

What Tribal Entities Need to Know to Pursue Business Interruption Coverage for COVID-19 Losses

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The spread of COVID-19 has continued to impact tribally-owned businesses throughout Indian Country, many of which operate in the industries hardest hit by stay at home and shut down orders –e.g., hospitality, tourism, and brick-and-mortar consumer goods. For those tribal businesses impacted by COVID-19, a potential avenue for relief could be an insurance claim to recover losses through business interruption coverage. The following are practical tips and considerations for any tribal entity considering a business interruption claim.

Practical Tips for Tribal Entities Considering a Business Interruption Claim

Review Your Policy Terms to Identify Potential Coverage and Limitations

Insurance claims are subject to the policy terms. Any tribal entity seeking to pursue a business interruption claim should start with a review of the terms of the policy to understand the scope of their insurance coverage and any limitations or exclusions.

- Typically, business interruption coverage is found in Property or All-Risk Policies, or added on as a rider to another type of policy.
- Business interruption coverage is often identified by language similar to the following:
We will pay for loss of Business Income or Extra Expense at the described premises caused by the interruption of service to the described premises. The interruption must result from direct physical loss or damage by a Covered Cause of Loss to the property described.
- Generally, the interruption or suspension of business must be caused by the direct physical loss, damage, or destruction to the insured's property and the loss or damage must be caused by or result from a covered cause of loss under the policy.
- If the insured sustains a covered business income loss, the extent of the insurer's obligation is often limited by policy terms and limits.
- Policies may include specific exclusions intended to limit the scope of business interruption coverage.
- State, local, and tribal laws can also impact the scope of business interruption coverage.

Because of the fact-specific nature of the scope of business interruption coverage, it is prudent to engage your in-house counsel or an outside attorney before pursuing or abandoning a potential claim.

Understand What Losses Qualify for a Business Interruption Claim

Business interruption insurance typically covers lost business income tied to a specific, covered peril, such as fire, water damage, other disasters, equipment damage, or theft. Losses are often defined as the actual loss sustained by the insured as a result of direct physical loss or damage to the insured's property by a peril not otherwise excluded from the policy. They typically include the policyholder's net income that would have been earned and continued normal operating expenses (i.e. payroll) for a period of time set forth in the policy.

Tribal entity policyholders should also check to see if they have any related business insurance coverage such as:

- Coverage for business losses that result from a failure or delay within the business' supply chain (contingent business interruption coverage).
- Coverage for losses resulting from a failure in services such as water or electricity (off-premises business interruption coverage).



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Our previous alerts on business interruption claims can be accessed [here](#) and [here](#).

- “Civil authority” coverage for losses arising as a result of a government or civil authority actions that restricted access to the policyholder’s premises or caused operations to cease temporarily, such as the government-mandated shutdown of non-essential businesses in the wake of the COVID-19 outbreak.

Identify Potential Bars to Coverage

Policyholders should also carefully evaluate any potential bars to coverage, including applicable exclusions, within their policies. Common barriers to obtaining coverage include:

- The inability to demonstrate that there was actual physical loss or damage to the covered property as required for business interruption coverage to be triggered. A number of lawsuits have been filed against insurance carriers since March 2020 arguing that COVID-19 constitutes physical damage because the virus contaminates surfaces or has rendered buildings uninhabitable or unusable; however, courts vary on whether contamination rendering a building uninhabitable or unusable constitutes physical damage; or,
- Policies excluding coverage for viruses, pandemic or infectious diseases. After recent epidemics such as SARS, MERS, Zika, and Ebola, many insurance companies wrote in such exclusions.
- However, as discussed below, policyholders should also identify whether applicable state or tribal law limits the effect of these specific policy exclusions.

