Paper Title: The Business of Interruption: Business Interruption Claims and COVID-19

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Session Title: Businesses have been hit by significant disruptions which have reverberated throughout the insurance industry. This presentation will include a discussion of business interruption/commercial property claims, including recent developments over the past year. Key insurance coverage decisions relating to COVID-19 litigation will also be the topic of discussion.

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Biography: Lee is a founding member of Shidlofsky Law Firm PLLC where he heads up the Insurance Law Practice Group. The Insurance Law Practice Group represents corporate policyholders that are in disputes with their insurance companies, provides advice to plaintiffs in complex litigation on how to best maximize an insurance recovery, and provides risk-management consultation in connection with contractual risk transfer issues. The Insurance Law Practice Group has handled a wide variety of first-party and third-party insurance claims (e.g., D&O, E&O, "personal and advertising injury liability," construction defect, commercial property, business interruption, pollution, and commercial auto) in state and federal courts at both the trial and appellate court levels. Shidlofsky Law Firm PLLC is ranked as a Top Insurance Coverage Firm by Chambers USA and Best Lawyers of America®.

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In 2019, Chambers ranked Lee as a Star Individual for Insurance Coverage. He also has been named a "Super Lawyer" by Texas Monthly Magazine since 2004, including a ranking as a Top 50 attorney in the Central and West Texas Region since 2007 and a Top 100 attorney statewide since 2016. He is ranked as a top insurance coverage and construction lawyer by Best Lawyers in America® (including 2012, 2015 and 2018 Lawyer of the Year for Insurance Coverage–Austin and 2013 and 2016 Lawyer of the Year for Construction–Austin); Chambers USA and Who's Who Legal. Lee was named a Top Notch Lawyer for Insurance Law by Texas Lawyer and was a finalist for Go-To Lawyer in 2012.

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The effects of the unprecedented COVID-19 pandemic cannot be understated. No event in recent history has affected the health and financial well-being of so many around the world. Initially, social distancing guidelines were put in place, which were then followed by stay-at-home orders in most states. Ultimately, many businesses were forced by governmental orders to limit occupancy or temporarily close. Businesses experienced astronomical immediate and long-term losses due to no fault of their own. Even with legislative relief efforts, the effects of the pandemic have been dire for many businesses, who continue struggling to make payroll, to pay rent, and to envision a viable path for the future.

A. COVID-19 Coverage Issues Under First Party Property Policies

Unsurprisingly, there have been a flurry of lawsuits filed by insureds in just the past year regarding COVID-19 related losses. Prior to the outbreak of the pandemic, courts had addressed many coverage issues—albeit in different contexts—that now present the most significant obstacles for insureds. While those pre-pandemic cases obviously did not involve the same factual circumstances, those cases did set forth the legal framework in which courts are now analyzing the COVID-19 claims.

One uniform concept in all insurance cases is that the insured bears the initial burden to establish that the requirements of the insuring agreement are met. *See, e.g.*, *Gilbert Tex. Const., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010). If the insured can meet this requirement, the burden shifts to the insurer to establish that an exclusion or limitation in the policy precludes coverage for the loss. *See id* at 124. As noted in more detail below, insureds have had significant difficulty thus far in meeting their initial burden to show that the insuring agreement of their property policies is met. Even when successful on this issue, many policies have virus exclusions that broadly apply to these claims.

1. Pre-COVID-19 Litigation Regarding the Meaning of Direct Physical Loss or Damage

The insuring agreement of most standard form commercial property policies requires that there be "direct physical loss or damage to" or "direct physical loss of or damage to" the insured property. What constitutes a "physical loss" has become the key dispute in many of the COVID-19 coverage cases. The terms "loss" and "damage" are not necessarily synonymous. *See Mangerchine v. Reaves*, 63 So. 3d 1049, 1056 (La. Ct. App. 2011); *Corban v. United States Auto. Ass'n*, 20 So. 3d 601, 612 (Miss. 2009). The "widely accepted definition" of physical damage to property is that there must be a showing of "distinct, demonstrable, and physical alteration" of the property's structure. In other words, there must be some sort of visible damage. *See, e.g.*, *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002) (quoting 10A Lee R. Russ & Thomas F. Segalla, Couch on Ins. § 148:46 (2010)); *see also Universal Image Prods. v. Chubb Corp.*, 703 F. Supp. 2d 705, 709 (E.D. Mich. 2010) ("physical" is defined as something which has a "material existence: perceptible especially through the senses and subject to the laws of nature").

Some courts, however, have concluded that a showing of visible damage is only one cause of loss of property, leaving the possibility open to argument that the insuring agreement can be satisfied in the absence of a showing of a demonstrable physical alteration in the property's structure. For

example, an insured can suffer a physical loss of property through theft without the property sustaining any actual physical damage. *Mangerchine*, 63 So. 3d at 1056; *Corban*, 20 So. 3d at 612. A permanent loss of property through theft is a common risk covered by commercial policies. The great weight of authority suggests, however, that absent a permanent loss of property, to establish a "physical loss" of property in order to trigger the insuring agreement, the insured has the burden of proof in establishing demonstrable change in the property or a complete loss of utility and functionality of the property.

This was exemplified in *Ross v. Hartford Lloyd Insurance Company*, where the U.S. District Court for the Northern District of Texas engaged in a detailed analysis of the meaning of "physical loss." No. 4:18-cv-00541-O, 2019 WL 2929761, at *1 (N.D. Tex. July 4, 2019). That case involved a situation where a tree fell on and caused significant damage to a portion of the insured's roof. The other portion of the roof, however, was undamaged. The insured sought coverage for the costs to replace the *entire* roof. The court explained:

> The requirement that the loss be "physical," given the ordinary definition of that term is widely held to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by *a* ***distinct, demonstrable, physical alteration of the property***.

Id. at *6–7 (quoting Couch 3d § 148:46) (emphasis in original)). The court rejected the insured's claim that the entire roof required replacement, explaining: "Reading the Policy in its entirety, and based on the ordinary meaning of its terms, the Court concludes that, contrary to [the insured's] argument, 'physical loss' under the Policy cannot fairly be construed to mean physical loss in the absence of physical damage." *Id.* at *7. The portion of the roof not impacted by the tree had no "distinct, demonstrable, physical alteration," so the insurer had no obligation to pay for the replacement of that particular portion. *Id.* Most courts that have evaluated the requirement for "physical loss" have reached similar conclusions. *See, e.g.*, *Port Authority*, 311 F.3d 226 (3d Cir. 2002); *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 332 (S.D.N.Y. 2014); *Universal Image Prods.*, 703 F. Supp. 2d at 709; *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.*, 187 Cal. App. 4th 766, 779 (Cal. Ct. App. 2010).

