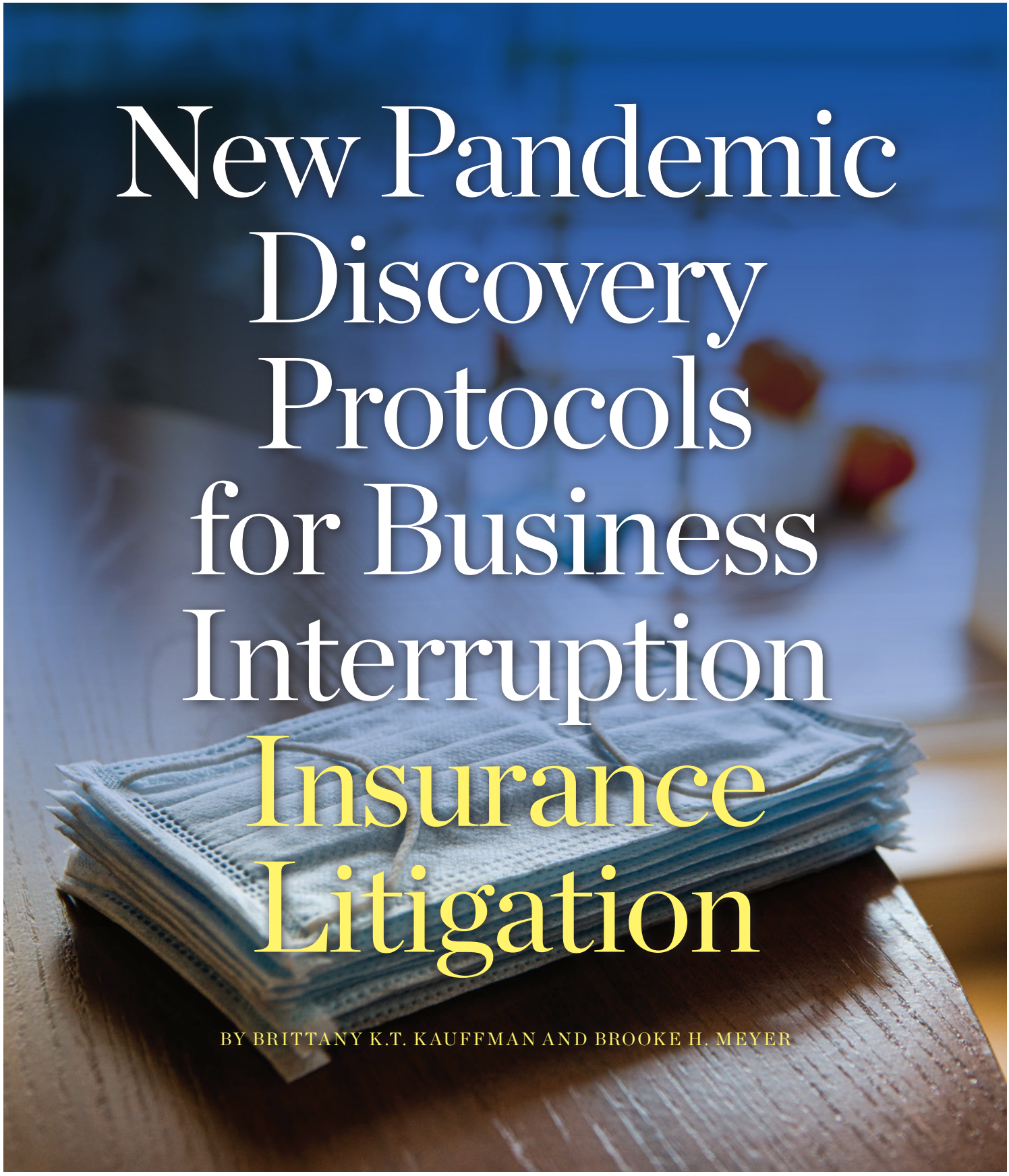

New Pandemic Discovery Protocols for Business Interruption Insurance Litigation

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This article builds on two previous Colorado Lawyer *articles surveying COVID-19 insurance issues. It highlights recently developed initial discovery protocols for business interruption insurance disputes that are intended to make discovery in these cases more efficient.*

