

Commercial Property Insurance Claims in Response to COVID-19

A publication of the COVID-19 Recovery Task Force for the Business Law Section of the Florida Bar

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With special thanks and recognition to:
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Nearly every business and not-for-profit in the country has been impacted by the ongoing COVID-19 pandemic. Demand for goods and services has dropped precipitously due to stay-at-home orders, public health recommendations, and unemployment. Governmental orders have prohibited entire categories of businesses from operating. And limitations on large gatherings have prevented not-for-profits from holding traditional revenue-generating events, such as charity auctions, parties, and seminars. As a result, businesses and non-profits are scrambling to find ways to generate revenue and offset their pandemic-related losses.

This paper provides an overview of one potential source of recovery for businesses and non-profits: business interruption insurance. It defines and explains the common characteristics of standard business interruption insurance coverage and civil authority coverage included in many commercial property insurance policies. The paper identifies the possible benefits, and the limitations, that these types of coverage may have for insured businesses hoping to recover their losses as a result of the pandemic. It also briefly explains the litigation and legislation that has arisen in response to near-universal denials of coverage under these policies by insurers. Finally, this paper concludes with some practical recommendations for business owners and non-profits who are considering making a claim under their property insurance policy.

Standard Business Interruption Coverage

Business interruption insurance is a type of coverage often included in commercial property policies that is intended to pay for a business's loss of income when its operations are interrupted as a result of forced shutdown. Ordinarily, this kind of coverage is implicated when there has been a fire, theft, vandalism, or other damage to an insured's property. Often in such instances, a business will be forced to close down or move to a new location, causing disruption to the business's income. That's where business interruption insurance steps in and makes up the difference between what the business would have made absent the disruption, and what it actually made.¹

¹ Many policies provide coverage for other components of business interruption loss as well. For example, "extra expense" coverage pays for the costs associated with operating from a location other than the damaged premises. "Contingent business income and extra expense" coverage extends coverage to business income losses resulting from an interruption of the insured's business due to property damage suffered by a key supplier or customer. And finally, "civil authority" coverage, discussed in detail later in this paper, pays for losses resulting from the interruption of the insured's business after a governmental authority prohibits access to the insured's business in response to damage to property other than the insured's.

Whether an insured business's losses are covered is governed by the specific language of the policy. Generally, commercial property insurance coverages fall into one of two categories: "specified risk" (or "named peril") or "all risk (or "open peril"). Specified risk coverages are triggered solely by covered perils listed in the policy; all-risk policies automatically cover any risk that the policy does not explicitly exclude. Thus, in analyzing all risk policies, the exclusion language is the critical consideration, and insurers have the burden of establishing that a particular type of loss is excluded. Conversely, with a specified risk policy, the coverage clause is critical, and insureds have the burden of showing coverage.

Most commercial property policies are all-risk with respect to property damage, but will include additional, more narrowly drafted additional specified-risk coverages, possibly including business interruption, contingent business interruption, and civil authority coverage. While the specific language in a policy may vary, the Insurance Services Office ("ISO"), a provider of various insurance services, provides standard policy language that is widely used in the insurance industry.

Whether incorporating ISO standard policy language or not, business interruption coverage is typically limited by the following factors and requirements:

- **Direct physical damage.** Most policies require that the business losses be the result of some "direct physical loss or damage" to property; business interruption alone is not enough to trigger coverage. As discussed further below, this threshold issue presents a problem for business owners making claims for COVID-19 related business interruption because virus and disease do not neatly satisfy the "physical loss or damage" requirement.
- **Time limitations.** Business interruption policies place a limitation on the length of time for which the coverage pays for fixed expenses and lost profits. Basic business interruption coverage pays for a period until the physical premises are reconstructed or could be reconstructed with reasonable effort. Extended business interruption coverage pays for the longer period of time until the business at the reconstructed premises recovers (or with reasonable efforts should recover).
- **Covered peril vs. Excluded peril.** The physical loss or damage must be caused by an incident or peril that is covered under the policy. Many policies expressly *exclude* certain perils. In Florida, floods and hurricanes are two relevant examples of perils not usually covered under ordinary property insurance policies. Thus, the specific terms of the policy will dictate whether losses are covered or excluded based on the cause of the losses.

