



Claiming Insurance Benefits to Compensate for COVID-19 Related Business Losses

About United Policyholders

- A trustworthy source of information and expertise and a respected voice for policyholders since 1991.
- **Non-profit**, 501(c)(3)
- Helping influence favorable outcomes for insured individuals and businesses through three programs.
- A professional staff and a national network of volunteers that includes leading insurance recovery counsel plus qualified construction, risk management, industrial hygiene, claim adjusting, wealth advisor and tax professionals.

Three Programs

- Roadmap to Recovery
 - *Helping people and businesses solve claim and coverage problems*
- Roadmap to Preparedness
 - *Increasing insurance literacy and promoting financial preparedness for adverse events*
- Advocacy and Action
 - *A voice for the insured in legislative, regulatory and court proceedings and in the media.*
 - See: <http://uphelp.org/programs/advocacy-and-action>
 - See also: <http://www.uphelp.org/resources/amicus-briefs>

Amy Bach, Esq.



- Dedicated to advancing the interests of insurance policyholders since 1984
- Published author, experienced trial and regulatory attorney
- Co-founder, UP
- Official consumer rep to NAIC since 2009
- Member, Federal Advisory Committee on Insurance (US Treasury)

What your broker may say regarding business interruption coverage:

“A communicable disease like the Coronavirus may not be a covered peril, but you should not allow that assumption to keep you from taking action. First, it is critically important to report all claims and potential claims to EACH AND EVERY CARRIER whose policy might apply to your loss. This includes CGL, Personal lines, Umbrella, Excess, Workers Compensation, Specialty and any other policy you may have.

Second, you need to determine whether you purchased business income coverage. If you don't find the coverage in your policy description, call our office.

Third, if your business closes due to the Coronavirus, it is important to know (again) that communicable diseases typically are not a covered peril that would give rise to insurance benefits for loss of income. It doesn't matter if the loss of income is just from a downturn of business due to the loss of many customers or the actual closure of your business. However, you should still report all claims and potential claims. Please be sure to contact our agency if you have any questions.”

UP's bottom line:

Insurance coverage and claim disputes are rarely “black and white”, despite what your insurer may say

Don't take no for an answer on your claim until you've exhausted all arguments and avenues for help. And there are many of them.

COVID-19 is creating many insurance issues of first impression

Available help:

- Your broker - *potentially*
- **Experienced policyholder counsel**
- A public adjuster w/commercial expertise
- Your State Department of Insurance
- Elected officials
- Forensic accountants

Factors that may influence coverage

- Litigation/policy interpretation case law
- Actions by Public Officials
 - Negotiations w/insurance leaders
 - Official orders that say virus is causing property damage (NYC, Napa, New Orleans)
 - Orders that say the opposite (Texas)
 - Proposed Legislation
 - Compelling claim payouts (i.e. NJ, OH, MA)
 - Overriding/interpreting policy language

Emergency Orders, and Proclamations are being issued daily:

Louisiana's Governor and the Mayor of New Orleans:

“...because of the ability of the COVID-19 virus to spread via personal interactions and because of **physical contamination of property due to its propensity to attach to surfaces for prolonged periods of time....**”

“...the propensity to attach to surfaces for prolonged periods of time, thereby spreading from surface to person **and causing property loss and damage in certain circumstances....**”

Squaring off for the coverage battles: differing opinions

- “Most insurance policies “were not designed to, provide coverage against communicable diseases such as COVID-19.”
 - *Insurance Trade Groups Letter to U.S. Congress*
- “[R]oughly 80% of commercial policies are silent or vulnerable on communicable disease coverage.”
 - *Chris Cheatham, CEO of Risk Genius.*
- “There may be exclusions, but there may very well be different interpretations.”
 - Stephan Holzberger, chief rating officer, AM Best

Step one:

Get and organize current and complete copies of all of your business insurance policies and communications w/your broker

CGL, BOP, Business Interruption,
Contingent Business Income, Extra
Expense, Workers Comp, D&O, E&O,
Event Cancellation

Ask for the full policy with all endorsements,
or for your “certified” policy in writing

Step two: Document your COVID-19 business losses

Document the impact on your business on an ongoing basis, even if you are unsure if your insurer will honor your claim(s):

- Keep a record of daily activity
- Keep track of communications with your carrier/applicable government orders/extra incurred expenses
- Note extra expenses and lost profits

What your insurer may require:

Loss Determination

In making any loss determination under this coverage, we may utilize relevant sources of information, including:

- your financial records and accounting procedures;
- bills, invoices and other vouchers;
- deeds, liens and contracts;
- status and feasibility reports; and
- budgeting and marketing records.

