



Part 9: COVID-19: The Impact on Insurance Coverage and Claims

◆ —◆ Let's Get Physical: Direct Physical Loss Strategies in the World of COVID-19 ◆ —◆

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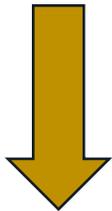
Direct Physical Loss

Is the presence of COVID-19 “direct physical loss of or damage to property”?

- Will likely depend on where you file suit and a battle of experts (Must prove COVID-19 on property constitutes “physical loss or damage.”).
- CDC: COVID-19 propensity to attach to surfaces for prolonged time.
- U.S. Courts split on the issue facing similar situations (odors, fumes, smoke, etc.).

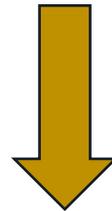
Considerations for Strategy

Facts



Is this really a "COVID" case?

Law



- What law applies?
- What does that law say?

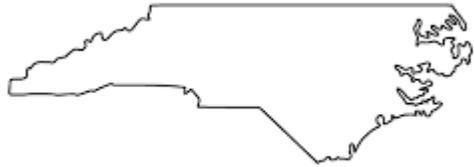
Policy



Is direct physical loss a requirement throughout?

Don't be Fooled...

North Carolina Department of Insurance have discouraged policyholders from seeking coverage:



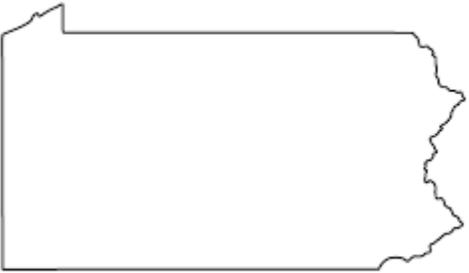
With the outbreak of the Coronavirus, some business owners may be wondering whether their insurance policies cover losses resulting from a business shut down or other losses related to the Coronavirus. Typically, coverage for losses occurring as a result of a pandemic, epidemic or other infectious or communicable diseases are excluded under the standard business owner's policy. To be covered against a business loss resulting from an infectious or communicable disease, a business owner would have to buy that additional coverage. Such coverage may generally be purchased separately via a policy endorsement.

This may not be the case – policy language will always control along with set of facts – take responsibility of your own coverage strategy.

Physical Loss of or Damage to Property

Pennsylvania:

- Supreme Court of Pennsylvania in Friends of DeVito v. Wolf, No. 68 MM 2020, 2020 WL 1847100 dealt with;
- Business owners asked for invalidation of Gov. Wolf's March 16th order shutting down all nonlife-sustaining businesses.
- Court reasoned that COVID-19 equates to a natural disaster that constitutes a "catastrophe which results in substantial damage to property".
- Such natural disaster triggered emergency executive authority because COVID-19 can be equated to earthquake, tornadoes, fire, etc.
- The Court also affirmed that "the virus can live on surfaces for up to four days".
- This case supports an argument that COVID-19 constitutes physical damage that triggers property coverage.



Direct Physical Loss Cases



Colorado - Western Fire Ins. Co. v. First Presbyterian Church
Gas seeping from underneath the church made it unusable.



Minnesota - General Mills, Inc. v. Gold Medal Ins. Co
General Mills used a pesticide not approved by the FDA. FDA shut down was a physical loss.



New Jersey - Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co
A power outage caused the Plaintiffs grocery stores food to spoil. Physical damage was defined as something that does not work.

Direct Physical Loss Cases



Ohio - Mastellone v. Lightning Rod Mut. Ins. Co.
Mold found in home did not damage the structure.



Michigan - Universal Image Products., Inc. v. Chubb Corp
Air contaminated with mold and bacteria not a physical loss because structure was undamaged.