Most relevant to the pandemic, some policies specifically exclude from coverage losses due to viruses and disease. In fact, in 2006, the ISO adopted form language to be included in a policy endorsement (that is, an added policy term) providing for an exclusion for losses due to virus or bacteria. The exclusion would generally only apply to business interruption and civil authorities coverage. ISO form CP 01 40 07 06 is titled "Exclusion for Loss Due to Virus or Bacteria," and provides, in relevant part:

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.

Many commercial property policies have adopted the ISO virus exclusion or similar language. Such explicit exclusions may make recovery for business losses as a result of the COVID-19 pandemic unlikely.

On the other hand, some policies contain an express virus *inclusion*, including pandemic coverage. This coverage is usually provided at an additional premium upon specific request; standard insurance is unlikely to include virus coverage. Most famously, the host of the Wimbledon tennis tournament purchased pandemic insurance years ago and is reportedly set to receive payment of \$141 million under its policy, covering roughly half of its expected losses as a result of the cancelation of this year's tournament.

Civil Authority Coverage

Civil authority coverage is typically intended to cover business losses stemming from a government order prohibiting access to the insured's property after damage to property *other than* the insured's. Civil authority coverage has gained attention during the current pandemic as a potential solution to some of the coverage issues under standard interruption policies. Indeed, nearly every business across the country has suffered significant losses arguably as a result of governmental "stay at home" orders and orders prohibiting certain business activity (often, "non-essential" business activity).²

Like standard business interruption insurance, the purpose of civil authority coverage is to put the insured in substantially the same financial position as it would have been had the physical loss or property damage not occurred. But also like business interruption insurance, civil authority coverage typically applies to a relatively narrow set of circumstances and for a limited period of time, often two weeks.

As with standard business interruption coverage, the scope of civil authority coverage is determined by the language of the policy itself. Insurance policies differ significantly and the specific terms and conditions used will prevail over any assumptions or generalizations. While civil authority provisions can differ, the following language is common:

We will pay for the actual loss of "business income" you sustain and necessary "extra expense" caused by action of civil authority that prohibits access to your premises due to direct physical loss of or damage to property other than at the "covered premises," caused by or resulting from any Covered Cause of Loss.

The foregoing example contains some of the typical limitations on civil authority coverage, including the following:

² Existing orders in Florida: <https://floridapolitics.com/archives/325112-a-round-up-of-which-florida-communities-have-stay-at-home-orders-in-place>

- **Direct physical loss or damage to other property.** The civil authority order preventing the insured from operating must be “due to” some physical loss of or damage to property *other than* the insured’s property. For example, the restaurant next door to your business catches fire, necessitating significant reconstruction. The city closes the street and prohibits access to your business until the reconstruction is completed. Such losses meet the requirement for “direct physical loss,” provided that “fire” is a covered cause of loss. Some policies require that the triggering physical loss or property damage be near or adjacent to the insured’s own property. Policies also typically require that the order be issued because of direct physical loss that has occurred *already*, rather than be issued prophylactically to prevent damage.

In the context of the COVID-19 pandemic, if a policy does not specifically exclude virus-related losses, then whether coverage exists likely turns on whether viral contamination constitutes the kind of “direct physical loss or damage” required to trigger coverage. This is, to say the least, an open, and hotly contested, question. Occasionally, a civil authority’s order will specifically state that it is being issued due to property damage. For example, Broward County Executive Order 20-01 specifically states that it is based, in part, on the fact that the “virus is physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time.” Most orders do not include such language. Regardless, it is far from clear whether insurers or courts will consider such language determinative, or even persuasive, in any particular case.

- **Lack of access to property.** The civil authority order in question must prohibit access to the insured’s property. It is usually not enough for it to be difficult to access the property, or for the lack of access to be peripheral to the order. For example, if an order specifically prohibited airline travel, a hotel whose business was damaged as a result of decreased travel would probably not have a claim. An order that provides a recommendation or guidance will not be enough to trigger coverage; the order must prohibit access.

