



# Property Insurance Coverage Issues Associated with COVID-19

by

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# The Effects of COVID-19

- Cancelled Events
- Disrupted Supply Chains
- Cleaning, Disinfection, Decontamination
- General Loss of Business Income

# Property Policies

## Example of Insuring Agreement for Commercial Property policy:

“We 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.”

# “Direct Physical Loss or Damage”

Generally defined to mean: the actual destruction of property, which affects its structural integrity or its function.

- Fire
- Collapse
- Windstorm & Hail
- Flooding

# “Direct Physical Loss or Damage”

Can also include: Loss of use or of habitability of the insured property

- Requires something, such as contamination, that renders the property uninhabitable or incapable of being used

# “Direct Physical Loss or Damage”

Leaves open situation where, like COVID-19, the damage is intangible, such as:

- Financial loss/business interruption
- Cleaning/Decontamination

\*\*No case law interpreting “physical loss” as it could relate to a virus such as COVID-19.

# Narrow Interpretations of Physical Loss

*Universal Image Prods. v. Chubb Corp.*, 703 F. Supp. 2d 705 (E.D. Mich. 2010)

- Insured discovered that mold had developed in the ventilation systems of its property
- Mold caused the property to be unusable
- Insured sought coverage for lost business income caused by vacating the property, which functioned as its headquarters

# Narrow Interpretations of Physical Loss Continued

*Universal Image Prods. v. Chubb Corp.*, 703 F. Supp. 2d 705 (E.D. Mich. 2010)

-As there was no structural or other tangible damage to the insured property, Court held there was no “physical loss”

-This was holding, even though there was a horrible smell and one employee had already been infected by bacterial pneumonia

## Narrow Interpretations of Physical Loss Continued

*Mama Jo's, Inc. v. Sparta Ins. Co.*, 17-CV-23362-KMM, 2018 WL 3412974 (S.D. Fla. June 11, 2018)

- Roadwork being completed caused debris and dust to accumulate on the insured's floors, walls, tables, chairs, and countertops
- Insured sought coverage for the cost to clean this debris and dust from the property

## Narrow Interpretations of Physical Loss Continued

*Mama Jo's, Inc. v. Sparta Ins. Co.*, 17-CV-23362-KMM, 2018 WL 3412974 (S.D. Fla. June 11, 2018)

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.”

## Narrow Interpretations of Physical Loss Continued

*Mama Jo's, Inc. v. Sparta Ins. Co.*, 17-CV-23362-KMM, 2018 WL 3412974 (S.D. Fla. June 11, 2018)

-The Court held that cleaning does not constitute “direct physical loss”

-As this event required only that the insured simply clean the dust and debris, and did not require actual repairs, the court found no physical loss

# Narrow Interpretations of Physical Loss Continued

## Other States/Jurisdictions

- Ohio – following similar reasoning and holding that dark staining from mold was not “physical loss” where expert testified that mold could be removed by simply bleaching and chemically treating affected area
- 9<sup>th</sup> Circuit – finding that asbestos contamination was merely an economic loss, not physical loss, because the building remained unchanged
- New York – “direct physical loss” requires physical damage, which was not found where power was preemptively shut off to preserve utilities during hurricane

# Broad Interpretations of Physical Loss

*Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014)

- Packaging facility experienced an accidental release of ammonia, causing the facility to be shut down for a week

- The only way to remedy the issue was to air out the property and hire a company to clean the property

## Broad Interpretations of Physical Loss Continued

*Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014)

- Court found that “physical loss” does not have to be structural damage to property, but could be any damage that renders “the facility temporarily unfit for occupancy.”

## Broad Interpretations of Physical Loss Continued

*Matzner v. Seaco Ins. Co.*, No. 96-0498-B, 1998  
WL 56658 (Mass. Super. Aug. 12, 1998)

- Insured property suffered contamination from carbon monoxide

- No actual physical injury or destruction to property

- Court held that the contamination was “direct physical loss” even though it did not produce tangible injury to the property.

# Broad Interpretations of Physical Loss Continued

## Other States/Jurisdictions

-Oregon – finding that noxious odors in apartment unit that emanated from a laboratory producing methamphetamines constituted “physical loss” even though there was no tangible, physical injury

-1<sup>st</sup> Circuit – Finding that an odor causing a property to be unusable constituted physical injury to property

-New Jersey – When property loses its essential functionality, it can be physically damaged even without structural alteration.

# Civil Authority

Business Interruption is available under some property policies for lost earnings that result from an order of a civil authority that prohibits access to the property or supplier.

# Civil Authority Continued

## Civil Authority

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain caused by action of civil authority that prohibits access to the described premises, 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

# Civil Authority Continued

- (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 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 Continued

Courts deciding coverage for damage because of civil authority will consider:

- (1) Whether the damage was because of the action of the civil authority;
- (2) Whether the action of the civil authority prohibited access to the described premises of the insured;
- (3) Whether the action of the civil authority prohibiting access to the described premises was caused by direct physical loss of or damage to property other than at the described premises; and
- (4) Whether the loss or damage to property other than the described premises was caused by or resulted from a covered cause of loss as set forth in the policy.

*Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683 (5<sup>th</sup> Cir. 2011).

# Civil Authority Continued

## Court applying narrow interpretation:

-Louisiana – finding that the civil authority provision did not apply where the business of a hotel was affected by the FAA closure of airports after 9/11. The court reasoned that because access was not prohibited by the civil authority or order, the civil authority did not cause the damage suffered.

-2<sup>nd</sup> Circuit – No civil authority coverage where airport was shut down before 9/11 attack on pentagon, so damages suffered were not “as a direct result of damage” to adjacent property as required by policy.

# Pollution Exclusion

- Commercial property policies typically contain exclusions for pollution, pollutants and/or contaminants
- While “pollutant” is typically defined, it does not typically include a virus in the definition
- Some carriers are now amending the definition of “pollutants” to include bacteria and viruses due to outbreaks such as SARS, Ebola, and Zika

# Pollution Exclusion Continued

*Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.*, 218 F. Supp. 3d 1034, 1037-38 (D. Neb. 2016)

-upholding exclusion where policy at issue excluded 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.”

# Pollution Exclusion Continued

What about policies that do not contain a definition of pollutants that includes viruses?

-Florida – held that legionella bacteria are not “pollutants” and exclusion did not apply by plain terms of policy

-Florida – held that a virus can constitute a “pollutant” even where definition did not expressly reference the term “virus”

-California – exclusion did not apply to mold and likely would not apply to viral infections, although because language of pollution exclusion was unclear, the exclusion was interpreted in favor of coverage

# Coverage for COVID-19

- Depends on the jurisdiction
- Depends on the specific policy language
- Split of authority as to whether requirement of “physical loss or damage” can be met with intangible damage such as a viral disease
- Where requirement of “physical loss or damage” is met, the policy may provide coverage under its business interruption, contingent business interruption, and civil authority provisions
- Look to definition of “pollutant” under policy and how that has been interpreted in the subject jurisdiction