

Property Coverage Update: COVID-19

New Jersey Courts took steps this week to confirm business interruption coverage for businesses in the first party property context.

Pursuant to the attached, all policies of insurance in the State of New Jersey will be construed to include "global virus transmission or pandemic" as a covered peril. Coverage required by the Act shall indemnify the insured subject to the limits of the applicable policies "for any loss of business or business interruption for the duration of the declared State of Emergency."

This Act potentially contradicts typical property policies which require "direct physical loss or damage to covered property" to trigger coverage. Limited case law exists with respect to the interpretation of direct physical loss or damage in a situation like COVID-19. While most courts have interpreted the term "direct physical loss or damage" narrowly, others have taken a broader approach.

Many courts have interpreted "direct physical loss" to require actual physical or visible damage to covered property. See, *Great Northern Ins. Co. v. Benjamin Franklin Federal Sav. & Loan Ass'n.*, 1992 WL 16749 (9th Cir. 1992) (unpublished) (asbestos contamination represents an economic loss and not a physical loss, as the building remained physically unchanged); *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974 (S.D. Fla. 2018) (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.); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App.3d 23 (2008) (mold is not "physical loss" where it can be removed by bleaching and treating affected areas).

Some courts, however, have found coverage under property policies based on something less than actual "physical loss or damage." Proof that contamination or other relatively intangible conditions like bacteria or gases which "rendered the insured property temporarily or permanently unusable or uninhabitable may support a finding that the loss was a physical loss to the insured property." *Mellin v. Northern Sec. Ins. Co.*, 115 A.3d 799 (N.H. 2015); see also *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, 2014 U.S. Dist. LEXIS 165232, (D.N.J. 2014).

We have found that some policies contain a definition of a "pollutant" (an excluded peril) to specifically include mold, bacteria and viruses. *Meyer Nat. Foods, LLC v. Liberty Mutual Fire Insurance Co.*, 218 F. Supp. 3d 1034 (D. Neb. 2016). However, we caution that other courts have ruled that viruses are not "pollutants" unless specifically defined by the policy.

Some property policies provide business interruption coverage where an order of civil authority prevents or prohibits access to insured property (or potentially an insured's supplier) resulting in loss of business income. To establish damage because of civil authority, courts examine whether (1) the damage occurred due to action of civil authority; (2) the action of the civil authority prohibited access to insured property; (3) whether the action of civil authority which prohibits access to insured property is caused by direct physical loss of or damage to property other than at the insured property; and (4) the loss or damage to property other than the insured property arises from a covered cause of loss. *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 685 (5th Cir. 2011).

In our experience, courts have found coverage only where all of the above conditions are met. While some municipalities have closed certain businesses or locations, the requirement of "physical loss or damage" must still be met in order for there to be coverage under a property policy.

This is a challenging time in our world, and new issues are emerging each day. We are here for you to face these new challenges together. Stay safe!

KD's Insurance Coverage & Litigation Practice Group is continuing to monitor the evolving laws and regulations governing insurance and litigation matters in the wake of the Coronavirus pandemic. It is always a good idea to check your state's laws as well, since they, too, are changing almost daily in response to this global crisis.

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