

BUSINESS INTERRUPTION INSURANCE AND COVID-19: COVERAGE ISSUES AND PUBLIC POLICY IMPLICATIONS

JILL M. BISCO, PH.D. | STEPHEN G. FIER, PH.D. | DAVID M. POOSER, PH.D.

IMPORTANCE In an effort to reduce the spread of COVID-19, many states and municipalities across the U.S. undertook various actions which resulted in businesses limiting or ceasing operations. While initial evidence suggests that these measures may have had the intended effect of slowing the spread of the virus, they also had a significant negative impact on the net income of firms across a wide-array of industries. Whether or not business interruption insurance should cover losses attributed to pandemics is being debated and legislative responses have been proposed, some of which would require involuntary coverage on a retroactive basis. Industry trade associations estimate that the outcome of these discussions and proposals could cost property-casualty insurers hundreds of billions of dollars.

OBJECTIVES Our study provides a discussion of the impact of COVID-19 on business interruption losses in the U.S. as well as an overview of the commonly relied upon ISO Business Income and Extra Expense (BIEE) insurance policy. We offer an analysis of the language contained in the unendorsed BIEE and summarize the arguments as to why business interruption insurance should or should not cover pandemic-related losses. Finally, we provide an overview of proposed approaches to address business interruption losses attributed to current and future pandemics.

EVIDENCE Although COVID-19 losses generally appear to be excluded from coverage, either by way of language that is present in the policy or through endorsements, some ambiguity exists as to whether the presence of the virus constitutes physical damage to or alteration of the property and whether coverage for losses due to civil authority should apply.

FINDINGS Business interruption losses due to COVID-19 are estimated to potentially exceed \$300 billion per month for small businesses. Many business owners have sought coverage for declines in net income through their business interruption insurance policies. In response, carriers and industry groups have stated that pandemic losses are not intended to be covered under the business interruption insurance policy and that the policies do not include, or even specifically exclude, pandemic coverage. Some businesses have responded by initiating lawsuits against their insurers.

In addition to these private actions, both state and federal governments have proposed legislation regarding indemnity for businesses impacted by pandemic losses. Several states proposed legislation to apply retroactive coverage for COVID-19 business interruption losses, although in some cases the legislation has already been withdrawn. Additionally, there has been a proposal for the federal government to provide a coverage backstop for catastrophic pandemic losses similar to the Terrorism Risk Insurance Act while some have proposed that only the public sector is capable of covering pandemic-related losses.

CONCLUSION & RELEVANCE Whether or not insurance will cover COVID-19 losses remains an open question and the answer to that question will ultimately have significant consequences for insurers as well as business owners. It is expected that even if insurers are successful in arguing that coverage does not exist for these losses, there will likely be significant legal expenses involved in defending denial-of-coverage and bad-faith lawsuits brought by policyholders while impending legislation will alter the insurance landscape as it relates to pandemics. We believe that regardless of the outcome, carriers as well as the ISO are likely to modify their business interruption policies and future demand for this coverage could be affected.

¹ Chiglinsky, K., 2020, "Insurers Worry Virus-Linked Costs May Reach \$383 Billion a Month", Bloomberg, accessed online at <https://www.bloomberg.com/news/articles/2020-03-30/insurers-worry-virus-linked-costs-may-reach-383-billion-a-month>.

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NAIC Executive Office
444 North Capitol Street, NW
Suite 700
Washington, DC 20001
202.471.3990

NAIC Central Office
1100 Walnut Street
Suite 1500
Kansas City, MO 64106
816.842.3600

NAIC Capital Markets
& Investment Analysis Office
One New York Plaza, Suite 4210
New York, NY 10004
212.398.9000

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Business Interruption Insurance and COVID-19: Coverage and Issues and Public Policy Implications

Jill M. Bisco, Ph.D.*
Stephen G. Fier, Ph.D.**
David M. Pooser, Ph.D.***

Abstract

In an effort to slow the spread of the novel coronavirus (COVID-19) and to lessen its impact on human health and safety in the U.S., many states and municipalities required “non-essential” businesses to cease or limit their operations. These actions had a significant negative impact on the income of firms across many industries, and some businesses are seeking payment for their losses from their business interruption insurance policies. Insurers and insurance industry trade associations claim that these policies were not designed or intended to cover pandemic losses and that policy features preclude coverage for COVID-19 losses. However, some businesses, attorneys and government officials disagree with this stance and contend that insurers should pay COVID-19 business interruption losses, either voluntarily or involuntarily. In this paper, we discuss provisions contained in the commonly used Insurance Services Office (ISO) business income insurance policy, the different ways in which courts have interpreted the policy’s language, and how these interpretations can affect whether COVID-19 losses are ultimately covered. We further discuss the response of government officials, the insurance industry and policyholders to the issue of coverage, as well as proposed actions that

* Assistant Professor of Finance, University of Akron; 330-972-5436; jbisco@uakron.edu.

** Associate Professor of Finance, University of Mississippi; 662-205-0767; sfier@bus.olemiss.edu.

*** Associate Professor of Risk Management and Insurance, St. John’s University; 212-284-7010; pooserd@stjohns.edu.

may result in the payment of claims stemming from both COVID-19 and future pandemic-related losses.

