

Business Income Insurance...Does It Cover Coronavirus Shutdowns?

by Bill Wilson, CPCU, ARM, AIM, AAM

On March 16, a [lawsuit](#) was filed in district court in New Orleans seeking a declaratory judgment about whether the business income coverage in a Lloyds property policy would cover a government-mandated shutdown or curtailment of a restaurant due to the coronavirus.

The policyholder law firm filing the suit asserted in a press release that, “The policy issued by Lloyds of London provides coverage for a civil authority shutdown and does not contain an exclusion for a virus pandemic.” As we shall see, the absence of a specific exclusion doesn’t mean there is coverage if the insuring agreement is never triggered. In addition, a literal reading of the policy indicates that it, in fact, does not provide coverage for a civil authority shutdown of this type.

The press release goes on to say, “We filed this action because we have reason to believe that Lloyd’s took premiums without the intention of providing the indemnity paid for.” If there is no intent to cover losses caused by a viral pandemic (almost certainly the actuarial intent), then no premiums were taken to provide coverage that does not exist or was not intended to exist. The assertions in the suit for potential fraud appear to be patently absurd.

The purpose of this article is to evaluate the claims in the lawsuit in the context of the actual policy form(s) involved and the facts and circumstances of the coronavirus pandemic, including the governmental orders impacting many businesses.

Let me offer two caveats before I begin. First, I am not an attorney and nothing in this article should be construed as offering any type of legal advice. My goal is to offer a coverage analysis based on policy language and logic. Second, insurance is not a commodity. Policy forms are different and the analysis in this article largely addresses one industry-standard form which, by chance, happens to be the form used in the Lloyds policy.

There have already been numerous articles written, many by attorneys, opining whether or not most business income policies cover business interruptions caused by viral pandemics and any resulting shutdowns imposed by civil authorities. Many of these articles cite specific case law dealing with pollution exclusions and what constitutes “direct physical loss” in policy insuring agreements. At the end of this article, I’ve included links to some of these articles, particularly an excellent one entitled “Commercial Property Insurance Coverage and Coronavirus” by attorney Shannon O’Malley of Zelle LLP.

The consensus of most legal pundits and insurance experts is that most business income policies do NOT cover shutdowns due to viral pandemics. But, as this article intends to demonstrate, even if they did, the amount of coverage available would likely be minimal at best.

The Lloyds policy in question, according to the copy I received, offers coverage under the [ISO CP 00 30 10 12 – Business Income \(And Extra Expense\) Coverage Form](#), an industry-standard form and probably the most common business income coverage policy found in the insurance marketplace. With that as the coverage basis for this article, let’s review the assertions in the [lawsuit](#).

Policy Exclusions

The lawsuit’s “FACTUAL BACKGROUND” claims that the Lloyds policy provides “all risk coverage.” It then goes on to say that “An ‘all risk policy’ is an insurance policy which covers all risks unless clearly and specifically excluded.” That is not technically a factual statement. Presumably, it’s made to support the statement two

paragraphs later that, “The policy does not provide any exclusion due to losses, business or property, from a virus or global pandemic.”

The absence of a specific exclusion doesn’t create coverage. Coverage is created initially by the policy’s insuring agreement(s). Sometimes an exclusion is included in a policy simply to reiterate, clarify, or amplify that certain exposures are not covered in order to prevent or minimize litigation. However, the failure to include specific exclusions for every conceivable cause of loss is not practical and, again, is not evidence that any omitted cause of loss is covered, especially when there is no express mention in the policy of coverage for “all risks.”

Too illustrate, in 2006, ISO introduced the [CP 01 40 07 06 – Exclusion Of Loss Due To Virus Or Bacteria](#) endorsement. The reason cited in their Forms Filing CF-2006-OVBEF (a state-specific version was filed in Louisiana). The reason for the endorsement cited in the filing was that, while the current pollution exclusion in ISO property forms encompasses contamination, incidents at that time involving viral and bacterial contaminants like SARS and legionella warranted specifically addressing those causes of loss. According to the filing [**emphasis** added]:

*“Disease-causing agents may render a product impure (change its quality or substance), **or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property.** When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), **cost of decontamination** (for example, interior building surfaces), and business interruption (time element) losses.*

*“Although building and personal property could arguably become contaminated (**often temporarily**) by such viruses and bacteria, **the nature of the property itself would have a bearing on whether there is actual property damage.** An allegation of property damage may be a point of disagreement in a particular case.*

*“In addition, **pollution exclusions are at times narrowly applied by certain courts.** In recent years, ISO has filed exclusions to address specific exposures relating to contaminating or harmful substances. Examples are the mold exclusion in property and liability policies and the liability exclusion addressing silica dust. **Such exclusions enable elaboration of the specific exposure and thereby can reduce the likelihood of claim disputes and litigation.***

*“While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, **the specter of pandemic or hitherto unorthodox transmission of infectious material** raises the concern that **insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.***

“In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.”

