



Coronavirus : Insurance Coverage Options

Matthew E. Lundy

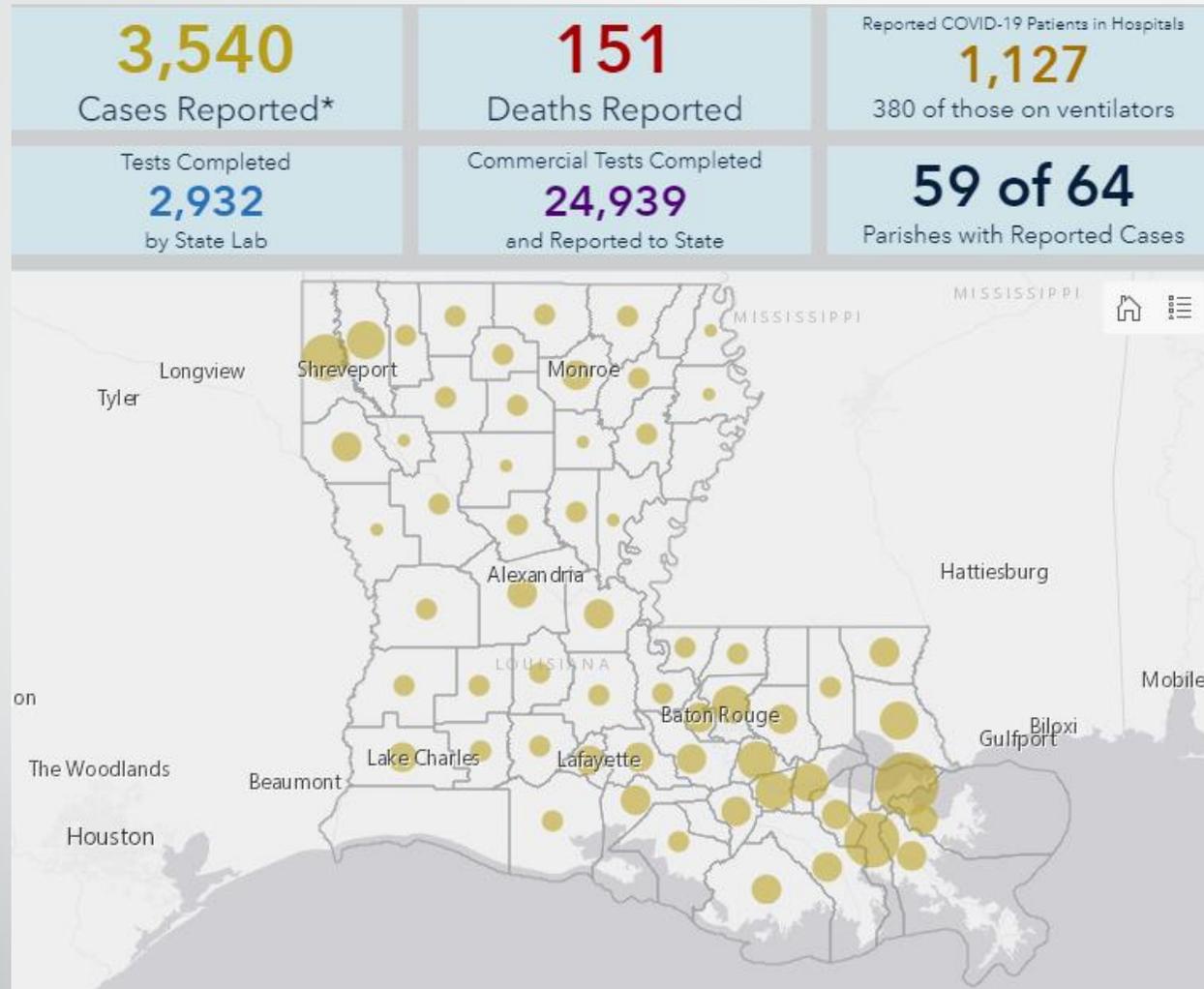
Hunter W. Lundy

Daniel A. Kramer

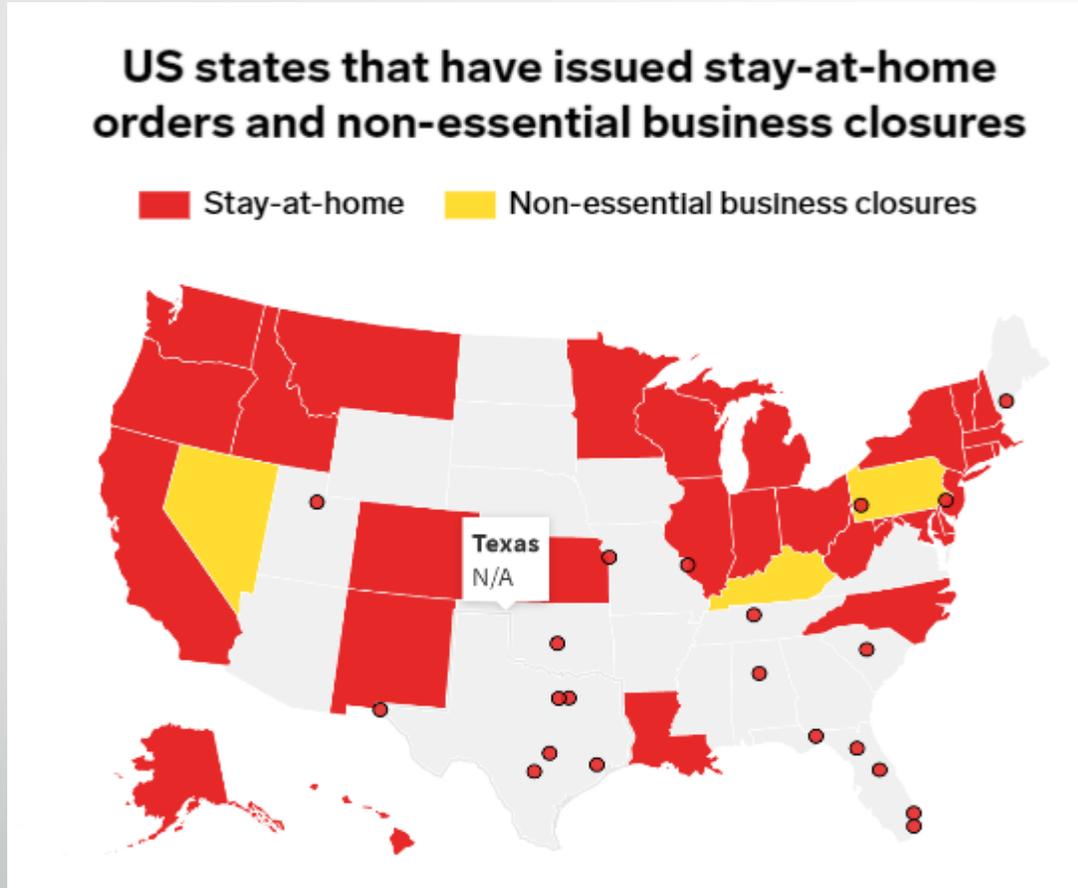
Lundy, Lundy Soileau & South, LLP

March 25, 2020

Coronavirus – Unprecedented Louisiana Exposure



Many states have issued “shelter in place” or “stay at home” orders



Credit: Business Insider

Cities and counties across the country have issued their own shelter in place orders; Most other states have placed restrictions on businesses and public gatherings

Some states are restricting travel from “hotspot” states like Louisiana and New York

1/3 of the world reportedly on some type of “lockdown”

Shut down orders have decimated businesses nationwide – New Orleans is ground zero for Louisiana



Coronavirus' Effects on Stock Markets



Is Coverage Available to Help Businesses Deal with the Economic Effects of Coronavirus?



