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Policyholder Alert

Shifting Momentum in COVID Business Interruption Litigation: An Update from the Front Lines


By Marshall Gilinsky and Rhonda Orin

Key points:

The momentum in COVID business interruption litigation may be shifting towards policyholders with broad policy wordings and strong claims.

Not all claims are alike and 17% of policies were sold without broad virus exclusions.

State appellate court decisions are acknowledging pre-pandemic precedent holding that losses from fumes, bacteria and other causes of non-structural damage are covered — and allowing COVID-related business interruption claims to proceed towards trial.

Advocates for policyholder rights reached a critical milestone recently when the Vermont Supreme Court became the first state high court to adhere to pre-pandemic precedent and hold that well-pled allegations of "direct physical loss or damage" to property from COVID-19 may be sufficient to trigger coverage for business interruption losses. This state Supreme Court decision comes on the heels of a growing number of state appellate court decisions in California and Louisiana also favoring policyholders on this important issue. Policyholders that purchased policies without broad virus exclusions and have pursued coverage on the grounds that COVID-19 caused direct physical loss or damage to property are gaining momentum at a time when the right to coverage for such claims is pending before several other state supreme courts.

In order to understand the significance of these recent decisions, it is important to examine how we got here. When the pandemic struck, **Anderson Kill immediately alerted businesses** to the established precedent holding that relatively intangible conditions like bacteria, gases, and fumes can constitute "direct physical loss or damage" and trigger coverage for business interruption losses. In alerts like this one from **February** and **March** 2020, we recommended that policyholders review their policies carefully to determine if they covered such losses.

Insurance Companies Grabbed Early Momentum in COVID-19 Claims

Many policyholders, often represented by relatively inexperienced counsel, rushed to court seeking coverage under policies containing broad exclusions for losses

caused directly or indirectly by bacteria or virus. Such exclusions were created by the insurance industry in response to the 2005 SARS outbreak in Asia, which led to multi-million dollar business interruption insurance claims there. *See* Todd C. Frankel, **"Insurers knew the damage a viral**

pandemic could wreak on businesses. So they excluded coverage," WASHINGTON POST (April 2, 2020). Over the years that followed, these broad virus exclusions were widely adopted and added to most commercial property insurance policies. Indeed, an **analysis conducted by the NAIC** at the outset of the pandemic in March 2020 found that 83% of all commercial property insurance policies sold in the US contained an exclusion for virus, communicable disease or pandemic. When the first wave of coverage lawsuits arrived, the insurance industry was sitting in the catbird seat. Insurance companies had the opportunity to selectively file motions to dismiss in the cases brought by the least experienced counsel, with the worst facts and the most restrictive policy provisions.

Because most policies contain broad virus exclusions, the complaints in many coverage lawsuits were drafted to allege that the losses were caused by something other than the coronavirus, in the hopes of sidestepping the policies' virus exclusions. Stronger complaints addressed the cause of loss head on and included allegations about how the virus survives in the air and on surfaces for days or weeks and stated that the virus caused direct physical loss or damage to property by taking property that is safe and useful and turning it into something that is unsafe, not usable for its intended purpose and possibly even deadly. Many of these detailed complaints cited to and attached scores of scientific studies supporting such allegations. Thus, the cases generally fell into two categories:

- "Orders-only" cases where the complaints did not allege the virus causes physical loss or damage to property or was present at the insured premises. Instead, these claims were based on the assertion that government orders themselves caused a "physical loss" of the policyholder's property.
- Cases alleging that the coronavirus causes direct physical loss or damage to property, including at the insured premises, at property that led to the issuance of government closure orders and at dependent properties that help drive the policyholders' revenue stream.

The insurance industry and its lobbyists were organized and ready. In addition to a broad public relations campaign[1], the industry hired and dispatched attorneys to file *amicus* briefs in scores of cases around the country[2] — arguing that rulings for policyholders would bankrupt the entire insurance industry. These arguments were false and misleading. As noted in a report by Reuters, the numbers used by the insurance industry ignored the fact that 83% of policies contained broad exclusions for virus, communicable disease or pandemic. Alwyn Scott and Suzanne Barlyn, **"U.S. insurers use lofty estimates to beat back coronavirus claims"** REUTERS BUSINESS NEWS (June 12, 2020).

In reality, the insurance industry was well positioned to honor their promise of coverage to the 17% of policyholders that purchased policies without any virus or pandemic exclusions. Indeed, the insurance industry profited enormously during the pandemic,[3] largely on the back of successive premium hikes[4] imposed every quarter despite their "no pay" stance on business interruption claims and a sharp decrease in other claims, since cars were off the roads and many businesses shut down as large numbers of people worked from home.