Introduction

On Dec. 31, 2019, the Chinese government reported a cluster of pneumonia cases in Wuhan, China. Days later, it was determined that these cases were the result of a new virus named SARS-CoV-2 (also referred to as the novel coronavirus or the COVID-19 virus). This new virus began to spread to countries around the world, infecting more than 7 million individuals in at least 177 countries and resulting in more than 400,000 deaths as of early June 2020 (Calfas, 2020). As the virus spread, it began to take hold in the U.S., where the first reported case appeared Jan. 21, 2020 (Taylor, 2020), with some estimating potential U.S. deaths in the thousands or even millions (Fink, 2020). In an effort to reduce the spread of the virus, cities and states across the U.S. put shelter-in-place orders into effect, closing or limiting the operations of public and private businesses and locations.¹ The goal of these orders was to reduce the number of individuals in groups or gatherings, thereby reducing individuals' exposure to the virus. As of April 9, 2020, only eight states did not have shelter-in-place mandates in effect (Ortiz and Hauck, 2020). While the objective of these orders was to limit the spread of the virus and reduce associated deaths, they also had severe economic ramifications, as "non-essential" businesses were forced to close and others were forced to limit the hours or extent of their operations.² A survey by MetLife and the U.S. Chamber of Commerce dated April 3, 2020, reported that 25% of small businesses had temporarily shut down during the pandemic, while 40% of those that had not shut down anticipated doing so temporarily within two weeks of the survey being taken (MetLife, 2020a). A May 5, 2020, update to the survey found that 29% of small businesses had temporarily closed during the prior two-week period and that 22% believed they were less than two months from permanent closure (MetLife, 2020b). Furthermore, the April survey found that nearly 50% of small businesses expected it would take anywhere from six months to one year before the U.S. economy recovered from the shutdowns.³ These orders resulted in many businesses experiencing dramatic declines in net income, potentially leading to the generation of limited to no income during the pandemic.

1. Some states also referred to these orders as "stay-at-home" orders. We use the term "shelter-in-place" in this article to refer to both.

2. States and municipalities defined the terms "essential" and "non-essential" in different ways, with some states describing most businesses as "non-essential" while others defined "essential" in a much more liberal way.

3. Another April 2020 survey conducted by Facebook and the Small Business Roundtable found that 31% of small businesses stopped operating and that more than 10% were facing permanent closure due to the coronavirus. Additionally, many businesses report operating on a reduced basis due to social distancing mandates, cessation of in-person activities and shutdowns in related areas of the economy (Frier and Cheng, 2020).

Once cities and states in the U.S. began implementing shelter-in-place orders, business owners and public policymakers began to question whether the loss of income resulting from the COVID-19 shutdown should be covered under the business interruption coverage forms that are commonly used in the U.S. As detailed below, insurers have asserted that the policies were never intended to cover pandemic claims and point to exclusionary language found in both the unendorsed policies and policy endorsements, while policyholders and their attorneys have begun filing suits against their insurers over what they argue is inclusive policy language or ambiguities in an attempt to recoup some of their financial losses.

The purpose of this article is to provide an overview of some of the major issues surrounding business interruption insurance and the COVID-19 pandemic, possible coverages available and limitations under standard business income insurance coverage forms, and the ways in which lawmakers at the state and federal levels, as well as insurers, have proposed addressing these problems.

Issues Surrounding COVID-19

As shelter-in-place orders were mandated by state and local governments, and with guidelines or requirements to engage in “social distancing,” businesses across the country were required to close or change their business practices or distribution structure.⁴ In many states, non-essential businesses (e.g., beauty parlors, nail salons and tattoo parlors) were ordered closed by governmental or regulatory bodies (e.g., Alcorn, 2020), and other businesses, such as restaurants, were ordered to serve their product either curbside or by delivery only.⁵ Some businesses, such as grocery stores, were permitted to continue normal operations but were encouraged or ordered to limit the number of individuals permitted in the store at any given time (e.g., Butler, 2020; Muccigrosso, 2020). These restrictions have had a significant impact on the revenue and profits of many industries. According to David A. Sampson, president and CEO of the American Property Casualty Insurance Association (APCIA), the loss of business income for small enterprises could be \$220 billion to \$383 billion per month.⁶ It is possible that there are as many as 30 million potential business interruption claims from small businesses that suffered losses as a result of COVID-19 (Simpson, 2020a). Given the economic significance of the lost income related to the COVID-19 pandemic, policyholders

4. The U.S. Centers for Disease Control and Prevention (CDC) (2020a) defines social distancing as “keeping space between oneself and others outside the home.” The CDC recommendation is to maintain a distance of at least 6 feet between any two individuals, avoid group gatherings and avoid crowded locations.

5. Essential businesses typically include grocery stores, health care providers, pharmacies and banks, as well as other entities deemed necessary by local or state governments (Snider, 2020).

6. An April 15, 2020, report by the U.S. Department of Commerce highlights that U.S. retail trade sales were down 6.2% and clothing store sales were down 50.7% in March 2020 from March 2019, while food and beverage sales were up by 28.0% (U.S. Census Bureau, 2020).

are looking for ways to cover such losses. While the U.S. government committed to a \$2 trillion economic relief plan (Shabad and Edelman, 2020), many businesses are seeking payment for lost income under their business interruption insurance policies.⁷

For many states, the response to COVID-19 has shifted from slowing the spread of the virus to a focus on economic reopening and recovery. Some of the first states to reverse shelter-in-place mandates and reduce restrictions in March 2020 included Georgia, South Carolina and Oklahoma.⁸ As of early June 2020, all states and U.S. territories had eased restrictions that were put in place (Elassar, 2020). It is unclear how reopening will impact the spread of COVID-19; however, it is evident that it will ease some of the economic impact placed on businesses during the shutdown: unemployment figures improved significantly in May relative to the prior two months' job numbers and there is some evidence that many consumers wish to resume at least some of their pre-pandemic activities (Mitchell, 2020).

