

I. 2019 Novel Coronavirus Insurance Tool Kit for Businesses

- A. Assemble copies of your commercial property, general liability and any unique policies, such as pollution legal liability policies.
- B. Leases should be checked for insurance requirements for Tenants. Tenant policies should be checked to determine whether rental or business interruption coverage, including civil authority and other extensions or additional coverages, are required and whether the Landlord/Owner is included as an additional insured. All of these forms vary greatly.
- C. Copies of previous policies going back to 2005 can be helpful in analyzing whether special exclusions were improperly added to your policy and thus whether they may be unenforceable.
- D. You will hear a great deal of incorrect information regarding insurance coverages, such as business interruption coverage and civil authority extension or additional business income loss coverage. ***Do not let the insurance industry's campaign to discourage claims under these policies dissuade you from pursuing viable claims.*** There are ample arguments to be made in favor of these critical coverages.

Set out below are a number of coverages that should be considered.

II. Business Interruption Insurance

Business interruption coverage is intended to protect a business from financial losses as a result of a covered event. Policyholders have very broad and important expectations regarding such coverage. Multiple suits have already been filed in seven different jurisdictions, including Texas. [Click here](#) for a list of resources and lawsuits filed to-date as a result of the 2019 Novel Coronavirus.

- A. **Triggering Events**: Business interruption insurers use different approaches as to what triggers coverage:
 1. **Nature of the Risks Insured**:
 - a. **All risks of physical loss**: Policies covering all risks of physical loss the broadest coverage. Care must be taken to review any excluded causes of loss.
 - b. **Specified Causes of Loss**: The listed covered causes of loss must be reviewed to determine whether the recent events trigger coverage. In the most restrictive coverage, coverage for civil commotion is included and is being urged as a basis for coverage for some 2019 Novel Coronavirus claims.
 2. **Type of Injury Covered**: Many misleading statements have been made about this and similar triggers of coverage. ***General statements that a pandemic or epidemic will not trigger this coverage are misleading and incorrect.*** The circumstances of the loss and whether it leads to business interruption losses must be considered. ***There clearly are things involved with the 2019 Novel Coronavirus pandemic that will lead to covered loss or damage.***
 - a. **Direct physical loss of or damage to property**: Where use of the property has been lost as a result of the threat of contamination, the policyholder can urge coverage is triggered. When you cannot safely use your property, you have strong arguments that you have suffered a physical loss of the property. Moreover, ***fear of the presence*** of the virus may itself involve a physical loss or damage. Government disaster and other orders barring use because of the threat also cause a physical loss of property. Similarly, given the government orders barring use and what we know about COVID-19, insureds can urge there has been a physical contamination of the property.
 - b. **Direct loss**: Some policies changed to this phraseology. Explanations provided by the carriers as to the meaning of the change in some renewal policies are misleading and suggest that this means the same thing as "direct physical loss."

c. **Order of a Civil Authority:** Most policies include some form of business interruption coverage involving orders of a civil authority. Typically, the trigger for coverage is (a) loss or damage to the property insured, or (b) injury to **other property** connected with the order of a civil authority affecting use of the insured property. The arguments noted above regarding physical loss of or damage would appear to be available to satisfy these requirements. Some additional limitations apply to this coverage:

- (1) **Limited Period of Coverage:** Many policies limit this coverage to 30 days from a designated date, usually some waiting time after date of the order.
- (2) **Proximity Limitation:** Some policies require that if property other than the insured property is injured, the other property must be within a specified distance. Given the broad designation of the disaster zone in Dallas and other cities and counties, this limitation may ultimately not be found to impact coverage.

B. Exclusions:

1. **Nature of the Risks Insured:** Terminology is key in dealing with the exclusions and other limitations carriers may choose to rely upon. Remember that COVID-19 actually refers to “corona,” ‘VI’ for ‘virus,’ and ‘D’ for disease.” Thus, it is the disease, not the virus. “Coronavirus” is any of a family of single-stranded RNA viruses that have a lipid envelope studded with club-shaped projections that infect birds and many mammals, including humans, and cause diseases such as MERS, SARS, and COVID-19. “2019 Novel Coronavirus (2019-nCoV)” is the actual virus involved in the current pandemic. (Hereinafter “2019 Novel Coronavirus”).

