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Coronavirus and Business Interruption Claims: A Guide to Insurance Coverage for Business Losses Arising from the COVID-19 Pandemic

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As the novel Coronavirus/COVID-19 spreads throughout the country and the world—and governments respond with travel restrictions and "shelter in place" orders—businesses of all kinds are experiencing sudden losses of revenue on an unprecedented scale. Business interruption insurance may provide much-needed coverage for some of these losses. Does your company have a viable business-interruption claim? As always, the answer depends on the specific circumstances regarding your loss and the terms of your insurance policy. Given the enormity of the business losses that are occurring across the global economy, insurance companies can be expected to push back hard against these claims. Businesses should review their policy language carefully and consider consulting with coverage counsel who are well-versed on the cutting-edge legal issues. Time is of the essence, as policies typically require that insureds give notice of claims promptly—and in some cases within a defined period of time, which can be as short as 30 or 60 days after the loss.

Overview of Business Interruption Coverage

"Physical Loss of or Damage to" the Insured's Property

Business interruption insurance typically appears as an add-on to commercial property insurance policies. This coverage is designed to make the insured whole for lost income and additional expenses incurred during a period when business operations are interrupted because of a covered cause of loss—often referred to as the "period of restoration." The policy language (and scope of coverage) can vary significantly. Some policies cover only specified perils (*e.g.*, a fire, hurricane, or flood); other policies cover "all risks" that are not specifically excluded.

Under one standard formulation, business interruption coverage is triggered by "physical loss of or damage to" the insured's property. Insurers have already begun denying COVID-19 claims by taking a narrow view of the "physical loss" or "damage" requirement, arguing that some structural damage to the property is required. However, insureds should not take an insurer's reflexive "no" for an answer, as there are strong counter-arguments to be made.

First, press reports indicate that the COVID-19 virus can be present on physical surfaces in buildings and outdoor spaces, and can be transmitted by contact with such surfaces. In similar circumstances, courts have held that the presence of a hazardous substance in or on a property can constitute "damage" to the property, triggering coverage under a property insurance policy. For example, in *Gregory Packaging v. Travelers Property Casualty Co. of Am.*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014), a federal court applying New Jersey law held that the accidental release of ammonia in a building, which rendered it unsafe, constituted "property damage." The court reasoned that "property can sustain physical loss or damage without experiencing structural alteration." *Id.*, at *5. Following the 9/11 terrorist attack on the World Trade Center, our firm successfully maintained a business interruption claim based on particulate matter and debris that settled in our Lower Manhattan offices, and which needed to be removed before attorneys could safely work in the office. There are other precedents, as well. *See, e.g.*, *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (holding, under New York and New Jersey law, that "the presence of large quantities of asbestos in the air of a building," rendering the property uninhabitable, constitutes "physical loss"); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247 (D. Ore. June 7, 2016) (business interruption coverage triggered when smoke from wildfires infiltrated building).

Notably, executive orders by the mayors of New York and New Orleans specifically cite "property damage" caused by the virus as a basis for governmental action. Insureds may be able to cite these orders to support a claim of physical damage.

Second, there is case law supporting an argument that under policies providing coverage for "direct physical loss of" property, the insured's loss of use of the property (*e.g.*, because of a hazardous condition or government order) may be enough to trigger coverage, even without any physical damage to the property. *See, e.g.*, *Total Intermodal Services, Inc. v. Travelers Prop. & Cas. Co.*, 2018 WL 3829767 (C.D. Cal. July 11, 2018). This may provide an independent basis for coverage under certain policies.

Contingent Business Interruption Coverage—Damage or Loss Suffered By Suppliers and Customers

Many businesses have suffered losses due to the impact of the COVID-19 pandemic on third parties—their suppliers and customers. These losses may be covered by policies that provide so-called contingent business interruption coverage. Insureds who have suffered supply-chain losses should check to seek whether their policies provide such contingent coverage.

Order of Civil Authority

Some state and local governments have responded to the COVID-19 pandemic by issuing orders mandating the closing of non-essential businesses—in the most extreme cases requiring all residents to "shelter in place." Such governmental orders may trigger coverage under policy provisions covering losses arising from an "order of civil authority" that prohibits or limits access to the insured's property. Depending on the specific policy language, coverage may be available even if the government order does not mandate the complete suspension of operations. For example, restaurants that have been forced to close their doors to customers, may be able to get coverage during the suspension of their "normal operations," even if they are still permitted to make home deliveries.

Specific Exclusions or Coverage for Losses Due to Virus or Bacteria

In the aftermath of the SARS epidemic, many insurers added exclusions precluding claims for business-interruption losses relating to any "virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." If your policy has such an exclusion, this can be a difficult roadblock to coverage for COVID-19-related losses. But it is important to review the language of the exclusion carefully, bearing in mind that exclusions from coverage are narrowly-construed against the insurer. Thus, an exclusion applicable only to a bacteria would not apply to COVID-19 (a virus). On the other hand, if your policy does not have a virus exclusion, the fact that insurers have added such exclusions in certain policies could be used to rebut an insurer's argument that a viral pandemic is not a covered event in the first instance.

Some policies expressly cover losses of income arising from "communicable disease," including the cost of "decontamination." Such coverage may be subject to special sub-limits below the general policy limits for business interruption claims.

Legislative Responses

Insureds should also be on the lookout for legislative action affecting business interruption claims. Legislatures in New Jersey, Ohio, Massachusetts, and New York have taken up bills aimed at assisting insureds with claims for COVID-19 losses. The New Jersey, Ohio, and New York bills would require insurers to treat virus transmission as a covered peril, but are silent on the effect of virus exclusions. The proposed Massachusetts legislation goes a step further and expressly purports to abrogate virus exclusions.

If enacted, such legislation may be subject to legal challenges by insurance carriers.

Practical Tips for Insureds

- In any coverage claim, the devil is in the details. Get a copy of the policy. The coverage analysis depends on the specific language of your policy and insureds often don't have a copy. Your broker should be able to give you one on request. Make sure that you ask for the full policywith all the coverage forms, and not simply the "Declarations" (which is a one or two page summary of the policy that does not have all the policy terms).

- When in doubt, err on the side of submitting a claim. You can't get coverage if you don't ask for it, and a delay in submitting the claim could itself be grounds for the insurer to deny a claim it would otherwise have to pay.

- Get to work early on documenting your claim, including all lost income and additional expenses incurred as a result of COVID-19 exposure.

- Don't be discouraged if your broker tells you the loss is not covered. Remember that some brokers are agents of the insurance company, and their interests may not be aligned with yours. The COVID-19 pandemic is an unprecedented crisis, and these are not cookie-cutter claims. But that does not mean your claim will not be successful if you have the right strategy, informed by an understanding of the terms of your policy and the applicable law.