

COVID-19: Business Interruption and Insurance Amid a Pandemic

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Businesses in the United States and around the world are undergoing a fundamental and unprecedented disruption as a result of the coronavirus pandemic (COVID-19). State governments have issued “shelter-in-place” and “stay-at-home” orders to the general population, postponed or otherwise cancelled schools in full, and shut down all businesses except those deemed “essential” or “critical” to the maintenance of our country. These actions have already caused dramatic losses of income to business, and those losses will continue to grow as the actions necessary to combat the coronavirus continue to take hold. Fortunately, businesses may have an avenue available to them to recoup some or all of these losses through business interruption coverage in commercial property insurance.

Standard business interruption coverage typically provides for the reimbursement of business income due to a suspension of business operations resulting from direct damage to or loss of the physical property of the business, and that results from a so-called “covered peril” such as fires, storm damage, earthquakes, and theft. Many policies define “business income” to include the net income a business would have earned through its normal operations if the interruption had not occurred, as well as continuing standard operating expenses, including payroll.

The terms and conditions of coverage vary widely, and turn in large part on the specific language in the pertinent insurance policy and the law governing the interpretation of that language. It is thus critical for businesses to promptly and closely review their insurance policies to determine whether coverage is potentially available. To assist in that regard, this Client Alert and the accompanying [Business Interruption Toolkit \(2020\)](#) do three things: first, we identify core issues businesses should consider when evaluating whether they have business interruption coverage for their losses stemming from the coronavirus; second, if such coverage is available, we walk through the best practices for responding to a business interruption and submitting a claim with insurance carriers for such losses; and, finally, for those businesses that lack insurance for lost business income, we identify the questions they should ask as they explore whether to supplement their insurance program to provide for such coverage in the future.

Although the scope of business interruption coverage varies widely from policy to policy, common issues that are pertinent during the present crisis include the following:

- *If business ceases or diminishes because an individual infected with the coronavirus was on the company’s premises, is the virus considered a direct physical loss needed to make a claim under a business interruption policy?* The answer to this question in the context of the coronavirus will depend upon the terms of the policy, and it may also depend upon the jurisdiction in which the business operates. Some courts interpret the “direct physical loss” requirement broadly. For example, in *Essex Insurance Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399 (1st Cir. 2009), the court found that odors emitted from defective carpeting could constitute a physical injury sufficient to trigger coverage. And, in *Matzner v. Seaco Ins. Co.*, 1998 Mass. Super LEXIS 407 (Mass Super Ct. 1998), the court found that carbon monoxide contamination was a “direct physical loss.” But other courts take a narrower approach. In *Universal Image Productions, Inc. v. Chubb Corp.*, 703 F. Supp. 2d 705 (E.D. Mich. 2010), the court held that “intangible harms such as strong odors and the presence of mold and/or bacteria in the air and ventilation system” were not a “direct physical loss.” And the court in *Mastellone v. Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130 (Ohio Ct. App. 2008), found that mold on siding did not constitute “property damage” sufficient to trigger coverage because it did

not impair the “structural integrity of the house” and could be “cleaned from the siding.”

- *Is there a virus exclusion in the policy and how broad is the exclusion?* Some policies expressly exclude coverage for virus- and bacteria-related claims. Even where there is no explicit exclusion for viruses or bacteria, this issue may also arise in the context of a pollution exclusion, which may exclude coverage for pollutants, irritants, and contaminants. In defining these terms, the policy may exclude viruses from the definition of a “contaminant.” Note that certain industries, like the hospitality, travel, and healthcare sectors, may have specific coverage for losses resulting from “communicable diseases,” including viruses.
- *Is there coverage for losses due to shutdowns imposed by civil ordinances or authorities, such as orders preventing businesses from opening to the public or preventing employees, customers, and others from entering the premises?* If an order from a civil or military authority prevents access to company property, resulting in the impairment of operations, there may be business interruption coverage for such losses. This assumes there is no policy exclusion for losses due to virus outbreaks.
- *Is there coverage because access to your business is prohibited due to physical damage to property (yours or someone else’s)?* Relatedly, there may be coverage where a business cannot be accessed, or access is limited, because of damage to the property. This raises the question, noted above, whether the presence of concern over viral contamination is deemed to be physical damage to property.
- *Do you have “contingent” business interruption coverage due to the loss of a key supplier?* If your company depends upon the timely receipt of products from key suppliers, you may have business interruption coverage if the operations of that supplier are disrupted. Likewise, other supply-chain disruptions, such as interruptions in the delivery of food or supplies to a hotel, may be covered under business interruption policies.
- *Do you have “leader” property coverage, meaning coverage for losses resulting from damage to an important nearby property (such as a mall or amusement park)?* If another business is affected, and that business provides substantial business to your company, you may have business interruption coverage for those losses. But, again, this type of coverage may be subject to policy exclusions for virus outbreaks.

In addition to these questions, which are key to determining whether your company has business interruption coverage for coronavirus-related losses, Goodwin has updated its guidance on important related issues, including best practices when submitting a business interruption claim. The accompanying Business Interruption Toolkit (2020) should provide helpful information in this regard.

At bottom, there is simply no blanket answer as to whether business interruption policies cover claims resulting from the unprecedented circumstances flowing from the coronavirus. The terms of the policy will control, along with the applicable state law. To determine whether your company has coverage for such claims, look at your policies and consult with your broker and legal counsel. Goodwin’s risk management and litigation attorneys are available to assist with any questions you may have.

To view Goodwin’s Business Interruption Toolkit (2020), [click here](#).

Please visit Goodwin’s [Coronavirus Knowledge Center](#), where firm lawyers from across the globe are issuing new guidance and insights to help clients fully understand and assess the ramifications of COVID-19 and navigate the potential effects of the outbreak on their businesses.

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