

BUSINESS INTERRUPTION INSURANCE

WHAT IS IT? WHAT DOES IT DO?

AND DOES IT COVER CORONAVIRUS?

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Introduction



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What Is Business Interruption Insurance?

- Business income coverage or business interruption insurance (“BI”) protects against economic losses resulting from a business’s inability to put insured property, which is damaged by a covered peril, to its normal use.
- This insurance typically indemnifies an insured for 2 things:
 1. The loss of revenue, including rental income, that would have been earned had there been no business interruption
 2. The continuing normal operating expenses incurred during the time it takes to restore the damaged property

What Is Business Interruption Insurance?

- BI coverage is often part of a commercial property policy, which may include commercial property coverage, commercial general liability coverage, and other building and business personal property coverages
- BI coverage can also be obtained on a standalone form

Business Interruption Coverage Forms

- Two Insurance Services Office (“ISO”) forms – Basis of many policies:
 1. Business Income (and Extra Expense) Coverage Form – Covers both “business income” and “extra expense,” even if the extra expenses do not reduce the business income loss
 - We use this form as the basis of this presentation
 2. Business Income (without Extra Expense) Coverage Form – Covers business income loss and covers extra expenses but only to the extent that the extra expenses reduce the business income loss

ISO Business Interruption Coverage

- The ISO business income insuring agreement is worded:

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to property The loss or damage must be caused by or result from a Covered Cause of Loss.

ISO Business Interruption Coverage Language Elements

1. Quantifiable loss of business income
2. Due to a suspension
3. Of operations at the insured property
4. From “direct physical loss of or damage to” the property
5. Caused by or resulting from a covered peril (in the Causes of Loss Form that applies, per declarations)
6. During the period of restoration

“Business Income”

- Includes:
 1. Net income that would have been earned or incurred if the suspension of business had not occurred, and
 2. Normal operating expenses that continue during the suspension, including payroll
- May also include “rental value,” or net income and normal operating expenses for a rental property
- Must have a real, calculable business income loss to trigger coverage

“Operations”

- Means:
 1. Business activities occurring at described premises (i.e., the insured's property listed in the policy declarations), and
 2. In case of rental value coverage, the “tenantability,” or suitability for occupancy, of the described premises

“Suspension”

- Means:
 1. The slowdown or cessation of business activities, or
 2. In case of rental value coverage, that a part or all of the premises described in declarations is rendered “untenantable,” or unfit for occupancy.

“Period of Restoration”

- Period during which business income loss or extra expense is covered
- Period of time it takes to restore the damaged property

“Period of Restoration”

- For business income, coverage begins 72 hours after the time of direct physical loss or damage
 - 72-hour deductible can be reduced or eliminated by endorsement.
- For extra expense, coverage begins immediately after the time of direct physical loss or damage
- Each ends on the earlier of:
 1. Date when the property should be repaired, rebuilt or replaced with reasonable speed and similar quality, or
 2. Date when business is resumed at a new permanent location

“Period of Restoration”

- Does not include:
 1. Additional time to repair or reconstruct property to comply with law (unless changed by endorsement), or
 2. Additional time to respond to effects of “pollutants”
- Pollutants means “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.”
 - Is COVID-19 a “contaminant”?

Causes of Loss

- 3 general ISO forms – Each lists certain causes of loss, exclusions, and more
 1. Basic – Fire, lightning, explosion, windstorm, hail, ...
 2. Broad – Covers Basic Form perils plus falling objects, water damage, and collapse
 3. Special – Instead of listing perils covered, covers all direct physical loss, subject to form's exclusions and limitations

ISO Extra Expense Coverage

- Extra Expense means necessary expenses incurred during the period of restoration that the insured would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a covered cause of loss
- Covers Extra Expense to avoid or minimize the suspension of operations at the described premises, replacement premises, or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location

