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Several States Introduce Legislation To Address "Business Interruption" Insurance Coverage Due To COVID-19

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Traditionally, business interruption coverage insures businesses against an interruption in their services and, thus, revenue streams, caused by a very narrow set of circumstances. The standard business interruption provision in an insurance policy provides coverage for instances when there is a necessary interruption of an insured's business service because of physical damage or destruction to real or personal property which is caused by some specified peril (e.g., hurricane, fire, etc.) or a peril not otherwise excluded by the policy. If an insured is successful in its claim for business interruption coverage, then it will be indemnified for the demonstrated loss that the interruption causes for the indemnification time period, as often defined or limited by the policy. The main question businesses now have is: will my business interruption insurance policy cover the interruption of service and loss of income caused by the COVID-19 pandemic? The initial answer has largely been "no."

Now, a handful of states, including New York, have responded with proposed legislation mandating that businesses be covered under their business interruption insurance policies during the pandemic. Massachusetts, Ohio and New Jersey have also introduced bills to this effect. These states are concerned that the lack of coverage will force many businesses to close and, some, to never re-open. The New York bill, proposed on March 27, 2020, states:

> Notwithstanding any provisions of law, rule or regulation 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, shall be construed to include among the covered perils under that policy coverage for business interruption during a period of a declared state of emergency due to the coronavirus disease 2019 (COVID-19) pandemic.

The New Jersey bill similarly sets forth the following:

> Notwithstanding the provisions of any other law, rule or regulation 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 act, shall be construed to include

among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic, as provided in the Public Health Emergency and State of Emergency declared by the Governor in Executive Order 103 of 2020 concerning the coronavirus disease 2019 pandemic.

Essentially, both of these bills provide that if an insured has business interruption coverage, its carrier must insure it against lost revenue during the pandemic, regardless of: (1) policy language which expressly requires physical property damage due to a specified or non-excluded peril; or (2) an endorsement that explicitly excludes viruses. The New York bill would apply to businesses with fewer than 100 employees on the date that the bill is enacted into law. An employee is defined as someone who works at least 25 hours per week. The New York bill would apply to business interruption coverage that was in effect on and after March 7, 2020.

The successful passage of these bills is questionable. Insurance companies have criticized these state efforts by pointing out that such legislation interferes with the contractual intent of two mutually agreeing parties. Arguably, the law would violate the Contracts Clause of the United States Constitution (and similar provisions under state constitutions) which prohibit the government from impairing parties' obligations under private contracts (*i.e*- an insurance policy). The industry further argues that this required coverage would set an untenable precedent, result in contractual agreements being less forceful than before and, in the long run, harm the very businesses that these bills seek to help. To date, none of these bills have been passed into law. If they do succeed at the legislative level, it is anticipated that constitutional and other legal challenges will be mounted.

If you have any questions concerning business interruption or related coverages, or if we can assist you in any manner during the COVID-19 pandemic, please contact Douglas Bohn via email at dbohn@cullenllp.com or telephone at (516) 357-3879.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

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