

COVID Interruption Insurance 2020

What's In, What's Out, and What's Coming

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Phone Rings...Now What?

Key Factors to Remember at the Outset of Any Coverage Investigation:

- What kind of case is it?
- What documents do I have?
- What documents do I need?

STEP 1 – Gather Information

Establish a Cast of Characters and a Timeline

- Who may be involved?
- What are the elements necessary to establish a valid claim?
- Who knew what, and when?
- What do I need going forward?

Map Out ALL Possible Claims

READ THE ENTIRE POLICY

Is the claim covered? (examine policy provisions)

- Covered Causes of Loss
- Extra Expense claims
- Civil Authority extensions

What Business Income Coverage is Meant to Protect

The Basic Goal:

To preserve the continuity of the insured's earnings
(Howard Stores Corp. v. Foremost Ins. Co., 82 AD2d 398, 441 NYS2d 674 [1st Dept., 1981])

The Basic Scope:

To cover losses arising from an inability to continue normal business operations as a result of damage sustained or a hazard insured against

No Double Recovery:

Business losses must be reduced by profits earned, or other insurance payments recovered, during the loss period

Policy Analysis

Kohane's Coverage Formula

$$C = (WI - WO) + CPC$$

Basic Grant of Coverage

As found in most policies:

We will pay the actual loss of Business Income you sustain **due to the necessary “suspension” of your “operations” during the “period of restoration”**. The “suspension” must be caused by a **direct physical loss of or damage to property** at premises which is described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by a Covered Cause of Loss. (emphasis added)

Four Fundamental Elements to a Business Interruption Claim

- Loss must be caused by a actual interruption of operations during the Policy Period
- Actual interruption must be caused by **direct physical loss or damage**
- The direct physical loss must be caused by a Covered Cause of Loss
- The direct physical loss must occur at the Insured Property

(Phila. Parking Auth. v. Fed. Ins. Co., 385 F. Supp.2d 280 [SDNY, 2005])

WHAT'S IN?

Questions to Answer

- Was the policy in effect on the date of loss?
- Is it a Covered Cause of Loss?
- Is there evidence of direct physical damage at the premises?
- What is the Period of Restoration?
- Was there a suspension of operations?
- Are there any coverage extensions that might apply?
 - Extra Expense
 - Civil Authority
 - Other Endorsements to the Policy

What is a Covered Cause of Loss?

- At times, the term is defined by a schedule of Perils Insured Against
- Usually, however, a Covered Cause of Loss is broadly defined as a “Risk of Direct Physical Loss”
- Direct physical loss is equivalent to proximate Cause
(E.A. Granchelli v. Travelers Ins. Co., 167 AD2d 839, 561 NYS2d 944 [4th Dept., 1990]).

Has there Been Physical Damage?

- Airport Parking Lot at Philadelphia International Airport did not sustain physical damage in 9/11 Terrorist Attacks; Therefore, no coverage for the Business Income claim

(Phila. Parking Auth. v. Fed. Ins. Co., 385 F. Supp.2d 280 [SDNY, 2005])

- Collapsed building which is adjacent to the insured location does not constitute physical damage

(Roundabout Theatre Co., Inc. v. Continental Cas. Co., 302 AD2d 1, 751 NYS2d 4 [1st Dept., 2002])

Has there Been Physical Damage?

- Where loss at part of the building renders the insured location inoperable, coverage may attach. This is the case even though the insured location sustained no damage

(Datatab, Inc. St. Paul Fire and Marine Ins. Co., 347 F. Supp. 36 [SDNY, 1972])

- Loss of electronically stored data may not be considered physical damage

(Ward Gen. Ins. Co. v. Employers Fire Ins. Co., 114 Cal. App. 4th 548 [Cal. App. Ct., 2003])

Has there Been Physical Damage?

- Naturally, the destruction of office space at the World Trade Center on 9/11 qualified as physical damage
(Lava Trading, Inc. v. Hartford Fire Ins. Co., 365 F. Supp.2d 434 [SDNY, 2005]).
- Physical damage requirement may also be triggered by loss of work area
(Zurich American Ins. Co. v. ABM Industries, Inc., 397 F.3d 158 [2nd Cir., 2005])



**Has there Been a Suspension of
Business Operations?**

*Must be a **TOTAL SUSPENSION** of
Operations;*

***PARTIAL SHUTDOWNS or
SLOWDOWNS Will Not Trigger
Coverage***



Has there Been a Suspension of Business Operations?

- No coverage for BI where damage to a computer system impacted the insured's efficiency, and resulted in a loss of profits

(Home Indemn. Co. v. Hyplains Beef, LLC, 893 F.Supp. 987 [USDC Kan., 1995]).

