

BUSINESS INTERRUPTION DURING COVID-19



Regardless of specialty, most of our clients have been impacted by the COVID-19 pandemic and need our help. Some have never been busier, but most must take drastic actions to stay afloat. We have advocated for our clients to adjust ratable exposures and to obtain premium relief when possible. But the hot button issue now is business interruption.

COVID-19 has caused nearly catastrophic disruption for a number of industries across the United States, especially healthcare. Healthcare organizations are scrambling to cover continuing operating expenses, payroll, lost profits, and extra expenses incurred due to the pandemic. As the losses and obligations mount, many are looking to their business insurance policy to see if there is any coverage, only to learn that in the vast majority of cases there is none.

Our firm has been working with clients to review their insurance policies, help them understand the complexities of their coverage and limitations, file claims, and advocate for coverage however possible. Throughout this unprecedented time, your broker should be your advocate and guide. Is there coverage for your claim? What can you do to ensure your claim is being properly and fairly investigated? What is the State and Federal Government doing to assist?

I will pause here to insert a disclaimer: all insurance policies are different. The process starts with turning in a claim to your insurance company. Their claims

department will review and provide their coverage determination.

For most healthcare organizations, business interruption coverage is tied to the Property portion the insurance policy. The trigger for coverage is a variation of the policy language “direct physical loss or damage to covered property” in the Insuring Agreement section of the policy. Loss of market or loss of opportunity to see or treat your patients is typically not covered. Insurers quickly took the position that virus-related and pandemic-related loss does not constitute direct physical loss or damage, and they have been denying the majority of claims submitted.

So, is that it? No coverage and move on? I do not want to give false hope, but not so fast! Remember my disclaimer, no two policies are the same.

Does your policy have specific virus or bacteria exclusions? Are there any exclusions or coverage extensions for SARS, influenza, legionella, anthrax, or bacterial contaminants like rotavirus? If a virus does not cause direct physical loss, why did the insurance industry begin adding specific exclusions in 2006?

Courts have held that property can sustain physical loss without structural alteration. A popular case reference these days is Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America, No. 12-cv-04418, 2014 U.S. Dist. LEXIS 165232 (D.N.J. Nov. 25, 2014). Following the release of an unsafe amount

of ammonia, Gregory Packaging, Inc. suffered a business interruption loss. Travelers denied coverage, maintaining that Gregory Packaging did not suffer direct physical loss or damage to covered property. The court concluded that the ammonia release rendered the building uninhabitable and was sufficient to trigger coverage. The Gregory Packaging v. Travelers case highlights that denials without proper investigation can be challenged, whether by you or your counsel. You should also be asking your broker to advocate on your behalf and to use their experience from working with their book of clients to help.

Across the nation, litigation over business interruption insurance is on the rise. According to the news organization Reuters, on April 20, 2020, two motions were filed with the judicial panel on multidistrict litigation asking the panel to consolidate federal suits accusing insurers of improperly denying claims by businesses shut down by government orders. Consolidating the cases would, in theory, avoid the inevitable confusion caused by courts throughout the US coming to different conclusions. Multiple states have introduced legislation mandating insurers pay for COVID-19



related losses under business interruption. As of this writing, no legislation has been introduced in Washington or Oregon.

Forcing insurance companies to pay for COVID-19 related losses—ignoring the individual policy form language—is far more complicated than it appears and has far-reaching potential consequences. Your insurance policy is a contract. If coverage exists, the insurer should pay, and that should be assessed on a policy-by-policy basis. Forcing insurers to pay through a state or federal mandate will likely result in lengthy legal challenges that question the constitutionality of providing coverage where no coverage may exist. Further, it could destroy contract law, resulting in unintended consequences for businesses, especially healthcare. Some insurers would become financially insolvent and unable to pay their claims. Such mandates would also throw out underwriting and risk evaluation models, causing insurers to increase premiums significantly, reduce coverage offerings, or completely remove business interruption coverage from policy renewal.

Three proposals under discussion at the federal level are getting the most attention: Pandemic Risk and Insurance Act (PRIA), The COVID-19 Small Business Insurance Program, and a “victims’ compensation” type fund. Each has the potential to provide a significant benefit and some challenges, but all are intended to help businesses survive this pandemic.

1. Pandemic Risk and Insurance Act (PRIA) is a pre-funded risk pool where the federal government acts as the bank, modeled after the Terrorism Risk and Insurance Act (TRIA) enacted after 9/11. PRIA would be the easiest to roll out as the framework is already in place. The challenge is the cost—some experts estimate business interruption losses at around \$350 billion per month.
2. The COVID-19 Small Business Insurance Program would be a wholly voluntary mechanism in which the Department of the Treasury would leverage the insurance industry’s existing catastrophe response capabilities to handle the claims. Businesses can claim continuing payroll expenses, continuing operating expenses, loss of profits, and extra expenses like temporary alterations to your reception area for safety reasons. The maximum payable would be \$100,000.

3. The third option is a victims’ compensation fund and does not involve the insurance industry at all. It would establish a fund, similar to the one that existed following 9/11, where the federal government would create a program with a schedule of benefits for businesses impacted by COVID-19.

How this will play out is anyone’s guess, but this article provides context for the debate. Some policies may provide coverage whether the insurer intended to or not. Some policies clearly exclude a pandemic loss and the courts will likely need to make those determinations. But, if the insurer owes, they should pay. A state or federal mandate would likely turn contract law upside down, and the consequences would have long-lasting and negative impacts on businesses for years to come. Some form of federally funded relief seems like the path of least resistance, but getting legislation passed will take time, and healthcare organizations are running out of time.

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