

## Publication

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### Client Alert: Revisionist Insurance History for Virus-Related Damage and Losses: Don't Believe the Insurance Industry's Assertion That the Coronavirus Can't Cause Physical Loss of or Damage to Property

The standard property insurance policy pays for property damage and business income losses sustained by an insured when there is some variation of "physical loss of or damage to" property. With businesses around the world suffering significant losses during the COVID-19 pandemic, insurance companies and their counsel have been quick to take the position that virus-related damage and losses do not constitute "physical loss of or damage to" property. This overbroad conclusion may not apply to all policies or in all jurisdictions. In reality, policies providing coverage for loss of or damage to property, whether related to business interruption or otherwise, may well provide coverage for losses caused by or arising from the coronavirus. In 2007, insurers started adding new virus exclusions to some policies. If, as the insurance industry claims, the current pandemic does not involve "physical loss of or damage to" property, some may rightly wonder why this exclusion was created in the first place.

The drafting history of one virus exclusion is revealing. In 2006, the Insurance Services Office ("ISO") circulated the *Circular "New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria,"* thereby announcing

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the industry's intention to actually exclude these perils from coverage. *New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria*, Insurance Services Office, ISO Circular, Commercial Property, July 6, 2006. ISO pointed to the then-current pollution exclusion—which did not mention viruses or bacteria—and concluded that “viral and bacterial contamination are specific types [of contamination] that appear to warrant particular attention at this point in time.” ISO stated that “[d]isease causing agents may . . . enable the spread of disease by their presence on internal building surfaces or the surfaces of personal property” and noted that such an event could well lead to claims, including for business interruption. ISO further acknowledged that “building and personal property could arguably become contaminated by viruses . . .” and that “a[n] allegation of property damage may be a point of disagreement in a particular case.” Both suspicions were well founded: the CDC has explained that “[i]t may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it . . .”.

By promulgating the virus exclusion in 2006, ISO acknowledged that a virus can cause “physical loss of or damage to” property. It also admitted that the typical pollution exclusion does not apply to damage and losses caused by a virus. Thus, “all-risk” property policies would provide coverage for such damage and losses, including business income losses.

As a result of the concerns expressed by ISO, some insurers began adding versions of ISO's proposed exclusion to some of their policies. One such version provides in relevant part that there is no coverage 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.” There is no standard exclusion, and the language varies from insurer to insurer and policy to policy. Therefore, a careful analysis of the exclusionary

language in conjunction with the rest of the policy is needed to determine how any particular exclusion will apply, if at all, to damage and losses sustained during the COVID-19 pandemic. The point is, though, that the existence of these exclusions is an admission by the insurance industry that policies without them may well insure virus-related damage and losses.

The fact is that most property policies are *all-risk* policies that cover all risks except those for which an exclusion actually applies. Multiple lawsuits have already been brought in the face of this pandemic by insureds whose policies lack the sort of virus exclusion mentioned above. While the specific language of each policy will be central to any coverage dispute, it may well be the case that courts conclude that the presence of the novel coronavirus in or on covered property constitutes “physical loss of or damage to” that property.

In fact, many courts have reached similar conclusions in analogous circumstances not involving visible or tangible alteration to property. *See, e.g., Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, No. 2:12-cv-04418, 2014 U.S. Dist. LEXIS 165232, \*19 (D.N.J. Nov. 25, 2014) (holding that the release of ammonia into the air within a facility constituted a physical loss under Georgia law); *Mellin v. Northern Security Insurance Co.*, 167 N.H. 544, 548 (2015) (concluding that “physical loss” included changes perceived only by the sense of smell); *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 493 (1998) (holding that the term “direct physical loss” in a homeowners policy “may exist in the absence of structural damage”).

As many courts have also concluded, the standard pollution endorsement was created to exclude coverage related to environmental pollution, which might explain ISO’s determination in 2006 that “viral and bacterial contamination . . . warrant[ed] particular attention” at that time. *See, e.g., Am. States Ins. Co. v. Koloms*, 177 Ill.



2d 473, 489 (Ill. 1997) (noting that the standard pollution exclusion’s drafting history “reveal[ed] an intent on the part of the insurance industry” to limit the exclusion’s application to traditional forms of environmental pollution).

The current state of uncertainty means that the safest course of action for an insured is to study its policy, notify its insurer of a loss, and consult an insurance coverage professional if needed – we are here to help. In the end, courts may find coverage to exist for losses caused by the novel coronavirus, notwithstanding the insurance industry’s vehement insistence to the contrary.

If you have any questions regarding COVID-19 claims or other insurance policyholder issues, please contact Angela Elbert, Jill Berkeley, Paul Walker-Bright, or your Neal Gerber Eisenberg attorney.

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