Ten months into the pandemic, COVID-19 continues to impact large and small businesses. Many businesses have permanently closed, while others have adapted by transitioning employees to teleworking, developing a virtual retail presence, or seeking federal loan assistance. The aggregate losses for US companies with fewer than 100 workers has been estimated at as much as $431 billion a month.[1] In the wake of these losses, businesses continue to file insurance claims for business interruption (BI) and similar insurance coverage. On the insurance side, insurers could face as much as $100 billion in losses from the pandemic.[2] There has already been a rapid increase in court cases involving commercial property damage BI insurance claims, as explored in a recent two-part *Colorado Lawyer* series.[3]

Recognizing the need to efficiently process this influx of cases in both state and federal courts, IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, launched a project to create discovery protocols for BI insurance disputes (BI Insurance Protocols).[4] The BI Insurance Protocols provide a new pretrial procedure for cases involving BI insurance for commercial property damage claims arising from the COVID-19 pandemic, with the goal of reducing conflict and cost for the parties and the court. The protocols are designed to be implemented by trial judges, lawyers, and litigants in state and federal courts.

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The Current State of Business Interruption Litigation

BI coverage, also known as business income coverage, covers lost income and operating expenses when a business cannot continue normal business operations. The business interruption must result from direct physical loss or damage to the insured's property. Coverage depends on the policy language, insurers' forms, and any exclusions that would preclude coverage for BI losses. The threshold question when determining coverage is whether the business suffered a direct physical loss of or damage to its property according to the policy terms at issue.[5] Jurisdictions disagree about what constitutes physical loss of or damage to the property. For example, some courts have held that property must suffer physical structural damage.[6] Colorado courts have held that physical loss means the property is unfit for physical occupancy or is unusable.[7] During COVID-19, litigation has focused on whether viral or similar exclusions exclude such coverage, and whether specialty coverage applies, such as coverage for business losses due to "civil authority clauses."

Covid Coverage Litigation Tracker

Professor Tom Baker at the University of Pennsylvania Carey Law School developed the online Covid Coverage Litigation Tracker to report data on BI insurance coverage cases related to the COVID-19 pandemic.[8] The data collected includes policyholder name and industry code, insurer name and AM Best number, policyholder and insurer law firms, jurisdictions where the case is litigated, the coverage sought, the type of insurance policy and state of issue, insurance policy forms, and information regarding key litigation events.[9] The site approximates a two-week delay from case filing to tracking on the website.[10] As of November 25, 2020, the site lists 1,414 lawsuits filed for BI coverage.[11] The site also keeps track of outcomes on merit-based motions to dismiss and will eventually track and compare specific policy language.[12]

Spectrum of Recent Court Rulings

BI lawsuits across federal and state courts are in early litigation stages. Courts are beginning

to rule on defendants' motions to dismiss for failure to state a claim, plaintiffs are seeking to amend complaints, and parties are exchanging initial disclosures. Court rulings on defendants' motions to dismiss for failure to state a claim run the gamut, including dismissing plaintiffs' cases with or without prejudice, denying the motions and proceeding with scheduling orders and setting trial dates, or granting dispositive motions in plaintiffs' favor.

In *Studio 417, Inc. v. Cincinnati Insurance Co.*, the Western District of Missouri denied an insurer's motion to dismiss, rejecting arguments that plaintiffs, a proposed class of restaurants and hair salons, did not state plausible claims for "direct physical loss," "civil authority," "ingress/egress," "dependent property," and "sue and labor" coverage under their "all risk" policies.[13] The court acknowledged that "'physical loss' is not synonymous with physical damage" because "loss" includes "the act of losing possession" and "deprivation," and a physical loss may occur when the property is "uninhabitable or unusable for its intended purpose."[14] The court then issued a scheduling order and set trial for May 2022.

