FEATURE

WEATHERING CORONAVIRUS:

How Business Interruption Insurance Could Help Businesses Survive the Pandemic

BY THOMAS M. WILLIAMS

Washington's Department of Health confirmed the first case of the novel coronavirus COVID-19 in the United States on Jan. 21. In less than three months, the state had more than 11,000 confirmed cases, and the virus had claimed the lives of nearly 600 Washingtonians. To try to curb the spread of the disease, Gov. Jay Inslee first ordered many businesses to close their doors. Then he ordered everyone to stay home. These measures have devastated businesses, both large and small, that rely on day-to-day operations to keep afloat. It is estimated that 75 percent of the independent restaurants that were ordered to close simply won't make it.[1] These are hard times. But many businesses with "business interruption" insurance are hopeful that their policies may help them make it through.

To that end, the response from the insurance industry has been less than encouraging. Immediately after the outbreak started, some insurers took a public position of "no coverage." For example, four of the nation's largest insurer-run organizations[2] wrote a letter to Congress claiming that these policies could *never* cover coronavirus losses: "Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19."[3] Despite such a conclusive proclamation, there is precedent to support an argument that business interruption insurance generally should cover losses caused by COVID-19. But the ultimate decision maker will likely be the courts—business owners in at least eight states have already filed COVID-19 coverage lawsuits.[4] While the outcome of these disputes may be dependent on the specific facts and policy language at issue, this article provides a general analysis of arguments Washington businesses might make to pursue business interruption coverage for their COVID-19 losses.

NOTE: *The opinions and viewpoints expressed in this article are those of the author and do not necessarily represent the opinions or positions of the author's law firm or its clients.*

BUSINESS INTERRUPTION COVERAGE FOR COVID-19 LOSSES

Business interruption coverage is a common form of insurance that is often included as part of a business's property policy. As one Washington court explained, business interruption insurance is designed to "protect the [business's] earnings":

> The essential nature and purpose of a business interruption policy is to protect the earnings which an insured would have enjoyed had there been no interruption of business. Business interruption coverage indemnifies an insured for losses sustained because of his or her inability to continue to use specified premises.

Keetch v. Mut. of Enumclaw Ins. Co., 66 Wn. App. 208, 210–11, 831 P.2d 784 (1992) (internal citations omitted).

To trigger coverage, most business interruption policies require a disruption of operations caused by "direct physical loss of or damage to property." This phrase will likely be the focus of the anticipated wave of COVID-19 coverage litigation—most insurers have already taken the position that COVID-19 does not cause "direct physical loss of or damage to property," even if the virus is on or inside the insured's property. That assertion can be challenged on at least two fronts. First, many courts have held that the phrase "physical *loss of* ... property" does not require a showing of physical *damage*. Second, even if damage were required, cases from several jurisdictions suggest that COVID-19 does cause damage.

COVID-19 Losses May be Covered Even Absent Physical Damage to Property

The use of the word "or" is key to understanding a business interruption policy's requirement that there be "direct physical loss of *or* damage to property." "Or" is disjunctive, meaning that a business owner can show either "physical loss of ... property" or "damage to property" to trigger coverage. As one Washington federal district court judge explained, any other reading would render the two phrases "superfluous":

> [I]f "physical loss" was interpreted to mean "damage," then one or the other would be superfluous. The fact that they are both included in the grant of coverage evidences an understanding that physical loss means something other than damage.

Nautilus Grp., Inc. v. Allianz Glob. Risks US, No. C11-5281BHS, 2012 WL 760940, at *7 (W.D. Wash. Mar. 8, 2012); *see also Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB (KSX), 2018 WL 3829767, at *3 (C.D. Cal. July 11, 2018) ("[T]o interpret 'physical loss of' as requiring 'damage to' would render meaningless the 'or damage to' portion of the same clause ....").

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If "loss of property" must mean something different from "damage to property," the next logical question is: "What constitutes a 'loss of ... property' sufficient to trigger coverage?" Noting the importance of an insurer's decision to use the phrase "loss *of* property"—instead of "loss *to* property"—the *Total Intermodal* court found that the *misplacement* of property would be covered:

> Under an ordinary and popular meaning, the *"loss of"* property contemplates that the property is misplaced and unrecoverable, without regard to whether it was damaged ... . "[D]irect physical loss *of*" should be construed differently from "direct physical loss *to*" or "direct physical loss."

Total Intermodal, 2018 WL 3829767, at *3-4 (emphasis in original). The court therefore held that the policy covered missing property even though that property had not suffered any physical damage. Similarly, in *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834 (8th Cir. 2006), a company could not sell an entire shipment of beef because of suspected mad cow contamination. When it was later determined that the beef had not been contaminated, the 8th Circuit found no coverage because there was no property damage, but also recognized that coverage would have been more likely "if the policy's language included the word 'of' rather than 'to,' as in 'direct physical loss *of* property.' " *Source Food*, 465 F.3d at 838 (emphasis in original).

