

Fear and loathing in a pandemic: Insurers battle business interruption claims

Restaurants, casinos and other businesses are filing insurance claims and lawsuits for Covid-related losses. Insurers are fighting back

By Keith Larsen

As a Las Vegas casino owner, Phil Ruffin is used to taking risks. But this time the odds seem stacked against the billionaire mogul.

For months, slot machines sat empty across the Vegas strip, while hotel conference rooms laid bare. And Ruffin's Circus Circus Hotel & Casino — perhaps best known as the scene of a drug induced bender in Hunter S. Thompson's "Fear and Loathing in Las Vegas" — was forced into closure for more than two months due to **the pandemic**.

To compensate for the lost revenue, Circus Circus filed a business interruption claim with AIG in March. The global insurance giant allegedly denied the claim and would not pay for any financial blows caused by Covid-19. But Ruffin, an octogenarian and close friend of President Donald Trump, has a few tricks up his sleeve.

Circus Circus hired high power attorneys out of Washington, D.C. and Vegas to sue AIG for denying its insurance policy, which the casino alleges should cover up to \$500 million in physical property damage and \$96.77 million in lost income.

"AIG relies on sleight-of-hand, distortions of fact, and contortions of law to escape from Circus Circus's covered claim," the casino's complaint reads. "But no illusion or death-defying feat can alter the plain language of AIG's policy and the broad all-risks coverage that it provides."

Michael Levine, of Hunton Andrews Kurth, one of the lawyers for Circus Circus, told *The Real Deal* that the losses could be in the tens of millions. Ruffin's other Vegas casino, Treasure Island, also filed a claim against its insurer Affiliated FM. Those claims were flatly denied by the insurers.

Ruffin declined to comment for this article. AIG and Affiliated FM did not return multiple requests to comment.

From casino and theater owners to local restaurants and sports teams, including the NBA's Houston Rockets, there are now more than 750 lawsuits pertaining to business interruption insurance, according to the University of Pennsylvania. If insurers are required to pay coronavirus related claims, it would be the largest payout ever by the insurers, industry sources say.

In its most recent quarter, for example, Zurich-based Chubb Limited, one of the largest property insurers in the world, has already reported net catastrophe losses of \$1.5 billion — including Covid-related losses of more than \$1 billion after taxes.

For the real estate industry, the direct and indirect ripple effects could be widespread.

Many restaurants and other retail tenants claim they would have to go out of business without such payments from insurers, which could leave commercial landlords with more vacant space and a greater strain on their income. A handful of real estate investment trusts are working on filing their own lawsuits over business insurance claims.

“The insurance industry is crippling the real estate industry,” said John W. Houghtaling, managing partner and majority owner of Gauthier Murphy & Houghtaling in New Orleans.

“What I am seeing here is an absolute bloodbath,” Houghtaling, who founded the [Business Interruption Group](#) to file lawsuits against insurers, added.

Insurance firms, including AIG and Chubb, are fighting back, maintaining there needs to be proof of physical damage to the place of business in order to pay such claims. Business interruption policies, they argue, are intended for a fire or natural disaster — not a pandemic.

“The vast majority of policies ... do not cover business interruption from pandemic risk, which would create infinite exposure for the insurance industry if applied to all policies,” a spokesperson from Chubb said. “Creating false expectations about coverage that does not exist, including filing baseless lawsuits, will not solve this crisis.”

The Trump card

Ruffin's litigation has amplified the fight between insurers and policyholders.

The Trump ally, for one, has a direct line to the White House — until the end of this year, if not longer. [Ruffin](#) co-developed the 64-story Trump International Hotel Las Vegas. Trump also served as Ruffin's best man at his 2008 wedding to a Ukrainian model and former Miss Universe contestant.

And the two seem to be speaking the same language over business insurance. In an April update on a coronavirus task force, the president opined on the issue amid the rising number of Covid-19 cases and

deaths across the country.

“You have people that have never asked for business interruption insurance and they have been paying a lot of money for a lot of years for the privilege of having it,” Trump said.

“And then when they finally need it, the insurance company says ‘We’re not going to give it,’” he added. “We can’t let that happen. I would like to see the insurance companies pay if they need to pay, if it’s fair.”

If Trump gets his way, insurance firms could be on the hook for billions of dollars in losses.

The insurance marketplace Lloyd’s of London estimates that claims caused by the pandemic will cost insurers about \$107 billion. That’s nearly double the insurance loss caused by Hurricane Katrina — a record for the U.S.

Ruffin’s case is particularly notable because state and federal courts have only ruled on a handful of related cases so far. For that reason, any decisions made in the upcoming months could have a direct impact on how judges rule on future cases.

“If you have a very business friendly court, it might look at a broader view of whether this should be covered,” said Clifford Rossi, a professor at the University of Maryland and the former chief risk officer for Citigroup’s consumer lending group. “This is no slam dunk for the insurance companies.”

AIG and other larger financial firms were bailed out by the U.S. government during the 2008 financial crisis after insuring risky derivative products that required them to pay out billions of dollars to counterparties.

But now the opposite seems to be happening.

Insurers could be forced to pay policyholders on basic insurance policies offered to businesses and consumers. AIG reported \$674 million of catastrophe losses in its most recent quarter, including \$458 million of estimated pandemic-related losses.

“The overwhelming majority contain exclusions for losses related to viruses, and otherwise require a showing that the virus caused direct physical loss or damage that was the cause of the business interruption,” AIG’s president, Peter Zaffino, said on the company’s first quarter earnings conference call.

“We are confident these exclusions and related terms and conditions will be upheld,” he noted.

Uphill battles

So far insurers seem to have the upper hand, according to attorneys involved in ongoing lawsuits.

