

## COVID-19: Do I Have a Business Interruption Insurance Claim?

As the coronavirus/COVID-19 pandemic drags on, businesses large and small continue to feel the impacts in a variety of ways. In recent days and weeks, in a necessary effort to “flatten the curve” of COVID-19 diagnoses, state and municipal governments across the country have issued shelter-in-place or safe-at-home orders that have forced closures of businesses deemed “non-essential,” altered hours or operations for almost all restaurants, and limited potential customer movement to only essential activities and travel. For example, Mississippi’s Shelter-in-Place Order, explained [here](#), took effect last Friday.

New legislation offering both disaster loans and forgivable small business loans (as part of the Paycheck Protection Program) provide small businesses with access to capital that was not available even a few weeks ago. Those programs, however, do not compensate for all lost revenue or additional expenses. To cover those losses, businesses may ask: Do I have a claim under property insurance and business interruption coverage?

Although all questions about insurance coverage turn on the specific language of your policy and the facts of your claim, it helps to know how insurance policies are typically structured and the common basis for insurer coverage denials.

**If you have lost business income due to the COVID-19 pandemic and accompanying governmental orders, Forman Watkins & Krutz LLP will review your insurance policy and discuss your options with you *free of charge*.** To contact us or submit your policy for review, email us at: [policyreview@formanwatkins.com](mailto:policyreview@formanwatkins.com).

Any such review and consultation will require a limited engagement letter prior to review.

### **What are the common policy terms?**

Commercial property insurance policies provide coverage for “direct physical loss or damage” to the insured premises. Those policies also commonly include **business interruption or income coverage**, which covers income that would have been earned but for the loss-causing event. Those policies may also include **extra expense coverage**, which covers any expenses incurred avoiding or minimizing the business interruption or any costs of repair or remediation.

Business interruption coverage is also commonly extended to include additional coverage for any actions of **civil authority** that impedes access to a business as a result of “direct physical loss or damage” to the insured property or

some other property within the vicinity of the insured property. These coverages may also include **contingent business interruption coverage**, which covers losses sustained if a *supplier* or a *customer* sustains “direct physical loss or damage.” Finally, a somewhat less common additional coverage may provide coverage for **interruption by communicable disease**.

For any business considering a claim, it is important to review the policy closely to determine what coverages are provided so that you can properly document all covered losses and understand all the coverage available to you.

### How are insurers denying coverage?

In response to what they expect to be a wave of business interruption claims, insurance companies, insurance lobbyist groups, and insurance defense firms have quickly published commentaries on the reasons why coverage is *not* available. Ultimately, those commentaries argue there is no coverage because (1) there is no direct physical loss; or (2) a specific virus exclusion applies.

- **Direct Physical Loss or Damage.** These insurance commentators have uniformly argued that the presence of virus at an insured property is not physical damage. As a result, any business interruption is not covered. This is not a new or entirely unique argument. A number of courts have addressed what counts as “direct physical loss or damage.” Some courts (Michigan and Ohio, for example) have agreed with insurers that requires structural damage to a property in order to have a physical loss.

On the other hand, courts across the country have held that changes to a property that cannot be seen or touched but that make the property uninhabitable or unusable are “direct physical losses” that trigger coverage. Those states include Louisiana (presence of a dangerous material alone, without emissions, is a physical loss); New Hampshire (odor from a neighboring property was a physical loss); Wisconsin (undamaged property could have physical loss if the property becomes inaccessible); Illinois (microscopic fibers capable of causing physical harm constitute physical damage); and Oregon (methamphetamine odor from tenant made property uninhabitable and was physical loss). Additionally, we note that, if your policy includes additional coverage for either civil authority or contingent business interruption, the physical loss or damage need not occur at your business.

Whether COVID-19 will be considered a “direct physical loss or damage” depends on the state law that applies to your policy and claim, language of your policy, and the facts of your particular claim.

- **Virus and Bacteria Exclusion.** Insurance commentators also point to the presence of virus exclusions in policies. This exclusion was drafted in 2006 by the Insurance Service Office (ISO) in response to the SARS outbreak and bars coverage for losses resulting from viruses. In addition, the ISO Circular accompanying the exclusion noted that it was drafted to exclude coverage for the “specter of pandemic.” Before making any claim, you should review your policy to determine whether this virus or bacteria exclusion is included.

