

COVID -19 and Business Interruption Claims

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As COVID-19 inflicts a disheartening human toll in the United States and throughout the world, officials balance science, politics and policy in determining appropriate responses to the health crisis and the immense economic loss resulting from the shuttering of businesses across the United States. As to business losses, The Paycheck Protection Program (PPP) established by the Cares Act currently provides eight weeks of federal stimulus to thwart that economic loss. Nonetheless, we are looking beyond PPP and other sources for recovery of losses. Businesses are currently evaluating whether their business interruption, or business income, coverage within their commercial property insurance policies provide a means to recover losses and some have already filed claims. This simmering pot of potential business interruption insurance claims are gaining steam and may well pour extensive litigation into state and federal courts. Determination of whether businesses recover losses, which they suffer as a result of COVID-19 and government mandated shutdowns, will determine the extent to which insured or insurer bear the brunt on the COVID-19 economic losses.

COVID-19 is a “novel” virus resulting in experiences previously unseen and thus to some extent will provide courts with a novel issue. Nonetheless, courts will use traditional jurisprudence to decide COVID-19 business interruption claims. Barring legislative action overriding determination of business interruption claims, which is under consideration at the state and federal level, such claims will be decided by the courts via established jurisdictional review standards applied to new terms and circumstances. Insured and Insurer alike are wise to review their insurance policies now as courts will be looking to the specific language within insurance policies in determination of coverage.

The law in Missouri, Illinois, Indiana and Wisconsin is the same or similar in the general principles applicable to such determination. Insurers are aware those principles lean toward giving a benefit of doubt to the Insured. Determinations of coverage will largely be made by Justices as they will be made on interpretation of insurance policies, thus questions of law to be decided by the court, not a jury. In construing policies, courts apply a layman understanding applying a meaning which would be attached by an ordinary person of average understanding purchasing insurance. Further, if a term or provision, is ambiguous, meaning it is susceptible to two reasonable interpretations, such ambiguity, or tie, is resolved in favor of the insured business. Further, if an Insurer argues there is no

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coverage due to an exclusion within the policy, the burden is on the Insurer to prove that exclusion. Exclusions will be a significant issue as some Insurers have added virus exclusions to property insurance policies in recent years.

Whether a business has even incurred a loss may not be as apparent as one would assume given PPP benefits and their impact on determination of lost income. Assuming business lost income, courts will grapple with the terms of the policies and such questions as whether a business suffered a physical loss or damage to insured property; whether a loss was directly caused by contamination, virus, or government shut down; and whether public policy prohibits an Insurer from denying coverage of loss covered by pandemic. In these more specific determinations, the law and application of law by courts in the above mentioned states, varies in subtle yet determinative details. Some hold definition of terms strictly against the Insurer as the author of the policy and thus if a term is ambiguous and not defined within a policy it is interpreted by the court in favor of coverage. Others are more apt to rely on other sources, such as a dictionary or other source, to apply a common sense interpretation of a term.

It is almost certain the business interruption segment of economic loss wrought by COVID-19 will be determined by the specific terms of insurance policies and the application of law by courts in each particular state, so Insurers and Insureds are wise to evaluate the specific terms of their policies and seek guidance as to how those terms will be treated in the courts of their state.

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