



Alerts

Insurers Must Be Proactive to Comply With Federal, State, and Local COVID-19-Related Laws and Regulations to Limit Potential Governmental Overreach

March 27, 2020

Insights for Insurers

The coronavirus (COVID-19) pandemic continues to wreak havoc across the globe and in the United States, bringing with it panic, sickness, and mass mortality. The U.S. health care system is under strain and the situation is expected to worsen in coming weeks. The pandemic and the resulting emergency declarations and stay at home orders have transformed the American way of life, at least temporarily, and are taking a major toll on the economy.

At the federal level, the third major relief bill—reportedly set to provide approximately \$2 trillion in financial relief to individuals and businesses impacted by the virus and inject an additional \$4 trillion in liquidity into the economy—passed the U.S. Senate and awaits a vote in the House of Representatives. Governmental entities have imposed unprecedented travel, movement, and gathering restrictions, and limited or prohibited for a period of time various activities. Exigent circumstances arm governmental entities with greater powers and legitimately require government action. Yet, impacted constituencies are urged to exercise vigilance to protect their rights and prevent government overreach associated with governmental actions, no matter how well-intended.

For insurers in particular, there has been a recent frenzy of legislative proposals and regulatory activity some of which give rise to considerable concern. Insurance is an important engine fueling the economy. Short-sighted initiatives that undermine the sanctity of insurance contracts and interfere with the risk assumption and transfer mechanisms pose a threat to the insurance industry. Ultimately, they will be detrimental to both insureds and the economy.

Congressional Appeal to Insurers

We [previously reported](#) on the March 18, 2020 letter to insurance industry and broker associations from 16 members of Congress from both political parties urging commercial property insurers to provide business interruption coverage for COVID-19-related losses—whether covered or not. Industry associations responded to the letter appropriately. These appeals, whether cogent or not, do not pose an active threat to the insurance industry unless they result in

Attorneys

Scott M. Seaman



legislative action.

In a pro-insurer plea this week, Pennsylvania State Representative Michael Driscoll (D) requested that the Pennsylvania House of Representatives draft a resolution urging Congress to reimburse insurers for voluntarily paid COVID-19-related business interruption claims as part of the federal COVID-19 relief package.

Proposed Legislation

Legislative bodies in at least three states are entertaining extraordinary legislation that would force insurers to provide coverage for claims, even where such claims do not meet the terms of coverage or are expressly excluded under insurance policies. Such retroactive nullification of contract represents an unwarranted assault on the insurance industry and on parties' freedom to contract. Additionally, these measures threaten to undermine the insurance regulatory structure as many of these contract provisions were subjected to the regulatory process and approved by insurance regulators. What's more, these proposals also fail to account for potential reinsurance ramifications.

The New Jersey Bill

We [previously](#) discussed the bill pending before the New Jersey legislature that would mandate business interruption coverage for certain New Jersey businesses. Earlier this week, similar legislation aimed at property insurers was introduced in both Massachusetts and Ohio.

The Ohio Bill

H.B. No. 589, introduced in the Ohio legislature on March 24, 2020, is intended to require insurers offering business interruption insurance to cover losses attributable to COVID-19. The bill provides:

every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption, in force in [Ohio] on the effective date of this section, shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic during the state of emergency.

Further,

[t]he coverage required by this section shall indemnify the insured, subject to the limits under the policy, for any loss of business or business interruption for the duration of the state of emergency.

The "state of emergency" refers to Executive Order 2020-01D issued on March 9, 2020.

By its express terms, this bill applies only to policies enforced as of the effective date issued to insureds located in Ohio that employ 100 or fewer eligible employees.

The bill would allow an insurer who pays for applicable COVID-19-related losses to request from the Ohio Superintendent of Insurance "relief and reimbursement from funds collected and made available" for the purpose of the bill. Further, the bill would require the Superintendent to establish procedures for insurers to submit reimbursement claims, and pay the claims either from such funds as are available to the Superintendent and to create a "Business Interruption Fund" and charge an assessment to insurers in the necessary amount required to recover amounts paid to insurers that submit claims for reimbursement.

The Massachusetts Bill

Massachusetts bill S.D. 2888 appears to go further than the New Jersey and Ohio bills. It provides:



[E]very policy of insurance insuring against loss or damage to property, notwithstanding the terms of such policy (including any endorsement thereto or exclusions to coverage included therewith) which includes, as of the effective date of this act, the loss of use and occupancy and business interruption in force in the commonwealth, shall be construed to include among the covered perils under such policy coverage for business interruption directly or indirectly resulting from the global pandemic known as COVID-19, including all mutated forms of the COVID-19 virus.

