

# POINT OF SALE

Updates from Benesch's **Retail, Hospitality & Consumer Products** Industry Group

## IN THIS ISSUE

### Fraud During COVID-19 Pandemic

- Recent Regulatory Actions . . . . .4
- Recent Cases . . . . .4

### Price Gouging . . . . .5

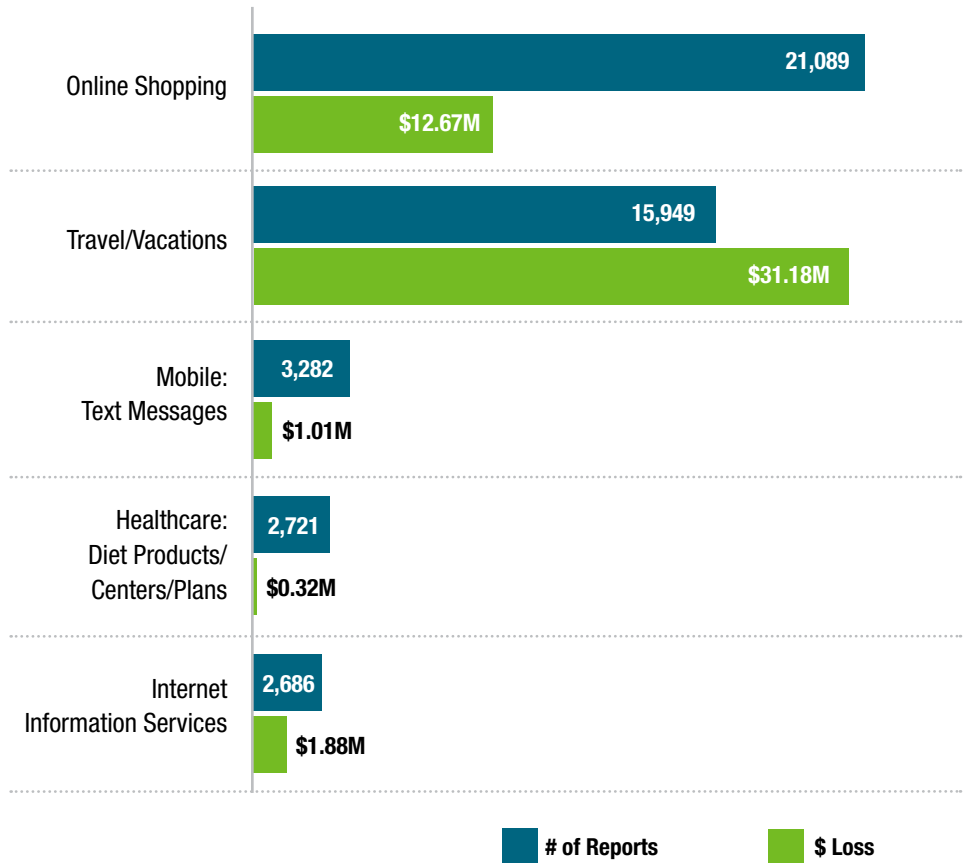
- Recent Regulatory Actions . . . . .6
- Recent Cases . . . . .7

### Business Interruptions . . . . .7

- Recent Cases . . . . .8

## Fraud During COVID-19 Pandemic

Regulators are continuing to pursue enforcement action against misrepresentations that are connected to the COVID-19 pandemic. The FTC has [received](#) 71,841 fraud reports from January 1 to July 21, where total fraud loss was valued at \$90.47 million and the median fraud loss at \$263 million. The frauds most reported to the FTC pertain to online shopping and travel/vacation, as shown by the following graph:



Source: FTC COVID-19 and Stimulus Reports

continued on page 2

## Fraud During COVID-19 Pandemic

*continued from page 1*

Although online shopping is the most frequently reported type of fraud complaint, it accounts for less than half the losses of travel and vacation scams. Similarly, mobile text messages and healthcare products account for a large share of claims by volume, but a small share by loss. Travel and vacation scams account for a larger share of losses than the four other categories combined.

