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Relating to a Business Interruption Claim (Part I of II)

It remains unclear whether business interruptions caused by the current novel Coronavirus pandemic will be covered under business interruption insurance policies because insureds and insurance companies are still arguing whether the pandemic and/or related state and/or local government shutdown orders qualify as “physical damage.” While litigation on the issue has begun, at the time of authoring this article, no courts have made a final decision on that question. The purpose of this two-part article is to consider the nature, timing, and extent of the information and/or documentation that logically should be gathered by a client with a potential claim in preparation for a detailed working meeting with the practitioner engaged to prepare that loss claim. Part I, focusses on the documents that should be gathered by the client. Part II will consider the range of likely questions that the practitioner will ask of the client during that management interview.



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It remains unclear whether business interruptions caused by the current novel Coronavirus pandemic (pandemic) will be covered under business interruption insurance policies because insureds and insurance companies are still arguing whether the pandemic and/or related state and/or local government (civil

authority) shutdown orders qualify as “physical damage.” While litigation on the issue has begun, at the time of authoring this article, no courts have made a final decision on that question.

The purpose of this two-part article is to consider the nature, timing, and extent of the information and/or documentation (documents) that logically should be gathered by a client (the client) with a potential claim in preparation for a detailed working meeting with the practitioner engaged to prepare that loss claim (the management interview). Part I, focusses on the documents that should be gathered by the client. Part II will consider the range of likely questions that the practitioner will ask of the client during that management interview.

This article contemplates the involvement of the client’s legal counsel in the document gathering process and envisions that the client’s legal counsel will attend the management interview. The practitioner might be engaged by the client or by the client’s legal counsel depending on the need to preserve legal privilege. Increasingly, video is being used to conduct such management interview.

If there is any possibility that the client has a potential and/or valid claim, practitioners with experience in determining economic damages and/or valuing businesses (the practitioner) could work with the client to assemble all relevant and reliable documents that the client might need to process their business interruption claim (claim). As claims are determined on specific facts and circumstances, practitioners long used to reviewing, analyzing, and evaluating the specific facts and circumstances of each engagement are uniquely positioned to assist the client assemble sufficient competent evidential matter needed for the claim to be reasonably certain, assuming coverage.

Some practitioners begin economic damages and/or business valuation engagements using standardized documents checklists, while others develop unique checklists after obtaining an understanding of the engagement. Either way, practitioners generally focus on gathering, reviewing, and analyzing relevant and reliable documents to properly prepare for the management interview with the client and/or the client’s legal counsel.

The practitioner will need to consider whether the relevant and reliable documents are to be assembled physically and or electronically. The client’s size and/or sophistication likely may dictate whether the necessary documents can be assembled in physical or electronic formats. Furthermore, current pandemic-related sheltering-in-place rules and protocols may give rise to a situation where the client does not have current access to all the necessary documents. While there still are clients who can and will only gather and deliver their documents to the practitioner in the proverbial “shoe box,” the reminder of this article contemplates a client gathering and providing the necessary documents by e-mail, USB flash drive, or share-file protocols.

Listed below are possible categories of documents that the practitioner may ask the client (and/or the client’s legal counsel) to provide prior to an initial management interview. This list of possible topics is not intended to represent a comprehensive “checklist” of all document categories that should be considered. In any event, while a checklist may ensure that a critical item is not overlooked, it should not be a substitute for the practitioner’s exercise of professional judgment, experience, and/or familiarity with the client’s unique circumstances and/or industry.

- General non-financial information—all documents regarding form of ownership, products and services, markets and marketing, physical facilities and equipment, background and experience

of key personnel, history of business and time in business, names and addresses of key persons, current sheltering-in-place contact details.

- Closure orders—all official closure orders of the civil authorities.
- Insurance documents—all insurance policies, premium notices and payments, name and address of insurance broker, communications with insurance brokers and/or carriers.
- Lost customers—all customer orders canceled or lost due to the pandemic, a sale (actual and/or prospective) that would have been made “but for” the pandemic, e-mails regarding cancelled customers.
- Gained customers—all revenues that the client would not have had ‘but for’ the pandemic, did the client switch to producing pandemic essential goods, did the client sell off inventory due to the pandemic, did the client receive stimulus funding.
- CARES Act—any aid received under the Coronavirus Aid, Relief, and Economic Security Act (CARES), the recent legislation providing certain financial aid to families and businesses impacted by the pandemic.
- Budgets forecast and/or projections—all data, whether captured in a spreadsheet or not, regarding expected pre-pandemic revenue projections, when and by whom these were prepared, impact of seasonality.
- Intervening events—all impacts on the business unrelated to the pandemic, business gains and/or losses entirely separate from the pandemic.
- Impact on employees—all details regarding full-time and part-time employees, before and after the pandemic (and/or monthly headcounts), payroll documents, did any employees quit unrelated to the pandemic.
- Coronavirus-related expenses—all schedules and/or receipts regarding expenses incurred by the client caused by the Coronavirus versus normal business operations, cleaning, security, personal protective equipment, all additional expenses whether directly or indirectly related to the pandemic or the business interruption.
- Avoided expenses—all expenses avoided and/or saved by and/or during the pandemic, costs that would have been incurred to achieve lost revenues, costs that will not be incurred later due to the pandemic.
- Industry analysis—Information available on the industry, the client’s North American Industry Classification System (NAICS) code, the client’s Standard Industry Classification (SIC) code, access to and/or availability of articles and/or trade associations research and development in the client’s particular industry.
- Capacity issues—could and did the client operate with reduced capacity, did the client use a portion of their physical facility, did the client relocate and were they able to engage in production at alternative facilities, did they shut down some but not all of their branches and/or plants? Did some employees in a service organization continue to service clients from home? If revenue

trends had continued without interruption, could the client have completed all orders using the same facilities, while occupying the same physical space?

- Cost analyses—identification of the relationship between the client’s fixed and variable costs, how does the client determine fixed and variable costs, what is the relationship between revenues and costs, did the pandemic change any relationship between average and marginal costs, what cost accounting methodologies/systems does the client use.
- Accounting books and records—all financial statements (annual and/or periodic), the client’s general ledger prepared using QuickBooks or similar accounting software packages, income tax returns, sales tax returns, payroll tax returns, description of all of the availability of documentation involved in the preparation of financial statements including bank statements, deposits, paid checks (with images), records of assets and liabilities, monetary transactions, ledgers, journals, and any supporting documents such as invoices; for (say) a prior five-year period.

The Comprehensive Guide to Economic Damages (Fifth Edition, Business Valuation Resources, 2018) edited by Nancy Fannon and Jonathan M. Dunitz (the Fannon Text), succinctly summarized the practitioner’s goal in these claims as follows: “The goal of the practitioner should be to advance a position for the insured or insurer that is based upon a clear understanding of the scope and intent of policy language as the courts have interpreted it and to use that position to bring the claim to a final conclusion that is consistent with the valid expectations of both parties to the contract.”

Accordingly, the practitioner should review and analyze the documents provided by the client to properly prepare for the management interview with the client. It is, of course, possible that there may be more than one interview of the client (and/or client’s legal counsel)—possibly a management interview even before the practitioner receives any documents. That should not change the practitioner’s overall processes, only perhaps the timing of those processes.

During the management interview, the practitioner should ask helpful questions (and meaningful follow up questions) and should focus attention on critical issues regarding the claim. Part II of this two-part article will focus on these important questions—again, not intending to make a comprehensive checklist of all questions to be asked during the management interview.

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