



Pandemic-Related Business Interruption Coverage: Past, Present and Future

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Ring around the rosies

A pocketful of posies

Ashes, ashes

We all fall down

“Essential” vs. “Non-Essential”

In 2020 state and local public officials, based upon recommendations of public health professionals, began closing the doors of all but “essential” businesses.

In June of that year the Government Accounting Office (GAO) found that the COVID-19 pandemic had a more rapid and severe effect on the United States than the Great Recession spanning from December 2007 to June 2009.



State by State Approach to Public Health

This patchwork approach to the use of state police power meant that safety protocols may have varied from state to state. However, regardless of state mandates on school closures, mask mandates, and family gatherings, one national constant existed. The lockdown mandates from state and local civilian officials produced an arbitrary patchwork of business closures. In many states, liquor stores and marijuana dispensaries were deemed “essential,” but medical offices were required to close.

*(Lindsay F. Wiley and Stephen I. Vladeck, Article: **Coronavirus, Civil Liberties, And The Courts: The Case Against “Suspending” Judicial Review**, 133 Harv.L.Rev. F 179 (July 2020)*



“Non-essential” Means You May Be Out of Business

The Occupational Safety and Health Administration (OSHA) provided guidance for employers and employees on preparing for safer workplaces from COVID-19 as early as March 2020. Despite such guidance, little changed with respect to the state and locally mandated shutdowns. The national result was that everywhere in the United States “non-essential” businesses were forced to close ending most commercial activity in the country.



Business Leaders Urge Federal Action

In a March 16, 2020, letter to President Trump and Congressional Leaders, the U.S. Chamber of Commerce urged federal action to alleviate the deleterious effects of the pandemic on U.S. businesses. The Chamber of Commerce urged Congressional action on a three-point plan regarding payroll taxes, streamlining loan programs for businesses with fewer than 500 employees and creating credit facilities to provide loans and loan guarantees to employers with fewer than 500 employees.

(Letter of Thomas J. Donohue, CEO, Chamber of Commerce, March 16, 2020)



The Extent of the Damages

The American Property Casualty Insurance Association (APCIA) estimated the cost of business closures from COVID-19 with 100 or fewer employees would result from business interruption losses of 30 million claims constituting a loss of \$383-\$647 billion. These estimated losses would have wiped out the entire commercial property & casualty industry within three months without some form of government intervention.

(Anne Gron and Georgi Tsvetkov, *History Can Inform Pandemic Biz Interruption Insurance Cases*, Law 360, May 21, 2020)



The Extent of the Damages

The result was a piecemeal approach in the name of public health. In March 2020 a rush of executive orders at the state and local level invoking the police power of those governments began the closure of businesses. A common theme resulted in the closure of restaurants, bars, health clubs and recreational facilities and entertainment venues. A phased reopening recommendation was made by the CDC by May 2020.



Congress Appropriates Relief

The political effort to provide federal relief for businesses in IRS Economic Impact Payments of \$375 billion in unemployment insurance payments, \$500 billion for economic stabilization and assistance to distressed economic sectors and \$670 billion under the Paycheck Protection Program of the SBA.

In total, the appropriations amounted to \$2.574 trillion. Much of the relief consisted of low interest loans which businesses would be required to repay.

But where is the commercial insurance industry since it is standard for any business enterprise to have a Business Owner's Policy that contains Business Interruption Coverage?



The Problem with Business Interruption Insurance

Initially, this coverage was known as “Use and Occupancy” Coverage. Well, if you cannot “use” your business and you cannot “occupy” your business then why isn’t Business Interruption Insurance covering the loss due to government mandated closures?

The 2012 version of the Business Interruption Policy Coverage Form reads as follows: “We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your ‘operations’ during the “period of restoration.” The suspension must be caused by a **direct physical loss** of or damage to property at the described premises. The loss of damage must be caused by or result from a Covered Loss.”

But where is the commercial insurance industry since it is standard for any business enterprise to have a Business Owner’s Policy that contains Business Interruption Coverage?

