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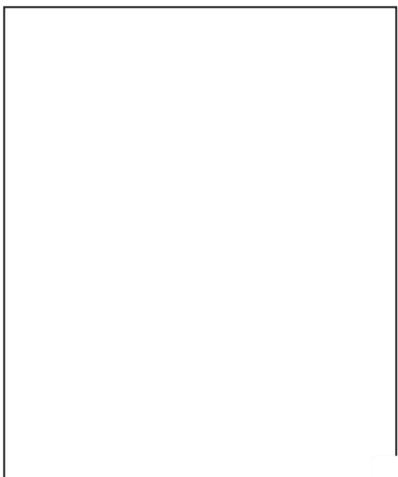
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Whether in courts or capitols, business interruption insurance debate heats up in Harrisburg, D.C.

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BY: ANDREW BAHL

([HTTPS://WWW.PLSREPORTER.COM/AUTHOR/ANDREWBAPLMYPLS-COM/](https://www.plsreporter.com/author/andrewbahlmyppls-com/)) MAY 7, 2020

If a tree falls on your house, filing a claim under your homeowner's insurance is a given. Likewise if a natural disaster rips through a grocery store, restaurant or office building, owners would be able to recoup lost revenue.

But what if the threat to your business is not fire or flood but a pandemic?

While business owners are scouring the fine print of their plan, lawmakers and legal minds at both the state and federal levels are bracing for a potentially intense fight over whether plans should cover the massive losses incurred by business owners due to the coronavirus pandemic and the resulting business closures which have ensued.

Business interruption insurance is typically carried to protect against lost revenue from a disaster or act of God, such as fire, storms or theft. If physical operations are disrupted due to one of these events, the policy can make up for income that would otherwise be lost, as well as help a business with any extra costs incurred, such as paying rent at a new facility.

With businesses in much of the state closed due to orders from Gov. Tom Wolf surely, owners wonder, there is no clearer example of their work being

Outside
The Dome
Harrisburg,
PA



52°F
Light Rain

Fri Sat Sun Mon Tue Wed Thu



55°F 48°F 64°F 54°F 59°F 66°F 66°F
30°F 36°F 43°F 37°F 36°F 46°F 59°F



Monday

Rep. Anita Kulik (D-Allegheny)

Friday

Sen. Dan Laughlin (R-Erie)

Rep. Mike Purskarcic (R-Allegheny)

Rep. Chris Sainato (D-Lawrence)

Saturday

Sen. Mario Scavello (R-Monroe)

Capitol Commentary

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interrupted.

The problem is pandemics are rarely spelled out as a “named peril” in insurance policies. This means that a business must be covered by an “all risk” policy, which covers all incidents unless not expressly restricted in the language, it is likely they will be out of luck for any COVID-19-related claims.

But not all “all risk” policies are created equal. Many insurance companies explicitly excluded pandemic-type situations from policies following the SARS outbreak in the early 2000s, fearing exactly the type of situation they currently are facing.

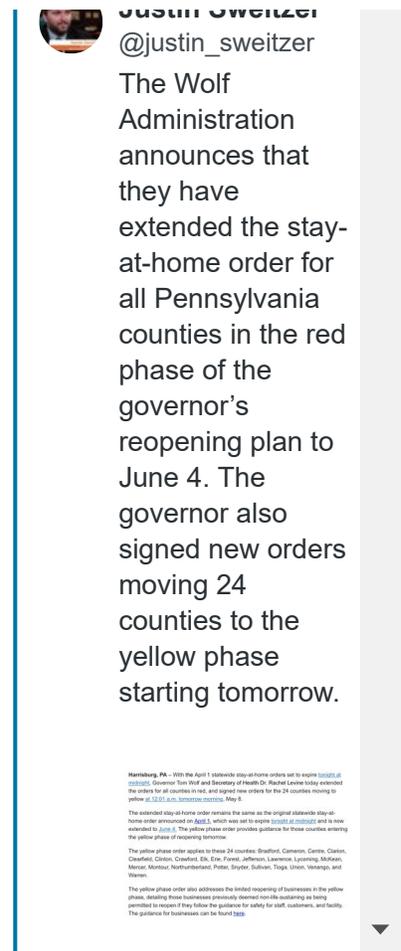
But for those that did not exclude a pandemic-type scenario, policyholders are wondering whether that conscious decision means they are due compensation.

