

# Bill of Health: Insurance Coverage for Coronavirus-Related Loss and Force Majeure Clauses

---

March 5, 2020 Micah Skidmore, Adrian Azer, Michael Stoner

---

**PRACTICES** Insurance Recovery, Outsourcing Transactions, Litigation, Franchise and Distribution, Procurement and Supply Chain Management, Construction Litigation, Energy Litigation, Project Finance and Development

---

Since its emergence from Wuhan, China, in December, the coronavirus (COVID-19) has exacted an immense human cost in death and suffering, with tens of thousands of confirmed cases worldwide. As the world reacts, the spread of this disease has also impacted businesses and world markets. Governments around the globe have restricted travel from areas with widespread, sustained transmission rates. Corporations have also suspended travel and operations in areas with high rates of infection. As reported cases rise domestically, companies can anticipate further closures, cancellation of events, and potential interruption of regular business operations.

The mounting financial implications for corporate policyholders have prompted many to ask what risk-mitigation tools are available to offset the potentially significant cost of responding to COVID-19. The two most apparent risk-mitigation tools are: (1) insurance; and (2) force majeure clauses.

## Insurance Policies That May Provide Coverage For COVID-19

### ***Civil Authority Coverage***

Many traditional property insurance policies include some form of civil authority coverage, which addresses loss of income resulting from restrictions placed on access to insured premises (or dependent business premises) by a government or civil authority. However, many policies with this coverage, which is also often sub-limited, require the order from a civil authority to be the direct result of physical loss or damage to other property. As a threshold matter, in anticipation of coronavirus-related claims, corporate insureds should first determine whether “physical loss or damage” is a condition precedent to coverage for civil authority claims. If “physical loss or damage” is a requirement, as addressed in more detail below, some cases under certain factual circumstances have found that property rendered unusable by contagion or contamination qualify as physical loss. Accordingly, subject to individual circumstances and policy terms, some civil authority coverage may be available for business interruption loss resulting from the order of a civil authority resulting from COVID-19 infection.

### ***Traditional Business Interruption, Commercial Property Insurance***

Policyholders should also consider insurance coverage under their commercial property insurance policies through their business-interruption coverage.

Traditional “all risk” commercial property policies will insure against “physical loss or damage” to covered property resulting from a non-excluded risk. Loss of business income coverage, otherwise known as business-interruption insurance, insures against the loss of profits resulting from covered physical loss or damage, subject to conditions.

While the spread of COVID-19 does not independently suggest “physical damage” to property, the loss of use of property that has become uninhabitable or unusable because of coronavirus contamination may under some circumstances be considered “physical loss” for purposes of a commercial property policy and any accompanying business interruption coverage. See, e.g., *Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823 (3d Cir. 2005) (finding a fact issue precluding summary judgment on a claim for “physical loss” relating to a home rendered uninhabitable by a well contaminated with e-coli bacteria). In fact, there is a body of case law, which varies according to individual facts, addressing insurance coverage for property that is not physically injured, but is physically lost. See, e.g., *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (loss by asbestos contamination); *compare Pentair, Inc. v. Am. Guar. & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005) (factories without power following an earthquake). Because the cases are fact specific, corporate policyholders will need to carefully consider under individual circumstances whether coronavirus-related losses constitute a “physical loss” under a commercial policy.

To the extent the insured can establish that a facility was shut down or property was quarantined due to health concerns involving the actual property itself, the insured will have a stronger argument that the facility or other property suffered physical loss or damage. For example, the CDC has noted that while it is not thought to be the main way the virus spreads, “[i]t may be possible that a person can get [coronavirus] by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes.” See Center for Disease Control, How COVID-19 Spreads, at <https://www.cdc.gov/coronavirus/2019-ncov/about/transmission.html>. If a facility is shutdown or property is quarantined because of concerns that the property itself will serve as the mechanism for the spread of the coronavirus, the insured will have a much stronger argument that there is physical loss or damage.

A related challenge facing insureds is that for many companies, the source of the supply-chain interruption is arising half-way across the world at the sites of third-parties. Because the burden of proof on establishing the existence of physical loss or damage usually lies with the insured, businesses seeking an insurance recovery will need to work with third parties and/or local authorities to marshal the requisite facts needed to prove the existence of coverage.

Finally, establishing that the insured’s suspension of operations was due to “physical loss or damage” is only the first step. Following the SARS outbreak in 2003, many insurance companies began including bacteria/viral-outbreak exclusions, which may prevent any recovery for a coronavirus-related suspension of operations. However, this is not a standard exclusion, with some policies only including a bacteria exclusion (which would not preclude coverage for the coronavirus) and the strength of the wording in a bacteria/viral-outbreak exclusion may vary from policy to policy. Therefore, the best practice is to review the specific language in the insurance policy to determine whether any exclusions will bar coverage.

### **Specialized Coverages**

Specialized coverages also exist and may be available to policyholders whose business operations have been impacted by the spread of coronavirus. For example, “event cancellation” insurance may apply to sporting events, trade shows, conferences, fairs, festivals, conventions, or concerts that are cancelled, postponed, relocated, or abandoned because of a covered cause or event. Subject to individual policy terms, non-excluded causes or events may include an outbreak of communicable disease. Depending on individual policy terms and policyholder circumstances, other specialized coverages, including trade disruption insurance or similar coverages, may be implicated by events arising out of the coronavirus outbreak. At a minimum, risk managers and

coverage counsel will want to explore the availability of any potential insurance coverage in the event of loss of business income related to COVID-19.

## **Force Majeure Clauses**

In addition to reviewing available insurance, risk management professionals should also consider the potential applicability of force majeure provisions in contracts. Force majeure provisions generally allow a party to excuse its performance under a contract when an outside event beyond the control of the parties frustrates that performance.

Thousands of Chinese or China-based companies have already invoked force majeure clauses to excuse performance due to the coronavirus outbreak and the government's reaction. Whether these force majeure declarations will withstand judicial scrutiny is yet to be seen, particularly given that the language of force majeure clauses can vary widely from contract to contract. Specifically, whether the coronavirus constitutes a force majeure event may vary depending on whether the clause: (1) limits force majeure events to circumstances that prevent performance (i.e., performance is legally or physically impossible); or (2) includes events that merely hinder or delay performance (a standard far less onerous than "prevents performance").

In addition, in situations where business interruption coverage is available, the declaration of a force majeure event by a supplier or the availability of force majeure to the insured as a defense to contractual performance may lead to disputes over the amount of the policyholder's loss or the efficacy of the policyholder's mitigation efforts. Therefore, it is also important for corporate insureds to review supply and vendor contracts to balance invoking or challenging the force majeure clause against the possible recovery of business-interruption insurance.

It remains unclear how long it will take to contain the health and financial risks posed by the coronavirus outbreak. In the meantime, policyholders, brokers, risk managers and counsel can be sure that preparation is the best medicine. By considering potential coverage and terms in advance, and considering alternatives to insurance (like force majeure clauses), corporate insureds will be able to maximize available resources and offset potential losses resulting from COVID-19.

If you have any questions about coronavirus-related losses or about insurance recovery in general, please contact one of Haynes Boone's Insurance Coverage Practice Group partners listed below.