COVID-19 Insurance and Nonprofits: The Case for Coverage

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The cancellation of events producing income, galas and other fundraising events, the furloughing and quarantining of employees and volunteers, and the prospect of possible third-party liability claims have all caused considerable financial strains for many nonprofit entities, in recent weeks, thanks to the COVID-19 crisis. Insurance coverage can help nonprofits weather the storm but getting past initial insurer denials or reservations of rights can require both know-how and considerable work. This article shows you how best to maximize coverage under two types of insurance policies: commercial property insurance (including business interruption coverage and several coverage extensions, such as "civil authority" coverage) and event-cancellation insurance.

I. Commercial Property Insurance: Business Interruption Coverage and Coverage Extensions

Just like any other business, nonprofits are experiencing loss of income because COVID-19 has shuttered their facilities. Property insurance can, and should, provide coverage for such a "business interruption." However, property insurance policies generally require the insured to show that it has suffered a "direct physical loss of or damage to property." This requirement for "direct physical loss" (to use the shorthand form of the term) applies not only to general business interruption coverage but also to some coverage extensions. In addition, insurers can be sure to assert any available exclusions. This article will first address the requirements for showing coverage exists, followed by the possible exclusions to that coverage.

A. Establishing Coverage

Currently, the most hotly disputed COVID-19 issue is whether a COVID-19-related closure results in "direct physical loss" (to use the shorthand form of the term). This is a dispute that policyholders may be able to win.

"Direct Physical Loss"

With regard to the "direct physical loss" requirement, many insurers have taken the position that even the documented presence of a virus within a building does not constitute "damage" to that building (since it's not as if a hurricane blew out all the windows) or result in a "loss of property" (since the building still stands). These insurers have essentially claimed that *visible, structural* or *tangible* damage is required, but this isn't necessarily so.

We can start with the policy language, along with a bit of logic. The clause in question requires "*direct physical loss of or damage* to property." Since the clause uses two terms – "loss" and "damage" – logically it must be referring to two different things. Otherwise, the policy would be repeating itself and wasting everyone's time. It follows that "loss" must mean something different from "damage." The ordinary use of the word "damage" suggests that it means something physical, like something a tornado might inflict - smashed windows and splintered walls. Whereas "loss" of property, in its ordinary sense, naturally means something broader, including the total loss of the property (say if the tornado does a "Wizard of Oz" trick, leaving nothing but the foundation), or a temporary loss of the use of the property. Such a temporary loss of use of property occurs when a state issues a shelter-in-place order that causes business interruption.

A wealth of court decisions addressing analogous situations provide support for the proposition that COVID-19 closures *do,* in fact, cause "direct physical loss."

In Motorists Mut. Ins. Co. v. Hardinger, 131 F. App'x 823, 826 (3d Cir. 2005), a federal appellate court held that E. coli-contaminated well water could have caused "physical loss" to a home, where the homeowners had experienced multiple illnesses and moved out. (We say, "could have" because the court specifically ruled that the matter was a "question of fact," which could not be decided until the parties had introduced evidence to determine the actual facts of the matter.) Thus, even though the E. coli caused no visible or structural damage to the home, and even though the home was still standing, the E. coli had, nevertheless, caused the loss of the home's use. The court therefore ruled in favor of the policyholder on the "physical loss" issue.

The Hardinger court followed an asbestos case, Port Authority of New York & New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226 (3d Cir. 2002), in which the presence of asbestos had similarly "made the structure *unusable.*" The Port Authority court focused on a loss of *function* or *utility* of the property, holding that "physical loss" existed if an actual release of asbestos had contaminated the property in such a way that "its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable." Physical loss would also exist if the imminent threat of such a release would similarly "cause such loss of utility." *Id.* at 236.

Holding that the laws of Pennsylvania, New York, and New Jersey all pointed to the same result, the Hardinger court characterized both asbestos cases and E. coli cases as situations in which "sources [of contamination] unnoticeable to the naked eye have allegedly reduced the use of the property to a substantial degree." COVID-19 is equally a source of contamination that is "unnoticeable to the naked eye" and equally reduces "the use of the property" during the period its presence in the region causes a shutdown.