### New cases challenging coverage denial

Predictably, restaurants have already filed lawsuits seeking a court to order their insurer to provide business interruption coverage. Restaurants have been particularly hard hit by governmental orders. At the early stages of social distancing those orders prevented gatherings above a certain number of people, restricted capacity for in-house dining, and/or limited restaurants to take-out and delivery service. The orders are becoming more and more restrictive as

States adopt statewide shelter-in-place rules.

We are following five cases that have been filed in Louisiana, California, Illinois, and Florida. Each of those cases involve “all risk” policies. As the Louisiana courts (and others) have explained, “an ‘all risk policy’ is an insurance policy where all risks are covered unless clearly and specifically excluded.” Notably, none of the policies at issue in these cases appears to include the virus exclusion. Indeed, in the California case (*French Laundry Part., LP, et al. v. Hartford Fire Ins. Co., et al.*), the policy at issue purportedly includes a “Property Choice Deluxe Form” that specifically *provides* coverage for loss caused by virus.

As a result, these cases will not address the question of whether an insured can overcome the virus exclusion to receive coverage for lost income due to COVID-19; however, these cases may set the course for state courts asked to determine whether the COVID-19 pandemic and accompanying governmental orders caused a covered loss for businesses across the country.

In addition, we note that the two Illinois cases involve breach of contract and other statutory claims. Illinois state law includes a statutory requirement for insurers to conduct a good-faith investigation prior to making a coverage determination. As noted, however, multiple insurance companies or their trade organizations have made blanket statements about the unavailability of business interruption coverage. Based on those blanket statements, businesses may have a valid breach of contract or statutory claim for bad faith denials. Those types of claims are very state-law and fact specific but should be considered by any business that receives a ready-made and quickly delivered coverage denial.

In addition to restaurant groups, the Choctaw Nation of Oklahoma has also filed a declaratory action seeking a court to order coverage for its business interruption losses under applicable all risk policies. That is another case to monitor for interpretation of similar policy language.

### **New legislative efforts to provide coverage**

In addition to newly filed lawsuits, State legislatures are working to address the lost income by their businesses and inevitable coverage denials by insurers. Five states (New Jersey, Ohio, Massachusetts, New York, and Louisiana) have introduced bills that would require coverage in certain instances. For example, in New York (A-10226), the bill would require coverage of lost business income for any business for 100 or fewer employees if that business has an insurance policy that includes business interruption coverage. Any funds paid by the insurer may be reimbursed by the New York Superintendent of Financial Services out of a new reimbursement fund based on a new assessment for all insurers. The other State bills operate similarly, although the number of employees differs. In fact, Louisiana’s bill (SB 477) does not include any employee limit.

In the United States Congress, a bi-partisan caucus group has discussed declaring the coronavirus a “public health crisis” with the explicit goal of triggering force majeure contract provisions and business interruption coverage. Others have suggested creation of a reinsurance program similar to the Terrorism Risk Insurance Act, which would provide insurance coverage for businesses but spread the cost federally, or to simply amend the TRIA to include COVID-19.

Legislative actions have moved quickly during the COVID-19 pandemic. In typical times, potential legislation would provide little comfort to a business experiencing loss in the moment; however, these state and federal efforts are worth

monitoring for any business considering a business interruption claim.

### What should I do next?

The first thing you should do is review your policy. Any question of whether you have or could have insurance coverage for losses depends, first and foremost on the language in the policy. **If you would like an attorney to review your policy, Forman Watkins & Krutz LLP will review your insurance policy and discuss our options with you *free of charge*.** To start that process, contact us at [policyreview@formanwatkins.com](mailto:policyreview@formanwatkins.com). Any such review and consultation will require a limited engagement letter prior to review.

In addition to reviewing your policy, document your losses or extra expenses. Finally, recognize that the new Families First Coronavirus Response Act and CARES Act offer new loan programs and access to additional capital for businesses. In many cases, those options do not prevent an insurance claim for lost business income and should be considered alongside a potential insurance claim.

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As we continue to monitor the COVID-19 pandemic, Forman Watkins & Krutz LLP lawyers are working diligently to stay up to date on the numerous legal issues and to counsel clients as needed across all business sectors. To see other updates and advisories, please visit our [COVID-19 page](#).