

# Business Interruption: Impact of COVID-19

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# Summary

1. Timeline of events, orders and advisories
2. Is there a 'physical loss or damage' trigger (and does it matter?)
3. General property and civil authority wordings
4. Infectious disease and pandemic wordings
5. Determination of covered loss
6. Exclusions
7. Comment on proceedings going forward
8. Liability Policy issues
9. Sample wordings

# Timeline of Events, Orders & Advisories

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# Timeline of Events

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- March 11, 2020: WHO classifies COVID-19 as a pandemic
- March 12, 2020: Quebec declares state of emergency
- March 16, 2020: PEI declares state of emergency
- March 17, 2020: Alberta and Ontario declare state of emergency
- March 18, 2020: British Columbia, Saskatchewan, Newfoundland and Labrador, Yukon, Northwest Territories, and Nunavut declare state of emergency
- March 19, 2020: New Brunswick declares state of emergency
- March 20, 2020: Manitoba declares state of emergency
- March 22, 2020: Nova Scotia declares state of emergency

# Designation under *Public Health Act*

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The orders declaring COVID-19 as a “communicable disease” (or comparable term) may be separate from the state of emergency order.

- For some policies (i.e. infectious disease policies), the relevant government order may not be the emergency order.
- Example:
  - BC declared COVID-19 as a communicable disease under the *Public Health Act* in a notice issued March 17, 2020.
  - BC declared a state of emergency in an order issued under the *Emergency Program Act* on March 18, 2020.

# Restrictions on Business Operations

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## British Columbia

- March 18, 2020: gatherings of more than 50 people banned; bars and nightclubs not serving food ordered to close, public schools recommended to be closed (grades k–12)
- March 20, 2020: all dine-in establishments prohibited from providing dine-in restaurant service, permitted to provide take-out service only
- March 21, 2020: all personal service establishments (including day spas, hair and beauty salons, and tattoo parlours) ordered to close

## Vancouver

- March 20, 2020: state of emergency declared; all dine-in establishments prohibited from dine-in restaurant service, permitted to provide take-out service only

# Restrictions on Business Operations

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## Ontario

- March 14, 2020: public schools ordered closed
- March 15, 2020: ONSC suspends court operations; OLG closes all casinos
- March 17, 2020: gatherings of more than 50 people banned; all libraries, theatres, cinemas, private schools, and daycares ordered to close
- March 24, 2020: all “non-essential” businesses ordered to close

# Limitation of Liability

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## BC Ministerial Order No. M094

- Effective March 31, 2020, the BC Government issued an order which limits COVID-19 related liability for businesses providing services deemed essential.
- The order notes that it is “in the public interest to protect persons who operate or provide essential services from liability for damages relating directly or indirectly from COVID-19.
- It protects essential service providers from liability for claims arising from COVID-19 exposure provided the essential service provider has followed all recommended guidelines to protect against infection.



# Limitation of Liability

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## BC Ministerial Order No. M120

- This order replaces M094 and became effective April 22, 2020.
- It does not materially alter order M094.

## Other provinces

- Ontario is currently considering a similar order (not yet enacted).

Is there 'Physical Loss or  
Damage'?

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(AND DOES IT MATTER?)

# Coverage Issues under Property Policies

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- Some Key Points:
  - Does 'contamination' of a surface by virus, organism or other substance constitute 'physical loss or damage'?
  - Case law is mixed on this point – limited Canadian law, more US law.
  - The insured has the onus of showing physical damage.
  - Transient or short term contamination less likely to be treated as physical damage.
  - If presence of coronavirus on a surface is physical damage, how does this trigger cover, given short existence and ability to correct through cleaning?
  - *MDS Inc. et al v. FM Global*, 2020 ONSC 1924 – does it change the law?

# Canadian Cases

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# Property Policies; Canadian Cases

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- Trigger generally requires “direct physical loss or damage” to covered property.
- Physical loss or damage requires harmful physical change.
- The change does not have to be obvious, but there does have to be physical change.
- The insured has the onus of showing physical change.
- See, for example, *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Company*, 2014 BCSC 1568 (affirmed 2015 BCCA 347).
- What about transient change, non-physical change and non-standard wordings?