ISO BIC Form Additional Coverages and Extension

- In addition to BI and EE, the ISO Business Income (and Extra Expense) Coverage Form includes certain Additional Coverages (automatically) and 1 Coverage Extension (if a coinsurance requirement is met)
- Additional Coverages include:
 - Civil Authority
 - Extended Business Income
 - Extended Business Income
 - Alterations and New Buildings
 - Interruption of Computer Operations
 - Newly Acquired Locations
- Other Optional Coverages and separate Forms available

Civil Authority Additional Coverage

- Provides coverage for business income loss and extra expense “caused by action of civil authority that prohibits access to” the insured’s property, when a covered cause of loss “causes damage to property other than” the insured’s property, provided that:
 1. “Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage,” and the insured’s property is within that area but is not more than one mile from the damaged property, and
 2. The action of civil authority “is taken in response to dangerous physical conditions resulting from the damage or continuation of the” covered cause of loss that caused the damage, or the action “is taken to enable a civil authority to have unimpeded access to the damaged property”

Civil Authority Additional Coverage

- For business income, coverage:
 - Begins 72 hours after the time of the first action of civil authority that prohibits access
 - Ends up to 4 consecutive weeks later
- For extra expense, coverage:
 - Begins immediately after the time of the first action of civil authority that prohibits access
 - Ends up to 4 consecutive weeks later or when coverage for business income ends, whichever is later
- Period of coverage can be extended by endorsement

Extended Business Income (“EBI”) Additional Coverage

- Provides coverage for business income loss that continues after period of restoration ends
- Must have an initial business income loss
- Begins on the date property is actually repaired, rebuilt, or replaced and operations have resumed
- Ends on the date which insured could have restored operations with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage had occurred, or 60 consecutive days after period begins, whichever is earliest
- Does not apply to business income lost as a result of unfavorable business conditions caused by the impact of the covered cause of loss in the area

Exclusions

- ISO Business Income (and Extra Expense) Coverage Form and Business Income (without Extra Expense) Coverage Form do not contain any express exclusions
- Exclusions are in the applicable Causes of Loss Form
- A common Causes of Loss Form contains 6 exclusions that apply specifically to Business Income Coverage
 - Other exclusions may apply

Exclusions

1. Off-Premises Services Interruption
2. Delay and Suspension, Lapse, or Cancellation of Agreements
3. Extra Expense Due to Suspension, Lapse, or Cancellation of Agreements
4. Other Consequential Losses
5. Antennas
6. Finished Stock

Off-Premises Services Interruption

- Excludes coverage for loss caused by a power failure or loss of utility service, however caused, if the failure occurs outside of a covered building
- Coverage for this can be added by endorsement
- If a covered cause of loss occurs at the described premises because of a power failure or loss of utility service, causing business income loss, business income coverage applies, but it only applies to business income loss resulting from the damage caused by the covered peril

Delay and Suspension, Lapse, or Cancellation of Agreements

- Excludes coverage for any increase of loss resulting from:
 1. A delay in rebuilding, repairing, or replacing property or resuming operations if such a delay is caused by the interference of strikers or others at the location of rebuilding, repairing, or replacing
 2. The suspension, lapse, or cancellation of any license, lease, or contract. But, if the suspension, lapse, or cancellation results from the suspension of operations, insurer will cover business income loss during the period of restoration plus any extension provided by the Extended Business Income additional coverage or the Extended Period of Indemnity optional coverage

Other Consequential Losses

- Excludes coverage for any other consequential loss
- Consequential losses are losses arising from the results of damage rather than the damage itself
- Business income loss is, generally, a consequential loss
- Exclusion reinforces the scope of coverage

Exclusions

- SARS – Following the SARS outbreak in 2002/2003, many insurance companies began including bacteria/viral-outbreak exclusions, which may prevent any recovery for a coronavirus-related suspension of operations
- ISO developed an exclusion, titled “Exclusion for Loss Due to Virus or Bacteria” (form CP 01 40 07), in 2006:

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.

