



Covid-19 Coverage and Claims Guide

Foa & Son's General Counsel, Bernard Goldman, answers some complex questions about the coverage arguments and claims reporting strategies for Business-Interruption Claims.

Given the massive number of losses being caused by the Covid-19 pandemic, are there any potential business-interruption recoveries that I may be able to obtain under my property insurance policy?

Some very significant challenges to business-interruption insurance coverage for losses are arising out of the Covid-19 pandemic.

The insurance companies have been "circling their wagons" on the coverage issue for weeks, arguing to legislators and regulators that their policies were never meant to address this type of exposure and that there isn't enough available capital in the insurance business to fully compensate even one month of these losses.

Meanwhile, plaintiff law firms have been trying to refine their potential litigation arguments. Nineteen purported class action lawsuits relating to insurance have already been filed nationally, with numerous stand alone cases. Hoping to gain scale, plaintiff lawyers in several lawsuits have already submitted legal filings seeking the transfer and consolidate of all Federal business interruption cases to a common court. At this point, no one is saying that any insurer will pay these claims without a fight or a new law forcing it to do so.

Can I raise any creative arguments that might increase my chances for coverage?

Perhaps. We at Foa & Son are advocates for you, not for the insurance companies. But as in a chess match, we recognize the likely moves that the insurance companies will take to counter. If the only element of the claim is the business interruption due to the effects of the social-distancing orders, the insurers feel they have a very strong position, and it may prove virtually impossible to get coverage, short of some government intervention.

However, there are multiple other parts to a commercial property insurance policy in which you could raise different arguments that prove over time to have better chances for insurance recoveries. In summary:

- These alternative arguments generally involve some aspect of *actual* contamination.
- Actual contamination may not simply be that Covid-19-positive individuals are onsite. Based on transmission guidelines from the Centers for Disease Control (CDC), it could also be argued that contact between Covid-19-positive individuals and your inventory or business personal property does qualify.
- The actual contamination may not need to be at your own facility, though if it is and you can document it, that's obviously a powerful argument.
- Other sources of actual contamination that could be argued include:
 - Suppliers
 - Transportation/logistics
 - Key customers
 - Nearby non-owned locations that impact access to your facilities
 - "Attraction properties" that drive significant revenue to your business (e.g., hotels near Disney World)

Do I need to provide notice to the insurance company of a potential business losses stemming from the pandemic?

Ultimately, yes. Policies do require that insurers be notified of potential losses. However, noticing a potential Covid-19 loss is tricky because it could potentially do more harm than good if filing is done prematurely or incorrectly. There are implications for both timing and content of the notice, and our counsel is as follows:

- It is generally accepted that there is no duty to report a fire loss in the midst of the fire or a hurricane loss during the storm. Therefore, a claim related to the pandemic could not be denied based on late or delayed notice.



- Once notice is submitted, the insurers are obligated by law to promptly investigate.
- If you report your claim too broadly (e.g., “I have losses associated with the pandemic”), the insurance company will very quickly ask for clarification and proof.
- If you report something very specific, it could box you in should other coverage arguments gain more traction later.
- If you refuse to respond to the insurance company investigation, the insurer will simply close its file for non-cooperation.

We believe the Foa & Son Sample Covid-19 Claims Reporting Worksheet strikes a balance and keeps the door open to all of the coverage avenues that could be argued while creating a paper trail showing you will need more time to document and assess your loss. However, before you submit such notice of loss we *strongly* recommend that you develop documentation of the loss in a way that implicates the greatest number of insurance coverages possible. To assist you, we have developed the Foa & Son Covid-19 Claims Reporting Worksheet.

What is the benefit of completing the Foa & Son Covid-19 Claims Reporting Worksheet before submitting a notice of claim?

It maximizes your chances of a recovery. Any competent coverage attorney can write a coverage disclaimer for business-interruption claims based solely on the social distancing orders. Although some may argue for other coverages, most business claimants will never go through the exercise of documenting the potential data points that can be raised on those other coverage parts. Frankly, the exercise involves significant work and may never result in an insurance recovery. However, we believe it will increase your odds, and given a much smaller pool of business with this level of documentation, it is conceivable that some insurance recoveries may be obtained.