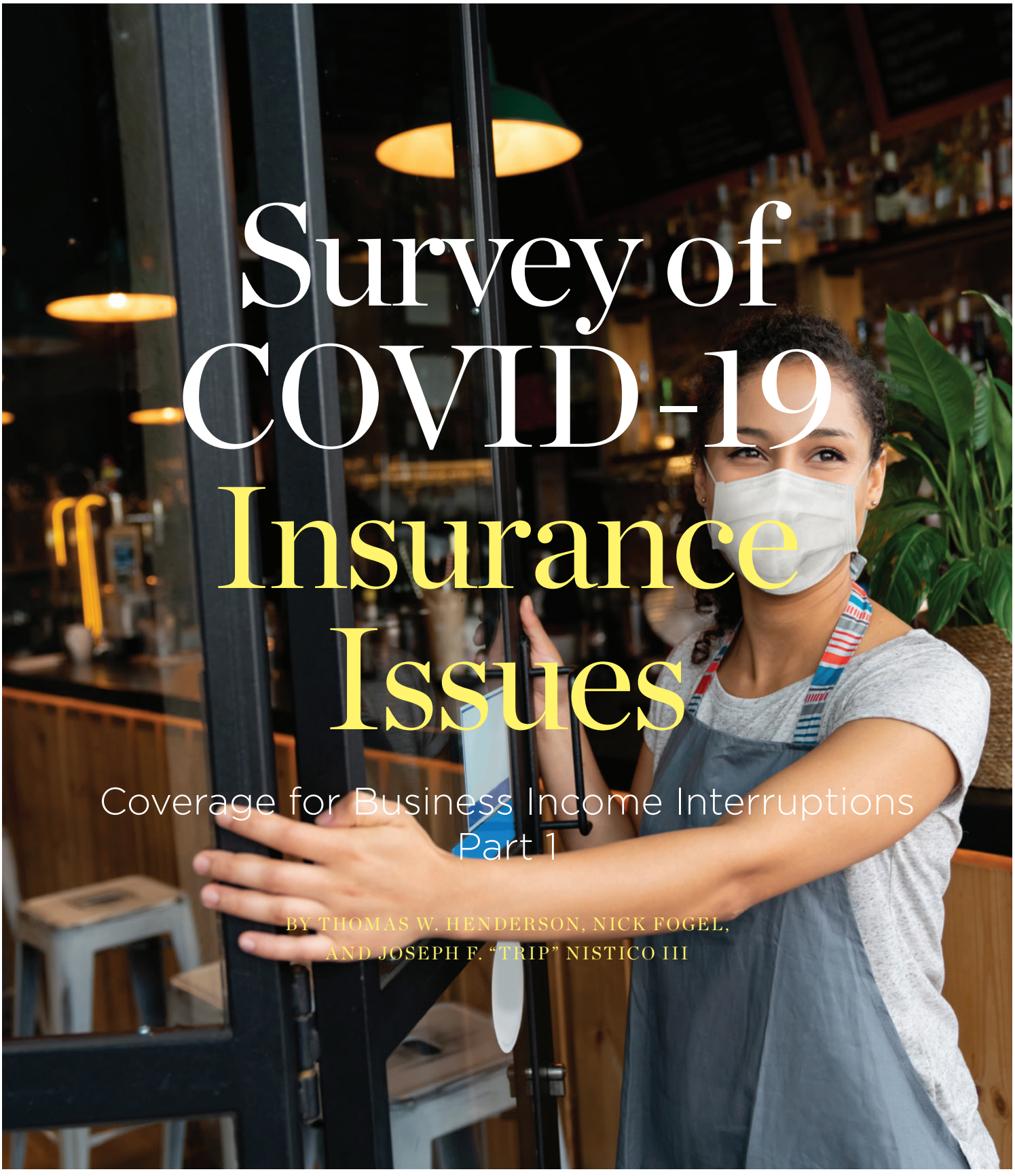

Survey of COVID-19 Insurance Issues

Coverage for Business Income Interruptions Part 1

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This two-part article surveys insurance issues relating to business income interruption and workers' compensation arising from the COVID-19 pandemic.

If you're part of an insurance law mailing list, or even just a casual news follower, you've likely seen headlines like these:

- "Restaurant Groups Serve COVID-19 Coverage Lawsuits in California and Illinois"[1]
- "COVID-19 Coverage Litigation Escalates"[2]
- "Class Action Lawsuits Related to Coronavirus Spike across the Country"[3]
- "Student files class-action lawsuit against Liberty University over coronavirus response"[4]

Discussions of insurance coverage for COVID-19 losses are taking up all the oxygen in the room. We are not only facing a once-in-a-generation health crisis, but an economic crisis as well—one that could have ripple effects for years. The stakes are high.

At the peak of this crisis, small businesses were losing anywhere from $220 to $383 billion a month.[5] Independent restaurants have been particularly hard-hit, with approximately 80% of these businesses reporting that they do not expect to reopen.[6] And while many businesses are looking to their insurance policies for a financial lifeline, insurers have been sounding the alarm about their financial health as well—after all, insurance giant AIG may have failed in 2008 if it weren't for an $85 billion Federal Reserve loan.

It's impossible to predict how long this health crisis will last, but it is unlikely that a vaccine will be available before spring 2021.[7] Until this crisis is resolved, small business owners will continue to face many uncertainties. First and foremost, business owners are probably asking themselves:

- How is my business going to survive after being closed for months, especially when I'm still unable to open at full capacity?
- What will I do if there's an outbreak among my employees?

This article provides guidance to help answer these questions. This Part 1 focuses on commercial property (CP) insurance coverage for business losses connected with the COVID-19 pandemic.

CP insurance issues tend to revolve around whether the actual or threatened presence of COVID-19 is a covered event under a CP policy, whether virus or similar exclusions bar such coverage, and whether specialty coverage applies, such as coverage for business losses due to "civil authority" or "governmental action." The elephant in the room is the virus exclusion. Insurers have maintained that these exclusions, by their plain language, exclude all losses associated with COVID-19. But many of the businesses that have filed suits seeking coverage for business interruption losses have a virus exclusion in their policy. This article explains some of the reasons why these businesses have argued that the virus exclusion does not apply in their situations, and why insurers maintain that it does.

While this article discusses whether coverage exists under typical insurance policy forms and policy language, such forms and language differ from insurer to insurer and, often, from policy to policy. So determining whether coverage exists in a specific situation requires a thorough review of the entire policy at issue.[8]

COVID-19 and CP Insurance

Many small businesses that have suffered and are continuing to suffer loss of business income arising out of the COVID-19 pandemic are looking to their commercial insurance policies for help. Most commercial insurance policies include both CP and Commercial General Liability (CGL) coverage. CP coverage usually includes "business interruption" (BI) coverage, which generally covers business income loss resulting from "direct physical loss or damage" to covered property. BI coverage is subject to its own limit, by dollar amount, duration, or both. CGL coverage, on the other hand, protects insured businesses against third-party liability claims because of property damage (including loss of use of property) and bodily injury.

