



**Lowenstein Sandler's Real Estate Podcast:
Terra Firma**

**Episode 20: Excuse the Interruption: Is
Business Interruption Insurance Worth It?**

By [Stacey Tyler](#), [Heather Weaver](#), Brad Dubler

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- Stacey Tyler:** Welcome to the Lowenstein Sandler podcast series. Before we begin, please take a moment to subscribe to our podcast series at [lowenstein.com/podcasts](https://www.lowenstein.com/podcasts). Or find us on Amazon Music, Apple Podcasts, Audible, iHeartRadio, Spotify, Soundcloud, or YouTube. Now let's take a listen.
- Heather Weaver:** Hello, everyone. I'm Heather Weaver, Counsel in Lowenstein Sandler's Insurance Recovery Group. Today I am joined by my colleague, Stacey Tyler, Senior Counsel in Lowenstein Real Estate Group, and Brad Dubler, Managing Partner and Executive Vice President of Sterling Risk Insurance. Brad, thank you very much for joining us today.
- Brad Dubler:** You're welcome. Thanks for having me.
- Heather Weaver:** Today we are recording a special edition episode for both our [Terra Firma](#) and [Don't Take No For An Answer](#) podcast listeners. We are going to dive into a hot topic that continues to become increasingly important for businesses, landlords, and tenants: business interruption insurance. We will discuss what it is, how it works, and why it's more important than ever for businesses to understand.
- We will also explore new legislation in New York that allows insurance companies to issue business interruption insurance without the typical physical loss or damage requirement, which is a big shift. And we'll discuss what triggered this change, what types of businesses should consider these policies, and what premiums might look like for this new product. And finally, for businesses which may have less to gain from this new type of insurance, we will also touch on what types of insurance those entities should be prioritizing.
- Stacey Tyler:** Thanks, Heather. So, I think for our listeners, let's just back up and just do a really high-level discussion of what is business interruption insurance. What does it cover and who should have it?

Brad Dubler: Sure. I mean, every business should have it because obviously they're a business to make money, and that's more or less what you're insuring is your loss, profit, and ability to stay open or at least come back to business after covered perils, such as a fire, or make it easy. So, think of it as lost income and operating expenses.

If it's covered, you got to be careful. Not everything under the sun is covered, just like we know from Covid. I mean, you can get a little more specific, but business interruption replaces income loss that the businesses halted due to a physical loss or damage. Fire, for example, also includes the loss of income. Really loss of profit not your total sales.

You had to be careful about that wording. Extra expense is important. Maybe you just need extra money to work 24/7 to get the place up and running sooner. Or you can go rent something across the street, go pay more money, but at least you can keep your business alive and keep your customers. That's called extra expense. Then there's contingent business interruption.

That would be if your business affected by another business and their fire now affects you and you can't sell or operate. That's called contingent business disruption. And then civil authority could be more like the government shuts something down. Those are usually limited. They don't give you, you know, a year or two, maybe 30 days, but that's another type of coverage that could trick it.

The policies pick up things like your operating expenses, the temporary location, certain payrolls if you wanted it included, loan payment, taxes. So, it all depends on how you calculate your math and how much limit you buy and what you're going to be covering. But that's—

Heather Weaver: Super helpful.

Brad Dubler: And it doesn't cover from a pandemic. And that's what I'm going to talk about today. People learned about that.

Stacey Tyler: Yeah. So, a lot of people learned, to their chagrin in 2020. It really is important that you think about it in terms of physical damage to property. And a lot of people will see this come up in their leases. If you're a landlord or the tenant. We're really talking about business interruption in the context of a casualty, where there's been a fire or some other event that has damage to the building, and then as a kind of extension of your property insurance, you are just getting the business interruption to cover your rent.

But that's super limited, right? And a lot of people were hoping that in the Covid experience where everyone was told to stay home, that of course that should cover my rent. But the fact is it didn't. Right, Brad?

Brad Dubler: Correct. And the policy was never intended to, I mean, they never priced for it. That's another story. How do they price for it? But the policies had specific virus and bacterial and other exclusions on purpose to make sure that it wasn't supposed to pick this stuff up. And they learned this from decades earlier with SARS and bird flu.

