BUSINESS INTERRUPTION AND COVID-19: COMMERCIAL PROPERTY COVERAGE ANALYSIS

APRIL 7, 2020
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DISCLAIMER: This paper and the materials provided are for informational purposes only. The information contained herein is not intended to constitute legal or other professional advice and should not be relied upon in lieu of consultation with your own legal and/or other professional advisor. Coverage will depend on the specific language in the insurance policies and individual loss circumstances. This is a fast-changing/novel situation and additional arguments for and against coverage for COVID-19 losses will develop as this process moves forward. There will be further legislative and other legal activity in the coming weeks and months, and we will continue to provide updates.
EXECUTIVE SUMMARY

Over the past several weeks, policyholders have filed thousands of Business Interruption ("BI") claims under Commercial Property insurance policies for losses associated with coronavirus disease 2019 ("COVID-19"). As the economic effects of COVID-19 continue to develop, it is widely expected that a substantial number of additional BI claims will be noticed to insurers. We have been closely tracking the Commercial Property market’s treatment of these claims, as well as associated legal, regulatory, and legislative activity.

This report will focus on five principle points:

- General explanation of how BI coverage operates in a conventional setting;
- Insurance carrier responses to COVID-19 BI claims filed to date;
- Policyholder and Insurer counsel analysis of BI coverage terms;
- Legislative and Regulatory activity related to possible gaps in BI coverage; and
- Ongoing recommendations for clients and expected future action.

For ease of reference, a quick guide to potential policyholder and carrier positions is attached as Exhibit A.

I. SUMMARY OF BI COVERAGE TERMS

A. The Commercial Property Coverage Trigger

Generally, there are two basic sections in a Commercial Property “Special Form” insurance policy: (1) Section A – Building and Personal Property Coverage; and (2) Section B – Exclusions.

Under Section A, Commercial Property policies afford coverage on: (1) an All Risks of Direct Physical Loss basis for; (2) physical loss or physical damage; to (3) Covered Property. “All Risks” means that all loss or damage is covered, unless the policy contains a specific exclusion in Section B or other limitation that precludes coverage. Covered Property generally means the Building and attendant structures, land, etc. described in the policy’s Declarations, as well as Business Personal Property (e.g., furniture, fixtures). The meaning of “physical loss or physical damage” in the context of COVID-19 will be explored later in this analysis. However, for present purposes, the term can be understood to include such basic losses as roof damage resulting from a hurricane, damage to building façade caused by wind, and any other form of common-sense physical loss.

1 Prepared by Joshua Weisberg, Stevi Sanderowitz, and Lia Krautmanis.
2 There are other Forms, Basic and Broad. We will focus on Special Form.
For ease of illustration, below are relevant sections of the ISO\textsuperscript{3} Commercial Property Form: (1) Section A; and (2) the Causes of Loss – Special Form:

**BUILDING AND PERSONAL PROPERTY COVERAGE FORM**

### A. Coverage

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

#### 1. Covered Property

Covered Property, as used in this Coverage Part, means the type of property described in this section, A.1., and limited in A.2. Property Not Covered, if a Limit Of Insurance is shown in the Declarations for that type of property.

- **a. Building**, meaning the building or structure described in the Declarations, including:

- **b. Your Business Personal Property** consists of the following property located in or on the building or structure described in the Declarations or in the open (or in a vehicle) within 100 feet of the building or structure or within 100 feet of the premises described in the Declarations, whichever distance is greater:

  (1) Furniture and fixtures;

**CAUSES OF LOSS – SPECIAL FORM**

### A. Covered Causes Of Loss

When Special is shown in the Declarations, Covered Causes of Loss means Risks Of Direct Physical Loss unless the loss is:

1. Excluded in Section B., Exclusions; or
2. Limited in Section C., Limitations;

that follow.

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\textsuperscript{3} ISO stands for Insurance Services Office. ISO prepares standard policy wordings that many insurers use. Other insurers may use "manuscript" forms that they draft internally, but those forms typically draw from ISO forms – at least in some part. This paper focuses on ISO forms.
Accordingly, on a basic level, if Covered Property sustains a direct physical loss or damage that is not otherwise excluded, coverage is triggered. Subject to the applicable policy limit and deductibles, the carrier then has an obligation to pay for the replacement cost or actual cash value of the damaged property.

B. The Business Income Coverage Trigger

Beyond payment in response to damage to Covered Property, a Commercial Property policy may also afford coverage for Business Income loss and Extra Expense. BI coverage, under the Special ISO form, is broken down into several relevant parts:

1. Business Income
2. Extra Expense
3. Civil Authority
4. Contingent Business Income

1. Business Income

Business Income covers the insured’s loss of Net Income, which can include rental revenue, as well as payment of continued operating expenses. Business Income coverage is generally triggered by:

(1) interruption or stoppage of the insured’s business activities; which has been caused by
(2) direct physical loss of or damage to property at a covered location; stemming from
(3) a Covered Cause of Loss; and
(4) no exclusions apply.

Coverage is subject to the policy’s Business Income Limit and any applicable Waiting Period. The carrier’s window of payment begins when the insured’s operations are suspended (in whole or in part) and ends when the property should be repaired, rebuilt, or replaced “with reasonable speed.”

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4 All relevant coverages under the BI Form are collectively referred to as BI unless otherwise stated.
5 “Extended” Business Income, where purchased, covers additional losses after the property damage is repaired and enlarges the period covered by the basic BI coverage grant to include the amount of time needed to bring the property back to its pre-loss income level following repair.
2. **Extra Expense**

Means the necessary expenses incurred by the insured that would not have otherwise been realized to avoid or minimize suspension of operations (e.g., overtime costs and other expenses). Like Business Income coverage, the trigger for Extra Expense is: (1) interruption or stoppage of the insured’s business activities; which has been caused by (2) direct physical loss of or damage to property at a covered location; stemming from (3) a Covered Cause of Loss.

3. **Civil Authority**

Provides coverage for loss of Business Income and Extra Expense caused by government action (e.g., county, state, or federal order) that prohibits access to the insured’s property. Coverage is typically limited to governmental actions stemming from “direct physical loss of or damage” to property other than at the insured’s location.

It is important to note that some ISO Business Income editions include an upfront “direct physical loss of or damage” trigger for Civil Authority. However, as will explained below, this may not be the case with all ISO or carrier-specific forms. More specifically, others include the following triggers:

- “damage” to property other than the insured’s property *[noted absence of “physical”]*;
- prohibiting access to the insured’s property;
- where access to the area immediately surrounding the damaged property is prohibited by civil authority;
- the insured’s property is located within certain proximity to the damaged property; and
- the civil authority action is taken in response to “dangerous physical conditions” resulting from:
  - the damage; or
  - the continuation of the Covered Cause of Loss that caused the damage.

We will further explore the distinction between Civil Authority Forms in Section III., C of this paper.