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Via filings with state regulatory authorities throughout the country, ISO expresses the intent of its policy language, even without the filed endorsement, to **not** cover “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.” The CP 01 40 endorsement was created to head off any unintended claim disputes and litigation.

The Lloyds policy in question includes the unendorsed language in the ISO forms that continues to include the pollution exclusion referenced in the filing. To further support the intent of these forms to not cover viral contamination, we have to look to the insuring agreement(s) as well.

Insuring Agreement(s)

The policy form insuring agreement includes the following [**emphasis added**]:

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.

The lawsuit asserts that, “It is clear that contamination of the insured premises by the Coronavirus would be a direct physical loss needing remediation to clean the surfaces of the establishment.” The key phrase here and in many other lawsuits is “direct physical loss.” So, what constitutes “direct physical loss”?

As mentioned earlier, at the end of this article is a listing of articles that specifically cite case law addressing the “direct physical loss” issue. Does the mere presence of a substance on the surface of property, especially that which can be removed with a Clorox wipe, constitute “direct physical loss”? In the case of *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, cited in the “Commercial Property Insurance Coverage and Coronavirus” article, the court stated:

“The recognition that physical damage or alteration of property may occur at the microscopic level does not obviate the requirement that physical damage need be distinct and demonstrable....

“The mere adherence of molecules to porous surfaces, without more, does not equate to physical loss or damage.”

In other words, if the surface of property can be cleaned such that the property has not been altered then, in one view, it has suffered no direct physical damage. The view hold that, in order to constitute “direct physical” damage, **there must be some permanency and not just a temporary impairment**. As suggested by the ISO CP 01 40 filing, “the nature of the property itself would have a bearing on whether there is actual property damage.” Smoke from a fire, especially one with hazardous residue, can result in the destruction of food products but may be relatively easily cleaned on nonporous surfaces.

If someone’s vehicle is dirty, would the owner consider filing an auto insurance physical damage claim, or would he or she simply wash the vehicle? When a home’s contents become dusty or outdoor property is covered in pollen, do home owners rush to file homeowners contents claims because this “contamination” is especially hazardous to people with respiratory problems, or do they dust or, in the case of outdoor property, wait for the evening’s anticipated rainfall to remedy the “damage”?

Current science indicates that the coronavirus doesn’t survive more than 12-72 hours on most surfaces. In other words, even if left untreated, the “damage” self-destructs. Most auto policy collision coverage applies only to direct physical loss. If you damage a fender in a wreck, it does not restore itself to its undamaged state. Property charred by fire does not magically heal. In the case of coronavirus contamination, the affected property becomes unaffected in a matter of time. The property is only temporarily impaired and suffers no real permanent damage.

Perhaps seemingly frivolous claims like dirty cars has never been tested because deductibles would preclude recovery anyway. Or perhaps common sense dictates that superficial “damage” should just be remediated without involving an insurance adjuster or the courts?

Admittedly, a viral contamination is potentially more serious than one involving dirt and dust or even the impact of pollen on someone with respiratory problems or allergies. However, at this point, we are concerned with whether there is actually any real, direct and physical damage, not the potential amount of the damage in the form of a loss of business income. Also, keep in mind that the burden of proof is on the insured that an insuring agreement is triggered. We’ll come back to that point momentarily.

Finally, there is some case law that supports an interpretation of “direct physical loss” to include “damage” that is not structural but could make the premises unfit for occupancy or functionality. However, a notable difference between those cases and the present one is that there was actually proof of some manifestation of at least an odor. In the lawsuit in question, no specific evidence is provided of any viral contamination. In fact, neither of the governmental orders covered in the following section of this article allege any actual damage anywhere.