A similar rationale has been applied by courts throughout the country to find coverage for the loss of use of property even absent evidence of physical damage. In *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 509 S.E.2d 1, 17 (1998), the Supreme Court of West Virginia found that a policyholder had suffered a "direct physical loss" of property "when it became clear that rocks and boulders *could* come crashing down [and damage property] at any time." *Murray*, 203 W. Va. at 493 (emphasis added). Thus, "[l]osses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage." *Id.*; *see also TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010) ("The majority of cases appear to support Defendant's position that physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces."). Another court held that "the temporary loss of use" of an electrical grid was covered, even though the system did not suffer any tangible damage. *See Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 541-44, 968 A.2d 724 (App. Div. 2009).

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These same principles could apply to losses caused by COVID-19: Businesses throughout the country have lost the use of the premises that they operate in. That loss is the result of an unprecedentedly widespread and easily communicable disease that—according to Gov. Inslee, health care professionals, and other industry leaders—has rendered nearly all indoor public spaces unusable for their intended purposes. Counsel advocating for their business-owner clients should therefore argue that COVID-19 has caused a "physical loss of ... property," and that those losses are covered.

Courts routinely find that intangible things like COVID-19 can cause 'physical damage to property' even if they don't visibly alter the property.

COVID-19 Arguably Causes Physical Damage to Property

An alternative argument can be made that COVID-19 *does* cause "physical damage to property" sufficient to trigger coverage. Perhaps the most obvious evidence of this are the government orders that forced businesses to close their doors. For example, New York City Mayor Bill de Blasio issued an order that closed restaurants, gyms, and other venues "because the virus physically is causing property loss and damage." Napa County's "shelter in place" order was similarly based on "evidence of ... the physical damage to property caused by the virus." Similar orders have been issued throughout the country.[5]

Moreover, courts routinely find that intangible things like COVID-19 can cause "physical damage to property" even if they don't visibly alter the property. For example, a federal judge in New Jersey found that the release of ammonia in a business's facility "physically transformed the air" and was covered because it "rendered the facility unusable for a period of time." *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *6-7 (D.N.J. Nov. 25, 2014). In *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997), asbestos contamination was deemed covered property damage even though it "d[id] not result in tangible injury to the physical structure." A New York court found coverage for noxious dust from the collapse of the World Trade Center that had "settled in the carpets and on other surfaces in offices [because it] constitutes property damage." *Schlamm Stone & Dolan, LLP. v. Seneca Ins. Co.*, 6 Misc. 3d 1037(A), 800 N.Y.S.2d 356 (Sup. Ct. 2005). Other jurisdictions have followed suit, ruling that odors, gases, and even diseases can cause "physical damage to property."[6] Business owners should argue that this same logic applies to COVID-19—experts agree that the virus physically adheres to and impacts the surfaces that it comes into contact with.[7] Courts may find that COVID-19, just like the other intangible conditions addressed in these cases, causes "physical damage to property."

That said, to establish coverage under the "damage to property" prong of a business interruption policy, a business owner may need to show that its property was in fact exposed to—and therefore damaged by—COVID-19. This might be possible even absent direct evidence of exposure. COVID-19 has an exceedingly high rate of infection, and up to 25 percent of contagious carriers might not ever develop symptoms.[8] An expert may therefore conclude (and be able to testify) that a business was, more probably than not, exposed. This is especially true for businesses that have a large amount of foot traffic, like restaurants, bars, theaters, gyms, malls, and retail stores.

CIVIL AUTHORITY PROVISIONS—ANOTHER AVENUE TO COVERAGE?

Many policies with business interruption coverage also have civil authority coverage, which covers lost earnings when a civil authority—e.g., a government official—prohibits access to the policyholder's business because of property damage *at some other location*. In other words, a policyholder may not need to show that its place of business was exposed to COVID-19 to trigger coverage. Gov. Inslee prohibited access to businesses because of the widespread outbreak of COVID-19 throughout Washington. Thus, assuming COVID-19 is deemed to cause property damage, a business with civil authority coverage may have a strong argument that its losses are covered.

But some insurers have already dismissed the validity of civil authority claims, citing a series of cases that denied coverage for losses incurred when businesses were closed after 9/11 and before the landfall of large storms. But the orders in those cases may be distinguished from the situation presented by COVID-19 because those orders closed businesses *before* any damage had occurred. For example, in *United Air Lines, Inc. v. Ins. Co. of State of PA*, 439 F.3d 128, 134 (2d Cir. 2006), the court found no civil authority coverage for losses sustained by the closure of an airport following the attack on the World Trade Center because: (1) the closure was ordered *before* the Pentagon—the only damaged property nearby—was attacked; and (2) the decision to close the airport "was based on fears of future attacks." *Id.* A federal judge in Louisiana similarly held that an evacuation order issued *in anticipation* of Hurricane Gustav did not trigger civil authority coverage because the order was not "based on property damage." *Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP v. Chubb Corp.*, No. CIV.A. 09-6057, 2010 WL 4026375, at *3 (E.D. La. Oct. 12, 2010). At the same time, that court recognized that a related order "could trigger civil authority coverage because it prohibit[ed] access ... in light of damage sustained." *Id.*

Unlike the orders in *United Air Lines* and *Jones*, Gov. Inslee's order was issued, in part, because of COVID-19's ongoing "effect" on property. COVID-19 was also widespread in Washington before the order was issued. Businesses may therefore have a strong basis to pursue civil authority coverage, in addition to standard business interruption coverage.

