

WILL MY BUSINESS INTERRUPTION INSURANCE COVER MY COVID-19-RELATED BUSINESS LOSSES? IF IT WON'T, WHAT ARE MY OPTIONS?

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As the economy is disrupted and expected revenues are lost during the COVID-19 pandemic, businesses need to know whether they have insurance coverage and, if they don't, what other options they might have to recoup or defray their losses.

Business Interruption Insurance. If you have a commercial property policy, it probably includes a business interruption policy ("BIP"). BIPs are a complex form of insurance because they are meant to cover something that never happened: a profit the business estimates it would have earned if the disruption hadn't occurred. Whether a BIP covers COVID-19-related losses depends on the language of your insurance policy and the extent to which the interruption of your business was caused by a risk covered by that policy language.

Policy Language. A BIP usually covers "direct physical loss of or damage to" your business operation due to a covered risk. Fires and natural disasters (like tornados or earthquakes) are common examples. Similarly, a contingent BIP, which is a separate policy from the standard BIP offered by most insurers and is not widely available in the market, can cover losses you experience because of a disruption to your customers or suppliers. "Supply chain insurance" usually covers business interruption due to a disrupted supply chain and doesn't require any loss to physical property. Such policies may cover similar COVID-19-related losses. Also, "civil authority coverage" can apply when government limits access to an area, resulting in impaired access to your business premises.

In the context of COVID-19-related claims, contingent BIPs and what is known as "notifiable disease coverage" are likely to come into play. Notifiable disease coverage is often triggered where the

government requires hospitals and businesses to report an instance of infection. We know from the SARS outbreak that it will likely only cover the difference between the loss to the business before the disease became notifiable, and after the disease became notifiable — which can be a tiny delta if (as was the case with SARS), the disease is highly stigmatized before it is officially notifiable (*i.e.*, required to be reported by the business).

Whether a COVID-19-related loss is a “physical loss” covered by a BIP will depend on how your policy language is interpreted. Closures ordered to control a virus are not the type of risk that typically arises under BIPs, but that doesn’t necessarily mean they aren’t covered in your policy. For COVID-19-related claims, policy wording is critical to coverage.

At the end of the spectrum where coverage is more likely, you may have a policy that specifically covers losses related to communicable diseases or, at least, does not require a physical loss to trigger coverage. Your policy is more likely to have that language if your business is in the hospitality, travel, or healthcare industries, but the language may crop up in policies sold to other types of businesses, too.

Even where coverage is more likely, though, it may be an uphill battle to prove that your loss directly resulted from COVID-19. For instance, if you have an employee with a positive test, that may or may not be sufficient in itself to show a direct physical loss to your business. The presence of a disease on your premises, or the spread of disease from your employee to a customer, are more likely to trigger coverage.

At the end of the spectrum where coverage is unlikely, your policy may specifically exclude coverage for losses caused by bacteria or viruses.

In the middle of the policy language spectrum, if your policy language neither clearly provides nor excludes coverage, your insurer will probably contend that your loss of business due to a virus shutdown, loss of consumer confidence or the like does not meet the “direct physical loss or damage” requirement in many standard policies.

If your policy language is in that unclear middle range of the coverage spectrum and your insurer takes the above position, there may be several ways to argue that your insurer is wrong. For instance, courts in several jurisdictions have held that a “physical loss” triggering BIP coverage exists where property is unfit for its intended use due to contamination. That argument would seem more likely to work if you have evidence that your business premises or products are contaminated, or spread contamination to your customers. Proof of that last option may well lead to litigation with the customer. You may have to decide if the potential for stigma and/or alleged liability related to any of these forms of proof is worth pursuing coverage.

If you are in the supply chain business, then under a contingent BIP you likely have coverage for damage at a supplier’s premises as if it was damage at your premises. But insurance is predicated on damage to property. If half of your supplier’s workers get sick, insurance will usually deny a claim for the resulting interruption to your business. But insurance will cover damage to your property, so if a large percentage of

the overall workforce falls ill (or the particularly virulent nature of a contagion makes such risk imminent), and the advice is that you need to do a deep clean and decontamination of premises, that could potentially provide a route for coverage as a result of damage to property – the premise being that the deep clean was necessary because the contagion was presumed to be present.

With supply chain insurance coverage, if a disease outbreak shuts down your supplier, your business could be covered for any lost income, regardless of whether there was any property damage that caused the disruption. Many businesses do not have supply chain insurance, though.

Also, if a BIP includes “civil authority” coverage that does not require proof that the government restricted access to the area where your business's premises are located as a result of a physical loss to your property, there may be an avenue for coverage. For example, if the government shuts down your entire office building because a worker in one of the businesses located there tested positive for COVID-19, you are more likely to have coverage if the civil authority provision in your policy doesn't require the infected worker to have been one of your employees and doesn't require the shutdown to have resulted from a direct physical loss or damage.

If the government shuts down your whole county as a public health measure to enforce social distancing, and you don't have a more direct link between viral contamination and your loss, then the legal determination of whether you have coverage will again depend on careful analysis of the policy language, the applicable law, and the facts of your case.

What we already know from the few cases on file in this crisis is that the insurance company will argue that the government lockdown does not trigger business interruption coverage under the typical civil authority clause. These arguments may be counteracted, in part, if the government decrees that the presence of COVID-19 resulted in property loss or damage to businesses in their area. New Orleans has put out a decree expressly stating as much for its area businesses, with the express intent of triggering business interruption coverage for them (<https://www.wvltv.com/article/news/health/coronavirus/first-coronavirus-insurance-dispute/289-9597675b-c4de-486b-b796-dc764b52b79a>).

