

# COVID-19 – Is it a Direct Physical Loss or Damage to Covered Property so as to Trigger Business Interruption Coverages?

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Each day we are seeing new restrictions, closures of businesses and self-quarantines of employees and family members. All of these impact our daily lives and our businesses. The continuing spread and the potential impact of the novel coronavirus, COVID-19 on the business world continues to dominate the news, social media and our every thought. As businesses continue to focus on how these developments are impacting or will impact them, one question is the extent to which any of the anticipated business interruption and related losses might be covered by your insurance programs.

Most companies will not have specialized coverage forms that are specifically designed to respond to the effects of a public health crisis. These specialized coverage forms are mainly seen in the travel and leisure industries. So where does that leave other businesses? The first response is your business interruption coverage.

Business interruption coverage is a first-party insurance form which is designed to cover all risk or loss or damages to insured property, along with associated losses, except as specifically excluded. The general purpose of this coverage is to reimburse the insured for lost profits and fixed costs associated with operating the business during the period of restoration from the interruption – in this case COVID-19 related closures.

Unfortunately, business interruption coverage is not all encompassing. It provides coverage for business interruption losses to the extent that the interruption results from covered property damage. A policyholder must first evidence the existence of covered property damage and can only then seek insurance recovery for business interruption losses flowing from that property damage.

In order to trigger this type of coverage, policies typically require direct physical loss of or damage to covered property. As these terms are not always defined, what do they mean? Does the presence of the coronavirus in a commercial setting constitute direct physical loss or damage? Arguably, yes. There is support for the argument that the presence of microscopic organisms such as the COVID-19 is in fact direct physical loss or damage triggering business interruption coverages. As information about the mode and manner in which the virus spreads becomes known, further support for this argument may be attained.

According to the Centers for Disease Control (CDC) the virus is thought to spread mainly from person-to-person contact but has also been observed that a person can contract the virus by contact with a surface or object that has the virus on it and then touching one's own mouth, eyes or nose. Recent information from a New York Times Report is that a study of other coronaviruses found they could remain on metal, glass and plastic for several days. Does this constitute direct physical loss or damage to covered property? Perhaps.

Support for this argument is found in decisions from the Third Circuit Court of Appeals and the U.S. District Court, New Jersey. In the context of an E.coli bacteria exposure, the Third Circuit Court of Appeals in *Motorists Mutual Insurance Co., v. Hardinger*, found that the presence of E.coli bacteria in the well of the house could constitute physical loss or damage to a structure. Similarly, the U.S. District Court of New Jersey found that "courts considering non-structural property damage claims have found that buildings rendered uninhabitable by dangerous gases or bacteria suffered direct physical loss or damage." *Gregory Packaging Inc. V. Travelers Prop. Cas. Co. of Am.*

There are definitely strong opinions for an against this argument for coverage. The answer probably lies somewhere in the middle ground and is highly dependent upon your policy terms and the nature of your claim. These issues are

evolving quickly and the response to these claims yet unknown. The best course of action for businesses is to carefully review your coverages, consult with those who have specialized knowledge in this area of the law in order to present any claim to your insurer.

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