

# Class Actions Against Property Insurers in the Wake of COVID-19

by Thomas F. Bush

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Several class actions have been filed recently asserting claims for business interruption coverage arising from business closures due to COVID-19. These suits assert claims on behalf of nationwide classes of the defendant insurers' policyholders. More may be filed in the next few weeks. There is a reasonable chance that most major insurers offering business interruption coverage in the United States will be named as a defendant in one or more of these class actions.

To help understand the issues that these suits raise, we have listed below a few of the key distinctive features of these class actions.

- When these claims are brought as class actions, the consequence is to magnify the exposure of the defendant insurers dramatically.

In a single lawsuit the insurance company's exposure is no more than the limits in the policies at issue. In a nationwide class action, its exposure expands potentially to the sum of the policy limits on all business interruption policies. For large insurers, the exposure can be several billion dollars, often large enough that an adverse judgment would threaten the insurer's solvency.

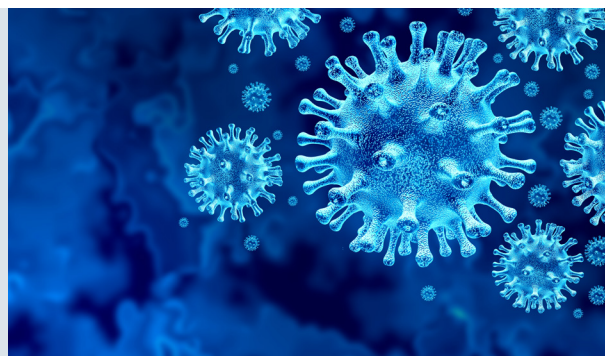
- To proceed as a class action, the plaintiffs' lawyers must persuade the court to certify the case as a class action. These motions will require a substantial amount of discovery and the opinions of expert witnesses. As a consequence, motions for class certification tend to be filed later in the litigation process, often a year or more after the filing of the complaint.

- The plaintiffs will face a serious challenge prevailing on a motion to certify a class action. The principal grounds for certifying class actions for monetary claims is a finding that issues common to the class predominate over issues individual to each class member. Courts will have difficulty making that finding in the COVID-19 cases, which will require proof that each policyholder did in fact close its business (not all businesses closed) and the amount of income that each policyholder lost due to the closure.
- Another factor that could discourage courts from certifying class actions is that decisions about conduct of the lawsuit, and about settlement, will be under the control of the few policyholders who filed the suits and

their lawyers. A policyholder with a business closed for several weeks will likely regard its claim for business interruption coverage as critical to its ability to survive until it can reopen. The policyholders' interests may not be served well if their claims are litigated and settled by lawyers that they did not select, who do not consult with them directly, and who are not obligated to follow their instructions on matters such as settlement.

- A statute known as the Class Action Fairness Act significantly lowers the requirements for federal court jurisdiction for class actions. Most of the COVID-19 cases filed as class actions are likely to meet the requirements of this statute. Consequently, most, and possibly all, of these cases will proceed in federal court, either because the plaintiffs file them there or the defendants remove cases filed originally in state court.
- Motions have been filed with the Judicial Panel on Multidistrict Litigation to consolidate all of the cases asserting business interruption claims for COVID-19 closures. The judges on this Panel can decide to transfer all cases in federal courts across the country asserting a similar claim to a single federal judge, who will oversee all pretrial proceedings, including discovery, class certification and dispositive motions.

*Freeborn's Insurance and Reinsurance Team includes several lawyers with deep experience defending class actions. Please contact Thomas Bush ([tbush@freeborn.com](mailto:tbush@freeborn.com); (312) 360-6837) or another member of the Team, who would be happy to answer any insurers' questions about these suits. Visit [Freeborn's COVID-19 webpage](#) for more information.*



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Tom Bush is a Partner in the Litigation Practice Group and member of the Firm's Insurance/Reinsurance Industry Group. He has extensive experience in complex litigation involving antitrust, insurance and reinsurance matters, and, in particular, has been very actively involved in the representation of significant lawsuits and arbitrations for global reinsurers in disputes arising from large scale losses. Tom also represents and counsels insurance companies and investment firms on antitrust compliance and on competition issues arising in mergers and acquisitions.

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