# Property Policies; Canadian Cases

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*D.P. Murphy Inc. v. Laurentian-Casualty Co. of Canada*, [1992] P.E.I.J. No. 70 (PEISC):

- The insured operated a Tim Horton's. Explosive vapours leaked from a storm sewer and into the building. An evacuation order was issued.
- The court held that the contamination exclusion applied.
- In obiter, the court considered whether there was "direct physical loss of or damage to" insured property. Slightly non-standard language.
- On this wording the court held that "damage" should be treated as synonymous with "injury" (in the extended pre-1973 CGL meaning of "injury to property").
- The existence of the fumes causes damage to the property in this sense.
- This point will be discussed again in connection with *MDS Nordion*.

# Coverage Issues under Property Policies

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*Jessy's Pizza (Bedford) v. Economical Mutual Insurance Co.*, 2008 NSSM 38:

- Vandals ruptured an oil supply line underneath the plaintiffs' leased premises.
- Oil leaked and permeated soils, slab and floor.
- Repairs had to be undertaken.
- Overpowering odour contributed to business interruption.
- The insurer denied coverage on the basis that there was no damage within the meaning of the policy.
- The court determined that the oil contamination constituted physical damage.
- Explained and distinguished *DP Murphy*.

# Coverage Issues under Property Policies

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*MDS Inc. et al v. FM Global, 2020 ONSC 1924:*

- Heavy water leaked within certain components of a research and isotope production nuclear reactor in Chalk River, Ontario.
- The decision involved a CBI claim by MDS, as a direct customer of AECL in connection with purchase, processing and resale of isotopes produced at Chalk River.
- Court addressed the question of whether “resulting damage” exception to a corrosion exclusion applied.
- Traditionally, “resulting damage” must be “physical loss or damage” rather than loss of use or other economic loss.
- The court held that the corrosion exclusion did not apply, but held, in the alternative, that the resulting damage exception would apply to bring MDS’ financial loss within cover.
- The judgment contains language which arguably supports the conclusion that “loss of use” can constitute physical loss or damage.



# Coverage Issues under Property Policies

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*MDS Inc. et al v. FM Global*, 2020 ONSC 1924:

- Some points to keep in mind concerning *MDS*:
  - The reasoning that radioactive contamination constitutes physical damage is likely not controversial. The controversial aspect of the decision is only the potential for pure loss of use to constitute “resulting damage” as an alternative ground for the decision.
  - The interpretation is arguably restricted to the facts and this policy – based on specific context of the policy and the risk insured.
  - *MDS* likely will not be interpreted as supporting a finding that loss of use constitutes physical loss or damage. If that is the ratio, *MDS* is likely contrary to prior case law.
  - The case is currently under appeal to the ONCA.

*Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Company*, 2014 BCSC 1568 (affirmed 2015 BCCA 347)

# US Cases

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# Coverage Issues under Property Policies

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DOES A PRECAUTIONARY ORDER TRIGGER COVER?– *SOURCE FOOD*

*Source Food Tech., Inc. v. U.S. Fidelity & Guar. Co.*, (8th Cir. 2006):

- The insured imported beef from Canada for manufacture of cooking products. In May 2003 the USDA issued an order prohibiting import of beef products from Canada due to an outbreak of BSE – ‘mad cow disease’.
- The insured argued that the closing of the border caused “direct physical loss” to its beef and triggered cover directly or on the basis of civil authority. The insured argued that the USDA order effectively meant treating the beef as if it were contaminated.
- The court rejected that argument. There was no argument the beef was actually contaminated with BSE. To find that the order supported a finding of physical damage “would render the word ‘physical’ meaningless”.
- The decision turned in part on use of the words physical damage “to” insured property.

# Property Policies US Cases

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## CASES DISTINGUISHING *SOURCE FOOD*

*Neth. Ins. Co. v. Main St. Ingredients, LLC*, (2013 US District Court for the District of Minnesota):

- Decision distinguishing *Source Food*. Arose under a CGL, not a property policy.
- The FDA found salmonella in MSI's plant and ordered a recall of MSI's milk products. Litigation ensued against MSI by its customers followed, and was settled. The relevant issue was whether the suit involved "physical injury" to the customer's products, into which MSI's recalled milk products had been incorporated.
- The court distinguished *Source Foods*. MSI's products had been manufactured in a salmonella contaminated plant, and this resulted in physical injury to downstream products.
- Here the order was not precautionary – the product was contaminated.