Business Interruption Insurance

When businesses face a slowdown or cessation of business operations, the financial losses associated with a reduction in net income are often addressed through the use of a business interruption insurance policy.⁹ These policies are intended to cover instances where a covered loss leads to a decline in revenue, an increase in expenses, or both. Insurers are not required to report financial data for business interruption insurance on a separate line-item basis in their statutory filings, which creates challenges in fully understanding the U.S. business interruption insurance market.¹⁰ While limited information regarding the market is available, Cohn, Barlyn and Hussain (2020) report that McKinsey & Company estimate global business interruption insurance premiums at roughly \$40 billion. In the U.S., commercial property insurance premiums (which include business interruption insurance) totaled approximately \$4.5 billion on a monthly basis in 2019 (APCIA, 2020).¹¹ Although data are limited, a recent survey conducted by the

7. For example, The Council for Insurance Agents and Brokers (CIAB) found that 75% of respondents experienced an increase in business interruption claims in the first quarter of 2020.

8. South Carolina reduced restrictions for furniture, clothing, department and sporting goods stores (Smith et al., 2020), while Oklahoma allowed personal care businesses, restaurants, dining rooms, movie theaters, sporting venues and gyms to reopen (Elassar, 2020). Georgia began allowing gyms, bowling alleys, nail salons, movie theaters and restaurants to reopen (Solomon, 2020).

9. Risk managers commonly identify business interruption as one of the most significant risks their businesses face (e.g., Aon, 2019; Allianz, 2020)

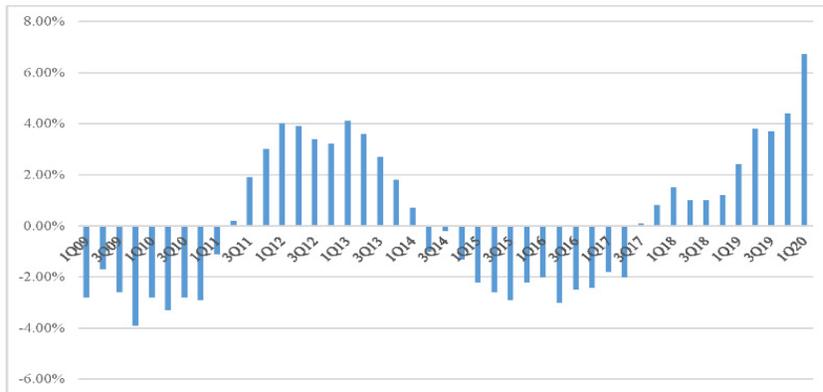
10. Partly to address this issue, on May 11, 2020, the NAIC issued a business interruption data call requiring insurers to disclose business interruption premium, claim and loss data (NAIC, 2020a)

11. It is estimated that premium volume for business interruption insurance in 2020 will decline by 7% to 13% in the U.S. and the U.K. (Hartwig, 2020).

Washington State Office of the Insurance Commissioner found that, as of March 15, 2020, “more than 194,000 commercial policies had at least one type of business interruption or civil authority coverage in effect” and estimated premiums for these policies were \$437 million (Sams, 2020a).¹² To put this value into perspective, total commercial property (non-liability) insurance premiums in Washington in 2018 were more than \$523.2 million and total direct premiums written for all property/casualty (P/C) business were approximately \$12.85 billion (NAIC, 2019).^{13,14}

In terms of pricing trends, as illustrated in Figure 1, quarterly reports issued by The Council of Insurance Agents & Brokers (CIAB) suggest an upward trend in business interruption insurance rate changes from the third quarter of 2017 to the first quarter of 2020, where the average rate increase in 2020 was 6.70% (CIAB, 2020).¹⁵ While the average rate change was 6.7%, the CIAB reports significant variation in the first quarter of 2020, with a high of a 28.8% rate increase and minimum of a 4.5% rate decrease. For comparative purposes, the CIAB reports that, on average, premiums increased by 12% for commercial property insurance, 9.6% for commercial auto insurance and 17.3% for umbrella coverage in the first quarter of 2020.

Figure 1
Business Interruption Insurance Rate Changes, Q1 2009 to Q1 2020



Values reported on the y-axis represent business interruption insurance percentage rate changes. Data used for the construction of this figure were obtained from quarterly surveys conducted by The Council of Insurance Agents & Brokers (CIAB), which are available at <https://www.ciab.com/market-intel/pc-market-index-survey/historical-pc-market-index-surveys>.

12. To our knowledge, this level of information is currently only publicly available for the state of Washington.

13. As noted previously, premiums for business interruption insurance are not separately reported by insurers and thus cannot be separated from the reported values.

14. Direct premiums written in Washington account for less than 2% of total premiums reported by U.S. P/C insurers (NAIC, 2019).

15. Survey respondents are broker members of the CIAB.

Although relatively little is known about the size of the business interruption insurance market or the primary writers of this line of business in the U.S., some evidence exists regarding the demand for this important line of business. A survey conducted by Nationwide in 2017 found that only 29% of small business owners that were surveyed had business interruption insurance (Nationwide, 2017). This is particularly significant as the U.S. Small Business Association's (SBA) Office of Advocacy reports that 99.99% of all business in the U.S. are "small businesses" (SBA, 2019) and that small businesses "account for almost 44 percent of U.S. economic activity" (SBA, 2018).¹⁶

While not used by all businesses, Wilson (2020) states that the ISO Business Income (and Extra Expense) (BIEE) Coverage Form (CP 00 30 10 12) is "probably the most common business income coverage policy found in the insurance marketplace."¹⁷ The business income insuring agreement located in the unendorsed BIEE states the following:

"We will pay for the actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration'. The 'suspension' must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss."

