

COVID-19's Effects on Real Estate Law PART 2

The Business Interruption Insurance Puzzle

BY KRISTIN A. ALLAN

This three-part series examines how COVID-19 and associated legal developments have affected real estate law. Part 1 featured commercial leasing. This part 2 covers business interruption insurance. Part 3 will provide an update on eviction law in light of the pandemic.

Since March 2020, businesses large and small have suffered monumental financial losses because of COVID-19. The pandemic prompted governmental actions that have resulted in intermittent and sometimes permanent business shutdowns. Consequently, many affected businesses have made insurance claims to cover their losses.

This article addresses business interruption coverage and insurance claims made under that coverage due to the COVID-19 pandemic and resulting state and local governmental actions. It explains how to analyze coverage and discusses recent COVID-19 business interruption lawsuits.

The Current Environment

The first major governmental action in Colorado occurred on March 16, 2020, when the Colorado Department of Public Health and Environment (CDPHE) issued a public health order,¹ stating in part:

The Colorado Department of Public Health and Environment (CDPHE) is working to stop the spread of novel coronavirus 2019 (COVID-19). . . . [It is] necessary to implement emergency measures to close down all bars, restaurants, theaters, gymnasiums and casinos in Colorado in an effort to protect and preserve the public health.

Subsequent stay-at-home orders prohibited nonessential movement by all residents. Today, many businesses remain closed or operate at partial capacity. Those businesses experiencing shutdowns and slowdowns that turned to their insurers for commercial property coverage for business losses have faced mixed results, and many have filed suit in federal or state courts to obtain coverage. Nationwide, as of April 2021:²

- Over 1,700 COVID-19 business interruption lawsuits have been filed, and that number continues to grow.
- Courts have granted insurers' motions to dismiss COVID-19 business interruption

lawsuits with prejudice 264 times and without prejudice 36 times.³

- Courts have denied insurers' motions to dismiss on 49 occasions.⁴
- Courts have granted seven summary judgment motions for policyholders and 15 such motions for insurers.⁵

Litigation is just beginning, and many claims are sure to follow. Practitioners contemplating business interruption actions must understand how to evaluate the coverage landscape.

Evaluating Business Interruption Claims

Analyzing an insurance policy is a lot like assembling a jigsaw puzzle: one missing piece leads to a frustratingly incomplete result. And just as randomly forcing pieces together won't conjure the desired puzzle box image, assembling an insurance policy in a haphazard fashion won't result in the client's full coverage picture. To successfully assemble the coverage puzzle, practitioners should follow the steps and heed the practice pointers below.

Step 1: Obtain a Copy of the Complete Policy

The first step in solving a jigsaw puzzle is to take all the puzzle pieces out of the box and arrange them in a coherent order. Like the puzzler sorting pieces, the practitioner evaluating coverage must collect the parts of the policy and sort them logically. The policy includes the declarations (the declarations of the policy period in which the loss occurred list all applicable forms within that policy), coverage forms, and all endorsements. The practitioner must ensure that the forms and endorsements match the declaration's list of these items. Once the policy's parts are sorted out, the practitioner's coverage puzzle assembly begins.

As a threshold matter, the practitioner must determine whether the commercial property insurance coverage is "all risks" or "named risks." An all risks policy provides coverage for any incident that the insurance policy does not specifically exclude. It offers much broader protection than a named risks policy, which only covers incidents the policy specifically enumerates. However, the term "all risks coverage" is

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somewhat misleading because all insurance policies contain several exclusions. In a named risks policy, the policyholder agrees that the insurance company is responsible only for losses related to the policy's specifically identified risks. Named risks often include vandalism, fire, lightning, wind damage, explosions, falling objects that damage the exterior of the property, frozen pipes, ice and snow damage, theft, and accidental water damage.

Practice Pointer: The complete list of coverage forms, including business interruption coverage, is typically listed in the policy's

declarations. To ensure you have the entire policy, request a certified copy of the policy from the insurer.

Step 2: Know the Law on Insurance Policy Interpretation

Insurance contracts are construed in accordance with general contract law.⁶ Courts interpret the language of insurance contracts according to their plain and ordinary meaning.⁷ "When the language used in a contract is plain and its meaning is clear, the agreement must be enforced as written."⁸ Courts do not rewrite clear and unambiguous policy provisions.⁹ Exclusionary terms must also be construed according to their plain and apparent meaning.¹⁰

A term is ambiguous when it is reasonably susceptible of more than one meaning.¹¹ If an insurance policy's limitation or exclusion is unambiguous, courts will enforce that limitation or exclusion.¹² The insured generally bears the burden of proving that coverage for a particular cause of loss is triggered, and the insurer bears the burden of showing an exclusion applies in a particular case and that it is not subject to any other reasonable interpretation.¹³ If the insurer shows that the exclusion applies, the burden shifts back to the insured to prove the applicability of an exception to the exclusion.¹⁴ An insurer cannot be liable beyond the scope of risks covered in the policy.¹⁵ When interpreting insurance contracts, courts will not force an ambiguity to resolve it against an insurer.¹⁶ And courts may not make a new contract between the insurer and the insured.¹⁷

Practice Pointer: Once all potentially relevant policy terms are identified, review Colorado case law to determine whether any policy provisions have been previously analyzed under Colorado law. Some provisions may be ambiguous, and some may be void for violation of a statute or as against public policy.