Some insureds have successfully argued that their property suffered "physical loss" due to the presence of a contaminant or condition that caused the property to change from a satisfactory to unsatisfactory condition. Or, in other words, courts found coverage when the insured showed that there were changes to the property from conditions that could not actually be seen or touched. *See, e.g.*, *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.,* No. 2:12–cv–04418, 2014 WL 6675934, at *2–3, *8 (D.N.J. Nov. 25, 2014); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709–10 (E.D. Va. 2010) (determining that toxic gases released by drywall rendered home uninhabitable and damage constituted a direct physical loss), *aff'd*, 504 F. App'x. 251 (4th Cir. 2013); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993) (concluding that pervasive odor from methamphetamine lab that had infiltrated house "was 'physical' because it damaged the house"); *Murray v. State Farm Fire and Cas. Co.,* 509 S.E.2d 1, 17 (W. Va. 1998) (recognizing that direct physical loss requires property to be damaged, not destroyed, and

may exist without structural damage to insured property); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54, 55 (Colo. 1968) (quotations omitted).

One of the most cited authorities for this position is an unpublished New Jersey federal district court opinion in *Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America*, where the court held that the insured property sustained covered losses when an ammonia spill temporarily incapacitated the insured's facility. No. 2:12–cv–04418, 2014 WL 6675934, at *3 (D.N.J. Nov. 25, 2014). The court determined that, while structural alteration provides the most obvious sign of physical damage, a property can sustain physical loss or damage without experiencing structural alteration. The court found that the release of ammonia "physically transformed the air" in the facility, rendering it "unfit for occupancy until the ammonia could be dissipated." *Id.* at *6. The court also concluded that the ammonia discharge constituted "physical loss" because it "physically changed the facility's condition to an unsatisfactory state needing repair." *Id*. at *7. The court supported its analysis by focusing on the fact that the property was unfit for occupancy due to the presence of the noxious chemical. *See id.* at *3 ("There is no genuine dispute that the ammonia release . . . rendered [the insured's] facility physically unfit for normal human occupancy and continued use until the ammonia was sufficiently dissipated."). Similarly, in *Motorists Mutual Insurance Co. v. Hardinger*, the Third Circuit held that the issue of whether the presence of *E. coli* bacteria in the well of the insured's home presented a fact question as to "whether the functionality of the [insured] property was nearly eliminated or destroyed, or whether [the insured's] property was made useless or uninhabitable." 131 F. App'x 823, 826–27 (3d Cir. 2005).

Thus, where there is no demonstrable physical change to the property, there generally must be conditions that make the property uninhabitable or to lose its intended functionality. *See id*. at 827; *Gregory Packing*, 2014 WL 6675934, at *3; *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 805 (N.H. 2015) (holding presence of cat urine odor making premises "temporarily or permanently unusable or uninhabitable" was sufficient for a finding of "physical loss"); *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co*., 615 N.W.2d 819 (Minn. 2000) (noting that presence of asbestos that made premises uninhabitable triggered the insuring agreement of the policy); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54, 55 (Colo. 1968) (concluding that gasoline and vapors that had infiltrated and contaminated the foundation, halls, and rooms of a church, making it uninhabitable and its use dangerous, constituted "direct physical loss" to the property); *Farmers Ins. Co. of Or. v. Trutanich*, 858 P.2d 1332, 1335–36 (Or. Ct. App. 1993) (odors from methamphetamine caused physical loss to insured's rental property).

On the other hand, the U.S. Court of Appeals for the Sixth Circuit issued a sweeping opinion in 2012, rejecting a claim that an insured property sustained "direct physical loss or damage" despite the *actual* presence of mold and bacteria. *Universal Image Production, Inc. v. Fed. Ins. Co.*, 475 F. App'x 569, 573 (6th Cir. 2012). Following a strong rainstorm, a pungent odor was noticed on the first floor of the insured premises. *Id*. at 570. Subsequent tests established that there was mold and bacteria within the HVAC unit of the insured property. *Id*. at 571. Once the HVAC system was shut down to address the issue, the business suffered disruptions due, in part, to the significant temperature increases inside the building, which caused the employees extreme discomfort. Moreover, the insured had to move all of its operations from the first floor to the third floor of the building. *Id*. at 571. The insured, however, had "circulated a memorandum to its employees and clients asserting that the air quality on the second and third floors of the . . . building was

'acceptable' and . . . 'no health threat' existed." *Id.* Nevertheless, the insured ultimately decided to vacate the premises during remediation. *Id.* The court held that the insured had not established that the property experienced any form of "tangible damage." *Id*. at 573–74.

The court also rejected the insured's argument that there was "direct physical loss or damage" because the premises was "uninhabitable" or substantially "unusable." *Id*. at 574. Though recognizing that working in the building was "difficult," the court found that the insured had not presented evidence indicating that the building was *actually* unusable or that the insured was not able to remain in the building during remediation. *Id.* The court further rejected an argument that the premises sustained "physical loss" due to "persistent and pervasive odor." *Id*. at 575. Rather, the court conclude that the insured presented no evidence that the odor affected operations on the second and third floors, meaning that the property was not completely useless. *Id*.

2. The Virus, Microorganism, Communicable Disease, and Pollution Exclusions in Commercial Property Policies

Meeting the requirements of the insuring agreement for these types of losses is a formidable challenge. Even then, however, insureds must contend with a litany of exclusions, including those that bar coverage for viruses, microorganisms, and communicable diseases. These exclusions are, in most instances, broadly worded and are oftentimes intended to negate coverage for any claims of damage to property or closure of businesses as a result of any virus, microorganism, or disease.

