



OWLS Membership Committee Lunchtime CLE Series

# **Insurance in the Time of Coronavirus**

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## Preview

### **I. Insurance Terminology**

- ❖ Coverage Grants, Exclusions, Interpretation, Conditions

### **II. Policies and Coverages Immediately Implicated by Coronavirus**

- ❖ Property, Pollution, Event Cancellation
- ❖ Coverages and Exclusions

### **III. Policies and Coverages That Eventually Will Be Implicated by Coronavirus**

- ❖ General Liability, Employer Liability, D&O, Employment Practices Liability
- ❖ Coverages and Exclusions

### **IV. Bankruptcy/Insolvency**

### **V. Wrap-Up / Q&A**

# Insurance Terminology and Principles



## Insurance Terminology and Principles – Coverage Grants –

- Coverage grants (insuring agreements) describe what must happen for the policy to potentially apply.
- Some federal cases state that coverage grants should be interpreted broadly to encompass as much loss as possible. *Forge Underwriting, Ltd. v. Greenspan*, 2019 WL 7633156, at \*20 (D. Or. Dec. 3, 2019); *Morrow Crane Co. v. Affiliated FM Ins. Co.*, 686 F. Supp. 265, 267 (D. Or. 1987).
- It is the insured's burden to prove a loss falls within the coverage grant. *See ZRZ Realty Co. v. Beneficial Fire & Cas. Ins. Co.*, 349 Or. 117, 127, 241 P.3d 710 (2010).

# Insurance Terminology and Principles

## – Exclusions –

- Exclusions remove certain types of losses or causes of loss from coverage.
- “It is the insurer’s burden to draft exclusions and limitations that are clear.” *N. Pac. Ins. Co. v. Hamilton*, 332 Or. 20, 29, 22 P.3d 739 (2001).
- The insurer has the burden to prove application of an exclusion. *See ZRZ Realty Co.*, 349 Or. at 127.
- Some federal cases state that, coverage exclusions should be construed narrowly. *Morrow Crane Co.*, 686 F. Supp. at 267.

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## Insurance Terminology and Principles – Interpretation –

- Oregon's rules of interpretation are set forth in *Hoffman Construction Co. v. Fred S. James & Co.*, 313 Or. 464, 836 P.2d 703 (1992).
  - In interpreting the meaning of a policy, the goal is to ascertain the intention of the parties.
  - If a term is potentially ambiguous (capable of more than one plausible interpretation), look to the context of the policy.
  - If context does not resolve ambiguity, adopt the insured's interpretation even if the insurer's interpretation is more reasonable.
- Unlike most jurisdictions, Oregon does not use extrinsic evidence to interpret ambiguous policy provisions.

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## Insurance Terminology and Principles – Interpretation –

- If terms are defined in a policy, those definitions control. *Hunters Ridge Condo. Ass'n v. Sherwood Crossing, LLC*, 285 Or. App. 416, 422, 395 P.3d 892 (2017).
- Where they are not, the court considers their plain meaning. *Congdon v. Berg*, 256 Or. App. 73, 87, 299 P.3d 588 (2013).
- When analyzing plain meaning, Oregon courts often rely on Webster's Third New International Dictionary. See *Kohring v. Ballard*, 355 Or. 297, 304 n.2, 325 P.3d 717 (2014).
  - But use whatever dictionary is best for your position.

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## Insurance Terminology and Principles – Conditions –

- Conditions can be considered merely procedural, such as when to expect payment.
- However, some conditions act like exclusions to coverage, such as refusing to cover loss that is not timely reported under the policy.
- The insured's failure to comply with policy conditions is often subject to the prejudice rule.

# Policies and Coverages Immediately Implicated by the Coronavirus

## Property Policies

- Business Interruption Coverage
- Civil Authority Coverage
- Dependent Property
- Civil Commotion?

## Pollution Liability Policies

## Event Cancellation Policies

## Accidental Contamination/ Recall Policies



## Property Policies

- Property policies are “first party” policies because they protect against damage to your own property.
- Many property policies are “all risk” policies, meaning that they cover physical loss from any cause unless it is specifically excluded or limited.
- Other property policies are “named perils” policies, where the policy only covers certain causes of loss (e.g., fire or windstorm).

## Property Policies

- “All risk” policies typically cover all “physical loss or damage” unless subject to an excluded cause of loss.