Limits

- Most insurer will pay for an occurrence is the applicable Limit of Insurance shown in the policy declarations
- Payments under the following additional coverages do not increase the applicable Limit of Insurance:
 1. Extra Expense
 2. Civil Authority
 3. Alterations and New Buildings
 4. Extended Business Income

Duties in the Event of Loss

- Prompt notice
- Take reasonable steps to minimize loss
- Cooperate with insurer
- Provide sworn, signed Proof of Loss
- One notable:
 - Resume operations, in whole or in part, “as quickly as possible”
 - If the insured does not do so, insurer will pay loss based on length of time it should have taken to resume operations as quickly as possible

Loss Determination – Business Income Loss

- Amount of business income loss determined based on:
 1. Net income before loss,
 2. Probable net income had no loss occurred,
 3. Operating expenses that must continue during period of restoration to permit insured to resume operations with quality of service that existed prior to loss, including payroll, and
 4. Other relevant sources of income
- **BUT** loss amount will not be based on net income that may have been earned as a result of an increase in business due to favorable business conditions caused by the impact of the covered cause of loss

Loss Determination – Extra Expense

- Amount of extra expense determined based on:
 1. Expenses that exceed normal operating expenses had no loss occurred, and
 2. Expenses that reduce the business income loss that otherwise would have been incurred.

Coinsurance

- An additional policy condition that requires insured to carry insurance equal to at least a specified percentage of the insured's projected net income and operating expenses, including payroll, that that would have been earned or incurred – had no loss occurred – by the insured's operations for the 12 months following the inception, or last previous anniversary date, of the policy, whichever is later
- Usually between 50-125% - Can be changed
- Condition does not apply to Extra Expense coverage
- The coinsurance “penalty” – Insurers will NOT pay the full amount of any business income loss if the Limit of Insurance for business income is less than:
 1. Coinsurance percentage shown for business income in the Declarations times
 2. The sum of:
 - a. Net income and
 - b. Operating expenses, including payroll

Business Income from Dependent Properties

- Dependent property exposure – Possibility of incurring business income loss because of physical loss on the premises of an organization that the insured relies on for materials, products, or sales
- Business Income from Dependent Properties – Broad and Limited Forms
 - Broad endorsement – coverage for locations subject to policy limits
 - Limited endorsement – different limits for different properties
 - No Extra Expense coverage
- Cover the insured's loss of income resulting from physical damage to property at other locations

Business Income from Dependent Properties

- Similar to Contingent Business Interruption Coverage – Relates to supply chain issues from start to sales
- Key points in sales:
 - Manufacturing location – Manufactures products for delivery to insured's customers
 - Contributing location – Furnishes materials or services from the insured
 - Recipient location – Purchases materials or services from the insured
 - Leader location – Attracts customers to insured's location

COVID-19 / Coronavirus



I got hand sanitizer down here...

COVID-19 / Coronavirus

- The virus Severe Acute Respiratory Syndrome Coronavirus 2, or SARS-CoV-2, causes the Coronavirus Disease, or COVID-19
- The virus is “novel” because it is a new coronavirus that has not been previously identified
 - Certain coronaviruses circulate among humans causing the common cold
- This is the first pandemic known to be caused by a new coronavirus
- Reported illnesses have ranged from very mild (including some with no reported symptoms) to severe, including illness resulting in death

COVID-19 / Coronavirus

- The virus spreads mainly from person-to-person contact via respiratory droplets from an infected person
- Research shows the virus can remain on metal, glass and plastic up to several days and in aerosol form, i.e., airborne, for hours
 - NIH, Study Suggests New Coronavirus May Remain on Surfaces for Days (Mar. 24, 2020), [tps://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days](https://www.nih.gov/news-events/nih-research-matters/study-suggests-new-coronavirus-may-remain-surfaces-days)
- Even if the virus has a “short lifespan,” there appears to be an ongoing risk of reintroduction of it to the same spaces
- March 6, 2020 – First date of community spread in Arizona

COVID-19 – Key Questions

- How does an insured know if the virus has been introduced into its space?
 - Is it present after community spread starts?
 - If the government guides or requires people to act as if the virus is commonly present, can one presume it is present?
- How does an insured show the presence of the virus?
 - An expert?
 - A scientific report?
- Will a government stay-at-home/closure order trigger coverage?
 - How is the order worded?
 - What is the scope of the order?
- Is there physical loss of or damage to property from COVID-19?

