By DAVID H. BROWN

COVID-19 Business Interruption Insurance Basics

Since the declaration of the coronavirus pandemic, insurers, legislators, and lawyers have generated a torrent of commentary addressing insurance coverage for business interruption (BI). The range of opinion is considerable due to the variability of the exact wording of commercial property insurance policies, differences in the insurance law of the states, the absence of pandemic-specific case law, and the extent to which the outcomes in the pertinent case law are fact intensive.[1]

Pandemic-related insurance initiatives include bills introduced in the legislatures of at least eight states that require insurers to provide BI coverage not otherwise afforded by policies. Insured policyholders have reportedly filed over 560 lawsuits (as of July 1, 2020) seeking coverage for BI losses in courts across the country. Some suits involve specialized coverages such as for event cancellation or communicable disease. Most suits, however, involve routine though non-standardized property policy forms.

Against this complex backdrop, the objective of this article is to sketch basic BI issues under the most common commercial property-policy insuring clause, citing cases of interest to Texas lawyers.

Commercial property policies typically insure against "all risks of direct physical loss or damage to property" insured under the policy. This phrase is broadly descriptive of the various perils that might cause property loss or damage, such as fire and windstorm. The words used in the "all-risk" phrase are typically not defined by the policy and, therefore, are given their plain or ordinary meaning with reference to dictionary definitions.[2]

The purpose of BI coverage, in those policies that include it, is to pay for loss of income in addition to the loss of value or the expense of repair or replacement of damaged property. It is termed a "time element" coverage because covered lost income is quantified based on the duration of the interruption.

A grant of BI coverage, or the BI insuring agreement, typically covers economic loss due to the "necessary interruption"[3] of the insured's business and repeats or incorporates the all-risks-of-direct-physical-loss-or-damage phrase.

Policies affording BI coverage typically include coverage "extensions" for categories of economic loss in addition to lost income. Most extensions, such as that for "extra expense" needed to continue in business, typically include the same physical-loss requirement as the BI insuring clause.

Some extensions, however—notably that for loss of business income caused by order of civil authority—require property loss to non-insured property, as where loss or damage to non-insured property causes the government to limit access to the insured property.[4] The applicable causation analysis for a civil authority extension also differs from BI coverage because coverage turns on the

rationale for issuance of the government order.

In making a claim, or in court, the insured bears the burden to show a loss within one or more of the BI or coverage extension insuring agreements.[5] The threshold coronavirus coverage question, therefore, is to identify a factual scenario showing a loss caused by a risk of direct physical loss or damage. The insured also would need to demonstrate a loss meeting the policy's loss quantification requirements.[6]

Base property insurance coverage forms (the so-called "coverage part") exclude a more or less standard set of perils, or possible causes of loss. These do not ordinarily include viral infection, which may, however, be excluded in any of several common endorsements.[7] If not excluded, due to the breadth of the term "all risks,"[8] coronavirus might cause covered loss if the terms of the insuring clause are otherwise met.

The many policies that require "direct" physical loss or damage require a close causal relationship—a so-called "immediate" or "proximate" cause of loss or damage—as distinguished from loss or damage that is more remote and is simply caused by, or is a "natural consequence" of, the peril.[9]

The disjunctive wording "loss or damage" requires that the words "loss" and "damage" have different meanings. Otherwise, one word or the other impermissibly would be rendered a nullity.[10]

Few Texas cases address the meaning of "damage" in the property insurance context, although "damage" plainly refers to physical damage.[11] Accordingly, the most natural plain meaning distinguishing "loss" from "damage" is that "loss" includes not only property that is entirely lost but also loss of use of property that is otherwise undamaged.

While few Texas cases address loss-of-use claims under property policies,[12] a number of out-of-state cases have found coverage in various loss-of-use scenarios. One line of cases, for example, holds that the physical-loss requirement may be met by a loss of use resulting from an imminent threat of physical damage, such as the danger of collapse or the risk of an avalanche.[13] In these cases, the immediacy of a physical threat in conjunction with loss of use of insured property results in a covered loss.