In addition to providing coverage for loss of income, the BIEE can also cover additional expenses that are incurred in order to continue operations following the occurrence of a covered loss. Furthermore, coverage is also available for instances where net income declines due to civil authorities' prohibiting access to the insured's premises as a result of a covered loss at property not owned or used by the insured. However, as we discuss below, differing interpretations of key terms found in the BIEE result in significant disagreement as to whether the policy should in fact cover business interruption claims stemming from the COVID-19 pandemic.

16. The SBA's Office of Advocacy defines a business as "small" if it has fewer than 500 employees (SBA, 2019), while the Nationwide survey classifies a business as "small" if it has fewer than 300 employees.

17. It should be noted that not all insurers use the ISO form discussed in this article and some have their own coverage forms that may offer broader or more restrictive coverage. Furthermore, smaller businesses frequently use the ISO Business Owners Policy (BOP), which contains coverage for property damage, liability and business interruption.

Interpretation of the Business Income Insurance Policy

Insurers have consistently asserted that business interruption claims stemming from COVID-19 were never intended to be covered under the business income policy, while policyholders and their attorneys argue that the language in the policy provides coverage.¹⁸ In this section, we discuss the various provisions of the BIEE policy that have created questions regarding coverages and exclusions. These include whether the suspension of operations¹⁹ is the result of direct physical loss or damage to property, whether the loss is in fact a covered loss, whether COVID-19 should fall under the definition of “pollutants” and, finally, whether the additional civil authority coverage should apply.

At the time of this writing, the insurance industry has asserted that the BIEE coverage does not apply to COVID-19 related losses because the slowdown or cessation of business operations has not been the result of direct physical loss, is not a covered loss and may even be excluded under the policy. Each of these issues are discussed below. The NAIC has further stated that “Business interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19, and therefore include exclusions for that risk” (NAIC, 2020b).

Direct Physical Loss or Damage to Property

One of the points that is frequently made by insurers is that the BIEE insuring agreement requires that a suspension of operations must be the result of “direct physical loss” or “damage to property at premises.” The policy does not provide a definition for the term “direct physical loss,” nor is there a further discussion regarding what is meant by “damage to property at premises.” This is potentially problematic for insurers, as it is often argued that when ambiguities in language exist in a policy, the court should find in favor of the insured.²⁰ While the term

18. This appears to be a longstanding stance that has been held by the industry. For example, in 2006, the director of inland marine for the AAIS stated that “Property policies were never intended to be a source of recovery for losses arising from organisms that cause disease” (Insurance Journal, 2006). Additionally, even before U.S. business closures due to COVID-19, a *Wall Street Journal* article discussed the common exclusion of epidemics by business interruption policies following the 2002 SARS outbreak (Yang, 2020).

19. The unendorsed BIEE defines suspension as “a. The slowdown or cessation of your business activities; or b. That a part of all of the described premises is rendered untenable, if coverage for Business Income Including ‘Rental Value’ or ‘Rental Value’ applies.”

20. As noted by Henry (2017), “One common alternative to traditional contract law is strict *contra proferentem*, which interprets ambiguous terms against the drafter without reviewing extrinsic or parol evidence.” However, the author also notes that an alternative to *contra proferentem* is the use of the reasonable expectations doctrine, in which the policy’s language is interpreted using the “reasonable person standard.”

“physical damage” is not defined in the policy, many courts have interpreted the term to mean a “distinct, demonstrable, physical alteration of the property” (Plitt, 2013). Using this definition of “physical damage,” it would appear that the BIEE should not cover virus-related losses, as the loss did not result in the “physical alteration of the property.”

While some courts have argued that physical alteration of the property is necessary to show physical damage occurred, others have begun to use more liberal interpretations of physical damage to include loss of use (Plitt, 2013). For instance, in the case of *Gregory Packaging, Inc. (GPI) v. Travelers Property Casualty Company of America*, a New Jersey court determined that the release of ammonia in a GPI facility in 2010 still constituted “direct physical loss of or damage to” the property. Gregory Packaging argued that the release of the ammonia “physically incapacitated its facility,” that government authorities prohibited access to the facility, and that no one could enter the facility following the release (*Gregory Packaging, Inc. v. Travelers Property Casualty Company of America*, 2014). While this interpretation may seem inconsistent with the commonly accepted definition requiring “distinct, demonstrable, physical alteration of the property,” in the case of *Port Authority of New York and New Jersey v. Affiliated FM Insurance Company* (2001), the court stated that “To be sure, there are circumstances in which the actual release of asbestos from building materials can constitute physical damage or loss. When this has been the case, however, the courts have described the level of asbestos release that will constitute physical damage in terms requiring the magnitude and extent of asbestos release to be relatively substantial.”

However, in the case of COVID-19, the issue is further complicated by the fact that the CDC has stated that the virus can be spread both person-to-person and with “contact with contaminated surfaces or objects” (CDC, 2020b). That the virus can be spread by way of contact with property may support the argument that the loss is attributed to physical damage to property. Using the interpretation offered by *Gregory Packaging, Inc. v. Travelers Property Casualty Company of America*, one could argue that business interruption claims should be covered even though alteration to the property did not occur.²¹ Insurers and courts may also consider that some governmental orders to shut down businesses “have specifically cited property damage from COVID-19” (Congressional Research Service, 2020).