The FDA is also pursuing more enforcement actions, with multiple updates in its [Daily Roundup](#). Most of these cases pertain to misleading COVID-19 prevention and treatment claims. At the state level, Attorneys General are monitoring COVID-related fraud and responding by issuing warning letters, launching lawsuits, and increasing public awareness. As a recent example, Arizona Attorney General sent a cease-and-desist [letter](#) to Clean Air EXP in June, demanding the company stop claiming their air filtration system eliminates “99.9% of viruses that are ‘COVID-19 surrogates.’”

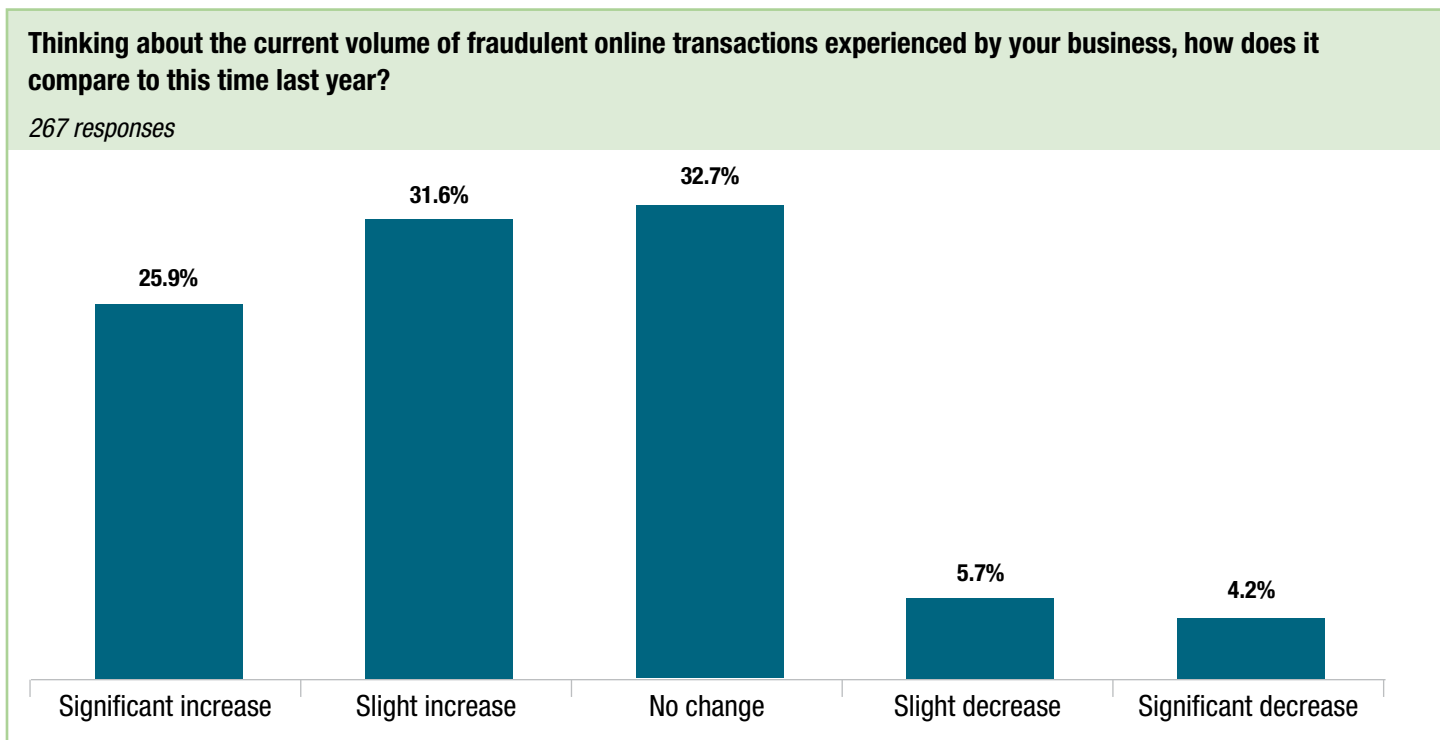
Another type of consumer fraud arising directly from the pandemic is companies’ refusal to issue refunds. Proposed class actions have been filed against [resorts](#), [universities](#), and [ticket sellers](#) for not issuing refunds for events and services that have been canceled due to the pandemic. These continue to proceed as private litigation, without regulatory intervention.

