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Insurance Coverage for Loss of Business Income during the COVID-19 Pandemic

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I. Introduction

Almost no business has been financially spared from the coronavirus pandemic, and losses will continue for some time to come. Most of the losses have resulted from the loss of business activity and income because of a wide range of issues: civil authority ordering a shutdown of businesses, disruption in the supply chain including suppliers and customers, loss of a local attractions that draws customers to an area, employees themselves becoming sick, the need to decontaminate buildings, and interruption of transportation that prevents customers from accessing business locations. With losses continuing to mount, businesses are looking for ways to either reduce or recover some of those losses, and one option being considered examines insurance coverage.

Business income (BI) loss insurance pays for lost or reduced income when business activities are suspended, or have retracted, due to a covered event identified in the policy. This type of insurance is essentially a tool to hedge against unfavorable business performance as a result of insurable losses. These insurable losses usually refer to events of "ordinary circumstances"[1] such as fire, lightning, explosion, windstorm, etc. BI loss insurance benefits both large and small companies, although larger companies usually have tailored insurance coverage with unique language; smaller companies normally use standardized insurance coverage with universal language. In this article, we discuss standardized insurance coverage only, although the spirit of our discussion also applies to tailored insurance coverages.

Losses, both personal and financial, from the current pandemic have been so large and so far-reaching that the Federal government has spent trillions of dollars to both help with healthcare and to somewhat soften the financial impact. The initial step was Public Law No: 116-123 signed into law on March 6, 2020, and titled "Coronavirus Preparedness and Response Supplemental Appropriations Act." This legislation, in addition to providing $8.3 billion in emergency funding for federal agencies to respond to the coronavirus outbreak, provides $20 million for the Small Business Administration (SBA) disaster loans program to support entities financially impacted as a result of the coronavirus. Federal help again came later that same month in the form of Public Law No: 116-136 titled "The Coronavirus Aid, Relief, and Economic Security (CARES) Act." Signed into law on March 27, 2020, it provides over $2 trillion in economic relief to protect the American people from public health and economic impacts of COVID-19. Part of the CARES Act also allocates $349 billion towards "The Paycheck Protection Program" that provides small businesses with funds to pay up to eight weeks of payroll costs including benefits. These funds can also be used to pay rent, utilities, and interest on mortgages. In addition to small businesses, other beneficiaries include certain nonprofit organizations, Veterans organizations, and Tribal businesses described in the Small Business Act, as well as individuals who are either self-employed or independent contractors, if they meet program size standards.

While the Federal benefits help to some extent, there will still be billions, if not trillions, of dollars of lost income that a large number of businesses will experience. Can these losses be recouped through business insurance? The answer is not clear, and this year has seen much debate on whether or not BI insurance coverage does or should provide coverage for a BI loss due to the coronavirus. Insurers and policy owners are in conflict and have espoused very different opinions. So far at least 101 Federal lawsuits have already been filed a seeking coverage for BI losses due to the coronavirus, and this

[1] The basic "cause of loss" refers to fire, lightening, explosion, smoke, windstorm, hail, riot, civil commotion, aircraft, vehicles, vandalism, sprinkler leakage, sinkhole collapse, and volcanic action.

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number is expected to rise into the thousands.[2] There is some uncertainty how aggressively the insurance industry will fight these cases, but undoubtedly litigation will continue for years.

For the accountant, this article provides an in-depth look at business insurance with an emphasis on coverage that may apply to losses resulting from the coronavirus. Having a better understanding of these areas, as well as insurance in general, should position the accountant to offer broader advice to clients to help in the mitigation of future risks. Forming a risk analysis team consisting of the business owner, the insurance agent, and the accountant is helpful in establishing effective risk management strategies. Also, a more comprehensive understanding of business insurance benefits forensic accountants who may be called upon to calculate damages from BI losses for submission to insurance carriers for reimbursement if policy coverage exists, or for litigation support if an insurance claim falls into litigation status. An expert witness who understands the various possible coverages, and when and how to calculate damages, becomes more valuable to the risk analysis team.

This article discusses the basics of a standardized BI loss insurance policy developed by the Insurance Service Office[3] (ISO), an organization that develops standardized policies widely used by businesses of all sizes. There can, however, also be non-standardized policies, which are the products of individual negotiation between an insured and an insurance company. These individually written non-standardized policies may or may not be similar to the standard ISO policy (with many possible variations, of course), and therefore it is both unnecessary and impractical to discuss in this article these individual non-standardized policies. The purpose of this article is to provide information for the forensic accountant which is helpful in analyzing standard BI insurance coverage specifically in the context of the coronavirus pandemic.

II. The Business Income Loss Coverage and its Application in the Coronavirus Pandemic

Commercial property insurance policies are designed to insure (protect) against damages incurred from a variety of perils that are accidental and uncorrelated which are inflicted upon the insured's buildings and personal property. The covered perils share common characteristics that make them insurable, including: (1) large number of insured risks (2) accidental and unintentional; and (3) not catastrophic. Loss from fire damage, for example, satisfies these three characteristics while loss from a terrorist attack does not. Therefore, losses from terrorist attacks are not readily covered by commercial insurance, which led congress to pass the Terrorism Risk Insurance Act (TRIA)[4] that provides temporary coverage until the insurance industry itself is ready to provide such coverage. Congress has extended this "temporary" coverage through 2027.[5]

Besides direct losses that are more easily identifiable, commercial property insurance also covers indirect losses such as a reduction or elimination of BI. The BI insurance covers actual loss of business income sustained due to the necessary suspension of operations during the period of restoration.

