1965); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

55 Letter, March 18, 2020, Congress of the United States, Washington, DC.

56 Letter, March 18, 2020, American Property Casualty Insurance Association, The Council, BIG, NAMIC.

By Andrea M. Palmer

PANDEMIC COVERAGES: WHERE WE WERE, WHERE WE ARE, AND WHERE WE'RE GOING FROM A BROKER'S PERSPECTIVE

Where We Were: Coverage Before and After SARS

Pandemic coverage has obviously been a significant topic of conversation lately. This article seeks to explain the history of coverage relating to pandemics, provide a snapshot of where coverages currently stand, and provide a glance into the future. This may be the first world-wide pandemic in a century, but similar events have happened before and are anticipated to happen again.

As with any claim, coverage for a pandemic has to be evaluated under an insurance policy's grants of coverage and exclusions. Before SARS (Sever Acute Respiratory Syndrome, first identified in February, 2003), a business-interruption or commercial general liability policy may have provided coverage for a pandemic-related claim, because the exclusions did not yet consistently address viruses or bacteria.

Consider the long-standing definition of "pollutants" within a pollution exclusion from a pre-2003 general liability policy:

> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste….

In the pre-SARS environment, some courts found this language did not exclude coverage for claims arising out of the presence of bacteria, meaning coverage for a virus was likely also not excluded. Thus, before SARS, there was a chance of coverage under the common policy forms.

This changed following outbreaks of SARS in 2003. A 2006 circular form ISO addressed the fact that contamination exclusions were already present in ISO forms, but "at this point in time," "particular attention" was needed regarding viruses and bacteria.

Some underwriters revised the definition of "pollutants" to include virus, bacteria, and/or microbes, whether within the standard definition or endorsement. In addition, underwriters developed new types of exclusions: "fungi or bacteria," "pathogenic organisms," "viruses, bacteria, and microbe," and others, meant to apply above and beyond the pollution exclusion.

A virus or bacteria exclusion:

> 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.

A fungi or bacteria exclusion:

> The Policy does not cover the following
>
> "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

A pathogenic organisms exclusion:

> We do not insure for loss or damage caused by, resulting from, contributing to or made worse by the actual, alleged or threatened presence of any pathogenic organism, all whether direct or indirect, proximate or remote, or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy . . .
>
> Pathogenic Organisms means any . . . virus . . .

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A quarantine and influenza exclusion:

> This insurance does not cover losses directly or indirectly arising out of, contributed to by, or resulting from:
>
> 8. any communicable disease which leads to:
>
> a. the imposition of quarantine or restriction in movement of people or animals by any national or international body or agency;
>
> b. any travel advisory or warning being issued by a national or international body or agency;
>
> and in respect of a. or b. above any fear or threat thereof (whether actual or perceived).
>
> This insurance also excludes loss directly or indirectly caused by, resulting from or in connection with any action taken in controlling, preventing, suppressing or in any way relating to a communicable disease.
>
> …
>
> 9. a. influenza A (H5N1) (also known as 'avian flu' or 'bird flu'); or
>
> b. influenza A (H1N1) (also known as 'swine flu'); or
>
> c. any strain, virus, complex or syndrome that is related to influenza A (H5N1) or influenza A (H1N1);
>
> and in respect of a., b. or c. above any fear or threat thereof (whether actual or perceived).
>
> This insurance also excludes loss directly or indirectly caused by, resulting from or in connection with any action taken in controlling, preventing, suppressing or in any way relating to any outbreak of influenza A (H5N1) or influenza A (H1N1).

Thus, following SARS but before COVID, many policies would not provide coverage for claims arising out of bacteria, viruses, or microbes—the causes of pandemics. We are now seeing this play out in courtrooms across the world.

This led to the creation of specialized products or exclusion buy-backs for pandemic coverage. Due to the high expense and small degree of risk, most insureds did not purchase these policies. The few that did were typically in the entertainment and event space—consider Wimbledon, which has maintained pandemic coverage since 2003. According to Insurance Journal, this cost Wimbledon approximately £25.5 million cumulatively but is covering claims of approximately £114 million. Unfortunately, that type of coverage is now very difficult to obtain now.

Where We Are: Coverage After COVID

Immediately after COVID became a world-wide pandemic, the underwriting departments began revising their policy forms. Absolute pollution exclusions, along with virus, bacteria, and microbe exclusions, are becoming standard in all lines. In addition, new exclusions have been drafted to give insurance carriers a belt-and-suspenders assurance that pandemic-related claims will not be covered.

For example, the absolute microorganism exclusion is becoming more common:

> This policy does not insure any loss, damage, claim, cost, expense or other sum directly or indirectly arising out of or relating to:
>
> mold, mildew, fungus, spores or other microorganism of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health.
>
> This exclusion applies regardless whether there is (i) any physical loss or damage to insured property, (ii) any insured peril or cause, whether or not contributing concurrently or in any sequence; (iii) any loss of use, occupancy, or functionality; or (iv) any action required, including but not limited to repair, replacement, removal, cleanup, abatement, disposal, relocation, or steps taken to address medical or legal concerns.
>
> This exclusion replaces and supersedes any provision in the policy that provides insurance, in whole or in part, for these matters.

