

Jim's Perspective...

COVID-19 INSURANCE UPDATE

According to CNBC, U.S. jobless claims recently reached 30 million people since the outbreak of the coronavirus pandemic. I am sure that many of those who are now unemployed, worked for a business that is now shut down due to the virus. These businesses essentially closed because they had few customers and little revenue or were labeled “unessential” and required to shut down. Many business owners are looking to their business interruption coverage for some form of insurance payment. State legislatures are doing the same thing. New Jersey became the first state to introduce a bill that would require insurers to provide insurance coverage for business interruption losses arising out of the COVID-19 virus. Assembly Bill No. 3844 would apply to businesses with less than 100 employees, and it provides that “every policy of insurance for loss or damage to property, which includes the loss of use and occupancy and business interruption, in force on the date of the executive order (issued by the Governor on March 9) shall be construed to include among other perils under that policy, coverage for business interruption due to global virus transmission or pandemic.” Apparently the policy limit still applies, and this statutory requirement of coverage only applies to losses incurred during the period of the state of emergency. Insurers that pay these losses can apply to the New Jersey Department of Insurance for relief and reimbursement from some fund made available by the state. Not sure what that would be. Also, many small businesses do not have business interruption coverage so the bill will be of limited assistance.

Additional jurisdictions have followed New Jersey. Ohio, Louisiana, South Carolina, Pennsylvania, New York and Massachusetts have proposed similar bills. The Ohio bill applies to businesses with 100 or fewer employees. The Massachusetts bill applies to businesses with 150 or fewer employees. It is not clear if insurers will be compensated by the state for payment of these claims.

Recently, two Napa Valley restaurants have filed lawsuits asserting that they are entitled to benefits under the business interruption coverage of a policy with Hartford Fire Insurance Company. The plaintiffs allege that the policy’s “Civil Authority” insuring agreement entitles them to “the actual loss of business income sustained and the legal, necessary and reasonable extra expenses incurred” due to the Civil Authority’s order prohibiting access to the restaurants. The California health officer restricted restaurant services to take out or delivery. The two restaurants are French Laundry and Bouchon Bistro. Both of these very popular restaurants have been in business in Napa Valley for many years. Janie and I have dined at both of them! It is important to note that the policyholders allege that the policy contains a **Property Choice Deluxe Form** that specifically extends coverage to direct physical loss or damage caused by virus. I have never heard of that, but you might double-check the business interruption policy language on this issue. The law firm filing these cases has also filed a similar case in Louisiana on behalf of a New Orleans restaurant. There are also restaurant business interruption lawsuits filed in Pittsburg and I would assume many more restaurant lawsuits will be filed across the nation. The Associated Press reports that Billy Goat Tavern, made famous on Saturday Night Live many years ago, has also filed a lawsuit for coverage under its business interruption insurance. Janie and I have been to this

tavern too! The beer on tap is wonderful! This tavern is located below a Michigan Avenue overpass. “These businesses are in the most trying times in their history and are going to their insurance company to get what they paid for,” said Chris Esbrook, attorney for the tavern which has been in business since 1934. The AP states, “What’s at stake could be the survival of thousands of businesses if insurers don’t pay, and the solvency of big-name insurance companies if they do.” American Property and Casualty Insurance Association estimates virus related claims could amount to \$430 billion. The tavern’s attorney also said, “They (insurers) are in the business of selling people insurance for exactly this kind of situation. They can’t now cry they’re too poor when the very situation they are insuring arises.” [Spoken like a true plaintiffs’ lawyer!] The AP also reports that President Trump expressed sympathy for businesses and asked insurers to pay up for business interruption coverage. The lawyers representing closed businesses point to separate policy provisions requiring that insurers pay losses when civil authorities intervene by government decree during emergencies and order businesses to close. Insurers argue, however, that whether the business is closed because of virus contamination or government decree, the ultimate *cause of loss* is a virus which is excluded under the policy. Charles Chamness, president of the National Association of Mutual Insurance Companies said, “If elected officials require payment for perils that were excluded, never underwritten for, and for which no premium was ever collected, catastrophic results will occur.” If these cases are tried to a jury, it will not be easy for insurers to achieve a successful outcome. Consider too that most lawsuits will include a bad faith claim and a claim for punitive damages in states that allow this claim to be asserted.