The first wave of decisions on motions to dismiss in 2020 — most of which involved virus exclusions and "orders-only" cases — were overwhelmingly in favor of insurance companies. A large number of those decisions specifically noted that the policyholder had not even alleged that the virus causes "physical loss or damage" and

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dismissed the case in the absence of such allegations. *See, e.g., Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020) ("Plaintiffs argue that it is not COVID-19 within Plaintiffs' Properties that caused the loss directly, but rather that it was the Orders that caused the direct physical loss and thus the Virus Exclusion should not apply.").

Some courts went further, however, and accepted arguments that "physical alteration or structural degradation" is required, contrary to the vast majority of pre-pandemic precedent. *See, e.g., Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690, 693 (N.D. Ill. 2020). Others accepted insurance industry arguments brushing away the significance of COVID-19 and its impact on the ability to safely operate during the pandemic — asserting that the risk from COVID-19 was easily resolved through simple cleaning. *See, e.g., Uncork & Create LLC v. Cincinnati Ins. Co.*, 498 F. Supp. 3d 878, 883–84 (S.D.W. Va. 2020), ("[b]ecause routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover"). Not only were such conclusions drawn without any evidentiary record, they also bore little resemblance to reality during the spring and summer of 2020, when the worst business interruption losses were sustained as most brick and mortar business screeched to a halt.

Curiously, pro-insurance company decisions were far more prevalent in federal courts compared to state courts. As of March 2021, in deciding motions on policies without a virus exclusion, Federal courts ruled in favor of the insurance company about 85% of the time, whereas state courts only sided with the insurance company about 33% of the time.

State Appellate Court Decisions Are Key

But insurance law is determined by the states,[5] and under established precedent, federal courts must follow state law as articulated by each state's highest court. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."). In the insurance law context, past battles over common insurance coverage issues have shown that insurance law often varies from state to state. See. e.g., Lorelie S. Masters, et al., Insurance Coverage Litigation §15.01[A] (2d ed. 2022). Thus, the most important decisions in the COVID-19 business interruption cases would come from state appellate courts.

Prior to the pandemic, only a few state supreme courts had ruled on the question of whether harm in the absence of structural alteration constitutes "physical loss or damage." *See Mellin v. Northern Sec. Ins. Co.*, 115 A.3d 799, 803-05 (N.H. 2015) (holding that pervasive odor of cat urine was "physical loss" to condominium); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (concluding that a home rendered dangerously unlivable by the presence of falling rocks had suffered a "direct physical loss to the property" even though the home had suffered no physical harm); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (en banc) (finding a "direct physical loss" where a church complied with the fire department's order to close because gasoline vapors made "use of

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the building dangerous"). In the absence of controlling state supreme court precedent, federal courts are called upon to make an "*Erie* guess."

Federal courts guessed overwhelmingly in favor of the insurance industry — following the herd rather than the 60 years of precedent supporting the policyholders' position. These decisions were controversial among insurance law experts, and were criticized for ignoring the wide majority of pre-pandemic cases holding that relatively intangible impacts to property constitute "physical loss or damage" that triggers business interruption coverage. *See* Knutsen and Stempel, **Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic**, 27 Conn. Ins. Law J. 185, 241-49 (2021). The pro-insurance industry decisions also received criticism for violating fundamental tenets of civil procedure that require well-pled allegations to be accepted as true when deciding motions to dismiss. *Id.* at 192 ("Judges granting dismissal motions without any opportunity for discovery, and denying any possibility of coverage at the metaphorical starting gate, have undermined the traditional American commitment to jury trials as well as widely accepted legal principles of insurance policy construction such as interpreting ambiguous terms against the drafter and considering policyholder reasonable expectations.") Even medical organizations responded to the insurance industry arguments so frequently being accepted by courts, stating that the insurance companies' assertion SARS-CoV-2 easily can be cleaned from a property is based on "junk science." *See* **NH Medical Society Denounces Insurers' COVID-19 Science** (June 27, 2022); **Amicus Brief of MedChi, the Maryland State Medical Society** (July 13, 2022).

A number of state court judges broke from the herd, often making that break explicit in their decisions:

> Economists refer to this as an appeal to "herding behavior" — a process by which group-think replaces individual decision-making... Judges are not sheep, and I do not decide a case by counting noses. Further, the "herd" can be wrong.

