

Insurance

Direct Evidence Of Loss Or Damage May Be Unnecessary To Obtain Coverage For Losses Due To COVID-19

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Commentary

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In the months since the outbreak of the novel coronavirus 2019 ("COVID-19"), businesses continue to face widespread opposition from insurers in seeking to obtain relief under property policies and other coverages. In addition to arguing that the presence of COVID-19 does not constitute "physical loss" or "damage" to property, many insurers have questioned evidence of the presence of COVID-19 at the premises to establish the loss or damage requirement. For example, some inquire if the insured has conducted any COVID-19 testing at the premises. However, test results are not the only type of evidence that insureds may use to demonstrate the presence of COVID-19. This article discusses how insureds also may rely on circumstantial evidence to show the presence of COVID-19.

I. Physical Presence of COVID-19

COVID-19 is a virus that causes, for most people infected, a mild to moderate respiratory illness.¹ Elderly people and people with underlying medical issues such as cardiovascular disease, diabetes, chronic respiratory disease, and cancer are more likely to develop serious illness.² COVID-19 spreads primarily through droplets of saliva or discharge from the nose when an infected person coughs or sneezes, which may be transmitted to others who breathe in the coughed or exhaled droplets.³

A cough has been estimated to create a cloud of infected droplets reaching 19 feet, and a sneeze can create a cloud reaching 26 feet away.⁴ The droplets can linger in the air for hours and can be pulled into air circulation systems.⁵ Even loud speech has been reported to produce oral fluid droplets that remain suspended in a closed, stagnant air environment for a period of 8 to 14 minutes.⁶ Some droplets can also land on objects and surfaces around the person, and others may contract COVID-19 by touching those objects or surfaces and then touching their eyes, nose, or mouth.⁷ Experts report that COVID-19 can remain on different surfaces for various amounts of time, ranging from hours to days.⁸

II. Direct Physical Loss or Damage under Commercial Property Policies

Commercial property policies commonly state that coverage is provided for direct physical loss of or damage to the insured premises. The interpretation of "direct physical loss" and "direct physical damage" is being disputed in hundreds of currently pending lawsuits. The recent decisions in *Studio 417, Inc., et al. v. The Cincinnati Ins. Co.*, Case No. 20-cv-03127 (W.D. Mo. Aug. 12, 2020) and *Rose's 1 LLC, et al. v. Erie Insurance Exchange*, Civ. Case No. 2020 CA 002424 B (D.C. Super. Ct. Aug. 6, 2020) support that the presence of COVID-19 may constitute direct physical loss of or damage to property. For instance, in analyzing whether municipal orders in connection with COVID-19 resulted in a "direct physical loss" of property, the court in *Rose's 1 LLC* noted that the insureds had not offered any evidence that COVID-19 "actually was present" on the premises at the time they were forced

to close. As discussed below, insureds may increase the likelihood that a court will rule in favor of coverage by relying on circumstantial evidence of the presence of COVID-19 at an insured premises. (This approach is separate from arguing that “physical loss” can reasonably be construed to encompass the loss of use of the physical property for its intended purpose, an issue that is outside the scope of this article.)

III. Direct vs. Circumstantial Evidence

Generally speaking, there are two types of evidence that may be used to prove a fact: direct evidence and circumstantial evidence. Direct evidence provides proof of a fact without requiring the factfinder to make any deductions. For example, direct evidence that a criminal defendant shot someone might include security footage showing the defendant drawing a gun and shooting the victim. Circumstantial evidence provides indirect proof of a fact based on supporting reasonable inferences. For example, circumstantial evidence that the criminal defendant shot the victim might include the testimony of a witness that heard a gunshot come from her boss’s office and immediately thereafter saw the defendant run out her boss’s office. The factfinder can infer from the witness’s testimony that the defendant ran out of the office after he had just shot the victim.

The law treats direct evidence and circumstantial evidence as equally acceptable proofs of a fact – circumstantial evidence is entitled to equal weight as direct evidence. In fact, the Supreme Court has recognized that “[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.” *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (quoting *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508, n.17 (1957)).

IV. Circumstantial Evidence of COVID-19

As noted above, direct evidence of the presence of COVID-19 at an insured premises might include a positive test for COVID-19 on a surface at the premises. However, any proof that would support a reasonable inference that COVID-19 is present at the premises (*i.e.*, circumstantial evidence) also may be relied upon to legally establish such fact.