Hundreds of businesses in Colorado, and tens of thousands nationwide, have made claims under their CP policies for lost business income and extra expenses suffered in association with the COVID-19 pandemic and the accompanying government-ordered shutdowns and slowdowns. Insurers have denied these claims, principally relying on arguments that the businesses have not suffered "direct physical loss of or damage to" property, and/or that coverage is excluded by virus or similar exclusions often found in CP policies.

The bulk of COVID-19-related insurance lawsuits filed in March, April, and May 2020 have been brought by businesses with BI coverage seeking payment for losses incurred either due to (1) the presence of the coronavirus that causes COVID-19, or (2) government-mandated shutdowns of their business. Aside from BI coverage, businesses may be entitled to coverage for decontamination expenses or for other direct property losses or damage (e.g., inventory that was lost or destroyed), provided it was "Covered Property"[9] as defined in the policy.

The American Property Casualty Insurance Association (APCIA) contends that many insurance policies, including those with BI coverage, do not cover pandemics or viruses such as COVID-19.[10] APCIA also claims that interpreting insurance policies to cover these

losses would topple the insurance industry, especially given APCIA estimates that small businesses will lose up to $220 billion to $383 billion per month.[11] However, commentators representing the interests of policyholders have countered that insurers collectively reported a surplus of approximately $800 billion last year.[12]

BI Coverage

The big question facing businesses that have been forced to shut their doors due to the presence of the coronavirus that causes COVID-19—or due to government-mandated business closures—is whether the BI coverage in their CP policies covers their loss of income during the shutdown. The insurance industry answers no, there has not been a "direct physical loss or damage"; alternatively, it maintains that the ubiquitous virus exclusion precludes coverage.[13] However, a closer look at existing Colorado law and at the virus exclusion reveals arguments supporting coverage for business income losses associated with these closures.

In a typical CP policy, a business is covered for "direct physical loss of or damage to" the property covered by the policy that was caused by or resulted from a "Covered Cause of Loss,"[14] subject to the policy's exclusions. This coverage grant describes the trigger of coverage found in every CP policy. Most commercial policies define "Covered Cause of Loss" through an endorsement that provides what is commonly referred to as "all-risk" coverage, meaning that it covers all kinds of accidental losses that are not otherwise excluded.[15]

What the insurer will "pay for" also varies. For example, a business that can no longer operate because its building or other covered property, such as inventory, was destroyed by fire could expect that, at a minimum, the cost of repairing or replacing the property damaged by the fire would be covered. But what about the income the business lost while its building was closed for repairs? In this example, the business would likely be covered for these losses under the policy's BI coverage.

If the business cannot carry on with normal business following the fire, while its "operations"[16] have been "suspend[ed],"[17] its lost income will be reimbursed under the BI coverage pursuant to a specified formula and a defined time. The BI calculation may require supporting documentation and an accountant's assistance. BI coverage generally pays for net income the business would have reasonably expected to earn if not for the loss, as well as continuing normal operating expenses, including payroll, that are incurred even though the business is shut down.

CP policies also usually contain "extra expense" coverage, which pays the reasonable cost, over and above normal operating expenses, reasonably necessary to avoid having to shut down during the repair and restoration period, such as paying contractors extra to work at night so the business can stay open during the day.[18] While policies vary as to the coverage levels, typically there would be little dispute as to whether the business in the preceding fire loss example is entitled to some BI coverage: the business suffered loss or damage to its property due to the fire; a fire is a "Covered Cause of Loss" in virtually every CP policy; and the business sustained income loss and some continuing expenses. Whether a business's CP policy covers losses suffered in connection with the COVID-19 pandemic, however, is more complicated.

Overview of CP Property Claims Relating to COVID-19

As explained in the following section, businesses with BI coverage first need to establish that a covered cause of loss caused "direct physical loss of or damage" to their property. A typical business interruption provision states, in pertinent part:

> 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 the premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage *must be caused by or result from* a Covered Cause of Loss.[19] (Emphasis added.)

Assuming this provision is satisfied, the next consideration is the policy's exclusions, and especially the "virus exclusion." Insurers began including virus exclusions in most CP policies around 2006 in response to the 2002–03 SARS outbreak.[20]

A typical virus exclusion states, in pertinent 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.[21] (Emphasis added.)

Many businesses have already filed suit against their insurer for their business income losses under the BI coverage in their CP policies that contain such an exclusion. In some of those cases the insureds have argued that it was government-ordered shutdowns—not the virus—that was the proximate cause of their BI losses.[22]

Do Viruses Cause "Physical Loss of or Damage to the Covered Property"?

The threshold question when determining if there is coverage under a CP policy is whether the business suffered "physical loss of or damage to" its property. Some jurisdictions focus on the "physical damage" portion of this phrase, holding that coverage is only triggered when there is some sort of tangible, visible damage, such as from a fire or hurricane, while others also consider the "physical loss" portion of the phrase, holding that the loss of use caused by the covered property being rendered uninhabitable or unusable triggers coverage.

In Colorado, the existence of a condition that renders the premises uninhabitable constitutes "physical loss of or damage to" the property.[23] In *Western Fire Insurance Co. v. First Presbyterian Church*, a church sought coverage for losses that it incurred after the local fire department ordered it to close its building.[24] The fire department had determined that an accumulation of gasoline around and under the building made continued use of the building dangerous.[25] The Colorado Supreme Court held that this was "direct physical loss" of the covered property, triggering coverage.[26]

The *Western Fire* court rejected the insurer's argument that the "loss of use" of the church in connection with the fire department's action was not a "physical loss," reasoning that the

"'loss of use,' occasioned by the action of the [fire department]" was the "consequential result of the fact that . . . the premises became so infiltrated and saturated [by gasoline fumes] as to be uninhabitable."[27] In other words, there is a "direct physical loss" where the government shuts down continued use of the property because a physical condition has rendered the premises uninhabitable.[28]

Courts in other jurisdictions have similarly found a "direct physical loss" where the presence of bacteria (or other disease-causing agents) presented a dangerous condition at the property, rendering the premises uninhabitable.[29] For example, in *Motorists Mutual Insurance Co. v. Hardinger*, the Third Circuit found that bacterial contamination of a home's water supply constituted a direct physical loss of use of the property because it rendered the home uninhabitable.[30] The court described a "physical loss of" the property as occurring when "the functionality of the property [is] nearly eliminated or destroyed," or where the property is "made useless or uninhabitable."[31] The court further held that a "physical loss" does not require a "distinct, demonstrable, [or] physical alteration of [the] structure."[32]

