

# SENATE BILL REPORT

## SB 5351

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As of February 2, 2021

**Title:** An act relating to business interruption insurance claims.

**Brief Description:** Concerning business interruption insurance claims.

**Sponsors:** Senators Frockt, Nobles, Cleveland, Das, Hasegawa, Keiser, Kuderer, Lovelett, Nguyen, Randall, Salomon and Wilson, C..

**Brief History:**

**Committee Activity:** Business, Financial Services & Trade: 2/02/21.

**Brief Summary of Bill**

- Extends the minimum limit to a right of action against an insurer from one year to two years.
- Establishes that every property insurance policy containing a grant of coverage for direct physical loss of or damage to property must be interpreted as deprivation and loss of the ability to use the property.

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### SENATE COMMITTEE ON BUSINESS, FINANCIAL SERVICES & TRADE

**Staff:** Kellee Gunn (786-7429)

**Background:** Business Interruption Insurance. When a business faces a slowdown or pause in business operations, the financial losses associated with the loss in net income may be managed with business interruption insurance. Business interruption insurance may also be known as a business income and extra expense (BIEE) policy.

A typical BIEE form, provided by Insurance Services Offices, Inc., provides coverage for loss of income as well as additional expenses incurred to continue operations following a covered loss. This has been interpreted to mean that the business suspension must be

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caused by direct physical loss of or damage to property at its location. A BIEE policy form often comes with an endorsement establishing that the insurer will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical stress, illness, or disease.

In March 2020, the Office of the Insurance Commissioner conducted an informal survey of commercial policies. The survey found more than 194,000 commercial policies had at least one type of business interruption or civil authority coverage in effect. The premiums for those surveyed policies were estimated at \$437 million. Of those, most companies had the endorsement which prohibited coverage due to virus.

Case Law. In Washington, the courts often decide whether an insurer has an obligation to its insured under the insurance contract. The insured then bears the burden of showing that coverage exists, and the insurer bears the burden of showing that an exception applies.

Washington courts examine the terms of an insurance contract to determine whether, under the plain meaning of the contract, there is coverage. They tend to interpret insurance policies as a whole and read them in a manner which an average person purchasing insurance would understand them to mean. If terms are defined in a policy, they are interpreted in accordance with the definition in policy. Undefined terms, however, must be given their plain, ordinary, and popular meaning.

A "direct physical loss" and "damage to" are often undefined terms in an insurance contract. A recent Spokane County Superior Court decision, *Perry Street Brewing Co., LLC v. Mut. of Enumclaw Ins. Co.*, and a recent King County Superior Court decision, *Hill and Stout PLLC v. Mut. Of Enumclaw Ins. Co.*, both determined that "loss of" and "damage to" have distinct meanings from each other. The courts established that the insureds' lack of access to their property was a loss because the plain meaning of the word meant to deprive. In both instances, the insureds lost the ability to use their property for its intended purpose because its use was prohibited by gubernatorial proclamation due to the COVID-19 outbreak. The insureds, in both cases, were seeking coverage on their business interruption insurance policies.

Right of Action Under Insurance Contracts. Under current Washington State law, an insurance contract must provide an insured one year, at a minimum, to bring a right of action against an insurer.

**Summary of Bill:** The minimum limit to a right of action against an insurer is extended from one year to two years, and every insurance policy containing a grant of coverage for direct physical loss of, or damage to, property shall be construed as deprivation and the loss of the ability to use the property.

All causes of action are deemed to be prospective, except for those that occurred since February 29, 2020, when a state of emergency was issued because of the COVID-19

outbreak.

**Appropriation:** None.

**Fiscal Note:** Requested on January 27, 2021.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Staff Summary of Public Testimony:** PRO: This bill intends to codify what the courts determined the law to be in Washington. This bill is limited. Most commercial business interruption policy holders have a virus exclusion. This bill would allow the few that do not to get coverage from their business interruption insurance policy.

The business owners matter the most here. Many courts, long before this crisis, determined there is loss coverage regardless whether property has been physically damaged. In King County, and Spokane County, they were using established case law. The insurers will say they will go out of business. During this pandemic, the insurers have not been exposed to many of the conventional risks they would otherwise have experienced in normal times. These rulings are well in line with current law. This brings clarity to policy owners across the state. This is not like the other bills in other states trying to change contracts.

