

Sonoma County businesses with pandemic-related losses hit wall with commercial insurers

The Press Democrat

In the aftermath of the power shut-offs during the October 2019 wildfire, Berlin Fisher realized he needed to get business interruption insurance coverage for his West County Style Bar in Guerneville because another disaster could put his hair salon on precarious financial footing.

Fisher had to wait until 30 days after the Kincadee fire, then bought a policy from Hiscox Business Insurance in November to provide him some protection for what would be the next in a series of natural disasters to ravage the region in recent years. Before Kincadee's flames, the lower Russian River area where he operates his salon was swamped by historic floodwaters last February.

When the Sonoma County health officer ordered the closure of businesses deemed not essential effective March 18 to help curtail spread of the coronavirus, Fisher initially was relieved figuring his business interruption insurance would kick in to make up for his loss of business. But Hiscox denied his claim, saying the salon's interruption "has not been caused as a result of direct physical loss or damaged property at the premises," according to an email from the insurer.

The rejection left Fisher baffled, perplexed and angry.

"There is actual physical damage to my business and equipment," he said in an interview. "The virus can sit on my equipment. It can sit on metal for three days. My scissors are metal, so that's damaging my equipment."

Fisher's frustration mirrors that of many other small business owners across the North Bay who have

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found themselves in the same quandary: business interruption coverage apparently excludes paying for losses during the COVID-19 pandemic. They are small shops, breweries, entertainment establishments that have faced the same refusal from commercial insurers to pay their business interruption claims. Their plight has attracted the attention of California lawmakers, the state insurance commissioner and lawyers.

Robert Hartwig, a business professor at the University of South Carolina and former president of the Insurance Information Institute in New York, the industry's main research group, said the coverage exclusion for a virus or bacterium started appearing in commercial insurance policies beginning in 2006, in the aftermath of the SARS (severe acute respiratory syndrome) outbreak from 2002 to 2004.

Some area small businesses are fighting back, though. Most notably, famed chef Thomas Keller of Yountville's French Laundry restaurant. Keller last month sued his insurer, Hartford Fire Insurance Co., in an attempt to have the insurance company pay for his losses caused by the interruption of French Laundry and his other restaurants. He has been forced to furlough 300 employees.

Keller's attorney, John Houghtaling, noted how the coronavirus has particularly threatened the nation's restaurant industry, which employs 15.6 million people. "This entire sector is crippled by a nationwide public health shutdown impacting countless livelihoods. We need insurance companies to do the right thing and save millions of jobs," Houghtaling said in a statement.

Insurance coverage woes

The latest anguish over insurance coverage during a crisis is all too familiar for many Sonoma County residents. Many of them who lost homes during the 2017 North Bay wildfires, have found their properties were underinsured and, therefore, have battled with insurers in some cases in order to rebuild their homes.

"They (2017 fire victims) had a full coverage problem," said Amy Bach of United Policyholders, executive director of United Policyholders, a San Francisco-based consumer advocacy group. "What they didn't have is a base coverage problem that we have here."

Only a third of U.S. small business owners are estimated to have business interruption coverage,

according to a survey by Nationwide Insurance. However, there is likely a fair number of them in the North Bay because they bought the coverage after being harmed or wiped out by recent fires or other calamities. Bach said she is working with lawyers to inform small business operators about the issue and recently held a webinar with about 25 vintners with the Napa Valley Vintners trade group to explain the intricacies of business interruption insurance.

The decision by a business owner to pursue legal action against a commercial insurer over this matter likely comes down to whether a business interruption policy includes a specific exclusion for virus-related losses. Typically, these commercial policies will have standard language stating that the suspension of business operations must be caused by direct physical loss of or damage to property — which is what insurers are saying isn't present with the coronavirus pandemic. Attorneys tend to be reluctant to take a case for a business if the interruption policy has such a virus exclusion, Bach said.

Most commercial insurers started including that exclusion in their business interruption policies after the luxury hotelier Mandarin Oriental International Ltd. recovered \$16 million in 2003 for business interruption losses from its insurers to cover losses at Asian hotels during the SARS outbreak, Hartwig said.

“There is no ambiguity in the language at all. None,” he said of typical business interruption insurance policies.

Hartwig went on about pandemic-related business losses: “Insurers have never collected a premium for this type of loss.”

