

Henderson Brothers, Inc. White Paper

Coronavirus and Potential Business Interruption Claims

There are a number of risk management options you and your organization may want to consider when faced with events such as the spread of a pandemic disease, for example the recent coronavirus (COVID-19) outbreak. There are specific insurance products, such as event cancellation insurance or business-travel accident policies, that can provide coverage for adverse effects from a “covered event” or for medical issues/evacuations for “covered individuals.” These policies are specialty products that you and your organization should consider when hosting/attending conferences or otherwise traveling to high-risk areas. However, one should be aware that Communicable Disease or similar exclusions are common to such policies. Be sure that your specialty product meets your needs and your possible exposures.



As part of a traditional commercial insurance program, most organizations obtain property insurance with business interruption coverage. In light of the current coronavirus concerns, many organizations might look to their business interruption form to obtain a benefit. Such benefits may include coverage for first-party lost income, associated extra expense, slowdowns, or other “contingent business interruption” losses experienced by customers or suppliers (third-party losses).

In order to obtain coverage for business interruption or contingent business interruption claims, carriers require some form of proof that the property at issue (e.g., food stuffs, clothing, or factory premises) itself suffered some level of contamination. Diligent and thorough preparation of a record documenting the causes of any shutdown or slowdown by the insured will be critical in efforts to secure coverage.

The damage to and/or contamination of the property at issue (first-party or third-party) will be the focus of any documentation which may put your organization in a position to benefit from a business interruption policy. As an insured, you should be aware

that the availability of coverage where no direct physical loss occurred is more likely the

In examining this component, an ISO business interruption form appears as follows:

COMMERCIAL PROPERTY
CP 00 30 04 02

BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words “you” and “your” refer to the Named Insured shown in the Declarations. The words “we”, “us” and “our” refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section G. – **Definitions**.

A. Coverage

1. Business Income

Business Income means the:

- a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
- b. Continuing normal operating expenses incurred, including payroll.

For manufacturing risks, Net Income includes the net sales value of production.

Coverage is provided as described and limited below for one or more of the following options for which a Limit of Insurance is shown in the Declarations:

- a. Business Income including “Rental Value”.
- b. Business Income other than “Rental Value”.
- c. “Rental Value”.

If option a. above is selected, the term Business Income will include “Rental Value”. If option c. above is selected, the term Business Income will mean “Rental Value” only.

If Limits of Insurance are shown under more than one of the above options, the provisions of this Coverage Part apply separately to each.

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. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of the site at which the described premises are located.

2. Extra Expense

With respect to the requirements set forth in the preceding paragraph, if you occupy only part of the site at which the described premises are located, your premises means:

- a. The portion of the building which you rent, lease or occupy; and
- b. Any area within the building or on the site at which the described premises are located, if that area services, or is used to gain access to, the described premises.

Extra Expense coverage is provided at the premises described in the Declarations only if the Declarations show that Business Income coverage applies at that premises.

Extra Expense means necessary expenses you incur during the “period of restoration” that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.

We will pay Extra Expense (other than the expense to repair or replace property) to:

- (1) Avoid or minimize the “suspension” of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.
- (2) Minimize the “suspension” of business if you cannot continue “operations”.

We will also pay Extra Expense to repair or replace property, but only to the extent it reduces the amount of loss that otherwise would have been payable under this Coverage Form.

exception than the norm, and this is especially true when there is an absence of the necessary documentation of the physical loss. Concerns and decisions not to attend usually do not trigger coverage. Thus, when evaluating any potential claim for coverage, the direct physical loss component is the key element requiring analysis when seeking coverage under your business interruption form.

In the blue highlighted area, you can see that the carrier will pay “for actual loss of Business Income . . . caused by direct physical loss of or damage to property at premises....” Coverage determinations will likely begin and end with this language.

In addition to this ISO standard business interruption form,

following the SARS outbreak in 2002-2003, ISO also developed a prototype endorsement to exclude property and business interruption losses caused by Virus, Bacteria, or other microorganism that “induces or is capable of inducing physical distress, illness, or disease.” Many carriers utilize this endorsement, although some industry-specific Virus and Bacteria endorsements, such as for healthcare organizations, may not be as limiting as the ISO prototype for Virus and Bacteria. Please review your endorsements carefully.¹

Upon consideration of the standard direct physical loss language and possible endorsements, the general rule is that when a claim for lost business income is made as a result of a communicable disease, such as the coronavirus, that adversely affects the insured’s business, the “direct physical loss of or damage to property at premises” element still must be satisfied in order to trigger coverage.