In *North State Deli, LLC, v. Cincinnati Insurance Co.*, a superior court in North Carolina granted plaintiffs' partial motion for summary judgment against defendants "jointly and severally" for declaratory judgment, where the policies did not contain viral exclusions and the court concluded that the policy language, "'accidental physical loss *or* accidental physical damage,'" has "two distinct and separate meanings," and "the phrase 'direct physical loss' included the loss of use or access to covered property even where that property has not been structurally altered."[15] Further, the court told parties that the order represented "a final judgment" with "no just reason for delay of any appeal."[16]

Courts have also dismissed insureds' lawsuits—both with and without prejudice—for failure to adequately allege direct physical loss. In *Henry's Louisiana Grill, Inc. v. Allied Insurance Co.*, the Northern District of Georgia granted the insurer's motion to dismiss with prejudice the insureds' lawsuit seeking coverage for BI and civil authority clause coverage.[17] The court examined the key phrase "'direct physical loss of or damage to' the covered property" and determined that plaintiffs could not state probable claims because they admitted that COVID-19 had never been identified on the premises.[18] The court also rejected plaintiffs' argument, based on the civil authority clause, that the Georgia Governor's Executive Order generated a physical change to the property that rendered the once satisfactory dining rooms "unsatisfactory."[19] The court also denied, in its discretion, plaintiffs' request to certify questions of law to the Supreme Court of Georgia for an answer on determinative state law issues based on "substantial doubt regarding the status of state law."[20] The court noted that while jurisprudence regarding COVID-19 is understandably in its early stages, at least one other district court within the Eleventh Circuit appeared to align with its decision.[21]

The US Judicial Panel on Multidistrict Litigation

Two motions were brought under 28 USC § 1407 to centralize BI litigation before the US Judicial Panel on Multidistrict Litigation (JPML). The first sought centralization in the Eastern District of Pennsylvania, and the second in the Northern District of Illinois.[22] Plaintiffs in more than 175 actions filed varying responses to the motions, including proposals for centralization to another district, or creation of an industry-wide multidistrict litigation (MDL) based on "a state-by-state, regional, or insurer-by-insurer basis."[23] The panel received "notice of 263 related actions . . . pending in 48 districts and nam[ing] more than a hundred insurers."[24] On August 12, 2020, the JPML concluded that centralization would not further the just and efficient conduct of this litigation or convenience the parties and witnesses where there is only a shared "superficial commonality" because "there is no common defendant" and the "cases involve different insurance policies with different coverages, conditions, exclusions, and policy language, purchased by different businesses in different industries located in different states."[25]

While the JPML rejected the insureds' motions to transfer and centralize all federally filed COVID-19-related BI cases, it agreed to consider creating an MDL specific to five insurers that accounted for about one-third of the cases.[26] On October 2, 2020, in *In re: Society Insurance Co. COVID-19 Business Interruption Protection Insurance Litigation*, the JPML agreed to transfer and centralize over 30 federal cases against Society Insurance Co. to the US District Court for the Northern District of Illinois.[27] With respect to *Society Insurance Co.*, the JPML found that a consolidated action would be manageable because it implicated the law of only six states and would "serve the convenience of the parties and witnesses and further the just and efficient conduct of this litigation."[28] The JPML declined insurer-specific MDLs for the other insurers—Cincinnati Insurance Co.; Hartford Financial Services Group Inc.; Certain Underwriters at Lloyd's, London; and Travelers Co.—finding that it would not be more efficient to consolidate the cases against those insurers because the lawsuits were pending in too many different jurisdictions that were geographically too far apart.

The Need for Efficiency

Like businesses, the justice system is being disrupted by the pandemic. Courts are rethinking and altering the way they do business, with the overarching goal of ensuring the efficient delivery of justice. These challenges will continue as filings increase, so litigants, attorneys, judges,

A JUDGE'S PERSPECTIVE

Judge Lee Rosenthal, chief judge of the US District Court for the Southern District of Texas, Houston Division, offers her view: "IAALS' prior discovery protocols have proven incredibly valuable to efficient, fair, cost-effective progress in each of these categories of cases. Because lawyers on both sides of the 'v.' were involved in developing each protocol, the obligations are balanced and fair. The lawyers and parties get critical information they need in every case early, and fast. Often this is the only information needed for meaningful case evaluation and early resolution."

and the courts should work now toward ensuring that cases move through the process efficiently.