The virus exclusion, in particular, came about due to the SARS pandemic from the early 2000s, which prompted insurers to begin including virus and communicable disease exclusions. The standard ISO endorsement form CP 01 40 07 06 (entitled, "Exclusion for Loss Due To Virus Or Bacteria") is found in many policies. It states: "We 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." The circular prepared by ISO [LI-CF-2006-175] in conjunction with the promulgation of the endorsement includes specific references to the intent to limit coverage for viral contaminants such as rotavirus, SARS, and influenza. Because they were introduced as a reactionary measure to SARS, these particular exclusions did not receive a significant amount attention in coverage litigation. As discussed below, however, these exclusions have proven extremely problematic for insureds on their COVID-19 claims.

Many property policies also include pollution exclusions. In some cases, courts have extended the meaning of the term "pollutant" to include noxious gasses or, in at least one case, a virus. For example, in *Midwest Family Mutual Insurance Co. v. Wolters*, the Supreme Court of Minnesota applied this exclusion where there was the release of carbon monoxide inside a house, noting that the carbon monoxide was a "gaseous . . . pollutant, irritant or contaminant." 831 N.W.2d 628, 638 (Minn. 2013). In doing so, the court specifically rejected limiting the pollution exclusion to applying only when there are "environmental releases" of contaminants. *Id*. at 638. Other states, like Texas, Alabama, Mississippi, Michigan, Rhode Island, North Carolina, Pennsylvania, and Florida, follow this approach in broadly interpreting and applying pollution exclusions. *See, e.g*, *Nautilus Ins. Co. v. Country Oaks Apartments*, 566 F.3d 452, 456 (5th Cir. 2009) (Texas law) (finding that carbon monoxide was a "pollutant" under a CGL policy); *Am. States Ins. Co. v. Nethery*, 79 F.3d 473, 475–78 (5th Cir. 1996) (applying Mississippi law); *U.S. Fire Ins. Co. v. City of Warren*, 176 F. Supp. 2d 728, 733 (E.D. Mich. 2001); *Toledo v. Van Waters & Rogers, Inc.*, 92

F. Supp. 2d 44, 51–52 (D.R.I. 2000); *Shalimar Contractors, Inc. v. Am. States Ins. Co.*, 975 F. Supp. 1450, 1456–57 (M.D. Ala. 1997); *Pa. Nat'l Mut. Cas. Ins. Co. v. Triangle Paving, Inc.*, 973 F. Supp. 560, 563–66 (E.D.N.C. 1996); *Brown v. Am. Motorists Ins. Co.*, 930 F. Supp. 207, 208–09 (E.D. Pa. 1996); *W. Am. Ins. Co. v. Band & Desenberg*, 925 F. Supp. 758, 761–62 (M.D. Fla. 1996).

Nevertheless, there are many other states that take a more restrictive approach to this exclusion, holding that it applies only to traditional forms of environmental pollution by industrial polluters. *See, e.g.*, *MacKinnon v. Truck Ins. Exchange*, 73 P.3d 1205, 1216 (Cal. 2003); *Doerr v. Mobil Oil Corp*., 774 So.2d 119, 135–36 (La. 2000); *Bituminous Cas. Corp. v. Advanced Adhesive Tech., Inc.*, 73 F.3d 335, 339 (11th Cir. 1996) (applying Georgia law) ("The pollution exclusion clearly contemplates shielding [the insurer] from liabilities associated with environmental contamination."); *Reg'l Bank of Colo. N.A. v. St. Paul Fire and Marine Ins. Co.*, 35 F.3d 494, 498 (10th Cir.) (applying Colorado law) (noting that, to trigger the pollution exclusion, the pollution event must occur in a setting such that they would be recognized as a toxic or particularly harmful substance in industry or by governmental regulators); *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1042–44 (7th Cir. 1992) (applying Illinois law); *Westchester Fire Ins. Co. v. City of Pittsburg, Kan.*, 768 F. Supp. 1463, 1468–70 (D. Kan. 1991).

In light of the above, whether a court is willing to apply the pollution exclusion to COVID-19 claims may depend upon how the courts in that jurisdiction interpret the exclusionary language in other contexts. Notably, the Environmental Protection Agency classifies "viruses" as an indoor contaminant and biological pollutant. https://www.epa.gov/indoor-air-quality-iaq/biological-pollutants-impact-indoor-air-quality. Moreover, a Florida court held in 2009 that viruses and biological microbes constituted "pollutants" under the terms of commercial general liability policies. *See First Spec. Ins. Corp. v. GRS Mgmt. Assoc., Inc.*, No. 08-81356-CIV, 2009 WL 2524613, at *5 (S.D. Fla. Aug. 17, 2009). Thus, this exclusion *potentially* presents additional concerns for insureds in pursuing claims for COVID-19 losses.

3. The COVID-19 Coverage Litigation Involving Commercial Property Policies

Under the above legal framework, it is not surprising that most insureds pursuing COVID-19 claims through litigation have found limited success. As of the writing of this paper, a total of 1,104 cases have been filed in state and federal courts. COVID Litigation Winners and Losers, https://www.irmi.com/online/covid-litigation/covid-litigation-winners-by-insurers-policyholders.aspx (last visited March 8, 2021). Out of the 1,104 cases tracked by IRMI, insurers have secured full dismissals in 178 cases, while insureds have "won" 25 cases. Of those 25 "wins," the insureds appear to have obtained a judgment on the merits (as opposed to simply surviving a motion to dismiss) in only 3 cases, 2 of which were in state trial courts and did not result in a written opinion. Insureds have voluntary dismissed 71 cases.

The primary issues in these cases have been whether insureds can meet their burden to establish coverage for their loss of business income and extra expenses due to interruptions caused by the COVID-19 pandemic, whether insureds can meet their burden to establish that their businesses lost income due to the necessary suspension of their business operations based on orders of civil authority, and whether the losses associated with COVID-19 in general are subject to the various

virus and microorganism exclusions. Each issue presents its own unique set of challenges for insureds.