However, other courts have been less inclined to find a "direct physical loss" in connection with bacteria. For example, in *Universal Image Productions v. Chubb Corp.*, a US district court held that the "pervasive odor, mold and bacterial contamination" caused by water seepage into the building did not constitute a "direct physical loss" because the insured did not establish any structural or tangible damage to the insured property.[33] The court did not foreclose the possibility that covered physical damage could occur at the "molecular or microscopic level," but, in the court's view, such damage would need to be "distinct and demonstrable."[34] The court also noted that there was no evidence suggesting that the "stench [of the mold and bacteria] was so pervasive as to render the premises uninhabitable" or "suggest[ing] that the entire premises [needed to] be vacated."[35] Thus, the circumstances in *Universal Image* were markedly different from those in *Western Fire*, where the insured was ordered to vacate the premises after the fire department determined that the accumulation of gas fumes had rendered the premises uninhabitable.[36]

Many Colorado businesses suffering losses in connection with COVID-19 can be expected to argue that its actual or assumed presence has rendered their property uninhabitable, similar to the situation in *Western Fire*. In particular, Colorado business owners will likely draw parallels between the fire department's order in *Western Fire* and recent state and local orders requiring Colorado businesses to close in response to the threat posed by the coronavirus. As discussed above, the insured in *Western Fire* was ordered to vacate the building "because of the infiltration of gasoline in the soil under and around the building . . . making the same uninhabitable and making the use of the building dangerous."[37] Similarly, Governor Polis provided the following justification for his executive order closing bars, restaurants, and certain other businesses:

> [E]vidence that the population of Colorado is at risk for serious health complications, including death, from COVID-19 make it imperative that the measures included in this PHO be taken immediately.
>
> . . .
>
> *COVID-19 also physically contributes to property loss, contamination, and damage* due to its propensity to attach to surfaces for prolonged periods of time.[38] (Emphasis added.)

Anticipating this argument, an insurance industry group penned an article arguing that "the alleged presence of a virus on objects is not analogous to noxious odors or gaseous releases" because "there is no indication or evidence that the virus corrodes physical surfaces."[39] This argument equates "physical loss" with "physical damage." To counter this, insureds can be expected to argue that

> the word "loss" cannot be collapsed into and mean the same thing as "damage." While "damage" might mean tangible physical damage such as inflicted by a tornado, "loss" must mean something different from "damage."[40]

Courts have routinely recognized that "physical loss of" property and "damage to" property represent distinct concepts,[41] and Colorado has long held that every term and phrase in an insurance policy should be given meaning.[42]

Insureds may also argue that there is no reason for the insurance industry to fashion a virus exclusion if the CP Coverage Grant does not contemplate that some virus pandemic events could trigger coverage. Along the same lines, there is no reason for the insurance industry to fashion a virus exclusion if, as some insurers claim, a virus is a "contaminant" that would be excluded by "pollution exclusions" that were already included in most CP policies.

Businesses that have no reports of the actual presence of the virus on their property can

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be expected to argue that government orders shutting down their business, like the fire department order shutting down the church in *Western Fire*, caused a "direct physical loss" of the Covered Property, for example, the business location. Insurers can be expected to argue that the virus must first be present before there can be a "direct physical loss."

Pollution Exclusions

Many CP policies contain pollution exclusions, which generally exclude losses arising from the discharge, dispersal, seepage, migration, release, or escape of "pollutants," unless the discharge, dispersal, seepage, migration, release, or escape is itself caused by any of the "specified causes of loss."[43] It is standard for policies containing such an exclusion to define "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."[44] Many insurers are citing to the pollution exclusion as another basis to deny coverage for BI loss claims, especially where the policy does not include a virus exclusion.

It is unclear whether courts would consider the coronavirus to be a "pollutant" under this definition. In *Connors v. Zurich American Insurance Co.*, 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.[45]

Other courts have decided differently. In *Westport Insurance Corp. v. VN Hotel Group, LLC*, the court found that Legionella bacteria are not pollutants, and thus the pollution exclusion did not apply.[46] Similarly, in *Johnson v. Clarendon National Insurance Co.*, the court found that the pollution exclusion did not apply to mold, reasoning that the language of the pollution exclusion was unclear, and thus the exclusion must be interpreted in favor of coverage.[47]

Colorado courts have not yet addressed whether the term "contaminant" in a pollution exclusion applies to bacteria or viruses.[48] However, like California, Colorado law provides that insurance policies must be interpreted broadly and in favor of coverage.[49] And exclusions must be construed narrowly and not applied unless they clearly and unambiguously exclude coverage.[50] Insurers also generally bear the burden of proving that an exclusion applies to a claim.[51] Thus, policyholders will likely argue that decisions like *Johnson*, which applied similar principles, are more persuasive than *Connors*.

> "Policyholders have had some success limiting the applicability of the pollution exclusion under regulatory estoppel principles, but courts have not yet addressed this argument in the context of CP virus exclusions."

As discussed above, policyholders may also argue that there is no reason for the insurance industry to fashion a virus exclusion if, as some insurers claim, a virus is a "contaminant" that would be excluded by "pollution exclusions" that were already included in most CP policies.

Virus Exclusions

After the SARS epidemic in the early 2000s, carriers sought to add an exclusion seeking to avoid coverage for viral or bacterial outbreaks.[52] This led to the Insurance Services Office (ISO) developing a standard virus exclusion, which states, in pertinent 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.[53]

ISO also assisted insurers in persuading state insurance regulators to approve the use of this virus exclusion without requiring a corresponding decrease in premium levels.[54] In a July 6, 2006 ISO Circular supporting the approval of its virus exclusion, ISO represented to regulators that

> *While property policies have not been a source of recovery for losses involving contamination by disease-causing agents*, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.[55] (Emphasis added.)

Similarly, the American Association of Insurance Services (AAIS) represented that "[p]roperty policies have not been, nor were they intended to be, a source of recovery for loss, cost, or expense caused by disease-causing agents."[56]

Some commentators have suggested that these representations were, at a minimum, highly misleading, and policyholders could therefore argue that such exclusions are void under the principle of regulatory estoppel.[57] Regulatory estoppel is "a form of equitable estoppel whereby insurers are prevented, or 'stopped,' from asserting an interpretation of an insurance policy provision that is contrary to the insurer's explanation of that policy provision to state insurance regulators when the insurer originally sought approval of the policy form from the department of insurance."[58] These commentators point to several examples of courts finding that CP policies covered claims involving disease-causing agents before 2006.[59]

Policyholders have had some success limiting the applicability of the pollution exclusion under regulatory estoppel principles,[60] but

courts have not yet addressed this argument in the context of CP virus exclusions. Courts have enforced virus exclusions in CGL policies, but due to differences in the language of CP virus exclusions, there remain questions as to how courts will interpret those.

