



Insurance Coverage for Business Interruption Losses During COVID-19 Pandemic

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One of the unfortunate consequences of the COVID-19 pandemic has been the widespread closure of restaurants, retail stores and other businesses. Insurers are already receiving claims for business interruption losses due to closure during the pandemic. At least two standard policy forms promulgated by Insurance Services Office, Inc., (ISO) provide business interruption coverage under certain circumstances:

1. Businessowners Coverage Form (BP 00 03 07 13); and
2. Business Income (and Extra Expense) Coverage Form (CP 00 30 10 12).

Each of the relevant insuring agreements of the Businessowners Coverage Form (BP 00 03 07 13) requires “direct physical loss,” as follows:

- The general insuring agreement provides the insurer “will pay for *direct physical loss of or damage to Covered Property* at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.”¹ Covered causes of loss refers to “[d]irect physical loss unless the loss is excluded or limited[.]”²
- The Business Income Coverage Form states the insurer “will pay for the actual loss of Business Income you sustain due to the necessary suspension of your ‘operations’ during the ‘period of restoration’.” However, “[t]he suspension must be caused by *direct physical loss of or damage to property* at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.”³ (Emphasis added.)
- The civil authority coverage applies “[w]hen a *Covered Cause of Loss* causes damage to property other than property at the described premises”

The language for the business income and civil uthority coverage under the Business Income (and Extra Expense) Coverage Form (CP 00 30 10 12) is virtually identical to the language set forth above, requiring a covered cause of loss, which is defined in the companion Causes of Loss – Special Form (CP 10 30 09 17) as direct physical loss.

In what could be a harbinger of what is to come, last week, a restaurant in New Orleans filed suit against its commercial property carrier for coverage for business interruption losses due to COVID-19.⁴ In the complaint, the restaurant notes that its policy, like the ISO forms referenced above, requires the existence of a “direct physical loss” to property for coverage to apply.

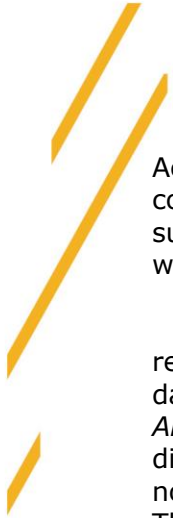
In determining whether the “direct physical loss” requirement has been met, one of the questions likely to arise is whether contamination constitutes direct physical loss.

¹ ISO BP 00 03 07 13 (emphasis added).

² *Id.*

³ ISO CP 00 30 10 12 (emphasis added).

⁴ *Cajun Conti LLC, Cajun Cuisine 1 LLC, and Cajun Cuisine LLC d/b/a Oceana Grill v. Certain Underwriters at Lloyd's, London and Governor John B. Edwards in his official capacity as Governor of the State of La., and the State of La.*, Civil District Court for the Parish of Orleans, State of La.



According to the restaurant in the aforementioned lawsuit, contamination by the new coronavirus satisfies the direct physical loss requirement because the virus can remain on surfaces for days. As discussed further below, courts in jurisdictions across the country have wrestled with similar issues.

Courts considering nonstructural property damage claims have found buildings rendered uninhabitable by dangerous gases or bacteria suffered direct physical loss or damage. For example, in *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, ammonia was released inside one of the insured's facilities.⁵ There was no genuine dispute that the ammonia discharge rendered the insured's facility physically unfit for normal human occupancy and continued use until the ammonia was sufficiently dissipated. The U.S. District Court for the District of New Jersey found, as a matter of law, the ammonia discharge inflicted "direct physical loss of or damage to" the insured's facility because the ammonia physically rendered the facility unusable for a period of time.⁶

On the other hand, in *United Airlines v. Insurance Co. of the State of Pennsylvania*, the insured airline sought indemnity for losses it suffered as a result of the Sept. 11, 2001, terrorist attacks.⁷ The issue was whether the insured could recover for its lost earnings caused by the national disruption of flight service and the government's temporary shutdown of the airport. Because the insured could not show such lost earnings resulted from physical damage to its property or from physical damage to an adjacent property, under the unambiguous language of the insurance policy, the losses were not covered.

