# COVID-19 UPDATE

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## I. INTRODUCTION

The purpose of this paper is to provide a brief update on COVID-19 litigation activity. Specifically, the paper is focused on insurance coverage and questions of law of interest to insurance professionals considering property and casualty claims under commercial policies. While other types of insurance may certainly have COVID-19 implications, such as travel insurance or health insurance, those coverages are outside the scope of this article. This article has a Texas focus. It does consider developments in other jurisdictions. This paper is not intended to be an exhaustive discussion of the policy provisions applicable to COVID-19 claims. Policy terms and conditions vary from claim to claim.

## II. COVID-19 IMPACT

The human cost of COVID-19 has been staggering. On March 11, 2020, the World Health Organization declared the coronavirus a pandemic; and, as of April 15, 2020, there were more than 2 million confirmed cases worldwide. The economic toll of the virus also has been dire. Multiple companies shuttered their businesses, major conferences were canceled, and the stock market dropped more than 20 percent. With the recent Delta variant, COVID-19 has again emerged just as many businesses and schools were attempting to return to "normal" operations.

The response to COVID-19 varies drastically from jurisdiction to jurisdiction. In Texas, these differences are seen at a local-government level.

Companies continue to take proactive measures to minimize the spread of coronavirus, which includes introducing heightened sanitation; adopting remote work for employees; canceling events; and, in some cases, suspending operations. As part of preparation efforts, insurance professionals and business leaders should consider whether there is any insurance available to help offset potential losses and liabilities.

## III. INSURANCE AND COVID-19 GENERALLY

First-party property insurance policies commonly provide insurance that covers businesses for the loss of income resulting from the suspension of their operations. The business interruption or business income insurance may extend not only to losses from the suspension of a business's own operations but also to losses from the suspension of a supplier's or customer's operations (known as contingent business interruption insurance, dependent property insurance, or supply chain insurance). Some property insurance policies cover "all risks" except those that are expressly excluded. Other policies are written on a "covered peril" basis, which means they respond only to losses caused by specifically enumerated events.

## IV. COVID-19 COVERAGE FOR BI CLAIMS

What is to become of the slew of business interruption claims made under pre-pandemic insurance policies that did not include pandemic/virus exclusions? While the dust has settled in many jurisdictions, the state of Texas law regarding insurance coverage for COVID-19-related losses remains – in a word – unsettled.

### A. All-Risk Policies and Covid-19 Business Interruption Claims

#### 1. Texas Courts Have Not Addressed Coverage Under An All-Risk Policy

Neither Texas Supreme Court, nor any Texas appellate court, has issued any opinion as to whether COVID-19 qualifies as a covered cause of loss.[1] This is problematic for insurers in the context of all-risks policies, as Texas law is clear

[1] It bears mentioning that our neighbors across the Red River face a clash of state district court opinions that could impact future legal arguments in Texas courts. Multiple state district courts in Oklahoma that granted policyholder motions for summary judgment, finding in favor of business interruption coverage for COVID-19-related losses. *Choctaw Nation of Oklahoma v. Lexington Ins. Co.*, Case No. CV-2020-00042 (Dist. Ct. Okla. Feb. 15, 2021); *Cherokee Nation v. Lexington Ins. Co.*, Case No. CV-2020-00150 (Dist. Ct. Okla. Jan. 14, 2021). However, other state

that all risks policies generally cover any cause of "physical loss or damage" to covered property unless specifically excluded. *JAW The Pointe, LLC v. Lexington Ins. Co.*, 460 S.W.3d 597, 604 (Tex. 2015) ("…the policy is an 'all-risks' policy, meaning it generally covers any 'physical loss or damage to the Covered Property at the premises,' no matter what causes that loss or damage, *unless* the policy specifically excludes or limits coverage for losses resulting from a specific cause") (emphasis original); *SMI Realty Mgmt. Corp. v. Underwriters at Lloyd's, London*, 179 S.W.3d 619, 627 n.3 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Accordingly, while such decisions may be forthcoming, there is not yet a reported Texas decision that rejects a COVID-19 related business interruption claim as a matter of law.