Step 3: Consider the Coverage Grants

Businesses generally obtain coverage for business losses as part of their commercial property insurance policies. While many policies include standard language derived from Insurance Services Organization (ISO) forms, others vary, sometimes significantly, from

those forms. Commercial property insurance typically includes business income and extra expense or business interruption coverage, civil authority coverage, additional business income coverage, and contingent business income or contingent business interruption coverage. This article references ISO forms in most instances.

The ISO “special form” commercial property insurance agreement coverage grant provides:

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.¹⁸

“Covered Property” under the ISO form includes the building identified in the declarations, the policyholder’s business personal property, and the personal property of others.¹⁹

By using this form, the insurer agrees to pay for direct physical loss of or damage to such things as structures, buildings, equipment, furniture, inventory, supplies, and fixtures at the premises caused by or resulting from a covered cause of loss. As this is an all risks policy, the next step requires determining what is a “covered cause of loss.” To that end, the policy’s section on “causes of loss” must be located and reviewed. This is usually on a different form or in a different section than the commercial property insurance agreement.

The ISO “Causes of Loss—Special Form” policy form states that “[w]hen Special is shown in the Declarations, Covered Cause of Loss means direct physical loss unless the loss is excluded or limited in this policy.”²⁰ Given that a Covered Cause of Loss means “direct physical loss unless excluded or limited” by the policy, the inclination may be to search for the exclusions next. But that would be like trying to match all the dark colors of the puzzle together without first separating the dark edge pieces from the dark middle pieces. So far, the only fact determined is that the commercial property policy provides coverage for physical loss or damage at the premises. These two forms are simply the starting place; they do not extend coverage to business income losses and extra expenses.

If the policyholder purchased business income loss coverage, a separate form then extends coverage for those financial losses

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When a direct physical loss is at issue, some courts have found that a direct physical loss requires a change in the business’s physical structure. Others have decided that a direct physical loss occurs when the property is rendered uninhabitable or unusable with no physical structural changes.

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caused by direct physical loss or damage. This coverage is commonly provided through the ISO “Business Income (and Extra Expense) Coverage Form,” which provides:

We will pay for the actual loss of Business Income you sustain due to the necessary “suspension” of your “operations” during the “period of restoration.” The “suspension” must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or

damage must be caused by or result from a Covered Cause of Loss²¹

Under this form, the insurer agrees to pay for loss of business income incurred due to necessary “suspension” of the policyholder’s “operations” during the “period of restoration.” “Suspension” is defined as (1) “[t]he slowdown or cessation of your business activities”; or (2) “that part or all of the described premises is rendered untenable, if coverage for Business Income ‘Rental Value’ applies.”²²

Business interruption coverage, which replaces income lost if business is halted due to direct physical loss or damage, often becomes an issue with COVID-19 claims. This type of insurance also covers operating expenses; a move to a temporary location, if necessary; and payroll, tax, and loan payments. The amount payable is usually based on the business’s past financial records. Coverage lasts until the end of the business interruption period, as determined by the insurance policy. Typically, the business interruption period is 30 days, but some endorsements extend that period to 360 days. Most business interruption insurance policies define this period as the date that the covered peril began until the date that the damaged property is physically repaired and returned to the same condition that existed before the disaster. There may also be a waiting period of 48 to 72 hours. The waiting period is the number of hours that must pass after a covered physical loss before the business interruption coverage starts to pay.

Business interruption insurance is triggered only if the cause of the business income loss is covered in the underlying property/casualty policy. The policyholder’s business must have stopped or slowed down because of direct physical loss of or damage to the covered property, and the loss or damage must result from a covered cause of loss, for example, where the restaurant policyholder sustains a fire loss and cannot operate until building repairs are made. If it takes one month to make repairs, the insurer may offer the insured an amount for the one-month period to make necessary payroll, tax, and loan payments.

In addition, civil authority coverage often comes into play in situations like the current

COVID-19 environment. The ISO “Business Income (and Extra Expense) Coverage Form” grants this coverage:

When a Covered Cause of Loss causes damage to property other than property at the described premises, 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 the described premises, provided that both of the following apply:

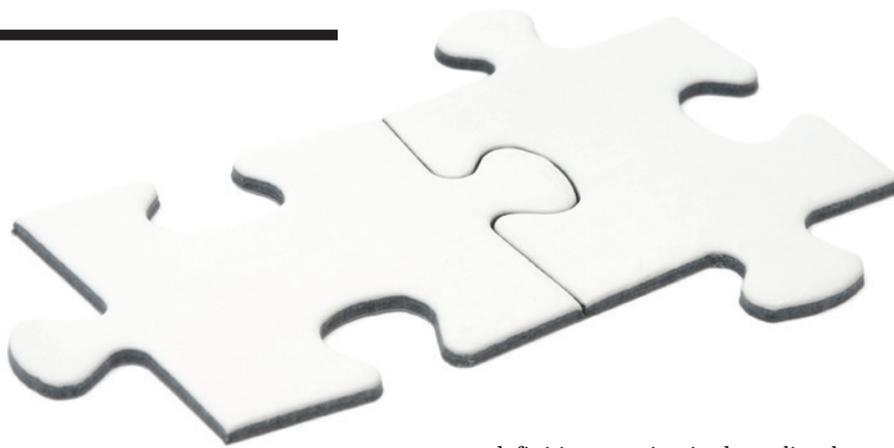
(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.²³

