Critical Business Updates for Business Owners

EVERY OTHER WEDNESDAY

EASTERN COLORADO

Critical Resource Updates for Business Owners

Every Other Wednesday @ 3PM

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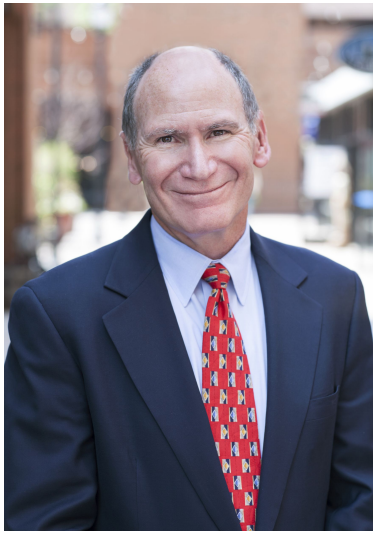
NORTHWEST COLORADO Small Business Development Center

Agenda

- **Welcome**
  - John Wittler, Ogallala Commons
  - Lisa Hudson, Director, East Colorado Small Business Development Center
- **Business Interruption**
  - Bradley A Levin, Shareholder, Levinsitcoff.com
  - Nelson A. Waneka, Shareholder, Levinsitcoff.com
- **Commercial General Liability Coverage**
  - Sarah Wallace, Partner, ballardspahr.com
  - Andrew Petrie, Partner, ballardspahr.com
- **Resource Update**
  - Joe Rinehart, Main Street Phoenix Project
- **Audience Poll**
- **Q&A & Wrap Up**
  - Jamie Billesbach, Central SBDC

Business Interruption



Bradley A. Levin
Shareholder

Nelson A. Waneka
Shareholder

LEVIN | SITCOFF
ATTORNEYS AT LAW
PROFESSIONAL CORPORATION

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Business Interruption Insurance Claims For Mandatory Closures And Other COVID-19 Losses

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What Is Business Interruption Coverage?

It’s a discrete coverage contained in most commercial property insurance policies.

It’s a standard coverage. (You may have it and not know it).

It provides benefits for lost business income stemming from covered losses to commercial property.

What Does Business Interruption Coverage Do?

One of the biggest risks faced by business owners is the inability to conduct business, or a reduction in business, due to a covered loss to property.

Example: A fire at a restaurant.

Example: A key piece of equipment is stolen, damaged, or destroyed.

The loss to the business goes beyond the damage to the property itself.

Common Aspects of Business Interruption Coverage

Beyond the typical perils such as fire, theft, wind, and water damage, many policies cover other causes of a business interruption.

-Closure by civil or military authority.

-Restriction on ingress/egress.

-Loss to an attraction property.

What Benefits Does Business Interruption Coverage Provide?

Generally, lost “net income.”

Some policies provide lost “profits.”

For a defined period of time.

-Usually the “period of restoration.”

-Up to a maximum number of days (typically 90).

How Can I Tell If I Have Business Interruption Coverage?

You own or lease a commercial space for your business.

You own or lease equipment for your business.

You obtained an insurance policy for your business or business property.

The Declarations Page (first page) of your insurance policy will often list business interruption coverage and have a limit of insurance for this coverage.

You can ask your agent or call your insurance carrier.

Business Interruption And COVID-19

Whether an insurer owes coverage for business interruption as a result of COVID-19 losses raises a number of issues.

-Is COVID-19 “direct physical loss of or damage to covered property?”

-Was the business interruption caused by the virus, was it caused by government-mandated closure orders, or both?

-Virus exclusions.

Status of COVID-19 Claims

Thousands of claims filed by business owners throughout the country.

We're unaware of a single claim for COVID-19 business interruption benefits being paid by an insurer.

Insurers have uniformly taken the position that COVID-19 does not cause "direct physical loss of or damage to" covered property.

There are many cases that have been filed by insureds in Colorado and throughout the United States seeking business interruption coverage for COVID-19 losses.

The Direct Physical Loss Or Damage Requirement

Because business interruption coverage is a subset of property insurance, most policies state that an insurer only owes business interruption benefits in the event of "direct physical loss of or damage to covered property."

What does "direct physical loss or damage" mean?