Businesses Should Ignore Blanket Statements that There is No Coverage for Coronavirus Losses

Misconceptions you may have after speaking with your insurance agent/broker:

- Insurance Services Office (ISO) excluded virus claims 15 years ago
- There is no coverage for loss of revenue from a pandemic disease
- Virus exposure is excluded from liability policies

Bottom Line: Every insurance policy is different. Read the terms and conditions. Generally courts interpret policies to give effect to coverage rather than to exclude coverage. Courts resolve ambiguities in policies favorably to the insured.

There is nothing to lose by making a claim.

Virus Coverage Exclusions May Not Kill Your Claim

COMMERCIAL PROPERTY
CP 01 40 07 06

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

- A.** The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B.** We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.
However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.
- C.** With respect to any loss or damage subject to the exclusion in Paragraph B., such exclusion supersedes any exclusion relating to "pollutants".
- D.** The following provisions in this Coverage Part or Policy are hereby amended to remove reference to bacteria:
1. Exclusion of "Fungus", Wet Rot, Dry Rot And Bacteria; and
 2. Additional Coverage – Limited Coverage for "Fungus", Wet Rot, Dry Rot And Bacteria, including any endorsement increasing the scope or amount of coverage.
- E.** The terms of the exclusion in Paragraph B., or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.

- Many policies do not have the ISO virus exclusion
- If there was no coverage for damages caused by viruses, there would be no need for the exclusion.
- The exclusion was intended to address “the specter of pandemic or hitherto unorthodox transmission of infectious material” in property policies. ISO 2006 informational circular.
- Courts may find that the exclusion is ambiguous or does not apply to civil authority coverage



Coverages to be Considered

- Commercial Property
- Event Cancellation
- Pollution/contamination
- Pandemic
- Workers Compensation

These Coverages are Key

- Business Interruption
- Contingent Business Interruption
- Civil Authority / Denial of Access
- Contamination / Pollution Extensions

Business Interruption Coverage is Triggered by “Direct Physical Loss or Damage”

1. BUSINESS INTERRUPTION

A. Coverage

This Policy covers the actual loss sustained resulting from the necessary interruption of business conducted by the First Named Insured caused by or resulting from direct physical loss or damage covered by this Policy during the Policy Term.

* * *

2.6 Damage

The word “Damage” shall mean (where not more specifically defined within this Policy) physical loss or destruction of or damage to the Property Insured caused by an Occurrence.

Is COVID-19 “Physical Loss or Damage”?

- Courts have decided that various types of “contamination” or the physical presence of substances, even at the microscopic level, can constitute “physical loss or damage.” This includes
 - The presence of asbestos
 - E. coli contamination
 - Release of ammonia gas
 - Lead dust accumulation
 - Chinese Drywall emitting sulfur gasses
- Inability to use a building for its normal purpose is a key factor.
- A business may need to show the physical presence of Coronavirus.
 - Inspection/testing of premises
 - Documented presence of employees or customers infected with COVID-19
 - The CDC reports that Coronavirus may last on surfaces for up to 17 days

Civil Authority Coverage

A. CIVIL OR MILITARY AUTHORITY

This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY if an order of civil or military authority limits, restricts or prohibits partial or total access to an insured **location** provided such order is the direct result of physical damage of the type insured at the insured **location** or within five statute miles/eight kilometres of it.

G. Interruption by Civil or Military Authority

This Policy covers the actual Time Element loss sustained during the period of time when access to the First Named Insured's premises is limited by order of civil or military authority when such order is a result of physical loss or damage covered by this Policy or due to a Peril Covered by this Policy occurring within the number of miles stated within the Declarations section of this Policy.

