

Will Business Interruption Insurance Be Available To Respond To COVID-19 Losses?

Description

We are fielding a lot of inquiries from business owners, large and small, asking if their business interruption coverage will respond to losses caused by COVID-19 shutdowns.

This advisory will not provide an in-depth analysis of coverage terms and conditions. Rather, it will provide some unvarnished and practical advice for businesses in need of guidance now.

The Current State of the Law. As a starting point, the current state of the law is not favorable in terms of recovery for such claims. The standard language in most policies, and the existing case law interpreting it would tend to preclude coverage under the conditions related to COVID-19. But, as discussed below, that could change. Coverage for the interruption or suspension of business operations generally has to be caused by a “*covered cause of loss*,” which most often refers to a “direct physical loss” or “damage to property.” Alternatively, many policies provide coverage for business interruption caused by orders of “civil authorities.” However, this coverage usually requires some showing of direct physical damage to the insured’s or adjacent property.

Unfortunately, many policies contain a specific exclusion (added after 2006 in response to earlier pandemics) that excludes losses “caused by or resulting from any virus...that is capable of inducing...illness.” Insureds with policies containing this exclusion will be particularly hard-pressed to obtain coverage.

Pressures and Possibilities. The current state of the law, however, may not end the inquiry. The political pressure for change will be overwhelming in the legislatures and the courts. We have seen this happen before and there are signs it will happen again.

A bill already has been introduced in the New Jersey legislature to force property insurers to pay business interruption claims for businesses with fewer than 100 employees. [See Philadelphia Inquirer, 3/19/20](#). The future of that bill is unclear, but it is a sign of the pressures that will only become greater as the enormity of COVID-19 business losses mount.

Meanwhile, on March 19, eighteen *bipartisan* members of Congress wrote to representatives in the insurance industry to urge them to extend business interruption coverage in light of the hardships being endured by their insureds. [Read here](#). For now, those eighteen members are simply urging the insurance industry to cover these claims out of a sense of shared community responsibility, but how soon might that change? As constituent pressures mount, more than a letter may be drafted.

Courts will also begin feeling tremendous pressure to interpret language in insurance policies in favor of providing coverage. There is recent historical precedent for that happening in response to Hurricane Katrina, when insurers ultimately paid hundreds of millions of dollars to settle claims they had confidently declined. Recall that, as devastating as Katrina was, its impact was geographically limited. COVID-19 is impacting businesses throughout the entire nation.

A restaurant owner in Louisiana has already filed a case seeking business interruption coverage for a COVID-19 closure. The complaint alleges that possible coronavirus in the insured’s facility or surrounding properties constitutes physical damage to the property and, further, that such contamination prompted the City’s order to shut down restaurants. In the past, “one-off” claims raising these kinds of arguments have met with limited success, but there have been a handful of cases where the presence of contaminants in a building have supported a finding of “physical damage.”

It remains to be seen how courts will interpret the scope of policy language and exclusions in the face of a tidal

wave of demands for relief under business interruption policies. It is likely that we will see an expansion of coverage and businesses should take steps now in case that occurs.

Practical Tips. Coverage does depend on the actual policy – and policy language does vary. There is simply no substitute for reviewing the policy. There are two very important steps to consider, in addition to seeking legal advice, for all businesses that have business interruption coverage:

1. File a claim with your insurer. You should expect a denial. However, based upon the above, it is fair to say that the future of business interruption claims is unclear. Old decisions, made in very different contexts, may not carry the day. Courts may adopt new, more liberal rules, or rely on previous decisions that applied a more liberal standard of what constitutes “direct physical damage.” Should that come to pass, businesses will want to have preserved their rights to seek coverage.

2. Keep detailed records to substantiate any losses resulting from closures or partial closures. Should coverage kick in, documenting the amount of your business’s loss will be crucial. Rather than reconstruct those records after the fact, do so now, on a contemporaneous basis. These records might also be important should governmental entities adopt programs to address the significant losses being suffered by the nation’s businesses.

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