

# SENATE BILL REPORT

## SB 5351

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As of February 1, 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.