Depending on the type of industry, businesses can suffer income loss for a variety of reasons. These include a disinfection period for a building (i.e., pests, bacteria and viruses), the loss of income due to a mandatory shut down of the business by a civil authority, disruption of supply chains, reduced income due to the slowing or shutting down of surrounding businesses, and lack of customer access. In addition, businesses might not only lose revenue but could also incur extra expense to continue their operations. In the following section, we discuss the sources of BI losses during the coronavirus pandemic and whether these losses should be covered by insurance. Also, an analysis of decided court cases is presented.

III. Possible Types of Business Income Losses as a Result of the Coronavirus

Damage to Insurer's Property

When the building within which the insured conducts business suffers from a covered cause of loss, BI loss coverage usually applies. The BI loss coverage specifies that the event responsible for the loss of income must be caused by direct

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[2] Sams, J. (2020). Number of Federal COVID-19 Business Interruption Lawsuits at 101 and Rising. *Claims Journal*, online at https://www.claimsjournal.com/news/national/2020/05/21/297180.htm (June 15, 2020).

[3] Formed in 1971, ISO is an advisory and rating organization for property/casualty insurance industry. One of its services includes providing standardized text for insurance forms. In October 2009, ISO became a subsidiary of Verisk Analytics headquartered in Jersey City, New Jersey.

[4] https://www.treasury.gov/resource-center/fin-mkts/Documents/hr3210.pdf.

[5] On December 20, 2019, the President signed into law the Terrorism Risk Insurance Program Reauthorization Act of 2019 (Pub. L. 116-94, 133 Stat. 2534) (2019 Reauthorization Act), which extended TRIP through December 31, 2027.

physical loss of, or damage to, the property at the premises. For example, if a restaurant closes due to fire damage, then the BI loss coverage pays for the restaurant's loss of income for the days the building is closed for repairs. But what if a business needs to shut down and thoroughly sanitize the building because one or more of its employees test positive for the coronavirus? Would BI loss coverage apply in this situation? Although the answer to this question has yet to be resolved, we can reasonably suspect that the answer may be rendered irrelevant considering the limited decontamination process (e.g., short time period) and the existence of waiting period in some policies. If decontamination is both low cost and fast, and completed within the waiting period, BI loss coverage is not triggered.

Acts of Civil Authority

During the coronavirus pandemic, many state and city governments have been urging residents to stay-at-home (safer-at-home), or even issued shelter-in-place mandatory orders while also banning social gatherings of a certain number.[6] Along with these orders, non-essential businesses, including schools, retail stores, restaurants, barber shops, and hair salons have been either ordered closed or activity severely restricted. As a result, business income either comes to a complete halt or is significantly reduced during the pandemic.

As an additional coverage to BI insurance, civil authority coverage pays for the BI loss caused by the action of a civil authority that prohibits access to the described premises. Two conditions apply for this coverage to be triggered: (1) access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within a one mile radius, and (2) the action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the covered cause of loss that was responsible for the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Note that the typical civil authority additional coverage contains a waiting period that begins seventy-two hours after the time of the first action of civil authority that prohibits access to the described premises and continues for up to four consecutive weeks after coverage begins. This waiting period can be eliminated by the Business Income Changes – Beginning of the Period of Restoration endorsement (CP 15 56).[7]

Would the civil authority additional coverage be triggered and provide coverage for BI loss due to a business being ordered to close during the coronavirus pandemic? Reviewing previous court cases, the answer to this question is mixed. For example, in *Sloan v. Phoenix of Hartford Insurance Company*,[8] the Governor of Michigan ordered a curfew in response to widespread riots. As a result, a movie theatre suffered BI losses and filed a claim for BI coverage. After reviewing the plain language of the policy, the court held that although no physical damage was incurred, a riot is a peril that was covered under the BI policy. Therefore, there was BI loss coverage under the civil authority provision for losses incurred to comply with the Governor's order.

In a subsequent similar case, however, the court's opinion was quite different. In *Syufy Enterprises v. Home Ins. Co. of Indiana,*[9] civil authorities imposed a general dawn-to-dusk curfew following the Rodney King trial. Syufy Enterprise closed its theaters during the curfew period and suffered BI losses. The court held that access to the movie theater itself was not denied because "no civil authority ever *specifically* prohibited any individual from entering a theater; rather, the cities-imposed dawn-to-dusk curfews to reduce the possibility of rioting and looting. Because access to a Syufy theater (plaintiff) was never specifically denied, coverage for a business interruption loss was never triggered." [10] In addition, the loss was not a direct result of damage to or destruction of property because "(t)he requisite causal link between damage to adjacent property and denial of access to a Syufy theater is absent."[11] Therefore, the court denied Syufy's claim of the BI loss coverage.

Similarly, in *United Air Lines, Inc. v. Insurance Co. of the State of Pennsylvania*,[12] United Airlines suffered a loss because the Ronald Reagan Washington National Airport was ordered closed due to the September 11 terrorist attacks on

[6] https://www.northstarmeetingsgroup.com/News/Industry/Coronavirus-countries-cities-ban-events-meetings
[7] ISO Properties, Inc., 2006: Business Income Changes – Beginning of the Period of Restoration.
[8] *Sloan v. Phoenix of Hartford Insurance Company et al*., 46 Mich. App. 46, 207 N.W.2d 434 (1973).
[9] *Syufy Enterprises v. Home Ins. Co. of Indiana,* No. 94-0756, 1995 WL 129229, (N.D. Cal. 1995).
[10] *Ibid.*
[11] *Ibid.*
[12] *United Air Lines, Inc. v. Insurance Co. of the State of Pennsylvania*, 439 F.3d 128 (2d Cir. 2006).

