



# Business Insurance Claims and COVID-19

Business insurance may cover losses companies experience due to the virus, but only if owners are smart about how they file claims.  
by David Goodman

As business owners react day to day to the complex and unprecedented impact of COVID-19 on the marketplace, supply chain and labor force – an impact that is very much still unfolding – they are juggling concern for their employees and customers in the short term with longer term worries about what all this is going to mean for the future of their business. Even if the shock to the economy turns out to be a relatively short disruption, the results could be catastrophic.

In the coming weeks and months, business owners will be turning to their contracts and insurance policies to determine their options for recovery and to defend themselves against potential breach of contract claims. While the details of each document and situation are different, here are five basic questions that can guide business owners as they gather information and devise a strategy for moving forward:

What are the specifics of the force majeure clause in your commercial contract?

Force majeure – Latin for “superior force” – is the contractual clause that, under certain circumstances, frees both parties from obligation or liability when an extraordinary event beyond their control disrupts the ability to do business. A global pandemic certainly seems like it would qualify, but that actually depends on how the clause is written in the contract that governs the business relationship. Sometimes these clauses are broad in scope and encompass many kinds of events; in other cases, however, the language will be much more specific and therefore limiting. In addition to determining whether the pandemic qualifies, this clause also will spell out the steps both parties must take to avoid or mitigate the consequences of the event. That may mean seeking alternate suppliers or customers, or taking all reasonable measures to avoid work stoppage, such as moving employees to remote status instead of shutting the business down.

Specific contractual language will govern when performance is “impossible.” Impossibility of performance may permit rescission of the contract, allowing the parties to return to their pre-contract status. But the right to rescind may be waived in certain circumstances, so prompt action is required.

Finally, some companies may find themselves in a “battle of the forms” scenario, where they must determine whether the clause in their form contract supersedes alternate language in business partner’s purchase order, or whether there is an enforceable agreement. The resolution of the issue will often turn on the conduct of the parties and whether that conduct suggested that they recognized the existence of a contract. Each industry may also have its own customs and practices, and those will be a factor.

## What does your insurance policy say about business interruption?

When a business suffers property damage that forces it to cease operation, business interruption coverage may kick in. In the case of something like a fire, it is easy for a business to demonstrate that though they took the proper precautions (such as complying with the fire code), they could not have prevented the lightning strike that hit a nearby tree and ignited the building. While the effects of COVID-19 may not be so clear cut, the spread of the virus is still doing damage to property as defined in many policies. If, for example, a manufacturing facility shuts down production because an employee tests positive for COVID-19 after having exposed coworkers to the virus, the business will lose profits during the shutdown and even after, when overall productivity may be lower for a time; it would also need to pay to clean or replace equipment and test to ensure a safe work environment.

Many policies will also articulate exclusions specific to claims arising from or related to “viruses.” It will take a creative advocate to think about how “property” may be defined when it comes to the response to COVID-19, or how to navigate around exclusions “related” to viruses. The ambiguities inherent in insurance policies often present opportunities to “find” coverage at a time when your own broker may be dismissive.

## What does your insurance policy say about contingent business interruption?

No business operates in a vacuum – each one depends on relationships with partners to produce its products and services, and some are less diversified than others. Many companies rely on a single supplier, making them vulnerable to interruptions in the supply chain, or sell the bulk of their product to a single customer. Coverage for contingent business interruption may provide relief to companies that lose revenue because a key supplier, customer, or business partner cannot fulfill its obligation or purchase. While a duty to mitigate requires a business to try to find another solution to the problem, the company does not have to take an action that is not commercially feasible, such as paying such a high price for a raw material that it no longer makes financial sense to manufacture the product.



It is important to remember that insurers may not cover actions by the policyholder that they consider “voluntary.” In the foreseeable future, the line between “voluntary” and “involuntary” actions to mitigate COVID-19 damages is likely to be blurred. Please be cautious in the words you choose when you communicate about any actions you are taking that interrupt your business. For example, never express in any communication that you have closed the office just “to be on the safe side.” This may later be construed as a voluntary action. Instead, cite CDC or other guidelines, and explain that the risk of exposing your workers or customers has forced you to close. This action is involuntary and thus more likely to be covered. An effective strategy for making a contingent business interruption claim requires planning and precision in your communications.

## How can you document your damages to increase the chances of a successful claim?

In order to make the strongest possible case for coverage, you will need to document every detail of the financial impact of the disruption. It will be easy to prove your outlay for materials, equipment, payroll and other overhead costs, but it may be more difficult to calculate how much you lost in potential sales and missed business opportunities. In these cases, companies sometimes use figures from a comparable period of time (for example, the same month or season from a prior year) to estimate the revenue they reasonably expected to bring in. Insurers are on the lookout, however, for projections they consider “speculative” – overly optimistic given the many variables that may have impacted your sales – so do what you can to make the case that your estimate is realistic. On the other hand, be comprehensive and don’t shortchange yourself. Unlike a discrete event like a fire, the COVID-19 disruption is a slow-moving crisis that will be with us for some time. Make sure you take into account the full scope of the damage your business has sustained when you calculate the loss.

## What are the short and long-term implications of the disruption?

As all good business owners know, sometimes it makes good sense to find a business solution to a legal problem. Synonyms for “lawyer” include both “advocate” and “counselor.” While your contract with a partner may absolve you from fulfilling an obligation, going above and beyond in this moment of crisis to help your partners could strengthen those relationships. A short-term loss can be an investment in your long-term future because everyone remembers who was good to them when the chips were down. And as much as possible, assume a positive intent when a partner company does not come through for you. While we are certainly living through a frightening time, this isn’t the end – it’s just a stop along the way. Find some common ground and negotiate sooner rather than later with an eye on the future.



If there is any silver lining to the misfortune caused by COVID-19, it's that the crisis creates an opportunity for businesses to better plan for the future. Pandemics come along once in a lifetime, but climate change is disrupting the seasons and increasing natural disasters; the technology we've come to rely on sometimes fails in profound ways; and political and social upheaval have the potential to upend our interconnected economy. It's not a matter of if but when you will face another disruption to your supply chain. Insurance companies will always protect their own interests by denying claims whenever they can, and it's safe to assume they are already writing up new exclusions based on the events of the past few weeks. When it feels like the deck is stacked against you, a skilled legal advisor may be able to help you overcome the roadblocks and get the coverage the insurance company promised to provide when you signed your policy.

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