So, there's been an evolution of language to kind of make it clear that they weren't supposed to be picking this kind of thing up.

Heather Weaver: Yeah, I think the pandemic really highlighted for policyholders how the traditional model of business interruption insurance didn't account for all types of disruptions. Right. So, the most classic examples are fire, natural disaster, something that destroys or physically damages your building so that you can't operate. But the Covid 19 pandemic is not obviously something that people think about regularly. And, you know, policyholders had to learn the hard way that their business interruption insurance might not cover every reason or circumstances for which their business might be interrupted.

Right. So, New York State recently authorized standalone business interruption policies through a newly passed bill, and it's intended to respond to claims for business interruption loss, even in the absence of direct physical loss or damage. Can you tell us a little bit about that, Brad?

Brad Dubler: Sure. They did pass a law. I think it's the first state in the country that is now authorizing insurance policies or insurance carriers to offer policies that only cover a business interruption that would trigger based on, like a Covid 19 pandemic. So, it's pretty new. And I mean, it's five years later and there's not really a viable market yet or true pricing to know how it's going to look.

So, the product is out there. Normally business interruption was covered when you had property insurance. It was like an add on to your property policy. So now she's authorized they could sell them separately.

Heather Weaver: Okay. So, this legislation, do you view it as coming? It's a response to a gap in the market that was realized by Covid 19 and policyholders' inability to recover for their business interruption losses, where there was no physical loss or damage to their actual property.

Brad Dubler: Correct. Prior to this, there were some limited policies out there. There was some specialty property policies like AFM is one, Lloyd's certain, you

could have negotiated some type of pandemic or virus coverage where pandemic coverage is actually some wording, but they put a limit on it, you know, \$500,000, etc. But there were actually contracts out there that kind of as a freebie threw it in.

But now they're saying insurance companies, you are authorized to sell a policy just for this. And one little caveat you got to be careful of, it only would trigger based on, you know, this law that they put out there if the whole business was closed, a lot of businesses just, you know, did takeover or worked at a different way of doing business.

And that wouldn't even qualify to trigger again, every policy is going to be negotiable and maybe manuscripted but in general, the intent is only for full closure based on the law.

Heather Weaver: So, what type of industries do you think stand to benefit the most potentially from this expanded coverage? Are there specific sectors that should be paying closer attention to this?

Brad Dubler: Yeah, like everybody's business is different. So, there's not one size fits all. They have to know their own business operations exposures. But things like hospitality and hotels and restaurants and entertainment venues and recreational type things that those are the biggest risk maybe in a commercial office, because that's not where people are sleeping at night. So those are probably the higher level, and I'm sure you can come up with so many more, but many of them still operated during Covid and medical industries and certain, you know whatever the definition was of necessary businesses?

Stacey Tyler: Right. So it would have to be people who really can't work from home or deliver their services in any other way.

Brad Dubler: Exactly. And that they wouldn't give them a pass to stay open like doctor's office, to still, stayed open or, you know, certain industries were allowed to stay open. Some could still work remotely, but, right, some of them, you have to be there in person.

Heather Weaver: And what about companies that rely on long supply chains? So, you mentioned contingent business interruption insurance earlier. And I just wonder if in connection with this legislation, there will be coverage for companies that sustain a loss because the business of their vendors or their suppliers is disrupted, even if they don't sustain physical loss or damage. So, this would essentially be a contingent business interruption insurance coverage without physical loss or damage requirement.

Do you think that the new legislation might capture that situation, or do you think it's really intended to cover your own business losses due to

your own inability to operate rather than, you know, a third party's inability?

Brad Dubler: I mean, great question. The problem is, it's going to be what the industry is willing to sell, because they don't really discuss that in the legal, you know, disclaimer of what it is they're telling them that it's okay to sell. So, I think that's going to be negotiable. But think about how difficult it would be for insurance carrier here to pick up an exposure, because China had something and shut it down and you couldn't get your goods in time, just like they don't cover ports and strikes and shipping delays.

So, my gut is probably not. But if you're a big enough customer and a big enough exposure, you can negotiate and buy anything. So, I think it's an open for translation, but I don't think that's going to be the norm.