What Is the Case Law on Coverage?

- No clear precedent from 9/11 in 2001
 - Mere fear of contamination may be insufficient
 - *United Air Lines, Inc. v. Ins. Co. of State of PA*, 439 F.3d 128, 134 (2d Cir. 2006) – Airline’s business interruption coverage not triggered based on order of civil authority where, in part “the government’s subsequent decision to halt operations at [Ronald Reagan Washington National Airport] indefinitely was based on fears of future attacks”
- No clear based on:
 - SARS from in or around 2003-2004
 - H1N1 from in or around 2009-2010
 - Ebola from in or around 2014-2015
 - Zika from in or around 2015-2017

What Is the Case Law on Coverage?

- Certain case law suggests that the loss of use of property that has become unusable or uninhabitable because of the presence of coronavirus contamination may be considered physical loss
- *Motorists Mut. Ins. Co. v. Hardinger* , 131 F. App'x 823 (3d Cir. 2005) (applying Pennsylvania law) – Presence of E.coli bacteria in house, which made the inhabitants ill with respiratory, viral, and skin conditions, could constitute physical loss or damage, if functionality of the property was nearly eliminated or destroyed or property was made useless or uninhabitable, based on underlying facts
- *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934 (D.N.J. Nov. 2014) (applying New Jersey law) – Held ammonia discharge in a building inflicted direct physical loss of or damage to the insured's facility because the release, which made the air unsafe, rendered the facility unfit for occupancy until the ammonia dissipated

Case Law That May Preclude Coverage

- Certain case law also suggests that the presence of the coronavirus in a structure does not change or alter the structure, so as to constitute direct physical loss or damage
- *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, 1999 WL 619100 (D. Or. 1999) (applying Oregon law) – Property exposed to high humidity, mold, and mildew from wet air may constitute direct physical loss or damage, but: “The recognition that physical damage or alteration of property may occur at the microscopic level does not obviate the requirement that physical damage need be distinct and demonstrable. In the methamphetamine odor damage cases, the physical damage is demonstrated by the persistent, pervasive odor. In the absence of such odor, no physical damage could be found. *The mere adherence of molecules to porous surfaces, without more, does not equate physical loss or damage.*”
- *Universal Image Prods. v. Chubb Corp.*, 703 F. Supp. 2d 705 (E.D. Mich. 2010) (applying Michigan law) – Holding that even though mold and bacteria permeated a floor, because the entire premises did not need to be vacated, and the insured could not meet its burden to show it suffered any structural or any other tangible damage to the property, there was no direct physical loss to property
- *Mama Jo’s, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, (S.D. Fla. 2018) (applying Florida law) – Holding that restaurant did not sustain direct physical loss when dust and debris from nearby roadwork could be remediated by cleaning

COVID-19 / Coronavirus Lawsuits

- *Cajun Conti LLC et al. v. Certain Underwriters at Lloyd's London et al.*, No. 2020-02558 (La. Dist. Ct. Mar. 16, 2020)
 - All risks property policy with no express virus/pandemic exclusion
 - Alleges COVID-19 “physically infests and stays [alive] on the surfaces of objects and materials for . . . days”
 - Claims statewide and local orders have sharply curtailed restaurant business by limiting service to take-out and delivery
- *French Laundry Partners LP et al. v. Hartford Fire Ins. Co.*, No. _____ (Cal. Super. Ct. Mar. 25, 2020)
 - Similar – Same counsel as restaurant in Cajun Conti

COVID-19 / Coronavirus Lawsuits

- *Big Onion Tavern Group, LLC et al. v. Society Ins. Co.*, No. 1:20-cv-2005 (N.D. Ill. Mar. 27, 2020)
 - Plaintiffs are owners and operators of restaurants and movie theaters
 - Various all risks property / business interruption insurance policies
 - Similar allegations as in *Cajun Conti*
 - “The continuous presence of the coronavirus on or around Plaintiffs’ premises has rendered the premises unsafe and unfit for their intended use and therefore caused physical property damage or loss under the Policies.”
 - Claims bad faith based on company memo that allegedly preemptively states there is no coverage for stay-at-home orders

