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COVID-19: RESPONDING TO BUSINESS INTERRUPTION CLAIMS

The novel coronavirus (COVID-19) has upended the global marketplace—forcing millions to shift to working from home, freezing entire industries, and stoking fears of a prolonged global recession. While the federal government has taken steps to stem losses, including passage of the Coronavirus Aid Relief and Economic Security (CARES) Act, businesses are likely to turn to their property insurance policies in an attempt to recover for lost income and the costs associated with reopening their doors following a viral pandemic—sanitizing and decontamination. In the near term, most attention will center on time element losses; that is, losses that result from the insured's inability to use their property during a given period. The most prominent of these, and the focus here, is on business interruption insurance, the purpose of which is "to indemnify the insured for loss caused by the interruption of a going business due to the destruction of the building, plant, or parts thereof."[1] Time element claims also include losses that stem from the actions of governmental entities (civil authority), and, for example, downstream disruptions that may result from another parties' business interruption (contingent business interruption).[2]

Importantly, whether businesses will be able to recover under their property policies is likely to turn, in large part, on the resolution of whether the existence (or potential existence) of the coronavirus in a facility amounts to "direct physical loss or damage." Beyond this, policies may include certain provisions that remove claims beyond the scope of coverage. Regardless, after a month of "social distancing," it is clear that these issues and more will be thoroughly examined in the years to come.

DOES COVID-19 TRIGGER COVERAGE?

On March 11, 2020, the World Health Organization (WHO) declared that the spread of COVID-19 had risen to the level of a global pandemic.[3] Following this declaration, state and local governments issued emergency declarations and began to institute "social distancing" via "Stay Home" orders.[4] A central component of these orders has been the closure of bars, dine-in restaurants, gyms, and most large gatherings. One of the most directly affected sectors, the hospitality industry, has led the way in seeking business interruption coverage from its insurers. The first known COVID-19-related lawsuit was filed by the operator of the Oceana Grill Restaurant in New Orleans.[5] Other restaurants,[6] movie theaters,[7] and small commercial operators[8] have followed in rapid succession, requesting coverage before quickly shifting to litigation. Whether businesses will be able to recover under their property policies is likely to turn, in large part, on whether the existence (or potential existence) of the coronavirus in a facility amounts to "direct physical loss or damage." This issue will very likely vary on a state-by-state basis. State and local governments have seemingly attempted to assist policyholders in their efforts to obtain coverage by, among other things, reciting that "the COVID-19 virus causes property loss or damage due to its ability to attach to surfaces for prolonged periods of time" in their "Stay Home" orders.[9] The effect, if any, of these declarations remains to be seen.

The insuring agreements of most policies extending business interruption coverage include some variation of the provision that the insurer agrees to pay for "***direct physical loss or damage*** to building or personal property caused by or resulting from a peril not otherwise excluded." This is a threshold requirement for coverage and it is the policyholder's burden to establish.[10] Unsurprisingly, whether the potential existence of a virus amounts to "direct physical loss or damage" has not received much attention before now; however, how courts have treated other invisible, intangible claims is instructive.

a. Intangible Alterations

To satisfy their burden, policyholders will likely turn to a line of cases that have adopted an expansive view of coverage. These cases hold that coverage exists, when there are intangible alternations, despite the requirement that there be "direct ***physical*** loss." This line is exemplified by ***Mellin v. Northern Security Insurance Co, Inc***.[11] In ***Mellin***, homeowners asserted that their condominium had sustained "direct physical loss" from a persistent cat urine odor that emanated from a neighboring unit. The New Hampshire Supreme Court rejected the insurers argument that coverage was excluded due to the absence of any physical alteration in the property, and held that "'physical loss' need not be read to include only tangible changes to the property that can be seen or touched, but can also encompass changes that are perceived by the sense of smell,"[12] and could exist "in the absence of structural damage."[13] The Court noted that while the alteration need not be structural, it "must be distinct and demonstrable," which could be evidenced by a property being rendered uninhabitable or unusable.[14]

Another case in the ***Mellin*** line that has garnered substantial attention is ***Motorist Mutual Ins. Co. v. Hardinger***.[15] There, the Third Circuit, applying Pennsylvania law, examined a homeowner's policy that provided coverage for "direct physical loss or risk of a direct physical loss."[16] In the case, homeowners became ill shortly after moving into a new home and discovered that a well on the property was infected with e-coli. Relying heavily on one of its earlier opinions regarding released asbestos fibers, the Court determined that coverage could exist if the bacteria substantially reduced the functionality of the property or rendered it useless or uninhabitable.[17] It determined that this was a fact question for a jury to determine.