the World Trade Center and the Pentagon. United Airlines subsequently claimed indemnity for a BI loss under the BI loss coverage. The court held that "because United cannot show that such lost earnings resulted from physical damage to its property or from physical damage to an adjacent property (Pentagon), under the unambiguous language of the insurance policy, the losses are not covered."[13]

Following September 11, Hurricane Sandy, and other disasters, insurers tightened policy language to make it clear that actual damage to the property of the insured was a requirement for coverage. One similarity in the cases above is that none of the courts challenged whether the curfew or shutting down the airport constituted a civil authority order. The main difference among those cases is how the courts interpreted such civil authority order as "direct physical loss." During the current COVID-19 pandemic, many states were only "urging" residents to practice social distance or to stay-at-home; therefore, it is debatable whether such advisory constitutes a civil authority "order."

Disruption in Supply Chain

A business may depend on another business as a major customer or as a key supplier, and as a result it can suffer business income losses which arise from this dependent property exposure. Such dependency could consist of materials, products, or sales. Supply chain dependency is sometimes referred to as a "contingent business income" (CBI) exposure. The contingent business interruption insurance is an insurance coverage extension that addresses the business income loss due to disruption in the supply chain. The terms of this type of coverage vary from policy to policy and may be limited to damage to a direct supplier's property or may extend to damage to the property of indirect suppliers, such as suppliers of suppliers. With typical CBI coverage, a policy pays for the actual loss of BI sustained due to the necessary suspension of operations during the period of restoration. The suspension must be caused by direct physical loss of, or damage to, dependent property at a premise described in the policy, resulting from a covered cause of loss. "Dependent property" refers to services that deliver materials or services to the insured, businesses that accept the insured's products or services, businesses that manufacture products for delivery to customers under contract of sale, and businesses that attract customers to the insured's business.

The outsourcing of all or part of a firm's operations further complicates business dependency. Cost savings, instead of revenue assurance, is usually the measurement of the procurement function, while supply chain disruption is often not fully considered when evaluating supplier performance. During the coronavirus pandemic, the supply chain has been strained as the virus spreads. Businesses that adopted the "just-in-time" inventory system as a method of cost reduction would suffer even more severe losses in this dependency scenario. Would BI losses due to coronavirus caused supply chain disruption to be covered under the CBI coverage extension? Several previous court cases offers some guidance.

In *Pentair, Inc. v. American Guarantee and Liability Insurance Co.*,[14] the insured claimed financial damages after an earthquake in Taiwan under a CBI coverage extension in the business insurance policy. During the earthquake, electricity to a manufacturing supplier was disrupted when a substation that provides electricity was disabled. As a result, the factories could not produce products they were supplying to a subsidiary of Pentair, Inc. The court held that the CBI coverage would not apply because the electrical substation was not itself a supplier, and Pentair's actual Taiwanese supplier did not suffer from a direct physical loss. This case demonstrates that direct physical loss is the key. For supply chain disruption in the context of the coronavirus pandemic, it may be difficult to demonstrate that a company's supplier suffered from "direct physical loss" when its operation where closed or curtailed.

Loss of Attraction

Supplier dependency can also be present when customers are drawn to a business location because of the existence of a "leader property" or "magnet store" that attracts customers to the area. Multiple smaller business, then, can benefit from a larger magnet store, but business income may be lost when the "leader property" is shut down. Recall that in a CBI policy, "dependent property" includes a business that "attracts customers to another business." The business that attracts customers is also referred as a "leader location." This type of insurance clause may be referred to as loss of attraction, and it applies when there is a destruction to a nearby attraction without direct damage to the insured's premises itself. Such a clause is very prevalent in the hospitality and entertainment industries.

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[13] *Ibid.*

[14] *Pentair, Inc. v. American Guarantee and Liability Insurance Co*., 400 F.3d 613 (8th Cir. 2005).

Ingress-Egress

Some policies have extensions of coverage for Ingress/Egress, which covers the insured's loss of income due to the necessary interruption of the insured's business as a result of the inability of customers or employees to reach the insured's premise, whether or not the insured's property is damaged. Like civil authority coverage, Ingress/Egress coverage is designed to pay for BI losses triggered by physical loss or damage caused by a covered peril to a third-party property that prevents or hinders ingress to, or egress from, the insured's business. However, Ingress/Egress is broader than civil authority in that no government order is needed to trigger the coverage.

In *City of Chicago v. Factory Mut. Ins. Co.*,[15] the city of Chicago sought coverage under the Ingress/Egress policy for its BI losses after the FAA's order of halting takeoffs and landings at all airports after the September 11 terrorist attacks. The court denied the city of Chicago's motion and held that "indirect or remote loss or damage is excluded by the policy,"[16] therefore "although ingress to and egress from the airport were prevented by the FAA's order and were indirectly caused by terrorist-inflicted damage, this damage is one of the types of damage excluded by this policy in that it was indirect and remote damage inflicted upon the World Trade Center and the Pentagon."[17]

The wording of the Ingress/Egress coverage is very broad, and a business location does not need to have a virus outbreak itself to trigger this coverage. However, insureds need to demonstrate the inability to access their property due to the insured's physical loss or damage when seeking coverage from the Ingress/Egress provision. With respect to coronavirus claims, it may prove challenging to demonstrate that any ingress is prevented due to physical damage, rather than fear of bodily injury due to person-to-person contagion.