Are CP Virus Exclusions Enforceable?

So far, courts have only addressed the applicability of virus exclusions in CGL policies, where the exclusion's applicability was fairly straightforward. For example, a federal court found that a man alleged to have transmitted HPV and herpes to his girlfriend and their daughter was not entitled to liability coverage due to the policy's virus exclusion, which excluded "[p]ersonal injury or property damage which *arises out of* the transmission of a communicable disease, virus, or syndrome by any insured" from coverage.[61] However, there are a couple of reasons why courts may be hesitant to follow these decisions in determining CP coverage for business closures related to COVID-19.

First, policyholders have argued that a government order shutting down their business caused a direct physical loss of Covered Property and the suspensions of their normal business operations, not the virus.[62] In other words, as one restauranteur explained in a recent interview: "A virus did not close my business. The government ordered it."[63]

Second, the language commonly found in CP virus exclusions is markedly different from CGL virus exclusions. Unlike CGL virus exclusions, the CP virus exclusions do not typically exclude coverage for losses "*aris[ing] out of*" a virus.[64] Instead, CP virus exclusions exclude "loss or damage *caused by or resulting from* any virus . . . ."[65] Courts have generally interpreted "arising out of" to mean "but for" causation, while "caused by" and "resulting from" mean the narrower "proximate cause." Insureds will likely argue that this difference in wording has a very significant impact on the scope of the CP virus exclusion.

"Arising out of" versus "Caused by or Resulting From"

When insurers intend to narrow the scope of a coverage grant, they use language such as "caused by" or "resulting from," and avoid the phrase "arising out of." For example, a Pennsylvania federal court found that ISO changed the "arising out of" language in a coverage grant to "caused by" with the express intention that "a narrower coverage interpretation . . . be afforded."[66] It can therefore be argued that an insurer's use of "caused by" or "resulting from" in an exclusion demonstrates that the insurer intended for the exclusion to be interpreted more narrowly than exclusions containing the phrase "arising out of." As discussed above, the CP virus exclusion typically only includes the narrower phrase "caused by or resulting from."

Specifically, courts have interpreted "arising out of" to mean "but for" causation,[67] while "caused by" and "resulting from" mean the narrower "proximate cause."[68] For example, the Tenth Circuit Court of Appeals has suggested that exclusions containing the phrase "arising from" can be triggered where the covered exclusion has only some causal connection to the injuries suffered:

> [T]he general consensus [is] that the phrase "arising out of" should be given a broad reading such as "originating from" or "growing out of" or "flowing from" or "done in connection with"—that is, it requires some causal connection to the injuries suffered, *but does not require proximate cause* in a legal sense.[69] (Emphasis added.)

On the other hand, at least one federal court has held that exclusions in CP policies containing the phrase "caused by or resulting from" require the insurer to establish that the covered exclusion was the proximate cause of the injuries.[70] And as a general matter, a majority of courts have held that the phrases "caused by or resulting from" and "resulting from" denote proximate causation.[71]

In other words, under virus exclusions using the narrower "caused by or resulting from" language, it would not be enough for the insurer to show that there was some causal connection between a virus and the covered losses; the virus must be the proximate cause of the losses.

Like these federal courts, Colorado courts have held that the term "arising out of" creates a "but for" test.[72] The Colorado Court of Appeals has reasoned that this interpretation is consistent with the ordinary meaning of "arising," which is generally understood to mean "originating from, growing out of, or flowing from."[73] However, Colorado courts have not yet determined whether an exclusion containing the "caused by or resulting from" language requires the insurer to establish that the covered exclusion was the proximate cause of the losses.

The difference in meaning that courts have generally attributed to "caused by or resulting from" language, as opposed to "arising out of" language, is critical to resolving disputes over the virus exclusion's applicability to BI coverage claims due to government-ordered business closures intended to mitigate the spread of COVID-19. Proximate cause can only be found, as a matter of law, "in the clearest cases, where reasonable minds can draw but one inference from the evidence."[74]

It is therefore an easier task to argue that closures arise out of—or would not have occurred but for—the community presence of the coronavirus. Whether the coronavirus was the proximate cause of a business closure would be less straightforward in most cases. Many Colorado businesses would not have closed, and did not close, simply because a novel virus was circulating in their community.[75] Rather, most businesses that closed did so because their local or state government either limited or prohibited the public's access to the premises in an effort to "flatten the curve" of community infections and mitigate the spread of the virus.

Businesses asserting business interruption claims relating to government-ordered closures to slow the spread of COVID-19 have already argued in several complaints filed in March and April that, while the novel coronavirus may have prompted state and local governments to order businesses to cease operations, the coronavirus itself was not the cause of their losses; it was the stay-at-home orders that caused the closures.[76] Where a business was shut down by government order, the argument is that the virus exclusion is inapplicable.

As discussed below, many policies provide coverage in situations where an order by a civil authority prohibits access to the insured

premises, resulting in business interruption losses.

Civil Authority Coverage

Many CP policies offer business income and extra expense coverage when a civil authority, such as a state, local, or federal governmental entity, prohibits access to an insured's premises. Such coverage is available due to direct physical loss of or damage to property other than at the insured's premises, from a covered cause of loss. Most civil authority endorsements provide that the insurer will only pay for "actual loss of Business Income . . . and necessary Extra Expense caused by action of a civil authority that prohibits access to the described premises . . . ."[77] The ISO Civil Authority provision further requires that "a Covered Cause of Loss cause[d] damage to property other than property at the described premises" and "the described premises . . . are not more than one mile from the damaged property."[78]

Unlike the standard virus exclusion, the language used in civil authority provisions often differs greatly from policy to policy. Many civil authority provisions do not require that damage occur within a specified radius of the insured premises. Also, some don't expressly require that the other premises suffer "damage" (as opposed to "loss"), and in the absence of an express "damage" requirement, courts will not read such a requirement into the contract.[79]

Some policyholders may therefore find coverage for civil authority closures made in response to a more generalized threat of loss of or damage to property. For example, in *Sloan v. Phoenix Hartford Insurance Co.*, the Michigan Court of Appeals interpreted a civil authority provision covering "actual loss . . . when as a direct result of the [insured] peril(s) . . . access to the premises . . . is prohibited by order of civil authority."[80] The court found that this provision covered business income losses incurred by the owner-operators of several Detroit movie theaters during a curfew imposed by the governor, who imposed the curfew out of concern that "civil strife" in Detroit would escalate into rioting, causing widespread property damage.[81] The court did not interpret the policy to require a showing of physical damage at or near the premises, noting: "Had the insurer sought to embody . . . a condition of physical damage . . . it would have been a simple matter to insert such a clause . . . ."[82]

Likewise, some civil authority provisions do not require that the damage be caused by a Covered Cause of Loss. For example, a New York federal court examined the following civil authority provision in *Abner, Herrman & Brock, Inc. v. Great Northern Insurance Co.*:

> [We] will pay for the actual business income loss you incur due to the actual impairment of your operations; and extra expense you incur due to the actual or potential impairment of your operations, when a civil authority prohibits access to your premises or a dependent business premises.[83]

Just as it is unlikely that courts would read a physical damage requirement into a contract that does not contain such a requirement, courts are also unlikely to read in a requirement that a covered cause of loss precede the civil authority order or action, unless the civil authority provision expressly requires this. It follows that, if the policy contains neither of these requirements, the underlying reason for the closure would most likely be irrelevant.