Still, there are attempts to challenge that stance. Keller is asking a Napa County judge to force Hartford to pay claims because he contends there is no virus exclusion in his commercial insurance policy. His suit also notes Napa County's Public Health Officer Dr. Karen Relucio's order on March 18 to close nonessential businesses, in which she specifically states the directive was issued based on evidence of physical damage to property caused by the virus. In Sonoma County, Dr. Sundari Mase, the health officer, also mentioned in her order March 31 to extend the county shutdown through at least May 3 that “the virus physically is causing property loss or damage due to its proclivity to stay airborne and to attach to surfaces for prolonged periods of time.”

Keller's lawyer, Houghtaling, said such language gives his client an advantage.

"To avoid payments for a civil authority shutdown, the insurance industry is pushing out deceptive propaganda that the virus does not cause a dangerous condition to property," he said. "This is a lie, it's untrue factually and legally."

Recovering losses

Many local business owners interviewed for this story say they have not gotten their hopes up to recover any lost money through their business interruption coverage.

Brad Bergum, the chief financial officer at the Epicenter Sports & Entertainment complex in Santa Rosa, said "our insurance broker told us our policies do not cover business interruption relating to pandemics, so that's where we are at."

HenHouse Brewing Co. of Santa Rosa also faces the same denial of coverage, co-owner Collin McDonnell said. "The people aren't shutting their businesses down, the Gov. Newsom order shut us down," he said with frustration.

Others are more hopeful, especially those businesses with more legal resources. Vintage Wine Estates of Santa Rosa has a "pretty good legal interpretation that this cannot get excluded," said Pat Roney, the company's CEO.

The donnybrook has caught the eyes of state and federal elected leaders. As of March 30, lawmakers in five states have drafted legislation to compel insurers to provide coverage for companies that had business interruption insurance in force before the coronavirus pandemic struck. Last week U.S. Reps. Mike Thompson and Jared Huffman, along with 31 other California colleagues, wrote to California Insurance Commissioner Ricardo Lara and asked him to use his authority to ensure commercial insurance companies comply with their business interruption policies regarding claims related to losses from the coronavirus. "The coronavirus poses significant challenges to many small businesses and we are urging you to exercise all authority to have insurance companies comply with their business interruption insurance to cover losses caused by a California statewide business shutdown ordered to prevent the spread of coronavirus," the lawmakers wrote.

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To better inform policymakers, Lara on March 26 asked commercial insurers operating in California to submit data to his office showing how they are handling virus-related claims from businesses under their business interruption policies.

Lara can order an insurance company to cover business losses caused by COVID-19, if the specific policy includes such coverage and the loss is not otherwise excluded, the insurance commissioner's spokesman said.

In a statement, Lara said his department is working with insurers and business owners "to find creative solutions during this unprecedented crisis to make sure our businesses survive."

Insurance industry troubles

Against this political backdrop, the insurance industry has made another argument: its financial viability would be at risk if insurers were forced to pay coronavirus-related business claims. In tandem, the insurers are making the argument the federal government already has stepped in to provide some relief small businesses are seeking, specifically the stimulus package passed last week by Congress that included \$350 billion for small businesses that pledged to keep employees on the payroll.

"The federal government has more policy tools and levers that it can adjust and it can use in a very targeted manner," said Hartwig, university professor and commercial insurance expert.

The American Property Casualty Insurance Association has conducted a preliminary estimate that business interruption claims only for U.S. small businesses with 100 or fewer employees could fall between \$220 billion to \$383 billion per month related to the pandemic. The current surplus for the overall U.S. property casualty insurance industry stands at \$812 billion.

"Any attempt to retroactively collect for nonexisting coverages for such an extraordinary catastrophe like the COVID-19 would absolutely put into question the industry's vitality and potentially solvency," said Sean Kevelighan, CEO of the Insurance Information Institute.

That answer is cold comfort to Guerneville hair salon operator Fisher, who uses his email signoff as a "dog dad of three rescues and a guy just trying to make a living."

His livelihood is now in jeopardy since he can't do home visits to cut hair. And even if he sold gift cards or vouchers for future service, Fisher said he likely would be digging himself into a financial hole he could not climb out of when he eventually reopens. He is set to pursue a legal claim against his insurer, Hiscox.

"I'm not letting go," he said. "We went to bed thinking we were covered, and we were great, and we were golden because our insurance companies sold us these policies."

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