

BUSINESS INTERRUPTION & EXTRA EXPENSE INSURANCE COVERAGE



COVID-19 NATIONAL STATE OF EMERGENCY

I DONALD J. TRUMP, President of the United States, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 et seq.) and consistent with section 1135 of the Social Security Act (SSA), as amended (42 U.S.C. 1320b-5), do hereby find and proclaim that the COVID-19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020.



See President Donald J. Trump Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak.

56 U.S. States and Territories Declared a State of Emergency

46 U.S. States and Territories Issued Stay-At-Home Orders

53 U.S. States and Territories Closed Restaurants and Bars

45 U.S. States and Territories Closed Non-Essential Retail Establishments

Business Is “Interrupted” - Now What?

- Look for “business interruption” insurance coverage.
- Intended to cover loss of income and expenses incurred following a disaster that causes suspension or reduction in business operations.
- Put the insured back in the position it would have been in had normal business operations continued.

Commercial Property Insurance Policy

- Commercial property insurance policies may provide coverage for business interruption losses.
- “Business Income and Expense” and other related coverages are found in the property coverage form or separate form made part of the policy.

Insurers Giveth and then Taketh

Exclusions

- Many provisions in the policy exclude or limit coverages.
- Important to read the policy for the exclusions and limitations.

Policy Language Matters



- An insurance policy is a contract between the insured and the insurer.
- Policy language for business interruption coverage can differ although most policies use standard forms developed by the Insurance Services Office.
- The meaning of coverage provisions must be read in the context of the entire policy.
- Courts construe policy coverage language broadly in favor of coverage, and exclusions narrowly in favor of the insured.

Covered Cause Of Loss

- Two types of “covered cause of loss”
- All causes ***not*** excluded
- Specific perils listed as covered – wind, earthquake, sinkhole

Issue: Is the COVID-19 pandemic a covered cause of loss?

What Does the Insurer Agree to Pay?

- We will pay for direct physical *loss of* or damage to the property caused by a covered cause of loss.

Issue: Did the COVID-19 pandemic cause the direct physical loss of or damage to the insured property?

- Courts have found that loss of the ability to operate or function due to conditions outside the property that make the property unusable constitutes damage.

Primary Coverages That Apply to Business Interruption Claim

- “Business Income”

Net Income (net profit or loss before income taxes) that would have been earned or incurred and continuing normal operating expenses incurred.

- “Extra Expenses”

Necessary expense incurred that would not have been incurred if there had been no direct physical loss of or damage to property.

- “Contingent Property Interruption”

Net income losses caused by business interruption of suppliers or customers.

“Civil Authority” Coverage

- Net business income loss and necessary extra expense incurred by civil authority order that prohibits access to the property in response to dangerous physical conditions of the property or surrounding the property

Issues: Did the state and local government orders prohibit access to the property in response to a dangerous condition?

Should it be assumed that the virus was present in or around the property?

Are the restrictions on people rather than access to the property?

Was there an imminent threat of a danger from COVID-19 spread?

Exclusions for COVID-19 Pandemic

- Virus
- Microorganisms
- Pollution
- Communicable Disease
- Civil Authority Orders and Acts

COVID-19 Virus Exclusion

- Virus exclusion is most notable exclusion.

We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

- Virus is not a living microorganism or capable of being released from the property so other exclusions may not apply.

Issue: Does this exclusion apply?

Must the virus be present within or outside the property?

History of this exclusion shows it was meant to apply to the pollution exclusion that encompasses actual contamination of the property by a virus or bacteria.

See ISO Circular LI-LF-2009-175, 2006-175.

Insurance Industry Reaction

- “Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19.”

See <https://www.insurancejournal.com/news/national/2020/03/20/561810.htm>

- State Departments of Insurance have generally supported the insurance industry statement that business interruption coverage does not apply to losses and expenses incurred related to the COVID-19 pandemic.

Issue: Does the policyholder have a reasonable expectation of business interruption coverage due to a national pandemic emergency?

Government Reaction to the Insurance Industry

- U.S. House Representative Mike Thompson Bill H.R. 2020 intends to void exclusions.
- Seven states have introduced bills declaring the need for emergency law to force insurance companies to cover losses.
- New Jersey Bill A-3844
- Ohio House Bill 589 – may provide reimbursement to carriers for coverage payments.
- Massachusetts [Bill SD 2888](#) – referred to the Joint Committee on Rules.
- New York [Assembly Bill A10226](#) – referred to the Insurance Committee.
- Louisiana [House Bill 858](#) and [Senate Bill 477](#)
- Pennsylvania [House Bill No. 2372](#) - referred to the Committee on Insurance.
- South Carolina [Bill S.1188](#) - referred to the Committee of Banking and Insurance.

Constitutional?

Issues:

Do State bills if passed into law violate the Contracts Clause of the Constitution (States cannot impair the obligations of a private contract unless the contract offends public policy)?

Can the federal government can modify contracts as Contracts Clause applies only to States?

Is forcing the insurance companies to provide coverage making them pay for something policyholders did not pay for?

Does this improperly shift the economic damage that resulted from government action to the insurance companies?



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