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COVID-19 AND BUSINESS INTERRUPTION INSURANCE

Many businesses financially impacted by the COVID-19 outbreak have been pushing the insurance industry to cover their income losses under business interruption insurance, even when their insurance contracts omit pandemics as the triggering event. Business Interruption Insurance is a type of coverage that protects a business when something beyond its control forces a shutdown of operations. It protects businesses against economic losses resulting from the inability to put physically damaged insured property to normal use. Research shows that one-third of small businesses have business interruption policies.

Some insurers argue that they do not have to cover these type of losses if the insurance policy does not provide relief for a pandemic such as COVID-19, given the unpredictability and unimaginable potential for loss. They argue that if they had to provide such coverage, the entire insurance system would bankrupt. Thus, many insurers have denied coverage, resulting in a wave of lawsuits brought by policyholders against insurance companies.

For a business interruption insurance claim to prevail, the policyholder must prove that the losses of the business income resulted from direct physical loss or damage at the premises or covered property. As to COVID-19 claims, attorneys for the insurance industry argue that there is no physical damage to the property arising from the pandemic; on the other hand, litigants for the businesses argue that actually there was a damage to the property if its intended use became unsafe and that surfaces that have been exposed to coronavirus are “physically” damaged.

In addition, policyholders contend that even when the business interruption insurance contract omits viruses or viral pandemics as a triggering event, the insurer should cover them under the “all risk coverage”, which are designed for any incident that could physically damage a property and that an insurance policy does not specifically exclude. The rationale here is that as the language of insurance policies are generally written by the insurer, if a pandemic was not intended to be a triggering event, the insurer should have had expressly excluded it from the coverage.

Another coverage that business owners should also be aware of is “civil authority coverage”. If the policy provides for this type of coverage, it will trigger when authorities force the interruption of the business due to property damage of another business located within a certain geographical range from the insured business, resulting in losses. This provision might be useful specially for businesses located in cities with substantial number of cases and that were forced to shut down due to a government order, by showing that the order was a result of the outbreak.

In the beginning of COVID-19 quarantine, judges were denying business interruption insurance claims. In New York, the Southern District denied a preliminary injunction as the plaintiff had not shown a probability of success on the merits. The plaintiff, which was a magazine publisher, was unable to show property damage triggering coverage, because the virus could not damage printing presses. The judge concluded: “New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going. . . . [T]his is just not what’s covered under these insurance policies.”

However, in August, a judge ruled that an insurance claim brought by a group of Kansas and Missouri hair salon and restaurant owners that were forced to shut down in compliance to state orders, could proceed because they suffered a direct physical loss under their policies. The decision provided that because the policy terms did not define “physical loss”, the policies did not exclude economic losses from viruses and that “COVID-19 allegedly attached to and deprived them of their property, making it ‘unsafe and unusable, resulting in direct physical loss to the premises and property’”. In addition, the court understood that the policyholders had adequately alleged that their access to their businesses was prohibited, having a plausible claim for civil authority coverage.

Finally, a recent decision of the Northern District of Illinois found no coverage for a business and rejected its argument that the virus caused physical loss or damage when there was “a sudden inability by the insured to use the property that was previously useable”. The Court explained that the physical loss should be of the property itself, not including the loss of use of the property to the insured. The Illinois judge further stated that it “agrees with the courts that have found that loss of use of property without any physical change to that property cannot constitute direct physical loss or damage to the property.”

While courts are still uncertain as to the admissibility of this type of claim, legislators are studying how to impose rules to compel insurers to cover losses caused by pandemics under existing policies.

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