This situation is reminiscent of a condition in most property policies that insureds must reasonably protect their property from further damage and the insurer will pay for the cost to do so. So, for example, if a hurricane knocks out the windows in a building and the owner has someone board up the windows to protect the interior of the building, the insurer will pay for that expense. However, if the owner boards up the window because a hurricane is approaching, that expense is usually not covered. It’s only after there has been damage that coverage is triggered. Similarly, in this case, there must actually BE damage...preventive measures are not covered and prevention of disease transmission is precisely the purpose of government-mandated closures.

As an aside, what’s interesting is the actual language in the ISO form. The full phrase in the policy language is “direct physical loss of or damage to property.” There are two ways to interpret this grammatically:

- The consensus interpretation: [direct physical loss of] or [direct physical damage] to property
- An alternative interpretation: [direct physical loss of] [or damage to] property

The first interpretation applies the “direct physical” requirement to loss and damage. The second interpretation only applies the “direct physical” requirement to loss, otherwise implying that any other kind of “damage” short of “loss” does not require the damage to be of a “direct physical” nature.

I don’t know if this has ever been litigated as a syntactical ambiguity, but it might be an approach to get around the “direct physical” requirement for “damage.”

Order of Civil Authority

Since there was allegedly no known viral contamination at the restaurant which is the subject of the lawsuit, the suit’s focus is on the impact of governmental orders to discontinue, curtail, or modify operations in a way that causes a loss of business income due to a cessation or slowdown of business activities. For a restaurant, this could include a mandate to close, reduce occupancy, or limit sales to carry-out, drive-thru, or delivery.

The lawsuit specifically references proclamations from the governor and the mayor. The governor’s order applies to certain businesses:

*“...because of the ability of the COVID-19 virus to spread via personal interactions and **because of physical contamination of property** due to its propensity to attach to surfaces for prolonged periods of*

time....some business establishments are unable to continue current operations without unacceptable risks to the health and safety of the public.” [emphasis added]

The mayor’s order says that:

*“...there is reason to believe that COVID-19 may be spread amongst the population by various means of exposure, including the propensity to spread person to person and the propensity to attach to surfaces for prolonged periods of time, thereby spreading from surface to person **and causing property loss and damage in certain circumstances....**” [emphasis added]*

Why is the rationale for the orders of interest? This is the Civil Authority Additional Coverage in the ISO form [emphasis added]:

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 and necessary Extra Expense **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.

Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises 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.

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Let’s examine each of the highlighted policy language excerpts:

“When a Covered Cause of Loss causes damage to property other than property at the described premises....”

The first requirement for coverage is that there must be damage to property other than the subject property (a provision later requires this other property to be within a mile of the subject property). Note that the requirement here is simply “damage” and not necessarily “direct physical damage.” However, the requirement is that there IS damage, not that there might be or could be damage. Nothing in the lawsuit support’s the plaintiff’s burden of proof that there IS damage that triggers the insuring agreement.

“...caused by action of civil authority that prohibits access to the described premises....”

If there IS damage, the resulting loss to the subject insured must be “caused by” an order of the civil authority that prohibits access to the described premises. If, for example, the governmental order allows restaurants to continue operations with a drive-thru or carry-out, then there is no access prohibition.

“...Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage....”

Finally, this condition (and a second one cited in the policy language) must be met for coverage to be triggered. That does not appear to be the case in the circumstances cited by the lawsuit. There has been no demonstrated damage to nearby property, nor does a civil authority order prohibit “access to the area immediately surrounding the damaged property.” As far as I know, citizens are free to walk the streets throughout this area...they simply, at worst, can’t transact business at some establishments.

Clearly, the premise of the lawsuit does not trigger civil authority coverage because of the clear and unambiguous language of the policy. This illustrates how important it is to read the precise language in the insurance contract in question and not generalize about coverage.

Despite one of the primary assertions of the lawsuit (a requirement of “direct physical damage”) not being applicable, there simply is no proof of damage. This situation is akin to the FAA effectively shutting down airports and the businesses therein following 9/11. For example, in *United Air Lines, Inc. v. Insurance Co. of the State of Pennsylvania*, the court said closures were based on the fear of future attacks, not because of the damage to the Pentagon.

Likewise, closer to home in the Louisiana case of *730 Bienville Partners, Ltd. V. Assurance Co. of America*, the court found that the order of civil authority coverage did not apply to a hotel’s loss of business due to the FAA closure of airports following 9/11.