Here we see both an exclusion for damages arising out of microorganisms, and a provision making this exclusion controlling over any other policy provision.

We are also seeing what appears to be a completely new exclusion for communicable disease. It defines communicable disease to include virus and bacteria, and there is language making clear it applies regardless of any other language in the policy.

Specialized new coverages are also emerging. One agency is offering non-damage business interruption coverages, tailored to the client, for future pandemic and epidemic outbreaks. Our agency offers a product to NCAA football teams, insuring for losses associated with game cancelation due to COVID.

Finally, the market for specialized pandemic coverages or buy-backs of exclusions has all but disappeared, and what is available is extremely expensive.

Where We Are Going: Post-COVID Coverages

Insurance markets are reactive: As new risks appear, new products are created, but as old risks grow and become too difficult to anticipate or too expensive to cover, the market declines to write those risks. When large risks settle and become more predictable, carriers sometimes offer the product again—though, we believe it unlikely there will ever specifically be broad-form coverage for COVID-19.

The risks posed by pandemics find parallel to those of flood and terrorism. All three risks are growing and present astronomical expenses that could bankrupt insurance markets. A world-wide pandemic falls into the category of "systemic risks"—those "uninsurable risks with the potential of surpassing the capital of the industry."

The market is looking to non-traditional insurance solutions, such as captives, where a company insures itself, often pooling with other companies to diversify risk. This arrangement allows a great deal of flexibility. We have seen captives pay pandemic-related claims for COVID, in situations that would not typically have triggered other insurance. This is because these policies may be written without the exclusions covered above or may not require physical damage as a trigger. We expect to see this market grow, both as a response to the unavailability and expense of pandemic coverages, as well as to the overall hardening of the market.

Finally, many in the industry anticipate governments will have to step in as a reinsurer, to entice markets to accept pandemic risks in the future, just as has been done with flood and terrorism. These public-private partnerships are a development to watch closely in the next few years.

1 The WHO: Severe Acute Respiratory Syndrome (SARS), https://www.who.int/health-topics/severe-acute-respiratory-syndrome#tab=tab_1 (last visited November 10, 2020).

2 *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 13 P.3d 785, 788–89 (Ct. App. 2000).

3 ISO Circular LI-CF-2006-175, New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria, ISO (July 6, 2006), https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf.

4 *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-AS, 2020 WL 5359653, at *1 (C.D. Cal. Sept. 2, 2020).

5 *Westport Ins. Corp. v. VN Hotel Group, LLC*, 761 F. Supp. 2d 1337, 1345 (M.D. Fla. 2010), *aff'd*, 513 Fed. App'x 927 (11th Cir. 2013).

6 *Boxed Foods Co., LLC v. California Capital Ins. Co.*, No. 20-CV-04571-CRB, 2020 WL 6271021, at *3 (N.D. Cal. Oct. 26, 2020), *as amended* (Oct. 27, 2020).

7 Hiscox UK organisers cancellation and abandonment wording 7613 (March 2009), https://www.hiscox.co.uk/sites/uk/files/documents/2017-04/7613-event-organisers-cancellation-abandonment.pdf (last visited October 28, 2020).

8 *Wimbledon Shows How Pandemic Insurance Could Become Vital for Sports, Other Events*, Insurance Journal, April 13, 2020, https://www.insurancejournal.com/news/international/2020/04/13/564598.htm (October 27, 2020).

9 Clark Wilson, *COVID-19 and Business Interruption: Is It Covered By Your Commercial Property Policy?*, March 26, 2020, https://www.cwilson.com/covid-19-and-your-business-insurance-issues/ (October 28, 2020).

10 One80 Intermediaries Pandemic Protector Program, https://www.one80intermediaries.com/programs/business-interruption-programs/pandemic-protector-program/ (November 2, 2020.

11 COVID-19 Coverage for College Football; https://www.linkedin.com/in/carolineperryman/detail/overlay-view/urn:li:fsd_profileTreasuryMedia:(ACoAABCR8Z0B6Ygt8QB0jabxG9X378msQPHO-Z0,1597432459364)/?lipi=urn%3Ali%3Apage%3Ad_flagship3_profile_view_base%3BwzjknQ4AQZCzMcE9OZtaXw%3D%3D&licu=urn%3Ali%3Acontrol%3Ad_flagship3_profile_view_base-featured_item_detail_view (last visited November 2, 2020).

12 *Carrier Management: COVID-19 Crisis Renews Attention on Systemic (Uninsurable) Risks*, September 28, 2020, https://www.carriermanagement.com/news/2020/09/28/211901.htm.

13 *Captive Insurance Seen as Covid-Era Remedy to Rising Premiums*, The Wall Street Journal, September 27, 2020, https://www.wsj.com/articles/captive-insurance-seen-as-covid-era-remedy-to-rising-premiums-11601208001.

By Christopher W. Martin and Rick Goldberg

THE IMPLICATIONS OF COVID-19 ON POTENTIAL JURY ATTITUDES AND PERSPECTIVES

The physical, economic, and emotional impact of COVID-19 has the potential to be the single greatest disrupter and influencer of attitudes impacting jury perceptions in the history of our country. Because the health and the economic effects of the coronavirus reached every community in every state and because the nationwide economic shutdown impacted millions of businesses across the country, the number of first-party insurance claims seeking coverage to mitigate against the effects of business closures and shutdowns are expected to impact literally every court in every American jurisdiction over the next four years.