A ruling upholding Gov. Tom Wolf’s business closure order might force insurers’ hands. The high court deemed the COVID-19 outbreak is on the same level as natural disasters in justifying most elements of Wolf’s response.

“The only commonality among the disparate types of specific disasters referenced is that they all involve “substantial damage to property, hardship, suffering or possible loss of life,” the majority opinion read in the Friends of Danny DeVito v. Pennsylvania case. “In this respect, the COVID-19 pandemic is of the ‘same general nature or class as those specifically enumerated,’ and thus is included, rather than excluded, as a type of “natural disaster.”

Some believe that this has insurance implications as well, even though the case was much broader in scope.

“With the Supreme Court having held that the pandemic is indistinguishable from other casualty events that routinely trigger business interruption and other similar coverages, policyholders have gained a clear advantage,” Jordan Rand, an insurance and real



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estate lawyer for the Philadelphia law firm Klehr Harrison Harvey Branzburg, wrote in a recent Law360.com opinion piece. “Though the harms occurring during the pandemic are unprecedented in magnitude, they are precisely the types of harms that have for more than a century triggered insurance coverage.”

Many also point to a federal case in the 3rd U.S. Circuit Court of Appeals, which includes Pennsylvania, where bacteria in a home’s plumbing constitutes physical damage. The argument goes that COVID-19 infections, while not physical in a traditional sense, could create similar harms.

But lawmakers at both the state and federal level have been pushing to legislate the matter, effectively requiring insurance companies to pay out claims related to the virus.

Such a move has garnered intense pushback from the insurance lobby, who argue such a move would bring them to the brink of bankruptcy and would open up legal concerns over retroactivity.

In an email, Sam Marshall, president of the Insurance Federation of Pennsylvania, said that policies were never designed to cover the kind of pandemic-type scenario the state is currently living in. Thus, business interruption legislation would offer “false hope, not realistic relief or a way forward, for Pennsylvania’s employers and employees.”

“As a general rule, insurers never charged and policyholders never paid premiums for this coverage, and our policies were never designed to cover this – a global pandemic and nationwide closure of businesses stretching over many months is beyond the capabilities of private insurance,” Marshall said. “Yes, we have reserves – that’s to pay for that which we did cover and charge for. We can pay for what we insured or pay for what we didn’t insure, but we can’t do both.”



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There also are arguments that the DeVito ruling focused on the public health ramifications of the pandemic and that their insurance implications should not be overstated.

“The Supreme Court only found that COVID-19 is a catastrophe resulting in injury to persons. It made no such finding regarding property damage,” two attorneys at the Philadelphia law firm White and Williams LLP wrote in an opinion piece. “That is not surprising. Wolf did not issue his executive order based on a threat of property damage; he issued the order in part to activate executive powers to contain the spread of disease.”

Thus the policy debate over legislation has created an awkward dichotomy, forcing policymakers to choose between supporting small business owners and insurance companies.

President Donald Trump has indicated he would be in favor of requiring businesses receive insurance payouts and his administration says the National Economic Council is studying the matter.

“When they finally need it, the insurance companies say we are not going to give it,” Trump said. “We cannot let that happen.”

At the state level, at least three lawmakers have introduced legislation that would require at least some claims be paid, garnering support from members of both parties. One of those supporters is Sen. Pam Iovino (D-Allegheny) who introduced legislation last week to clarify “ambiguous” language in business interruption insurance policies.

While the legislation would not provide for payouts beyond whatever a business’ insurance plan outlines, Iovino said that it would be a needed supplement to government aid funds.

“I’ve heard from businesses in my district that are struggling,” she said in an email. “While government-run programs are a vital stopgap to the economic relief package for businesses, we need to explore any and all available options. Businesses that have consistently paid their business interruption insurance premiums expected to be able to rely on their insurers for some security during a time of need.”

