

Insurance Claims and PPP Updates

Green Hasson Janks and Nossaman LLP Webinar

Speaking With You Today



MODERATOR:
Ben Sheppard
Managing Director
Green Hasson Janks



Jennifer Meeker
Partner and Co-Chair of
Insurance Discovery Group
Nossaman LLP



Peter Brown
Partner and Forensic Services
Practice Leader
Green Hasson Janks



David Sutton
Managing Director,
Transaction Advisory Services
Green Hasson Janks

Agenda

Intro	Ben Sheppard, Managing Director, Green Hasson Janks
Property Insurance	Jennifer Meeker, Partner, Nossaman LLP
Preparing a COVID Business Interruption Claim	Peter Brown, Partner, Green Hasson Janks
PPP Update	David Sutton, Managing Director, Green Hasson Janks
Wrap Up	Ben Sheppard, Managing Director, Green Hasson Janks

Property Insurance

Jennifer Meeker, Partner
Nossaman LLP

Property Insurance

- A type of First Party Insurance
- “Property insurance” is an agreement by which an insurer agrees to indemnify its insured in the event that designated property suffers a covered loss
- Property insurance may be written on an “open peril” (formerly “all risk”) basis, covering all losses not expressly excluded in the policy; or on a “named perils” (or “specified perils”) basis, covering physical loss from certain causes only (e.g., fire, windstorm, hail)
- Why does Property Insurance matter during COVID-19 times?
 - Business Interruption Coverage

What is Business Interruption Coverage?

- Many Commercial Property Policies Cover Economic Losses Resulting from the Inability to Use Property for Its Intended Purpose Due to Covered Physical Loss or Damage.
- Many Commercial Property Policies Cover Economic Losses Resulting from the Inability to Use Covered Property for Its Intended Purpose Due to A Civil Authority Order Barring or Limiting Access Due to Physical Loss or Damage to Non-Insured Property Occurring Within a Specified Distance of the Covered Property.
- Key to coverage is definition of “Direct Physical Loss or Damage.”

Property Insurance: “Direct Physical Loss or Damage”

- Requires “direct physical loss” to the property.
 - The ISO “special form” commercial property insuring agreement provides as follows: We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.
 - The ISO “Causes of Loss – Special Form” policy form provides, in turn, that “[w]hen Special is shown in the Declarations, Covered Cause of Loss means direct physical loss unless the loss is excluded or limited in this policy.”

Property Insurance: Defining “Direct Physical Loss or Damage”

- Policyholders and Insurers Disagree About the Meaning of “Physical Loss or Damage.”

Property Insurance: “Direct Physical Loss or Damage”

Insurer Position:

- Insurers have taken the position that the actual presence, or imminent threat of the presence, of SARS-CoV2 or COVID-19 is not a covered direct physical loss or damage.
 - A common formulation of property insurers’ position on this issue is that “physical loss or damage” requires an “actual, tangible, permanent, physical alteration”²⁴ of covered property.
 - Insurers then argue that the presence of SARS-CoV-2 is not a tangible and permanent alteration of property, and thus the insuring agreement has not been triggered.
 - This position makes no attempt to distinguish between “physical loss” and “physical damage,” essentially treating “loss” and “damage” as synonyms.

Property Insurance: Defining “Direct Physical Loss or Damage”

Policyholder Position:

- The strongest policyholder arguments have focused on the meaning of “direct physical loss” which is rarely, if ever, defined in property policies.
- Courts have recognized that “loss” and “damage” are not synonyms, and each term must be afforded its own meaning.
- A reasonable interpretation of “direct physical loss” is the loss of the ability to safely use insured property for its intended purpose.
- What is this based on? Insurance contract interpretation principals

How the Courts are Deciding...



Outcomes Favorable to Insurers

- 11th Circuit
 - *Mama Jo's Inc. v. Sparta Insurance Company*, No. 18-12887, 2020 WL 4782369, at *8 (11th Cir. Aug. 18, 2020).
- Also, California, Michigan, Mississippi, Florida, D.C., New York, Alabama, Minnesota, etc...

Outcomes Favorable to Policyholders

- North State Deli , LLC v. Cincinnati Ins. Co. (N.C. Sup. Ct., Oct. 9, 2020)
 - On October 9, 2020, a state court in North Carolina issued the first substantive victory to policyholders in a COVID-19-related business interruption coverage case. In an Order granting plaintiffs’ Motion for Summary Judgement, the court held that the term “direct physical loss” covers business income losses caused by COVID-19 shutdown orders (previous policyholders have survived motions to dismiss).