Courts can take meaningful steps to tailor processes for different case types and unique customer demands, from large companies to self-represented litigants. This will help address the anticipated increase in civil cases that is likely to persist for the foreseeable future as businesses deal with the economic fallout of COVID-19. As one member of the IAALS' BI Insurance Protocols working group stated, "Courts and litigants throughout the country will be grappling with COVID-19 insurance issues long after the disease has run its course."[29]

Discovery is often at the heart of cost and delay in litigation, so enhancing efficiency at this stage of litigation can make a significant difference.

Initial Discovery Protocols

Discovery can be expensive and time-consuming for parties, particularly when the information and documents sought in discovery are central to resolving the issues. Pattern discovery protocols provide a clearly defined set of information and documents to be exchanged that are tailored by case type. This approach has been used successfully in state and federal courts, and some states have adopted pattern discovery by rule for common case types such as personal injury actions.[30]

IAALS has facilitated the development of pattern discovery protocols for specific case types. The first set of protocols, the Initial Discovery Protocols for Employment Cases Alleging Adverse Action (Employment Protocols), was published as a nationwide pilot project by the Federal Judicial Center (FJC) in November 2011.[31] The Employment Protocols have since been adopted by over 75 federal judges and on a district-wide basis in multiple jurisdictions around the country, including the District of Connecticut and the District of Oregon. The FJC has issued multiple reports evaluating the pilot project, reflecting that discovery motions are less common in pilot cases than comparison cases.[32]

The Initial Discovery Protocols for Fair Labor Standards Act Cases Not Pleaded as Collective Actions (FLSA Protocols)[33] and Initial Discovery Protocols for First-Party Insurance Property Damage Cases Arising from Disasters (Disaster Protocols)[34] followed. For each of the protocols, IAALS brought together a balanced committee of attorneys from across the country who regularly represent plaintiffs or defendants in these matters, along with other key experts (e.g., a Federal Emergency Management Agency attorney in the case of the Disaster Protocols) and state and federal judges.

The IAALS protocols offer a pretrial procedure that makes it easier and faster for parties and their counsel to

- exchange important information and documents early in the case;
- frame the issues;
- evaluate claims for possible early resolution; and
- plan more efficient and targeted subsequent formal discovery, if needed.

In each instance, the protocols create a new category of information exchange, replacing initial disclosures with initial case-specific discovery. This discovery is provided automatically by both sides within a specific number of days from the responsive pleading or motion (30 days for Employment and FLSA Protocols, 45 days for Disaster Protocols). While the parties' subsequent right to discovery under the Federal Rules of Civil Procedure (FRCP) is not affected, the amount and type of information initially exchanged focuses on the disputed issues, which streamlines the discovery process and minimizes opportunities for gamesmanship. The protocols are accompanied by a Standing Order for their implementation by individual judges, as well as an Interim Protective Order that the court and parties can use as a template for discussion.

IAALS' BI Insurance Protocols Project

In May 2020, IAALS launched a project to develop a fourth set of Initial Discovery Protocols focused on the incoming wave of BI insurance cases expected to result from the pandemic. The BI Insurance Protocols provide a new pretrial procedure for cases involving first-party insurance BI and related coverage claims that arise from the COVID-19 pandemic, or similar public health threats from disease or other sources of infection or contamination. To create the BI Insurance Protocols, IAALS gathered a balanced working group comprising highly experienced attorneys from across the country who regularly represent plaintiffs or defendants in BI insurance and other commercial property damage disputes.[35] This working group was kept small to promote efficiency.

Through virtual meetings, the working group developed a draft of discovery protocols based on the Disaster Protocols. The draft was then reviewed by a second, broader committee of experts, which helped generate buy-in for the project. The final product is the result of rigorous debate and compromise on both sides, inspired by the goal of improving the pretrial process in BI cases nationwide. The BI Insurance Protocols aim to reduce conflict and cost and to help businesses and insurers reach quick resolution during the pandemic, whether it be in settlement, motions practice, or trial.

