

COVID-19

# Updates & News

## **Business Interruption Insurance – Do You Have Coverage?**

As discussed in our client alert earlier this week, your business may be protected by business interruption insurance. While we know that, like us, you are probably preoccupied with assessing how you can continue your business operations in this challenging climate, it would make sense to begin considering how your business may be protected by its insurance program. Taking steps now may put you in a better position to maximize any such recovery and give you a realistic picture of the extent to which insurance may help offset your losses.

### **Basics of Business Interruption Insurance**

Business interruption insurance is typically issued in connection with a commercial property or business owner's insurance policy and may cover some of the following:

- Business income that is lost because of the interruption. This principally means the profits from the work you could not do or the sales you could not make, and is usually calculated as a reduction of net income attributable to the business interruption.
- Fixed business costs that, although providing no current business benefit because of the interruption, could not reasonably be avoided due to contract terms or other practicalities. This could include rent on long-term facilities or equipment, utility bills, and similar expenditures.
- Extra expenses incurred because of the business interruption, such as rent and utility payments on short-term facilities, temporary staff, increased cost of materials, and advertising to inform customers that you are still operating albeit at a different location or with different capabilities.

Coverage is normally limited to a "period of restoration," which means the time period from the business interruption to your resumption of normal operations, as demonstrated by the completed repair of any damage and cessation of government restrictions on your activities. Many policies cover an extended period of restoration, which recognizes that a business interruption may have ongoing financial impacts even after your business is, theoretically, "up and running."

Business interruption insurance is usually an adjunct to another coverage such as commercial property insurance and is normally based on triggering that coverage. Thus, if the underlying coverage requires direct physical damage to your insured property, you will need to show this in order to obtain business interruption insurance benefits. Many policies, however, broaden this concept to allow business interruption coverage if the damage to key property is owned or controlled by third parties such as your suppliers or customers, utility service is interrupted, or the government forbids you to access your property because of damage to your property or nearby property. And, loss of use of property may be considered property damage under certain circumstances.

Maximizing recovery in a business interruption claims requires presenting a compelling factual story about what happened, how you dealt with it, and how it impacted your business. This almost always requires developing a credible hypothetical scenario portraying your business' fortunes absent the business interruption. Telling these stories requires careful documentation of both your business' normal operations and its response to the business interruption. In formal dispute resolution proceedings such as litigation and arbitration, testimony is commonly given by a business' own operational and accounting personnel as well as specially-retained forensic accountants and industry experts.

### **Challenges to Coverage for COVID-19 Losses**

Although many businesses are suffering losses because of the current COVID-19 public health crisis, obtaining business interruption insurance coverage may face obstacles. Thus far, insurers have given public indications that they intend to interpret their policies as narrowly as possible and find ways to avoid or limit coverage.

Faced with a COVID-19 claim, Insurers will most likely point to three types of policy provisions that purportedly limit business interruption coverage.

First, business insurance coverage is normally provided as an additional coverage to a policy that requires direct physical damage to some property that your business owns or that is closely related to its operations. Making such a connection may be relatively simple when the business interruption results from, for example, the destruction of the policyholder's facility or equipment. In addition, some courts have held that contamination constitutes direct physical damage. This could apply if, for example, an individual who was later diagnosed with COVID-19 worked at your worksite or your supplier's plant, requiring an extended shutdown for decontamination and additional screening before the government allows operations to continue. But insurers seem poised to argue that their policies do not cover business interruption caused by general concern over public health because of the alleged tenuous link to any direct physical damage. Insurers would likely make this argument even if the government shut down your business or entire industry and would claim that the lack of direct physical damage means there is no coverage.

Second, in many cases the commercial property insurance or other policy underlying the business interruption coverage specifies that it only covers loss caused by specific "named perils." Communicable disease and virus are almost never named perils in these policies. Other policies cover "all risks" and would not be subject to this limitation.

Third, however, in the wake of the 2003 SARS crisis, many insurers adopted policy language that purports to specifically exclude coverage for losses caused in whole or in part by communicable disease, bacteria, or virus despite any "all risk" language or lack of a direct physical damage requirement. These changes were not much noted at the time and now strike many as unfair.

### **Government to the Rescue?**

The possibility that many businesses may not be covered by business interruption insurance and the preliminary signals that insurers intend to fight against coverage have prompted concern and action from government bodies.

Most notably, the New Jersey state legislature is considering adopting legislation that would require insurers to provide property and business interruption coverage for COVID-19 losses under existing policies despite any policy language to the contrary. The bill as currently drafted would only apply to "small businesses" in New Jersey employing between 25 and 100 persons. The insurance industry has strongly indicated both its opposition to the bill and its determination to continue the battle in court should the bill become law.

The New York Department of Financial Services, which regulates the insurance industry within New York, ordered all insurers underwriting business interruption insurance within that state to provide their commercial policyholders with a written explanation of benefits applicable to COVID-19 no later than March 18, 2020. We are not aware of any other states requiring this.

Also, on March 18, 2020, a bipartisan group of eighteen U.S. House members from ten states sent a letter to four insurance industry associations pointing out that the COVID-19 public health crisis is having a significant effect on American businesses and urging the industry to provide business interruption coverage to businesses affected by COVID-19. Insurance industry leaders largely rebuffed the request, stating that although it was willing to help, it would not do so through business interruption coverage. "Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19," they wrote.

Whether government will intervene forcefully and effectively on behalf of policyholders remains to be seen.

### **What We Can Do Together**

If you have not already done so, now is the time to review your business interruption coverage to determine what, if any, benefits you may be owed. DFL Legal is available to help you review your various insurance policy documents and any communications you may have received from your insurers, discuss your current situation, and assess this important issue. If you have any questions about business interruption insurance, or any other insurance-related issues, please contact Joe Luciana of DFL Legal at [jluciana@dflegal.com](mailto:jluciana@dflegal.com) or 412-926-1812, or Abe Delnore at [adelnore@dflegal.com](mailto:adelnore@dflegal.com) or 412-926-1824.

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