

# OREGON TRIAL LAWYERS ASSOCIATION

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Testimony of Arthur Towers  
Regarding Insurance Industry and Small Business  
House Committee on Judiciary  
May 28, 2020

Thank you for the opportunity to testify today on behalf of the Oregon Trial Lawyers Association. As you know, OTLA members are lawyers who fight for underdogs. The underdogs in question today are small business owners who face a number of the same crushing pressures that individual Oregonians do.

**Our members report that the biggest challenge their business clients face is that of mistreatment by their insurance company.** Small businesses who have worked hard and played by the rules pay their insurance premiums month in and month out for years and years and years. Now, when they have a business interruption claim to file, the insurance company, like a bad neighbor, is not there for them.

Take Naomi Pomeroy, owner of a Portland restaurant and a contestant on Top Chef. She has operated her restaurant since 2007 and has studiously paid her premiums for business interruption coverage. Her business was interrupted by the pandemic and now her insurance company is refusing to pay the claim. We are concerned there is systemic delay and denial of claims. **The impact is that small business owners who -- if not denied outright -- often settle for pennies on the dollar because they need the cash.**

The articles linked below provide a good flavor for the breadth of the crisis and the variety of small businesses and non-profits hit by the insurance denial industry.

<https://www.wweek.com/news/courts/2020/05/13/beast-chef-naomi-pomeroy-sues-insurer-for-denying-coverage-of-losses-during-the-pandemic/>

<https://www.nytimes.com/2020/05/05/arts/insurance-claims-coronavirus-arts.html>

[https://www.washingtonpost.com/politics/simon-wiesenthal-center-sues-insurance-giant-in-latest-fallout-over-coronavirus-claims/2020/04/29/2928cab8-89c4-11ea-ac8a-fe9b8088e101\\_story.html](https://www.washingtonpost.com/politics/simon-wiesenthal-center-sues-insurance-giant-in-latest-fallout-over-coronavirus-claims/2020/04/29/2928cab8-89c4-11ea-ac8a-fe9b8088e101_story.html)

**At the federal level, Congress has started to demand the information needed to make good public policy.**

The link below is to information that Congresswoman Jayapal from Seattle has asked for from insurers in Washington state. It is reasonable for the legislature to make the same requests from Oregon insurers.

<http://jayapal.house.gov/wp-content/uploads/2020/04/Insurance-letter.pdf>

**Americans want lawmakers to protect consumers.** In the accompanying testimony, please find a polling memo titled, “**Bipartisan Opposition to Guaranteeing Businesses Immunity from COVID Lawsuits**” This May 6<sup>th</sup> memo spells out that both Trump and Biden supporters agree that businesses should not get blanket immunity. The same holds true for those who have lost a job or income due to the pandemic.

**Oregon’s protections for small business and consumers under the Fair Claims Settlement Practices Act are notoriously weak.** This is something the legislature should examine in 2021.

**The problems of insurance coverage are not new. We will see them again.**

The “you’re not covered” reactions of the good-hands insurance industry added a second wave of losses to Gulf-coast consumers and small businesses in the wake of the Katrina flooding. We have been cautioned many times that Oregon is overdue for a major earthquake. And indeed, many in the building have worked hard on emergency preparedness. The COVID-19 insurance coverage crisis highlights the need for further consumer and small business protections. We buy insurance specifically for problems like COVID disruption. Coverage rules must be tightened, and consequences of failures to promptly provide benefits must make insurers do the right thing.

<https://www.npr.org/templates/story/story.php?storyId=6368165>

<https://www.nytimes.com/2007/09/02/business/worldbusiness/02iht-orleans.4.7353442.html>

## **Will businesses be sued by customers over exposure issues?**

Some in the business community raise concerns over potential lawsuits against businesses from consumers who might claim that they contracted COVID from the business.

Based on the specifics of the disease and the strict legal requirements in place, we think this is very unlikely in Oregon. In Oregon, a consumer who claimed to be harmed by contracting COVID from a business would be required to prove several things: 1) they would need to prove that the business acted unreasonably, and 2) they would need to prove that they suffered harm as a result.

The second part is nearly impossible, in the case of COVID-19. All medical information emphasizes that the virus can be transmitted by asymptomatic people. All medical evidence and public health information reveals that transmission can come from any source. A consumer who claimed to be harmed by her visit to a small business would need to prove that the exposure that caused her COVID came at that place. This is a nearly impossible to prove.

<https://www.kansascity.com/news/coronavirus/article242962271.html>

The recent episode involving two stylists who exposed more than 100 clients is a telling example. The contingency fee structure discourages lawyers from bringing long-shot cases. They do not get paid unless and until they win. We have not seen these cases yet, and we seriously doubt that any retail contact cases would ever get filed. On the other hand, and we have seen a plethora of the business interruption insurance cases.

## **This is much different than the responsibility employers have to employees.**

Under Executive Order 20-12, workers were allowed to return to work, except in a handful of industries. Many workers placed themselves in harm's way to serve our community or in order to feed their family. They did so even when it meant putting their health and that of their loved ones at risk. Often workers had no personal protective equipment, or they were provided untested equipment.

The sole set of businesses for which immunity should be considered right now are those that have stepped forward to make personal protective equipment. Corporations that make this gear as part of their normal operations should be held accountable if their gowns and masks fail to perform as promised. However, other companies that normally make clothing or shoes or some other product that instead rushed protective equipment to market deserve consideration. But keep it in

context – the manufacturers might deserve to be shielded, but the workers forced to use the untested gear deserve to be notified that the mask they wear today may not be any better than a bandanna. They should be told that the mask they are using is supposed to be discarded after each patient. The worker should have the power to make an informed decision whether or not to work in those conditions. Workers who had to return to work and deal with the public should be presumed to have been exposed to the virus on the job.

I'll close by telling the story of Enesha Yurchak. She is an Emergency Medical Technician who worked in-house at the Amazon warehouse 5 miles from the capitol, next to DPSST. Enesha is a 36-year-old immigrant, engaged to be married, with a 3-year-old little boy at home. Enesha took time off in early March when she began experiencing symptoms consistent with COVID-19. Upon her return in mid-April, Yurchak says she witnessed violations of safety policies designed to stem the spread of the virus. She and several coworkers were asked, at that time, to wash other employees' personal protective equipment.

She expressed concern to her supervisor about the risks associated with washing the gear and failures to conduct necessary sanitization of facilities, according to the complaint. After a tense conversation, Yurchak says she fell ill again. She left work to recover, at which point she was terminated for "insubordination." Enesha also reports that her supervisor withheld masks from employees that arrived in early April.

<https://www.geekwire.com/2020/ex-amazon-employee-sues-wrongful-termination-claims-coronavirus-whistleblowing-led-firing/>