



LEGAL ALERT

Insurance Coverage for Losses and Claims Associated with SARS-CoV-2 and COVID-19

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Pasich LLP
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I. INTRODUCTION

A. The Impact of the Coronavirus and the Resulting Sickness or Disease

Since the “coronavirus” was first identified in Wuhan, Hubei Province, China, the World Health Organization (“WHO”) has confirmed that more than 4,500,000 people have been infected with the SARS-CoV-2 virus and more than 300,000 people have died from COVID-19.¹

Many countries around the world have adopted health measures that restrict international travel, and domestic measures that do the same. Additionally, many countries, or provinces or states in countries, have imposed quarantines, internal travel restrictions, and “stay home” or “shelter in” orders, while directing the closure of non-essential businesses.

As SARS-CoV-2 has spread, there have been suspensions and disruptions of factory operations and supply lines, cancellations of conferences, concerts and music festivals, and meetings, closures of motion picture theaters, cancellations of and restrictions on sporting events, a substantial drop in attendance at sporting events, movies, concerts, theater shows, attractions, and restaurants, closings of business and schools, and the widespread adoption of temporary telecommunicating/“work from home” policies. The economic losses are projected to be at least in the hundreds of billions of dollars with disruptions potentially lasting for two years.

Furthermore, many lawsuits already have been filed, seeking damages for alleged exposure to SARS-CoV-2 and claiming that insurers must pay for their insureds’ losses—likely the proverbial “tip of the litigation iceberg.”

B. The Virus and the Disease That May Result

Various terms have been used to describe the coronavirus. The virus is not the same as the disease that may result, and the distinction between the two may be extremely important in accessing insurance coverage.

WHO has named the virus and a resulting disease:

Official names have been announced for the virus responsible for COVID-19 (previously known as “2019 novel coronavirus”) and the disease it causes. The official names are:

¹ https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200517-covid-19-sitrep-118.pdf?sfvrsn=21c0d4fe_6.

Disease

coronavirus disease
(COVID-19)

Virus

severe acute respiratory syndrome coronavirus 2
(SARS-CoV-2).²

WHO also has provided a straight-forward example of the distinction between a virus and a disease:

Viruses, and the diseases they cause, often have different names. For example, HIV is the virus that causes AIDS. People often know the name of a disease, such as measles, but not the name of the virus that causes it (rubeola).

There are different processes, and purposes, for naming viruses and diseases.³

Other sources also distinguish between an infection and a disease, recognizing that an infection is not a disease. *See, e.g.*, <https://quizlet.com/251784537/infection-vs-disease-flash-cards/> (“Does infection and disease have the same meaning? NO”).

The insurance industry long has recognized the distinctions, too. For example, general liability policies have, for decades, typically distinguished between “sickness” and “disease,” usually defining “bodily injury” to mean “bodily injury, sickness or disease.”

Also, insurance policies generally are to be interpreted as understood by a layperson. Therefore, if the “ordinary” person would consider COVID-19 to be a “sickness” rather than a “disease” (much as people do with a cold or the flu), a technical interpretation to the contrary should not be adopted when it would limit coverage. *See AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 821 (1990) (“The ‘clear and explicit’ meaning of [policy] provisions, interpreted in their ‘ordinary and popular sense,’ unless ‘used by the parties in a technical sense or a special meaning is given to them by usage’ controls judicial interpretation.”).

Thus, while the differences between a “virus,” a “sickness,” and a “disease” might not seem important, for insurance purposes, such distinctions may determine the availability and scope of coverage.

² [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it).

³ *Id.*

C. Possible Insurance Coverage

The question now being posed is whether insurance covers any of the losses and actual or possible claims and lawsuits associated with SARS-CoV-2 and COVID-19. The answer is, “It depends—but frequently yes.” That coverage may be found in insurance policies that otherwise might be overlooked because of overly broad interpretations of exclusions applicable, for example, to “communicable diseases,” or because of notions that the presence of a virus does not constitute physical loss of or damage to property. Some insureds also might assume (or insurers might say) that because they have a particular type of insurance (such as event cancellation), or because some of the insurance they have may have an applicable exclusion, other insurance policies will not apply. However, as explained below, many common types of insurance, such as property, general liability, and workers’ compensation insurance may provide coverage, even in areas far removed from outbreaks. In fact, steps taken to minimize exposure to SARS-CoV-2 or to reduce its spread may trigger insurance coverage under multiple types of insurance policies.

Several types of insurance may provide coverage. They include:

- **Property Insurance:** Property insurance covers damage to or loss of property. Based on court decisions over the years, the presence of SARS-CoV-2 in premises or at a location may be deemed to constitute physical loss of or damage to property covered by property insurance policies. This means that if an insured suffers interruptions, or loss of business, because of the presence of SARS-CoV-2 somewhere else in the world, its property insurance policies may pay. In fact, property insurance policies may provide coverage when there are economic losses because of SARS-CoV-2 or COVID-19 outbreaks, quarantines, government orders interfering with operations, supply chains, or customers, or restrictions that make travel more difficult to events or that interfere with an insured’s ability to continue with planned events or deliver goods or services. Putting it simply, if an insured is suffering losses relating to SARS-CoV-2, COVID-19 or their effects, its property insurance may apply.
- **General Liability Insurance:** General liability insurance typically covers claims or suits for bodily injury, property damage, and various instances where the ability to use, occupy, or enjoy property is compromised. In many versions of this insurance, coverage also is afforded for claims of emotional distress. These policies may apply not just when claims are made or lawsuits are filed, but also to steps taken to reduce the possibility of exposure to SARS-CoV-2.
- **Workers Compensation and Employers’ Liability:** Workers compensation and employers’ liability typically provides coverage for “bodily injury by accident or bodily injury by disease.” This coverage may be implicated both by SARS-CoV-2 and COVID-19. It also may apply to the costs incurred to reduce employees’ exposure to SARS-CoV-2.

- **Event Cancellation and Cast Insurance:** Event Cancellation insurance covers losses caused by the cancellation or postponement of events because of insured risks. Cast insurance policies provide insurance if motion picture and television productions are affected by illnesses or injuries to cast members, or by the need to protect cast members from such illnesses and injuries. While many policies include potentially applicable exclusions or limitations, many exclusions will not apply so broadly as insurers may contend. This insurance may provide a valuable financial resource, particularly as cancellations mount.
- **Political Risk Insurance:** Political Risk insurance covers losses arising from the activities of foreign governments. One common type of political risk insurance protects against losses when contracts are “frustrated” by the laws, regulations, or orders of foreign governments when those laws, regulations, or orders (no matter how well-intentioned) interfere with contracts. Another provides coverage when a debtor is unable to pay its debt.
- **Employment Practices Liability Insurance:** Employment practices liability insurance covers the costs of defending and resolving employment-related lawsuits and claims. These policies may apply to lawsuits and claims alleging wrongful termination and discharge, wrongful demotion, discrimination, wrongful failure to adopt or enforce appropriate workplace policies and procedures, and wrongful failure to make the necessary accommodations for employees working from home. Such policies also might cover claims concerning the alleged failure to reimburse employees working from home for necessary business expenses, provide them with required meal and rest breaks, and otherwise comply with state and federal labor laws and requirements.
- **Directors and Officers Insurance:** Traditional directors and officers insurance (“Side A and B”) covers claims against directors and officers of a corporation for “wrongful acts” by the director or officer while acting in that capacity. In addition, many directors and officers policies have “Side C” coverage for specific types of claims (for example, securities claims) against the corporation itself. These policies generally do not obligate the insurer to defend the insured in the claims brought against it, but do obligate the insurer to pay defense costs. This insurance may cover shareholder derivative and other lawsuits against directors, officers and their corporations alleging violations of the securities laws, breaches of fiduciary duty or the duty of loyalty, or mismanagement in connection with the corporation’s response SARS-CoV-2, COVID-19, and associated events.
- **Cyber Insurance:** Cyber insurance covers losses and liabilities arising from cyber breaches and cybercrime. Specifically, cyber insurance can protect against losses such as: business and network interruption; cyberextortion; data breaches; invoice manipulation schemes; network security and privacy liability; phishing, spear phishing and whaling schemes; and ransomware attacks. Cyber criminals have exploited the current crisis, including the fact that many people are now

working at home, to gain access to corporate systems for nefarious purposes. They have also launched ransomware attacks on healthcare institutions focused on beating back COVID-19.

D. The Insurance Industry Response

Factors external to the policies could impact recovery. For example, multiple states are looking at requiring insurers to pay some business interruption losses, even if their policies do not otherwise obligate them to do so (we think that the constitutionality of such legislation will be challenged based on the contract clause).

Some insurance organizations have written to a House Committee, categorically saying, “Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19.”⁴ Various insurance companies have made similarly aggressive and categorical statements.⁵ Thus, myriad and lengthy courtroom battles should be anticipated.

Additionally, there is a serious question as to whether the insurance industry has the financial wherewithal to pay the totality of the likely claims. A recent *Washington Post* story reported that the insurance industry has \$822 billion in cash reserves.⁶ One leading insurer association has preliminarily estimated that

business continuity losses just for small businesses with 100 or fewer employees could fall between \$220-383 billion per month. The total surplus for all of the U.S. home, auto, and business insurers combined to pay all future losses is roughly only \$800 billion⁷

While many insurers already have said that many, most, or all of their policies will not pay such losses, to the extent that policies do pay, the reserves could be overwhelmed, leading to large-scale insurer insolvencies, liquidations, and reorganizations.⁸

⁴ March 18, 2020, Letter, American Property Casualty Insurance Association, The Council of Insurance Agents & Brokers, Big i Independent Insurance Agents & Brokers of America, and National Association of Mutual Insurance Companies to House Committee on Small Business.

⁵ See, e.g., March 25, 2020, letter, Travelers Casualty Insurance Company Of America to policyholders (“Nor does the policy provide coverage for cancellations, suspensions and shutdowns that are implemented to limit the spread of the coronavirus. There are not the result of direct physical loss or damage. Accordingly, business interruption losses resulting from these types of events do not present covered losses under our property coverage forms.”). While some policies may not provide coverage, we disagree with such broad unqualified disclaimers of coverage.

⁶ Todd Frankel, “Insurers knew the damage a viral pandemic could wreak on businesses. So they excluded coverage,” *Washington Post* (April 2, 2020).

⁷ American Property Casualty Insurance Association, “APCIA: Insurance Perspective on COVID-19” (March. 26, 2020), <http://www.pciaa.net/pciwebsite/cms/content/viewpage?sitePageId=59762>

⁸ Such events happened when insurers were faced with extensive asbestos and environmental liabilities and again after Hurricane Katrina.

There is also the possibility that the federal government will step in in some manner not yet known. It has done so in the past, although prospectively after losses (including as to flood insurance and terrorism insurance).

Therefore, there is considerable uncertainty as to the likelihood of recovery. Given the comparatively limited insurance industry financial capability (when measured against the magnitude of the economic loss), there is also some risk in not promptly pursuing claims on the theory that available insurance resources might go to those “first in line.”

II. OVERARCHING ISSUES

No matter the type of insurance, there are likely to be common issues that arise. Under property and liability policies, one question undoubtedly that will be raised is whether the presence of SARS-CoV-2 constitutes “property damage” or loss of use of property.

Another question that likely will be raised across all lines of coverage is whether an exclusion applies to bar coverage.

And, there will be a question of whether losses and expenses incurred to minimize or avoid an otherwise covered lawsuit or claim must be paid by an insurer.

We address each of these questions.

A. Is There Property Damage?

The insuring agreement in property policies typically requires that there be “physical loss or damage to property” or “direct physical loss or damage to property.” Liability policies typically cover claims or suits by third parties alleging damage to tangible property or loss of use of tangible property. Many insurers already have said that the presence of the coronavirus does not constitute the requisite damage or loss.

