

# COVID-19 Insurance Update: Coverage for Loss of Income Following Government Closures of Businesses

by Patrick Frye

A FREEBORN & PETERS LLP CLIENT ALERT



## ABOUT THIS CLIENT ALERT

This Alert details how businesses might argue that COVID-19 causes physical loss or damage in order to obtain protection from their insurance coverage during this uncertain time.

Many U.S. businesses have recently seen a sharp decline in revenue after their customers ceased frequenting them out of fear of COVID-19 and following government advice to avoid crowds and keep others at a distance. Quite naturally, many of these businesses are considering whether they can recover their financial losses from any insurer to which they paid premiums. The issue for many businesses will likely be that the insurance coverage they purchased to protect them from the costs of property damage, business interruption, or supply disruption requires that the insured business show that its loss stems from direct physical damage to or loss of property. So how might businesses argue that COVID-19 causes such physical loss or damage?

### “Physical Loss or Damage”

While some jurisdictions recognize contamination and uninhabitable conditions as that type of property damage, insured businesses will have to show property damage from the COVID-19-causing coronavirus. Unless there is some determination that the coronavirus had become ubiquitous, not every business affected by that virus has been physically contaminated by it. And proof of the contamination may prove difficult for those businesses where coronavirus truly was. The virus can float in the air certainly for seconds and possibly for hours, then settle on a surface where it can last for perhaps three days. For businesses that closed last Saturday, it is likely too late to collect any virus once present at the property. A business might point to individuals who tested positive for this coronavirus after visiting the business

as evidence the premises were in fact contaminated. But given that [symptoms may not exhibit for up to two weeks after infection](#), and the possibility that the person may have been exposed to the virus in many different places, this showing may not be enough to prove the virus’s presence at the insured business. Even then, the business’s property arguably can be remediated by [cleaning it with household disinfectants while wearing disposable gloves](#). If a property is safe if periodically and inexpensively disinfected, a court may not deem that property to be physically damaged as it might a property with mold or asbestos, which can be rehabilitated only through intensive specialty work.

As events have moved swiftly over the last several days, another avenue to insurance recoveries may have opened in the form of civil-authority coverage, which can indemnify a business’s lost profits after a civil authority prohibits access to the insured’s property. American governments from California to Illinois to New York have ordered the partial or entire closure of many businesses. While these businesses were surely affected by these same governments’ earlier advisories urging precaution by avoiding public spaces, those advisories arguably were not enough to entitle a business to recover its ensuing losses from its insurance because they were not outright prohibitions. The more recent government prohibitions have fallen on different types of businesses in different ways. For example, [barbershops, beauty salons, and tattoo parlors have been ordered closed entirely](#). Restaurants, however, have only been closed to dine-in service.

People can still stop by for take-out. Relative to a barbershop, it is debatable whether a government has prohibited access to a restaurant's property.

Moreover, civil-authority coverage is usually a variation of property insurance in that it will usually respond only if direct physical loss or damage to a nearby property prompted the government order that prevented access to the business's own property. Proving that type of damage to someone else's property faces the same challenges posed by the need to prove that type of damage to the insured business's own property.

### Government Influence on the Insurance Industry

States and municipal government seem to be drafting their orders with at least a nod to the physical loss or damage requirements of insurance policies. For example, the State of New York ordered the close of non-essential business based upon a declaration of emergency that was issued in part specifically ["to protect state and local property,"](#) while the City of New York has gone further, ordering businesses closed ["because the virus physically is causing property loss and damage."](#) Also, the State of Illinois forbade dining-in ["due to the virus's propensity to physically impact surfaces and personal property."](#) While these excerpts from those orders do not guarantee that the closure orders will be deemed to have been issued due to property damage, they may help insured businesses to argue that point. Insurers, on the other hand, may respond that these are generalized statements of fear, and do not support any claims of actual physical damage to any particular property, let alone to property nearby the business's property.

Some in government are going even further in efforts to try to secure insurance coverage for hard-hit businesses. Having taken notice of the challenges businesses face based on standard policy language on business interruption coverage, various governments are pressuring insurers to accept those claims nevertheless.

The New York Department of Financial Services required insurers to advise their insureds whether and in what circumstances their property insurance policies would provide coverage responding to the coronavirus and to report to the Department regarding these issues. Several members of the U.S. House of Representatives urged insurers to acknowledge business-interruption coverage for losses related to COVID-19. The New Jersey state legislature is considering an act that would command – with retroactive effect – certain insureds' business-interruption coverage to include COVID-19-related losses. Unsurprisingly, the insurance industry has resisted any commitment to provide coverage for COVID-19-related losses regardless of insurance policy language.

### Potential for Government/Insurer Partnership

It will take time for businesses and their insurers to resolve whether or not COVID-19 has caused physical property damage, and many businesses need relief now. Some in the federal government are considering how to partner with insurers to deliver funds to businesses hurt by the shut-downs. The federal government and the insurers may agree to a program akin to the National Flood Insurance Program, whereby insurers would accept COVID-19-related claims under existing insurance business-interruption coverage in exchange for the government funding the payments to the insured businesses. This program would expedite payments to the businesses while taking advantage of insurers' already established administrative systems.

The coronavirus crisis and the various responses to it continue to develop at warp speed with hourly developments. Issues of insurance coverage will surely continue to be at the forefront as businesses endeavor to mitigate their economic losses.

Visit [Freeborn's COVID-19 webpage](#) for more information as this situation develops.

## ABOUT THE AUTHOR



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