



*The Covid-19 Pandemic is resulting in an explosion of insurance coverage cases for business losses suffered by the myriad businesses that have been forced to close their doors, or drastically reduce operations. This article addresses some recent cases filed in California and Pennsylvania.*

## New COVID-19 Coverage Cases in California and Pennsylvania

by Lee Applebaum

### **PART 1: AN INSURER BRINGS A COVID-19 DECLARATORY JUDGMENT ACTION IN CALIFORNIA**

Covid-19 coverage suits against insurers are expanding daily. [We recently summarized](#) some key litigation issues concerning the “Exclusion of Loss Due to Virus or Bacteria”; the need to establish “direct physical loss of or damage to property at the described premises” for business interruption insurance; and the same type of damage or loss to property, other than the insured’s premises, to get civil authority coverage.

On April 20, 2020, an insurer became the plaintiff when Travelers brought a declaratory judgment action against a Los Angeles law firm, asking a California federal court to “[e]nter a declaratory judgment that the Policies do not provide coverage for the losses claimed....” The case is *Travelers Insurance Company of America v. Geragos & Geragos, P.C.* A copy of the complaint [can be found here](#).

Travelers begins its complaint with a statement aimed at putting its coverage denial in context: “Travelers understands that the COVID-19 Pandemic has affected the public and the vast majority of businesses throughout the country (and world) in unprecedented ways. But these challenging and unfortunate circumstances do not create insurance coverage for losses that fall outside the terms of a policyholder’s insurance contract.”

Travelers alleges the law firm’s broker told Travelers that “G&G closed its business in light of directives issued by government officials in California and New York (the “Governmental Orders”), and was suffering an ongoing loss of business income as a result of closing its law firm’s physical offices.” Travelers also alleges the firm’s CEO told Travelers that (i) “SARS-CoV-2 purportedly causes physical damage because other countries impacted by the COVID-19 Pandemic have fumigated public spaces, and scientists have found that SARS-CoV-2 is detectable in aerosols and on certain surfaces for particular periods of time”; (2) “he was claiming loss of business income due to the Governmental Orders and courts being closed”; and (3) the firm lost rental income in New York.

After reciting relevant policy terms and exclusions, Travelers sets out various bases for its position:

1. “There is no coverage for G&G’s claimed losses of business income under the Business Income provision ... because any suspension of G&G’s operations was not ‘caused by direct physical loss of or damage to property at the described premises.’”
2. “[T]he presence of SARS-CoV-2 on a surface would not cause physical damage to that surface.”
3. “[T]here can be no coverage for G&G’s claimed losses of business income under the Business Income provision because the COVID-19 Pandemic is not a Covered Cause of Loss.”
4. “There is no coverage for G&G’s claimed losses of business income under the Civil Authority provision ... because the Governmental Orders were not ‘due to direct physical loss of or damage to property at locations, other than described premises, that are within 100 miles of the described premises.’”
5. “[T]he Government Orders do not prohibit all access to G&G’s premises.”

6. “There is no coverage for G&G’s claimed losses of business income under the Business Income and Extra Expense From Dependent Property provision ... because any suspension of G&G’s operations was not ‘caused by direct physical loss or damage at the premises of a Dependent Property’ within the meaning of the Policies. Any temporary closure or limitation of operations of courts in which G&G conducts litigation was the result of governmental actions taken to slow the spread of the COVID-19 Pandemic, not the result of direct physical loss or damage at the premises of a Dependent Property.”

7. The “EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA” excludes “loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.’ SARS-CoV-2 is a virus that induces or is capable of inducing physical distress, illness or disease.”

Geragos & Geragos had earlier sued Travelers for coverage in California’s Superior Court (in Los Angeles). A copy of that complaint [can be found here](#).

When juxtaposed with Travelers’ claims, the firm’s allegations set out the battle lines:

1. “The global COVID-19 pandemic has physically impacted both public and private property and physical spaces around the world, as well as the right of the general public to gather and utilize retail business locations. The currently-raging pandemic has been exacerbated by the fact that the deadly virus physically infects and stays on surfaces of objects or materials, ‘fomites,’ for up to twenty-eight days. The scientific community in the United States and indeed, across the world, including the World Health Organization, has recognized that the Coronavirus is a cause of real physical loss and damage.”

2. “Indeed, a number of countries such as: China, Italy, France, and Spain have required the fumigation of public areas prior to allowing them to re-open. A recent scientific study printed in the New England Journal of Medicine explains that the virus is detectable for up to three hours in aerosols, up to four hours on copper, up to 24 hours on cardboard boxes, and up to three days on plastic and stainless steel. Notably, the most potent form of the virus is not airborne but rather present on physical surfaces.” (footnote omitted)

3. The local (Los Angeles) order directing closure of non-essential businesses “specifically referenced that it was being issued based on the dire risks of exposure with the contraction of COVID-19 and evidence of physical damage to property.” Shortly after that, the Governor “issued a state-wide ‘Stay-at-Home Order’ for all residents of California. In this case, the property that is damaged is in the immediate area of the Insured Property.”
4. “Any effort by Travelers to deny the reality that the Coronavirus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger policyholders, such as Plaintiff, and the public.”
5. “[T]he Policy does not include an exclusion for a viral pandemic and actually extends coverage for loss or damage due to physical loss and damage, including by virus....”