(Emphasis added)



No Loss, No Foul

If your businesses are forced to close through the exercise of a state or local official's police power and they have not sustained a *direct physical loss* as required under their Business Owners Policy as written, they have no recourse under their present insurance coverage.

Case law on whether a loss needs to be "direct" or "physical" in order to trigger Business Interruption Coverage is inconsistent depending upon the wording of the policy terms and the venue in which coverage is litigated.



Does This Mean The Risk is Uninsurable?

Is the insurance industry to blame?

Property and Casualty Insurers collect approximately \$6 billion a month in premiums, but the ACPIA estimates that monthly losses for business interruption for businesses with fewer than 100 employees would cost \$255 to \$431 billion per month for which no premiums had ever been charged. The net result would be that the claims would exceed the net worth of the entire property-casualty industry which is presently valued at \$800 billion.



Too Little, Too Late

What about those economic impact relief funding from the federal government to employers?

“Employers Wait Months for Promised U.S. Aid.”

“Employers are waiting as much as six to 10 months for the Internal Revenue Service to process claims for a popular wage subsidy that was designed to keep workers on payrolls during the Covid-19 pandemic.”

(Richard Rubin and Ruth Simon, *Wall Street Journal*, March 28, 2022)



Thinking Outside of the Current Box

One proposed solution is to pattern pandemic-related business closures on the public-private approach to terrorism as a risk to the nation. The Terrorism Risk Insurance Act (TRIA) requires the private insurance industry to absorb the first \$5 billion in property & casualty losses before the Secretary of the Treasury declares such losses an act of terrorism.

(Terrorism Risk Insurance Program Reauthorization Act of 2019, 15 USC 6701, November 18, 2019)

Originally enacted in 2006, Congress has repeatedly reauthorized the law with modifications.



Is Terrorism a Risk Management Model?

The U.S. Treasury Dept. is empowered to declare an emergency (TRIA) triggering insurance coverage. The TRIA also permitted insurers to surcharge a policy for terrorism risks if the insured opted to purchase such coverage. The private insurance industry absorbs the first \$5 billion in losses before triggering a federal insurance response as the reinsurer of last resort. The amounts of federal coverage have increased based upon then current economic conditions.



Gridlock On Potential Solution

Attempts have been made to replicate a private-public insurance program for pandemic-related business closures, but the effort has gained little ground. The proposed legislation does not require a “physical loss” or “direct physical loss” requirement for BIP coverage. The proposal re-writes the coverage as an optional coverage for business owners and permits insurers to charge an appropriate premium. In return, the insurance companies under such coverage would provide disclosure to the insured that the aggregate amount of losses on an industry-wide basis would be capped at \$250 million in any calendar year at which point federal coverage would be triggered by the Secretary of the Treasury for a total cap of \$750 million.

(H.R. 7011, 116th Cong. 2d Session, May 26, 2020)



We're In This Together!

Should the total private-public reinsurance exceed a \$750 million cap, the Secretary of the Treasury shall notify Congress no later than fifteen days after conclusion of a declared public health emergency. Rates for such optional insurance coverage would be required to be approved by the National Association of Insurance Commissioners (NAIC) in order to establish rates to the associated risk.



Insurers Take Aggressive Litigation Initiative

Many insurers when presented with a business interruption claim based upon COVID related business closures have resorted to 'strike suits' initiating declaratory relief in federal court before a state court action can be commenced.

The reason these aggressive litigation tactics are being used is to ensure that consistency applies to any BIP claims instead of the piecemeal legal decisions of the past.

(Panel Discussion, Eighth Circuit Judicial Conference, Oct. 2021)



Can't We All Just Come Together?

While solutions may still be attained to encourage insurers to extend optional coverage to private businesses for closures absent a 'direct physical loss' unless Congress is willing to put in place an incentive to do so, it seems unlikely that the current policy terms will be changed.



Questions & Answers?

Thank you to the National Council of Insurance Legislators (NCOIL) and The Institutes Griffith Insurance Education Foundation for the opportunity to present this subject to you today.