### A. COVERAGE

We will pay for direct physical loss of or physical damage to Covered Property at the premises described in the Declarations (also called "scheduled premises" in this policy) caused by or resulting from a Covered Cause of Loss.

### 3. Covered Causes of Loss

RISKS OF DIRECT PHYSICAL LOSS unless the loss is:

- Excluded in Section B., EXCLUSIONS; or
- Limited in Paragraph A.4. Limitations; that follow.

- All-risk policies have a “broad grant of coverage.” *See 12W RPO, LLC v. Affiliated FM Ins. Co.*, 353 F. Supp. 3d 1039, 1046 (D. Or. 2018) (insurer so conceding).

## Potential Exclusions

### Reversing the order of analysis

#### ➤ ISO Virus or Bacteria Exclusion

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.

#### ➤ Bioaerosol Exclusion

We will not pay for loss, damage or expense caused directly or indirectly by or resulting from... any microorganisms, biological organisms, bioaerosols or organic contaminants, including but not limited to bacteria, mold, mildew, “fungus”, spores, yeast or other toxins, mycotoxins, allergens, infectious agents, wet or dry rot or rust.

#### ➤ Virus Exclusion w/ Exception for “Civil Commotion”

#### ➤ Microorganism Exclusions

#### ➤ Contamination Exclusions

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## **The Most Important Thing to Do to Get Coverage**

**GIVE NOTICE UNDER  
ALL POTENTIALLY  
IMPLICATED POLICIES**

## Does the Coronavirus Cause “Physical Loss or Damage”?

- Under Oregon law, “physical loss or damage” may include loss of essential functionality and may not require proof that property has been destroyed or structurally altered.
  - *Oregon Shakespeare Festival Assoc. v. Great Am. Ins. Co.*, 2016 WL 3267247 (D. Or. June 7, 2016), *order vacated by stipulation*, 2017 WL 1034203 (Mar. 6, 2017) (wildfire smoke is physical loss because it made theater uninhabitable and unusable for holding performances, i.e. loss of “essential functionality”).
  - *Farmers Ins. Co. of Oregon v. Trutanich*, 123 Or. App. 6, 858 P.2d 1332 (1993) (pervasive odor from meth cooking is physical loss).
  - *Prudential Prop. & Cas. Ins. Co.*, 2002 WL 31495830 (mold damage is physical loss).

## Does the Coronavirus Cause “Physical Loss or Damage”?

- Insurers will likely argue that a simple cleaning will restore the property. *Cf. Mama Jo’s, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974 (S.D. Fla. June 11, 2018) (dust from neighboring construction site not physical loss because, in part, additional cleaning while restaurant continued operations not loss of use).
- Unlike dust, *no accumulation* of coronavirus is acceptable.
- Insured premises continuously re-exposed.

# Potential Property Policy Coverages – Standard Business Interruption –

## o. Business Income

- (1) 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 physical damage to property at the "scheduled premises", including personal property in the open (or in a vehicle) within 1,000 feet of the "scheduled premises", caused by or resulting from a Covered Cause of Loss.
- (2) With respect to the requirements set forth in the preceding paragraph, if you occupy only part of the site at which the "scheduled premises" are located, your "scheduled premises" also means:
  - (a) The portion of the building which you rent, lease or occupy; and
  - (b) Any area within the building or on the site at which the "scheduled premises" are located, but only if that area services, or is used to gain access to, the "scheduled premises".
- (3) We will only pay for loss of Business Income that occurs within 12 consecutive months after the date of direct physical loss or physical damage.

This Additional Coverage is not subject to the Limits of Insurance.

- Standard business interruption requires physical loss of/damage to the premises.
- Business interruption coverage requires proof of causation between physical loss and lost profits/extra expenses.
- Business interruption coverage is limited to the "period of restoration."

## 12. "Period of Restoration" means the period of time that:

- a. Begins with the date of direct physical loss or physical damage caused by or resulting from a Covered Cause of Loss at the "scheduled premises", and
- b. Ends on the date when:
  - (1) The property at the "scheduled premises" should be repaired, rebuilt or replaced with reasonable speed and similar quality;
  - (2) The date when your business is resumed at a new, permanent location.

