September 10, 2021

Insurers and Courts Err in Resisting SARS-CoV-2 Science

By Micah E. Skidmore

Recent opinions from courts and commentators have criticized policyholders' reliance on scientific research to establish the physical changes wrought by SARS-CoV-2 on property for purposes of business interruption claims.[1] These reactionary arguments generally fall into two categories: (1) those that would substitute factual assumptions for scientific evidence; and (2) those that would attempt to diminish or ignore the import of research studies confirming electrochemical interaction between the Coronavirus and airborne particulate matter and common property surfaces, like wood, metal, fabrics and glass. Both approaches are erroneous, and neither can justify insurers' continued denial of COVID-19 business interruption claims.

The "Cleaning" Myth

Many courts and more insurers have reasoned that SARS-CoV-2 contamination cannot qualify as "physical loss" if the virile, contagious state of the viral infestation is temporary or if the contagion can be cleaned. *See, e.g.*, *Ilios Prod. Design v. Cincinnati Ins. Co.*, 2021 U.S. Dist. LEXIS 69843, at *20, 2021 WL 1381148 (W.D. Tex. Apr. 12, 2021) ("Even assuming that the virus that causes COVID-19 was present at Plaintiff's property, it would not constitute the direct physical loss or damage required to trigger coverage under the Policy because the virus can be eliminated. The virus does not threaten the structures covered by property insurance policies and can be removed from surfaces with routine cleaning and disinfectant."). This rationale is not justified by science or semantics.

While disinfectants and sanitizing agents are readily available, the notion that all viral contamination can be easily eliminated by wiping a surface is naively simplistic. Routine cleaning does not, for example, remove SARS-CoV-2 from airborne particulate matter. Sanitizing wipes and conventional cleaners are ineffective when it comes to treating soft surfaces, like clothing, furniture, and carpets.[2]

Routine cleaning of hard surfaces is also not the panacea portrayed by carriers. "[M]anual wiping is limited by human error and cross-contamination between surfaces."[3] Even in the rarefied sanitary environment of a

---

[1] *See, e.g.*, Fleischer & Ross, *Courts Should Heed Contract Law In COVID-19 Physical Loss*, Law360 (July 29, 2021).

[2] Reynolds, et al., *Impact of a Whole-Room Atomizing Disinfection System on Healthcare Surface Contamination, Pathogen Transfer, and Labor Efficiency*, CRITICAL CARE EXPLORATIONS (Feb. 17, 2021), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7892299/ ("Also, soft surfaces such as curtains, fabric chairs, and linens have been linked to healthcare disease outbreaks and pose additional challenges for surface disinfectants." (citations omitted)).

[3] Castano, et al., *Fomite Transmission and Disinfection Strategies for SARS-CoV-2 and Related Viruses*, at 21 CORNELL UNIVERSITY (May 23, 2020), *available at* https://arxiv.org/ftp/arxiv/papers/2005/2005.11443.pdf (emphasis added).

hospital, "[m]ultiple studies reported that only ~40% of near-patient surfaces in hospitals were cleaned according to policy."[4]

Instead of removing SARS-CoV-2 from surfaces, "routine cleaning and disinfectant" can actually increase physical loss from viral contamination. "If wipes are re-used between surfaces, there is a risk of transferring pathogens between surfaces."[5] Moreover, rigorous and repeated cleaning of hard or soft surfaces over time will inevitably lead to premature chemical or mechanical damage to property, which both qualifies as "physical loss" and makes further decontamination from SARS-CoV-2 more difficult.[6]

Commercial property insurance policies do not define "physical" loss in terms of whether the physical alteration of property is temporary or can be "cleaned." But setting aside the lack of any textual support for the "cleaning" myth, the insurers' argument that physical changes to property caused by SARS-CoV-2 can simply be wiped away are just that—more fiction than fact. Those who adopt this argument ironically do what some insurers have contemptuously referred to as abandoning judicial robes in favor of lab coats, but with no authoritative scientific basis for concluding that contamination from SARS-CoV-2 is anything other than a "physical loss."

An Argument About Causation Is An Argument Against Dismissal

Although sometimes cited as a pretext for dismissal, adherents to the "cleaning" myth err in making factual contentions about "physical loss" because doing so moves the debate away from any legal argument that could form the basis for dismissal under Rule 12(b)(6) or any state law analog. The same is true of insurers' arguments about causation. To say that molecular interaction between spike proteins and property surfaces is not the "cause" of business interruption loss is not an argument for dismissal. It is an argument for discovery.

As a strictly factual matter, the electro-chemical adhesion of SARS-CoV-2 to airborne particulate matter and common property surfaces is without question a direct cause of the business interruption and loss of income claimed by so many insureds. If the Coronavirus was not persistently present in the air and subject to transmission through contact with door handles, shopping carts, silverware, chairs, elevator buttons, tabletops, cardreaders, menus, windows, and countless other common business property items, patrons would have no reason to avoid restaurants, hotels, hospitals, and other public places as they have during the pandemic.

The notion that government lockdown orders are the real cause of any business interruption is a convenient assumption but denies the reality that business losses have continued to mount long past the expiration or lifting of community quarantine orders. This carrier argument also blithely ignores the fact that orders compelling the

[4] *Id.* (citation omitted) (emphasis added).

[5] *Id.* (citation omitted) (emphasis added).

