

Business Interruption Insurance and COVID-19

It is clear that COVID-19 has interrupted business-as-usual and caused substantial damage to companies across the economy. But for many businesses, there is a potential source of relief that should be considered: their insurance. While many policies include specific exclusions that could preclude coverage, including specific exclusions for loss arising out of a virus or pandemic, not every policy limits coverage in this way. Without such specific exclusions, policyholders may be able to take advantage of three categories of insurance coverage that are common in some standard form property damage insurance policies: (1) business interruption, (2) contingent business interruption, and (3) civil authority insurance.

Business Interruption and Contingent Business Interruption Coverage: For coverage to apply, a typical business interruption policy requires that the losses be a direct result of "physical loss or damage" to the policyholder's property. Carriers will argue that this requirement forecloses coverage as a result of the COVID-19 disruption, arguing that contamination from the virus does not create physical damage. While it is too early for there to be any case law directly addressing this issue, courts have found the required physical loss or damage under analogous situations. For example, in Illinois, where the law required corrective action arising out of contamination due to microscopic asbestos fibers, courts have held that the contamination constituted the physical loss or damage required to trigger coverage for property damage.^[1] Similarities between the physical loss or damage caused by asbestos and that caused by COVID-19 allow policyholders to argue that the physical loss or damage requirement found in most business interruption provisions is met, depending on the language of the policy at issue. It may, however, be more difficult to demonstrate the presence of COVID-19 than asbestos fibers.

Civil Authority Coverage: Civil authority coverage is triggered where access to the policyholder's insured property is prohibited by government order as a result of a peril insured against. Again, however, to qualify as an insured-against peril, most policies require direct physical loss or damage. These provisions were tested in an analogous situation arising out of airport closures after the 9/11 attacks. When airports and airlines sought coverage under their civil authority policies, the results were mixed. While the City of Chicago was denied coverage because a court concluded that Chicago airports were not closed from immediately impending physical loss or damage, U.S. Airways prevailed in another court when it argued that its airplanes at Reagan National Airport were under such a threat.^[2] The difference between these two outcomes rested on the two courts' differing assessment of the risk of terrorist attacks at the airports in Washington, D.C. and Chicago. With respect to COVID-19, there is a credible argument that the risk of damage represented by the virus is present everywhere, particularly in jurisdictions like Illinois where government orders expressly state that the threat is statewide.

Given the breadth of business closures and inevitably devastating loss of profits due to COVID-19, it is only a matter of time before claims for business interruption coverage and the resulting litigation will emerge. At least two such lawsuits have already been filed. The precedents set will eventually provide guidance regarding the effectiveness of

March 26, 2020

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the analogies made above. In the meantime, businesses impacted by COVID-19 should review their policies to preserve coverage.

If you would like assistance or have specific questions concerning business interruption or civil authority coverage, including questions about what businesses can be doing now to maximize their likelihood of securing coverage, please contact one of the Goldberg Kohn Insurance Litigation attorneys listed here.

[1] *United State Fidelity & Guarantee Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64 (1991); *Board of Educ. of Twinsp. High School Dist. No. 211 v. Internat'l Ins. Co.*, 308 Ill. App. 3d 597 (1st Dist. 1999), *appeal denied*, 188 Ill. 2d 562 (2000).

[2] *Compare City of Chicago v. Factory Mutual Ins. Co.*, No. 02-C-7023, 2004 WL 549447 (N.D. Ill. Mar. 18, 2004) with *U.S. Airways, Inc. v. Commonwealth Ins. Co.*, No. 03-587, 2004 WL 1637139 (Va. Cir. Ct. July 23, 2004), *rev'd on other grounds*, 271 Va. 352 (2006).

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