Though the wins for insureds have been infrequent, several rulings provide a "template" for other insureds in their attempts to seek coverage for COVID-19 related losses. A caveat is that none of these cases have reached the appellate court level, so whether the cases where insureds have been successful can withstand additional legal scrutiny remains unknown.

a. Wins for Insureds

For example, in *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Company*, the insured won summary judgment arguing that their restaurants suffered losses caused by "physical loss or damage to property." No. 1:20 CV 1239, 2021 WL 168422, at *10 (N.D. Ohio Jan. 19, 2021). The insured operated restaurants in Ohio, Pennsylvania, Michigan, Indiana and Florida. Following state government orders restricting the operations of restaurants in an effort to abate the spread of COVID-19, the insureds closed all but four of their Ohio restaurants on March 15, 2020. Those four Ohio restaurants continued to provide only carry-out dining until March 17, 2020, when they closed. *Id*. at *1. The insured sought coverage for the losses associated with the shutdown of the restaurants and layoffs of staff members, which the insurer denied.

The insurer argued that the losses were not caused by "physical loss or damage to property." *Id*. at *4. Alternatively, the insurer argued that, even if there had been direct physical loss to the property, the microorganism exclusion barred coverage. *Id.* The insurer also argued that the civil authority coverage was not implicated because the states' orders did not prohibit access to the insured premises. In response, the insured pointed out that its policy provided coverage not for "physical loss or damage to property," but rather for "direct physical loss *of* or damage to" language. *See id*. at *5. Thus, according to the insured, the policy contemplated a scenario where the insured suffered losses due to its inability to possess something in the real, material or bodily world, and that the government orders caused the insureds to lose their property in this manner. *Id*. Additionally, the insured argued that the microorganism exclusion was not applicable because COVID-19 was not the underlying cause of the loss, but rather it was the government orders issued in response to COVID-19. *Id*. at *6.

The court recognized "that there is a growing consensus of cases around the country that have held that the business interruptions caused by COVID-19 do not involve the physical loss of or damage to property necessary to trigger coverage under a first-party commercial property policy." *Id*. at *7. Nevertheless, the court found significant that the policy's insuring agreement covered the insured for "physical loss *of*" its property as opposed to just "physical loss or damage to" its property. *Id*. at *7, 10. The court reasoned that because the restaurants could not be used for dine-in purposes, the properties lost their intended functionality, meaning that the insured suffered a "physical loss *of*" its property. *Id*. at *11.

As to the exclusion, the court agreed with the insured's position, finding that the microorganism exclusion was inapplicable because the losses at issue were not "'directly or indirectly caused by, contributed to, or aggravated by the presence, growth, proliferation, spread, or any activity of "microorganisms."' *Id*. at *14. The parties had stipulated that none of the insured properties were closed due to any known or confirmed presence of COVID-19. Rather, the properties were

shuttered because of the government orders issued in response to the COVID-19 pandemic. *Id*. The court limited the scope of the exclusion, such that it would only be implicated if there was a closure of the insured's business because of the actual presence of COVID-19.

Of particular note, the argument relied upon by the insured in *Henderson Road* regarding the significance of the differences in language of the insuring agreement (*i.e.*, "physical loss *of* or damage to" as opposed to "physical loss or damage to") has played a key role in the few cases where insureds have survived the motion to dismiss stage. Even still, however, this argument has been outright rejected—or simply ignored—by courts in Alabama, California, Florida, New York, Ohio, Pennsylvania, and Texas. *See, e.g*. *Brunswick Panini's, LLC v. Zurich Am. Ins. Co.*, No. 1:20CV1895, 2021 WL 663675, at *8 (N.D. Ohio Feb. 19, 2021); *Whiskey Flats, Inc. v. Axis Ins. Co.*, No. No. 20-3451, 2021 WL 534471, at *4 (E.D. Pa. Feb. 12, 2021); *Drama Camp Prods., Inc. v. Mt. Hawley Ins. Co.*, No. 1:20-CV-266, 2020 WL 8018579, at *5 (S.D. Ala. Dec. 30, 2020); *10012 Holdings, Inc. v. Sentinel Ins. Co.*, No. 1:20-cv-04471, 2020 WL 7360252, at *3 (S.D.N.Y. Dec. 15, 2020); *Terry Black's Barbeque, LLC v. State Auto. Mut. Ins. Co.*, No. 1:20-CV-665-RP, 2020 WL 7351246, at *4 (W.D. Tex. Dec. 14, 2020); *Palmer Holdings and Invest., Inc. v. Integrity Ins. Co.*, No. 4:20-cv-154-JAJ, 2020 WL 7258857, at *8–10 (S.D. Iowa Dec. 7, 2020); *10E, LLC v. Travelers Indem. Co.,* No. 2:20 cv 04418, 2020 WL 6749361 (C.D. Cal. Nov. 13, 2020); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut,* No. 2:20 CV 04423-AB-SK, 2020 WL 5938689 (C. D. Calif. Oct. 2, 2020); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London*, No. 8:20-cv-1605, 2020 WL 5791583, at *5 (M.D. Fla. Sept. 28, 2020).

Additionally, the *Henderson Road* court interpreted the microorganism exclusion *very* narrowly, stating its reasoning was because of the way in which the insurer had drafted its language. The only other case where a court construed a similar exclusion so narrowly was in *Elegant Massage LLC v. State Farm Mutual Insurance Company*, where the U.S. District Court for the Eastern District of Virginia denied an insurer's motion to dismiss claims by an insured for loss of business income and extra expense coverage. No 2:20-cv-265, 2020 WL 7249624, at *10, --- F. Supp. 3d --- (E.D. Va. Dec. 9, 2020). In *Elegant Massage*, the court also provided a detailed discussion of issues associated with the "direct physical loss" component of the insuring agreement. Though not a win for the insured on the merits, the case provides guidance for insureds that are or considering pursuing a COVID-19 claim through litigation.

In *Elegant Massage*, the insured operated a spa where it offered therapeutic massages. On March 23, 2020, the Governor of Virginia issued a declaration of a public health emergency closing "recreational and entertainment businesses" including "spas" and "massage parlors" due to the COVID-19 pandemic. *Id*. at *1. Though the governor issued revised orders allowing for limited capacity under certain circumstances, the insured decided to voluntarily remain closed through May 15, 2020. The insured thereafter sought coverage for its business income losses, dating back to March 16, 2020. *Id*. at *2. The insurer denied coverage, explaining that the insured had voluntarily closed, there was no civil order to close the business, there was no known damage to the business space or property resulting from COVID-19, and a virus exclusion barred coverage for any loss of income coverage. *Id.* The insured then filed suit in federal court.