For business owners in Dallas, the most important sentence published in the last week came on March 31, 2020, when the Amended Order of County Judge Clay Jenkins (Stay Home Stay Safe) included similar language to the New Orleans decree: “WHEREAS, The COVID-19 virus causes property loss or damage due to its ability to attach to surfaces for prolonged periods of time.” <https://www.dallascounty.org/Assets/uploads/docs/covid-19/orders-media/033120-DallasCountyOrder.pdf>. This language could be helpful for business owners who may seek to rely on it as some evidence that coverage should be triggered under policies that require property loss or damage as a coverage threshold.

On March 26, 2020, a Houston-area wig shop filed the first Texas suit related to an insurance company's denial of coverage for COVID-related losses in *Barbara Lane Snowden d/b/a Hair Goals Club v. Twin City Fire Insurance Company*, Cause No. 2020-19538, in the 113th Judicial District Court of Harris County, Texas.

The petition does not discuss the basis for coverage under the policy, but the quick denial and filing of suit suggests that the insurance companies may respond to these claims promptly and with minimal investigation in at least some cases. <https://www.huntoninsurancerecoveryblog.com/2020/03/articles/business-interruption/two-more-lawsuits-filed-over-covid-19-business-interruption-losses/>.

Causation. In circumstances where your policy won't cover your loss if it was caused by COVID-19, but the loss may have also been caused by a risk covered under the policy, coverage will depend on fact-intensive questions concerning which event actually caused the loss, and to what extent.

For example, if you are a contractor who fails to meet a construction schedule, and that failure may have been due to a subcontractor who tested positive for the virus or the destruction of certain key equipment at the jobsite (or both), the determination of whether the interruption of your business will be covered by your policy could be complicated. Expert testimony may be needed to help answer such questions if the answers depend on specialized knowledge that the layman juror would be unlikely to possess.

Extended Coverage. If you are not in an area where COVID-19 has arrived or do not have an ongoing business interruption from the virus, there are companies putting out COVID-19-specific endorsements. If purchased, such a policy would almost certainly not cover past losses, but could cover future losses, if they are significantly independent from the prior loss.

Ultimately, as COVID-19-related business disruptions continue to accrue, businesses must keep the lines of communication open with legal counsel, insurance brokers and accountants. Forethought and careful planning and consultation are key to gathering the information needed to submit a well-presented claim. The property/casualty insurance industry estimates that small business BI losses alone due to COVID could be between \$220-\$383 billion per month, which is one quarter to one half of the total industry surplus available to pay all P/C claims. <https://www.insurancejournal.com/news/national/2020/03/30/562738.htm>.

Other Options If You Have No Insurance Coverage. If you have no business interruption insurance or if coverage is denied, here are some options that may be available to defray or recoup your losses.

Force Majeure. If, due to COVID-19, you are facing losses because you are unable to perform under a contract, or the other party to the contract will damage you by failing to perform, then a *force majeure* clause may come into play if your contract has one. A *force majeure* clause is typically meant to excuse the parties from performing under the contract when certain circumstances beyond their control make performance commercially impracticable, illegal or impossible.

Those who will be unable to perform due to a COVID-19-related shutdown may argue that a pandemic is equivalent to an "act of God" that renders performance impracticable, illegal, or impossible. The party on the other side of the contract may argue that the party failing to perform is making excuses, being unreasonably cautious, or in breach of contract for some other reason.

See Bell Nunnally's COVID-19 Legal Services Resource Directory article discussing *force majeure* in more detail [here](#).

Litigation. If your own insurance policy won't cover your losses, part of them might be covered by the opposite parties to your contracts or their insurance, if their breach was not subject to a *force majeure* clause or if their insurance policy does not exclude coverage for damages related to your claim. Litigation is not a cheap or easy path, but it can be an appropriate one when the times are tough and the circumstances are right.

Help Through New Laws. At the time of this writing, state and federal government have passed a number of laws designed to dull the impact of the COVID-19 shutdowns. Bills intended to force insurance companies to pay on business interruption claims despite a lack of policy coverage are currently working their way through the New York, New Jersey, Massachusetts, and Ohio legislatures, though no such bill has been introduced to date in Texas. The federal EIDL and CARES Acts may provide alternatives to insurance coverage. The details of these legislative efforts and new laws are beyond the scope of this article, but business owners should pay close attention to the news and updates on Bell Nunnally's [COVID-19 Legal Services Resource Directory](#) to stay abreast of laws that may help minimize or recover COVID-19-related losses.

Other Resources. Validation of these business interruption concepts, as well as information on event cancellation insurance due to COVID-19, General Liability insurance (for claims from infected customers), and Workers' Comp insurance (for employees who have medical bills and lost-time claims due to infection) are beyond the scope of this article, but addressed briefly on the Texas Department of Insurance's website at <https://www.tdi.texas.gov/general/business-insurance.html>.

Next Steps. Whatever your current operational status is, there are a few steps every business should take right now:

1. Obtain a copy of your business interruption insurance policy from your insurance broker.
2. Review the policy with a knowledgeable attorney to know your rights.
3. If available, make a claim with your insurer so you do not accidentally waive any rights.
4. If the insurer is denying a valid or potentially valid claim, consider enforcing your rights through litigation.

Business owners may also choose to contact their congressional representatives to encourage them to introduce the kinds of legislation seen in New York, New Jersey, Massachusetts, or Ohio.

If you have questions or would like to discuss further, please contact [Ross Williams](#) or [Mason Jones](#).

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Litigation

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