While the decisions are not uniform on this point, many courts have recognized that contamination of property may constitute direct physical loss or damage to property. *See, e.g., Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App’x 823, 826-27 (3d Cir. 2005) (insureds vacated property because well contaminated with e-coli bacteria; question of fact as to whether property was “made useless or uninhabitable” by the contamination); *Centennial Ins. Co. v. NE Pharmaceutical & Chem Co.*, 811 F.2d 1180, 1186 (1987) (“[t]he policies’ definition of ‘property damage’ as damage to ‘tangible property’ or ‘physical injury’ seems to contemplate damage to tangible property such as land, trees, air, and water”), *opinion on reh’g en banc*, 842 F.2d 977 (8th Cir. 1988); *Maryland Cas. Co. v. Wausau Chem. Corp.*, 809 F. Supp. 680, 693 (W.D. Wis. 1992) (“‘property damage’ includes contamination to natural resources such as ground water and soil and the cost of subsequent clean-up”); *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 842 (1990) (“contamination of the environment satisfies” the requirement of property damage). In fact, this point should not be controversial, given that insurers have acknowledged it in litigation. *See, e.g., Aetna Cas. & Sur. Co. v. Pintlar Co.*, 1948 F.2d 1507, 1514 (9th Cir. 1981) (“The insurers further concede that contamination of the soil and water by hazardous substances constitutes injury to property And an ordinary person would find that the

environmental contamination alleged . . . falls within the plain mean of ‘property damage’ as that term is used in policies.”).

The question, though, is whether the presence of SARS-CoV-2 inside the air of, or on surfaces in, a building or other structure constitutes damage to property. Many courts have recognized that contamination of airspace or surfaces inside a building can constitute physical loss or damage to property. Here are some of the many examples:

- *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.2d 399, 406 (1st Cir. 2009): odor from carpet and adhesive “can constitute physical injury to property.”
- *Farmers Ins. Co. v. Trutanich*, 123 Or. App. 6, 9-11 (1993): odor from methamphetamine “cooking” constituted “direct physical loss.”
- *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014): closure of facility because of accidentally released ammonia; while “structural alteration provides the most obvious sign of physical damage, . . . property can sustain physical loss or damage without experiencing structural alteration.”
- *Mellin v. N. Sec. Ins. Co.*, 167 N.H. 544, 550-51 (2015): cat urine odor inside condominium constitutes direct physical loss; “‘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.” . . . a property policy insures “physical loss changes to the insured property, but also changes that are perceived by a sense of smell” and ‘may exist in the absence of structural damage to the insured property.’”
- *Oregon Shakespeare Festival Ass’n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *9 (D. Ore. June 7, 2016): “smoke infiltration in theatre caused direct property loss or damage by causing the property to be uninhabitable and unusable for its intended purpose.”
- *Sentinel Mgt. Co. v. Aetna Cas. & Sur. Co.*, 1999 WL 540466, at *7 (Minn. Ct. App. July 27, 1999): “If rental property is contaminated by asbestos fibers and presents a health hazard to tenants, its function is seriously impaired.”
- *Sentinel Mgt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997): “Although asbestos contamination does not result in tangible injury to the physical structure of a building, a building’s function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants. . . . Under these circumstances, we must conclude that contamination by asbestos may constitute a direct, physical loss to property under an all-risk insurance policy.”

- *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 39-40 (1968): direct physical loss when gasoline contaminated church building making it dangerous to use.

See K. Pasich, G. Warner & L. Smith, "Insurance Coverage For Hazardous Substances In The Airspace of Buildings," 10 *Mealey's Litig. Rpts: Insurance* No. 1, at 21 (Nov. 1, 1995) (discussing development of law that airspace is property that can be damaged by presence of hazardous substances).

B. Do Any Exclusions Apply?

The insurance industry has long known of the possibility of the impact of viruses and pandemics. In fact, ISO, the insurance industry's drafting organization, promulgated a standard-form virus exclusion **in 2006**. See "Exclusion of Loss Due to Virus or Bacteria," CP 01 40 07 06 (ISO Properties, Inc. 2006) ("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.").

In fact, it has been widely reported that insurers have long known the dangers of a broad-scale event, with many insurers adding the ISO standard exclusion or some other variant so they would not have to pay such losses. See, e.g., Todd C. Frankel, "Insurers knew the damage a viral pandemic could wreak on businesses. So they excluded coverage," *The Washington Post* (Apr. 2, 2020).⁹ In fact, there were many publicly available reports about the risks of pandemics and what insurers should do well before the SARS-CoV-2 outbreak. See, e.g., "What the 1918 Flu Pandemic Can Teach Today's Insurers," *AIR* (Mar. 29, 2018) ("Even with today's technology, a modern severe pandemic would cause substantive direct financial losses to the insurance community. In addition, indirect losses would be severe, most notably on the asset side of the balance sheet.").¹⁰

1. The Rules Governing the Interpretation of Exclusions

Insurers have asserted that various exclusions may apply to bar coverage, including pollution and contamination exclusions, as well as exclusions for viruses, communicable diseases, microorganisms, and pathogens. Exclusions must be carefully reviewed to determine whether they apply. However, the rules governing the interpretation of exclusions generally are very favorable to insureds. These are the general rules.

a. Exclusions must be conspicuous, plain, clear, and understandable.

"A restriction on coverage is not sufficiently conspicuous unless it is "positioned in a place and printed in a form which would attract a reader's attention." *Ponder v. Blue Cross*, 145

⁹ <https://www.washingtonpost.com/business/2020/04/02/insurers-knew-damage-viral-pandemic-could-wreak-businesses-so-they-excluded-coverage/>.

¹⁰ <https://www.air-worldwide.com/publications/air-currents/2018/What-the-1918-Flu-Pandemic-Can-Teach-Today-s-Insurers/> (visited April 19, 2020).

Cal. App. 3d 709, 719 (1983). An exclusion "must also be plain and clear in order to be given effect." *Travelers Prop. Cas. Co. v. Superior Court*, 215 Cal. App. 4th 561, 575 (2013). *See also State Farm Fire & Cas. Ins. Co. v. Deni Assoc. of Florida, Inc.*, 678 So. 2d 397, 401 (Fla. 4th DCA 1996) ("strict construction is required of exclusionary clauses in insurance contracts only in the sense that the insurer is required to make clear precisely what is excluded from coverage"); *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 311 (1984) ("whenever an insurer wishes to exclude certain coverage from its policy obligations, it must do so 'in clear and unmistakable' language"). In fact, the California Supreme Court has "declared time and again 'any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.'" *Haynes v. Farmers Ins. Exch.*, 32 Cal. 4th 1198, 1204 (2004). "This means more than the traditional requirement that the contract terms be 'unambiguous.' Precision is not enough. Understandability is also required." *Id.* at 1211. Thus, an exclusion is subject to the "closest possibility scrutiny." *Id.* at 1212.

b. Exclusions will be strictly construed against the insurer.

"[C]overage exclusions and limitations are 'strictly construed against the insurer and liberally interpreted in favor of the insured.' Similarly, exceptions to exclusions are construed broadly in favor of the insured. . . . '[T]he burden rests upon the insurer to phrase exceptions and exclusions in clear and unmistakable language.'" *Meraz v. Farmers Ins. Exch.*, 92 Cal. App. 4th 321, 324 (2001); *see also Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1032 (9th Cir. 2008) ("California law requires us to adopt a narrow construction" of an exclusion; holding that field of entertainment exclusion does not excuse insurer from duty to defend suit brought against two members of The Doors by another member for infringing trademark, name, and logo); *Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co.*, 12 N.Y.3d 302, 306 (2009); *Demshar v. AAA Con Auto Transport, Inc.*, 337 So.2d 963, 965 (Fla. 1976) ("Exclusionary clauses in liability insurance policies are always strictly construed."); *Pekin Ins. Co. v. Miller*, 367 Ill. App. 3d 263, 267 (2006) ("Exclusion provisions that limit or exclude coverage must be construed liberally in favor of the insured and against the insurer.").

c. An insurer's interpretation should not be accepted if clearer language is available in the marketplace.

In assessing the scope of an exclusion, courts consider other language available in the marketplace and elsewhere in the insurance policy. "[S]everal courts have observed an insurance company's failure to use available language to exclude certain types of liability gives rise to the inference that the parties intended not to so limit coverage." *Fireman's Fund Ins. Co. v. Atlantic Richfield Co.*, 94 Cal. App. 4th 842, 852 (2001). Thus, if an insurer chooses "not to include limiting language," then the words it uses will not "support [the insurer's] position regarding an intent to limit coverage." *Id.*

Indeed, the California Supreme Court has applied this principle in invalidating exclusions. For example, in *Safeco Insurance Co. of America v. Robert S.*, 26 Cal. 4th 758 (2001), the court addressed an exclusion for "any illegal act." The insurer argued that the exclusion should be interpreted to bar coverage only for violations of criminal law. The court rejected this argument, stating:

Had Safeco wanted to exclude criminal acts from coverage, it could have easily done so. Insurers commonly insert an exclusion for criminal acts in their liability policies Because Safeco chose not to have a criminal act exclusion, instead opting for an illegal act exclusion, we cannot read into the policy what Safeco has omitted. To do so would violate the fundamental principle that in interpreting contracts, including insurance contracts, courts are not to insert what has been omitted.

Id. at 763-64. In so holding, the court reaffirmed that policies should not be interpreted in a fashion that renders coverage illusory. *Id.* at 765.

Therefore, the proliferation of differently worded exclusions will undermine an insurer's argument that its exclusion applies—unless its exclusion is the plainest and clearest in the marketplace:

In determining the meaning of an ambiguous term, it is appropriate to consider the difficulty of redrafting the insurance policy to more plainly express the meaning urged by the drafting party, ordinarily the insurer, taking into account that some residual risk of ambiguity is to be expected. The easier it would be for the drafter to state that meaning more plainly, the more likely it is that the other party's proposed meaning is the meaning that a reasonable policyholder would give to the term. This approach creates an incentive for insurers to draft insurance policy terms that provide clear guidance regarding the scope of the risks insured under their policies.

Restatement of the Law, Liability Insurance § 4, Comment k, at 40 (Am. Law. Inst. 2018).

d. Even if the insurer's interpretation of an exclusion is the most reasonable interpretation, it should not be adopted if the insured has a reasonable interpretation.

When there is a dispute over the meaning of an ambiguous exclusion, an insurer cannot prevail unless it demonstrates that its interpretation is the only reasonable interpretation. In *MacKinnon v. Truck Insurance Exchange*, 31 Cal. 4th 635 (2003), the court addressed the scope of a pollution exclusion. The insurer argued that the exclusion applied to a claim that a building tenant had died from exposure to pesticide applied at the building. The court disagreed, stating once again that insurance coverage provisions are “‘interpreted broadly so as to afford the greatest possible protection to the insured, [whereas] . . . exclusionary clauses are interpreted narrowly against the insurer.’” The court explained that the rule applies “with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded.” *Id.* at 648.

The court emphasized that “even if [an insurer's] interpretation is considered reasonable, it would still not prevail, for in order to do so it would have to establish that its

interpretation is the only reasonable one.” *Id.* at 655. See *Ticketmaster, LLC v. Illinois Union Ins. Co.*, 524 F. App’x 329, 331-32 (9th Cir. 2013) (fee exclusion does not apply to class action lawsuit regarding false representations regarding delivery fees and order-processing charges because insurer “failed to satisfy its burden of showing that . . . its interpretation of [the exclusion] is the *only* reasonable one”); *Mount Vernon Fire Ins. Co. v. Belize N.Y., Inc.*, 277 F.3d 232, 237 (2d Cir. 2002) (“With respect to exclusions from coverage, the same must be set forth clearly and unmistakably, not be subject to any other reasonable interpretation, and fit the particular case.”); *State Farm Mut. Auto. Ins. Co. v. Jacober*, 10 Cal. 3d 193, 202-03 (1973) (“even assuming that the insurer’s suggestions are reasonable interpretations which would bar recovery by the claimants, we must nonetheless affirm the trial court’s finding of coverage so long as there is any other reasonable interpretation under which recovery would be permitted in the instant cases”); *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 311 (insurer has the burden to show that an exclusion is “subject to no other reasonable interpretation”); *Restatement* § 4, Comment a, at 33 (“All that is required is that the language of the policy be reasonably susceptible to the coverage-promoting interpretation urged by the insured.”).