- No coverage for BI where, although the law firm office was damaged, attorneys still recorded billable time while repairs were ongoing

(Buxbaum v. Aetna Life and Cas. Co., 103 Cal. App. 4th 434 [Cal App. Ct., 2002])

Has there Been a Suspension of Business Operations?

- No coverage for BI where damage to a hotel's kitchen led to lower occupancy rates

(Ramada Inn Ramogreen, Inc. v. Travelers Indemn. Co. of America, 835 F.2d 812 [11th Cir., 1988])

- No coverage where a storm rendered only four of a possible twenty cabins uninhabitable. Because the other sixteen units were operational, the Court ruled there had not been a total cessation of business

(Forestview The Beautiful, Inc. v. All National Ins. Co., 704 NW2d 773 (Minn. Ct. Apps., 2005)).

Has there Been a Suspension of Business Operations?

- No coverage for BI where occupancy rates at a hotel dropped after the Mount Saint Helen's eruption
(Keetch v. Mut. Of Enumclaw Ins. Co., 831 P.2d 784 (Wash. 1992)).
- No coverage for BI where occupancy rates of apartments dropped due to fire and the loss of use of an adjacent apartment building
(Royal Indemn. Ins. Co. v Mikob Properties, Inc., 940 F.Supp. 155 [SD Texas, 1996])

Has there Been a Suspension of Business Operations?

- No coverage for BI where the insured's office was destroyed by a flood, but at least two employees were able to continue their normal job duties

(Madison Madiens, Inc. v. American Manu. Mut. Ins. Co., 2006 WL 1650689 [SDNY 2006])

- No coverage for BI after tenants were permitted to return to apartment buildings owned by the insured in Southern Manhattan after 9/11

(Broad Street, LLC v Gulf Ins. Co., 37 AD3d 126, 832 NYS2d 1 [1st Dept., 2006]).

What is the Period of Restoration?

*As found in Most Policies,
the Period of Restoration is Defined as:*

"PERIOD OF RESTORATION AND/OR INDEMNITY"
shall not exceed such length of time as would be
required with the exercise of due diligence and dispatch
to rebuild, repair or replace such property that has
been destroyed or damaged

What is the Period of Restoration?

The Purpose: To enable insureds to continue to receive lost profits until the insured location can be rebuilt or refurbished, or a suitable alternative location can be secured

(Duane Read, Inc. v. St. Paul Fire and Marine Ins. Co., 411 F.3d 384 [2nd Cir., 2005])

An insured cannot be forced to move to non-suitable locations without being permitted time to make necessary alterations and updates to the new location

(Duane Read, Inc. v. St. Paul Fire and Marine Ins. Co., 411 F.3d 384 [2nd Cir., 2005])

What is the Period of Restoration?

The Standard: The Period of Restoration should be tied to remedies within the control of the insured e.g., finding suitable alternatives and/or commissioning repairs

(Lava Trading, Inc. v. Hartford Fire Ins. Co., 365 F.Supp.2d 434 [SDNY, 2005]).

Courts may be permitted to extend the Period of Restoration to account for likely delays, and alterations to be completed.

(Anchor Toy Corp., 4 Misc.2d 364, 155 NYS2d 600 [NY Sup. Ct., 1956])

What is the Period of Restoration?

- Period of Restoration on insured/apartment building owner's claim for BI ended when tenants were permitted to return to Southern Manhattan after 9/11

(Broad Street, LLC v Gulf Ins. Co., 37 AD3d 126, 832 NYS2d 1 [1st Dept., 2006]).

- Period of Restoration ended when store reopened on 9/12/01, notwithstanding that pedestrian traffic in the area was significantly reduced

(Royal Indemn. Co. v. Retail Brand Alliance, Inc., 33 AD2d 392, 822 NYS2d 268 [1st Dept., 2006]).

What is the Period of Restoration?

- Where the insured chooses not to relocate after its store was destroyed, the Period of Restoration is governed by calculating how long it would take to resume operations at another location. The Period of Restoration will not run until the building housing the insured's store can be rebuilt.

(The Children's Place Retail Stores, Inc. v Federal Ins. Co., 37 AD3d 243, 829 NYS2d 500 [1st Dept., 2007])

Is there Extra Expense Coverage?

As found in most policies, Extra Expense is defined as:

... necessary expenses you incur during the “period of restoration”
that you would not have incurred if there had been no
direct physical loss or damage to property caused by or
resulting from a Covered Cause of Loss.

Is there Extra Expense Coverage?