A larger number of out-of-state cases hold that various forms of contamination may result in a covered direct loss of use. The Ninth Circuit, for example, affirmed an award based on the closure of a restaurant due to e-coli contamination of the water supply.[14] Similarly, the physical-loss requirement was met where otherwise undamaged buildings were rendered unfit for occupancy due to ground saturated with gasoline[15] or due to a release of ammonia. Some courts have rejected loss-of-use contamination claims absent evidence of uninhabitability.[17]

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Where a physical risk is absent, however, the courts have generally rejected coverage. As one author recently concluded, "Courts have uniformly agreed that pure economic or financial losses do not constitute physical loss or damage under a property insurance policy."[18]

Similarly, in civil authority cases, courts have rejected loss-of-use claims where the factual "nexus" between physical loss or damage and the government order foreclosing access was deemed insufficient. For example, the Fifth Circuit held that the required nexus between a hurricane evacuation order and direct loss or damage to property was missing where no damage had occurred at the time the order was issued and the order did not reflect that it was

issued "due to" property damage.[19]

An argument that the coronavirus pandemic was a direct cause of loss of use might begin with the observation that the relevant time frame commences with the onset of the interruption, and should not include post-loss hindsight based on advances in scientific understanding. Several interrelated factors suggest a physical risk of loss at the time of the March shutdown. First, the virus has a physical though microscopic existence, distinguishing non-physical economic loss scenarios. Second, stay-at-home orders referencing possible surface contamination[20] gave the imprimatur of government sanction to the risk of surface contamination. Third, the public arguably perceived commercial premises as unsafe for several reasons, including the reported novelty of the coronavirus, uncertainty as to its exact means of transmission, health officials' early emphasis on the importance of surface cleaning, uncertainty as to exactly what to clean, and the lack of availability of cleaning supplies. Fourth, the absence of any ready means of surface testing to assess the risk of contamination would naturally heighten the perceived risk of viral contamination.

On the other hand, how the courts will assess the sufficiency of evidence of direct causation in coronavirus cases is uncertain. Courts might require proof of contamination in fact[21] or proof of the income loss after consideration of the susceptibility of the virus to cleaning. One unique aspect of coronavirus coverage litigation will be the personal familiarity of every lawyer, judge, and juror with events surrounding the March shutdown.

Ultimately, the threshold BI and civil authority coronavirus coverage questions come down to a nuanced, word-by-word reading of the potentially applicable insuring-agreements. One key is the exact wording describing the causation standard. A second issue is the extent to which the "risk" causing the loss of use must in some sense be a "physical" risk to property. If the risk of airborne person-to-person transmission, requiring social distancing, were not regarded as a "physical" risk to property, then the controlling consideration may be the relative weight given to the concurrent risk of viral surface contamination as a cause of loss.

