

# Insurance Buyers' News



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## COVID-19 Business Interruption Lawsuits Move Through the Courts

Insurance companies have been denying COVID-related business interruption claims unless the policy specifically includes damage from viral contamination.

Attempts in Congress and state legislatures to pass legislation forcing insurers to cover COVID-related losses have been resisted by insurers who point out that paying such claims would make many companies insolvent.

The National Association of Insurance Commissioners has also said that expanding the coverage obligations of insurance policies in this manner would be unconstitu-



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## This Just In...

The availability of wildfire insurance for commercial property insurance is severely strained. There has also been greater scrutiny when underwriting business interruption coverage, particularly as related to pandemics, according to various reports issued by major insurance brokerages. Some London brokers have developed availability to cover viruses but pricing is prohibitively high.

In the first part of 2021, U.S. property underwriters were caught off guard by unexpected losses such as the first-quarter Texas winter storm and freeze and the June 24 collapse of a condominium building near Miami.

Property insurance rates have been increasing due to uncer-

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tional under the Contracts Clause of the U.S. Constitution, since there is no specific contractual obligation to cover these losses in most insurance policies.

Nevertheless, many businesses have filed lawsuits against insurers to enforce COVID business interruption claims. Some businesses, like restaurants and hotels, say their policies include provisions that expressly address losses caused by viruses.

Additional arguments are that COVID-19 losses are the result of governmental orders (to some extent policies may cover losses stemming from acts of civil authorities) or that the absence of tangible physical damage does not mean loss of use of the property and should therefore be covered. These suits also challenge the applicability of the virus exclusion found in most policies.

More than 1900 lawsuits have now been filed. And according to analysts from the University of Pennsylvania who track these suits, more are on the way. But fewer than a quarter of those have been decided and of those decided 188 are on appeal. Appeals remain pending in 13 state courts: California, District of Columbia, Florida, Illinois, Indiana, Massachusetts, Michigan, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, and Wisconsin. No state appellate court has yet rendered a decision.

“Although new COVID-19 business interruption filings and trial court rulings will continue capturing headlines well into the balance of this year and beyond, as courts of last resort, the appellate courts will ultimately shape the law on coverage for COVID-19 business interruption coverage,” according to attorneys Ash-

ley Jordan and Jessica Gopiao of Reed Smith, a law firm.

The following five cases are expected to be heard soon:

### **Sea v. California Mutual Insurance**

The main question for the court is:

Does coverage for “direct physical loss of or damage to” property need to include a physical alteration of the property? In other words, can property be said to be damaged even if there’s nothing wrong with it except that it just can’t be used under the present circumstances?

### **Choctaw Nation v. Lexington**

The lower court concluded that “direct physical loss” does include property that is normally usable but has been rendered unusable by COVID-19 and that its physical alteration was not necessary.

Also, even though the policy has virus exclusions, the court said the language was not specific enough to rule out coverage against pandemics. The insurers have appealed the decision to the Supreme Court of Oklahoma.

### **Gavrilides Management Company v. Michigan Insurance Company**

A Michigan Circuit Court dismissed the policyholder’s suit saying that the virus exclusion does apply. It is on appeal.

### **Nail Nook v. Hiscox Insurance.**

The Ohio court said that the virus exclusion was clear and unambiguous. It is on appeal.

### **Mudpie v. Travelers**

The Northern District Court of California, as

#### *This Just In*

**tainties surrounding the pandemic, though they’ve moderated lately, with a few property owners even experiencing rate decreases of 1 or 2 percent.**

**Whether that moderating trend continues will depend on what happens during the Atlantic hurricane season. Tough occupancy properties such as habitation, heavy manufacturing, forest products and risks involving food and recycling have been harder hit with losses lately, and could see increases of 20 percent, 30 percent or more.**

**Catastrophe exposures, including hurricanes, wildfires, hail and tornados, continue to draw great attention from insurers, brokers say. Wildfires, they say, are still insurable. But barely!**

**There has also been a push to impose percent deductibles for tornado and hail, much like wind. Insurers are also seeking more accurate valuations, having paid a lot of losses against inadequate valuations lately, according to reports from several major brokerages.**

with the Michigan and Ohio courts, dismissed the complaint. But it is on appeal to the 9th U.S. Circuit.