### 2. Texas Federal Courts Have Rejected COVID-19 Claims Under All-Risk Policies

Meanwhile, federal district courts in Texas have been largely consistent in rejecting COVID-19-related business interruption claims. The primary authority upon which the federal district courts in Texas rely is the *Mississippi Valley Gas* case, wherein the Fifth Circuit (applying Mississippi law) affirmed the well-established rule that suffering mere pecuniary loss does not give rise to a covered loss under an all-risks policy. *Hartford Ins. Co. of Midwest v. Miss. Valley Gas Co.*, 181 F. App'x 465, 470 (5th Cir. 2006). ("The requirement that the loss be 'physical'…preclude[s] any claim…when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.") (citing *Trinity Indus., Inc. v. Ins. Co. of N. Am.*, 916 F.2d 267, 270-71 (5th Cir. 1990)) (finding "physical loss or damage" implies an initial satisfactory state that was changed by some external event into an unsatisfactory state, and does not apply to mere monetary loss). Indeed, the Fifth Circuit is clear that "direct physical loss or damage" requires that there be some event that transforms the insured property from a satisfactory condition to an unsatisfactory condition (e.g., hurricane, fire, etc.). *Id*.

## B. COVID-19 and "Direct Physical Loss or Damage"

The practical reality of most COVID-19-related coverage cases is that very few policyholders can credibly allege the actual presence of the virus at the insured property caused them to suffer "direct physical loss or damage." Instead, many policyholders only allege that their losses result from the general threat posed by COVID-19, or from the civil authority orders issued in response to the pandemic. Such tenuous proximate cause allegations have been unanimously rejected by federal district courts in Texas that apply the *Mississippi Valley Gas Co.* framework. *Hajer v. Ohio Sec. Ins. Co.*,—— F.Supp.3d ——, 2020 WL 7211636, at *3 (E.D. Tex. Dec. 7, 2020) ("The regulation causes no changes to the structure of the property, and there is no pleading that the virus itself was present on and altered the property."); *Vizza Wash, LP v. Nationwide Mut. Ins. Co.*, 496 F.Supp.3d 1029, 1039 n.7 (W.D. Tex. 2020) ("[I]n recent months, numerous courts—including at least one court in this District and Division—have held that the lost use of a property due to the Covid-19 pandemic and/or government shutdown orders did not constitute 'direct physical loss of' a property such that it may be the basis for a claim for loss of business income."); *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353, 360 (W.D. Tex. 2020) ("[T]he Court finds that the line of cases requiring tangible injury to property are more persuasive here and that the other cases are distinguishable."); *Selery Fulfillment Inc. v. Colony Ins. Co.*, --- F. Supp.3d ---, 2021 WL 963742 (E.D. Tex. Mar. 15, 2021).

### 1. Civil Authority Orders

For example, in *Selery*, an eCommerce logistics provider sued its insurer for business interruption and civil authority coverage after Denton County issued general social distancing orders in response to the pandemic. These orders resulted in a temporary cessation or decline of local business operations, including those of the policyholder. *Selery Fulfillment, Inc.*, 2021 WL 963742, at *3. However, the District Court rejected the claims because "Selery never alleged that COVID-19 entered the property, only that the pandemic prevented Selery from utilizing it." *Id.* at *6. As such, the Court found that Selery failed to allege "direct physical loss or damage" to the insured property because its losses derived from a general government order issued to prevent further spread of COVID-19, rather than from the presence of COVID-19 at a property, or any specific government order issued in response thereto. *Id*. Furthermore, the court

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district courts have granted summary judgment for insurers, holding that COVID-19 does not cause "direct physical loss or damage" under Oklahoma law. *Kickapoo Tribe of Okla. v. Lexington Ins. Co.*, CV-2020-00047 (Dist. Ct. Okla. May 25, 2021).

found the general existence of a global pandemic was too attenuated of a causal link to give rise to a viable claim for civil authority coverage. *Id*. at *7-*8. Therefore, the court granted the insurer's motion to dismiss and rejected Selery's claims for coverage. *Id*. (citing *S. Tex. Med. Clinics P.A. v. CAN Fin. Corp.*, 2008 Wl 450012, at *10 (S.D. Tex. Feb. 15, 2008) (finding that governmental evacuation orders issued due to an anticipated impact of a hurricane did not constitute property damage under Texas law).

