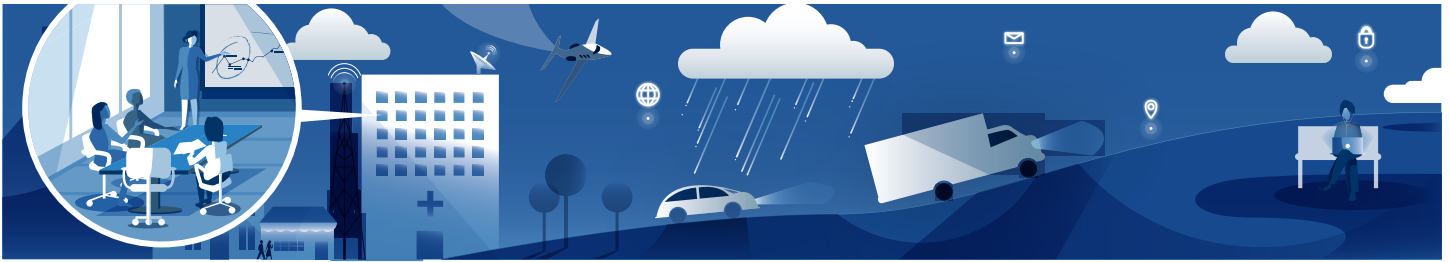


LEGISLATIVE, LEGAL & POLICY RESPONSES TO BUSINESS INTERRUPTION CAUSED BY COVID-19



As an increasing number of businesses deemed “non-essential” are closing their doors or significantly decreasing operations based on social distancing orders, efforts are being accelerated to address the financial impacts. Property and casualty insurance legislation and legal action is beginning to take stage and centers around business interruption coverage.

HOW ARE BUSINESS INTERRUPTION POLICIES EXPECTED TO RESPOND TO CORONAVIRUS CLAIMS?

Property policies with “standard” terms typically include virus exclusions. This means they would not cover damage caused by the coronavirus. Most small and medium sized businesses have this exclusion in their policies.

The standard policy contract language* is as follows:

We will not pay for loss or damage caused directly by any of the following. Such loss or damage is excluded regardless of any other cause of event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area Virus or Bacteria (1) Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

We expect this contract language would be withheld in a legal hearing and would not results in covered losses if challenged.

There are two less common situations that could cause an insurance policy to be challenged, potentially resulting in covered losses.

- Standard language was not used in the contract and the insurer was not clear in the language or excluded the word “virus.”
- The language includes specific endorsed coverage such as infectious disease or loss of attraction. This language is no prevalent and would typically be included but sub-limited.

Barring exclusions like a virus, business interruption coverage responds when there is direct physical loss from a covered peril. Physical loss/property damage can be to the insured’s property, a customer or supplier’s property, or a civil authority order prohibiting access to property due to physical loss or property damage.

The standard policy contract language* for this is:

“Civil Authority When a Covered Cause of Loss causes damage to property other than the property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

1. Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

*Source: Insurance Services Office (ISO)

2. The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the covered cause of loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.”

ARE THE CIVIL AUTHORITY LAWSUITS AROUND BUSINESS INTERRUPTION LEGITIMATE?

When a virus exclusion is not present in the business’ policy, the question becomes whether the physical presence of COVID-19 in an area under civil authority is considered a Covered Cause of Loss.

The argument for coverage is that COVID-19 should be covered as it is a source of loss because:

- The virus created physical damage to the property.
- The property is located within the boundaries of a civil authority shut down.
- Ongoing dangerous physical conditions exist during the civil authority shut down that are resulting in business interruption losses.

The main argument against coverage is that COVID-19 does not constitute as physical damage because it can be removed and does not permanently alter a property. If it did qualify as physical damage, the argument is:

- There is no evidence that it existed on the property, or if there was, it could easily be removed which eliminates the ongoing threat.
- Social distancing is not covered and that was the reason civil authority was enacted.
- The shutdowns were to avoid potential future physical damage, which would not be covered.

Again, these arguments are for policies that do not exclude virus coverage. The courts need to determine if COVID-19 causes physical loss or property damage. If yes, then they need to interpret whether the municipality/state shutdowns were due to the physical damage caused by COVID-19. The interpretations get further complicated by a partial vs. complete shutdown of the area. We will follow this closely.

WHAT IS THE POSITION OF THE INDUSTRY?

The industry relies on premiums to fund claim payments. Since the majority of business’ policies did not include business interruption coverage for this type of situation, and therefore premiums were not collected to fund the claims, paying them out would put the industry at risk.

According to the National Association of Insurance Commissioners (NAIC) is:

“Insurance works well and remains affordable when a relatively small number of claims are spread across a broader group, and therefore it is not typically well suited for a global pandemic where virtually every policyholder suffers significant losses at the same time for an extended period. While the U.S. insurance sector remains strong, if insurance companies are required to cover such claims; such an action would create substantial solvency risks for the sector, significantly undermine the ability of insurers to pay other types of claims, and potentially exacerbate the negative financial and economic impacts the country is currently experiencing.”

IS THERE ANY SUPPORT FOR SMALL BUSINESSES (UNDER 100 EMPLOYEES)?

Businesses with under 100 employees typically have virus exclusions in their policies as they are provided coverage under Business Owners policies that are specifically filed with the states and are not Package policies which do not follow the strict guidelines afforded to the Business Owner policy.

There is a growing list of states introducing bills that propose requiring insurers to retroactively cover business interruption for small businesses. If passed, the legislation would attempt to recoup the losses through assessments across the larger insurance base. These bills face significant legal opposition as there are both contractual and constitutional issues with the proposed laws.

Outside of insurance coverage for losses, the CARES Act includes a broad lending program for small businesses at the federal level.



WHAT'S NEXT?

There are many unknowns between the growth legislation and the legal interpretation of the courts. In regard to business interruption insurance, the majority of policies include standard virus exclusions, which are expected to hold up in court and we do not foresee the insurance industry being forced to unilaterally retroactively cover business interruption claims. We do; however, expect to see efforts to help businesses and their employees with the financial implications caused by the pandemic.

BKS-Partners is staying abreast of the situation. This has been an especially challenging time for businesses and the coverage is ultimately determined by the language in your policy.

We will keep you informed as we learn more. If you have questions, please do not hesitate to reach out to a member of your BKS-Partners team.