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Endnotes

1. *See* John K. DiMugno, The Implications of COVID-19 for the Insurance Industry and Its Customers, 41 INS. LITIG. REPORTER 8 (2020) (surveying business interruption issues, legislative initiatives, and liability coverage for virus-related claims).
2. *E.g.*, *De Laurentis v. U.S. Auto. Ass'n*, 162 S.W.3d 714, 723 (Tex. App.—Houston [14th Dist.] 2005, pet denied).
3. *See GBP Partners, Ltd. v. Maryland Cas. Co.*, 505 F. App'x. 389 (5th Cir. 2013) (explaining that the words "necessary suspension of operations" required complete cessation of business for some interval).
4. *See* 730 *Bienville Partners, Ltd. v. Assurance Co. of Am.*, No. 02-CV-106, 2003 WL 21145725, 67 F. App'x 248 (5th Cir. Apr. 29, 2003) (per curiam) (La. law) (New Orleans hotels that remained open were not covered for lost income due to the September 11 attacks).
5. *E.g.*, *Tex. Windstorm Ins. Ass'n v. Dickinson Indep. Sch. Dist.*, 561 S.W.3d 263 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (addressing the insured's burden of proof under policy given the concurrent cause doctrine, which required the insured to distinguish damage caused by a covered event from excluded damage).
6. BI coverage is usually for a "period of restoration" and is limited to the "actual loss sustained," precluding resort to speculative damage models. *E.g.*, *Royal Indem. Co. v. Little Joe's Catfish Inn, Inc.*, 636 S.W.2d 530 (Tex. App.—San Antonio 1982, no writ). Most forms include loss mitigation requirements. Policies often also contain provisions limiting the covered loss to pre-occurrence sales. *E.g.*, *Catlin Syndicate, Ltd. v. Imperial Palace of Miss.*, 600 F.3d 511 (5th Cir. 2010) (Miss. law).
7. Some policies include a virus exclusion endorsement issued by the Insurance Services Office in 2006. Some contain a "Biological and Chemical" endorsement excluding loss caused by "pathogenic" material. Pollution exclusions, arguably textually inapplicable in their standard form, might apply if excluded "pollutants" are defined as including a virus or biological material. Microorganism exclusion endorsements pose the question of whether a virus is, in fact, a microorganism. Some contamination exclusions reach viruses, but only if listed in the federal environmental statutes or rules.
8. *See JAW the Pointe, LLC v. Lexington Ins. Co.*, 460 S.W.3d 597, 603 (Tex. 2015) (all-risk policy covers physical loss "no matter what causes that loss" unless an exclusion applies, but ultimately denying coverage due to anti-concurrent causation provision).
9. *De Laurentis*, 162 S.W.3d at 723; *Allianz Cornhill Int'l v. Great Lakes Chem. Corp.*, 2006 WL 778618, at *7 (S.D. Tex. Mar. 24, 2006) (applying fact-driven direct loss analysis).
10. *See* Pan Am Equities, Inc. v. Lexington Ins. Co., 959 F.3d 671, 676 (5th Cir. 2020) ("Texas law commands that we honor the Policy's plain language—every word on every page—'giving effect to all . . . [the Policy's] provisions,' such that no term is rendered a nullity.").
11. *See Glens Falls Ins. Co. v. Covert*, 526 S.W.2d 222 (Tex. App.—Beaumont, 1975, writ ref'd n.r.e.) (insured failed to prove physical loss or damage where sealed product fell to the floor causing the manufacturer to withdraw its warranty due to possible interior damage); *see also Trinity Indus., Inc. v. Ins. Co. of N. Am.*, 916 F.2d 267, 270–71 (5th Cir. 1990) (La. law) ("physical loss or damage" implies "an initial satisfactory state that was changed by some external event into an unsatisfactory state"). In the liability insurance context, "property damage" means "actual physical damage" to property. *E.g.*, *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 24 (Tex. 2008).
12. *See EMS USA, Inc. v. Travelers Ins. Co.*, No. H-16-1443, 2018 WL 1545700 (S.D. Tex. Feb. 28, 2018) (loss of use of pilot hole due to stuck drill string was direct loss).
13. *Hampton Foods, Inc. v. Aetna Cas. & Surety Co.*, 787 F.2d 349 (8th Cir. 1986) (risk of physical loss shown where grocery store was in imminent danger of collapse, construing the term "direct loss" in the insured's favor because it was held to be ambiguous); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W.Va. 1998) (threat of avalanche caused physical loss of homes that were unsafe for habitation).
14. *Cooper v. Travelers Indem. Co.*, C-01-2400-VRW, 2002 WL 32775680 (N.D. Cal. Nov. 4, 2002), aff'd, 113 F. App'x. 198 (9th Cir. 2004).
15. *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968).
16. *Gregory Packing, Inc. v. Travelers Prop. Cas. Co.*, No. 2:12-cv-04418, 2014 WL 6675934 (D. N.J. Nov. 25, 2014).
17. *E.g., Universal Image Prods. v. Fed. Ins. Co.*, 475 F. App'x. 569 (6th Cir. 2012) (bacterial and mold contamination not shown to render building uninhabitable); *Commonwealth Enter. v. Liberty Mut. Ins. Co.*, 1996 WL 660869 , 101 F.3d 705 (9th Cir. Nov. 13, 1996) (unpublished table op.) (tenants' perception of asbestos contamination did not meet requirement of direct physical loss).
18. Scott G. Johnson, *What Constitutes Physical Loss or Damage in a Property Insurance Policy?*, 54 TORT TRIAL & INS. PRAC. L.J. 95, 102 (2019).
19. *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683 (5th Cir. 2011) (La. law) (adopting the reasoning of *S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.*, No. H-06-4041, 2008 WL 450012 (S.D. Tex. Feb. 15, 2008) (evacuation order prompted by fear of hurricane damage did not supply nexus required for civil authority coverage).
20. For example, Harris County Judge Lisa Hidalgo's March 24, 2020 Order recited both that the virus "causes property loss or damage due to its ability to attach to surfaces for prolonged periods of time" and that the virus "spreads through person-to-person contact."
21. *E.g., Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834 (8th Cir. 2006) (USDA embargo of Canadian beef due to "mad cow" concern did not cause "direct physical loss" because no "actual physical contamination" was shown).