Regardless of whether regional or national Multidistrict Litigations (MDLs) are created to deal with this flood of insurance litigation and regardless of whether the state or federal courts grant summary judgments in favor of some of the insurers on any of the coverage issues, property insurers will inevitably have to face juries across the country to try breach of contract and bad faith claims arising out of the carrier's handling of individual insurance claims. The combination of the volume of claims and the enormous dollar amounts involved will make it impossible to simply settle all of them out of court because there is not enough capital, surplus, and reinsurance capacity to do that on a nationwide basis. As such, when the flood of COVID-19-related litigation reaches the courthouse steps, the question becomes how jurors' experiences during the pandemic will affect how they filter information received in a first-party insurance trial dealing with the COVID-19. The purpose of this report is to examine an extensive nationwide survey we conducted beginning in May of 2020 to examine these critical issues.

Every major catastrophe to hit a metro area in the U.S. in the last 30 years has resulted in measurable attitudinal affects impacting jury perceptions for more than a year. Any time a hurricane, tornado, wildfire, earthquake, or other environmental disaster impacts a major metropolitan area, we have personally seen how local juries repeatedly demonstrate a willingness to disregard a court's instructions or ignore some of the trial evidence presented in order to "take care of their own" and render a breach of contract and/or bad faith finding against a property insurer in favor of a local business or local homeowner. This jury nullification phenomenon has historically been limited both geographically and in time. Geographically, the willingness to overcompensate a business or homeowner for an insurance claim arising out of the catastrophe in question has been limited to those geographic areas directly impacted by the event. In other words, the desire of local jurors to find against a property insurer regardless of the evidence at trial or the instructions from the court have not historically been replicated outside of the limited geographic area directly impacted by the catastrophic event. In our experience, this phenomenon also only lasts for approximately 18 months because as local citizens personally experience premium increases and begin to develop negative opinions about local businesses and local homeowners who received "betterment" as a result of their insurance claims, so juries in these previously impacted areas return to their "historic" attitudinal positions after one year but before two years most frequently.

Jury attitudes historically return to more normal predictive patterns approximately 18 months after a catastrophe impacts a region, but it can vary slightly depending on the degree of potential trauma. Because this has proven true in every single catastrophic event giving rise to numerous first-party insurance claims and suits in the last 3 decades, the purpose of our research project was to assess whether the exact same attitudinal risks exist for juries nationwide because of COVID-19. If we know from experience and prior research that jury nullification risks exist in geographically limited areas for approximately 18 months

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Rick Goldberg is a trial psychologist and the Founding Partner of Rick M. Goldberg & Associates in Houston, Texas, a jury consulting and witness preparation firm with extensive experience in a wide variety of cases including first and third-party insurance coverage and bad faith cases across the country. He focuses on identifying and understanding the psychological factors that influence juror decision making. Rick was assisted by Dustin Williams, Ph.D., the Director of Research & Analytics for Rick M. Goldberg & Associates in Houston, Texas. He employs scientific methods to examine case issues with the aim of better understanding human thought and behavior.

following a catastrophe, are we at risk of similar experiences nationwide because every American was impacted in some way by the COVID-19 pandemic?

OUR RESEARCH

Our nationwide survey of attitudes and perceptions about COVID-19 and insurance claims was designed to answer the question of whether the scope of COVID-19 losses create national risks for jury nullification in first-party insurance coverage and bad faith cases for the foreseeable future. Our online questionnaire featured 150+ questions, which were ultimately answered by an exceptionally diverse spectrum of respondents in all 50 states, including employees of the insurance industry and their lawyers. Typically, insurance industry employees are excluded from such surveys because the researchers fear their personal perspectives will skew the survey results. We intentionally *included* them to specifically test whether the attitudes and opinions of those in the insurance industry differ significantly from those around the country who do not work for the insurance industry. We discovered their views are diametrically opposed on virtually every single issue we tested.

Our survey contained a large number of political and social identifiers for the purpose of helping us correlate characteristics and leanings in order to identify certain traits that might make a specific type of individual more appreciative or more understanding of the positions taken by an insurer in a first-party property case. We believe these "filter" identifiers are critical to correlate the interrelationship between a variety of factors concerning social and political perspectives and how they impact perceptions of insurance coverage and insurance claims handling issues. We wanted to test, for example, how working, married females in their 30s from the Southwest, who watch Fox News, received a stimulus check, and feel strongly about the freedom *not* to wear masks, feel about a multitude of specific insurance coverage and claims handling issues. Our survey gave us a new ability to draw those correlations. It is our intent to repeat our study later in 2020 and again in 2021 to gauge how opinions continue to change regarding the country's attitude about COVID-19 and related insurance claims.