COVID-19 / Coronavirus Lawsuits

- *Billy Goat Tavern I et al. v. Society Ins. Co.*, No. 1:20-cv-2068 (N.D. Ill. Mar. 31, 2020)
 - Bar/restaurant group with all risks property policy with no virus/pandemic exclusion
 - Seeks class action status to represent all similarly situated businesses in Illinois
- *Mace Marine Inc. v. Tokio Marine Specialty Ins. Co.*, 20-CA-000120-P (Fla. Cir. Ct. Apr. 6, 2020)
 - Scuba diving shop alleges it has serviced customers from around the world since pandemic started and has no way of knowing if any of those customers were infected, and it has incurred costs both from shutting down and disinfecting the premises
- Many more filed and to be filed...

COVID-19 / Coronavirus – ISO Action

- In February 2020, ISO released two optional endorsements to provide limited business interruption coverage for business interruption due to actions by civil authorities in order avoid or prevent infection or spread by or from the coronavirus
 1. Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus and
 2. Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus (Including Orders Restricting Some Modes of Public Transportation). Neither form is numbered.
- ISO took no other steps – Endorsements were not filed, ISO did not add them to its portfolio of forms, and ISO did not provide rating information
- The fact that the ISO is issuing endorsements providing for coverage may suggest that current forms offer no coverage

COVID-19 / Coronavirus – Legislative Action

- Bills have been introduced in New Jersey, Ohio, Massachusetts, and New York to retroactively expand business interruption coverage to include losses attributable to the pandemic – Variety of means to do so
- If passed, these bills likely face difficult constitutional challenges
 - Contracts clause (Art. I, Sec. 10, Cl. 1)
 - “No State shall ... pass any ... Law impairing the Obligation of Contracts”
 - Can do if law does not substantially interfere with the rights of a contracting party, the state has a legitimate and significant interest, and the law is reasonably related to furthering this interest. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410-13 (1983)
 - Due Process
- Could help....
- Could hurt – Do the bills suggest that current policies do not cover?

April 10, 2020 Coronavirus Task Force Press Conference

Speaker: Mr. President may I ask you about credit and debt as well...

Trump: . . . You have people, I speak mostly to the restaurateurs where they have a restaurant they've been paying for 25, 30, 35 years. Business interruption, they've never needed it. All of a sudden they need it. And I'm very good at reading language. I did very well in these subjects. And I don't see the word pandemic mentioned. Now some cases it is, it's an exclusion, but in a lot of cases I don't see it. I don't see a reference and they don't want to pay up. I would like to see the insurance companies pay if they need to pay if it's fair. And they know what's fair and I know what's fair. I can tell you very quickly.

April 10, 2020 Coronavirus Task Force Press Conference

Trump (continues): But business interruption insurance, that's getting a lot of money to a lot of people and they've been paying for years. Sometimes they just started paying. But you have people that have never asked for business interruption insurance and they'd been paying a lot of money for a lot of years for the privilege of having it and then when they finally need it, the insurance company says we're not going to give it. We can't let that happen.

Possible Considerations for Next Steps

- Act now or wait?
- Act on own or in a group?
 - Large restaurant group being formed, but its next steps are unclear
- Assess losses – current and future
- Check risk management strategies
- Consult counsel

Conclusion

- Coverage will ultimately depend on the specific facts of the claim, the policy language, and the applicable law—as it develops
- Claims may present proof and quantification challenges
- The only way to know if an insurer will cover a claim is to submit the claim

Before We Go – Navigating Stormy Seas

- Other insurance issues
- Workplace & Workforce issues
- Regulatory/Governmental issues
- Privacy and Data Security issues
- Contractual issues
- Supply & Product issues
- Customer issues
- General Liability issues
- Securities & Capital Markets issues
- Investor and/or Financing issues
- Reorganization issues
- Bankruptcy issues



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