Other Outcomes Favorable to Policyholders

Pennsylvania

- Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London, No. 20093502, Order denying Insurer's Motion to Dismiss (1st. Div. Civ. Dist. Ct., Philadelphia Cty Penn., Oct. 26, 2020)

Missouri

- Studio 417 Inc. v. Cincinnati Insurance Co., Order Denying Defendant's Motion to Dismiss (W.D. Mo, Aug. 12, 2020)

Mixed Results

- Some courts are denying that there coverage for general business interruption based on virus exclusions or lack of property damage, but finding a potential for coverage under other endorsements (e.g. time element coverage).
 - E.g. *Independence Barbershop, LLC v. Twin City Fire Ins. Co.*, Order Denying Insurer's Motion to Dismiss in Part (W.D. Tex. Nov. 4, 2020)

Multidistrict Litigation? So Far, No...

- *In re COVID-19 Business Interruption Protection Ins. Litigation*, MDL No. 2942, Order Denying Transfer and Directing Issuance of Show Cause Orders (Doc. 772, August 12, 2020) (2020 WL 4670700)
 - On August 12, 2020, the Judicial Panel on Multidistrict Litigation (JPMDL) issued an order denying an all-encompassing industry-wide consolidation of COVID-19 business interruption coverage cases, but finding that insurer-specific MDLs might be appropriate.

Multidistrict Litigation? So Far, No...

- **Pending MDL requests:**

- ***In re National Ski Pass Insurance Litigation*, MDL No. 2955, June 16, 2020 (E.D. Ark.)**

- Motion to coordinate all coverage cases for canceled ski trips to the Eastern District of Arkansas.

- ***In Re: National Travel Insurance Litigation*, MDL No. 2968, August 14, 2020 (E.D. Texas)**

- Motion to coordinate all COVID-19-related travel insurance coverage cases filed by insureds that purchased a Generali travel insurance plan and transfer them to the Eastern District of Texas.

Coordination of Litigation... Possibly

- On July 23, 2020, the Allegheny Court of Common Pleas ordered that all suits filed in Pennsylvania against Erie Insurance will be consolidated before it and any new cases filed against Erie in Pennsylvania will become part of the coordinated proceedings.
 - *Joseph Tambellini, Inc. v. Erie Ins. Exchange*, Motion to Coordinate Granted, No. 52-WM-2020 (Penn. Sup. Ct., July 23, 2020)

Considerations if You Are Not Sure if You have Coverage or Your Claim has Been Denied

- **Seek a professional coverage opinion.**
 - Lawyers v. Brokers
- **Tender your claim if there is any possibility of coverage.**
- **To sue or not to sue.... That is the question...**
 - Realities of litigation

Property Insurance: Virus/Bacteria Exclusion

Example:

ISO form CP 01 40 07 06 is titled "Exclusion for Loss Due To Virus Or Bacteria" and provides, in relevant part:

We 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 distress, illness or disease.

The exclusion goes on to specifically state that it applies, among other things, to "business income," i.e., business interruption.

ISO's July 6, 2006 circular [LI-CF-2006-175], prepared as part of its filing of the exclusion with state regulators, makes specific reference to such viral and bacterial contaminants as rotavirus, SARS, influenza (such as avian flu), legionella and anthrax.

Insurers can also be expected to argue that their standard pollution exclusions apply to bar coverage. Whether viruses or bacteria are pollutants is a controversial question to which no settled rule yet applies. Specific policy wordings sometimes provide relevant definitions.

