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## INSURANCE ALERT

### DOES YOUR INSURANCE POLICY COVER LOSSES DUE TO THE PANDEMIC?

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The California Insurance Commissioner recently issued a Notice requiring insurers to accept, acknowledge, and fairly investigate all claims submitted by insureds under Business Interruption insurance provisions for losses due to the effects of COVID-19. The Notice does not address the basic question of whether business losses caused by the pandemic are covered under such policy provisions. The insurance industry asserts that commercial insurance coverage is not intended to address these losses. The National Association of Insurance Commissioners issued the following statement:

*Business interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19 and therefore include exclusions for that risk. Insurance . . . is typically not well suited for a global pandemic where virtually every policyholder suffers significant losses at the same time for an extended period . . . [I]f insurance companies are required to cover such claims, such an action would create substantial solvency risks for the sector, significantly undermine the ability of the insurers to pay other types of claims, and potentially exacerbate the negative financial and economic impacts the country is currently experiencing.*

In other words, the insurance industry prioritizes the preservation of profit margins over the protection of its insureds. The industry is using a variety of rationales to avoid coverage of pandemic related losses.

#### 1. The Insuring Provision

The standard insuring provision for business interruption or business income loss contains some variation of the following language:

*We will pay for 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 the direct physical loss, damage, or destruction to property. The loss or damage must be caused by or result from a covered cause of loss."*

Another form of coverage has the following language:

*We will pay for 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 direct physical loss or damage to property at premises which are 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 or result from a Covered Cause of Loss.*

Insurers are denying claims made under such policy provisions on the grounds that the effects of COVID-19 do not constitute "physical loss, damage, or destruction to property." The counter argument is that the presence, or potential presence, of COVID-19 in a business renders the premises unsafe and unfit for its intended use, which constitutes physical property damage to the insured property. The definition of the word "damage" includes both "to inflict physical harm on" and "to have a detrimental effect on." The presence in the community of the COVID-19 virus clearly has a detrimental effect on insured businesses. The virus itself exists in the community, and as such has a physical presence. Insurers will counter that a virus, which can either be eliminated by cleaning or which ceases to be communicable after a period of time, is not "damage" because it does not permanently alter the property where it may exist.

Another policy provision that might provide coverage is the "Civil Authority" provision. The standard policy provision reads:

*When a Covered Cause of Loss causes damage to property other than property at the described premises, 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, provided that both of the following apply:*

*(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and*

*(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.*

*Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.*

*Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end:*

*(1) Four consecutive weeks after the date of that action; or*

*(2) When your Civil Authority Coverage for Business Income ends;*

*whichever is later.*

Other policies may have a simpler version:

*Interruption by civil or military authority. This policy is extended to cover the loss sustained during the period of time when, as a result of a peril not excluded, access to real or personal property is prohibited by order of civil or military authority.*

This provision was originally intended to cover natural disasters that affected properties adjacent to an insured property, which caused a governmental agency to issue an order prohibiting access to the insured property. Insurers take the position that these provisions do not provide coverage because (i) they do not change the underlying insuring agreement requiring “physical damage” which does not apply to COVID-19, and (ii) there is no “order” closing the insured property. However, to the extent that Governors have deemed businesses “non-essential” and directed employees not to come to work, the language of this type of provision may apply.

In addition, there are policy provisions that expressly provide coverage for losses due to “communicable diseases.” A typical policy provision reads:

*We will pay for the following under Communicable Disease Coverage:*

*Direct Physical loss or damage to Property Insured caused by or resulting from a covered communicable disease event at the premises described in the Declarations.*

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*If the Declarations show you have Business Income with Extra Expense Coverage . . . , we will pay for the actual loss of business income, rental value, or necessary extra expense or expediting expense that you sustain due to the necessary full or partial suspension of operations during the period of restoration. The suspension must be caused by direct physical loss or damage caused by or resulting from a covered communicable disease event at the premises described in the Declarations.*

If a policy contains this provision, the insurer may provide coverage for the business losses. Insurers will argue that the provision is intended to cover a limited outbreak at a particular location (i.e., Legionnaire’s Disease), and does not apply to a pandemic that is not limited to the subject property.

## **2. Exclusions**

Insurance companies add policy exclusions to avoid covering certain specific risks. In the aftermath of the SARS and Ebola epidemics, the industry formulated a provision that excluded coverage for losses due to viruses:

*We will not pay for loss or damage caused by or resulting from any virus, bacterium, or other micro-organism that induces or is capable of inducing physical distress, illness, or disease.*

The insurance industry is aggressively asserting this exclusion as a defense against claims for losses related to the pandemic. Last week an insurance company filed suit in a federal court in California against a well-known Los Angeles law firm, seeking a judicial ruling that this exclusion precludes coverage for such losses.

## **3. Current Legal Status**

Lawsuits seeking coverage have been filed across the country. Lawyers in other states have asked federal courts to

consolidate the cases into mass coverage litigations. The issue is likely to take some time to resolve. In addition, legislators in New Jersey, Ohio, Massachusetts, and New York have introduced legislation designed to force insurers to provide coverage, with retroactive dates and applying to companies of a certain size (the dates and coverage vary from state to state). No such legislation has passed so far, but the efforts are ongoing.

**TAKEAWAY:** Any company that has business interruption coverage should consider submitting a claim for any losses sustained due to the coronavirus pandemic. California's Insurance Commissioner has emphasized that insureds are entitled to a fair evaluation and prompt resolution of the claim. In the event that the insurer denies coverage, consult with an experienced insurance coverage attorney to determine the rights and options available under the language of the insurance policy in question.

Please do not hesitate to contact us if you have any questions regarding the above provisions.

Authored by:

Horace W. Green

T 925.944.9700

hgreen@brotherssmithlaw.com

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2033 North Main Street, Suite 720  
Walnut Creek, California 94596  
T 925.944.9700  
F 925.944.9701

[www.brotherssmithlaw.com](http://www.brotherssmithlaw.com)