# Coverage Issues under Property Policies

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## CASES DISTINGUISHING *SOURCE FOOD* (cont'd)

*United Sugars Corp. v. St. Paul Fire & Marine Ins. Co.*, (2007 Court of Appeals of Minnesota):

- USC supplied sugar was found by Nestle, a USC customer, to contain 'contaminants' (cigarette butts and bee parts).
- USC and Nestle settled broad recall claim. St. Paul denied, in part on reliance on Source Foods and an argument that most of the recalled product was not shown to have actually been contaminated.
- The court distinguished *Source Foods*, primarily on the basis that, in the context of the food industry, food products made from adulterated ingredients should be treated as having been physically injured (citing *General Mills v Gold Medal* 622 NW 2d 147 and other cases).

# Coverage Issues under Property Policies

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DOES TRANSIENT CONTAMINATION CONSTITUTE PHYSICAL DAMAGE?

*Oregon Shakespeare Festival Association v. Great American Insurance Company*, 2016 WL 327247 (D. Ore. June 7, 2016):

- Where a theatre had to be closed due to smoke from wildfires that infiltrated the premises this was direct physical damage to the premises.

# Coverage Issues under Property Policies

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*Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014):

- An ammonia discharge in a manufacturing facility constituted “direct physical loss of or damage to” the facility because it “physically rendered the facility unusable for a period of time”.

# Coverage Issues under Property Policies

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*Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 825 (3d Cir. 2005):

- Bacteria contamination of a home's water supply could constitute a direct physical loss where the "functionality" of the property is "nearly eliminated or destroyed", or where the property is rendered "useless or uninhabitable".



# Coverage Issues under Property Policies

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*Universal Image Prods. v. Chubb Corp.*, (E.D. Mich. 2010):

- Superficial or intangible contaminant not considered “physical damage”.
- The insured claimed that water seepage into its leased office caused direct physical loss in the form of pervasive odour, mould and bacterial contamination, which forced it to vacate.
- This did not constitute direct physical loss or damage.
- Evidence that workers were recommended to wear respirators and that one employee suffered bacterial pneumonia.

# Coverage Issues under Property Policies

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*Mama Jo's Inc. v. Sparta Ins. Co.*, (S.D. Fla, 2018):

- Restaurant impacted by dust and debris from nearby roadwork.
- Court found that condition could be remediated by cleaning and did not constitute direct physical loss.
- The court noted that the restaurant was not “uninhabitable” or “unusable” – the restaurant remained open and there was no evidence that the dust had an impact on the restaurant’s operation other than requiring daily cleaning.
- An appeal of this decision was heard by the US Court of Appeals for the Eleventh District in January 2020 – the decision is still pending.

# Coverage Issues under Property Policies

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*Mastellone v. Lightning Rod Mut. Ins. Co.*, (Ohio Ct. App, 2008):

- The court held that mould that could be removed by cleaning was not physical damage because it did not alter or otherwise affect the structural integrity of the building's siding.
- Expert evidence indicated that the mould could be removed without causing any harm to the wood surfaces on which the mould was growing.

# Coverage Issues under Property Policies

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## FIRST US COVID DECISION

*Social Life Magazine, Inc. v. Sentinel Insurance Co. Ltd.*, No. 20-cv-3311 (VEC) (S.D.N.Y.):

- The court denied an injunction requiring the insurer to pay insurance proceeds to the policyholder immediately for COVID-19 damages.
- The insured sought coverage under two provisions: a Business Income provision and a Civil Authority provision.
  - The Business Income provision covered, “the actual loss of Business Income you sustain due to the necessary suspension of your ‘operations’ . . . [provided the suspension was] caused by direct physical loss of or physical damage to property at the ‘scheduled premises’”.

# Coverage Issues under Property Policies

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## *Social Life* (cont'd):

- The Civil Authority provision covered, “the actual loss of Business Income you sustain when access to your ‘scheduled premises’ is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your ‘scheduled premises’”.
- In denying the motion, the court noted that it had difficulty understanding how COVID-19 could cause physical damage to property.
- The court referenced *Roundabout Theatre* as the most “on-point New York precedent”.