Actual Property Damage at the Premises Not Necessarily Required to Trigger Civil Authority Coverage

- Courts have held that where access to a business is prohibited by government order, due to a peril insured against by the policy (such as physical damage at some location), civil authority coverage is triggered, even when there is no actual physical damage at the insured premises. Examples include:
 - An amusement park closed due to a mandatory hurricane evacuation order in Texas. Civil authority coverage was triggered even though the storm never made landfall.
 - Where there was evidence of actual property damage to property other than the insured premises, and a county-wide evacuation order was in effect, civil authority coverage was triggered that covered loss of business income.
- Caveat: there may be no coverage where the civil authority order was purely prophylactic in nature (to prevent harm that has not already happened somewhere in the jurisdiction where the order issued).
- Many civil authority coverage provisions will include a “distance” parameter; i.e., the physical damage must have occurred within five miles of the premises.
- The same “direct physical loss or damage” considerations will apply in the context of civil authority coverage.
- There will be a limited time period for coverage.

Communicable Disease and Contamination Coverage

- Some commercial property policies expressly cover “communicable disease” at an insured premises.
- A “communicable disease” is defined under one policy as a “disease which is transmissible from human to human by direct or indirect contact with an affected individual or the individual’s discharges.” Definitions in differing policies may vary.
- Other policies cover “contamination,” which arguably includes Coronavirus. If “contamination” is not defined, then a court may consider the term ambiguous and find coverage exists.
- These types of coverage are usually subject to a sublimit made available by endorsement to the standard property policy forms.
- Coverage may include
 - clean-up costs
 - crisis / public relations expenses
 - business interruption losses
- Some policies require “actual not suspected presence of communicable disease”
 - Inspection/testing may be key
 - Presence of COVID-19 infected workers or customers should be documented

Event Cancellation Coverage

- Thousands of events will be cancelled due to Coronavirus and COVID-19
- Billions of dollars will be lost in the travel, hospitality, and live entertainment industries
- Typical Event Cancellation Insuring Agreement
 - *“We will indemnify you for your loss as a direct result of cancellation, abandonment, curtailment, postponement, or relocation of the insured event to which this insurance applies.”*

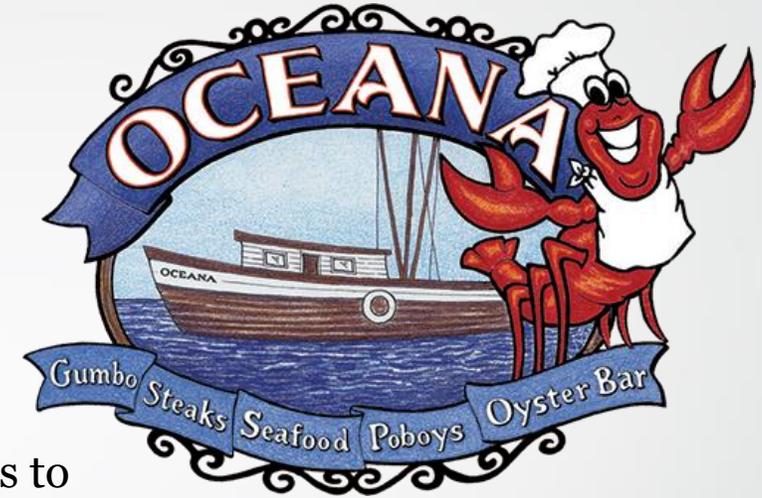
Event Cancellation Coverage Concerns

- Requirement that Coronavirus/COVID-19 actually cause cancellation of the event
- Virus/pandemic exclusions

Test Case?