The court recognized that the policy covers "all accidental or fortuitous 'direct physical loss[es]' unless the cause of the loss is explicitly excluded under the contract." *Id*. at *6. The court evaluated the many cases that have discussed "direct physical loss," noting that the "phrase . . . has been

subject to a spectrum of interpretations in Virginia on a case-by-case basis, ranging from direct tangible destruction of the covered property to impacts from intangible noxious gasses or toxic air particles that make the property uninhabitable or dangerous to use." *Id*. at *8. Based on this, the court concluded that it should interpret the phrase "direct physical loss" in the most favorable to the insured and "strongly against the insurer." *Id.* at *8, 10. The court held:

> [W]hile the . . . Spa was not structurally damaged, it is plausible that [the insured] experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus. That is, the facts of this case are similar those where courts found that asbestos, ammonia, odor from methamphetamine lab, or toxic gasses from drywall, which caused properties uninhabitable, inaccessible, and dangerous to use, constituted a direct physical loss.

Id. at *10. Finding that the insured established a *plausible* claim for a fortuitous "direct physical loss" under the policy.

The court then turned its attention to the virus exclusion. *Id*. at *11. The exclusion at issue barred coverage for losses due to: '(1) Growth, proliferation, spread or presence of "fungi" or wet or dry rot; or (2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease." *Id*. at *12. The exclusion also barred coverage for costs associated with "'remediation of "fungi", wet or dry rot, virus, bacteria or other microorganism . . . .'" *Id.* The insurer argued that the exclusion was supported by "an expansive anti-concurrent causation clause which excludes from coverage 'for losses if virus is "in any sequence" in the chain of causation, even if there are also other causes."' *Id*. at *11.

Rejecting the insurer's proffered interpretation, the court first explained that Virginia does not follow the anti-concurrent causation doctrine. *Id.* at *12. Thus, when applying a narrow interpretation of the exclusion (as required under applicable contract interpretation standards), the insurer had not established that the virus was the *direct and immediate* cause of the loss. *Id.* Rather, the court noted that the insured was asserting that the government orders were the "sole cause" of the insured's loss of income and extra expense, As such, the court concluded that the insurer had not met its burden to establish applicability of the exclusion. *Id*. at *13.

Just as in *Henderson Restaurant*, the "virus" exclusion in *Elegant Massage* was drafted more narrowly than the ISO promulgated exclusion that exists in most policies. Moreover, while *Elegant Massage* provides a roadmap to survive a motion to dismiss, we note that since that opinion was issued on December 9, 2020, courts in New Jersey, California, West Virginia, and Connecticut have distinguished or outright rejected the decision. *See Eye Care Center of New Jersey, PA v. Twin City Fire Ins. Co.*, No. 20-05743, 2021 WL 457890, at *4 (D.N.J. Feb. 8, 2021) (rejecting decision as to virus exclusion); *Protégé Restaurant Partners LLC v. Sentinel Ins. Co., Ltd.*, No. 20-cv-03674, 2021 WL 428653, at *5 (N.D. Cal. Feb. 8, 2021) (rejecting analysis as to meaning of "physical loss of" and finding that the term requires "permanent dispossession" of the property); *Bluegrass, LLC v. State Auto. Mut. Ins. Co.*, No. 2:20-cv-00414, 2021 WL 42050, at *4 (S.D.W.V. Jan. 1, 2021) (noting that *Elegant Massage* was an "outlier" on its evaluation of the requirement for "direct physical loss"); *LJ New Haven LLC v. AmGUARD Ins. Co.*, No. 3:20-cv-00751, 2020

WL 7495622, at *7, --- F. Supp. 3d. --- (D. Conn. Dec. 21, 2020) (applying broad application of similar virus exclusion to preclude coverage).

Even though establishing "direct physical loss" is difficult in the context of COVID 19 claims, most of the insurer wins have centered on the application of the virus exclusion. In fact, in some cases, the insurers have focused their *entire* argument in their motion to dismiss upon the application of the exclusion. *See, e.g.*, *Pure Fitness LLC v. Twin City Fire Ins. Co.*, No.: 2:20-CV-775, 2021 WL 512242, at *3 (N.D. Ala. Feb. 11, 2021) (explaining that the insurer's motion to dismiss focused on the application of the virus exclusion). In fact, out of the 178 cases tracked by IRMI where insurers have won, in approximately 45% of these cases the court found that the virus (or a similar) exclusion provided a complete bar for coverage. As of the writing of this paper, only two courts have written opinions explaining why they believed that the exclusion did not bar coverage for an insured's COVID-19 claims: *Henderson Restaurant* and *Elegant Massage*. In other words, the virus exclusion is presenting an almost insurmountable obstacle for insureds seeking coverage under their policies.

Insureds were successful in two state court cases, one in Oklahoma (*Cherokee Nation v Lexington Insurance Company*, No. CV-2020-00150 (Cherokee Cty. Okla. Jan. 14, 2021)) and the other in North Carolina (*North State Deli LLC v. Cincinnati Ins. Co*., No. 20-CVS-02569 (N.C. Super. Ct. Oct. 9, 2020)). In *Cherokee Nation*, the trial court issued a two-paragraph order stating that the insured had stated a "plausible claim for fortuitus 'direct physical loss'" and that the insurer failed to establish that any exclusionary provision barred coverage. There was no substantive discussion of the issues, however, so it is unclear what language was at issue (or if the "exclusionary provision" referenced in the order was even a virus exclusion).