On a separate track, the FTC continues to crack down on illegal business practices (and lists such cases on its [website](#)) but there is little enforcement action against *legitimate* businesses that refuse to issue refunds to consumers. The FTC published a [blog post](#) that informed consumers of their options to obtain refunds for canceled travel plans, and specified consumers can file complaints with their State Attorney General’s office or the FTC.

Meanwhile, certain existing types of fraud have become more common during the pandemic. These opportunistic crimes arise from changing

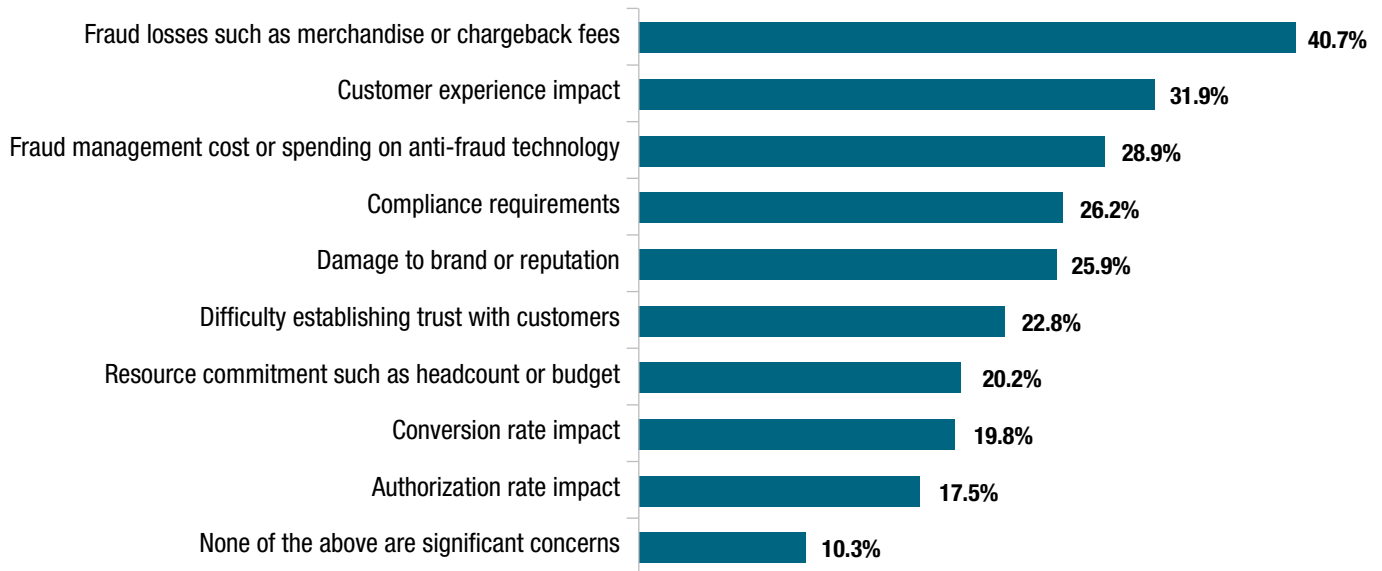
consumer preferences, needs, and lifestyles, as more consumers shop online, and businesses are learning how to conduct business differently. For example, there is anecdotal evidence showing the [restaurant](#) industry is increasingly targeted by fraudsters. Common schemes include placing orders with stolen credit cards and launching false social media promotions. Such frauds are often successful, where restaurants don’t have the controls in place to identify fraudulent transactions, and they have a short window of time to respond accordingly because orders must be fulfilled quickly.

Retail fraud is also increasing in the U.S. A recent [survey](#) conducted by 451 Research found close to 26% of respondents noted a “significant increase” in the volume of fraudulent online transactions during the COVID-19 pandemic, and another 31.6% experienced a slight increase, as shown in the following chart.



**Which of the following, if any, are significant concerns as it relates to the impact of fraud on your business?**

263 responses



Data compiled May 11, 2020

Represents responses from approximately 260 commerce technology decision-makers to a survey conducted by 451 Research in March and April. Source: 451 Research's Voice of the Enterprise: Customer Experience & Commerce, Merchant Study 2020

At the top of retailers' concerns in the chart above are losses attributable to merchandise or chargeback fees (occurring when consumers dispute purchases). While these tactics are not new, and retail "shrink" was already a significant problem that impacted retailers' bottom line before the pandemic, the poll results indicate a majority of retailers have seen at least a "slight" increase in fraud during the pandemic. Still, around 30% of respondents report there has been no change, as compared to the previous year.

