



Insurance Coverage for COVID-19 Related Losses Under Commercial Property Policies

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Over the last few years, COVID-19 has hit businesses hard. Many of the affected businesses have turned to their insurance policies for help. Unfortunately, a recent decision from the Ohio Supreme Court limits the availability of coverage under many commercial property policies.

Aside from provisions that are directly implicated by COVID-19, insurance policies typically include: (1) an insuring agreement setting forth what is covered under the policy; (2) exclusions that, true to their name, exclude coverage for certain hazards, perils, or property (and sometimes there are exceptions to exclusions that further complicate the analysis); and (3) endorsements that amend or add to the terms of the policy.

Most business claims associated with COVID-19 and related government shutdown orders are pursued under the following coverage grants: (1) Business Interruption (BI) coverage (also referred to as business income or actual loss sustained); (2) Extra Expense; (3) Civil Authority coverage; (34) Communicable Disease coverage.

Business Interruption insurance covers a policyholder's lost profits if the policyholder's

operations are interrupted or suspended due to a fire, flood, or other covered loss to the policyholder's property. Under most—but not all—policies, BI coverage is triggered by “direct physical loss or damage” to property owned, leased, or rented by the policyholder. The question being litigated across the country is whether a pandemic resulting in widespread shutdown orders, constitutes “direct physical loss.” The focus of such litigation is on the meaning of the phrase “direct physical loss”

“physical alteration” or a “total loss of access to properties at issue...” Id. at ¶24. With this definition in mind, the Court concluded that “direct physical loss or damage to property does not arise from (1) the general presence of Covid in the community, (2) the presence of Covid on surfaces at a premises, or (3) the presence on a premises of a person infected with Covid.” Id. at ¶26. The Court's decision makes it difficult for policyholders to obtain BI coverage for COVID-19 related losses

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and whether “direct physical loss” requires a tangible, alteration of the property, permanent loss of property (as insurers argue), or if dispossession or deprivation of the property's use is a loss sufficient to trigger coverage.

In addition to the traditional BI coverage, many property policies include an extension for business income and extra expenses in the event of a cessation in operations caused by order of a civil authority. Policyholders argue that the government shut-down orders during the COVID-19 pandemic trigger Civil Authority coverage.

In *Neuro-Communication Servs., Inc. v. Cincinnati Ins. Co.*, the Ohio Supreme Court held that a property policy covering “direct loss,” with “loss” defined as “accidental physical loss and accidental physical damage” required that damage to covered property be “physical in nature,” not simply loss of the ability to use the covered property. Slip Opinion No. 2022-Ohio-4379, at ¶17. The Court then distinguished Neuro's loss due to COVID-19 and related government orders, which, according to the Court, did not result in

where the policy requires a “direct physical loss.”

The Court's decision does not address policy language that does not require both “direct” and “physical” loss or Communicable Disease coverage. To the extent a policyholder has such language in its policy the Court's decision does not limit such coverage. A careful review of the policy language is needed in order to assess whether coverage is available, and if so, the extent of limits available. (Communicable Disease coverage often is subject to sub-limits that are often significantly lower than BI coverage and therefore may not fully cover a policyholder's loss.)

While commercial property policies may, in some instances, help offset losses associated with COVID-19, some policyholders may not get the help needed to fully compensate them for COVID-19 related losses given the Ohio Supreme Court's decision. It is important to note, however, that language differs from policy to policy, and the specific language of the applicable policy will govern whether any claim, including a claim related to COVID-19, is covered.

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