The Billy Goat Tavern lawsuit seeks class action status. A Fort Lauderdale restaurant, IT!italy Ristorante & Bar recently filed a lawsuit against Chubb which also seeks class action status and the Complaint filed in federal court alleges the business interruption coverage has no virus exclusion. If Class action status is granted by the court in any of this business interruption litigation, it will substantially increase the financial stakes of the plaintiffs’ lawyers since their fee is usually determined as a percentage of what they recover for the class action plaintiffs. These class action cases that include bad faith allegations and a request to recover punitive damages will be large and very risky loss exposures for insurers.

On April 13, California’s Insurance Commissioner issued Bulletin 2020-3 to all Property and Casualty insurers and all Workers’ Compensation insurers, requiring them to “make an initial premium refund for the months of March and April to all adversely impacted California policyholders . . . as quickly as practicable, but in no event later than 120 days after the date of this Bulletin” for the following lines of insurance:

- Private passenger and commercial automobile insurance
- Commercial multiple peril insurance
- Commercial liability insurance
- Workers’ compensation insurance
- Medical malpractice insurance
- “any other line of insurance where the measures of risk have become substantially overstated as a result of the pandemic”

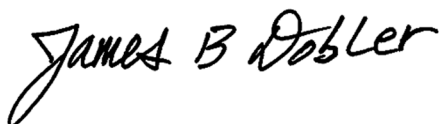
Representative Mike Thompson of California introduced H.R.6494 labeled the “Business Interruption Insurance Coverage Act of 2020.” In part, the Act requires “each insurer that offers or makes available business interruption insurance coverage” to “make available, in all of its

policies providing such coverage, coverage for losses resulting from any viral pandemic; any forced closure of business, or mandatory evacuation, by law or order of any government.” The Act also voids any existing exclusions which might have applied to the coverage made available under the Act. Representative Brian Fitzpatrick of Pennsylvania has introduced similar legislation. PIA National and the insurance industry oppose both bills.

If the states or the federal government mandate business interruption coverage, I wonder how reinsurers will handle claim payments that exceed the retained limit of the primary insurer and are submitted to the reinsurer for reimbursement under the reinsurance contract. If reinsurance does not apply, this will obviously result in a much bigger financial hit for the primary insurer. Mandating business interruption coverage also seems to run afoul of the contracts clause of the Constitution which provides in part that, “No state shall pass any law impairing the obligation of contracts.” [Article 1, Section 10, Clause 1]

Another potential problem. Many insurers are already ignoring contract language that requires payment of renewal premium in order for the policy to remain in effect for another policy term. If insurers are ignoring some policy language already, why not ignore the virus exclusion? Consider too what Allstate CEO Tom Wilson said when it was announced that the company would be refunding \$600 million in premium to auto insurance customers. “Given an unprecedented decline in driving, customers will receive a Shelter-in-Place Payback. This is fair because less driving means fewer accidents.” Isn’t it just as “fair” to ignore the virus exclusion? How can it be “fair” for the insurer to ignore one policy provision (payment of premium), but also be “fair” for the insurer to vigorously enforce and not ignore another policy provision (a virus exclusion)? I can’t believe Wilson said that. Plaintiffs’ lawyers will repeat his words in every coverage lawsuit.

It is hard to tell what will become of all of this and whether the state or federal government will step in and mandate business interruption coverage, or whether the courts might find coverage. Considering all of this, and the uncertainty of what may happen, I think it is important to advise commercial clients to maintain a record of revenue lost and expense incurred due to the coronavirus pandemic. I think most business interruption coverage provides for a coverage trigger based upon a claims made and reported basis. It may be advisable to report a claim to the insurer so that the current coverage applies to a business interruption occurring in March and April. Perhaps a discussion with an underwriter can help determine whether to submit a claim now. I think too, commercial clients can consider some form of extended reporting coverage, but this can be expensive. At the very least, a conversation with the client about all of this is advisable and should be documented in the file. Of course, the reporting requirements may be of no consequence if insurers are mandated to provide coverage, but still, at this point, it is hard to tell what might happen.



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