Counsel for policyholders have already begun to lean heavily on cases such as ***Mellin*** and ***Hardinger*** to argue that the presence of COVID-19 has rendered their properties unusable and, thus, amount to "direct physical loss." This is an overly simplistic analysis that ignores the plain language of their policies and countervailing caselaw.

As an important distinction with how Texas courts would likely treat a case dealing with invisible "sources [that have] allegedly reduced the use of…property to a substantial degree,"[18] the ***Hardinger*** court noted that while there were no Pennsylvania cases directly on point, an intermediate court had given "substantial attention and approval" to ***Western Fire Insurance Co. v. First Presbyterian Church***, a 1968 case from the Colorado Supreme Court that first held that "direct physical loss or damage" did not require a tangible alteration in property.[19] The ***Mellin*** court also cited ***Western Fire*** with approval. No court applying Texas law appears to have ever referenced ***Western Fire***. Unlike some states, Texas law places a heavy emphasis on the precise words used in a policy when construing its terms,[20] and will not strain them even "though the insured may suffer an apparent harsh result as a consequence."[21]

b. COVID-19 Associated Losses are Economic, Not Physical

Though COVID-19 is a virus, the treatment of bacteria-related claims may be instructive. In ***Universal Image Productions, Inc. v. Chubb Corp.***,[22] the insured alleged that a foul odor caused by bacterial contamination amounted to physical loss. The court disagreed, first focusing on the dictionary definition of "physical," before considering many of the same cases that the ***Mellin*** Court consulted. The Court concluded that in order satisfy the policy's "direct physical loss" requirement, the insured had to establish that there was "structural or [some] other tangible damage to the insured property."[23] Something that the policyholder could not do. On appeal, the Sixth Circuit relied on Texas law to affirm that "tangible damage" was necessary to recovery.[24] Important to examining coverage for COVID-19, the Court remarked that the insured had not "experienced any form of 'tangible damage' to its insured property," and that "not a single piece of [its] physical property was lost or damaged as a result of mold or bacteria contamination."[25] The Court observed that the insured sought coverage for, in part, cleaning expenses and lost business income, and noted that "[t]hese are not tangible, physical losses, but economic losses."[26] Under the same reasoning, courts have also found that the presence of lead[27] and undisturbed, intact asbestos[28] are similarly economic, not physical, losses.

As noted, the appellate court in ***Universal Image Productions***, relied on Texas law to conclude that "physical loss" required a tangible change in the insured property. In ***de Laurentis v. United Services Automobile Association***, the insured sought coverage under a renter's insurance policy for mold damage that resulted from a leaking air conditioning unit.[29]

To determine whether "physical loss" had occurred, the court consulted a dictionary and concluded that a physical loss "is simply one that relates to natural or material things."[30] With this definition in hand, the court determined that the policy required tangible damage to the insured's property.[31] The court ruled that the resulting mold growth on the insureds' furniture, art work, and clothing from the air conditioner could satisfy this requirement.[32] Considering ***de Laurentis*** and ***Universal Image Productions***, it should be clear that, as the plain language suggests, "physical loss" requires a tangible alteration to satisfy the insuring agreement. The presence of COVID-19 likely does not satisfy this requirement, as there has been no evidence, thus far, that the surfaces that it encounters sustain any "tangible damage." This represents an important distinction from mold (a frequent comparator), which pulls nutrients out of, and physically alters, the surfaces on which it grows. As with undisturbed asbestos and certain microorganisms, the presence of COVID-19 appears to amount to an economic, not physical, loss.

c. Emerging State Action

In addition to declaring that COVID-19 causes "property loss or damage," elected officials have also sought to enact legislation that would prohibit insurers from disclaiming coverage for the loss of use or business interruptions stemming from COVID-19; in some instances, "even if the relevant insurance policy excludes losses resulting from viruses."[33] While legislators and policyholder lobbyist that support such measures may believe they are supporting insureds, such actions are, in fact, evidence that COVID-19 ***does not*** amount to "physical loss," if it did, such legislation would not be necessary. To date, four states appear to have considered such legislation: Massachusetts, New Jersey, Ohio, and Pennsylvania. The proposals before these statehouses appear to be focused on ensuring that coverage exists for small businesses in their states. Application of the Massachusetts measure, for instance, would be limited to "insureds with 150 or fewer full-time-equivalent employees" in the state. The New Jersey proposal, would only apply to "insureds with 100 eligible employees" in the state.[34]

The measures would permit insurers who pay business interruption claims in accordance with its terms to apply to their state insurance authorities for reimbursement from a pool created by a fund to which all insurers covering risks in the state would be required to contribute.

