

Insurance and business interruption losses caused by COVID-19 shutdowns: Are you covered?

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As Ontario enters another month of a government ordered lockdown of the economy because of the worldwide COVID-19 health emergency, businesses continue to struggle as they see their revenues and profits plummet. In some cases businesses are either closing forever or seeking bankruptcy protection. Particularly hard hit by the forced closure of non-essential businesses, the limits placed on social gatherings and social distancing measures are manufacturing facilities, non-essential construction, restaurants and retail businesses which rely heavily on in-person service or require in-person attendance at their business or customer facility to operate.

For many businesses, the interruptions caused by the various government measures is unprecedented.

Although federal and provincial governments have announced and legislated numerous subsidies to provide relief to businesses that are struggling to either pay or retain their employees or pay for their rent, the measures are simply not enough to cover the losses that are being suffered by most businesses.

Accordingly, businesses are turning to their insurers to recover the losses they have experienced and continue to incur and are looking to pursue claims for business interruption loss under policies they have in place.

If your business has an all-risk insurance policy or a business interruption loss policy, it will be worthwhile to examine the terms of your coverage *closely* to see if a claim can be made.

However, as discussed below, whether an insurance policy will cover such a loss is heavily dependent on the coverage actually obtained by a business and the wording of any exclusion that might apply to the claimed loss.

These kinds of policies almost always require that there be “physical damage” to property as a condition of coverage.

In the case of an all-risk policy which covers “physical damage”, there is a recent decision that arguably opens the door to potentially a successful claim for coverage of losses suffered in the current circumstances as a result of the government mandated shutdown currently in force in Ontario, in particular where your business is not classified as an “essential service” under that Order. This recent decision is the Ontario case of *MDS Inc. v. Factory Mutual Insurance Company*. In this case, a government mandated shutdown was found to constitute a physical loss of property.

The facts of *MDS Inc.* required the court to determine if MDS was entitled to recover \$25 million under an all-risk policy for business losses incurred because a supplier of radioactive isotopes was forced to close its operations for 15 months due to an unsafe radioactive leak at its nuclear facilities. MDS purchased the radioactive isotopes for sale worldwide where they are used for cardiac imaging, cancer treatment and the sterilization of medical products.

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Although the insurer confirmed that there was a coverage for loss of profits for the interruption of the supply of radioactive isotopes to a maximum of \$25 million, the insurer contended that certain exclusions in the policy applied to the insured's claim for loss. In assessing the insured's action, the court explained that, in general, all-risk policies are understood to protect against all fortuitous losses, unless such losses are otherwise excluded, and noted that "fortuity" described an event that was unlooked for, unexpected or not intended by the insured.

The court further explained that the purpose of the insurance policy was to protect the insured from various fortuitous events and to cover loss of profit, subject to any exclusions, if a supplier was unable to furnish product. This coverage had been specifically purchased by the insured and it applied to the supply of radioactive isotopes produced at the nuclear facility.

In the circumstances of the case, the court ultimately held that none of the exclusions for coverage raised by the insurer applied and that MDS's loss of profits to the maximum of \$25 million (MDS's losses were \$120 million) were covered.

Applied to the current COVID-19 pandemic, it is understandable from the brief summary above why *MDS Inc.* may provide some hope for businesses that have suffered losses from a government mandated shut down of a business.

The COVID-19 shutdown is an unexpected event and government orders have essentially negated the ability of some business to stay open at all.

With the requirement for actual physical loss, for most businesses it will continue to be extremely difficult to make a successful claim for coverage under a business interruption policy or an all-risk policy. But business owners should closely examine your policies to see if your policy contains a specific endorsement that provides protection caused by disease or pandemic or by the business itself having been exposed to the virus.

Physical damage does not necessarily require structural alteration.

But even in cases where additional coverage has been bought to deal with disease or government-mandated shutdowns, the language of the additional coverage must be carefully examined because the additional coverage may actually specify the disease covered or may be written in such a way that it does not apply to a pandemic.

However, given the ever evolving circumstances and government responses to the COVID-19 health emergency, which now includes some U.S. states having passed specific legislation to deal with business loss insurance, and the obvious business losses suffered as a result of the government ordered shutdown of most businesses, it is important for businesses to review their insurance policies.

If you have any questions as to whether your business losses due to the current COVID-19 health emergency are covered under your all-risk policies or business interruption insurance, please don't hesitate to contact the legal team at Gardiner Roberts LLP for advice.

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