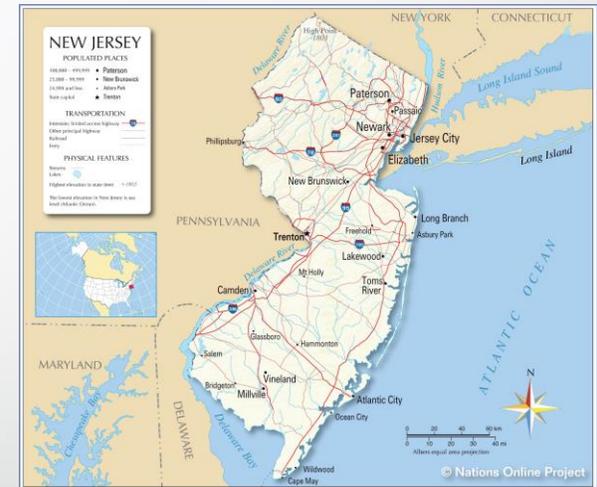
Cajun Conti LLC et al. v. Certain Underwriters at Lloyd's London et al., Civil District Court for the Parish of Orleans, Louisiana

- A restaurant company purchased insurance covering losses to business income.
- The covered cause of loss was for **direct physical loss** unless otherwise excluded.
- The policy had no virus exclusion or pandemic exclusion.
- The Governor of Louisiana and Mayor of New Orleans ordered that people could only gather in groups of limited size, and that restaurants could only have limited capacity.
- The plaintiff seeks declaratory relief that the policy has coverage for civil authority shutdown based on the existence of Coronavirus at nearby locations.
- The petition was filed before the insurance claim was submitted to the insurer, or denied by the insurer, which may be problematic in a lawsuit for declaratory relief.



State Legislatures Considering Action

- The New Jersey legislature proposed Bill A-3844.
- The bill would have invalidated virus exclusions (with respect to Coronavirus) and provided positive coverage for business interruption losses.
- The bill would have shifted coverage benefit costs to all insurers, even those not providing business interruption policies. This means all consumers would pay the price for coverage.
- This bill would have applied retroactively an provided coverage even where policies excluded it.
- The bill was pulled, but legislators are in discussions with insurers and it may be re-introduced.



Louisiana Dept. Insurance Response Emergency Rule 40

- The purpose of Emergency Rule 40 is to impose a moratorium on policy cancellations and non-renewals for policyholders in Louisiana during the outbreak of the coronavirus disease (COVID-19). Emergency Rule 40 is effective during the period of time from March 12 thru May 12. Cancellations for fraud and material misrepresentations or upon written request by the consumer continue to be permitted during this period. Insureds remain obligated to pay all premiums. Emergency Rule 40 does not apply to new policies issued after the effective date therein.



Coronavirus : Insurance Coverage Options

Matthew E. Lundy

Hunter W. Lundy

Daniel A. Kramer

Lundy, Lundy Soileau & South, LLP

March 25, 2020

Documenting a Claim

- Documenting and saving information now is critical to a successful insurance claim.
- Make a timeline. Capture information for each impacted facility which includes dates of closure, reasons for closure, actual presence of Coronavirus, infected employees, supply chain failures, etc.
- Save copies of all government orders and closure notices for each impacted facility.
- Decisions to close facilities (if not related to a government order) should be written and saved.
- Save all correspondence to/from customers and suppliers regarding reasons for closure.
- Create new accounting codes to document COVID-19 related costs.
- Document any new policies regarding employees (paid leave, work at home, etc.) during this time. Put those policies in writing.

Documenting Key Financial Information

- Save copies of any and all pre-loss business forecasts – February, March, April 2020 projections
 - Include both revenue and expense forecasts
 - Get customer specific forecasts where applicable
 - Group cancellations, in the hospitality industry
 - Nearby event cancellations, such as sporting events
- Maintain monthly profit and loss statements. Use older accounting data to prepare monthly profit and loss statements from January – June in previous years for comparison purposes.
- Understand and document new sources of revenue
 - Revenue earned in mitigation of your losses.
 - Document any additional expenses incurred in connection with the new business by using COVID-19 accounting codes.
- Document costs associated with employees “working at home” or employees on furlough
 - Laptops
 - Telecommunications costs – teleconferencing, broadband access, file sharing services
- It is very important to make sure all of your business units (divisions, subsidiaries, different locations and premises) receive guidance on documentation requirements

Types of Costs to Mark with COVID-19 Accounting Codes

- Cancelled Contracts, Orders, Reservations
- Extra Expenses
- Expenses to reduce the loss – mitigation costs
- Discounts, price decreases or other concessions to customers
- Expediting costs, including overnight delivery and overtime as examples
- Preservation of property expenses, including extra security
- Employee costs, including paid family leave, paid sick leave, additional work at home expenses and telecommunications costs
- Decontamination costs
- Property damage related costs
- Potential saved costs – what costs did your business not incur because it was shut down?