To date, none of the proposed legislation has been signed into law, and all are likely to face constitutional challenge if enacted.

WHAT EXCLUSIONS ARE LIKELY TO APPLY?

Though policyholders are focused on whether COVID-19 constitutes "direct physical loss," as noted above, this represents only the initial step in determining whether coverage exists. In the event a court determines that COVID-19 amounts to "direct physical loss or damage," coverage will still only exist if there are no applicable policy exclusions. Establishing the existence of an exclusion is the insurer's obligation.[35]

a. Virus, Bacteria, and Contamination Exclusions

The most direct exclusion for disclaiming coverage will likely be the "Virus or Bacteria Exclusion," which is often found in property policies. This exclusion often states that the insurer will not "pay for loss, cost, or expense, caused by, resulting from, or relating any virus, bacterium, or other microorganism that causes disease, distress, illness, or physical distress or that is capable of causing disease, illness, or physical distress." Because COVID-19 is a virus, this exclusion would likely serve as a barrier to recovery. Though this exclusion is often found in policies, it is not uniformly written or included; as such, careful attention must be given to the policy before asserting this as a basis to disclaim coverage.

In addition to policies that expressly exclude viruses, exclusions exist that apply generically to "microorganisms," or, more narrowly, to Fungi and Bacteria. While the former may serve as a basis for disclaiming coverage, the latter likely will not. Though similarities exist between bacteria and viruses—any attempt apply a bacteria-only related exclusion to COVID-19 will likely be rebuffed.

b. Pollution Exclusions

While the ***Mellin*** line of cases' ability to satisfy the "physical loss" requirement has captured the attention of counsel for policyholders, little attention seems to have been given to the ultimate result of many of these cases— that ultimately coverage is often barred. The pollution exclusion serves as a bar in many of these cases.[36]

Many policies contain some version of a pollution exclusion. Because of the variations that exist, it is important to carefully review the language of the exclusion and any relevant definitions. Treatment of pollution exclusions vary by state, with some taking a very restrictive stance requiring that they apply narrowly to insured's that operate in hazardous industries, while other states have taken a more expansive approach. In relation to COVID-19, whether a virus satisfies the definition of a "pollutant" will likely determine the applicability of the exclusion. In some policies, "pollutant" is given a very broad definition, which expressly includes viruses:

> CONTAMINANTS or POLLUTANTS means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, fungi, **virus**, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency. Waste includes materials to be recycled, reconditioned or reclaimed.

However, a virus may satisfy the "pollutant" definition even if it is not expressly identified in the policy's definition. Courts applying Texas law, for instance, have determined that "pollutants" are not terms of art, and that any substance can be a "pollutant" if it is found in an unintended location.[37] Moreover, "pollutants" often include "contaminants" as a component of their definition. In the COVID-19 context, the presence of the virus in a business likely amounts to a "contamination." While special attention should be given to the language used, pollution exclusions may serve as a viable option for disclaiming coverage.

c. Additional Considerations

In addition to policy exclusions, special attention should be given to the policies' notice and mitigation requirements. Typically found under the heading "Duties in the Event of Loss," most insurance policies require insureds to provide prompt written notice detailing their claim. Such notice allows insurers an opportunity to conduct inspections and obtain evidence and relevant documents before they may be discarded. In the COVID-19 context, notice and the ability to conduct an inspection may be critical. While a lot of attention has been given to the whether COVID-19 causes "physical loss or harm," much of this analysis presupposes that the virus is actually present in the insured's facility. The interest in mitigating a threat of harm is understandable; however, the total absence of the virus should end the conversation regarding whether a claim exists. In many instances, the interest in eliminating a potential threat is a rational business decision—but is not a covered loss since no actual damage has occurred.[38] In some instances, promptly conducting an investigation to take samples from the insured's property may be beneficial. The failure to request such access prior to reaching a coverage decision may amount to a waiver of the right to require such prior access or evidence.[39]

Evidence relating to the insured's efforts, if any, to mitigate their damage will also be essential. Even if coverage does exist, most property policies require that an insured take prompt action to reduce its loss and resume operations—even if these operations are only partial. Insurers should request documents that may establish whether the insured attempted, for example, to shift its operations online (for retail), from its employees' homes (where possible), or to an alternative model (***e.g.***, serving to-go orders in place of dining in, for restaurants).