Civil authority coverage is triggered when a “Covered Cause of Loss” harms property other than the insured’s property at the “described premises.” If there is damage to property other than property at the described premises, the insurer agrees to pay covered damages caused by a civil authority’s action that prohibits access to the described premises. A “Covered Cause of Loss” is a direct physical loss or damage unless the loss is excluded or limited in the policy. The ISO policy form only requires damage to property, not necessarily “direct physical damage.”

Civil authority coverage addresses events such as a tornado, where authorities cordon off an entire hard-hit area. This area might include businesses that sustained little or no physical damage but whose revenue would nevertheless be impacted by the civil authority order.

The governmental shutdown and slow-down orders issued in response to COVID-19 may also trigger civil authority coverage. To determine whether this coverage applies, the practitioner should consider whether the above conditions for civil authority coverage are met. Few closures based on governmental action



taken in response to the COVID-19 pandemic will provide a basis for coverage under civil authority provisions unless access to the specific property is “prohibited.”

Lastly, some policies include contingent business income coverage. This insurance covers the insured’s business losses resulting from loss, damage, or destruction of property owned by others, if this cause of damage to the supplier or customer is of the type covered by the policyholder’s own property policy. Essentially, contingent business income coverage extends business income coverage by protecting the policyholder against the suppliers’ issues and problems.²⁴ For example, if a business that sells custom wood furniture gets most of its wood from a neighboring lumberyard and that lumberyard’s stock is destroyed in a fire, the furniture business will experience a major interruption until it secures a new wood supplier. If the furniture business sustains lost revenue because it can’t fulfill orders, contingent business income insurance may cover those financial losses.

In identifying where business interruption coverage may be located in the policy and the potential scope of coverage, the practitioner has completed the coverage puzzle’s edging. Now it is time to dive into the heart of the puzzle. In COVID-19 claims and lawsuits, one of the main substantive disputes arises over the meaning of “direct physical loss or damage” within the coverage grant.

Practice Pointer: Policy terms are often in quotations, bold, or both. Usually, this means there is an associated definition with that term. Definitions may be located in various places within the policy. Typically, there is a separate

definitions section in the policy, but endorsements may amend how a term or phrase is defined.

What is “Direct Physical Loss or Damage?”

To trigger business income coverage, (1) the “suspension” must be caused by direct physical loss of or damage to the described premises, and (2) the damage or loss must result from a Covered Cause of Loss. The phrase “direct physical loss or damage” is not defined in policy forms.

Colorado case law is sparse on the meaning of “direct physical loss.” In *Western Fire Insurance Co. v. First Presbyterian Church*,²⁵ the Colorado Supreme Court held that a direct physical loss occurred and coverage was triggered where authorities closed a building after gasoline fumes seeped into it and made its use unsafe. Thus, the loss of use resulting from the infiltration of an intangible substance can be a physical loss where a building is not demonstrably altered but its function is eliminated. No federal or state Colorado cases have cited *Western Fire* for this proposition. But cases in other jurisdictions have referred to or relied on *Western Fire* when addressing facts involving the physical infiltration of a substance into a structure.²⁶ This differs from scenarios involving the threat or fear of infiltration, the need to shut down to prevent the possible spread of the substance, or some other indirect cause of a business interruption. Therefore, the question becomes whether *Western Fire* is analogous to COVID-19 business interruption cases. Is evidence required that COVID-19 actually infiltrated the location to draw the parallel? These are some questions courts across the country are considering in deciding whether policyholders’ complaints allege a direct physical loss.²⁷

There is no consensus on the meaning of “direct physical loss or damage to the property” in court opinions. In some cases courts have determined that substances such as dust, debris, mold, and intangible odors are not physical losses because they do not affect a business’s physical structure.²⁸ But other cases suggest a loss of use model to address the presence of such substances, holding that the physical loss occurs when the property is rendered uninhabitable and unusable. Such cases have addressed a direct physical loss without physical alteration in situations involving infiltration of wildfire,²⁹ carbon-monoxide contamination within an apartment building,³⁰ mold inside a home,³¹ release of asbestos fibers from asbestos-containing materials,³² ammonia discharge,³³ odor from a chemical reaction between a carpet and the concrete floor,³⁴ residue from a dumped substance that covered and adhered to a structure’s interior,³⁵ and toxic gas released by drywall.³⁶

When a direct physical loss is at issue, some courts have found that a direct physical loss requires a change in the business’s physical structure.³⁷ Others have decided that a direct physical loss occurs when the property is rendered uninhabitable or unusable with no physical structural changes.³⁸

