

COVID-19 and its Effect on Insurance Carriers: **How Have Legislatures Responded?**

In the wake of the COVID-19 pandemic, states across the country are facing near-unprecedented demand for government assistance in the form of unemployment, welfare, and stimulus benefits. While the focus of many news stories and social media posts has been the effect of the pandemic on individuals and families – from school closures and telecommuting to the invasion of our lives by TikTok and The Tiger King – lost on many is the reality faced by many business owners dealing with the shuttering of their operations: if their business interruptions are not covered by their insurance policies, the businesses may close for good.

Since the outbreak of the pandemic, much attention in the insurance industry has been paid to the typical commercial insurance policies providing business interruption coverage to businesses across the country. Insurers have been placed in the unenviable position of being asked to insure against risks which were never underwritten and for which premiums were never paid.

Litigation has ensued nationwide, with many cases having been filed by business owners seeking declarations the “damage” caused by COVID-19 constitutes a direct physical loss to property sufficient to trigger coverage for business interruptions. Insurance companies have responded by noting that not only have these businesses not suffered a direct physical loss merely because the virus may live on physical surfaces for extended periods of time, but standard business interruption policies exclude coverage for losses resulting from virus or bacteria.

State Legislatures

Legislatures are making attempts to address this void in coverage, and it appears insurers may be in the crosshairs. On April 13, 2020, the Pennsylvania General Assembly introduced H.R. 842. The resolution states “all businesses are deserving of Federal stimulus aid during these extraordinary times” and urges the United States Congress, “as part of an overall COVID-19 relief package, to reimburse, via disbursement of Federal stimulus funds, insurance companies for the costs associated with the voluntary payment of claims to businesses made through business interruption insurance.”

H.R. 842, which has been referred to the Committee on Insurance, comes just over a week after Pennsylvania joined several other states in attempting to mandate retroactive insurance coverage for business interruption claims filed due to COVID-19. That bill, H.B. 2372, would interpret any policies in force as of March 6, 2020 (the date of the Proclamation of Disaster Emergency concerning the COVID-19 pandemic) and insuring against the loss or damage to property, including the loss of use and occupancy and business interruption, “to include among the covered perils under the insurance policy coverage for business interruption due to global virus transmission or pandemic.” The mandate would apply to any insured having fewer than 100 eligible employees in Pennsylvania. Under the bill, insurers paying out the business interruption claims could apply to the Pennsylvania Insurance Commissioner for

reimbursement, which would be funded by a “special purpose apportionment” the Insurance Commissioner would be authorized to collect from all property and casualty insurers doing business in Pennsylvania.

The American Property Casualty Insurance Association has estimated the closure losses for small businesses could be as high as \$431 billion per month. The National Association of Mutual Insurance Companies has estimated the total surplus of the U.S. property and casualty insurance industry is only \$800 billion. These figures, and the real threat to insurer solvency they represent in the event COVID-related business interruption coverage is mandated on a large scale, have not stopped Pennsylvania from joining at least 5 other states (New York, New Jersey, Louisiana, Massachusetts, and Ohio) in attempting to mandate the coverage.

United States Congress

On the federal level, House Democrats have proposed a federal reinsurance program which is designed to shield businesses from business losses suffered due to COVID-19. The proposal is akin to the Terrorism Risk Insurance Act (TRIA), which provides a government guarantee to insurance companies providing products which protect companies from damages caused by domestic terror attacks.

The Pandemic Risk Insurance Act of 2020, which has not yet been introduced, would, subject to certain deductibles, conditions, and caps, cover insured losses arising from public health emergencies. Under the bill, the Federal Pandemic Risk Reinsurance Program would be administered by the U.S. Department of Treasury. Participation in the program by insurers would be voluntary, and insurers electing to participate would be charged a premium for reinsurance coverage. Each participating insurer would have to make coverage available in all of its business interruption policies. The current annual cap in the discussion draft of the bill is \$500 billion, such that neither the Department of Treasury nor participating insurers would be liable for paying losses in excess of that amount. The draft also contemplates a federal cause of action for property damage, personal injury, or death arising or resulting from a public health emergency.

Of course, the issue of business interruption coverage and related exclusions likely will only see heightened attention now that President Trump has mentioned the issue. In his Coronavirus briefing on Friday, April 10, 2020, President Trump acknowledged there are exclusions for pandemics “in some cases,” but he added, “In a lot of cases, I don’t see it.” He went on to state, “You have people that have never asked for business interruption insurance, and they’ve been paying a lot of money for a lot of years for the privilege of having it, and then when they finally need it, the insurance company says, ‘We’re not going to give it.’ We can’t let that happen.”

Thus, perhaps it was no surprise when on April 14, 2020, H.R. 6494, the Business Interruption Insurance Coverage Act of 2020, was introduced in the U.S. Congress. That Act would mandate that each insurer offering or making available business interruption insurance coverage make available, in all policies providing business interruption insurance, coverage for losses resulting from any viral pandemic, any forced closure of business by law or order of

government, or any power shut-off conducted for public purposes. Any exclusion in a business interruption policy in force on the date of the Act's enactment would be void if it excludes losses specified in the Act. An insurer could reinstate a preexisting provision excluding the mentioned losses if the insured affirmatively authorizes the reinstatement or the insured fails to pay any increased premium charged for providing the enhanced coverage.

The attorneys at LUCAS AND CAVALIER, LLC continue to monitor legal developments in this fast-paced news environment, including issues related to COVID-19. We are available to discuss the current coverage landscape concerning the issues addressed in this article and will work nimbly and efficiently to meet the challenges presented by the pandemic.