COVID-19 Business Interruption Insurance:
What Should I Be Thinking About?

The outbreak of COVID-19 has taken its toll on the daily lives of American citizens and businesses. Phrases such as "social distancing," "shelter-in-place," and "work from home" have now become part of the normal lexicon. The typical routines for people have been disrupted, and so have those for businesses and commerce. Many companies are suffering from the inability to adequately or effectively operate under circumstances where the workforce is stuck at home or otherwise unable or unavailable to handle many of the day-to-day operations.

"Business Interruption Insurance" contemplates the possibility of providing coverage for losses and damages from interruptions in business operations resulting from such events as fire, flood, theft or similar catastrophes which are common and anticipated dangers in today's world. However, what about pandemics? What about when businesses need to shutter, suspend or limit operations when employees cannot come to the workplace because of the possibility of contracting a debilitating illness? How, if at all, does that differ from being unable to operate due to a fire or flood that shutters the premises for an extended period of time? Does the business interruption policy procured to cover such perils cover pandemics too?

While much of this is uncharted territory and will require further research and analysis dependent on the facts and circumstances of each situation, to help with some of the questions and concerns arising during this uncertain time, below is a summary of some concepts and issues to consider when thinking about business interruption claims.

What is Business Interruption Insurance and what does it cover?

Each insurer is different and some may offer different policies or coverage depending upon the insurer or the nature and circumstances of who or what type of business is to be insured. Further, each policy may contain different exclusions that will expressly exclude coverage for specified events or damages depending upon the insurer or the needs of the insured. As such, it is critical to read the provisions and exclusions of the policy to generally understand what is and isn't covered.

Typically, however, business interruption insurance is intended to protect against lost income after a covered peril affects a business. Covered perils often include events such as fire, water, theft, wind, falling objects or lightning. In other words, business interruption insurance usually covers losses caused by ***events that involve some type of "physical damage" to a property that impacts the operation of the business.***

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For example, a fire breaks out rendering the building uninhabitable and destroying the merchandise stored in the building right before that merchandise was about to be shipped to the customer. Under those circumstances, and depending upon the type of policy obtained, business interruption insurance would likely cover the (a) lost income from the lost merchandise (less shipping costs already paid); and (b) additional expenses such as relocating the business to a temporary space because of the fire.

Generally, there are three types of business interruption insurance typically encountered.

- "Business interruption" insurance, which is intended to compensate the insured for lost income suffered during the time needed to repair or restore the damage to the property.

- "Extended business interruption," usually for a limited duration, covers the lost income after the property is repaired, but before income returns to what it was before the loss.

- "Contingent business interruption," which provides coverage for lost income resulting from physical damage not to the property itself, but to the property of others such as either providers or suppliers on the one hand or consumers of its product or services on the other.

The latter two coverages are usually offered as "add-ons" to the business interruption policy and carry an additional premium. Like any other insurance, business interruption insurance has limitations and exclusions. It does not cover every event that could possibly cause a business to close its doors. For example, if flooding is not covered by the property insurance policy and that is what keeps your business from operating, you will not be covered by business interruption insurance unless you have a flood insurance endorsement to your property insurance policy.

Although this is not an exhaustive list, here are some items a business interruption policy may cover or exclude:

Possibly covered:

- Income your business would have earned if operating normally during the time the business is closed.
- Rent or lease payments during the time when the premises were unusable.
- Relocation expenses associated with moving to a temporary location, which may include moving costs and rent.
- Employee wages to help you make payroll while your business is unable to operate.
- Business taxes
- Loan payments
- Losses caused by damage preventing access to a building. Also known as loss of ingress or egress, this coverage applies when a government implements a curfew or other restriction that keeps people away from your business.

Possibly excluded:

- Undocumented income: It is important to have several months of documented income, particularly if your business is growing, so you can account for the income for which you want the policy to reimburse you. You will need to prove that your business suffered financial damage because of the interruption.