# Coverage Issues under Property Policies

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*Social Life Magazine, Inc. v. Sentinel Insurance Co. Ltd.*, No. 20-cv-3311 (VEC) (S.D.N.Y.):

- In *Roundabout Theatre Co., Inc. v. Continental Casualty Co.*, (N.Y. App. Div. 1<sup>st</sup> Dep't 2002), the court found that a theatre was not entitled to business interruption coverage for losses suffered when the city denied access to the building due to a nearby construction accident.

# Coverage Issues under Property Policies

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*Social Life* (cont'd)

In *Social Life* the court said:

- “New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going... this is just not what’s covered under these insurance policies”.
- COVID-19 “damages lungs... It doesn’t damage printing presses”.
- The potential damage was to a person rather than damage to property.

# Comment

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Issues will no doubt be determined in litigation, but overall:

- Most businesses which have suffered BI loss will not have virus present.
- Where virus is present, it can be remediated by cleaning (or waiting a few hours).
- The BI loss is due to pandemic orders intended to prevent spread of virus, not due to physical damage.
- Pure loss of use is not, on existing case law, physical loss or damage.



# Civil Authority – Specific Issues

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# Civil Authority

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Civil authority extensions (CP 00 30 04 02)

Sample wording:

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

The coverage for Business Income will begin 72 hours after the time of that action and will apply for a period of up to three consecutive weeks after coverage begins.

# Civil Authority

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## Civil authority wording

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.

# Civil Authority

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## Civil authority wordings

Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end:

(1) Four consecutive weeks after the date of that action; or

(2) When your Civil Authority Coverage for Business Income ends;

whichever is later.

Source: Insurance Services Office, Inc. Business Income and Extra Expense Coverage Form CP 00 30 10 12, Copyright 2011

# Civil Authority

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*Owners, Strata Plan KAS3058 v. St. Paul Fire and Marine Insurance Company (Travellers)*, 2013 BCSC 2197:

- One of the few Canadian cases to consider a civil authority wording:

“Interruption by Civil Authority

We will pay your actual loss of revenue when a civil authority denies access to an insured location as a direct result of physical loss or damage by a covered cause of loss to property not at an insured location. We will pay for loss of revenue for up to four consecutive weeks while access to an insured location is denied.”

COMMENT: Civil authority generally requires insured peril to trigger cover. Where the insured peril is direct physical loss or damage, civil authority is not triggered.

# Civil Authority – US cases

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*Southern Hospitality Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137 (3<sup>rd</sup> Cir. 2004):

- The civil authority clause referred to “action” of civil authority which prohibits access to the premises.
- The case arose out of the FAA air travel ban issued following 9/11
- The insured operated various hotels and lost substantial business as a result of customers being unable to travel.
- The court accepted that the FAA travel ban constituted an order within the meaning of the policy.
- However, the court found that the order did not prohibit access.
- The plain and ordinary meaning of “prohibit” was defined as “to formally forbid, esp. by authority”.

# Civil Authority – US cases

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*Abner Hermann & Brock Inc. v. Great Northern Ins. Co.*, 308 F. Supp. 2d 331 (SDNY 2004):

- Arose out of traffic restrictions in Manhattan following 9/11.
- The insurer accepted that there was cover under the civil authority clause for the period during which access to the insured's offices was actually prohibited (amounting to a few days).
- The issue was whether there was coverage for the longer period during which traffic restrictions made access to the insured's premises more difficult, but not impossible.
- The court held that the civil authority clause was triggered only while access to the insured's premises was actually prohibited rather than the longer period.

# Civil Authority – US cases

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*Penton Media Inc. v. Affiliated FM Mutual Ins. Co.*, 2006 US Dist. LEXIS 64387:

- The insured's tradeshow was cancelled when the premises it had booked were taken over by FEMA following 9/11.
- The court held there was no coverage for the resulting business loss.
- The court noted as follows:

An order is "a rule or regulation made by a competent authority." Webster's Third New International Dictionary (2002). In previously reaching the conclusion that no evidence in support of a finding that a civil authority existed in this case, the court [in the decision under appeal] stated:

The word "order" is defined as "an authoritative indication to be obeyed." Webster's II New Riverside Univ. Dictionary (1994). Black's Law Dictionary defines "order" as "a mandate; precept; command or direction authoritatively given; rule or regulation." Black's Law Dictionary (6th Ed. 1990). These definitions contemplate something authoritative or mandated. In this case, however, there was no such authoritative command from a civil authority.