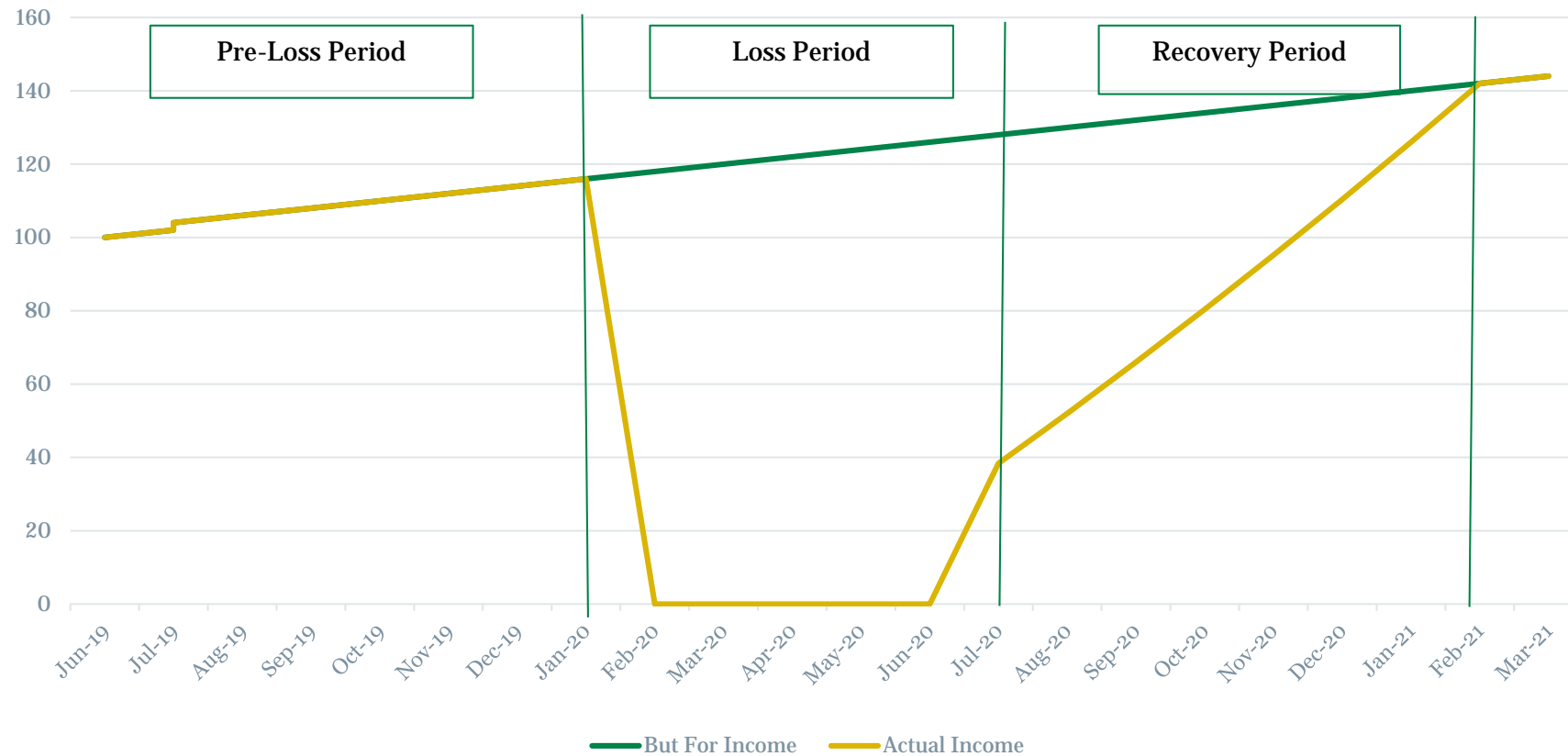
Preparing a COVID Business Interruption Claim