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6 “Ingress/Egress” is a related coverage grant that can be included in the BI Coverage Form. The analysis of Ingress/Egress coverage is effectively the same as Civil Authority – with the exception that depending upon policy wording, the insured may not need to establish that property access is prohibited due to government order.
4. Contingent Business Income

“Contingent” Business Income coverage is an offshoot of baseline BI coverage. Contingent BI extends coverage to loss sustained, subject to the same triggers as conventional BI, except the damage is linked to “dependent properties”7 – as opposed to the insured’s locations.

We again include various sections of the Business Income coverage forms for illustration purposes:

**BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM**

A. Coverage

1. Business Income

   Business Income means the:
   
   a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
   
   b. Continuing normal operating expenses incurred, including payroll.

   We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of the site at which the described premises are located.

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7 Example locations would be a customer’s store or a supplier’s facility.
2. Extra Expense
   a. Extra Expense coverage is provided at the premises described in the Declarations only if the Declarations show that Business Income coverage applies at that premises.
   b. Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.

   We will pay Extra Expense (other than the expense to repair or replace property) to:

   (1) Avoid or minimize the "suspension" of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.

   (2) Minimize the "suspension" of business if you cannot continue "operations".

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Two versions of the Civil Authority coverage grant:

<table>
<thead>
<tr>
<th>ISO CP 00 30 04 02</th>
<th>ISO CP 00 30 10 12</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>5. Additional Coverages</strong></td>
<td><strong>5. Additional Coverages</strong></td>
</tr>
<tr>
<td>a. Civil Authority</td>
<td>a. Civil Authority</td>
</tr>
<tr>
<td>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.</td>
<td>In this Additional Coverage, Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations. 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:</td>
</tr>
<tr>
<td>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.</td>
<td>(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</td>
</tr>
<tr>
<td></td>
<td>(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.</td>
</tr>
</tbody>
</table>

**C. Recap of Property and Business Income Coverages**

As outlined above, the trigger for coverage under Section A is generally the same for BI as well: physical loss or damage that is not otherwise excluded from coverage. It is usually only with respect to Civil Authority that the “loss or damage” trigger may be somewhat distinct, depending upon policy wording.

Here’s how BI coverage could apply from the same loss example offered in Section I.A of this paper. If a hurricane were to damage the insured’s Building, the insured would be entitled to coverage for the repairs. The insured would also be entitled to coverage under the Business Income form for Net Income loss and any Extra Expense incurred if the hurricane forced the insured to suspend or terminate operations at the Building. Civil Authority coverage could
also be triggered if the government ordered the closure of specified locations due to damage or loss covered according to policy terms.

D. Relevant Exclusions for COVID-19 BI Claims

Again, Commercial Property policies written on a Special Form cover “All Risks” unless otherwise excluded. Assuming a COVID-19 claim constituted a Covered Cause of Loss and met all other conditions to coverage, the loss would still not be covered if any exclusions apply. In the context of COVID-19 claims, the ISO Exclusion of Loss Due to Virus or Bacteria, CP 01 40 (07/06) is most relevant:

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

B. We will not pay for 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.

However, this exclusion does not apply to loss or damage caused by or resulting from “fungus”, wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.

As highlighted above, carriers can be expected to maintain that the Virus exclusion applies to property damage to buildings, as well as Business Income, Extra Expense, and Civil Authority, where such loss is caused by or results from a virus such as COVID-19. This exclusion was added to Commercial Property policies beginning in or around 2006, in response to viral epidemics such as MERS, SARS, and H1N1. Note, many policies written on proprietary carrier forms include a variation of the ISO exclusion, but with differences in language or terms.

8 Other exclusions that might apply to COVID-19 losses include exclusions for Pollutants, Hazardous Substances, and possibly others. We will not focus on them for purposes of this analysis as carriers have not frequently cited such exclusions in the position letters we have received thus far.
II. CARRIER RESPONSES TO COVID-19 BI CLAIMS

A. The Loss or Damage Trigger

As stated above, over the past several weeks, SterlingRisk has processed hundreds of claim notifications for COVID-19-related BI losses. We have already received coverage position letters from numerous commercial property carriers. None have accepted any form of coverage for BI loss. Carriers are taking the position that any loss stemming from COVID-19 does not meet the triggers built into the policies, whether Business Income, Extra Expense, Civil Authority or Contingent BI. Meaning, coronavirus does not constitute a physical form of loss, damage, or condition and, as such, the coverage trigger is not satisfied.

B. The Virus Exclusion

Aside from the physical loss/damage/condition triggers, carriers are consistently relying upon the Virus exclusions to deny coverage.

III. POLICYHOLDER COUNSEL ANALYSIS & EXPECTED CARRIER RESPONSE

A. The Loss or Damage Trigger

Policyholder counsel has published numerous white papers over the past several weeks, detailing court decisions from all over the country in support of coverage for COVID-19 claims. We anticipate that carriers and their counsel will forcefully dispute the applicability of these cases by arguing that coronavirus does not constitute physical loss or damage.

   i. Coronavirus as Physical Loss or Damage

      a. Policyholder Position


In the Hardinger case, the federal court concluded that E.coli contamination of a water well potentially constituted “physical loss or damage.” The court said that the “physical loss or damage” trigger could be met where the functionality of the insured’s property “is nearly eliminated or destroyed, or the structure is made useless or uninhabitable” as a result of
bacterial contamination. In Gregory Packing, another federal court similarly concluded that ammonia release into the insured’s factory qualified as “direct physical loss or damage” because the property lost its “essential functionality” as a result. See also, Essex v. BloomSouth Flooring Corp., 562 F.3d 399, 406 (1st Cir. 2009) (finding that, under Massachusetts law, an unpleasant odor rendering property unusable constituted “physical injury” to the property); TRAVCO Ins. Co. v. Ward, 715 F. Supp. 2d 699, 709 (E.D. Va. 2010), aff’d, 504 F. App’x. 251 (4th Cir. 2013) (finding “direct physical loss” where “home was rendered uninhabitable by the toxic gases” released by defective drywall); Newman Myers, et al. v. Great N. Ins. Co., 17 F. Supp. 3d 323 (S.D.N.Y. 2014) (“But the critical policy term at issue, requiring ‘physical loss or damage,’ does not require that the physical loss or damage be tangible, structural or even visible. The invasions of noxious or toxic gases...rendering the premises unusable or uninhabitable, were held to suffice, because even invisible fumes can represent a form of physical damage”).