- Utilities: Often, utilities are shut off when a location cannot be used and therefore, are sometimes not covered by the insurance.
- Partial closure losses: Business interruption coverage usually does not go into effect if access to the building is limited but not completely eliminated.
- Losses from closures from specifically excluded events or if closure is voluntary.
- Closures for short duration: Most business interruption policies require closure for an extended period and typically will not cover losses for interruption of only a couple days.

Does Business Interruption Insurance Cover Losses from the COVID-19 Pandemic?

The short answer is: it's unclear

Until this point, there is no caselaw or other determination that definitively states that losses sustained as a result of business interruptions because of the mass threat of illness or pandemic are covered. Because business interruption insurance is intended to cover the lost profits that arise out the interruption in the business operations resulting from "physical damage" (such as a fire or flood), it is uncertain whether it will cover a business for closing operations where there is no visible or discernable destruction of a business's physical structure, yet employees are unable to work in the premises because of damage to a building, structure or facility.

The "Physical Injury" Requirement – In New Jersey (and likely in other states where similar business interruption policies are provided), a claim for damages from business interruption must show physical damage or injury. While this can be more readily shown through actual damage to a building or structure (such as from a fire or flood), establishing damage from an airborne contaminant or danger that does not appear to physically impact the building or structure but prevents employees from using it is more problematic.

While physical damage such as fire or flood is much simpler to establish as a likely covered event since is can be seen and evaluated relatively easily, the difficulty with damages that go beyond a building or facility's physical structure can be more difficult.

Airborne contaminants or, in the case of COVID-19, a virus, cannot be seen with the naked eye and, even more difficult is establishing that the condition exists in the area or that it affects the building or structure. Adding to that the generalized fear and uncertainty of who, where and how this pandemic affects each business, makes the issues that much more uncertain. Further, some policies include exclusions for damages resulting from governmental shut-downs. However, while each case is fact-sensitive, some New Jersey caselaw dealing with what can be characterized as "invisible dangers" could provide some guidance depending upon your particular circumstances.

- Wakefern Food Corp. v. Liberty Mutual Fire Ins. Co., 406 N.J. Super. 524 (App. Div.), cert. denied, 200 N.J. 209 (2009) ("Wakefern") – In Wakefern, the insured (a group of supermarkets) sought to claim losses resulting from a power blackout in 2003. Clearly, without electricity, the supermarkets could not maintain refrigeration resulting in the loss of food and other perishable merchandise. The policy did not provide a specific definition as to what qualified as "physical damage," but the insurer denied coverage claiming there was no physical damage to the property and that a loss of electricity did not qualify. Although the trial court initially found that the losses did not result from physical damages, but rather from "de-energizing power lines by the proper operation of protective relay devices" (essentially that circuit breakers were properly activated to shut power), the Appellate Division reversed. In doing so, it found that because the policy was drafted by the insurer and it did not expressly define "physical damage," the policy was interpreted against the insurer and that shutting down the electrical system constituted physical damage. It also found that the insured reasonably expected to be covered for spoiled food resulting from a loss of its refrigeration due to the blackout. Simply put, the Court construed the ambiguity in favor of the insured finding the loss of electricity to be a physical damage warranting business interruption coverage.

- Gregory Packaging v. Travelers Property Casualty Co. of Amer., 2014 U.S. Dist. Lexis 165232 (D.N.J. Nov. 25, 2014) ("Gregory") – The Court in Gregory was presented with a claim for business interruption arising from the evacuation of a building for several days caused by the release of toxic ammonia gas in the area. The presence of the ammonia gas rendered the premises uninhabitable preventing anyone from working from the site. The Court looked to a prior holding in Port Authority of New York and New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226, 235 (3d Cir. 2002) which involved claims arising from airborne asbestos released from buildings as a result of the 9/11 attacks to find that physical damage or loss can result from an airborne substance that causes a building or structure to be unusable or uninhabitable.