Covered Causes of Loss and Exclusions

The unendorsed BIEE business income insuring agreement states that coverage applies when the loss is due to a “Covered Cause of Loss.” The term “Covered Cause of Loss” is linked to the cause of loss form that applies to the policy, which may either be a named perils form (i.e., the “Basic” and “Broad” forms) or an open perils form (i.e., the “Special” form).²² The named perils forms specifically list the

21. An issue related to the COVID-19 is that many business interruption losses are the result of preemptive measures to avoid contamination and spread of the virus, rather than an actual outbreak or contamination of the insured virus. Unlike cases with ammonia or asbestos contamination, it may be impossible to determine if the virus was present within a business (Lalor, 2020).

22. Open peril forms are sometimes referred to as “all risks” coverage.

perils that are covered, while the opens peril cause of loss forms are often interpreted to cover perils that are not explicitly excluded in the form. Neither the Basic nor Broad cause of loss forms list communicable diseases or “bacteria” as covered causes of loss and both include exclusions related to “Fungus,” “Wet Rot,” “Dry Rot” and “Bacteria.” While the term “Fungus” is defined in the policy, the term “bacteria” is not. A similar exclusion is also found in the ISO Special Cause of Loss Form (CP 10 30 10 12), which would seem to eliminate coverage in the event that the term “bacteria” were to include a virus. However, while the policy does provide an exclusion for “bacteria,” it does not explicitly include exclusions related to viruses, communicable diseases or pandemics. The lack of an explicit exclusion in the unendorsed BIEE and cause of loss forms may then arguably afford a policyholder with coverage.²³

Issues also arise as to whether a virus should be interpreted as a “pollutant.” This is of importance, as the unendorsed BIEE does include some language addressing “pollutants.” In particular, the policy states that the period of restoration:

“does not include any increased period required due to the enforcement of or compliance with any ordinance or law that...[r]equires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way responds to or assesses the effects of ‘pollutants.’”

While the number of definitions found in the unendorsed BIEE is fairly limited relative to many commercial insurance policies, the term “pollutants” is defined in the policy. The policy defines “pollutants” as:

“any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditions or reclaimed.”

Similar to the issue of “direct physical damage,” some courts have ruled that a virus may not be a pollutant and may thus be covered. Boggs (2020) argues that the term “contaminant” includes a virus, resulting in the exclusion of these losses. However, as noted by Kroeger and Park (2020), some courts have found that viruses are not pollutants, so this is an issue that will likely be resolved in the courts.

Although debate exists regarding whether an exclusion will allow insurers to avoid coverage or if any coverage resides in the unendorsed forms, an endorsement

23. While this is commonly the case, Berry (2020) notes that requiring interpretation of policy language does not necessarily mean an ambiguity exists. This is illustrated in the case of *Blue Shield of Florida, Inc. v. Woodlief* (1978), in which the court stated, “ambiguity is not invariably present when analysis is necessary to interpret the policy.”

does exist which explicitly excludes losses due to virus or bacteria.²⁴ This endorsement, titled “Exclusion of Loss Due to Virus or Bacteria” (CP 01 40 07 06), states that the insurer “will not pay for 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 endorsement further states that the exclusion applies to forms associated with the commercial coverage, including “business income, extra expense or action of civil authority.” In the event this endorsement is attached to the policy, it would seem that coverage under the BIEE for COVID-19-related claims should not apply. While it is not known what proportion of commercial policies include this exclusion, Ayers (2020a) states that “the vast majority...contain exclusions for viral/bacterial contamination.”²⁵ This is further supported by Robinson (2020), who notes that most states require the attachment of the CP 01 40 07 06 endorsement.

Civil Authority

An important additional coverage that resides in the unendorsed BIEE is coverage for loss due to the actions of civil authorities. Specifically, the policy states that coverage exists when civil authorities “prohibit access to the described premises” as a result of *physical damage* caused by a *covered cause of loss at a property* that is *not the insured’s property* (emphasis by the authors). However, coverage for civil action would require several concurrent facts. First, that the courts employ an interpretation of physical damage which does not require the actual alteration of property (as discussed above). Second, as noted by Schiffer, Garavaglia and Mihocik (2020), that access was in fact prohibited due to physical damage and that there is a “nexus to a direct physical loss.” Third, the action taken by the civil authorities must be due to a covered cause of loss.²⁶

Additional issues that arise are whether civil authority actually “prohibited” access to the property and whether the civil authority’s order occurred prior to the occurrence of a physical loss. In the case of the former, while some businesses were in fact mandated to cease operations, “frequently, the “order” of civil authority is the nature of an “advisory” or “voluntary” evacuation” (Berry, 2020). If a business chose to suspend operations in the best interest of its customers and/or employees, the question then arises as to whether the suspension of operations was in fact due to civil authorities prohibiting access to the premises. In the case of the latter, according to Schiffer, et al. (2020), in prior cases of business interruption due to catastrophe evacuations, if the evacuation order was created prior to physical

24. A.M. Best notes that insurers introduced exclusions related to communicable diseases as a result of the severe acute respiratory syndrome (SARS) outbreak in the early 2000s (Simpson, 2020b).

25. A similar endorsement exists for the Businessowners Coverage Form (BP 06 01 01 07).

26. The provision also requires that the damaged premises be located within one mile of the insured property.

damage occurring, courts have not required insurers to pay for these business interruption events.

Given the set of requirements that must be met in order to successfully demonstrate that the civil authority additional coverage should apply to a given claim and the unique circumstances surrounding the suspension of operations during the COVID-19 pandemic, claimants may find it difficult to recover business interruption losses through this additional coverage in the unendorsed BIEE.

