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Insurance

Tracking The Flurry Of COVID-19 Related Legislative & Regulatory Activity Impacting Insurers

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Commentary

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I. The Coronavirus Pandemic

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—providing \$2.2 trillion in financial relief to individuals and businesses impacted by the virus and injecting an additional \$4 trillion in liquidity into the economy—was passed by Congress and signed by the President. The Coronavirus Aid Relief and Economic Security Act known as the CARES act is the largest economic bill ever enacted.

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.

II. Congressional Appeal To Insurers

In a March 18, 2020 letter to insurance industry and broker associations, a bi-partisan group of United States Congress Members urged commercial property insurers to provide business interruption coverage for COVID-19-related losses. The letter signed by 16 members of Congress, referenced current and prospective shelter-in-place orders and curfews and stated:

Business interruption insurance is intended to protect businesses against income losses as a result of disruptions to their operations and recognizing income losses due to COVID-19

will help sustain America's businesses through these turbulent times, keep their doors open, and retain employees on the payroll. During times of crisis, we must all work together. We urge you to work with your member companies and brokers to recognize financial loss due to COVID-19 as part of policyholders' business interruption coverage.

In a joint response, the American Property Casualty Insurance Association, the Council of Insurance Agents and Brokers, the Independent Insurance Agents & Brokers of America, and the National Association of Mutual Insurance Companies stated:

Standard commercial insurance policies offer coverage and protection against a wide range of risks and threats and are vetted and approved by state regulators. Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19. The U.S. insurance industry remains committed to our consumers and will ensure that prompt payments are made in instances where coverage exists.

The response was appropriate.

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.

This dialogue, standing alone, does not pose an active threat to the insurance industry unless they result in legislative action.

III. Proposed State 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.

A. The New Jersey Bill

For a variety of reasons, insured entities likely will face an uphill battle when seeking coverage for COVID-19 losses under most commercial insurance policies. Perhaps, in recognition of this reality, the New Jersey legislature is considering extraordinary legislation, Assembly Bill 3844, which would rewrite property insurance policies to provide coverage for COVID-19 business interruption losses—even policies that contain a virus exclusion.

AB 3844, introduced on March 16, 2020, would apply to property policies that were in effect on March 9, 2020 and issued to insureds with less than 100 eligible employees in New Jersey. An eligible employee is a full-time employee who works 25 hours or more in a normal work week. The costs for any paid claims would ultimately be passed on to all insurers operating in New Jersey, except for life and health insurers. The bill is working its way through the legislative process.

B. 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.

C. 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.”

D. The New York Bill

On March 27, 2020, Assembly Bill No. A10226 was introduced. The bill is similar to the other bills discussed above.

Section 1 of the bill provides, at subsections (a) through (c):

Notwithstanding any provisions of law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption, shall be construed to include among the covered perils under that policy, coverage for business interruption during a period of a declared state emergency due to the coronavirus disease 2019 (COVID-19) pandemic.

The 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 a period of a declared state emergency due to the coronavirus disease 2019 (COVID-19) pandemic.

This section shall apply to policies issued to insureds with less than 100 eligible employees [full time employees working 25 hours a week or more] in force on the effective date of this act.

Sections 2 and 3 provide that an insurer may apply to the superintendent of financial services for reimbursement

by the department from funds collected and authorizes the superintendent of financial services to charge insurance and make distributions to insurers for this purpose.

This act purports to take effect immediately and to apply to insurance policies in force on March 7, 2020. The proposed act is hardly a model in draftsmanship and suffers from the same deficiencies as the other proposed bills.

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. Effective education of legislators and advocacy will be particularly challenging in view of social distancing policies currently in place.

These bills, and their abrogation of express contractual provisions and purported application to policies previously priced and executed present a host of legal and constitutional issues. Further such bills, if enacted, could threaten the solvency of insurers.