JDS Constr. Grp., LLC, v. Cont'l Cas. Co., No. 2020 CH 5678, 2021 WL 8775920, at *3 (Ill. Cir. Ct. Oct. 25, 2021).[6] These demurrals set the stage for the most important decisions — from state appellate courts.

By early 2022, several lower court decisions were under review by state supreme courts. The first state high court

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decisions came down in favor of the insurance companies, but these generally were "orders-only" cases and many of those courts noted the absence of allegations that COVID-19 causes "physical loss or damage" or was present at the insured premises. *See Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545, 548-50, 552 (Iowa 2022); *Cherokee Nation v. Lexington Ins. Co.*, --- P.3d --- 2022 WL 4138429 (Okla. Sept. 13, 2022); *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 515 P.3d 525 (Wash. 2022). Thus, the merit of claims based on allegations and evidence of direct physical loss or damage caused by COVID has not been tested or decided in these states. That said, there have been three state supreme courts that have affirmed the dismissal of cases without virus exclusions that alleged "direct physical loss or damage" to property caused by the virus. *See Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266 (Mass. 2022); *Sullivan Mgmt., LLC v. Fireman's Fund Ins. Co.*, No. 2021-001209, --- S.E.2d ----2022 WL 3221920 (S.C. Aug. 10, 2022); *Colectivo Coffee Roasters, Inc. v. Soc'y Ins.*, 974 N.W.2d 442 (Wis. 2022).

Vermont Supreme Court Shuns "Strength in Numbers"

The Vermont Supreme Court did not follow the high court decisions in Massachusetts, South Carolina, Wisconsin or the states that had reviewed "orders-only" cases — offering this forceful statement of independence at the outset of its analysis:

> [T]here is a majority approach that has been adopted – primarily in various federal courts at the district and circuit levels but also in some state trial and appellate courts – under which courts have concluded that the presence of COVID-19 on a property is not "direct physical loss or damage to property" as a matter of law. *See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 892-93 (9th Cir. 2021) (holding no coverage for COVID-related losses under policy and noting its conclusion conformed with majority approach); *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266, 1275-76 (Mass. 2022) (same); see also Covid Coverage Litigation Tracker, U. Penn., **https://cclt.law.upenn.edu/ [https://perma.cc/T5RX-LQGN]** (tracking cases and providing statistics). Though we use the reasoning of cases across the spectrum of this jurisdictional divide to guide us, we emphasize that we are not bound by any of these decisions and that our conclusion is based on the application of settled principles of Vermont insurance law. *See Town of Stowe v. Stowe Theatre Guild*, 2006 VT 79, ¶ 9 n.2, 180 Vt. 165, 908 A.2d 447 ("While we may look to the reasoning of other states as persuasive authority, **our ultimate objective is to reach decisions that comport with Vermont law and the reasonable expectations of the parties to the contract, and not to adopt a rule simply because there is apparent strength in numbers**.").

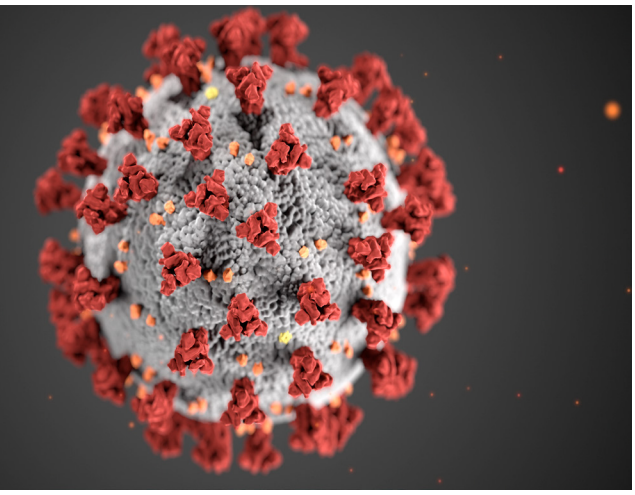
Huntington Ingalls Indus., Inc. v. Ace American Ins. Co., --- A.3d --- 2022 WL 4396475, at ¶20 (Vt. 2022) (emphasis added).

The Court rejected the insurance industry argument that "direct physical loss or damage" requires the structural alteration of property, and instead held that there has been "direct physical damage" where there has been a "distinct, demonstrable, physical change to property" — adding that such change "need not necessarily be visible; alterations at the

VT Supreme Court: "We emphasize that we are not bound by any of these decisions and that our conclusion is based on the application of settled principles of Vermont insurance law."

microscopic level may meet this threshold." *Id.* at ¶26.

