

Businesses are asking the wrong question about insurance coverage for coronavirus shutdowns

By Bob Rutter, Rutter & Russin, LLC

In the last few weeks our firm has repeatedly fielded questions from policyholders, particularly in the hospitality and entertainment industries, about whether their business interruption insurance will cover the losses that they are certain to incur as a result of the coronavirus pandemic. But that question is unanswerable, at least right now.

What policyholders should be asking is: **Should I file a claim for a business interruption loss?**

Our answer is yes, which I'll explain below.

Numerous insurance experts have weighed in on the Covid-19 insurance coverage question in a slew of published articles that are readily findable on the web. Lots of people have opinions on the issue, but so far none of them have come from a court rendering a decision in a lawsuit. Until that happens—and happens repeatedly—there will be uncertainty.

Consider the sub-issues that need to be addressed in order to decide the overall coverage issue:

- Was your business effected by the actual virus, by the shutdown, or by the impact the virus or the shutdown had on a vendor or supplier?
- Was the virus present on the insured premises?
- Did the virus cause direct physical harm to the premises?
- Does your policy contain civil authority coverage?
- Does your policy cover contingent business loss?
- Does your policy have a virus exclusion?

It's easy to see why one court decision will not control every claim.

Think back on other topics that have drawn a great deal of insurance attention over the years. Asbestos. Mold. Katrina. 9-11. Sandy.

The eventual resolution of these coverage issues was not apparent when the issues first arose. That is why they engendered years of litigation. There were arguments for and against, there were varieties of policy language, and sometimes there were different courts from different states that reached different conclusions.

Insurance coverage law is state-driven. There is nothing that says all state courts must arrive at the same conclusion. Many times, they do not. Will they on the issue of whether there is business interruption coverage for losses caused by Covid-19 closings? Only time will tell.

What's a policyholder to do?

Although there is uncertainty about the eventual coverage determination, one thing is fairly clear. If a policyholder unreasonably delays giving its insurer notice of claim, then the insurer will probably assert a late notice defense that may be enough to defeat the claim, regardless of the merits.

So, the question that policyholders should be asking is—**Should I file a claim for a business interruption loss?** It will likely take years of litigation for there to be any final answer to the ultimate coverage issue, and the answer could differ from state to state. But there is little effort involved in calling your agent and submitting a claim, nor is there likely to be any repercussion unless and until a claim is actually paid, if at all.

The best and safest thing for a policyholder to do now is to submit a claim. It will likely be denied, but that gives the policyholder, under most commercial policies, two years to decide whether to file suit. If, as that two-year deadline approaches, the coverage landscape has developed in a way that looks favorable, then the policyholder has the option of deciding whether to pursue litigation.

If, on the other hand, policyholders have taken a severe beating over the previous two years, then the business owner will likely decide not to spend any time, energy, or money seeking to try and upset the established order. But at least that option still remains.

Our advice then—give notice, temporarily accept the likely denial, and wait.