



McGUIREWOODS

# COVID-19: Business Interruption Coverage

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# COVID-19: Challenges

A microscopic image showing a cell with various organelles and a large, spherical coronavirus particle with characteristic surface spikes. The image is in shades of green and blue.

- State governments across the country have issued orders requiring countless businesses to close.
  - Restaurants, hotels, retail stores, and places of entertainment
- Businesses are incurring massive losses, which has sparked tremendous interest in whether business interruption (BI) insurance coverage can help offset some or all of those losses.

# COVID-19: Overview

A microscopic image showing a cell with various organelles and a large, spherical coronavirus particle with characteristic surface spikes. The image is in shades of green and blue.

- Today, our team is going to take you through:
  - The basics of how this type of coverage works,
  - The issues involved with making a claim for BI cover based on the COVID-19 outbreak, and
  - Recommendations for how policy holders can preserve and assert their rights.

# COVID-19: Introductions



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# COVID-19: BI and Extra Expense Coverage Basics

- Business Interruption (BI) cover is typically included with commercial property policies.
- It provides the policyholder with coverage for lost business income incurred when covered property is damaged.
- Extra Expense (EE) coverage provides coverage for expenses incurred as a result of a business interruption.



# COVID-19: BI Coverage Basics

Example:

“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 a direct physical loss of or damage to property** at premises which are described in the Declarations....”

# COVID-19: BI Coverage Basics



Example:

“This Policy insures Business Interruption loss, as provided in the Business Interruption Coverage, **as a direct result of physical loss or damage of the type insured . . . To the property** as described in this Policy and not otherwise excluded by this Policy. . .”

# COVID-19: BI Coverage Basics



Example:

“This policy shall cover the loss resulting from necessary interruption of business conducted by the Insured including all interdependent loss of earnings between or among companies owned or operated by the Insured **caused by loss, damage, or destruction by any of the perils covered herein during the term of this policy to real and personal property as covered herein.**”



A microscopic image of a cell with a coronavirus particle. The cell is shown in a dark green, almost black, color with various organelles visible. The coronavirus particle is a spherical structure with a distinct outer layer of spikes, resembling a crown or a sunburst. It is positioned in the upper right quadrant of the image.

# COVID-19: BI and Extra Expense

- The battleground issue will be whether the existence of COVID-19 constitutes “physical damage”
- The science is still evolving.



# COVID-19: Civil Authority Extension

- What is more important and highly relevant for present purposes is the Civil Authority coverage extension.
- The coverage triggers vary, but this type of coverage provides lost business income and extra expense incurred because the civil authority issues an order limiting access to your insured property.
- Is physical damage to other property required?.

# COVID-19: Civil Authority Extension

Example:

“When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense **caused by an order of the civil authority that prohibits access to the described premises due to direct physical loss or damage to property within one mile of that described premises. . . .**”

# COVID-19: Civil Authority Extension

Example:

“This Policy covers Business Interruption Coverage loss incurred by the Insured during the Period of Liability if an order of civil or military authority prohibits access to a location **provided such order is the direct result of physical damage of the type insured at a location within five (5) statute miles of it.**”

# COVID-19: Civil Authority Extension

Example:

“This policy. . . Insures against loss resulting from damage or destruction by the perils insured against, to: . . . the actual loss sustained for a period not to exceed ninety (90) consecutive days, when, as a result of a peril insured against, access to real or personal property is impaired or hindered by order of civil or military authority **irrespective of whether the property of the Insured shall have been damaged.**”



# COVID-19: Civil Authority Extension

Example:

“This policy is extended to cover the loss sustained during the period of time, not to exceed 30 days, **when access to real or personal property is impaired by order or action of civil or military authority in connection with or following a peril insured against.**”

# COVID-19: Civil Authority Extension

- The key distinction between these two types of clauses is whether the policy holder must prove physical damage to other, non-insured property.
- The presence of COVID-19 may well satisfy this requirement, and the claims are still viable, but the open-ended Civil Authority clauses are pretty clearly better for policy holders.

# COVID-19: Communicable Disease Coverage



- Some policies have coverage for outbreaks of infectious disease.
- But the coverage is usually only for an outbreak at the insured premises.
- These coverage extensions should be carefully reviewed in each case.



# COVID-19: Communicable Disease Coverage

Example:

“If a described location owned, leased or rented by the Insured **has the actual not suspected presence of communicable disease** and access to such described location is limited, restricted or prohibited by . . . An order of an authorized government agency regulating such presence of communicable disease. . . This policy covers Business Interruption Coverage loss incurred by the Insured during the Period of Liability at such described location with such presence of communicable disease.”

# COVID-19: Exclusions

A microscopic image of a cell with a coronavirus particle. The cell is shown in a cross-section, revealing various organelles and structures. The coronavirus particle is a spherical virus with a characteristic crown-like appearance, composed of numerous surface proteins (spikes) that give it its name. The background is dark, highlighting the cell and the virus.

- Virus Exclusion
- Pollution Exclusion

# COVID-19: Virus Exclusions

A microscopic image showing a cell with various organelles and a large, spherical coronavirus particle with characteristic surface spikes. The image is in grayscale with a greenish tint.

Example:

“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.”

# COVID-19: Virus Exclusions

A microscopic image showing a cell with various organelles and a large, spherical coronavirus particle with characteristic surface spikes. The image is in shades of green and blue.

