



## COVID-19 and the Spread of Business Interruption Claims

The COVID-19 pandemic and its associated lockdown and shelter at home orders disrupted businesses of all types, even those that have been able to stay open and continue their operations to some degree. Thus, it is a crucial time for business owners to review their insurance policies and determine whether business interruption claims stemming from COVID-19 are adequately covered, if at all.

**Establishing a Business Interruption Claim.** In the typical scenario, business interruption insurance covers a policyholder's lost profits and additional expenses incurred when the insured property from which their business operates is disturbed due to direct "physical loss or damage." In the case of COVID-19, business interruption coverage may be available under certain "all-risk" policies wherein all risks of physical loss or damage are covered and only certain specific risks are excluded. In such policies, as long as there is not an exclusion for "losses to business or property from a virus or global pandemic" or similar language, then physical damage due to a COVID-19 viral contamination may trigger a covered claim.

Common among businesses, all-risk property policies protect proprietors because they lessen the burden of proof required to establish an insurable occurrence and increase the insurer's burden to demonstrate that a more specific and enumerated exclusion applies. In the COVID-19 context, a business owner would have to show that a coronavirus contamination amounts to physical loss or damage, which could require a scientific determination regarding the degree and duration of exposure. Fortunately for policyholders, scientific data now suggests COVID-19 "fomites" are able to infect surfaces for as long as twenty-eight days.

Another avenue to pursue for policyholders experiencing lost business income is through a "civil authority" or "public authority" clause. A public authority provision comes into play when a government entity denies access to the insured property. While particular policy language differs, insurance claimants will want to show that the effects of COVID-19 caused loss or damage in the "immediate area" of the business.

Under some policies, the immediate area for the purpose of a public authority provision is defined as being within a certain number of feet or miles, or may even remain silent. While it is important to note that many policies now contain standard virus exclusions put forth by the Insurance Services Office, it is of equal note that the Office has responded to the ever-growing COVID-19 concerns with endorsements for standard forms that do not otherwise provide business income coverage during the outbreak.

**What information should I collect to show COVID-19 harmed my business?** Equally as important as policy language, documentation of COVID-19-related business impacts can make or break a business interruption claim. A policyholder should be able to clearly demonstrate all business interruptions to a claim agent, including cancellations and site closures, mandates and expenses in furtherance of remote work measures, employee claims, stop-work and protective orders, and other costs linked to COVID-19. Moreover, part and parcel to business interruption data collection and retention is *notice*. It is absolutely essential that affected business owners and their attorneys provide *timely notice* of potential claims to their carriers, even if they are not certain if the claims may be covered. A record of such notice should always be maintained.

Once timely notice is established, affected insureds should continue to keep track of all facts relevant to potential or actual losses and additional expenses. Insureds should also be mindful of applicable duties to mitigate losses as well as impacts to related parties up and down the supply chain; both of which are issues that may necessitate a more tailored conversation with counsel. Finally, while collecting financial information demonstrating losses and expenses, it may be prudent for a business to proactively set up separate accounts to flag COVID-19-related costs with respect to its internal accounting system. This recordkeeping may include receipts, payroll, timesheets, bank statements, marketing, and other increased expenses related to the outbreak and reflected in the books.

**Insurance Company Perspectives and Defenses.** Insurance carriers are likely to answer business interruption claims with initial denials and subsequent defenses. Carriers will undoubtedly first turn to a virus exclusion if the policy contains one. If a virus exclusion is not present, the carrier will likely argue that coverage is not triggered by COVID-19 because a viral contamination does not amount to physical loss or damage. The success of a defense based on the definition of physical loss or damage largely depends on the individual state law where the claim is brought. Some state courts, such as in Connecticut and Massachusetts, have taken an expansive approach, finding that physical loss or damage could include smells, airborne contaminants, and even bacteria. For example, in Yale University v. CIGNA Ins. Co., 224 F. Supp. 2d 402 (D. Conn. 2002), the Court underscored the distinction of a mere “presence” of a material versus a “contamination” of said material in the context of lead and asbestos. While the case does not fall squarely into the COVID-19 context, it supports a broad view of the physical loss or damage criterion most insurers require for business interruption coverage.

Rejecting the narrow interpretation, the Court specifically pointed out the insurer’s “fail[ure] even to consider, let alone distinguish, the substantial body of case law in which a variety of contaminating conditions have been held to constitute physical loss of or damage to property.”

Another potentially strong argument an insurer may raise, particularly if the policy at issue does not contain a virus exclusion, is the “ordinance or law” exclusion. Found in many commercial policies, an ordinance or law exclusion typically excludes from coverage any loss or damage caused by the enforcement of or compliance with an ordinance or law enacted to regulate the use of an insured property. The ordinance or law provision is especially advantageous to carriers because it usually contains an “anti-concurrent causation” clause, i.e., it renders any other cause irrelevant, and applies regardless of the property damage issue.

Some carriers may also try to use pollution exclusions to circumvent virus-related claims; but such equation would be on the carrier to prove. Others have even gone so far as to retroactively push virus-excluding endorsements on potentially affected insureds, but such unilateral material modifications appear, on first blush, questionable at best. As mentioned above, certain policies do contain exclusions for communicable diseases, and such language is a strong defense for insurance carriers.

