

CORONAVIRUS AND BUSINESS INCOME CLAIMS



Authored by:

Anthony J. Antonellis, Esq.

Brendan L. Labbe, Esq.

Emma A. Coppola, Esq.

SLOANE AND WALSH, LLP

With the coronavirus spreading throughout the nation, and public and governmental precautions mounting, many businesses in the hospitality and other industries are experiencing revenue losses. Although the health and safety of those exposed to the virus should remain the paramount concern, the question nonetheless naturally arises: can a business file a claim with their insurance carrier for lost business income? To find the answer to this emerging coverage question, one must look at the unique, applicable policy language, jurisdiction and underlying facts. Nevertheless, the intent of this article is to provide a brief overview of the various coverage issues and policy provisions that may come into consideration when assessing whether coverage is afforded for business interruption and the resulting business loss due to the presence of COVID-19 at a property.

BACKGROUND OF COVID-19

On December 31, 2019, the first case of “coronavirus disease” (COVID-19) was reported out of Wuhan, Hubei Province, China. Gradually, the outbreak has spread through different countries. Within the last month, COVID-19 has been confirmed in a number of cities and states across the United States. On January 31, 2020, Human Services Secretary Alex M. Azar II declared a public health emergency for the United States. Various states, including the Commonwealth of Massachusetts, have since declared a state of emergency.

Unfortunately, in the coming months, the number of cases is predicted to increase across the United States. This outbreak poses a threat to healthcare facilities, schools, public areas, and individuals, and also local, national and international

businesses. Many businesses in the restaurant, hotel and travel industries have experienced, and will continue to experience, a substantial decrease in business. Moreover, it remains a possibility, and perhaps even a likelihood, that many businesses will have to temporarily close, and thus sustain a business income interruption.

THRESHOLD REQUIREMENT: DIRECT PHYSICAL LOSS

Under the majority of commercial property policies, coverage is typically only afforded if a property sustains “direct physical loss.” For instance, in Massachusetts, courts have held that “direct physical loss” is construed as tangible or material loss/damage to an insured property. The courts have further stated that “physical loss or damage” cannot be construed to mean physical loss in the absence of physical damage.

Does the presence of COVID-19 constitute “direct physical loss” to a property? A business may not sustain “physical damage” due to the general outbreak of the disease, but what if COVID-19 is present at the insured premises? Supplemental questions arise, including whether the presence of contaminated staff or customers constitutes physical damage, or whether COVID-19 must be present at the property itself. As the virus continues to spread, the threshold requirement of “direct physical loss” will continue to be under further scrutiny.

CIVIL AUTHORITY COVERAGE

Many policies provide civil authority coverage. This coverage may provide Business Income and Extra Expense coverage in the event a civil authority prohibits access to the insured

premises. Depending on the policy language and the circumstances of the insured's business shutting down for a period of time, an argument could potentially be made for coverage. However, in the event a business closes operations preemptively for a period of time, without the direction of a government or civil authority, coverage may not be afforded.

DOES AN EXCLUSION PRECLUDE COVERAGE?

The potential, applicable exclusions depend on the specific, applicable policy language, which varies by form and jurisdiction. Many commercial policies, such as those with a "CP Cause of Loss – Special Form," do not typically explicitly exclude coverage for loss caused by a virus. Although, a specific endorsement is available to exclude loss caused by virus under a CP policy. Other policies, such as a BP policy, may contain a "Virus Or Bacteria" exclusion, precluding coverage for loss caused by "any virus, bacterium or other microorganism that induces or is capable of inducing physical distress illness or disease." Most policies exclude coverage, or provide minimal coverage, for Fungus, Wet Rot, Dry Rot And Bacteria; however, those provisions are often devoid of language pertaining to viruses.

Some may assess other exclusions as well when examining this question of coverage. For instance, most policies contain an exclusion for "acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body." Although, one might argue that this exclusion may only apply to a decision by the business to close down, or any order by the government to do so, due to the general spread of COVID-19, as opposed to the specific presence of the virus at the property. In the event that a government directive is issued to close a business, other provisions, such as the exclusion for Governmental Action, or the Exclusion, or Additional Coverage, for Ordinance Or Law, may come under consideration as well.

Many policies also contain pollution exclusions, which specifically bar coverage for "discharge, dispersal, seepage, migration, release or escape of pollutants, unless the discharge dispersal, seepage, migration, release or escape is

itself caused by any of the specified causes of loss." Most of said policies define pollutant as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

CLOSING THOUGHTS

While the health and safety of the people exposed to COVID-19 remains the paramount concern, it is anticipated that insurance-related issues stemming from the virus will continue to arise. Whether coverage is afforded for business income losses stemming from business interruption as a result of the presence of the virus depends on the specific underlying facts, jurisdiction and policy language. When assessing coverage questions, it is recommended to consult with an attorney.



Authored by Sloane and Walsh, LLP attorneys Anthony J. Antonellis, Brendan L. Labbe and Emma A. Coppola. Sloane and Walsh, LLP is a national insurance law firm with offices throughout New England.

Sloane and Walsh, LLP is a national law firm with a focus on litigation and insurance law including large loss subrogation, insurance coverage, extra contractual and bad faith law, appraisal law, personal injury, property damage, construction law, complex litigation, professional liability, class action law, privacy, cyber law, medical malpractice law, employment law and legal malpractice law.

From the main office in Boston, Massachusetts and branches in Rhode Island, Connecticut and New Hampshire, Sloane and Walsh attorneys represent businesses and professionals throughout the United States.

617.523.6010

sloanewalsh.com