



Is There Coverage For The Financial Losses To Your Business Due To COVID-19?

The events of today bring much uncertainty and unanticipated change to all of our lives and businesses. While there is no doubt that we will persevere, the financial cost associated with this interruption is likely to be staggering. It is in times like these when many businesses will turn to their insurers to help mitigate the financial losses caused by the virus and associated shutdowns.

This bulletin is written to assist you in understanding your first party property insurance policy and whether your business may have coverage due to the COVID-19 pandemic. A few of the issues you want to consider is whether your claim falls within the insuring provision, whether a governmental order that shuts down your business triggers coverage, your business interruption loss due to the mandated closures, and whether your policy excludes coverage for damage caused by or resulting from a virus.

BKCG is ready and available to assist your business as you navigate through these difficult and uncertain times.

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On March 11, 2020, the World Health Organization (“WHO”) declared that the worldwide outbreak of the COVID-19 virus is now officially a pandemic. The WHO and U.S. health experts anticipate a significant increase in the number of reported COVID-19 cases over the next several weeks. Consequently, businesses have cancelled events. Other businesses have sent workers home. The impact on the service sector and the halting of the production of some goods is severe. In certain areas, there have been forced closures of restaurants, bars, and businesses. Many factories throughout Asia and Europe have been shut down meaning products that U.S. businesses depend on cannot be supplied. These cancellations and shutdowns have serious economic consequences for many businesses as business income is lost and expenses will have to be incurred to clean and sanitize property. This raises an issue of whether a business has any avenue under its business property insurance policy to help recover these financial losses.

Below we discuss certain coverage issues that you should be aware of when contemplating whether to make a claim under your first party property policy. Please keep in mind that we are simply identifying issues for you to consider. A review of the specifics of your policy would be required to provide you with any coverage advice for your particular claim.

The Insuring Provision

The insuring provision of the property policy contains a requirement that there be “direct physical loss or damage” to the covered property. “Direct physical loss or damage” essentially means some type of damage having a material existence and perceptible through the senses. Even if the damage occurs on a microscopic level, it is sufficient to constitute “physical loss or damage.” This issue has been litigated in a variety of contexts. See *Western Fire Ins. Co. v. First Presbyterian Church* (1968) 165 Colo. 34 (where court held there was direct physical loss when gasoline vapors penetrated the foundation of an insured church and accumulated, rendering the building uninhabitable); *Matzner v. Seaco Ins. Co.* 1998 WL 566658 (Mass.Super.1998) (where court held that carbon monoxide levels in an apartment building sufficient to render the building uninhabitable constituted a “direct physical loss”); and *Farmers Ins. Co. of Oregon v. Truitanich* (1993) 123 Or.App. 6 (where court held that an odor from methamphetamine “cooking” constituted direct physical loss to a house). While there are courts that take a narrower view of the “direct physical loss or damage requirement” and look for more tangible and visual evidence of damage, courts tend to read the insuring provision more broadly when the claimed damage concerns food, medicine, and health/life safety issues.

In the context of COVID-19, an insured may be required to incur expenses to clean and sanitize its property due to the presence of the virus. In that situation, the insured would have the initial burden to show the existence of the virus on the surfaces of the property. This can be done through an expert or even possibly by demonstrating that a person such as an employee who tested positive for COVID-19 was at the property thereby necessitating the cleaning of the premises.



Civil Authority

Many policies contain what is known as “Civil Authority” coverage. In a nutshell, civil authority is an order by the government to shut down or to stay away from a certain area. To trigger coverage, there are typically four requirements: (1) an insured peril (2) that causes or results in (3) an order or action of civil or military authority (4) during which access to or ingress/egress from real or personal property was impaired, inhibited or prevented to some extent. Regional – an in this case, worldwide – catastrophes implicate this coverage. For instance, although a business may not have sustained any physical loss or damage to its own property, a business may nevertheless claim to have sustained business interruption as a result of some restriction or access to its property. The catastrophe generates government directives impacting access to business that may not be damaged or otherwise directly affected by the peril. As seen with catastrophes such as 9/11 and the Southern California wildfires, governmental bodies will issue declarations and orders restricting vehicular traffic, impose curfews, cordon off areas, and issue warnings to keep away from certain areas.