Thus, in assessing exclusions, it is important to consider whether all of the requirements for the application of an exclusion are satisfied. If an exclusion is conspicuously placed in a policy, the inquiry does not end there. If other language is available in the policy, other policies, or the marketplace that more clearly states a purported exclusion, then the exclusion in question should not be read as if it contained that language. To be enforced, the language must be clear and unmistakable. And, as the courts have recognized, if the language is susceptible to more than one reasonable interpretation, then it matters not if the insurer’s interpretation is a reasonable one.

2. Is the Cause Excluded or Not?

Even if an exclusion appears to bar coverage, it may not necessarily do so if other perils or causes may be more directly response for the loss.

a. Causation under Property Insurance Policies

For example, two New York courts grappled with this issue under property insurance policies. In *Throgs Neck Bagels, Inc. v. GA Insurance Co.*, 671 N.Y.S.2d 66 (1998), a fire damaged three stores located in the building containing a bagel shop. The bagel shop itself was not damaged. However, the Department of Buildings issued a “vacate” order. Thereafter, the landlord canceled the bagel shop’s lease. The bagel shop then sought coverage for its losses under its fire insurance policy. The insurer denied coverage, citing an exclusion for loss caused “directly or indirectly” by the enforcement of any ordinance or law. The court rejected the insurer’s argument. It explained:

In reality, the order served merely as a confirmation of the circumstances regarding the actual cause of the loss, i.e., the fact that the premises had been structurally unsound and unfit for continued use as a result of the fire. It cannot logically be claimed that [the bagel shop] would not have vacated a building rendered structurally

unsound but for an order from the Department of Buildings. On the contrary, when the order was served, the need to vacate the premises and all the immediate and consequential losses stemming from the fire and explosion, both direct and indirect, had already been “caused”.

Id. at 69-70 (citations omitted). As the court further explained:

To construe the exclusion in the manner urged by defendant insurer would be to render the underlying coverage nugatory in a host of cases where it should reasonably be expected to apply. The Department of Buildings or other governmental agency could be expected to frequently issue various orders and decrees in response to the consequences of any catastrophic event affecting public safety, and an insurer could avoid coverage by simply claiming that such an order was one of the “causes” of the loss. Indeed, to apply defendant’s interpretation here would mean that even if plaintiff’s store had been one of those that had been completely destroyed by the fire, defendant could have declined coverage on the identical ground that the issuance of the vacate order was a concurrent “cause” of the loss. To hold that the . . . exclusion applies under circumstances such as here present would be an unreasonable construction that would frustrate the underlying purpose of the policy.

Id.

However, a different result was reached in *Massi’s Greenhouses, Inc. v. Farm Family Mutual Insurance Co.*, 233 A.D.2d 844, 844 (N.Y. Sup. Ct. App. Div. 1996). There, the insured’s greenhouse was contaminated by bacteria. A quarantine order was issued. The insured sought coverage for its clean-up costs and lost business. The insurer denied coverage, relying on an exclusion for losses caused by orders of civil authority. The court held that it was question of fact whether the losses were caused by quarantine or by bacterial contamination.

California has characterized the question under first-party insurance, such as property insurance policies, as follows:

[C]overage would not exist if the covered risk was simply a *remote* cause of the loss, or if an excluded risk was the efficient proximate (meaning predominant) cause of the loss. On the other hand, the fact that an excluded risk contributed to the loss would not preclude coverage if such a risk was a remote cause of the loss

Garvey v. State Farm Fire & Cas. Co., 48 Cal. 3d 395, 402-03 (1989).

b. Causation under Liability Policies

The approach under liability policies typically is different. Courts tend to look at whether two concurrent causes exist. If so, there may be coverage even when one of those causes is excluded. One of the leading decisions is *State Farm Mutual Automobile Insurance Co. v. Partridge*, 10 Cal. 3d 94 (1973). In this case, State Farm had sold the insured an automobile policy and a homeowner's policy. The first covered liability arising out of the use of a motor vehicle, while the homeowner's policy excluded liability arising out of the use of a motor vehicle. The insured had filed the trigger on a pistol to it would have a "hair-trigger" reaction. He and some friends went out driving, intending to shoot rabbits from an SUV. In pursuit of one rabbit, he drove off the road. The pistol discharged, seriously injuring a passenger. The insurer acknowledge coverage under the automobile policy, but denied coverage under the homeowner's policy, pointing to the exclusion.

The California Supreme Court rejected the insurer's position. It explained:

[A]lthough the language in the two policies is substantially similar, past authorities have made it abundantly clear that an entirely different rule of construction applies to exclusionary clauses as distinguished from coverage clauses. Whereas coverage clauses are interpreted broadly so as to afford the greatest possible protection to the exclusionary clauses are interpreted narrowly against the insurer. . . .

In view of the above approach the fact that an accident has been found to 'arise out of the use' of a vehicle for purposes of an automobile policy is not necessarily determinative of the question of whether that same accident falls within a similarly worded exclusionary clause of a homeowner's policy.

Id. at 101-02. However, the did not rely on these rules in rendering its decision. Instead, it held:

Here the "use" of [the insured's] car was not the sole cause of [the passenger's] injuries but was only one of two joint causes of the accident. Thus, even if we assume that the connection of the car with the accident is the type of non-ambiguous causal relationship which would normally bring the exclusionary clause into play, the crucial question presented is whether a liability insurance policy provides coverage for an accident caused jointly by an insured risk (the negligent filing of the trigger mechanism) and by an excluded risk (the negligent driving). [The insureds] correctly contend that when two such risks constitute concurrent proximate causes of an accident, the insurer is liable so long as one of the causes is covered by the policy.

Id. at 102.

In dealing with losses and claims associated with SARS-CoV-2 and COVID-19, there are myriad potential causes—some as part of the causal chain and some independent. Possible causes of loss include:

- The actions or failures to act by various governments and organizations (after all, the prior outbreaks of SARS, MERS, and Ebola did not cause the losses associated with SARS-CoV-2 and COVID-19);
- SARS-CoV-2 (arguably not a communicable disease, contaminant, microorganism, or pollutant within the scope of some common exclusions);
- COVID-19 (not a virus, so arguably not subject to a virus exclusion, and apparently not a communicable disease, so arguably not subject to a “communicable disease” exclusion);
- Orders of civil authority; and
- The lack of capacity in our medical system (such as lack of ventilators and hospital beds) and the attempt to “flatten the curve” (after all, neither SARS-CoV-2 and COVID-19 has vanished, yet closure and “stay-in” orders are being lifted).

Therefore, all possible causes should be considered in assessing coverage.

3. **Examples of Exclusions**

There are myriad types of exclusions and myriad variations in the language of those exclusions. Insureds should not assume that just because a policy may have an exclusion that arguably might apply that it does, in fact, apply to bar coverage. It will depend on what the exclusion actually says, and whether its limitations are plain and clearly understood.

For example, a pollution exclusion might not apply because (i) such exclusions usually, but not always, are deemed to apply only to environmental pollution, and (ii) the coronavirus typically would not be viewed to be “pollutant” in the context of an exclusion. For example, in *Pasternostro v. Choice Hotel International Services Corp.*, 2014 WL 6460844, at *14 (E.D. La. Nov. 14, 2014), the court held that a pollution exclusion does not apply to bacteria *Legionella* and *Pseudomonas aeruginosa*. Its reasoning provides guidance here:

[T]he bacteria *Legionella* and *Pseudomonas aeruginosa* do not qualify as pollutants. The nature of these microbial agents are bacteria, not pollutants as is “generally understood.” These bacteria are significantly different than a typical environmental pollutant and are also distinguishable from other common “pollutants” such as asbestos, carbon monoxide, gasoline, and lead paint. Rather, these bacteria are simply microorganisms existing in a natural environment. Finally, they do not discharge, dispers[e], seep[], migrat[e] in the manner a typical pollutant does.

Id. at *14 (citation omitted). See also *Western Alliance Ins. Co. v. Gill*, 426 Mass. 115, 119-20 (1997) (pollution exclusion does not bar coverage for claims alleging injury from carbon monoxide exposure inside restaurant; “The insureds purchased the general liability policy to protect against potential premises and operations hazards that could arise while conducting a restaurant business. A reasonable insured would not expect a pollution exclusion to abrogate this coverage.”).

The Insurance Services Office (“ISO”), which drafts standard-form language for the insurance industry, promulgated an “Exclusion of Loss Due to Virus or Bacterium” in 2006. It states in relevant part:

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 of disease.

Form CP 01 40 07 06 (ISO Properties, Inc. 2006). However, it was designed only for property insurance policies. Furthermore, on its face, it does not bar coverage for loss caused by disease. Even though the exclusion has been available for more than a decade, many policies do not contain in. Therefore, whatever the scope of this exclusion, if a policy does not include an exclusion expressly mentioning a virus, the insurer may be precluded from arguing that its more generic, less specific exclusions apply to bar coverage for any virus-caused loss.

Likewise, a communicable disease exclusion will not necessarily apply to bar coverage. For example, one version of a communicable disease exclusion reads as follows:

This Insurance does not cover any loss directly or indirectly arising out of, contributed to by, or resulting from any loss, expense or liability directly or indirectly arising out of, attributable to or resulting from Severe Acute Respiratory Syndrome (SARS) and/or Atypical Pneumonia and/or Avian Flu and/or Swine Flu and/or any other flu variant recognized as a pandemic, whether phase 1,2,3,4,5 or 6 as determined by the World Health Organization.¹¹

For this exclusion to apply, the insurer would have to prove several things. First, it would have to prove that SARS-CoV-2 is the “SARS” referenced, Atypical Pneumonia, Avian Flu, Swine Flu, or a flu variant. It is not. The Centers for Disease Control have stated: “The recently emerged 2019-nCoV is not the same as the coronavirus that causes Middle East Respiratory Syndrome (MERS) or the coronavirus that causes Severe Acute Respiratory Syndrome (SARS).”¹² Furthermore, this exclusion should not apply to any loss arising, or caused, before any determination by the World Health Organization that SARS-CoV-2 is a “pandemic.”¹³ Therefore, on a reasonable and narrow reading of this form of the communicable disease

¹¹ Lloyd’s Policy Wording, GC(NAC) (U.S.A. & Canada) NMA 2746 (amended Jan. 24, 2017).

¹² <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>

¹³ <https://www.bbc.com/news/world-asia-china-51368873>

exclusion, as required under the tenets of contract interpretation, coverage may still be available.

Other forms of communicable disease exclusions may be broader. For example, one states:

This insurance excludes any loss directly or indirectly arising out of, contributed to by, or resulting from:

- (a) any infectious or communicable disease in humans or animals that leads to:
 - i) the imposition of quarantine or restriction in movement of people or animals by any national or international body or agency; and/or
 - ii) any travel advisory or warning being issued by a national or international body or agency
- (b) Swine Flu A (H1N1) or any mutation or variation thereof;
- (c) any threat or fear of any infectious or communicable disease in humans or animals (which for the avoidance of doubt includes Swine Flu A (H1N1) or any mutation or variation thereof), whether actual or perceived.¹⁴

Even with this type of exclusion, as noted above, SARS-CoV-2 is officially categorized as a virus, not as a disease. Therefore, an exclusion that applies only to a “disease” may not apply to quarantines, travel restrictions, or other losses from SARS-CoV-2. There is also a question as to whether COVID-19 is a communicable disease. If it is not, then the exclusion may not apply in any event. *See Pasternostro*, 2014 WL 6460844 at *16 (denying insurer’s motion to dismiss based on communicable disease exclusion because insurer had not shown that *Legionella* and *Pseudomonas aeruginosa* are communicable diseases).

