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'Businesses Scramble to Assess Business Interruption Insurance Coverage for COVID-19'

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COVID-19 has sickened hundreds of thousands of people and resulted in the deaths of thousands. Millions will likely be affected. Up until very recently, there was widespread belief that the United States and other countries might be spared the level of disruption seen in China, Iran and Italy earlier this year. Recent events have shown this is no longer a reasonable assumption. The World Health Organization has declared COVID-19 a global pandemic, the United States designated a national emergency, and financial markets recently suffered their worst weeks since 2008, resulting in the stock market ending its lengthy and historic bull market run.

These events have brought great uncertainty, and businesses are scrambling to stay afloat and mitigate the damages. One option is pursuing coverage under commercial insurance policies. Businesses may find that this pursuit will not achieve the desired goals unless they have purchased broad coverage for pandemic-type events. Insurance policies differ markedly and coverage grants and exclusions are not all the same. As is usually the case, the specific terms and conditions of an insurance policy will prevail over assumptions and generalizations. Thus, any analysis of whether insurance covers claims arising from COVID-19 will be a fact-based determination on an individual insurance policy basis.

The Facts Matter in Prospective Coverage Disputes Over COVID-19

There are two main questions in every insurance coverage dispute. First, what are the actual facts that gave rise to the claim? Second, what are the actual words contained in the specific insurance policy provisions relevant to the claim? The facts and words matter because, more often than not, each claim and each policy is different. And the differences will matter when construing insurance policies in the context of COVID-19 claims.

Why write about this obvious point? Because of the many analyses that policyholder and insurer counsel are circulating on whether this policy or that policy provides coverage for losses arising from COVID-19, very few focus on the real issue: the importance of the actual facts of any claim applied to the actual words of the

insurance policy.

If we have learned anything over the history of judicial construction of insurance policies it is that, the specific words and actual facts matter. In nearly every state, courts have made it clear that they will look to the plain language of an insurance policy and construe it based on its ordinary meaning. Courts typically reject presumptions and generalizations about insurance policy language.

A prime example of how courts construe insurance policies was succinctly stated by the New York Court of Appeals in In re Viking Pump, Inc., 27 N.Y.3d 244, 52 N.E.3d 1144 (2016):

When construing insurance policies, the language of the "contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured" (citations omitted). Furthermore, "we must construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (citations omitted). Significantly, "surplusage [is] a result to be avoided" (citations omitted). Moreover, while "'[a]mbiguities in an insurance policy are to be construed against the insurer'" (citations omitted), a contract is not ambiguous "if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (citations omitted).

So what does this all mean to COVID-19 insurance issues? It means that generalizations about coverage are worth as much as the paper the coverage generalizations are written on. Yes, we can look at prior cases involving business interruption insurance and other forms of commercial insurance that may be asked to respond. We can review how courts have addressed disease and contagion in the past and we can see how courts looked at physical damage requirements and draw reasonable conclusions.

But all of this is a bit speculative until we construe the actual language of a real insurance policy that is being asked to respond to a COVID-19 claim and look at the facts of that COVID-19 claim. There are myriad circumstances and language choices that will make a big difference in whether there is, in fact, coverage. So while we all struggle to predict the future by looking at existing precedent, let's remember that, at the end of the day, it is the actual facts of the claim and the actual words of the contract that control. We present the following discussion about business interruption coverage and COVID-19 against that backdrop.

Business Interruption Coverage and COVID-19

Businesses generally obtain business interruption coverage as part of their commercial insurance policies. Coverage under these provisions generally requires "direct physical loss or damage" to an insured property. Although language varies from policy to policy, time element or business interruption provisions commonly include language like:

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations….

Accordingly, one important issue is whether COVID-19 causes "direct physical loss of or damage to property." This issue is central to the allegations in the first COVID-19 coverage cases brought by several restaurants and

two casinos, and filed in state court in New Orleans, California and Oklahoma, respectively. A related issue is whether losses resulting from contamination of insured property, such as cleaning an office after an employee tests positive, may result in "direct physical loss of or damage to property."