- a. **Bacteria and Fungi:** These exclusions based on the express language used have no application to viral infections or contamination.
- b. **Pollution:** Pollution exclusions typically use definitions that focus on chemicals and the like and would not include viruses. The failure of pollution exclusions to include things like viruses apparently led to the development of virus and more detailed contamination exclusions.
- c. **Exclusion of Loss Due To Virus or Bacteria:** Some carriers are very bullish on “virus exclusions.” The most typical such exclusion is one developed by the Insurance Services Office in 2005-2006. It states in 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.” The exclusion does not apply to “pandemics.” Some carriers are arguing that it applies to civil authority and other extensions or additional coverages for business income loss as well.

Carriers started adding these to some policies in 2006-2007. ***It is important to identify if, when and whether it was appropriate for this endorsement to have been added to your policy. It is also important to determine if your insurance company was lawfully authorized to use this exclusion and whether your carrier complied with the requirements applicable in the jurisdiction where it was used.*** The explanation provided to some policyholders and regulatory authorities that this was a “clarification” of original intent is a gross understatement and will be the basis numerous attacks against the exclusion.

Note also that the legislatures in various states are considering bills that would eliminate the use of the virus exclusion and other possible policy defenses under certain circumstances. [Read more here.](#) This is certainly reflective of the fact the exclusion may be contrary to public policy. Also, note that several U.S. Congress members have written the insurance industry leaders, urging:

Business interruption insurance is intended to protect businesses against income losses as a result of disruptions to their operations and recognizing income losses due to COVID-19 will help sustain America's businesses through these turbulent times, keep their doors open, and retain employees on the payroll.

During times of crisis, we must all work together. We urge you to work with your member companies and brokers to recognize financial loss due to COVID-19 as part of policyholders' business interruption coverage.

- d. **Other Specialty Exclusions and Approaches:** The insurance carriers have taken an inconsistent approach to handling issues related to virus. The ISO exclusion discussed above is only one approach. Some exclude “contamination” with definitions including or excluding viruses. Others attempt to grant coverage for virus related situations with a miniscule sublimit. Some deal with “pathogenic biological material.” ***When science meets coverage, there is clearly confusion that will not aid the insurance companies.***

- C. **Contingent Business Interruption Coverage:** Contingent business interruption insurance covers losses resulting from an interruption of business at the insured premises based on a physical or direct loss of a customer or supplier. Thus, the issue will be whether the presence of the virus or its threat on continuous contamination from use by customers at the locations of customers or suppliers amounts to a physical injury or direct loss. The contingent property may be specifically named, or the coverage may blanket all customers and suppliers. The businesses of others that are covered may include: (1) direct suppliers or service providers, (2) direct customers of the Insured, or (3) any other third-parties that the Insured depends upon to attract customers.

III. **Event Cancellation Insurance**

Event cancellation coverage insures against loss arising out of the cancellation, interruption, or postponement of a covered event, so long as the source of the cancellation or postponement is covered under the insured’s policy. These are not standardized policies and thus their terms may vary greatly. Typically they cover a wide range of specified risks, sometimes including the outbreak of disease. Note, however, that some policies expressly exclude anything arising from a pandemic, epidemic or similar outbreak of disease.

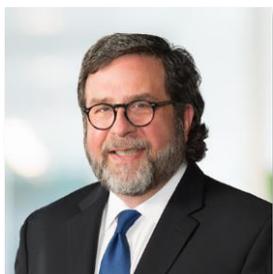
IV. **General Liability Insurance**

General liability insurance extends liability coverage for a wide variety of claims against the insured. We have seen that claims by the government for clean-up and remediation costs in environmental contamination cases that have been treated by some courts as a covered claim for damages. The Texas Supreme Court has also held that the cost of providing protective headsets to prevent bodily injury is a claim for damages because of bodily injury and thus covered. Any claims for 2019 Novel Coronavirus coverage relating to governmental orders will be vigorously contested by carriers.

General liability policies will also be tapped to respond to claims of third-parties claiming negligent exposure to the virus as a result of the conduct of the insured. Proof of causation will be difficult given the numerous sources of transmission. Nevertheless, such claims would likely be covered under a general liability policy absent a specific disease transmission, epidemic and/or pandemic exclusion.

V. **Workers’ Compensation**

Workers compensation insurance provides workers compensation benefits to employees injured in the course and scope of employment. Given the multiple sources of transmission, carriers will be carefully assessing whether the injury arose in the course and scope of employment of elsewhere.



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