

COVID-19 Coverage Litigation

Where We are and What Variants Lay Ahead

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Topics

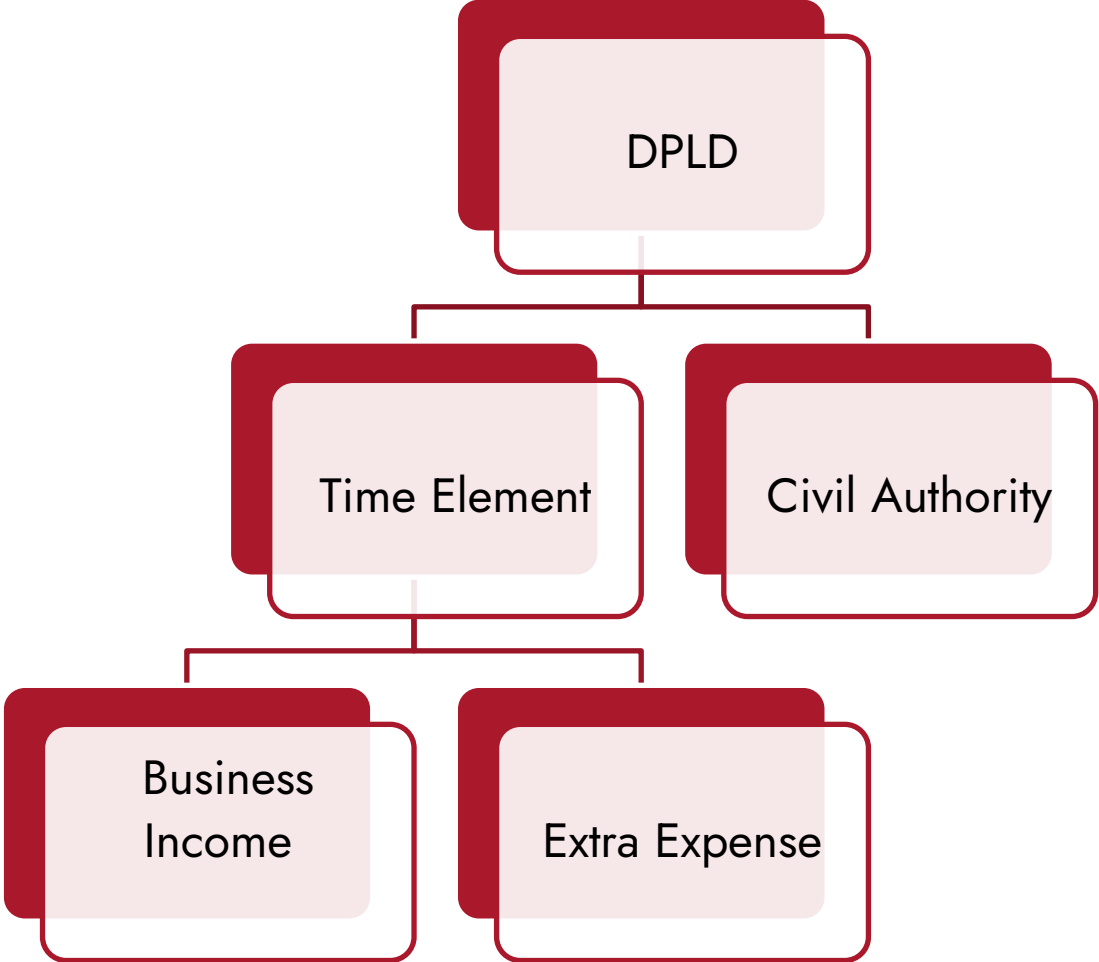
- Coverage Litigation Variants
- Key Coverage Arguments
- Key Exclusion Arguments
- Decisions Scorecard
- Strategies for Venue and Choice of Law
- Procedural Posture of Cases
- Class Action Trends
- Lasting Impact
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Coverage Litigation Variants

- Phase 1: No Virus Present- Allege Loss or Damage was Due to Government Shutdown Orders
- Phase 2: Risk of Virus's Presence/ Virtual Certainty of Virus's Presence Cause Loss or Damage
- Phase 3: Virus is Present and Caused Physical Loss or Damage



Anatomy of a COVID-19 Coverage Claim



Property Damage

A. Coverage

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.