Insurance policies often do not define "direct physical loss." With experts believing that COVID-19 spreads by contact with contaminated surfaces and through aerosol droplets, the question is whether either circumstance constitutes "direct physical loss of or damage to" covered property. Case law addressing contamination suggests COVID-19 may not create a "direct physical loss."

In one case, a court found that bacterial and mold contamination was not a "direct physical loss" under a property insurance policy. In Universal Image Products v. Federal Insurance Co., 475 F. App'x 569 (6th Cir. 2012), a series of heavy rainstorms created a bacterial and mold infestation in the ventilation system of a leased office building. Experts determined there was no "notable airborne contamination" and that an evacuation was not necessary, but recommended the insured move its operations from the first floor. The insured eventually vacated the building for two months. The property owner covered the costs of hiring experts and a two-month cleaning.

Notably, neither cleaning nor suffering an infiltration of dust, debris, or "possibly noxious and toxic chemicals" may necessarily result in a "direct physical loss." In Mama Jo's, Inc. v. Sparta Insurance Co., No. 17-cv-23362-KMM, 2018 U.S. Dist. LEXIS 201852, at *24-25 (S.D. Fla. Jun. 11, 2018), a restaurant was required to perform extensive cleaning to mitigate dust and debris from a nearby construction project. The court found there was no "direct physical loss" because "cleaning is not considered direct physical loss." In addition, the court declined to conclude that there was "direct physical loss" under even an expansive definition of the term, stating, "[t]he fact that the restaurant needed to be cleaned more frequently does not mean Plaintiff suffered a direct physical loss or damage."

In contrast, in a case cited by policyholder attorneys, one court found contamination by an ammonia leak constituted a "direct physical loss" under a property insurance policy. In Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America, No. 2:12-cv-04418 (WHW), 2014 U.S. Dist. LEXIS 165232 (D.N.J. Nov. 25, 2014), a worker was injured by an ammonia leak and the insured's facility was closed for cleaning. There was a dispute over whether the facility closed for around five days or a week, but, in any event, the court found that the ammonia remained in the building "for some amount of time." While the court held that the ammonia leak caused physical damage to the plant by rendering it unusable for a period of time, query whether viral contamination caused by COVID-19 would rise to the same level of physical damage when sanitizing a plant for COVID-19 would not take days and does not render a premises unusable.

Case law also suggests that there must be a causal connection between direct physical damage to covered property and the insured loss. In United Air Lines v. Insurance Co. of the State of Pennsylvania , 439 F.3d 128 (2d Cir. 2006), the Second Circuit parsed the various causes of an airline's losses following the September 11 attacks. The policy insured against losses caused "by damage to or destruction of the Insured Locations resulting from Terrorism . . . ." The airline had a ticket counter located in the destroyed World Trade Center. It also suffered losses because of the government's temporary disruption of flight services and airport shutdown. The court affirmed the district court's determination that the airline could recover under its business interruption policy only for those losses "attributable to the destruction of [the] ticket office," and that it could not recover for its lost earnings attributable to the "system-wide disruption of air service." The court

concluded, "[t]he interruption to [the airline's] business following the attacks was, therefore, not the 'direct result' of damage to adjacent premises."

Additionally, a governmental order restricting commerce in response to a Mad Cow Disease outbreak was held not to be a "direct physical loss." In Source Food Technology, Inc. v. United States Fidelity & Guaranty Co. , 465 F.3d 834 (8th Cir. 2006), the U.S./Canada border was closed for beef shipments after a Mad Cow outbreak in Canada. The insurer rejected coverage for business it lost due to the restriction. The court found there was no "direct physical loss," in part, because it was not shown that the beef the insured would have imported was contaminated.

Finally, costs associated with restructuring an inventory destroyed by disease may not be covered. In Rembrandt Enterprises, Inc. v. Illinois Union Insurance Co., 269 F. Supp. 3d 905, 906 (D. Minn. 2017), the insured owned several poultry farms that were affected by a bird flu outbreak. A response to the outbreak required extensive euthanasia of poultry stock. The insured began the process of repopulating its stock, which required extensive heating to protect the new poultry from the elements. The court declined to extend coverage for those heating costs, finding that the euthanasia of the poultry did not damage the barns themselves and declined coverage.

