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# LEGAL ALERT

## Insurance Coverage for Losses and Claims Associated with the Coronavirus

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# Insurance Coverage for Losses and Claims Associated with the Coronavirus

## 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 270,000 people have been infected with the SARS-CoV-2 virus and more than 11,000 people have died from the resulting COVID-19.<sup>1</sup>

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, lawsuits already have been filed, seeking damages for alleged exposure to SARS-CoV-2—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.

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<sup>1</sup> [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200310-sitrep-50-covid-19.pdf?sfvrsn=55e904fb\\_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200310-sitrep-50-covid-19.pdf?sfvrsn=55e904fb_2).

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:

**Disease**

coronavirus disease  
(COVID-19)

**Virus**

severe acute respiratory syndrome coronavirus 2  
(SARS-CoV-2).<sup>2</sup>

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.<sup>3</sup>

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.” Therefore, when an exclusion references “disease,” but not “sickness,” a court may be reluctant to apply the exclusion to something that many would perceive as a sickness or illness, whether it be a cold, the flu, or a SARS-CoV-2 infection. *See Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal. 4th 758, 764 (2001) (“[W]e cannot read into the policy what [the insurer] 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.”); *Fireman's Fund Ins. Co. v. Atl. Richfield Co.*, 94 Cal. App. 4th 842, 852 (2001) (an insurer’s “failure to use available language to exclude certain types of liability gives rise to the

<sup>2</sup> [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).

<sup>3</sup> *Id.*

inference that the parties intended not to so limit coverage"; 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").

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.

### C. Possible Insurance Coverage

One question now frequently raised 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 do 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:

- **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 in the event that 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.
- **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.
- **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.

We provide below an overview of each of these types of insurance. We also discuss coverage for the costs of reducing losses. And, we highlight some of the timing requirements and other procedural requirements that, if not complied with, may jeopardize coverage.

## II. 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 actually 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 to 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. Interpreting the exclusion to bar coverage would render the coverage provided by the policy illusory, something that courts will not do. *See, e.g. Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal. 4th 758, 894 (2001) (noting that courts will not interpret provisions so that coverage is rendered illusory and instead will interpret provisions “in a manner that makes them reasonable and capable of being carrier into effect”). Clearly, the exclusion should be reasonably interpreted to apply only when the act of a promoter is the triggering event in the cancellation. *See 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.”); *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 406 (1989) (“[E]xclusionary clauses are interpreted narrowly, whereas clauses identifying coverage are interpreted broadly.”).

A New York court has addressed the question of whether there is coverage when the initial event is insured, but a subsequent event allegedly causing the loss is excluded. 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.*

Some, but by no means all, event cancellation policies may have a communicable disease exclusion. Like any exclusion, this one should be interpreted narrowly with any ambiguities interpreted in favor of coverage. *See, e.g., Pioneer Tower Owners Ass’n v. State Farm Fire & Cas. Co.*, 12 N.Y.3d 302, 306 (2009); *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); *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 648 (2003) (“exclusionary clauses are interpreted narrowly against the insurer”).

Insureds should not assume that just because a policy may have a “communicable disease” exclusion that there is no coverage. It will depend on what the exclusion actually says, and whether its limitations are plain and clearly understood. 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 or the threat or fear thereof (whether actual or perceived).

This Exclusion shall not apply if any of the above communicable diseases affect an Insured Person and/or Named Person and such infection of an Insured Person or Named Person is the sole and

direct cause of the necessary Cancellation, Abandonment, Postponement or Interruption of the Insured Performance(s) or Event(s); or

The Venue is closed by or under the order of any government or public or local authority as a sole and direct result of any of the above communicable diseases which originate and manifest within the confines of the Venue.<sup>4</sup>

In order 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, Swing Flu, or a flu variant. However, 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.”<sup>5</sup> Additionally, the Center for Disease Control has 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).”<sup>6</sup> Therefore, on a reasonable and narrow reading of this form of the communicable disease exclusion, as required under the tenets of contract interpretation, coverage for cancelled events associated with SARS-CoV-2 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.<sup>7</sup>

<sup>4</sup> See Lloyd’s Policy Wording, GC(NAC) (U.S.A. & Canada) NMA 2746 (amended Jan. 24, 2017).

<sup>5</sup> <https://www.bbc.com/news/world-asia-china-51368873>

<sup>6</sup> <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>

<sup>7</sup> See Beazley Policy Wording, available at <https://www.yumpu.com/en/document/read/50184246/beazley-event-cancellation-wordingpdf>

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.

Furthermore, as also noted above, the interpretation of policy language is done from the perspective of the layperson. Therefore, 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.