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Covered Cause of Loss - **All risks** of direct physical loss of or damage from any cause unless excluded.

A. Covered Causes Of Loss

When Special is shown in the Declarations, Covered Causes of Loss means **Risks Of Direct Physical Loss** unless the loss is:

1. Excluded in Section **B.**, Exclusions; or
 2. Limited in Section **C.**, Limitations;
- that follow.

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What is Damage?

- “The plain wording” of the phrase direct physical loss or damage “requires either a *permanent disposition* of the property due to a physical change (‘loss’), or **physical injury** to the property requiring repair (‘damage’).”

Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co., 520 F.Supp.3d 1066, 1072 (N.D. Ill.), *aff’d*, 20 F.4th 303 (7th Cir. 2021).

- “The words ‘direct’ and ‘physical,’ which modify the word ‘loss,’ ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises.”

Sandy Point Dental, PC v. Cincinnati Ins. Co., No. 20 CV 2160, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020) *aff’d*, 20 F.4th 327, 330, 335 (7th Cir. 2021) (“Sandy Point insured its property, not its ideal use of that property”).

Direct Physical Loss or Damage

What is Loss?

- “loss” is distinct from “damage”—“loss” refers to complete destruction or dispossession, not a situation where “the Businesses’ preferred use of the premises was partially limited, while other uses remained possible.”

Sandy Point Dental v. The Cincinnati Ins. Co., 20 F.4th 327 (7th Cir. 2021).

- “‘direct physical loss’ and ‘physical damage’ . . . Do not extend to mere loss of use of a premises, where there has been no physical damage to such premises.”

10012 Holdings, Inc. v. Sentinel Ins. Co., LTD, 21 F.4th 216 (2d Cir. 2021).

- “direct physical loss of” property as used in those provisions requires a “physical aspect to the loss.”

Jesse’s Embers LLC v. Western Agriculture Ins. Co., No. 21-0623 (Iowa Sup. Ct. Apr. 22, 2022).

Coverage Examples

(1) Business Income

(a) 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 the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

g. Extra Expense

(1) We will pay necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

- Reinforces concept that loss or damage must be physical
 - Period of restoration “makes no sense” if “required ‘loss’ need not be a tangible destruction or deprivation of property,” because there would be “no property to [repair] or replace”
Estes v. Cincinnati Ins. Co., 23 F.4th 695, 700 (6th Cir. 2022).
 - “Even assuming the virus’s presence at [the insured’s] studio, the complaint does not allege that any part of its building or anything within it was damaged—let alone to the point of repair, replacement, or total loss.”
Kim-Chee LLC v. Philadelphia Indem. Ins. Co., No. 21-1082-cv, 2022 WL 258569 (2d Cir. Jan. 28, 2022).
- Measures the period for Time Element losses
 - Begins after DPLD
 - Ends when damaged property is or should be “repaired, rebuilt or replaced” or business is resumed at a new permanent location.

Civil Authority

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.

- Covered Cause of Loss
- Damage to a nearby property
- Government order prohibits access to the insured property AND
 - Government prohibits access to surrounding **area because of the damages** AND insured property is within certain radius AND
 - Government acts in response to either (1) a dangerous physical condition that results from the Covered Cause of Loss OR (2) to enable unimpeded access



Affirmative Coverages

- Often an endorsement
- Subject to a sublimit
- Some require uninhabitability

INTERRUPTION BY COMMUNICABLE DISEASE

The Company will pay for the actual Gross Earnings loss sustained by the Insured, as provided by this Policy, resulting from the necessary **Suspension** of the Insured's business activities at an Insured Location if the **Suspension** is **caused by order of an authorized governmental agency enforcing any law or ordinance regulating communicable diseases and that such portions of the location are declared uninhabitable** due to the threat of the spread of communicable disease, prohibiting access to those portions of the **Location**.

