

## Employer Resources from May 20, 2020 webinar *Leading Through COVID-19*



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During our last session, I talked about recent filings related to insurance denial claims in the COVID-19 era. Specifically, we discussed the lawsuit that Beast restaurant owner Naomi Pomeroy filed against her insurance company for denying coverage for losses she sustained when she closed her restaurant in response to Governor Brown's order. Three take away lessons from this lawsuit are: (1) many of these lawsuits are being filed as class actions, so it's not just a dispute between the individual policyholder and the insurance company, but could implicate all similarly situated policyholders; (2) policyholders need to act quickly and file a claim if they think they have business losses related to COVID-19 that should be covered by their insurance (many policies require that claims are filed within 30 days of the loss); and (3) an insurance company or a broker is not necessarily the final arbiter of coverage questions—a policyholder can always pursue internal appeals or even file a lawsuit seeking a ruling from the court that their claim should have been covered. I also include a recent article from Law360 that provides more context on this developing area of the law. In sum, this is a nuanced area that requires quick action. If you have questions, do not hesitate to reach out to me. Our team would be happy to help.



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## Major Trends In COVID-19 Business Interruption Lawsuits

By Lee Siegel and Ryan Maxwell (May 14, 2020, 5:19 PM EDT)

### IMPORTANT NOTICES

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Another complaint cites that a governor's executive order "specifically referenced that it was being issued based on the dire risks of exposure with the contraction of COVID-19 and evidence of physical damage to property." Many, quite technically, assert that COVID-19 is a physical substance capable of remaining active on inert, physical surfaces, causing direct physical loss or damage and rendering property unsafe.

Another popular approach focuses on loss of use as property damage. Policyholders assert that covered physical loss includes the loss of use, arguing that COVID-19 denies access to the property, and prevents customers from physically occupying the policyholder's premises. "[COVID-19 is] causing the property to be physically uninhabitable by customers, causing its function to be nearly eliminated or destroyed, and/or causing a suspension of business operations on the premises," one complaint asserts.

Another complaint similarly alleges that, "the presence or danger of COVID-19 on property renders that property unusable and non-functioning until such time as the property is sanitized." An Illinois pleader contends that Illinois law holds that the presence of a dangerous substance (such as the COVID-19 virus) constitutes physical loss or damage.

However, on the road less traveled, a minority of policyholders attempt to avoid the entire virus as property damage conundrum. One group of plaintiff's attorneys, responsible for at least four putative national class actions, argue that their clients' loss is not due to the virus; the effect of the closure orders, without concern for whether the virus was actually present, is the efficient proximate cause of the lost business income.

"Rather, the efficient proximate cause of the Plaintiff's, and other Class Members' losses, were precautionary measures taken by the governments of their respective counties and states to prevent the spread of COVID-19 in the future, not because coronavirus was found in or on Plaintiff's insured property," proclaims one complaint.

Accordingly, the direct physical loss of and damage to policyholder property stems, the theory goes, from a loss of use of the property for its intended purpose. One North Carolina complaint similarly asserts that the five plaintiff-policyholders' losses are as a result of public fear, not the virus.

A tact of some Alabama and Louisiana pleadings is to avoid taking any position. These complaints assert that the policyholders have all-risk policies and, therefore, it's the carriers' burden of proof to establish that their revenue losses result from an excluded cause of loss. Another side-step pleading approach is for policyholders to point out that the phrase "direct physical loss of or damage to property" is undefined and ambiguous, thus requiring a finding of coverage for COVID-19 business income loss.

Our favorite pleading approach, without a doubt, we call "But Mom Said So." In these complaints, policyholders rely on the weight of President Donald Trump's comments to persuade that coverage is owed. The president is directly quoted in many complaints as having said:

I'm very good at reading language. I did very well in these subjects, OK? I don't see pandemic mentioned. Now, in some cases it is; it's an exclusion. But in a lot of cases I don't see it. I don't see reference that they don't want to pay up. I would like to see the insurance companies pay if they need to pay, if it's fair. And they know what's fair. And I know what's fair. I can tell you really quickly.

## **But the Virus Exclusion**

Notwithstanding the variety and creativity of pleadings, there remains the virus exclusion. The exclusion of loss due to virus or bacteria (CP 01 40 07 06) provides that an insurer "will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."

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Policyholder pleadings either confront this exclusion as a shield held by insurers or, alternatively, use its absence as a sword wielded against an insurer who should have known better. Some, flippantly, declare it inapplicable without more, in a damn-the-torpedoes approach.

Policyholders, such as in one Wisconsin case against Society Insurance Inc., argue that the insurance industry was aware in drafting the virus exclusion that "[t]he presence of virus or disease can constitute physical damage to property."

These policyholders demand coverage from policies lacking the virus exclusion, arguing that since industry leaders acknowledged property damage might result from a virus when drafting the exclusion, an insurer's decision not to schedule the virus exclusion permits coverage for loss or damage to property caused by COVID-19, under an all-risk policy.

But just because the virus exclusion is present doesn't mean that the policyholders have surrendered. For example, in a New Jersey class action against Chubb International, despite the inclusion of ISO's virus exclusion, the policyholder argues that the exclusion is inapplicable because the "losses were not caused by" the virus.

The "precautionary measures taken by the State of New Jersey to prevent the spread of COVID-19 in the future, not because coronavirus was found in or on Plaintiff's property," was the efficient proximate cause of loss. The policyholder argues that the "direct physical loss of or damage to property" experienced is the physical loss of use of and access to its property, such that a government order — rather than the virus itself — caused the loss.

## **Conclusion**

While the similarities in pleading still far outpace the differences, there are a significant number of novel COVID-19 pleadings, demonstrating that there is certainly more than one way to seek coverage even under the standard ISO coverage forms. The success or failure of these theories, and the response to them by insurers, remains to be seen. With our ears to the ground and an understanding of the arguments asserted today, we chart the course forward.

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