Other Coverages

During the coronavirus pandemic, closing down the operations of certain essential businesses such as hospitals, gas stations, and banks is not ideal. In order to continue their operation, these businesses may need additional resources and incur extra expenses, in addition to the typical ordinary and necessary business expenses. Examples of additional expenses include sanitizing costs, cost of protective gear, extra delivery cost, and costs to make employees' homes a type of satellite location workplace. For these scenarios, the "extra expense" insurance coverage would be a good option. The extra expense coverage can be purchased together with the BI insurance, or as a stand-along-coverage for those that would need to maintain usual business operations and stay open. Here the extra expense means necessary expenses the insured incurs during the "period of restoration" that the insured 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.

An event cancellation policy could also be useful for mandatory or voluntary event cancellations in an effort to curb coronavirus related losses. Event cancellation coverage may be written expressly to include specific insurance against cancelations due to infectious diseases, but such coverage is not very prevalent. For example, the insurance company Hiscox said that less than 10% of its event customers had opted for additional pandemic coverage.[18] South by Southwest, the canceled Austin, Texas, festival, said its insurance did not cover cancelations for disease-related reasons.[19] Some insurers have already started inserting exclusions for non-coverage of losses related to COVID-19 if the insurance coverage was written later than the end of 2019. In addition, an event cancellation policy often requires cancellation to be "beyond the control of the insured," so a recovery of BI losses could be difficult in the case of voluntary cancellations.

IV. Reasons Why Business Income Losses are Likely Not Covered Under the Insurance

There are three conditions typically within insurance policies that the BI losses from COVID-19 are likely not have been met: (a) BI loss is a result of a direct physical loss; (b) the loss is caused by property damage from a covered peril, and (c) the BI loss needs to be incurred during the period of restoration.

Direct Physical Loss Requirement

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[15] *City of Chicago v. Factory Mut. Ins. Co*., 2004 WL 549447 (N.D. Ill. Mar. 18, 2004).
[16] *Ibid.*
[17] *Ibid.*
[18] https://www.postonline.co.uk/commercial/4647186/fewer-than-10-of-hiscox-events-customers-have-pandemic-cover
[19] Sisario, B. and Jacobs, J. (2020). South by Southwest Is Canceled as Coronavirus Fears Scuttle Festival. *The New York Times*, March 6, 2020, updated March 10, 2020, https://www.nytimes.com/2020/03/06/arts/music/sxsw-cancelled.html (on June 20, 2020).

Under a standard commercial property policy that includes coverage for business income losses, having business interruption by itself is not enough to trigger the policy. In many cases, physical damage to the insured's property is typically required to trigger coverage. The policy makes it specific that the suspension must be caused by direct physical loss of, or damage to, property. In addition, the loss or damage must be caused by, or result from, a covered cause of loss. A company may try to seek damages because its products may come from a region affected by coronavirus, or even from a location where an infected person worked. However, having that claim reimbursed by the insurance company where the coronavirus caused the BI loss is difficult because it is hard to demonstrate the requisite "direct physical loss" damage to property.

For example, as discussed above in *United Air Lines, Inc. v. Insurance Company of State of Pennsylvania*,[20] the court held that the shutdown of the Ronald Reagan Washington National Airport in connection with the September 11 terrorist attacks on the World Trade Center and the Pentagon was not a direct result of damage to adjacent property since the decision to shut down the airport was made before the attack on the Pentagon. Instead, evidence showed that the shutdown was based on the fear of future attacks. Therefore, United Airlines was not entitled to the indemnity for economic losses relating to government closure of the airport. Similarly, in a BI loss claim resulting from the coronavirus, insurers will most likely take the position that the presence of a virus, including the coronavirus, on or at the insured's covered property does not constitute direct physical loss or damage to the property. And the fear of the possibility of the presence of coronavirus does not constitute direct physical loss or damage to property. Therefore, the policy's business income coverage would typically not be "triggered" in that situation.

Similarly, in *Universal Image Productions, Inc. v. Chubb Corp*.,[21] the insured (Universal Image Production) sought to obtain damages under the BI loss coverage provided by the insurer (Chubb Corp) following a bacterial contamination caused by heavy rain. The court held that the mere presence of bacteria does not constitute a direct physical loss to the property. The insured could have continued its business with its employees wearing respirators (as suggested by the insured's expert witness). Since the insured could not demonstrate any structural or any other tangible damage to the property, the BI loss coverage was not triggered.

When a civil authority order is involved, the situation becomes even more complicated. For example, in *Source Food Technology v. U.S. Fidelity and Guaranty Corp,*[22] Source Food Technology (plaintiff) sought for indemnity for a BI loss after the importation of Canadian beef products was prohibited by USDA after some cows in Canada tested positive for mad cow disease. The court held that "the beef product on the truck to be sent to Source Food was not physically contaminated or damaged in any manner."[23] "Considering not being able to transport its truckload of beef product across the border and sell the beef product in the United States as direct physical loss to property would render the word 'physical' meaningless."[24] Therefore "Source Food did not experience direct physical loss to its property" and "there was no coverage under the policy."[25]

There are many more cases where direct physical loss plays a key role in court decisions when considering a BI loss coverage claim. Mold that could be removed[26] and asbestos contamination[27] do not constitute direct physical loss since there was no structural damage.

However, it is worth mentioning that courts across the country have not settled upon a uniform rule for when the insured property has suffered a physical loss. In a number of jurisdictions, courts have determined that contamination and other incidents that render property uninhabitable or otherwise unfit for its intended use constitutes a physical loss sufficient to trigger business interruption coverage.