Key Exclusions

- Virus Exclusion
 - Anti-concurrent causation language & Appleman's Rule issue
 - Regulatory Estoppel issues
- Contamination Exclusions
 - Traditional View
 - Expansive View



Virus Exclusion

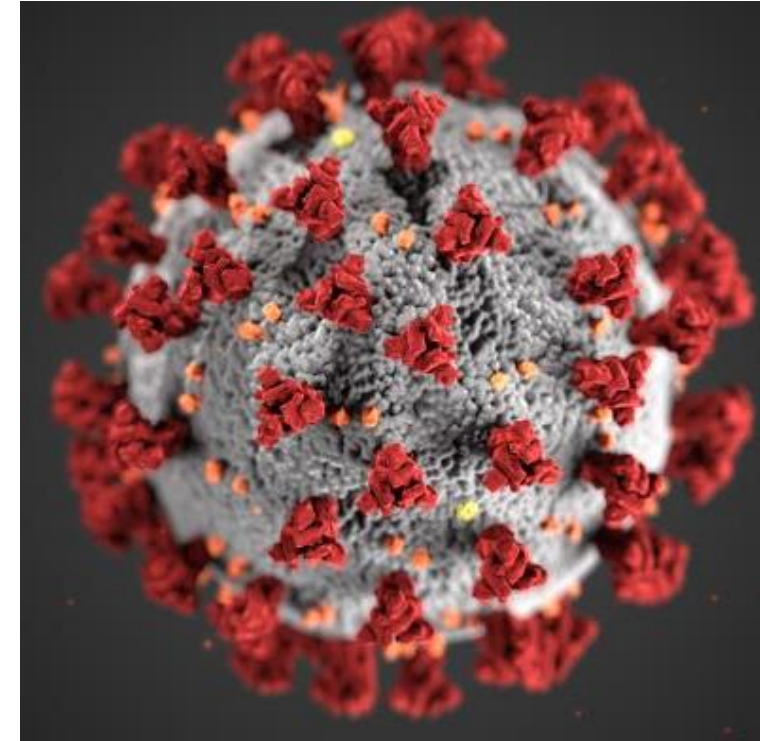
COMMERCIAL PROPERTY
CP 01 40 07 06

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.

However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.



Virus Exclusion – Two issues to consider

(1) Appleman’s Rule

A canon of construction providing that “if an exclusion bars coverage for losses caused by a particular peril, the exclusion applies only if the excluded peril was the ‘efficient proximate cause’ of the loss. Where a chain of causation leading to loss includes both a covered cause and an uncovered cause, the “predominant” cause of the loss controls.

- **Question courts have faced: While the closure orders were effective, was the COVID-19 virus the predominant cause of business interruption? If Yes – Then no coverage because virus exclusion applies. If No – Then virus exclusion does not apply.**
- **Courts have held that the Closure Orders are “inextricably tied” to COVID-19, such that “the predominant and proximate cause of Plaintiff’s business-related losses is the COVID-19 virus, not the closure orders that were issued in response to the virus.” Put differently, “[t]he virus and the orders are not two equal independent concurrent causes that worked together to cause the loss. The orders are wholly dependent on the virus.”**
- ***Beach Glo Tanning Studio Inc. v. Scottsdale Ins. Co.*, No. 3:20cv13901, 2021 WL 2206077 (D.N.J. May 28, 2021). Plaintiff not entitled to recovery under Appleman’s Rule.**

Virus Exclusion – Two issues to consider

(2) Regulatory Estoppel Theory

- A novel theory attempted at invalidating the virus exclusion: The exclusion should be invalidated because it was proposed to and approved by insurance regulators based on purported misrepresentations about the availability of insurance for virus-caused property damage.
- Thus far, courts have largely rejected this argument.