# Infectious Disease and Pandemic Wordings

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# Infectious Disease and Pandemic Wordings

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## Infectious Disease Policies

- Very little case law interpreting these types of policies.
- Most policies will require an “outbreak at the insured premises” and may require an order to be issued as a result of that outbreak.
- On that wording would not cover loss resulting from general pandemic restrictions. An order specific to the premises may trigger cover. Causation and quantification issues arising on this scenario are discussed below.

# Infectious Disease and Pandemic Wordings

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There are also broader infectious disease wordings. For example:

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## **6. Notifiable disease, vermin, defective sanitary arrangements, murder and suicide**

**Consequential loss** as a result of interruption of or interference with the **business** carried on by you at the premises following:

a) ... iii. any **notifiable disease** within a radius of twenty five miles of the **premises**;

The maximum we will pay for any one loss will not exceed **£100,000**.

### **Conditions**

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**3. We will only be liable for the loss arising at those premises which are directly affected by the loss, discovery or accident.**

# Infectious Disease and Pandemic Wordings

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## Event Cancellation Policies

- Wording will generally cover Loss due to cancellation, postponement or move of the event to alternate premises, due to unavoidable circumstances.
- The wording will always exclude matter within the control of the insured, or matters such as lack of audience support.
- In some case the wording will exclude loss caused by virus or pandemic.

# Infectious Disease and Pandemic Wordings

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## Pandemic Insurance

- Seem to be rare - Example:

### (k) **Outbreak Extra Expense**

We agree to extend the insurance provided by **Part II -- Business Income** to apply to your incurred necessary “extra expense” resulting from interruption of or interference to your business operations as a result of a “pandemic outbreak” declared by Civil Authority or “public health authority” during the policy period.

However, we will not cover any loss resulting from, caused by or contributed to by, arising or resulting, directly or indirectly, in whole or in part, from:

- (1) any infectious or contagious disease which has not been declared a “pandemic outbreak” by Civil Authority or “public health authority”;
- (2) asbestos or any materials containing asbestos in whatever form or quality, “fungi” and “spores”, “terrorism”, war, “pollutants”, nuclear incident or contamination by radioactive material;
- (3) any increased costs incurred to comply with the enforcement of any by-law, regulation, ordinance, law or order, including but not limited to any cost or expense arising out of the repair or upgrading or retrofitting of equipment or defective sanitation; or

# Infectious Disease and Pandemic Wordings

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## Pandemic Insurance

- (cont'd):

- (4) any loss, cost or expense arising out of testing for, monitoring of, clean up, removal, containment or treatment of a “noticeable” infectious or contagious disease, including but not limited to viral or bacterial infections, poisoning caused by the consumption of food or beverage, an infestation of animals, including but not limited to insects, birds or rodents or defective sanitation.

The most that we will pay under this Extension of Coverage in any one policy period is as specified on the Coverage Summary, or as otherwise indicated on the “schedule”, subject to indemnity provided by this Extension of Coverage will not exceed the shorter of:

- (i) 30 days from the date of the declaration by Civil Authority or “public health authority”; or
- (ii) the reasonable time required to comply with the declaration by Civil Authority or “public health authority”.

# Determination of Covered Losses

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# Causation and Quantification Issues

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The loss must have been caused by the insured event.

*Orient-Express Hotels Ltd. v Assicurazioni Generali SPA*, [2010] EWHC 1186:

- The insured's hotel was damaged by a hurricane leading to its closure for two months.
- The entire city was shut down for several weeks following the declaration of a state of emergency.
- The court held that the 'but for' causation test applies under standard BI policy wordings where there are two concurrent independent causes of loss.
- The hotel could therefore only recover losses which would not have arisen had the damage to the hotel not occurred.
- The hotel could only be put in the position of an owner of an undamaged hotel and were therefore not entitled to compensation since the hotel would not have been able to operate even if it was not damaged (due to the closure of the city).



# Causation and Quantification Issues

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Example:

the amount we pay for loss of income or loss of gross profit will be amended to reflect any special circumstances or business trends affecting your activities, either before or after the loss, in order that the amount paid reflects as near as possible the result that would have been achieved if the insured damage, insured failure or restriction had not occurred.

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# Exclusions

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Virus

Example:

We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.

