Proposed Legislation to Expand Business Interruption Insurance Coverage for COVID-19

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The legislatures of New Jersey (A.3844), Massachusetts (S.D. 2888), New York (A.10226) and Ohio (H.B.589), among others, are considering bills on business interruption insurance coverage. The proposed bills are designed to encourage or require insurers to cover COVID-19 business interruption claims to thus reduce the financial impact on businesses.

If adopted, the proposed laws would essentially amend the terms of property policies that otherwise expressly exclude coverage for losses due to viruses or bacteria. While some property policies afford coverage for "pollution", it is likely that this coverage would not be deemed to include a virus. Hence, the need to specifically expand coverage to include the coronavirus. These proposed laws would likely be subject to constitutional challenges and significant litigation by insurance carriers. In fact, some associations have already expressed their opposition. The Ohio Insurance Institute has expressed their disagreement with Ohio Bill HB 589. Also, the president and CEO of the American Property Casualty Insurance Association has stated "that taking steps to force insurers to cover losses not covered under existing policies could threaten the stability of the insurance sector."

Under the proposed bills, the insured would be indemnified under policies that were issued before the declaration of a state emergency by the specific state, for any loss of business or business interruption starting on the date of the declared emergency. Several of the bills are similar, in that coverage would only be available to insureds with less than 100 full-time employees, although in Massachusetts, the proposed bill would cover insureds with up to 150 full-time employees.

The bills in New Jersey, Massachusetts, New York and Ohio provide that insurers paying these expanded claims would be entitled to apply for reimbursement to the state insurance departments in those states. These states would secure the funding for reimbursement by charging domestic and foreign insurers issuing business interruption insurance coverage in those states, with assessments. The assessments would be charged to those insurance carriers in order to provide a backstop to enable recovery regarding the costs of the claims. Assessments would be in proportion to net written premiums received by each company for insurance written or renewed on risks in the state during the calendar year immediately preceding the effective date of the bill.

In light of the potential claims that could arise relating to business interruption in New York, the Department of Financial Services (DFS) has required licensed insurers to report the volume of business interruption, civil authority, contingent business interruption and supply chain coverages that the insurer has written and that has not lapsed as of March10, 2020.
In addition, the DFS has demanded that insurers prepare a clear explanation of benefits relating to coverage each policy offers relating COVID-19. This DFS request likely will enable the DFS to better assess the current business interruption situation in New York which perhaps could lead to guidance or perhaps advisory notices providing greater clarity on how coverage is being offered by the New York licensed insurers.

There are other alternatives being explored. The National Council of Insurance Legislators (NCOIL) has reached out to all members of the U.S. House Committee on Financial Services to suggest a congressional act creating a COVID-19 Business Interruption & Cancellation Claims Fund (COVID Claims Fund) which would ensure that insurers' current reserves are not put at risk. In addition, the Reinsurance Association of America (RAA) joined by the American Property Casualty Insurance Association (APCIA) and other industry trade associations has asked Congress to support the COVID-19 Business and Employee Continuity and Recovery Fund, a federally funded program, envisioned by both the insurance and retail sectors, to help preserve jobs and employee benefits.

There is also discussion in Congress with respect to amending the Terrorism Risk Insurance Act (TRIA) to include coverage for pandemics along with risks associated with virus, communicable disease and quarantines, as well as consideration of a proposal to consider crafting a Pandemic Risk Insurance Act (PRIA) to "…."create a reinsurance program similar to [TRIA] for pandemics, by capping the total insurance losses that insurance companies would face." Creative solutions to address this crisis are evolving throughout the industry with much more undoubtedly to come…

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