HIGH-LEVEL CONCLUSIONS

Before we discuss the details of our nationwide survey, we wanted to note several high-level conclusions, which are worthy of comment as an introduction to the core results of our survey. As we have similarly experienced in isolated regions following hurricanes, tornadoes, earthquakes, wildfires, and other catastrophes, we documented very strong attitudes indicating the willingness of potential jurors all across the country to engage in jury nullification practices, including ignoring virus exclusions, "rewriting" insurance policies to allow recovery for economically devastated insureds, and expressing hostility towards the insurance industry for not paying COVID-19 related insurance claims. We learned that, nationwide, approximately 70% of our potential jurors expressed a willingness to engage in improper jury nullification practices related to COVID-19 claims. More than half considered the mere possibility of COVID-19 being present in a building a form of property damage. It is not surprising that most members of the insurance industry would not be able to relate to these feelings because fewer than 20% of our respondents who work in the insurance industry feel the same way about these result-oriented perceptions.

We believed any significantly negative results would be discounted by some in the industry as inaccurate or incomplete because the reported opinions differ so radically from their own. Consequently, we wanted to document discrepancies between those who work in the industry and those who do not. We wanted to test whether the opinions of those in the industry are normative. We learned they are not.

While most people still like and trust their own carrier, demonstrable distrust and dislike of the insurance industry continues to permeate all regions of the country. This does not mean it is impossible for an insurer to win a COVID-19 coverage or bad faith case before a jury, but it does mean the carrier and its lawyer have to be very careful regarding how to identify the opinions, practices, and preferences of those 20 to 30% who, on average, are inclined to positively filter the actions and position of the carrier. Traditional stereotypes can be exceptionally dangerous here. For example, we learned that masks and social distancing "rebels" are a small minority with surprisingly diverse opinions. We learned that politically conservative Caucasian men over 50 with a college degree can be just as "dangerous" on COVID-19 claims issues as a female millennial who is still in school and considers herself politically liberal. The key to avoid stereotypes is to test numerous data points across numerous and diverse experience factors. We did that, and the results are striking.

OUR PRELIMINARY WARNINGS

The purpose of our research is not to give policyholders or their lawyers "leverage" to settle COVID-19-related claims and suits or to "scare" the industry into settling claims that are not covered. Every reader must fight myopic tendencies for how they can individually use our research to accomplish a personal or professional goal of theirs. Research of this nature always creates risks of over-generalizations, and we caution readers to fight the desire to do so. Our research goal was to help identify the approximate 30% of jurors across the country more likely to favorably perceive a carriers' position on certain coverage and claims-handling issues. If some of the COVID-19 insurance claims *have* to be tried, and they will, the question then becomes how to select a jury to resist jury nullification pressures and objectively consider

the trial evidence and witnesses in a COVID-19 insurance trial. Once one drills down past the conclusory headlines, our research shows how that can be done.

SAMPLE CHARACTERISTICS

We administered the questionnaire designed for this study using an online survey platform available for public use. In total, we received several thousand completed surveys with 68% of the surveys coming from "surrogate jurors" and 32% of the surveys coming from insurance-industry professionals, which we will refer to as "industry professionals." There were some notable (but expected) demographic differences between the samples comprised of surrogate jurors and industry professionals.

Our sample represented a cross section of the United States from all 50 states. Within the sample, the average age of respondents was 42 years. Surrogate jurors were slightly younger than the sample average. Industry professionals were slightly older than the sample average. The overall sample skewed male (59%) vs. female (41%). Regarding ethnicity, the sample was racially balanced. Most of the sample had at least a bachelor's degree (52%) or a graduate degree (27%). Significantly more respondents with graduate degrees in the sample were comprised of industry professionals (42%). Regarding marital status, the respondents indicated they were single (20%) or married/in domestic partnership (70%). The sample is marginally skewed conservative (52%) compared to liberal (35%). A subset of the sample identified as political moderates (13%). Most participants indicated they were employed full-time (78%) or part-time (8%). The remainder of respondents indicated they were either unemployed (7%), students (1%), retired (3%), homemakers (2%), or they could not work (1%).

We also asked participants to provide the city and state where they primarily reside. We then took that information and quantified the percentage of respondents within the major regions through the country (i.e., North East, South East, Midwest, Southwest, and West). We sampled to ensure we had an even distribution of respondents within each region. We achieved that distribution within the sample. Throughout our analyses, there was not one single instance of statistically significant differences between respondents grouped by the regions listed above. This result suggests that jurors are likely to have similar attitudes, thoughts, and behaviors related to business interruption insurance cases due to COVID-19 through the entire country. We divided our research focus into several different categories to enable us to cross-reference attitudes within certain demographics on certain topics with opinions on other topics.