Do you have to be able to see the damage or observe it with your senses?

If COVID-19 is present on a surface, or suspected to be present on a surface, has the property been "physically damaged."

Insurance companies say no.

We say yes. (And the law supports this).

Plain Language

In Colorado and elsewhere, unless otherwise defined, the words used in an insurance policy are given their “plain and ordinary meaning.”

The plain and ordinary meaning of “physical” is very broad.

-Generally means “of or relating to the material world and subject to the laws of nature.”

-COVID-19 is a material thing that is subject to the laws of nature.

Plain meanings of “loss” and “damage” are also broad.

How Courts Have Addressed The “Physical Loss Or Damage” Requirement

The leading case in the country is from the Colorado Supreme Court.

It held that gasoline vapors constituted “direct physical loss of or damage to” a church building.

It held that a building that has been rendered useless or uninhabitable has suffered “direct physical loss or damage.”

More than 30 other courts have held similarly in a wide variety of circumstances analogous to COVID-19.

Some courts have even held that the mere threat of imminent physical damage is enough.

Public Policy

In numerous executive orders, Colorado declared that COVID-19 "physically contributes to property damage:"

> My administration, along with other State, local, and federal authorities, has taken a wide array of actions to mitigate the effects of the pandemic, prevent further spread, and protect against overwhelming our health care resources. COVID-19 also physically contributes to property loss, contamination, and damage due to its propensity to attach to surfaces for prolonged periods of time. The measures ordered through this Executive Order are designed to limit the spread and mitigate the harm caused by COVID-19 and protect our most vulnerable populations.

The Bottom Line

Call your insurance company and ask for a copy of your policy.

Call your agent and ask if you have business interruption coverage.

If you have a policy of commercial property insurance, make a claim even if you're not sure whether you have business interruption coverage.

If you have additional questions, contact an insurance lawyer.

If you get a letter or a phone call denying your claim for business interruption coverage on grounds of "direct physical loss of or damage to" covered property, or any policy exclusions, contact an insurance lawyer.

If you believe your claim was wrongfully denied, contact an insurance lawyer.

There are significant remedies available to Colorado insureds whose claims for coverage have been wrongfully denied.

Ballard Spahr LLP

Commercial General Liability Coverage

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Commercial General Liability Coverage

In The Time Of COVID

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CGL Policies

Can CGL policies provide coverage against any third party claims associated with COVID-19, or any other infectious disease?

Possible Types of Claims

- Cases based on exposure to and contracting of COVID-19 allegedly due to the failure of a business to sanitize the premises, close/quarantine more quickly, or otherwise prevent the spread of COVID-19.
- These claims will typically be brought by customers, clients, students, independent contractors and invitees, tenants, and other non-employees.

Examples

- Cruise lines failed to require crew members to wear masks or to enforce social distancing during cruises.
- Consumers have filed at least three putative class actions against manufacturers and distributors of hand sanitizer, alleging the defendants' advertising misrepresented the efficacy of their products in combating COVID 19.
- Families of nursing home residents have filed against Riverbend Post Acute Rehabilitation, a care center in Kansas City, Kansas, where nearly 100 residents tested positive for the coronavirus. The lawsuits allege that the facility allowed an employee who had cough and fever symptoms to come to work in late March infecting residents.

Why Claims Are Worrisome

- While claims will be very hard for plaintiffs to prove (causation), that does not mean those claims won't be expensive for business owners to defend
- Insurance coverage may be available to help defray the costs of litigation

Benefits of CGL Policies

- Indemnity
- Duty to Defend

Indemnity

Indemnity is generally interpreted as imposing an obligation on one party (the insurer) to pay or compensate the other party (the insured) for legal liabilities or losses.

But that obligation does not typically arise until the end of a case when the insured has had a judgment entered against it for damages, or, in some instances, when the insured has made payments or suffered actual loss

Duty to Defend

- Duty to defend imposes an independent duty
- The insurer's obligation to defend any claim brought against the insured that falls within the scope of the indemnification provisions

Duty to Defend Broadly Interpreted

- An insurer's duty to defend is triggered when a claim is filed against an insured alleging acts or omissions that fall within the coverage set out in the insured's policy.
- The mere possibility that a claim covered under the policy may succeed is sufficient to impose the duty to defend. As such, the duty to defend is quite broad and arises even if the claim is eventually dismissed.