Extra Expense Coverage Applies to:

- Expenses incurred in relocating business operations (people, equipment, etc.)
- Updating alternative locations
- Repairing, replacing or restoring lost information
- Any other expenses aimed at minimizing the suspension of business

Is there Extra Expense Coverage?

Extra Expense Coverage May Not Apply to:

- Gratuitous payments made by the Insured to a Third-Party to ensure good will (Forestview The Beautiful, Inc. v. All Nations Ins. Co., 704 NW2d 773 [Minn. Ct. App., 2005])
- Losses where there has not been a permanent suspension of business operations (The Commerce Ins. Co. v. Sentry Ins. Co., 1998 Mass Super. LEXIS 62 [Mass. Super Ct., 1998]).
- Costs incurred in constructing a replacement premises (Thompson v. Threshermen's Mut. Ins. Co., 493 NW2d 734 [Wisc. Ct. App., 1992])

Is there Civil Authority Coverage?

b. Civil Authority

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by **action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises**, caused by or resulting from any Covered Cause of Loss.

Is there Civil Authority Coverage?

Civil Authority Coverage:

- Does not require physical damage at the insured premises but damage somewhere else
- Must be caused by a Covered Cause of Loss (usually Risk of Direct Physical Harm)
- Government action MUST PROHIBIT ACCESS to the insured location
- Must be a causal link between Civil Authority action and the loss of income claim

(Syufy Enters. v. Home Ins. Co., 1995 US Dist. LEXIS 3771 [ND Cal., 1995]).

Is there Civil Authority Coverage?

- Although all flights were grounded after 9/11, Civil Authority coverage did not apply because the Order did not preclude access to the insured's parking garage
(Philadelphia Parking Auth. v. Federal Ins. Co., 385 F.Supp.2d 280 [SDNY, 2005])
 - Similar decisions also precluded coverage for airport shops, and hotel vacancies.
- City Ordered curfew did not preclude access to the insured's business
(Syufy Enters. v. Home Ins. Co., 1995 US Dist. LEXIS 3771 [ND Cal., 1995]).

Are there any Applicable Exclusions Available?

- Enforcement of Law or Ordinance
- Government Action (unless Civil Authority Applies)
- Virus
- War
- Water

Valuation of Damages

- Payment made for damaged inventory may be offset from any claim under the BI coverage

(J&R Electronics, Inc. v. One Beacon Ins. Co., 35 AD3d 169, 825 NYS2d 462 (1st Dept., 2006)

- Losses that are recovered after the business re-opens are not recoverable

(Fireman's Fund Ins. Co. v. Holland America Line Westours, 2002 US App. LEXIS 244 [9th Cir., 2002]).

- PPP/Cares/Government Funding?

Casualty Claims

- What an we expect with 63,000+ deaths, 1,000,000+ illnesses, government closures, and business losses?
 - Wrongful death cases
 - Bodily injury cases
 - Suits against municipalities for unlawful “takings”
 - Premises liability claims
 - Malpractice claims against nursing homes, insurance agents and brokers
 - ADA Claims

Casualty Policies

- Commercial General Liability - Premises
 - Fungi, bacteria (mold), virus, exclusions.
 - Pollution exclusions
 - Communicable disease exclusions are more common in personal lines policies
- Professional Liability (Malpractice)
 - Nursing homes, physicians, insurance agents and brokers.
- Government Errors and Omissions
- Employment Practices Liability Policies
- Product Liability

State Legislative Proposals

Currently pending:

- Two bills in Louisiana
- One in Massachusetts
- One in New Jersey
- Three in New York
- One in Ohio
- Three in Pennsylvania
- One in South Carolina

Assembly Bill A10226B

- Retroactively construes Business Interruption coverage to include coverage during a period of a declared COVI-19 state of emergency.
- Applies to insured with fewer than 250 employees.
- Carriers to apply to DFS for funding reimbursement; DFS then charges back the industry based on proportion of net written premium.
- Nullifies virus or bacteria exclusions.

Federal Legislative Proposals

As of May 1, there were two proposals in Congress, both introduced on April 14

- H.R. 6494 -- *Business Interruption Insurance Coverage Act of 2020*, which would retroactively require carrier who sold BI coverage to provide insurance for business closures resulting from viral pandemics or forced government closures and,
- H.R. 6497, the *Never Again Small Business Protection Act* which would provide BI coverage, in the future, for government closures due to national emergencies.

For Those Who Dabble in NY Coverage Law

- Bi-weekly newsletter, *Coverage Pointers*
- Only by e-mail
- Entertaining and educational
- Send email to sep@hurwitzfine.com

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