At this point, it does seem like *Choctaw Nation v. Lexington* is an outlier. However, policyholders and insurers alike should be glad to see these cases come up for review, particularly *Mudpie v. Travelers* because it will be heard in the 9th U.S. Court of Appeals. The only higher court is the U.S. Supreme Court, where the matter may ultimately be decided. ■

# Are Employers Responsible for Employee Identity Theft?

The answer is yes, which is why it's important to practice good cyber risk management.

Cyber thieves love employee personnel records. With the information they steal from Social Security numbers, birth dates, work history, bank account information and health information, they can do a lot of harm and “earn” a lot of money.

As an employer, it's your responsibility to protect this information. In fact, state and federal laws require employers to safeguard this data. If you don't, you could be held liable when the information is stolen.

Employers need this information for background and credit checks. It therefore often falls to human resource (HR) departments to determine risks and figure out the best lines of defense.

## What Thieves Target

It's helpful to understand what types of information thieves are looking for. For instance, thieves can use stolen financial information to establish new accounts and use them to steal funds from the victim's existing accounts. Employee information also can be sold to undocumented workers to provide a false work history.

Thieves will sometimes use email to pose

as a company executive to request a copy of an employee's W-2 form. If the employee receiving the request fails to verify the legitimacy of the request and forwards the W-2, the thief can use it to create and submit false tax returns or open lines of credit.

## Internal Dangers

The Society for Human Resource Management (SHRM), a professional human resources membership association, reports that 30 to 50 percent of identity theft begins in the office. Numerous employees and management have access to HR records, making it more difficult to enforce proper security protocols. In addition, data stored in the cloud can be accessed if an employee uses an unsecure network or falls prey to a phishing scam. There is also the potential that a disgruntled employee might be enticed to sell password data

## Federal Laws

The Fair and Accurate Credit Transactions Act and the Fair Credit Reporting Act hold employers liable if their acts or omissions lead to identity theft. In addition, failure to adequately safeguard health-related information or medical records makes employers liable under the



Americans with Disabilities Act or the Health Insurance Portability and Accountability Act.

However, there is no one federal law that covers identity theft. The law that applies depends on the type of crime committed.

## State Laws

States have taken the lead in establishing employer liability laws, but there is no uniformity or consistency from state to state. Some states have data privacy legislation, while almost all states have data breach notification laws. These laws often impose additional requirements and restrictions on how employers use, store and transmit employee information.

## Best Practices

The first step is to develop a comprehensive cybersecurity plan. Working with your IT department and management, craft a document that outlines the best policies for handling, storing and accessing the personal data of employees. You will need to address:

- ✱ How the company will encrypt files that contain sensitive data
- ✱ Where hard-copies can be stored safely – preferably in a locked location
- ✱ How and when you'll conduct internal risk assessments
- ✱ What employee information should be stored on the network
- ✱ Who will be allowed to view or edit sensitive employee data
- ✱ Under what circumstances employee information can be shared
- ✱ How this data should be stored and encrypted
- ✱ Who will oversee training
- ✱ Whether to hire a consultant to assess your network vulnerabilities

- ✱ Who will be in charge of overseeing security and serve as the go to person for questions
- ✱ How the company will handle a breach if sensitive data is compromised.

Once you have a plan in place, train both your managers and your employees on the new procedures. It's also important for employees to understand the various ways thieves can get their or the company's information. For instance, a cybercriminal who gets control of a victim's social media account can defame and slander an employer and defraud an organization's customers, partners, vendors and clients.

Training should include the importance of:

- ✱ Understanding the tactics that cyber thieves use to attack employees and corporations, such as phishing emails
- ✱ Using stronger passwords and securing the information
- ✱ Alerting a manager, HR and IT immediately about potential data breaches
- ✱ Using more secure networks
- ✱ Not accessing company information from public Wi-Fi.

Finally, it's an excellent idea for your firm to carry cyber liability insurance. ■

# What to Do if Your Business Has a Property Loss

In the event of a loss here's what to do:

## 1. Make "Safety First" Your First Priority

Make sure everyone is safe. You will most likely want to evacuate the damaged property and notify staff, vendors, suppliers and anyone else who should know about the situation.

