



Evaluating Insurance Coverage for Business Interruptions

April 30, 2020

As the COVID-19 pandemic has progressed, many of our clients have had questions about the business interruption provisions of their insurance policies. Most (but not all) commercial property insurance policies include coverage for suspension of business operations or extra expenses incurred resulting from a covered cause of loss (the specific risks against which the property is insured). With many insurance companies and brokers taking the blanket position that these policies do not provide coverage for losses resulting from the coronavirus, the COVID-19 pandemic, or government orders in response thereto, each client should consider an independent review of its policy terms by its own attorney, rather than its broker. Every client who may have a business interruption claim should preserve its rights by giving notice of a claim to its insurance carrier, customarily through the client's insurance broker, as soon as possible (with receipt confirmed by the carrier).

The specific language used in the insurance policy is the starting point in every case. Insurance policies vary widely, and the insuring clauses of the policy must be read carefully in conjunction with any exclusions from coverage and endorsements (riders) that may expand or restrict the scope of coverage. Coverage also may be provided subject to deductibles or sublimits. Specific policy provisions must be read in the context of the overall structure of the policy.

Policies typically require "physical loss or damage" to the insured property. Many insurance companies and brokers have asserted that the actual or suspected presence of coronavirus does not constitute direct physical damage or loss. However, many courts have held that contamination by a foreign substance is a form of physical loss or damage if it impairs access to or use of the insured property. While New York courts generally have not been receptive to this position, we expect courts to revisit the issue in light of the unprecedented coronavirus pandemic. In addition, some policies may provide for the application of the law of another jurisdiction that may be more or less favorable on this issue. We are also closely following pending litigation and legislative developments that may affect the analysis.

Insurers also have asserted that coverage for coronavirus is excluded from coverage by exclusions for loss caused by pollution, contamination, or bacteria and microorganisms that can cause physical illness or disease. These exclusions may or may not apply, depending on the exact language used. For example, policy exclusions for pollutants or contamination may not encompass biological hazards and policies that exclude coverage for bacteria and microorganisms

may not be broad enough to exclude coverage for viruses, or at least the coronavirus, which may not even be a living microorganism. The scope of such exclusions also may be limited by other policy language and how they fit into the overall context of the policy. These are complex considerations that would benefit from careful analysis by an attorney.

Finally, coverage may be provided by other policy provisions that may not require direct physical damage or loss to the insured property. These can include coverage for governmental orders that restrict or prohibit access to or use of the insured property, ingress/egress provisions that apply where access to the property is prevented, or dependent property provisions that apply where there is damage or loss to another business that is a supplier or distributor for the insured or attracts customers to the insured's business.

While coverage may not be provided in every case, we urge all of our clients to examine their policies carefully and in consultation with their attorney, and not to just take "no coverage" for an answer.

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If you have any questions concerning your policy and would like us to help you in evaluating coverage, please contact any of the undersigned or your regular Warshaw Burstein attorney.

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