Step three:

Read and re-read your policy

The type or form of policy ***you*** have is the starting point to determine whether you have coverage. Do you have a:

- Standardized Form
 - Is there “ISO*” form #s along the bottom of the pages?
 - Most will contain an exclusion for losses due to a virus
- Manuscript Form
 - A customized form that may include different language from ISO forms and be more broad or narrow in scope

* ISO is the Insurance Services Office, a supplier of policy forms/ templates that many insurers use in the products they sell.

Coverages you may have:

- Business Income Loss
 - Lost profits/Lost sales etc.
 - Decontamination
 - Vandalism/Damage to inventory
- Contingent Business Interruption
 - Supply chain disruptions
- Extra expense (Increased costs)
- Event Cancellation
- Civil Commotion
- Civil Authority
- CGL for liability claims related to COVID-19

Threshold matters:

- What is causing your losses:
 - Prohibition of access/state and local closure orders
 - Direct physical loss/property damage
 - Virus is a tangible albeit tiny “thing”
 - Contamination/communicable disease
- What wording is in your policies?
- How has similar language been interpreted and how will it be interpreted now?

Business Interruption

BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy, the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section F. Definitions.

- Do you have the coverage?
- If so, is there a specific virus/communicable disease exclusion?
- Is there a requirement of “direct physical loss of or damage to” property?
- Does your policy have additional coverage for loss due to acts of “Civil Authority”?

Digging into your policies:

BUSINESSOWNER'S COVERAGE FORM INDEX

This index is provided only as a convenience. It should not be assumed to provide a reference to every provision that can affect a question, claim or coverage. To determine the full scope of coverage and pertinent restrictions and exclusions, the policy (including endorsements) must be read in its entirety. The features may also be affected by related provisions not referenced at all in the index, or noted elsewhere in it. For instance, an **Exclusion** feature addresses a specific policy exclusion; but restrictions of coverage and exclusions also appear within the areas where coverage, covered causes of loss, etc., are described.

- A coverage form index is a good place to start
 - Be mindful that most provisions must be read in the context of the policy as a whole and that exclusions may not be listed with the corresponding coverage section

BUSINESSOWNER'S COVERAGE FORM INDEX

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Manuscript/custom language business income example

Business Income And Extra Expense

We will pay for the actual:

- **business income** loss you incur due to the actual impairment of your **operations**; and
- **extra expense** you incur due to the actual or potential impairment of your **operations**, during the **period of restoration**, not to exceed the applicable Limit Of Insurance for Business Income With Extra Expense shown in the Declarations.

This actual or potential impairment of **operations** must be caused by or result from direct physical loss or damage by a **covered peril** to **property**, unless otherwise stated.

This Premises Coverage applies only at those premises:

- where you incur a **business income** loss or **extra expense**; and
- for which a Limit Of Insurance for Business Income With Extra Expense is shown in the Declarations.

Virus Exclusions

- The most common exclusion impacting coverage is the updated Virus, Bacterium, or other Microorganism Exclusion
 - The contamination and pollution form was updated by ISO in 2006 for fear of vagueness
 - A memo was published clarifying its application intent
- This exclusion is not in all policies – read your policy

ISO memo clarifying intent of the virus exclusion

COMMERCIAL FIRE AND ALLIED LINES
FORMS FILING CF-2006-OVBFEF

Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

About This Filing

This filing is made pursuant to the following information:

An example of bacterial contamination of a product is the growth of listeria bacteria in milk. In this example, bacteria develop and multiply due in part to inherent qualities in the property itself. Some other examples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella and anthrax. The universe of disease-causing organisms is always in evolution.

contamination are specific types that appear to warrant particular attention at this point in time.

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If/then...did your premium reflect reduced coverage?