Aside from a direct physical damage path to coverage, many

business interruption forms provide coverage for losses derived from Civil Authority directives. On this topic, one case applying Pennsylvania law is particularly illustrative. In Philadelphia Parking Authority v. Federal Ins. Co., 385 F.Supp.2d 280 (S.D.N.Y. 2005), a Pennsylvania state-created agency (“Parking Authority”) that operated parking facilities at the Philadelphia airport sued its property insurer for certain business losses sustained when the FAA grounded all civil aircrafts after the 9/11 terrorist attacks.

In support of its position, the Parking Authority argued that the FAA’s order grounding civil aircrafts “effectively prevented ingress and egress of passengers into terminal areas of the airport and the parking facilities” and, as a result, there was a severe reduction in business. In rejecting the Parking Authority’s argument, the court held that the plain language of the FAA’s order did not “prohibit[] access to” the Parking Authority’s garages, even though it obviated the need for the parking services

The direct physical loss component of your Business Interruption coverage is critical, even when the interruption results from a Civil Authority’s order or by a voluntary quarantine/shutdown.

¹ ISO, in its efforts to provide forms that reflect modern exposures, recently created two business income endorsements as a specific response to the Coronavirus:

- Business Interruption: Limited Coverage For Certain Civil Authority Orders Relating To Coronavirus -Edition February, 2020; and
- Business Interruption: Limited Coverage For Certain Civil Authority Orders Relating To Coronavirus (Including Orders Restricting Some Modes Of Public Transportation) -Edition February, 2020.

An individual insurer will have to make the decision whether or not to implement (or modify and implement) these types of endorsements. It is not clear at this point whether any insurers will be willing to offer such coverage on these forms.

temporarily, and therefore did not create the potential for coverage under the Parking Authority's policy. Consequently, no coverage—i.e. there was no damage to or unusable scenario pertaining to the parking garages.

Hypothetically speaking, if the FAA had also prohibited access to the Parking Authority's garages as part of its order, the Parking Authority may have been able to recover under its policy pursuant to a Civil Authority coverage extension. However, as previously stated, direct physical loss is still a requirement even when the

loss is precipitated by a Civil Authority's order. Therefore, the Parking Authority would have had to establish that it sustained a business interruption caused by the FAA's order as a result of "direct physical loss of or damage to property, other than at the premises." Thus, while a more expansive and encompassing FAA order could have improved the Parking Authority's argument in favor of coverage; satisfying the direct physical damage element would have remained tenuous.

An example of the operative language in the general ISO form reads as follows:

As you can see, when evaluating the direct physical loss requirement, we note that while the element must still be satisfied, the direct physical loss must occur somewhere in the chain, must be documented, and must directly impact the insured's operations, but it need not be precisely on the insured's premises to trigger coverage.

In conclusion, the direct physical loss component of your Business Interruption coverage is critical, even when the interruption results from a Civil Authority's order or, even, when caused by a voluntary quarantine/shutdown.

Preparing a detailed record documenting any interruption related in whole or in part to the coronavirus is vital to the potential for success of your claim for coverage. In addition, a detailed review of your policy language is paramount when considering a claim for losses/disruption related to the coronavirus.

when action is taken to avoid or minimize a "suspension" of "operations" caused by destruction or corruption of electronic data, or any loss or damage to electronic data, except as provided under the Additional Coverage – Interruption Of Computer Operations.

c. Electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment. The term computer programs, referred to in the foregoing description of electronic data, means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data.

5. Additional Coverages

a. Civil Authority

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 due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

The coverage for Business Income will begin 72 hours after the time of that action and will apply for a period of up to three consecutive weeks after coverage begins.

Cause of Loss to:

- (1) New buildings or structures, whether complete or under construction;
- (2) Alterations or additions to existing buildings or structures; and
- (3) Machinery, equipment, supplies or building materials located on or within 100 feet of the described premises and:
 - (a) Used in the construction, alterations or additions; or
 - (b) Incidental to the occupancy of new buildings.

If such direct physical loss or damage delays the start of "operations", the "period of restoration" for Business Income Coverage will begin on the date "operations" would have begun if the direct physical loss or damage had not occurred.

c. Extended Business Income

- (1) Business Income Other Than "Rental Value"

If the necessary "suspension" of your "operations" produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period that:

 - (a) Begins on the date property (except "finished stock") is actually repaired, rebuilt or replaced and "operations" are resumed; and
 - (b) Ends on the earlier of:
 - (i) The date you could restore your "operations", with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage had occurred; or

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