**CP 01 40 07 06**

# Comment on Proceedings Going Forward

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# Status of legal proceedings

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1. Class action suits
2. FCA test case (UK)
3. Legislative intervention

# Class Action Suits

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## Business Interruption Insurance Class Action

- Filed by Regina-based law firm Merchant Law Group LLP.
- Challenges various insurers' refusal to pay business interruption claims in relation to losses suffered due to COVID-19.
- The class action alleges that the “physical damage” requirement to trigger coverage for business interruption claims is satisfied by the presence, release, discharge or contamination of COVID-19.

# Class Action Suits

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## Business Interruption Insurance Class Action

- Named defendants in the suit include:
  - Aviva Canada Inc.
  - Co-operators General Insurance Company
  - Desjardins Financial Security Life Assurance Company
  - Economical Insurance
  - Intact Financial Corp
  - Lloyd's Canada
  - Lloyd's Underwriters
  - Northbridge General Insurance Corp.
  - Royal & Sun Alliance
  - TD General Insurance Co.
  - Wawanesa Mutual Insurance Co.
  - Wynward Insurance Group

# Class Action Suits

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## Business Interruption Insurance Class Action

- Claim for relevant business interruptions resulting from COVID-19, including:
  - Loss of revenue caused by a decrease or elimination of customers.
  - Loss of revenue caused by federal, provincial and municipal orders that restrict business operations or entirely close businesses.
  - Loss of revenue caused by the “costs of addressing physical damage to business premises due to the presence, release, discharge or contamination of COVID-19 at the business premises...”.
- Class action filed in Quebec and Saskatchewan.

# Test Case – FCA

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## Financial Conduct Authority (FCA)

- 16 insurers' business interruption insurance policies will be examined in the test case over whether claims should be paid out to small and medium-sized businesses hit by interruptions due to the COVID-19 lockdown.
- 8 insurers participating:
  - Hiscox
  - QBE
  - Zurich Insurance
  - MS Amlin Underwriting
  - Royal & Sun Alliance
  - Ecclesiastical Insurance Office
  - Argenta Syndicate Management
  - Arch Insurance



# Test Case – FCA

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## Financial Conduct Authority (FCA)

- Initially announced May 1, 2020.
- The FCA approached 56 insurers and reviewed more than 500 relevant policies across 40 insurers.
- On May 15, 2020, the FCA invited holders of business interruption insurance policies who remained in dispute with their insurers over the terms of their policies to send in their arguments.
- The FCA received more than 1,200 submissions by May 20, 2020.
- On June 1, the FCA identified samples of 17 policy wordings that capture the majority of the key issues in dispute.
- The policies selected were determined to be representative in nature – meaning they will provide guidance for many policies.

# Test Case – FCA

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## Financial Conduct Authority (FCA)

- The FCA has provided the following timeline for next steps:
  - June 9: FCA will file claim form and particulars.
  - June 11: a case management schedule will be used to fix a timeline for the case.
  - June 23: insurers will file defences.
  - June 26: a second case management conference will take place.
  - July 3: the FCA will file its reply.
  - July 1–15: skeleton arguments and replies will be served.
  - July 16–31: a 5–10 day court hearing will take place.

# Legislative Intervention

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## New Jersey

- On March 16, 2020, a bill was proposed in New Jersey that would require insurance companies of certain small-to-medium-sized businesses to provide business interruption coverage for COVID-19 losses.
- If passed, the law would apply to policies in effect on March 9, 2020 and sold to policyholders with less than 100 eligible employees in New Jersey.
- The wording of the bill is as follows: “Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption in force in this State on the effective date of this act, shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic . . . concerning the Coronavirus disease 2019 pandemic.”
- The bill has been pulled from consideration in its current form.

# Liability Policies

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# Liability Policies

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## Commercial General Liability (CGL)

- Insures against claims by third-parties alleging that the policyholder's conduct caused bodily injury or property damage to the claimant.
- *Temple-Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88, (1999 Texas)
  - Held that a person exposed to asbestos cannot claim mental anguish damages for fear of contracting an asbestos-related disease if the “eventual consequences are uncertain”.
- *Campanella v. Northern Properties Group, LLC*, No.19-171 (D. Minn. Feb 28, 2020)
  - Suggests that exposure to a toxic substance can constitute an “occurrence”, triggering coverage for third-party claims under standard CGL policies.

