



A reply to denial

First steps when the insurer says no to your client's COVID-19 business interruption claim

BY KIM H. COLLINS

In the aftermath of businesses destroyed by the pandemic, insurers today are issuing blanket denials of claims made under the business income (and extra expense) coverage of many commercial property and casualty policies.

The denial is often based on the coverage exclusion for "virus." In fact, the ISO form regarding the exclusion for "virus" is simply an exclusion for the common virus. The underwriters were well aware of the pandemic issue and chose not to directly address it. The fact that they excluded the common virus proves that coverage could exist for that issue. Many of these policies are drafted in manuscript form and will vary in their wording, particularly exclusions. The use of the generic word "virus" or "pathogen" cannot serve to provide a reasonable underwriting intent to exclude the well-known risk of a pandemic.

This article advances the cause for coverage by expressing in clear language why we have a physical loss to the premises. It also gives some guidance to plaintiffs' attorneys who do not want to lead the charge, but want to turn the tables on the insurer, telling them their approach is not in good faith and their inaction has consequences.

The letter is written to come from your prospective client, who will send it to their carrier. The insurer will quickly understand that the letter was written by an attorney – one who will likely become involved if the denial is not reconsidered. For the plaintiff's attorney who chooses to join the fight immediately, you can rephrase the letter to come from your offices.

The simple assertion in the letter is that there is but one cause for the loss, the pandemic, and the civil shutdown was directly caused by the physical loss of use of the premises because of the pandemic's invisible spread.

This is a critical coverage issue. Until you can convince the Court that there is "physical loss" the insurers win. And in my opinion, with over a 50-year career of service to coverage, the policy is designed to cover this unusual but wholly predictable event.

Letter to insurer

ABC Insurance Company
Dear Claims Manager:

This will respond to your denial letter, sent without any investigation or conversation regarding my claim under the Business Interruption Coverage of your Policy.

As Claims Manager of ABC Insurance Company, it is my assumption you represent management in your decision to deny all claims related in any way to the COVID-19 pandemic.



My restaurant business of 30-plus years is in serious jeopardy of closure from debt without the protection of the pre-paid coverage provided in the Policy. My coverage has now been wrongfully denied by your form letter.

Your letter states that the entirety of my loss is due to the COVID-19 shutdown mandated by Civil authorities and places the date of loss as March 15, 2020. In fact, the closures began before that date as we had a customer who was sick and later diagnosed with COVID-19, and then began experiencing absences from my employees, as well as a gradual slowdown of business, which culminated into the mandated shutdown on your referenced date of loss.

The facts are that sometime after the issuance of my Policy, while the Policy was in full force and effect, a *new* coronavirus, for which no vaccine existed, escaped out of containment from the Republic of China, and did so in a negligent, unexpected and unforeseen manner.

The accidental discharge of this killer pandemic from China is a covered cause of loss resulting in "direct physical loss of" or "damage to" my restaurant, as well as loss of use or suspension of business operations covered under the Policy. The "or" means a



separate causal analysis and “loss of” includes an inability to use or to continue normal operations even if direct physical loss does not occur. The premises are unusable because it has rendered dangerous by the very presence of the pandemic.

California recognizes coverage under a bodily injury policy for the undetectable asbestos fibers which can cause harm or death. This new coronavirus is an invisible killer. It is not just unseen, the damage it causes is unforeseen, and unexpected. It causes direct physical loss to my premises, the use of harsh cleaning agents to protect the premises from invisible harm, the loss of employees due to sickness, the loss of customers through health announcements from Civil authority, and, of course, my mandated suspension of business.

The Additional Coverage contained in the BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM providing coverage due to closure by Civil authority also applies to my claim. The damage or loss of use was not self-caused by the insured, as is specifically prohibited in the Policy. The pandemic was the direct cause of physical loss or damage, it closed down my business as well as the surrounding area. The Civil authority caused the shutdown of business operations due to deaths caused by the dangerous physical conditions created by the pandemic, and to prevent further deaths from the pandemic.

As an example of coverage under the Policy, if there were a fire in an adjacent building, and the fire did no actual damage to my premises, a Civil closure of my premises would be covered. Here, we have a mandated closing caused by a new pandemic, with no vaccine, which did sweep over my premises, as well as the surrounding premises, causing an invisible, but deadly, mist of tangible deadly substance and resulting in my loss of use of business premises.

Your denial letter anchors its opinion on the very broadly worded Exclusion, attached to the Policy as an Endorsement. This Exclusion Endorsement only “modifies” the Policy. This Endorsement

was not intended to apply to and does not apply to the BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM, which also includes the Additional coverage for Civil authority shutdown. This separately underwritten part of the Policy required a separate paid premium. It also requires a separate, good faith coverage analysis. This Endorsement exclusion is expressly limited only to the BUSINESS PERSONAL PROPERTY FORM.

In California, as you must know, an Exclusion in an Insurance policy is read narrowly and restrictively, in order to give the coverage Grant contained in the policy its fullest interpretation, in accordance with underwriting intent.

Under these facts, the nature and kind of risk insured against is in fact triggered under the Policy, an unforeseen accident resulting in loss of use of the business premises. The sweeping and generalized wording of your Endorsement Exclusion cannot be used to cancel paid-for coverage. Broadly interpreting an exclusion so it cancels the coverage provided under the policy is not permitted in the interpretation of an insurance policy.

Here, the expansive wording of the Endorsement Exclusion attempts to greatly overreach by prohibiting coverage generically and without benefit of any definition. This Endorsement expansively prohibits coverage “...of any pathogenic or poisonous biological or chemical materials.” There are no commas. If the Policy wished to clearly eliminate coverage for a pandemic, it could have excluded such coverage in a clear and concise manner. The Policy itself does clearly and concisely exclude “terrorism” claims. There are no definitions given in the Policy for this broadly worded exclusion for “pathogens.” The Policy is able to define “fungus” in great detail. But the Policy failed to provide a definition for “pathogenic material.” It is observed that Endorsement Exclusion does provide conditions for possible coverage when the “pathogenic material”

is kept at or brought on to the premises and the dispersal is accidental. This shows that this Endorsement Exclusion was meant to be read in a narrow, temporal manner.

I hereby demand payment of all Policy benefits. As the insurer, ABC Insurance Company from its own underwriting documents, without further investigation, already knows my claim is more valuable than the Limits stated in the Policy. I hereby demand payment of all Policy limits, and each of them.

Due to your breach of my Policy provisions as well as your extra-contractual wrongdoing, I do assert your knowing waiver of Policy conditions, and your estoppel from further investigation. I do assert that ABC Insurance Company has waived its right to limit my losses to Policy limits and has, by its conduct, become responsible for all naturally flowing damages to my business, whether contractual or in tort, including bankruptcy, suffered or to be suffered by your Insured.

Sincerely,
Your Insured

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