Whether a Partial or Complete Cessation of Business Is Required for BI Coverage?

Business Income and Extra Expense provisions traditionally provide coverage for loss resulting from a "suspension" of business operations. Not all insurance policies describe "suspension" in the same way. While some insurance policies refer to a "necessary" suspension (see ISO CP00300402), other insurance policies refer to "necessary or potential" suspensions or to "necessary interruption of business, whether total or partial." Generally, policies do not define either term. As various courts have determined, the difference between "necessary," "potential" and "partial" may be crucial.

The vast majority of courts have interpreted "necessary suspension" as requiring a complete cessation of business operations. For example, in Madison Maidens, Inc. v. American Manufacturers Mutual Insurance Co., No. 05-4585, 2006 U.S. Dist. LEXIS 39633 (S.D.N.Y. June 14, 2006), the court granted summary judgment to the insurer, finding there was no business interruption coverage because a water leak did not cause a "complete cessation" of business operations. In that case, the business was still able to operate (although not at full capacity) in spite of the water leak.

At 5:00 pm on a Friday, a water leak began damaging the insured premises. The damage was not noticed until the following Monday. Then, "and for some time thereafter," "at least some employees" worked on salvaging office materials and supplies. At least two employees, however, were able to return to work on Monday and focus solely on their jobs instead of recovery efforts. The policy provided business interruption coverage in the event of a "necessary suspension of [the insured's] 'operations.'" There was also an Extended Period of Indemnity provision that stated, in relevant part:

If the necessary suspension of your "operations" produces a "business income" loss payable under this policy, and you resume "operations" with reasonable speed, we will pay for the actual loss of "business income" you incur during the "extended period of indemnity."

The court found that "necessary suspension" required a "complete cessation of activity, even a temporary one"

(emphasis in original). Additionally, the presence of "resume 'operations'" in the Extended Period of Indemnity Provision also influenced the court's analysis. The court indicated that the choice of "resume" meant, "'there must necessarily have been a stoppage of operations from which it was necessary to begin anew'" (internal citations omitted).

Another court considered the extent of consumer demand in determining whether there had been a complete cessation of business operations. In H & H Hospitality LLC v. Discover Specialty Insurance Co. , No. 10-1886, 2011 U.S. Dist. LEXIS 146055 (S.D. Tex. Dec. 20, 2011), the court granted summary judgment to the insurer, finding there was no business interruption coverage.

Hurricane Ike damaged the insured motel, which consisted of two buildings. The second building bore the brunt of damage, resulting in the loss of part of its roof. Additionally, high winds rendered approximately forty rooms between both buildings not rentable, with the majority of those rooms in the second building. Despite the damage, the motel continued to operate and rent some of its rooms, although the opinion did not specify how many.

Although the motel was damaged, that damage was not the sole factor the court examined. The court noted that the motel "remained open continuously" and that the insured did not argue the damage was so extensive it could not meet consumer demand or had to turn any customers away. The court also examined historical occupancy rates and found the motel's occupancy had never exceeded 80 percent and generally hovered around 60 percent. Query the implications of H & H Hospitality on insureds with extensive interaction with third parties and whether reduced demand due to quarantines, either self-imposed or by civil order, may affect coverage under a "necessary suspension" provision.

Other courts have echoed the court's conclusions in H & H. See Ramada Inn Ramogreen, Inc. v. Travelers Indemnity Co., 835 F.2d 812 (11th Cir. 1988) (policy providing business interruption insurance for restaurant and hotel did not cover losses for lower hotel occupancy caused by damage and closure of restaurant because it did not result in a complete cessation of hotel operations); Lantheus Medical Imaging v. Zurich American Insurance Co., 255 F. Supp. 3d 443 (S.D.N.Y. 2015) (collecting cases, but decided on other grounds).

One court has interpreted "necessary or potential" suspension language as not requiring a total cessation of business operations. In American Medical Imaging Corp. v. St. Paul Fire & Marine Insurance Co., 949 F.2d 690 (3d Cir. 1991), the court reversed summary judgment previously granted to the insurer. The insured provided ultrasound testing services for the medical industry. Early one morning, its headquarters caught fire. The day after the fire, the insured procured an alternative worksite and obtained some working telephone lines by 1:00 pm, but argued that it lost income due to diminished capacity and incurred extra expense because of the temporary relocation. It did not return to its original headquarters for six weeks. The policy provided coverage for loss resulting from "the necessary or potential suspension of [the insured's] operations."