In a different context, in *Fairfax County v. Espinola*, 11 Va. App. 126, 130 (1990), the Virginia appellate court determined that circumstantial evidence established

that a medical technician had contracted hepatitis from his workplace. The court noted that the technician “had ten years of exposure to blood and blood products, which came into contact with his skin every day at work, and had suffered over 200 percutaneous exposures from needles and shattered blood vials. He had no significant exposure to blood or blood products outside of his employment.” *Id.*

In another case, *Denaro v. 99 Restaurant, Inc.*, 2002 Mass. App. Div. 195, 2002 Mass. App. Div. LEXIS 78, 2002 WL 31546120, at *2 (2002), a patron contracted salmonella poisoning after eating at a restaurant. The court acknowledged that, while there was no direct evidence that the restaurant’s food was tested and found to contain salmonella bacteria, circumstantial evidence might permit a reasonable inference that the food eaten by the plaintiff was contaminated. For example, “[e]xpert opinion as to causation, proof that other patrons had contracted salmonella poisoning at the defendant’s restaurant, or evidence that the food had an abnormal or unwholesome appearance, taste or odor all would have been probative.” *Id.*

Finally, measurements of radiation taken at a certain mountain area after the relevant period were determined to constitute sufficient circumstantial evidence that radiation levels at the mountain area exceeded federal standards during the relevant time period, in *Jasso v. Citizens Telecommunications Co. of California*, No. CIVS05-2649GEB EFBPS, 2009 U.S. Dist. LEXIS 18526, 2009 WL 635249, at *9 (E.D. Cal. Mar. 11, 2009), *report and recommendation adopted*, No. 205CV2649GEBEFBPS, 2009 U.S. Dist. LEXIS 29752, 2009 WL 902092 (E.D. Cal. Mar. 31, 2009), *aff’d sub nom. Ainslie v. Citizens Telecommunications Co. of Cal.*, 385 F. App’x 638 (9th Cir. 2010).

In the COVID-19 context, circumstantial evidence of the presence of COVID-19 at a premises might include witness testimony that certain employees or patrons of the business had tested positive for COVID-19 before or after being present at the premises.

Further, where an insured’s business entails interacting with the public at the premises, especially in areas where cases of COVID-19 continue to arise, the insured might describe its business interactions with the public and point to the statistical data reflecting the cases of COVID-19 that have arisen and continue to arise in the area where the premises is located.

Expert witnesses also might opine, based on factors similar to those described above, that it can be determined with reasonable certainty that COVID-19 was present (or would become present, if operations were to continue) at the premises. Statistical data regarding the number of COVID-19 cases arising in a particular area, including positivity rates (the number of people who test positive out of those who have been tested) also may serve as circumstantial evidence of the presence and risk of presence of COVID-19.

Businesses that are filing an action seeking business interruption coverage in connection with COVID-19 may strengthen allegations in the complaint about the presence of COVID-19 and the loss or damage that can result by expressly describing this circumstantial evidence in the allegations. Such circumstantial evidence should be sufficient on its own, regardless of any direct evidence, to prove the existence of COVID-19 and the loss or damage that has resulted to the insured.

V. Conclusion

As issues continue to develop regarding the extent to which COVID-19 constitutes direct physical loss of or damage to property for purposes of business interruption coverage, insureds may rely on circumstantial evidence to allege the presence of COVID-19 at an insured premises. Such circumstantial evidence, which would support a reasonable inference that COVID-19 is present at the premises, should be given the same legal weight as direct evidence such as a positive test for COVID-19.

Endnotes

1. World Health Organization, *Coronavirus*, (https://www.who.int/health-topics/coronavirus#tab=tab_1) (last visited Aug. 13, 2020).

2. *Id.*
3. *Id.*
4. Ramon Padilla & Javier Zarracina, *Coronavirus might spread much farther than 6 feet in the air. CDC says wear a mask in public.*, USA Today (Apr. 5, 2020) (www.usatoday.com/in-depth/news/2020/04/03/coronavirus-protection-how-masks-might-stop-spread-through-coughs/5086553002/) (last visited Aug. 13, 2020).
5. *Id.*
6. Rhea Mahbubani, *A minute of loud talking can generate more than 1,000 coronavirus-laden droplets*, Business Insider (May 16, 2020) (<https://www.businessinsider.co.za/loud-speech-coronavirus-droplets-study-2020-5?r=US&IR=T>) (last visited Aug. 13, 2020).
7. World Health Organization, *How does COVID-19 spread?*, (<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses#>) (last visited Aug. 13, 2020).
8. Ramon Padilla & Javier Zarracina, *Coronavirus might spread much farther than 6 feet in the air. CDC says wear a mask in public.*, USA Today (Apr. 5, 2020) (www.usatoday.com/in-depth/news/2020/04/03/coronavirus-protection-how-masks-might-stop-spread-through-coughs/5086553002/) (last visited Aug. 13, 2020); Alex W H Chin, *et al.*, *Stability of SARS-CoV-2 in different environmental conditions*, The Lancet (Apr. 2, 2020) ([https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247\(20\)30003-3/fulltext](https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247(20)30003-3/fulltext)) (last visited Aug. 13, 2020); The New England Journal of Medicine, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, (Mar. 17, 2020) (<https://www.nejm.org/doi/full/10.1056/NEJMc2004973>) (last visited Aug. 13, 2020). ■

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