Over the coming months, retailers and restaurants alike should be aware that credit card fraud is [projected](#) to increase at a higher compound

annual growth rate through to 2021. The growth in e-commerce, combined with increased attacks to steal credit card information, make this type of fraud around 28% more likely over the coming year.

Another type of long-standing fraud that continues to be a problem during the pandemic is [advertising fraud](#). A [report](#) published in July 2020 by the Transnational Alliance to Combat Illicit Trade indicated that more than 70 companies have been victims of advertising fraud on Facebook since 2017. For the companies that have reduced their marketing budgets during the pandemic, there is a [risk](#) that false ads might attract more attention than legitimate ones, and

**Another type of long-standing fraud that continues to be a problem during the pandemic is advertising fraud.**

continued on page 4

## Fraud During COVID-19 Pandemic

continued from page 3

### Recent Regulatory Actions

Regulator	Enforcement Claims	Status
FTC	As part of ongoing enforcement action against marketers of false health supplements, the FTC <a href="#">reached</a> an administrative settlement in July with the marketer of a supplement called “Thrive.”	The marketer in this enforcement action is barred from making baseless claims the supplement can treat, prevent, or reduce the risks from COVID-19.
FDA	Over several months, FDA has issued <a href="#">dozens</a> of warning letters against firms that sell products with claims to prevent, treat, mitigate, diagnose, or cure COVID-19.	Regulatory activity in this area shows some signs of slowing down, although multiple letters have been issued in July.
FBI, SBA, FTC	<p>In the earlier months of the pandemic, most tips to the National Center for Disaster Fraud were <a href="#">not related</a> to stimulus funding, but rather consumer frauds or price gouging. However, the FBI indicated in April that it expected more fraud activity to attempt to access stimulus money. In June, the FTC <a href="#">stopped</a> a fraudulent scheme in Louisiana that was allegedly deceiving consumers with a mailer that purported to offer federal COVID-19 stimulus benefits.</p> <p>Separately, a group of regulators <a href="#">asked</a> small-business owners to be aware of fraud risks relating to the CARES Act. The regulators reminded entrepreneurs that if anyone asks for money, they are not legitimate, nor are any emails that end in anything but “.gov”. Further, the SBA does not reach out to initiate a loan, nor does it ask for information previously provided in the application process.</p>	Stimulus fraud is an area that overlaps with many government entities’ jurisdictions, including the FTC, the DOJ, the FBI, and the SBA. As this type of fraud is expected to increase, regulators will need to coordinate enforcement action and ensure individuals and small businesses don’t lose their stimulus funding.

### Recent Cases

Case	Key Claims	Status
Rickenbaker v. Drexel University	In April, Grainger Rickenbaker <a href="#">sued</a> Drexel University for refunds, after the campus closed because of the coronavirus. U.S. undergraduates have sued more than <a href="#">50 schools</a> with similar contract-based claims, demanding partial refunds for tuition, room and board, and fees after university campuses shut down.	Many universities <a href="#">offered</a> partial refunds for room and board, but the most contentious issue is tuition. Universities insist their degrees retain value, even though the student’s educational experience is different.
Matthew Ajzenman et al. v. Office of the Commissioner of Baseball et al.	In April, Matthew Ajzenman and Susan Terry-Bazer <a href="#">filed</a> a proposed class-action lawsuit against Major League Baseball Commissioner Rob Manfred and the 30 teams. The proposed plaintiffs are asking to receive their money back for tickets.	MLB and Ticketmaster recently <a href="#">asked</a> the court to pause discovery in the lawsuit, as they argue the discovery process would be too broad and they would prefer to resolve the matter in arbitration.
Hunt v. The Vail Corporation	Consumers <a href="#">filed</a> a proposed class action against Vail Resorts, alleging the company improperly retained passholder fees despite the closure of all of its 34 North American resorts.	The litigation is ongoing, and a motion to transfer the litigation has been <a href="#">withdrawn</a> in June.