COVERAGE UNDER ORDERS TO QUARANTINE

As discussed above, most coverage requires physical damage to the covered property. However, some policies include Civil Authority coverage. These policies often provide coverage when a Covered Cause of Loss damages property other than the property described at the premises. Business Income and Extra Expense is paid when the action of a civil authority prohibits access to the described premises. Most of these provisions require both (1) that access to the area immediately surrounding the damaged property is prohibited by a civil authority as a result of the damage, and (2) that the action of the civil authority is taken in response to dangerous physical conditions resulting from the damage.

This issue was addressed following the events of September 11, 2001. Following these events, the Metropolitan Washington Airports Authority made the decision to close Reagan Airport. United Airlines sued its insurer for coverage under the Civil Authority coverage of its policy. A federal court in New York held that the policy clearly required physical damage for there to be coverage.[40] Other courts throughout the country, including the Fifth Circuit and federal courts in Texas, have also held there is no coverage following evacuation orders due to impending hurricanes when there is no property damage resulting from the hurricane. [41]

Therefore, whether there is coverage based on Civil Authority orders will likely be analyzed by the Courts in the same manner as discussed above; the question will be whether or not there was physical damage to the property or the surrounding area. In most cases, the answer to this will be that there is no physical damage.

CLAIMS HANDLING LAWSUITS

Aware that there are coverage issues in these cases, some of the lawsuits that have been filed since the pandemic have focused less on coverage or breach of contract claims, and, instead, assert extra-contractual claims based on claim handling. Our firm has remained successful in defeating the claims arguing that the law in Texas generally bars extra-contractual claims if there is no breach of contract claim.

These claims are being asserted as violations of the breach of good faith and fair dealing and under the "Unfair Settlement" provisions of the Texas Insurance Code Sections, 541.060 and 542.003.

Our firm recently had summary judgment granted by a federal court in a case on just this point. Arguing that the plaintiff could not prove coverage and therefore had no breach of contract claim, we asserted that the extra-contractual claims necessarily fail. A Houston federal court agreed.[42] The court dismissed the plaintiff's causes of action for violations of the Texas Insurance Code, breach of the duty of good faith and fair dealing, and the Texas DTPA. The court followed Texas Supreme Court law that extra-contractual claims against insurers fail if they rely on the denial of a claim that was not covered by the policy.[43]

Federal courts applying Texas law have held that summary judgment is proper on a plaintiff's claims for breach of the duty of good faith and fair dealing, and for violations of the Texas Insurance Code if there was any reasonable basis for denial of that coverage.[44] In ***Hahn***, the court granted summary judgment because the insurer produced evidence that there was a reasonable basis for denying the plaintiff's claim.[45] In order for an insurer to be liable under Section 542, an insured must first prove that the insurer is liable for the underlying claim. [46]

The exception to the general rule that extra-contractual claims are barred occurs when the bad faith or claims handling causes actual damage that is independent of the breach of contract allegations.[47] In most cases we have seen, this is difficult to establish. We are seeing many insureds allege that they were "encouraged" by their insurer ***not*** to make a claim at all, and, thus, cause them damage.

Further, the Texas Insurance Code requires a reasonable investigation of a claim. Section 541.060(7) creates a cause of action for failing to conduct a reasonable claim investigation. Under Texas law, what is "reasonable" under the circumstances is a fact question for the jury.[48]

Therefore, some level of claim investigation when a claim is made should cut off most of these claims. Some claim adjustment will be beneficial both to prevent claim handling lawsuit allegations and to gather fact information that may be useful should a court find that coverage does exist.

WHAT STEPS SHOULD YOU TAKE NOW?

As noted above, policyholders have already begun to file suits seeking coverage for the disruption of their business operations. Given the breadth of the effect of COVID-19 on the economy, these suits are likely just the beginning of what will likely be an avalanche of litigation over business interruption claims. How early claims are adjusted and litigated (and the caselaw they develop) will certainly influence future judicial decisions; as such, each case, regardless of size, must be effectively and appropriately handled. Though each claim is unique, there are certain actions insurers should take—and considerations to keep in mind—when handling each claim to ensure that they are in the strongest possible position to defend their coverage positions.

