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Business Insurance Coverage in the Time of Covid

The COVID-19 pandemic has now been with us for almost two years. In that time, it has brought hardships and lost profits to many sectors of the business community, from hotels to restaurants to brick-and-mortar stores. As a result, a popular question has arisen among business owners: are my business losses covered under my business insurance? While the facts and circumstances underlying any individual insurance claim can vary greatly, New York federal and state courts have largely answered this question in the negative.

Generally, losses related to the cessation or limitation of business activities are covered, if at all, under a business interruption clause. Unfortunately, many business interruption clauses contain language limiting coverage to lost income, additional business expenses or the general interruption of business caused by "loss or damage to real or personal property caused by a peril covered during the policy period." *See, e.g., Mangia Restaurant Corp. v. Utica First Ins. Co.*, 72 Misc. 3d 408, 413 (Sup. Ct. Queens County 2021). Absent direct physical loss, New York courts have routinely denied coverage due to closures based on the COVID-19 pandemic. For example, in *Rainbow USA Inc. v. Zurich Am. Ins. Co.*, -- Misc. 3d --, 2022 N.Y. Slip. Op. 22019, at *4 (Sup. Ct. Kings County 2022), the court surveyed New York courts addressing the interplay of COVID-19 closures and business interruption clauses and found "there has been a unanimity that without any direct physical loss there can be no claims for business interruption insurance due to government shutdowns in the wake of COVID-19." *See also 10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.*, 21 F.4th 216, 222 (2d Cir. 2021) ("We therefore hold, in accord with … every New York state court to have decided the issue, that under New York law the terms 'direct physical loss' and 'physical damage' in the Business Income and Extra Expense provisions do not extend to the mere loss of use of a premises, where there has been no physical damage to such premises; those terms instead require actual physical loss of or damage to the insured's property.").

Courts have come to this conclusion, particularly with respect to COVID-19, because even with proof that the virus physically attaches to property, such attachment "would not []constitute[] the direct, physical loss or damage required to trigger the policy coverage, because such presence can be eliminated by 'routine cleaning and disinfecting.'" *Mangia Restaurant Corp.*, 72 Misc. 3d at 415. Further, even if a policyholder could establish the physical presence of COVID-19 on the property, "any business income losses were caused by the precautionary measures taken by the state to prevent the spread of COVID-19, rather than by direct physical loss of, or damage to, the property." *See Id.* The presence or absence of a virus exclusion clause does not alter this analysis. *See Kim-Chee LLC v. Philadelphia Indem. Ins. Co.*, 2022 WL 258659, at *2 (2d Cir. 2022).

Insureds have also sought coverage for business losses under "civil authority" clauses. Such clauses are generally triggered when a civil authority (a/k/a governmental entity) prohibits access to the insured's business premises based upon a covered loss to the property in the immediate area of the insured's property. Courts have rejected this argument for two reasons. First, as with the more traditional business

interruption clause, civil authority cluses typically require a direct physical loss to the property or surrounding area to be triggered. *See Mario Badescu Skin Care Inc. v. Sentinel Ins. Co.*, 2022 WL 253678, at *6 (S.D.N.Y. 2022). Second, state and local municipal orders did not prohibit, but rather limited access to businesses. *Id.; see also Mangia Restaurant Corp.*, 72 Misc. 3d at 416. For example, in Mangia Restaurant Corp., the court held "an essential element of the civil authorization coverage has not been demonstrated" because the insured "could have continued to operate its restaurant under a 'limitation.'" 72 Misc. 3d at 416.

Accordingly, an insured's claim will generally not be covered unless they can establish a direct physical loss associated with the COVID-19 pandemic or that a government order prohibited, as opposed to limited, access to the insured's property. To underscore this, only 4.5% (3/66) of the business interruption cases filed in New York State or federal courts alleging business losses stemming from the COVID-19 pandemic have survived a motion to dismiss intact. *See https://cclt.law.upenn.edu/judicial-rulings/*. Nationally, only 8.8% (67/756) have continued to discovery.

However, there is a glimmer of hope for those who seek coverage for COVID-19 business losses. As with all contracts, determining insurance coverage starts with the plain language of the policy itself. In *New York Botanical Garden v. Allied World Ins. Co. (U.S.) Inc.*, Index No. 803872/2021E, Doc. 34 (Sup. Ct. Bronx County), the relevant insurance policy had a business interruption clause that reduced recovery under the policy "to the extent that the insured can resume operation, in whole or in part." Based on this language, the court held "a complete denial of access to the Plaintiff's property is not required to trigger contingent business interruption coverage." *Id.* at 9. The court further determined the policy language did not require physical damage to the insured's property to be triggered. As a result, the insured's claim survived dismissal and proceeded to discovery. *Id.*

It is important to have informed counsel review any policies that could potentially cover business losses stemming from the COVID-19 pandemic. While coverage may exist, other exclusions could hamper your ability to recover under any given policy.

For any questions about this issue, please feel free to contact Kevin Cope, any attorney in Bond's Litigation practice or the attorney at the firm with whom you are regularly in contact.

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