Even it can be said that an exclusion would clearly apply to both SARS-CoV-2 and COVID-19, coverage still may be afforded because the exclusion may not be as broad in application as it might appear on first read. For example, a policy might have an exclusion for losses from microorganisms, but cover losses resulting from an order of a civil authority, such as a quarantine. In that circumstance, to the extent the loss is deemed to be caused by the order, then coverage still may be afforded. *See, e.g., Massi’s Greenhouses, Inc. v. Farm Family Mut. Ins. Co.*, 233 A.D.2d 844, 844 (N.Y. Sup. Ct. App. Div. 1996) (insureds sought coverage for loss business associated with excluded bacterial contamination of geraniums in greenhouses following quarantine order; question of fact whether losses were caused by quarantine or by bacterial contamination).

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 event cancellation policies will provide coverage, some, and perhaps many, will—and that coverage should not be overlooked.

### **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 physical 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. Loss or Damage to Property**

Many businesses do not consider the possibility of property insurance for SARS-CoV-2 losses because they do not consider those losses as involving loss of or damage to property.

Instead, they may think of these losses as uninsured economic losses or losses that affect people, not property. However, there is a reasonable argument that SARS-CoV-2 losses may, in fact, be covered by property insurance.

The starting point is the question of whether there is some loss or damage to real or personal property. While a virus that infects people might not, at first impression, involve loss or damage to real or physical property, that is not actually the case. When property, such as surfaces or airspace, is contaminated, including by a virus, it may be deemed to be damaged. In fact, courts have recognized that contamination that renders a property uninhabitable or unusable for its intended purpose may constitute direct property loss or damage.

This possibility was recognized in *Motorists Mutual Insurance Co. v. Hardinger*, 131 F. App'x 823 (3d Cir. 2005). The insureds sought coverage under their property insurance policy after discovering that the well on their property was contaminated with e-coli bacteria. The insureds became ill and had to vacate the property. The Third Circuit found that there was a question of fact as to “whether the [insureds’] property was nearly eliminated or destroyed, or whether their property was made useless or uninhabitable” by the contamination, and therefore reversed the trial court’s granting of summary judgment to the insurer. *Id.* at 826-27.

In *Oregon Shakespeare Festival Association v. Great American Insurance Company*, 2016 WL 3267247 (D. Ore. June 7, 2016), for example, a festival cancelled performances at a theatre due to air quality and health concerns as a result of smoke infiltration caused by wildfires. *Id.* at \*2. In finding that the festival was entitled to business interruption coverage, the court held, “The smoke that infiltrated the theatre caused direct property loss or damage by causing the property to be uninhabitable and unusable for its intended purpose.” *Id.* at \*9.

In reaching this decision, the *Oregon* court looked to an “extremely persuasive” federal court decision, *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014). In *Gregory*, the accidental release of ammonia into a packaging facility caused the facility to be shut down while the ammonia dissipated. *Id.* at \*3. To remedy the problem, the facility had to “air the property” and hire an outside company to clean up the facility. While acknowledging that “structural alteration provides the most obvious sign of physical damage,” the court noted “property can sustain physical loss or damage without experiencing structural alteration.” *Id.* at \*5.

Many courts have recognized that contamination of property by a hazardous substance is property damage. *See, e.g., AIG Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 842 (1990) (“Contamination of the environment satisfies” the requirement of property damage); *Maryland Cas. Co. v. Wausau Chem. Corp.*, 809 F. Supp. 680, 693 (W.D. Wis. 1992) (“[P]roperty damage’ includes contamination to natural resources such as ground water and soil and the cost of subsequent clean-up.”). 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.”).

Therefore, the next question is whether the presence of SARS-CoV-2 inside the air of, or on surfaces in, a building, ship, or other structure constitutes damage to property. The answer to that question should be “yes.” Indeed, even the space, including airspace, within a building long has been recognized to be real property. *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); *see also 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.”); *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”); *Centennial Ins. Co. v. NE Pharmaceutical & Chem Co.*, 811 F.2d 1180, 1186 (1987) (“The 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.” (emphasis added)), *opinion on reh’g en banc*, 842 F.2d 977 (8th Cir. 1988); *Butler v. Frontier Tele. Co.*, 186 N.Y. 486, 491 (1906) (“the law regards the empty space as if it were a solid, inseparable from the soil”). In fact, courts have held that even odors in a building can constitute physical loss. *See, e.g., Mellin v. N. Sec. Ins. Co.*, 167 N.H. 544, 550-51 (2015) (property policy insures “physical loss changes to the insured property, but also changes that are perceived by a sense of smell and that exist in the absence of structural damage”).

## **B. 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).

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).

## **C. 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.* See also *AIU*, 51 Cal. 3d at 843 (policy insuring losses because of "property damage to which this policy applies" covers business interruptions "because of property damage in general, regardless of by whom it is suffered").

