

Briefing on Business Interruption Insurance and the Coronavirus

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Key Insurance Coverage Questions

- Do my policies cover business losses?
- What legislation and other developments could affect coverage?

Are Business Losses Covered by Insurance?

Potentially applicable coverages:

- Property damage/business interruption
- Civil authority
- Communicable disease/contamination (exclusions and inclusions)
- Event Cancellation coverage
- D&O and other coverages...

Focus: property damage/business interruption

Insurers

How are insurance companies addressing coronavirus coverage?

“It’s not covered”

- Only named perils like fire, windstorm, lightning are covered
- No “physical loss or damage”
- Virus/contamination exclusion



Property and Business Interruption

- Losses
 - Clean-up costs (property damage)
 - Lost revenue from shutdown (business interruption)
 - Interruption due to supply chain disruption (contingent business interruption)
 - Cleanup costs
 - Extra expenses



Property and Business Interruption

Policy language

This Policy covers property... against ALL RISKS OF **PHYSICAL LOSS OR DAMAGE** except as hereinafter excluded....

This Policy insures **TIME ELEMENT** loss ... directly resulting from **physical loss or damage** of the type insured.

What does this mean?

Property and Business Interruption

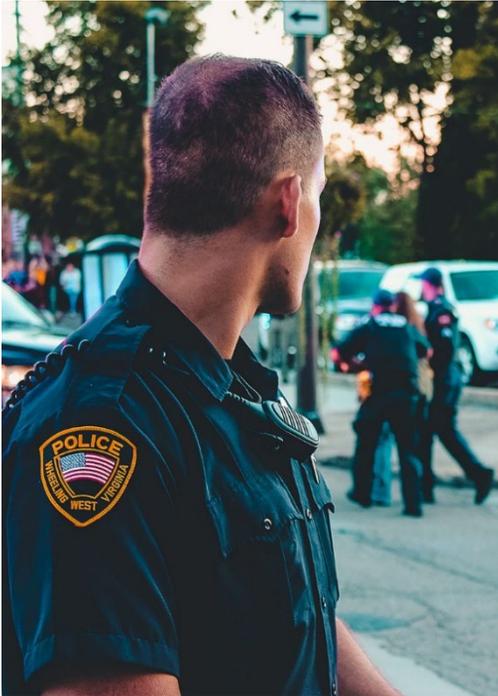
Is there “physical loss or damage”?

- Is the virus physically present? How long can it survive? Is cleaning required?
- Is structural damage required for “physical loss”?
- Is presence of substance that renders property **uninhabitable** or **unusable** enough for “physical loss”?
- Ambiguous policy language

Executive orders:

Legal analysis will depend on where your premises are located and what law applies.

“Civil Authority” coverage



We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

- Related: “ingress/egress”
- Insurers: “stay home orders” do not qualify

Coverage Extensions: Communicable Disease

F. COMMUNICABLE DISEASE RESPONSE

If a **location** owned, leased or rented by the Insured has the actual not suspected presence of **communicable disease** and access to such **location** is limited, restricted or prohibited by:

- 1) an order of an authorized governmental agency regulating the actual not suspected presence of **communicable disease**; or
- 2) a decision of an Officer of the Insured as a result of the actual not suspected presence of **communicable disease**,

this Policy covers the reasonable and necessary costs incurred by the Insured at such **location** with the actual not suspected presence of **communicable disease** for the:

- 1) cleanup, removal and disposal of the actual not suspected presence of **communicable diseases** from insured property; and
- 2) actual costs of fees payable to public relations services or actual costs of using the Insured's employees for reputation management resulting from the actual not suspected presence of **communicable diseases** on insured property.

Coverage Extensions: Communicable Disease

F. INTERRUPTION BY COMMUNICABLE DISEASE

If a **location** owned, leased or rented by the Insured has the actual not suspected presence of **communicable disease** and access to such **location** is limited, restricted or prohibited by:

- 1) an order of an authorized governmental agency regulating the actual not suspected presence of **communicable disease**; or
- 2) a decision of an Officer of the Insured as a result of the actual not suspected presence of **communicable disease**,

this Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY at such **location** with the actual not suspected presence of **communicable disease**.

This Extension will apply when access to such **location** is limited, restricted, or prohibited in excess of 48 hours.

Virus/Contamination Exclusions

- Virus/Contamination exclusions (examples)

Contamination - Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew.

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.