Civil authority coverage is typically subject to the virus exclusion. But some policyholders with both civil authority coverage and a virus exclusion may be able to argue that they suffered losses due to the "impairment of [their] operations" caused by a "civil authority prohibit[ing] access to [their] premises,"[84] and that the proximate cause of these losses was the action by the civil authority, not a "virus, bacterium or other microorganism."[85]

In fact, several recent complaints involving policies containing virus exclusions have already made similar arguments. One such complaint, for example, listed the following question for the court to decide: "Whether the measures put in place by civil authorities to stop the spread of the COVID-19 caused physical loss or damage to covered commercial property."[86]

Another complaint brought under a policy containing a virus exclusion argued that the loss "is not based on the presence of COVID-19," but rather "a series of events that resulted from or was caused by the orders of Alabama's State Health Officer."[87] This plaintiff also argued that it had a "reasonable expectation . . . that coverage is available under the Policy for any direct physical loss of Covered Property resulting from the lawful exercise of the government's police power."[88]

What Constitutes a "Prohibition of Access"?

As shown in the example endorsements above, civil authority coverage under most policies is only triggered where the civil authority "prohibits access" to the premises. Some commentators argue that this language does not provide coverage when a civil authority has only issued an "advisory" or "voluntary" evacuation—that is, where the order says something like "'nonessential' traffic is discouraged but not prohibited."[89]

However, courts have interpreted this "prohibits access" language broadly in past decisions. In *Abner*, for example, the court found coverage based on traffic and security restrictions that only partially prohibited access to the premises.[90] The court found the "prohibition of access" requirement was met where "traffic restrictions . . . put a crimp in the ability of [the plaintiff's] Chairman to use his car and driver" and "made it difficult for the plaintiff's employees to get to the premises . . . ."[91]

Further, most policies define "'suspension' of business" as including not only the cessation of business but also the "slowdown" of business.[92] So it appears likely that businesses, like restaurants, that have suffered a slowdown of their business due to a prohibition on certain types of access, like dine-in service, will still be able to establish that such orders were a "prohibition of access."

Civil Authority "Orders" versus Civil Authority "Actions"

Another important distinction to consider is that some civil authority endorsements require the insured to establish that there was an "action of civil authority that prohibits access" to the premises,[93] while others require "an order . . . that . . . [p]rohibits access" to the premises.[94] The difference between these endorsements may lead to different results. At least one court has held that policies that require only an action of a civil authority "provide[] for coverage on a

lesser showing" than those policies that require an order of a civil authority.[95]

In *Penton Media, Inc. v. Affiliated FM Insurance Co.*, the insured, a convention center operator, argued that losses that it suffered as a result of a lease agreement it "involuntarily" entered into with FEMA were the result of "an order of a civil authority," and were thereby covered by the policy.[96] In rejecting this argument, the court stated:

> An order could be oral or written. It could be formal or informal, as long as it comes from a civil authority. It could mention the Javits Center by name, or it could not, so long as the scope of the order clearly encompassed the Javits Center. However, the policy does not provide that a voluntary (or involuntary) lease agreement is an order of a civil authority. It also does not indicate, or imply that activities taken out of concern that the government might act is sufficient.[97]

This suggests that an advisory action taken by a civil authority may not be sufficient to trigger coverage in cases requiring an order of a civil authority. However, if coverage under the civil authority provision is triggered upon "an order or action" by a civil authority prohibiting access to the premises, and not simply an order, the provision will likely be more broadly interpreted in favor of coverage.[98]

Conclusion

With all of the insurance coverage issues discussed in this article, it is important to keep in mind that we're sailing in uncharted waters here. Truth be told, attorneys on either side don't know how the courts will end up deciding these difficult issues. And each policy is different, so case outcomes will likely be largely fact-driven. For those facing difficult legal questions in connection with the COVID-19 outbreak, the best course of action is to consult an attorney with significant experience handling these types of insurance claims.

Part 2 will discuss issues that may arise involving workers' compensation insurance and other issues relating to workers contracting COVID-19. Further, the authors also expect to provide a summary update in six months reflecting recent decisions of note. CL



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NOTES

1. *See* Schwartz et al., "Restaurant Groups Serve COVID-19 Coverage Lawsuits in California and Illinois," Goldberg Segalla (Apr. 2, 2020), https://www.goldbergsegalla.com/news-and-knowledge/knowledge/restaurant-groups-serve-covid-19-coverage-lawsuits-in-california-and-illinois.

2. Schiffer, "COVID-19 Coverage Litigation Escalates," *Nat'l Law Rev.* (Mar. 31, 2020), https://www.natlawreview.com/article/covid-19-coverage-litigation-escalates.

3. Stockler, "Class Action Lawsuits Related to Coronavirus Spike Across the Country," *Newsweek* (Apr. 3, 2020), https://www.newsweek.com/covid-19-class-action-lawsuits-1496027.

4. Neidig, "Student files class-action lawsuit against Liberty University over coronavirus response," The Hill (Apr. 14, 2020), https://thehill.com/regulation/court-battles/492727-student-files-class-action-lawsuit-against-liberty-university-over.

5. Wallace, "French Laundry Restauranteur Thomas Keller sues insurer for coronavirus losses," CNN Business (Mar. 28, 2020), https://edition.cnn.com/2020/03/27/business/thomas-keller-lawsuit-coronavirus-losses/index.html.

6. Coley, "80 Percent of Independent Restaurants Aren't Sure They'll Survive COVID-19," *FSR Magazine* (Apr. 2020), https://www.fsrmagazine.com/finance/80-percent-independent-restaurants-arent-sure-theyll-survive-covid-19.

7. *Id.*

8. *See generally*, Sandgrund et al., "Your First Insurance Policy Coverage Dispute," 49 *Colo. Law.* 42 (Feb. 2020).

