

Business Interruption Claims - Insurance Coverage/Bad Faith Newsletter

Business interruption and/or Business Income and Business Expense coverage is typically added to a Business Property Policy or via a comprehensive Business Owner's Policy. This coverage is intended to protect businesses against income loss that may be sustained as a result of disruptions in their operations due to defined conditions. While the unique language in any given policy will ultimately control, the scope of coverage that is typically provided is triggered when the policyholder sustains "direct physical loss of or damage to scheduled property" caused by a "covered loss." As it relates to potential business interruption/business expense claims arising from the Coronavirus crisis, a policyholder will have to establish that the existence of the Coronavirus at the business premise satisfies the policy requirement of "direct physical loss of or damage to insured property." This requirement would not appear to be satisfied by instances of person to person transmission at a business location.

Separate and apart from the foregoing, a policyholder's claim for business interruption coverage may also face additional coverage defenses. For example, a policy's coverage for business interruption may be subject to a policy exclusion for a virus. In 2006, ISO introduced an endorsement containing an exclusion for loss due to virus or bacteria. There may also be potential coverage defense arising from the policy's pollution exclusion depending upon the policy language as some policies define a "pollutant" as including a virus. Another common policy exclusion is the fungi or bacteria exclusion. It is questionable as to whether the Coronavirus would be considered bacterium under this exclusion.

Notably, cases have already been filed by restaurant owners whose businesses have been adversely impacted by a government mandated shutdown or restriction on the gathering of people. Interestingly, the policyholders in these cases are arguing that the physical presence of the Coronavirus on business property physically impacts public and private property. The policyholders maintain that the virus physically infects and stays on surfaces for up to twenty-eight days and that a contamination of the insured premises by the virus constitutes "direct physical loss requiring remediation to clean the surfaces of the establishment." In essence, this policyholder position likens the existence of the Coronavirus on business surfaces to cases where intrusion of lead or gaseous fumes into an insured's business premise have been found to constitute direct physical loss.