Heather Weaver: Yeah. And I can see, you know, how contingent business interruption is sort of a greater risk in a lot of scenarios to insurance company than business interruption because they're really insuring the operations of another entity that they haven't been able to, you know, perhaps do as much diligence on than their own insured. But I've seen in policies, coverage for contingent business interruption but limited in some way, right, like a sublimit or if you have certain key vendors or suppliers, you could have, you know, a schedule or list. So, the insurer will say we'll take on this contingent business interruption risk, but we're going to limit it to these few key suppliers as a way to manage the scope of their risk.

Brad Dubler: Yeah, you said that perfectly. Right, the carriers got to know what they're underwriting. And even then, it's difficult to have, a Japanese plant, the only plant in the world that made this product for a client, and it an earthquake was an exposure. And again, the cost was prohibitive. Like, yes, we'd like to buy it, but at this point, it didn't make any sense because they were underwriting the one plant you want to insure is an earthquake zone.

Stacey Tyler: So, you raise an interesting point, Brad, that I'm sure a lot of our business people listeners will think about is just at what point, or how do you kind of think about the decision tree of, at what point does this coverage, even though it sounds great, does it really make sense for my business? When you take into account, especially this, which is a new product, it sounds like we don't know a whole lot about how these claims are going to be handled when they do.

We don't know a lot about pricing, and in an event like Covid, that's going to impact pretty much every business in some way, shape or form. How do people, how do you counsel your clients to think about whether this is a valuable expense for them to take on?

Brad Dubler: Yeah. Great question. I mean, look, it comes down to just acting as, you know, we act as the risk manager and give them advice, but we can't spend their money. And is it high in the list of the biggest things that keep me up at night? No, it was horrific, what happened. Businesses got crushed. But come on, insurance is going up.

People are poor from just everything else going up in salaries and overhead inflation. So look, there's other priorities I would think is much higher on the list of insurance and I can name some of them, but I kind of think this is an exposure. But I have to put it a little bit lower down the pole.

Stacey Tyler: Right. So then maybe it's just like a real business by business calculation of like, how exposed am I to this exact risk and what am I willing to pay to minimize that exposure.

Brad Dubler: And even then, it's like, wait, I'm already paying so much for these 17 other general liability and excess liability, which is skyrocketing in pricing, property insurance, business interruption, real business interruption. And yet the cyber exposures and employment practices and lawsuit type harassments, environmental, and then construction, renovation exposures, professional insurance if you or something that is professional guidance, crime from somebody stealing from you, your own employees embezzling.

Oh, and now go buy some, you know, pandemic insurance. On top of that, right?

Stacey Tyler: You mean I can't be 100 percent safe from every risk.

Brad Dubler: You can be. And I'd be happy to take your premiums, but you can't afford to go insurance poor. So, we got to be realistic also, what can they afford to spend?

Heather Weaver: And what about landlords specifically? You know, companies that rely on rent payments or income? I remember during the Covid 19 pandemic, my dad owned some commercial buildings out of New Jersey and various types of businesses rent space from him. So, there are the businesses that were able to continue operating from home. And then, for example, he rents space to a gym, which is obviously shut down during, you know, during the pandemic.

And I remember he had a lot of trouble collecting rent because those businesses were struggling to pay since they themselves weren't operating. And as a landlord, you, you know, you potentially, depending if you have a mortgage, you still have to answer to a bank and you still have to keep up with your payments. And I remember, you know, banks

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making exceptions and pushing deadlines and everything was sort of chaotic at the time.

But if my dad had, you know, business interruption insurance that did not require a physical loss or damage requirement. As a landlord, do you see that potentially being a valuable protection?

Brad Dubler:

Oh, tremendously valuable. The question is you have to pay how much money annually and then how many years to collect, if ever. I mean, Covid, just a memory now three to five years ago. So, think about if every year you've been paying those premiums, when are you going to get to the point where this is ridiculous? Or do we learn lessons from last pandemic that maybe things will be handled differently or closed differently?

Will the government operate differently with, you know, free checks and money to some people. But like commercial landlords got hurt. They really didn't get anything. Even though people were paying them. And they said the government said it was okay. So yes, they have an exposure and yes, it would be great to have it. The question is, can they afford it?

