



## INSURANCE COVERAGE AND BAD FAITH

### Legal Issues Raised by COVID-19: Business Interruption Insurance

By: John Hughes, Esq. | April 8, 2020

Many small businesses have as part of their package of insurance coverage what is known as business interruption or business income loss coverage. We are seeing an uptick in lawsuits regarding restaurants and other small businesses who are making claims against their insurance companies under business interruption coverage. A summary of the issue and the legal considerations is below.

#### FAQs

**What is Business Interruption Insurance?** It is insurance coverage that replaces business income lost in a disaster or other event that causes a shutdown and loss of income for the business.

The event giving rise to the claim could be a fire, a flood, storm damage, a natural disaster, as toxic gas release or as here, a pandemic. Claims can arise when government actions or shutdown orders cause operations to cease temporarily, which results in business loss. Business interruption coverage may be sold as a separate policy, added to a property/casualty policy, found in “all risks” coverage or included in a comprehensive package policy as an add-on or rider. **If you are a small business owner, read your policy carefully.**

**What does Business Interruption Insurance Cover?** The coverage may allow benefits such as:

- *Lost profits.* Based on prior months' performance, a policy may provide reimbursement for profits that would have been earned had the event not occurred.
- *Fixed costs.* These can include operating expenses and other incurred costs of doing business.
- *Temporary relocation.* Some policies cover the costs involved with moving to and operating from a temporary business location.
- *Commission and training costs.* A company will often need to replace equipment and retrain personnel. Business interruption insurance may cover these costs.
- *Extra expenses.* Business interruption insurance may reimburse reasonable expenses (beyond the fixed costs) needed to continue operating while the business gets back on solid footing.
- *Government closure loss.* A business interruption event may result in government-mandated closure of business premises. Examples include forced closures because of government-issued curfews or street closures related to an event.



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- *Employee wages.* Coverage of wages is essential if a business does not want to lose employees while shutting down. This coverage can help a business owner make payroll until the crisis passes.
- *Taxes.* Businesses may still have to pay taxes, even when disaster hits. Tax coverage may ensure a business can pay taxes on time and avoid penalties.
- *Loan payments.* Loan payments are often due monthly. Business Interruption coverage can help a business make those payments even when they are not generating income.

**How do I know if I have Business Interruption Insurance?** You must locate your insurance policies and read through them carefully. If you cannot find them, contact your insurance agent or broker who may have copies. Or, contact the insurer directly. Remember that this coverage might be in a separate standalone policy but might also be buried within an all-risk, property or casualty policy or comprehensive package. Also remember to check for add-ons, riders and amendments. If the insurer or agent will not cooperate with getting you information, contact a lawyer or the NC Department of Insurance (website: [www.ncdoi.gov](http://www.ncdoi.gov)).

**What if my insurance carrier denies my claim?** As a result of COVID-19, there have already been lawsuits filed by insureds against carriers who deny coverage. For example, some restaurant businesses have brought lawsuits against their insurers for refusing to cover losses due to having to shut down their restaurants until the pandemic and local government closure orders pass. If you have concerns that your Business Interruption Insurance coverage has been denied without good grounds, you should contact an attorney.

### Highlights and Take-aways from Lawsuits Filed:

1. The claims were filed by small business owners in the hospitality and restaurant industries.
2. Some businesses have claimed that their “all risks” insurance policies allow coverage for losses occurring as a result of COVID-19. Such policies may provide coverage for “civil authority” directed closures. These policies have no virus exclusions.
3. Insurers are denying coverage, claiming the loss “must be caused by physical loss of or damage to the covered property,” however, small business owners are challenging that interpretation, noting that some courts have held that the presence of a dangerous substance can trigger coverage.
4. Claimants argue that the whole reason why government authorities are ordering shutdowns is because of the physical fact of the virus itself landing and staying on surfaces and people, floating through the air and causing infection.



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### Commentary on the Case Law

Depending on the exact terms of the insurance policy language, there is a potentially compelling argument that the “physical loss” requirement can be satisfied by the prevalence of the potentially lethal COVID-19 virus on surfaces and in physical premises – similar to the manner in which toxic bacteria, gases, fumes, asbestos fibers or other toxic contaminants can affect properties and make them temporarily lose their essential function.

For example, assume that a railroad tanker car goes off the tracks and spills chemical gases throughout a community so that the nearby businesses must shut down. The situation caused by the virus is not that different. Like the toxic gas spill, the Coronavirus is an incursion of an unexpected toxic substance – the virus particles themselves – which rest and persist on surfaces, and travel through the air. Unlike things like the common cold or the flu, the COVID-19 virus particles can cause horrific percentages of hospitalization and mortality. When the prevalence of the virus leads to governmental temporary shutdown orders, it may be argued that the virus has caused physical loss or damage by its contaminating and destructive effect.

Unlike the common cold or the flu, the COVID-19 virus is not a common everyday occurrence that society has simply grown to live with. Rather, like the spill of toxic chemical gases into a community, or the detection of asbestos in a school building, the virus represents an unexpected, devastating, but temporary event, which will pass once it is controlled and recedes and once a vaccine is found.

This is the kind of unexpected damage that should be covered by business insurance because it falls into the range of what ordinary business owners thought they were paying for when they paid their premiums. They paid premiums for insurance to cover the unlikely event of a shutdown order and temporary business closures due to an unexpected disaster. A small business owner needs this coverage because even though eventually the pandemic will pass and closure orders will lift, this may come too late for small businesses without deep cash reserves. For those who work in the people-serving, in-person-service, hospitality space, weeks of a shutdown may put them out of business forever. It is no surprise, then, that some have already filed claims in court.

### What You Can Do

Small business owners are advised to consult their policies and see if they contain language that provides coverage for losses incurred due to a business interruption. The policy language must relate to events that trigger the suspension of their business operations, such as being forced to close due to a government order.



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Also, one must check to see whether the insurance policy has an express exclusion for contamination due to communicable diseases or viruses. Such a “virus exclusion” may preclude a claim.

If the policy is broadly worded and does not contain such an exclusion, this is a point in the small business claimant’s favor. This is because if the insurer had wanted to exclude pandemic-related losses under the policy, it could have sought to do so, but did not.

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If you need help analyzing your policy language or understanding if your business may have a valid claim, please do not hesitate to contact our firm for assistance. We know these are stressful financial times for most in the retail, restaurant, service, and hospitality industries. We look forward to seeing if we can help.