INSURANCE COMPANY ATTITUDES

When we have previously shared similar research results with clients in the insurance industry, many were in disbelief because the results are *so different* from the opinions they hold. Because industry professionals consider their opinions and reactions normative, they tend to discount or discredit any different perspectives. We specifically included insurance industry professionals in our study to demonstrate that their opinions on COVID-19 issues were *not* normative and differed drastically from the surrogate jurors surveyed. Our research proved there are stark differences in attitudes towards the role insurance companies play in times of crisis like (COVID-19) between surrogate jurors and industry professionals, with industry professionals scoring significantly lower on all measures. For nearly every question on this topic, 75% or more of surrogate jurors agreed that insurance companies should play a role or are responsible in helping overcome COVID-19 in the U.S. For example, surrogate jurors agreed insurance companies should: help people regardless of policy language (73%), protect vulnerable people (75%), provide stability in times of crisis, and that customers deserve to get something back for their premiums (60%). Surrogate jurors were also more likely to agree that insurance companies are doing harm by denying COVID-19 claims (76%) and business-related COVID-19 claims (73%). Fairness was also an issue of concern for surrogate jurors. Specifically, surrogate jurors agreed that insurance companies were exploiting people by denying claims (72%), it is only fair that insurance companies honor COVID-19 claims (65%), and it is unfair for companies to deny workers compensation claims related to COVID-19 (72%). Surrogate jurors also indicated they would be angry to learn their insurance company denied workers' compensation claims (78%) or commercial property claims for COVID-19 losses (75%). Lastly, surrogate jurors agreed insurance companies have a greater duty to their policyholders because of COVID-19 (70%) and insurance companies are legally bound to protect policyholders in times of crisis like COVID-19 (68%). **These findings are critical to understand. While industry professionals have unique perspectives on matters like policy language, these results help concretize our conclusions that jurors are very likely to hold insurance companies accountable for COVID-19 claims, regardless of policy language**. Attitudes on matters related to the role insurance plays in times of crisis significantly influenced response within the case vignette presented below.

Age and ethnicity also influenced attitudes towards insurance companies. Middle-aged respondents, who are more likely to have multiple insurance policies, were significantly more likely to agree that insurance companies are responsible for and have a specific role to play in paying business claims related to COVID-19. Middle-aged respondents were most likely to express anger toward their personal insurance companies should they learn these companies were denying claims related to COVID-19. Taken to together, these findings suggested middle-aged people are valuable customers given that they carry multiple policies, have predefined expectations regarding the role their insurance company will play in paying COVID-19 claims, and could take their business elsewhere if they learn their insurance companies are denying COVID-19 claims. Additionally,

African American respondents had a similar profile when compared to middle-aged respondents. African Americans are also significantly more likely to agree that insurance companies are responsible for and have a specific role to play in paying business claims related to COVID-19, and they are also more likely than any other ethnicity surveyed to express anger toward their personal insurance companies for denying COVID-19 claims. These insights will prove critical later in the cluster analysis we performed on surrogate jurors. They also provided additional filter factors, which enable us to cross-reference these general attitudes with other more specific opinions about coronavirus issues within various demographic identifiers.

INSURANCE COMPANIES – BUSINESS DISRUPTION CLAIMS

Attitudes towards insurance companies and business interruption insurance did differ significantly between surrogate jurors and industry professionals. Moreover the diversity of opinions gave us the ability to identify those factors that were more like to push someone towards a willingness to engage in jury nullification practices, as opposed to those factors that indicated an inner strength to not engage in such practices. Most surrogate jurors again expressed a belief that we need insurance companies to help overcome COVID-19; however, most were not sure they can trust insurance companies to do "the right thing." Specifically, surrogate jurors consistently agreed that: they respect their insurance agents (66%); insurance companies provide a sense of security in times of crisis (63%); and we need insurance companies to help overcome the COVID-19 crisis (68%). Conversely, only half of the surrogate jurors trust insurance companies to do "the right thing" in times of crisis. Less than half of the surrogate jurors agreed insurance companies are already helping policyholders. Industry professionals scored significantly lower on each of these questions, as expected, given the higher confidence they have in the industry.

Not surprisingly, those who are unemployed and single are least likely to trust insurance companies in times of crisis. African Americans, conservatives, those with graduate degrees, and those with more than one child are most likely to believe that insurance companies provide a sense of security in times of crisis. However, each of these groups were also equally likely to score lower on measure related to trusting insurance companies to do "the right thing" in times of crisis.

As we expected, industry professionals emerged as being significantly different from surrogate jurors on questions related to the vulnerability insurance companies face in times of crisis like COVID-19. Specifically, industry professionals agreed that people will take advantage of insurance companies in times of crisis like COVID-19 (79%), some people will cheat on things like insurance for personal gain during times of crisis (87%), and people are more likely to understand why insurance companies deny claims in times of crisis (59%). Surrogate jurors scored significantly lower on all these measures.

Certain demographic factors influenced differences on these questions between surrogate jurors and revealed profile characteristics from which jury selection decisions can be made in COVID-19 cases. Those who are employed full time and who are conservative were more likely to agree that people will take advantage of insurance companies and that some people will cheat insurance. Most surrogate jurors could not comprehend why insurance companies would deny claims in times of crisis like COVID-19. Single surrogate jurors disagreed more often that people will try to take advantage of insurance companies, understood less why some people would cheat insurance, and understood less why insurance companies would deny claims in times of crisis like COVID-19. These insights proved pivotal in understanding why surrogate jurors voted the way they did in our COVID-19 case vignette.

We also assessed surrogate juror and industry professional attitudes toward business interruption insurance. Again, there were significant differences worth noting between the two sample groups. The same trend seen in results related to insurance reported earlier in our report was seen again in these results because nearly three out of four surrogate jurors agreed with each question in this section of the questionnaire related to business interruption research. In contrast, industry professionals scored significantly lower on each of these questions. These results are discussed in more detail below.

