How hotels get Business Interruption insurance coverage for COVID-19

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Hotels have seen substantial losses in revenue in the wake of the coronavirus, and face the uncertainty of an economy which may take months or years to recover. For many, insurance payments may assist in keeping their business afloat, but few hotel owners or lenders are making claims. JMBM partner Guy Maisnik explains how some hotels may qualify for Business Interruption insurance coverage for COVID-19.

— Jim

Business Interruption Insurance may cover hotel losses from COVID-19 shelter with judicial claims

Many coverage exclusions focus on disease, not government shelter orders

by
Guy Maisnik

Hotel owners and underwriters have seen the economic prognosis for hotels for the next twelve to twenty-four months, and it does not look good. Modern America 2.0 will not be the America of January 2020 for a long time.

The “V” uptick in the U.S. and world economy will come when the world can pass the “middle aisle test,” as in when will you comfortably: 1) take the middle seat in public transportation and travel; 2) sit on a bar stool or restaurant counter between two others; and 3) attend sports or entertainment events or other public gatherings. Until then, the bottom of the economic “U” may feel like an eternity.

A mistake not to pursue claims

So, what does this have to do with insurance? Everything. Because insurance payments might sustain your business until your guests can pass the middle aisle test. By now, you have read a number of articles written by lawyers and consultants on business interruption insurance – some more measured and analytical and others more aggressive.

Many hotel owners (or their lenders, surprisingly) are not bothering to make insurance claims at the advice of their insurance agents or counsel. These advisors believe there is a low likelihood of making a successful claim based on the 2006 Insurance Services Office (ISO) circular – Form CP 01 40 07 06, which excludes from coverage the loss or damage
caused by “virus, bacteriaum or other micororganism that induces or is capable or inducing physical distress, illness or
disease.”

In our view, this is a mistake. We believe hotel owners and capital providers should carefully review their insurance
policies and coordinate with their consultants, lawyers and brokers to determine whether an aggressive approach is
possible.

**Policy exclusions are narrowly construed**

First, all business interruption insurance policies are not the same. A sophisticated buyer of insurance services – and its
legal counsel – will have their policies carefully analyzed. Depending on the policy and applicable law, there can be
meritorious arguments in support of coverage, even if a hotel is open and operating.

Second, history and case law are replete with apparently so-called airtight policy exclusions only to find a court holding an
insurer liable for coverage. Katrina is the most notable example, with insurers paying out approximately $900 million in
coverage notwithstanding flood exclusions. Recently, the Seventh Circuit held that a manufacturer’s insurer must cover its
insured, a designer and builder of anaerobic digesters, under its errors and omissions policy for claims alleging breach of
contract, despite an express exclusion in the policy for claims arising out of a breach of contract. Similarly, the Ninth
Circuit held that a war exclusion did not apply when an entertainment production company incurred damages as a result of
Hamas rocket attacks.

The point is that insureds who purchased business interruption insurance and paid expensive policy premiums, should
strongly consider pursuing coverage, even if not apparent under the precise language of a policy, particularly taking into
account the policy terms, applicable law – both case and statutory – and prior judicial decisions.

**The case for income loss coverage**

The coronavirus pandemic caused states, cities and counties throughout the U.S. to impose social distancing measures in
the form of stay at home, shelter in place and other executive type orders, and required businesses to close and remain
closed until otherwise directed. Excluded from such orders were so-called essential businesses, which often included
hotels. Regardless of whether a hotel is open or not, such closure and limited closure requirements seriously crippled
virtually all hotel revenue demand drivers (i.e., businesses, restaurants, entertainment venues, schools, and so forth). This
has had led to disastrous consequences for hotel businesses, severely reducing demand, disrupting operations and
supply chains, causing a loss of income. The income losses will extend well beyond the date such orders are removed.

Hotels are suffering damages in a variety of ways as a result of COVID-19 and the shelter orders, most notably income
loss, fixed expenses during partial or total closure, structure contamination, reputation damages and third-party claims.