# Liability Policies

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## CGL

- Exclusions
  - Many CGL policies contain specific pathogen exclusions
- Example:

### **ORGANIC PATHOGENS**

(a) All liability or expense arising out of any actual, alleged or threatened infectious, pathogenic, toxic or other harmful properties of any **Organic Pathogen**, including exposure to any **Organic Pathogen**; and

# Liability Policies

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- Example (cont'd)

Organic Pathogen" means any:

- (d) Bacteria; mildew, mold or other fungi; other microorganisms; or mycotoxins, spores or other by-products of any of the foregoing;
- (e) Viruses or other pathogens (whether or not a microorganism); or
- (f) Colony or group of any of the foregoing.

# Liability Policies

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## Directors & Officers (D&O)

- May apply to claims by shareholders alleging that management's actions caused financial losses.
- Decline in stock market may result in shareholder lawsuits alleging that corporations did not adequately prepare for the impact of COVID-19.
- Several securities class actions have already been filed related to COVID-19.
  - Norwegian Cruise Lines.
    - The lawsuit seeks to recover damages for Norwegian investors under federal securities law.



# Liability Policies

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## Directors & Officers (D&O) (cont'd)

- Inovio.
  - The claim alleges that the defendants capitalized on widespread COVID-19 fears by falsely claiming that Inovio Pharmaceuticals, Inc. had developed a vaccine for COVID-19.
  - As a result of these statements, Inovio's stock price more than quadrupled.
  - Once it was determined that the statements were false, the stock price plummeted.

## Errors & Omissions ("E&O")

- Generally cover professional liability (not including bodily injury).
- Will likely be most relevant to hospitals and health care facilities.
- Losses must relate to the definition of "professional services" within the policy.

# Some of the FCA Test Case Wordings

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## Disease clause

### **Section 6 – Business interruption – Optional**

#### **Additional cover – provided as standard**

We will pay you for:

...

#### **6. Notifiable disease, vermin, defective sanitary arrangements, murder and suicide**

**Consequential loss** as a result of interruption of or interference with the **business** carried on by you at the premises following:

a) ... iii. any notifiable disease within a radius of twenty five miles of the premises;

The maximum we will pay for any one loss will not exceed **£100,000**.

#### **Conditions**

...

**3. We will only be liable for the loss arising at those premises which are directly affected by the loss, discovery or accident.**

# Some of the FCA Test Case Wordings

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## Policies

\*ADA555-20191101 Forge Commercial Combined (with Eastlake & Beachell)

### Denial of access clause

#### 1) Prevention of access

Loss resulting from interruption of or interference with **your business** because of

a) ...

b) action by a competent public authority following threat or risk of **damage** or injury in the vicinity of the **premises** which will prevent of [sic] hinder use of the **premises** or access to them whether **your property** will be damaged or not is included but excluding

i) the first 6 hours of any interruption or interference; or

ii) any interruption or interference with **your business** because of outbreaks of either foot & mouth disease or avian flu.

# Some of the FCA Test Case Wordings

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## Denial of access clause

### Revenue Protection Insurance

### Business Interruption Section

### Clauses

We will also indemnify You in respect of reduction in Turnover and increase in cost of working as insured under this Section resulting from

#### [(7)][(8)] Government or Local Authority Action

Prevention of access to The Premises due to the actions or advice of a government or local authority due to an emergency which is likely to endanger life or property.

We will not indemnify You in respect of

[(1)][(a)] any incident lasting less than 12 hours

[(2)][(b)] any period other than the actual period when the access to The Premises was prevented

[(3)][(c)] a Notifiable Human Infectious or Contagious Disease as defined in the current relevant legislation occurring at The Premises

The maximum We will pay under this Clause is £25,000, or the Business Interruption Sum Insured or limit shown in the Schedule, whichever is the lower, in respect of the total of all losses occurring during the Period of Insurance.