Although the Port Authority court spoke in terms of the "actual release" of asbestos or the "imminent threat" of such a release, COVID-19 is factually different from both asbestos and E. coli in that it is so dangerous to human health that even the risk of its presence in the general region surrounding a property requires a shutdown of every non-essential business in that region. Because Covid-19 is both highly contagious and new, it presents unique circumstances.

As to its contagiousness, current evidence indicates that even asymptomatic or pre-symptomatic infected people can transmit the virus to others; that people may remain contagious even after recovering, for an unknown period of time; that while the maximum incubation period is estimated to be 14 days, https://www.ncbi.nlm.nih.govpubmed/ 32150748, early reports indicated periods as long as 38 days; and that transmission may occur either through contact with infected droplets on surfaces, or through much smaller "aerosol" droplets, by breathing in air. Another factor affecting contagiousness is that it remains unknown as to whether antibodies confer immunity and, if so, for how long. As to its newness, U.S. health authorities are still scrambling to increase the nation's testing capacity for the virus and its antibodies, to conduct contact tracing, and to understand exactly how best to treat COVID-19, the full range of its symptoms, which age groups it endangers, whether it causes long-term damage, and how the disease progresses -- with silent hypoxia emerging, only recently, as both a hallmark symptom and a particularly dangerous threat. The combination of the contagiousness, the further work needed in addressing the outbreak, and the scientific unknowns means that COVID-19 renders entire regions of commercial properties useless at one time.

In addition to Hardinger, other US cases have similarly concluded that various forms of contamination or threat cause "direct physical loss":

- Cooper v. Travelers Indem. Co. of Illinois, No. C-01-2400-VRW, 2002 WL 32775680, at *1 (N.D. Cal. Nov. 4, 2002): A well contaminated with E. coli prompted county health authorities to force the closure of a Lake Tahoe tavern for several months, until a new well could be dug. The court held the tavern's closure was due to "direct physical damage" to the property from the E. coli contamination. Here, the policy also provided coverage for any "extra expense" incurred due to the direct physical loss, and although the policyholder not yet offered evidence of its lost business income, the court held that $18,000 used to dig the new well was covered as an "extra expense."

- US Airways, Inc. v. Commonwealth Ins. Co., 64 Va. Cir. 408 (2004). The 9/11 terrorist attacks caused the federal government to immediately ground all flights in the air and close Reagan National Airport for a period of about three weeks. The policyholder, an airline, sought coverage for the resulting interruption of its business under a "civil and military interruption" provision in the policy. The insurer argued that the grounding and closure was "a precautionary measure taken to prevent property damage and injury *that had not yet occurred* (emphasis in original)," and that such precautionary measures were not covered. The airline countered that the policy did not require damage to its property, and that the physical "loss" of its airline facilities and its ability to serve its customers was sufficient to trigger coverage. The court agreed, finding that the policy's

terms were clear and unambiguous and did not require physical damage to the property. The loss the airline had suffered was sufficient for coverage for business interruption under the "civil or military interruption" provision.

- TRAVCO Ins. Co. v. Ward, 715 F. Supp. 2d 699, 701 (E.D. Va. 2010), aff'd, 504 F. App'x 251 (4th Cir. 2013). The court held that Chinese drywall in a home that had released sulfuric gas into a residence over time, rendering the home uninhabitable, had caused a "direct physical loss."

- Gregory Packaging, Inc. v. Travelers Prop. Cas. Co., No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *1 (D.N.J. Nov. 25, 2014). The insured manufactured and sold juice cups. Ammonia was released from a newly built refrigeration system inside one of its facilities, causing severe burns to a contractor who had started up the system and resulting in the facility's immediate evacuation. Government authorities also evacuated the area around the plant to a one-mile radius, and the fire department banned entry into the building. The insured hired a remediation company to dissipate the ammonia from the facility. The insured sought coverage for loss of property and business interruption under a property policy that required "direct physical loss." Travelers took the position that "direct physical loss" had to involve "a physical change or alteration to insured property," and that inability to use the plant was insufficient. The court held under New Jersey law that "direct physical loss" did not require "structural alteration" and that "damage" includes "loss of function or value." It also found Georgia law would have produced the same result.