According to policyholder counsel, these courts held that physical loss or damage does not need to be “structural” or readily appreciable. Rather, so long as the property has been effectively rendered useless or destroyed as a result of a microbial or microscopic cause, the physical loss or damage trigger is satisfied. With COVID-19 related cases, policyholder counsel will similarly argue that coronavirus has effectively rendered property useless through either actual contamination or through governmental closure orders intended to stem from potential contamination.

b. Carrier Expected Response

Carrier counsel has not published on the extensive level as policyholder firms, who by outlining their arguments are (in part) seeking to recruit possible clients. However, review of limited position papers published by carrier law firms, and our discussions with carrier representatives, indicate we can expect carriers to strongly argue that a virus does not constitute physical loss or damage, and to cite existing case law in support of their position. See, e.g., Universal Image Prods., Inc. v. Chubb Corp., 703 F. Supp. 2d 705 (E.D. Mich. 2010) (mold and bacteria permeation does not constitute physical loss or damage); Columbiaknit, Inc. v. Affiliated FM Ins. Co., 1999 WL 619100 (D. Or. 1999) (“the mere adherence of molecules to porous surfaces, without more, does not equate physical loss or damage”); Mastellone v. Lightning Rod Mut. Ins. Co., 175 Ohio App. 3d 23, 40–41 (2008) (affirming lower court’s ruling that dark staining from mold did not constitute “physical loss” where plaintiff’s expert testified that mold was temporary and could be removed from wood surface by bleaching and chemically treating affected areas); Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass’n, 953 F.2d 1387 (9th Cir. 1992) (unpublished) (opining that under Oregon law, asbestos
contamination represented an economic loss and not a physical loss, because the building remained physically unchanged). As in cases like Mastellone, we anticipate carriers will argue that coronavirus does not constitute physical loss or damage because: (1) the virus does not structurally alter any tangible property; and (2) remediation does nothing to alter tangible property. Instead, the virus is treated through use of cleaning products and disinfectants that leave no subsequent trace of application.

c. Conclusion
Carriers will maintain that the coronavirus cannot, under any circumstances, constitute physical loss or damage. This argument is going to carry greater force in those states where courts have explicitly rejected the position that intangible effects to property (in the form of mold and other microbial matter) can constitute physical loss or damage. In other states, where courts have found physical loss or damage in the context of microbial contamination, policyholders stand a better chance at prevailing on this issue.9

ii. Physical Loss or Damage to Covered Property
Even if coronavirus could constitute “physical loss or damage,” there are additional triggers to coverage that apply to a BI claim.10 More specifically, even if coronavirus could constitute physical loss or damage, insureds will have the burden of proving that the virus actually “damaged” their Covered Property (or Contingent locations where applicable). This is a critical point because the cases cited by policyholder counsel above all involved situations where the actual presence of contaminants or microbial matter at a Covered Location was undisputed. Insurers will argue that insureds cannot demonstrate the presence of the virus at any Covered Location or Contingent property.

a. Policyholder Position
Policyholder counsel have already staked out their position on this issue. Assuming the coronavirus can constitute physical loss or damage, policyholders will argue that the virus causes damage through its general and pervasive presence within the United States – and by extension, a scientific assumption should be made that it is present in virtually any building or property. Indeed, policyholder counsel are already implicitly making this argument in

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9 Note, there is New York authority which suggests that policyholders will have a degree of support for their position on this issue. See, Newman Myers, supra. However, several cases applying New York law on this issue were under federal jurisdiction. How a New York state court would construe the physical loss or damage trigger in this context will need to be determined.
10 This applies to Business Income and Extra Expense. We will address Civil Authority separately.
lawsuits that have been filed in various courts. See, e.g., French Laundry Partners, LP v. Hartford Fire Ins. Co., Case No. Pending, Sup. Ct. CA.\(^{11}\) We can also expect individual insureds to rely upon evidence of specific contamination (e.g., proof that someone who tested positive for COVID-19 occupied or frequented a Covered or Contingent Property such that it can be assumed they had shed the virus within the Property’s building space).

b. Carrier Expected Response

The insurers will cite a line of cases that addressed the Covered Property trigger in various contexts. In these cases, the courts found that physical loss or damage did not occur at a Covered Location and, as such, the insured was not entitled to BI coverage. See, e.g., Roundabout Theatre Co. v. Cont’l Cas. Co., 302 A.D.2d 1 (1st Dep’t 2002) (under New York law, damage at a location other than the insured’s Covered Property failed to satisfy BI trigger); Newman Myers, supra; Source Food Tech., Inc. v. U.S. Fidel. & Guar. Co., 465 F.3d 834 (8th Cir. 2006). Several law firms representing insurers have published articles explicitly citing to some of these cases and asserting the position that absent some affirmative proof that the virus is found on Covered Property (e.g., a physical surface or some other building element), the “physical loss or damage” to Covered Property trigger cannot be met.\(^{12}\)

c. Conclusion

Assuming the coronavirus could constitute “physical loss or damage,” there does not appear to be any dispute between insureds and insurers that damage must occur at a Covered or Contingent Property. Insurers will maintain that this link cannot be established through the underlying threat of potential future spread of the virus or its general presence within the United States. Policyholders are certain to rely on proof of positive human tests and a combination of more specific scientific evidence attesting the virus’ movement within the area of the property in question. Ultimately, this is likely to become an issue for scientific and factual investigation in the context of each claim.

B. The Applicable Interruption Period

As outlined above, BI coverage is limited in time to the applicable interruption period. The interruption period in the standard ISO Commercial Property Form begins 72 hours after suspension of the insured’s operations and ends when the property “should be repaired...with

\(^{11}\) We have attached a copy of this lawsuit as Exhibit B.

reasonable speed..." The question is how the interruption period will be measured for COVID-19 losses.

i. **Policyholder Position**

Insureds have already alleged in various BI lawsuits filed to date that the applicable interruption period for coronavirus claims is ongoing. Stated differently, insureds maintain that there is no way the insureds can repair or restore their property to pre-loss condition, because any remedial action taken before the virus is fully abated (on a regional or even super-regional basis) is essentially futile. The virus will continue to infect persons and settle on property until persons cease transmitting the virus through person to person and person to surface contact. We have yet to locate any legal authority cited by policyholders in support of this position.

ii. **Carrier Expected Response**

Carrier counsel have taken the opposite position. They assert that the typical period required to clean a building or property for possible COVID-19, takes a maximum of several days. As such, even if the Covered Property were fully closed, according to insurer counsel, it is unlikely the 72-hour “suspension” period would be met – let alone any other additional waiting period that might apply to a BI claim.

iii. **Conclusion**

Although there is general case law addressing the application of restoration periods, we have not seen any cases cited by insurer counsel that speak to the specific and unique issues raised by COVID-19’s effective saturation of the national living space. As such, it is unknown how courts will interpret the restoration period in this highly unique circumstance.

C. **Civil Authority Coverage**

i. **General Introduction**

The widespread issuance of quarantine and business closure orders by local and state authorities directly implicates the Civil Authority coverage grant. As stated above, Civil Authority coverage can have different triggers depending on the applicable ISO form. For purposes of this report, we will focus on the most recent ISO edition.

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13 Extended Periods of Indemnity can add more time to the period of restoration, allowing for further payment to cover the period during which the insured must ramp up operations to bring the business in line with pre-loss performance. A good example of this would be the time required for a hotel to repopulate its guest bookings after completing repairs.
The triggers for Civil Authority coverage under the modern ISO form are:

- Action of civil authority that prohibits access to the Covered Property;
- Stemming from “damage to property” other than Covered Property as a result of a Covered Cause of Loss;
- Access to the area “immediately surrounding the damaged property” is also prohibited by civil authority as a result of the damage;
- The Covered Property is within that area of the damaged property, but not more than one mile from the damaged property;
- The civil authority action is taken in response to “dangerous physical conditions” resulting from the damage or continuation of the Covered Cause of Loss that caused the damage.

