

## 'Business interruption' recovery may be uphill climb for insureds

By: Barry Bridges    May 14, 2020



STEPHEN M.  
PRIGNANO

Sees potential for 'explosion of litigation'

Attorneys say that while increased litigation appears to be imminent, insureds could face a difficult time in recouping pandemic-related losses through the business interruption provisions of their commercial insurance policies.

"I see the potential for an explosion of litigation around business interruption insurance," Providence attorney Stephen M. Prignano says. "Not all businesses have been able to take advantage of recent government programs, and I expect this will cause many to turn to their insurance."

Barton Gilman's Robert C. Shindell also reports that his firm is anticipating that insureds impacted by COVID-19 will be commencing litigation in large numbers.

Meanwhile, Nicholas L. Nybo of Adler, Pollock & Sheehan says that declaratory judgment actions seeking enforcement of business interruption insurance policies have already popped up in other jurisdictions and "will surely continue to proliferate over the coming months."

But typical policy language requiring a "direct physical loss," as well as specific exclusions pinpointing events such as virus outbreaks, could mean a rocky road for insureds.



*"At the 10,000-foot level, the current state of the law will make a business interruption claim based on COVID-19 difficult."*

— Paul M. Kessimian, Providence



PAUL M.  
KESSIMIAN

"It's fair to say this is an evolving area of the law that will be heavily litigated, and it's hard to know how it will play out," says Paul M. Kessimian of Partridge, Snow & Hahn.

### 'Direct physical loss'

"At the 10,000-foot level, the current state of the law will make a business interruption claim based on COVID-19 difficult," Kessimian says. "The standard language as interpreted by most case law would tend to preclude such claims because coverage has to involve a 'covered cause of loss,' which most often means a direct physical loss or damage to property."

As for situations in which business interruption insurance has provided relief in the past, Shindell points to the natural gas outage in Newport in early 2019 that forced businesses to close, while Kessimian identifies weather

events like hurricanes.

"In the case of the pandemic, 'direct physical loss' is going to be a challenge, because insurers will say, 'You can go in to your business; there is no physical damage,'" Kessimian says.

On another front, since the SARS outbreak, some insurers have included "virus exclusion clauses" in their policies, which "all but forecloses coverage" in Prignano's estimation.

"But the language of each policy will be key," Prignano says, adding that some "physical damage" provisions may open an opportunity for insureds to argue that social distancing or other temporary restrictions to business operations trigger coverage.

"Insureds would be well advised to scrutinize the language of their own policies closely and to seek legal advice," he says. "Any gray area has the potential for litigation, and most courts will favor an interpretation of ambiguous language that protects the insured."

Shindell explains that coverage also depends on the courts' interpretation of policy language, in addition to the regulatory scheme.

"Some policies provide coverage for business interruption losses where civil authorities shut down or bar access to the business premises, while others may have an exclusion for losses caused by viruses or bacteria. So there are several moving parts here," Shindell says.

According to Kessimian, the fact that some policies cover losses incurred due to "order of civil authorities" may not be a determinative factor because physical damage usually remains a requirement.

These questions are already coming to the forefront as litigation gets underway across the country, Nybo says. He reports that one of the earliest business interruption lawsuits arising from the pandemic was filed in Louisiana on March 16 by a creole restaurant in the French Quarter. The insured restaurant is seeking a declaration that its policy "does not contain an exclusion for a viral pandemic" and that it offers coverage "for any future civil authority shutdowns of restaurants in the New Orleans area due to physical loss from coronavirus contamination and ... provides business income ... in the event that the coronavirus has contaminated the insured premises."

On the opposite side of the coin, insurers are also seeking declaratory relief, according to Nybo. He describes a California federal action filed by Travelers Casualty Insurance Co. against its insured, a Los Angeles law firm, seeking an order that the firm's business interruption coverage was not triggered by COVID-19 because it caused no "direct physical loss of or damage to property at the described premises."

Travelers also argues that, in any event, the subject policy excludes losses or damages caused by "any virus, bacterium or other microorganism."

Kessimian suggests that after consulting with counsel, business owners might consider filing a claim to cover their bases in case the law changes with increased litigation. It's also important, he notes, to maintain detailed records to substantiate losses.

### **Legislative intervention?**

With insurance generally regulated at the state level, at least one Rhode Island lawmaker is preparing to introduce legislation that he hopes will ease the way for businesses to recover their pandemic-related losses.

Rep. John J. Lombardi's "COVID-19 Pandemic Insurance Recovery Act," modeled on a bill introduced in New Jersey, would provide "a mechanism by which certain businesses that suffer losses due to interruption as a result of the coronavirus disease 2019 pandemic may recover those losses from their insurer if they had a policy of business interruption insurance in force on March 9, 2020," the date that Gov. Gina Raimondo declared a state of emergency through Executive Order 20-02.

Lombardi, a Providence lawyer, recognizes the potential roadblocks presented by insurance policy terms and the constitutional questions posed by retroactive changes to coverage.

“But these are unusual times, and I’d like to see a good-faith effort on the part of the multi-billion-dollar insurance industry on behalf of people who have very often been paying policies for decades with no claims,” he says.

It is uncertain when state legislators will reconvene to potentially consider Lombardi’s measure, but other attorneys are expressing reservations over whether such legislation would withstand scrutiny.

“While there have been efforts in other states to introduce legislation retroactively imposing coverage for losses related to the coronavirus, notably in New Jersey and Ohio, I think these efforts are problematic,” Prignano says.

If any such laws are passed, he expects their constitutionality to be questioned on the ground that they impermissibly interfere with freedom of contract under federal and state law.

Shindell is also aware of bills in other jurisdictions seeking to bar enforcement of exclusionary language or proposing that the state partially reinsure insurers who have to provide coverage beyond what they bargained for.

“Anything passed that alters coverage after the fact will spur litigation,” Shindell says. “Carriers price their policies based on the risk they are taking, and there would likely be pricing repercussions down the road if the Legislature expands coverage after the fact.”

Similarly, Kessimian predicts that such legislation would bring litigation on a practical front — i.e., that insurers did not set aside funds to pay for such claims they did not figure into the risk — as well as on a constitutional front.

Nybo adds that Contracts Clause suits generally involve the courts analyzing whether the government’s impairment of contract was substantial and, if so, whether the actions were reasonable and necessary to fulfill an important public purpose.

“It is notable that courts usually show greater deference to the government action where it impairs a private contract between third parties — such as a private insurance policy — as opposed to a public contract to which the government is a party,” Nybo says. “The authors of Rhode Island’s Pandemic Insurance Recovery Act appear to be cognizant of the potential constitutional concerns, as the bill would reportedly permit insurance companies required to pay claims to apply to the Department of Business Regulation insurance division for relief and reimbursement. That may result in more favorable judicial scrutiny if the bill is enacted and subsequently challenged.”

Issue: MAY 18 2020 ISSUE

#### YOU MIGHT ALSO LIKE

---



Employment lawyers brace for wave of COVID-19 litigation

🕒 May 14, 2020



Negligence action against party host survives motion to dismiss

🕒 May 14, 2020



‘Substantial evidence’ backs board’s veto of solar project

🕒 May 7, 2020

(617) 451-7300

 GoodFlow Maps