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“BUSINESS INTERRUPTION INSURANCE AND COVID-19”: A BRIEF RESPONSE AND A REMINDER ABOUT NOTICES OF CIRCUMSTANCE

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REMINDER FOR OUR CLIENTS WITH CLAIMS-MADE POLICIES, including professionals, directors & officers, fiduciaries, employers, and others: We strongly encourage you to review your policies for any obligations to provide a written notice of circumstances that may lead to claims being brought against you after the expiration of the policy period, *especially if that policy period expires soon*. While most of the industry is currently focused on recovering for business interruptions losses, your business should also take the steps necessary to be prepared for possible future lawsuits arising out of acts or omissions during this global crisis. In fact, already, a securities claim has been filed against Norwegian Cruise Lines for false or misleading statements about COVID-19 to entice customers to purchase cruises. We are happy to answer any questions that you may have.

Some of you may have seen the recent informational notice [“Business interruption insurance and COVID-19”](#) distributed by the Department of Consumer and Business Services (the “DCBS”). We thank the DCBS for being proactive in attempting to educate businesses on their business interruption policies; however, as described below, we have some concerns regarding the notice. As always, we encourage our clients to carefully review their policies.

- The DCBS notice states, “Your business interruption insurance policy should list or describe the types of events it covers. Events that are not listed on, or not described in, the policy are typically not covered.”
 - While some policies only provide coverage for named causes of loss, most policies provide “all-risk” coverage, which insures against all risks of loss *except those specifically excluded*. In other words, under an all-risk policy, the specific cause of loss need not be identified in the policy.
- As another example, the DCBS notice states, “any claim [for business interruption coverage] still needs to be related to *your* property damage for coverage to be triggered.” (Emphasis added).
 - That is misleading and incomplete. It implies that coverage exists only in cases of physical destruction of property, which is not true. A loss of the ability to use property for its intended purpose can qualify as well. Also, loss of or damage to your own property is one avenue to business interruption coverage, but so too is a governor’s order shuttering businesses based on the loss of or damage to the property of a third party.

- In a related example, the DCBS notice states, “Business interruption policies typically exclude coverage for a pandemic-epidemic. A state of emergency declaration does not change the terms of your business interruption policy and is unlikely to trigger business interruption coverage.”
 - This is overstated. Whether pandemics are excluded depends on the existence of a clearly worded exclusion, and many policies do not contain such exclusions. And it is not necessary to contend that an emergency declaration changes the terms of your policy. An executive order requiring you to shut down your business may trigger business interruption coverage without any change in policy language.
- As a final example, the DCBS notice states, “Most business interruption insurance covers only loss of income that results from physical damage to property, so it is unlikely that stalled inventory will trigger business interruption coverage.”
 - Even if that statement might be true in a given case, there may still be coverage if a supplier on which you rely shuts down its manufacturing facility because of the presence of the coronavirus in its facility or because of an executive order shuttering its business.

The point, again, is that generalizations are problematic. Insurance coverage is policy-specific. Losses from the coronavirus may well satisfy the policy’s initial insuring agreement, at which point the question is whether the policy contains an applicable exclusion. If your policy does not specifically excluded losses from “virus,” you may be able to recover for your business interruption losses. Even if your policy has a “virus” exclusion, the extent to which it applies greatly depends on how it is worded.

Because this issue is so important, and because there is presently so much misinformation, we are offering free reviews of our clients’ business property policies. We are happy to take a look and let you know where you stand. Simply email your policy to ksasse@pfglaw.com. Stay safe and well.