[6] Jo, et al., *Assessment of Early Onset Surface Damage from Accelerated Disinfection Protocol*, ANTIMICROBIAL RESISTANCE & INFECTION CONTROL (Jan. 31, 2019), *available at* https://aricjournal.biomedcentral.com/articles/10.1186/s13756-019-0467-9 ("Surfaces which experience a high-frequency of exposure to disinfectant chemicals may be at additional risk of critical surface damage that renders the surface more challenging to disinfect.")).

suspension of non-essential business operations did so in recognition of the fact that "[t]he COVID-19 virus causes property loss or damage due to its ability to attach to surfaces for prolonged periods of time."[7]

But even if, for the sake of the argument, there was a legitimate debate about what is causing businesses to lose millions upon millions of dollars during the pandemic—the presence of the Coronavirus or the government orders reacting to and attempting to control the spread of the Coronavirus—that is a debate that can never be settled in the context of a Rule 12(b)(6) motion to dismiss, where factual allegations in the policyholders' complaint must be accepted as true. Factual disagreements about causation are not the domain of a motion to dismiss. By disagreeing over whether molecular absorption of the Coronavirus "causes" business income loss, carriers implicitly acknowledge that such claims are not subject to dismissal under Rule 12(b)(6).

Insurers' "Impossibly Impractical" Argument Does Not Change The Physical Impact Of SARS-CoV-2 On Property

Another overt inconsistency in insurers' resistance to scientific evidence of SARS-CoV-2's impact on property is the argument that viral contamination is so prevalent that it cannot qualify as "physical loss" under a commercial property policy. Insurers contradict themselves in making this argument because it ignores the "causation" requirement that insurers elsewhere erroneously contend is overlooked by policyholders.

However omnipresent other viral contagion may be, no one has argued, on any scale that would justify allegations of impossible impracticability, that the prevalence of influenza, the common cold, or any virus other than SARS-CoV-2 has caused individual businesses to suspend operations and lose untold millions in revenue over the past 18 months. Empirically, business patrons have not stayed home in droves to avoid catching a cold or the flu, as they have to avoid COVID-19. Unless and until the presence of other viral contamination actually results in substantive loss of income, hyperbolic hand-wringing about excessive insurance claims are wholly unjustified factually or by the terms of common commercial property policies.

In any event, the mere ubiquity of a loss is not an argument against its existence. No one would credibly maintain, for example, that a single house fire is a "physical loss" but cannot be deemed a "physical loss" when a wildfire impacts thousands of homes and millions of acres of property. Similarly, to say that viral contamination is commonplace can never be an argument for or against its characterization as "physical loss." The scientifically documented impact of SARS-CoV-2 on airborne particulate matter and common property surfaces does not change whether the contamination is isolated or everywhere.

The "Tangible" And "Perceptible" Impact Of SARS-CoV-2

Unable to deny the fact that SARS-CoV-2 chemically bonds with airborne particulate matter and common property surfaces, insurers attempt to move the goalpost once more by arguing that "loss" must not only be "physical," it must also be "tangible" and "perceptible" to trigger commercial property and business interruption coverage. Of course, these words do not appear in commercial property policies. No insurer has drafted a policy defining "physical loss" to require a tangible and perceptible structural change in property. And with good reason.

---

[7] *See* Amended Order of County Judge Clay Jenkins (Mar. 31, 2020), *available at* https://www.dallascounty.org/Assets/uploads/docs/covid-19/orders-media/2020/march/033120-DallasCountyOrder.pdf.

While commercial property policies do not use the words "tangible" or "perceptible," they do in many cases expressly insure physical loss that is neither tangible or perceptible—at least to the naked eye. Policies explicitly insure physical loss caused by bacterial contamination or communicable disease. *See, e.g.*, *Catholic Med. Ctr. v. Fireman's Fund Ins. Co.*, 2015 U.S. Dist. LEXIS 70450, at *5, 2015 WL 3463417 (D.N.H. Jun. 1, 2015) (addressing coverage under a policy promising that "[w]e will pay for the following under Communicable Disease Coverage: (1) Direct Physical loss or damage to Property Insured caused by or resulting from a covered communicable disease event at the premises described in the Declarations."). Other policies insure pollution, including airborne and waterborne contamination, which may be neither tangible or perceptible without the aid of advanced scientific testing. Still other policies exclude certain pollution or contamination, which may include viral or other microscopic agents. In no case would any of these provisions make any sense if the only "physical loss" recognized by courts or carriers in the first place was loss that was tangible or perceptible.

The fact is, with the aid of science, the effect of SARS-CoV-2 is both tangible and perceptible. Volumes of research confirm this truth. Scientists have documented the measurable impact of SARS-CoV-2 on surface roughness and the propensity of a surface to repel water.[8] To suggest otherwise or imply that molecular interactions between SARS-CoV-2 and insured property cannot be investigated or assessed in a claims process is nothing more than turning a blind eye to science.

In order to ensure integrity in the processes whereby insurance claims are adjusted by insurers and judicially determined by courts, science cannot take a back seat to factual assumptions, hyperbole, *ad hoc* policy improvisations, or self-serving characterizations of what is practical and what is not. Science must play a role. But unfortunately, meaningful reliance on scientific evidence is missing both from insurers' arguments and from many of the judicial opinions issued on COVID-19 business interruption claims to date. If and when science is given a voice in this debate, the existence of "physical loss" from SARS-CoV-2 contamination will be confirmed.

If you have any questions about pandemic-related business interruption coverage or about insurance recovery in general, please contact one of Haynes Boone's Insurance Recovery Practice Group partners listed below.

[8] Xie, et al., *A Nanochemical Study on Deciphering the Stickiness of SARS-CoV-2 on Inanimate Surfaces*, ACS APPL MATTER INTERFACES (Dec. 30, 2020), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7770894/?report=classic.