

INSURANCE FOR COVID-19 LOSSES

The devastation caused by COVID-19 will be felt throughout the world. The immeasurable human toll is self-evident and the economic fallout will be immense. For businesses across the country and all over the globe, the virus has caused supply chain disruptions, business interruption, decreased demand, impaired production levels, and lower revenues. As economic losses accelerate, businesses should examine their insurance assets to see if they are protected against the losses associated with the pandemic and society's attempts to minimize the loss of life.

Will insurance policies provide coverage for losses sustained as a result of COVID-19? Whether coverage applies depends on several factors, including primarily the terms of the specific insurance policy and the circumstances of the alleged loss. Businesses should evaluate how their operations are affected and closely analyze whether their insurance policies provide coverage.

Business Interruption Coverage

Businesses are often covered for more than just property damage or loss. Many policies provide coverage for loss of income a business sustains because of damage to or loss of property. Depending on the policy, business interruption coverage may also encompass losses caused by events elsewhere. As a result, policyholders may find protection against losses associated with COVID-19 even if those losses arise from events far across the world.

A key question may be whether COVID-19 triggers coverage under these policies. Most business interruption insurance policies require evidence of a "direct physical loss or damage" to a property before coverage applies. Courts have held that policies with this language provide no coverage in the absence of "actual" or "physical" damage. Under this case law, a mere loss of use or access to a property would not trigger coverage.

But in what is surely to be a hotly litigated issue, policyholders should consider whether the presence of a contaminant such as a COVID-19 may be deemed to constitute physical loss of or damage to property covered by property insurance policies. Framed this way, a policyholder that suffers a loss of business because of the presence of COVID-19—for example, a manufacturer whose factory is shut down for decontamination—may be able to seek business interruption insurance.

Nonetheless, policyholders should be aware that property insurance policies have a range of exclusions that insurers might argue apply to preclude or limit coverage for COVID-19 losses, such as a communicable disease exclusion. As discussed more below, however, these exclusions may not be as broad as insurers contend and may not even apply.

Contingent Business Interruption

Another possible source of relief for businesses may be contingent business interruption insurance, which provides coverage for damage arising from disruptions to a business's suppliers or customers. For businesses that rely on a supply chain, this type of coverage can step in when a supplier sustains direct physical loss to its property that impairs its ability to deliver goods or materials. In addition to coverage for the loss of income, these policies may also cover additional costs—for example, any extra costs to provide replacement parts—and expenses the business incurred to mitigate further loss.

The terms of contingent business insurance coverage vary from policy to policy and may be subject to different limitations. In the event of a dispute, each claim will be investigated and evaluated based on the specific policy at issue. The following factors may be particularly important to determine whether coverage applies:

- Coverage is often limited to “direct” suppliers or “direct” customers located within a geographic territory specified in the policy. Many policies require that affected suppliers be identified or scheduled in order for coverage to apply.
- Policies may also exclude particular types of damage to the supplier or customer.
- Policies may include coverage extensions for interruptions that arise from the prevention of ingress to or egress from the company’s location. For example, they may provide coverage in the event where the sole means of access to the insured’s business location has been shut down. These extensions vary widely, though, and as with all insurance, policy language is critical to determine their scope of coverage. Some ingress/egress extensions require physical loss or damage to property of the type covered by the policy; others require that the impediment to access be within a certain distance from the insured’s location.

Civil Authority Coverage

The COVID-19 crisis may also implicate civil authority insurance, which covers losses sustained when government authorities restrict access to the area where a business is located or on which it depends for its operations.

Many policies with civil authority coverage require that the order from the civil authority be the direct result of “physical damage or loss” to other property. As always, policyholders should review the specific terms of their policies to determine whether physical damage or loss is a condition precedent to coverage for civil authority claims.

Where physical damage or loss is a requirement, the terms of the policy may define additional limitations on coverage. In many cases, coverage will apply only when the physical damage or loss affects an “adjacent or nearby” property; in others, the damage must affect the policyholder’s own property. The specific wording of a policy’s civil authority coverage will determine whether coverage is available under specific factual circumstances such as viral outbreaks.

