

Covid-19 Business Interruption Insurance Coverage Alert: Statute Of Limitations Watch

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It's been nearly two years since the COVID-19 pandemic shuttered businesses across the United States and abroad, causing a flurry of business interruption insurance claims along with it. With this critical anniversary approaching, insureds must be mindful of any applicable **two-year statutory or contractual deadlines to file suit**. Many states apply a two-year statute of limitations to some insurance-related claims, and policy provisions often attempt to shorten statutes of limitation that exceed two years.

The bottom line: the time is now for corporate insureds to carefully analyze COVID-19-related insurance claims (or potential claims) and determine a course of action.

To prudently advise its commercial policyholder clients, Carrington Coleman's Insurance Practice Group has been closely tracking COVID-related insurance coverage litigation across the country. The landscape of decisions is varied, though many cases are still working their way through the courts. While policyholders have found some success, the majority of opinions thus far have favored insurers.

From the outset, insurers have argued that COVID-19 does not cause "direct physical loss or damage" to property, so coverage cannot be triggered. Accepting the insurer's argument, the Northern District of Texas recently held that "physical loss" does not include "intangible or incorporeal" losses, and an insured that merely suffers "a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property" has not suffered a "physical loss." *Graileys, Inc. v. Sentinel Insurance Co., Ltd.* (August 2021). Coronavirus, the court concluded, "does not cause physical damage to property, it causes people to get sick." Because the insured had not pleaded that it suffered any physical loss, the court held the insurer properly denied the insured's claim, granting the insurer's motion to dismiss.

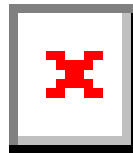
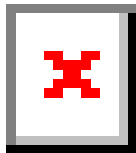
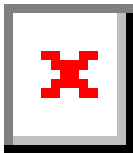
On the other hand, some courts have sided with policyholders. A federal court in Missouri read the "direct physical loss or damage" language in favor of the insured in *Studio 417, Inc. v. Cincinnati Ins. Co.* (August 2020). In response to Cincinnati's motion to dismiss, the policyholders argued that the policy required direct physical loss or damage, and that there could be "physical loss" even if there was no damage, i.e., a physical alteration of property. The court held that "loss" meant "deprivation." Because the plaintiffs alleged that the virus had attached itself to

property—an allegation sure to be hotly contested throughout the case—the court concluded the plaintiffs had adequately pleaded a direct physical loss.

Keep in mind that, as always, coverage will depend on the specific language of each policy and the circumstances of each loss. For example, many policies contain a “virus exclusion” that excludes coverage for losses caused by a “virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease.” A federal court in Texas relied on such an exclusion to dismiss a group of policyholders’ COVID-related claims against their insurer in *Diesel Barbershop, LLC v. State Farm Lloyds* (August 2020).

Other policies instead include the word “virus” within a “pollution exclusion” that bars coverage for losses caused by pollutants or contaminants many times defined to include “smoke, vapor, fumes, acids, alkalis, chemicals, virus, waste, or hazardous substances.” A Nevada state court concluded that this exclusion could be reasonably interpreted to apply only to “instances of traditional environmental and industrial pollution and contamination,” as opposed to a virus like COVID-19. *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.* (November 2020). So, the Nevada court denied the insurer’s motion to dismiss.

With statutes of limitation potentially expiring soon, Carrington Coleman’s Insurance Practice Group is ready to help its commercial policyholder clients navigate potential insurance claims for business interruption losses. Please contact us for an analysis of your claim today.



[Lyndon Bittle](#)

[Marisa O’Sullivan](#)

[Brent Rubin](#)

lbittle@ccsb.com

mosullivan@ccsb.com

brubin@ccsb.com

214.855.3096

214.855.3015

214.855.3123



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