Tucker Ellis LLP

Legislative Responses to COVID-19 Insurance Coverage Considerations

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Since our March 10 Client Alert, Insurance Considerations for Businesses Facing Losses from Coronavirus Disease (COVID-19) Outbreak, most states have issued stay-at-home orders that require all non-essential businesses to close or to operate remotely. The hardest-hit businesses – restaurants, bars, and hotels – have experienced catastrophic losses that only continue to grow as the orders are extended through the end of April or longer. These businesses are also learning that most of these losses may not be covered by their business interruption policies, based on the "direct physical loss" provision in most business interruption policies, as well as virus exclusions developed in the wake of the SARS epidemic in the early 2000s.

Should policyholders submit business interruption claims for losses attributable to the pandemic and the stay-at-home orders or wait until some of the dust surrounding COVID-19 coverage settles? The short answer is: it depends, but in most cases policyholders should move forward and submit their claims to comply with the notice requirements in their policies. Of course, as losses are continuing, most policyholders will have the opportunity to first consult their brokers about coverage under their particular policies. That said, policyholders should be sure to examine their policies' "notice" provisions to ensure that they do not prejudice any potential claims by holding off on submitting their claims immediately.

In the meantime, lawmakers and the insurance industry have taken note of potential COVID-19 coverage pitfalls and are actively evaluating near-term solutions, as well as programs that would help mitigate the losses incurred by future pandemics.

I. Insurance Services Office (ISO) COVID-19 Endorsements

On February 7, 2020, ISO released two optional endorsements for use with commercial property forms that would provide limited business interruption coverage for circumstances related to COVID-19. They are virtually identical to advisory-only endorsements made available for business interruption losses arising out of civil authority orders related to the Ebola virus.

The ISO forms have not been filed in any states for regulatory approval and are not being added to ISO's portfolio of forms. Nor has ISO provided any loss costs or supplementary ratings information for the endorsements. Companies that wish to use the endorsements

would have to comply with state regulations for filing before use.

The first endorsement – Business Interruption: Limited Coverage for Certain Civil Authorities Relating to Coronavirus – modifies coverage under the standard Business Interruption Income and Extra Expense Coverage Form. It requires an insured to identify specific covered premises on a schedule premises, and list a coverage period specified by days, weeks, or months, as well as an annual aggregate limit of insurance. Coverage applies if the business interruption policy otherwise covers business income and is for the actual loss of business income or necessary extra expenses incurred because civil authority ordered the closing or quarantine of the premises, even if the order is based merely on suspicion or risk of contagion.

The second endorsement – Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus (including Orders Restricting Some Modes of Public Transportation) – applies when the insured's business operates out of a vehicle or other mobile equipment.

Both endorsements are subject to a handful of exclusions, including intentional spread of the virus by any person or group with the intent to cause disease, damage, fear, or anxiety; cleanup or disinfection of the premises due to contamination or suspected contamination; costs to replace property or property of others that has been or is suspected to have been contaminated; cost of disposing of contaminated or suspected contaminated property; cost of testing or monitoring for the presence of a coronavirus; and losses or expenses attributable solely to fear of contracting the disease – i.e., if customers, vendors, or tenants avoid part of the premises not under quarantine.

II. State Legislation

On March 24, 2020, Ohio lawmakers introduced House Bill 589, which, if enacted, would require insurers offering business interruption policies in Ohio to cover losses attributable to COVID-19 that accrue during the official state of emergency, which was issued on March 9, 2020.

The bill, in line with an analogous bill first introduced in the New Jersey legislature, proposes that "[n]otwithstanding any other law or rule 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, in force in this state 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." The bill further proposes that "[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 bill would apply only to policies issued to insureds that meet all of the following:

1. The business in question is located in Ohio.
2. The business employs 100 or fewer eligible employees.
3. The business was covered by a business interruption policy that was in force on the effective date.

Any insurer who indemnifies an insured could subsequently apply to the Ohio Superintendent of Insurance for relief and reimbursement from a special fund created by the Ohio State Treasury – the Business Interruption Insurance Fund. The Fund would be financed by assessments made against insurers who write coverage in Ohio, "in an amount necessary to recover the amounts paid to insurers." The assessment would be distributed in proportion to the net written premiums received by each insurance company subject to the assessment on risks in Ohio.

This Ohio bill, along with similar bills introduced in New Jersey (A-3844), Massachusetts (SD-2888), and New York (A-10226), have been adamantly opposed by insurers. The New Jersey bill, initially set for a vote on March 16, was withdrawn after substantial insurance industry backlash. In response to the bill, the National Association of Mutual Insurance Companies said it would work to oppose the legislation because it "would fundamentally change the agreed upon transfer of prospective risk of loss exposure to coverage for a known and presently occurring loss, something the parties did not agree to, the insurer did not rate for, and the policyholder did not pay for."

III. Federally Backed Pandemic Insurance

Federal legislators have also been discussing some sort of federally backed pandemic insurance. Pandemic insurance is not something insurers typically write as the size of loss is unknown, the timing is unpredictable, and insurers cannot diversify their risks. All of the losses occur at the same time, in virtually every industry and across all geographic regions. The proposed federally backed pandemic insurance would help lessen the risk assumed by insurers by being partially funded by the federal government. It could also eliminate the need for large-scale piecemeal legislation, like the $2 trillion CARES Act, while providing more certain financial support for businesses suffering losses attributable to pandemics.

The federally backed pandemic insurance currently being discussed would be modeled after the Terrorism Risk Insurance Act ("TRIA"). TRIA requires insurers to offer terrorism risk insurance coverage for commercial property, liability, and workers compensation policies. Under TRIA, the federal government shares the burden of such losses with insurers,

maintaining a $100 billion federal reinsurance fund for certain claims that exceed a prescribed trigger and industry deductible.

Unfortunately, even if a bill is formally introduced in Congress, it would not apply to COVID-19 claims, but would provide prospective relief the next time a pandemic occurs.

In the meantime, businesses feeling the squeeze of losses arising out of the coronavirus and the stay-at-home orders associated therewith can look to some of the aid programs under the CARES Act, such as the expansion of the Small Business Administration's loan programs through the Paycheck Protection Program, increases in Express loans, and expanded eligibility under the disaster loans program.[1]

[1] This Client Alert was prepared with the invaluable assistance of associates **Emmanuel Sanders** and **Smita Gautam**.

Additional Information

For more information, please contact:

- Karl A. Bekeny | 216.696.2699 | karl.bekeny@tuckerellis.com
- Kevin M. Young | 216.696.4691 | kevin.young@tuckerellis.com
- Jennifer L. Mesko | 216.696.4579 | jennifer.mesko@tuckerellis.com

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