The court concluded that there would be coverage if the trier of fact believed the insured's evidence that the insured suffered a "necessary suspension" on the morning following the fire and on the morning of the fire, a "potential suspension of a much longer duration."

Additionally, policy language expressly covering "partial" suspensions brings another level of analysis. In Aztar Corp. v. U.S. Fire Insurance Co., 224 P.3d 960 (Ariz. Ct. App. 2010), although the court ultimately affirmed summary judgment to the excess insurers for different reasons, it still found the trial court erred when it

granted summary judgment to the excess insurers under the theory that the insured's operations were not diminished. The insured was a casino in the midst of a 27-story expansion when six floors collapsed, necessitating the closure of the casino's main entrance, a pedestrian bridge, a hotel tower, parking structure, and bus terminal. It took one month to rebuild the six floors and open to the public. These events caused a decline in patronage. The policy provided potential coverage for "loss resulting directly from necessary interruption of business, whether total or partial."

The court interpreted "partial" broadly, concluding it could also refer to complete cessation of a portion of a business:

The addition of the phrase 'total or partial' also makes it plain that any stoppage, or hindrance, need not impact the entire 'business' but only a portion. We do not, however, conclude that the use of the term "or partial" can only be given meaning by allowing coverage for reduced patronage. It can be applied, as the Excess Insurers argue, to mean the complete stoppage of a portion of an insured's business as contrasted with stoppage of the entirety of an insured's business.

Putting aside the other myriad issues concerning business interruption coverage, the extent of an insured's suspension of business and how the insurance policy applies to that suspension is yet another issue for policyholders and insurers to contend with when addressing business interruption coverage.

Civil Authority Orders and COVID-19 Coverage

The COVID-19 pandemic has caused local and state governments to issue directives closing non-essential businesses like restaurants, movie theaters, gyms and other businesses. Some local governments have issued shelter-in-place orders. In other instances, some businesses have begun closing their doors as a preemptive measure, either to reduce the spread of the virus or in response to reduced demand from customers. As an example, early in the pandemic restaurants in many large cities, such as New York and Washington, D.C., shuttered their doors except for delivery orders.

Business income and extra expense coverage typically contains a "civil authority" provision. This coverage generally applies when a civil authority (e.g., state, local or federal governmental entity) prohibits access to an insured's premises due to direct physical loss of or damage to property other than at the insured's premises, from a covered cause of loss.

Although policyholders may assume that they are entitled to coverage simply because their policy contains a civil authority provision, this isn't necessarily so. Insurance policies differ markedly and the specific terms and conditions of an insurance policy will prevail over any assumptions or generalizations. See Penton Media, Inc. v. Affiliated FM Ins. Co., 245 F. App'x 495 (6th Cir. 2007) (applying traditional principles of contract construction to interpret the policy and affirming district court's determination that the civil authority provision did not cover the insured's claim). Moreover, as discussed above, even when a government order prohibits or otherwise specifically restricts access to an insured premise, the policy may still require a nexus to a direct physical loss before triggering coverage.

For example in Dicki Brennan & Co. v. Lexington Insurance Co., 636 F.3d 683 (5th Cir. 2011), the court held that insureds could not recover for business losses resulting from an evacuation order issued in anticipation of Hurricane Gustav. The policy's civil authority provision provided,

[w]e will pay the actual loss of Business Income . . . 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 . . . .

The insureds argued that the evacuation order was issued in response to physical loss in the Caribbean, but the court rejected this argument, holding that the insured "failed to demonstrate a nexus between any prior property damage and the evacuation order." The court held that the policy required a "causal link between prior damage and [the] civil authority action," and that the insureds had not demonstrated that causal link because the evacuation order was issued to prevent possible future storm damage.

