Coronavirus-Related Business Interruption Claims: Update from the Trenches

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Many businesses, and healthcare providers specifically have experienced significant losses due to the coronavirus' impact. The loss of patient volume, hence revenue, has yet to be quantified, and it may be months or longer before the economic impact is fully known.

Business interruption insurance is an avenue of potential economic recovery for some of these losses. Providers would reasonably expect that if their operations are ordered closed in whole or in part by government edict, that is precisely the sort of circumstance that a reasonable insured would expect to be covered under their business interruption policy. The trouble is, getting paid isn't quite that simple.

At the core of many business interruption policies is the expectation that coverage is provided when actual physical damage forces a business to close. In some cases, coverage has been extended to apply where natural conditions such as fire, rockslides, or the like, prevent patrons from being able to physically access the insured business, due to events such as road closures caused by natural conditions, smoke in the vicinity of the insured business, or other such circumstances. Some policies expressly provide coverage when closures are mandated by governmental entities, some polices are silent, and some policies exclude such an event from coverage. Similarly, some policies expressly provide coverage for business interruption due to pandemics and the like, some policies are silent on the matter, and some policies contain "viral exclusion" clauses, explicitly disclaiming coverage for losses due to widespread disease, which gained popularity amongst insurers following the SARS epidemic.

We encourage policyholders with a colorable business interruption claim to carefully examine the specific language of their policies because as you can see from the prior paragraph, the strength of a provider or other business' claim can vary widely. The only guarantee is that a claim which is not made, will never be paid. Caution should be taken to make claims in a timely manner, as policies often contain claim reporting deadlines (which may, or may not, be enforceable under governing law).

Insurers have aggressively battled against paying most claims seeking business interruption coverage arising from the current pandemic. As early as this past Spring, insurers took various positions explaining to their policyholders (and other interested parties) why they would not pay claims. The explanations varied somewhat between carriers, but examples include: (1) specific language in the policy provisions disclaim coverage for pandemic-related closures; or (2) notwithstanding potentially ambiguous policy language, it was not in either the insurer's nor the insured's reasonable expectations that such coverage would be provided; (3) the problem arising from business losses from the pandemic is better left to a governmental solution (i.e., the taxpayers as a whole should bear the losses, to the extent they are compensated at all); and/or (4) providing coverage for pandemic losses would bankrupt the industry (despite its reported $800 billion in reserves). These examples are just highlights of the defenses that insurers have raised. As you can imagine, insurers are sparing no effort and expense in their battle to avoid paying such claims. Indeed, the battle over business interruption claims arising from the coronavirus pandemic is likely to be the largest and most economically significant legal battle between insurers and insureds in history.

The latest news is not good from the providers' perspective. In the vast majority of early-filed lawsuits by businesses seeking coverage for pandemic-related losses, the insurers have been largely winning in the early rounds. On September 1, The Wall Street Journal reported that out of more than 1,000 lawsuits filed to date by insureds against their carriers, the carriers have been prevailing in the majority of cases. According to a Covid-19 litigation-tracking effort at the University of Pennsylvania Carey Law School, to date insurers have prevailed in state and local courts in California, Michigan and the District of

Columbia, and in federal courts in Texas and California.

State laws governing policyholders' rights with respect to pandemic-related losses vary from state to state, with some states being significantly more policyholder-friendly than others. Further, with respect to early trial court rulings, appeals in most such cases are almost inevitable. There is also the possibility of a legislative fix, including perhaps the establishment of a common fund scheme in which affected carriers contribute a certain amount, and claims are paid on a percentage basis, as happened following the 9/11 attacks.

So, for the college football fans out there missing their favorite game, the COVID-19 business interruption dispute has the insurers up 7-0 at the end of the first quarter. But there's a lot of game left to play. If you would like further insights as to your own specific circumstances, please do not hesitate to reach out to us.

For further information, please contact Andrew Struve in San Diego, Gary Torrell in Los Angeles, or your regular Hooper, Lundy & Bookman contact. We also invite you to visit the Health Care Financial Restructuring practice group's webpage.

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