The trial court in *North State Deli* provided more analysis for its ruling, stating that the "direct physical loss" requirement of the policy included the inability to utilize or possess something in the "real, material, or bodily world"—which included the loss business owners suffered when they were not permitted to access or use their properties. The court found significant that the term "loss" was defined as "accidental physical loss *or* accidental physical damage." The court concluded that if it were to read the term "physical loss" to require structural alteration of the property, this would make the "physical damage" portion redundant. The court therefore held that the loss of the use of the business due to the government shutdown orders was sufficient to trigger the insuring agreement of the policy and coverage for the COVID-19 losses. Of particular importance, the policy at issue in *North State Deli* did *not* have a virus exclusion

On February 22, 2021, a group of insureds who operate various hospitality businesses obtained a favorable ruling with respect to their claims for business interruption coverage in a multidistrict litigation matter. *In Re: Society Ins. Co. COVID-19 Business Interruption Protection Ins. Litigation*, MDL No. 2964, 2021 WL 679109 (N.D. Ill. Feb. 22, 2021). In that case, the court evaluated claims for busines interruption as a result of the insureds' requirement to modify their business operations due to the pandemic. Each policy at issue required that the suspension of operations "be caused by direct physical loss of or damage to covered property." *Id*. at *2. The policies also provide coverage for loss "caused by action of civil authority that prohibits access" to the premises. *Id.* Finally, the policies provided coverage for when the insureds' operations were interrupted due to "contamination." *Id. Again, of importance, none of the policies had any type of virus or communicable disease exclusions.*

In evaluating the applicable law in Wisconsin, Minnesota, and Tennessee, the court decided that a jury could find that the insureds sustained a direct "physical" loss of property due to the shutdown orders, as those orders imposed a physical limit on the use of the premises. *Id*. at *9. In particular, the court explained that the insureds have been unable "to use their premises as they did for indoor, sit-down service before the pandemic. Depending on the particulars of applicable shutdown orders . . . , some have not been able to offer on-site service at all, while others have only been able to do so at limited capacity." Accordingly, the court denied the insurer's motion to dismiss the business interruption claims. *Id*. at *10. The court did, however, dismiss the insureds' claims for coverage under the civil authority provision and contamination provision.

This case highlights the difficulty that insureds have had in arguing that civil authority coverage applies. Unlike the business interruption coverage, the civil authority coverage is not triggered by mere "loss of" property, but rather when access to the insured property is "prohibited." *See id.* Because the insureds were not prohibited from accessing their premise, the court granted the insurer's motion to dismiss those claims. *Id.* Likewise, with respect to the contamination coverage, there was no indication that the premises suffered from losses due to the actual presence or contamination of COVID-19. *Id*. at *11. *See also Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, No. 1:20-cv-02806 (N.D. Ill. Feb. 28, 2021) (Texas law) (denying insurers' motion to dismiss based on analysis of meaning of "physical loss" from *In Re: Society Ins. Co. COVID-19 Business Interruption Protection Ins. Litigation*).

In another case where the policy had no virus exclusion, the insured survived a motion to dismiss, arguing that its hair salon businesses sustained "direct physical loss" because COVID-19 "is a physical substance" that "live[s] on" and is "active on inert physical surfaces" and is also "emitted into the air." *Studio 417, Inc. v. Cincinnati Insurance Company*, 478 F. Supp. 3d 794, 798 (W.D. Mo. 2020). The insured argued that COVID-19 attached to and deprived the insured of their property, making it "unsafe and unusable, resulting in direct physical loss to the premises and property." *Id.* The court adopted a broad interpretation of the meaning of "physical loss" and "physical damage" and found that the insured had "adequately stated a claim for direct physical loss." *Id*. at 800. *Studio 417* was the first reported decision where an insured survived a motion to dismiss. Nevertheless, since the opinion was issued on August 12, 2020, it has been distinguished, rejected, or declined to follow by at least *thirty-one* subsequent opinions in various state and federal courts around the country.

b. A Sampling of Key Wins for Insurers

Notwithstanding the cases above, the trend thus far has been heavily in favor of wins for the insurers. Moreover, in most cases where the insurer has won, the rulings have been at the motion to dismiss stage. One such case was *Turek Enterprises, Inc. v. State Farm Mutual Automobile Insurance Company*. 484 F. Supp. 3d 492 (E.D. Mich. 2020). In *Turek*, the insuring agreement of the policy required "accidental direct physical loss to Covered Property," which the court found required a showing of tangible damage to the property. The court also rejected arguments that the insuring agreement could be met by the inability of the insured to use the property, noting that this would render the use of "physical loss *to*" property meaningless. The court specifically noted that the insured's argument on that point would be more plausible if the insuring agreement stated that it applied when there was "accidental direct physical loss *of* Covered Property." Finally, the court

held that even if there was a showing of "accidental direct physical loss to Covered Property," the broad virus and microorganism exclusion would negate coverage.

Additionally, in *Diesel Barbershop, LLC v. State Farm Lloyds*, barbershops brought suit against their insurer, seeking coverage for their business interruption losses suffered when their businesses were forced to shut down by orders issued by the state and county. 479 F. Supp. 3d 353, 357 (W.D. Tex, 2020). As in *Turek*, the policies provided coverage for "direct physical loss to … Covered Property[.]" *Id*. at 359. The insurer moved to dismiss the complaint, arguing that the policyholders failed to plead a direct physical loss because the government orders were the cause of the loss and the property had not been "tangibly damaged." *Id*. The policyholders argued that a tangible and complete physical loss to the insured properties was not required and that the policies covered partial loss to the properties, including loss of use of the properties as a result of the county and state orders. The court, siding with the insurer, held that the policies required physical damage to or alteration of property, not simply a loss of use. While the court noted that other courts have found loss of use of property, even without physical damage, to be sufficient to trigger coverage, it found "the line of cases requiring tangible injury to property … more persuasive[.]" *Id.* at 360.

The court also distinguished a decision from the First Circuit Court of Appeals in *Essex Ins. Co. v. BloomSouth Flooring Corp.*, where the court held that an offensive odor permeating a building constituted "physical injury" to the building. 562 F.3d 399, 406 (1st Cir. 2009). The *Diesel Barbershop* court explained that, "unlike *Essex Ins. Co.*, COVID-19 does not produce a noxious odor that makes a business uninhabitable." 479 F. Supp. 3d at 360. While recognizing that the presence of a substance invisible to the human eye can cause "physical loss" even when there is no physical alternation of the property, the court did not extend that analysis to the mere presence of COVID-19. *Id.* The court also reasoned that the virus exclusion would bar coverage, even if the insuring agreement was triggered.

