

Blog: The COVID-19 Pandemic and Business Interruption

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By **Dan Cotter** - May 8, 2020



Dan Cotter // Courtesy photo

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On May 7, Whitmer announced her "MI Safe Start Plan" that has six phases to address the reopening of businesses, while at the same permitting manufacturers to begin going back to work on Monday, May 11.

With such orders come major business disruptions and closures. Faced with the potential for major financial disruption to households and businesses, many are looking at possible resources, including insurance and business interruption. What is developing is a coverage storm, with business owners facing off against insurers.

Business interruption (BI) covers loss of income that a business suffers resulting from a disaster covered by the particular policy. Losses covered by BI might include loss of revenue, business closures, supply chain interruptions, and loss of customers, as well as costs to rebuild or decontaminate. Typically, BI is part of a business's property insurance policy or included in a comprehensive package policy, often known as a Business Owner's Policy.

Property insurance, including BI, is first-party insurance, meaning the insurance applies to the insured's own property or person. Policy language varies by insurer and by policy. Many insurers subscribe to one of the two major form services: Insurance Services Office (ISO) or American Association of Insurance Services (AAIS). Subscribers to ISO or AAIS often adopt the approved forms and rules the services have submitted to the various states. Other insureds utilize their own proprietary or manuscript forms.

A common BI provision reads, "We will pay for the actual loss of Business Income ... caused by direct physical loss of or damage to property at premises ..."

Most BI policies require the loss be a result of a covered cause of loss. Many BI policies include coverage language for closures of businesses and interruption caused by order of a civil authority. A civil authority provision states: "We will pay for the actual loss of 'Business Income'... caused by action of civil authority that prohibits access to the described premises ..."

The purpose of the civil authority provision is to expand BI to situations where civil authorities prohibit access to the insured's property.

Insureds have begun to file claims for BI coverage, primarily pursuant to the civil authority provisions, asserting the executive orders such as Whitmer's trigger coverage. Insurers have quickly

denied such claims, asserting there is no physical loss or that a particular virus or other exclusion applies.

The Oceana Grill's Claim for Business Interruption

In the first known lawsuit seeking BI, a New Orleans restaurant, Oceana Grill, filed suit against its insurer. (*Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd's London, et al.*) The case argues the civil authority provision of its insurance policy was invoked because of restrictions and bans put in place by the local authorities, similar to Whitmer's shelter in place order.

The Grill alleged COVID-19 meets the definition of physical loss because "the deadly virus physically infects and stays on the surface ... for up to twenty-eight days ..." Further, the complaint alleges it is "clear that contamination of the insured premises by the Coronavirus would be a direct physical loss ..."

Oceana's argument relied in part on a prior case (*Gregory Packaging vs. Travelers Property and Casualty*) in which the plaintiff argued that ammonia released by a faulty refrigeration unit constituted a "direct physical loss" sufficient to trigger coverage.

Multiple Factors to be Considered in Evaluating BI Claims

The battle over BI will come down to science, with experts battling over whether the coronavirus presents physical damage to insured's premises. In addition, insureds will face defenses that contamination is fleeting and that an insured cannot prove actual physical damage to the insured's property. Experts will also have to analyze whether COVID-19 was contemplated by the various language that insurers have used in their BI policies.

Approximately 15 years ago, the insurance industry responded to other potential pandemics by adding exclusions to confirm that losses such as those presented by COVID-19 were not covered. ISO filed a form, "Exclusion for Loss Due To Virus Or Bacteria," stating: "We will not pay for loss or damage caused by or resulting from any virus, bacterium ..."

When ISO files policy language, it also files an explanatory memorandum. For this exclusion, the memorandum addresses the reasoning for the exclusion and insurers' intentions when it comes to various pandemics. Many policies include the specific ISO exclusion or similar language that purports to exclude situations such as the present. Battles will present over the specific, precise wording and the intentions of the insurer.

Each suit to date alleges the insured's submitted claims for BI and were immediately denied.

While no suit has been identified to date in Michigan, some firms in Michigan have indicated they are focusing on such actions.

Settling BI Claims Will Involve Courts, Lobbying and Legislatures; Could Take Years

Various trade associations have urged Congress to guarantee or pay for business interruption coverage. In addition, some state legislatures have introduced legislation that would mandate coverage for the pandemic regardless of policy language. Michigan State House Rep. Tommy Brann (Grand Rapids) is reportedly drafting legislation for Michigan. The insurance industry has pushed back, arguing that such actions would raise constitutional and contractual issues. At his April 10 press briefing, President Donald Trump argued that generally, insurers should cover insureds' BI claims.

The COVID-19 crisis and unique circumstances presented by it will lead to many disputes in the coming years. Insurers will argue credibly that pandemic situations were never the type of risk contemplated or priced by the industry. Insureds will argue they paid premiums for years and reasonably expected insurance would respond to such a situation. Absent a solution that works for

businesses and the property and casualty industry, thousands of coverage suits are likely, with many restaurants and other businesses likely not surviving the crisis.

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