In nearly all COVID-19 claims and lawsuits, one of the main substantive disputes concerns what “direct physical loss or damage” means within the coverage grant. Multiple definitions have emerged from COVID-19 business interruption lawsuits. Because “loss” and “damage” in insurance policies are not necessarily synonymous,³⁹ many COVID-19 lawsuits begin with the proposition that the coverage grant is triggered in two situations: for damages caused by “direct physical damage,” and damages caused by “direct physical loss.” The cases then address and define, with significantly different results, “direct physical loss.”⁴⁰ Some courts, in denying insurers’ motions to dismiss COVID-19 claims, have found that pleadings sufficiently allege a “direct physical loss” where the complaint asserts that the premises is unsafe or unusable.⁴¹ In other cases, the phrase was found to be ambiguous.⁴² And many cases have been dismissed because the complaint failed to allege factual allegations of “direct physical loss.” Some of these dismissal

orders also rely on a policy’s virus exclusion, as discussed below.⁴³

Based on the author’s review of many pleadings filed to date in COVID-19 litigation, some courts agree with these policyholders’ arguments:

- “Direct physical loss” includes damage that is not structural but could make the premises unusable, unfit, or unsafe for occupancy.⁴⁴
- The term “direct physical loss” is not defined, subject to different interpretations, and is therefore ambiguous.⁴⁵
- If a property becomes physically contaminated and uninhabitable because of the coronavirus, there may be a basis to claim that a “direct physical loss” has occurred.⁴⁶
- When a government mandate forbids access to the policyholder’s property and putting the property to use, the order results in “direct physical loss.”⁴⁷
- “Direct physical loss” encompasses loss of use of the property based on the words’ plain and ordinary meaning and the policy’s definition of “loss.”⁴⁸
- The policyholder has a reasonable expectation of coverage for this type of loss.⁴⁹

In a New Jersey case, the court denied an insurer’s motion to dismiss because the insurer did not provide the court with any controlling New Jersey legal authority to support its argument that there was no direct physical loss.⁵⁰ Because the policyholder asserted the argument that physical damage occurs where the policyholder loses functionality of its property by civil authority, such as an executive order, the court allowed the case to proceed to discovery.

On the other hand, some courts have found the following insurers’ arguments persuasive:

- “Physical loss or damage” requires an actual, tangible, permanent, and/or physical alteration. When the complaint does not allege an alteration of the insured premises, the direct physical loss requirement is not satisfied.⁵¹
- When a business remains habitable but has been closed as part of a mandatory or voluntary closure to protect against contamination, it has not suffered a “direct physical loss.”⁵²

- Purely economic loss, and lack of access to property, do not qualify as direct physical loss.⁵³
- Without an allegation that COVID-19 infected its premises, the insured has only alleged an intangible loss to its property.⁵⁴
- Shutdown of stores because of COVID-19 orders does not constitute physical damage.⁵⁵

Some states already have case law requiring a physical alteration of the insured premises to satisfy the direct physical loss or damages requirement.⁵⁶ Note that the temporary inability to use covered property due to government intervention does not constitute direct physical loss of property.⁵⁷

Thus, the threshold issue is whether business losses due to COVID-19 claims are claims for a covered cause of loss. That is, are the business losses based on COVID-19 and the resulting governmental shutdown of businesses caused by direct physical loss or damage? As more cases are filed, whether policyholders succeed will likely depend on whether the specific jurisdiction considers the term “direct physical loss” to be a loss of use, whether the phrase is ambiguous, or both. If the insured successfully alleges and proves that a “direct physical loss” caused business income losses, the insured has met the first step in obtaining business income coverage. After completing that step, whether coverage extends COVID-19 business interruption claims depends on whether any exclusions eliminate that coverage.

Policy Exclusions

The puzzler now faces the challenge of tackling the inside pieces, which at first appear identical in shape, size, and color. Methodical analysis reveals slight differences. When those variances are identified, the puzzle begins to come to life. Analogously, policy exclusions are not often formulaic. How an exclusion is written often alters the availability of coverage in any given matter.

The ISO “Causes of Loss—Special Form” policy form states that a Covered Cause of Loss means “direct physical loss” unless the loss is excluded or limited in the policy.⁵⁸ In 2006 ISO form introduced an exclusion for loss due to

virus or bacteria. The exclusion applies to loss or property damage to buildings or personal property and endorsements that cover business income, extra expense, or civil authority actions “caused by or resulting from any virus or micro-organism which induces physical distress, illness, or disease.”⁵⁹ COVID-19 is a virus that induces “physical distress, illness or disease,” so some COVID-19 business interruption lawsuits have been dismissed based on the virus exclusion.⁶⁰

Whether the virus exclusion will bar a COVID-19 claim depends on the language in the specific exclusion. For example, in *Urogynecology Specialist v. Sentinel Insurance Co., Ltd.*, a policyholder’s business interruption claim survived a motion to dismiss where the policy’s “Limited Fungi, Bacteria or Virus Coverage” exclusion stated:

[The insurer] will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:

- (1) Presence, growth, proliferation, spread or any activity of “fungi,” wet rot, dry rot, bacteria or virus.
- (2) But if “fungi,” wet rot, dry rot, bacteria or virus results in a “specified cause of loss” to Covered Property, we will pay for the loss or damage caused by that “specified cause of loss.”