For example, in *Gregory Packing, Inc. v. Travelers Property Cas. Co. of America*,[28] Gregory Packing successfully obtained an insurance payment for covered property damage when ammonia was accidentally released into a facility

[20] *Supra*, note 11.
[21] *Universal Image Productions, Inc. v. Chubb Corp*., 703 F Supp 2d 705 (ED Mich. 2010).
[22] *Source Food Technology v. U.S. Fidelity and Guaranty Corp*., 465 F.3d 834 (8th Cir. 2006).
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*
[26] *Mastellone v. Lightning Rod Mut. Ins. Co*., 884 N.E.2d 1130 (Ohio Ct. App. 2008).
[27] *Great Northern Ins. v. Benjamin Franklin Fed. S & L*, 793 F. Supp. 259 (D. Or. 1990).
[28] *Gregory Packaging, Inc. v. Travelers Property Casualty Company of America*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014).

rendering the building unsafe until it could be aired out and cleaned. The court held that "property can sustain physical damage without experiencing structural alteration."[29]

Similarly, in *Shakespeare Festival Association v. Great American Insurance Company*,[30] the insured was granted indemnity under the BI loss coverage after Shakespeare Festival had to cancel performances at a theater due to smoke from wildfires that infiltrated the premises although structural damage did not incur. In *Sentinel Mgt. Co. v. New Hampshire Ins. Co*.,[31] the court held expressly that physical injury or loss "may exist in the absence of structural damage to the insured property," and that "Sentinel's loss by asbestos contamination constitutes a fortuitous, direct, physical loss." In *Port Auth. V. Affiliated FM Ins. Co*.,[32] the court held that the presence of large quantities of asbestos in the air of a building may constitute "physical loss or damage." In *Farmers Ins. Co. v. Trutanich*,[33] an Oregon appellate court found that an odor from "cooking" methamphetamine "was 'physical' because it damaged the insured property." The court deemed the cost of removing the odor to be a "direct physical loss." In *Travco Ins. Co. v. Ward*.,[34] the court found that "direct physical loss" exists where a "home was rendered uninhabitable by the toxic gases" released from defective drywall.

In the cases listed above, decisions have come down on both sides as whether or not a non-structural damage constitutes "physical damage" to the insured property. While the insurer will indeed argue that there is no physical damage due to coronavirus contamination, insureds may argue that "physical damage" does not equal to "structural damage." Several cases listed above support the argument that non-structural conditions such as odor, fumes, asbestos, or other material that could render the building unfit for safety reason could constitute physical damage, and the insurance policy should provide coverage under such conditions. In these cases, however, there was no doubt that these dangerous conditions are either the nature of the building or persist in the building. For a BI loss during the coronavirus outbreak where there is no evidence of contamination or no employee testing positive, but the business closed out of precaution anyway, it would be unclear whether such a condition constitutes the requisite physical loss.

Covered Peril

Both BI coverage and the extra expense coverage specify that the loss of damage must be caused by, or result from, a covered cause of loss. There are two types of "covered causes of loss" associated with commercial property coverage: the "broad form" and the "special form." The broad form covers losses resulting from a list of covered losses actually specified in the policy, while the special form covers any direct physical loss unless the loss is specifically excluded or limited in the policy. The special form is therefore also referred as an "all risk form," since it covers all the risks unless specifically excluded. The broad form typically does not include viruses as a listed coverage. So, for any BI insurance with broad form coverage, unless otherwise written, it does not provide BI loss coverage as a result of coronavirus. For BI insurance with special form coverage, a virus is not (at least in the past) specifically excluded, thus creating a possibility for the existence of virus loss coverage.

In 2003, the outbreak of Severe Acute Respiratory Syndrome (SARS) alerted the insurance industry of the possibility of coverage arising from virus contamination. A hotel chain, the Mandarin Oriental International Ltd., sought for and received $16 million in coverage from its insurers as indemnification of its BI loss due to SARS. Following this payout, insurers quickly updated insurance contract provisions in most policies to exclude losses resulting from communicable diseases.

With an intention to restrict virus loss coverage, the ISO has introduced an "exclusion of loss due to virus or bacteria" endorsement[35] in 2006 that is mandatory in majority of states. This endorsement specifically excludes loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease. The virus exclusion applies to the insurers who adopted the standardized ISO policy form as part of their

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[29] *Ibid*.
[30] *Ibid*.
[31] *Sentinel Mgt. Co. v. New Hampshire Ins. Co. v. New Hampshire Ins*., 563 N.W.2d 296 (Minn. Ct. App. 1997).
[32] *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co*., 245 F. Supp. 2d 563 (D.N.J. 2001).
[33] *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993).
[34] *Travco Ins. Co. v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010).
[35] ISO Properties, Inc., 2006: Exclusion of Loss Due to Virus or Bacteria, (CP 01 40).

policies. For non-standardized policies, however, whether BI loss from coronavirus is actually covered depends on the individual wording of the policies.

As an example, in *Meyer Natural Foods, LLC v. Liberty Mutual Fire Insurance Company*,[36] Meyer sought loss coverage for beef that was contaminated with E. coli while being processed in the company's possession. The court held that the "contamination exclusion in the insurance policy encompassed loss attributable to E. coli" and thus barred coverage.[37]

Industries such as hospitality and retail clearly remembered the financial damages from SARS and were seeking coverage that could provide protection against BI losses due to similar types of outbreaks. The insurance industry then started providing coverage to address losses caused solely by such a virus. The "Communicable Diseases" specific coverage extension can be added to the BI loss insurance policy to pay for "the actual loss of Business Income you sustain as a result of having your entire 'operations' temporarily shut down or suspended by an order from any local, state or federal Department of Health having jurisdiction over your 'operations.'"[38]

There are three important considerations to be pointed out about this specific coverage. First, the communicable disease special coverage extension specifies that "such shutdown must be the direct result of an outbreak of a 'communicable disease' at the insured premises."[39] It is important to note that the communicable disease coverage makes it very clear that the outbreak needs to be "at the insured premises." During the coronavirus pandemic, most businesses closed due to a government order, a suspected presence of the virus, or just out of fear without there being actual presence of the virus at the premises. Such fear could be the possibility of the presence of coronavirus, potential bodily injury due to person-to-person contagion, or customer traffic reduction because the customers themselves are fearful of contracting the virus.

