

Airborne COVID-19: Is 'Physical Loss' a Factual Question for the Experts'

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PRACTICES Insurance Recovery

Thousands of denied claims and hundreds of lawsuits pending around the country are testament to the fact that business interruption coverage for losses sustained during the COVID-19 pandemic depends on the existence of “physical loss or damage.” Insurers contend that “physical loss” requires tangible injury internal to insured property, while corporate policyholders insist that viral contamination, the inability to use insured premises and the tangible loss of employees, essential supplies and patrons qualifies as “physical loss.”

While this debate has been churning in courtrooms across the nation, another potentially related controversy has raged among epidemiologists. According to a July 4th article published by the *New York Times*, health experts are divided over the question of whether COVID-19 is transmitted through the air.¹ Since the beginning of the pandemic, the World Health Organization (WHO) has maintained that “coronavirus is spread primarily by large respiratory droplets that, once expelled by infected people in coughs and sneezes, fall quickly to the floor.” This presumption has driven current mitigation strategies, including social distancing and facial masks.

However, 239 scientists in 32 countries have recently urged the WHO to consider evidence “showing that smaller particles can infect people,” and experts interviewed by the *New York Times* have maintained that “[w]hether carried aloft by large droplets that zoom through the air after a sneeze, or by much smaller exhaled droplets that may glide the length of a room . . . , the coronavirus is borne through the air and can infect people when inhaled.”

If the experts featured by the *New York Times* are right, the implications may go far beyond changing public recommendations for disease control and prevention. The notion that coronavirus is airborne means that indoor spaces are high-risk zones where “the air-exchange rate is usually much lower, allowing the virus to accumulate in the air. . . .” The accumulation of infectious airborne coronavirus inside an insured premises makes the case for “physical loss” much more compelling and consistent with existing precedent finding insured “physical loss” when conditions in and around covered premises render insured property unsafe and unusable. See, e.g., *Matzner v. Seaco Ins. Co.*, 1998 Mass. Super. LEXIS 407, at * 9–12 (Mass. Super. Aug. 26 1998) (interpreting “direct physical loss” to include carbon monoxide contamination rendering the building unusable but did not affect its structural integrity); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (landslide rendered residences unsafe; additional “rocks and boulders could come crashing down at any time”); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997) (asbestos fibers; building function impaired).

At a minimum, the ongoing scientific debate over something as fundamental as how COVID-19 is transmitted, including whether it can remain airborne indoors for sustained periods, suggests that early attempts by insurers to deny the existence of “physical loss” are uninformed and premature. Likewise, for those courts attempting to decide the issue of “physical loss,” on motions to dismiss or otherwise as a matter of law, the evidence urged by 239 scientists in 32 countries suggests that the question is not simply a straightforward issue of legal interpretation. Courts are certainly

empowered to construe the meaning of policy terms requiring “physical loss or damage,” and many have already held that “physical loss” means something separate and distinct from “physical damage.” Once the meaning of those terms is established, the particular application of such policy terms to a given claim may constitute a factual question for a jury, especially given unresolved scientific questions about how COVID-19 is transmitted through the air. In the face of such uncertainty, judges should exercise restraint. Corporate insureds, risk managers and in-house counsel should also act appropriately in pursuing claims for the devastating loss of income sustained by so many businesses since the public health crisis began earlier this year.

If you have any questions about business interruption losses or about insurance recovery in general, please contact one of Haynes Boone’s Insurance Coverage Practice Group partners listed below.

¹ Apoorva Mandavilli, *239 Experts With One Big Claim: The Coronavirus Is Airborne*, THE NEW YORK TIMES (July 4, 2020).