**Insurers will aggressively defend**

True, there are hurdles to overcome. Given the state of the insurance industry and the large number of claims being
made, it is unlikely that your insurance company will simply roll over and write a check. The insurer’s first (and not only)
defense will likely be “virus, bacteriaum or other micororganism” exclusion from coverage under its policy, and that further the 2006 circular specifically addresses loss of business income. Hotel policies may also explicitly exclude coverage for property damage and loss resulting from viral and bacterial contaminants such as SARS, MERS, avian flu and the coronavirus. Insurers may even bring their own claim in a separate suit for declaratory relief that there was not an insurable event, which under a business interruption policy is generally defined as a direct physical loss or damage. Regardless, courts may well determine that business interruption and losses were caused by governmental order and not a viral pandemic.

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Make the claim

My partner, Matt Kenefick who litigates insurance policies states that “following catastrophes, carriers often campaign that potentially covered categories of loss are excluded. Insurers do this to discourage claims. Do not be persuaded. Fully evaluate your policy documents and advocate your claims, enlisting the help of your broker and the assistance of counsel.” We take this position for a number of reasons. First, insurance policies are usually interpreted in the light most favorable to the insured. As a result, the circumstances concerning losses and damages within a hotel and the policy language may create openings for coverage. Second, business interruption insurance, whether as an add-on to a property insurance policy or a stand-alone policy, may cover losses due to actions by civil authorities, such as a shut-down order that indirectly impacts the business of the hotel. Third, there is precedent for coverage in the case of government shut down orders. In one case, operators of movie theaters in Michigan were entitled to coverage as a result of a curfew ordered by a Michigan Governor. Of course, cases can and do go either way.

Furthermore, there have been discussions of passing legislation to render the virus and bacteria exclusion unenforceable as a matter of public policy. Ordinarily, this would be unheard of; however, we are presently in unique times.

Behave as if you’re in survival mode.

This is a matter of survival, and hotel owners and lenders really cannot afford to play it lightly (i.e., just going through the motions). Given the enormous losses hotels have and will continue to sustain, hotel owners and their debt and equity capital providers need to look seriously at their insurance coverage and determine whether to be aggressive in seeking recovery.

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Coronavirus as Force Majeure Event – What Hotel Owners and Operators Should Consider

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Guy Maisnik has over three decades of commercial real estate transactions with a specialty in hotels and finance. In advising clients in hospitality matters, which includes insurance structured coverages, Guy provides both a practical business and legal focus, representing buyers, sellers, lenders, funds, special servicers, REITs and developers in hotel matters, such as workouts, remedies, joint ventures, hotel management agreements and franchise agreements, buying, selling, ground leasing, development and construction of hotels, complex mixed used development and fractional and timeshare structuring.

Guy’s practice is equally domestic and foreign, where he advises on matters throughout the United States, Mexico, Canada, South America, Caribbean, Eastern and Western Europe, Australia, Middle East and Asia. Guy specializes in structuring capital raises through private equity, securitization, qualified opportunity zones, Chinese and EB-5 investments, and structuring workable condo hotel and resort trust solutions for domestic and foreign buyers and investors. A partner and Vice Chair of the JMBM Global Hospitality Group®, Guy is a senior member of the JMBM Chinese Investment Group, and a partner in the JMBM Real Estate Department. Guy is a fellow in the American College of Mortgage Attorneys, has been recognized in The Best Lawyers in America®, California Real Estate Journal’s Best Real Estate Lawyers, Los Angeles magazine’s Top Southern California Lawyers, as well as a Top Real Estate Lawyer in Real Estate Southern California magazine. For more information, please contact Guy Maisnik at mgm@jmbm.com or +1 (310) 201-3588.

This is Jim Butler, author of www.HotelLawBlog.com and founding partner of JMBM and JMBM’s Global Hospitality Group®. We provide business and legal advice to hotel owners, developers, independent operators and investors. This advice covers critical hotel issues such as hotel purchase, sale, development, financing, franchise, management, ADA, and IP matters. We also have compelling experience in hotel litigation, union avoidance and union negotiations, and cybersecurity & data privacy.

JMBM’s Global Hospitality Group® has been involved in more than $87 billion of hotel transactions and more than 3,900
hotel properties located around the globe. Contact me at +1-310-201-3526 or jbutler@jmbm.com to discuss how we can help.

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