The insurer relied on this virus exclusion in its motion to dismiss but did not also argue that there was a lack of physical damage to the property. The court determined the exclusion alone did not preclude any chance of recovery under the policy and denied the motion because the exclusion grouped the word “virus” with other pollutants. Thus, it was unclear whether the exclusion was “intended to deny coverage for these kinds of business losses.”⁶¹

While many commercial property policies include the virus exclusion, some do not. Of the 302 motions to dismiss COVID-19 lawsuits granted, 91 involved policies without a virus exclusion. Of the 49 motions to dismiss denied, 28 did not have a virus exclusion. Among the 15 summary judgment orders in insurers’ favor, nine policies included virus exclusions. Finally,

of the seven summary judgment orders granted in favor of policyholders, four policies did not include a virus exclusion.⁶² This serves as an important reminder to review the entire policy.

Even if a policy includes a virus exclusion, the exclusion may not apply to business interruption claims or may be ambiguous. For example, as discussed above, in *Urogynecology Specialist*, it was unclear if the exclusion was intended to deny coverage for the kinds of business losses the policyholder claimed. In another case the court denied a motion to dismiss, holding that even though the policy contained a virus exclusion the court was required to take the plaintiff’s allegations as true, so the plaintiff met its burden of asserting a viable claim and the case proceeded to discovery.⁶³ In a third case, the policy’s virus exclusion was held to not apply to the claims in the suit.⁶⁴

Further, some virus exclusions contain anti-concurrent causation provisions, implicating the efficient proximate cause doctrine. This doctrine states that where two or more identifiable causes lead to a single property loss, the policy covers the ensuing loss as long as one of those causes was covered under the insurance policy.⁶⁵ The exclusionary language “caused by or resulting from,” as set forth in the ISO virus exclusion above, has been recognized in Colorado as a contract term that disclaims the efficient proximate cause doctrine.⁶⁶ So if a policy contains this language and the policyholder asserts a sustained loss caused by a Covered Cause of Loss and COVID-19, coverage under the commercial property policy is excluded. Yet if the virus exclusion does not include a disclaimer of the efficient proximate cause doctrine, and a business interruption claim is based on a Covered Cause of Loss and COVID-19, the exclusion may not eliminate coverage for the claim.

Lastly, when researching whether a virus exclusion is applicable, note that it may be on a separate form or endorsement to the policy such as a pollution/contamination exclusion. Some policies include specific coverage for communicable diseases. And other policy exclusions could apply.

While not the focus of this article, some business interruption coverage forms may also

exclude ordinance or law coverage (covering losses caused by enforcement of an ordinance regulating the use of property), or coverage for delay, loss of use, loss of market, and other consequential losses.

Practice Pointer: After establishing the coverage grant, analyze all potentially applicable exclusions and the definitions within those exclusions for (1) whether the claim solely falls within the exclusions, (2) whether there is any potential ambiguity within the exclusions, and (3) whether the exclusions are void as against public policy.

Colorado Public Health Orders and Guidance

The March 2020 public health order was, and continues to be, extended and amended to allow businesses to operate at limited capacity. Other local public health orders have also been implemented, extended, and amended.⁶⁷

On April 8, 2020, Governor Polis issued Executive Order D 2020 032, “Amending and Extending Executive Order D 2020 003 Declaring a Disaster Emergency Due to the Presence of Coronavirus Disease 2019 in Colorado,” which states, “COVID-19 . . . physically contributes to property loss, contamination, and damage due to its propensity to attach to surfaces for prolonged periods of time.” The executive branch continues to issue executive orders.⁶⁸

Soon after the COVID-19 pandemic began leading to the shutdown and slowdown of thousands of Colorado businesses, Colorado’s Division of Insurance (DOI) issued several Bulletins and Frequently Asked Questions (FAQs),⁶⁹ including “FAQs from the DOI on Business Interruption Coverage and COVID-19 (April 3, 2020).”⁷⁰ The FAQs are mainly directed at insurance consumers and provide basic information on business interruption coverage and exclusions, contingent business interruption coverage, and civil authority coverage. The FAQs also provide information on resources for business owners during this challenging time.

Interestingly, FAQ 1 notes that business interruption coverage may require physical loss to property, such as “damage from a fire or tornado.” And FAQ 7 states that even where there is a stay-at-home order, business interrup-

tion coverage “may require property damage. Without property damage, coverage may not be triggered.” This is a more limited interpretation of coverage than that provided by the Colorado Supreme Court in *Western Fire*.⁷¹

Colorado Lawsuits

Seven business interruption lawsuits have been filed in Colorado.⁷² The first, *Monarch Casino & Resort, Inc. v. Affiliated FM Insurance Co.*, was filed in the federal court for the District of Colorado. The complaint alleges that Monarch Casino & Resort, Inc. (Monarch) owns and operates the Atlantis Casino Resort in Reno, Nevada (Atlantis) and Black Hawk Casino in Black Hawk, Colorado (Black Hawk). Monarch maintained a commercial business policy that included business interruption coverage with Affiliated FM Insurance Co. (AFM). Both Atlantis and Black Hawk were closed in March 2020 and remain closed to the public under Nevada and Colorado civil and executive orders. The policy includes property damage coverage for communicable diseases. AFM denied benefits under various policy coverages because Monarch failed to “identify any physical loss or damage to insured property.” Monarch’s claims include breach of contract, bad faith breach of insurance contract, and violation of CRS § 10-3-1115. Monarch seeks relief under CRS § 10-3-1116 and declaratory judgment. AFM filed its answer on July 20, 2020. This case is set for a 10-day jury trial on January 24, 2022.