CONCLUSION

So what does this all mean if you represent a business that is—like so many others these days—hurting as a result of the coronavirus pandemic? First, you should submit an insurance claim immediately. You should then expect a denial letter. But don't let that discourage you. Have a coverage attorney analyze the denial letter in light of your client's policy language and unique circumstances to help determine whether you can argue that the denial was improper. Bottom line: if your client's business is experiencing losses due to the coronavirus pandemic—and your client has business interruption coverage, civil authority coverage, or both—you may be able to successfully argue that those business losses are covered. BN

NOTES

1. *See* Kim Severson and David Yaffe-Bellany, "Independent Restaurants Brace for the Unknown," *New York Times*, March 20, 2020.
2. The National Association of Mutual Insurance Companies, Independent Insurance Agents & Brokers of America, the Council of Insurance Agents and Brokers, and the American Property Casualty Insurance Association.
3. *See* www.hinshawlaw.com/assets/htmldocuments/Alerts/Joint_Trades_Response_1584664268.pdf.
4. *See* Cajun Conti LCC et al. v. Certain Underwriters at Lloyd's, London et al., Case No. 20-02558, Civil District Court for the Parish of Orleans, State of Louisiana; Chickasaw Nation Department of Commerce v. Lexington Ins. Co. et al., Case No. CV-20-35, District Court of Pontotoc County, State of Oklahoma; French Laundry Partners, LP et al. v. Harford Fire Ins. Co. et al. case number unavailable, Superior Court for the State of California, Napa County; Big Onion Tavern Group, LLC et al. v. Society Ins., Inc., Case. No. 1:20-cv-02005, U.S. District Court for the Northern District of Illinois Eastern Division; Snowden v. Twin City Fire Ins. Co., Case No. 2020-19538, District Court of Harris County, Texas; Prime Time Sports Grill, Inc. v. Certain Underwriters at Lloyd's London, Case No. 8:20-cv-00771, U.S. District Court, Middle District of Florida, Tampa Division; Indiana Repertory Theatre, Inc. v. The Cincinnati Cas. Co., Case No. 49D01-2004-PL-013137, Superior Court for the State of Indiana; LH Dining L.L.C. v. Admiral Indem. Co., Case No. 2:20-cv-01869, U.S. District Court, E.D. of Pennsylvania. Given the speed at which this issue is developing, it is very likely that additional lawsuits will have been filed by the time this article is published.
5. Executive Orders issued by the governors of Illinois and Hawaii express concern regarding COVID-19's "propensity to physically impact surfaces and personal property." A proclamation from the Major of New Orleans states that the spread of COVID-19 "caus[es] property loss and damage." An executive order from the governor of West Virginia was issued "because of physical contamination of property due to [COVID-19's] ability to remain on surfaces for prolonged periods of time." Although Gov. Inslee did not expressly say that COVID-19 causes property damage, he did acknowledge that the virus "affects property": "[T]he worldwide outbreak of COVID-19 and the resulting epidemic in Washington State ... remains a public disaster affecting ... property."
6. *See, e.g.*, Matzner v. Seaco Ins. Co., No. CIV. A. 96-0498-B, 1998 WL 566658, at *3-4 (Mass. Super. Aug. 12, 1998) (carbon-monoxide contamination covered because "physical loss or damage" includes "more than tangible damage to the structure"); Mellin v. N. Sec. Ins. Co., Inc., 167 N.H. 544, 549-50, 115 A.3d 799 (2015) (odor from cat urine covered because "physical loss" includes "condition that causes changes to the property that cannot be seen or touched"); Motorists Mut. Ins. Co. v. Hardinger, 131 F. App'x 823, 826–27 (3d Cir. 2005) (whether E. coli contamination triggered coverage by rendering property "useless or uninhabitable" is a question of fact); W. Fire Ins. Co. v. First Presbyterian Church, 165 Colo. 34, 38–39, 437 P.2d 52 (1968) (gasoline infiltration under building covered because it made "further use of the building highly dangerous"); Widder v. Louisiana Citizens Prop. Ins. Corp., 82 So. 3d 294, 296 (La. App. 2011) (intrusion of lead covered because it "rendered the home unusable and uninhabitable"); Farmers Ins. Co. of Oregon v. Trutanich, 123 Or. App. 6, 10, 858 P.2d 1332 (1993) (odor from meth lab covered because it "damaged the house").
7. *See* Neeltje van Doremalen, Ph.D. et al., "Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1," Vol. 382 No. 16 New Eng. J. Med. 1564 (April 16, 2020).
8. *See* Apoorva Mandavilli, "Infected but Feeling Fine: The Unwitting Coronavirus Spreaders," *New York Times*, March 31, 2020.