

# Can Making An Insurance Claim Due to Forced Closures Help Your Small Business?

by **Nancy Lanard**, *Lanard and Associates, P.C.*

**W**hen our firm reviews a lease for our clients, we strongly recommend that they take out at least 12 months of business interruption insurance. This insurance should cover the rent and other expenses that occur if there is a reason that the business is closed for a period of time. Typically this is due to a physical or structural reason for the closure. However, I believe that it could be argued that a forced closure due to a virus, is a physical reason for the closure. As such the business interruption insurance should then kick in and pay rent, payroll, etc. Since the virus is transmitted through the air and on surfaces,

it arguably is physical damage to the property. The virus can be present in stores, businesses, airplanes, etc.

Courts have found that dangerous substances found on or at a property can be considered "property damage" and trigger first party property insurance. A federal court in New Jersey, in 2014, in *Gregory Packing, Inc. v. Travelers Property Cas. Co. of America*, found that ammonia accidentally released in a building made the building unsafe for human occupancy. The court in that case found that structural damage was not necessary to a finding of property damage. Other courts have held similar conclusions.

Additionally, government ordered closures may trigger business interruption insurance where an "order of civil or military authority" is required. It is important to check with your carrier to see if either property damage insurance or business interruption insurance will apply in this instance. A creative broker should be able to assist you in making a proper claim.

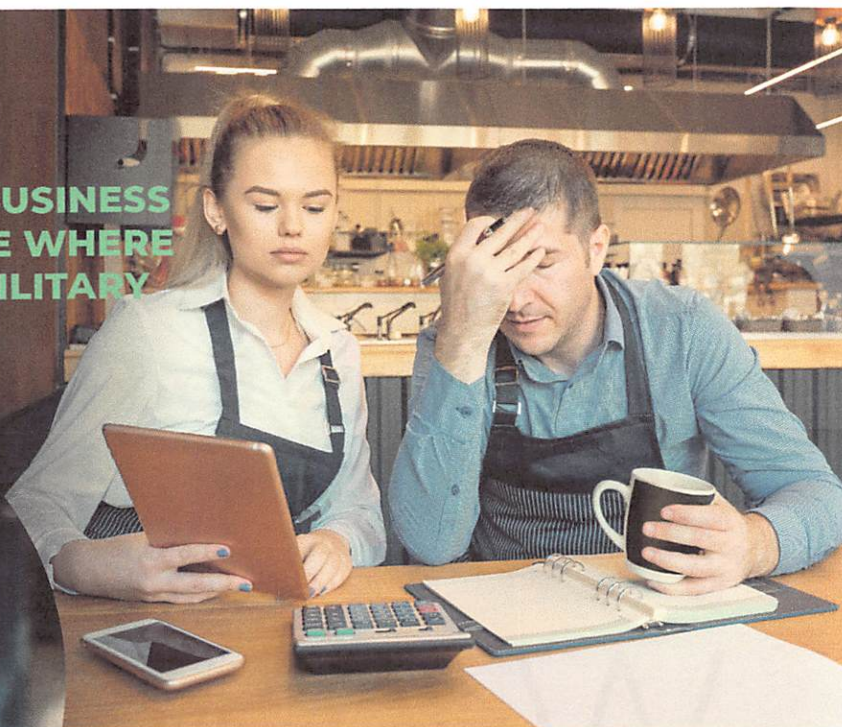
I would strongly recommend that everyone pursue their property damage and business interruption insurance with their carriers to see if claims can be made. Seek the assistance of a good broker to help with filing the claim in a way that may facilitate the process.

It is important to review your business insurance policies to determine if you have business interruption insurance. Business interruption insurance generally covers the loss of profits a business suffers after certain events. The specific terms of business insurance policies differ, so it is imperative to determine what





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causes are covered under the policy. For example, some business interruption policies may exclude losses caused by viruses and other biological agents, but, conversely, some policies cover losses caused by orders of a civil authority (i.e. government action) which might be helpful.

In addition, when reviewing relevant insurance policies, business owners should check to see if they have contingent business interruption insurance (“CBI”), which is an extension to other insurance. CBI reimburses the policyholder for lost profits and extra expenses resulting from damage to the property of a customer or a supplier, where those damages directly impact the policyholder’s ability to provide a service


or produce a product. CBI insurance typically provides cash to help you cover payroll, rent, and other expenses necessary to keep your business open. You should check the specific terms and conditions of your insurance policy and how it may help you with your business losses.

Another issue to consider is whether commercial tenants can potentially benefit from insurance coverage that is available to the landlord relating to government-mandated closures. For example, provided that a tenant’s obligation to pay rent is legally excused (e.g. under the provisions of the lease), the landlord may possibly have insurance coverage under the rent loss provisions of the landlord’s property insurance policy, which could include lost rent due to orders of a civil authority that restricts access or use of the leased premises. In that case, the landlord may be more willing to offer rent concessions, such as full or partial rent abatement or rent deferral.

Many insurance companies will take the position that the business losses suffered in

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connection with COVID-19 are not covered by policies and such losses are not caused by the type of physical damage required to file a successful claim. To address this argument, insureds should read their policy closely to see how "physical damage" is defined as well as consider state-specific laws. This issue is in flux and lawmakers in several states, including New Jersey, are considering bills that, if passed, could require insurance companies to cover business interruption losses caused by government shutdowns. Certain members of congress are also considering a Pandemic Risk Insurance Act, or "PRIA", which would establish a pandemic risk insurance program, similar to the Terrorism Risk Insurance Act enacted after 9/11.

When you address these issues and give notice to your franchisor, landlord, and insurance company, it is absolutely critical that such notices are put in writing. E-mails may not necessarily be considered valid notice under relevant agreements, so it is important to read your contracts to see what is considered to be valid "notice", including the proper party to whom all notices must be sent. Furthermore, be very careful to document any resulting agreement with your franchisor, landlord or insurance company in writing, which should be acknowledged and signed by the parties.

In conclusion, I would strongly recommend that everyone pursue their insurance with their carriers to see if claims can be made. As I recommended before, seek the assistance of a good broker to help with filing the claim in a way that may facilitate the process. It is very likely that claims may be initially denied, but later, they may be approved, perhaps with legislative or court ordered recovery. So it is important to preserve your rights by making sure to file a claim now.

Please let us know how we can help you during this very unique time.

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