Additionally, as also noted above, policy language is to be interpreted from a layperson’s perspective. Thus, even if WHO classifies COVID-19 as a “disease,” that does not mean that the term “disease” in a policy exclusion would be interpreted the same way.

Given these variations in language, all potentially applicable policies should be carefully reviewed. Because the “devil is in the details,” an insured should not assume that a policy exclusion applies, or that coverage might not be afforded for some other reason. While not all policies will provide coverage, some, and perhaps many, will—and that coverage should not be overlooked.

¹⁴ See Beazley Policy Wording, available at <https://www.yumpu.com/en/document/read/50184246/beazley-event-cancellation-wordingpdf>

C. The Impact of Loss Prevention Provisions and the Mitigation Doctrine

1. Property Insurance

Property insurers and other first-party insurers typically are obligated to pay for the expenses their insureds incur in trying to reduce or mitigate loss that might be covered by a policy. Typically, reasonable costs of mitigation efforts are covered, even if it turns out that those expenses exceeded what the loss otherwise might have been. This coverage commonly applies when, for example, an insured boards up its windows to prevent damage. The insured is entitled to reimbursement for these costs regardless of whether the covered property suffers damage from a covered peril. *Cf. Royal Indem. Co. v. Grunberg*, 553 N.Y.S.2d 527, 529 (App. Div. 1990) (an insured entitled to coverage under its homeowners policy for expenses incurred to prevent imminent collapse of home because “the policy places an affirmative duty on the insured to maintain and repair all covered property in the event of any loss”). *See also Zurich Ins. Co. v. Pateman*, 692 F. Supp. 371, 376 (D. N.J. 1987) (“Under this provision the underwriter is liable for all costs expended by the insured in preventing or ameliorating a loss which the underwriter would be required to pay.”).

The “prevention of loss” clause may be regarded as a distinct type of coverage supplementing a property insurance policy. The clause is designed to protect the insurer’s interest by reducing and mitigating the risk of damage from a covered loss. Accordingly, deductibles applicable to other types of coverage provided by the policy should not apply to the “sue and labor” coverage, and the insured should receive full reimbursement from the insurer for these expenses. *See, e.g., Am. Home Assurance Co. v. J. F. Shea Co.*, 445 F. Supp. 365, 369-70 (D.D.C. 1978) (deductible does not apply to sue and labor coverage because it would be “inconsistent to place an affirmative obligation of this nature on the insureds for the benefit of the insurer and then additionally . . . require the insureds to pay for the first [portion] of the cost in providing this benefit.”). *See also Western & Clay v. Landmark Am. Ins. Co.*, 2011 WL 321740, *4 (W.D. Wash. Jan. 28, 2011) (adopting *Shea*). For the same reason, amounts paid under “sue and labor” clauses will generally not count against an insured’s policy limits, barring policy language to the contrary. *See generally M. J. Rudolph Corp. v. Lumber Mut. Fire Ins. Co.*, 371 F. Supp. 1325, 1327 (E.D.N.Y. 1974).

Even absent a “sue and labor” or “prevention of loss” clause in its property policy, an insured may be able to rely on the common law of mitigation of damages or loss to recover costs incurred to avoid insured losses. Courts long have recognized that if an insured takes steps to prevent or minimize damage to covered property, its insurer should pay. *See, e.g., Slay Warehousing Co. v. Reliance Ins. Co.*, 471 F.2d 1364, 1367-68 (8th Cir. 1973) (“[T]he obligation to pay the expenses of protecting the exposed property may arise from either the insurance agreement itself or an implied duty under the policy contract based upon general principles of law and equity” (citations omitted)); *Winkler v. Great Am. Ins. Co.*, 447 F. Supp. 135, 142 (E.D.N.Y. 1978) (if insured had raised his house to avoid flood damage, insurer would have to pay expenses because “the duty to protect the property from further damage implies a responsibility on the insurer’s part to pay for the costs of reasonable protective measures”); *see also McNeilab, Inc. v. N. River Ins. Co.*, 645 F. Supp. 525, 551 (D.N.J. 1986) (“[I]n cases where an insured takes steps to minimize the harm already incurred, the insured is lessening an already

vested damage recovery right and is, therefore, entitled to reimbursement for its reasonable expenses from its insurer.”).

2. Liability Insurance

Many insureds have taken or are taking steps to prevent or reduce the chances that third parties or its own employees are exposed to SARS-CoV-2. These steps include closing venues and stores, evacuating media outlet facilities, relocating some operations, cancelling events, and telling employees to work from home or restrict travel. The expenses incurred may be covered under liability policies, even though liability policies often do not contain policy terms requiring mitigation of damages.

Insureds nonetheless have common law duties to mitigate damages under such policies. Further, courts have held that insurers are required to reimburse insureds for expenses incurred by mitigating threatened covered damage before any damage has occurred. For example, in *Globe Indemnity v. California*, 43 Cal. App. 3d 745 (1974), the court held that fire suppression costs incurred to prevent a fire from spreading from an insured’s own property to a third person’s property were covered as “sums which the insured became legally obligated to pay as damages because of . . . property damage[.]” *Id.* at 748. The court further held that it could not

conceive as a reasonable rule of law that which would encourage an insured property owner not to report that neighboring property was being destroyed by reason of his negligence in permitting a fire to escape from his property because his insurance would cover him for the property damage but not for the fire suppression costs.

Id. at 751.

Other courts have made the same point. For example, one court commented 60 years ago:

It is folly to argue that if a policy owner does nothing and thereby permits the piling up of mountainous claims at the eventual expense of the insurance carrier, he will be held harmless of all liability, but if he makes a reasonable expenditure and prevents a catastrophe, he must do so at his own cost and expense.

Leebov v. United States Fid. & Guar. Co., 401 Pa. 477, 481 (1960). *See also AIU v. Superior Court*, 51 Cal. 3d 807, 833 (1990) (environmental response costs “incurred largely to prevent damage previously confined to the insured’s property from spreading to government or third party property . . . are ‘mitigative’ in nature . . . [and] constitute[] ‘damages’”); *Watts Indus., Inc. v. Zurich Am. Ins. Co.*, 121 Cal. App. 4th 1029, 1043 (2004) (removal of parts to stop leaching of lead into water supply “fits within a reasonable definition of both remediation and mitigation, even though it does not involve impounding and purifying water already contaminated”); *Hakim v. Mass. Insurers’ Insolvency Fund*, 424 Mass. 275, 280 (1997)

(“where, as here, there was contamination of adjacent property, the costs of remedial efforts to prevent further contamination of that property are not excluded from coverage by the owned property exclusion”).

D. Insurers’ Changes in Policy Terms upon Renewal

In response to notices regarding SARS-CoV-2 and COVID-19, many insurers have cited exclusions purporting to bar coverage for viruses, communicable diseases, pathogens, and the like. Regardless of the scope of such exclusions, they might not be enforceable.

Indeed, many of the more common virus, communicable disease, and pathogen exclusions were first incorporated into insurance policies in the last decade or so—and in some cases, even more recently than that. Given that businesses frequently purchase coverage from the same insurers for long periods of time, an insured initially may have been sold a policy by its current insurer that did not contain the virus, communicable disease, or pathogen exclusion now being invoked. In that case, the exclusion necessarily was introduced in one of the insured’s renewal policies—meaning that, unless the insurer can demonstrate that it satisfied all requirements when adding the exclusion, it may now be unenforceable.

Most states require that an insurer tell its insured if it intends not to renew coverage or to add new exclusions or limitations upon renewal. For example, the California Insurance Code states:

An insurer, at least 60 days, but not more than 120 days, in advance of the end of the policy period, shall give notice of nonrenewal, and the reasons for nonrenewal, if the insurer intends not to renew the policy, or to condition renewal upon reduction of limits, elimination of coverages, increase in deductibles, or increase of more than 25 percent in the rate upon which the premium is based.

Cal. Ins. Code § 678.1.

Many courts also have required insurers to highlight any reductions in coverage when renewing policies. For instance, in a 1949 decision, the California Supreme Court confirmed that when an insurer agrees to renew an expiring policy, “no change may be made in the terms of the renewal policy without notice to the insured.” *Industrial Indem. Co. v. Indus. Acc. Comm’n.*, 34 Cal. 2d 500, 506 (1949). *See also Zito v. Fireman’s Ins. Co.*, 36 Cal. App. 3d 277, (1973) (“an insurer, when renewing a policy, may not change the terms of the policy without first notifying the insured”). Thus, whenever an insurer incorporates an exclusion into a renewal policy, it is obligated at that time to notify its insured of the change and of any reduction in coverage. Such notice, as with all notices from insurers, must be “conspicuous, plain, and clear.” *Allstate Ins. Co. v. Fibus*, 855 F.2d 660, 663 (9th Cir. 1988).

In this regard, California courts have held renewing insurers to high standards when evaluating the adequacy of notice to their insureds. As these courts have confirmed, the notices must clearly, conspicuously, and plainly highlight the specific changes and reductions

in coverage. See *Davis v. United Servs. Auto. Ass'n*, 223 Cal. App. 3d 1322, 1332 (1990) (the law “requires notice of the *specific* reduction in coverage”); *Sorensen v. Farmers Ins. Exch.*, 56 Cal. App. 3d 328, 334 (1976) (when insurer reduces coverage in a renewal policy, insured may reasonably expect “some form of specific notice (probably separate from the policy) that would direct his attention to or acquaint him with the change”). General admonitions to “read the policy for changes” are, thus, insufficient. See; see also *Casey v. Metro. Life Ins. Co.*, 688 F. Supp. 2d 1086, 1095–1096 (E.D. Cal. 2010) (warning to insured to “read your entire policy carefully” not effective notice of changes in renewal policy).

Importantly, when an insurer fails to highlight and sufficiently explain reductions in coverage in renewal policies, the changes are void and unenforceable. As one court put it, “[i]t is a long-standing general principle applicable to insurance policies that an insurance company is bound by a greater coverage in an earlier policy when a renewal policy is issued but the insured is not notified of the specific reduction in coverage.” *Fields v. Blue Shield*, 163 Cal. App. 3d 570, 579 (1985).

Thus, when pursuing coverage for losses associated with SARS-CoV-2 and COVID-19 and the subsequent events, insureds should not automatically presume that virus, communicable disease, and pathogen exclusions in their policies, whether just added or added earlier, are valid and enforceable. It is possible that such exclusions were introduced into renewal policies years ago by insurers that, contrary to governing statutory and case law, failed to highlight the changes and adequately explain them to their insureds. If that is indeed the case, then such exclusions may be unenforceable.

III. PROPERTY INSURANCE

Property insurance typically covers loss or damage to property. A key to accessing property insurance is understanding that coverage may be afforded even if there is no structural damage to property or there is no “loss” of property in the sense of property being destroyed or vanishing. Simply put, the mere presence of SARS-CoV-2 may constitute insured loss of or damage to property and may trigger coverage for economic losses far away for any SARS-CoV-2 outbreak. This fact may be critical because estimates are that SARS-CoV-2 can last in the air for a short time, but could last for several days on hard and soft surfaces. As a result, the so-called “time element” coverages found in most property insurance policies can be invaluable. These coverages protect the insured against revenue or income loss—not only from physical loss or damage to their own property, but from losses caused by events elsewhere. These extended forms of insurance may provide substantial protection against losses associated with SARS-CoV-2, even if those losses arise from events far across the world.

