

# THE COVID PROPERTY CLAIM

**\*UPDATE\*** October 2022

By some accounts, over 1,500 COVID-19 claims nationwide have been filed by businesses seeking coverage for business interruption and other related COVID-19 property losses. Most of these claims were filed in 2020 and 2021. Fewer have been filed in 2022. Half of these claims have gone against the policyholders and another 20% have been withdrawn. (See *University of Pa. Law COVID-19 property claim Tracker and Law360 COVID-19 case tracker*).

Most courts have ruled in favor of the insurance carrier's Motion to Dismiss. These motions rely on the argument that there has been **no tangible, or structural alteration to the bricks and sticks involved and no physical property loss or damage**. The judicial consensus has been that **COVID-19 particles have not altered the physical characteristics (color, appearance, shape, or structure of the physical property) and therefore no coverage applies**. Many of these cases draw this conclusion in the preliminary stages before any substantive discovery has been completed or expert witnesses have been called. Courts have restrained themselves from expanding the definition of *physical loss* beyond commonly recognized physical perils. If the typical perils (fires, floods, hail, and wind etc.) were not involved, the policyholder fails in their attempt to gain coverage.

The COVID-19 claims have been primarily focused on Business Interruption (BI) coverage due to lockdowns and related public health restrictions. This BI coverage can only be found within the terms of the property policy. Additional claims have been for "extra expense" provisions, costs associated with restoring property, or complying with other restrictive COVID-19 requirements from state and federal health care agencies. Think PPE requirements for example. To get to these coverages however, most courts have required an insured to prove that their losses came from a direct physical loss to its property due to the common perils mentioned previously, and this is where the cases have been lost.

However, there are a few glimmers of hope in a minority of cases. A few examples include: [The Board of Regents of the University of Washington v. Employers Insurance Company of Wausau](#). In this case, the University, in opposing the carrier's Motion to Dismiss, is making many of the arguments noted above for COVID-19 property losses. Namely, and somewhat novel, that **COVID-19 has caused a "loss of functionality" of its property, and that COVID-19 being present in the air has altered the use of their property for its intended purposes**. This theory was given some traction by the Washington Supreme Court in an unrelated COVID-19 property claim. They also argued that the COVID-19 particles have altered the physical condition of their physical property. Currently, the Motion to Dismiss is pending.

In a recent trial in Harris County Texas, [Baylor College of Medicine v. XL Insurance America Inc. et al](#), a judge allowed expert testimony, albeit unique, that **COVID-19 particles changed the makeup of the University's physical structures and equipment**. On that testimony, the case went to a jury which found in favor of the University to the tune of \$43 million dollars. The carriers argued strenuously against the alleged expert testimony coming from a Baylor university professor. That decision is likely to be appealed by the carrier.

In another recent case, a Hawaiian State Court in Hawaii Theatre Center v. The American Insurance Co. allowed a COVID-19 business interruption suit against the American Insurance Co. to proceed, over a motion to dismiss. The Court found that the theater adequately pled that the virus damaged its physical property. The court concluded that this was a question of fact and should be decided at trial.

Some policyholders have also argued that the “contamination” provisions of their property policy should apply to cover their losses. The language of most contamination provisions generally has restrictive conditions. Examples include a requirement that the civil authorities, namely public health officials, closed their business, prohibited access, or suspended their operations due to a contamination. In many cases, the court found that the civil authority actions did not stop all operations, they simply limited them, albeit severely. In many other cases, the companies themselves imposed restrictions on their own operations beyond the orders of the public health authorities.

Many civil authority orders were directed at mitigating the spread of COVID-19 at large, in the environment. Hence, the Iowa Supreme Court recently ruled that the civil authority orders had to be unique to a condition at the insured’s place of business. For these types of reasons, courts have typically rejected the insureds requests for coverage under the contamination sections of policies. Many policies also excluded “virus” within their contamination definition. Most all new policies now clearly exclude organic virus and or COVID-19 from the contamination coverage.

By this point, most COVID-19 property claims are likely already filed or out of time to be filed. Those few cases that have found some traction with the courts have been on policies that predated 2020, or on policies whose language may have been broad or ambiguous enough to allow for a COVID-19 claim. Any new claims that may be filed and for most claims still pending, the insured will have to overcome the arguments above against the requirement of a direct physical loss to their buildings and equipment due to known perils. In addition, having credible expert testimony on how their physical property has been damaged by COVID-19 particles will be a required threshold requirement.

*David Thurber, JD, Senior Vice President*  
*CAC Senior Living Practice*  
[David.Thurber@CACSpecialty.com](mailto:David.Thurber@CACSpecialty.com)

*Mark Holt, Dir. of Risk, Senior Vice President*  
*CAC Senior Living Practice*  
[Mark.Holt@CACSpecialty.com](mailto:Mark.Holt@CACSpecialty.com)

**Expanding what’s possible for solving risk challenges - from the simple to the previously unsolvable.**

***We’re here to help. Let’s connect.***

Atlanta | Boston | Chattanooga | Chicago | Dallas | Denver | Eugene  
Houston | Knoxville | New York | Phoenix | San Francisco | Seattle