



COVID-19 & BUSINESS INTERRUPTION COVERAGE: ONE RISK MANAGER'S PERSPECTIVE

To date, most of the discussion about the role of insurance coverage during the COVID-19 crisis has focused on the availability of business interruption coverage.¹ Commentators have pointed out the obstacles to coverage that may be presented by policy terms requiring a connection to physical damage, or by specific policy exclusions for pandemics and other events. At the same time, state legislatures – most notably in New Jersey – have begun to step into the fray with proposed legislation requiring insurers to pay on business interruption claims in spite of such limitations and exclusions. Finally, the first lawsuits against insurers for claims of business interruption coverage are already starting to emerge.

During my tenure as the senior EHS counsel for a chemical manufacturing company, I also served in the role of corporate risk manager. As a result of this experience, questions about the availability of business interruption coverage have prompted me to think about how I might respond as a risk manager. Before I get into that though, I would like to lay out one possible scenario for how this issue may ultimately play out. This scenario involves quite a bit of speculation, but I do believe it is plausible. So, here it is:

- Given the current environment, there is a good chance that the New Jersey legislature carries through with its promise to enact legislation requiring insurers to provide business interruption coverage to insureds, specific policy limitations and exclusions notwithstanding.
- Several other state legislatures may follow suit. Still more state legislatures may either threaten similar legislative action, or at least enact legislation that would provide more limited relief to insureds with business interruption coverage. Several state regulatory authorities may try to provide similar relief. The federal government may also get involved at some point.
- State attorney general offices may step into the fray with lawsuits against insurers demanding that they provide business interruption coverage to their insureds. This may lead to a “snowball effect” wherein litigation is initiated by several state attorneys general, and then more – perhaps as many as 20 or 30 – join in.

¹ While business interruption coverage can be found in a variety of different types of insurance policies, including standalone business interruptions policies, it is most commonly found in property insurance policies.

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- Insurance carriers – including some of the largest in the industry – may begin to raise concerns about whether sufficient reserves exist to cover all of the potential claims in play.
 - The upshot of all of this may be some type of “global settlement” of COVID-related business interruption claims, wherein the insurance industry agrees to bear part of the load for these claims. Alternatively, or in parallel, there may be similar settlements that only apply with respect to certain states.
 - Current legislative and regulatory efforts to provide such relief seem to be targeted towards smaller businesses. In addition, such relief seems to be focused more on specific exclusions for pandemics and other similar events, rather than on coverage limitations that require loss due to business interruption to be connected to some type of physical loss. Given these facts, it is likely that any settlements would be similarly targeted. However, all of this could evolve and change in the lead up to a settlement, even if it means larger insureds recovering only “cents on the dollar” for their respective claims.
 - Any such settlement may limit eligibility to those insureds who submitted notices of business interruption claims prior to the date of such a global settlement, or perhaps even some earlier date.

As I noted, this scenario relies on a lot of speculation. Nonetheless, it illustrates the broader point that these are not normal times. There appear to be enough facts on the ground – such as the legislation contemplated in New Jersey and the existence of litigation related to business interruption coverage – to justify a careful vetting of the question of business interruption coverage.

This is why I would be inclined to put property insurers on notice of potential business interruption claims even if at first glance, terms requiring a connection to physical damage or exclusions pertaining to pandemics or other events presented obstacles to such claims. Of course, I would want to first consult with outside professionals such as insurance brokers, outside coverage counsel, and forensic loss accountants about the strategic and tactical considerations relating to such an action. An important lesson I learned during my tenure as a corporate risk manager when it came to seemingly novel claims was “when in doubt, vet it out.” What I mean by this is that while it is necessary for a risk manager to have an intimate and detailed understanding of the company’s business operations and insurance coverage, such knowledge can work against the risk manager if he or she does not vet questions concerning claims that might initially seem novel, or even dubious, based on a baseline knowledge of the company’s business operations and insurance coverage under ordinary circumstances.