A. Business Interruption Insurance

“Business Interruption” coverage reimburses the insured for the amount of gross earnings minus normal expenses that the insured would have earned but for the interruption of the insured’s business (that is, its profits). As one court has described it:

Business Interruption insurance is insurance under which the insured is protected in the *earnings* which insured would have enjoyed had there been no interruption of business.” In other words, Business Interruption insurance protects earnings that are lost or diminished because of a business interruption.

Archer-Daniels-Midland Co. v. Phoenix Assurance Co., 975 F. Supp. 1124, 1128 (S.D. Ill. 1997) (citation omitted).

Business interruption coverage provisions typically apply even when an insured is forced to relocate in order to keep its business going or to minimize its overall loss. *See, e.g., American Med. Imaging Corp. v. St. Paul Fire & Marine Ins. Co.*, 949 F.2d 690, 692-93 (3d Cir. 1991) (insured reopened at an alternate location, but earned less than it otherwise would have; carrier obligated to indemnify insured while business continued at less-than-normal level).

B. Coverage with Excluded Damage, or Damage to Uninsured Property

Even if there has been physical injury to tangible property, insurers still may deny coverage if the physical injury was not covered, or if the property did not belong to the insured. Depending on the policy language involved, they may be wrong. For example, in *Burdett Oxygen Co. v. Employers Surplus Lines Insurance Co.*, 419 F.2d 247 (6th Cir. 1969), the insured’s property was damaged when a machine broke down. The physical injury to the machine was excluded from coverage by a “Mechanical Breakdown” exclusion. However, the Sixth Circuit held that the business interruption and extra expense were covered. The court pointed out that the insurer “could have drawn up a policy unambiguously conditioning recovery for business interruptions solely upon the occurrence of insured property damage.” *Id.* at 250. But, it did not do so. As a result, the policy did not “unambiguously condition recovery on the presence of insured property damage” *Id.*

C. Coverage for “Restoration” or “Extended Period of Indemnity”

When an insured ceases business activity and thereafter resumes operations to the extent possible, business interruption insurance ordinarily extends to cover the resumption period until business returns to normal.

For example, in *Lexington Insurance Co. v. Island Recreational Development Corp.*, 706 S.W.2d 754 (Tex. App. 1986), the insured owned a restaurant that was severely damaged in a storm. Once the restaurant reopened, it did not return to the same volume of business for another nine months. The insured sought to recover not only for the time it was closed, but also for the time it took to return to its prior business volume. The court broadly interpreted the policy to protect the reasonable expectations of the insured. Because the insurance policy did not explicitly exclude the period of recovery after resumption of operation, the court held that the insured was entitled to recover for the loss it suffered during its closure and also during the months that followed until it recovered its lost business volume. *Id.* at 755-56.

Coverage also should be afforded for the period from when the insured resumes business until its business returns to normal (subject, of course, to any applicable time or monetary limits in the policy). For example, in *American Medical Imaging Corp. v. St. Paul Fire & Marine Insurance Co.*, 949 F.2d 690 (3d Cir. 1991), fire damage rendered the insured's ultrasound headquarters unusable. The insured's business interruption insurance covered "necessary or potential suspension" of operations. It also required the insured to reduce its loss, if possible, by "resuming operations." The insurer was obligated to indemnify the insured until it returned to "normal business operations." Rather than suffer the extensive losses that a lengthy complete closure of its business would have entailed, and in compliance with the mitigation requirements of the policy, the insured reopened as quickly as possible at an alternate location. As a result, the insured incurred extra expenses and earned less than it otherwise would have. The court pointed out that barring recovery of the insured's loss of earnings and extra expenses, when the insured had done no more than attempt to minimize its losses, would have the undesirable effect of giving the insured no motivation to mitigate. *Id.* at 692. It held that the plain language of the policy requiring the insurer to indemnify the insured until it returned to "normal business operations" necessarily implied that the insurer was obligated to indemnify the insured while business continued, albeit at a less-than-normal level. *Id.* at 693.

D. Civil Authority and Ingress/Egress Insurance

It long has been recognized that a government or other civil authority has the power to quarantine people that may have been exposed to infectious diseases. *See, e.g., Ex Parte Dillion*, 44 Cal. App. 239, 244 (1919) ("Where sufficient reasonable cause exists to believe that a person is afflicted with a quarantinable disease, . . . and if quarantining is found to be justifiable, such quarantine measures may be resorted to only as are reasonably necessary to protect the public health, remembering that the persons so affected are to be treated as patients, and not as criminals."); *Hickox v. Christie*, 205 F. Supp. 3d 579 (D.N.J. 2016) (nurse's quarantine after return from Africa where she had been caring for Ebola patients did not violate law regarding quarantine and related health measures).

For those companies with business interests in areas where access or travel has been hindered or prohibited, insurance relief may be available.

Many insurance policies, including the standard ISO Form for Business Income (and Extra Expense) Coverage, provide coverage for "Civil Authority" losses. One iteration of the Form requires the insurer to

pay for the actual loss of Business income [the insured sustains] and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.¹⁵

¹⁵ Business Income (and Extra Expense) Coverage Form, CP 00 30 04 02, at A.5.a. (ISO Properties, Inc. 2001).

This “coverage for Business Income will begin 72 hours after the time of that action and will apply for a period of up to three consecutive weeks after coverage begins.”¹⁶

The Form also provides that the coverage for Extra Expense will begin immediately after the time of that action and end the later of “(1) 3 consecutive weeks after the time of that action; or (2) When your Business Income coverage ends”¹⁷

Some insurer forms also provide separate protection for loss of income when ingress or egress is prevented to or from the insured premises.¹⁸ Although similar to Civil Authority coverage, this coverage can be distinguished from that set forth in the ISO Form because no “action of civil authority” is required to trigger coverage.

Under the ISO Form and other policies, the insured may be required to demonstrate “physical loss of or damage to property.” As discussed above, such loss or damage may exist when property (including airspace) has been contaminated by COVID-19.

Several courts have considered whether business interruption insurance applies to business losses that do not involve actual “physical” damage or destruction. Two of the leading cases are *Sloan v. Phoenix of Hartford Insurance Co.*, 46 Mich. App. 46 (1973), and *Allen Park Theatre Co. v. Michigan Millers Mutual Insurance Co.*, 49 Mich. App. 199 (1973). The insureds in both cases claimed lost revenues because they were forced to close their movie theaters during a dusk-to-dawn curfew imposed by the government after the 1967 Detroit riots. The *Sloan* court stated:

[A] plain reading of the policy would lead the ordinary person of common understanding to believe that, irrespective of any physical damage to the insured property, coverage was provided and benefits were payable when, as a result of one of perils insured against, access to the insured premises was prohibited by order of civil authority, and we so hold.

46 Mich. App. at 436-37.

The *Allen* court followed *Sloan*, simply stating: “If the insurer wanted to be sure that the payment of business interruption benefits had to be accompanied by physical damage it was its burden to say so unequivocally.” 48 Mich. App. at 201. Other courts have reached similar conclusions.

Even if there is no order of a civil authority disrupting business, coverage may be available if ingress or egress to an insured location is hampered. For example, in *Fountain Powerboat Industries v. Reliance Insurance Co.*, 119 F. Supp. 2d 552 (E.D.N.C. 2000), the policy

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Albert Risk Management Consultants, “The Next Level of Business Income Coverage,” *IRMI Expert Commentary* (November 2011), <https://www.irmi.com/articles/expert-commentary/the-next-level-of-business-income-coverage>.

provided coverage when, as a result of a non-excluded peril, ingress to or egress from the insured's facility was "thereby prevented." Hurricane-caused flooding prevented ingress and egress to and from the insured's facility. The sole means of accessing the facility was a road off a highway that was closed for nine days as a result of the storm. The insurer challenged coverage, arguing that the facility suffered no physical damage. The court held that the insured was entitled to coverage because it had limited access to its facility as a result of the flooding. As it unequivocally held, "Loss sustained due to the inability to access the Fountain facility and resulting from a hurricane is a covered event with no physical damage to the property required." *Id.* at 557. The court also concluded, "the policy would provide coverage not only when the property itself was inaccessible, but also when the only route to the Facility caused the property to be inaccessible." *Id.*

Insurers may argue that a policy's reference to "prevention" of ingress or egress means that there is no coverage because it requires a complete stoppage of all ingress and egress. However, the term "prevent" is commonly defined to mean not only "to keep from happening or existing" but also "hinder," and it is often used to mean "to interpose an obstacle." Merriam-Webster, "Prevent," <https://www.merriam-webster.com/dictionary/prevent>. In *National Children's Exposition Corp. v. Anchor Insurance Co.*, 279 F.2d 428 (2d Cir. 1960), the court indicated that when "prevent" is used with respect to preventing actions, rather than with respect to preventing the existence of something, "prevent" may mean "hinder." *Id.* at 431.

The *Fountain* court recognized that coverage should be afforded if there was an interference with reasonable access to the facility, even if extraordinary means could lead to access. *Id.* at 557 n.4 ("The efforts of Fountain to pick up employees and drive them to work are extraordinary. The court finds that the ingress/egress provision relates only to reasonable access to the Fountain facility and does not therefore apply to extraordinary efforts by Fountain or its employees to get to work over closed and flooded roads."). See also *Marriott Fin. Servs., Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 144 (1975) (pedestrian, rather than vehicular, access not deemed reasonable; "when an insurer contracts to insure against lack of access to property, it must be deemed to have insured against the absence of access which, given the nature and location of the property, is Reasonable access under the circumstances"). Accordingly, the word "prevention" reasonably can be interpreted to require only that ingress to and egress from the premises be hindered, not that it be completely prevented.

In addition to these coverages, there may be other related civil authority and ingress/egress coverages that may aid businesses through these challenging times. During the 2014 Ebola outbreak, ISO developed endorsements to provide coverage for the loss of business income in relation to an Ebola outbreak.¹⁹ Relatedly, some insurers have developed policies that are expressly designed for the purpose of covering pandemic or infectious disease risk.

¹⁹ "ISO Creates Coverage Options to Help Businesses Survive Ebola," ISO (Dec. 3, 2014), <https://www.verisk.com/archived/2014/december/iso-creates-coverage-options-to-help-businesses-survive-ebola/>.

E. Contingent Business Interruption Insurance

Companies across the globe may also lose earnings because they incur additional costs and/or are unable to conduct business with companies directly impacted by the SARS-CoV-2 outbreak. Such losses may be covered by contingent business interruption, or “dependent properties,” insurance, a type of insurance against loss caused by damage to the property of suppliers, customers, and other third parties upon which the insured depends.

Indeed, contingent business interruption losses account for a significant percentage of overall insured losses following a significant loss event, like the SARS-CoV-2 outbreak. While it is a given that the outbreak will cause significant damage and disruption at the location where it exists, the resulting contingent business interruption losses can have an exponential impact across multiple industries and sectors of the global economy.

The potentially broad reach of contingent business interruption coverage creates challenges in larger global organizations to identify income losses that are caused by the impact of SARS-CoV-2 on entities several steps removed from the insured. Indeed, notice of damage at a supplier’s distant location may only reach the insured through slightly higher component costs. In the face of increasing costs, supply chain personnel may decide to secure alternative components without informing the risk management department or even ascribing the increased costs to potentially covered damage.

Similarly, businesses should not assume that contingent business interruption coverage is limited to suppliers of raw materials because most contingent business interruption provisions also cover lost earnings resulting from damage to any supplier of services. For example, if SARS-CoV-2 prevents employees from coming to work and thereby reduces an insured’s earnings, that event could constitute a contingent business interruption loss because the employees’ labor is a service provided to the insured. Likewise, if customers or patrons are unable to travel to a concert or other event, there may be coverage for the resulting losses.