- Matzner v. Seaco Ins. Co., No. CIV. A. 96-0498-B, 1998 WL 566658, at *3 (Mass. Super. Aug. 12, 1998). The insureds owned an apartment building where a chimney blockage caused carbon monoxide to build up inside a tenant's apartment, tripping the carbon monoxide detector twice. The insureds had to spend money diagnosing the problem, cleaning and lining the chimney, and installing a fan, in addition to expenses for consultations and building inspections. The carrier claimed carbon monoxide did not cause "direct physical loss." The court disagreed. It held that the term "direct physical loss" to be ambiguous, while also finding that a broad interpretation of the term – one that would include "more than tangible damage to the structure of insured property" -- was more persuasive.

- Western Fire Ins. Co. v. First Presbyterian Church, 165 Colo. 34, 437 P.2d 52 (1968). A church had been made dangerous and uninhabitable by "the infiltration of gasoline in the soil under and around" the structure, along with gasoline vapors infiltrating the building's interior. Although the carrier had argued that this was a non-covered "loss of use," the court held that the gasoline contamination was "direct physical loss."

- Mellin v. N. Sec. Ins. Co., Inc., 167 N.H. 544, 547, 115 A.3d 799, 803 (2015). In this case, the policy term at issue was slightly different -- "We insure against risk of direct loss to property described in Coverage A, only if that loss is a physical loss to property" – but since it included both the term "direct loss" and "physical loss," the difference was not significant. The policyholders owned a condominium where a downstairs neighbor kept two cats that caused a cat urine odor that was bad enough to make the condo both unrentable and uninhabitable. One tenant had moved out, after that the policyholders "could not have tenants," and were able to live in the unit only a short time themselves. A building health inspector advised them they had a "health problem." Remediation efforts were unsuccessful, and the policyholders eventually sold the property, allegedly for far less than it would've been worth odor-free. The carrier claimed that cat urine odor was not a direct or physical loss, because it did not cause "a tangible alteration to the

appearance, color, or shape" of the condominium. The court, citing a dictionary definition of "physical" as "pertaining to matter, or the world as perceived by the senses; material as [opposed] to mental or spiritual," disagreed. Citing numerous cases, it held that "an insured may suffer 'physical loss' from a contaminant or condition that causes changes to the property that cannot be seen or touched."

Many additional cases support the policyholder position that "direct physical loss" does *not* require a visible, tangible or structural change to the insured property. Also, a virus is indisputably a physical thing, even if invisible to the naked eye. COVID-19, because of its contagiousness and all unknowns regarding its transmission and disease progression, is also a highly dangerous physical thing, so dangerous that it damages all properties in a region where it is even suspected of being present. Thus, barring an applicable exclusion (discussed below), policyholders should find coverage for COVID-19 under their property/business-interruption policy, even without visible, tangible or structural damage to the property.

Coverage Extensions

The battle over business-interruption coverage under property insurance is particularly important for policyholders because a win gains access to the policy's full limits. Policies often also contain extensions of coverage (such as "civil authority," "communicable disease" and "loss of attraction" extensions) that should be explored as well. These coverages can be subject to sub-limits, waiting periods, deductibles, or time limits measured in days, making them less valuable than general business interruption coverage. Nevertheless, policyholders should pursue coverage under these extensions, because every bit of coverage helps, and policyholders are free to simultaneously pursue all forms of coverage available in their policies. Other potentially helpful coverages include the following:

- *Contingent business interruption* coverage may cover disruptions caused by damage to the property of an upstream supplier, a downstream distributor, or a leader or attraction property (e.g., Disney World, in relation to nearby hotels, restaurants, boutiques, car services and other businesses that provide services to the patrons the resort attracts), where damage or a loss at the related property results in disruptions to the policyholder's business. While this form of coverage typically includes the same requirement of "direct physical loss" as general business interruption coverage, for the reasons discussed above, that requirement may not prove to be an obstacle.

