

Can Insurance Help Your Business Weather The Coronavirus Crisis?

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It is an understatement to say the current Coronavirus crisis is unprecedented. As individuals and businesses, we are all facing risks few of us ever contemplated. Ordinarily, one source of potential assistance when faced with financial risks is insurance. Naturally, many people have asked whether any of the policies for which they have been paying premiums for years provide any protection against the potentially devastating losses they are confronting now.

The answer, unfortunately, is complicated, and often not particularly promising. As always, whether you are covered for a particular loss depends on two things: the terms of the relevant policies and the actual facts creating the loss. The purpose of this Client Alert is to offer some general guidelines and suggest the first steps towards determining what, or whether, coverage might be available. I will focus on the most pressing issue for most businesses—coverage for lost income resulting from the current crisis. Liability risks and policies will be addressed in subsequent alerts.

BUSINESS INTERRUPTION COVERAGE IN PROPERTY POLICIES

A common problem facing many businesses right now is the dramatic loss of profits caused by emergency orders either requiring or encouraging them to shut down the business altogether or drastically reduce operations. Most commercial property policies include some amount of coverage for business losses under certain circumstances. This is generally known as “Business Interruption” coverage. Typically, the coverage is triggered by “direct physical loss or damage” to covered property. For example, if a business is damaged by fire and has to close operations while the damage is repaired, the policy will pay to repair or replace the structure, and will also pay for a limited amount of profits lost while the business is closed and for a limited period of “restoration” after it is reopened. A threshold issue, therefore, is whether the business interruption is the result of “direct physical loss or damage” where a business has closed or reduced operation because of actual or potential virus contamination.

As with many other issues, courts in some states have been more “generous” than others in finding physical damage in similar situations, and the facts of a specific situation can make or break an insurance claim. Certainly, proof of actual contamination, rendering a building uninhabitable or unfit for its ordinary use, is more likely to satisfy the physical-damage test than a voluntary closure prompted solely by a concern for public health and compliance with “social distancing” recommendations. In any event, the meaning of “direct physical loss” is not as cut and dried as many insurance companies and adjusters are likely to assume.

Another, related provision contained in some property policies is coverage for business interruption attributed to an order of a civil authority prohibiting access to your building. This coverage often has a lower limit of coverage than the core property policy. These provisions also vary in the extent to which they require physical damage to your property or other property in some proximity to the covered building.

Another obstacle to coverage for business interruption losses under many policies will be the requirement that the business completely close before coverage is triggered. Disputes are likely to arise in connection with businesses that continue operations, but on a drastically reduced basis, such as doing only take-out or delivery for a period of time.

At least one lawsuit has already been filed to determine the scope of coverage under a government-ordered closure provision. Oceana Grill, a French Quarter restaurant, filed suit in a Louisiana court seeking a declaratory judgment construing the “direct physical damage” requirement in light of statewide orders curtailing the size of gatherings and requiring restaurants to close on-site dining. The issues may prompt a “battle of experts” on how long the coronavirus can contaminate a building and render it unusable. Similar lawsuits can be predicted in other jurisdictions, including Texas.

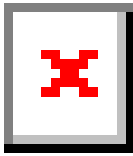
Importantly, some property policies even have an endorsement expressly extending coverage to damages attributed to virus, bacteria, or similar contamination. More often, however, policies have explicit endorsements excluding all coverage for loss or damage caused by such perils. There have been efforts by some legislatures, notably New Jersey, to compel insurers not to enforce the virus exclusion in this circumstance, at least for businesses with fewer than 100 employees. Removing the exclusion, however, would not necessarily resolve the “physical damage” issues, which could prompt even more drastic legislative action in some states (probably not Texas).

Finally, several members of Congress sent a letter on March 18, 2020, to CEOs of four large insurance associations urging the industry to “recognize financial loss due to COVID-19 as part of policyholders’ business interruption coverage” in order to “help sustain America’s businesses through these turbulent times.”

FIRST STEP

As should be clear from this discussion, insurance policies are not all the same. Although there are a few standard forms and similar terms in many policies, there also nuances in language that can spell the difference between coverage and no coverage in a particular situation. There are also a number of endorsements that can either add or exclude coverage for certain types of loss. And every policy has a deadline for giving notice to the insurer, generally tied to the date of the loss, as well as limitations on what actions a policyholder may take without impinging on coverage.

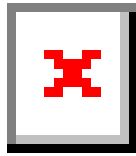
So, the first step is to collect your policies. If you don't already have copies in your files, ask your insurance agent or broker to provide copies. Reading the policies, of course, can be a daunting task for the average individual. Carrington Coleman's experienced insurance attorneys are prepared to help you understand the scope of your coverage and, if necessary, work with you in diligently pursuing your claims.



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