Three Tips for Healthcare Providers in Recovering Business Interruption Loss from the Public Health Crisis

By Micah E. Skidmore | May 18, 2020

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Much of the media coverage of the COVID-19 pandemic over the last two months has focused on the loss of business sustained by restaurants, hotels and retail. Little attention has been paid to healthcare providers—at least those who are not valiantly staffing emergency rooms and intensive care units treating those patients stricken by the coronavirus. But the same people, who are not traveling or eating out or going to the movies, are also postponing visits to physicians, surgeons, dentists, chiropractors, psychiatrists, optometrists, dermatologists and other providers.

These healthcare providers—large and small—have, like so many other businesses, sustained substantial lost revenues from the ongoing public health crisis. While many other businesses begin to consider and implement scaled re-openings, the delivery of healthcare services to patients presents special challenges to providers seeking to adapt to a post-pandemic economy. It may be some time before consumer confidence and commercial infrastructure permit a return to patient volumes and revenues resembling pre-March 2020 levels.

What are healthcare providers to do? Some may have already benefitted from PPP loans or other SBA programs. Others may not have qualified or received sufficient funding to compensate for existing or anticipated losses. But most providers should have some form of commercial property insurance, including some amount of business interruption coverage. Though individual policies may vary, typically commercial business interruption coverage offers some limit of compensation for the loss of income (and potentially increased expense) sustained by an insured company as a result of “direct physical loss or damage” that is not excluded by the policy. Such policies may also offer specific coverage for loss of income (measured in dollars or days) resulting from either the order of a civil authority or the loss of ingress or egress to insured property, provided that such order or lack of ingress/egress results from direct physical loss or damage to another property within a prescribed distance from the insured’s premises.

The language used in these insurance contracts may seem dense and even daunting at times, but insurance policies are business assets with potentially significant monetary value to be unlocked when a claim is made and pursued. Here are three tips for healthcare providers to follow in maximizing the value of business interruption claims, particularly in the context of the current public health crisis.

Don’t Subscribe to the “No Coverage” Narrative. By one estimate, business interruption losses for domestic small businesses could range between $255 billion and $431 billion per month.[1] Given the amounts at stake, the insurance industry has aggressively campaigned against coverage for so-called coronavirus claims—denying that businesses have sustained the requisite “physical loss or damage” to trigger coverage. Sadly, some insurance brokers have joined in this chorus.

Because every policy is different, some commercial property policies will inevitably provide more coverage than others. But the notion that businesses denied access to employees, vendors, supplies and, most importantly, customers and clients, have not suffered a “physical loss” is simply

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not true. In granting coverage for "physical loss" *and* "damage," commercial property policies contemplate "loss of use" claims that are distinct from and do not involve actual injury and damage to property. There is legal precedent supporting such claims, and abundant factual evidence that prevailing state and local lockdown, stay-at-home and healthcare regulatory orders have rendered insured business premises and equipment unusable and "physically lost" for purposes of most commercial property policies. In many states and counties, such orders expressly confirm that the closure of "non-essential businesses" and the requirement to shelter-in-place is because of the "physical loss and damage" caused by COVID-19. Some orders are expressly directed toward healthcare providers by limiting elective surgeries and other procedures to ensure adequate capacity to treat COVID-19 patients. Still other orders indicate, correctly, that quarantine measures are aimed at preventing a more extensive "physical loss" and ensuing business interruption to businesses if the spread of the coronavirus is not arrested. In other words, the "no-coverage" narrative sponsored by insurance carriers and their affiliates improperly ignores the legal and factual bases for pursuing business interruption claims as loss resulting from "physical loss" as well as "civil authority" & "ingress/egress" claims.

Some policies may include "virus" or "pollution" exclusions, which carriers will cite as a further basis for refusing coverage. Depending on specific policy terms, such exclusions may not eliminate coverage for providers' business interruption claims. After all, very few providers will have documented exposure to COVID-19 at insured premises. Moreover, the coronavirus is not the immediate cause of business interruption loss. As providers know better than most, viruses cause sickness, not lost income. It is the public reaction to the COVID-19 pandemic, including social and governmental anxiety over infection and mortality rates as well as concerns over adequate medical supplies, equipment and infrastructure to treat affected patients, that has caused patients to stay home and businesses to lose money. As a result, policy exclusions that speak in terms of loss caused by a virus may not apply.

There may be other coverage defenses insurance carriers may assert in response to business interruption claims, but the bottom line is this. Do not subscribe to the "no-coverage" narrative sponsored by those insurance companies, whose vested financial interest is to avoid payment for business interruption losses arising out of the current public health crisis.

Preserve your claim by giving proper notice and complying with policy conditions. Most commercial property policies will require timely notice of a claim. These same policies will further require formal "proof of loss" documenting the amount of the claim with appropriate support either at the request of the carrier or within a prescribed period of time after the loss occurs. Take time to review and comply with these deadlines and other policy requirements to ensure that your claim and rights under your policy are preserved and protected.

When providing notice, be accurate and precise in describing the nature of the claim. While references to COVID-19, may be a useful shorthand for describing the current state of affairs generally in the world, such references may not be appropriate when describing your business interruption claim. If, for example, your property has not sustained actual exposure to the coronavirus, references to COVID-19 or the coronavirus may be inaccurate and have unintended consequences—particularly if your policy includes a virus or pollution exclusion. Other considerations may be appropriate in crafting your notice depending on the terms of your individual policy.

You may get assistance from your broker in providing notice to your insurer, and depending on the nature of the claim, substantiating a business interruption loss may require additional help from accountants or other professionals. If more time is needed, ask the adjuster handling your claim for

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an extension of the current deadline, allowing sufficient time for a response and contingency if the request is denied.

Be careful in responding to inquiries from your insurance carrier. In responding to any claim, the insurance carrier has a duty to investigate and respond to the insured on a timely basis. In the context of the current public health crisis, many insurers have responded to business interruption claims by providing detailed and extensive requests for information. Others have requested recorded telephone interviews or "examinations under oath." In some cases, such requests appear calculated to avoid, rather than investigate, coverage.

When responding to an insurer's requests for information, be as precise and accurate as possible, again bearing in mind the particular nuances of your policy's coverage. In response to a request for an interview, find out in advance if the interview is to be recorded and determine whether your policy authorizes such interviews. In order to ensure that accurate and complete information is provided in any interview, it may be appropriate for the policyholder to request any questions in writing in advance.

Compliance with policy conditions is important, but policyholders are not compelled to cooperate in a carrier's effort to deny coverage for a valid claim. Where appropriate, your broker or coverage counsel may be able to assist in responding to requests for information without compromising your claim.

In summary, many healthcare providers have already sustained substantial business income losses relating to the current public health crisis. Where losses are great, the potential for substantial gains exist in the business interruption coverage afforded by most commercial property insurance policies. In order to access this coverage, providers should resist the "no-coverage" narrative that has been crafted and communicated by insurers by giving notice and complying with policy conditions. With so much at stake, providers should also exercise care, in coordination with insurance brokers and other professionals, to ensure that claims notices and other information communicated to insurers is accurate and consistent with the terms of the relevant policy.

This alert was also posted in *D Magazine.*

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[1] Lyle Adriano, *Calls for business interruption insurance cover for coronavirus grow louder,* INSURANCE BUSINESS MAGAZINE (Apr. 27, 2020), available at https://www.insurancebusinessmag.com/us/news/breaking-news/calls-for-business-interruption-insurance-cover-for-coronavirus-grow-louder-220751.aspx.

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