Example:

“We will not pay for any 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 of the loss . . .

**Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness, or disease.”**



# COVID-19: Pollution Exclusions

Example:

“This policy does not insure . . . **loss or damage caused directly or indirectly by the release, discharge, dispersal, seepage, migration, or escape of pollutants or contaminants** unless the release, discharge, dispersal, seepage, migration, or escape is caused by a peril not otherwise excluded herein.”

# COVID-19: CBI and Supply Chain

- Some companies also have contingent business interruption (CBI) or supply chain coverage.
- This provides business income protection for damage to property of suppliers and sometimes key customers.
- These are less common, and they need to be carefully reviewed.
- Need to show damage to property.
- Perhaps helpful if it fits your facts.

# COVID-19: CBI and Supply Chain

Example:

“This policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability directly **resulting from physical loss or damage** of the type insured to property of the type insured **at the premises of any of the following** within the Policy’s Territory:

- a) **Direct Suppliers, direct customers** or direct contract service providers of the Insured . . .
- c) Any company that is a **direct or indirect supplier, customer or contract service provider of those described in a) above.**

# COVID-19: CBI and Supply Chain

Example (cont.):

“Business Interruption Coverage loss recoverable under this Business Interruption Coverage Extension **is extended to include the following** Business Interruption Coverage Extensions:

**a) Civil or Military Authority . . .”**



# COVID-19: Quantum of Recovery



- Calculating the recovery on a BI claim can be complex.
- Policies have per occurrence limits as well as a time period for which lost income is covered.
- Policy will generally cover net income plus operating expenses that are not reduced due to shutdown.
- “Extra Expense” for costs incurred in addressing the interruption.

# COVID-19: Quantum of Recovery



Example:

“[t]his company shall be liable for the actual loss sustained resulting directly from such interruption of business, but not exceeding the reduction in gross earnings less charges and expenses which do not necessarily continue during the interruption of such business.”

# COVID-19: Quantum of Recovery



- Policy holders will generally need to engage an accountant to work up the proof of loss and possibly testify.
- Most policies contain an appraisal provision where a panel of three appraisers fixes the quantum of damages in the event the carrier and the policy holder are unable to agree.
  - This looks a lot like arbitration.
  - Coverage can still be litigated.

# COVID-19: Specific Issues



Three principal questions that arise in BI case:

- A) Does the virus constitute “physical damage to property”?
- B) Civil Authority cover -- what is the scope of damage?
- C) Virus exclusion/Pollution exclusion – do they apply?

# COVID-19: Specific Issues



From a recent reservation of rights letter:

“Direct physical loss or damage generally means a physical effect on Covered Property, such as a deformation, permanent change in physical appearance or other manifestation of a physical effect. Your notice of claim indicates that your claim involves Coronavirus. However, the fact of the pandemic, without more, is not direct physical loss or damage to property at the premises.”

# COVID-19: Specific Issues



- Notice is key.
  - Failure to give notice may forfeit coverage.
- Policy holders are also required to submit a sworn proof of claim, sometimes within a defined window, such as 90 days from loss.
  - May need to negotiate an extension.
  - May need to submit and then supplement later.

# COVID-19: Fact Specific Issues



- Voluntary business closures may impact your argument for coverage.
- There is no coverage for lost income because customers are shopping less or because a company closed of its own volition.
- Coverage for costs associated with cleaning sites and losses due to the forced closure of business to clean sites may be easier to obtain.



# COVID-19: The State of Litigation

- There have been a few coverage suits filed by policy holders so far.
- Policy holders generally do not have a right to sue until the claim is denied.
- Most claims will not be resolved quickly.



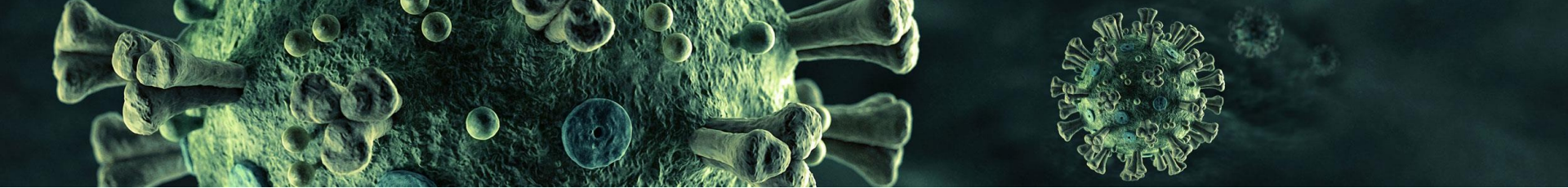
# COVID-19: Legislative Efforts

- March 18 letter from 18 members of Congress to insurance trade groups.
  - “We urge you to work with your member companies and brokers to recognize financial loss due to COVID-19 as part of policyholders’ business interruption coverage.
- Bills have been introduced in NJ, MA, and OH to require carriers to cover COVID-19 BI claims.
  - E.g. Massachusetts bill (SD.2888) would void virus exclusions.
  - Would also require coverage even if there is a lack of physical damage.

# COVID-19: Recommendations



- Fulsome review of policy
- Identify losses and begin to track losses
- Understand your coverage situation and add it to your analysis when making business decisions.
- Meet with your broker/agent
- Provide notice to reserve all rights under the policy
- Be sure to respond to the carrier's letters



# Questions