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Alerts

State Insurance Commissioners Weigh In On Business Interruption Coverage for COVID-19 Losses

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Insights for Insurers

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Over the past several weeks, we've seen legislators introduce bills to retroactively rewrite existing insurance policies to provide coverage for COVID-19 claims, and a flood of insurance coverage complaints filed across the country. Now we are also seeing a number of state insurance commissioners weighing-in on whether property policies generally provide coverage for virus-related business interruption.

In one example, North Carolina's insurance commission stated this in a recent letter to business owners:

[Y]our issue with commercial property insurance, specifically business interruption insurance, presents a more difficult problem. Standard business interruption policies are not designed to provide coverage for viruses, diseases, or pandemic-related losses because of the magnitude of the potential losses. Insurability requires that loss events are due to chance and that potential losses are not too heavily concentrated or catastrophic. This is not possible if everyone in the risk pool is subject to the same loss at the same time. Consider the difference, for example, between losses suffered from a hurricane and the losses resulting from COVID-19. The hurricane losses affect certain areas on the coast where the event occurred but the losses from this pandemic cover the entire nation. Therefore, mandating coverage for this size and type of loss while canceling existing exclusions in the policies would end the very existence of the business interruption insurance market as we know it. Recent estimates show that business continuity losses from COVID-19 just for small businesses of 100 employees or fewer could amount to between $220 billion to $383 billion per month. Meanwhile, the total reserve funds for all of the U.S. home, auto, and business insurers combined to pay all future losses is only $800 billion. This type of loss could cripple the insurance industry causing many companies to fail, which would put the protection of homes, automobiles, and businesses at risk. We can't legally force insurers to cover a risk which they didn't intend to cover and which, in some instances, was specifically excluded in the policy.

In response to Frequently Asked Questions on the District of Columbia's Department of Insurance, Securities, and Banking's website, the acting commissioner stated:

Likely, business interruption insurance will not provide coverage. Communicable diseases are usually excluded. For a business interruption policy to respond, the following conditions will need to be met: 1. Actual loss of business income 2. Suspension of business operation 3. Direct physical loss or damage at the described premises that is from a covered cause Business interruption insurance does not provide coverage for a slowdown or reduction in operations.

On March 17, 2020, Georgia's insurance commissioner issued Bulletin 20-EX-3, in which he noted that "[f]ollowing September 11, Hurricane Sandy, and other disasters, insurers tightened policy language to make clear that property damage was a requirement" for coverage. He further stated that "[v]iruses and disease are typically not an insured peril unless added by endorsement."

On its website, in response to a question about business interruption coverage for COVID-19, the Kansas Department of Insurance noted that "it is the Department's understanding that it is unlikely that a business policy would cover losses related to COVID-19, as most business policies have communicable disease exclusions." Meanwhile, Louisiana's department of insurance responded to a question about business interruption coverage due to civil authority order on its website, noting that "most commercial business interruption policy forms provide coverage only when … the civil authority order is due to a covered peril that causes direct physical damage ('virus' is typically not a covered peril…."

Mississippi's insurance commissioner has stated on the insurance department's website that "[u]nder the business interruption or business income policy, there likely is no coverage [for losses resulting from a business shut down related to COVID-19] as losses occurring as a result of virus or bacteria are typically excluded by admitted companies." Similarly, North Dakota's insurance department noted on its website that "it's unlikely that you will find coverage through your business disruption coverage. Generally, the triggering event for coverage would include physical damage; a pandemic is not considered physical damage. Also, under business disruption coverage there can be Civil Authority coverage, this too generally is triggered by physical damage."

In Bulletin No. 20-08, West Virginia's insurance commissioner noted:

A business interruption insurance policy should clearly list or describe the types of events, commonly known as perils, that it covers. Perils that are not listed or described in the policy, or that are specifically excluded in the policy, are generally not covered. These excluded perils are typically risks that are too great to be underwritten at an affordable price. For example, insurance policies generally contain exclusions for loss or damage caused by war, nuclear accident and radiation. The potential loss costs from such perils are so great that providing coverage would jeopardize the financial solvency of insurers and many businesses could not afford the premium costs to cover such catastrophic events even if they were covered perils. Global pandemics like COVID-19 usually fall into this category of risks or perils that are not covered. Business interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19, and therefore usually include exclusions for that risk.

On March 18, 2020, Maryland's Insurance Administration stated that global pandemics fall into a category of risks, such as war, nuclear action and radiation, that "are so extreme that providing coverage would jeopardize the financial solvency of property insurers."

We will continue to monitor and report on this and other issues related to insurance coverage for COVID-19 exposures.