## 2. Mitigate Damages

It should go without saying that you need to protect and preserve your property from further damage. But your insurance policy also requires it. For example, if your building suffered fire damage to the roof, you need to secure an emergency tarp for it and have the water extracted from the building. Be prepared and know how to mitigate damage in the event of contingencies.

You may also need to make temporary repairs to protect the undamaged portion of the premises.

## 3. Establish a Plan

Work with your adjuster to decide what needs to be done to repair the damage in the most expedient manner. The insurance claim process will probably take a while, so plan ac-



cordingly. Part of the plan should also include temporarily operating your business from another location, if necessary. The business interruption coverage portion of your policy should cover this.

#### 4. Determine Coverage

Be sure you understand exactly what your insurance policy covers, including coverage amounts, coverage exclusions, limitations such as co-insurance penalties, various damage valuation methods, and your duties and responsibilities for filing a claim. Promptly complete any required claim notices.

#### 5. Create a “Loss Record”

Gather all records associated with the loss. Claims people call this a “loss record.” Everything related to costs incurred because of your loss will be recorded. These should include all costs related:

- ✦ Protection of property
- ✦ Immediate remediation
- ✦ Temporary repairs
- ✦ Building reconstruction and repair
- ✦ Contents repair and replacement
- ✦ Expediting expenses
- ✦ Extra expenses

You should try to get your adjuster’s permission to use your own personnel if they are important to the restoration efforts. Be sure to do this before you use them for repairs or clean up though. Then submit those costs for reimbursement.

#### 6. Negotiate Your Claims Settlement

In most cases, if there is extensive damage, your adjuster will engage a construction consultant to help develop a scope of work for your repairs. You will usually be asked to invite two or three contractors to bid that scope of work.

You will want to reach an agreement with your adjuster on the selection of contractors and the price. For specialized equipment or structures, you may need to engage special vendors or experts. If there are differences of opinion about anything, you may need to hire experts at your own expense to plead your cause, but this would not be typical.

#### 7. Get Your Check(s)

Claims payments are basically a three-check process.

- ✦ The initial payment is an Actual Cash Value Payment or at least an estimate of such for the undisputed amount of the claim, less the deductible.

- ✦ The second check is payment of the deductible to contractors, which is your responsibility.
- ✦ Third is a check for the balance of claim — or Recoverable Depreciation, which is released once all work listed in the insurance claim has been completed. The contractor provides a final invoice only for work completed. This is the notice to the insurance company to release recoverable depreciation. You must spend all the claim funds in order to get the entire amount of recoverable depreciation. (If there are mortgage companies, they will typically also be listed as co-payees on claim checks when the entire claim amount exceeds \$10,000.00.)

#### 8. Build Back Better!

Be sure to get a written agreement from your insurance company before starting on restoration work. It’s recommended you have check in hand for at least an estimate of the Actual Cash Value portion of the claim before starting work. ■



# How to Prepare for a Property Loss

**N**obody wants to have a loss of course, but you need to be ready. Here are six things to do right now, while you're safe and sound with no immediate threats out there:

- 1 Anticipate the kind of loss you might sustain.** Which business units are at risk, how will those units respond to an event and how they can quickly and efficiently resume operation either in place or off-site?
- 2 Create a Loss Adjustment Team.** Generally, it is helpful to identify the parties involved in advance of the loss. This means identifying an adjuster in advance and any other consultants that may be useful such as an engineer, construction consultant or accountant.
- 3 Understand Your Coverage.** Carefully look at your coverage. Then, if you have any questions or concerns, call us to review it with you as well. The time to reconcile matters like this is now, prior to a loss.
- 4 Secure Important Documents:** financial records, inventory records, appraisals, building drawings, etc. can all be critical to the adjustment process. If you have paper documents make sure they are properly secured in a fire-proofed location or, better yet, stored off-site. Make sure your electronic records are secure and backed-up.
- 5 Identify Key Points of Contact.** Who are the key players in your organization in sales, operations, accounting and finance, warehousing, and risk management? Your plan should ensure that the entire team can interact efficiently and effectively with leadership during the aftermath of the loss and with the adjuster.
- 6 Contact us.** We want to help. ■

Insurance Buyers' News



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