

# Coronavirus and Community Association Insurance *Managing Expectations during the Pandemic*

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## INTRODUCTION

The Coronavirus Pandemic has found most of us with our arms up in the air. These are definitely uncharted waters.



What am I going to do?

My question, as someone who has been spending a great deal of time answering questions on the Coronavirus and insurance coverage is: *did any prior pandemic, epidemic or outbreak of a communicable disease lead to the myriad of insurance issues we are now being asked to respond with clear and immediate responses.* Maybe our standard response should be “maybe” or “it depends” on many variables before an intelligible response can be provided.

This conundrum provides numerous opportunities for creative coverage attorneys representing Insureds to boldly assert and plausibly argue to find coverage where no such coverage was intended to exist. These very creative attorneys who are doing exactly what they are paid to do have not had much success to date. A Federal District Court in Washington, DC. To date, notwithstanding the challenges, including a class action, no court has accepted that the Coronavirus constitutes “Direct Physical Damage” to any property. There have been a couple of cases being remanded or motions to dismiss denied because of unrelated procedural issues.

The anticipated arguments, protracted litigation, attorney fees and costs, as well as the fees and costs of countless multidisciplinary experts will depend on specific policy wording, state laws, court interpretation, judges and creative attorneys. All these factors will ultimately determine **coverage or no coverage.** These coverage issues and related litigation will undoubtedly go on for years. I do not believe that insurers ever intended for coverage to exist under these circumstances.

## COMMUNITY ASSOCIATION INSURANCE FOR CORONAVIRUS

The following chart sets forth the basic community association insurance puzzle. It is anticipated that Insured(s) may seek coverage under the four highlighted policies below, General Liability, Directors and Officers Liability Coverage, Workers Compensation Coverage and Property Coverage.

## Coronavirus and Community Association Insurance Which Policies may apply?

**Purple** = 3<sup>rd</sup>  
Party Liability  
Policy

**Red** = first  
party coverage  
for the  
Insured(s)  
property

**Blue** =  
package pol for  
Unit Owners

**Green** = Assn  
Package pol  
with both  
Property and  
Liability

**Black** =  
Association Self  
Insurance

General Liability Coverage	Directors & Officers Liability Coverage	Employment Practices Liability	Umbrella Liability	Auto Liability Coverage
Workers Compensation Coverage	Property Coverage	Fidelity Coverage	Crime Insurance	Fiduciary Coverage
Earthquake Insurance	Wind Coverage	Flood Insurance	Cyber Liability	Data Breach Response Services
Special Event Coverage	Master Policy Condo - Coop - SF HOA - Townhouse	Homeowners Policy Single Family HOA	Condo Unit Owner HO6 Policy	Coop Shareholder Policy
Business Partner Professional Liability Policy	Additional Insured Status on Contractor GL Policy	Bank Loan	Association's Assets	Special Assessment

Community Association Insurance Puzzle  
Joel W. Moskowitz © 2018

An analysis of each policy for the purpose of finding coverage will involve the basic following steps:

- Does the alleged claim meet the elements of the insuring agreement; if one is satisfied, does one of the definitions work to defeat coverage;
- if there are no definitions to defeat coverage, are there any exclusions that apply and does the exclusion preclude defense and indemnity, or just indemnity still requiring the carrier pay for the defense;
- is there an applicable condition that has not been made, such as the time in which a claim must be reported to the carrier; and,
- is there an endorsement that changes any terms or conditions or removes an exclusion or condition.

### ISSUES

The focus of the issues set forth below involves the “common elements, property and amenities” of a not-for-profit community association such as a Condo, Coop or HOA. In addition, the focus here is on the alleged consequences from the existence of the coronavirus existing in/on a common element. I also confidently contend that actuaries did not consider these exposures in developing rating and other modeling they use to best anticipate acceptable loss ratios, necessary to properly price coverage for the intended exposure.

**Issue No. 1:** Most property insurance policies require that the Insured(s) property suffer *direct physical damage to Insured property resulting from a covered peril*. Does the existence, or possible existence of coronavirus constitute direct physical loss or damage to Insured property?

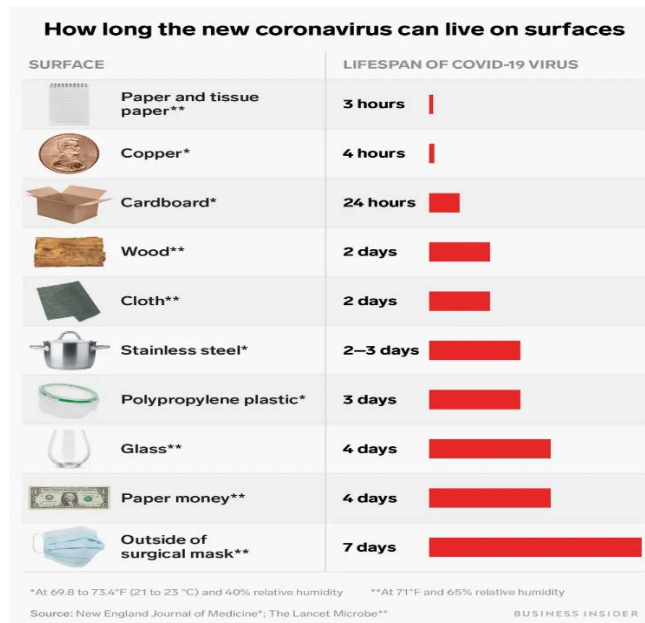
**Response No. 1:** Probably not.

