



Business Interruption Insurance in the Age of COVID-19 and the Steps You Should Take to File Your Claim

NOTE: This article was posted on March 25, 2020 at 9 am PDT. Because the COVID-19 situation is rapidly changing as the government and State of California continues to fight the pandemic, individuals and businesses should consult with counsel for the latest developments and updated guidance on this topic.

While one's first concern in this time of global pandemic is naturally to protect the health and well-being of our families, friends and colleagues, the reality is that businesses are also susceptible to serious consequences resulting from the pandemic. No doubt client fear and uncertainty may contribute to a downturn in business in these trying times, and many businesses have planned and prepared for such contingencies. However, what is a business owner to do when faced with a government order mandating severe restrictions--or even closure--of the business? One potential avenue for protection may be to seek insurance coverage for the losses sustained.

Some insurance companies, perhaps unsurprisingly, have proactively announced that COVID-19 related business losses are not covered by business interruption coverage. One position being espoused is that COVID-19 related losses are not caused by the type of "direct physical damage" most business interruption insurance policies require. Insurers may claim they wrote policies in such a way to ensure they would not be required to pay for losses such as those businesses are currently sustaining from COVID-19.

Regardless of the general claims made by insurance companies, coverage for business losses resulting from COVID-19 or government ordered shutdowns will be determined by state law and the specific language of each insurance policy. If the insured does not have an insurance policy or endorsement which expressly provides coverage for losses caused by "communicable or infectious diseases" without requiring physical damage to insured property (most common in the hospitality and healthcare industries) any coverage for COVID-19 related losses coverage will likely come in the form of either business interruption insurance or civil authority coverage.

Businesses often purchase business interruption insurance as part of their commercial property coverage. While helpful in the event of fire, earthquake, or other natural disaster, business interruption coverage generally requires the insured to suffer a "direct physical loss." The requirement for "direct physical loss" to trigger business interruption insurance coverage for losses resulting from COVID-19 related closures raises the question whether a pandemic mandated closure constitutes a "direct physical loss." While an actual COVID-19 contamination

in a factory, restaurant, or other workplace is arguably a “direct physical loss,” there is no clear answer as to whether a closure mandated due to a viral pandemic constitutes a triggering event. A determination of coverage will require an evaluation of the specific facts and coverage mandated by the insured’s individual policy and the applicable law in its jurisdiction.

Some commercial business policies contain civil authority clauses extending coverage for business interruption losses caused by “civil authority” orders. Traditionally, civil authority coverage applies when a business cannot access its property due to an order issued by a civil authority. Such orders are generally issued because of a neighboring fire or other unsafe condition. Many policies with civil authority coverage do not cover a business until a designated “waiting period” has concluded. It has yet to be tested in California whether civil authority coverage is triggered by business shutdown orders from state, county, or federal government or similar agency in the event of a pandemic. It will likely take litigation and a judicial order before it is known whether civil authority coverage covers the Coronavirus pandemic.

As businesses continue to face restrictions or closure resulting from government orders, it is important they take steps to protect the ability to file claims with their insurers, despite the current uncertainty of applicability of coverage to claims arising from the current pandemic and its fallout. These steps should include:

- (1) Review your insurance coverage and make note of virus exclusions in your insurance policy. There is little law interpreting virus exclusions in insurance policies. Understanding how your specific exclusions apply in your circumstances will be important for filing your claim and understanding your probability of success.
- (2) Stay up to date on the news. The current situation can change minute-by-minute. It is important to stay up to date on both national and local news to plan for what may happen to your business. While impossible to know for sure, legislative action may force your insurer to cover your losses.
- (3) Keep detailed records of how your business is impacted by COVID-19 and government ordered closures. If your business makes a claim with your insurer, you will need to show how the business operated before the closure and after the closure.
- (4) Consult an attorney to help you understand how each contractual clause governing performance of the insurance policy is affected by state and federal laws. It is important to fully understand your obligations and rights before you need to act or exercise them.

No one, including your insurer, knows with certainty if business interruption insurance or civil authority coverage will cover COVID-19 related losses until the courts issue rulings. However, insurance companies have a financial incentive not to pay out COVID-19 and government ordered closure claims, particularly considering their widespread nature. Because this area of law promises to develop and evolve rapidly, business owners must make efforts to understand the potential impact of the pandemic and take every step necessary to maintain rights under their policies and protect their business.

If you have questions regarding this article, contact The Maloney Firm at 310.540.1505.