It's interesting that the governmental proclamations specifically reference property damage as a basis for the order. Perhaps this language was suggested by an astute attorney familiar with 9/11 litigation and/or insurance policy language. However, a proclamation does not constitute proof and the reality is that the circumstances of this pandemic simply do not trigger coverage under this policy language. And, if we’re being honest, any denial of access is not really “a result of the damage” ...it’s to prevent the communication of the virus from person to person using property surfaces as the means of transmission.

In February, ISO made two advisory forms available to subscribing insurers:

Business Interruption: Limited Coverage For Certain Civil Authority Orders Relating To Coronavirus

Business Interruption: Limited Coverage For Certain Civil Authority Orders Relating To Coronavirus
(Including Orders Restricting Some Modes Of Public Transportation)

The introduction of these coverage forms supports the premise that, without them, ISO considers their business income forms to not provide coverage otherwise. Whether courts will concur with that presumption is another matter.

Conclusions

- There is a consensus among insurance coverage experts and likely case law that “direct physical damage” of property requires more than superficial, temporary contamination that can be remediated relatively quickly and inexpensively.
- Case law that has found superficial “damage” to constitute “direct physical damage” is based on “damage” that has actually occurred, not on “damage” that might have occurred or could possibly occur.
- Even where “damage” can be proven, the language of the Civil Authority coverage in the ISO business income forms is unlikely to be triggered, especially when governmental orders, however phrased, are issued not because of any actual property damage, but rather to *prevent* property damage and, more likely, to prevent the spread of disease from person to person. The “property damage” angle, at best, is an attempt to trigger insurance coverage where none exists and for which no premium was ever collected.
- Finally, in the unlikely event that coverage IS triggered, the amount of coverage is likely to be limited. In the case of “damage” at the insured property, there is often a 72-hour waiting period for coverage. Most premises can be remediated within that time frame such that there is little, if any, loss of business income and any extra expense payment is likely to be relatively low. Similarly, the ability to clean the facilities quickly, even HVAC treatment, means that, if the 72-hour period is exceeded, it likely won’t be by much. And, in the case of civil authority orders, the coverage is usually limited to 2-4 weeks.

It will be interesting to see how the courts respond to this and other lawsuits seeking coverage. My conclusion, based on the policy language addressed in this article, is that there will be little, if any, coverage for business income loss. If there is coverage to be found, it will likely be for remediation under direct property forms and/or extra expense coverage under business income forms. Regardless, I would not anticipate long-term coverage for business income losses.

Note: This article was originally published on March 20, 2020 and edited on March 22, 2020 to correct some typos and expand the discussion of what constitutes “direct physical” damage. To ensure that you have the most recent edition, go to:

<https://insurancecommentary.com/business-income-insurancedoes-it-cover-coronavirus-shutdowns/>

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Related Reading

“Commercial Property Insurance Coverage and Coronavirus” by Shannon O’Malley, Zelle LLP

<https://www.zelle.com/assets/htmldocuments/Commercial%20Property%20Insurance%20Coverage%20and%20Coronavirus.pdf>

“First Coronavirus Coverage Suit Filed For Business Interruption” by Randy Maniloff, White and Williams LLP

<https://www.whiteandwilliams.com/resources-alerts-First-Coronavirus-Coverage-Suit-Filed-For-Business-Interruption.html>

“Coronavirus: Is There Coverage Under Property Insurance” by Paul Ferland and Alycen A. Moss, Cozen O’Connor

<https://www.lexology.com/library/detail.aspx?g=2f384dcf-bcfe-4e56-9611-5cfa5b08e424>

“Why Everyone Should Tender a COVID-19 Business Interruption Claim to Their Insurers” by Nicholas Reuhs, Ice Miller LLP

<https://www.lexology.com/library/detail.aspx?g=49c91b2d-1c71-4122-88fc-a2a096f04ca4>

“Will Business Interruption Insurance Provide Coverage for Coronavirus Losses?” by Julie E. Nevins and Robert Lewin, Stroock Special Bulletin

<https://www.stroock.com/publication/will-business-interruption-insurance-provide-coverage-for-coronavirus-losses/>

“Applying Commercial Property Insurance To COVID-19 Losses” by David Kroeger and Elin Park, Jenner & Block LLP

<https://jenner.com/system/assets/publications/19625/original/kroeger%20park%20March%20ILU%20March%2012%202020.pdf?1584115939>

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