Communications Are Exhibits. Keep in mind that all communications with the insured are likely to be used as exhibits in any resulting litigation. Representations regarding the potential or absence of coverage, as well as any changes in positions over time, will feature prominently in litigation. All communications should clearly and respectfully explain any coverage position taken, explain why additional information is needed, or respond to the insured's request.

Investigate the Insured's Claim. The initial wave of COVID-19-related claims has confirmed that policyholders' counsel will aggressively pursue extra-contractual claims against carriers for any perceived errors in adjusting a claim or for reaching a negative coverage position too rapidly—even if it has not been formally expressed. In ***SCGM, Inc. v. et al. v. Certain Underwriters at Lloyds***,[49] the insured, an operator of movie theaters and restaurants, sought coverage under a policy that provided business interruption coverage and contained a Pandemic Event Endorsement. In its complaint, the insured state that it submitted a notice of claim on March 18, 2020. Later that same day, the insured alleges that the insurance adjuster responded that there was no coverage under the policy for COVID-19. The insured admits that it, "has yet to receive a formal denial of coverage," but anticipates that a denial is forthcoming. In addition to its breach of contract claim, SCGM asserts that "[b]y immediately refuting coverage to [its] broker," the insurer breached its duty of good faith and fair dealing. As noted, each claim is unique and should be investigated to ensure that the appropriate coverage determination is made. While certain trends may develop by industries, it is important to keep in mind that the claims are likely to be fact intensive. Adjusters should be sure to understand the insured's business operations; date of closure due to COVID-19, and the specific reason for the closure; whether any changes were undertaken to continue their operations (or why not); if the closure was due to a governmental order, whether an exemption from the order was sought.

Focus on Relevant Provisions. Building from their assertion that insurers are reflexively denying claims, policyholder counsel are likely to assert that the reference to numerous and patently inapplicable policy provisions in any coverage communication will be evidence of the insurer's outcome-based investigation. Familiarize yourself with the policy associated with each claim to ensure that all referenced provisions are actually in the policy (and not a mistaken belief), and be certain to only rely on policy provisions that are relevant to the claim. A policy's terrorism or nuclear endorsements are unlikely to be related to a COVID-19 claim and should not find their way into any coverage communication. More likely, however, will be the incidental inclusion of a state-barred exclusion or pollution exclusion that is inapplicable in the context (active polluter),

Maintain a Quality Claim File. It is difficult to understate the importance of a claim file for defending against bad faith allegations. For the defense, it may be the roadmap to a take-nothing verdict. For a policyholder's counsel, it can be the key exhibit to establish a costly bad faith claim. Properly constructed, the claim file can function as a chronological account of documentation and reasoned decision-making. When not maintained, however, policyholder attorneys frequently characterize a poorly documented claim file as the result of (1) incompetence, (2) active indifference, (3) an outcome-based investigation, or (4) an attempt to conceal facts. The claim file should include the notice of loss; basic policy information; documents from your fact-finding investigation or work product; copies of all correspondence

to and from the insured; a diary of all significant communications (and documentation of unsuccessful attempts to communicate) with the insured, interoffice communications, and the date of referral to counsel; damage information; reserves; and, where appropriate, settlement or file closing documents. The diary should be updated regularly and as soon as possible to the event being recorded and include an activity log that documents conversations with the insured or its representative. Finally, ensure that the diary is readable. Frequent errors or misspellings reflect poorly on the claim investigation and excessive abbreviations can render the diary cryptic to a lay person (***i.e.***, a juror).

Stay Informed and Seek Guidance. Though nationwide litigation is not unusual, there have been few events that have resulted in the amount of litigation and intense focus that is likely to stem from the COVID-19 Pandemic. Early court decisions will be very influential on the suits that follow, and it will be important to stay abreast of developments to ensure the appropriate questions are asked of insureds and all necessary materials are obtained.

The COVID-19 Pandemic will likely result in claims being filed under every type of insurance product offered.[50] While we have provided a brief overview of some of the issues related to business interruption coverage, additional avenues for analyzing claims exist and the potential for new losses still exists. As businesses continue to face uncertain futures, they will continue to pursue all potential avenues for revenue. Insurance policies are certain to continue to be viewed as a viable option.