If these triggers are met, the insured is potentially eligible for BI and Extra Expense for a period usually lasting between 30 and 90 days (depending on policy wording).

**ii. Policyholder Position**

The critical distinction between the Civil Authority and BI/Extra Expense coverage grants is the “damage” trigger. A side-by-side comparison demonstrates the difference:

<table>
<thead>
<tr>
<th>Business Income Form</th>
<th>Civil Authority Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>We will pay for the actual loss of Business Income you sustain due to the necessary</td>
<td>a. <strong>Civil Authority</strong></td>
</tr>
<tr>
<td><em>&quot;suspension&quot;</em> of your <em>&quot;operations&quot;</em> during the &quot;period of restoration&quot;*. The &quot;suspension&quot; must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.</td>
<td>In this Additional Coverage, Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations. 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:</td>
</tr>
</tbody>
</table>

The BI grant includes a “direct physical loss of or damage to property” requirement. Civil Authority, on the other hand, sometimes includes a “damage to property” trigger - with the word “physical” **absent from the policy provision**. In an article published on March 24, 2020, a
prominent policyholder law firm argued that the absence of the word “physical” in the Civil Authority coverage grant may expand coverage to include orders emanating from a purportedly “non-physical” form of damage such as COVID-19.14

Further, older versions of the ISO Civil Authority form expressly included “physical” loss in the coverage grant. The deletion of this word from the modern ISO form will be used by policyholder counsel to demonstrate that the modern edition does not require proof of physical damage.

Even if the policy includes a “physical loss or damage” trigger, policyholder counsel will argue that COVID-19 satisfied this condition for all the reasons cited above in Section III. A., 1., a. of this paper. In fact, many of the closure orders and quarantine directives issued by governmental officials have included specific language stating the orders are needed to prevent further spread of the virus and “because the virus is physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time.” See, e.g., Broward County Admin. Order 20-01 (March 22, 2020). Similar orders were specifically cited by policyholder counsel as support for triggering Civil Authority coverage in multiple recently filed lawsuits. See, e.g., French Laundry Partners, LP v. Hartford Fire Ins. Co., Case No. Pending, Sup. Ct. CA.

iii. Carrier Expected Response

Insurers will argue that quarantine and closure orders issued in response to COVID-19 do not meet the conditions to coverage for Civil Authority. First, insurers will argue that even under the modern ISO form’s modified “damage to property” trigger, Civil Authority coverage requires proof of physical damage and the coronavirus cannot meet this requirement. See, Two Caesars Corp. v. Jefferson Ins. Co. of N.Y., 280 A.2d 305 (D.C. 1971) (holding that “civil authority” coverage was not triggered, because there was no physical damage to restaurant, despite absence of an express “physical” damage requirement); Adelman Laundry & Cleaners, Inc. v. Factory Ins. Ass’n, 207 N.W.2d 646 (Wis. 1973) (following Two Caesars).

Second, insurers will argue that the modern ISO form does require physical damage. Insurers can potentially point to Section a.(2) of the Civil Authority grant, which states that the Civil Authority action must be taken in response to “dangerous physical conditions” resulting from the damage. The same provision alternatively requires that the order stem from a “continuation of the Covered Cause of Loss that caused the damage.” Of course, Covered Cause of Loss is defined as “Risks of physical loss.” The repeated use of “physical loss or

damage” in the Civil Authority provision, even if absent from Section a., will be used by insurers to support a physical damage requirement.

Third, carriers will argue that the quarantine and closure orders do not stem from physical loss or damage to property of any kind. Rather, the orders are intended to prevent further spread of the disease caused by the coronavirus. Following this reasoning, the orders, while preventing access to property, were not prompted by property damage.

iv. Conclusion
Changes made to the ISO form, deleting the “physical” damage wording in the Civil Authority coverage grant, could constitute a material change that courts will examine in addressing potential coverage. See, Burlington Ins. Co. v. New York City Transit Auth., 57 N.Y.S.3d 85 (N.Y. 2017) (holding that change in ISO form wording signaled intent to change scope of coverage). We would expect insurers to fully rely upon those cases that have found a physical loss trigger in the Civil Authority grant, absent such express wording. Insurers will also attempt to draw support from the surrounding language in the modern ISO form that require proof of a “physical” condition and Covered Cause of Loss (i.e., “Risk” of physical damage).

D. The Virus Exclusion
As noted above, the current iteration of the ISO Virus exclusion is a byproduct of earlier pandemics such as SARS and H1N1. It is consequently unsurprising that carriers are specifically relying upon the Virus exclusion as a prime defense to coverage for losses associated with the current pandemic, i.e., COVID-19. We have received numerous coverage denial letters from multiple carriers rooted in application of this exclusion. Furthermore, in response to directives issued by the New York Department of Financial Services (“DFS”) and other insurance regulators, carriers issued a series of “Policyholder Notices” in March 2020, warning insureds that the Virus exclusion could bar coverage for any COVID-19 BI claim. Multiple examples of these notices are attached to this report as Exhibit C.

i. Policyholder Position
We have yet to see any detailed argument from policyholder counsel in opposition to application of the Virus exclusion. Most white papers, articles, or webinars hosted by policyholder counsel do not directly address the Virus exclusion. Instead, policyholder counsel have essentially made three general points: (1) exclusions are always narrowly applied; (2) any ambiguity in an exclusion is construed against the insurer; (3) there are different
iterations of the Virus exclusion and the exclusion may not apply depending upon the specific language included in each version.\textsuperscript{15}

\textit{\textbf{ii. Carrier Expected Response}}

Again, insurers will rely upon the terms of the Virus exclusion as a main defense to COVID-19 claims for BI. While it appears that no case has directly addressed application of the ISO Virus exclusion, several cases have upheld other microbial exclusions in different settings. See, e.g., \textit{Sentinel Ins. Co. v. Monarch Med. Spa, Inc.}, 105 F.Supp.3d 464 (E.D.Pa. 2015) (bacterial exclusion to liability policy); \textit{Tate v. One Beacon Ins. Co.}, 328 S.W.3d 262 (E.D.Mo. 2012) (mold exclusion to liability policy).

In fact, various insurance regulators and the National Association of Insurance Commissioners (“NAIC”) have either tacitly or explicitly agreed with this assessment. See, e.g., NAIC Statement on Congressional Action Relating to COVID-19 (March 25, 2020) (“Business interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19 and therefore include exclusions for that risk.”).

\textit{\textbf{iii. Conclusion}}

Policyholder attorneys have published extensively over the past several weeks, detailing the arguments they will make in support of BI coverage for COVID-19 losses. These publications do not address at length the possible application of the Virus exclusion. How policyholders might be able to avoid application of Virus exclusions is simply not known at this juncture.