Surrogate jurors consistently believed insurance companies are obligated to protect their policyholders in times of crisis like COVID-19, regardless of insurance type, standard policy language (68%), and business disruption claims (71%). The results of our research also indicated specific reasons for these attitudinal positions. Surrogate jurors agreed when an insurer writes a business interruption policy, the policy should be honored to protect the economy (69%), that insurance companies have a role to play in the economy by honoring business interruption policies (70%), and that these claims should be honored even if it costs them profits (74%) or causes them to go bankrupt (65%). Surrogate juror attitudes toward business interruption insurance evoked emotional responses within the results as they agreed that insurance companies would betray their customers by denying claims (68%) and that it is only fair insurance companies honor business interruption claims since the government forced businesses to close (72%). Surrogate jurors also believe insurance companies will play a critical role in helping the economy recover by honoring business interruption claims.

Surrogate jurors agreed insurance companies would cause

economic harm by denying business interruption claims related to COVID-19 (75%). These jurors also agreed insurance companies should reimburse business interruption claims seeking to cover wages of workers laid off due to COVID-19 (78%), insurance companies would strengthen the economy by paying business interruption claims related to COVID-19 (62%), insurance companies can help businesses stay open by honoring business interruption claims (77%), and insurance companies demonstrate loyalty to business owners by honoring business interruption claims (70%). There were no demonstrative differences regarding demographic factors worth noting here.

VIGNETTE RESULTS

We presented a case vignette to surrogate jurors and industry professionals to test the probabilities with which certain people would be more likely to engage in jury nullification. The first hypothetical test case involved a fictitious restaurant that was forced to close due to local and national COVID-19 restrictions. In our imaginary claim, the restaurant filed a claim against their commercial property carrier for a business interruption loss seeking $3 million to cover lost revenues during the government-ordered closure period and for costs for decontaminating the restaurant from COVID-19. In the vignette, the insurance company denied the claim, which resulted in the restaurant suing the insurance company. Without knowing more, we asked participants whether they would vote at trial to award damages to the restaurant, how much in damages they would award, and why they voted the way that they did.

72% of surrogate jurors voted to award damages to the restaurant compared to 42% of industry professionals. While more surrogate jurors voted to award damages, on average, they awarded lower damage amounts to the restaurant compared to the industry professionals who awarded $1.8 million on average. African Americans were significantly more likely to award lower damage amounts compared to all other ethnicities. Surrogate jurors who did not have college degrees were least likely to vote for the restaurant; however, those who did awarded an average of $1.2 million in damages. Lastly, liberals were significantly more likely to award damages compared to conservatives. There were distinct attitudinal differences that influenced surrogate jurors and industry professionals to vote specific ways and award specific damages. Our expertise to identify these and cross reference them to the filter factors identified earlier gives us the ability to identify characteristics of the 28% of surrogate jurors in our survey who would *not* be inclined to award damages in this claim scenario. These identifiers provide the most useful results from our study in terms of our ability to successfully select a jury with less risks to engage in jury nullification practices in a COVID-19 insurance trial.

As expected, surrogate jurors scored higher on all measures related to the case vignette than industry professionals. Most agreed that the owners of the restaurant were harmed by the business closure and insurance should pay (71%). Surrogate jurors and industry professionals both agreed it was only fair the restaurant filed the claim given the circumstances (66%). Jurors provided specific reasons why they voted the way they did in this case.

Surrogate jurors agreed that businesses like the restaurant were suffering due to COVID-19 (62%), that the restaurant needs to be decontaminated (62%), that insurance companies should protect businesses like this in times like these (67%), and that the decontamination costs should be covered by insurance companies (62%). Industry professionals tried to provide a voice of reason in their responses as they were most likely to agree that lawsuits like this would lead to increased insurance premiums for all (75%). Despite such distinct reasoning for their votes, surrogate jurors expressed some attitudinal positions worth nothing. For example, only 44% of surrogate jurors agreed the restaurant was harming the economy by filing a $3 Million suit, 44% agreed no business deserves a pay out that large, 43% of jurors agreed the lawsuit was likely driven by greedy lawyers, and nearly half of jurors agreed it made them "sick" to think a business could profit $3 Million from COVID-19. African Americans with graduate degrees, between the ages of 26–54 were more likely to agree the owners were harmed by the closure, business is suffering due to closures, insurance should protect businesses like this regardless of policy language and that if the government won't pay, insurance should. Those who were unemployed, who work white collar jobs, and who self-label as conservatives are most likely to see this lawsuit as "greed driven" by lawyers and also struggle to think a business could profit $3 Million from COVID-19.

We also developed distinct insights regarding jury nullification risks that deserve attention. Surrogate jurors scored higher than industry professionals on all questions related to jury nullification risk factors. Most surrogate jurors would vote to pay a claim *even if* the policy did not cover a specific loss or an event like COVID-19 (65%). Half of the surrogate jurors would vote to pay a claim *even if* there was "black and white language in the policy" excluding virus coverage. Nearly 60% of the surrogate jurors said they would be willing to "rewrite" an insurance policy to cover COVID-19 costs with their vote at trial. This trend continued in the jury nullification results. The key to our research was *not* the superficial headlines of these conclusions but the identification of characteristics of those people who *disagreed* and indicated they would *not* engage in jury nullification practices. Although a distinct minority, they *do* exist, they *can* be identified, and they *can* be used to prevent runaway juries in coronavirus insurance cases.

