



## **Coronavirus – will Insurance Coverage Respond?**

I want to get two things out there before I start on my rant. First, I am not a lawyer, so this article should not be construed in any way as me offering legal advice. Having said that, I have worked in the general insurance industry for over 40 years and have always had a keen interest in analyzing and understanding the wordings – some would call me a wording geek. Second, I will base my observations on the IBC recommended wordings. I realize that although coverage will vary from company to company, most have used the IBC wordings as the template.

There have been numerous articles written over the past month about whether business losses resulting from the coronavirus will be insured by the property wordings. The main focus of concern is the loss of business income resulting from forced closures. So, how do we think the insurance industry will respond?

Generally lost income coverage will only be triggered by a direct insured loss to the insured property. It seems a stretch to say that the coronavirus could qualify as an insured loss, but of course, the courts will be the final judge as to how the wordings will be interpreted. The best place to find answers to this question is to analyze the wordings.

Considering Business Income coverage is a follow form, our first stop will be to review the Commercial Property wording and this can be done in a series of steps as follows:

### **Step 1: Analyze the Indemnity Agreement:**

This agreement simply states that the insurer will indemnify the insured when the insured property suffers direct loss or damage as a result of an insured peril. Is the coronavirus an insured peril? Let's take a look.

## Step 2: Analyze the Insured Perils:

The IBC policy insures *All Risks of Direct Physical Loss or Damage* to the insured property. One question that arises is: Can the coronavirus actually cause direct physical loss to property? There is case law to suggest that in order to constitute *direct and physical* damage, there should be some permanency and that some peril has actually changed the property causing it to be unsatisfactory for future use. Health officials have advised us that the coronavirus can live on surfaces for anywhere from a few hours to several days, but with a thorough disinfectant cleaning the remains of the virus can be removed. Considering this, it appears that the virus would not cause direct and physical damage.

On the other hand, there is conflicting US case law where the judge ruled that property can actually sustain physical damage without experiencing structural alteration.

We already have a class-action suit in the Canadian courts, so we will see how they rule on the question of direct physical loss. But let's say the courts rule in favour of this virus causing direct physical loss. Remember the obligation will still rest with the insured to prove that their reduction in sales is caused by the physical damage to property insured.

## Step 3: Analyze the Exclusions:

If the courts rule that direct and physical loss has occurred, the next step is to review any exclusions that may apply:

- Delay, loss of market, loss of use or occupancy: The Insured Perils clause specifically state that there must be a *direct*, physical loss to property, so this exclusion has only been included to clarify the fact that all resulting *indirect losses* will be excluded.
- Vacancy: The commercial exclusion for vacancy is stricter than the exclusion found in the homeowner's wordings. Coverage will cease if the insured is aware of the property being vacant, shutdown or unoccupied for 30 days or more. Unless the insurance companies amend this exclusion, any coverage that may be granted would cease after 30 days of shutdown.
- Fungi: This exclusion states that there is no direct or indirect coverage consisting of or caused by fungi or spores. Fungi is defined in the IBC policy to include a number of things, including, "*pathogenic or toxigenic, and any substance, vapour, or gas produced by, emitted from or arising out of any fungi or spores or resultant mycotoxins, allergens or pathogens.*" Merriam Webster defines pathogen as *a specific causative agent (such as a bacterium or virus) of disease*. This definition presents a potential argument that the coronavirus could fit within the definition of pathogen and if that argument sticks, all coverage would be excluded.

- **Pollution:** All Risks wordings include an exclusion for pollution that I think may be worthy of mention, however, I don't think it will impact any decisions about whether or not losses resulting from the coronavirus will be insured.
- **Contamination:** All Risks wordings include an exclusion for contamination that I think may be worthy of mention, however, I don't think it will impact any decisions about whether or not losses resulting from the coronavirus will be insured.

#### **Step 4: Analyze the IBC Business Interruption Coverage:**

Now that we have reviewed the *direct* coverage and exclusions that apply to the building and contents, let's take a look at the *indirect* Business Interruption extensions of coverage. There are a couple of clauses of interest, so let's start at the beginning with the Indemnity Agreement.

- **Indemnity Agreement:** Whether we are looking at the old IBC Profits Wording, or the newer IBC Business Income Wordings, the Indemnity Agreement clearly states that there must first be direct insured damage to the property insured to trigger loss of income coverage. The newer IBC Business Income wording defines *damage* to specifically include direct physical loss or damage to the property that results from an insured peril. As mentioned above, it seems unlikely that the income that is lost because of forced closures to reduce the spread of the coronavirus will qualify as a direct loss to the property insured, however, this will fall upon the courts to decide.
- **Interruption by Civil Authority:** All Business Interruption wordings include a clause to extend coverage for income lost because a civil authority has prohibited access to their premises. This clause will only apply when access has been denied because the neighbouring premises has suffered a loss that would be insured by this policy. The standard IBC wordings restrict this extension to a maximum of 2 weeks.

All insurers have some form of this same extension included in their business interruption coverage, and the actual perils and the time limitations vary from company to company. Generally speaking, this coverage will not respond unless an insurer has modified their wordings to specifically insure the spread of a virus. If this happens, there will most certainly be waiting periods and/or a time restriction that could range anywhere from 2 weeks to 60-90 days!

- **Conclusion:** Will insurance coverage respond to the coronavirus? We need answers to the following 3 questions:

1. Can the coronavirus actually cause direct physical damage? It seems unlikely, but the courts will make the final decision.

2. If the courts say YES, will the exclusions hold up? Exclusions vary from Insurer to insurer, but the IBC exclusions look pretty tight.

3. How will the Interruption by Civil Authority apply? Standard wordings require *insured direct damage* to neighbouring premises to trigger this extension, so as in question #1, it depends on the court's decision about direct damage. If the courts deem coronavirus to cause direct damage, coverage could be available, but it will be restricted in time from anywhere from 2 weeks to 60-90 days!

The final judgment is in the hands of the courts! It will be interesting to see how this unfolds - in the courts as well as the impact this will have on future wording updates.

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#### **References:**

- IBC Commercial Property Broad Form, 4037, 09/06
- Merriam Webster Dictionary, Definition of Pathogen, 2020
- IBC Profits Endorsement, 4055, 03/1999
- Insurance Institute Business Interruption (C40), 2011, Chapter 3, pages 1-18, The Extended Business Income Form (Broad Form) IBC 4107B