9. For example, an Aurora Walmart was forced to close for a weekend to undergo "thorough cleaning and disinfecting" "following an outbreak of COVID-19 cases tied to the store, which claimed the lives of an employee, her husband, and a security guard." Keith and Grewe, "Aurora Walmart reopens following deadly COVID-19 outbreak linked to store," KKTV 11 News (Apr. 27, 2020), https://www.kktv.com/content/news/3-COVID-19-deaths-connected-to-a-Colorado-Walmart-store-closes-temporarily-in-Aurora-569911821.html. The authors are unaware whether Walmart has filed an insurance claim in connection with this incident.

10. Sampson, APCIA: Insurance Perspective on COVID-19, American Property Casualty Insurance Association (Mar. 26, 2020), http://www.pciaa.net/pciwebsite/cms/content/viewpage?sitePageId=59762.

11. *Id.* ("APCIA's preliminary estimate is that business continuity losses just for small businesses with 100 or fewer employees could fall between $220–383 billion per month.").

12. *See, e.g.*, Wallace, *supra* note 5. *But cf.* Sampson, *supra* note 10 ("The total surplus for all of the U.S. home, auto, and business insurers combined to pay all future losses is roughly only $800 billion, with the combined capital of the top business insurance underwriters representing only a fraction of that amount.").

13. The authors have reviewed denial letters from many different insurers, which often cite to additional exclusions. But because the "direct physical loss or damage" and virus exclusion (if present) are raised in virtually every denial, and the others are more policy specific, this article focuses on the former.

14. *See, e.g.*, ISO Form CP 00 30 06 07 (2007) ("We will pay for direct physical loss of or damage to the Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.").

15. *See Morley v. United Servs. Auto. Ass'n*, 2019 COA 169 ¶ 18 ("[A]n all-risk policy [is] designed to cover a wide range of damages to the [insured's] property unless coverage for a particular type of loss is expressly excluded.").

16. *See* ISO Form CP 00 30 10 12 (2011) ("'Operations' means: a. Your business activities occurring at the described premises; and b. The tenability of the described premises, if coverage for Business Income Including 'Rental Value' or 'Rental Value' applies.").

17. *See id.* ("'Suspension' means: a. The slowdown or cessation of your business activities; or b. That a part or all of the described premises is rendered untenable, if coverage for Business Income Including 'Rental Value' or 'Rental Value' applies.").

18. If related to repair or replacement, extra expenses are typically only covered to the extent they do not exceed BI coverage

available if the business closed.

19. ISO Form CP 00 30 10 12 (2011).

20. *See* Wilson, "Commentary: Does Business Income Insurance Cover Coronavirus Shutdowns?" *Ins. J.* (Mar. 24, 2020), https://www.insurancejournal.com/news/national/2020/03/24/562144.htm; Frankel, "Insurers knew the damage a viral pandemic could wreak on businesses. So they excluded coverage.," *Wash. Post* (Apr. 2, 2020), https://www.washingtonpost.com/business/2020/04/02/insurers-knew-damage-viral-pandemic-could-wreak-businesses-so-they-excluded-coverage.

21. ISO Form CP 01 40 07 06 (2006).

22. Special coverage provisions applying governmental and civil authority shutdowns are discussed in later sections.

23. *See W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 39 (1968).

24. *See id.* at 36–37.

25. *See id.*

26. *Id.* at 39.

27. *See id.* at 38–39.

28. *See id.*

29. *See, e.g.*, *Cooper v. Travelers Indem. Co. of Illinois*, No. C-01-2400-VRW, 2002 WL 32775680, 2002 U.S. Dist. LEXIS 29085 (N.D.Cal. Nov. 4, 2002) (finding that an E. coli contamination in a business's water supply constituted a direct physical loss of or damage to the property, and therefore holding that the insurer was obligated to pay time element/extra expense coverage); *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 709 (E.D.Va. 2010), *aff'd*, 504 F. Appx. 251 (4th Cir. 2013) (finding direct physical loss where a "home [was] rendered uninhabitable by . . . toxic gases," regardless of lasting physical damage to the property itself). *See also* Thompson, Coronavirus Is A Direct Physical Loss Triggering Event, Law 360 (Apr. 9, 2020), https://www.law360.com/foodbeverage/articles/1261513?utm_source=shared-articles&utm_medium=email&utm_campaign=shared-articles (describing additional cases with similar holdings); Eyerly, "Is There Direct Physical Loss Under A Property Policy When Coronavirus is Present?," Ins. Law Hawaii (Mar. 30, 2020), https://www.insurancelawhawaii.com/insurance_law_hawaii/2020/03/does-covid-19-create-direct-physical-loss-under-property-policy.html (same).

30. *Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823 (3d Cir. 2005).

31. *Id.* at 826–27.

32. *Id.* at 826 n.6.

33. *Universal Image Prods. Inc. v. Chubb Corp.*, 703 F.Supp.2d 705, 713 (E.D.Mich. 2010).

34. *Id.* at 710.

35. *Id.*

36. Another factor distinguishing *Universal Image* from *Western Fire* was the existence of a "Pollutant Exclusion" provision, which precluded coverage for "loss or damage caused by or resulting from the mixture of or contact between property and a pollutant when such mixture or contact causes the property to be impure and harmful to: (1) itself or other property; (2) persons, animals or plates; [or] (3) land, water or air. . . ." However, the *Universal Image* court stated that it was not basing its decision on the existence of this exclusion. *Universal Image*, 703 F.Supp.2d at 713.

37. *See Western Fire*, 165 Colo. at 36–37.

38. Fourth Updated Public Health Order 20-24 Implementing Stay At Home Requirements (Apr. 9, 2020), https://cha.com/wp-content/uploads/2020/04/Fourth-Updated-Public-Health-Order-Authorized-Business.pdf.

39. Bernard et al., "Coronavirus Is Not A Direct Physical Loss Triggering Event," Law360 (Apr. 6, 2020), https://www.law360.com/articles/1258619/coronavirus-is-not-a-direct-physical-loss-triggering-event?copied=1.

40. Thompson, *supra* note 29.

41. *See, e.g.*, *Motorists Mut. Ins. Co.*, 131 Fed. Appx. at 826 n.6 (holding that a "physical loss" does not require a "distinct, demonstrable, [or] physical alteration of [the] structure.").

42. *See, e.g.*, *Colo. Pool Sys., Inc. v. Scottsdale Ins. Co.*, 317 P.3d 1262, 1270 (Colo.App. 2012) ("[W]e must ensure that any interpretation of "accident" comports with the policy's remaining provisions."); *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 299 (Colo. 2003) ("Courts should read the provisions of the policy as a whole, rather than reading them in isolation."); *Holland v. Bd. of Cty. Comm'rs*, 883 P.2d 500, 505 (Colo.App. 1994) (in construing contracts, courts must give effect to every provision, if possible).