We also tested some of the likely affirmative defenses, which will be raised by carriers in COVID-19 insurance trials. Half

of jurors agree they would vote to pay an insurance claim *even if* there was exclusion in the policy related to events like COVID-19. Even if damages to property were speculative, 55% of jurors would vote to pay an insurance claim related to COVID-19 to be super safe. Even if covering claims hurts insurance companies, 56% of surrogate jurors would vote to pay a claim related to COVID-19. Lastly, 58% of surrogate jurors agree they would vote to consider the mere possibility of COVID-19 being present in the building as a form of property damage.

Minorities are most likely, compared to Caucasians, to agree with statements related to jury nullification. Most surprisingly, those with graduate degrees and conservatives are also most likely to agree with statements related to jury nullification. This clearly demonstrates the dangers of applying traditional stereotypes to jury predictions regarding COVID-19. While these results are insightful, we elected to take our analysis one step deeper by performing a two-step cluster analysis to identify distinct groups of surrogate jurors, understand why they voted the way they did, and better understand who they are as people. This gives us the most useful data from which we can actually participate in a jury selection and identify jurors who are the *least likely* to engage in jury nullification practices in insurance trials related to coronavirus.

LITIGATION IMPLICATIONS

There are several implications of our research worth noting. The first is in relation to differences between surrogate jurors and industry professionals. No differences emerged in our research that are counterintuitive to what we expected to see. Surrogate jurors are more likely to vote in favor of measures to hold insurance accountable for helping the economy compared to industry professionals. There was not one instance in our results where industry professionals responded in a way contrary to our hypotheses.

Second, there are no regional differences on any measure administered within the survey. Regardless of where a case is being tried in this country, there is a high likelihood that most jurors will vote to award damages in cases like the one presented in our vignette. There is no one single demographic factor that individually identified plaintiff- or defendant-leaning jurors for the case considered in this research. Instead, combinations of demographic factors, attitudes towards lawsuits, attitudes toward this specific case, experiences with and impacts felt from COVID-19, and willingness to vote to nullify laws as a juror are factors most likely to predict plaintiff and defendant leaning jurors on COVID-19 cases.

As stated, personal experiences with and personal impacts felt from COVID-19 heavily influenced votes in the case vignette presented in this research. Specifically, those with the most experience with and impacts felt by COVID-19 are most likely to vote for the plaintiff in this case. Interestingly enough, one cluster was opposed to the lawsuit filed in the case vignette and still voted to cover damages for decontaminating the restaurant, as they themselves had experienced COVID-19 and are likely sympathetic to those effected by the virus. Those with little-to-no exposure or experience with COVID-19 are more likely to filter the evidence in a favorable manner for the carrier in our case vignette. As such, those with little-to-no exposure or experience with COVID-19 are likely favorable defendant jurors in cases where COVID-19 is a factor.

Attitudes towards insurance of any kind are relatively universal through the sample. Jurors, especially those who are pro-plaintiff, are likely to agree that insurance companies should pay insurance claims related to COVID-19. They are also likely to see insurance playing a role in helping the economy recover by paying out business interruption claims. Lastly, most jurors are likely to see insurance companies as the next line of defense given that the government is not likely to provide businesses what they need to recover due to being forced to close.

Most jurors were willing to vote pro-plaintiff and award damages in the hypothetical business interruption case vignette we presented in this research. Additionally, most jurors were willing to award varying levels of damages depending on their experiences with and impacts felt by COVID-19, attitudes toward lawsuits, and attitudes toward specific case elements. In our research, we traditionally see 55%–65% of our jury samples awarding damages to plaintiffs in cases we test. Anytime we see more than 65% of our jury samples voting for the plaintiff and awarding damages is a cause for concern, as is the case in this specific situation**.** In fact, we believe we documented the single greatest risk of jury nullification in civil cases in the history of American jurisprudence.

Good news still exists on multiple fronts. First, we identified a measurable group (which ranges from 20% to 30% of sample jurors depending on the jurisdiction) that can and will fight jury nullification pressures if they are seated on a jury in a COVID-19 case. We know what this groups looks like, what they have experienced, and how they generally feel about COVID-19 issues. If a large enough jury panel is selected, it is mathematically possible to seat a jury where 80% of the jury exhibits these pro-carrier characteristics. At a minimum, we know how to seat enough of them to either "hang" the jury or fight for more reasonable liability or damage findings.

Additional good news can be seen in our results. Not one juror cluster agreed with awarding $3 million in suggested damages. This does not mean jurors in COVID-19 cases would not award large damages, but it means the economic devastation of the pandemic has, for now, decreased even liberal jurors' willingness to over-compensate plaintiffs.

