

Business Interruption, Insurance Coverage, and COVID-19

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Similar to East Asia and Europe, the United States is in the throes of the Covid-19 pandemic. Social distancing, stay-at-home orders, and quarantines are a part of daily life. It is apparent many commercial organizations have experienced, or will experience, significant slowdowns in business — or even complete shutdowns. What role could insurance play in providing coverage for business interruption losses?

Business Interruption Insurance and What It Covers

Business interruption insurance, also known as business income insurance, is commercial property insurance designed to cover loss of income incurred by an organization due to a slowdown or suspension of its operations at its premises, under certain circumstances. Business interruption insurance may include coverage for a suspension of operations due to a civil authority or order, pursuant to which access to the policyholder's premises is prohibited by a governmental authority. Business interruption insurance is often paired with extra expense insurance, designed to provide coverage for additional costs in excess of normal operating expenses an organization incurs in order to continue operations following a covered loss. Contingent business interruption insurance is a related product and is designed to provide coverage for lost profits resulting from an interruption of business at the premises of a customer or supplier. The contingent property may be explicitly named, or the coverage may apply to all customers and suppliers.

Business interruption coverage is generally triggered when the policyholder sustains physical loss or damage to insured property by a covered loss as defined in the policy. In the event of a claim for a business interruption related to COVID-19, insurance carriers and policyholders will dispute whether the physical loss requirement has been satisfied. In the aftermath of previous viral outbreaks early this century (e.g., SARS, rotavirus, etc.), the insurance industry responded by adding exclusions designed to preclude coverage for such losses. The insurance coverage arguments are varied, and those arguments will be the subject of litigation over the coming years.

Legal and Government Influence on Coverage

At least one lawsuit relating to insurance coverage for business interruption losses due to COVID-19 has already been filed. In the case styled *Cajun Conti LLC, et al. v. Certain Underwriters at Lloyd's, London, et al.*, No. 2020-02558 (La. Dist. Ct., Orleans Parish, complaint filed March 16, 2020), the

plaintiffs, who own Oceana Grill restaurant in New Orleans, seek a declaration from the court that their insurer must cover business interruption losses and the costs of cleaning. According to the complaint, the insurer, a Lloyd's syndicate, issued an all-risks policy to the plaintiffs that does not contain an exclusion applying to a viral pandemic and covers business losses due to a shutdown by a civil authority. This case will be followed very closely as it develops.

Government authorities may take action impacting insurers' obligations to provide coverage for business interruption losses resulting from COVID-19. On March 18, 2020, members of the United States House of Representatives urged four major insurance trade organizations to cover business interruption claims arising from COVID-19. The letter was addressed to the CEOs of the following organizations:

1. The American Property and Casualty Insurance Association;
2. The National Association of Mutual Insurance Companies;
3. The Independent Insurance Agents & Brokers of America; and
4. The Council of Insurance Agents & Brokers.

Members of Congress state business interruption insurance is intended to protect businesses against income loss as a result of operational disruption, and covering losses resulting from COVID-19 would, "help sustain America's businesses through these turbulent times, keep their doors open, and retain employees on the payroll."

In response, the CEOs wrote to the first signatory of the March 18 letter. The CEOs stated, "Standard commercial insurance policies offer coverage and protection against a wide range of risks and threats that are vetted and approved by state regulators. Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19." The CEOs also stated they recognize the extraordinary challenges our country is facing but, "The proposed retroactive application legislation would fundamentally change the agreed-upon transfer of prospective risk-of-loss exposure to coverage for a known and presently occurring loss, something the parties did not agree to, the insurer did not rate for, and the policyholder did not pay for."

It seems unlikely the federal government will directly interfere with the parties' freedom of contract and unilaterally alter the terms of policies of insurance. However, it is possible the federal government will intervene in a less intrusive way.

Term Amendments and Implications

New Jersey has taken preliminary steps to directly alter the terms of insurance contracts issued to insureds in New Jersey. On March 16, 2020, New Jersey Bill A-3844 was introduced with the goal of assisting businesses impacted by COVID-19.

The principle provision of draft Bill A-3844 states:

"Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption in force in this State on the effective date of this act, shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic, as provided in the Public Health Emergency and State of Emergency declared by the Governor in Executive Order 103 of 2020 concerning the coronavirus disease 2019 pandemic."

The draft bill is limited to insureds in New Jersey with fewer than 100 full-time employees, and the forced coverage is still subject to policy limits. The draft bill also includes a provision allowing liable insurers to petition the commissioner of banking and insurance for partial reimbursement collected from other insurers in the state that did not issue business interruption coverage.

Bill A-3844 was passed out of committee on March 16 but was pulled from consideration before being presented to the full assembly. Its passage is still very much a possibility. If the bill is passed, it would face significant legal challenges, including challenges to its constitutionality based on the Contracts Clause — U.S. Const. art. 1, § 10.

While no other state has taken any measure as extreme as the draft bill in New Jersey, it is possible other states will seek to influence whether insurers provide coverage for claims relating to COVID-19. On March 10, 2020, the New York Department of Financial Services mandated property casualty insurers provide to the department, “Certain information regarding the commercial property insurance it has written in New York and details on the business interruption coverage provided in the types of policies for which it has ongoing exposure.” Insurers must also provide the same information to policyholders. Several observers have noted this move could be a precursor to a draft bill similar to NJ A-3844 being introduced in New York.

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