## Price Gouging



Following the issuance of an Executive Order in March prohibiting the hoarding of [designated](#) items (PPE, respirators, ventilators, disinfecting devices, etc.), Attorney General Barr created the COVID-19 Hoarding and Price Gouging Task Force to address COVID-related hoarding, price gouging, and market manipulation. The task force is [working](#) closely with Health and Human Services (HHS) to develop enforcement measures and best practices, and to coordinate cross-country investigations and prosecutions. Each state has been asked to designate an attorney to serve on the task force. As of June, the task force [included](#) over 100 federal prosecutors designated by U.S. attorney's offices and the DOJ. The task force, which coordinates with federal and state law enforcement agencies, has opened hundreds of investigations surrounding allegations of hoarding, price gouging, counterfeiting, and misbranding.

In support of those enforcement efforts, several states have introduced bills to create or refine price-gouging laws. Examples include Colorado's price-gouging bill, [signed](#) into law in July, California's, which [advanced](#) out of committee in June with bipartisan support, and Massachusetts', which also [passed](#) out of committee in June. While New York State already had legislation prohibiting price gouging in emergency situations, in June the City of New York's Department of Consumer and Worker Protection (DCWP) rendered permanent a [rule](#) that had been promulgated by the Department of Consumer Affairs (DCA) as a citywide emergency measure in March. The rule states that price gouging is illegal for goods or services essential to health, safety, or welfare and [allows](#) the DCA to declare such occurrences as unconscionable.

The first-ever nationwide [bill](#) protecting against price gouging—the Health and Economic

Recovery Omnibus Emergency Solutions Act (HEROES Act)—passed in the U.S. House in April. If signed into law, this act will create the first-ever federal anti-price-gouging statute, the violation of which will automatically constitute a violation under the Federal Trade Commission Act. While private litigants would not be able to file claims using the HEROES Act, the [increased](#) scrutiny it would bring from federal regulators would shine a spotlight on companies' pricing practices and would support consumer class action lawsuits on price gouging. The bill has been read twice by the Senate and is on the Senate Legislative Calendar.

Another national [bill](#) was introduced in April that would prohibit, during a public health emergency caused by COVID-19, the sale of consumer goods or services at prices that are either exorbitantly high or that indicate the seller is unreasonably profiting from the circumstances of the emergency. If adopted, the COVID-19 Price Gouging Prevention Act would enable state attorneys general whose state laws do not cover price gouging to lay charges by enforcing the federal statute. While this bill seeks to [fill](#) the regulation gaps in current state price-gouging laws, it would not preempt existing state laws and regulation, which remain the primary enforcement at the state level.

In June a new bipartisan House [bill](#) was introduced—Make Medications Affordable by Preventing Pandemic Pricegouging Act (MMAPPP)—to prohibit unreasonable pricing of drugs used to treat diseases that cause a public health emergency. This bill includes COVID-specific provisions that prohibit the exclusive licensing of new taxpayer-funded drugs for the prevention and treatment of COVID-19, and that require the government to enforce affordable pricing of any new taxpayer-funded drug in relation to COVID-19. The bill has been referred to the Committee on Energy and Commerce.