With COVID-19, most claims will likely center on whether there is an insured peril and whether there has been an “order” or “action” of civil authority. The insured peril question can only be resolved through an analysis of your policy language. If your policy provides coverage for damage caused by a “virus,” then civil authority is more likely.

The issue of whether there has been an “order” or “action” of civil authority will be decided on an area by area basis unless the Federal Government issues a mandatory nationwide quarantine. For instance, the six Bay Area counties announced a “shelter in place” order for all residents directing everyone to stay inside their homes and away from others as much as possible for the next three weeks. The result is that bars, restaurants, fitness centers, and other businesses will be closed. Most likely, this will be considered to be an order or action of civil authority that will trigger coverage. Orange County took a less drastic measure and issued an order effective March 17, 2020, officially closing all non-essential public and private gatherings outside a household. There were exceptions for “essential activities” that are specifically set forth in the order. If your business is closed as a result of the Orange County order, there is a likelihood that it could trigger civil authority coverage. Still, other counties have not issued an official order. If an order is not issued in those counties, civil authority coverage is less likely.

Business Interruption And Contingent Business Interruption

To the extent that you have sustained property damage or have been impacted by an order of civil authority, business interruption coverage very well may be triggered. The purpose and nature of Business Interruption (“BI”) insurance is to indemnify the insured for any loss sustained by the insured because of its inability to continue to use the business property. To trigger business interruption, there must be: (1) physical loss or damage (2) to covered property (3) by a covered peril (4) that causes a necessary suspension of operations to the business (5) which, in turn, results in lost income or extra expense. Indemnity is for the period of time to repair the covered damage plus any additional extended period provided in your policy.

Contingent Business Interruption (“CBI”) is for instances where your business depends on obtaining products from a supplier or you have customers whose business is temporarily halted so they cannot purchase from you. CBI coverage is generally triggered by a covered loss to a customers’ or supplier’s property or to property on which the insured company depends on to attract customers. Indemnity is provided for the interruption in your business caused by a covered event at your supplier’s or customer’s property. Suppose your supplier of microchips is located in Milan, Italy and had its operations interrupted due to a covered event. In turn, you may be compelled to also suspend your production because you no longer can obtain the microchips needed for your product or you can only receive a reduced allocation of the microchips. In that instance, you will suffer a CBI loss and your business interruption loss should be covered in order to make you whole.

Both BI and CBI are triggered when there is a covered peril that causes damage. Whether COVID-19 is a covered peril depends on your policy language.



Contamination and Pollution Exclusion

Most first party property policies are called “all-risk” policies but the name is a bit of a misnomer. Not all events are covered. Instead, coverage is provided for damage due to all causes UNLESS there is an applicable exclusion. If an exclusion applies, there will be no coverage for your property damage, BI, or CBI losses. Consequently, the policy language and the interpretation of any exclusion is extremely important.

COVID-19 presents an issue of whether a “virus” is an excluded peril. While each policy must be reviewed in its entirety, if a “virus” were to be excluded it would most likely be wrapped up in the “contamination and pollution” exclusion or, possibly, in a separate endorsement that expressly excludes viruses. Very often, a policy that excludes contamination and pollution specifically defines the term “pollutant” as an irritant or contaminant, whether in solid, liquid, or gaseous form, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. The term “contaminant” is oftentimes not defined.

While there is plenty of case law interpreting the pollution and contamination exclusion, there is no consensus as to whether a virus is a “pollutant” or “contaminant.” In fact, there are cases where courts have held that a virus is not a pollutant because it found the policy language ambiguous. *Johnson v. Clarendon National Insurance Co.*, 2009 WL2524619; *Westport Insurance Corp. v VN Hotel Group, LLC* 761 F. Supp. 2d 1337. You should review the specific terms of your policy with your broker to determine whether your policy specifically excludes damage caused by or resulting from a “virus” or whether the language is not clear.

Have Your Policy Reviewed

These are difficult and uncertain times for all of us. Undoubtedly, many businesses are going to be financially hurt because of forced closures due to COVID-19 and governmental shut down orders. In the event your business sustains a loss due to a closure, it is important to review your policy to see whether your property policy can provide indemnity.



BKCG is ready and available to assist you in analyzing your insurance coverage and determining whether you have a claim for your business losses. Please call or email us for more information or for a review of your policy.

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