The Court held that losses due to "direct physical loss" are covered in addition to losses due to "direct physical damage," and set forth a four-part standard for determining whether "direct physical loss" has occurred. *Id.* at ¶24. In so doing, the Court explained that there can be coverage "for circumstances in which property is not harmed but may not be used for



some reason" (*id.* at ¶29), including "when property is unusable due to a health hazard" *(id.)* and that the loss of property "may be in whole or in part" (*id.* at ¶31). The Court noted that the requisite "loss" of property "can be identified in specific situations based on how the property was intended to be used and why it cannot be used in that manner anymore." *Id.* at ¶29.

Importantly, the Court's decision repeatedly cited and adhered to pre-pandemic precedent that so often had been ignored by other courts. *Id.* at ¶¶28, 29, 33, 37 *(citing Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (gasoline fumes); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 805 (N.H. 2015) (cat urine odor); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 302 (Minn. Ct. App. 1997) (asbestos); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826-27 (3d Cir. 2005) (E. coli); *de Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 724-25 (Tex. App. 2005) (mold); TRAVCO Ins. Co. v. Ward, 715 F. Supp. 2d 699, 707-10 (E.D. Va. 2010), aff'd, 504 F. App'x 251 (4th Cir. 2013) (toxic gas); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418, 2014 WL 6675934, at *2 (D.N.J. Nov. 25, 2014) (ammonia); *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (offensive odor); *Farmers Ins. Co. of Or. v. Trutanich*, 858 P.2d 1332, 1336 (Or. Ct. App. 1993) (methamphetamine odor)).

The Vermont Supreme Court's decision aligns with recent pro-policyholder decisions from intermediate state appellate courts in several other states in cases where the policyholder purchased policies without virus or pandemic exclusions. *See Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, -- So.3d --, No. 2021-CA-0343, 2022 WL 2154863 at *7 (La Ct. App. June 15, 2022); *Marina Pac. Hotel & Suites, LLC v. Fireman's Fund Ins. Co.*, 81 Cal. App. 5th 96, 109, 296 Cal. Rptr. 3d 777, 788 (2022); Butter Nails and Waxing v. Underwriters at Lloyd's London, No. B311455, (Cal. Ct. App. Aug. 25, 2022 (unpublished); *Tarrar Enterprises, Inc. v. Associated Indem. Corp.*, No. A162795, 2022 WL 4377163, at *2 (Cal. Ct. App. Sept. 22, 2022). These state court appellate decisions support the conclusion that these cases should be decided based on the evidence adduced regarding the disruption and loss suffered by each policyholder, analyzed under longstanding insurance law precedent.

Notably, that is what occurred in a Texas courtroom in August, during the trial over Baylor Medical Center's COVID-19 business interruption claim. The result was a $48.5 million jury verdict upholding the policyholder's right to coverage for its business interruption losses.

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See Jim Sams, **"Jury Awards $48.5M to Baylor Medical College for COVID Business-Interruption Claim"** CLAIMS JOURNAL, Sept 7, 2022.

How the litigation in so many different jurisdictions will shake out is still far from clear. A number of appeals are pending before the high courts in Connecticut, Maryland, Nevada, New Hampshire and Ohio. Others are sure to follow. But it does look like some states will protect policyholders' rights while insurance companies will be let off the hook in other states. So the advice from February 2020 holds: check your policies carefully and consult with an experienced coverage attorney to see if your business is entitled to coverage for its pandemic-related business interruption losses.