**Current litigation.** On April 3, 2020, the Indiana Repertory Theatre, Inc. (“IRT”) filed a complaint in Indiana’s Marion County Superior Court against its insurance carrier, The Cincinnati Casualty Company (“CCC”). In its complaint, IRT seeks a declaratory judgment as to the scope of CCC’s obligation to pay losses due to COVID-19 business interruptions. IRT, which purchased an all-risk policy, claims that CCC failed to include a virus-related exclusion and thus is obligated to cover IRT’s business losses incurred as a result of the cancellation of its September – May theater season. In response, CCC argues that the forced closure, in response to the county-mandated prohibition of gatherings of 50 or more people, does not equate to a physical loss under the policy.

And on April 6, 2020, Mace Marine Inc. (“Mace”), on behalf of its subsidiary Conch Republic Divers dive shop, filed a complaint in the Circuit Court of the 16<sup>th</sup> Judicial Circuit in Monroe County, Florida against its insurer, Tokio Marine Specialty Insurance Company (“Tokio”). Similar to IRT’s suit, and according to the complaint, Mace ceased operations and shut its business by order of the state and county authorities. After making a claim under its all-risk policy’s business income and extra expenses coverage, Mace subsequently received a denial letter from Tokio, which similarly argued that the COVID-19 pandemic does not constitute a direct physical loss under the policy as written. Additionally, Mace raises its policy’s public authority clause as further support that its business losses and extra expenses should be covered by Tokio. The developments will continue to unfold as many policyholders around the country struggle with insurers over COVID-19 coverage; meanwhile, some states have begun to introduce legislation to address the current commercial tension.

**State and Federal action.** Many state and federal bodies have stepped up to curb the danger of insurance carriers retroactively limiting or excluding COVID-19 related coverage.

New Jersey: New Jersey's N.J. Draft Bill A-3844 would apply retroactively, insure against business interruption, loss of use and occupancy, and would effectively eliminate virus exclusions.

Ohio: Similar to New Jersey, Ohio's HB 589 covers business interruption claims from a global viral pandemic running back to the date of Ohio's declaration of a state of emergency.

Massachusetts: By far the most broad, SD.2888 renders the "physical loss or damage" argument moot, providing "no insurer in the commonwealth may deny a claim for the loss of use and occupancy and business interruption on account of (i) COVID-19 being a virus (*even if the relevant insurance policy excludes losses resulting from viruses*); or (ii) there being *no physical damage* to the property . . . ." Massachusetts Bill SD.2888, Section 1(a) (emphasis added). Notably, SD.2888 is expressly subject to Chapter 176D of the General Laws—Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance—which sends a clear message to carriers to oblige in good faith and with principles of fair dealing.

New York: New York Draft Assembly Bill A10226 operates much like the Massachusetts Bill such that its passage will mandate an interpretation of current insurance policies to include BI coverage stemming from COVID-19 and New York's declaration of a state of emergency. Like the aforementioned bills, coverage under A10226 would be subject to the current monetary and durational limits of applicable commercial property policies.

South Carolina: South Carolina Senate Bill 1188 would require insurance companies to payout on COVID-19 related loss claims brought by small business insureds, those with 150 or fewer employees, since the beginning of the COVID-19 pandemic regardless of whether the insureds' business policies are written to cover such claims.

Federal: Recognizing the financial impact of the pandemic on businesses, eighteen U.S. House Representatives signed a letter on March 18<sup>th</sup> addressed to the American Property Casualty Insurance Association, Counsel of Insurance Agents and Brokers, Independent Insurance Agents & Brokers of America, and National Association of Mutual Insurance Companies. The purpose was to shine light on the substantial business losses experienced nationwide. On April 14<sup>th</sup>, U.S. Representative Mike Thompson introduced the Business Interruption Insurance Coverage Act (H.R. 6494) that would nullify virus exclusions and obligate carriers to payout business interruption claims related to COVID-19. On May 26<sup>th</sup>, U.S. Representative Carolyn Maloney and twenty co-sponsors introduced the Pandemic Risk Insurance Act of 2020 (H.R. 7011) which would require carriers offering business interruption policies to cover losses incurred due to pandemics. As of publication, neither bill has advanced out of committee review.

**Final Takeaways.** Business owners are feeling the real-time effects COVID-19 is having on their bottom line. More than just business interruptions, employers must also be mindful of varying responsibilities to the public, employees, contractors, partners, and other industry affiliates. As such, it is now more important than ever to engage in a careful and detailed review of your insurance policies and data retention practices. A knowledgeable and competent business insurance attorney can assist in developing a coverage and recovery strategy tailored to your business's needs in the wake of COVID-19-related interruptions.

The State of Connecticut Insurance Department has published an FAQ regarding business interruption insurance and COVID-19 which is available [here](#).

For further information on the implications of COVID-19 in the insurance industry and business interruption insurance, or other related questions, please contact Attorney [Donald Doeg](#) at [ddoeg@uks.com](mailto:ddoeg@uks.com) or at (860) 548-2638; Attorney [Kerry R. Callahan](#) at [kcallahan@uks.com](mailto:kcallahan@uks.com) or at (860) 548-2639; or Attorney [Richard Dighello](#) at [rdighello@uks.com](mailto:rdighello@uks.com) or (860) 548-2633.

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