A direct physical loss was not found by the court in Source Food Technology, Inc. v. United States Fidelity & Guaranty Co., 465 F.3d 834, 838 (8th Cir. 2006), a case briefly discussed above. The insured sold modified beef products it obtained exclusively from a Canadian supplier. After a cow in Canada tested positive for Mad Cow Disease, the U.S.D.A. issued an embargo prohibiting the importation of beef from Canada. The embargo affected the insured's ability to obtain beef from its Canadian supplier and resulted in the termination of one of its contracts. The court held that there was no coverage under these circumstances, finding, in part, that because the insured conceded that the beef it sought to import was not physically contaminated or damaged in any way, there was no "direct physical loss" to property and, accordingly, there was no coverage for business interruption.

It is common for policies to require that civil authority orders specifically prohibit access to the insured's premises. For example, in Southern Hospitality, Inc. v. Zurich American Insurance Co., 393 F. 3d 1137 (10th Cir. 2004), a group of hotels sought to recover business losses under a civil authority provision after the government temporarily grounded all flights in the United States following the attacks on September 11th. The policy provided that "[w]e will pay for the actual loss of Business Income you sustain . . . caused by action of authority that prohibits access to the described premises . . . ." The Tenth Circuit affirmed the district court's conclusion that the civil authority provision did not provide coverage because the order related to grounding flights and the effect on the insured's hotels was peripheral.

In Borah, Goldstein, Atschuler, Nahins & Goidel, P.C. v. Trumbull Insurance Co., 2016 N.Y. Slip Op. 32736 (U) (N.Y. Cty. Apr. 5, 2016), a New York trial court agreed with an insurer that civil authority coverage did not apply because the government order did not specifically prohibit access to the insured's premises. There, the civil authority provision provided "[t]his insurance is extended to apply to the actual loss of Business Income you sustain when access to your 'scheduled premises' is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property . . . ." The court determined that the "scheduled premises" were located in zone C, and the civil authority orders pertained to zone A. Thus, "plaintiff's access to the 'scheduled premises' was not 'specifically prohibited . . . .'" Further, "the state of emergency declared by" the governor and mayor "did not "specifically prohibit[ ]" access to plaintiff's property and it was not enough to show that plaintiff had a "mere difficulty in accessing the premises."

In the context of natural disasters, courts have generally held that civil authority orders issued prior to actual, physical damage of an insured property do not trigger business interruption coverage. Query the implications of a civil authority order prior to a COVID-19 infection.

In Kelaher, Connell & Conner, P.C. v. Auto-Owners Insurance Co., No. 19-00693, 2020 U.S. Dist. LEXIS 31081, at 2-4, 8-11 (D.S.C. Feb. 24, 2020), an insured law firm was located within a mandatory evacuation zone prior

to Hurricane Florence. The court found there was no business interruption coverage because the policy extended coverage only when "access to the described business premises" was "prohibited by order of civil authority because of damage or destruction" (emphasis added). The court found no coverage under the civil authority provision, which it interpreted as "requir[ing] a link between the issuance of the civil authority order and the property damage." Id. at 14; see South Texas Medical Clinics, P.A. v. CNA Financial Corp., No. 06-4041, 2008 U.S. Dist. LEXIS 11460, at *2, 31-34 (S.D. Tex. Feb. 15, 2008) (no business interruption coverage when policy required a civil authority order to be issued "due to direct physical loss of or damage to property").

Finally, at least one court has treated a civil authority's recommendation differently than an order. In Kean, Miller, Hawthorne, D'Armond McCowan & Jarman, L.L.P. v. National Fire Insurance Co., No. 06-770, 2007 U.S. Dist. LEXIS 64849, at *2-3, 11-12 (M.D. La. Aug. 29, 2007), a New Orleans law firm was affected by a recommended, but not mandatory, evacuation order leading up to during Hurricane Katrina. The court found there was no coverage "because the advisories and recommendations given did not actually 'prohibit access' to the insured premises." On the contrary, the civil authorities "merely recommended or encouraged that residents remain off the streets if possible." The insured failed to show "that its employees, or any other residents . . . were specifically prohibited from driving on the streets and/or traveling to and entering its business premises."