One issue that insureds must consider with respect to contingent business interruption coverage is how a policy defines the third party that must suffer damage to trigger a claim for coverage. For example, some policies require damage to a “dependent property,” which may include “contributing locations,” “recipient locations,” “manufacturing locations,” and “leader locations.” Other policies require damage to “suppliers,” “customers,” “contract manufacturers,” and “contract service providers.” While some policies may define these terms, many policies do not, resulting in disputes down the road about which third parties upon which the insured relies are included in the insured’s contingent business interruption coverage.

This is particularly true given the growing complexity and interdependence of many modern supply chains. For example, in *DIRECTV v. Factory Mutual Insurance Co.*, 692 F. App’x 494 (9th Cir. June 19, 2017), the Ninth Circuit interpreted a contingent business interruption provision that insured against business interruptions stemming from certain events at any location “of a direct supplier, contract manufacturer or contract service provider to [DIRECTV].” The critical question before the Ninth Circuit was whether Western Digital, a manufacturer of hard drives that are used in DIRECTV’s set-top boxes, qualified as a direct supplier. The insurer

argued that because Western Digital's hard drives were sent to third-party set-top box manufactures, Western Digital was not a "direct supplier" to DIRECTV. DIRECTV, however, offered extrinsic evidence showing that in the electronics supply chain industry, Western Digital would reasonably be understood as a "direct supplier" because DIRECTV exerted significant control over and directly managed design, product development, cost, production, and quality control with Western Digital. The Ninth Circuit stated "that '[t]he law charges insurance companies with the duty of informing themselves as to the usages of the particular business insured, and a knowledge of such usage on the part of such company will be presumed.'" *Id.* at 495. Accordingly, the court held that "the phrase 'direct supplier' is 'reasonably susceptible' to the meaning urged by [DIRECTV]." *Id.*

These issues also were addressed in *Archer-Daniels-Midland Co. v. Phoenix Assurance Co.*, 936 F. Supp. 534 (S.D. Ill. 1996). The insured sought coverage under the contingent business interruption provisions of its policy arising from a flood of the Mississippi River and its tributaries and resulting damage to 20,000,000 acres of farmland. The insured processed farm products for domestic and international consumption. A substantial part of the insureds' raw materials traveled by barge on the Mississippi River and its tributaries. When barge traffic was halted because of the flooding, the insured had to arrange alternate—and more expensive—transportation by rail. It claimed it was covered for a contingent business interruption loss for the increased costs it incurred for transportation and raw materials. It argued farmers and the United States government, through the Army Corps of Engineers ("Corps"), which operated and maintained the Mississippi River system, were suppliers. The insurers disagreed.

The court noted that the phrase "any supplier of goods or services" "denotes an unrestricted group of those who furnish what is needed or desired." *Id.* at 541. It concluded that "the Corps is undoubtedly providing a service. As a result, the Corps . . . are 'suppliers' of 'services' for purposes of" the coverage. *Id.*

The court also rejected the insurers' argument that the Corps was not a supplier because the insured did not have a contract with the Corps and that the principal entity that supplied the insured locations was a subsidiary of the insured. The court agreed with the insured that "the policies do not state that coverage is limited to principal suppliers or suppliers with whom ADM has a written contract, rather, they apply to 'any' supplier." *Id.* at 543.

The court then addressed the question of whether the farmers were "suppliers of goods and services" within the coverage. The insurers argued that the farmers were not suppliers because the insured did not contract for the purchase of grain from individual farmers, but rather did so from licensed grain dealers. The court rejected this argument, too. It noted that "the policy language does not limit coverage to those suppliers in direct contractual privity." *Id.* at 544. It stated: "The farmers may be an 'indirect' supplier of the grain, but they are a supplier nonetheless. Had either of the parties wanted to limit the coverage to 'direct' suppliers, they could easily have added language to that effect." *Id.*

Another potential issue is whether the third party must be unrelated to the insured. For example, in *Park Electrochemical Corp. v. Continental Casualty Co.*, 2011 WL 703945 (E.D.N.Y. Feb. 18, 2011), one company, Neltec, was unable to purchase its supply of a vital component

due to an explosion at Nelco's facility. Both companies were wholly owned subsidiaries of their parent, Park. Park and Neltec were insured under a policy that covered losses "caused by direct physical damage or destruction to . . . any real or personal property of direct suppliers which wholly or partially prevents the delivery of materials to the Insured or to others for the account of the Insured." *Id.* at *2. The insurer argued that coverage did not apply because "subsidiaries of the insured, such as Nelco, are not considered 'direct suppliers' under the policy." *Id.* The court noted that the "term 'direct suppliers' is not defined anywhere in the policy," and concluded that the "language of the policy on this point is vague and ambiguous." *Id.* at *4. The court concluded that the "ambiguity survives the proffers of extrinsic evidence" and ruled in favor of the insured. *Id.* at *6.

F. Exclusions

Property insurance policies have a range of exclusions that insurers might argue apply to preclude or limit coverage for SARS-CoV-2 losses. As explained above, however, many of these exclusions are not as broad as insurers contend and, even if they are, may not apply in a given situation.

IV. GENERAL LIABILITY INSURANCE

Like with MERS, SARS, and other viruses before it, SARS-CoV-2 was initially spread by and between animals before infecting humans. The person-to-person spread is thought to occur by way of respiratory droplets transmitted by way of coughing and sneezing, with those droplets being inhaled into the lungs of others.²⁰ It also appears that SARS-CoV-2 can be spread through air and can remain on surfaces for several days.

Thus, it is possible that people visiting offices, other facilities, and venues might be infected by exposure to others who have contracted SARS-CoV-2 and may, in turn, sue the building owners or tenants, and, in the case of events, the promoter, artist, agent, or vendors—in essence, anyone that they might blame because they contracted SARS-CoV-2. In such an event, a general liability policy might provide protection.

A general liability policy covers claims for bodily injury (including, sickness, disease, and death, and frequently emotional distress). It also typically covers claims for damage to or loss of use of property (such as contamination). This insurance does not typically cover an insured for its own losses, but is designed to protect an insured against claims and suits by third parties. Liability insurance can prove invaluable should such suits arise, typically obligating an insurer to pay for its insured's defense (often with any cap on the amount the insurer must pay). And, when an insurer has a duty to defend, it must defend immediately and fully, even if the suit is meritless. As one court has explained:

[A] liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity. . . . The defense duty is a

²⁰ Centers for Disease Control and Prevention, "2019 Novel Coronavirus," <https://www.cdc.gov/coronavirus/Covid-19/about/transmission.html>.

continuing one, arising on tender of defense and lasting until the underlying lawsuit is concluded Imposition of an immediate duty to defend is necessary to afford the insured what it is entitled to: the full protection of a defense on its behalf. . . . [T]he insurer may not decline to defend a suit merely because it is devoid of merit, but instead must assert appropriate defenses on its insured's behalf in the underlying action."

Montrose Chem. Corp. v. Superior Court, 6 Cal. 4th 287, 295 & 298 (1993).

As noted above, coverage also may be provided for costs and losses that an insured incurs in mitigating loss—long before any lawsuits are filed.

V. WORKERS' COMPENSATION AND EMPLOYERS LIABILITY INSURANCE

Workers' compensation and employers liability insurance typically insures employers for claims by their employees for "bodily injury by accident or bodily injury by disease." They usually obligate the insurer to defend any claim, proceeding, or suit for benefits payable by the insurance. This coverage may apply as to employees that have contracted SARS-CoV-2, but not yet developed COVID-19, and those that have developed COVID-19. This is because the virus itself might be deemed to cause injury to the lungs even before COVID-19 develops. *Cf. Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 44-48 (recognizing that with exposure to asbestos, "'injurious physiological processes'" begin with exposure to fibers long before disease manifests itself).

While employees typically cannot bring workers' compensation claims as civil lawsuits, if they do, then the workers' compensation insurer may be obligated to defend the insured. *See Theodore v. Zurich Gen. Accident & Liab. Ins. Co.*, 364 P.2d 51, 55 (Alaska 1961) (court rejected insurer's contention that it did not have to defend insured when claim against insured fell within the purview of workers' compensation laws rather than purview of maritime laws). Additionally, employers liability insurance may provide coverage for the family members of employees that have contracted SARS-CoV-2 from an employee.

Furthermore, steps that an insured takes to reduce the chance that its employees will be exposed to SARS-CoV-2 might be covered by their insurance as a reasonable step to mitigate damages that might result from such exposure, although the law is not well developed under workers' compensation insurance.

VI. EVENT CANCELLATION INSURANCE

Event cancellation insurance is intended to cover losses caused by the cancellation, abandonment, curtailment, postponement, or relocation of an insured event, but what an insurer will pay depends entirely on the policy language. Event cancellation policies will typically cover lost gross revenue, unrecoverable expenses, lost ticket sales, lost gross guarantees, or any combination thereof, as long as the cause of the loss is "beyond the control" of the insured entity and not excluded by an enumerated cause. In the case of a tour, each

performance can be insured with an individual limit, or the entire tour can be insured in the aggregate. Individual concerts, music festivals, and other events can also be insured. Additionally, the covered perils in an event cancellation policy can range from death, accident, or illness affecting a named performer or band to adverse weather and/or travel delays. “All risk” policies provide insurance for enumerated perils as well as a catch-all category of non-enumerated risks. All risk policies will therefore cover any cause of a loss due to the cancellation or postponement of an event that is not specifically excluded.

Typical policy language usually requires the loss to be the result of an unexpected cause “beyond the insured’s control,” or that it not be the result of an agent or promoter’s act or omission. The phrase “beyond the control” of the insured has been the subject of debate in the past. For example, what if an artist “elects” not to travel to a show in China because of travel difficulties, the presence of SARS-CoV-2, and the fact that few people may attend? At what point do the impediments to travel and concern about exposure to SARS-CoV-2—for the artist and the attendees—mean the non-appearance is “beyond the control” of the insured?

Some courts have interpreted the phrase “beyond the control.” For example, in *Great Southern Wood Preserving, Inc. v. American Home Assurance Co.*, 292 F. App’x 8 (11th Cir 2008), the insured sought coverage for lumber shipments that it had off-loaded at a port that was then destroyed by a hurricane. It sought coverage for its loss under a policy that covered goods while in transit, arguing that the shipments still were “in transit.” The court disagreed, finding that the insured “exercised dominion and control over the lumber once it was off-loaded” because it made decisions about the storage and destination of the lumber. *Id.* at *2. This decision, and others like it, suggest that if the insured exercises dominion or decision-making authority, then the cause may not be “beyond” its control.

The determination of when something is “beyond the control” of the insured is likely to depend heavily on the specific circumstances involved. As at least one court has recognized, the application of the phrase “beyond the control” often involves factual questions properly determined by a jury. *HDMG Entm’t, LLC v. Certain Underwriters at Lloyd’s of London Subscribing to Policy No. L009082*, 355 F. Supp. 3d 373, 382 (D.S.C. 2018). In *HDMG*, the insured sought coverage for losses incurred from the cancellation of an event caused by a third party’s failure to timely finish installing a communications system that was necessary to produce the event. In denying the insurers’ motion for summary judgment, the court ultimately held that there was “a genuine dispute as to whether the fact that Plaintiff chose a venue without a communications system means that the subsequent loss resulting from the failure to timely install one was expected and within Plaintiff’s control.” *Id.* at 381.

However, insurance policies are generally subject to a reasonableness standard. Therefore, for example, while an insurer could argue that it was within an insured’s control to schedule, or not schedule, appearances in areas that could be in a location with a potential SARS-CoV-2 outbreak, how is an insured to know in advance, particularly in the face of world-wide efforts to limit the spread of SARS-CoV-2? And, whatever can be said about the scheduling of future events, given that concerts, tours, and promotional appearances typically are booked long in advance of scheduled dates, it certainly is reasonable to conclude that a SARS-CoV-2 outbreak after the insured set dates is “beyond the control” of the insured. The “beyond the

control” language should not require the insured to do things outside the norm or that which would be deemed to be commercially unreasonable.