**2. Mere Allegations of COVID-19**

But what about those claims where the policyholder *does* allege the actual presence of COVID-19 at the insured property, or that the presence of COVID-19 constitutes "direct physical loss or damage"? Here, there is far less clarity given the lack of binding authority vis-à-vis so-called "non-traditional" causes of alleged loss or damage under Texas law (e.g., asbestos, caustic fumes, etc.) Some federal district courts in Texas have held that it does not matter whether a policyholder alleges that COVID-19 was present at the insured property. For example, in the recent *University of St. Thomas* case, the Southern District of Texas – Houston Division dismissed a business interruption coverage suit despite the policyholder making clear allegation that COVID-19 was present at the insured property and caused "direct physical loss or damage." *Univ. of St. Thomas v. Am. Home Assur. Co.*, 2021 WL 3129330, at *5 (S.D. Tex. July 23, 2021) (Miller, J.) ("This court sees no reason to depart from [*DZ Jewelry*], especially when its own analysis leads to the same conclusion.") (citing *DZ Jewelry, LLC v. Certain Underwriters at Lloyd's, London*, --- F.Supp.3d ---, 2021 WL 1232778, at *5 (S.D. Tex. Mar. 12, 2021) (Rosenthal, J.) ("COVID-19 does not cause physical damage to property; it causes people to get sick.")

Conversely, the Eastern District of Texas – Sherman Division (i.e., the same federal court that issued the *Selery* opinion) recently rejected an insurance carrier defendant's attempts to dismiss a policyholder's COVID-19 business interruption coverage lawsuit because the policyholder alleged COVID-19 was present at the insured property, and that its presence caused loss or damage by making the air and surfaces at the insured property "unsafe, unfit and uninhabitable for ordinary functional use." *Cinemark Holdings, Inc.*, 2021 WL 1851030, at *3. Despite the insurer's arguments to the contrary (citing to authorities on which the carrier relied in *St. Thomas*), the district court found these allegations satisfied the Fifth Circuit's standard for alleging "direct physical loss or damage" and, therefore, denied judgment as a matter of law. *Id*. (citing *Miss. Valley Gas Co.*, 181 F. App'x at 470).

**3. Civil Authority Order and Allegations of COVID-19**

Considering these conflicting opinions, the Fifth Circuit may look to provide resolution when it considers the *Terry Black's* case later this year. *Terry Black's Barbecue, LLC, et al. v. State Auto. Mut. Ins. Co.*, --- F.Supp.3d ---, 2021 WL 972878 (W.D. Tex. Jan. 21, 2021). In *Terry Black's*, an Austin-based barbecue restaurant is appealing an order dismissing its claims for business interruption coverage after it allegedly suffered losses in the wake of the COVID-19 pandemic, as well as from the local government's social distancing orders issued in response thereto. Much like the courts in *Hajer*, *Vizza Wash*, and *Diesel Barbershop*, the Western District of Texas – Austin Division dismissed Terry Black's claims on the basis that the restaurant did not allege that it suffered "direct physical loss or damage" to its property due to the confirmed presence of COVID-19. Rather, the district court found that the policyholder alleged mere loss in business revenue resulting from the general threat posed by the COVID-19 pandemic, or from the civil authority orders issued in response to that general threat.[2]

While the case has not yet been argued or fully submitted, *Terry Black's* presents the Fifth Circuit with a unique opportunity to clarify its interpretation of "direct physical loss or damage" vis-à-vis non-traditional alleged causes of loss. However, it remains unclear how far any opinion may reach given that the policyholder did not allege COVID-19 was present at the insured property. As such, insurers and policyholders alike may have to wait until such a case reaches New Orleans, or until the Texas state courts decide to weigh-in and settle the general rule once and for all.

Yet even should such rulings ultimately inure to the benefit of insurers, so-called "unicorn" cases are likely to emerge as exceptions to the general rule. No two claims are the same, nor are any two policies. Plus, if COVID-19 has taught us anything, it is to "expect the unexpected." Therefore, all readers would be prudent to watch the forthcoming

[2] While the policy also contained a "virus exclusion," the opinion did not address that language in its opinion. As such, the issue lies dormant for the time being.

evolution of COVID-19-related caselaw with great attentiveness. Much like the vaccine, an ounce of study may prove worth a pound of cure for your clients.