RDS Vending Co. LLC v. Union Ins. Co., 539 F.Supp.3d 365 (E.D. Pa. 2021). Court dismissed the case with prejudice because there was no property trigger and because virus exclusion applied. The court rejected plaintiff's regulatory estoppel argument, finding that plaintiff failed to show that insurance trade groups made statements to regulators or that defendant took a contrary position.

Contamination Exclusion

- 3.03.01.01. **Contamination**, and any cost due to **Contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy, except as provided by the Radioactive Contamination Coverage of this Policy.
- 7.09. **Contamination(Contaminated)** - Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, **Fungus**, mold or mildew.
- 7.10. **Contaminant(s)** - Any solid, liquid, gaseous, thermal or other irritant, pollutant or contaminant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste (including materials to be recycled, reconditioned or reclaimed), asbestos, ammonia, other hazardous substances, **Fungus** or **Spores**.

Contamination Exclusion

Policyholder argument / Narrow interpretation:
contamination exclusion is akin to pollution exclusion and should only apply to traditional pollution, i.e. should not exclude virus.

JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co., No. A-20-816628-B, 2020 WL 7190023 (Clark Cnty. Dist. Ct. Nov. 30, 2020). Insurer had “not shown that it was unreasonable to interpret the Pollution and Contamination Exclusion to apply only to instances of traditional environmental and industrial pollution and contamination that is not at issue in the matter, where [plaintiff’s] losses are alleged to be the result of a naturally-occurring, communicable disease.” The exclusion precluded coverage for contamination and the actual or threatened release, discharge, dispersal, migration or seepage of pollutants.



Contamination Exclusion

Insurer argument / Broad interpretation”: contamination exclusion language has “virus” in it, so excludes virus.

- *Firebirds Int’l LLC v. Zurich Am. Ins. Co.*, No. 2020-CH-5360, 2021 WL 2007870 (Cook Cnty. Cir. Ct., IL, Apr. 19, 2021): Court found it uncontested by the parties that SARS-CoV-2 is a virus, and plaintiff alleged that SARS-CoV-2 “caused direct physical loss and damage” to its property. The court provided that “[t]he factual scenario in this case is the exact type anticipated by the exclusion. The applicability of the exclusion is free from doubt.”
- *Ralph Lauren Corp. v. Factory Mut. Ins. Co.*, No. 2:20-cv-10167, 2021 WL 1904739 (D.N.J. May 12, 2021). The definition of “contamination” includes “virus,” and the court concluded that “virus” encompassed the virus that causes COVID-19.

Decisions Scorecard

As of May 5, 2022. . .

- 743 favorable (to insurers) decisions on dispositive motions.
- 76 unfavorable decisions on dispositive motions
- 54 favorable decisions at appellate court level

Let's break this down . . .

Class Action Issues

- Insurance coverage disputes are generally considered not susceptible to class treatment because coverage claims, and more generally breach of contract claims, typically present unique and individualized issues that defeat the purpose of a class action.
- Hurdles
 - Different state laws
 - Policies may define “direct physical loss” or “damage” differently
 - Proof of the virus on the property
 - Putative class members subject to different restrictions
 - Timing and duration of restrictions/closures
- Even if policies are exactly the same, interpretation of policy terms may differ by jurisdiction (example – narrow versus expansive interpretation of pollution exclusion).
- So far, of the few COVID-19 business interruption class actions, dismissed at pleadings stage with one or two exceptions where court found exclusion language was ambiguous.

Lasting Impact

- Expansion of case law
- Tangible requirement
- Harder to show coverage for asbestos and odors – covid analogy
- Virus exclusion body of case law
- Reinsurance recoveries and impact

Questions?

