

# Coronavirus Raises Novel Business Insurance Issues

## I. Overview

A. As the novel coronavirus continues its march across the U.S., the bottom line for all businesses and workers is that it will be some time before we return to “business as usual.” This new reality begs the question many businesses are asking: “Do I have any insurance for this?”

B. Some businesses, such as restaurants, bars, and gyms, have been shuttered pursuant to orders by state and local governments, while others have voluntarily scaled back and/or have moved to a remote work structure, making use of remote access to work from home.

C. Most businesses have insurance programs in place to guard against unforeseen circumstances. Businesses may have a program that includes commercial general liability, employment practices, director and officers and business interruption. Some companies may even have specialty policies such as event coverage, fiduciary coverage, errors and omissions, kidnap and ransom, and, perhaps, product tampering and product contamination.

D. Whether this coverage will cover or help to defray the effects of the Covid-19 pandemic largely depends on the terms and conditions of the specific policy. Thus, it is important for businesses to consult with their brokers and attorneys to determine what, if any, insurance coverage is available and under what circumstances coverage might be triggered.

E. Below is general guidance on the coverages offered by carriers and raises issues for businesses to consider when examining if their insurance policies cover the losses caused by the outbreak of Covid-19. It's imperative for business owners to understand that insurance coverage can be highly fact driven, but we offer some general statements to assist businesses as they review their insurance program.

## II. Business Interruption and Contingent Business Interruption

A. Business interruption coverage, also called business income coverage, is designed to cover financial loss caused by an interruption in operations. It is triggered by a covered cause of loss that results in slowed or suspended revenue generation. Extra expense coverage often goes hand-in-hand with business interruption, as it provides reimbursement for additional expenditures incurred in the course of resuming business operations.

B. The covered causes are often specifically delineated and require a designated peril to trigger them, such as fire, earthquakes, or other specified incidents. Policies often also require “direct physical loss” to the property and proof of causation. As a result, Covid-19 presents unique coverage questions because it may not fulfill these policy requirements.

C. For example, if a business were to close voluntarily but was otherwise still habitable, it probably has not suffered a “direct physical loss” even if such closure was a reasonable response to Covid-19.

D. By contrast, if property becomes uninhabitable due to a contamination, there might be a basis to claim a “direct physical loss” though the coverage may be limited to the time and expense to sanitize the property, as opposed to the extended time of shutdown many businesses are currently facing.

E. Government-mandated closures present their own unique questions, such as whether such shutdown is ordered or merely recommended, and whether a particular policy includes such eventuality as a named peril triggering coverage.

F. For example, Pennsylvania Gov. Tom Wolf (D) ordered that restaurants and bars close their dine-in facilities, but only urged “non-essential” businesses such as gyms, hair salons, and movie theaters to do the same. Municipal, county, and state-wide closures are changing daily, so it is important to stay abreast of the news. Careful attention to policy provisions specifically addressing government action is warranted.

G. Additionally, many policies contain express exclusions for “communicable or infectious disease” or “virus.” Policies may also require mitigation of losses, though whether the extra expense incurred in doing so is covered depends on the policy language.

H. Finally, even if business interruption and extra expense coverage exists, the scope is likely up for debate. For example, a fitness studio closes and suffers the loss of drop-in customer revenue, but purchases equipment and software to stream video workouts to monthly customers who continue to pay. What is covered in such a scenario? It is vital for businesses to work closely with brokers and attorneys to answer these kinds of questions.

### **III. Event Cancellation and Nonappearance Insurance**

A. Insurance policies covering event cancellations or nonappearance of key persons generally provide coverage for losses beyond the control of the policyholders, organizers, and/or attendees.

B. Such policies are commonplace in the entertainment, music, sports, and event-planning industries and are purchased to cover losses beyond the policyholder’s control, such as weather events—including hurricanes, tornadoes, major storms,

earthquakes, and wildfires—as well as terrorism, labor strikes, non-appearance of key people, and unavailability of the venue due to fires, floods, or power outages.

C. Generally, event-cancellation policies exclude infectious disease coverage, which is offered only via an optional rider or endorsement for an additional charge.

D. This type of coverage has become increasingly relevant in the wake of Covid-19. Indeed, as the lights on Broadway flicker out for the time being and the NBA, MLB, and PGA suspend all sporting events, questions as to coverage for such postponements and cancellations abound.

E. Insureds who purchased the optional coverage for infectious or communicable diseases before January 2020 may be covered for losses caused by the outbreak; however, it is being reported that such optional coverage is no longer being offered. And many insurers are including specific coronavirus exclusions in newly issued event-cancellation policies.

F. Insureds should carefully review their event-cancellation policies with their attorneys or insurers to determine if they purchased optional coverage that may cover Covid-19 losses.

#### **IV. Commercial General Liability ('CGL') Insurance**

A. Commercial general liability policies may provide defense and indemnification for claims asserted by third parties for bodily injury or property damage arising out of the Covid-19 outbreak.

B. For instance, consider the lawsuit recently filed in a federal court in California: *Weissberger et al. v. Princess Cruise Lines Ltd.* There, the plaintiffs, Ronald and Eva Weissberger, were passengers on the Grand Princess cruise liner that was docked off the coast of California for several days because its passengers and crew had been exposed to Covid-19.

C. The Weissbergers allege that Princess Cruise Lines had actual knowledge that two other passengers had symptoms of Covid-19 and placed profits over the safety of its other passengers by choosing to continue its regular business operations. At some point, it is likely that the question will arise as to whether the losses alleged by the Weissbergers are covered under the CGL policy of Grand Princess Cruise Lines.

D. Policyholders should review their CGL policies and the exclusions contained therein to determine if losses, such as those described above, are covered, and whether any exclusion, such as for communicable diseases, bars coverage for such third-party claims.

## V. State Actions

A. Some states are already taking action to protect policyholders. The New Jersey Assembly is currently considering Bill A-3844, which “concerns business interruption insurance during coronavirus disease 2019 state of emergency.”

B. The draft bill provides, in relevant part: “Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption in force in this State on the effective date of this act, shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic .... concerning the coronavirus disease 2019 pandemic.”

C. In New York, the Department of Financial Services issued a call to all property and casualty insurers to examine their policies and prepare an explanation of benefits for each policy type to be sent to policyholders, which should “explain the coverage each policy offers in regard to Covid-19—both presently and as the situation could develop to change the policyholder’s status (i.e., is there any potential for coverage as a result of Covid-19).”

D. Other states may choose to follow in the footsteps of New Jersey and New York in order to protect businesses, especially given concerns about the economic impact of the Covid-19 outbreak.

E. In these uncertain times, businesses should stay on top of the news—including governmental closures, recommendations, and potentially helpful legislation and orders. Small businesses in particular should carefully track extra expenditures and consult resources such as the U.S. Small Business Administration for guidance and capital loans, which may fill in gaps where insurance coverage is not available.

F. Legal guidance is especially important in determining duties and obligations under the law and under insurance policies, including best practices in the event that coverage is applicable at some point in the future.