## V. COVID 19 AS CONSEQUENTIAL DAMAGE/WORKERS COMP

While much attention has been given to those businesses who urged civil authorities to ease social distancing guidelines, little attention has been given to those businesses who refrained from re-opening and/or imposed mask mandates on patrons to avoid civil liability. Indeed, the pandemic saw a litany of COVID-19 related personal injury and wrongful death lawsuits filed against businesses during the pandemic, ranging from allegations of negligent failure to warn patrons regarding the risk of contamination to allegations negligent failure to adopt standards designed to mitigate the spread of COVID-19.

### A. The Texas Pandemic Liability Protection Act

The wave of lawsuits prompted the Texas Legislature to introduce a series of measures to increase liability protections for businesses and religious organizations. Ultimately, these measures resulted in the Texas Pandemic Liability Protection Act (TPLPA) that Governor Abbott signed into law in June 2021. While TPLPA does not create a new cause of action, it does outline the high thresholds that's plaintiffs asserting COVID-19-related injury or death claims must survive.

Under the TPLPA, a person cannot face lability for injury or death resulting from exposure to COVID-19 unless (1) the person who exposed the individual (a) knowingly failed to warn the individual of or remediate a condition that the person knew was likely to result in the exposure of an individual to the disease; or (b) the person knowingly failed to implement or comply with government-promulgated standards, guidance, or protocols intended to lower the likelihood of exposure to the disease that were applicable to the person or the person 's business; and (2) reliable scientific evidence shows that the failure to warn the individual of the condition, remediate the condition, or implement or comply with the government-promulgated standards, guidance, or protocols was the cause in fact of the individual contracting the disease.

However, it is not enough for a plaintiff merely to allege the elements of a claim under TPLPA. Rather, TPLPA also requires that within 120 days of the defendant filing its answer, the claimant must serve a *Robison*-style report on the defendant that "provides a factual and scientific basis for the assertion that the defendant's failure to act caused the individual to contract" COVID-19. If the claimant fails to provide such a report, or if the claimant's report fails to satisfy the standards promulgated under the TPLPA, the Court "shall dismiss" the claim and award defendant's attorney's fees.

### B. Applying the TPLPA

By its terms, the TPLPA applies retroactively to all personal injury or wrongful death claims filed on or after March 13, 2020, unless the claim previously reached final adjudication. As such, its passage is expected to curtail COVID-19-related injury and wrongful death claims brought by third parties against businesses and religious organizations. Indeed, given the back-logged state of many district court dockets, it appears all (nearly) businesses at risk of COVID-19-related liability in will be able to avail themselves of the protections contained in this law.

Yet while Texas business owners and private organizations heralded TPLPA's passage, many consumer rights and labor attorneys criticized the law on the basis that it "effectively makes it nearly impossible for workers to win in court."[3] Specifically, if an employee's work proximately caused them to contract COVID-19 and suffer long-term injuries/death, one would traditionally look to workers' compensation insurance/employer liability insurance to cover the cost of such claims. However, because TPLPA affords such broad protections to employers and private businesses, it is hard to imagine how the employer could ever face direct liability if it complies with the standards promulgated under TPLPA. As such, we anticipate a litany of administrative and legal challenges to the TPLPA in years to come in an effort to balance the equities.

## VI. LOOKING AHEAD

[3] https://www.washingtonpost.com/nation/2021/07/15/texas-pandemic-negligence-business/

The safety of businesses' employees and customers should be the paramount concern. But, in preparing to respond to this unexpected crisis, insurance professionals and business leaders should not lose sight of insurance as a potentially important recovery source to offset losses.

As to the industry itself, it is a foregone conclusion that insurers will revise future policies to exclude coverage for pandemic/virus-related losses. As recently as April 2020, nearly all commercial liability insurance carriers amended their standard policies to include exclusionary language for virus or pandemic-related losses. The ISO offers at least two endorsements that address pandemic/virus-related losses. Those policy have not been the subject of most of the claims. Given that state and federal courts in Texas have been nearly unanimous in ruling in favor of insurers in cases where the policies included such language, it is likely that Texas courts will continue to interpret such "virus exclusion" clauses in a similar fashion.