Put simply, these decisions (and possibly others like them), are fact-dependent and not dispositive of whether the COVID-19 pandemic would be deemed physical damage or loss for purposes of a business interruption claim. They could, however, serve as a starting point for analyzing whether such a claim could be made under particular circumstances. Once again, a careful review of the applicable insurance policy, together with the exclusions, should be made under the circumstances to ascertain whether coverage may exist.

Note: NJ Pending Bill for COVID-19 Coverage

Recently, the New Jersey Legislature proposed a bill – New Jersey Bill A-3844 – which, if enacted, would provide a framework for businesses to recover for business interruption losses from their insurer retroactive to March 9, 2020 (the date Governor Phil Murphy declared a public health emergence due to COVID-19). This bill has not been passed and is not law. Moreover, it will take some time for the bill to gain support and, even then, will undoubtedly be met with objections and hurdles posed by the insurance industry and others who will stand to lose the most from such claims. In particular, such a law could override specific policy exclusions for loss or damage caused by disease or virus thereby undermining the contractual intent of the parties to the policy. Similarly, doing so could also implicate constitutional issues which afford protections against legislative interference in contracts between contracting parties – especially sophisticated ones such as those between businesses and insurance companies.

Thus, while it is possible that this bill passes and becomes law, it will likely be challenged.

Is it worth submitting a claim and, if so, should I?

Before considering filing a business interruption claim, a business should evaluate the nature, extent and cost involved in pursuing such a claim. If the damages are relatively low in comparison to the burdens and expenses of pursuing such a claim, then perhaps it is not practical or feasible to submit a claim. Obviously, much will depend upon the type of business affected, how it has been impacted, the nature and extent of the losses and what evidence is available to establish those losses. Because of this, claims made for business interruption are complicated and difficult to make and submitting a claim can be time-consuming requiring extensive and careful preparation.

In the context of the unprecedented COVID-19 pandemic, it is anticipated that insurance carriers and the industry as a whole will resist these types of claims because of the large number of those affected and the far-reaching ramifications that will result if they are held to be liable for them. As such, we expect business interruption claims will be vigorously challenged and the requirements for establishing such claims could be even more difficult.

Regardless, should you be thinking about making such a claim, here are a number of things to consider:

- *Notify your insurer.* Timing is everything. Contact your insurance agent or broker as soon practicable to describe the damage.

- *Look at your policy provisions carefully.* Be informed. Read your policy fully to see what is and isn't covered and, if it appears there may be a claim, what is needed to establish a claim. Also, know what the policy's limits and deductibles are before spending time documenting losses that may not be covered or may not be worth pursuing. Consulting someone well-versed in insurance coverage issues is recommended.

- *Keep good records.* The devil is in the details. Maintain accurate records and detail the costs associated with the business interruption with supporting documents. These documents can include, among others: pre-event financial statements and income tax returns, post-event business records, current utility bills, employee wage and benefit statements, and other records showing continuing operating expenses, receipts for services or supplies needed to deal with the event, paid invoices from service providers to address the crisis, and receipts for rental or other payments incurred for operating the business from a temporary location.

Ultimately, determining whether a business interruption claim exists highly depends upon the particularized facts. Moreover, the costs involved in pursuing such a claim are uncertain and how the insurers and courts will interpret the policies and applicable law under those facts also is unclear.

Accordingly, the thoughts, suggestions and opinions expressed in this bulletin are not intended to be relied upon as legal advice nor does this bulletin create an attorney-client relationship with those to whom it is sent. Rather, this bulletin is provided for general information purposes only and is not a substitute for a legal consultation based upon a thorough review of the law and facts that may be applicable to each situation.

To that end, should you wish to discuss these or other issues or concerns as they affect your business, please feel free to contact Marc Singer directly at 973-507-2423 or by e-mail at mcs@olss.com; or you can visit the OLSS website at www.olss.com to review its practice areas and professional profiles for further information.