There are two other important lessons I learned during my tenure as a risk manager. The first is to maintain good communications and relationships with the company’s insurance carriers. The second is to keep senior leadership well-informed on the company’s insurance and risk



program, especially when it comes to significant claims. Thus, if I were to pursue business interruption coverage in connection with the COVID-19 crisis, I would continue to engage in the basic “blocking and tackling” that is part of running a corporate insurance and risk management program. This includes the following:

- When it comes to putting insurers on notice about actual or potential claims, the general rule is the earlier, the better.
- Even after insurers have been put on notice about a claim, frequent communication with the insurance carriers’ claims managers and adjusters is important. When an insurer is faced with significant claims, its claims managers and adjusters will come under immediate pressure to acquire enough information to allow the insurer to make reasonable estimates of necessary reserves. The claims managers and adjusters will look to the insureds for information – even if preliminary and incomplete – that can be used to estimate reserves.²
- While frequent communication with an insurance carrier’s claims managers and adjusters is important, there are two additional points that need to be considered in connection with such communications. First, any such communications should be closely coordinated with the company’s legal strategy. Questions of attorney-client privilege or attorney work product need to be considered when formulating strategies and tactics for such communications. Second, according to some of the recent accounts about business interruption coverage in connection with the COVID-19 pandemic, some insurers are taking very firm positions that business interruption coverage is not available, and that any claims relating to such coverage will be denied. Communications with insurers that have taken these positions may be futile, and companies that find themselves on the receiving end of such strongly articulated positions may simply find themselves on an adversarial litigation footing vis-à-vis their respective insurers.
- This crisis is likely to last long enough for the next round of insurance renewals to take place while questions about pending business interruption claims remain unresolved. Insurance underwriters will probably have many of the same questions that their claims managers and adjusters have. (One cannot necessarily assume that there is complete sharing of information between an insurance carrier’s underwriting and claims management functions.) In addition, underwriters are likely to have questions about the company’s supply chains and business continuity plans. Insureds need to be prepared for such questions.
- I raise the point in the previous bullet point because, while the ultimate resolution of any COVID-related business interruption claims may be critical to a company’s business

² For the sake of simplicity, I frequently refer to an “insurer” or “insurance carrier” in the singular. In reality, many larger and more complex property insurance programs consist of a syndicate of multiple property insurers. Such syndicated programs will typically have a single claims adjuster that acts on behalf of all insurers.



operations and financial performance, continuing to maintain a robust and complete insurance and risk program is critical as well. This is particularly important in certain industries, such as the chemical manufacturing industry, where the number of participating insurers and available capacity are limited. This is also important in the current property insurance marketplace, where double-digit increases in rates and premiums over the last year or so have been commonplace.

- Throughout the on-going pandemic, it will be essential to keep senior leadership informed on how the company's insurance and risk program is responding. This should include whether the company is pursuing any claims for business interruption coverage, as well as the status of any such claims. Board members, CEOs, CFOs, general counsel, business unit vice-presidents, and other company leaders are probably reading or hearing the same stories about business interruption coverage in relation to the COVID-19 pandemic. Some of them may have questions about the company's response. Senior leadership will want to know what, if any, recovery can be expected and will want to know the rationale for such expectations. In addition, they will expect that all reasonable steps are being taken in pursuit of any business interruptions claims, even if recovery is unlikely or may be limited.

One final point to keep in mind is that these thoughts and suggestions are based on my own personal experience as a risk manager for a relatively large chemical manufacturing company. The types of business interruptions that I am considering involve impacts on the supply chain and the ability of manufacturing facilities to operate at full capacity. The types of business interruption coverage available, and the types of situations faced by smaller businesses or businesses in other industries, are likely to be considerably different. To take just one example, business in the restaurant industry or the retail sales industry may be more directly impacted by local government shutdown orders or by a complete lack of customer traffic. These types of impacts probably require considerably different approaches to questions of business interruption coverage than what I have suggested.

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