

Application of Business Interruption Insurance Due to COVID-19 Shutdown: Is Legislative Help on the Way?

05/01/20

As New Jersey slowly begins to reopen in the wake of the COVID-19 pandemic, countless business owners have been left feeling abandoned by the institutions meant to protect them from crises such as these – their insurers. The New Jersey State Assembly introduced a bill to require insurance carriers to provide business interruption coverage for the pandemic shutdown notwithstanding certain exclusionary policy provisions. If that bill ultimately reaches the Governor, constitutional challenges are likely. It remains to be seen whether the bill will provide much needed clarity. In the meantime, however, all may not be lost under existing business interruption language.

A. Typical Coverage Considerations

Faced with lost revenue, additional sanitation expenses, and the potential of claims arising from the pandemic and the related government shutdowns, insurance companies across the United States have begun to take a firm stance that their insurance policies exclude events such as viruses, pandemics and outbreaks of disease.

Just because your insurer may forcefully claim that the damage resulting from the pandemic is not covered by your policy, does not necessarily mean that it is true. If your business is covered by business interruption or contingent business interruption insurance you may be entitled to insurance coverage. A business interruption policy is usually a rider or add-on to a property or casualty policy and provides coverage for lost income if a covered event, typically some natural disaster, triggers coverage. A contingent business interruption policy typically covers lost income and expenses incurred when a third party, such as a customer or supplier, is shutdown down by some covered event.

Like most insurance policies, review of business interruption or contingent business interruption coverage is generally a three step process: (1) does the event at issue trigger “coverage”; (2) if so, is there an applicable “exclusion” to coverage; and (3) if so, is there an applicable “exception” to the exclusion?

As to coverage, many, but not all, business interruption riders contain a “physical loss” or “physical damage” requirement, and insurers may attempt to dissuade policyholders from pursuing claims on this basis. While your individual policy may differ, the “physical loss” or “physical damage” requirements are not always clear in their application. At least one New Jersey federal district court has ruled that contamination which renders property uninhabitable is a direct physical loss. For example, the release of ammonia that rendered a packaging company’s property uninhabitable was determined to be a direct physical loss of and damage to property. *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2:12-CV-04418 WHW, 2014 WL 6675934, at *4 (D.N.J. Nov. 25, 2014). Similarly, the Third Circuit has also held bacteria contamination of a home’s water supply constituted a “direct physical loss” when it rendered the home uninhabitable. *Motorists Mutual Ins. Co. v. Hardinger*, 131 Fed.Appx. 823, 825–27 (3d Cir. 2005).

As to exclusions and exceptions, some, but not all, business interruption coverages contain a virus or bacteria exclusion. These exclusions became prevalent in the 2006 ISO form in response to the SARs outbreak of 2003. A careful review of your policy is warranted to determine whether it contains the “virus exclusion.”

B. Legislative Action

Many states, including New Jersey, have introduced legislation to force insurers that have written business interruption coverage to provide coverage for income lost as a result of the COVID-19 pandemic. On March 16, 2020, the New Jersey State Assembly introduced Bill No. 3844, which would require insurers to include “global virus transmission or pandemic” among the covered perils under business interruption and loss of business policies. While the constitutionality of Bill No. 3844 is debatable, these are strange times – times when landlords have been directed to cease collecting rent and some banks directed not to foreclose. If the Contracts Clause, which typically restricts the power of States to disrupt contractual agreements, may be narrowly construed in favor of protecting tenants and mortgagors, our state legislature may find a compelling interest to do the same with protecting insured parties.

In sum, policyholders should be vigilant to ascertain all possible avenues of insurance coverage and have them reviewed by competent advisors to carefully assess potential coverage under their existing policies. While insurance policies can be difficult to understand, policyholders may potentially miss out on coverage, and thus should begin by reviewing their insurance policies carefully before writing off the possibility of obtaining coverage.

If you have a question about this legal alert or another legal question about COVID-19, contact [Don Taylor](#) or any member of the Wilentz [Litigation team](#).

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