Second, the communicable disease coverage is subject to a relatively low dollar limit—usually under $5 million—and is often an aggregate limit. The aggregate limit means all claims under this special coverage are added together and the sum is subject to the policy limit. This limit is usually lower than the limit provided by other coverages such as civil authority coverage.

Third, the only coverage that pays for such losses must be specifically pre-negotiated. A trigger event such as a closure to sanitize facilities or protect employees or consumers may be outlined in the policy and may be required to begin the disruption recovery. Therefore, business owners should carefully review the specific wording related to such coverage. In addition, organizations that carry communicable disease coverage and are then impacted by coronavirus or other pathogens may still have to wait for an appropriate authority to inspect and certify their facility was indeed contaminated.

Period of Restoration

With the BI loss insurance coverage, losses are covered only if the loss occurs during the "period of restoration." The period of restoration is defined as is the period of time that begins immediately after the initiation of the direct physical loss and ends on the earlier of the date when the property should be repaired, rebuilt, or replaced with reasonable speed and similar quality, or the date when business is resumed at a new permanent location. Coverage extensions and additional coverages under BI loss insurance usually specify a waiting period. For example, the civil authority additional coverage is a time element coverage that begins seventy-two hours after the time of the first action of a civil authority that prohibits access to the described premises and continues for up to four consecutive weeks after coverage begins.

In many previous court cases, the period of restoration was a key point of contention in considering whether the policy holder is entitled to insurance indemnification and, if so, to what monetary amount. Some examples include *Steel Products Co. v. Millers Nat. Ins. Co.*,[40] *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*,[41] and *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Properties, LLC*.[42] In the *Steel Products* case, the court interpreted the language of "period of restoration" to mean "the time by which an insured acting "as quickly as possible" would have completed repairs to its property. This

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[36] *Meyer Natural Foods, LLC v. Liberty Mutual Fire Insurance Company*, 218 F.Supp.3d 1034 (2016).
[37] *Ibid.*
[38] Markel Insurance Company, 2007: Business Income Changes – "Communicable Disease" and "Food Contamination" Extension.
[39] *Ibid.*
[40] *Steel Products Co., Inc. v. Millers National Ins*. Co., 209 N.W.2d 32 (Iowa 1973).
[41] *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co*., 411 F.3d 384 (2005).
[42] *Sr Intern. Bus. Ins. v. World Trade Center Prop*., 445 F. Supp. 2d 320 (S.D.N.Y. 2006).

theoretical calculation reflects "the length of time required with the exercise of due diligence and dispatch to rebuild, repair or replace the damaged premises. Where the actual restoration period exceeds the theoretical period or where the premises are not restored, the theoretical period becomes the computation period."[43] In the other aforementioned cases, the courts generally used the same time period interpretation.

In the case of a coronavirus BI loss claim, a key issue thus becomes how a court would interpret "period of restoration." Does it mean a reasonable amount of time to sanitize the building? In this regard, insurers will argue that the virus exists for only a very short period in the air and/or on surfaces, and that a quick cleaning is all that is needed to eliminate the threat. Therefore, restoring the property may only need a very limited period of time. Considering the waiting period specified in an individual policy, BI loss coverage may not be triggered at all because the process of decontamination would likely be shorter than the waiting period. A counter argument, however, would be that the virus persists within people in the immediate area. Although it is fairly easy and fast (and therefore low-cost) to sanitize a business premises, re-contamination is still possible and the period of restoration could be significantly extended.

V. Legislature Movement and COVID-19 Insurance Coverage

Legislature Movement

On March 14, 2020, The United States Congress introduced the Families First Coronavirus Response Act in response to the economic impacts of the ongoing 2019–2020 coronavirus pandemic. This law offers paid leave, implements free coronavirus testing, encourages strong unemployment benefits, expands food availability for children and families in need, supports healthcare workers on the front-line, and provides funds to states for help with the ongoing economic consequences of the pandemic. It also requires private insurers to cover COVID-19 testing free of charge and creates a path towards payment for the uninsured.

While individuals are helped to an extent by this legislation, businesses that suffer from severe income loss during the pandemic are left wondering whether their "regular" BI loss insurance coverage could apply to their pandemic business losses. These companies are usually small businesses that provide face-to-face services to their communities. While successful claims under business interruption coverage for COVID-19 infection may not be common, according to one of the largest independent claim managers,[44] several states are bringing pressure on insurers to cover business loss due to the coronavirus.

On March 18, 2020, 16 members of Congress dispatched a letter to four trade groups urging payments of claims under BI related insurance coverages. The lawmakers cited a growing number of shelter-in-place related orders, along with other civil orders, that will have an economic impact on America's businesses. As a response, the four trade groups claimed that under standard commercial insurance policies, coverages for diseases such as COVID-19 was never meant to be included and thus will not be paid.

