

SANGRA MOLLER LLP*Barristers & Solicitors***LEGAL CURRENCY***A Client Communication****BUSINESS INTERRUPTION INSURANCE AND THE COVID-19 PANDEMIC***

In the face of unprecedented economic losses caused by the COVID-19 pandemic, businesses will likely look to their insurance providers to mitigate such losses. One form of insurance that businesses may carry is business interruption insurance.

The following is a brief summary of business interruption insurance and the factors that a business must consider in assessing whether it can successfully make a claim for losses incurred in connection with the COVID-19 pandemic under such insurance.

I. WHAT IS BUSINESS INTERRUPTION INSURANCE?

Business interruption insurance typically provides coverage for lost income and/or increased operating expenses during a period of interruption resulting from what may be described as physical loss or damage to the insured property of the business.

Coverage will only be available if the interruption is caused by a "peril" that is covered by the business interruption insurance policy. An insurance policy may set out specific perils for which coverage will be provided, or it may be an "all-risks" policy, meaning that coverage will be provided for all perils, save those excluded by the policy.

II. WILL BUSINESS INTERRUPTION INSURANCE COVER LOSSES CAUSED BY THE COVID-19 PANDEMIC?

Whether or not an insured business will be entitled to coverage of a loss caused by the COVID-19 pandemic will depend on the specific terms and conditions of the business' insurance policy, the specific circumstances of the business' loss, and the specific jurisdiction in which the loss occurred. However, two of the main factors to consider are: (A) whether the

business has incurred physical loss or damage to its insured property; and (B) whether the cause of such physical loss or damage is a peril that is covered by the insurance policy.

A. Physical Loss or Damage

In order for coverage to be available under business interruption insurance, a business must have incurred physical loss or damage to its insured property. Traditionally, physical loss or damage has been interpreted as actual physical loss or damage, such as loss or damage to a business' property caused by a fire or flood. Therefore, as the properties of most businesses affected by the COVID-19 pandemic have not been physically damaged or destroyed, it will likely be difficult for such businesses to demonstrate that the COVID-19 pandemic has caused physical loss or damage to their properties.

However, physical loss or damage may also arise when work premises become contaminated, and therefore unusable. If a business has incurred losses because its property has become contaminated by the COVID-19 virus, such contamination may be interpreted as a physical loss or damage. As with any kind of loss or damage, the business will need to provide sufficient proof that its property has actually been contaminated by the COVID-19 virus.

On March 30, 2020, the Ontario Supreme Court (the "OSC") rendered its decision in *MDS Inc. v Factory Mutual Insurance Company* ("**MDS Inc.**"). In *MDS Inc.*, the OSC concluded that, in the context of an all-risks insurance policy and taking into consideration the particular facts of the case, the term "physical damage" should be interpreted broadly to include the loss of use of property, even in the absence of actual physical damage.

The COVID-19 pandemic has caused considerable loss of use of property, resulting in loss of income. In the absence of actual physical damage, *MDS Inc.* may support a business' claim for coverage under its business interruption insurance policy. However, it should be noted that the OSC's decision in *MDS Inc.* was based on a complex and unique set of facts, including the particular wording of the "all-risks" insurance policy at issue, and was in no way made with reference to the COVID-19 pandemic. Furthermore, as *MDS Inc.* is a decision of the OSC, it may be appealed to a superior court.

The courts of British Columbia have not yet considered the issue of whether the loss of use of property constitutes physical loss or damage in the absence of actual damage with respect to business interruption insurance claims.

B. Covered Perils

In addition to demonstrating physical loss or damage to property, a business will also need to prove that such physical loss or damage was caused by a peril that is covered by its insurance policy.

An "all-risks" insurance policy provides coverage for all perils that are not excluded. Consequently, the COVID-19 pandemic will be a covered peril under an "all-risks" insurance policy, unless the COVID-19 pandemic falls within a peril that is excluded.

An insurance policy that sets out specific perils for which coverage will be provided will need to include a peril within which the COVID-19 pandemic could fall. Applicable terms may include "pandemic", "public health emergency" or "infectious disease".

An insurance policy may also include protection against interruptions caused by governmental authorities, which may be applicable to businesses who have had to cease operations due to the COVID-19 pandemic.

Some insurance policies may also provide coverage for when the operations of critical suppliers or customers are similarly affected and result, for example, in business losses resulting from supply chain disruptions.

III. CONCLUSION

A business' entitlement to coverage can only be determined upon an analysis of the specific wording of the policy and the specific circumstances surrounding its loss. Furthermore, coverage may vary from jurisdiction to jurisdiction.

As noted above, a business will have to establish physical loss or damage in order to obtain coverage under its business interruption insurance policy. Without actual physical damage or loss, obtaining coverage will likely be difficult.

However, if, because of the COVID-19 pandemic, a business does intend to make a claim under a business interruption policy, it will need to provide proof of its financial losses, which it should thoroughly document. A business should also document its efforts to mitigate its losses.

Furthermore, insurance policies often require notice of claims within a certain timeframe. A business should take care to provide notice of its claim to its insurer within the appropriate period.

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