And would the coverage be deep enough to make it worthwhile, because I'm sure there's going to be significant detentions or deductibles, maybe even co-insurance so they're going to get paid X percent on each dollar of loss. You know, the devil's in the details.

Stacey Tyler:

I would think that if landlords start including it in their lease language as a requirement for the tenants to have it, that's when we'll see maybe some real movement. And I think we'll just have to see if landlords start requiring it, if tenants push back strongly against it and what the pricing could be because typically the landlords aren't really paying for that themselves anyway.

Brad Dubler:

Yeah, it's a great point. They could drive it if they demand it and then it goes down to I'll go to another building and then landlords don't want to lose them. That's another whole real estate play or I guess the issue whether or not they could be that aggressive.

Stacey Tyler:

Right. I haven't seen it really. I mean, it's brand new. I haven't seen it come out in any leases I'm working on yet, but I imagine, you know, it's not an easy market for a leasing space in New York right now. So I think—

Brad Dubler:

Unless you're a special building, maybe you can get away with it if some reason they have to be there.

Stacey Tyler: Yeah, right. Anything else? It's, well, we'll delete anything you want. Just please take some space, come on.

Brad Dubler: Right. That's the real world.

Heather Weaver: So, I just wanted to mention for businesses that do operate remotely in large part, which as we know there's more than ever since Covid 19, it's kind of changed the way of the world for a lot of businesses. Right. Big companies that, you know, where their employees work primarily remotely. I think companies have realized that in certain industries that their employees can be just as efficient remote, and why not decrease their overhead, not have to pay so much rent and all of these things.

So, for companies that operate in large part remotely, perhaps this type of insurance is less important to them. But I just want to mention and we could do a whole separate podcast episode on this, and maybe we will, but business interruption insurance is often found in cyber policies, right. And it's important for these companies that we're talking about that operate remotely to make sure that they're covered for a cyber event or a network disruption or something that could, you know, occur to the systems digitally that will make their systems go down, even though even if it's not physical loss or damage, there is other business interruption insurance within the context of cyber that is extremely important, I think, for companies that do a lot of, you know, remote work to consider and think about. Has that been, have you seen an increase in the market and demand for cyber insurance, including business interruption?

Brad Dubler: Yes. Good point. A cyber is definitely grown in the past five years. It was a growing market to begin with. But ever since Covid, with people taking advantage of the work from home and weak securities and even just people's houses working and doing some confidential info, the cyber-attacks picked up. People have stepped up their game and improved technology and, you know, multi-factor authentication, things like that have gotten smarter, almost demanding.

Some companies won't sell you cyber insurance, unless you have basic protocols in place. And then yes, the business interruption coverage built into a cyber liability policy will protect the business for their lost profit and issues related to a cyber event, not a fire. So, it kind of bifurcates it and keeps it separate for that.

Stacey Tyler: And I guess at that point we're really not talking about rent anymore since, I mean arguably even a cyber event, if it's incredibly disruptive to your business, it doesn't mean you can't show up in your office building and work there. So, your landlord's not really going to care about that.

Brad Dubler: But now you can't meet your deadlines, your projects, things you had, you know, making money on whatever your business is, is no longer, you know, monetizable. So, you would have a loss there. And then the cost to get yourself back up and running again is more expensive than people realize. Even just notifying the people by law that each state you got to deal with different rules.

Again, it's expensive and that's why the policies kind of pay for those professionals to do that for you. Instead, you go to your lawyers and say, help me. I have no idea what to do. Here's a retainer or whatever. What's the next step?

Heather Weaver: So, we spoke a little bit about what types of businesses would benefit most from these new standalone business interruption policies, and what type of insurance other types of companies should be thinking more about, whether it's cyber, CGLs, or something else. From an insurance company's perspective, do you anticipate that insurers will have an appetite to issue these types of policies, and how do you expect the removal of the physical damage requirement to, you know, impact their risk and, as a result, the premiums that they charge for these types of policies?

Brad Dubler: That's it. I think that's kind of like no answer because these carriers have no data. It's all about data. And actual underwriting insurance companies for hundreds of years. How many fires, storms, they have an idea. They see the litigation environment. So, there's no answer here other than Covid was huge and everybody, more or less, in the world got affected, which was a strange one.