*continued on page 6*

## Price Gouging

continued from page 5

## Recent Regulatory Actions

Regulator	Enforcement Claims	Status
U.S. Attorney for the Eastern District of New York	Federal prosecutors <a href="#">charged</a> the DOJ's first criminal case under the Defense Production Act in April against Amardeep Singh, who allegedly sold large quantities of PPE out of his retail sports apparel store. Singh allegedly received 67 shipments of face masks, surgical gowns, hand sanitizer, and digital thermometers for resale. These PPE items and other items designated as scarce were advertised and sold at prices far exceeding market prices, some at markups as high as 1,328%.	Singh allegedly <a href="#">violated</a> the anti-hoarding provision that is found in Section 102 of the Defense Production Act, which states that no person can accumulate an excessive amount of items beyond reasonable need, and no person can resell scarce materials at higher-than-market prices. In April, a search <a href="#">warrant</a> was carried out at Singh's retail store, and more than 100,000 face masks, 500,000 pairs of disposable gloves, 10,000 surgical gowns, and nearly 2,500 full-body isolation suits were seized.
Texas AG	Texas AG <a href="#">filed</a> a lawsuit in April against Cal-Maine Foods Inc., the country's largest egg producer and supplier behind brands such as Eggland's Best and Land O'Lakes. The AG accused the producer of violating the state's Deceptive Trade Practices Act (DTPA) and taking unfair advantage of the COVID-19 disaster declaration by more than tripling the price of eggs.	Under the Texas DTPA, price gougers may be held <a href="#">liable</a> for civil penalties of up to \$10,000 per violation, with an additional penalty of up to \$250,000 if the affected consumers were elderly. They could also be ordered to reimburse consumers.
U.S. Attorney for the Southern District of New York	Prosecutors <a href="#">filed</a> hoarding and price-gouging charges in May against Ronald Romano, who allegedly attempted to defraud the city of New York into disbursing approximately \$45 million for PPE priced with exorbitant markups that he neither possessed nor was authorized to sell. The defendant has been <a href="#">charged</a> with one count of wire fraud, one count of conspiring to commit wire fraud, and one count of conspiring to violate the Defense Production Act (DPA).	The case against Romano is being handled by the Office's Complex Frauds and Cybercrime Unit. The U.S. attorneys <a href="#">requested</a> a 30-day continuance to allow additional time for the parties to discuss a potential disposition of the case. On June 9, counsel for the defendant agreed to the 30-day continuance, and July 27 was set as the date by which the Government must file an indictment or information.
U.S. Attorney for the Southern District of Georgia	In May, federal prosecutors <a href="#">charged</a> the defendant, Paul Penn, for attempting to defraud a foreign government in connection with an attempted sale of 50 million respirator masks. Penn, through his company Spectrum Global Holdings LLC, allegedly agreed to act as a middleman in exchange for a cut of the \$317 million sales price, which is 500% higher than the normal market value.	The DOJ <a href="#">continues</a> to aggressively investigate and prosecute cases of hoarding and price gouging of materials designated by HHS as critical health and medical supplies. The U.S. Attorney for the Southern District of Georgia is <a href="#">collaborating</a> with the COVID-19 Hoarding and Price Gouging Task Force and other law enforcement partners to seek out any fraudsters who exploit the COVID-19 crisis for personal gain.
Pennsylvania AG	The Pennsylvania AG <a href="#">reached</a> a settlement with a Pittsburgh hardware store, Vogt True Value Hardware, which has agreed to pay refunds to customers for KN95 masks purchased at illegal markups. Vogt allegedly sold masks at more than 20% markup, overcharging customers by over \$1,000 in two days.	Pennsylvania retailers are <a href="#">prohibited</a> from marking up their inventory by more than 20% during a state of emergency, according to the state's price-gouging law. The AG in this case agreed to suspend \$1,800 in civil penalties if Vogt reimburses consumers and agrees to never price gouge again. The agreement is one of several recent settlements between the Pennsylvania AG's office and retailers exploiting the demand caused by COVID-19.

Recent Cases

Case	Key Claims	Status
Fraser et al. vs. Cal-Maine Foods Inc.	Plaintiffs in California brought forth a class action <a href="#">suit</a> in April against more than two dozen producers, wholesalers, and stores that allegedly tripled the price of eggs following California’s declaring a state of emergency on March 4. Companies named in the suit include Whole Foods, Walmart, Trader Joe’s, Costco, Amazon, Kroger Co., and Albertsons. The suit alleges the defendants violated California’s Unfair Competition Law and engaged in price gouging.	Several of the defendants have <a href="#">filed</a> notices of voluntary dismissal, some of which have been granted.
3M Company vs. KM Brothers Inc.	3M Company <a href="#">filed</a> a trademark lawsuit over price gouging in June against Amazon vendor Mao Yu and related corporate defendants. The suit alleges defendants sold fake N95 masks at more than 20 times the market price. The suit includes claims against several affiliated companies for using “bait-and-switch” tactics and other deceptive behavior to sell more than \$350,000 worth of fake masks to Amazon customers. The suit resulted from a collaboration between 3M and Amazon in which Amazon alerted the company following multiple customer complaints and removed Yu’s listings from its site.	At the time of this filing, 3M had already filed 12 similar trademark cases over price gouging for N95s, securing five preliminary injunctions. One of those suits led to federal criminal charges being laid against one New Jersey defendant. On June 18, 3M <a href="#">settled</a> a price-gouging case of N95 masks against Florida company TAC2 Global LLC, and as of July 16 it had filed 18 suits in total related to COVID-19 fraud. 3M states it has also successfully shut down thousands of websites and social media posts related to the alleged wrongdoing.

