

Business Interruption or Business Income Coverage for Coronavirus Disease 2019 (COVID-19) Disruptions

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With recent events affecting commerce worldwide, as well as here at home, businesses of all sizes have been evaluating their individual situation and the existence of any possible resources that may exist to help the business weather this unprecedented financial storm. This evaluation often includes questioning whether their insurance policy or policies may provide some coverage for the interruption or suspension of normal business operations, as well as the resulting loss of income.

Nationally, Texas presents an unusual market for most business insurance. Most Texas business operations have commercial general liability and commercial property insurance policies to cover the physical assets of their business. Due to the extreme nature of the Texas environment (e.g., hurricanes, hail, windstorm, flooding), the Texas business property market has been a challenging one as compared to the rest of the country. For these and other related reasons, a significant portion of the Texas business marketplace for property insurance is often insured by a specialty category of insurance known as "surplus lines." Surplus lines insurance is exempt from most of the statutory requirements that apply to so-called "standard insurance," which has standardized policy language and coverage requirements that are common across most standard insurance policies. Surplus lines policies provide the potential for coverage that likely does not exist with standard policies.

Importantly, any evaluation of whether there may be coverage for COVID-19-related business interruption or business income losses will begin with a careful analysis of the specific policy language at issue and its application to the specific facts and circumstances of the claimed damage or loss. With that said, unfortunately most, if not all, standard commercial property policies may not provide coverage for **Business Interruption** or **Business Income Loss** resulting from exposure to COVID-19. The following is a summary of certain key issues with respect to standard commercial property policies:

Policy Language—Direct Physical Loss of or Damage to Property from a Covered Loss

Under most commercial property policies that include coverage for business interruption or business income loss, these secondary coverages must be triggered first by the occurrence of an actual direct physical loss of or damage to the covered property by a covered cause of loss. Most, if not all, insurers would likely take the position that the presence of a virus, including COVID-19, being found on or at the insured's covered property does not constitute "direct physical loss of or damage to [the insured] property." Insurers would also likely take the position (and many already have done so publicly) that the mere fear of the possibility of the presence of the COVID-19 on insured property does not constitute a direct physical loss of or damage to the insured property. Therefore, lacking the required physical damage to property, the policy's resulting business interruption or business income loss coverage that exists after a direct physical loss has occurred, would not likely be "triggered" to apply. Accordingly, the key issue will be whether the presence of an intangible such as a virus (e.g., COVID-19) meets a policy's direct physical loss or damage requirement. If the requirement is met, there may be coverage under the policy's business interruption or business income loss coverage.

Virus Exclusions

Even if a policy's direct physical loss or damage requirement is met, most standard commercial property policies include the "exclusion of loss due to virus or bacteria" endorsement. This endorsement expressly excludes "loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." The endorsed exclusion applies to "coverage under all forms and endorsement that comprise this coverage part or policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority." As a consequence, again, even if coverage is arguably triggered under the specific policy language, insurers will likely take the

position that this common endorsement excludes any damages due to COVID-19. As a result, a policy's exclusionary language must be examined.

However, all is not lost. In certain circumstances, commercial property policies may include coverage extensions and endorsements that kick in to provide coverage for non-physical damage. Moreover, there may be coverage when a business is shut down due to an order of civil authority. Furthermore, for the reasons set out above regarding the surplus lines insurance market, many surplus lines policies do not follow standardized language, policy forms, etc. Often, surplus lines policies, including Lloyds of London policies, are negotiated policies with unique language, often referred to as script policies. These policies may have language that is unique to your business commercial property policy. This means that surplus lines policies are often written differently from standard commercial property policies. Additionally, surplus lines policies will often vary in language from one surplus lines insurer to another. For this reason, there is no one size fits all answer to surplus lines policies and what they cover for **Business Interruption** or **Business Income Loss**.

How do you know if you have a surplus lines policy? Surplus lines insurance policies are required to have a notice in the early pages of the policy informing you that "This insurance contract is with an insurer not licensed to transact insurance in this state...". If you find your commercial property policy has such a notice, you very likely have a surplus lines policy.

With that said, not all surplus lines agents manage to include the required notice in their policies issued to you. Winstead's Insurance attorneys have the knowledge, experience, and resources to quickly assess your policy to determine if it is a surplus lines policy regardless of whether the notice was included or not.

In closing, coverage for COVID-19-related **Business Interruption** or **Business Income Losses** will turn on the specific policy language at issue, its application to the specific facts and circumstances of the claimed damage or loss, and the particular jurisdiction where the claim is made. Indeed, in order to assess whether your commercial property policy or whether a surplus lines policy provides coverage for loss of or damage to property, a thorough assessment of your policy's specific policy language must be done relative to the facts and circumstances of your specific loss. Winstead's Insurance section has attorneys with over 30 years of individual experience in the insurance industry and the ability to review policy language such as surplus lines coverage.

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