Alert

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COZEN O'CONNOR

Property Insurance Coverage Issues Associated with COVID-19

The novel coronavirus 2019 (COVID-19) has disrupted events, supply chains, sales, and entire industries. As a result, businesses will likely look to their property insurers to recuperate lost business income, as well as expenses related to cleaning, sanitizing, and decontamination. This Alert discusses how courts have analyzed and applied first-party property policies for these types of non-physical losses, potential coverage under a civil authority provision, and pollution/contamination exclusions.

Physical Loss or Damage

Almost all property policies require direct, physical loss or damage to property to trigger coverage. It is simple to prove there is physical loss where there is obvious, visible physical damage; it is more difficult in a situation like COVID-19 where the damage is an intangible, financial loss in the form of business interruption or cleaning/decontamination. Unfortunately, the case law is basically non-existent with regard to the interpretation of physical loss as it relates to a virus like COVID-19.

However, there is guidance from courts with regard to claims where there has not been a physical change to property. Some courts interpret "direct physical loss" narrowly to only mean damage causing physical alteration to the property, such as flooding or fire. Other courts take a broader approach finding coverage to be triggered with the loss of use or habitability of insured property. Each of these approaches is discussed below, and we should also be mindful of the fact that the insured has the burden of proof to show that the claimed loss falls within the coverage provided by the policy's insuring clause

Courts Narrowly Interpreting Physical Loss

Many courts interpret "physical loss" narrowly to mean damage causing apparent and discernable damage to the property. For example, in *Universal Image Prods. v. Chubb Corp.*, 703 F. Supp. 2d 705 (E.D. Mich. 2010), the insured's property developed mold in the ventilation systems rendering the property unusable. The insured sought coverage for cleaning and moving expenses, as well as lost business income, which were caused by vacating the property, which was functioning as its headquarters. *Id.* at 710. The court found there was no structural or other tangible damage to the insured property, and thus, no physical loss. *Id.* at 705. It noted the stench caused by the mold did not render the entire property uninhabitable, even where one employee was infected by bacterial pneumonia. *Id.* at 710.

Likewise, in *Mama Jo's, Inc. v. Sparta Ins. Co.*, 17-CV-23362-KMM, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018), the Southern District of Florida addressed whether there was a direct physical loss when construction debris and dust from road work required the insured to clean its floors, walls, tables, chairs, and countertops. The court held that "cleaning is not considered direct physical loss." *Id.* The court stated: "A direct physical loss 'contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so.'" *Id.*, citing *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010); *see also AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 308, (2003).

Other courts across the country have followed similar logic. *See Mastellone v. Lightning Rod Mut.*

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Ins. Co., 175 Ohio App.3d 23, 40-41, 2008 Ohio 311, 884 N.E.2d 1130 (2008) (affirming lower court's ruling that dark staining from mold did not constitute "physical loss" where plaintiff's expert testified that mold could be removed from wood surface by bleaching and chemically treating affected areas); *Great Northern Ins. Co. v. Benjamin Franklin Federal Sav. & Loan Ass'n.*, No. 90-35654, 1992 WL 16749, *1 (9th Cir. Jan. 31, 1992) (unpublished) (opining that asbestos contamination represented an economic loss and not a physical loss, inasmuch as the building remained physically unchanged); *Newman Myers Kreines Gross Harris P.C. v. Great N. Ins. Co.*, 17 F.Supp.3d 323, 330 (S.D.N.Y 2014) (holding that "direct physical loss or damage" required a physical element, not met when power was preemptively shut off by the power provider to preserve the integrity of the utility system during Hurricane Sandy).

Courts Broadly Interpreting Physical Loss

Other courts take a broader approach to defining "physical loss or damage," finding coverage to be triggered with the loss of use or habitability of insured property. In *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *3 (D.N.J. Nov. 25, 2014), an accidental release of ammonia into a packaging facility caused the facility to be shut down for one week while the ammonia dissipated. The record showed the only way to fix this issue was to "air the property" and hire an outside company to clean the property. *Id.* at *4. The court noted that physical loss did not have to be structural change to the property, but could be damage rendering "the facility temporarily unfit for occupancy." *Id.* at *8.

