Will Business Interruption Losses From COVID-19 Be Covered By My Insurance?

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The answer is maybe; but you will not know without a thorough review of all potentially applicable policies. You may be hearing in the media, or directly from brokers, insurance adjusters, or risk managers that there is no coverage for COVID-19 business interruption losses, but that is not necessarily true. Many insurance professionals and others are assuming there is no coverage without conducting a thorough review of all potentially applicable policies and without an understanding of how courts treat certain nuanced policy language. The applicable policies vary *significantly,* and while some have problematic language, including exclusions, others have very specific coverage for this exact type of loss. No policyholder should assume or accept "there's no coverage" without a thorough review by coverage counsel.

With the effects of the COVID-19 pandemic still unfolding, many companies are facing protracted uncertainty amidst government-mandated "stay-at-home" directives, inability to get necessary supplies, and inability to provide services and goods to consumers. Worsening matters, it is still too early to predict when these orders will be lifted and regular operations can resume. As a result, affected commercial enterprises are rapidly amassing significant business interruption-related expenses with no end in sight. Businesses worldwide are looking to their commercial property policies in hopes of finding coverage for these losses, but without guidance on what to look for and how courts have interpreted certain policy provisions, they are operating at a disadvantage. The following provides some things to look for when analyzing commercial property policies (and pollution liability policies) for potential COVID-19 business interruption coverage.

First and foremost, keep in mind that insurance policies are not standard form, and many have nuances that can make or break whether you are entitled to millions of dollars of coverage.

Has There Been a Loss Triggering the Policy?

At the outset, a policyholder should consider what policies might apply and whether there has been a potentially covered loss that may trigger those policies. Most commercial property policies insure against "all risks of direct physical loss of or damage to" covered property, or a close variation of that language. Many policyholders are hearing from others (or assuming) that such provisions require tangible and overt physical damage or destruction of covered property. The question then becomes: "Does a virus like COVID-19 satisfy the ‘direct physical' loss or damage requirement?" It depends. The precise policy language, and the factual

circumstances surrounding the loss may drastically impact the coverage determination.

Notably, some courts have found the use of the word "of" before the disjunctive word "or" in the phrase "direct physical loss of or damage to" property means that there is coverage for "loss of use" of covered property, even without physical damage. In other words, "shelter-in-place" directives and other civil authority orders may trigger business interruption coverage, whether or not the presence (or presumed presence) of a virus is considered "physical damage."

In policies containing seemingly stricter "direct physical loss" language, all is not necessarily lost. Coverage under these policies may depend on whether the policyholder can demonstrate that someone infected with coronavirus has been present in or around the covered property. In these situations, a government order requiring business closure or severely restricting business may not trigger coverage in and of itself, but if you have positive identification of the virus on your premises (or at the premises of your suppliers), that may be enough to trigger coverage.

In addition to business interruption coverage (covering loss of income due to "damage" of your own covered property), many policies also insure against "contingent business interruption." Contingent business interruption is typically coverage for the interruption of your business caused by the inability to secure essential supplies from unrelated third parties, or the inability to provide services or goods to your customers.

There is commonly coverage for business interruption arising out of "civil or military authority." This coverage typically applies to lost business income due to a government mandate which prohibits or impairs access to the insured's business. Some provisions are broader and include coverage not only when a civil order denies the insured access to its own property, but also to the insured's customers. Others are less preclusive in that *any* impairment of access (even partial) is sufficient to trigger coverage. This is especially crucial, for instance, to many restaurants that may be allowed to stay open for take-out orders only, but sustain a significant decrease in gross revenue due to the inability to host dine-in patrons.

The insured should consider whether there are any sublimits which may cap or otherwise limit coverage. Frequently, coverages such as business interruption or contingent business interruption may be subject a sublimit which is lower than the full policy limit. However, in other instances business interruption coverage may have a separate limit listed as an "extension" or "additional coverage," which could mean there is more coverage than anticipated.

Is Coverage Excluded?

After considering whether there was a loss that triggers coverage, it is necessary to determine if any exclusions may preclude coverage for business interruption costs as a result of COVID-19. Some

commercial property policies specifically include coverage for "communicable diseases" and ensuing business interruption. On the other hand, some policies contain broad "virus" exclusions.

There are several exclusionary provisions which may affect coverage. Among those are virus exclusions, microorganism exclusions, and "flu-variant" exclusions.

Years ago, most U.S. insurers added an exclusion for damages as a result from any virus or bacteria capable of causing illness or disease, which would encompass the coronavirus. However, not all policies contain these exclusions.

Microorganism exclusions and flu-variant exclusions could impact coverage. Because of the relatively unknown nature of COVID-19, it is unclear whether the coronavirus constitutes a microorganism or is considered a variant of influenza. Insureds should be cautious about the nomenclature used when referencing COVID-19.

Other exclusions might also apply. For example, is there a pollution exclusion? If so, does "virus" count as a pollutant? Conversely, is there pollutant cleanup coverage that may provide at least some coverage? This could be under the same policy or in a separate pollution policy.

Does the virus count as an "act of God," or is it encompassed by a "war or military action" exclusion? Insurers may raise these exclusions (and others) as bases to deny coverage, but policyholders should keep in mind that **it is generally the insurer's burden to prove that an exclusion applies**. Without clear law on the application of these exclusions to something like coronavirus, odds are in policyholders' favor. The only way to guarantee that you have no coverage is to not assert a claim.

For additional information, please contact Kim Winter, Noah Nash, or your regular Lathrop GPM attorney.