\textbf{IV. REGULATORY AND LEGISLATIVE ACTION}

Given the strong possibility that the Virus exclusions could apply to COVID-19 losses, as well as the possible absence of a “physical loss or damage” trigger, various states and the federal government have either drafted or are exploring legislation to address the possible lack of BI coverage. We briefly summarize some of those efforts below.

\textsuperscript{15} In certain instances, policies may provide sub-limits of coverage for viral decontamination or BI loss associated with communicable disease, which could run counter to application of a Virus exclusion. Note, where viral decontamination expense is included in Commercial Property policies, it is typically with a sub-limit of between roughly $25,000.00 and $100,000.00. Sometimes this limit is for decontamination expense only and sometimes there is an additional limit for BI for periods of restoration covering the decontamination process. Further, coverage for these expenses or loss is the exception and not the rule.
A. Proposed State Legislation

Much has been reported on New Jersey Assembly Bill A-3844. If passed by the full New Jersey legislature, the bill would effectively force property insurers to cover COVID-19 related BI losses. In brief, the bill only applies to businesses with less than 100 full-time eligible employees in New Jersey as of the law’s effective date. If a business meets the employee criteria, and has a policy affording BI coverage in place on the effective date of the Act, the policy will be construed to cover BI losses associated with the COVID-19 pandemic. The policy will apply to BI loss irrespective of any Virus exclusion in the policy or the “physical loss or damage” triggers. Meaning, the bill would effectively negate application of several policy provisions. In return for payment of claims that would probably have otherwise been excluded, insurers would be entitled to seek reimbursement of all BI payments from a pool of money to be collected from all insurers operating in New Jersey under Section 2 of the Public Law. The bill is being held from a floor vote by its sponsor due to concerns about its constitutionality, and to allow the legislature to continue discussions with insurers.

There is a carbon copy bill pending in Ohio (Ohio House Bill 589), Louisiana (Louisiana SB477 and HB858), Pennsylvania (Pennsylvania House Bill 2372), and one in Massachusetts that increases the employee headcount limit to less than 150 full-time employees. Most recently, on March 27, 2020, the New York State Assembly introduced Bill A-10226. If enacted in its current form, the proposed bill would force insurers of certain businesses to provide BI coverage and pay for COVID-19 losses, regardless of any Virus exclusion in the policy or the “physical loss or damage” triggers. The carrier could then apply to the superintendent for relief and reimbursement by the DFS. The proposed bill would apply to policies in force on March 7, 2020 and issued to policyholders with less than 100 eligible employees in New York. The proposed law defines “eligible employee” as “a full-time employee who works a normal work week of 25 or more hours.”

These bills have not yet become law. While we fully expect other states to take up similar legislation, even if legislation is passed, insurers are certain to challenge these laws as unconstitutional.

Indeed, the NAIC and the National Council of Insurance Legislators (“NCOIL”) have both come out against the passage of any law that retroactively requires insurers to pay BI claims. See, NAIC Statement on Congressional Action Relating to COVID-19 (March 25, 2020) (“However, as Congress considers further legislative proposals to address the devastating impacts of the COVID-19 pandemic, we would caution against and oppose proposals that would require insurers to retroactively pay unfunded COVID-19 business interruption claims that insurance

16 “Eligible employee” means a full-time employee who works a normal work week of 25 or more hours.
policies do not currently cover."); Letter to U.S. Rep. Nydia Velazquez from NCOIL, March 25, 2020 (“We at NCOIL have received a number of communications about this issue, including legislative efforts in states to enact such coverage into existing policies despite express exclusions for communicable diseases in those policies. Such state legislation would violate the Contract Clause within Article I of the United States Constitution, which prohibits the Legislature from impairing the obligation of contracts.").

Further, insurance counsel have generally expressed their opinion in several articles that such state legislation would not withstand constitutional scrutiny.17

B. Proposed Federal Legislation

Given the potential obstacles to securing coverage for BI claims under Commercial Property policies, and the unlikelihood of any state-based solution, there is growing consensus behind finding a complete or partial federal option. Insurers have a vested interest in cooperating with state and federal actors in this effort, as they continue to incur enormous administrative claims costs and will certainly end up paying substantial legal fees to contest coverage litigation related to BI claims.

No formal legislation has been proposed on the federal level. However, members of Congress have outlined, via memoranda and letters to insurer trade groups, several different structures to potentially “unfreeze” coverage for BI claims. These programs would place the federal government in the position of either: (1) directly paying BI claims; or (2) reimbursing insurers, with the carriers administering the process. The basic model for these programs would be like the 9/11 Victims Compensation Fund18 and/or the Terrorism Risk Reinsurance program. Of note, the NCOIL has expressly stated its support for a model like the Victims Compensation Fund. The NCOIL even endorse using the insurance industry to adjust BI claims (which would contrast with government’s adjustment of claims under the Victims Compensation Fund). We are closely monitoring activity in Washington D.C. and will provide updates as warranted.

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18 On March 31, 2020, the Council of Insurance Agents and Brokers (“CIAB”) formally endorsed a funding mechanism like the Victims Compensation Fund. It is expected that this proposed fund will be on the legislative agenda for further action in April 2020.
V. CONCLUSION & RECOMMENDATIONS FOR CONTINUED DISCUSSIONS WITH CLIENTS

Without doubt, coverage for COVID-19 BI claims are going to be a subject of litigation. There will be further legislative and other legal activity in the coming weeks and months. We will continue to provide updates as this completely unprecedented claim landscape evolves. In the meantime, we recommend insureds place all applicable policies on notice of BI claims to protect rights to any potentially available coverage. Insureds must also keep regular track of all relevant financial and other records that might support any claim. We can provide a template record checklist to any client upon request.

If you have a potential claim for losses stemming from coronavirus, please contact your SterlingRisk Account Executive who will connect you with our Claims Team as needed. You can also reach out to members of our Claims Team directly:

- Joshua Weisberg, Director of Risk Management Services, Senior Counsel, at iweisberg@sterlingrisk.com or 212-457-4206, or
- Marni Horowitz, Director of Claims Department, at mhorowitz@sterlingrisk.com or 516-773-8671.
EXHIBIT A
## COVID-19 BI Claims — Summary of Policyholder Positions & Carrier Expected Responses

