



437 Liholiho Street
Wailuku, HI 96793

Insurance Claim Management Throughout Hawaii

Phone: 808-856-3041
Fax: 888-428-2352

The COVID 19 Pandemic and Insurance Coverage Issues

The world is reeling from the impact of the COVID-19 (“Coronavirus Disease 2019”). Pandemics occur when new viruses emerge which can infect people easily and spread across borders via person to person contact in a persistent manner.

While it is impacting the world’s general population, it’s also heavily influencing various types of businesses as it expands its reach. Thus, there has been significant disruption of global supply chains, and possible forthcoming government-imposed closure orders. This situation is causing insurers and policyholders to closely examine whether their business insurance policies can be construed to provide coverage for the loss of business associated with this developing pandemic.

This commentary will discuss what various coverages that might come in to play, should a policyholder decide to make a claim.

1. Coverage Type: Business Interruption (“B.I.”)

Business interruption insurance is intended to protect the probable earnings of a business. It is also designed to do for the insured, in the event of a loss, what the business would have done for itself if an interruption in the operation of the business, had the event not occurred. Thus, B.I. insurance is designed to indemnify the policyholder for losses arising from their business’s inability to continue its normal operations and functions. There is no prescribed or accepted formula for determining the actual loss of net profits and business expenses covered by business interruption insurance. The method employed, however, should test the insured’s historical profitability, past experiences, the likelihoods of the future, and the loss all should be determined in a practical way. The insured’s books and accounting system are not controlling in determining the recoverable loss under the policy of insurance. On the other hand, they are not irrelevant and should be given such weight as practical judgment dictates.

Three separate components must be connected in order to satisfy the requirements of the typical business interruption insuring agreement:

- A. covered cause of loss must cause *direct physical loss of, or damage to*, the property at the described premises; and
- B. The covered loss must cause a *necessary suspension or interruption of operations*; and
- C. The business income loss must be *caused* by the suspension or interruption.

Because of prior pandemic outbreaks, many property policies now contain specific exclusions for property damage arising from viral or bacterial related losses. Those insurers that have not added the exclusionary language to their property policies, are likely to experience challenges and coverage questions as to whether the COVID-19 is capable of triggering business

interruption coverage under their policy endorsements. For those impacted carriers, one of the first threshold questions to be addressed is whether COVID-19 can result in direct physical loss or damage to covered property. Thus, an employee who worked in and possibly infected a company's business premises immediately before being tested positive for COVID-19 suggest that the insured property's policy may afford the owner for B I coverage. Some courts have found that the loss of use or *inhabitability* of an insured property, under certain circumstances, can constitute "physical loss or damage" while other mainland courts have not.

2. Coverage Type: Supply Chain / Contingent Business Interruption ("CBI")

For businesses that are dependent on supply chain production, contingent business interruption (CBI) insurance often provides coverage when a supplier suffers a *direct physical loss* to its property that impairs its ability to provide delivery of goods or materials to its customers. CBI insurance may also cover economic losses, including increased costs from lost or reduced operations resulting from physical damage on the premises of one of the business's *named or unnamed supplier*. CBI policies may also cover loss of services to the insured business, such as loss of utility services or loss of markets for the business's own products.

What comes to mind are the wholesale shutdown of restaurants, theaters and other such consumer venues that are being barred by government entities that, in order to survive, need to remain open to the public. That said, CBI insurance likely includes the same conditions and exclusions found in a standard commercial property policy. In other words, the same issue remains regarding whether the COVID 19 could result in direct physical loss or damage to the insured's covered property.

3. Coverage Type: Civil Authority

Many property policies extend business interruption coverage for losses arising from "civil authority" orders that prejudice or prohibit access to an insured's property. The scope and limitations of business interruption coverage under such endorsements vary based upon whether a "direct physical loss" will be required. Note that insurers may also issue Civil Authority Coverage meant to address a policyholder's specific needs based on expenses, geography, disease, calendar year, voluntary or mandatory orders, direct physical loss, a designated risk or other differing criteria.

Some courts have concluded that where the insured businesses were closed by order of a *civil authority*, physical damage to the insured premises was not a prerequisite to the insurer's obligation to reimburse the insured for the net losses resulting from the event. Insurers, however, would usually decline coverage due to a voluntary decision not to go forward with an event or a choice not to gather any group of people.

4. Coverage Type. Worker's Compensation

Cases in which an employee is exposed to COVID 19 onsite likely wouldn't be considered workers' comp cases, unless the exposure was sufficiently intertwined with their job. This is already

true of situations in which an employee catches a cold or the flu. In the case of first responders, however, it should be fairly easy to demonstrate work relatedness, given that they routinely deal with the general population and are more vulnerable to become infected.

5. Coverage Type: General Liability

General liability insurance carriers will likely be pulled into the fray as companies face lawsuits over allegedly failing to protect customers from the coronavirus. Claims of negligence resulting in bodily injury typically fall under "Coverage A" of standard general liability policies. However, one of the prerequisites for coverage under that prong is that there be an accidental "occurrence," and some of the public may say that companies deliberately ignored critical information that could have prevented the spread of COVID 19.

In Conclusion, it appears that as we move forward, we may witness more broadening of these types of coverages relating to "non-physical" property damages. I am sure that, coming on the heels of that statement, more businesses will come to realize that these types of losses pose a serious threat to their operations and contingency planning and, therefore the insurance industry will increasingly be called upon to develop new endorsement products and will craft tighter exclusions in an effort to address these loss exposures. As of today, the New Jersey State legislators have introduced a bill (Assembly Bill 3844) that is meant to force insurance carriers to provide Business Interruption coverage for companies with 100 or less. Stay tuned, folks. This will surely heat up as COVID 19 expands its depth and reach.



Robert Hugh Joslin- CPPA
437 Liholiho Street Wailuku, Maui, Hawaii 96793
Phone: (808)856-3041

Website: www.hawaiipublicadjuster.com
FaceBook: Hawaii Public Adjusters

About the Author:

Robert Hugh Joslin is Hawaii's only Certified Professional Public Adjuster (CPPA) as designated by the Insurance Institute of America (IIA). He is the principle Public Adjuster at Hawaii Public Adjusters Corp where he also serves as its president. He is an active member of the National Association of Public Adjuster (NAPIA) serving as the nationally elected Officer-Secretary for NAPIA for the 2019/2020 term. He currently is NAPIA's Officer-In-Charge for the Professional Education, Professional Certification, Constitution & Bylaws Committees. He has been guest speaker at several symposiums covering topics such as Adjuster Ethics, Hawaii Property Claim Practices, and Hawaii Property Policy Coverages. He has given presentation before the Hawaii County Bar Association (HCSA), Legal Aid Society of Hawaii (LASH) and before several Hawaii policyholder groups that were initially denied insurance coverage for their claims including those losses relating to lava, tephra and Sodium Dioxide damages.