“I have not heard of [commercial] tenants successfully succeeding in business interruption on the basis of Covid-19,” said attorney Alan Taylor, co-chair of Segal McCambridge Singer & Mahoney’s professional liability unit.

After the SARS outbreak in 2003, insurance firms started writing **virus exclusions** into their business interruption policies to prevent future payouts. Insurers are now arguing that these exclusions prevent them from paying claims.

In three known cases over business interruption that have been decided since March, the judge ruled in favor of the insurer.

On July 1, a Michigan county circuit judge dismissed a claim by the local Lansing restaurant Soup Spoon Cafe, claiming there had to be physical evidence of damage to the property. In another case filed in April in the Southern District of New York by Social Life Magazine, a publication that covers high life in the Hamptons, the judge denied a preliminary injunction requested by the magazine’s publisher.

And the number of cases is growing exponentially as the pandemic worsens and government aid for businesses runs out.

The attorneys for Ruffin’s Circus Circus argue, however, that the casino’s coverage policy is different from the cases that have already been decided — since there is no exclusion in its AIG policy for communicable diseases. The lawyers argue that the policy only had an exclusion for contaminants and pollutants, which does not apply.

“It’s not a virus exclusion,” said Levine, of Hunton Andrews Kurth.

The fight over business interruption claims isn’t just happening in courtrooms. It’s also coming to a head in at least three state capitals. California, New York and New Jersey are seeking to pass laws that would force insurers to pay coronavirus-related loss claims brought by small businesses. The laws would overrule policies that include virus exemptions.

So far, none of the legislation has passed.

David Sampson, president and CEO of the American Property Casualty Insurance Association, said in a statement that insurers cannot afford to pay these claims. He argued that total Covid-related losses for small businesses in California could range from \$10 billion to \$40 billion per month.

“These numbers dwarf the premiums collected for all relevant commercial property risks in the key insurance lines for California, which are estimated at \$480 million a month,” Sampson noted.

Insurers also question the legality of the new legislation put forward by states since it could violate

contracts the policyholder has with the insurer.

“You got an overreach by some state governments that we should force insurers to pay these, but that violates contract law,” said Anita Byer, CEO of Florida-based insurer Setnor Byer Insurance & Risk. “That is unconstitutional.”

Closing the curtain

Business interruption insurance wasn't just designed for billionaire casino owners to recoup lost gambling dollars. Many of the companies filing suits are small local businesses and nonprofits struggling to stay afloat.

Barbara Stein, who co-founded the Actors' Playhouse at the Miracle Theatre in South Florida with her husband more than 30 years ago, is one of those policyholders. Her theater in downtown Coral Gables was preparing to open Camelot when Gov. Ron DeSantis closed all non-essential businesses and events in March.

Now revenue and memberships renewals have dried up and the nonprofit lost more than \$1.5 million in income, according to Stein. “This has been the most devastating experience ever,” she said.

“We have sustained a lot over the years, and I don't think that I have seen such a bleak road ahead,” said Stein.

Part of Stein's costs, like those of many small businesses, are real estate-related. The Actor's Playhouse does not have to pay rent for its theater, due to an agreement it has with the city of Coral Gables. But it does have to pay for its storage space in Miami's trendy Wynwood area, where the rent totals \$60,000 a year.

Stein said she has never made a claim on the nonprofit's insurance policies and was seeking to use the money to pay employees in addition to the rent at the theater's warehouse. But her insurer, SCOR SE, denied the claim, leading her attorney, Steve Marks of Podhurst Orseck, to file a lawsuit.

“We have a policy that should be looked at and adhered to,” Stein said. “We are not in a spot to manage something like this.”

Other small businesses that are taking similar legal actions include Boston's iconic Cheers bar, which sued its insurers Allianz Global and Fireman's Fund Insurance Company, and Berkeley, California's Chez Panisse, which sued its insurer AMCO.

Many like the Actor's Playhouse are joining together in class-action lawsuits. Nearly a third of the cases are seeking class action status, the University of Pennsylvania's research shows.

Restaurants make up a majority of business interruption claims since the pandemic hit, totaling over

250 lawsuits, according to the data. And more could be on the way. The National Restaurant Association and investment bank UBS expect that at least 20 percent of U.S. restaurants will close down by the end of the year.

“There has been an explosion of litigation related to denial of coverage,” said Marko Cerenko, a commercial real estate attorney with Kluger Kaplan. “Everyone is fighting for every penny ... especially as their revenues have been reduced to zero.”

“An asset of the estate”

With the real estate market reeling from the pandemic, the cases could be ongoing for years as businesses and creditors seek to get paid for their losses.

“These cases are not going to go away,” said Tom Baker, a professor of insurance law at the University of Pennsylvania. “Many of these businesses are going to go under and this is going to be an asset of the estate.”

Insurers are likely going to take a financial hit from Covid-19. But some firms remain confident that the payout won't be as bad as perceived. Insurers can also tap into reinsurance policies if they are forced to pay out more claims.

During Chubb's first quarter earnings call, the insurance firm's CEO Evan Greenberg told investors the impacts from the virus will be manageable.

“This will be an earnings event for Chubb,” Greenberg said. “It will not threaten our balance sheet.”

But as the pandemic and economic fallout leave countless businesses, families and entire cities in need of support, the full extent of damage remains anyone's guess. For now, it seems unlikely that the financial losses for insurance firms alone will warrant a “too big to fail” bailout like with AIG in 2008.

And without federal aid, observers say, insurers are engaging in their all out war over paying claims with little end in sight.

“I can't say it's anybody's fault,” Stein said. “There is no quick answer. We go day by day and we make our plans.”

The Actors' Playhouse co-founder also maintained that her insurer needs to cover the losses she and the local theater community have endured.

“We paid for this insurance,” she said. “I believe that we are entitled.”