In another significant win for insurers, a Texas federal magistrate judge evaluated a policy that had an insuring agreement that required "direct physical loss of or damage to property." *Terry Black's Barbeque, LLC v. State Auto. Mut. Ins. Co.*, No. 1:20-CV-665-RP, 2020 WL 7351246, at *4 (W.D. Tex. Dec. 14, 2020). The insureds argued that their use of their restaurants was suspended due to a combination of COVID-19 and the related civil authority orders, and as a result, their claims triggered the terms of the insuring agreement. *Id*. at *5. In rejecting this argument, the magistrate judge focused on the fact that the insured had not established that the restaurants suffered from any "'physical loss"' by a "'distinct, demonstrable, physical alteration of the property."' *Id*. (quoting *Ross v. Hartford Lloyd Ins. Co.*, No. 4:18-CV-00541-O, 2019 WL 2929761, at *6 (N.D. Tex. July 4, 2019). The court also rejected the claims for civil authority coverage, noting that the restaurants were never actually shut down due to COVID-19 or any governmental orders. *Id*. at *7. Rather, the restaurants were able to continue offering "take-out services and, subsequently, limited capacity dine-in services." *Id.* As a result, the court found that the insureds were not denied use of their property.

The court further rejected the insured's contention that COVID-19 itself causes direct physical damage to property, based on "the presumed presence of this contagious, infectious disease on physical surfaces in buildings, in the air, and in human beings, transmissible by any of these vehicles." *Id.* The insureds made no allegations that COVID-19 was ever present at either of their restaurants, but instead relied on the fact that COVID-19 was prevalent in the cities where the

insured's restaurants were located. *Id.* The court ruled that "[s]uch conclusory allegations are insufficient to state a plausible claim that [the] property was damaged." *Id.* Finally, the court explained that even assuming that COVID-19 was present at the insured properties, it would not be "direct physical loss or damage required to trigger coverage" because the virus can be eliminated. *Id.* In particular, the court noted that the virus does not threaten the structures covered by the policy and can be removed from surfaces with routine cleaning and disinfectant. *Id.* As a result, the magistrate granted the insurer's motion to dismiss.

As recognized by the court in *Terry Black's Barbeque*, a majority of courts outside the Fifth Circuit also have held that COVID-19 and related civil authority shutdown orders do not constitute a direct physical loss of property under similar insurance policies. *See id.* at *6 n. 8 (citing *Promotional Headwear Int'l. v. Cincinnati Ins. Co.*, No. 20-CV-2211-JAR-GEB, 2020 WL 7078735, at *8 (D. Kan. Dec. 3, 2020); *4431, Inc. v. Cincinnati Ins. Co.*, No. 5:20-CV-04396, 2020 WL 7075318, at *12 (E.D. Pa. Dec. 3, 2020); *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 2:20-CV-00401, 2020 WL 6436948, at *1 (S.D. W. Va. Nov. 2, 2020); *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-CV-22833, 2020 WL 6392841, at *8 (S.D. Fla. Nov. 2, 2020); *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, No. 1:20-CV-275-JB-B, 2020 WL 6163142, at *8 (S.D. Ala. Oct. 21, 2020); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-CV-04423-AB-SK, 2020 WL 5938689, at *5 (C.D. Cal. Oct. 2, 2020), *appeal docketed*, No. 20-56031 (9th Cir. Oct. 6, 2020); *Henry's La. Grill, Inc. v. Allied Ins. Co. of Am.*, No. 1:20-CV-2939-TWT, 2020 WL 5938755, at *6 (N.D. Ga. Oct. 6, 2020), *appeal docketed*, No. 10-14156 (11th Cir. Nov. 4, 2020); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, No. 4-20-CV-222-CRW-SBJ, 2020 WL 5820552, at *1 (S.D. Iowa Sept. 29, 2020), *appeal docketed*, No. 203211 (8th Cir. Oct. 21, 2020); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, No. 20 CV 2160, 2020 WL 5630465, at *3 (N.D. Ill. Sept. 21, 2020); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-03213-JST, 2020 WL 5525171, at *6 (N.D. Cal. Sept. 14, 2020), *appeal docketed*, No. 20-16858 (9th Cir. Sept. 24, 2020); *Turek Enters. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *8, --- F. Supp. 3d --- (E.D Mich. Sept. 3, 2020).

One case has gone to trial. In *Cajun Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, the insured restaurant sought business interruption losses from its insurer based on the closure of its businesses due to COVID-19. No. 2020–02558. After the trial on the merits, the parties submitted post-trial briefing to further address the legal issues for the court. This resulted in the court entering a judgment as a matter of law against the insured.

4. Summary of the Commercial Property Policies

In sum as to the commercial property policies, as with any coverage dispute, the particular language of the policy is key. The reported decisions *heavily* favor the insurers. From a review of the published decisions, it appears that, in order to make the best attempt at surviving a motion to dismiss, an insured must generally assert that COVID-19 was present at the premises and that its presence actually deprived the insured of the functionality and intended use of its property. Such allegations still do not guarantee that the lawsuit will survive a motion to dismiss. Establishing that there is "direct physical loss" has been very challenging. Arguments can be made that the loss of functionality or utility of a premises equates to a "direct physical loss." Such arguments may have better success if the policy utilizes the "direct physical loss *of* or damage to" language.

Nevertheless, even in the cases where insureds can make arguments that they have suffered "physical loss *of*" property, the virus exclusion presents a very problematic coverage issue.

Moreover, insureds have had significant difficulty in arguing that the civil authority coverage of their policies is triggered. Many insureds assume that this type of coverage would be implicated due to the many governmental shut-down orders and restrictions on occupancy of businesses. But it is not that simple. In fact, the civil authority coverage may actually be more difficult than proving a claim for business interruption or extra expense coverage. In particular, the civil authority coverage generally requires not only a showing of direct physical loss (not to the insured property but usually to properties in proximity to the insured property), but also that there is a prohibition of access to the insured property itself. For businesses that were allowed to maintain limited operations, any argument as to civil authority coverage appears to be challenging.

In light of these issues, insureds are beginning to voluntarily dismiss their suits against their insurers over the COVID-19 losses. According to data compiled by IRMI, as of the date of this paper, 71 policyholders have dismissed their claims, essentially abandoning any hope for business interruption coverage for their COVID-19 losses. This trend could change, but it is not surprising given the number of unfavorable decisions rendered so far and the significant coverage issues faced by insureds. It also appears, as will be discussed next, that many insureds may be waiting to see if legislation will be passed that may bolster first-party claims. Finally, another significant issue that insureds will face if they are able to survive a motion to dismiss is proving causation and damages. We are unaware of any legal authority addressing this issue at this time. For those insureds that have been able to avoid a motion to dismiss, they will eventually be required to put forth evidence of covered damages in support of their claim. This topic, however, is well beyond the scope of this paper.