COVID-19 and Waiting Periods Under Business Interruption Coverage

As discussed above, many insurance policies offer business income and extra expense coverage pursuant to "civil authority" provisions. Many policies do not begin covering a loss caused by a civil authority order until a certain period of time, the "waiting period," has concluded. This amount of time is usually a period of days. For example, the ISO CP00300402 form states:

The 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.

Because a waiting period is a condition to coverage, some insureds have argued that a waiting period is a deductible. In BY Development, Inc. v. United Fire & Casualty Co., No. 04-5116, 2006 U.S. Dist. LEXIS 14703, at *9-10 (D.S.D. Mar. 14, 2006), evacuation orders were issued for several towns because of wildfires. The policyholder evacuated and closed its business, and it claimed that it lost business income during and after the evacuation period. The policy had the same waiting period quoted above. The insurer denied the policyholder's claim because the business was not closed for more than 72 hours.

The policyholder argued that the policy language stating that there was no deductible nullified the 72-hour waiting period language in the policy. The court found the waiting period was not a deductible and compared it to a self-insured retention, stating:

The Policy in the instant case had no deductible, but defined the time coverage began as seventy-two hours after the action of civil authority that prohibits access to the insured premises. Under the terms of the Policy, no amount was deducted from the Business Income or Extra Expense coverage during the period of time the Defendant agreed to provide coverage. Like a self-insured retention [], this seventy-two hour period differs from a deductible . . . [t]he waiting period is conceptually distinct from a deductible and, as such, does not create an ambiguity when read in conjunction with the "No Ded." language on the declarations page. No deductible applies under the terms of the Policy; thus, once coverage begins under the Policy (seventy-two

hours after an action of civil authority that prohibits access to the covered premises), the Defendant would have been liable to cover the losses fully, without a deductible amount withheld from the insured coverage.

The court eventually found there was no coverage because a civil authority did not restrict access for the 72-hour waiting period.

When a waiting period begins is another question. In Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP v. Chubb Corp., No. 09-6057, 2010 U.S. Dist. LEXIS 109055, at *11-14 (E.D. La. Oct. 12, 2010), civil authorities issued two orders in response to Hurricane Gustav. On August 30, the mayor of New Orleans issued the first order, a mandatory evacuation order, to become effective on August 31 at 12:00 pm. This order issued before the hurricane arrived and before there was any physical damage to trigger coverage. On September 2 at 8:42 pm, the mayor issued the second order, a voluntary evacuation order that rescinded the first order as of September 4 at 12:01 am.

The insured's policy included a 96-hour waiting period. The policy stated, "[t]he Waiting Period . . . will begin immediately following the time the civil authority prohibits access" as a "direct result of direct physical loss or damage to property." The insured argued the waiting period began on August 31 at 12:00 pm, when the first order became effective, and concluded on September 4 at 12:00 pm.

The court disagreed, finding that the waiting period began on September 2 at 8:42 pm, when the second order was issued, which was after the necessary condition of physical damage had occurred. The court stated:

The only reasonable interpretation of the "will begin immediately following the time the civil authority prohibits access" language is . . . unlike other business income coverages that trigger with property damage, Civil Authority coverage requires property damage and a civil authority order . . . [t]he waiting period "will begin immediately following the time the civil authority prohibits access" clearly means that coverage begins, not when the property damage is sustained that might in fact prohibit access, but only when the civil authority prohibits access, again based on the normal sequence of events. It would have certainly been clearer if the statement read "will begin immediately following the time the civil authority prohibits access following the direct physical loss" but this additional caveat is implicit in light of the coverage requirements.

Although the court ultimately found there was no coverage, it assumed for purposes of the motions that the requirements necessary for the civil authority coverage were in place as of the September 2 order. The court then held that the 96-hour waiting period would have concluded on September 6 at 8:42 pm, which was after the prohibition was rescinded.

Can Coverage for COVID-19 Be Excluded?

Business insurance policies contain exclusions precluding coverage under specified circumstances. Two exclusions potentially relevant to COVID-19 claims are the virus, bacteria or communicable disease and pollution exclusions.