- If your policy contains a virus exclusion, when was it added and did you get notice of a reduction in coverage?
- Did your premium reflect a reduction in coverage when the exclusion was added?

Common Key Language

“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.”

“This exclusion applies to . . . any denial of access to property because of any virus . . .”

Catch-all - “The terms of the exclusion, or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded . . .”

Exclusion may be written in line with the coverage or added as an endorsement elsewhere in the policy (example of endorsement on next slide)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**SELECT BUSINESS POLICY
EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA**

This endorsement modifies insurance provided under the following:

SELECT BUSINESS POLICY BUILDING AND PERSONAL PROPERTY COVERAGE FORM
SELECT BUSINESS POLICY BUSINESS INCOME AND EXTRA EXPENSE COVERAGE FORM
SELECT BUSINESS POLICY BUSINESS INCOME WITHOUT EXTRA EXPENSE COVERAGE FORM
SELECT BUSINESS POLICY EXTRA EXPENSE COVERAGE FORM

- A.** The exclusion set forth in paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

B. 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.

However, this exclusion does not apply to loss or damage caused by or resulting from "Fungus," Wet Rot or Dry Rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.

- C.** With respect to any loss or damage subject to the exclusion in paragraph **B.**, such exclusion supersedes any exclusion relating to "pollutants."
- D.** The following provisions in this Coverage Part or Policy are hereby amended to remove reference to bacteria:
1. Exclusion of "Fungus," Wet Rot, Dry Rot and Bacteria; and
 2. Additional Coverage - Limited Coverage for "Fungus," Wet Rot, Dry Rot and Bacteria, including any endorsement increasing the scope or amount of coverage.
- E.** The terms of the exclusion in paragraph **B.**, or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

Pollutants/Contaminant Exclusions

- Even if your policy does not have a virus exclusion, some insurers may assert that pollutants/contamination exclusions bar coverage
- This coverage issue may yield different results state-by-state

F. Definitions

"Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

2. We will not pay for loss or damage caused by or resulting from any of the following:
 1. Discharge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss". But if the discharge, dispersal, seepage, migration, release or escape of "pollutants" results in a "specified cause of loss", we will pay for the loss or damage caused by that "specified cause of loss".

This exclusion, I., does not apply to damage to glass caused by chemicals applied to the glass.

Property Damage

- Coverage for actual loss of business income during the “period of restoration”
- There must be “direct physical loss of or damage to property”
- Most insurance policies do not define the term, leading to disputes and uncertainty

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 damage to property, at locations which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described location includes the area within 1000 feet of the site of the described location.

Insurers rely on case law that says, for example:

- “that even though mold and bacteria permeated a floor, because the entire premises did not need to be vacated, and the insured could not meet its burden to show it suffered any structural or any other tangible damage to the property, there was no direct physical loss to the property.”
- *Universal Image Productions, Inc. v. Chubb Corp.*, 703 F.Supp.2d. 705, 710 (E.D. Mich. 2010)

Policyholders rely on case law that says:

- “courts considering non-structural property damage claims have found that buildings rendered uninhabitable by dangerous gases or bacteria suffered direct physical loss or damage”
- *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 U.S. Dist. LEXIS 165232, at *15-17 (D.N.J. Nov. 25, 2014)

Manuscript Policies (Custom) might be different:

- Example - Lloyds of London BI Policy: pays for losses due to the “inability to use your premises . . . following an occurrence of notifiable human disease.”
- Also - pays for losses when there is a “loss to” building property or business personal property.

How do you prove property damage?

- At your property:
 - It is your burden of proof to demonstrate property damage has occurred
 - Is your business closed because
 - your property was contaminated with the virus? OR
 - to stop the spread of the virus?
- At nearby property/supplier property:
 - Important for Civil Authority and Supply Chain claims

“Extra Expense” coverage

2. Extra Expense

- a. Extra Expense coverage is provided at the location described in the Declarations only if the Declarations show that Business Income coverage applies at that location.
- b. Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.

We will pay Extra Expense (other than the expense to repair or replace property) to:

- (1) Avoid or minimize the "suspension" of business and to continue "operations" at the described location or at replacement locations or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.
- (2) Minimize the "suspension" of business if you cannot continue "operations."

