**Coronavirus (COVID-19): Does Business Income Respond?**

Over the past two weeks, the VU has received countless questions concerning COVID-19 (the coronavirus) and the business income policy. As authorities require businesses to limit activities or shut down completely, the fear and reality of the loss of income looms large.

Insureds call their agents to ask about business income coverage and agents call us. Or, the agents contact us to get ahead of their clients. Either way, business income is a major topic right now.

Every agent asks essentially the same question, “Is there coverage in the business income policy for business closure or slow down as a result of the coronavirus?”

I’m sorry to tell you up front, but the short simple answer is, no, there is no coverage. The longer answer is a bit more complicated, even though the ultimate answer is the same – no coverage.

In this short piece, three business income coverages are reviewed:

* The business income coverage itself;
* The additional coverage for civil authority; and
* Dependent property coverage.

**Business Income**

We will begin with the insuring agreement from the business income coverage. The form reads:

*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 premises 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.*

Within this insuring agreement, there are three key coverage triggers to consider, “suspension of…operations,” “direct physical loss or damage” and “covered cause of loss.” Let’s review each trigger.

**Suspension of operations**. Given the local, state or federal requirements, this condition may apply as the business may be shut down by a regulatory authority. As of this writing, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont and Washington have all shut down restaurants and bars. The debate may be the necessity, but government made it necessary. So, regardless of the abuse of power and intrusion into our lives by the government, this requirement is met.

**Direct physical loss or damage**: Here is the first question that causes a bit of problem for whether coverage exists. Does or can a virus cause physical damage?

Physical or property damage as understood and applied in the courts requires physical harm generally evidenced by changes in the physical characteristics that require repair.

Consider an invisible virus **on** any property or even **in** the property, does the presence of a virus on a surface or in the air change the physical characteristics such that repair is required? Given the everyday application and meaning of those terms, no, the virus does not result in property damage.

So, there is no property damage as required by the form, and without property damage, business income coverage does not respond.

**Covered Cause of Loss**: Even if the presence of a virus can be “forced” by the courts to be considered property damage; is the mere presence of the virus a covered cause of loss? This is a longer discussion than the other two triggers discussed above; let’s detail this trigger.

**Is a Virus a Covered Cause of Loss**

Is the presence of the virus a covered cause of loss? Of course, whether it’s a covered cause of loss or not matters only if presence of the virus can cause property damage according to the courts.

There is a specific exclusion within the policy that may apply in addition to a mandatory exclusionary endorsement. Let’s look at both exclusions.

Within ISO’s business income policy written on a special cause of loss form, the following is excluded:

*l. 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".*

A “pollutant” is defined in the form to mean: “*any solid, liquid, gaseous or thermal irritant or* ***contaminant****, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.”* A contaminate, particularly a biological “contaminant,” is defined as a contamination of food or environment with microorganisms such as bacteria, **VIRUSES**, fungi or parasites.

Based on the policy wording and the applicable meaning of “contaminant,” the unendorsed policy excludes coverage for the presence of a virus via the pollution exclusion. But even this isn’t going to stop some attorneys from grasping at straws and any possibility of coverage. On March 16, the first business income suit was filed in Louisiana (Cajun Conti, LLC et al DBA Oceana Grill v. Certain Underwriters at Lloyd’s (and others including the governor and state)).

But even if the virus is considered property damage AND the pollution exclusion is ignored, how long will the “damage” be present?

* Surface can be disinfected in one day.
* If not taken care of and disinfected by the owner – according to recent scientific research, the virus can live for only a short time:
	+ Up to four hours in the air depending on the consistency (mist vs. droplets); and
	+ One to three days on surfaces – depending on the surface

Most Business Income policies have a 72-hour “deductible” or waiting period; so unless the waiting period has been reduced by endorsement (CP 15 56), there won’t be qualifying property damage after a maximum of three days for there to be a qualifying loss. But what about recontamination? Every new contamination is a new event and a new waiting period begins.

If the pollution exclusion is ignored, there is a mandatory endorsement attached to ISO property policies that removes all doubts, the CP 01 40. ISO Released the CP 01 40-Exclusion of Loss Due to Virus or Bacteria in 2006 as a mandatory endorsement to specifically exclude loss resulting from a Virus or bacteria.

ISO stated in the initial filing that the presence of viruses was NEVER intended to be covered due to the pollution exclusion, but they anticipated that some would torture the policy. The CP 01 40 was introduced to negate “*efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent*.” (ISO wording in the release.)

**Business Income Result**

So, what’s the result? There is no business income coverage.

* There is no property damage – thus there is no coverage.
* If courts disagree about property damage AND ignore the pollution exclusion, what is the period of damage? According to scientist, a maximum of three days without human intervention. (Remember, there is generally a 72-hour deductible.)
* If CP 01 40 attached, there is no question that there is no coverage.

Ultimately and overall, there is no Business Income Coverage.

**Civil Authority**

Let’s go to the policy and look at the wording in regard to civil authority (slightly abridged):

***a.******Civil Authority***

*In this Additional Coverage, Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.*

*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…caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:*

*(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*

*(2) 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 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 and will end:*

*(1) Four consecutive weeks after the date of that action; or*

*(2) When your Civil Authority Coverage for Business Income ends;*

*whichever is later.*

What are the requirements for there to be coverage? Some look very familiar:

* There must be a covered “cause of loss.” The damage, if there is any, is excluded by either the pollution exclusion or the CP 01 40.
* Access to the area must be prohibited by the civil authority. You can still get into the area you just can’t go into the building (maybe).
* The property damage must have occurred within 1 mile of insured’s premises.
* The civil authority must prohibit access due to dangerous physical conditions. Is it the property or the people that might lead to a civil authority decree? This is a biological condition not a physical condition.
* There is a 72-Hour “deductible.”

What is the result of these requirements? There is likely no coverage.

**Dependent Property Coverage**

Before we look at the coverage, let’s first define what qualifies as a dependent property. Dependent properties eligible for coverage in the business income form include:

* Buyers (ISO terminology - Recipient Locations);
* Suppliers (ISO - Contributing Locations);
* Providers (ISO - Manufacturing Locations); and
* Drivers (ISO - Leader Locations).

Let’s review the language from one of the four endorsements:

*A. 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 "dependent property" at the premises described in the Schedule caused by or resulting from a Covered Cause of Loss.*

Note the common requirements found in this language. There must be direct physical loss or damage and the damage must be from a covered cause of loss. Given the similarities, how does this coverage respond? Applying the same reasoning as that found in the other two sections, there is no coverage.

**The Moral of the Story**

In the business income policy, with or without the CP 01 40, there is no coverage – unless:

* Courts ignore the meaning and reality of property damage;
* Courts ignore the pollution exclusion (in the absence of the CP 01 40); or
* Governmental authorities intervene.

Even if coverage is found – there is generally a 72-hour deductible. The virus doesn’t live in the air on surfaces beyond that amount of time.

Here is the final reality, is it the property or the people that is the problem? Is this a biological issue or a property damage issue? The commercial property policy is not designed to cover biological issues, it is for property issues.

To end this article, given the policy wording and requirements, there is no coverage for a business income loss resulting from the coronavirus. But let me give you this final warning – if the insured wants to make a claim, do it and let the carrier decide. However, if the insured is just asking your opinion as to whether coverage exists, you can give it. But don’t advise against filing a claim, simply say you don’t think it’s covered based on policy wording, but that you will still file a claim if the insured wants you to do so.