In Amco Insurance Co. v. Swagat Group, LLC, No. 07-3330, 2010 U.S. Dist. LEXIS 4770 (C.D. Ill. Jan. 20, 2010), the court found a bacteria exclusion precluded a hotel's coverage for a series of underlying lawsuits. The complaints alleged that guests had died after contracting Legionnaire's disease from bacteria allegedly in the hotel's pools and hot tub. The court rejected the broad interpretation of the term "bacteria." Instead, the court found that "bacteria" was a "scientific classification," which covered the bacteria that causes Legionnaire's

disease.

In contrast, another court found that a bacteria exclusion did not preclude coverage for exposure to Legionnaire's disease-causing bacteria allegedly present in an outdoor hotel spa. In Westport Insurance Corp. v. VN Hotel Group, LLC, 513 F. App'x 927, 932 (11th Cir. 2013), the court found an outdoor spa would not be considered a "structure." The policy excluded coverage for bodily injuries caused by "bacteria on or within a building or structure."

Additionally, in Connors v. Zurich American Insurance Co., 872 N.W.2d 109 (Wis. Ct. App. 2015), although the court denied summary judgment for other reasons, the court found that a standard pollution exclusion would have excluded coverage for a suit by an employee alleging exposure to the bacteria that causes Legionnaire's disease. The court stated:

It is undisputed that Legionella bacteria in aerosolized water droplets would have been pollutants under the standard pollution exclusion at the time the bacteria allegedly infected Connors, because there is no dispute that: (1) it is uncommon for people to inhale Legionella bacteria in aerosolized water droplets and when these bacteria are inhaled they pose a health hazard; and (2) a reasonable insured would view these mist- or vapor-borne bacteria as pollutants.

Finally, some policies contain a communicable disease exclusion. In Koegler v. Liberty Mutual Insurance Co., 623 F. Supp. 2d 481, 484-85 (S.D.N.Y. 2009), although the court held that the insurer had to defend the insured because of a late disclaimer, the court recognized that an individual alleged to have transmitted the human papillomavirus and herpes virus to his girlfriend and their daughter, contractually was not entitled to liability coverage. The court found that the communicable disease exclusion, which excluded coverage for bodily injuries arising out of the "transmission of a communicable disease, virus, or syndrome," would have precluded coverage. The court treated the analysis as a simple matter, stating "[t]he exclusions [we]re couched in plain English, and are not at all difficult to understand."

Applied to COVID-19, Amco, Westport, Connors, and Koegler suggest the following. First, Amco and Westport suggest that whether a bacteria exclusion precludes coverage for a COVID-19 claim is an issue ripe for coverage disputes. In Amco, the court declined to broadly interpret the term "bacteria." COVID-19 is a virus and not a disease caused by bacteria. Accordingly, under Amco, a court may be disinclined to broadly interpret a bacteria exclusion to encompass a virus.

Under Westport, however, the issue was the source of transmission, which was alleged to be an outdoor spa at a hotel, and whether that constituted a "structure" as required by the bacteria exclusion. Westport suggests that, if the line between bacteria and virus is removed, then the alleged source of infection is critical. Applied to COVID-19, an infection acquired from the surface of a hotel bathroom may be within a "structure," whereas an infection from an off-site parking lot payment machine may not be covered.

Second, under Koegler, a communicable disease exclusion, which does not distinguish between bacteria and viruses and specifically mentions viruses, will likely preclude coverage of COVID-19 claims. The Insurance Services Office (ISO) developed an exclusion, titled "Exclusion for Loss Due to Virus or Bacteria" (form CP 01 40 07), 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 or disease." Additionally, in February 2020, ISO drafted two business income endorsements specifically regarding

COVID-19. If approved, the endorsements would provide limited coverage for a suspension of operations because of closure or quarantine at an insured location under a civil authority order attempting to halt or mitigate the spread of COVID-19. These endorsements, however, would also exclude coverage for costs due to cleaning or disinfecting property, consumer behavior due to fear of contagion, and expenses attributed to an absence of infected employees or employees suspected of being infected.

Third, under Connors, a standard pollution exclusion may exclude coverage for an illness. That COVID-19 is not caused by bacteria does not influence factors the Connors court applied. In Connors, the court stated that Legionella bacteria would be a pollutant under a standard pollution exclusion because people would experience a health hazard when inhaling aerosol droplets containing the bacteria. COVID-19 can be spread through aerosol droplets.