#### **D. Coverage for "Restoration" or "Extended Period of Indemnity"**

When an insured ceases business activities and subsequently 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). See, e.g., *American*, 949 F.2d at 692-93. In *American*, 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. Nonetheless, the district court concluded that, once the insured had reopened for business, recovery for the further period of operation with reduced earnings was precluded. On appeal, the Third Circuit rejected this conclusion. *Id.* at 692-93. It reasoned 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. 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.

### **E. Civil Authority and Ingress/Egress Insurance**

The City of Wuhan, the epicenter of SARS-CoV-2, is home to more than 11,000,000 people. As part of its efforts to prevent the spread of the virus, China isolated Wuhan from the rest of China. As a result, planes and trains were barred from entering or leaving the City, and, within Wuhan, buses, subways, and ferries also were suspended.<sup>8</sup> These travel restrictions spread throughout the country and have caused serious problems for businesses inside and outside of China. And, now, quarantines and travel restrictions have been instituted elsewhere in the world, including as to travel into, out of, or within multiple countries, provinces, and cities.

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.<sup>9</sup>

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.”<sup>10</sup>

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<sup>8</sup> Michael Levenson, “Scale of China’s Wuhan Shutdown Is Believed to Be Without Precedent,” *New York Times* (Jan. 22, 2020), <https://www.nytimes.com/2020/01/22/world/asia/coronavirus-quarantines-history.html>.

<sup>9</sup> Business Income (and Extra Expense) Coverage Form, CP 00 30 04 02, at A.5.a.

<sup>10</sup> *Id.*

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 . . . .”<sup>11</sup>

Some insurer forms also provide separate protection for loss of income when ingress or egress is prevented to or from the insured premises.<sup>12</sup> 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 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

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<sup>11</sup> *Id.*

<sup>12</sup> 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>.



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 as long as 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.<sup>13</sup> Relatedly, some insurers have developed policies that are expressly designed for the purpose of covering pandemic or infectious disease risk.

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<sup>13</sup> “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/>.

## F. 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 (“CBI”) 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, CBI 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 CBI losses can have an exponential impact across multiple industries and sectors of the global economy.

The potentially broad reach of CBI 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 make arrangements 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 CBI coverage is limited to suppliers of raw materials because most CBI 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 CBI 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 CBI 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 CBI 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.*, 2017 WL 2629134 (9th Cir. June 19, 2017), the Ninth Circuit interpreted a CBI 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].” *Id.* at \*1. 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.* 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 CBI 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 Corporation. 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 CBI 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.

As illustrated by *DIRECTV*, *Park*, and *Archer*, CBI coverage is an effective tool to protect an insured against risk of loss or damage to others upon which the insured depends. Accordingly, in the wake of the Covid-19 outbreak, insureds should pay close attention to the CBI provisions in their policies and take measures to ensure that they are maximizing the benefits provided by this valuable asset.

### **G. 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 may not be 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.<sup>14</sup> How easily this virus can be spread amongst humans is not yet fully understood, including whether the virus can be transmitted by touching an object that has the virus on it.

Thus, it is possible that people attending concerts and other events might be infected by exposure to others who have contracted SARS-CoV-2 and may, in turn, sue the venue, 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.

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<sup>14</sup> Centers for Disease Control and Prevention, “2019 Novel Coronavirus,” <https://www.cdc.gov/coronavirus/Covid-19/about/transmission.html>.

A general liability policy covers claims for bodily injury (including, sickness, disease, and death, and frequently emotion distress). It also typically covers claims for damage to or loss or 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 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 attorney 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).

## **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, as discussed below, steps that an insured takes to reduce the chance that its employees will be exposed to SARS-CoV-2 may be covered by their insurance as a reasonable step to mitigate damages that might result from such exposure.

## VI. 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.

## VII. INSURANCE FOR COSTS INCURRED TO MINIMIZE EXPOSURE TO SARS-COV-2 AND TO MITIGATE LOSSES OR DAMAGES

### A. First-Party Insurance

Property, political risk, 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.

Event cancellation and property policies also typically call for insureds to take reasonable steps to reduce or mitigate losses. In fact, in many of these policies, an insured not only has the right to take such steps, but may have an affirmative obligation to do so. And, these policies usually also provide reimbursement for preventative measures taken to avoid loss. Historically, these provisions were known as “sue and labor” provisions (the word “sue” has the now-obsolete meaning of “to go in pursuit of”). Today, such provisions are often referred to as “expenses to prevent loss” provisions.

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 actually 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.”).

## **B. Third-Party 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 general liability, workers’ compensation and employers liability, and other types of third-party insurance.

Third-party insurance policies generally 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”).

#### **VIII. 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 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 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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