In our study, two of the three clusters who voted to award damages did not like the idea of businesses profiting off COVID-19. One cluster, the pro-plaintiff and pro-lawsuit cluster did not have a problem with businesses profiting off COVID-19. However, jurors in this segment did not award the full $3 million requested. Rather, they awarded an average of $1.875 Million. This research suggests that jurors are willing to hold insurance companies accountable so that businesses who had to shut down due to COVID-19 can get back on their feet and cover costs associated with reopening their businesses since the government shut them down. At least in this hypothetical case, jurors were not willing to award damages large enough to cover lost revenues or lost wages.

Our research proved that jury nullification in the COVID-19 insurance litigation arena is a real concern. While we have seen jury nullification occur in certain jurisdictions following natural disasters in the U.S. over the last 3 decades, we have never seen a national risk of similar jury responses nationwide. In our study of the three jury clusters who voted for the plaintiff and awarded damages, each jury cluster supported our questions related to jury nullification. Specifically, the test jurors all admitted they would vote to award damages even when there is clear and unambiguous written policy language *expressly excluding virus claims*. Additionally, they admitted they would vote to "rewrite" insurance policies related to COVID-19 claims to allow for the payment of COVID-19 claims even when the policy excluded coverage for such claims. While each case will be unique, industry professionals should pay attention to these results as the political, cultural, emotional, physical, and psychological climate amongst jurors in the US populace is fragile and, in some cases, volatile.

FINAL CONCLUSIONS

In addition to COVID-19 being an unprecedented social, economic, and political experience for all Americans, it is also an unprecedented situation for America's property insurers, our judicial system, and the parties and lawyers who will be handling these claims and cases. Unprecedented situations call for unprecedented responses. The goal of this paper was not to make specific recommendations about a particular form of litigation management (such as MDLs) or any other logistical alternative. Our goal was to test national attitudes and then publicize our results, so individuals and businesses across the spectrum can make more well-informal decisions on a multitude of different issues.

The P&C industry, historically, has dealt with localized regional CATs by pursuing quick mediations for those cases that could settle more reasonably and pursuing litigation efforts (including dispositive motions) in those cases which could not in an effort to drive more reasonable settlements before trial. The vast majority of carriers have consistently decided not to try cases in those jurisdictions ravaged by national disasters or other manmade catastrophes because the limited geographic and temporal realities discussed above left sufficient financial capacity through reinsurance or other factors which enabled them to essentially overpay in a CAT zone and still not suffer devastating economic losses**. The nationwide scope of COVID-19 losses does *not* make that possible here. The P&C industry lacks sufficient capital, surplus, and reinsurance capacity to simply settle the millions of COVID-19 claims that have been filed and will continue to be filed over the next several years. This is literally a trillion-dollar problem with the potential to adversely impact the entire American insurance industry and, absent Congressional attention, countless millions of consumers will be hurt**.

Because we assume Congressional action will not be easy or quick and because we know not every coronavirus case can be resolved by dispositive motion, **P&C carriers are going to have to make choices about trying COVID-19 claims in various jurisdictions around the country**. The primary purpose of our research was to figure out the thoughts and perceptions of those 20% to 30% who have not already developed very-strong perceptions *against* the insurance industry in COVID-19 claims. For example, as we have experienced in CAT litigation, it may be necessary to call unusually large panels for voir dire because of the inevitable need to use numerous for-cause challenges and peremptory challenges to deal with certain jurors with strong attitudes.

Our next steps beyond the initial publication of our research results include additional research later in 2020 and again in 2021 in order to give us the ability to gauge how attitudes about COVID-19-related insurance claims continue to change, if at all. Great uncertainty exists as to whether regional healthcare situations may worsen as businesses and schools continue to reopen nationwide, as individuals practice social distancing with less frequency, and as individuals begin interacting with each other more socially, vocationally, religiously, and politically over the next several months. A worsening of the health effects of COVID-19 will obviously have negative implications on the national attitudes and perceptions of potential jurors. We anticipate attitudes and perceptions will remain in flux across the country and will be divergent in certain geographic areas in response to different local healthcare conditions. Our research did not address liability issues arising out of the coronavirus pandemic that will also generate enormous numbers of suits against nursing homes, prisons, jails, the transportation industry, the restaurant industry, healthcare providers, and a host of others who will be alleged to be the cause of COVID-19-related injuries or death. Additional research is obviously needed there, but it was outside the scope of our initial project. We hope to test and address those issues in the future.

FINAL THOUGHTS

The American insurance industry has no hope of winning the COVID-19-related insurance coverage and bad faith cases as matter of law in every case and in every jurisdiction across the country. The industry also lacks the capacity to settle all the claims given the magnitude and scope because the industry lacks sufficient financial capacity to do. If some cases have to be tried, the question becomes how to do so while maximizing the chances of seating jurors who have the ability to fairly and reasonably assess the facts before them and not be tempted to engage in jury nullification techniques for the purpose of helping an economically devastated and well-liked local business or local claimant who has been hurt by COVID-19 or the related economic shutdown. These cases *can be won at trial* if sufficient resources and insight into the makeup of the ultimate fact finders can be employed in all the jurisdictions around the country where such cases need to be tried. We hope our work improves the chances for those coronavirus insurance cases to be tried and won at trial.

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