Accordingly, there may be circumstances where a policy will provide coverage under the civil authority clause

when a governmental authority has limited access to areas where active transmission of COVID-19 has been identified.

Event Cancellation Coverage

Numerous events have been canceled or postponed amid widespread concern about the continued spread of the coronavirus. The National Basketball Association, National Hockey League, and Major League Soccer have all canceled or suspended current seasons. Major festivals, such as Tokyo’s Cherry Blossom Festival, the Glastonbury Music Festival, the Coachella Music & Arts Festival, the Tucson Festival of Books, and the popular South by Southwest Festivals have been canceled. Trade shows, conferences, fairs, conventions, and concerts have also been placed on hold or canceled.

Event cancellation policies may cover losses resulting from such cancellations, including lost profits and revenue; amounts paid to reimburse vendors, ticketholders or other third parties; and additional amounts that must be incurred to reschedule or relocate the event. Additional coverage may also be available for out-of-pocket costs, lost advertising, lost ticket sales, or other contractual obligations.

Many organizers secure event cancellation policies either on an annual basis or specifically for large events. In general, such policies insure against cancellations due to circumstances beyond the policyholder’s control, such as weather events, fires, floods, earthquakes, power outages, terrorism, or labor strikes.

The specific terms and conditions of the event cancellation policy control whether it will cover losses arising from events that were canceled as a precautionary measure to limit the spread of COVID-19. An “all-cause” policy will generally provide coverage for event cancellations due to an outbreak of a communicable disease such as coronavirus.

More commonly, policies will only provide coverage for cancellations due to communicable diseases if the policyholder purchased additional coverage for that risk, as an option available for additional cost. Following the declaration of COVID-19 as a global emergency in January 2020, however, new event insurance policies now typically exclude coronavirus coverage in an attempt to limit the flood of claims expected to arise from the pandemic.

Ultimately, whether a particular loss is covered by an event cancellation policy will depend on the specific language of the policy along with the circumstances of the loss.

Exclusions for Communicable Diseases

Whether or not a specific insurance policy covers losses from coronavirus will depend on the specific language at issue.

In recent years, the insurance industry has been paring back coverage of standard policies to exclude losses arising from communicable diseases. Following previous virus outbreaks such as SARS (2003), Ebola (2014), and Zika (2015), most basic coverage policies now include explicit language that denies coverage of losses attributable to viral and communicable diseases.

Policy language dictates the scope of these exclusions. Some policies exclude only bacteria from coverage—in which case, the insured may still have coverage for COVID-19. Others exclude viruses; and others yet exclude any disease-causing agents. Certain recent policies have specific exclusions for any losses arising from coronaviruses.

Even where a policy provides coverage for losses arising from communicable diseases—by, for instance, including an explicit “interruption by communicable disease” clause—limits may remain modest and coverage narrow. Review your policy with experienced counsel to determine the scope of your coverage.

Specific Responses to Coronavirus

The insurance industry has started to develop a specialized response to the COVID-19 outbreak. For example, in February 2020, the Insurance Services Office (ISO, an insurance advisory organization) issued two new endorsement forms specific to COVID-19 that would provide coverage for actual loss of business income and additional expenses caused by a government order closing the insured’s premises or quarantining all or part

of the premises, as well as from government suspension of some modes of public transportation. The forms would also extend coverage to a dependent property included in the policy, such as a supplier’s or customer’s premises.

It can be assumed that insurers will consider offering to sell insurance coverage to their policyholders under these new COVID-specific forms draft by ISO, but any such insurance would only be forward-looking and would not likely apply to lost income already incurred.

Recommendations

As the COVID-19 crisis continues, policyholders should consult with insurance coverage counsel about relevant insurance policy language. Experienced counsel can advise you whether your policy may be construed to provide coverage for losses resulting from the pandemic.

For Questions Relating to this Client Alert, Please Contact:



Joshua Blosweren
212.689.8808
jblosweren@hnrklaw.com



Andrew Bourne
212.689.8808
abourne@hnrklaw.com



Dorothea Regal
212.689.8808
dregal@hnrklaw.com

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