State and Federal Responses to COVID-19 Claims

As discussed above, significant uncertainty exists regarding how courts will interpret the language in the ISO BIEE coverage form or any attached endorsements. However, a potentially more important source of uncertainty arises from proposed state-level legislation. In response to questions regarding whether BIEE policies were intended to cover business interruption due to communicable diseases or viruses, state lawmakers in at least nine U.S. states and the District of Columbia initially proposed bills that would require insurers to cover these losses on a retroactive basis.²⁷ In general, the bills would require insurers to offer retroactive coverage for business interruption losses stemming from the coronavirus and pandemics (e.g., Adriano, 2020; Wilkinson, 2020a). The bills typically focus on providing this retroactive coverage for small business (i.e., those with fewer than 100 to 150 full-time employees); some bills would allow those insurers paying these claims to apply for reimbursement from the state, with reimbursement funds coming from an assessment on insurers writing P/C business in the state.²⁸ However, several proposed bills have already been withdrawn or amended to remove wording related to retroactive coverage for BIEE. For instance, Louisiana SB 477—which originally called for insurers doing business in the state to retroactively cover BIEE claims—is being amended to remove the retroactive coverage. The proposed amended bill would require insurers to clarify exclusions on BIEE policies (Wilkinson, 2020c). The District of Columbia City Council also decided not to move forward with a retroactive insurance coverage mandate (Weinberger, 2020).

Louisiana proposed an alternative approach that differs from those discussed above. Under SB 495, insurers would have the option to contribute to a “Business Compensation Fund.” Insurers that choose to contribute to this fund would receive

27. These states include Louisiana, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island and South Carolina (Giordano et al., 2020; National Association of Mutual Insurance Companies (NAMIC), 2020).

28. Although the passage of laws requiring retroactive business interruption coverage has been discussed in a number of states, questions remain as to whether the U.S. Constitution would prohibit this type of action (e.g., Nevins and Lewin, 2020a; Pierson and Gallagher, 2020; Tager, White and Hamilton, 2020).

immunity from COVID-19 bad-faith claims, while insurers that choose not to contribute would not receive this immunity. Under the terms of the proposed bill, insurers writing business in Louisiana could participate by contributing “the greater of \$50 million or 80% of the aggregate policy limits for “all commercial policies” that the insurer has in force in Louisiana on March 11, 2020, or anytime thereafter during the state of emergency” (White and Breen, 2020).

In addition to the various bills that have been proposed at the state-level, the U.S. Congress has also encouraged the insurance industry to cover business interruption claims stemming from COVID-19. On March 18, a group of lawmakers in the U.S. House of Representatives (House) wrote, “As the world community continues to navigate the impact and response of the declared global health emergency caused by COVID-19, we urge your member companies and brokers to make financial losses related to COVID-19 and other infectious disease-related losses part of their commercial business interruption coverage for policyholders” (Ayers, 2020a). In response to this request, four insurance industry trade groups responded by noting that the policies were never intended to cover these types of losses and that the federal government is best suited to address the large economic losses associated with the pandemic.²⁹

Beyond the federal government simply encouraging insurers to voluntarily cover these losses, a caucus of Republicans and Democrats in the House referred to as the “Problem Solvers Caucus” has proposed the Health Crisis and Economic Revival Package, which includes the declaration of the pandemic as a public health crisis that would be a “qualifying event” for business interruption policies. Similar to the aforementioned state proposals, this would have the effect of requiring insurers to pay for business income losses attributed to the coronavirus (Grande, Symington and Wienecke, 2020).

During a press conference held April 11, 2020, President Donald J. Trump also encouraged insurers to cover the loss of income resulting from COVID-19. The president acknowledged that some policies may exclude pandemics, but went on to state that many small businesses have been paying for business interruption coverage “for a lot of years” but have never filed a claim and now, “all of a sudden they need it.” The president stated that he would like insurers to pay the pandemic losses “if it’s fair” (Vazquez, 2020). However, in response to the president’s comments, several Republican senators cautioned about the impact on the insurance industry over requiring this retroactive coverage, stating that such an action “would undoubtedly undermine our insurance system and create major unintended consequences for new contractual relationships going forward (Ayers, 2020b; Scism, 2020).

Looking to the future, the House Financial Services Committee has proposed another solution in the form of the Pandemic Risk Insurance Act (PRIA) of 2020. The PRIA would operate in a manner similar to the Terrorism Risk Insurance Act (TRIA), where insurers would provide coverage for pandemics and a federal

29. The four trade groups are the APCIA, NAMIC, the CIAB and the Independent Insurance Agents & Brokers of America (IIABA).

reinsurance backstop would be available that would have the effect of limiting total insurer losses. According to H.R. 7011, a bill proposed by U.S. Rep. Carolyn Maloney (D-NY), the PRIA program would be voluntary and the federal government would begin participating once aggregate industry losses exceed \$250 million. Once triggered, the federal government would be responsible for 95% of losses in excess of an insurer-specific deductible (equal to 5% of the insurer's prior-year direct premiums earned) and aggregate losses would be capped at \$750 billion annually (Sclafane, 2020).³⁰

In April 2020, two additional bills were introduced in the House, both of which would provide small businesses with business interruption insurance during future national emergencies. H.R. 6497, called the Never Again Small Business Protection Act, was introduced April 24 (Fitzpatrick, 2020). This bill would require that BIEE coverage be provided for business and nonprofits for BIEE losses that result from any federal, state or local government-ordered business shutdown after the declaration of a national emergency. The bill calls for the coverage to apply when the business is interrupted for at least 30 days, requires that the business not terminate any employees' employment during the national emergency, and requires that the employer maintains employees' health coverage during the national emergency. The bill does allow the policyholder to waive the coverage via a written statement and insurers would also be permitted to exclude coverage if the policyholder fails to pay premiums associated with the coverage. As part of the bill, the government would put into place a federal backstop that would cover the costs to insurers in order to help ensure the stability of the insurance industry (Fitzpatrick, 2020).