For a constitutional issue on an impairment of contract to occur, the impairment of contract must be substantial. This is not changing the rights of the parties. This is not changing the reasonable expectations of the parties. I am a law professor at Penn State University and specialize in insurance law. I have published 25 law review articles on business interruption coverage. There are a dozen other cases, besides the two already brought up, where "loss of" means loss of use. The NAIC did a study on business interruption insurance in June and found 83 percent of these policies have a virus exclusion. This bill would only then apply to 17 percent, which is modest. Passing this bill will streamline the litigation. This will save business owners money on litigation fees, and it will save the courts money.

I am a business owner in Kirkland and we employ many families. We have been closed for almost a year and Phase 2 will not allow us to open in a way that would be profitable. This bill supports us. This would give us an opportunity to argue for coverage. I am a restaurant owner. Restaurants are a low-margin industry. We invested a lot of money into our space and got insurance to cover losses. Since the pandemic began, we have not been able to use the space as intended and should be able to get coverage from our business interruption insurance. I own several yoga studios that have been closed since March 16, 2020. I have business interruption insurance, which is expensive. My total premium last year was over \$20,000.

I am a Ballard business owner. I saw a decrease in revenue because I was not able to use my restaurant space as intended. This bill will ensure businesses can get coverage. We own a small business in Seattle. Our only option is take-out and delivery. When we started this restaurant, we got an insurance policy that was comprehensive. Within days of applying for business interruption insurance coverage from our policy, our claim was denied. We were not protected by the product the insurers sold us. I own Perry Street Brewing and like all other business owners, the pandemic has been terrible for business. We always assumed we thought we had coverage under our business interruption insurance. Most of our employees are on unemployment. This will help those who need it most. We need to enforce the case law. Business owners with interruption insurance can get coverage from civil unrest and wildfires, but cannot get coverage for the pandemic. The point and primary function of insurance companies is to protect those who pay their premiums. The insurers should shoulder some of this burden.

CON: This bill is well intentioned but is flawed for several reasons. This will put the thumb on the scale of the interpretation of the law by the courts. The two trial court cases mentioned have opponents who will appeal those decisions to the state supreme court. There are hundreds of cases that have decided opposite of those two courts. The Legislature can not pass laws that inhibit current contracts. In some instances, the Legislature can act retroactively but, in this case, it is not feasible because of its effect on current contracts. The reality of this bill is, it will guarantee years of litigation. It will not provide immediate relief for these businesses. The Legislature has other tools to help these businesses. This sets a dangerous precedent.

The government made a difficult decision to shut down businesses, and they must now financially help these businesses. Government-funded solutions are the best approach. It does not make sense to risk the health of another business sector to pay for this. Why can not insurers pay policy holders retroactively for this? If an insurer does not collect premiums to cover these risks, then they can not pay for those risks. Premiums will go up. Contract interpretations should be left to the courts. Most cases found there was not business interruption coverage. We object to the intent section. The findings in there suggest there is inaccurate information provided by insurers. There is a reference to trial level cases. There is a reason why those cases are not cited in the bill itself. It is a tortured effort to include intangible property damage. The adverse impacts, if this bill were to pass, cannot be overstated.

I am the general counsel for Lloyds of London in the United States. Lloyds has built a reputation on providing coverage for risks other insurers will not cover. Prior to 2020, very little coverage for pandemics was being written. This is a difficult risk to cover, as everyone is experiencing it at the same time.

OTHER: I am a small business owner in southwest Washington. This bill is recognizing the clear taking of private property by the government. The government must compensate business owners.

**Persons Testifying:** PRO: Senator David Frockt, Prime Sponsor; Don Wells, Totem Bowl and Inv. dba Tech City Bowl; Linda Burch, Hot Yoga Inc.; Liz Curran, Bellsea Group LLC dba Watershed Pub and Kitchen; Dan Crookston, Eat Mean Sandwiches LLC; Uyen Nguyen, Nue Restaurant, Seattle; Chris Cvetkovich, Nue Restaurant, Seattle; Ben Lukes, Perry Street Brewing; Marshall Powell, TTS, Inc., The Elk Public House, The Two Seven Public House, Geno's; Maygan Wurzer, All That Dance; Mark Wilner, Gordon Tilden Thomas and Cordell PLLC; Ian Birk, Keller Rohrback L.L.P.; Jesse Spring, Bad Bishop; Jessica Tousignant, Seattle Restaurants United.

CON: Phil Talmadge, Talmadge/Fitzpatrick; Mel Sorensen, American Property and Casualty Insurance Association; Mel Sorensen, Professional Insurance Agents Washington/Alaska; Sabrina Miesowitz, Lloyd's America, Inc.; Christian Rataj, National Association of Mutual Insurance Companies.

OTHER: Chris French; Karl Kanthak, Kanthak Karate.

**Persons Signed In To Testify But Not Testifying:** No one.