“4 Corners” Rule

- If the third-party’s claim alleges a state of facts which, if proved, would fall within the coverage of the policy, the insurer is obligated to defend
- The insurer must defend the suit regardless of the truth or falsity of those allegations
- So, for example, it is not enough for the insurer to say that the plaintiff won’t be able to prove that exposure at the insured’s business caused the plaintiff to contract COVID

CGL Policies

In the most broadest sense, CGL insurance offers coverage or "bodily injury" and "property damage", as long as the "bodily injury" and "property damage" were caused by an "occurrence," *i.e.*, an "accident."

Bodily Injury

- Most CGL policies define "bodily injury" to include "sickness or disease sustained by a person, including death resulting from any of these at any time".
- On its face, it would seem as though a third party suffering from COVID would qualify as bodily injury.

Caused by an Occurrence

- Most policies define an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions".
- If a plaintiff alleges that he or she was exposed to the virus, and subsequently suffered bodily injury due to the virus at an insured's place of business, that could be enough to trigger coverage.
- The carriers will argue, however, that given the widespread news coverage of the COVID virus and recent warnings, instructions, and restrictions issued by governmental entities, contracting COVID-19 could be regarded as a foreseeable event to be expected by an insured and, therefore, not covered.

Exclusions

- **Communicable disease exclusions.** An exclusion for communicable diseases exists in the marketplace. The wording of these exclusions varies, with some focusing on bacterial disease and others viral infections. Depending on the wording, the exclusion may bar coverage for coronavirus claims.
- **Organic pathogen/fungi/mold/mildew/yeast/microbe exclusions.** While these exclusions are often referred to as "mold" exclusions, they sometimes include bacteria, microbes and viruses.

Exclusions

- **Pollution exclusions.** Insurers may take the position that COVID-19 is a form of a pollutant. Don't expect this will be a successful argument, but one to look out for.
- **"Expected or intended" exclusions.** Again, unlikely to succeed, but here the insurer would argue that because the insured did not take appropriate safety measures the insured expected that third parties would be infected.

Resource Update

The Main Street Phoenix Project

Joe Rinehart
The Main Street Phoenix Project

MAIN STREET

Phoenix Workers Cooperative

Saving Community Restaurants By Building Quality Jobs and Worker Equity

Financial Crisis Creates Investment Opportunities Usually Seized Only by Private Equity.