We will also pay Extra Expense to repair or replace property, but only to the extent it reduces the amount of loss that otherwise would have been payable under this Coverage Form.

Civil Authority

- Does your policy include Civil Authority Coverage?
 - Provides coverage for “loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to [your business] due to **direct physical loss of or damage to property *other than* [your property]**”
 - The damaged property must usually be in a range of 1 to 5 miles
 - May be a waiting period (i.e. time deductible) before coverage starts
 - Business Income benefits usually last about 4 weeks
 - Extra Expense benefits may differ

Compare different requirements in similar policies

1. Civil Authority

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 location described in the Declarations due to direct physical loss of or damage to property, other than at the described location, caused by or resulting from any Covered Cause of Loss, provided that both of the following apply:

- (a) access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described location is within that area but is not more than five miles from the damaged property; and
- (b) the action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority Coverage for Business Income will begin immediately after the time of the first action of civil authority and will apply for a period of up to four consecutive weeks from the date on which such coverage began.

The coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described location and will end:

- a. four consecutive weeks after the date of that action; or
- b. when your Civil Authority Coverage for Business Income coverage ends;

whichever is later.

Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

Civil Authority

We will pay for the actual:

- **business income** loss; or
- **extra expense**,

you incur due to the actual impairment of your **operations**, directly caused by the prohibition of access to:

- your premises; or

Civil Authority (continued)

- a **dependent business premises**,

by a civil authority.

This prohibition of access by a civil authority must be the direct result of direct physical loss or damage to property away from such premises or such **dependent business premises** by a **covered peril**, provided such property is within:

- one mile; or
- the applicable miles shown in the Declarations,

from such premises or **dependent business premises**, whichever is greater.

The most we will pay for Civil Authority is the applicable Limit Of Insurance for Business Income With Extra Expense shown in the Declarations.

The coverage for:

A. **business income** will begin:

1. after the applicable waiting period shown in the Declarations for Business Income expires; or
2. 24 normal business hours following the time the civil authority prohibits access, whichever is the longer.

The Waiting Period shown in the Declarations will begin immediately following the time the civil authority prohibits access.

The coverage will apply for a period of:

- up to 30 consecutive days after coverage begins; or
- when your **business income** loss ends,

whichever occurs first; and

B. **extra expense** will begin immediately after the time the civil authority prohibits access and will end:

1. 30 consecutive days after the coverage begins; or
2. whenever your **business income** coverage ends, whichever is later.

This Additional Coverage does not apply if the direct physical loss or damage is caused by or results from earthquake or **flood**.

Contingent Business Interruption

- Coverage may be available for loss and expense that results from an interruption of your supply chain
- May have to document and prove damage to a supplier
- Specific exclusions to your policy will also apply

Event Cancellation

Most will cover cancellation due to circumstances beyond your control

- Some policies include communicable disease riders, but this is not the norm
- Many event policies require you to specifically request a communicable disease rider
- Typically, cancellation must be **necessary** and not **prophylactic**

Workers' Compensation

Layoffs allow worker to apply for unemployment

Employees who allege they caught the virus at work:

- *Potential* Coverage under workers comp
- Proof challenges – *how* did worker contract?
- Employment or conditions under which the work was performed

Commercial General Liability

- Exposure to a toxic substance can constitute an accident or occurrence
- This coverage may cover defense and indemnity costs incurred if a third-party sues and alleges bodily injury or property damage
 - Some policies contain exclusions for claims related to communicable diseases

Directors and Officers

- Shareholder claims
- Financial damage claims = covered versus
bodily injury claims

Errors & Omissions

- Claims arising out of the provision of professional services

Notice and Burden of proof

- All risk versus Named perils. All risks covered except where excluded. You have the initial burden to provide your insurer with notice that a loss has occurred
- Burden shifts to insurer to prove an exclusion or limitation applies to defeat coverage

General coverage interpretation rules

- Insurance contracts are different
- Indemnity in case of loss to be effectuated
- Contract interpretation
 - Contra proferentem (ambiguities construed against the drafter)
 - Plain meaning vs Reasonable expectations
 - 4 corners vs. extrinsic evidence

Questions?

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We've got your back when
insurance matters