*Peter Brown, Partner
Green Hasson Janks*

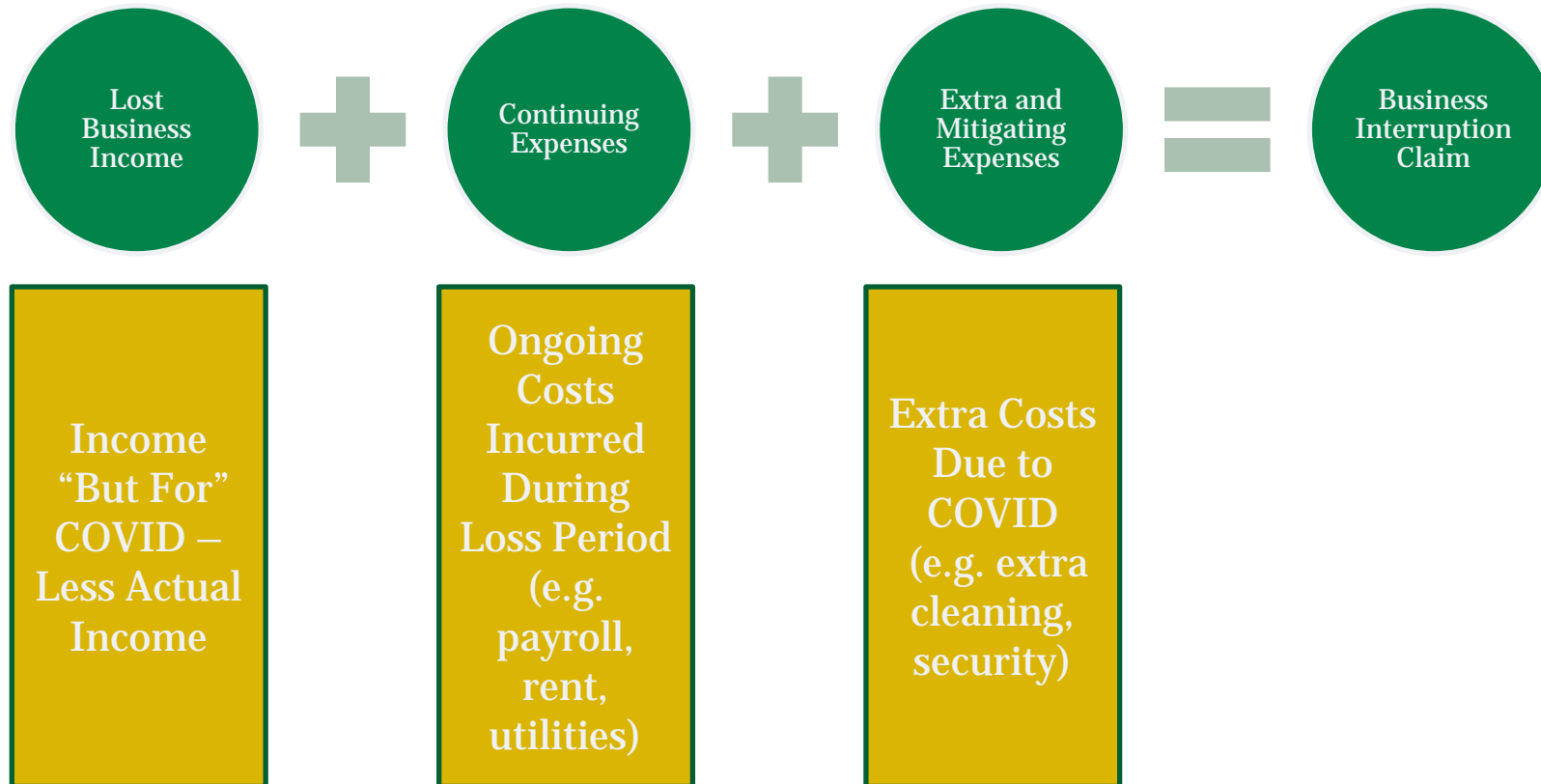
Preparing a COVID Business Interruption Claim

1. Develop a plan and determine who will prepare the claim (both internal resources and external service providers).
2. Gather information needed to support the claim
3. Prepare your own loss calculations
4. Demonstrate how you have mitigated losses

Business Interruption Claim - Lost Business Income



Business Interruption Claim - Example



PPP Update

*David Sutton, Managing Director
Green Hasson Janks*

PPP Update

- General update on PPP
 - Flexibility Act
 - SBA Questionnaire
- Forgiveness can be unclear
 - When to apply
 - Impact on business disruption claims
- Future stimulus

Speaker Bios

Ben Sheppard, Managing Director



310.873.6706

bsheppard@greenhassonjanks.com

Ben Sheppard, CPA, is a Managing Director leading the Firm's Expert Witness and Litigation Support Practice and has more than 30 years of experience. He has deep expertise in litigation support and expert witness services, as well as forensic investigations and valuations. Ben works closely with clients to helping them find answers to situations that may pose a threat to their business.

Starting his public accounting career in Houston, Ben previously worked at a Big Four firm before moving to Los Angeles and accepting a job at Disney. Since then he has also worked for big studios such as MGM and Warner Brothers and as a consultant on litigation, forensic investigation and valuation projects.

Ben has offered expert witness opinions in over 35 separate matters, in state courts, federal courts and arbitrations. He has also served as a court appointed neutral expert in a state court matter.

Ben is a Certified Public Accountant and Certified Valuation Analyst. He is also a member of the Beverly Hills Bar Association and American Bar Association and is a frequent speaker for a variety of entertainment conferences and for other organizations. He has been published in *Wiley's Litigation Services Handbook, Sixth Edition* and *ABA's Landslide Magazine*.

Ben has a BBA in Management Info Systems and MBA in Accounting from the University of Houston.

Related Industries and Services

- Entertainment and Media
- Litigation and Forensic Consulting
- Filmed Entertainment
- Forensic Accounting
- Internal Audit and Controls
- Manufacturing and Distribution
- Media and Technology
- Royalty and Licensing Audits

Jennifer Meeker, Partner



213.612.7863

jmeeker@nossaman.com

Jennifer Meeker litigates complex disputes, with a particular focus on representing clients in commercial litigation in state and Federal court. She partners with clients to understand their business objectives, key concerns and risk tolerance. She utilizes this insight to develop tailored strategies to resolve disputes both inside and outside the courtroom.