Some event cancellation policies have an exclusion to similar effect as the “beyond the control” language. These exclusions purport to apply when the loss arises out of the act or omission of a promoter, sponsor, organizer. If read broadly and artificially, they could bar coverage for almost any loss. After all, almost every cancelled event could give rise to a claim that there was an act or omission by a promoter involved in the cancellation of a concert. For example, if a venue were in the center of a SARS-CoV-2 outbreak subject to quarantine, presumably a promoter would cancel or advise cancellation of the event. In such a situation, the clear cause of the cancellation is SARS-CoV-2 and the quarantine—not the promoter’s decision not to proceed.

VII. POLITICAL RISK INSURANCE

Political risk insurance policies typically insure against several types of “political risk,” covering risks such as currency restrictions, expropriation of assets, political violence, and terrorism, contract frustration, and trade credit. Coverage often depends on the precise terms of the policy—and political risk policies have many variations in their terms.

One insured risk implicated by the SARS-CoV-2 outbreak is contract frustration. Contract frustration insurance protects a company’s trade or sales contract with a foreign company from an action (or inaction) of a foreign government, often including impacts from changes in laws, rules, or regulations. Thus, if a government implements a rule impairing an insured’s ability to get the benefit of a contract, such as quarantines or other travel or shipping restrictions, a political risk policy may afford coverage (but note that the terms of political risk policies vary substantially, so a close review is warranted).

Another insured risk implicated by SARS-CoV-2 is the inability to collect on accounts receivable. If, for example, a trading partner cannot pay its debts because of insolvency or financial distress resulting from a SARS-CoV-2 outbreak, quarantines, or travel or transport restrictions, then trade credit insurance may cover a substantial part of the loss.

As circumstances develop, other risks often covered by political risk policies may arise. For example, it is possible that a government might take control of an insured’s assets, either directly or by implementing restrictions by which it is, for all intents and purposes, exercising control over those assets. In such a situation, there could be coverage on the theory that there has been an expropriation of assets.

Political risk policies typically contain varying conditions and requirements that an insured must address in order to secure coverage. For example, some political risk policies include very restrictive notice provisions that require that an insured give notice of “any occurrence likely to give risk to a claim” to the insurer within days or weeks of the insured’s knowledge of an occurrence. What this means—in connection with the claims arising out of SARS-CoV-2—is that an insurer may argue that its insured was required to give notice of an “occurrence” within days of outbreak, even if it has not yet suffered any actual loss. While a

purported delay in notice might not be a bar to coverage under the law of most U.S. jurisdictions (where late notice often is recognized as a valid coverage defense only if and to the extent that an insurer is actually and substantially prejudiced by the delay), this might not be true under political risk policies governed by another jurisdiction's laws.

Many political risk policies contain a "due diligence" clause stating that the insured is to do everything "reasonably practicable" to protect or remove the insured property and to avoid or diminish any potential loss. Other policies may require the insured to take steps to mitigate its loss. Because of the room for debate about whether an insured did everything "reasonably practicable" under the circumstances and whether the "mitigation" was appropriate, an insured may need to document what it did, and why.

VIII. EMPLOYMENT PRACTICES LIABILITY INSURANCE

Employment practices liability ("EPL") insurance covers a wide range of lawsuits and claims that arise in the context of an employment relationship. This coverage may prove to be a valuable resource to insured employers in the wake of the COVID-19 pandemic.

For instance, with many businesses being forced to suspend or constrict their operations, many employers throughout the country have made the difficult decision to lay off or furlough employees. To the extent these employment decisions result in claims by discharged and furloughed employees, such claims are likely to be covered under most EPL policies. Indeed, EPL policies typically cover claims alleging wrongful discharge or termination of employment. In many such policies, coverage extends to both actual and constructive terminations and discharges.

Furthermore, EPL policies commonly cover claims alleging "wrongful demotions" and other "adverse" employment decisions. Although some EPL insurers might contend that such coverage should be limited to claims alleging a wrongful demotion in title or position, coverage grants are broadly construed to protect the reasonable expectations of insureds. *See, e.g., MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 648 (2001). Therefore, depending on the precise policy language at issue, EPL policies very well may cover claims alleging that employers improperly or unfairly cut pay or benefits their employees in the weeks and months following the COVID-19 outbreak—allegations that reasonably could be construed as alleging a wrongful demotion or an adverse employment decision.

Moreover, EPL policies generally cover claims alleging "discrimination" and the wrongful failure to adopt or enforce appropriate workplace policies and procedures. These broad coverages could be relevant if, for instance, employees assert claims taking issue with their employers' handling of confirmed or suspected cases of COVID-19 or their alleged failures to make reasonable accommodations to employees who contract the disease. These coverages also should apply to claims alleging that employers failed to provide safe work environments for their employees or take appropriate steps to minimize the chance of exposure to SARS-CoV-2. In this regard, subject to any potentially applicable exclusions or limitations, EPL policies generally cover both common law and statutory claims. Thus, employers should consider the possibility that they may have coverage for statutory claims alleging that their efforts to

respond to SARS-CoV-2, COVID-19, and related issues and events fell short of the requirements imposed by federal and state laws governing disabilities and workplace conditions—including claims alleging violations of the Americans with Disabilities Act of 1990 (“ADA”), the Occupational Safety and Health Act of 1970 (“OSHA”), and their state counterparts.²¹

Moreover, with many employees working from home for extended periods of time, some employment litigators have predicted that there could be an uptick in so-called “wage and hour” claims alleging violations of state and federal labor laws. To the extent insured employers find themselves facing such claims, they should look to their EPL insurers for coverage. Indeed, although EPL insurers frequently dispute coverage for lawsuits alleging violations of the federal Fair Labor Standards Act and state Labor Codes, their positions are not always correct. Several courts have confirmed that, depending on their particular terms and conditions, EPL policies can provide broad coverage for claims alleging, among other things, a failure to reimburse necessary business expenses, a failure to provide required meal or rest breaks, and a failure to pay all overtime wages owed. *See, e.g., Southern Cal. Pizza Co., LLC v. Certain Underwriters at Lloyd’s, London Subscribing to Policy No. 11EPL-20208*, 40 Cal. App. 5th 140, 152-53 (2019) (claims for unreimbursed business expenses construed as alleging “Inappropriate Employment Conduct” covered under EPL policy); *Profl Sec. Consultants, Inc. v. U.S. Fire Ins. Co.*, 2010 WL 4123786, at *3 (C.D. Cal. Sept. 22, 2010) (coverage for “any employment-related misrepresentation” triggered by allegation employer “[d]isseminated false information [regarding overtime compensation to] employees”); *PacPizza, LLC v. Certain Underwriters at Lloyd’s, London Subscribing to Policy Nos. 11EPL-20191& 12EPL-20281*, No. C18-00249, Order at 12-13 (Contra Costa Super. Ct. July 12, 2018) (coverage for “any failure to adopt, implement or enforce employment related policies or procedures” triggered by express and implied allegations that employer’s alleged failures to comply with state Labor Code were corporate policies). These and other courts also have rejected attempts by insurers to construe policy exclusions too broadly. *See, e.g., Southern*, 40 Cal. App. 5th at 150-51 (exclusion for alleged violations of “wage and hour law(s)” inapplicable to claims seeking unreimbursed business expenses); *California Dairies, Inc. v. RSUI Indem. Co.*, 617 F. Supp. 2d 1023, 1045-47 (E.D. Cal. 2009) (exclusion for violations of Fair Labor Standards Act and “similar” state laws deemed inapplicable to claims alleging failure to reimburse business expenses, timely pay wages owed upon termination or discharge, and provide accurate wage statements to employees).

Finally, as businesses start to resume somewhat “normal” operations, employers may face allegations of bias or discrimination in the manner in which they re-hire and re-integrate employees into the workplace. To the extent such claims are asserted, they very well may fall within the coverage afforded by EPL policies—many of which cover discrimination and bias

²¹ In March 2020, the U.S. Equal Employment Opportunity Commission (or “EEOC”) issued guidance to employers regarding ADA compliance and the COVID-19 pandemic. *See* U.S. Equal Employment Opportunity Comm’n, “Pandemic Preparedness in the Workplace and the Americans With Disabilities Act” (March 21, 2020), *available at* https://www.eeoc.gov/facts/pandemic_flu.html. The Occupational Safety and Health Administration also recently issued guidance to employers regarding OSHA compliance and the pandemic. *See* U.S. Dept. of Labor, Occupational Safety and Health Admin., “Guidance on Preparing Workplaces for COVID-19” (March 2020), *available at* <https://www.osha.gov/Publications/OSHA3990.pdf>.

claims, as well as allegations concerning the wrongful failure or refusal to employ and the wrongful deprivation of a career opportunity.

IX. DIRECTORS AND OFFICERS LIABILITY INSURANCE

Many claims arising out of the coronavirus pandemic may also give rise to coverage under directors and officers insurance. Traditional D&O coverage (“Side A and B” policies) generally provide coverage for the “Ultimate Net Loss” the directors and officers of a corporation are obligated to pay in connection with a claim for a “Wrongful Act” by the director or officer while acting in that capacity. The directors and officers are covered under Side A to the extent that the corporation does not indemnify the director or officer for the loss, and the corporation is covered under Side B for the amounts that the corporation has indemnified the director or officer for the above type of claim. In addition, many entities also have “Side C” coverage which covers claims made against the entity itself. Sometimes the Side C coverage is limited to specific types of claims, such as securities claims, while other Side C coverage is broader.

Some lawsuits arising out of the pandemic have already been filed against directors, officers, and entities that is likely to trigger D&O coverage. For example, a class action has been filed in the Eastern District of Delaware against Inovio Pharmaceuticals and its president and chief executive officer on behalf of all persons and entities who purchased Inovio common stock between February 14, 2020, and March 9, 2020. The lawsuit claims that the defendants violated the Securities Act by making false public statements to the effect that Inovio had successfully developed a vaccine against the spread of COVID-19 that it could rapidly bring to the market. Similarly, a securities class action lawsuit was filed against Norwegian Cruise Lines, its chief executive officer, and its chief financial officer in the Southern District of Florida. The plaintiffs in this lawsuit allege that Norwegian made false and misleading statements both publicly and in Form 8-K and 10-K filings with the SEC to the effect that the Company's financial health was far less impacted by COVID-19 than it was and underplaying the danger of COVID-19.

It is likely that there will be many more securities lawsuits filed in the not-too-distant future. In addition, there are likely to be lawsuits, both derivative and otherwise, filed against directors and officers alleging that they breached their fiduciary obligations of trust, loyalty, good faith and due care to the corporation or failed to act in a manner so as not to cause harm to the corporation. For example, plaintiffs are likely to claim that directors and officers failed to take meaningful action to limit the impact of the coronavirus, both in terms of minimizing the impact of the pandemic on the company's business and in terms of taking steps to protect both employees and the public, thereby limiting the company's exposure to liability. This sort of “wrongful act” is squarely within a D&O policy's coverage grant.

D&O policies are unlikely to have exclusions that specifically refer to virus or communicable diseases. Most will, however, have exclusions for claims for “bodily injury, sickness, disease or death of any person” and “damage to or destruction of any tangible

property.”²² Insurers may argue that the bodily injury and property damage exclusion applies to claims relating to the coronavirus because without the bodily injuries and property damage caused by the coronavirus, there would be no claims against the directors and officers.