<table>
<thead>
<tr>
<th>Policyholder Position</th>
<th>Carrier Expected Response</th>
<th>Current Evaluation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Virus Exclusion</strong></td>
<td>Insurers will rely upon the terms of Virus exclusion as a main defense to COVID-19 claims for BI and will cite to cases which have upheld similar exclusions in different settings.</td>
<td>There may be “one-off&quot; circumstances where a policy contains a manuscript Virus exclusion or some form of affirmative coverage for decontamination or communicable disease. In such instances, there may be some argument favoring coverage, although even manuscript versions of the exclusion we have reviewed appear to be equally applicable. In any case, most policies contain either the ISO version of the Virus exclusion or a similarly broad provision that likely applies to the full spectrum of BI claims. Coverage is unlikely to be available in those policies.</td>
</tr>
<tr>
<td><strong>Coronavirus as Physical Loss or Damage</strong></td>
<td>Carriers will argue that coronavirus does not constitute physical loss or damage because: (1) the virus does not structurally alter any tangible property; and (2) remediation does nothing to alter tangible property. Instead, the virus is treated through use of cleaning products and disinfectants that leave no subsequent trace of application.</td>
<td>Carriers will maintain that the coronavirus cannot, under any circumstances, constitute physical loss or damage. This argument will carry greater force in those states where courts have explicitly rejected the position that intangible effects to property (in the form of mold and other microbial matter) can constitute physical loss or damage. In other states, where courts have found physical loss or damage in the context of microbial contamination, policyholders are more likely to prevail.</td>
</tr>
<tr>
<td><strong>Physical Loss or Damage to a Covered Location</strong></td>
<td>Carriers will argue absent some affirmative proof that the virus is found on Covered Property (e.g., a physical surface or some other building element), the damage to Covered Property trigger is not met.</td>
<td>Assuming the coronavirus could constitute “physical loss or damage,” there does not appear to be any dispute between insureds and insurers that damage must take place to a Covered or Contingent Property.</td>
</tr>
</tbody>
</table>

**Policyholder Counsel**

Policyholder counsel have essentially made four general points: (1) exclusions are always narrowly applied; (2) any ambiguity in an exclusion is construed against the insurer; (3) there are different iterations of the Virus exclusion and the exclusion may not apply depending upon the specific language included in each version; and (4) in certain instances, policies may provide sub-limits of coverage for viral decontamination or BI loss associated with communicable disease, which could run counter to application of a Virus exclusion.

**Insurers**

Insurers will rely upon the terms of Virus exclusion as a main defense to COVID-19 claims for BI and will cite to cases which have upheld similar exclusions in different settings.
<table>
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<th><strong>Policyholder Position</strong></th>
<th><strong>Carrier Expected Response</strong></th>
<th><strong>Current Evaluation</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Policyholders will rely on proof of positive human tests and a combination of more specific scientific evidence attesting the virus’ movement within the area of the property in question.</td>
<td>To support this argument, carriers will cite a line of cases that addressed the Covered Property trigger in various contexts and held that physical loss or damage did not occur at a Covered Location and, therefore, the insured was not entitled to BI coverage.</td>
<td>Ultimately, this is likely to become an issue for scientific and factual investigation in the context of each claim.</td>
</tr>
<tr>
<td><strong>Applicable Business Interruption Period</strong></td>
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<td>Policyholder counsel will allege that the applicable interruption period for coronavirus claims is ongoing and that there is no way insureds can repair or restore property to pre-loss condition, because any remedial action taken before the virus is fully abated on a regional level is essentially futile. The virus will continue to infect persons and settle on property until people cease transmitting the virus through person-to-person and person-to-surface contact.</td>
<td>Carriers will assert that the typical period required to clean a building or property for COVID-19 is at most several days, and therefore, even if the Covered Property was completely closed, it is unlikely the 72-hour “suspension” period would be met or any other additional waiting period applicable to a BI claim.</td>
<td>Although there is general case law addressing the application of restoration periods, we have not seen any cases that speak to the specific and unique issues raised by COVID-19’s effective saturation of the national living space. As such, it is unknown how courts will interpret the restoration period in this highly unique circumstance.</td>
</tr>
<tr>
<td><strong>Civil Authority</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Policyholder counsel will argue that the absence of the word “physical” in the Civil Authority coverage grant expands coverage to include orders emanating from a purportedly “non-physical” form of damage such as COVID-19. As additional support for triggering Civil Authority coverage, policyholders will cite to government closure orders and quarantine directives which have included specific language stating that the orders are needed to prevent further spread of the virus and “because the virus is physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time.”</td>
<td>Carriers will argue that under the modified ISO form’s “damage to property” trigger, Civil Authority coverage requires proof of physical damage and coronavirus does meet this requirement. Insurers will also argue that the ISO form does require physical damage. Insurers will point to Section a.(2) of the Civil Authority grant, which states that the Civil Authority action must be taken in response to “dangerous physical conditions” resulting from the damage. Additionally, carriers will argue that the quarantine and closure orders do not stem from any physical loss or damage to property of any kind.</td>
<td>Changes made to the ISO form, deleting the “physical” damage wording in the Civil Authority coverage grant, could constitute a material change that courts will examine in addressing potential coverage.</td>
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EXHIBIT B
French Laundry Partners, LP dba The French Laundry, a limited partnership; 
KRM, Inc. dba Thomas Keller Restaurant Group, a Corporation; Yountville Food Emporium, LLC dba Bouchon Bistro, a limited liability company,

Plaintiffs,

vs.

HARTFORD FIRE INSURANCE COMPANY, a corporation; TRUMBULL INSURANCE COMPANY, a corporation; KAREN RELUCIO, an individual, and; DOES 1 to 25, inclusive,

Defendants.
Plaintiffs French Laundry Partners, LP dba The French Laundry; KRM, Inc., dba Thomas Keller Restaurant Group; Yountville Food Emporium, LLC dba Bouchon Bistro; (collectively “plaintiffs”), bring this Complaint, alleging against Defendants Hartford Fire Insurance Company; Trumbull Insurance Company; Karen Relucio, and DOES 1 through 25 (“Defendants”) as follows:

PARTIES
1. At all relevant times, French Laundry Partners, LP dba French Laundry ("French Laundry"), is a Limited Partnership, authorized to do business and doing business in the State of California, County of Napa. French Laundry owns, operates, manages, and/or controls the restaurant The French Laundry.
2. At all relevant times, Plaintiff KRM Inc. dba Thomas Keller Restaurant Group ("KRM"), is a Corporation, authorized to do business and doing business in the State of California, County of Napa. KRM is the managing entity for the French Laundry and Bouchon Bistro, plaintiffs herein.
3. At all relevant times, Plaintiff Yountville Food Emporium, LLC dba Bouchon Bistro ("Bouchon") is a Limited Liability Company, authorized to do business and doing business in the State of California, County of Napa. Bouchon owns, operates, manages and/or controls the restaurant Bouchon Bistro.
4. At all relevant times, Defendants Hartford Fire Insurance Company, a corporation, and Trumbull Insurance Company, a corporation (collectively “HARTFORD DEFENDANTS”) are corporations doing business in the County of Napa, State of California, subscribing to Policy Number 72UUNHD8373K2 issued to the plaintiffs for the period of July 8, 2019 through July 8, 2020. HARTFORD DEFENDANTS are transacting the business of insurance in the state of California and the basis of this suit arises out of such conduct.
5. At all relevant times, Defendant KAREN RELUCIO (“RELUCIO”) is an individual who is being named in her official capacity as the Napa County Health Officer.

JURISDICTION AND VENUE
6. This Court has subject matter jurisdiction over the matters alleged herein.

///
7. Venue is proper in this Court because the acts and/or omissions complained of took place, in whole or in part, within the venue of this Court.