- *Civil authority coverage* can be used to pay for damages resulting from orders by "civil authority" – such as federal, state or local government -- or the effects of those orders that limit access to a property. Again, this form of coverage typically requires "direct physical loss," but the same analysis discussed above means that it may not interfere with coverage.

  A case finding coverage under a "civil authority provision" is Assurance Co. of Am. v. BBB Serv. Co., 265 Ga. App. 35, 35, 593 S.E.2d 7, 7 (2003). Because of the threat posed by Hurricane Floyd, authorities in Brevard County, Florida issued an evacuation order. The policyholder owned several Wendy's hamburger restaurants in Florida and was forced to close those in Brevard County. The civil authority clause at issue in BBB contained typical terms, including a "direct physical loss" requirement, along with a time limit:

> 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 your premises due to direct physical loss of or damage to property, other than at the "covered premises," caused by or resulting from any Covered Cause of Loss. This coverage will apply for a period of up to 4 consecutive weeks from the date of that action.

The carrier denied coverage, asserting that the evacuation order was issued only because of the *threat* of damage, not *actual* damage. After the insured introduced evidence that the evacuation order had been issued because the hurricane had caused damage in the Bahamas, and threatened to cause damage in Brevard County, the trial court ruled in its favor. On appeal the court held that the trial court had implicitly held that basis of the evacuation was actual damage to property other than the insured premises (i.e., property as far away as the Bahamas) and that therefore the conditions of the civil authority clause had been met. The US Airways case discussed above also involved civil authority coverage.

- *Decontamination costs and communicable disease coverage* may be accessed to pay for cleaning a facility from viral pollutants, rendering it safe for use.

- *Ingress/egress provisions* may provide coverage for loss or damage that occurs to a third party's property, if it prevents or hinders the policyholder from accessing its own property.

- *Communicable disease coverage grants* may cover business interruption costs even if a virus exclusion is present in the policy.

B. Exclusions

Even when the policyholder establishes "direct physical loss," insurers can be expected to look for any possible exclusion, including the following that may be relevant to Covid-19:

- Virus
- Microorganism/microbe
- Communicable disease
- Contamination
- Pollution.

While a virus exclusion, at first glance, seems to exclude coverage, policyholders are on much firmer ground than they might expect. First, insurers are always on defense when it comes to *any* type of exclusion. Insurers bear the burden of proof to show an exclusion applies, and courts will narrowly construe exclusions and require them to be unambiguous. The devil often lies in the details with exclusions, since they might not apply to all coverages, and might vary in scope, specific terms and applicability. Many policies simply don't have any of these exclusions in the first place. Sometimes carriers will claim the policy contains a "virus" exclusion when the language in question refers only to some supposedly related category, such as "microorganism."

Insurers face particular challenges when it comes to virus exclusions. One form of virus exclusion was issued by the Insurance Services Office ("ISO") in 2006, in response to the SARS epidemic.

Although carriers like to refer to the "standard" ISO virus exclusion, in practice many insurers did not incorporate the standard ISO provision, but rather created their own, often simply adding the word "virus" to a pre-existing, nonstandard exclusion for bacteria, fungi and/or other microorganisms.

Moreover, state insurance departments must approve policy provisions, and many of these agencies -- concerned that carriers were accepting premiums for purportedly "all risk" policies and then turning around and excluding almost everything from coverage, making the promise of coverage virtually illusory -- promulgated rules that required one to read the word "virus" right back off the list. Thus, the first step for policyholders facing a virus exclusion is to check whether their state's insurance department has effectively nullified it through regulation and/or to determine if the policy provision was submitted for approval.

"Contamination" exclusions may, upon closer inspection, turn out to be part of what's more usually termed a "pollution exclusion," a provision originally designed to address *environmental* pollution or contamination. In this case "contamination" might be added to a list of chemical substances, such as smoke, soot, vapor, acids, alkalis, chemicals, waste, etc. With the possible partial exception of "waste," the substances are typically all inorganic. Furthermore, because of their environmental origin, these exclusions often refer to a "release, escape, discharge, or dispersal" of contaminants. Those verbs don't fit well with viruses. They contemplate movement of materials from a contained location – an underground gasoline tank; an industrial containment pond; a leaking drum of hazardous waste – into the environment at large. Viruses, by contrast, are *transmitted* from one host to another, through the air or, after falling to a surface from the air, by contact with infected surfaces. They don't "escape," and they aren't "released," "discharged" or "dispersed."