Review Whether any Applicable State, Local, or Tribal Law Increases Coverage Availability

Policyholders should also be sure to review recent resolutions, regulations, and legislation from relevant state, local, and tribal governments regarding potential expansions and insurance coverage for COVID-19 related claims. Faced with the prospect of enormous business losses, a number of state legislatures have introduced legislation that would circumvent virus exclusions and the requirement for physical loss or damage to trigger coverage.

Considerations for When and How to Make a Business Interruption Claim

Insurance claims are a way to protect your rights under your policy; those rights are only recognized if you, as the insured, assert them. If you believe the terms of your policy may entitle you to business interruption coverage, the first step is to provide notice of a claim to your insurer as soon as practicable. Consultation with experienced insurance counsel is recommended before giving notice of your claim.

Considerations that will be important when making an insurance claim:

- The claim must be made by the specific tribal entity that is insured under the applicable policy. A claim made by the wrong entity will not succeed.
- Tribal entities should make sure to receive all appropriate tribal and/or tribal organization approvals prior to making a claim.
- Policyholders should review federal, state, and tribal law to identify all relevant stay-at-home and shutdown orders and any potential legislation relating to business interruption coverage for COVID-19-related insurance claims.

Further considerations if your claim is denied by an insurer:

- Expect that your claim will initially be denied, in which case it is important to seek counsel to continue to pursue your claim. Your insurance carrier is under a legal obligation to fully and fairly investigate policyholder claims. An insurer that denied your claim without a reasonable investigation may have failed to meet this obligation if your claim is dismissed too quickly.
- An insured can pursue litigation to enforce the terms of its policy. For example, the Chickasaw Nation Department of Commerce and the Choctaw Nation of Oklahoma both filed lawsuits against their respective insurance carriers seeking to recover for losses under the business interruption coverage after closure of their casinos due to COVID-19. A number of other businesses such as restaurants, salons, dental practices, bowling allies, and movie theatres have also gone to the courts seeking to recover business losses from their insurance carriers.

The Relationship between Business Interruption Coverage and Federal COVID-19 Relief Programs for Tribes and Tribal Entities

Insurance Claims and the Paycheck Protection Program

Many businesses have applied or are in the process of applying for the Paycheck Protection Program (PPP). Businesses should not stop there, and should still look to their insurance policies for possible sources of support. The PPP and insurance claims will be two very different tools for relief. To compare the two, a PPP loan will cover payroll, utilities, and rent or mortgage payments, and is focused on providing businesses with immediate support for basic operational costs but does not address lost revenues. Conversely, a business interruption insurance claim is a longer process and will cover lost earnings due to the pandemic. Additionally, even if a business does recover losses through its business interruption coverage, there is typically a deductible, a waiting period, or both which results in uninsured losses.

Please see our previous alert on the PPP, [here](#).

Insurance Damages and the Coronavirus Relief Fund

Another key program for tribes and tribal entities under the CARES Act is the Coronavirus Relief Fund. Under the CARES Act and related guidance from the Department of Treasury, damages covered by insurance are ineligible expenses for Coronavirus Relief Fund monies. Simply, if a business receives business interruption insurance coverage those expenses would be ineligible. It will be important for tribes and tribal entities to keep a close accounting of eligible expenses for Coronavirus Relief Fund distributions, including whether insurance claims were denied or approved.

Additional information can be found in our previous [alert](#) on Coronavirus Relief Fund and Treasury guidance.

FOR MORE INFORMATION

Van Ness Feldman is closely monitoring [COVID-19](#) related stimulus issues and is in a strong position to provide expert analysis and advice to tribal entities trying to navigate this ever-changing landscape. If you would like more information about ways in which we can support your tribe's businesses and programs, please contact [Ed Gehres](#) or [Maranda Compton](#), or any member of the firm's [Native Affairs](#) practice at (202) 298-1800, and for specific advice on insurance coverage matters, please contact [Michael Goodstein](#) (202-298-1923) or [Anne Lynch](#) (202-298-1926) in our Washington, D.C. office, or [Allison McAdam](#) (925-282-8011) in our California Bay Area office.

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