

## Updates

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### Higher Education COVID-19 Losses: Property and Business Interruption Insurance Policies Should Provide Relief

Due to the COVID-19 pandemic, institutions of higher education are facing significant revenue challenges and incurring extra expenses for which their insurance programs should provide relief. Potentially covered sources of loss and damage include (1) efforts to make buildings safe for students, faculty, staff, and administrators, (2) tuition adjustments, loss of athletic and extra-curricular events revenue and related sponsorships, and (3) extra expenses and/or lost revenue related to student housing issues.

Property and business interruption policies may provide broad coverage in response to COVID-19 under the following:

- Communicable disease
- Physical loss or damage
- Protection and preservation of property
- Civil or military authority
- Contingent time element extended
- Attraction property
- Ingress/egress
- Claim preparation costs

Despite the anticipated financial backstop to be provided by these coverages to higher education institutions, the insureds instead have found that insurers have wrongfully failed and refused to pay COVID-19 insurance claims. Below, we explain how insurers have erred in interpreting these coverages as applied to COVID-19 claims by colleges and universities.

#### **Communicable Disease Coverage**

Many of higher education institutions purchased policies with specific communicable disease coverage. In those policies, communicable disease response coverage applies if a communicable disease is present (not suspected) on a location owned, leased, or rented by the institution if access to that location is limited, restricted, or prohibited by an order of authorized governmental authority or a decision of an officer of the institution. If this occurs, the policy covers the reasonable and necessary costs incurred for cleanup, removal, and disposal, and the actual fees payable to public relations services or the cost of using university employees for reputation management. Likewise, the interruption by communicable disease coverage applies under the same circumstances once access is affected for at least 48 hours, triggering the insurer's obligation to pay the institution's lost profits or lost tuition fees. Tuition fees coverage is commonly defined as fees which are prevented from being earned or received, other income derived from routine and special services, or other operating and non-operating revenue, donations, and fundraising proceeds less the cost of goods, supplies, or services sold or purchased which do not continue under the contract. Communicable disease coverage is also likely to be triggered by a government mandate affecting the institution's ability to deliver its expected services to students, faculty, and staff.

#### **COVID-19 Causes "Physical Loss or Damage," Triggering Other Coverages**

Beyond the communicable disease coverage, most business interruption policies sold to institutions of higher education require "physical loss or damage" to trigger the coverage. In a policy with communicable disease coverage, a "communicable disease," by definition constitutes "physical loss or damage" in all coverages despite carriers' arguments to the contrary. For policies without specific communicable disease coverage, policyholders must look to their own state laws for interpretation of this broad, ambiguous policy term, but the plain meaning of "physical loss or damage" should apply to losses from COVID-19.

Once the institution overcomes the threshold physical loss or damage issue (and absent an express communicable disease exclusion in the policy—other exclusions should not apply), a higher education institution should be entitled to coverage for COVID-19-related losses and costs under several additional sections of the policy. Although policy language can vary, coverage is usually provided for the following:

- Protection and preservation of property covers the costs to temporarily protect or preserve insured property due to actual, or to prevent immediately impending, insured physical loss or damage to insured property.
- Civil or military authority provides coverage for extra expenses or lost revenues "if an order of civil or military authority limits, restricts or prohibits partial or total access to an insured location provided such order is the direct result of physical damage of the type insured at the insured location or within [a specified number of] statute miles or kilometers of it."
- Contingent time element extended coverage applies where the institution experiences a loss due to "physical loss or damage" to any location "of a direct customer, supplier, contract manufacturer or contract service provider to the Insured." (i.e., if the students are banned from attending the institution because of physical damage or loss to their property due to presence of COVID-19.)
- An institution of higher education may also be able to show losses from an attraction property within a specified distance of an insured locations. Attraction property covers extra expenses and lost revenues resulting from physical loss or damage to other locations that attract business/students to an insured location.
- Ingress/egress coverage may apply when access to an institution is interrupted due to partial or total physical prevention of ingress to or egress from an insured location.

## **Higher Education Institutions Should Involve Counsel**

To date, insurers have been requiring higher education policyholders to respond to lengthy questionnaires regarding the legal and factual basis of COVID-19 claims. As insurers are so far zealously refusing to cover COVID-19-related losses under property and business interruption policies, it is becoming apparent that higher education institutions will be forced to litigate coverage under these policies. They should be taking steps to properly present and preserve their claims by consulting counsel when responding to questionnaires or starting to consider making claims.

Perkins Coie is committed to providing assistance through no-cost reviews of COVID-19 property/business interruption claims for higher education institutions and, as appropriate, litigating these claims on an alternative fee basis. In addition, we have developed a number of resources for policyholders available on our [website](#).

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