With "microorganism," "microbe" and "bacteria" exclusions, it's important to closely examine the list, as in many policies the list will *not* include viruses. A general principle in law dictates that, if a contract contains a list of specific items, and the relevant item does not appear on the list, then the implication is that the parties intended to omit the relevant item: The inclusion of some implies the exclusion of others. Moreover, as noted above, courts interpret exclusions narrowly. Therefore, if a contamination exclusion lists "contaminants," "bacteria," "microorganisms," and "microbes," but omits "viruses," the implication is that viruses were intentionally omitted.

This implication is underscored by the scientific fact that "bacteria," "microorganisms" or "microbes" (the last two words are actually synonyms) are in a different category from viruses. Bacteria and microorganisms/microbes are all living things: they are composed of at least one cell, and they eat, respond to stimuli and reproduce. Viruses, by contrast, are not considered to be "living." It's true that viruses are composed of strands of DNA or RNA (nucleic acids that are genetic material), but they contain no cells, do not eat or respond to stimuli, and need to hijack the cells of a host organism in order to reproduce. https://now.tufts.edu/articles/what-are-viruses-and-how-do-they-work

In addition, the list may be too specific. For example, it may refer to "SARS-CoV-1" and/or "SARS," which are different from the current virus -- SARS-CoV-2 or the novel coronavirus -- and the disease it causes, COVID-19.

This is one area in which the standard maxim to "read your policy" is paramount, because the actual terms of a provision that a carrier labels a "virus" exclusion might be either something much broader, something too narrow, something ambiguous, or something else entirely. Again, do not accept the interpretation of the insurer.

II. Event Cancellation Coverage

For many nonprofits, in-person fundraising events are important for generating income, and many have suffered losses in recent weeks due to cancellations caused by the pandemic. Nonprofits often obtain event cancellation policies when they plan to hold large events that entail both substantial costs and revenues, or when their major source of revenue consists of concerts, plays, etc.

Event cancellation policies tend to be non-standard and thus can vary widely. They may cover losses if the event is cancelled for reasons beyond the nonprofit's control, such as governmental restrictions caused by the virus. The policies usually cover direct, actual losses, such as the loss of a deposit for an event venue or money spent on organizing an event. An event cancellation policy can also cover lost revenue and ticket sales. Some policies can cover extra expense incurred to avoid cancellation and mitigate losses, such as the cost of rescheduling the event.

Event cancellation policies often require that events "beyond the control of the insured" result in "legal or physical impossibility." They do not generally cover voluntary cancellation, or a decision to cancel after a headlined performer drops out.

In the COVID-19 context, policyholders can and should expect to find coverage. The emergence of COVID-19 was indisputably an event "beyond the control of the insured." The same is true of governmentally imposed shelter-in-place orders, orders shuttering all but essential services, and orders limiting the size of gatherings. When such an order has closed the venue where the event was scheduled to be held, or limited gatherings in the state to no more than 50 (or 10) people at a time, the order has resulted in a "legal or physical impossibility."

The major caveat is that the insured should avoid framing the cancellation as a step it took only because it believed few invited guests would show up. Characterizing the facts in that way could result in the insurer deeming the cancellation to be "voluntary."

Even if a nonprofit does not have an event cancellation policy, it may still be possible to recover some costs for event preparations by referring to a "force majeure" provision in the contract with the event venue. A force majeure clause relieves a party to a contract from its contractual obligations (such as the obligation to pay an event venue fee) when a natural disaster, government order, or other "superior force" prevents the contract from going forward. Specific analysis of the clause is necessary because these nonstandard contracts vary and because different states treat this clause differently.

In short, COVID-19 presents numerous challenges for nonprofits seeking coverage. However, with a little bit of effort and savvy, these challenges can be overcome.

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