Practitioners should stay on top of developments as COVID-19 claims wind their way through the courts.

Evaluating Choice of Law Issues

Along with analyzing coverage, practitioners must determine which state’s substantive law applies to a claim. The starting place is the policy itself, which may include which state’s law will apply to contract interpretation. It is not, however, the ending place. If the policy points to a specific state’s substantive law, research is still needed to determine such issues as whether the section of law clause is enforceable, whether the terms are void as against public policy, and whether a substantial connection to the forum state is needed to enforce the clause.

If the policy lacks a selection of law clause, the practitioner must analyze choice of law issues. Choice of law matters are procedural and governed by the forum state’s law. Under Colorado choice of law rules, “an insurance contract is governed by the law of the state with the most significant relationship to the insurance contract.”⁷³ This determination is guided by a consideration of several factors under Chapter 8 of the *Restatement (Second) of Conflict of Laws*.⁷⁴

Accordingly, practitioners must determine in each case the likely approach of the states in which the action might be filed, including applicable substantive statutes, statutes of limitations, case law, and other practical considerations for business interruption claims before determining where and how to proceed.

Conclusion

Addressing business interruption claims requires several steps. Practitioners must review a policy for completeness, identify all potentially applicable coverage, determine whether the facts of the loss fall under any of the coverages, and if so, whether any exclusions may eliminate that coverage. Case law pertaining to the potential ambiguity of insurance policy terms should be reviewed. And practitioners are well-served by staying apprised of nationwide trends and winning arguments.

Finally, clients should review their policies with their attorneys, brokers, or specialized coverage counsel to best prepare for future events like the COVID-19 pandemic. **CL**



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NOTES

1. Notice of Public Health Order 20-22 Closing Bars, Restaurants, Theaters, Gymnasiums, and Casinos Statewide (Mar. 16, 2020), www.colorado.gov/pacific/sites/default/files/atoms/files/Bars%20Restaurants%20PH%20Order.pdf.
2. University of Pennsylvania Carey Law School Covid Coverage Litigation Tracker, <https://cclt.law.upenn.edu> (from the main page, select Covid Coverage Litigation Tracker/Latest Developments/Cumulative Filings). Several COVID-19 case trackers are publicly available, many of which reference the University of Pennsylvania’s tracker.
3. <https://cclt.law.upenn.edu/judicial-rulings>.
4. *Id.*
5. *Id.*
6. *Fed. Deposit Ins. Corp. v. Am. Cas. Co. of Reading, Pa.*, 843 P.2d 1285, 1289 (Colo. 1992).
7. *Chacon v. Am. Family Mut. Ins. Co.*, 788 P.2d 748, 750 (Colo. 1990).
8. *Fire Ins. Exch. v. Rael by Rael*, 895 P.2d 1139, 1142 (Colo.App. 1995); *In re May*, 756 P.2d 362, 368 (Colo. 1988).
9. *Lovell v. State Farm Mut. Auto. Ins. Co.*, 466 F.3d 893, 902 (10th Cir. 2006).
10. *Worsham Constr. Co. v. Reliance Ins. Co.*, 687 P.2d 988, 990 (Colo.App. 1984).
11. *Carlisle v. Farmers Ins. Exch.*, 946 P.2d 555, 556 (Colo.App. 1997).
12. *Colo. Intergovernmental Risk Sharing Agency v. Northfield Ins. Co.*, 207 P.3d 839, 842 (Colo.App. 2008).
13. *Id.*
14. *Am. Family Mut. Ins. Co. v. Johnson*, 816 P.2d 952 (Colo. 1991).
15. *Kane v. Royal Ins. Co. of Am.*, 768 P.2d 678, 683 (Colo. 1989).
16. *Martinez v. Hawkeye-Sec. Ins. Co.*, 576 P.2d 1017, 1019 (Colo. 1978).
17. *Higgins v. Conn. Fire Ins. Co.*, 430 P.2d 479, 480 (Colo. 1967).
18. ©ISO form CP 00 10 10 12 at 1.
19. *Id.*
20. ©ISO form CP 10 30 09 17 at 1.
21. ©ISO form CP 00 30 10 12 at 1.
22. *Id.* at 9.
23. ©ISO form CP 10 30 09 17 at 2.
24. See *Archer Daniels Midland Co. v. Hartford Fire Ins. Co.*, 243 F.3d 369, 371 (7th Cir. 2001).
25. *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968).
26. See *Phila. Parking Auth. v. Fed. Ins. Co.*, 385 F.Supp.2d 280 (S.D.N.Y. 2005); *Mellin v. N. Sec. Ins. Co.*, 167 N.H. 544 (N.H. 2015); *Nat’l Union Fire Ins. Co. of Pittsburgh v. CML Metals Corp.*, No. 2:12-cv-00934-TC (D. Utah Aug. 11, 2015).
27. A number of COVID-19 business interruption cases have addressed *Western Fire*. See *Georgetown Dental, LLC v. Cincinnati Ins. Co.*, No. 1:21-cv-00383-TWP-MJD (S.D. Ind. May 17, 2021); *1210 MCGAVOCK ST. HOSP. PARTNERS v. ADMIRAL INDEM. CO.*, No. 3:20-cv-694 (M.D.Tenn. Dec. 23, 2020); *4431, Inc. v. Cincinnati Ins. Cos.*, No. 5:20-cv-04396 (E.D.Pa.