The insurance industry has made its position clear on whether policies providing business interruption coverage provide coverage for COVID-19-related business income losses. On March 18, several members of Congress sent a letter to the leaders of four property/casualty industry groups — the American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, Independent Insurance Agents & Brokers of America and Council of Insurance Agents and Brokers — asking that the industry pay all business interruption claims. In their response letter, the group executives stated that most business interruption policies "do not, and were not designed to, provide coverage against communicable diseases such as COVID-19."

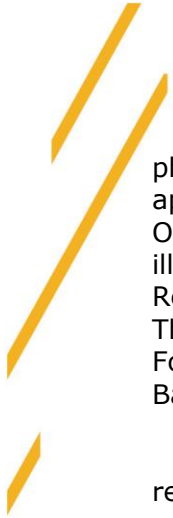
Whether these policies provide business interruption coverage under these unique circumstances will ultimately be a matter for the courts to decide. It remains to be seen whether — for purposes of determining if there is coverage for business interruption losses due — courts will view the threat of coronavirus contamination as more akin to the nonstructural property damage claims discussed above, in which direct physical loss was found, or to the Sept. 11 business loss claims, which were not covered. In any event, each individual claim will need to be analyzed based on the specific facts of the claim and the specific policy language at issue.

We note the Businessowners Coverage Form (BP 00 03 07 13) also contains a Virus or Bacteria exclusion, which precludes coverage for loss or damage caused by or resulting from "[a]ny virus, bacterium or other microorganism that includes or is capable of inducing

⁵ No. 2:12-cv-04418 (WHW) (CLW), 2014 U.S. Dist. LEXIS 165232, at *1 (D.N.J. Nov. 25, 2014).

⁶ See also *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 825 (3rd Cir. 2005) (finding, under Pa. law, contamination of a home's water supply constituted a "direct physical loss" when it rendered the home uninhabitable); *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (finding, under Mass. law, an unpleasant odor rendering property unusable constituted physical injury to the property); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 709 (E.D.Va. 2010), *aff'd*, 504 F. App'x. 251 (4th Cir. 2013) (finding "direct physical loss" where "home was rendered uninhabitable by the toxic gases" released by defective drywall).

⁷ 439 F.3d 128, 129 (2nd Cir. 2006).



physical distress, illness or disease.” We are not aware of any case in any jurisdiction applying this exclusion in the context of a pandemic. According to the World Health Organization (WHO) website: “Coronaviruses (CoV) are a large family of viruses that cause illness ranging from the common cold to more severe diseases such as Middle East Respiratory Syndrome (MERS-CoV) and Severe Acute Respiratory Syndrome (SARS-CoV).”⁸ Thus, based on a plain reading of the language set forth in the Businessowners Coverage Form (BP 00 03 07 13), even if the “direct physical loss” requirement is met, the Virus or Bacteria exclusion could preclude coverage for any loss caused by COVID-19.

Finally, we note the Georgia Office of Insurance and Safety Fire Commissioner released Bulletin 20-EX-3 on March 17, 2020. In February 2020, ISO developed two new endorsement forms relating to business interruption insurance and COVID-19. Those forms provide coverage for actual loss of business income and extra expenses caused by a government order closing the insured's premises or quarantining all or part of the premises and from government suspension of some modes of public transportation. The forms were not filed with the Georgia Department of Insurance (the Department) and will not be added to ISO's form portfolio. The bulletin sets forth that upon learning of these forms, the Department elected to offer expedited review processes for these coverages and states that “[t]he Department intends to remove any barriers to insurers offering coverages that may protect Georgia businesses during this unprecedented Public Health Crisis.” The bulletin does not purport to expand the coverage provided by existing policies.

⁸ <https://www.who.int/health-topics/coronavirus>.