It wasn't just, you know, geographical limited. So, I think it's this, a couple guys will dip their toe in the water and they're going to try figure if they get lucky, they can make money if nothing ever happens. But if something does happen, they're going to get their crops clean. So, I think that's an issue with pricing on this is going to be a little Wild West.

Heather Weaver: Yeah, yeah. When you see new products in the market, I'm sure there's some trial and error, right, where insurers might adjust their pricing models depending on how things are going. So, if they issue a policy for a certain premium and they see that they're paying out losses that, you know, would justify a higher premium or would make them unable to issue the policy unless they charge you more, I could see things, you know, shifting around depending on what the losses look like for a new product.

Brad Dubler: Right. And this new product parametric like weather types, related insurances and again, when you look at it, they do so much crunching of the numbers at the point that they start offering you insurance after your retentions. It's like, why would I buy this? Like I don't see the risk reward

here. So that's I've dealt with some of those where it doesn't make any sense.

If you pay so much money, you collect so little, maybe you're better off parking it on the books and build your own little slush fund. So sometimes self-insurance is an answer.

Stacey Tyler:

Right. I feel like that's a conversation I have to have a lot with my clients where it's like, well, but I have coverage for business interruption and my business has been interrupted. And it's like, well, you have to look about 15 definitions in to your policy to really understand, oh, wow, this is way more limited than I thought I was getting.

And ultimately, the insurer doesn't want to pay you. This is not going to be a simple claim process. So, you know, you just have to really kind of think that keep that in mind when you're trying to think about where is my dollar best spent?

Brad Dubler:

That's a great point also—that you think you have coverage and all of a sudden, they're just denying you. And I'm not saying all carriers do that, but definitely some play hard. And you need a good attorney who's probably going to get a coverage counsel that is going to have to get involved, sometimes. Hopefully a great broker can do it. They have the teams in-house, but a lot of them don't.

But yeah, it is another an expense that the insurance has got to deal with, an aggravation lost time and frustration.

Heather Weaver:

Yeah. And coverage counsel is definitely here to help with that. But it's also key to work with an experienced broker on the front end who understands the nuances of these policies and can explain to you before you actually take out a policy, what is it going to cover so that you can anticipate in the event of a loss?

You should already know whether your policy is likely to cover a claim or not. And make sure that you understand upfront what risks you're covered for, where your potential exposures are, and balance all of that. And you know, for somebody who's purchasing insurance on behalf of a business might not really understand the nuances of these policies, like Stacey was saying, definitions of definitions and definitions, it's really, the devil's really in the details when it comes to insurance policies.

And working with a broker, it could really help to maximize what type of coverage you're getting.

Brad Dubler:

Yeah. And the thing is to manuscript and negotiate it before you buy it because you don't, I mean, there's certain products you can't really manipulate or improve, but there's many of them you can like the

professional insurances, the cybers, the employment practices, the errors in emissions. You don't take a standard off the shelf. A lot of smaller brokers, the carrier offers this, and they sell it.

They have no idea what they sold. And then it turns to legalese where you start changing words and commas and ends. And again, you know, I pretend to be a lawyer, but it's amazing how you could drastically change definitions of a contract. I once got a \$10 million claim paid, all because of a one word and a comma made the definition different.

So little things like that where you need a good attorney or the broker skillset to do that.

Heather Weaver: Absolutely. Well, this has been a very insightful conversation, Brad. Thank you so much for joining me and Stacy today. There are certainly a lot of moving pieces in the business interruption insurance space. It will be interesting to see how the legislation unfolds and again, for our listeners while it might be difficult for someone who's not in the insurance industry to have a good handle on what's needed for your particular business.

You know, that's where an experienced broker like Brad or coverage counsel comes in. And I think Brad would agree that we are here to help with those needs.

Brad Dubler: Yeah.

Heather Weaver: So, thank you for tuning in, everyone, and we will see you next time.

Stacey Tyler: Be sure to like, subscribe and follow Terra Firma and Don't Take No For an Answer wherever you're listening to this episode. Thanks everybody.

Brad Dubler: Thanks, everybody. Thanks for having me.

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