## Business Interruptions

The stay-at-home orders enacted by states and local governments in mid-March to slow down the spread of the novel coronavirus have taken a financial toll on retail as businesses forced to shut down have seen their [sales decline](#) dramatically. Litigation is brewing as retailers are invoking force majeure clauses to free themselves of contractual obligations to cover for losses related to the interruption of businesses ranging from retail to food and beverage.

One of the most important drivers behind business interruption claims is the inability to pay commercial rent. Many nonpaying retail tenants are [pointing to the pandemic](#) as a force majeure preventing them from fulfilling their lease agreement, but most [property owners disagree](#), noting the current public health crisis does not qualify as force majeure. Provisions can vary from one lease agreement to another, and unless pandemics are

explicitly named, it remains unclear whether the novel coronavirus qualifies. Some retailers have also referred to the frustration of purpose doctrine to invalidate their lease agreements.

Property owners, for their part, argue that the outbreak of the COVID-19 virus is out of their control, adding that they need rent payments to come in, as they are themselves responsible for mortgage and tax payments as well as insurance and maintenance costs. Even though some landlords are willing to agree to [rent deferrals or lease modifications](#), especially considering that more retailers could potentially file for bankruptcy protection, others are [bringing their cases to court](#). Before granting rent abatements or lease modifications, some property owners are requiring retail tenants to submit business interruption insurance claims, another area leading to legal battles.

Hundreds of businesses—restaurants, retailers, and others—are suing their insurers to get them to cover financial losses caused by the pandemic-related shutdowns. While the government-imposed lockdowns to stall the spread of the virus have created business disruptions and interruptions, insurance companies have often [refused to pay](#), citing a standard requirement for physical damage to property and noting that most policies specifically exclude viruses. Some business owners [countered](#) that the shutdowns trigger policies’ “civil authority” coverage, which covers losses when a government order prevents a business owner from accessing its commercial property. The availability and wording of such clauses varies from one insurance provider to another, and one contract to another, such that the parties to the contract must reach a common

*continued on page 8*

## Business Interruptions

*continued from page 7*

understanding on the scope of coverage or ask the court to resolve any ambiguity.

Because of this lack of uniformity, insurers are [opposing the consolidation](#) of more than a hundred federal lawsuits pertaining to business interruption coverage. The industry is also taking a united stance in arguing that it cannot pay for pandemic-related business interruption coverage, as it [collected no premiums](#) for such occurrences due to its policies' exclusions of viruses.

The issue is being looked at by lawmakers. Several states, including New Jersey, Massachusetts, New York, Louisiana, Pennsylvania, South Carolina, and Ohio, have looked into [adopting legislation](#) that would force insurers to retroactively cover business interruption claims related to COVID-19. Louisiana, however, has shelved proposed

legislation over concerns that forcing insurers to pay these claims could bankrupt the industry and lead to years of litigation.

The American Property and Casualty Insurance Association, which has been lobbying against these states' efforts, [claims](#) that forcing insurers to cover business interruption claims would endanger the solvency of the industry. The Association warns that it could [cost insurers](#) between \$255 billion and \$431 billion per month if they were forced to compensate businesses for losses due to COVID-19 shutdowns. Similarly, the National Association of Insurance Commissioners [argues](#) that the COVID-19 pandemic, like any other pandemic, goes against a central principle of insurance, which is the pooling of risk. In the context of COVID-19, almost all policyholders suffer losses at the same time, such that the pooling and distribution of risk is impossible or

unsustainable. Part of the insurance industry's response to the crisis has been to push for a government-subsidized fund—the Business Continuity Protection Program (BCPP)—to cover the cost of pandemic-related business interruptions.

In the meantime, many retail stores and restaurants are counting on an insurance payout to remain in business. As such, the ongoing legal battle over business interruption claims is not only lining up to be “one of the biggest legal fights in the history of insurance,” as *The Wall Street Journal* [puts it](#), but may be determinant in the survival of many retail and hospitality businesses. The number of companies filing business interruption insurance lawsuits is expected to continue to grow, mobilizing industries facing different sets of COVID-19-related challenges.

