Mandated Coverage and Public-Private Risk Sharing Initiatives Under Consideration for COVID-19 Related Business Interruption Losses

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In just a few weeks, we have gone from discussing what was believed to be the first COVID-19 lawsuit related to business interruption insurance and a handful of state legislative efforts to redefine the scope of coverage for businesses impacted by COVID-19 to dozens of lawsuits filed across the nation, including several class actions, and legislation circulating at the federal (and international) level proposing to provide a backstop to private insurers who pay out to policy holders. The impact of COVID-19 shutdowns on businesses is being felt wide and deep. The Risk & Insurance Management Society (RIMS) recently reported to Congress that more that 66% of its members will have business interruption losses due to COVID-19, with 77% expecting losses over $1 million and 36% expecting $25 million+ in losses. We hit the highlights of several noteworthy legislative developments related to business interruption insurance below. We discuss related litigation developments in a separate post.

State Legislative Efforts. State efforts to mitigate the rapidly mounting business losses attributable to COVID-19 continue to expand. The pending state bills we previously discussed that would require all business interruption provisions to be construed to cover COVID-19 related losses are still under consideration. The New York Bill (A. 10226), introduced March 27th, has since been amended twice and remains with the Committee on Insurance. A Senate version of the bill (S8211A) was introduced on April 17th, amended and recommitted to the Committee on Insurance. The Massachusetts Bill (SD 2888), filed on March 24th has been referred to the Joint Committee on Financial Services. And the status of the New Jersey Bill (A3844) and Ohio Bill (House Bill 589) has not changed.

The Louisiana Senate is considering a similar bill, SB 477, which would require insurers to cover COVID-19 related business losses. SB 477 was read a second time on May 4th and referred to the Committee on Insurance. While insurers would be required to cover COVID-19 losses, several of these bills provide a mechanism for insurers to seek reimbursement from the state with the state authorized to impose assessments on insurers to recover the amounts reimbursed. Louisiana's SB 495, which would create a Business Compensation Fund for COVID-19 related losses, also was read a second time and referred to the Committee on Insurance. The proposed fund would be voluntary for insurers, upon application to the commissioner of insurance, and they would pay into the fund at the greater of $50 million or 80% of the aggregate policy limits for commercial insurance policies the insurer has in force during the state of emergency. Policy holders could apply for recovery of losses from the fund but must agree to no more than 80% of actual losses up to the policy limit.

MANDATED COVERAGE AND PUBLIC-PRIVATE RISK SHARING INITIATIVES UNDER CONSIDERATION FOR COVID-19 RELATED BUSINESS INTERRUPTION LOSSES

Pennsylvania's legislature has been considering H.B. 2372, a bill that would require insurance companies to cover COVID-19 related business interruption claims similar to the other states, as well as H.B. 2386, which would establish grants for businesses with COVID-related business interruption losses that are denied by an insurer. In addition, the Pennsylvania Senate introduced SB 1127 on April 30th that seeks to construe the policy terms that seem to be at the heart of most coverage disputes in a manner that will result in coverage. For example, the bill sets forth the parameters for what constitutes experiencing "property damage" and "the actual presence of a communicable disease," such that any building in a municipality in which at least one person has COVID-19 or COVID-19 has been detected would be deemed to have "experienced property damage" and deemed to have "experienced the actual, and not merely suspected, presence of a communicable disease." The bill also states that the Governor's order requiring business closures constitutes an order of civil authority and an order preventing egress from and ingress to the businesses "as a direct result of physical damage at or in the immediate vicinity of those locations." There is a savings clause in the bill that provides for honoring the mutual intent of the parties as "clearly and expressly communicated to each other," if the statute would result in a contrary construction of the policy. SB 127 has been referred to the Committee on Banking and Insurance.

Federal Legislative Efforts. At the federal level, there have been efforts to require or incentivize insurers to provide coverage for business interruption losses attributable to COVID-19 and related government-mandated business shutdowns. Similar to the efforts of the state legislatures we discussed, Rep. Mike Thompson (joined by 9 others) introduced H.R. 6494: Business Interruption Insurance Coverage Act of 2020 on April 14, 2020, which would require any insurer that provides business interruption loss coverage to cover losses resulting from "any viral pandemic," as well as from any government forced business closure, mandatory evacuation or any public safety related power shut-off. The insurer would be required to provide coverage, notwithstanding any current exclusions for such circumstances. However, the bill provides that the insurer could reinstate the coverage exclusions if the insured explicitly agrees or if the insured fails to pay an increased premium to account for the expanded coverage after sufficient notice from the insured. H.R. 6494 has been referred to the House Committee on Financial Services.

On April 20, 2020, several organizations, including RIMS and the National Retail Federation with sixteen other business organizations, sent letters to Congress requesting the creation of a pandemic risk insurance program under which risk would be shared among the insurance industry, policyholders, and the Federal government. "As with traditional insurance policies, policyholders would absorb initial losses up to a specified deductible. Insurers would then provide affordable business interruption coverage up to a certain limit with the government backstopping the program after that limit is exhausted." The drafting process for the Pandemic Risk Insurance Act of 2020 (PRIA), which would provide such a backstop by the federal government, began in March and it is anticipated that it will be introduced soon by Rep. Carolyn Maloney, a senior member of the House Finance Services Committee. This description of the PRIA program can be found in this article:

While participation in the proposed reinsurance program would be voluntary, insurers that sign up would be required to offer pandemic coverage in all their business interruption policies. Participating insurers would collectively be responsible for covering the first $250 million of business interruption losses incurred by their policyholders. Once that threshold is reached, a federal fund administered by the U.S. Treasury Department would cover 95% of additional losses up to $500 billion in a single year, with the remaining 5% spread among the insurers.

At least one similar bill is reportedly planned by the House Financial Services Committee, Subcommittee on Housing, Community Development and Insurance. Other countries, including France and Britain, are reported to be considering similar public-private partnership programs to cover pandemic insurance risk as well.

Litigation of COVID-19 related coverage denials is proliferating rapidly. It will be remarkable if state and federal legislative efforts can effectively address or eliminate areas of contention between policyholders and insurers. Read more in our latest litigation update.