Further, no insurer in Massachusetts:

may deny a claim for the loss of use and occupancy and business interruption on account of (i) COVID-19 being a virus (even if the relevant insurance policy excludes losses resulting from viruses); or (ii) there being no physical damage to the property of the insured or to any other relevant property.

The Massachusetts bill provides that the required coverage shall cover the insured for any loss of business or business interruption until such time as the emergency declaration dated March 10, 2020 and designated as Executive Order 591 is rescinded by the governor.

Insurers would not be liable for any payments beyond the "monetary limits of the policy," and would be subject to "any maximum length of time set forth in the policy for such business interruption coverage."

The Massachusetts bill would apply to insureds with 150 or fewer full-time equivalent employees in Massachusetts. Similar to the New Jersey and Ohio bills, it provides that insurers who are required to pay COVID-19-related losses "may apply to the commissioner of insurance for relief and reimbursement from funds collected and made available for such purpose as provided" in the proposed law. The insurance commissioner would be required to establish procedures for the submission and qualification of claims by insurers for reimbursement and pay those claims with funds collected from "assessments" imposed "against licensed insurers in [Massachusetts] that sell business interruption insurance as may be necessary to recover the amounts paid, or estimated to be paid, to insurers" seeking reimbursement. The bill subjects insurers making these mandatory payments to Mass. Gen. Laws Ch. 176D, which provides a list of acts and omissions by insurance companies that constitute "unfair claim settlement practices."

It is difficult to predict the prospects of such bills becoming law or what amendments may be made to the proposed legislation along the way, but it is important that insurers engage with legislators to ensure they understand the adverse consequences associated with these bills, the troubling precedent they present, the likely unintended consequences should these bills become law, and require coverage for which a premium was not paid, and the legal and constitutional issues presented by these bills and their abrogation of express contractual provisions. Effective education of legislators and advocacy will be particularly challenging in view of social distancing policies currently in place.

Regulatory Activity

The Wisconsin Commissioner

The Wisconsin Commissioner of Insurance encouraged insurers to offer flexibility to insureds experiencing economic hardship because of the public health emergency related to COVID-19, including offering non-cancellation periods, deferring premium payments, instituting premium holidays, and accelerating or waiving underwriting requirements. Further, during this period no insurer form filings will be approved absent express action by the Commissioner of Insurance office.

The California Commissioner

On March 18, 2020, the California Insurance Commissioner sent a notice to admitted and non-admitted insurance companies providing life, health, auto, property, casualty, and other types of insurance in California requesting they give their insureds at least a 60-day grace period to pay insurance premiums in light of COVID-19 and related response measures. The notice also urged steps to eliminate the need for in-person payments, including that "all insurance agents, brokers, and other licensees who accept premium payments on behalf of insurers take steps to ensure that customers



have the ability to make prompt insurance payments," such as through online payments.

The New York Department of Financial Services

We [previously](#) discussed the directive from the DFS requiring insurers to prepare a special report under Section 308 of the New York Insurance Law that includes a clear and concise explanation of benefits applicable to COVID-19.

The United Kingdom

In the U.K., the parliamentary Treasury Committee has written to the Association of British Insurers requesting extensive data on how its members plan to approach claims for losses in connection with COVID-19.

The Treasury Committee has requested detailed data from insurers about their response to the crisis, including how many companies have stopped offering some products during the crisis or changed their terms; how much they expect to pay out in COVID-19-related claims; their approach to addressing claims under policies providing business interruption insurance; details about communications with policyholders regarding the insurance implications of COVID-19. The committee warned insurers it expects a swift response and will be making all data it receives publicly available.

The Association of British Insurers said insurers in Britain could be hit with \$329 million in claims over the crisis, the highest pay-out on record for passenger flight cancellations. Britain's Financial Conduct Authority wrote to insurers on Thursday urging them to show fairness and flexibility when assessing claims related to the coronavirus. Meanwhile, Lloyd's of London reports that it expects coronavirus claims to impact up to 14 different business lines this year

We will continue to monitor developments and advise our insurer clients on business, regulatory, coverage, and reinsurance issues, and help them protect their portfolio interests in the wake of COVID-19. Hinshaw has also created a [resources page](#) as part of our efforts to keep clients informed of the rapidly evolving circumstances and the potential impacts they may face due to the COVID-19 pandemic. You can [opt-in to receive updates](#) in the future.