Endnotes

1 *Quality Oilfield Prods. Inc. v. Michigan Mut. Insurance Co*., 971 S.W.2d 635, 638 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (citation omitted).

2 Explaining further, a contingent business interruption is a form of coverage that does not require physical loss or damage to the insured's property; instead, it insures against lost business income caused by damage to the property of the insured's customers or suppliers.

3 Dr. Tedros Adhanom Ghebreyesus, Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020).

4 E.g., Proclamation by the Governor of Texas (Mar. 13, 2020); Order of County Judge Lina Hidalgo (Harris County, Texas) (Mar. 11, 2020); Order of County Judge Clay Jenkins (Dallas County, Texas) (Mar. 12, 2020).

5 *Cajun Conti LLC et al. v. Certain Underwriters at Lloyd's,* London, et al., No. 2020-02558 (La. Dist. Court, Orleans Parish) (March 16, 2020)

6 *Big Onion Tavern Grp, LLC, et al. v. Society Insurance, Inc*., Case No. 1:20-CV-2005, in the U.S. District Court for the Northern District of Illinois.

7 *SCGM, Inc. d/b/a Star Cinema Grill, et al. v. Certain Underwriters at Lloyd's*, Case No. 4:20-CV-1199, in the U.S. District Court for the Southern District of Texas.

8 *Mark J. Geragos v. The Travelers Indem. Co. of Connecticut*, Case No. 20STCV14022, in the Superior Court of California (Los Angeles County).

9 Order of County Judge Lina Hidalgo (Harris County, Texas) (March 24, 2020).

10 *Gilbert Tex. Constr. L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010).

11 115 A.3d 799 (N.H. 2015); *see also Gregory Packaging, Inc. v. Travelers Prop. Cas. Co*., 2014 WL 6675934 (D.N.J. 2014) (finding that spilled ammonia "physically transferred the air" rendering it "unfit for occupancy until the ammonia could be dissipated."); In *re Chinese Manufactured Drywall Prods. Liab. Litig.,* 759 F.Supp.2d 822 (E.D. La. 2010) (noxious off-gasing" of sulfide gasses and other toxic chemicals from "Chinese Drywall" constituted "physical loss or damage"); O*regon Shakespeare Festival Ass'n v. Great Am. Ins. Co*., 2016 WL 3267247 (D. Or. 2016) (finding that smoke from nearby wildfire that infiltrated nearby theater amounted to "physical loss").

12 115 A.3d at 803.

13 *Id.* at 805.

14 *Id.*

15 *Motorists Mut. Ins. Co. v. Hardinger,* 131 Fed. App'x 823 (3rd Cir. 2005).

16 *Id.* at 825.

17 *Id.* at *826-27 (*citing Port Authority of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002)).

18 *Id.* at * 826.

19 437 P.2d 52 (Colo. 1968). In *Western Fire*, the court held that the term "direct physical loss" extended to cover the loss of use of the insured property where the accumulation of gasoline around and under the property rendered it uninhabitable.

20 Gilbert Tex. Constr. L.P. v. Underwriters at Lloyd's London, 327 S.W.3d 118, 126 (Tex. 2010) (noting that the looks to "the language of the policy because we presume parties intend what the words of their contract say.").

21 *Quality Oilfield Prods. Inc. v. Michigan Mut. Insurance Co.*, 971 S.W.2d 635, 638 (Tex. App.—Houston [14th Dist.] 1998, no pet.)

22 703 F.Supp.2d 705 (E.D. Mich. 2010).

23 *Id.* at 710.

24 475 Fed. App'x 569, 573 (6th Cir. 2012) *(citing de Laurentis v. United Servs. Auto. Ass'n,* 162 S.W.3d 714, 723 (Tex. App.—Houston [14th Dist.] 2005, pet denied.)).

25 *Id.* at 573.

26 *Id.;* e.g., 10 Couch on Ins. § 148:46 (3d ed. West 1998) ("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.")

27 *Pirie v. Federal Ins. Co.*, 696 N.E.2d 553 (Mass. Ct. App. 1998) (reasoning that the presence of lead was "an internal defect" in the insured property that did "not rise to the level of a physical loss.").

28 *Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n*, 793 F. Supp. 259, 263 (D. Or. 1990) (finding no coverage when the insured building "remained physically intact and undamaged" and the "only loss [was] economic."); *see Port Authority of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002) (noting that "the mere presence of asbestos, or the general threat of future damage from that presence, lacks the distinct and demonstrable character necessary for first-party insurance coverage.").