Jennifer serves as Co-Chair of Nossaman's Insurance Recovery Group, counseling and litigating on behalf of policyholder clients a wide variety of insurance claims. She has experience with commercial general liability (CGL) policies, Directors & Officers (D&O), Errors & Omissions (E&O) and other forms of liability coverage. She has been involved in property and other first-party insurance recoveries, including title insurance. She serves as a Vice-Chair of the Insurance Coverage Litigation General Committee & Self Insurance and Risk Management Committee of the American Bar Association's Tort & Trial Insurance Practice Section. In this capacity, she was selected to the Committee's leadership ladder and will co-chair the Committee's annual seminar in Phoenix Arizona in 2021.

Jennifer is a key member of Nossaman's appellate group. She has experience in all stages of the appellate process. She has briefed dozens of civil appeals, writs and petitions to the U.S. Courts of Appeals, California Supreme Court, and California Courts of Appeal. She handles appeals on behalf of both public and private clients. Jennifer's experience includes appeals involving land use/coastal commission, trade secrets, real estate & landlord/tenant, water rights, eminent domain, insurance coverage, trust litigation, the Federal and California False Claims Act, attorney's fees under the Attorney General statute, and construction disputes. She takes a long-term view, utilizing her experience in the courtroom. This approach enables her to partner with trial counsel and clients early on to best position a case on appeal, should that become necessary.

Jennifer is active in the legal community. She serves on the Board of Governors of the Association of Business Trial Lawyers (ABTL), Los Angeles Chapter and serves as the Los Angeles Chapter chair of the 2021 annual seminar. She is also dedicated to her local community, serving on the Board of Directors for the Boys and Girls Club of Long Beach.

Related Industries and Services

- Insurance Recovery & Counseling
- Appellate Practice
- Class Actions & Multi-District Litigation
- Litigation

Peter Brown, Partner



310.873. 1645

pbrown@greenhassonjanks.com

Peter Brown, CPA, CFF, ABV, leads GHJ's Forensic Services Practice and has extensive experience quantifying damages in commercial litigation and conducting internal investigations. He has served as an expert witness in a variety of matters and as a third-party neutral regarding accounting matters and purchase disputes.

Peter spent nearly 30 years working at Big Four accounting firms. Prior to joining G HJ in 2020, Peter worked at a Big Four firm where he served as the Forensic Services Practice leader for investigations and disputes for Southern California.

Peter is an active member of the American Institute of Certified Public Accountants (AICPA) where he sits on the Forensic and Valuation Services Executive Committee and COVID-19 Damages Task Force. Peter also holds leadership positions with the California Society of Certified Public Accountants (CalCPA). Peter is currently the Chair of CalCPA's Forensic Services Section and is a member of CalCPA's Board of Directors.

Related Industries and Services

- Employment
- Litigation
- Privacy, Cybersecurity and Data Protection

Additionally, Peter is a past-chair and current treasurer for Uplift Family Services, the largest behavioral and mental health treatment program for children in California.

Peter graduated from the University of California, Davis, where he received a Bachelor of Science degree in managerial economics and from Loyola Marymount University, where he received a Master of Business Administration.

David Sutton, Managing Director



310.873.1718

dsutton@greenhassonjanks.com

David Sutton is a Managing Director in GHJ's Consulting Practice with more than 15 years of experience across technology, restructuring and mergers and acquisitions. Originally from the U.K., David's advisory experience includes work across the retail, technology, distribution, manufacturing and real estate sectors. David leads the firm's M&A projects and oversees all of the firm's cyber security engagements.

Prior to joining Green Hasson Janks in 2017, David provided performance improvement, restructuring and turnaround advice to distressed clients and their stakeholders. David previously advised a \$150 million manufacturing group on cross-boarder M&A strategy and led the modeling and accounting advisory engagement for an \$8 billion technology business. David was previously an Aerospace Engineer with the U.K. Ministry of Defense.

David earned his master's in Electronic Engineering from the University of Leeds and studied at the University of California, Los Angeles. He is also a certified Associate Chartered Accountant in the U.K. and a member of the Institute of Engineering and Technology and is currently pursuing his Masters in Computer Science at Georgia Tech.

David is an avid Formula One fan, the Treasurer of the OC Chapter of The American Institute of Aeronautics and Astronautics and holds his private pilot license. David is married with two children and lives in Los Angeles South Bay.

Related Industries and Services

- M&A Advisory and Due Diligence
- Cyber Security
- Entertainment and Media
- Technology
- Retail
- Consumer Products
- Manufacturing and Distribution
- Real Estate

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