COVID-19 and Business Interruption Insurance Coverage

Attempting to Revise Insurance Contacts Retroactively Is a Bad Idea

What Is Business Interruption Insurance Coverage and How Does it Work?

- Business interruption insurance covers financial losses (e.g., continuing operating expenses, lost income) when a business cannot function because of physical damage to a commercial property due to a covered loss (e.g., a fire in a restaurant kitchen).
- Only about 40% of commercial property insureds purchase this coverage, and it is purchased by an even smaller percentage (30%) of small businesses.

Is Business Interruption Coverage Available to Pay for COVID-19 Losses?

- For nearly every commercial policy, the answer is no. For the financial and practical reasons outlined below, there is largely no coverage for pandemic events of this nature available in the marketplace today.
- To recover under business interruption coverage, losses must be related to physical damage inflicted upon the insured's property. There is no physical damage predicate in the context of the COVID-19 pandemic.
- In addition, most commercial policies with a business interruption component also contain an explicit exclusion for any losses caused by any virus. COVID-19 is the virus responsible for the current pandemic and the related business closures, and the exclusion precludes coverage.

Why Is There an Exclusion for Losses Caused by COVID-19?

- Pandemics are uninsurable, and the losses associated with a pandemic are beyond what the existing insurance mechanism can afford to cover.
- Insurance policies contain exclusions for losses caused by events like war, nuclear and radiation accidents, and pandemics because the potential losses are so extreme and widespread that providing such coverage would threaten insurer solvency and force companies to charge premiums that would be cost-prohibitive.
- Exclusions for extreme perils of this nature are commonplace, and the policy terms are contained in filings routinely submitted to state insurance departments.

Such Proposals Are Unconstitutional.

- Legislatively rewriting existing insurance contracts by somehow nullifying the virus exclusion or the physical damage requirement would blatantly run afoul of the constitutional prohibition against the government impairing private contracts.
- Courts would almost certainly find such action unconstitutional. This is not a close legal question, and even prominent attorneys representing policyholders in litigation have admitted this.

Mandating Retroactive Business Interruption Coverage for COVID-19 Losses Would Be Financially Catastrophic for the Property-Casualty Industry.

- Insurers do not collect premiums for excluded risks of loss, and forcing insurance companies to pay for losses that were not accounted for and supported by premium will jeopardize the solvency of the insurance system.

- The magnitude of these losses is enormous and will threaten the financial health of many insurers, quickly send some domestic companies into insolvency, and destabilize an otherwise healthy economic sector. The insurance industry will be needed to support economic activity and help fuel our economic rebound when the restrictions are lifted, but it will not be positioned to do so if measures like this are enacted into law.
- Such proposals would require insurers to utilize the premiums collected for other specified risks and set aside to pay claims, and the outlays this would mandate will almost certainly exceed the amount of premium collected for all commercial property insurance.
- Requiring insurers to compensate businesses with fewer than 100 employees for these excluded losses would cost the industry $255 billion to $431 billion per month. That amount rises to $900 billion per month if the threshold is raised to 500 employees. In contrast, the P&C industry's total surplus – which exists to pay covered automobile, home, and business losses – is only $812.2 billion and would be wiped out quickly if such mandates ever took effect.
- Such proposals will have lasting and significant negative effects and result in large increases in premiums and reductions in the availability and scope of coverage.

State Regulators and Legislators Object to Retroactive Mandates.

- The National Association of Insurance Commissioners (NAIC) – which is comprised of the regulators responsible for ensuring the solvency of the industry and protecting consumers – has cautioned against and expressed opposition to such proposals. The NAIC has said requiring the payment of claims that were not covered "would create substantial solvency risks for the sector, significantly undermine the ability of insurers to pay other types of claims, and potentially exacerbate the negative financial and economic impacts the country is currently experiencing."
- The National Council of Insurance Legislators (NCOIL) has stated that such proposals are unconstitutional and "inadvisable for policy and economic reasons." NCOIL has also noted that requiring payment for such losses would destabilize insurance companies, "render them unable to pay claims for which they did accept the risk," and "jeopardize the solvency of any number of insurers."

Businesses Are Hurting. What Can Be Done?

- Proposals that attempt to revise insurance contracts and compel insurers to pay for losses that were clearly not covered are misleading and offer false hope to those struggling through the crisis. These businesses need serious and realistic solutions.
- We are in the midst of an unprecedented crisis, and the federal government is the only entity able to provide the type and magnitude of financial assistance required.
- The insurance industry is working closely with the business community on a proposal that would enable those in need to receive compensation from the federal government. The proposed federal fund would be open to all businesses adversely affected by the pandemic and not simply the small minority that bought business interruption coverage that did not cover such risks.
- The insurance industry is also actively working with customers in need (by instituting moratoriums on cancellations and non-renewals, providing premium payment grace periods and refunds, etc.) and proactively educating clients about the federal financial assistance and resources that are already available.

Statement of the National Association of Insurance Commissioners
March 25, 2020

State insurance regulators are committed to working at the state and federal level to help mitigate the devastating economic impacts of the coronavirus (COVID-19) pandemic. For example, states have already taken swift action to allow health insurance consumers to access COVID-19 testing without cost-sharing, and working to extend access to coverage for consumers where states are empowered to do so. Given the current condition of the financial markets, state regulators and the NAIC are also closely monitoring the financial health of insurers to ensure their continued strength and resilience.

We thank Congress and the Administration for acting quickly to give states greater flexibility to protect consumers and deal with ever-changing market dynamics, and we look forward to continuing that partnership as issues arise. However, as Congress considers further legislative proposals to address the devastating impacts of the COVID-19 pandemic, we would caution against and oppose proposals that would require insurers to retroactively pay unfunded COVID-19 business interruption claims that insurance policies do not currently cover.

Business interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19 and therefore include exclusions for that risk. Insurance works well and remains affordable when a relatively small number of claims are spread across a broader group, and therefore it is not typically well suited for a global pandemic where virtually every policyholder suffers significant losses at the same time for an extended period. While the U.S. insurance sector remains strong, if insurance companies are required to cover such claims, such an action would create substantial solvency risks for the sector, significantly undermine the ability of insurers to pay other types of claims, and potentially exacerbate the negative financial and economic impacts the country is currently experiencing.

Moving forward, if Congress believes that the business interruption insurance sector can play a vital role in addressing the policy challenges of future pandemics, we stand ready to work with Congress on such solutions. However, swift action by Congress to directly address the needs of citizens and our economy is the most effective and expedient means to addressing the devastating impact of COVID-19.