- **Complete prohibition.** The prohibition must be total, as opposed to partial. Thus, a business such as a restaurant or a grocery store which has been deemed “essential” under a “stay at home” order, and can continue to do business, albeit in a limited capacity, is unlikely to be able to take advantage of this coverage.

Litigation in response to claim denials

In response to the nearly universal denials of coverage under business interruption insurance policies for pandemic-based claims, numerous businesses in Florida and across the country have commenced litigation against their policy carrier. Many claimants are seeking class action status so that other companies with unpaid business interruption claims that have been or will be denied by the same insurance company can be added to the existing lawsuit.

Generally, these lawsuits are premised on two main arguments. First, because “direct physical loss” is required under both standard business interruption and civil authority clauses, businesses are arguing that SARS-CoV-2 (the virus that causes COVID-19) actually causes direct physical damage or property loss. One variant of this argument is that the virus renders the physical property inoperable, and thereby “damages” the property. Advocates may draw parallels to precedent established in the courts related to asbestos claims, though the comparison may only go so far. Asbestos, unlike a virus, physically degrades and harms physical surfaces.

Second, some businesses argue that virus related losses are covered *unless* they are expressly excluded from coverage. Proponents of this argument point out that many insurers (and the ISO, as noted above) adopted virus exclusions many years ago. Based on this fact, one can deduce that virus related damages *are* covered in the *absence* of a virus exclusion, or so the argument goes.

Many business interruption insurance carriers have issued public statements suggesting that business interruption coverage generally was not designed to cover losses as a result of a viral pandemic, pointing to the “direct physical loss” requirement. However, the particular language of each individual policy will determine the scope of coverage. Likewise, the outcome of any litigation initiated to dispute a denial of coverage will depend on the jurisdiction in which the case is filed. Courts’ interpretations of commonly used phrases (e.g., “due to,” and “direct physical loss or damage”) differ from state to state, and even from court to court within a state.

Legislation in response to claim denials

There is growing political pressure on insurers to provide coverage for business losses under existing insurance policies. As of this writing, there are bills proposed in Congress and the legislative bodies of six states that would require commercial property insurers to retroactively cover losses that insureds statewide have incurred because of the pandemic. These states so far include: Louisiana, Massachusetts, New York, Ohio, Pennsylvania, and South Carolina. To date, no legislation has been introduced in the Florida legislature. The bills, for the most part, limit retroactive coverage to smaller employers (e.g., 100 or fewer full time employees) and allow insurers who are forced to pay for losses to seek reimbursement through a state fund made up of assessments against all insurance companies. These bills would require insurers with in-force policies that offer coverage for losses from business interruption and civil authority orders to pay all losses arising from the pandemic until the civil authority orders are lifted, regardless of what the policy says—even if the policy expressly excludes virus related losses.

For insurers, retroactive state-mandated coverage for the pandemic poses a potentially existential threat to the entire industry. The industry unexpectedly faces the prospect of being required to pay claims on nearly every policy in the country, regardless of the particulars of each policy. Insurers are therefore expected to vigorously resist passage of any such legislation. Among other challenges, insurers are likely to seek an injunction to prevent enforcement of any legislation that becomes passes, and to challenge the constitutionality of the legislation under the Contracts Clause of the United States Constitution.

Recommendations to business owners with business interruption policies.

First, read your policy. While there are many common attributes of business interruption insurance policies, there are also many different inclusions, exclusions, endorsements, riders, and addendums that can determine the scope of coverage provided. As discussed above, policies may have either a virus inclusion or exclusion, and may include a civil authority clause.

Second, if you have been unable to operate your business, whether due to a civil authority order or otherwise, make a claim. The policy should include a phone number or website address for making claims. You do not need to retain an attorney or other professional to make a claim.

Simply call your carrier and submit a claim based on interruption to your business from the COVID-19 pandemic and, if applicable, the civil authority order(s) that prohibit or limit the operation of your business.

Third, if your claim is denied, consider challenging the denial. Given the complexity of the issues involved, hiring an attorney who practices insurance litigation law is recommended. An insurance litigation professional can help you evaluate the pros and cons, and chances of success, of challenging a claim denial (whether through filing a lawsuit or otherwise).