Likewise, other courts have found the "physical loss or damage" threshold met without any tangible injury to property. *See Matzner v. Seaco Ins. Co.*, No. 96-0498-B, 1998 WL 566658, *3 (Mass. Super. Aug. 12, 1998) (finding that carbon monoxide contamination constitutes direct physical loss even though it did not produce tangible damage to the structure of the insured property); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (court deemed subject property to have been physically damaged by noxious odors emanating from methamphetamine laboratory in neighboring apartment unit); *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (finding, under Massachusetts law, an odor rendering the property unusable constituted physical injury to the property); *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 543 (App. Div. 2009) (holding property can be physically damaged, without structural alteration, when it loses its essential functionality).

The foregoing cases demonstrate how far a court may go to find "physical loss or damage" without tangible injury to property.

Civil Authority

Some property insurance policies provide business interruption coverage where lost earnings are the result of an order of a civil authority prohibiting access to a property of the insured or insured's supplier. To establish damage because of civil authority, courts will examine whether (1) the damage was because of action of civil authority; (2) the action of the civil authority prohibited access to the described premises of the insured; (3) the action of civil authority prohibiting access to the described premises is caused by direct physical loss of or damage to property other than at the described premises; and (4) the loss or damage to property other than the described premises is caused by or result from a covered cause of loss as set forth in the policy. *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 685 (5th Cir. 2011).

Courts will narrowly interpret these provisions and only find coverage where all of the conditions are met. *See 730 Bienville Ptnrs, Ltd. v. Assurance Co. of Am.*, 2002 WL 31996014 (E.D.La. Sept. 30, 2002) (holding a civil authority provision did not apply to a Louisiana hotel whose business was affected by the FAA closure of airports after September 11, 2001, because access to the hotel was not "prohibited" by any order); *see also, United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128 (2d Cir. 2006) (finding United Airlines was not entitled to civil authority coverage because Ronald Reagan National Airport was shut down before the 9/11 attack on the Pentagon and was not "as a direct result of damage" to adjacent property, as required by the policy). Notably, the specific language of civil authority provisions vary widely, which can alter the analysis significantly.

The analysis of civil authority coverage is particularly relevant in light of recent COVID-19 related events as some states, cities, and towns have issued orders and/or directives that have forced

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closures of certain businesses within the area. Of course, these claims would also need to clear the "physical loss or damage" hurdle as well.

Exclusions

Commercial all-risk property insurance policies commonly include exclusions for pollution and/or contamination. Usually, the term "pollutant" or "pollution" is defined, but it may not specifically reference a virus. Other policies may not define the terms "contaminant" or "contamination" at all. In the wake of Severe Acute Respiratory Syndrome (SARS), Ebola virus, and Zika virus outbreaks, some insurers began to specifically include mold, bacteria, and viruses as listed "pollutants." *See Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.*, 218 F. Supp. 3d 1034, 1037-38 (D. Neb. 2016) (the policy at issue specifically excluded loss or damage caused by "the actual or suspected presence or threat of any virus, organism or like substance that is capable of inducing disease, illness, physical distress or death, whether infectious or otherwise, including but not limited to any epidemic, pandemic, influenza, plague, SARS, or Avian Flu.").

Where the policy does not define pollutants, some courts have reasoned that viruses and comparable microscopic substances are not considered to be pollutants. *See Westport Insurance Corp. v. VN Hotel Group, LLC*, 761 F. Supp. 2d 1337, 1343-44 (M.D. Fla. 2010) (legionella bacteria are not pollutants, and pollution exclusion did not apply); *Johnson v. Clarendon National Insurance Co.*, No. G039659, 2009 WL 252619, at **2, 13 (Cal. Ct. App. Feb. 4, 2009) (pollution exclusion did not apply to mold and likely would not apply to viral infections; court reasoned that the language of the pollution exclusion was unclear, and thus, the exclusion must be interpreted in favor of coverage). However, at least one court has held that a virus can be considered a pollutant, even if the policy definition does not expressly reference the term "virus." *See First Specialty Insurance Corp. v. GRS Management Associates, Inc.*, No. 08-81356, 2009 WL 2524613, at **3, 5 (S.D. Fla. Aug. 17, 2009).

Conclusion

Whether coverage is triggered for COVID-19 claims is largely based on the jurisdiction in which the claim is brought and the specific language of the policy. Courts are split on whether an intangible such as a viral disease meets the "physical loss or damage" requirement. If this requirement is met, the policy may provide coverage under its business interruption, contingent business interruption, and civil authority provisions.

Of course, the specific policy or contract language will play the largest factor. If a policy specifically excludes losses caused by disease or viral infections, courts will not allow for recovery.

As always, should you have any questions, need any additional information, or wish to discuss these issues in further detail, please do not hesitate to contact us.