The second bill proposed by the House, H.R. 6494, is called the Business Interruption Insurance Coverage Act of 2020. This act would "ensure that businesses who purchase interruption insurance won't get their claims denied because of major events, such as viral pandemics, forced closure of businesses, mandatory evacuations, and public safety power shutoffs" (Fitzpatrick, 2020). Similar to H.R. 6497, this bill would allow insurers to deny coverage if premiums are not paid; however, it does not require policyholders to retain employees or maintain their health coverage for the business interruption coverage to apply.

Insurer Responses to COVID-19 Claims

The APCIA has estimated that the COVID-19 shutdown could cost insurers up to \$383 billion for one month of business interruption claims to small businesses (Chiglinsky, 2020). To put this cost in context, the Insurance Information Institute (III) (2019) states that total insured losses associated with the 9/11 terrorist attacks were \$47.1 billion, while insurers in the U.S. P/C market had approximately

30. As of 2020, federal participation for terrorism losses under TRIA begins after insured losses exceed \$200 million and the program is capped at \$100 billion (III, 2019).

\$812 billion in policyholders' surplus in the third quarter of 2019 (*Insurance Journal*, 2020a).³¹ Industry advocates argue that the policies were not priced to include coverage for communicable diseases such as the COVID-19 virus, so paying these claims would not only result in significant loss payments, but could also reduce the ability of some insurers to pay for other covered claims and ultimately increase insolvency risk for some insurers.^{32,33} Additional claim costs would also have the effect of reducing insurers' available investable funds, which are an important source of insurer profit.

Rather than the industry bearing the large costs associated with these claims, insurers have supported the "COVID-19 Business and Employee Continuity and Recovery Fund," which would be responsible for providing federal assistance to businesses and workers that are adversely affected by the pandemic. In particular, the fund would "help businesses retain and rehire employees, maintain worker benefits, and help cover operating expenses such as rent. It may also provide funds for payroll, lost income of sick employees, and lost business revenues but not profits" (Simpson, 2020c). This particular approach would be similar to the September 11th Victim Compensation Fund that was created to address losses associated with the 9/11 terrorist attacks.³⁴ While insurers (as well as agents and brokers) may be involved in the process of handling application filings and reviewing those filings, they would not actually be financially responsible for the loss payments (Wilkinson, 2020b). Another proposal offered by P/C trade organizations is the Business Continuity Protection Program (BCPP). This program would operate similar to the National Flood Insurance Program (NFIP) and would provide businesses with the option to purchase "revenue replacement coverage" which would provide coverage for up to 80% of the business's payroll and other expenses. Under this arrangement, loss payments would be made by the federal government through the Federal Emergency Management Agency (*Insurance Journal*, 2020b).³⁵ Just as with the NFIP, while losses would be paid by the federal government, businesses would have the ability to purchase coverage through agents and carriers.

31. It is unclear how much of the \$812 billion would be applied toward business interruption claims. Not all insurers offer business income insurance coverage or commercial insurance, which means some portion of surplus would not be available for these claims. According to a 2018 Federal Insurance Office report, commercial insurance premiums made up about 46% of P/C sector revenue in 2018.

32. For example, the president of the Ohio Insurance Institute stated that such retroactive coverage "would likely wipe-out a number of Ohio insurance companies" (Jones, 2020).

33. Two of the central tenets of insurance are that insurable risks should not be catastrophic and they should be diversifiable (Böhme, Laube and Riek, 2019). To some degree, the industry's argument that these types of losses were never intended to be covered by the issued policies is supported by the fact that both of these tenets are clearly violated.

34. The purpose of the September 11th Victim Compensation Fund is to compensate individuals who were injured or killed as a result of the 9/11 terrorist attacks or during the process of removing debris (September 11th Victim Compensation Fund, 2020).

35. Under this proposed program, businesses opting to purchase this coverage would receive aid "...once there is a presidential viral emergency declaration" (*Insurance Journal*, 2020b).

Although carriers and industry trade groups have responded to proposed legislation and offered alternative approaches to addressing future pandemic-related business interruption losses, there is currently little publicly available evidence suggesting that either insurers or the ISO are revising policy language. While it is unclear whether insurers will eventually make such changes, the ISO did issue two non-filed advisory endorsements in February 2020 that allowed for business income and extra expense coverage for civil authority losses attributed to the coronavirus pandemic (IRMI, 2020).³⁶ As noted by IRMI (2020), these endorsements are similar to advisory endorsements that were created in 2014 in response to the Ebola virus, and Wilson (2020) argues that the purpose of these new endorsements is to effectively restate the fact that the unendorsed ISO forms were never intended to provide coverage for these types of losses. Finally, Nevins and Lewin (2020b) point out that even if insurers or the ISO have not made additional changes to policies, in the future “there may be further responses, including specific exclusions for coronavirus.”

Policyholder Responses to COVID-19 Claims

The aforementioned discussions address the issue of legislative and insurer responses to these events, as well as proposed solutions to similar losses in the future. However, another looming question is how insured businesses will respond. The response by insureds will largely be dependent on how insurers choose to interpret the policies and whether some will voluntarily cover pandemic-related business interruption claims. At the time of this writing, it appears that insurers intend to deny business interruption claims stemming from COVID-19, with some insurers publicly stating this fact. For example, Travelers, Hartford and Chubb have each signaled that they intend to deny COVID-19 business interruption claims.³⁷

36. The two new forms are titled “Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus” and “Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus (Including Orders Restricting Some Modes of Public Transportation).”

