Gregory J. Lestini
Partner
Columbus
614.227.4893
glestini@bricker.com

Business interruption insurance coverage and COVID-19

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COVID-19 has certainly had an impact on business operations, and the potential implications of insurance coverage in this time can cause unprecedented uncertainty and anxiety. As businesses and carriers review policies for possible coverages during the coronavirus pandemic, questions fall into certain buckets of coverage:

- workers' compensation
- property damage
- event/trip Cancellation
- supply chain interruption
- business interruption
- general liability

In this publication, we focus on business interruption. As businesses reach into their files to review what losses related to the pandemic may be covered, insurers are reviewing those same policies to determine what claims to expect. To say the coronavirus outbreak is paramount to a catastrophic event is an understatement, with insurers bracing for potential worldwide losses at a magnitude the industry has never seen. Both regulators and litigators will be impacted for many years to come on this singular issue.

Business interruption insurance

The most direct loss felt by most businesses during the pandemic has been, and will continue to be, business interruption (BI). This interruption could be caused by an ill workforce, governmental orders, loss of suppliers, loss of customers or a combination of all of the above as a result of the pandemic and responses to COVID-19. Part of most businesses commercial property coverage, policies often require some kind of physical loss to the premises to trigger the BI coverage. This requirement has already triggered many questions about what physical loss looks like in the age of the COVID-19 pandemic.

Importantly, the insured or the insurer must simply read the policy to make the best determination as to what is covered. As pointed out in an excellent article by Bill Wilson in the Insurance Journal, "insurance is not a commodity," meaning no two policies are likely the same. The language of each policy, including endorsements, exclusions, riders and other codicils, will determine the chances that a claim will be paid.

Many policies include business interruption for contagious diseases. The language, matters, however, as some policies require a governmental order to shut down, actual presence of the disease or a combination of both to qualify for coverage. Also, many policies will likely exclude coverage for losses caused by a pandemic, partially in response to previous outbreaks of the SARS and H1N1 viruses. Specifically, the popular and ubiquitous ISO template business loss policy carries exclusions specifically for "pandemics" through language referencing pollution through contamination by disease causing agents. Again, each insured will need to review policies to determine when coverage may be allowed and what facts are present for each instance.

Laws and regulations

As business losses mount, it's critical to review the actions taken by individual states and departments of insurance in the various jurisdictions, as well as actions taken by the federal government. States' approaches so far during this pandemic have vacillated between protecting the solvency of insurers to mandating for the payment of BI insurance even when such coverage was not written into policies.

The Ohio Department of Insurance (ODI), for instance, has issued guidance regarding BI insurance coverage. Its description of BI insurance includes a heavy reliance on the plain language of the policies, including any exclusions written. ODI states, "[i]nsurance policies typically have exclusions of coverage for risks that are too great to be underwritten at an affordable price…The potential loss from such perils is so extreme that providing coverage would jeopardize the financial solvency of property insurers." This seems to warn insureds that in the event of a consumer complaint, ODI will rely heavily on the language as written in the policies in question.

New Jersey, on the other hand, is pushing hard to pass legislation that would mandate BI coverage to be provided even when not contemplated or underwritten by insurers. While limited to employers with less than 100 employees, A-3844 would require all policies in force as of March 9, 2020, with BI coverage to pay such coverage regardless of any exclusions written into the policies. The New Jersey Assembly passed the legislation despite much concern over the enforceability and constitutionality of such a requirement. The bill, however, was pulled before it reached the New Jersey Senate and seems to be dead, for now.

As of the second week of April, seven states have introduced business interruption coverage bills of some type, many of them forcing insurers to pay some kind of coverage outside of what was underwritten in the policies in question. In addition to numerous bulletins and statements on various aspects of insurance law during this pandemic, regulators in many states are reviewing and opining on the possible applicability of BI coverage triggered by the pandemic.

Similarly, there has been talk at the federal level of a possible fund to cover certain business losses in the absence of BI coverage being properly triggered. In a letter dated April 2, national insurance trade associations, including the American Property Casualty Insurance Association, the Reinsurance Association of America and the Big I, requested that the federal government explore the "creation of the COVID-19 Business and Employee Continuity and Recovery Fund," that would be administered by the feds and help cover business interruption losses when such coverage was not underwritten.

It remains to be seen where federal and state governments will land on this issue, but the discussion will continue for quite a while, even after certain definitive action has been taken. In the meantime, insureds have not waited for guidance, and litigation has already begun.