Best Practices in Claim Preparation

- Keep your claim documentation in a central repository where it can be accessed by all individuals involved with both creating the documentation and preparing the claim.
- Establish a multi-disciplinary team empowered and responsible to handle claim related issues from various departments (Finance, Operations, Risk Management, Legal, Human Resources, Accounting).
- Document and retain all internal and external communications regarding decisions made at this time.
- Document and retain all changes to employee policies, in writing.
- Document and retain all changes to customer and supplier policies regarding cancellation charges or other modifications.

Other Opportunities -- Government Funds

- Even if in your case insurance coverage is not triggered by Coronavirus/COVID-19, there are numerous government programs which may provide funding for your business.
- Documentation requirements for government programs may be similar to documentation requirements for supporting insurance claims for business interruption losses.
- There are probably going to be millions of requests for recovery.
- Well documented claims are likely to receive funding quicker than others.
- That has been our experience, gained in handling thousands of claims for our clients in *Deepwater Horizon* Oil Spill litigation and economic settlement program, among other class settlement agreements.

Government Programs

- **SBA Economic Injury Disaster Loan Program.**

- The U.S. Small Business Administration offers the Economic Injury Disaster Loan Program. This program provides small businesses with low-interest working capital loans of up to \$2 million that can provide vital economic support to small businesses to help overcome temporary losses of revenue experienced due to the economic effects of Coronavirus and COVID-19. For more information about the Economic Injury Disaster Loan Program, visit <http://SBA.gov/Disaster>

- **SBA Express Bridge Loans**

- The Express Bridge Loan Pilot Program allows small businesses who currently have a business relationship with an SBA Express Lender to access loans of up to \$25,000 with less paperwork. If a business has an urgent need for cash while waiting for a decision or disbursement on a SBA Economic Injury Disaster Loan or other type of loan, this may be an avenue worth exploring. You can find an Express Bridge Loan lender by using SBA's Lender Match Tool at: <https://www.sba.gov/funding-programs/loans/lender-match>.

- **Paycheck Protection Program** (part of the Coronavirus Emergency Relief Bill)

- Businesses with 500 or fewer employees (and those in the accommodations and food service industries) may get loans directly from banks to cover more than two months of payrolls and some other operating expenses (loans of up to 250% average monthly payroll, up to \$10 million), with the government paying off the balance as long as the companies either do not lay off workers or rehire ones they've already let go

Government Programs

The Families First Coronavirus Response Act

- The Families First Coronavirus Response Act becomes effective on April 1, 2020. General paid sick and safe leave mandate on all employers with fewer than 500 employees, with benefits to be reimbursed by the government.
- Temporarily expands coverage and imposes a paid leave requirement under the Family and Medical Leave Act for reasons associated with COVID-19 on most employers with fewer than 500 employees.
- Makes unemployment benefits available for reasons associated with COVID-19
- Gives businesses a refundable tax credit for paid sick and paid family and medical leave.

