

Coronavirus – Business Interruption Losses / Insurance Coverage Possibilities

Preliminary Thoughts from CHTA Allied Member Stan Smith, Smith Orloff & Associates

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Under standard commercial insurance policies coverage for business interruption (“BI”) losses have to be triggered by a covered peril (*e.g., say a fire or hurricane*) and damages to the property insured under the policy must occur “material damages”. And I should add the property owner (the “insured”) would needless to say have purchased BI coverage, not just property coverage. I will address possibilities in this regard.

An additional area for BI coverage is what is called consequential BI coverage in the form of Civil Authority coverage, however, not all standard “off the shelf” policies have this coverage. Higher possibilities for this coverage exist under “manuscript” type policies, or policies where the terms and conditions are negotiated or written to the situation at hand.

Thus, in regard to the coronavirus, loss of revenues can come about through situations such as the following:

1. Guests simply cancelling their reservations
2. Airlines cancelling flights under their own discretion
3. Guests or employees on premises contaminating the insured property causing closure
4. Airlines cancelling flights under government orders
5. Governments under civil authority closing their borders

Under situations #1 and #2, it is difficult to envision where coverage might kick in.

Regarding situation #3, depending upon the insured perils covered under a policy (and the excluded perils language) perhaps there could be a case made for taking the position that the insured property has been damaged by the virus – the property is “damaged” which then allows for BI coverage to come into play. With regard to excluded perils under most policies, I believe it is generally a known fact that mold and related type items are an excluded peril; i.e., there is no coverage/insurance to pursue. In previous epidemics such as SARS and Ebola, coverage was often limited by operation of specific exclusions relating to viruses and biological contaminants. Thus, under traditional property policy forms, losses related to coronavirus may well be excluded or limited. So, in all cases one would really need to read their own policy language to see if there might be coverage for coronavirus. And if coverage does exist costs to decontaminate and sanitize the property would exist. Typical language for this BI coverage is as follows:

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 of 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...

Regarding situations #4 and #5, there is a much better chance for coverage to exist for BI, but again the language in the policy will dictate as to whether or not a claim for BI can be made. In this endeavor the extreme measure of a Government of a Caribbean Country closing their borders off to travel or restricting travel in some manner would certainly be a Civil Authority action. This Civil Authority coverage is intended to apply where access to an insured's property is prevented due to an order issued by a civil authority (*local and/or foreign??*) and a BI claim results if the loss: (i) is caused by an action of civil authority; (ii) involves prohibited access to the insured's property; (iii) is caused by direct physical loss of or damage to property other than the insured's property; and, (iv) the loss or damage to property is caused by a covered loss under the policy. And this language can vary.

The next issue in all situations, if a claim can be made for the lost revenues / BI loss related to the virus, is the period of time that will be covered, known as the "period of restoration". In the case of #3, the period of time for a claim would in most cases be the period of time to restore the premises to its pre-loss condition with due diligence and dispatch, which if it takes several weeks to sanitize a property that would be the period for which a BI claim could be made. And this time period can be significantly less than the period impacted by the virus. However, if a policy should also provide for Extended BI coverage, this additional coverage would kick-in at the end of the restoration period for the designated period of time specified in the policy, which could be from 30 to 90 days or greater. I have one client with a 365-day extended BI coverage.

With regard to Civil Authority, a policy will set forth a time period for this coverage, which can be 30 days or longer, and might well have a "time period" deductible. Regarding situation #3, the deductible can vary by policy from a dollar amount to a time period.

In summary with this coronavirus as with other previous such health situations, coverage questions and the amount of coverage will most certainly develop. As with all types of "risks", new and/or old, new coverages and policy endorsements can be written going forward, which is something that CHTA and their designated broker could work on developing. To enable coronavirus BI claims to be successful today under most existing policy forms, issues that need to be addressed include the specific nature of the loss and its "damage" and "local" (*and perhaps foreign*) jurisdiction legal interpretations of various policy provisions that may afford coverage. And policies throughout the Caribbean can and will probably differ. Each Member has to review their own policy.