43. ISO Form CP 10 30 10 12 (2011).

44. *See id.* These policies also define the term "waste" as "materials to be recycled, reconditioned, or reclaimed."

45. *Connors v. Zurich Am. Ins. Co.*, 872 N.W.2d 109 (Wis.App. 2015).

46. *Westport Ins. Corp. v. VN Hotel Grp., LLC*, 761 F.Supp.2d 1337, 1343–44 (M.D.Fla. 2010).

47. *Johnson v. Clarendon Nat'l Ins. Co.*, No. G039659, 2009 WL 252619 at *2, 13 (Cal. Ct.App. Feb. 4, 2009).

48. However, the Colorado Court of Appeals found that "water and sewage, which overflowed from a residential toilet or sewer, [carrying] bacteria and parasites" was a contaminant because the pollution exclusion "is unambiguous when applied to raw sewage." *Figuli v. State Farm Mut. Fire & Cas.*, 304 P.3d 595, 598 (Colo.App. 2012). But *Figuli* did not address whether the bacteria itself was a "contaminant."

49. *See* Sandgrund et al., *supra* note 8 at 49.

50. *See id.*

51. *See id.*

52. Pfeil and Meuler, Business Interruption Insurance for COVID-19, *Nat'l Law Rev.* (Mar. 18, 2020), https://www.natlawreview.com/article/business-interruption-insurance-covid-19.

53. ISO Form CP 01 40 07 06 (2006). It is interesting to note, although the legal effect is uncertain, that the standard Virus Exclusion refers to "*any virus*, bacterium *or other microorganism* that induces or is capable of inducing physical distress, illness or disease." (Emphasis added.) It is well-accepted that a "virus" is not an organism, micro or not. Among scientists, and according to every textbook and dictionary the authors have consulted, a virus in a nonliving partial strand of an RNA molecule. An organism is a living thing. Thus, the exclusion is factually mistaken in its use of these scientific terms. However, whether this error has any bearing on coverage remains to be seen.

54. *See* Lewis et al., "Here we go again: Virus exclusion for COVID-19 and insurers," *PropertyCasualty360* (Apr. 7, 2020), https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers.

55. Podoshen, New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria, ISO Circular (July 6, 2006), https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf.

56. *See* Lewis et al., *supra* note 54.

57. *Id.*

58. International Risk Management Institute, Inc., Regulatory Estoppel, https://www.irmi.com/term/insurance-definitions/regulatory-estoppel.

59. *See* Lewis et al., *supra* note 54. For example, as discussed above, the court in *Motorists Mut. Ins. Co.*, 131 Fed. Appx. at 826, held that the presence of E. coli may cause a "physical loss" of the property. *See also Cooper v. Travelers Indem. Co.*, No. C-01-2400 VRW, 2002 WL 32775680, 2002 U.S. Dist. LEXIS 29085 (N.D.Cal. Nov. 4, 2002) (finding that a tavern owner was entitled to BI coverage when health authorities ordered closure of the tavern due to the presence of E. coli in the tavern's well).

60. For example, in *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 566 Pa. 494, 498 (Pa. 2001), the policies covered pollution if it was "sudden and accidental," but not otherwise. The damage at issue was "accidental," but it was not "sudden." However, the court held that, under the doctrine of regulatory estoppel, the insurer was prohibited from taking the position that gradual pollution—even if accidental—is not covered. *See id.* at 504. This is because the insurer had stated, in a memorandum to the regulatory authority in support of approval of the pollution exclusion, that "[c]overage is continued for pollution and contamination caused injuries when the pollution or contamination results from an accident." *Id.* The court further held that "having represented to the insurance department, a regulatory agency, that the new language in the 1970 policies—'sudden and accidental'—did not involve a significant decrease in coverage from the prior language, the insurance industry will not be heard to assert the opposite position when claims are made by the insured policyholders." *Id.* at 500.

61. *Koegler v. Liberty Mut. Ins. Co.*, 623 F.Supp.2d 481, 484 (S.D.N.Y. 2009) (emphasis added). *See also, e.g.*, *Alice J. v. Joseph B.*, 198 A.D.2d 846, 847 (N.Y.App.Div. 1993) ("The complaint alleged the transmission of a communicable disease as the basis for the

causes of action asserted against Joseph B. The basis for Berskshire's disclaimer of liability was a communicable disease exclusion set forth in the policy . . . . Therefore, Berkshire had sufficient facts to disclaim . . . .").

62. One policyholder argued, for example, that it was "[t]he orders of [the] State Health Office [that] resulted in a direct physical loss of Covered Property [and] in the necessary suspension of [the insured's] normal business operations"; and that these "claims are not based on any loss or damage 'caused by or resulting from any virus.'" *Sharecropper LLC v. Farmers Ins. Exch.*, Case No. 01-CV-2020-901319.00, Complaint at ¶¶ 50, 62 (Ala. Dist. Ct. Jefferson Cty. Apr. 7, 2020), https://www.sefinanciallitigation.com/files/2020/04/Ollie-Irene-v.-Farmers-Insurance-Exchange.pdf.

63. *See* Chmura and Jackson, "Restaurants Learn 'Business Interruption' Insurance May Not Cover Coronavirus Closures," NBC Bay Area (Apr. 15, 2020), https://www.nbcbayarea.com/investigations/consumer/restaurants-learn-business-interruption-insurance-may-not-cover-coronavirus-closures/2271037 (quoting Rebecca Boyles, owner of Beer Revolution in Oakland, California).

64. *See Koegler*, 623 F.Supp.2d at 484 (emphasis added).

65. ISO Form CP 01 40 07 06 (2006), https://northstarmutual.com/UserFiles/File/forms/policyforms/Current/CP%2001%2040%2007%2006.pdf (emphasis added).

66. *See Dale Corp. v. Cumberland Mut. Fire Ins. Co.*, No. 09-1115, 2010 WL 4909600, 2010 U.S. Dist. LEXIS 127126 at *15–16 (E.D.Pa. Nov. 30, 2010) (citing 4 Bruner and O'Connor Jr., *Bruner and O'Connor on Construction Law* § 11:167 (Thomson Reuters 2010)).

67. *See, e.g.*, *Fed. Ins. Co. v. Tri-State Ins. Co.*, 157 F.3d 800, 804 (10th Cir. 1998); *Taurus Holdings, Inc. v. United States Fid. and Guar. Co.*, 913 So. 2d 528, 539–40 (Fla. 2005) (finding the term "arising out of" in a CGL policy exclusion unambiguous and broader in meaning than the term "caused by" and means "originating from," "having its origin in," "growing out of," "flowing from," "incident to," or "having a connection with"); *Meadowbrook, Inc. v. Tower Ins. Co., Inc.*, 559 N.W.2d 411, 419–20 (Minn. 1997) (finding the words "arising out of" in a CGL insurance policy exclusion to mean "causally connected with" and not "proximately caused by").

