INDUSTRY NEWS

Insurance Recovery

When Amenities or Services are Unavailable to Guests

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What happens when a hotel suffers property damage, whether by natural disaster or man-made accident, and is forced to close some or all of its rooms, amenities, or services? It is important to understand how insurance can protect you from the resulting financial loss. In addition to potential recovery for property damage from your property/casualty policy, you may be able to recover lost revenue from your business interruption coverage. If your operations are disrupted, whether completely or partially, the language of your policy will determine if, and for how long, your insurance company will cover such loss.

Historically, many business interruption provisions required a "necessary suspension" of operations. These older policies and forms did not define "suspension" or state whether complete shutdown was necessary. Insurance should cover income loss not only when operations are completely shuttered, but also when business is partially suspended. The distinction is important to hotel owners and operators, especially those with amenities or services like restaurants, spas, and seasonal activities.

In New York, courts have held that policies requiring a "necessary suspension" of operations, where the term "suspension" is not defined, must experience a "total interruption or cessation" of operations. Broad St., LLC v. Gulf Ins. Co., 37 A.D.3d 126 (N.Y. App. Div. 2006) (after loss on 9/11, building owner could only recoup lost business income from insurance until tenants were again allowed to reside in building). The result is similar in California, where courts have held that a "necessary suspension" of operations "connotes a temporary, but complete, cessation of activity." Buxbaum v AETNA Life & Cas. Co., 126 Cal Rptr. 2d 682, 688 (Cal. Ct. App. 2002) (emphasis added) (law firm did not trigger business interruption coverage because there was no complete cessation of operations when evidence showed that attorneys continued to bill hours following incident of water damage in office building). Where suspension is not defined, unfortunately, some jurisdictions have followed this narrow interpretation of coverage - thereby preventing policyholders from recovering income loss where there is only a partial cessation or a slowdown of business. See, e.g., Apartment Movers of Am., Inc. v One Beacon Lloyds of Texas, 170 Fed. Appx. 901, 901 (5th Cir 2006) (slowdown was not a necessary suspension of operations to trigger coverage for loss of business income). See also Keetch v Mutual of Enumclaw Ins. Co., 831 P.2d 784 (Wash Ct. App. 1992) (motel remained partially open, so policyholder could not recover under business interruption coverage despite dramatic decrease in occupancy caused by ash from volcanic eruption).

Some jurisdictions, like Pennsylvania, have not required a complete cessation of operations. In American Med. Imaging Corp., v. St. Paul Fire and Marine Ins. Co., 949 F.2d 690, 693 (3rd Cir. 1991), the court ruled that denying insurance recovery because the policyholder was able to resume partial operations at another location would remove any incentive for the policyholder to mitigate its losses. The court rejected the insurance company's suggestion that coverage was precluded because the policyholder "would be carrying on the same kind of activities [elsewhere] that occurred at the covered location." In fact, the court remarked that the policy imposed "an affirmative duty [on the policyholder] to mitigate its losses." Id. More recently, in iCue Corp. v. USF&G, Civil No. 07-1871 (E.D. Pa. April 23, 2008), an unpublished case, the federal court in Pennsylvania held that "suspension," as used in the insurance policy, included both partial and total cessations. Moreover, the Court allowed lost business income covered by insurance to include the time period when the insurance company delayed making payments to fully restore operations.

The insurance market has responded to the need for coverage of a partial cessation or slowdown in business operations. In 1999, the ISO Business Income (and Extra Expense) Coverage Form was updated to expressly define "suspension" as "[t]he slowdown or cessation of your business activities." (ISO Form CP 00 30 10 00). Today, most brokers and insurance companies covering the hospitality industry have access to forms that affirmatively state the policy "shall cover the loss resulting from complete or partial interruption of business." (Emphasis added).

Policyholders experiencing a partial interruption, such as closure of some but not all rooms, amenities, or services, should review their policies. Professional services are becoming increasingly necessary to calculate and recover for business interruptions, especially when due to lost patrons or the need to discount rates. If appropriate, make sure your policy includes coverage such as reimbursement of your expenses preparing the business interruption claim. Such costs may be covered as "LOSS ADJUSTMENT EXPENSES." Work with a knowledgeable broker to get the coverage that suits your business.

When claims arise, insurance companies will often look for ways to deny coverage or diminish their exposure to the loss. After charging you premiums based on the entirety of your business operations, they should not be so quick to deny coverage when you experience a mere slowdown or partial interruption. If your insurance company is not fully cooperating, you should engage the services of an insurance recovery attorney who can assist you in getting the insurance company to honor its obligations under the policy.

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