

FHMS COVID-19 Resource Center:

**COVID-19 ISSUES AFFECTING UNDERWRITERS AND POLICYHOLDERS OF
GENERAL LIABILITY AND BUILDING/PERSONAL PROPERTY INSURANCE**

As a result of COVID-19, policyholders and underwriters must look closely at current insurance policy provisions, as well as the language in policies at the time of renewal. These concerns cannot be viewed in a vacuum. One should look at issues affecting insurance coverage, including available immunity, policy language, and best practices moving forward.

I. COVID-19 Immunity Overview

The federal Public Readiness and Emergency Preparedness Act (PREP Act) (42 U.S.C. §§ 247d-6d) may provide immunity to businesses connected to the administration or use of countermeasures to COVID-19 as the Act defines. Under the PREP Act, immunity extends to claims for loss related to the “administration or use of countermeasures” to COVID-19, to entities and individuals involved in the development, manufacturing, testing, distribution, administration, and use of such countermeasures. As the PREP Act is federal law, it should provide immunity from state-based tort claims to those covered under the Act.

States have also created immunity from claims related to COVID-19 efforts or exposure. Both Pennsylvania and New Jersey have provided immunity to healthcare workers related to certain COVID-19 efforts. Other states have provided immunity to businesses from claims related to COVID-19 exposure. An in-depth discussion on federal and state immunity legislation can be found [here](#).

II. Policy Language and Provisions in General Liability and Building/Personal Property Policies

Without tort immunity for businesses, there may be an influx of claims related to the virus. FHMS is closely monitoring for these lawsuits and are prepared to defend them. Information on the COVID-19 exposure lawsuits that have been filed against businesses and recommendations for defending those claims can be found in our [FHMS COVID-19 Resource Center – Premises Liability](#). Coverage for these tort-based claims is mainly determined by the express policy language and sufficiency of policy exclusions.

A. General Liability Policies

General liability policies typically cover claims brought by third parties, such as customers and patrons, as well as claims arising out of bodily injury and property damage liability, personal and advertising injury, and medical payments. Without an exclusion, it is likely that third-party claims related to COVID-19 will be covered under most general liability policies.

1. Exclusionary Language in General Liability Policies

General liability insurance policies contain exclusions that limit or preclude coverage in some cases. It is likely that COVID-19 claims will fall under a general liability policy's coverage for bodily injury and property damage. Even so, exclusions may be found in these policies which might relieve insurers of covering such claims. An example of an exclusion to COVID-19 could be:

- Organic Pathogen Exclusion—excludes: any bodily injury and/or property damage which would not have occurred, in whole or in part, but for the actual, alleged, threatened, or suspected inhalations or ingestion of, exposure to, discharge, dispersal, seepage, migration, growth, release or escape, or contact with any “organic material.” These provisions also exclude remedial measures taken in response to “organic pathogens.” These exclusions are manuscript exclusions, meaning that there is not a standard industry-wide form currently in use.
 - Related to this manuscript policy exclusion, organic pathogen means any bacteria including Escherichia, Salmonella, Listeria, microbe, virus, fungi, mold, mildew, mycotoxins, spores, and their scent or byproducts.

For current policies, unless there are exclusionary clauses, such as the example above, that could be applied to third-party negligence claims, it is likely that current general liability policies will cover these types of claims. In renewing policies going forward, such exclusionary measures could be used by insurers to insulate themselves from having to cover such claims. However, many of the alleged injuries related to COVID-19 have already occurred and would be covered under the policies when the injury occurred.

2. Handling of COVID-19 Claims Under General Liability Policies

In bringing third-party negligence claims, plaintiffs will need to prove the traditional elements of negligence: duty, breach, causation, and damages. For plaintiffs, the hardest element to prove is causation, given the difficulties in establishing how an individual contracted the virus. If multiple individuals had been frequenting a specific location and those same individuals contracted COVID-19, there could be several exposure claims brought against a single business entity. However, the difficulty presented by proving causation will likely not deter plaintiffs and their attorneys from bringing these claims as causation is easy to plead. COVID-19 third-party exposure claims have already been filed throughout the country. An update on those cases can be found in [our resource center](#).

3. COVID-19's Potential Impact on the Renewal Application Process of General Liability Policies

During the renewal and application process, policyholders do not typically have direct contact with the underwriters processing their applications. Underwriters, when writing a new policy or dealing with renewals, assess the risks associated with the applicant based on several variables, including, but not limited to, the type of business involved. For example, some non-COVID related areas of questioning to be covered in an application for a restaurant may include questions such as

- Is there deep frying or grill on the premises?
- Does the restaurant serve alcohol?
- Does the restaurant have banquet hall facilities seating for 50 or more people?
- Is there tableside cooking?

If underwriters now wish to include an assessment of risk for a future pandemic, they may choose to incorporate exclusionary language specific to COVID-19, or more generally, wide spread of disease and/or a pandemic, in applications for renewals going forward. Some COVID-19 specific questions for underwriters to assess risk could include:

- Were you operating during quarantine?
- In what capacity where you operating during quarantine?
- What policies/procedures were in place for operation during quarantine?
- Did you offer delivery services during quarantine?