5. Legislation Regarding COVID-19 Property Insurance Claims

In response to the insurers' coverage positions under commercial property policies, various state legislatures have considered legislation that would invalidate virus exclusions or establish that COVID-19 causes "physical loss" to an insured property. The legislation would also typically include some type of mechanism that would allow insurers to seek reimbursement from the state through a managed loss fund. Unsurprisingly, the insurers have opposed such efforts, arguing that it would be improper for state legislators to modify existing contracts. It seems that most legislative proposals have not advanced past the initial proposal stage.

An example of such legislation is SB 5351 in the State of Washington, which is being considered in committee. SB 5351 states, in part, that "direct physical loss of or damage to property shall be construed to include the deprivation of such property and the loss of the ability to use such property." If passed, this law would apply retroactively to February 29, 2020, when the Governor of Washington issued an emergency proclamation due to COVID-19. Before SB 5351 becomes law, however, it must make it out of the senate committee, pass the full, pass in the house of representatives, and then signed be signed by the governor. If SB 5351 is eventually enacted as law, it would have a significant impact on not only COVID-19 insurance claims in Washington, but also for those around the country.

B. COVID-19 Coverage Issues Under Commercial General Liability Policies

The case law in the context of liability claims for COVID-19 losses under commercial general liability ("CGL") policies is not as well established. To this extent, liability policies present entirely different issues, which will likely result in different outcomes for insureds.

Thus far, the only known reported opinion appears to be from *McDonald's Corporation v. Austin Mutual Insurance Company*, where McDonald's and McDonald's franchise owners sought liability coverage against claims being asserted by employees of the insured. No. 1:20-cv-05057 (E.D. Ill. Feb. 22, 2021). In that case, the employees asserted that the insureds were

> liable for public nuisance and negligence in their decision to remain open during the COVID-19 pandemic without enhanced health and safety standards. The [employees] specifically seek a mandatory injunction requiring [the insureds] to, among other things: (1) provide their employees with adequate personal protective equipment; (2) preclude the reuse of face masks; (3) supply hand sanitizer; (4) require that customers wear face masks; (5) monitor employee COVID-19 infections; and (6) provide . . . employees with accurate information about COVID-19.

The policy at issue included the standard language from most CGL policies, where the insurer agrees to pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which insurance applies. The "bodily injury" must be caused by an "occurrence," which is generally defined to be an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." A liability insurer usually has a duty to defend the insured against any "suit" seeking potentially covered damages.

In responding to the insurer's motion to dismiss, the insureds argued that the employees made allegations "that 'but for' the [employees] contracting COVID-19—an indisputable bodily injury—they would not have to expend money as 'damages' to comply with the mandatory injunction [entered in the underlying] lawsuit. [The insureds] also argue[d] that exposure to [COVID-19] constitutes 'bodily injury' and that money spent to comply with the mandatory injunction would constitute 'damages' 'because of' the exposure to [COVID-19]." Based on these arguments, the court refused to grant the insurer's motion to dismiss. While not a finding on the merits at this time, the result likely ensured that the insured would get a defense.

Insureds facing liability claims due to COVID-19 may fare better in obtaining a defense for those claims under their CGL policies, as the claimants will likely assert claims for damages because of COVID-19. In evaluating whether a duty to defend exists, many courts will evaluate only the eight-corners of the pleading and terms of the policy. Unless the underlying claimants make express allegations that the insured intended to cause COVID-19 injuries or damage or the policy has virus or communicable disease exclusions, an insured will likely have good arguments that it is at least entitled to a defense. The standard for triggering coverage under the CGL policy does not require a showing of "direct physical loss" of property, but simply that the claimant make allegations that the claimant is seeking damages for "bodily injury" caused by an "occurrence."

An allegation of exposure to COVID-19 would likely constitute a "bodily injury." There could conceivably be coverage questions as to whether the "bodily injury" is the result of an "occurrence," especially if there is exposure caused by the insured violating a government shutdown or occupancy order. Nevertheless, there would likely have to be allegations that the insured intended to harm the claimant for this to provide an insurer with a basis to deny coverage.

CGL policies sometimes have virus exclusions added by endorsement. These were generally not as frequently present—at least not prior to COVID-19—as they are in the commercial property policies. Liability claims, however, could implicate other exclusions, like the employer's liability or workers' compensation exclusions to the extent there is a claim made by an employee of the insured. CGL policies also have pollution exclusions that may be implicated depending on how broadly they are applied. As noted above, whether a pollution exclusion could potentially even be implicated may turn on how courts in the jurisdiction whose law applies interpret those particular exclusions.

While the case law is not nearly as robust in the CGL context involving COVID-19 cases at this time, this is almost certain to change in the months and years ahead, especially as more research is developed as to potential long-term effects of exposure to COVID-19. Thus, insureds should carefully review their CGL policies to determine if there are any broad-form virus exclusions that may jeopardize coverage for potential COVID-19 liability claims. Failure to do so could result in facing extensive uncovered defense costs exposure. Nevertheless, we again note that while beyond the scope of this paper, even if there is potential coverage under the CGL policy for a liability claim, causation and damages will likely be difficult to prove in COVID-19 litigation, especially with so much uncertainty as to how, when, and where a person may have gotten the virus.

C. Conclusion

The coverage issues presented by the COVID-19 pandemic are nearly as complex and unsettled as the cause and long-term physical, psychological, and financial effects of the virus itself. While there is no general consensus as to the interpretation of the insuring agreement of commercial property policies, most jurisdictions have case law that requires the insured to establish either demonstrable physical damage or complete loss of utility of an insured property to meet the initial threshold of coverage. Only then will the virus, microorganism, and communicable disease exclusions become relevant and present additional obstacles for recovery under the commercial property policies. The trend certainly appears to favor the insurers, but this could change under certain circumstances and depending on the specific language in the insurance policy being reviewed.

Insureds likely have better arguments in triggered defense coverage under CGL policies. But with the unprecedented losses created by the COVID-19 pandemic, it is likely that insurers will seek to add provisions to limit or eliminate their exposure for these types of claims in the future. If so, this could lead insureds to facing significant uncovered exposures. The only certainty appears to be the fact that litigation over COVID-19 issues will continue for many years to come.