# Potential Property Policy Coverages – Civil Authority–

## q. Civil Authority

- (1) This insurance is extended to apply to the actual loss of Business Income you sustain when access to your "scheduled premises" is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your "scheduled premises".
- (2) The coverage for Business Income will begin 72 hours after the order of a civil authority and coverage will end at the earlier of:
  - (a) When access is permitted to your "scheduled premises"; or
  - (b) 30 consecutive days after the order of the civil authority.

- Physical loss or damage within certain radius of insured premises (often 1 mile).
- Government shutdown order because of such loss or damage.
- Time limitation on coverage (often three to four weeks).

## Potential Property Policy Coverages – Civil Authority–

### What about orders that only partially shutdown a business?

- Rely on plain meaning of “prohibit.”
  - 1: To forbid by authority or command 2a: to prevent from doing or accomplishing something: **effectively stop** b: to make impossible: debar, **hinder**, preclude.
- Case law from other jurisdictions may be unfavorable. *See Keetch v. Mut. of Enumclaw Ins. Co.*, 831 P.2d 784, 787 (Wash. App. 1992) (“By requiring the insured to mitigate the loss and resume operations as soon as practicable, the endorsement implies that a business interruption loss has forced the insured to cease business operations.”).

## Potential Property Policy Coverages – Dependent Business Interruption –

- Dependent business interruption covers losses caused by physical loss or damage to property of others, such as suppliers or customers.
- Coverage may be limited.

### s. Business Income from Dependent Properties

- (1) We will pay for the actual loss of Business Income you sustain due to direct physical loss or physical damage at the premises of a dependent property caused by or resulting from a Covered Cause of Loss.

The most we will pay under this Additional Coverage is \$5,000 in any one occurrence unless a higher Limit of Insurance is indicated in the Declarations.

- (4) Dependent Property means property owned, leased or operated by others whom you depend on to:

- (a) Deliver materials or services to you or to others for your account. But services do not include:
- (i) Water, communication, power services or any other utility services; or
  - (ii) Any type of web site, or Internet service.
- (b) Accept your products or services;
- (c) Manufacture your products for delivery to your customers under contract for sale; or
- (d) Attract customers to your business premises.

The dependent property must be located in the coverage territory of this policy.

# Potential Property Policy Coverages – Civil Commotion? –

Some Virus Exclusions Make Exceptions for Specified Causes of Loss, which includes “Riot or Civil Commotion.”

i. “Fungi”, Wet Rot, Dry Rot, Bacteria And Virus

We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:

(1) Presence, growth, proliferation, spread or any activity of “fungi”, wet rot, dry rot, bacteria or virus.

(2) But if “fungi”, wet rot, dry rot, bacteria or virus results in a “specified cause of loss” to Covered Property, we will pay for the loss or damage caused by that “specified cause of loss”.

This exclusion does not apply:

(1) When “fungi”, wet or dry rot, bacteria or virus results from fire or lightning; or

(2) To the extent that coverage is provided in the Additional Coverage – Limited Coverage for “Fungi”, Wet Rot, Dry Rot, Bacteria and Virus with respect to loss or damage by a cause of loss other than fire or lightning.

This exclusion applies whether or not the loss event results in widespread damage or affects a substantial area.

19. “Specified Cause of Loss” means the following:

Fire; lightning; explosion, windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

## Potential Property Policy Coverages – Civil Commotion?–

- “Commotion” means “1: a condition of civil unrest, *public disorder*, agitation, or insurrection.”
- Governor Brown’s Stay Home, Stay Safe Order

In a short time, COVID-19 has spread rapidly. Additionally, some Oregonians are not adhering to social distancing guidance provided by the Oregon Health Authority, as represented by crowds this last weekend at the Oregon Coast, Smith Rock State Park, the Columbia River Gorge, and other places around the state. To slow the spread of COVID- 19 in Oregon, to protect the health and lives of Oregonians, particularly those at highest risk, and to help avoid overwhelming local and regional healthcare capacity, 1 find that immediate implementation of additional measures is necessary. The purpose of this Executive Order is to reduce person-to-person interaction with the goal of slowing transmission.

- Coverage???