This is not an exhaustive list and it is likely that COVID-19 related questions will become more prevalent on insurance applications as businesses re-open under applicable federal or state plans.

B. Building and Personal Property Policies

Coverage provided under a typical building and personal property policy will pay for the direct loss of or damage to covered property at the premises described in the Declarations caused by or resulting from any covered cause of loss. **Generally, under this type of policy, covered property does not include accounts, bills, currency, food stamps or other evidences of debt, money, notes or securities. For coverage under this type of policy to be triggered, absent specific language, there must be direct physical loss of or damage to the property.** For instance, if a business were damaged by a fire forcing it to shut down, coverage under this type of policy should be triggered. Exclusions in these policies are like those of general liability policies. Businesses may add business income coverage (also called “business interruption” insurance) to cover losses related to business income, extra expenses, and several coverage extensions that can be sought by the policyholder.

1. Handling of COVID-19 Claims Under Building/Personal Property Policies

Currently, there is no precedent as to whether COVID-19 claims brought under business interruption policies will be covered by those policies’ insuring agreements. The analysis and viability of those claims will be determined not only by the specific policy exclusion language, but also the specific policy language relating to “direct and physical loss” to determine if losses caused by business closures related to the virus constitute “direct physical loss.”

The first lawsuit seeking coverage under a business interruption related COVID-19, *Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd’s London, et al.*, was filed in state court in New Orleans, Louisiana. The plaintiffs argued that Louisiana courts interpreted “intrusion of lead or gaseous fumes constitute a direct physical loss under insurance policies.” Also, the plaintiffs also alleged that they are entitled to coverage because the policy at issue contains no exclusions related to viral pandemics. Since the filing of that lawsuit, other claims have been filed with allegations that potential COVID-19 contamination constitutes “direct physical of or damage to” property under business interruption policies. In addition, some commercial property insurance policies contain an endorsement that excludes coverage for claims arising out of virus contamination. Whether businesses can succeed in obtaining business interruption coverage for COVID-19 related losses will turn on the specific policy language at issue.

2. COVID-19’s Potential Impact on the Renewal Application Process of Building/Personal Property Policies

When renewing policies, it is possible that policies to be issued may have exclusions that preclude business interruption coverage for losses attributable to pandemics. In addition to adding exclusions, insurers, especially those with non-standard forms, could add specific language relating to what “direct physical loss” means to justify future denials of claims under these types of policies. Conversely, insurers could elect to specifically cover COVID-19 related business interruption claims by including an endorsement to that effect. Any such coverage would likely entail an adjustment to insurance premiums to cover the continuing and increased risk involved.

III. Best Practices for Reopening for both Insurers and Policyholders

Insurance underwriting is a complex process that involves measuring risk exposure and costs to cover that risk. In the context of the COVID-19 outbreak, underwriters should assess and dictate preventive measures taken by their insureds. To keep risk exposure contained, it is important that both underwriters and policyholders be familiar with necessary best practices as business resumes.

A. CDC Guidance and Other Recommendations

1. *Develop a Plan*

- **Determine what needs to be cleaned.** Areas unoccupied for seven or more days need only routine cleaning and existing cleaning practices for outdoor areas should be maintained.
- **Determined how areas will be disinfected.** Consider the types of surfaces and how often they are touched. The more a surface is touched, the more often it should be cleaned and disinfected.
- **Consider the resources and equipment needed.** It is important to understand the availability of cleaning products and PPE appropriate for cleaners and disinfectant.

2. *Implement the Plan*

- **Clean visibly dirty surfaces with soap and water before disinfecting.**
- **Use the appropriate cleaning products and disinfectants.** It is recommended to use an EPA-approved disinfectant and read the label to make sure it meets your needs in protecting against COVID-19.
- **Always follow the directions on the label related to proper use.** Cleaning and disinfectant products will include safety information and application instructions for proper and effective cleaning.

3. *Maintain and Revise the Plan*

- **Continue routine cleaning and disinfection.** Based on the type of business, it is likely that all businesses will have different needs in cleaning and disinfecting. Even so, individual businesses should revise their plans based on their needs and services offered.
- **Maintain safe practices that reduce the possibility of employee and customer exposure.** These include frequent handwashing, use of facemasks and other PPE, as well as social distancing protocols. If you are an employee and sick or exhibiting symptoms, STAY AT HOME!

B. State Specific Mandated Regulation

Many states, such as Pennsylvania, have relied on CDC guidance to determine safe operating and reopening procedures. It will be critical to stay up to date with proposed legislation to actively protect against and mitigate exposure risks attributable to the virus. For the most current guidance, please visit the [Federal](#), [Pennsylvania](#), and [New Jersey](#) websites on COVID-19.

C. Additional Recommendations for Best Practices

Businesses that follow the guidance from the government should be in a better position to defend themselves from anticipated COVID-19 claims. One keyway to accomplish this goal is to **document everything**. Businesses should track precautionary measures taken on a daily or weekly basis to ensure the safety of their employees and customers. Some businesses are implementing the use of a COVID-19 supervisor to oversee those mitigation efforts and ensure compliance with the guidance. This should help reduce risk and be submitted with renewal applications. For more information on preparing for, and defending, COVID-19 exposure claims, please visit our [FHMS COVID-19 Resource Center](#)

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