Coronavirus Emergency Relief Bill

- Congressional leaders agreed to pass a \$2 trillion Coronavirus emergency relief bill.
- Checks to more than 150 million American households

Paycheck Protection Program Highpoints

- For small businesses with 500 or fewer employees, and Accommodation and Food Services businesses (NAICS classification code 72)
- Loans for 250% of average monthly payroll, up to \$10 million, intended to cover 8 weeks of payroll and debt obligations
- Principal & Interest Forgiveness: The sum of expenses for payroll and interest payments on mortgages, rents, leases, and utility services agreements. Payroll includes employee salaries (up to \$100k annual), cash tips, paid sick or medical leave, group health insurance premiums. If you keep all your employees, the entirety of the loan will be forgiven.
- Loans can also be used for other business-related expenses, but that portion of the loan will not be forgiven.
- Loan forgiveness happens at the end of the 8 week period.
- Deadline for applications is June 30, 2020. The covered period during which expenses can be forgiven is February 15, 2020 – June 30, 2020.



There is no downside to filing a claim with
your insurance company.

Navigating Business Insurance Interruption Call

Monday, March 30, 2020 @ 2:00 p.m. EST

2:04 p.m. Jill introduced attorneys: Matt Lundy, Daniel Kramer, Hunter Lundy

Presentation 1:

- Do businesses have insurance that will respond to Coronavirus related losses?
 - Common Misconceptions:
 - Insurance Services Office exclude virus claims 15 years ago
 - There is no coverage for loss of revenue from a pandemic disease
 - Liability policies won't respond because virus exposure is excluded
 - *Bottom Line*: every policy is different. Read terms and conditions. Courts interpret policies broadly. There is nothing to lose by making a claim.
 - Usually courts will rule in favor of the insured against the insurer
 - Exclusion of Loss due to virus or bacteria – *Endorsement*
 - Many policies don't have this exclusion
 - If your policy doesn't have this exclusion, then the insurance company can't claim that you must have physical damage.
 - This exclusion is evidence that this endorsement previously didn't include property damage coverage
 - Courts may find that the exclusion is ambiguous or does not apply to civil authority coverage
 - Policy may not have an exclusion for civil authority coverage
 - Look at policy as an individual
 - Coverages that should be considered:
 - Commercial property
 - Event cancellation
 - Cyber
 - Pollution/contamination
 - Pandemic
 - Workers Compensation
 - Key Insuring Agreements to Consider in Commercial Property Policies
 - Business interruption
 - Contingent Business Interruption
 - If you have this endorsement, your interruption doesn't have to be at your own facility. If you have a supplier out of an affected country that impacted your business, your contingent business interruption endorsement would take affect
 - Civil Authority/ Denial of Access
 - If it applies to your community, you may still have coverage if people can't access your business
 - Ingress/Egress
 - Contamination/Pollution Extensions
 - Possible that the way contamination is defined, it could cover income revenue loss.
 - Business Interruption and Property Damage
 - Key Question: what is considered direct physical loss under the Coronavirus?
 - Is Covid-19 "Physical Loss or Damage"?
 - ...Variety of contaminating conditions have been held to constitute 'physical loss or damage to property
 - Coronavirus could trigger the physical loss or damage endorsement
 - Don't let your agent tell you that Coronavirus doesn't trigger physical loss or damage

Navigating Business Insurance Interruption Call

Monday, March 30, 2020 @ 2:00 p.m. EST

- The fact that it lives on surfaces for 15 days could trigger endorsement
- Civil Authority Coverage May Be Triggered in Many Jurisdictions Around the World
 - Civil or Military Coverage
- Actual Property Damage at the Premises Not Necessarily Required to Trigger Civil Authority Coverage
 - Hunter gave specific cases of damage *not at the actual location of the business* to trigger civil authority coverage and thus activating the endorsement
- Event Cancellation Coverage
 - Thousands of events cancelled
 - Look to see if your policy has this endorsement
 - Coverage Issues:
 - Causation / “direct result” requirement (directly because of Coronavirus)
 - Coronavirus/pandemic exclusions
 - Viruses are not microorganisms... a virus is *NOT* a microorganism and would not be excluded
- Early Trends in Litigation and Legislatures
 - Watching New Jersey’s bill that would enact a law to require broader coverage
- Louisiana Dept. of Insurance Response Emergency Rule 40
 - Imposes a moratorium on policy cancellations and non-renewals for policyholders in Louisiana during the outbreak of the Coronavirus

