

# COVID-19 Update: Business Interruption Insurance Litigation and Related Legislation

As state and local governments continue to issue civil orders directing the mandatory shut down of commercial activity deemed non-essential or non-life sustaining, we can expect to see an increase in claims and litigation wherein business interruption insurance policy holders seek coverage for lost income due to state mandated closures, and the introduction of corresponding legislation which could require that business interruption insurers cover such loss.

Business interruption coverage is designed to protect businesses from lost revenue, which may result from a natural disaster, emergency or other devastating event. The purpose is to ensure that a temporary business shutdown does not necessitate a permanent closure. Most policies include coverage for property damage and any lost profits that may result. Coverage may also include loss of income due to interruption in the supply chain, lack of ingress or egress to the facility, lost income due to an evacuation, or shut down order issued by a civil authority. Insurers argue that most policies require actual property damage in order to activate coverage.

The application of this type of policy language to COVID-19 related circumstances has already begun. In the first case of its kind specific to COVID-19, a large seafood restaurant in New Orleans' French Quarter recently filed a declaratory judgment action asking a state court to confirm that its business interruption policy with Lloyd's of London would cover lost income due to civil-authority shutdowns or quarantine directives. So as to conform to the language of the policy, Plaintiffs specifically argue that coronavirus is "physically impacting public and private property, and physical spaces in cities around the world" and "any effort...to deny...that the virus causes physical damage and loss would constitute a false and potential fraudulent misrepresentation that could endanger policyholders and the public." The lawsuit further argues that contamination of the insured premises would be a "direct physical loss needing remediation to clean the surfaces of the establishment." See *Cajun Conti, LLC et al. v. Certain Underwriter at Lloyd's, London, et al.*, Civil District Court for the Parish of Orleans, Louisiana. While this matter remains pending, and its determination is uncertain, it is not unreasonable to expect that the loss of business income resulting from mandatory business closures will initiate extensive new litigation as to the application of COVID-19 related events to business interruption provisions.

At the same, time, some state legislators will seek to mandate coverage for business interruption claims. In New Jersey, Assemblyman Roy Freiman introduced a bill on March 16 that would force insurers to pay certain COVID-19 business interruption claims, even if the policy language provides for a specific virus exclusion. The bill would cover businesses with fewer than 100 employees working at least 25 hours a week, and would mandate coverage regardless of contractual language. The proposed bill would be retroactive for any insured with a business interruption policy in place from March 9, 2020, when Governor Phil Murphy declared a state of emergency due to COVID-19. If enacted, it will undoubtedly face constitutional challenges specific to the Contracts Clause found in Article 1 of the United States Constitution, which limits the ability of states to interfere with private contracts.

Like the coronavirus itself, these legal issues are novel and complex. Clients and attorneys should review commercial property insurance policies generally, and business interruption provisions specifically, so as to determine the legal challenges and opportunities that may arise during and after the current health crisis.