### Recent Cases

Case	Key Claims	Status
Big Onion Tavern Group LLC et al. v. Society Insurance Inc.	A group of Chicago movie theater and restaurant owners <a href="#">allege</a> that Society Insurance has denied their business interruption claims without undertaking any investigations. Society Insurance <a href="#">said</a> the group cannot receive payment for their claims because the policy provisions—direct physical loss or damage to their property—have not been triggered.	The companies in the suit are seeking up to \$60,000 each from Society Insurance.
Egg and I LLC et al. v. U.S. Specialty Insurance Co. et al.	Las Vegas breakfast chain Egg Works filed a <a href="#">proposed class action against</a> U.S. Specialty Insurance, alleging the insurer wrongfully denied its business interruption claim for losses resulting from state-imposed COVID-19 shutdowns. Egg Works recently opposed the insurer's bid to dismiss the class suit, saying it was taking a narrow view of its policy. U.S. Specialty says the policy was not designed to cover losses resulting from government-mandated closures.	Egg Works is seeking to represent a class of U.S. Specialty policyholders that have seen their business interruption claims under restaurant recovery policies denied.



Case	Key Claims	Status
Gavrilides Management Co. LLC v. Michigan Insurance Co.	A Michigan judge <a href="#">dismissed</a> Gavrilides Management Co. LLC's suit seeking \$650,000 from Michigan Insurance Co. for losses it suffered following lockdown orders that limited its two restaurants to takeout and delivery orders. The judge said she was convinced by Michigan case law that direct physical loss or damage must take a tangible form and somehow alter "the physical integrity of the property" for a business interruption claim to be valid.	The plaintiff plans to appeal the circuit court's ruling.
Treasure Island, LLC v. Affiliated FM Insurance Company	Las Vegas casino and resort Treasure Island is suing FM Insurance Co. in federal court, <a href="#">alleging</a> the insurer wrongfully denied coverage for losses incurred as a result of the COVID-19 pandemic. Treasure Island claimed that the presence of the COVID-19 virus in its casino and resort has triggered coverage under its "all risk" policy. Treasure Island further argued that patrons infected with COVID-19 were present at its property prior to its shutdown, such that its losses weren't strictly attributable to the shutdown. Treasure Island said it is entitled to coverage up to \$850 million in property damage and \$327 million in business losses since it paid almost \$1 million in premiums for a one-year business interruption policy. FM Insurance denied the claim, stating that there was no physical damage to the property.	The plaintiff is asking for AFM to cover COVID-19-related losses, and is demanding damages of more than \$75,000 to be determined in a jury trial, as well as attorney fees.
48th Americas LLC v. The Gap Inc.	48th Americas <a href="#">filed a lawsuit</a> against The Gap, alleging the clothing retailer failed to pay hundreds of thousands of dollars in rent, breaching the terms and conditions of its 2015 lease extension. The retailer allegedly failed to pay rent in April and May, as well as \$1,171 for water and \$783 for snow removal.	The plaintiff is asking for unpaid rent and fees as well as attorney and court fees.
535-545 Fee LLC v. NBA Media Ventures LLC	535-545 Fee LLC <a href="#">filed a lawsuit</a> against NBA Media Ventures for allegedly failing to pay rent for its store on Fifth Avenue in Manhattan, owing more than \$1.2 million in rent. 535-545 Fee LLC claims the tenant did pay its rent despite an "absolute and unconditional obligation" to pay under its lease agreement. NBA said its store was <a href="#">required</a> to shut its doors because of the pandemic, and that under these circumstances, it believes that 535-545 Fee LLC's claim is without merit.	The plaintiff seeks payment of the unpaid rent, as well as damages and at least \$20,000 in attorney fees.

**For more information, please contact**

**DAVID S. ALMEIDA**

Chair, Retail, Hospitality & Consumer Products Group  
312.212.4954 | [dalmeida@beneschlaw.com](mailto:dalmeida@beneschlaw.com)

**SUZANNE M. ALTON DE ERASO**

312.212.4977 | [saltondeeraso@beneschlaw.com](mailto:saltondeeraso@beneschlaw.com)

**MARK S. EISEN**

312.212.4956 | [meisen@beneschlaw.com](mailto:meisen@beneschlaw.com)

**MATTHEW J. LANGLEY**

312.634.6408 | [mlangley@beneschlaw.com](mailto:mlangley@beneschlaw.com)