Sen. Vincent Hughes (D-Philadelphia) has similar legislation which is slightly broader in scope, overriding any language barring payouts during pandemics to let businesses file claims, which would be 100 percent of a small business policyholder’s coverage limit and 75 percent for larger enterprises.

It also would classify any positive cases of COVID-19 among staff or customers as “property damage” and require that any legal challenges to the mandate go directly to the state supreme court.

The effort is also bipartisan with two Republicans—Sens. David Argall (R-Schuylkill) and Doug Mastriano (R-Franklin)—have signed on to support the legislation.

But a separate option is emerging, one which is being championed by some lawmakers at all levels and which would bypass insurance providers entirely by having the government cover business interruption claims during a pandemic.

At the state level Rep. Tom Mehaffie (R-Dauphin) has pushed legislation that would create a grant program that “mimics what business interruption insurance does,” available to businesses with fewer than 200 employees.

Initially, the bill was set to be fast-tracked in an effort to avoid layoffs at many small businesses in need of a short term infusion of cash.

But Mehaffie said that it quickly became apparent that it would come too late. At that point, in consultation with other members, he said the decision was made to take a step back and refer the legislation back to the House Finance Committee. That's in part due to a push to have the bill apply only to the state's smaller enterprises.

"I heard from a lot of our colleagues ... that they'd like to go to a 100 or [fewer employees] to really focus on the small businesses that didn't have an opportunity to get the PPP loans or other grant opportunities out there," he told *The PLS Reporter*. "So we wanted to make it for much smaller businesses."

But the main reason for the delay is that lawmakers are on the search for a clearer funding mechanism to underwrite the grant program, with Mehaffie saying he was hopeful that some of the \$4 billion earmarked specifically for the state's COVID-19 relief efforts

Mehaffie made it clear that his legislation would not be the answer if adequate funding could not be found, although he said he did not have a final number in mind for how much it would cost and would be "grateful for whatever."

"We're out working for businesses, the one thing I don't want to give anybody is false hope," he said. "This bill is designed to help them, it is designed to help them come out of this and hopefully be debt-free ... But the number one thing is we're going to have to have the funding. And that is going to have to come from the federal government and the CARES Act. And if that doesn't happen, unfortunately, this bill is not going to run."

A hybrid model could also be on the table, with legislation from House Minority Leader Frank Dermody (D-Allegheny) creating a fund operated by the Insurance Commission which would be refreshed with future assessments on insurance companies

operating in the state. The proposal mirrors similar bills introduced in Massachusetts, New Jersey, New York and Ohio.

But there is a sense that many of these issues will be decided in the court system. Standard and Poor's has cautioned that legislative efforts "will not materialize" and that it is likely any legislation passed will need to be carefully constructed if it is to withstand a heavy legal challenge from insurance allies.

Marshall said in his email that the Insurance Federation understood the struggles businesses were facing and that other policy areas would be more useful for policymakers to focus on.

"We stand with [businesses] in trying to keep insurance available and affordable as our economy reopens," he said. "That should include meaningful liability protection for employers as they reopen, and for those who are providing essential services throughout this ordeal – as with some level of immunity for businesses operating in accordance with the administration's standards of safety."

There will likely be similar back-and-forth over the resolution of individual claims, over both policies which appear to exclude pandemic coverage and those that do not. Class-action suits have already been filed nationally, and Rand said it might be possible for some collective success in cases where insurers have very similar situations.

But overall, he cautioned, a macro-level solution might not be forthcoming in how claims get resolved.

"I know there is this desire to address this on a macro level but insurance coverage litigation inherently sometimes turns on the location of a comma," Rand said in an interview. "And when you're dealing with a body of law that is so highly dependent on the

specifics of the language and the structure of a written document, the notion that there is a sweeping resolution is a bit far-fetched in my view.”

Andrew Bahl is a State Government Reporter for The PLS Reporter. Have a question, comment or tip? Email: andrewbahl@mypls.com (<mailto:andrewbahl@mypls.com>).

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