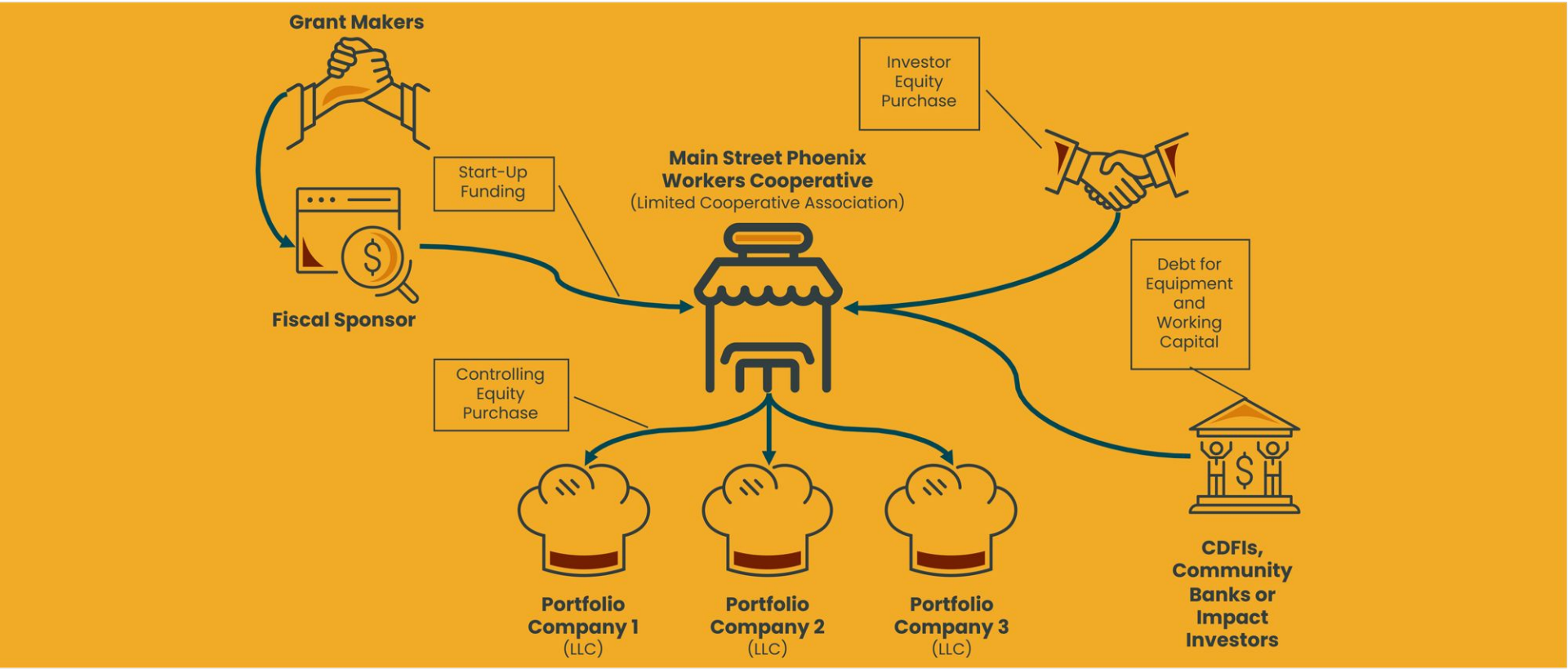
Employee Ownership Can Create Opportunities for All in a Crisis:
For Workers,
For Communities, and
For Business Owners.

The Main Street Phoenix Worker Cooperative is Building an Employee-Owned Restaurant Group Of Previously Successful Businesses

Supported By a Team of Industry Experts That Drive Profitability, Business Resilience, and Job Quality.

Together, We're Saving The Restaurants That Make Communities Vibrant And Building Engines Of Economic Equity For The Workers Who Need It Most.

THE MAIN STREET PHOENIX WORKER COOPERATIVE



MAIN STREET PHOENIX AND EMPLOYEE OWNERHIP IMPACTS

EMPLOYEES

- Full Time Hours
- Open Book Management
- Industry Leading Benefits
- Carrier Pathways
- Profit Sharing

ENTERPRISE

- Increased Resilience
- Improved Profits

Every Closed or Struggling Busines Represents an Opportunity for Someone.

Together, We Can Seize These Opportunities for Workers and Communities.

Rocky Mountain Employee Ownership Center:
Info@RMEOC.org
(303) 351-2003
www.rmeoc.org

Main Street Phoenix Worker Cooperative:
info@mainstreet.coop
(720) 340-2591
www.mainstreet.coop

Audience Poll

Moderator:Jamie Billesbach,
Director,
Central SBDC

1. **For our July 22 call, we are planning a marketing webinar titled *Beyond Social Media* with Nancy Murphy from Region 10. Does this topic interest you?**
   a. Yes / No / Maybe

2. **In these calls we cover the following content, which do you value most? (pick one)**
   a. Timely updates from national/state/regional business support organizations and agents
   b. Trends & insights, both locally and nationally
   c. Nut-n-bolts, business mechanics, and educational webinars

NOTE: If you are watching the replay or livestream on YouTube, please add your answers in the comments

IMPORTANT UPDATE ON PPP

- **The Paycheck Protection Program (PPP) re-opened until Aug. 8.**The extension keeps a source of funding open to struggling small businesses while Congress works on a second, more targeted funding program.

Q & A and Additional Resources

Slides from today's presentation can be downloaded at
EastColoradoSBDC.com/disaster-relief

For more business resources go to
coloradosbdc.org/covid/

For resources related to entrepreneurs and entrepreneurial communities go to
startupcolorado.org

Questions & Call Recordings

To access the call recordings or to listen to other topics across all four rural regions, visit the Choose Colorado YouTube Channel.

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STILL HAVE QUESTIONS? Email: startupco@colorado.edu

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Next call: Wednesday, July 22nd @ 3pm

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