68. *See Cher-D, Inc. v. Great Am. Alliance Ins. Co.*, No. 05-5936, 2009 WL 943530, 2009 U.S. Dist. LEXIS 30206 at *20–22 (E.D.Pa. Apr. 7, 2009. *See also, e.g.*, *Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins. Co.*, 863 F.Supp. 1226, 1233 (D.Nev. 1994) ("[A] 'loss caused by or resulting from' means a risk which is proximate as distinguished from remote"); *Grifith v. Cont'l Cas. Co.*, 506 F.Supp. 1332, 1334 (N.D.Tex. 1981) (noting that "caused by or resulting from" language means proximate cause); *Home Ins. Co. v. Am. Ins. Co.*, 147 A.D.2d 353, 354 (N.Y.App.Div. 1989) (noting that phrase "caused by or resulting from" denotes proximate cause); *Westchester Fire Ins. Co. v. Cont'l Ins. Co.*, 312 A.2d 664, 669 (N.J.App.Div. 1973) (equating phrases "caused by" and "resulting from" to proximate cause), *aff'd*, 319 A.2d 732.

69. *Fed. Ins. Co.*, 157 F.3d at 804.

70. *See Pioneer Chlor Alkali Co.*, 863 F.Supp. at 1232 (holding that an exclusion for "damage or expense caused by or resulting from . . . corrosion" in a commercial "all risk" policy would only apply if the "proximate cause of [the insured's] loss was corrosion.").

71. *See Cher-D, Inc.*, 2009 U.S. Dist. LEXIS 30206 at *20–22. *See also*, *e.g.*, *Pioneer Chlor Alkali Co.*, 863 F.Supp. at 1233 ("[A] 'loss caused by or resulting from' means a risk which is proximate as distinguished from remote"); *Grifith*, 506 F.Supp. at 1334 (noting that "caused by or resulting from" language means proximate cause); *Home Ins. Co.*, 147 A.D.2d at 354 (noting that phrase "caused by or resulting from" denotes proximate cause); *Westchester Fire Ins. Co.*, 312 A.2d at 668–69 (equating phrases "caused by" and "resulting from" to proximate cause). *Cf. Poage v. State Farm Fire & Cas. Co.*, 203 S.W.3d 781, 787 (Mo. App. 2006) (recognizing that courts have generally interpreted "resulting from" to require proximate causation, but finding that the meaning of the phrase was ambiguous enough that it should be "liberally interpreted to grant, rather than deny, coverage" and "construed against the insurer").

72. *Mgmt. Specialists, Inc. v. Northfield Ins. Co.*, 117 P.3d 32, 37 (Colo.App. 2004) (citing *N. Ins. Co. v. Ekstrom*, 784 P.2d 320 (Colo. 1989)).

73. *See id.*

74. *Rodriguez v. Healthone*, 24 P.3d 9, 15 (Colo. App. 2000) (citing *Lyons v. Nasby*, 770 P.2d 1250, 1256 (Colo. 1989)), *rev'd, in part on other grounds*, 50 P.3d 879 (Colo. 2002).

75. For example, the Pepsi Center did not cancel or reschedule a sold-out show that took place on March 12, 2020—one day before Governor Polis officially prohibited gatherings of 250 people or more—despite Governor Polis's previous warnings of the significant health risks posed by large gatherings. *See* Garcia, "Despite Coronavirus, Post Malone Concert Goes On As Planned," CBS Denver (Mar. 12, 2020), https://denver.cbslocal.com/2020/03/12/coronavirus-post-malone-concert-pepsi-center; Roberts, "Polis Bans Gatherings of 250-Plus Over COVID-19, Three Patients Critical," *Westword* (Mar. 13, 2020), https://www.westword.com/news/covid-19-update-three-coloradans-in-critical-condition-large-gatherings-banned-11664613.

76. *See, e.g.*, *Sharecropper LLC*, Complaint at ¶¶ 50, 62.

77. *See* ISO Form CP 00 30 10 12 (2011), https://www.northstarmutual.com/UserFiles/Documents/forms/policyforms/Current/CP%2000%2030%2010%2012.pdf.

78. *Id.*

79. Berry, "COVID-19—When Civil Authorities Take over, Are You Covered?" Int'l Risk Mgmt. Inst., Inc. (Mar. 2020), https://www.irmi.com/articles/expert-commentary/when-civil-authorities-take-over-are-you-covered. *See also* Sandgrund et al., *supra* note 8 at 49 ("Ambiguous policy provisions will be construed in favor of coverage and against limitations that inure to the insurer's benefit.").

80. *See Sloan v. Phoenix Hartford Ins. Co.*, 207 N.W.2d 434, 436 (Mich.App. 1973).

81. *See id.* at 435–36.

82. *See id.* at 436.

83. *Abner, Herrman & Brock, Inc. v. Great N. Ins. Co.*, 308 F.Supp.2d 331, 334 (S.D.N.Y. 2004).

84. *See*, *e.g.*, *id.*

85. *See* ISO Form CP 01 40 07 06 (2006).

86. *El Novillo Restaurant v. Certain Underwriters at Lloyd*'s London, No. 1:20-cv-21525, Complaint at ¶ 67(c) (S.D.Fla. Apr. 9, 2020), https://www.law360.com/articles/1262470/attachments/0.

87. *Sharecropper LLC*, Complaint at ¶¶ 80, 83.

88. *Id.* at ¶ 84.

89. *See* Berry, *supra* note 79.

90. *See Abner*, 308 F.Supp.2d at 333.

91. *Id.*

92. *See*, *e.g.*, ISO Form CP 00 30 10 12 (2011).

93. *See id.*

94. *See* Berry, *supra* note 79.

95. *See Penton Media, Inc. v. Affiliated FM Ins. Co.*, Case No. 3cv2111, 2006 U.S. Dist. LEXIS 64387 at *25 (N.D. Ohio Aug. 29, 2006), *aff'd*, 245 Fed. Appx. 495 (holding that FEMA's take-over of the Javits Center pursuant to a lease agreement following the attacks of 9/11 did not constitute an "order of a civil authority.").

96. *See id.*

97. *Id.*

98. *See id.* at *23 (distinguishing *Zurich Am. Ins. Co. v. ABM Indus., Inc.*, 397 F.3d 158, 161, 171 (2d. Cir. 2005) on the ground that, in *Zurich*, "the policy covered an 'order or action' of civil authority, not simply an order"). *See also Zurich*, 397 F.3d at 161, 171 (finding material questions of disputed fact, preventing summary judgment, as to whether actions taken by New York civil authorities following the 9/11 attacks prohibited plaintiff, a janitorial service, from accessing 34 locations in Manhattan with which plaintiff had service contracts).