- Dec. 3, 2020). Some courts have distinguished it from the COVID-19 business interruption case before that court. See *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, No. 1:20-cv-1136 (W.D.N.Y. Apr. 22, 2021); *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, No. 20-cv-2211-JAR-GEB (D.Kan. Dec. 3, 2020). At least one court, *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-cv-265 (E.D.Va. Dec. 9, 2020), relied on it when ruling in the policyholder's favor.
28. See, e.g., *Mama Jo's, Inc. v. Sparta Ins. Co.*, No. 18-12887, 2018 U.S. Dist. LEXIS 201852 (S.D.Fla. Jun 11, 2018) (holding that restaurant did not sustain direct physical loss when dust and debris from nearby roadwork could be remediated by cleaning); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130 (Ohio Ct.App. 2008) (finding that mold that could be removed by cleaning was not physical damage, as it did not alter or otherwise affect the structural integrity of the building's siding); *Universal Image Prods., Inc. v. Chubb Corp.*, 703 F.Supp.2d 705 (E.D.Mich. 2010) (holding that intangible harms such as odors or the presence of mold and bacteria in an HVAC system did not constitute physical damage to property); *Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n*, 793 F.Supp. 259 (D.Or. 1990) (opining that asbestos contamination was not a physical loss, as the building remained unchanged), *aff'd*, 953 F.2d 1387 (9th Cir. 1992).
29. *Or. Shakespeare Festival*, No. 1:15-cv-01932-CL (D.Or. June 7, 2016).
30. *Matzer v. Seaco Ins. Co.*, No. 960498B (Mass.Cmmw.Ct. Aug. 1, 1998).
31. *Prudential Prop. Cas. Ins. v. Lillard-Roberts*, CV-01-1362-ST (D.Or. June 18, 2002).
32. *Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002).
33. *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, Civ. No. 2:12-cv-04418 (WHW) (CLW) (D.N.J. Nov. 25, 2014).
34. *Essex Ins. Co. v. Bloomsouth Flooring Corp.*, 562 F.3d 399, 402 (1st Cir. 2009).
35. *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995).
36. *Travco Ins. Co. v. Ward*, 715 F.Supp.2d 699, 707 (E.D.Va. 2010).
37. See, e.g., *Mama Jo's, Inc.*, 2018 U.S. Dist. LEXIS 201852; *Mastellone*, 884 N.E.2d 1130; *Universal Image Prods.*, 703 F.Supp.2d 705; *Great N. Ins. Co.*, 793 F.Supp. 259.
38. See, e.g., *Port Authority of N.Y. and N.J.*, 311 F.3d 226 (holding, where the insurance policy covers physical damage and physical loss, when the presence of asbestos in the air of a building rendered the structure uninhabitable and unusable, there is a direct loss to the owner/insured); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332 (Or.App. 1993) (holding that the persistence of methamphetamine odor itself was physical loss); *Am. Guarantee & Liab. Ins. Co. v. Ingram Micro, Inc.*, No. 99-185 TUC ACM, 2000 U.S. Dist LEXIS 7299 (D.Ariz. Apr. 19, 2020) (holding that the term "physical damage" included "loss of access, loss of use, and loss of functionality").
39. *Rankin v. USAA Cas. Ins. Co.*, 271 F.Supp.3d 1218, 1229 (D.Colo. 2017) (internal citations omitted.).
40. See, e.g., *N. State Deli LLC v. Cincinnati Ins. Co.*, No. 20-CVS-02569 (N.C.Super.Ct. Oct. 9, 2020).
41. *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-cv-03127-SRB (W.D.Mo. Aug. 12, 2020).
42. *N. State Deli LLC*, No. 20-CVS-02569.
43. *Gavrilides Mgmt. Co. LLC v. Mich. Ins. Co.*, No. 20-258-CB-C30 (Ingham Cty.Mich. July 1, 2020).
44. *Elegant Massage LLC v. State Farm Mut. Ins. Co.*, No. 2:20-cv-265 (E.D.Va. Dec. 9, 2020).
45. *Hill & Stout PLLC v. Mut. of Enumclaw Ins. Co.*, No. 20-3-07925-1 (Wash.Super.Ct. Nov. 13, 2020); *N. State Deli LLC*, No. 20-CVS-02569.