Interaction with Rules of Civil Procedure

The BI Insurance Protocols supersede the parties' obligations to make initial disclosures under FRCP 26(a)(1) or applicable state disclosure rules. They require both the insured and the insurer to disclose information within 30 days after the insurer has submitted a responsive pleading or motion, unless the court orders otherwise.

The BI Insurance Protocols focus on the basic documents and information required in BI insurance cases. They are not intended to preclude or modify any party's rights to formal discovery, and they do not waive or foreclose a party's right to seek additional discovery. The disclosures focus on the information and documents most likely to be important in facilitating early settlement discussions and resolving or narrowing the issues, and they are not subject to objection except for attorney-client privilege or work-product protection, including joint-defense agreements.

Documents withheld based on a privilege or work-product protection claim are subject to FRCP 26(b)(5) or applicable state rules. Rather than providing a detailed privilege log, the parties may briefly describe documents withheld as privileged, or work-product pro-

tected communications, by category or type. The BI Insurance Protocols also recognize that non-testifying consulting experts need not be disclosed under FRCP 26(b)(2)(B). The initial discovery is subject to supplementation under FRCP 26(e), to certification of responses under FRCP 26(g), and to the requirements of FRCP 34(b)(2)(E) or similar applicable state rules governing form of production.

Participating courts may implement the BI Insurance Protocols by local rule or by standing, general, or individual case orders. The protocols include a model Standing Order for the court and an Interim Protective Order that remains in place until and unless the parties agree on, or the court orders, a different protective order. Absent party agreement or court order, the Interim Protective Order does not apply to subsequent discovery.

Beyond these initial disclosures for BI cases, which is the project's first priority, IAALS may also develop a set of case management guidelines and other protocols to guide the litigation resulting from the pandemic.

Conclusion

The COVID-19 pandemic has created unique challenges for litigants and the court system. Unlike typical natural disaster cases, which generally affect a certain geographic area, BI insurance claims are being filed in all 50 states.

The BI Insurance Protocols are being released this month for use around the country by state and federal judges and attorneys. IAALS hopes these protocols will serve as an effective tool to streamline the critical early stage of COVID-19 insurance cases, positioning these disputes for a more efficient resolution. Read and download the protocols at iaals.du.edu/protocols. CL


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NOTES

1. Feeley and Chiglinsky, "Houston Rockets Becomes First NBA Team to Sue Insurer Over Denied COVID-19 Claims," *Houston J.* (July 16, 2020), https://www.insurancejournal.com/news/southcentral/2020/07/16/575820.htm (citing statistics from the American Property Casualty Insurance Association).

2. *Id.*

3. Henderson et al., "Survey of COVID-19 Insurance Issues, Coverage for Business Income Interruptions—Part 1," 49 *Colo. Law.* 56 (Aug./Sept. 2020); Henderson et al., "Survey of COVID-19 Insurance Issues—Part 2: Workers' Compensation," 49 *Colo. Law.* 50 (Oct. 2020), https://cl.cobar.org/features/survey-of-covid-19-insurance-issues.

4. Initial Discovery Protocols for Business Interruption Insurance Disputes Arising from the Covid-19 Pandemic and Similar Public Health Threats, iaals.du.edu/protocols.

5. *See W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968).

6. *See Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868 (11th Cir. 2020) (under Florida law, the insured restaurant failed to show that it suffered a direct physical loss of or damage to its property when its interior was exposed to dust and debris from a road construction project near the restaurant; cleaning the restaurant's interior and items within the interior was all that was required to maintain the property, and there was no actual change to the physical structure of the restaurant).

7. *See W. Fire Ins. Co.*, 437 P.2d 52.

8. Covid Coverage Litigation Tracker, an insurance law analytics tool, https://cclt.law.upenn.edu.

9. About the CCLT, https://cclt.law.upenn.edu/about.

10. *Id.*

11. The CCLT case list identifies the case name, court, state, NAICS code for the business, filing date, and plaintiff's firms, https://cclt.law.upenn.edu/cclt-case-list.