ENDNOTES

1. See *Knutsen and Stempel*, ***Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic***, *27 Conn. Ins. Law J. 185, 201-06 (2021).*
2. *Policyholders do not have a powerful lobby to advocate for their interests like the insurance industry does. Yet one small non-profit did its very best to draw attention to the rights of policyholders in the litigation as it progressed. United Policyholders operates on a shoestring budget, mainly supported by pro bono assistance from volunteer attorneys. Anderson Kill proudly dedicated hundreds of attorney hours drafting amicus briefs on behalf of United Policyholders, as did our colleagues at other firms with extensive experience representing policyholders including Covington; Hunton Andrews Kurth; McCarter & English; Perkins Coie; Pilsbury Winthrop & Stimson; Plews Shadley Racher & Braun; and Reed Smith.*
3. See *Richard Holober,* ***Progressive Insurance Hoards Covid-19 Windfall Profits****, Consumer Federation of California (Aug. 13, 2020); Claire Wilkinson,* ***Chubb reports gains in Q3 profit, net premium written****, Business Insurance (Oct. 28, 2020); Angela Childers,* ***CNA Reports Higher Net Income Despite Cat Losses****, BUSINESS INSURANCE (Nov. 2, 2020); J. Greenwald,* ***Berkley Reports 161% Jump in Profits****, BUSINESS INSURANCE (Jan. 26, 2021).*
4. *See Matthew Lerner,* ***Most Policyholders See Rate Hikes Across Multiple Lines****, BUSINESS INSURANCE (Oct. 26, 2020); Matthew Lerner,* ***U.S. Commercial Property Pricing up 22% in Q2****, BUSINESS INSURANCE (Aug. 10, 2020); Claire Wilkinson,* ***Insurance Prices Increased Sharply in Third Quarter****, BUSINESS INSURANCE (Nov. 5, 2020); Matthew Lerner,* ***Global Prices Rise 22% in Q4: Marsh****, BUSINESS INSURANCE (FEB. 4, 2021); JUDY GREENWALD,* ***CONTINUED RATE INCREASES EXPECTED: WILLIS****, BUSINESS INSURANCE (Nov. 19, 2020); Gavin Souter,* ***Insurance Premium Renewal Rates Continue To Rise****, BUSINESS INSURANCE (Dec. 7, 2021); Claire Wilkinson,* ***Commercial property insurance rates rise again****, BUSINESS INSURANCE (July 12, 2022).*
5. See *McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1011-1015 (1976); Jonathan R. Macey & Geoffrey P. Miller, The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role in Insurance Regulation, 68 N.Y.U.L. REV. 13, 17 (1993).*
6. See also MacMiles, LLC v. Erie Ins. Exch., *No. GD-20-7753, 2021 WL 3079941, at *5 (Pa. Com. Pl. May 25, 2021) ("merely accepting the non-binding decisions of other courts 'by the purely mechanical process of searching the nations courts for conflicting decisions' amounts to an abdication of this Court's judicial role");* Ungarean, DMD v. CNA, *No. GD-20-006544, 2021 WL 1164836, at *6 (Pa. Com. Pl. Mar. 25, 2021) (same);* Brown's Gym, Inc. v. Cin-

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cinnati Ins. Co., *No. 20 CV 3113, 2021 WL 3036545, at *19 (Pa. Com. Pl. July 13, 2021) ("State trial courts throughout the nation have agreed with the foregoing rationale articulated in the federal case law in denying insurers' attempts to dismiss business interruption insurance claims filed by insureds who assert that COVID-19 was present on their covered property")*; Goodwill Indus. of Orange Cty., Cal. v. Phila. Indem. Insur. Co., *No. 30-2020-01169032-CU-IC-CXC, 2021 WL 476268, at *3 (Cal. Super. Ct. Jan. 28, 2021) (stating that the Federal cases relied on by the insurance company "are not binding on this court and were decided under a different standard")*; Snoqualmie Enter. Auth. v. Affiliated FM Ins. Co., *No. 21-2-03194-0 SEA, 2021 WL 4098938, at *6 (Wash. Super. Sept. 3, 2021) ("This Court is not persuaded by [another judge's] reliance on the opinions of other federal district court opinions across the country that applied the laws of other states, nor its holding that the undefined phrase 'all-risks of physical loss or damage' cannot be reasonably interpreted by the average lay person to include the insured's inability to physically use, control, or manipulate its property as a result of the COVID-19 closure orders and Tribal resolutions")*, Boardwalk Ventures CA LLC v. Century-National Ins. Co., *20STCV27359, 2021 WL 1215892, at * 3 (Cal. Super. Ct. Mar 18, 2021) (rejecting the "litany of unpublished federal district court cases" cited by the insurance company "in support of the proposition that courts applying California law have 'uniformly dismissed lawsuits like the instant action'" — recognizing that these cases are not binding and the dismissal was not proper)*; Risinger Holdings, LLC v. Sentinel Ins. Co., *No. 1:20-CV-00176, 2021 WL 4520968, at *12 (E.D. Tex. Sept. 30, 2021) (holding that the policy's use of "physical loss" is ambiguous and concluding that the policyholder "may have suffered direct physical loss due to Governor Abbott's lockdown order by being deprived of the use or full use of the physical space of its covered property, or alternately, because of the severe material losses it endured when it was forcibly excluded from its businesses").*

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