FACTUAL BACKGROUND

8. On or about July 8, 2019, HARTFORD DEFENDANTS entered into a contract of insurance with the plaintiffs, whereby plaintiffs agreed to make payments to HARTFORD DEFENDANTS in exchange for HARTFORD DEFENDANTS’ promise to indemnify the plaintiffs for losses including, but not limited to, business income losses at several properties (hereinafter “Insured Properties”).

9. The Insured Properties include two different prominent restaurants located in Napa Valley County, The French Laundry and Bouchon Bistro, which are owned, leased by, managed, and/or controlled by the plaintiffs.

10. The French Laundry is a world-renowned, three-Michelin-starred restaurant which serves Chef’s daily nine-course tasting menu and nine-course vegetable tasting menu made with the finest quality ingredients available. The restaurant is open all three hundred and sixty-five days of the year between the hours of 5:00 p.m. to 8:45 p.m. from Monday through Thursday, and from 11:00 a.m. to 4:45 p.m. and 5:00 p.m. to 8:45 p.m. on Friday to Sunday. The French Laundry is located at 6640 Washington Street, Yountville, California 94599. This address is listed as an Insured Property under the Policy.

11. Bouchon Bistro is a one-star rating recipient from the France-based Michelin Guide San Francisco, Bay Area & Wine Country, a three-and-a-half star rating from the Santa Rosa Press Democrat, as well as a three star rating from the San Francisco Chronicle. Bouchon’s seasonal menu and raw bar selections change throughout the year, while staples like roast chicken, leg of lamb, and trout amandine remain as consistent, year-round favorites. The restaurant is open all three hundred and sixty-five days of the year. Bouchon Bistro is located at 6534 Washington Street, Yountville, California 94599. This address is listed as an Insured Property under the Policy.

12. The Insured Properties are covered under a policy issued by the HARTFORD DEFENDANTS with policy number believed to be 72UUNHD8373K2 (hereinafter “policy”).

///
13. The policy is currently in full effect, providing property, business personal property, business income and extra expense, and additional coverages between the period of July 8, 2019 through July 8, 2020.

14. Plaintiffs faithfully paid policy premiums to HARTFORD DEFENDANTS, specifically to provide additional coverages under The Property Choice Business Income and Extra Expense Form in the event of business closures by order of Civil Authority.

15. Under the policy, insurance is extended to apply to the actual loss of business income sustained and the actual, necessary and reasonable extra expenses incurred when access to the scheduled premises is specifically prohibited by order of civil authority as the direct result of a covered cause of loss to property in the immediate area of plaintiffs’ scheduled premises. This additional coverage is identified as coverage under “Civil Authority.”

16. The policy is an all-risk policy, insofar as it provides that covered causes of loss under the policy means direct physical loss or direct physical damage unless the loss is specifically excluded or limited in the policy.

17. The policy’s Property Choice Deluxe Form specifically extends coverage to direct physical loss or damage caused by virus.

18. Based on information and belief, the HARTFORD DEFENDANTS have accepted the policy premiums with no intention of providing any coverage under the Property Choice Deluxe Form or the Civil Authority extension due to a loss and shutdown from a virus pandemic.

19. While some rogue media outlets have called the 2019-2020 Coronavirus an exaggerated mass hysteria that will unlikely create significant physical damage, the scientific community, and those personally affected by the virus, recognize the Coronavirus as a cause of real physical loss and damage.

20. The global Coronavirus pandemic is 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.

21. China, Italy, France, and Spain have implemented the cleaning and fumigating of public areas prior to allowing them to re-open publicly due to the intrusion of microbials.
22. On March 18, 2020, the health officer of Napa County, Defendant Karen Relucio, issued an order directing all individuals living in the county to stay at home except that they may leave to provide or receive certain essential services or engage in certain essential activities (“The Order”). The Order further requires all non-essential businesses located within the County to “cease all activities at facilities located within the County, except Minimum Basic Operations […].”

23. The Order specifically states that it is being issued based on evidence of physical damage to property. The property that is damaged is in the immediate area of the Insured Properties.

24. Except for delivery or takeout, the Order does not specifically exempt restaurants and has caused a shutdown of plaintiffs’ business operations. As a direct and proximate result of this Order, access to the Insured Properties has been specifically prohibited.

25. As a further direct and proximate result of the Order, plaintiffs have been forced to furlough over 300 employees.

26. The virus is physically impacting public and private property, and physical spaces in cities around the world and the United States. Any effort by the HARTFORD DEFENDANTS to deny the reality that the virus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger policyholders and the public.

27. A declaratory judgment determining that the coverage provided under the policy will prevent the plaintiffs from being left without vital coverage acquired to ensure the survival of their businesses due to the shutdown caused by the civil authorities’ response is necessary. As a result of this order, plaintiffs have incurred, and continue to incur, a substantial loss of business income and additional expenses covered under the policy.

FIRST CAUSE OF ACTION
DECLARATORY RELIEF
(Against All Defendants and DOES 1 to 25)

28. Plaintiffs re-allege and incorporate by reference into this cause of action each and every allegation set forth in each and every paragraph of this Complaint.
29. Under California Code of Civil Procedure section 1060 et seq., the court may declare rights, status, and other legal relations whether or not further relief is or could be claimed.

30. An actual controversy has arisen between plaintiffs and the HARTFORD DEFENDANTS as to the rights, duties, responsibilities and obligations of the parties in that Plaintiffs contend and, on information and belief, the HARTFORD DEFENDANTS dispute and deny, that: (1) the Order by Karen Relucio, in her official capacity, constitutes a prohibition of access to plaintiffs’ Insured Premises; (2) the prohibition of access by the Order is specifically prohibited access as defined in the Policy; (3) the Order triggers coverage because the policy does not include an exclusion for a viral pandemic and actually extends coverage for loss or damage due to virus; and (4) the policy provides coverage to plaintiffs for any current and future civil authority closures of restaurants in Napa County due to physical loss or damage from the Coronavirus under the Civil Authority coverage parameters and the policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the insured premises or immediate area of the insured premises. Resolution of the duties, responsibilities and obligation of the parties is necessary as no adequate remedy at law exists and a declaration of the Court is needed to resolve the dispute and controversy.

31. Plaintiffs seek a Declaratory Judgement to determine whether the Order constitutes a prohibition of access to plaintiffs’ Insured Premises by a Civil Authority as defined in the Policy.

32. Plaintiffs further seek a Declaratory Judgement to affirm that the Order triggers coverage because the policy does not include an exclusion for a viral pandemic and actually extends coverage for loss or damage due to virus.

33. Plaintiffs further seek a Declaratory Judgment to affirm that the policy provides coverage to plaintiffs for any current and future civil authority closures of restaurants in Napa County due to physical loss or damage from the Coronavirus and the policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the insured premises.

34. Plaintiffs do not seek any determination of whether the Coronavirus is physically in the insured premises, amount of damages, or any other remedy other than declaratory relief.

