

CHALLENGES WITH MANDATING RETROACTIVE BUSINESS INTERRUPTION INSURANCE COVERAGE



AB 1552 creates a mandate for insurers to provide retroactive coverage for business interruption policies. Specifically, AB 1552 creates certain rebuttable presumptions that COVID-19 was present on specified property and caused physical damage to that property which was the direct cause of the business interruption.

Commercial insurance performs a critical role in the world economy. Insurers protect the economic system from failure by assuming some risk associated with running a business. A commercial insurance policy with business interruption (BI) can cover lost profits, rent, utilities and clean up costs. It less often provides transition expenses and payroll. About 30% of small businesses (less than 50 employees) have BI coverage.

Typical BI coverage is only triggered by physical damage to a property and covers the period of time to repair the damage.

Examples of physical damage include:

- a tree falling on a business
- a store window broken during civil unrest preventing normal business hours

BI covers physical damage because it is temporary and repairable. Viruses, such as COVID-19, are not insurable because they are enduring and incurable. Insurers create limitations in their contracts to better predict risk. The goal is to ensure coverage for all their customers. The rates customers pay for BI reflect this level of coverage.

Insurance contracts reflect this narrow understanding of BI. Contracts create a basis of understanding for parties of a business transaction. Insurance policies are a contract between the insurance company and their customer.

Recent judicial decisions reflect insurers' understanding of physical damage. In the first final ruling on the question, a Michigan judge dismissed a case filed by a restaurant claiming their insurer was liable for financial damages caused by a coronavirus closure order. The restaurant argued the government shut down order amounted to physical damage because it barred public entry. In response, the judge offered, "that argument is simply nonsense." Additionally, another judge in the Southern District of New York denied a preliminary injunction requested by a magazine publisher to force its insurers to pay for financial losses caused by a coronavirus closure order. These decisions reflect a uniform understanding that viruses do not cause prolonged physical damage.

Legislation that retroactively rewrites insurance contracts to provide BI coverage threatens US and global financial stability. The Department of Insurance regulates insurance rates and the coverage associated with those rates. Insurance contracts are not created in a vacuum. If insurers cover a risk that we did not receive payment for, they would go bankrupt. The National Association of Insurance Companies [agrees](#) with this sentiment.

Pandemic BI coverage is available to purchase from some insurers as distinct coverage from typical BI policies. In October 2014, following Ebola epidemic, some insurance companies began offering "Pandemic Disease Business Interruption Insurance." These rates are exponentially higher to reflect the increased risk of this exposure. One example of this broad coverage is the Wimbledon tennis tournament. Before the pandemic, they paid \$2 million dollars a year for 17 years for this coverage. Insurers limit their coverage of these broad events because they need to ensure solvency for all their customers.

The Personal Insurance Federation of California (PIFC) is a statewide trade association that represents six of the nation's largest property and casualty insurance companies (State Farm, Liberty Mutual Insurance, Progressive, Mercury, Nationwide, and Farmers as well as associate members NAMIC, Chubb, and American Family Connect Property and Casualty Insurance) who collectively write a majority of personal lines auto and home insurance in California. For more information please contact PIFC Legislative Advocate, Deanna Jarquin, at 925.395.8802.