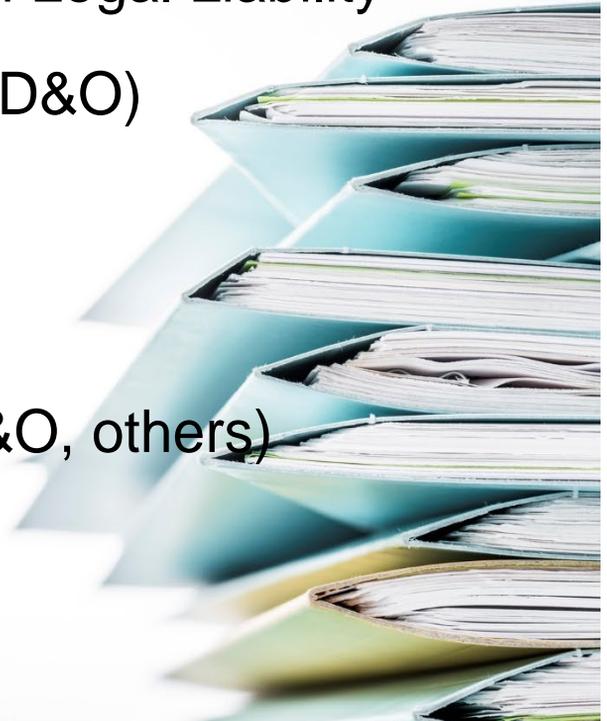
Event Cancellation Coverage

- **Trigger:**
 - “unavoidable” cancellation of event, “enforced reduced attendance”
- **Insurers:**
 - Voluntary cancellation or non-attendance not covered
 - Exclusions still apply
- **Opportunities to negotiate?**
 - Consider possibility of agreement with insurer re: cancellation of event to mitigate other losses



Other Coverages

- Contamination/Pollution Legal Liability
- Directors and Officers (D&O)
- Employers Liability
- General Liability
- Crisis Management (E&O, others)
- Crime/Fraud
- Cyber



Legislation

- U.S. Pandemic Risk Insurance Act of 2020 (PRIA)
 - Backstop for insurers in consideration for agreeing to pay Covid-19 loss claims (like TRIA)
- State bills (LA, MA, NJ, NY, OH, PA, SC)
 - Require insurers to cover business interruption losses attributable to viruses and pandemics (regardless of policy language)
 - Small businesses only
 - Most (not all) have state reinsurance-like reimbursement fund



Litigation

- First wave:
restaurant/hospitality
industry lawsuits against
insurers
- Class actions
- MDL petition



Key Insurance Coverage Questions

- What next steps should I take?

What should I do next?

- Notify
- Document
- Protect



Notify Insurers

- Notify relevant insurers of loss (or claim, or circumstances that may give rise to a claim)
- Commercial Property
 - ✓ Tie to physical damage or loss
 - ✓ Civil Authority
 - ✓ Ingress/Egress
 - ✓ Other coverages (communicable disease, event cancellation)
- Other insurers/coverages
 - ✓ Event cancellation
 - ✓ Liability (if you have been sued)
 - ✓ D&O (if financial claims have been asserted)

Document Damage, Losses and Expenses

- Identify the presence of coronavirus at relevant location(s)
 - *Pro tip:* Have an expert do this
- Calculate your shutdown timeframe and projected BI losses
- Identify and document supply disruptions
- Keep careful track of all lost income and costs



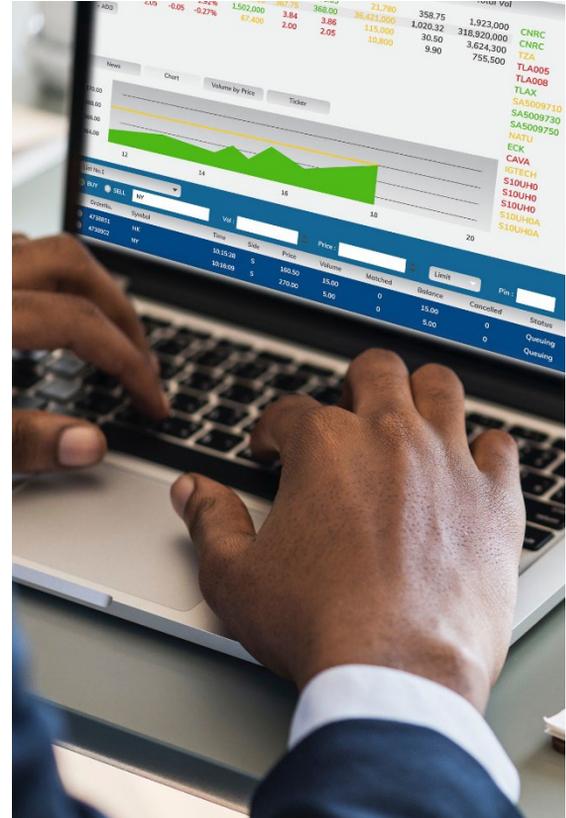
Protect Assets

- Mitigate damage
- Maintain security
- “Extra expense” incurred in order to keep operations running as closely to normal as possible should be covered (e.g., extra security, certain payroll expenses), assuming the loss itself is otherwise covered



Role of Brokers and Accountants

- Accountants
 - document losses
 - quantify business interruption
- Brokers
 - submit claims
 - negotiate policy renewals (including sublimits, endorsements to enhance and preserve coverage)
- **Brokers and accountants are not necessarily well-versed in the legal and contractual requirements of your policies**



Conclusion

■ To Know:

- Whether or not you have coverage for your specific coronavirus losses generally depends on two things:
(1) the precise wording in your policies, and
(2) the relevant case law
- State and federal legislation may affect insurance outcomes
- Plaintiffs' bar proposals to consolidate claims may affect policyholder rights

■ To Do:

- ✓ Notify insurers
- ✓ Document losses and expenses
- ✓ Protect assets
- ✓ Monitor legislation and developments in lawsuits

Parting Thoughts

The insurance industry wants you to
assume there is no coverage.
Sometimes they will be right...
but not always.

Parting Thoughts

“Don’t take no for an answer.”

Winston Churchill, 1930

Parting Thoughts

“Don’t believe the hype.”

Public Enemy, 1988

Questions?

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