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## Other Policies Immediately Implicated by the Coronavirus

- **Pollution Liability Policies**
  - Significant variation among policy language.
  - Triggered by “contamination,” which sometimes includes viruses.
  - Must contamination occur at insured premises?
- **Accidental Contamination/Recall Policies**
  - Significant variation among policy language.
  - Error in manufacturing process wherein use or consumption of insured product would cause bodily injury or property damage.
  - “Adverse Publicity” coverage.
- **Event Cancellation Policies**
  - Significant variation among policy language.

# When the Avalanche Comes: Policies That Eventually Will Be Implicated Lawsuits



# Eventually Many Types of Third-Party Liability Policies Will Be Implicated

## Policies to Examine Once a Company is Sued for the Coronavirus

- General Liability Policies
  - Cover bodily injury or property damages that occurred during policy period.
- Employment Practices Liability
  - Cover Employment Wrongful Acts; “Loss” does not include benefits, and usually not bodily injury.
- Employers Liability Policies
  - Cover Work-Related Injuries Not Covered by Workers Compensation.
  - Application of WC and WC bar for the coronavirus will vary from state to state (OR WC may cover; WA WC may not).
- Director & Officers Liability
  - Entity coverage often broader for non-public companies.

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## **The Most Important Thing to Do to Get an Insured Defense**

**GIVE NOTICE UNDER  
ALL POTENTIALLY  
IMPLICATED POLICIES**

## The Duty to Defend

- The eight-corners rule. *Bresee Homes, Inc. v. Farmers Ins. Exchange*, 353 Or. 112, 116, 293 P.3d 1036 (2012).
- “The insurer has a duty to defend if the complaint provides any basis for which the insurer provides coverage. Even if the complaint alleges some conduct outside the coverage of the policy, the insurer may still have a duty to defend if certain allegations of the complaint, without amendment, could impose liability for conduct covered by the policy. Any ambiguity in the complaint with respect to whether the allegations could be covered is resolved in favor of the insured.” *Ledford v. Gutoski*, 319 Or. 397, 399-400, 877 P.2d 80 (1994)
- Duty to defend applies to the operative complaint; discover insurance policies and amend accordingly

## The Duty to Settle

- The duty to defend carries with it the corresponding duty to settle a case “within policy limits if it would be reasonable to do so.” *Goddard ex rel. Estate of Goddard v. Farmers Ins. Co. of Oregon*, 173 Or. App. 633, 637, 22 P.3d 1224, (2001).
  - Insurers will argue that the duty to settle cannot override the limitations on the duty to indemnify. However, “an insurer may be liable [for breach of the duty to settle] even when it has no duty to pay under the policy.” *See Safeco Ins. Co. of Am. v. Barnes*, 133 Or. App. 390, 395, 891 P.2d 682 (1995).
- The Oregon Supreme Court has articulated the duty as one of “due care,” “impartiality,” and “giving equal consideration” to the insured’s interests. *Maine Bonding & Cas. Co. v. Centennial Ins. Co.*, 298 Or. 514, 518, 693 P.2d 1296 (1985).

## Potentially Applicable Exclusions

- Contamination/Pollution Exclusion
  - Is contamination the only basis for the claim?
  - Limited to industrial pollution?
  
- Communicable Diseases Exclusion
  - Pay close attention to the wording.
  
- Intentional Acts Exclusion?

## Bankruptcy

- Bankruptcy does not negate the obligation of the insurer to make good on its insurance promises. *See* ORS 742.031 (generally, policies must provide, “Bankruptcy or insolvency of the insured shall not relieve the insurer of any of its obligations hereunder....”).
  - Except in limited circumstances, Chapter 742 does not apply to surplus lines insurance. ORS 742.001.
- Policy proceeds often are assets of the bankruptcy estate.
- Are insurance proceeds due to third party beneficiaries, such as directors and officers, assets of the estate?

## Insurer Insolvency

- The insurance industry estimates business interruption losses just for small businesses to be between \$220-\$383 billion, or 1/4 to 1/2 of total industry surplus.
- Policies issued by admitted insurers are backed by the Oregon Insurance Guarantee Association up to \$300,000 for those claims existing at insolvency or within 30 days thereafter. ORS 734.570(1) (explaining limits of obligation).
  - Surplus lines insurance is not backed by the OIGA.
- If you cannot assert a claim against OIGA due to size of claim, assert directly against insolvent insurer's estate.
- Payment percentage has historically varied widely.

# Wrap-Up / Q&A