

## Business Interruption Coverage and Current, Pending Federal Legislation

Michael D. Strasavich

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We are fielding a number of inquiries from clients relative to their business interruption coverages. The following bullet points below constitute some basic considerations and issues that should be contemplated concerning these particular policies under the present circumstances:

- **Has a business location entirely ceased operations or closed, or has business or customer traffic merely fallen off?** Many business interruption policies may not respond unless and until a business location's doors have been closed and business ceased at that location. The mere fact that business has fallen off is not likely in and of itself to trigger coverage. A business location must generally be closed for a certain period of time (expressed in hours or days in the policy's declarations) before coverage is triggered (think of this like a deductible).
- **Has there been physical damage to the business premises?** This will be the primary and most heavily litigated question for business interruption insurance policies in the context of the coronavirus pandemic. Viewed traditionally, there would be no coverage under such policies triggered by the pandemic because there has not been "physical damage" to the business premises. In the coronavirus pandemic, however, there will likely be debate over precisely what this term means, especially given that the virus is reported to have the ability to exist on surfaces for hours or days, thus giving rise to the argument that there has been "physical damage" to the physical business premises due to contamination by the virus. This will ultimately be a very fact intensive question depending on the circumstances of the business.
- **Has the business been closed by an order of the civil authorities?** Right now, business losses are likely being caused due to a drop off in customer traffic. In other instances, however, businesses have been forced to close their doors due to orders from state or local governments (for example, order of state or local health departments). The question of whether a business has closed may be further complicated under particular circumstances, as restaurants prevented from providing on-site consumption continue to provide take-out orders. However, note that civil authority provisions typically provide coverage only where the civil authority order closing your business is caused by "physical damage" to another nearby business, thus again implicating the question above.
- **Is the coronavirus pandemic a covered cause of loss under the business interruption policy?** First, many policies may contain an exclusion for losses caused by communicable diseases, bacteria, or viruses. These exclusions are typically covered with very strong and broad language that will make circumvention of such exclusions doubtful, but this will be a policy-specific issue. Otherwise, there are policies that are "all risk" policies and policies which are "named peril" policies. For "all risk" policies, the policy insures against physical loss or damage provided by all risks unless a risk is expressly excluded elsewhere in the policy. For

“named peril” policies, the policy will insure against physical loss or damage only caused by those perils which are specifically named or listed in the policy, unless otherwise excluded. Even if a policy is “all risk” and does not have a specific exclusion applicable to the coronavirus, there will be an issue of whether a business premises has sustained physical damage.

- **If there is the potential for coverage, what is the history of the profitability of the business location?** There are a variety of policy provisions which relate to how business loss is calculated or which cover certain aspects of a business loss from cessation of business, assuming that the threshold issue of coverage is overcome. Typically, such policies replace the business location’s net business income, meaning the profit (revenue minus expenses). If a business is unprofitable before a triggering event, there may be no compensable loss under the policy even if the coverage issues are overcome. If there is coverage and a business relocated to a different, undamaged business location in order to resume normal operations, the expense of this move may be covered under what is known as Extra Expense coverage. Other potential forms of Extra Expense coverage could be the implementation of technology enabling employees to work remotely and restart business operations after they have ceased due to a covered cause of a loss.
- Business A is unaffected by coronavirus but my supplier’s business is closed or unable to provide supplies and materials to my business. Depending upon the type of business interruption policy, there is a particular coverage available called Contingent Business Interruption coverage, which will typically name specific suppliers or subcontractors. If included in the policy, this coverage may provide benefits to businesses whose own locations are not specifically damaged, if there is physical loss or damage to the supplier’s or subcontractor’s business premises such that its business must cease.
- **Exhaust review of all potentially applicable policies.** Even if there may not be coverage under one policy form, certain companies especially larger ones may have master policies or other policies with different provisions on coverage, on calculation of loss, etc. Some may even call for application of the law of another state or a foreign country, which may impact the above questions and considerations. Check with your company’s insurance broker on this when in doubt.

As stated above, the primary issues now are (1) whether a business location has sustained physical damage, (2) whether the business activities at a particular location have ceased entirely, and (3) whether a civil authority closure can be traced to another nearby business that has sustained physical loss or damage.

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**To discuss this further, please contact:**

[Michael D. Strasavich](#) at (251) 345-8206 or [mike.strasavich@burr.com](mailto:mike.strasavich@burr.com)

or the Burr & Forman attorney with whom you normally consult.

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