29 *de Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714 (Tex. App.—Houston [14th Dist.] 2005, pet denied).

30 *Id.* at 723.

31 *Id*.

32 On appeal, the insurer argued that the insured had not presented any evidence that her personal property had been contaminated by mold. The Court noted that the issue before it was limited to whether coverage for such a loss ***could*** exist, presuming the insured was able to establish the existence of the damage and causation. *de Laurentis*, 162 S.W.3d at 722, n. 4.

33 Mass. S.B. 2888.

34 N.J. Bill A-3844.

35 *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London,* 327 S.W.3d 118, 124 (Tex. 2010).

36 *See e.g., Travco Ins. Co. v. Ward,* 715 F.Supp.2d 699 (E.D.va. 2010), affirmed on other grounds, 504 App'x 251 (4th Cir. 2013).

37 Most of these interpretations have come before courts in commercial general liability policies. *Great Am. Ins. Co. v. ACE Am. Ins. Co*., 325 F.Supp.3d 719, 727 (N.D.Tex. 2018) ("[S]ubstances can constitute pollutants regardless of their ordinary usefulness."); *see also Nautilus Ins. Co. v. Country Oak Apts., Ltd.*, 566 F.3d 452, 455 (5th Cir. 2009) (the Fifth Circuit has rejected the argument that a substance must generally or usually act as an irritant or contaminant to constitute a pollutant under the pollution exclusion); *Landshire Fast Foods of Milwaukee v. Employers Mut. Cas. Co.*, 676 N.W.2d 528, 532 (Wis. 2004) (holding that "contaminants" in definition of "pollutant" "incorporates bacteria such as Listeria monocytogenes" in food products.").

38 *See Phoenix Ins. Co. v. Infogroup, Inc.,* 147 F.Supp.3d 815 (S.D. Iowa 2015) (relocating business because perceived threat that a nearby river would eventually flood and cause damage found not be "physical loss or damage").

39 *de Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 723 (Tex. App.—Houston [14th Dist.] 2005, pet denied.) ("The provisions of an insurance policy regarding an insured's duties after a loss are for the benefit of the insurance company. But, an insurer's denial of a claim before the deadline for presenting the required proof of loss (or other documentation) waives the requirement as a matter of law.").

40 *United Airlines, Inc. v. Ins. Co. of State of Pa*., 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005), *aff'd sub nom*. *United Air Lines, Inc. v. Ins. Co. of State of PA,* 439 F.3d 128 (2d Cir. 2006).

41 *Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, No. 4:19-CV-00693-SAL, 2020 WL 886120, at *4, (D.S.C. Feb. 24, 2020); *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686 (5th Cir. 2011); *S. Texas Med. Clinics, P.A. v. CNA Fin. Corp.*, 2008 WL 450012, at *1 (S.D. Tex. 2008).

42 *Papa Yolk's Grill, Inc. v. Amguard Insurance Company; Civ. Ac*. 4:18-CV-02995, in the U. S. District Court for the Southern District of Texas.

43 *USAA Texas Lloyds Co. v. Menchaca*; 545 S.W.3rd 478, 491 (Tex. 2018).

44 *Hahn v. United Fire & Cas. Co.*, No. 6:15-CV 00218 RP, 2017 WL 1289024, at *8 (W.D. Tex. Apr. 6, 2017) (applying Texas law).

45 *Id.*

46 *Harris v. Am. Prot. Ins. Co.,* 158 S.W.3d 614, 621 (Tex. App. – Fort Worth 2005, no pet.); *see also Allstate Ins. Co. v. Bonner,* 51 S.W.3d 289,291 (Tex. 2001).

47 *USAA Texas Lloyds Co. v. Menchaca*; 545 S.W.3rd 478, 491 (Tex. 2018).

48 *State Farm v. Nicolau,* 951 S.W.2d 444 (Tex. 1997).

49 Case No. 4:20-cv-1199, in the U.S. District Court for the Southern District of Texas.

50 "Essential businesses" have already become involved in COVID-19-related liability suits amid allegations that employees and patrons have been exposed to the virus. E.g. T*oney Evans v. Wal-Mart, Inc.* Case No. 2020L003938, in the Circuit Court of Cook County, Illinois. Liability claims from employees and patrons are likely to increase as "Stay Home" orders are lifted.