The coronavirus issue in community associations is not really the existence of contaminated property as a result of the virus. One study concluded as follows:

“The researchers behind the new study tested the virus' life span in a 71-degree-Fahrenheit room at 65% relative humidity. After three hours, the virus had disappeared from printing and tissue paper. It took two days for it to leave wood and cloth fabric. After four days, it was no longer detectable on glass or paper money. It lasted the longest, seven days, on stainless steel and plastic.” (Business Insider, April 7, 2020 - <https://www.businessinsider.com/coronavirus-lifespan-on-surfaces-graphic-2020-3>)

The coronavirus issue in community associations arising out of the closing of non-essential common elements to prevent social gathering and the spread of the virus from person to person is virtually non-existent. Associations that do not follow governmental orders or the recommendations of health care providers should be concerned with potential significant liability. Not only significant liability, but liability that is not covered by insurance.

The coronavirus as is discussed each day all day in the news has an extremely short life. By the time that the property can be tested for any contamination by coronavirus, or the governmental orders are lifted, the existence of the coronavirus would be moot. The coronavirus would no longer exist.



The physical nature and life of the coronavirus is different than that of asbestos and mold where there are much stronger arguments that they constitute contamination of actual property damage and will not go away without remedial measures. Coronavirus will self-eliminate.

**Issue No. 2:** Is there coverage for testing and or remediating costs?

**Response No. 2:** Probably Not.

There is no coverage for testing or remediation costs, again if there is no direct physical damage or loss. As a side note, the question arises whether in this situation, with respect to closed common elements, will there be anything to clean other than ordinary day to day cleaning. Insurance responds initially to “unexpected perils.” If an association chooses to open the common element such as the pool, and someone is allegedly exposed to coronavirus, would that be “unexpected.” The discussion to this response is the same as Response No. 1.

**Issue No. 3:** In the unlikely event that the coronavirus is considered “property damage” will there be any other impediment to coverage?

**Response No. 3:** Yes.

- Even if the property damage is established, there are numerous exclusions that would apply. These exclusions further support that insurers had no intent to provide coverage.
- No. Coverage *may exist* where a policy may have a specific endorsement. This is not likely for community associations, however, because of extremely prohibitive costs. This is more likely in an industry such as Restaurants and the Hospitality industry where the significant cost can be included in the cost of doing business. These supplemental coverages in the normal course will not include the direct physical loss of damage requirement. Accordingly, the mental gymnastics of whether there is property damage or not is avoided.

**Issue No. 4:** Is there coverage for consequential damages such as Business Interruption, Loss of Income or Loss of Use?

**Response No. 4:** No.

To trigger these coverages for consequential damages, the damage must again result from Direct Physical damage or loss to the Insured(s) property. Accordingly, the same discussion in Response No. 1 above will apply here.

Keep in mind that Business Interruption insurance is intended to protect businesses against income losses sustained as a result of disruptions to their operations.

In the community association context, the interruption of operations may be argued to be the unit owner members’ inability to pay fees and assessments. This is not the result of coronavirus in the community association, but the result of the impact on their business or employment.

With respect to the association’s inability to pay business partners such as landscapers, pool services or the like, the potential issue would not be a property policy issue. The potential risk will be a claim or suit against the association for breach of contract. As a breach of contract issue, there may be an a justification to fulfilling a contract pursuant to a Force Majeure provision in the contract (unforeseeable circumstances that prevent someone from fulfilling a contract.)

**Issue No. 5** If the Board opens common elements such as pools, clubhouses and Gyms, will any insurance policy defend or indemnify the Board?

**Response No. 5:** No.

**The director and officer liability policy has never intended to pay any defense or indemnity directly or indirectly related to, arising out of the subject matter of its various absolute exclusions such as bodily injury and property damage. These are exceedingly broad exclusions.**

**Issue No. 6:** If a unit owner or guest got sick with covid-19 alleging the association negligently maintained the common elements that could not be closed (i.e. Elevators, entry doors or stairways)?

**Response No. 6:** Probably No.

Preliminarily, coverage in a general liability policy has an “occurrence” requirement. In most cases, an “occurrence” is defined as: an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Even if the “occurrence” requirement was satisfied, most General Liability policies have an Expected or Intended Exclusion. The challenge here for the Insured(s) is to establish that the risk of opening a common element was not “expected.” This is the key issue that the associations are considering and concerned with in their determinations. On the other hand, an Insurer will have the burden to show that the exclusion applies. My bet would go with the insurer here. Finally, most general liability policies that respond to bodily injury or property damage in the normal course have infectious and/or communicable disease exclusions.

**Issue No. 7:** Is the Corvid-19 disease covered under a workers compensation policy?

**Response No.7:** No. However ...

An employee is required to show that the exposure to coronavirus it is a natural consequence of their work rather than an ordinary disease of life to the public. In the normal course, this is not the case as the statistics demonstrate. However there are probable exceptions for Health Care Workers, First Responders for whom the necessities of the job putting them in close if not direct contact with effected patients to an extent that the greater population are not exposed. I believe there may be similar arguments for CAMS and Community Association Employees who are not able to self-quarantine as the general population.

**TAKE-A-WAYS**

- The Coronavirus Pandemic is a new and caught everyone by surprise. We are all treading new waters – be careful not to let the dog wag the tail.
- The Board’s Duty is to Protect, Preserve and Enhance the Community Association’s Assets
- The Board is the Risk Manager – with the assistance and counsel from CAMs and Business Partners/Experts.
- Not everything is Insured or Insurable.
- Not all Insurance Covers all exposures in the Community Association.
- Most alleged damages as a result of the Coronavirus are probably not covered by Insurance. Plan accordingly.

**CONCLUSION:**

I opine that there is not going to be coverage under any of these policies for any of the issues presented. However, that does not preclude the possibility that attorneys will not challenge the basic policy forms. Insureds will have to do a cost benefit analysis in the event there is a possibility to challenge a policy provision.

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