46. *JGB Vegas Retail Lessee LLC v. Starr Surplus Lines Ins. Co.*, No. A-20-816628-B (Clark Cty.Nev. Dec. 1, 2020).
47. *N. State Deli LLC*, No. 20-CVS-02569.
48. *Id.*
49. *Humans & Res. LLC v. Firstline Nat'l Ins. Co.*, No. 2:20-cv-02152 (E.D.Pa. Jan. 8, 2020).
50. *Optical Servs. USA v. Franklin Mut.*, BER-L-3681-20 (Bergen Cty.N.J. Aug. 13, 2020).
51. *10E, LLC v. Travelers Indem. Co. of Conn. et al.*, Case 2:20-cv-04418-SVW-AS (Cent.D.Cal. 2020). See also *Hillcrest Optical, Inc. v. Continental Cas. Co.*, No. 1:20-cv-00275 (S.D.Ala. Oct. 21, 2020).
52. *4431, Inc. v. Cincinnati Ins. Cos.*, No. 5-20-CV-04396-JFL (E.D.Pa. Dec. 3, 2020).
53. *Dime Fitness LLC v. Markel Ins. Co.*, No. 20-CA-5467 (13th Cir. Fla. Nov. 10, 2020).
54. *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Ins. Co.*, No. CV-20-511-R (W.D.Okla. Nov. 9, 2020).
55. *AFM Mattress Co. LLC v. Motorists Com. Mut. Ins. Co.*, No. 1:20-cv-03556 (N.D.Ill. Nov. 25, 2020).
56. *Long Affair Carpet & Rug, Inc. v. Liberty Mut. Ins. Co.*, No. SACV20-01713-CJC (Cent.D.Cal. Nov. 12, 2020); *Hajer v. Ohio Sec. Ins. Co.*, No. 6:20-cv-00283 (E.D.Tex. Dec. 7, 2020); *Palmer Holdings & Invs., Inc. v. Integrity Ins. Co.*, No. 4:20-cv-154-JAJ (S.D. Iowa Dec. 7, 2020).
57. *Hillcrest Optical, Inc. v. Continental Cas. Co.*, No. 1:20-cv-00275.
58. ©ISO form CP 10 30 09 17 at 1.
59. ©ISO form CP 01 40 07 06.
60. See, e.g., *Wilson v. Hartford Cas. Co.*, No. 2:20-cv-03384 (E.D.Pa. Sept. 30, 2020); *Franklin EWC, Inc. v. Harford Fin. Servs. Group, Inc.*, No. 3:20-cv-04434 (N.D.Cal. Sept. 22, 2020); *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, No. 2:20-cv-00401 (M.D.Fla. Sept. 2, 2020). See also *Its Nice, Inc. v. State Farm Fire & Cas. Co.*, No. 2020L000547 (Ill.Cir.Ct. Sept. 29, 2020) (even if the insuring agreement had been triggered, the virus exclusion would apply).
61. *Urogynecology Specialist v. Sentinel Ins. Co., Ltd.*, No. 6:20-cv-01174 (M.D.Fla. Sept. 24, 2020).
62. <https://cclt.law.upenn.edu/judicial-rulings>.
63. *Ridley Park Fitness, LLC v. Philadelphia Indem. Ins. Co.*, No. 200501093 (Pa.Ct.Com.Pl. Aug. 13, 2020).
64. *Urogynecology Specialist*, No. 6:20-cv-1174.
65. *Koncilija v. Trinity Universal Ins. Co.*, 528 P.2d 939, 940 (1974).
66. *Kane v. Royal Ins. Co. of Am.*, 768 P.2d 678 (Colo. 1989).
67. <https://covid19.colorado.gov/prepare-protect-yourself/prevent-the-spread/public-health-executive-orders>.
68. For a complete list of executive and public health orders, visit <https://covid19.colorado.gov/public-health-executive-orders>.
69. The DOI Bulletins and FAQs can be found at <https://doi.colorado.gov/statutes-regulations-bulletins/colorado-insurance-bulletins>.
70. https://drive.google.com/file/d/10k_zfwoifK6sxbWhmdVBAVeNXyIIInfnH/view.
71. *W. Fire*, 165 Colo. 34.
72. See *Eaten Path LLC v. Nationwide Mut. Ins. Co.*, No. 2021CV30030 (Pitkin Cty.); *Holtzman Enters. Inc. v. Continental Cas. Co.*, No. 1:2020cv02152 (D.Colo.); *Monarch Casino & Resort, Inc. v. Affiliated FM Ins. Co.*, No. 1:2020cv01470 (D.Colo.); *Qdoba Rest. Corp. v. Zurich Am. Ins. Co.*, No. 1:2020cv03575 (D.Colo.); *Sagome, Inc., d/b/a L'Hostaria v. Cincinnati Ins. Co.*, No. 1:2021cv00097 (Pitkin Cty.); *Spectrum Ret. Comtys. LLC v. Cont'l Cas. Co.*, No. 2021CV30695 (Denver Cty.); *Tom's Urban Master LLC v. Fed. Ins. Co.*, No. 1:2020cv03407 (D.Colo.).
73. *Berry & Murphy, P.C. v. Carolina Cas. Ins. Co.*, 586 F.3d 803, 808 (10th Cir. 2009).
74. *Restatement (Second) of Conflict of Laws* (Am. Law Inst. 1971). See, e.g., *Poole v. State Farm Fire & Cas. Co.*, 941 F.Supp. 964, 966 (D.Colo. 1996) ("Colorado has adopted the restatement . . . for resolving choice of law issues arising in contract actions.").