The court will have to determine the scope and meaning of direct physical loss or damage to property. It will also have to decide either (i) a factual dispute over the presence of the virus exclusion in the applicable policies, or (ii) why that exclusion might apply to discrete viruses, but not viral pandemics. There may also be an abstention issue in the federal action.

## **PART 2: NEW COVID-19 COVERAGE CASES FILED IN PENNSYLVANIA**

Like other states, Pennsylvania Covid-19 coverage cases are rapidly expanding in the last few weeks.

### **Western Pennsylvania**

In Western Pennsylvania, two cases were filed in the Allegheny County Court of Common Pleas on April 17, 2020, [\*\*HTR Restaurants, Inc. v. Erie Insurance Exchange\*\*](#), a class action, and [\*\*Joseph Tambellini, Inc. v. Erie Insurance Exchange\*\*](#). Counsel of record are the same in both cases, two of whom are from Philadelphia firms, along with one firm each from Pittsburgh and Harrisburg. The same counsel filed a separate class action less than a week later in the U.S. District Court for the Western District of Pennsylvania, [\*\*Windber Hospital v. Travelers Property Casualty Company of America\*\*](#). On Friday, April 24, 2020, a new Western District action was filed by two different Philadelphia firms, [\*\*Chester County Sports Arena v. The Cincinnati Specialty Underwriters Insurance\*\*](#)

**Company**. The two Philadelphia firms in Chester County Sports are also counsel in all the Eastern District cases listed immediately below (with Alabama co-counsel in this Western District case only).

### Eastern Pennsylvania

In Eastern Pennsylvania, five cases were filed in the U.S. District Court for the Eastern District of Pennsylvania, **LH Dining, L.L.C. v. Admiral Indemnity Co.** (April 10, 2020), **Newchops Restaurant Comcast, LLC v. Admiral Indemnity Company** (April 17, 2020), **C. A. Spalding Co. v. Selective Insurance Group** (April 20, 2020), **Jul-Bur Associates, Inc. v. Selective Insurance Company of America** (April 21, 2020), and **Ian McCabe Studio, LLC v. Erie Insurance Exchange** (April 21, 2020). The same two Philadelphia firms are counsel in all of these cases, and a Pittsburgh firm is also counsel in the Ian McCabe matter.

### The Pennsylvania Supreme Court and Covid-19 Business Loss Coverage

These new cases all involve the now familiar issues concerning what constitutes direct physical loss or damages for purposes of business interruption or civil authority coverage. See **our earlier article discussing the basic issues in Covid-19 coverage cases for business losses**. Three of the Philadelphia cases and one Western District case, however, add the argument that Pennsylvania's Supreme Court has already weighed in on whether the Covid-19 virus can constitute direct physical loss or damage, citing **Friends of Danny Devito v. Wolf** (decided April 13, 2020). This reflects the hot debate over the impact of the Court's reference to "substantial damage to property" in determining Governor Wolf's power to compel "the closure of the physical operations of all non-life-sustaining business to reduce the spread of the novel coronavirus disease."

The plaintiff's perspective is that **Devito v. Wolf** has virtually decided the issue for coverage purposes, while the insurer side points out the Court's Opinion is focused on health issues and not business interruption, and that insurance coverage was in no way an issue before the Court, which did not render any decision on insurance coverage. While close legal analysis

would seem to favor the insurer's arguments, the underlying message from plaintiffs' counsel could be that Pennsylvania's Supreme Court may be open to finding coverage due when the time comes to rule on the issue. (There is no language in [Devito v. Wolf](#) addressing the virus exclusion found in many policies.)

### The Legislative Alternatives

Finally, [as discussed in our most recent article](#), all of these legal disputes may be resolved by emergency legislation to create coverage where it does not otherwise exist, in return for a state or federal "backstop" to protect insurers from bankruptcy. There is a recent [Pennsylvania Senate bill \(No. 1114\)](#), however, that does not appear to propose such protections for insurers required to pay when coverage is otherwise not due, while still expanding the definition of direct physical loss, damage or injury to tangible property to include, "The presence of COVID-19 having otherwise been detected in this Commonwealth." It is hard to imagine legislation passing that could financially cripple insurers when they were expressly seeking to avoid the payment risks posed by viral pandemics (for which specific risk their insureds did not pay premiums).

Further, insurers are uncertainty averse. This kind of legislation would cast a future pall over all insurers if legislatures develop a sense of empowerment to rewrite insurance coverage for any public emergencies, contrary to express policy language, to provide an involuntary alternative to a government safety net. If such legislation is imposed on insurers, they will certainly seek significantly large premium increases to anticipate uncertain coverage risks, or argue that they will otherwise eventually go out of business. Thus, the most likely result of any legislation would be some sort of compromise, rather than placing all the burden on insurers.

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