Requiring insurers to pay claim not covered by insurance policies by government fiat is neither sound nor sustainable public policy. Subjecting insurers to such mandates – even with provisions for reimbursement through pools created through state insurance industries – would not provide an efficient mechanism to respond to the fallout from a pandemic.

There have been reports of discussions between insurance industry representatives, government officials, and others about the prospect of establishing a multi-million dollar federally back program similar to the system implemented to compensate victims of the September 11 terrorist attacks to provide a mechanism to compensate businesses for business interruption losses.

IV. Regulatory Activity

COVID-19 has generated considerable regulatory activity as well. We provide some examples below.

A. 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.

On March 23, 2020, the Wisconsin Office of the Commissioner of Insurance ordered that insurers cannot deny a claim under a personal auto policy solely because the insured was engaged in deliver food on behalf of a restaurant, until restaurants resume normal operations. Further, general liability insurers were required to notify restaurant-insureds that hired and non-owned auto coverage is available and, if requested, insurers must provide this coverage.

B. 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.

On March 26, 2020, the California Department of Insurance issued an “urgent data survey” to all admitted and non-admitted insurance companies, seeking information about coverage for COVID-19 business interruption exposures. In the notice, entitled “Request for Information: Business Interruption and Related Coverage in California,” the Department stated that recent events “have left California business and the state facing uncertainties and weighing public policy options.” In order to understand “the number and scope of business interruption type coverages in effect, and the approximate number of policies that exclude virus such as COVID-19,” the Department posed several questions regarding the number of employees of policyholders to which such policies were issued. Responses must be submitted by April 9, 2020.

C. The New York Department Of Financial Services

In light of anticipated losses arising from the outbreak of COVID-19, New York State's Department of Financial Services (NYDFS) has instructed property/casualty insurers to prepare explanations for their policyholders concerning "commercial property insurance" written in New York that might be implicated by coronavirus-related losses. NYDFS considers commercial property insurance to include business owners, commercial multiple peril, and specialized multiple peril policies, along with substantially similar insurance.

Insurers were required to provide each policyholder a detailed explanation for each policy type, including business interruption, contingent business interruption, civil authority, and supply chain coverage, and explain whether those coverages are implicated by a contamination-related pandemic. Insurers are specifically required to explain what types of damage or loss constitutes "physical loss or damage" under various policy forms and to describe the workings of applicable waiting periods.

NYDFS acknowledges that the coverages implicated by COVID-19 may change as the situation evolves, but noted that it considers insurers' "obligations to policyholders a heightened priority." NYDFS also stated that it is important for insurers "to continue to assist policyholders with the [required] information as developments concerning COVID-19 unfold."

In responding to this and other requests by regulators and policyholders – and in evaluating their exposures – insurers should carefully consider their analyses and explanations of coverage issues in light of the exact policy wordings at issue as well as the relevant facts and applicable law.

V. National Association Of Insurance Commissioners Public Session

On Friday, March 20, 2020, the National Association of Insurance Commissioners held a video conference public session during which state insurance regulators, insurance industry members, and consumer representatives discussed insurance issues arising from the COVID-19 pandemic. Insurance industry representatives urged state regulators to coordinate their various requests for information and data to avoid taxing insurer resources in responding. Insurance industry representatives expressed confidence that, due to adequate reserving, insurers will be able to adequately respond both

to health and property-casualty insurance claims related to COVID-19. However, they warned that this may not be the case if states mandate that insurers cover virus-related claims, especially for "business interruption" coverages. Regulators and insurer representatives agreed it is important for legislators to include the insurance industry in discussions about insurance-based solutions to the economic effects of the pandemic.

There was discussion about the need for some regulatory and operational deadlines to be adjusted due to the pandemic's widespread impact on operations, such as extending premium payment dates and insurer financial reporting deadlines.

VI. Developments In The United Kingdom

Similar developments are taking place in the United Kingdom. For example, 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.

VII. Conclusion

Developments impacting insurers continue at a rapid pace. Insurers and their counsel must continue to monitor developments closely. ■

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