COVID-19 Related Business Interruption Claims, Coverage Issues, Disputes and Litigation

Summer National Meeting
Consumer Liaison Committee
August 14th, 2020

Amy Bach, Co-Founder & Exec. Director
NAIC COVID-19 PROPERTY & CASUALTY INSURANCE BUSINESS INTERRUPTION DATA CALL PART 1 | PREMIUMS AND POLICY INFORMATION JUNE 2020:

Premium by Business Type National

<table>
<thead>
<tr>
<th>Policy Type</th>
<th>Total Premium Written for Policies with Business Interruption Cover</th>
<th>Premium Written for Business Interruption Coverage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Businessowners Policy (BOP)</td>
<td>$9,919,595,690</td>
<td>$132,350,763</td>
</tr>
<tr>
<td>Other than BOP</td>
<td>$38,814,670,259</td>
<td>$2,299,392,133</td>
</tr>
<tr>
<td>Grand Total</td>
<td>$48,734,265,949</td>
<td>$2,431,742,896</td>
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</tbody>
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Percent of Policies with Exclusion All Policy Types & Business Sizes

- Percent of Small Business Policies with Exclusion: 82.80%
- Percent of Medium Business Policies with Exclusion: 82.15%
- Percent of Large Business Policies with Exclusion: 77.96%
- Total Policies with Exclusion: 82.65%

Percent of Policies with Physical Loss Requirement All Policy Types & Business Sizes

- Percent of Small Business Policies with Physical Loss Requirement: 98.07%
- Percent of Medium Business Policies with Physical Loss Requirement: 97.15%
- Percent of Large Business Policies with Physical Loss Requirement: 85.39%
- Total Policies with Physical Loss Requirement: 97.75%
Business Interruption Coverage Questions

– Do forced closure orders, infiltration of insured premises and/or imminent risk of grave harm meet the common requirement of “direct physical loss of or damage to” insured property?

– Are losses due to mandatory closure covered under “Civil Authority”?

– Direct physical loss “to” vs. “of” (loss of use = loss of, not to)
• Loss projections/Losses in progress = Speculative/Unknown
• Trillion $ loss projections, solvency fears = Speculative/Unknown
• # of actual claims filed = NAIC data calls, Volume of litigation
• Regulators reminded insurers of the duty to investigate
• # of claims accepted/being processed = Unknown
• # of claims denied = “Most”/Unknown
• At least 16 Motions to Dismiss fully briefed
• Litigation outcomes/forums (MDL, State, Federal) = Unknown
• Legislation (Federal/State) = PRIA, etc., HR 7412, Presumptions
Small businesses bearing the brunt

- Many (most?) small businesses, especially restaurants, bars, concert venues that are mandatorily closed by public safety orders, don’t have B.I. coverage or have B.I. coverage w/virus exclusion

- Some Higher Ed Institutions have coverage for losses related to communicable diseases

- Some large businesses have BI coverage w/out virus exclusion
I would like to see the insurance companies pay.
Q 1 and 2 results for one insurer:

Legal expenses defending BI claims cost the company about $19 million, it reported.

The company posted a $41 million underwriting loss, compared with a $48 million profit, which Johnston attributed to $231 million of catastrophe- and $65 million of pandemic-related losses and expenses (Best’s News, July 27, 2020)

Second-quarter net income more than doubled to $909 million in the second quarter after the company recognized an $825 million increase in the fair value of equity securities held.

Source: Best's Insurance News & Analysis - July 28, 2020
In 2003...

- Mandarin Oriental hotels in Hong Kong, Malaysia, Singapore and Thailand all lost business due to cancellations and reduced local food and beverage sales stemming from the SARS outbreak.

- Mandarin Oriental International Ltd. Received $16 million from its insurers to pay for business interruption losses suffered by the group’s hotels in Asia as a result of the severe acute respiratory syndrome outbreak.¹

¹ https://www.businessinsurance.com/article/20031102/story/100013638/hotel-chain-to-get-payout-for-sars-related-losses#
Questions:

• What were regulators told by insurers at the time they added the 2006 ISO virus exclusion?

• If insurers paid out on SARS claims – shouldn’t there have been a rate decrease when the virus exclusion was adopted?

• Claims that pandemic losses were “never covered” are contradicted by the fact that SARS claims were paid
Food for thought:

• What were business policyholders told when their policies renewed with the exclusion added? No rate impact seems to have been associated with the exclusion.

• Most policies don’t mention “pandemic” and closures due to public safety orders are matters of first impression.

• Novel Coronavirus = a new coronavirus that has not been previously identified. The virus causing coronavirus disease 2019 (COVID-19), is not the same as the coronaviruses that commonly circulate among humans and cause mild illness, like the common cold. [www.cdc.gov](http://www.cdc.gov) Jul 15, 2020
Current Complaint Trends

- Covid Coverage Litigation Tracker
- Weekly filing peaked on the week of 5/4/20
- Most frequent coverage sought
  1. Business Income
  2. Civil Authority
  3. Extra Expense
- Most Frequent Ins. Co. (Cases)
  1. Sentinel Insurance Co. (54)
  2. Cincinnati Insurance Co. (46)
  3. Hartford Financial Services Group (32)

https://cclt.law.upenn.edu/ (7/9/20)
Parallels w/the Pollution Exclusion  
(Regulatory Estoppel Argument)

The New Jersey Supreme Court in *Morton Int’l. Inc. v. General Acc. Ins. Co. of Am.*, 629 A.2d 831, 852-53 (*N.J. 1993*) determined that the insurance industry, through its agents, predecessors to ISO, represented to state insurance regulators in 1970 that the “sudden and accidental” polluters exclusion merely clarified pre-existing insurance coverage.

The Supreme Court found that the insurance industry had failed to disclose its intent to restrict coverage for gradual pollution damage. The court determined that, “[h]aving profited from that nondisclosure by maintaining pre-existing rates for substantially-reduced coverage, the industry justly should be required to bear the burden of its omission by providing coverage at a level consistent with its representations to regulatory authorities.” (emphasis added).
The Morton Court:

- Found the “sudden and accidental” pollution exclusion to be unambiguous, and that it would have applied.
- Barred the insurance industry from relying upon the exclusion, because they misrepresented the effect of the exclusion to regulators (to avoid a rate reduction).
- Considered representations by ISO predecessors to any regulator in any state: because ISO binds its members and the language is the same in each state, so a misrepresentation to the New York regulator should bar ISO members seeking to enforce language in Alabama.
- ISO language is standard form, sold on a take-it-or-leave it basis, so the only negotiations that are relevant are between ISO and regulators.
Questions? Comments?

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