On March 16, 2020, Assembly Bill 3844 was proposed by the New Jersey Legislature. In proposing such a bill, New Jersey attempts to create coverage for COVID-19 losses even though losses from viruses are specifically excluded in most insurance policies. This bill would force insurers to pay for BI loss claims for small businesses in New Jersey with less than 100 eligible employees (full-time employees working 25 or more hours per week), despite the relevant insurance policy wording for the exclusions. Similarly, in Ohio bill H.B. 589 was introduced in an attempt to retroactively expand business interruption policies to cover losses in connection with the outbreak of the coronavirus.

A Massachusetts bill, S.D. 2888, went a step further and explicitly mandates coverage of BI losses to apply towards COVID-19 related business income losses, even in the face of unambiguous policy language. This bill revoked the virus policy exclusion for the loss of use, occupancy, and business interruption policies in force within the commonwealth. It noted that in spite of the policy wording, the coverage should be construed to include business interruption directly or indirectly resulting from COVID-19 and its mutated forms. Moreover, insurers are not allowed to deny a claim for these policies based on COVID-19 being a virus (even with the virus exclusion) or lack of physical damage. The Massachusetts bill honored the policy monetary limits and coverage period so that insurers are not liable for any payments beyond the already set monetary policy limit and coverage time limit. The wave of legislature pressure on insurers to provide BI loss

[43] *Supra*, note 39.
[44] Crawford & Co., *The Insurance Impacts of 2019 Novel Coronavirus 4*. Online at https://www.crawco.com/assets/uploads/docs/CRAW-Global-WhitePaper-Coronavirus.pdf (June 15, 2020).

coverage despite the policy exclusions does not end with the three states mentioned above. Other jurisdictions may attempt to issue similar mandates on insurers either through legislative efforts or through a directive from the department of insurance.

The COVID-19 Endorsement

In response to the COVID-19 pandemic, the ISO in early February 2020 made two endorsements available for BI or extra expense losses from civil authority orders: "Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus" (referred to as Endorsement 1 below) and "Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus (Including Orders Restricting Some Modes of Public Transportation)" (referred to as Endorsement 2 below). These endorsements are designed to add limited business income or extra expense coverage for losses suffered if the insured's business is ordered closed, or the described premises are placed under quarantine by a civil authority in response to the COVID-19 pandemic. They also provide coverage that applies to dependent property losses suffered as a result of civil authority orders (for example, when dependent property closes under quarantine). The policy contains an annual aggregate limit which sets a maximum dollar amount that the insurer will pay for all covered losses and expenses from occurrences within a 12-month annual policy period, regardless of the number of occurrences that takes place.

These two endorsements do not provide coverage for the cost of clean-up or disinfection of the insured's premises or property, or of the premises or property of others due to contamination or suspected contamination. Coverage is also not extended to the cost of disposing of any insured's property or the property of others that is contaminated or suspected of being contaminated. In addition, business income losses due to the fear of contracting the disease, and losses due to the absence of workers, fines imposed, and penalties assessed, are not covered.

Endorsement 1 provides coverage for "the actual loss of Business Income you sustain and/or necessary Extra Expense you incur to the extent that such loss and expense are caused by order of a civil authority to close your business or to place all or part of the described premises under quarantine, in an effort to avoid infection by a Coronavirus or limit the spread of such infection, even if such order is undertaken based on suspicion of a risk of contagion."[45] Endorsement 2 provides the same coverage as Endorsement 1, plus adds coverage for losses resulting from inaccessibility to the premises due to closure/restricted public transportation serving the area where the described premises are upon an order from a civil authority in an attempt to avoid or limit the spread of infection by a coronavirus.

These two endorsements are virtually identical to the 2014 Ebola virus business income or extra expense coverage for loss from a civil authority order except for replacing "Ebola" with coronavirus. Just like the 2014 Ebola virus endorsements, the 2020 ISO COVID-19 endorsements are advisory-only, on a non-filed basis. This fact means that insurance companies who wish to add these endorsements to their portfolios need to follow state insurance regulations and file for approval from their individual states' insurance commissioners. The ISO has not provided any loss costs or supplementary rating information on these endorsements. Due to the non-file nature of the ISO coronavirus endorsements, it is unlikely any insurer would be willing to attach either of these endorsements to their commercial property policies that they issue during an on-going pandemic with related civil authority orders in effect. Even if they do, the policy probably comes with a low policy dollar limit along with a high premium that renders the coverage not economically feasible for the insured. So, future virus specific coverage for civil action related losses is possible to obtain, but at a high cost.

VI. The Forensic Accountant's Role

Just like the terrorist attack on September 11, 2001, the COVID-19 pandemic hit our lives and economy in an unprecedented way and continues to do so. There is no doubt that businesses will rethink their strategy in the areas of supply chain, disaster response, and risk management (including business insurance) to be much better prepared for the unexpected. Despite policy holders' advocacies and certain states' efforts, catastrophic exposures that are correlated with global influence such as COVID-19 will most likely create uninsurable risk that cannot be otherwise mitigated or transferrable with insurance. Although product supply logistics are currently severely interrupted, international trade will eventually resume thanks to the law of comparative advantage in each individual economy. When the more deadly SARS emerged in 2002, the virus did not spread around the world like COVID-19 and took far fewer lives. We are unsure if the next pandemic

[45] ISO, Inc., 2020: Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus.

will be more or less deadly, but when it hits, one can reasonably expect that it will spread just as fast, if not much faster than the current one.

Having a disaster plan in place is crucial to a business's continuity and survival, and a strong team consisting of the insured, the insurance agent, and a forensic accountant needs to be ready to implement the plan as quickly as needed to secure the possibility of an insurance claim. Below are five areas that should be considered by the team.