Whether the bodily injury and property damage exclusion bars coverage is likely to turn on the nature of the claim against the directors and officers and, to some extent, the introductory language to the exclusion. Some policies exclude coverage for claims “for” personal injury and property damage, and others exclude coverage for claims “arising out of, directly or indirectly resulting from or in consequence of, or in any way involving” personal injury or property damage. The former should only exclude claims that specifically seek these damages (as opposed to, for example, claims for loss of value of the plaintiff’s stock). Although insurers will argue, as they have in other factual situations, that the latter language requires only a but/for relationship between the damages caused by the coronavirus and the claims brought against the insured, courts seem to require a fairly direct causal connection between the bodily injury or property damage and the claim for the exclusion to apply. *See Somerset Medical Ctr. v. Executive Risk Indem., Inc.*, 2010 WL 4057151, at *7 (N.J. Super. Mar. 22, 2010) (bodily injury exclusion in hospital’s D&O policy did not bar coverage for lawsuit for alleged negligence in hiring and supervision of nurse who had murdered approximately 29 patients at health care facilities; “the origin of the underlying lawsuits as they relate to [the hospital] is not the death or physical injury of patients placed in [the nurse’s] care while a nurse at Somerset. Instead, it is the acts and omissions of [the hospital’s] officers that resulted in the allegations of negligence.”); *Fireman’s Fund Ins. Co. v. University of Ga. Athletic Ass’n, Inc.* 288 Ga. App. 355, 363–364 (2007) (exclusion for claims “[a]lleging, based upon or attributable to, arising out of, in consequence of or in any way related to any Bodily Injury” did not bar coverage for claim by injured athlete against insured for breach of its duty to provide athlete with disability insurance; “the nexus between the [athlete’s] bodily injury and his claims against [the insureds] is too attenuated to bring his claims within the ambit of the bodily injury exclusion.”); *Philadelphia Indem. Ins. Co. v. Maryland Yacht Club, Inc.*, 129 Md. App. 455, 466–467 (Md. Ct. Spec. App. 1999) (rejecting the insurer’s argument that bodily injury exclusion barred coverage for employee’s wrongful discharge claim because former employee claimed that he was fired because of work-related injury; “a reasonable person in the position of the parties could not conclude that the **bodily injury** exclusion applied to the facts attendant here. Indeed, only a tortured construction of the exclusion—one that ignores common sense—would lead to the result urged by appellant.”); *but see Breland v. Arena Football One, LLC.*, 221 F.Supp.3d 799, 804 (E.D. La. 2016) (personal injury exclusion barred coverage for claim by former player against football league for fraud, negligence, and breach of contract on ground that league failed to take steps to protect him from concussions despite knowing risks and misrepresented those risk to him; player sought damages for physical injury and medical expenses).

Most D&O policies also have “conduct” exclusions that bar coverage for claims against a director or officer arising out of that insured’s having committed a deliberately fraudulent or deliberately criminal act or omission. To the extent that claims against directors or officers are based on misrepresentations made by the insured about the financial impact on the company of the coronavirus or the steps taken by the company to protect the public from the coronavirus,

²² After all, this type of claim would generally be covered by the company’s CGL policies.

insurers are likely to assert this exclusion. However, many conduct exclusions require that the deliberately fraudulent or deliberately criminal act be established by a final, non-appealable adjudication against the director or officer in the underlying action for the exclusion to apply. This is a difficult standard for the insurer to meet.

Although most D&O policies do not contain exclusions for virus or communicable disease, it is possible that insurers will try to add such exclusions to future policies. Further, D&O policies are written on a claims-made (or claims-made and reported) basis. In other words, for a claim to be covered it must be made (or made and reported) during the policy term. Therefore, when D&O policies come up for renewal, insurers may seek to add these exclusions before additional claims come in. However, some D&O policies contain a “notice of circumstance” provision that may allow insureds to maintain coverage. Under these provisions, if an insured person or entity becomes aware of circumstances that could give rise to a claim, and gives written notice of those circumstances to the insurer during the policy period, then any claims later arising from the circumstances will be considered to have been made during the policy period during which the notice of circumstance was reported. Therefore, if an insured is aware of a likely claim before its policy is renewed, it may wish to give notice of the circumstance to the insurer under the current policy so that a later-added exclusion will not bar coverage.

X. CYBER POLICIES

Prior to the emergence of SARS-CoV-2 and COVID-19, cyber security, ransomware, and privacy liability issues were at the top of the list of concerns for risk management and in-house counsel. Unfortunately, such concerns cannot be cast aside to deal with COVID-19. Cyber criminals are exploiting the fact that many people are working at home, distracted and less focused on cyber hygiene, to gain access to corporate systems for nefarious purposes. Perhaps even more insidious, cyber criminals are also launching ransomware attacks on vulnerable institutions in the health care space knowing that such institutions may be unable to fight back while focused on beating back COVID-19.

For example, cyber criminals are sending e-mails, allegedly on behalf of the Centers for Disease Control and Prevention and the World Health Organization, with malicious links.²³ They are also sending phishing emails selling coronavirus protection kits and masks, seeking donations for vaccines, and even offering phony tax rebates.²⁴

There are reports of ransomware attacks on at least two COVID-19-related medical facilities – Brno University Hospital in the Czech Republic and Hammersmith Medicines

²³ Homer Pacag, “Multiple Phishing Attacks Discovered Using the Coronavirus Theme,” Trustwave (Feb. 13, 2020) <https://www.trustwave.com/en-us/resources/blogs/spiderlabs-blog/multiple-phishing-attacks-discovered-using-the-coronavirus-theme/>; World Health Organization, “Beware of criminals pretending to be WHO,” <https://www.who.int/about/communications/cyber-security>.

²⁴ Erin Ayers, “Coronavirus cyber scams reaching pandemic proportions,” *Advisen* (Mar. 25, 2020), https://www.advisen.com/tools/fpnproc/fpns/articles_new_35/P/363166890.html?rid=363166890&list_id=35#.XnlWgZc3jGc.linkedin; Joe Tidy, “Coronavirus: How hackers are preying on fears of Covid-19,” *BBC News* (Mar. 13, 2020), <https://www.bbc.com/news/technology-51838468>.

Research in the UK. The attack on Brno University Hospital impacted operations and surgeries.²⁵ In the attack on Hammersmith, the attackers put patient records online to try to force payment of the ransom.²⁶

Cyber insurance and other policies, such as property, are likely to have responsive coverage to such cybercrime and cyber breaches.²⁷ Cyber insurance generally includes both first-party and third-party liability insurance. First-party cyber coverage generally covers the costs associated with a hack or data breach of an insured's computer systems. This can include business income losses arising out of attacks on the insured's computer systems and those of its cloud providers and vendors. Third-party cyber coverage generally covers claims against an insured following a hack or data breach.

Cyber coverage, reviewed in more detail below, is unlikely to contain exclusions for losses and claims associated with SARS-CoV-2 and COVID-19.

A. First-Party Cyber Coverages

Although the coverage and policy language may differ from policy-to-policy, first-party cyber coverages generally include breach response coverage as well as:

- Event Management (including Data Recovery, Betterment, etc.);
- Cyber Extortion;
- Network/Business Interruption (including System Failure & Voluntary Shutdown);
- Dependent Business Interruption (IT & Non-IT Providers); and
- Consequential Reputational Loss.

Following a security breach, an insured will want to look to their cyber policy to obtain reimbursement for the insured's costs and expenses. Some insurers have associated with certain professional firms, including technical and legal experts, and may cover breach response costs associated with using such professionals without reducing policy limits.

Moses Afonso Ryan Ltd. v. Sentinel Insurance Co., Case No. 1:17-001570-WES-LDA (D.R.I.), demonstrates how detrimental these attacks can be. In *Moses Afonso*, a law firm sought coverage following a ransomware attack on the firm's network. The attackers encrypted the firm's files so that they were not accessible without payment of a ransom. The firm paid the cyber criminal's \$25,000 ransom but it still took over nine months to retrieve the corrupted

²⁵ Lily Hay Newman, "Coronavirus Sets the Stage for Hacking Mayhem," *WIRED* (Mar. 19, 2020), <https://www.wired.com/story/coronavirus-cyberattacks-ransomware-phishing/>

²⁶ Davey Winder, "COVID-19 Vaccine Test Center Hit By Cyber Attack, Stolen Data Posted Online," *Forbes* (Mar. 23, 2020), <https://www.forbes.com/sites/daveywinder/2020/03/23/covid-19-vaccine-test-center-hit-by-cyber-attack-stolen-data-posted-online/#534820b18e55>

²⁷ Peter A. Halprin and Jacquelyn M. Mohr, "COVID-19 Cybersecurity and Insurance Coverage," *New York Law Journal* (Forthcoming).

information. The firm suffered over \$700,000 in business income losses as a result. Other businesses have simply folded up shop after such attacks.

B. Third-Party Cyber Coverages

Although the coverage and policy language will differ from policy-to-policy, third-party cyber policies generally include coverage for:

- Network Security Failures & Privacy Events;
- Regulatory Defense & Penalties (including coverage for GDPR liabilities);
- PCI-DSS Liabilities & Costs; and
- Media Content Liability.

This coverage may prove invaluable for claims by consumers and employees, including class actions, as well as regulatory actions arising out of data breaches. Those cases can involve substantial exposure. For example, in January 2020, Facebook settled a class-action lawsuit over its use of facial recognition technology which arose under the Illinois Biometric Information Privacy Act.²⁸ The case settled for \$550,000,000.

As noted above, since it is unlikely that a cyber policy will contain any potentially applicable exclusions, insureds should pay close attention to this coverage to ensure that they are maximizing the benefits provided under such policies.

XI. CONCLUSION—AND SOME CAUTIONARY NOTES

Even though there are standard forms of insurance policies, an insured should never assume that its policy does not have important variations. So-called “standard” forms often vary from insurer to insurer, and most policies have endorsements changing their terms. In any event, assessing possible insurance coverage requires a close and careful review of insurance policies and the nuances of their policy language. There’s also a wealth of insurance industry drafting history, secondary authority, and court decisions that may govern how policy language is to be interpreted (with ambiguities generally resolved in favor of coverage). Even if a policy appears clear on its face as not providing coverage, that clarity may be an illusion.

As noted above, insurance policies contain exclusions and limitations on coverage. Some are clearly labeled as such, while others are buried elsewhere, including in insuring agreements and provisions that otherwise grant coverage. All such exclusions and limitations need to be carefully reviewed to assess their impact on coverage, particularly those that may apply to bacteria, viruses, and other agents.

Additionally, policies may carry time restraints and other traps that could jeopardize the availability of coverage. First-party insurance, such as event cancellation and property policies, typically require notices “as soon as practicable,” call for the insured to file a proof of loss within a specified period (often a matter of 30 or 60 days after *inception* of the loss), and may

²⁸ Natasha Singer and Mike Isaac, “Facebook to Pay \$550 Million to Settle Facial Recognition Suit,” *NY Times* (Jan. 29, 2020), <https://www.nytimes.com/2020/01/29/technology/facebook-privacy-lawsuit-earnings.html>.

require that an legal action to enforce rights to coverage be filed within a year after the inception of the loss.

Third-party policies have their own time restraints and traps, too. They typically require that the insured notify the insurer of a claim or suit “as soon as practicable,” or, with claims-made-and-reported policies, that a claim, even if timely noticed, be reported to the insurer before the end of the policy period. Such reporting requirements may be strictly enforced.

Insurance policies also have other conditions that might operate to limit coverage, such as conditions stating that the insured must cooperate with its insurer and not admit liability, incur expenses, or settle without the insurer’s consent or approval.

There are all sorts of intricacies involved in sorting through exclusions and conditions—not simply based on policy language, but also on how courts have approached these conditions and, given differences in court decisions, what jurisdiction’s law governs. Therefore, all potentially applicable insurance should be considered and carefully analyzed. By doing so, insureds may discover that they have substantial financial protection for their losses.

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