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Additional Policyholder Allies Emerge in the Fight for COVID-19 Business Interruption Coverage

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COMMENTARY
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Additional Policyholder Allies Emerge in the Fight for COVID-19 Business Interruption Coverage

IN SHORT

The Situation: In an ongoing effort to discourage commercial policyholders from pursuing COVID-19-related business interruption claims, the insurance industry continues to issue sweeping pronouncements of alleged "no coverage" for such losses.

The Result: As these battle lines are being drawn, the executive and legislative branches of numerous state governments have issued orders and proposed legislation which may be of assistance in holding property insurers accountable for their COVID-19 coverage obligations.

Looking Ahead: Commercial policyholders should closely monitor these developments as they prepare their COVID-19 business interruption claims and evaluate potential forums for related insurance recovery litigation.

For weeks now, the insurance industry has been hard at work seeking state and federal government assistance for the COVID-19-related business interruption claim exposures they simultaneously purport not to have.

In the meantime, the executive and legislative branches of numerous state governments have emerged as potential allies of policyholders, as illustrated by executive orders and proposed legislation designed to reinforce the obligations of property insurers for COVID-19 coverage.

Although the outcomes of these initiatives remain to be seen, the states in which they have been advanced may present potentially attractive venues for policyholders forced to litigate their COVID-19 insurance claims, and these developments should therefore be closely monitored as part of such decision-making.

Policyholders Should Carefully Review COVID-19 Executive Orders

Policyholders should continue to collect and review the COVID-19-related executive orders affecting their businesses, which may become critical to the pursuit of COVID-19-related business interruption coverage.

Notably, a number of these orders directly contradict insurers' proclamations that COVID-19 allegedly does not cause "physical loss" to property. For instance, the March 16, 2020, shelter-in-place order issued by the Office of the New York City Mayor expressly acknowledged and was predicated on, in relevant part, the fact that COVID-19 "physically is causing property loss and damage." Emergency Executive Order No. 100.

Similarly, the March 31, 2020, shelter-in-place extension order of the Sonoma County Health Officer also expressly acknowledged and was issued, in relevant part, "because the [COVID-19] virus physically is causing property loss or damage due to its proclivity to stay airborne and to attach to surfaces for prolonged periods of time." Order No. C19-05.

Such orders are beneficial to policyholders insofar as they confirm what the insurance industry has refused to admit publicly: (i) that the presence of COVID-19 constitutes physical loss or damage to property; and (ii) that COVID-19 shelter-in-place orders trigger the "civil authority" business interruption coverage contained in their policies.



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Policyholders Should Also Closely Monitor Proposed COVID-19 Insurance Legislation

Over the past month, the legislators of numerous states have introduced bills that would require property insurers to indemnify COVID-19-related business interruption losses under their existing policies. In effect, this legislation codifies policyholders' reasonable expectations concerning the availability of coverage under their all risks commercial property insurance policies for COVID-19-related losses. Among other things, such legislation would expressly override insurers' attempted application to COVID-19 losses of so-called "virus" exclusions. Even absent such legislation, the validity of virus exclusions has recently been called into question, given potential insurer misrepresentations when obtaining regulatory approvals for such provisions.

For example and most recently, on April 15, 2020, a bipartisan coalition of Pennsylvania state senators introduced bill S.B. 1114 (titled the "COVID-19 Insurance Relief Act"), which would apply to all active insurance policies with effective dates prior to March 6, 2020. Under its terms, S.B. 1114 would declare that such property insurance policies "shall be construed to include among the covered perils coverage for loss or property damage due to COVID-19," as well as "coverage for loss due to a civil authority order ... caused by the COVID-19 disease pandemic."

In addition, S.B. 1114 defines "property damage" in an insurance policy to include, in the context of a "commercial establishment or other area of business activity," direct physical loss to tangible property as a result of "the presence of a person positively identified as having been infected with COVID-19" within either the property or the same municipality where the property is located, or the presence of COVID-19 having otherwise been detected in the Commonwealth of Pennsylvania.

However, Pennsylvania is not alone in this regard and the state legislatures of Louisiana, New Jersey, New York, Massachusetts, Ohio, and South Carolina have each also introduced similar bills. See New Jersey A.B. 3844 (introduced March 16, 2020); Massachusetts S.D. 2888 (introduced March 24, 2020); Ohio General Assembly H.B. 589 (introduced March 24, 2020); New York A.B. A10226 (introduced March 27, 2020); Louisiana S.B. 477 (introduced March 31, 2020); and South Carolina S. 1188 (introduced April 8, 2020). While containing some differences as compared to S.B. 1144 (e.g., most would apply only to businesses with less than 100 or 150 employees), these additional bills would also require existing property insurance policies to indemnify COVID-19-related business interruption losses.

Likewise, on April 14, 2020, United States Representative Mike Thompson (CA-05) introduced H.R. 6494 (titled the "Business Interruption Insurance Coverage Act of 2020"). If enacted, this federal legislation would similarly require commercial property insurers to indemnify COVID-19-related business interruption losses and would also nullify any exclusions for viral pandemics contained in existing property insurance policies.

Policyholders should continue to monitor the progress of these and future legislative initiatives designed to address insurers' COVID-19-related coverage obligations, which, regardless of their outcomes, may provide valuable insights in connection with forum issues for COVID-19 insurance recovery litigation. In the meantime, for more in-depth discussion of COVID-19 insurance coverage considerations, please see our related *Commentaries*: [Time for a Policy Checkup: Maximizing Insurance Coverage for Coronavirus Losses](#) and [Policyholders Should Anticipate and Prepare to Defeat Insurer COVID-19 Coverage Denials](#).

THREE KEY TAKEAWAYS

1. Commercial policyholders should continue to treat the insurance industry's public posturing with skepticism and remain mindful that there are various potentially available avenues for the recovery of COVID-19-related business interruption losses under the terms of many commercial property insurance policies.
2. Commercial policyholders should carefully review the COVID-19 executive orders impacting their businesses, a number of which directly contradict insurers' proclamations that COVID-19 allegedly does not cause "physical loss" to property and may become critical to the pursuit of COVID-19-related business interruption coverage.
3. Commercial policyholders should closely monitor proposed COVID-19 insurance legislation, which, regardless of its outcome, may provide useful insights regarding forums for potential COVID-19 insurance recovery litigation.



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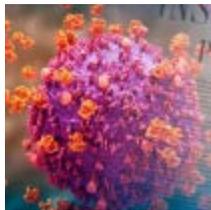


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