Presentation 2: Insurance Coverage Options

- Considerations in preparing a claim:
 - Capture and track information now
 - Develop a timeline to capture information for each impacted facility... all data that pertains to your business in regard to virus
 - Retain all orders that have impacted your business
 - Document the decision you made to close your facility not required by a government order
 - If you lost a supplier and you couldn’t get product or something happened where you could not get your necessary products, document why you had to close
 - Hotels closing due to no guests – document this
 - Retain correspondence to/from customers and suppliers regarding reasons for closure
 - Establish new accounting codes to track COVID-19 related costs
 - Talk to your CPA
 - Retain any new policies regarding employees during this time
 - Paid leave, work-at-home, etc...
- Tracking Key Financial Information
 - Retain all pre-loss business forecasts – February, March, April 2020 projections?
 - Include both revenue and expense forecasts
 - Group cancellations for hospitality
- Track costs for employees to “work at home”
 - Laptops, etc..
 - Third party claims against you
 - When you have to cancel a wedding and they pursue legal activity
 - Types of Costs to Track:
 - Cancelled contracts or orders
 - Extra expenses

Navigating Business Insurance Interruption Call

Monday, March 30, 2020 @ 2:00 p.m. EST

- Expenses to reduce the loss – mitigation costs
- Expediting costs, including air freight and OT as examples
- Preservation of property expenses
- Employee costs, including “paid leave” additional work at home expenses and commuting costs
- Decontamination costs
 - If you had a guest/employee infected and you had to deep clean
- Property damage related costs
- Potential “saved costs”
- Additional discounts, price decreases
- Claim Preparation – Best practices
 - Establish central repository for tracking and retaining information
 - Create a multi-disciplinary team to handle claim related issues from various departments
 - All internal and external communications regarding decisions made at this time
 - Document changes to employee policies
 - Document changes to customer or supplier policies regarding cancellation
 - **The more you document, the more seriously your claim will be taken
- Government Fund – Opportunities for Recoveries
 - Better documented claims will be taken more seriously and receive funding more quickly than lesser-documented claims
- Government Plans
 - Coronavirus Emergency Relief Bill
 - Loan Programs for both small and large businesses
 - Business with 500 or fewer employees will get loans directly from banks to cover more than 2 months of payroll and some other operating expenses
 - Can use to replenish inventory
 - Interest on mortgage, lease, rent – will be forgiven
 - The periods for these loans is February 15 – June 30 ... deadline to apply is June 30
 - Families First Coronavirus Response Act
 - Sick leave covers up to 80 hours for those sick/being treated for Covid-19
 - 80 hours at 2/3 pay to take care of sick family members
 - Initially paid by employers, but will be forgiven by the federal government
- Hunter:
 - Go online to Small business owners guide for CARES Act
 - Will explain relief package
 - Counselors to help you go through this process
 - Program for churches, pastors and priests
 - Program where you can get a summary of payroll for insurance, retirement and tax obligations for one month
 - Paycheck relief program applies to businesses that supply accommodations that have greater than 500 employees – based on a census code... MAICS code
 - After Katrina and Rita, attorneys encouraged everyone to go make their claims. They don’t know what will happen with these contractual claims. Even though the legislature extended the statutes by a year at the time of the hurricanes, go ahead and gather all of your information now so that if your insurance company denies the claim, get your lawyer and get a suit filed immediately. You only have a case when they deny the coverage, so move quickly.

Navigating Business Insurance Interruption Call

Monday, March 30, 2020 @ 2:00 p.m. EST

- Q&A:
 - Richard Fischer: Eligibility for small business owners to receive multiple loans? Can you receive money from both and only pay back one of the two?
 - A: You can't get duplicate benefits. If you have an existing loan, you can apply for another loan, but you will still have to pay your existing loan.