///
PRAYER FOR RELIEF

Wherefore, Plaintiffs herein, French Laundry Partners, LP dba French Laundry; KRM Inc., dba Thomas Keller Restaurant Group; Yountville Food Emporium, LLC dba Bouchon Bistro; and each of them, pray as follows:

1) For a declaration that the Order by Karen Relucio, in her official capacity, constitutes a prohibition of access to plaintiffs’ Insured Premises.

2) For a declaration that the prohibition of access by the Order is specifically prohibited access as defined in the Policy.

3) For a declaration that the Order triggers coverage because the policy does not include an exclusion for a viral pandemic and actually extends coverage for loss or damage due to virus.

4) For a declaration that the policy provides coverage to plaintiffs for any current and future civil authority closures of restaurants in Napa County due to physical loss or damage from the Coronavirus under the Civil Authority coverage parameters and the policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the insured premises or immediate area of the insured premises.

5) For such other relief as the Court may deem proper.

DATED: March 25, 2020

DICKENSON, PEATMAN & FOGARTY

By: ________________________________

Paul G. Carey
Valerie R. Perdue
Attorneys for Plaintiffs
NOTICE TO POLICYHOLDERS

Re: BUSINESS INCOME (AND EXTRA EXPENSE) and CIVIL AUTHORITY Coverage Parts of *Commercial Property policy.*

Dear Policyholder:

The New York State Department of Financial Services (DFS) has asked all insurers to describe Business Income and Civil Authority coverage to its policyholders as it relates to the outbreak of Coronavirus known as COVID-19 (while the DFS has inquired about Supply Chain Coverage, do not offer that coverage so it will not be addressed in this letter). The purpose of this letter is to describe these coverages available from in compliance with the request of the DFS.

However, this notice and the information contained herein does not form a part of any insurance policy. No coverage is created or provided by this Notice, nor can it be construed to replace any provisions of any policy. The term “policy” as used in this notice, shall include all endorsements to any policy. If there is any conflict between this Notice and the policy, the provisions of the policy shall prevail. You should always carefully read your policy, including any endorsements attached to your policy.

**Business Income (and Extra Expense)**

In general, Business Income (and Extra Expense) coverage requires direct physical loss or damage to the described property. The loss or damage must be from a covered cause of loss. Business Income (And Extra Expense) coverage typically is not triggered until 72 hours after the time of direct physical loss or damage to your property. Essentially, Business Income and Extra Expense is designed to reimburse you for your loss of income or the extra expenses you have incurred as a result of a covered cause of loss.

However, your Commercial Property Policy contains the endorsement “New York-Exclusion of Loss Due to Virus or Bacteria” CP 01 78 (attached), which excludes coverage for loss or damage caused by or resulting from any virus (such as COVID-19), bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.

**Civil Authority**

Your policy includes coverage for loss of income for up to three consecutive weeks caused by action of civil authority that prohibits access to the described property due to direct physical loss or damage to property other than at the described property. However, as noted above, your Commercial Property Policy contains endorsement CP 01 78 (attached), which excludes coverage for loss or damage caused by or resulting from any virus (such as COVID-19), bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.

As a result of this exclusion, your policy does not cover an act of civil authority for the presence of or suspected presence of a virus such as COVID-19.
Business Income From Dependent Properties

You may have opted for Business Income From Dependent Properties coverage. Business Income From Dependent Properties coverage refers to properties operated by others, whom an insured depends on for delivery of materials or services to you, or that manufacture products for delivery to your customers under a contract of sale (subject to certain exceptions as noted in your policy). However, as noted above, your Commercial Property Policy contains endorsement CP 01 78 (attached), which excludes coverage for loss or damage caused by or resulting from any virus (such as COVID-19), bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.

As a result of this exclusion, your policy does not provide coverage for Business Income From Dependent Properties in connection with or related to the presence or suspected presence of a virus such as COVID-19.

Summary

As your policy contains the “New York-Exclusion of Loss Due to Virus or Bacteria” there is no coverage for loss or damage caused by or resulting from any virus, bacterium or other micro-organism.

Further while this is not intended to be a full analysis of all of policy terms, conditions and exclusions, we also note contamination, proximity to contaminated premises or fear of contamination or infection on the part of the public is not a direct physical loss or damage as is required for coverage under your policy.

Actual claims are factually dependent and if you have a claim, you may submit that to your agent and/or the Company directly for a formal review and analysis of that claim and the coverage you have purchased.

If you have any further questions about your coverage, or any other aspect of your insurance policy, please contact your agent.

We thank you for choosing as your insurance carrier and appreciate your business.

*The member companies of the that write business in New York:
Dear Valued Partner,

In response to New York Section 308, we are required to send the enclosed policyholder communication to our policyholders who have commercial property policies, including BOP, CMP and Special Multi-Peril, with business interruption type coverages. We continue our commitment to keeping our clients and business partners fully informed and therefore, are sending this Notice so that you can be prepared. These Notices have been sent out to policyholders.

Please do not hesitate to get in touch with your usual contacts by telephone or email if you have any concerns or business needs. We stand in support with you to get through this crisis.

Sincerely,
NEW YORK CORONAVIRUS – BUSINESS INTERRUPTION AND RELATED COVERAGES

ADVISORY NOTICE TO POLICYHOLDERS

This Notice is in response to a call for special report, pursuant to Section 308 of the New York Insurance Law, with respect to Business Interruption (often referred to as Business Income and/or Extra Expense) and related coverages and to the novel Coronavirus (COVID-19) pandemic.

understands that you may have questions about coverage that may be available under your policy with in connection with the outbreak of COVID-19. Since insurance policies and circumstances will vary for each policyholder, we encourage you to discuss any questions concerning whether your insurance policy may potentially respond to specific claims arising from COVID-19 with your agent or broker. We want to assure you that we will work with your agents and brokers to address your questions.

has many insurance products that may or may not provide coverage for a range of exposures potentially arising out of a pandemic. Your policy describes the types of events it covers. Events that are not listed on, or not described in, the policy are typically not covered. It is important to review the policy exclusions, coverage limits, and applicable deductibles. You should also determine if the policy requires your business interruption to last for a certain time period before you are entitled to any policy benefits. Additionally, business interruption coverage typically can only be triggered if you have property loss that leads to the business interruption.

This Notice does not form a part of your insurance contract. No coverage is provided by this Notice, nor can it be construed to replace any provisions of your policy (including its endorsements). If there is any conflict between this Notice and the policy (including its endorsements), the provisions of the policy (including its endorsements) shall prevail.

Please know that we will review every claim submitted individually under its set of facts and coverages under your policy to determine whether coverage is available. Again, we want to assure you that we will work with your agents and brokers to address your claims promptly.

Should you have any questions about coverage that may be available under your policy, please contact your agent or broker. If your agent or broker is unavailable the New York Department of Financial Services has posted FAQs at:

https://www.dfs.ny.gov/consumers/coronavirus/business_interruption_insurance_faqs

As always, stands ready in difficult times to help answer your questions.