# Some of the FCA Test Case Wordings

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## Definitions

### **Damage (OGI Commercial Combined)**

Accidental loss or destruction of or damage to property used by You at The Premises for the purpose of The Business

### **Damage (OGI Retailers, Powerplace (Offices & Surgeries))**

Accidental loss, destruction or damage

### **Notifiable Human Infectious or Contagious Disease**

Acute Encephalitis, Acute Poliomyelitis, Anthrax, Chickenpox, Cholera, Diphtheria, Dysentery, Legionellosis, Legionnaires Disease, Leprosy, Leptospirosis, Malaria, Measles, Meningococcal Infection, Mumps, Ophthalmia Neonatorum, Paratyphoid Fever, Plague, Rabies, Rubella, Scarlet Fever, Smallpox, Tetanus, Tuberculosis, Typhoid Fever, Viral Hepatitis, Whooping Cough or Yellow Fever

# Some of the FCA Test Case Wordings

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## Disease clause

The **COMPANY** will also indemnify the **INSURED** as provided in The Insurance of this Section for such interruption as a result of

...

### 4. Defective Sanitation **NOTIFIABLE HUMAN DISEASE** Murder or **Suicide**

(a) ...

(d) any occurrence of a **NOTIFIABLE HUMAN DISEASE** within a radius of 25 miles of the **PREMISES**

## Definitions

### **DAMAGE**

Accidental loss damage or destruction

### **NOTIFIABLE HUMAN DISEASE**

illness sustained by any person resulting from

(a) ...

(b) any human infectious or human contagious disease an outbreak of which the competent local authority has stipulated shall be notified to them excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition.

# Some of the FCA Test Case Wordings

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## Denial of access clause

(all save Nurseries)

[The insurance [cover] [provided] by this section] [This section] is extended to cover loss resulting from interruption of or interference with [the *business* carried on by *you* at the *premises*] [your usual activities] as a result of the following

...

### Prevention of access [– Non-damage]

Access to or use of the *premises* being prevented or hindered by...

[(a)][(b)] any action of government police or a local authority due to an emergency which could endanger human life or neighbouring property...

### Excluding

[(i)/(ii)] [...] any restriction of use of less than 4 hours

[(ii)/(iii)] any period when access to the *premises* was not prevented or hindered

[(iii)/(iv)] closure or restriction in the use of the *premises* due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease) food poisoning defective drains or other sanitary arrangements

[(iv)/(v)] ...

# Some of the FCA Test Case Wordings

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## Disease clause

We will insure you for your financial losses and other items specified in the schedule, resulting solely and directly from an interruption to your activities caused by:

...

### Public authority

[11.][12.][13.] your inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following:

a...

b. an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority;

## Denial of access clause

We will insure you for your financial losses and other items specified in the schedule, resulting solely and directly from an interruption to your activities caused by:

### Non-damage denial of access

3. an incident occurring during the period of insurance within a one mile radius of the insured premises which results in a denial of access or hindrance in access to the insured premises, imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 consecutive hours;



# Some of the FCA Test Case Wordings

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## Disease clause

We will [also] insure you for your financial losses and any other items specified [under this section] in the schedule, resulting solely and directly from an interruption to your business caused by [the following]:

...

### Public authority

[4.] [5.] [6.] [7.] your inability to use the [office][salon][venue][business premises][insured location][hall] due to restrictions imposed by a public authority [during the period of insurance] following:

a...

b. an occurrence of [a][any] notifiable human disease

# Some of the FCA Test Case Wordings

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## Disease clause

[We will indemnify you for]:

[7.3.9] [8.2.5] [11.1.10] Murder, suicide or disease

[We shall indemnify you in respect of]

interruption of or interference with the business [as insured by this section] [arising from][caused by]:

a) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the premises or within a twenty five (25) mile radius of it;

# Some of the FCA Test Case Wordings

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## **THIS INSURANCE ALSO COVERS**

...

### **2 Disease, Murder, Suicide, Vermin and Pests**

Loss as a result of

- A) closure or restrictions placed on the Premises as a result of a notifiable human disease manifesting itself at the Premises or within a radius of 25 miles of the Premises

# Some of the FCA Test Case Wordings

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## Exclusions

Also refer to the Policy General Exclusions at the back of this Policy

The following additional Exclusions apply to this Section

We will not be liable for any claim in respect of...

## Pollution and Contamination

Damage caused by or arising from pollution or contamination except (unless otherwise excluded) Damage to the Property insured caused by:

a) pollution or contamination which itself results from fire lightning explosion aircraft or other aerial devices or articles dropped therefrom riot civil commotion strikers locked out workers malicious persons theft involving physical force or violence earthquake storm flood escape of water from any tank apparatus or pipe or impact by any road vehicle or animal

b) any of the contingencies in (a) above which itself results from pollution or contamination

# Questions?

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