

COVID-19 and Business Interruption Insurance

Most businesses in the United States are suffering diminution in revenues as a consequence of the novel coronavirus. Some have simply closed, whether temporarily or permanently. Others have reduced sales, often due to restrictions, whether self-imposed or mandated by authorities, on physical access to premises by customers and/or employees. Further, fear of contagion has fundamentally altered people's retail behavior. Many businesses purchased business interruption insurance coverage to protect themselves from reductions in revenues. The availability of such coverage in the present circumstances will depend primarily upon the language of the individual policies and, to a lesser extent, on the applicable state law. Unfortunately for many insureds, however, the standard forms of policies in the market generally do not contemplate coverage in the event of a pandemic or similar circumstances. Coverage may be available under certain specialized covers, such as for event cancellations, but this again will turn on specific policy language and applicable law.

The first hurdle for a business interruption insured is demonstrating that the event comes within the insuring clause of the policy. Most business interruption policies are triggered by physical loss or damage to property, whether that of the insured or in some circumstances of a third party. The question of whether contamination of physical property by a virus constitutes such loss or damage is one that jurists can debate. While most courts have required direct physical damage to property, a few courts have found that contamination by a harmful substance that cannot be seen can trigger coverage. It nonetheless may be an uphill battle for insureds because the current changes to everyday life mostly are prophylactic measures attributable to fear of transmission by proximity to other people rather than responses to demonstrated actual contamination of specific property.

The second and more difficult hurdle to coverage is that most business interruption policies contain an exclusion which is directed to pandemics. Specifically, the Insurance Services Office, which prepares, circulates and files with state regulators standard policy language, in 2006 adopted an exclusion for loss due to a virus or bacteria. As a consequence, most business interruption policies contain one or more exclusions which pertain to viruses, bacteria, pathogens, microorganisms, etc. However, it is important to review the language of the specific policy to be sure.

The COVID-19 crisis has renewed focus on the extent of coverage by these policies. One case has already been filed by a restaurant in Louisiana alleging that the quarantine has led to a covered business interruption (notably under a policy that does not contain the pandemic exclusion), and members of Congress are urging the insurance industry to provide coverage under business interruption policies for losses arising from COVID-19.^{1,2} In addition, new coverage for pandemics reportedly is available in the marketplace, but any such coverage would exclude the current pandemic arising out of the new coronavirus.

Thus, while insureds face an uphill battle, coverage for COVID-19 losses under existing business interruption insurance policies will be determined by the specific language of the policy, the applicable state law and whatever new law or precedent is created as a result of the COVID-19 crisis.

¹ Randy Maniloff, *First Coronavirus Coverage Suit Filed For Business Interruption*, Coverage Opinions (March 17, 2020), <https://www.coverageopinions.info/Vol9Issue2/FirstCOVIDcase.html>.

² Catrin Shi, *US lawmakers urge industry to pay BI losses from Covid-19*, Insurance Insider (March 9, 2020), <http://communicatoremail.com/I6e1sO2jzXPaFOhaPelr2QVaonK8N2ZsYbjMi~Nnrg/WebView.aspx>.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email authors Helene R. Banks at 212.701.3439 or hbanks@cahill.com; or Thorn Rosenthal at 212.701.3823 or trosenthal@cahill.com; or email publications@cahill.com.

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