37. Travelers (2020) has stated the following: “Insurance for business interruption can provide coverage when a policy holder suffers a loss of income due to direct physical loss or damage to covered property at its location or another location. It does not cover loss of income due to market conditions, a slowdown of economic activity or a general fear of contamination. Nor does the policy provide coverage for cancellations, suspensions and shutdowns that are implemented to limit the spread of the coronavirus. These are not a result of direct physical loss or damage. Accordingly, business interruption losses resulting from these types of events do not present covered losses under our property coverage forms.” The Hartford (2020) has also issued the following statement: “Most property insurance includes business interruption coverage, which often includes civil authority and dependent property coverage. This is generally designed to cover losses that result from direct physical loss or damage to property caused by hurricanes, fires, wind damage or theft and is not designed to apply in the case of a virus.” Finally, Chubb’s CEO said that business interruption insurance would not cover COVID-19-related claims because coverage requires physical damage (Stempel, 2020).

Not surprisingly, the denial of these claims has resulted in a significant number of lawsuits against carriers that have issued BIEE coverage.³⁸ The suits brought by insured businesses commonly assert that their claims have been wrongfully denied, there is a breach of contract and/or request declaratory judgment that the plaintiff's business interruption policy should cover COVID-19 claims.³⁹ The outcomes of these suits remain unclear, but they will ultimately dictate whether insurers will be responsible for covering business interruption claims stemming from pandemic-related losses outside of any legislative actions.

In addition to increased litigation activity surrounding COVID-19 claims, there has also been a proposal put forth by the Business Interruption Group (BIG), a restaurant and hospitality-focused organization that asserts business interruption claims should be paid by the insurance industry. Under the proposed program, called the "BIG Insurance Relief Act," insurers that issued policies without a virus exclusion could voluntarily pay business interruption claims stemming from the COVID-19 pandemic and then receive reimbursement from the federal government (*Insurance Journal*, 2020b). An attorney representing BIG described this proposal as a "compromise" that would allow insureds to receive payments for their business interruption losses while reducing the costs associated with future legal action. Although the proposed program supports the use of federal subsidies to cover these claims, details regarding how the program would be structured and administered are currently limited.

The response by insureds over coverage for pandemic-related claims may extend well beyond litigation. In particular, while it is anticipated that businesses will continue to bring new lawsuits against insurers for claims, it is also predicted that the demand for business interruption coverage will likely be affected. For instance, respondents to a survey administered by the CIAB (2020) indicated that there was a 47% increase in the demand for business interruption insurance in the first quarter of 2020, while in the fourth quarter of 2019 there was only an 18% increase in demand. The CIAB notes that at least part of the increase was "purely driven by companies looking for coverage that includes viruses/pandemics." In addition to the increase identified by the CIAB, Banham (2020) notes that recent demand for pandemic-related parametric business interruption insurance has been "soaring." Though some evidence points to a potential increase in the demand for business interruption coverage, the possibility also exists that demand could decline if businesses question the value of the coverage, lose trust in their insurer's ability or willingness to cover claims, or decide that it is unclear as to the types of losses that could be covered under the policy.

38. Sams (2020b) notes that more than 100 lawsuits were filed as of May 20, 2020.

39. Recent suits include *Big Onion Tavern Group LLC et al. v. Society Insurance Company*; *Cajun Conti, LLC et al. v. Certain Underwriters at Lloyd's of London*; *French Laundry Partners, LP dba The French Laundry, et al. v. Hartford Fire Insurance Company, et al.*; *Legal Sea Foods LLC v Strathmore Insurance Co.*; *Mudpie, Inc. v. Travelers Casualty Insurance*; *Simon Wiesenthal Center Inc. et al v. Chubb Group of Insurance Cos.*

Conclusion

The COVID-19 pandemic caused the states to place restrictions on the ability of businesses to operate, which has resulted in substantial economic losses across the country. As the states have begun either easing restrictions or completely eliminating “shelter-in-place” mandates, there currently exists a debate over the coverage of COVID-19 business interruption claims by U.S. insurers. In support of coverage for these claims are arguments revolving around the interpretation of the term “direct physical damage,” the definition of “pollutants,” the exclusion of “bacteria” and whether the civil authority additional coverage should apply. From a policy interpretation perspective, the existence of endorsements that specifically prohibit coverage for losses stemming from viruses will likely be used to fend off many of these claims. However, even with such language, it appears the most significant risk facing insurers is not necessarily potential ambiguity that exists in the policy, but rather uncertainty regarding government-required retroactive coverage. In the event the states and/or the federal government do in fact pass laws that require insurers to pay for these losses, which presumably were never intended to be covered, it is anticipated that insurers will dig in for a prolonged legal battle with the government and policyholders. Even without federal intervention, litigation stemming from denied COVID-19 business interruption claims has been described by one attorney as potentially “the largest civil litigation battle in human history” (Ayers, 2020c).

While insurers moved to exclude viruses, pandemics and epidemics from business interruption policies following the SARS outbreak in 2002–2003, it appears that some of the language used in at least the ISO standard business interruption policy remains open to some interpretation. Following the COVID-19 pandemic, it may be expected that the ISO and insurance carriers that provide their own business interruption policies will revisit this policy language. Insurers that continue to offer insurance against epidemic or pandemic business interruption will likely want to provide precise wording about coverages and to consider an appropriate premium for this coverage.

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Cummins, J. David and Richard A. Derrig, eds., 1989. *Financial Models of Insurance Solvency*, Norwell, Mass.: Kluwer Academic Publishers.

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