

COVID-19: Recouping Business Losses Through Business Insurance

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As a result of COVID-19 and its effects, including government-ordered shutdowns and advisories, many businesses will voluntarily and involuntarily close or significantly reduce operations, leading to immediate liquidity problems and potentially longer-term solvency issues. In light of this situation, each business should assess what sources of funds might become available to cover losses and mitigate adverse financial effects, including insurance.

Types of Business Interruption Insurance Coverage Potentially Available

First-Party Property and Business Interruption Insurance. This type of insurance is generally applicable for the stoppage or slowdown of your business due to property damage. Business interruption coverage is often included in an endorsement to a commercial policy, but it may also be a stand-alone policy. Typically, coverage is triggered when a "covered cause of loss" creates a slowdown or suspension of business operations. For some policies, the inability to occupy your place of business due to the order of a governmental authority may be sufficient to afford coverage. While many insurance policies define a "covered cause of loss" to include only direct physical loss or damage, courts in several jurisdictions have recognized that if the insured's premises becomes uninhabitable, that could be enough to constitute physical damage. Also, while policies may exclude coverage if the incident was caused by infectious disease pathogens, whether or not there could still be coverage depends on the language of the policy, the reason for the shutdown and the nature of the claim.

Some policies may contain "all-risk" coverage, triggered by all perils, including COVID-19. Moreover, certain industries, such as retailers, restaurants, bars and hotels may have unique coverages or coverage extensions under which COVID-19 would be covered, such as "event cancellation" coverage.

Contingent Business Interruption (CBI) or Supply Chain Risk Insurance. Even if the COVID-19 outbreak may not be a covered "covered cause of loss" as described above, there may be alternate available coverage if the slowdown or shutdown is due to a supplier or customer-related shutdown or market disruption (this can also be called "dependent property coverage"). Again, the language of each policy is key to understand in order to answer important questions such as: does the policy include "supply chain" coverage; is the coverage limited to named products or services from specific suppliers, does the coverage need to be triggered by a physical loss or damage, etc.

Civil or Military Acts Coverage. Depending upon how the federal and state governments respond to the COVID-19 pandemic, certain insurance policies may provide coverage under provisions relating to actions of civil or military authorities.

Third-Party Commercial General Liability (CGL) Insurance. You should check to see whether you have insurance to cover liabilities vis-à-vis third parties arising from bodily injury, personal injury or property damaged caused by direct person-to-person transmission of COVID-19 arising from your business operations.

Directors & Officers (D&O), Management Liability, Errors & Omissions (E&O), and Professional Liability Insurance. A company's management may potentially face claims from third parties, employees or even shareholders for failing to take appropriate measures to protect the business or third parties (including person-to-person transmission,

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contamination of property, or secondary effects such as financial losses). This type of coverage may be applicable in the COVID-19 situation.

Travel Insurance. Business travel policies are available to cover persons incurring illness or death while on business-required travel. While some policies may exclude infectious diseases specifically associated with flight cancellations or delays or medical reimbursement, they should be examined carefully to check if coverage is available in a particular situation.

Environmental Insurance. Typically, while environmental insurance will not provide coverage for bodily injury or business interruption, such policies may provide coverage for clean-up and disinfection costs.

Employee (Workers' Comp and Unemployment) Insurance. In general, workers' compensation policies cover injuries and occupational diseases that are due to causes/conditions specific to employment, occupation or trade, but that usually does not include coverage for contagious diseases incurred outside the health-care industry. However, the requirement that the disease "arose out of employment" will be a critical determining factor.

Moreover, several states have already announced plans to extend unemployment benefits to cover COVID-19. For instance, Michigan's Governor recently signed an executive order, effective immediately and lasting until mid-April, to expand eligibility for unemployment benefits to individuals who leave work if they have COVID-19 or have been in contact with a confirmed case in the last 14 days, or if they have a need to care for someone with a confirmed diagnosis or for family care as a result of a government directive. The executive order also allows negative-balance employers to participate in the work share program and provides for non-charging employer accounts for benefits resulting from layoffs and other unemployment because of an executive order requiring the closure or limitation of operations.

New York State's Insurance Instruction

Additional clarification may soon be available. On March 10, the New York Department of Financial Services ("NYDFS") instructed all property and casualty insurers providing business interruption coverage in New York to provide a "clear and concise explanation of benefits" to all commercial policyholders. In each such explanation, the insurance company is required to answer whether a policy covers "business interruption," "contingent business interruption," and what specifically is covered under the policy. The explanation also needs to answer whether the policy includes "supply chain" coverage and whether "physical damage or loss" is required, and whether contamination related to the COVID-19 could constitute "physical damage or loss." Because the insurance companies are also required to provide copies of each explanation of benefits to NYDFS by March 18, it will become clearer what the insurance industry's position on many of these issues will be.

Next Steps

Even in this uncertain and rapidly changing environment, in light of the above discussion, it is highly advisable that each business take the following measures:

- Compile all insurance policies and potential coverages.
- Examine the language of each insurance policy (Miller Canfield and your insurance broker can help).

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- Understand which contingencies are or might be covered, and which might not be.
- Keep track and good records of actions taken and costs and losses incurred, as this information will be relevant in any claims made.
- Mitigate your damages by taking those steps that are reasonable, under the circumstances, to keep your business running.
- Contact the author or your Miller Canfield attorney with further questions.

This is part of a series of our COVID-19 alerts providing clients with practical advice on measures they can take to navigate through these troubled times. Future e-alerts will address what governmental funds and programs may become available to your business.

This information is based on the facts and guidance available at the time of publication, and may be subject to change.