

## Insureds struggle to cover business losses from virus

### Legislative fixes face fierce insurance industry resistance



By Pat Murphy

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Insurance attorneys who see daunting challenges in lawsuits to establish business interruption coverage for losses caused by the coronavirus pandemic are holding out hope that state and federal legislators can come up

with solutions to avoid financial ruin for many of their clients.

Boston attorney Joshua M. Bowman says calls from clients about their business interruption coverage began “pouring in” back in March.

“When I read the policy language, I concluded the insurance industry was going to do everything they possibly could to deny just about every claim,” says Bowman, who represents restaurants, hotels and other businesses in the hospitality industry as part of his commercial real estate practice. “To my knowledge, they haven’t paid out a single claim.”

In fact, the insurance industry has drawn a line in the sand against legislative efforts to prevent the denial of business interruption claims. In a March 18 letter to the insurance industry, a bipartisan congressional group urged commercial property insurers to provide business interruption coverage for COVID-19-related losses.

The American Property Casualty Insurance Association and other industry groups responded with a joint letter of their own flatly rejecting the legislators’ invitation to act.

“Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19,” the insurance industry’s reply letter states.

But plaintiffs’ attorneys refuse to take “no” for an answer. Bowman has teamed up with a friend from law school, state Sen. James B. Eldridge, to help draft an emergency bill to address the problem.

“There must be a legislative fix to this, because even if a plaintiff is successful in litigation [against their insurance company], by the time the courts decide these cases the plaintiffs won’t be in business anymore,” Bowman says.

### Litigation roadblocks

Springfield business and commercial real estate attorney Michael A. Fenton says he’s already received a number of inquiries from clients regarding their business interruption insurance.

“Across the board, we’re hearing that insureds are receiving feedback [from their carriers] that their claims will be denied,” he says.

Nonetheless, Fenton says he is advising clients that it is important to proceed and file claims in a timely fashion in order to preserve their rights.

“Clients need to pay very close attention to the notice requirements under their policies so that they comply with all deadlines,” he says.

According to Fenton, in cases in which a business interruption claim has been denied because of a “physical damage” requirement in the policy, some courts in Massachusetts and elsewhere have taken the “broad view” of direct physical loss. Siding with policyholders, those courts ask whether events have rendered the building “unusable or uninhabitable.”

“Under that standard, certainly it would be reasonable for a court or insurance company to come to the conclusion that COVID-19 has rendered a premises either unusable or uninhabitable,” Fenton says.

On the other hand, Fenton says some courts have adopted a strict analysis, looking to whether there was “actual, physical, structural” change to the property.

“We’re telling clients that the direct physical loss requirement has been litigated for many years,” Fenton says. “The definition of what that means in the context of these business interruption policies was a very confusing subject even before COVID-19. We expect there will be significant litigation in Massachusetts and across the country that sort that out in the context of COVID-19.”

Bowman says a second fundamental obstacle policyholders sometimes face is a standard endorsement excluding coverage for loss due to virus or bacteria.

“They did that [in 2006] in response to the SARS crisis,” Bowman says. “The virus rider is not in every policy, but most smaller businesses have policies with the virus rider.”

According to Bowman, it can be argued that a virus exclusion in a particular policy is ambiguous and does not apply to the closure of a business in the current crisis.

“Most restaurants are not closed down because there was a virus actually in their restaurant,” he

says. “They’re closed down because of the pandemic that has gripped the world.”

But virus exclusions will be hard for policyholders to overcome, says Michael D. Brier, a Boston business litigator.

“If you have a virus exclusion in your policy, you’re in big trouble,” Brier says.

Boston attorney Sara Perkins Jones points out that, depending on policy language, coverage for coronavirus-related shutdowns may be more readily available under certain specialty policies. For example, Jones says she is currently analyzing one client’s environmental policy that has business interruption coverage without a virus exclusion.

“While [the policy] still would require some physical loss, if we can get around that there’s a very good chance we could get coverage for our client,” says Jones who co-chairs the Boston Bar Association’s Insurance and Reinsurance Subcommittee. “We’re also looking at event cancellation policies to see if there is any other coverage that can be drummed up for any part of people’s losses.”

### Out-of-state litigation

Fenton says he hasn’t heard of any business interruption insurance cases recently filed in Massachusetts, but he’s closely following two cases filed in other states.

In *Big Onion Tavern Group v. Society Insurance*, filed on March 27 in U.S. District Court for the Northern District of Illinois, the owners and operators of restaurants and movie theaters in the Chicago area are suing to obtain payment under commercial policies providing coverage for losses incurred due to a “necessary suspension” of their operations. The plaintiffs contend that coverage was triggered by state shutdown orders in response to the coronavirus outbreak.

In *Cajun Conti LLC v. Lloyd’s of London*, filed on March 18 in Louisiana state court, a New Orleans restaurant is seeking a declaratory judgment that its business interruption policy will cover its losses should it be ordered by local authorities to cease operations during the coronavirus pandemic.

As with most insurance litigation, Bowman anticipates that a majority of lawsuits over business interruption coverage will settle.

“So even if it never gets to a verdict, these litigators will be doing their clients a great service by bringing these claims and getting some money,” he says.