First, if a loss occurs, give prompt notice to the insurer. It is important to "promptly" notify the insurer of any potentially covered losses even when it is believed that there might eventually not be any coverage. Promptness is important because a situation such as COVID-19 is dynamic; just like the insurance recoveries from the September 11 disaster, BI losses from COVID-19 related problems might actually end up being recoverable. Insurance policies always require prompt notice for a loss, and filing a claim promptly gets the insured in the queue of claimants. If the insured does not file a claim on time as per the policy deadline, the insurer would have a valid reason not to provide payment.

The notice letter (or other acceptable form of initial communication) should be worded broadly. For example, if a shutdown has caused BI losses, do not state that the shutdown was due to the discovery of the disease at the premise; this statement may limit the recoverable amount for the damages. Instead, use plain, non-specific wording such as "I was ordered to shut down and I have suffered a loss." There will be plenty of communication with the insurer at a later date where more specific language will be required; just do not limit yourself at the onset.

Second, read all of the relevant insurance policies including coverage provisions and other details carefully. That includes your own policies and, if possible, the policies of your business counterparts such as suppliers, customers, and nearby businesses. Sometimes the other company's insurance coverage might also provide coverage for your loss. In a loss that impacts multiple covered parties, questions arise such as "whose policy should provide coverage first?" Also, if someone else's policy should cover the loss, what steps need to be taken to give you access to their policy coverage? Information like this can be included within an insurance policy exhibit, or within the policy section titled "named insured or additional insured."

Third, highly consider contacting the insurance broker immediately at the onset of the loss to ask about steps that, if taken contemporaneously, will help support the claims when they are eventually filed. This contact must include documentation. While firms should start tracking the types and scale of losses due to COVID-19, and although insurance policies define the nature of indemnity and exclusion, they rarely list the exact documents required to support claim submission. Most policies include provisions that enable the insurer to audit and inspect the insured's "books and records." Being prepared for such an audit, is the important reason to contact your broker. Sometimes an insurance adjuster hires an accounting firm when handling complex business interruption claims. These accountants are referred to as loss accountants, loss consultants, or forensic accountants. Policy holders are notified and sometimes even consulted about the hiring of these specialized accountants.

Clear communication starts with an open dialogue concerning the impact of the loss and then focuses on the documentation needed in the claims process. It is important to understand what documentation is expected by the loss adjuster or forensic accountant. The goal of this communication is for the adjuster and accountant to obtain as much information as possible in a short period of time about the loss scenario, and to review and analyze the information for a timely and effective claim adjustment. During this process, the business' own accountant can also be very helpful in providing appropriate documentation, including monthly profit and loss statements, monthly and daily production reports, monthly inventory balances, monthly cost accounting reports, and invoices and purchase orders. Preparation, then, is essential to support and substantiate the pandemic monetary damages.

Fourth, be aware of municipalities' orders, as well as an individual state's scenario when evaluating the virus exclusions. Although an insurance policy might exclude property damage caused by fungi, bacteria or viruses, those exclusions may not apply to all extensions of coverage. Those exclusions may, after all, not be enforceable in a particular situation due to requirements of state insurance departments or judicial precedent. Some states have even rejected the virus exclusion altogether. Massachusetts for example, does not recognize the virus exclusion because a virus is not a not a condition of the building; thus, excluding virus related problems from insurance coverage is irrelevant. Therefore, it is a good idea not to automatically relinquish hope on coverage just because such an exclusion is in the policy.

Finally, despite everything mentioned above, it may be very likely that a BI loss claim could be denied. After all, insurance is designed to cover accidental, uncorrelated losses, and a pandemic does not qualify under those criteria (accidental and uncorrelated). To this end, businesses should review their disaster plans and be ready to hopefully limit severe losses through both insurance and non-insurance mitigation plans. Extreme impactful events could emerge either locally or globally. While businesses in an immediate area most notably absorb the brunt of the impact from a disaster, organizations around the globe also could be affected through supply-chain disruption.

Organizations need to evaluate several aspects of a potential disaster: (1) their physical business location, which may be rendered unusable in a disaster, (2) their operational capacity with the loss of a supply chain, (3) their technology, which might be under digital attack, and (4) their internal financial status such as cash flow concerns. Most people know that emergency preparedness focuses on providing emergency supplies and trained personnel to ensure the safety of both people and an organization's tangible property during and after catastrophes. Companies' disaster plans should also include both insurance and non-insurance techniques to mitigate all of the possible types of damages that may arise whether they be financial or non-financial.

Calculating damages (BI losses) for a business due to a COVID-19 related slowdown or shutdown is somewhat similar to the situation where a party is accused of causing an action that financially harms another. One major difference, however, from the typical business damages calculation might be the length of the damages period; the COVID-19 losses may extend only for a number of months rather than years. This shortened time period also brings the seasonality of operations to the forefront. For example, if a business historically had a slowdown in operations during the months of March, April, and May, then the estimated losses should be based on the averages for those months rather than the higher averages of operations within other months during the year. Two other adjustments will need to be made are (1) the insurance waiting period (as mentioned earlier) where insurance will not pay for losses incurred until a certain length of time has expired and (2) payments a business receives under the 2020 CARES Act that reduce the amount of actual losses.

When helping a business with COVID-19 insurance loss claims, a forensic accountant's familiarity with insurance policies, along with the actual and potential coverage they offer, will provide more accurate claim filing. Ideally, the claim will be paid, but in many situations, it will not be paid. So, the accountant's services also should include preparing for litigation support which may be necessary and is already occurring for a large number of policy holders. In this unprecedented time of pandemic-caused severe economic and financial hardship being faced by numerous businesses, timely and complete loss estimates should potentially lead to much needed relief.

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