12. Outcomes on Merits-Based Motions to Dismiss, Covid Coverage Litigation Tracker, https://cclt.law.upenn.edu/judicial-rulings.

13. *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385 at *5 (W.D.Mo. Aug. 12, 2020).

14. *Id.*

15. *N. State Deli, LLC v. Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507 at *3 (N.C.Super.Ct. Oct. 09, 2020).

16. *Id.*

17. *Henry's Louisiana Grill, Inc. v. Allied Ins. Co.*, No. 1:20-CV-2939-TWT, 2020 WL 5938755 at *6 (N.D.Ga. Oct. 6, 2020).

18. *Id.*

19. *Id.*

20. *Id.*

21. *See Malaube, LLC v. Greenwich Ins. Co.*, No. 1:20-22615, 2020 WL 5051581 at *8 (S.D.Fla. Aug. 26, 2020) (holding that allegations of "direct physical loss or damage" without alleging that the virus has entered the premises does not state a claim for which relief can be granted).

22. *See In re COVID-19 Bus. Interruption Prot. Ins. Litig.*, No. MDL 2942, 2020 WL 4670700 (J.P.M.L. Aug. 12, 2020).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Orders Rejecting Transfer of Cases for Travelers Co., Hartford Financial Servs. Group Inc., Cincinnati Ins. Co., and Certain Underwriters at Lloyd's, London are located on the JPML's website, https://www.jpml.uscourts.gov/panel-orders.

28. *See In re: Society Ins. Co. COVID-19 Business Interruption Prot. Ins. Litig.*, No. MDL 2964 (Oct. 2, 2020).

29. IAALS Press Release, New Pandemic Protocols for Litigation Will Help Struggling Businesses and Their Insurers (May 27, 2020), https://iaals.du.edu/sites/default/files/documents/publications/pandemic_protocols_press_release.pdf (quoting Douglas J. Pepe, former member of the IAALS Disaster Protocols Committee and current member of the COVID-19 Protocols working group).

30. *See, e.g.*, Utah R. Civ. P. 26.1 (disclosure and discovery in domestic relation actions), 26.2 (disclosures in personal injury actions), and 26.3 (disclosure in unlawful detainer actions).

31. Fed. Judicial Ctr., Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action (Nov. 2011), https://www.fjc.gov/sites/default/files/2012/DiscEmpl.pdf.

32. Cantone and Lee III, Fed. Judicial Ctr., Initial Discovery Protocols for Employment Cases Alleging Adverse Action: Report on a Pilot Project to the Judicial Conference Advisory Committee on Rules of Civil Procedure (Oct. 2018); Lee III and Cantone, Fed. Judicial Ctr., Report on Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action (Oct. 2015). *See also* Memorandum from Lee III and Cantone to the Judicial Conference Advisory Committee on Civil Rules (Oct. 26, 2016).

33. Fed. Judicial Ctr., Initial Discovery Protocols for Fair Labor Standards Act Cases Not Pleaded as Collective Actions (Jan. 2018).

34. IAALS, Initial Discovery Protocols for First-Party Insurance Property Damage Cases Arising from Disasters (Feb. 20, 2019), https://iaals.du.edu/publications/initial-discovery-protocols.

35. Working group members are: Steven J. Badger, Zelle LLP; David H. Brown, Copeland & Rice LLP; Hon. Andrew M. Edison, US magistrate judge, S. Dist. of Texas, Houston Division; Hon. John Koeltl, US dist. judge, S. Dist. of New York; Jay Levin, Offit Kurman; Adam J. Levitt, DiCello Levitt Gutzler; Douglas J. Pepe, Joseph Hage Aaronson LLC; Hon. Lee H. Rosenthal, US dist. chief judge, S. Dist. of Texas, Houston Division; Ronald P. Schiller, Hangley Aronchick Segal Pudlin & Schiller; Rene M. Sigman, Merlin Law Group; and Joyce Wang, Carlson, Calladine & Peterson LLP.