Direct Physical Loss Cases

Eljer Mfg., Inc. v. Liberty Mut. Insurance Company:

A more holistic approach and a good case for the foundation of what is yet to come

Eljer Mfg. does not involve a first-party commercial property policy, but it is nevertheless instructive insofar as it addresses how courts should approach the concept of physical damage in the context of insurance coverage. Eljer manufactured a plumbing system that was later determined to be defective, causing leaks and minor property damage. The main take away from this case is Judge Posner's holding regarding the issue of direct physical loss or damage. Posner held that the presence of physical damage for the purpose of insurance coverage should be predicated on the objective of the insurance contract rather than nice distinctions concerning the phenomenal nature of the damage.

Elier Manufacturing., Inc. v. Liberty Mutual Insurance Co

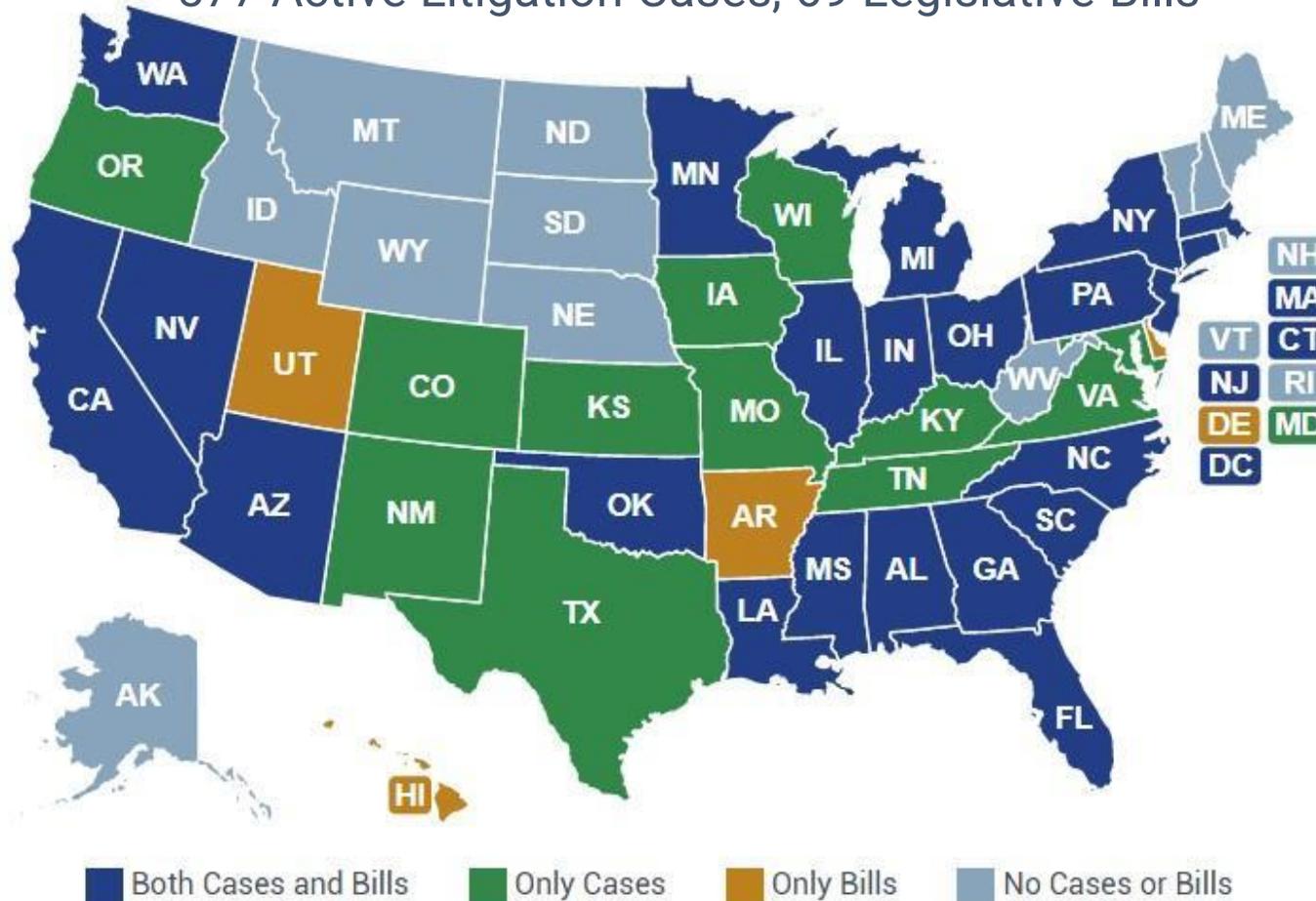
Writing for the Seventh Circuit, Judge Posner wrote:

*“The central issue in this case – when if ever the incorporation of one product into another can be said to cause physical injury – pivots on a conflict between the connotations of the term “physical injury” and the objective of insurance. The central meaning of the term as it is used in everyday English – the image it would conjure up in the mind of a person unschooled in the subtleties of insurance law – is of a harmful change in appearance, shape, composition, or some other physical dimension of the “injured” person or thing. If water leaks from a pipe and discolors a carpet or rots a beam, that is physical injury, perhaps beginning with the very earliest sign of rot—the initial contamination The ticking time bomb, in contrast, does not injure the structure in which it is placed, in the sense of altering the structure in a harmful, or for that matter any, way—until it explodes. **But these nice, physicalist, “realistic” (in the philosophical sense) distinctions have little to do with the objectives of parties to insurance contracts. The purpose of insurance is to spread risks and by spreading cancel them.** Most people (including corporate executives) are risk averse, and will therefore pay a premium to avoid a small probability of a large loss. Once a risk becomes a certainty—once the large loss occurs—insurance has no function.”*

Insurance Litigation Tracker

Active Litigation Cases, Reopening Orders and Legislative Activity Due to COVID-19

577 Active Litigation Cases, 69 Legislative Bills



French/Canadian Cases

A Paris court ruled May 26th that AXA should pay a restaurant owner two months of revenue losses caused by the virus pandemic. AXA had argued its policy did not cover business disruption caused by the health crisis



Some other French insurers have said they will pay out business interruption losses to some customers, depending on specific contracts. Generali France, for example, has said it will make payments to 600 hospitality businesses

On March 30, 2020, the Ontario Superior Court of Justice released its opinion in the MDS, Inc. et al v. Factory Mutual Insurance Company case. While the case is favorable to policyholders with business interruption claims under “all risk” policies, attorneys representing policyholders are particularly excited as Justice Wilson’s adoption of broad interpretation of “resulting physical damage” may be very useful in pursuing coverage for business interruption losses related to COVID-19 exposures

The Court concluded that a broad definition of “resulting physical damage” was

appropriate in the factual context of this case to interpret the words in the Policy to include impairment of function or use of tangible property caused by the unexpected leak of heavy water. This interpretation is in accordance with the purpose of all-risk property insurance, which is to provide broad coverage. To interpret physical damage as suggested by the Insurer would deprive the Insured of a significant aspect of the coverage for which they contracted, leading to an unfair result contrary to the commercial purpose of broad all-risk coverage.

Pandemic Risk Insurance Act of 2020 (“PRIA”)

Still in Legislation



Federal Pandemic Risk Reinsurance Fund and Program – mirrors Terrorism Risk Reinsurance Act “TRIA”



Mandates coverage by participating insurers for business interruption losses resulting from outbreak of infectious disease or pandemic that is declared an emergency or major disaster by President and certified by Secretary of Treasury



Reinsurance Fund would pay 95% of covered losses when *aggregate industry insured losses exceed \$250 million dollars*



Reinsurance Fund annual aggregate limit capped at \$500 billion dollars



Retroactive Application

Business Interruption Insurance Coverage Act of 2020 (H.R. 6494)

Still in Legislation

- Introduced April 14, 2020, in the U.S. House of Representatives
- Proposed legislation would require, among other things, that any insurer offering business interruption coverage make available coverage resulting from:
 - “viral pandemics” and
 - “forced closure of businesses, or mandatory evacuation, by law
 - or order of any government or governmental officer or agency.”
- No restrictions based on number of employees or size of company
- **Retroactive Application**



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