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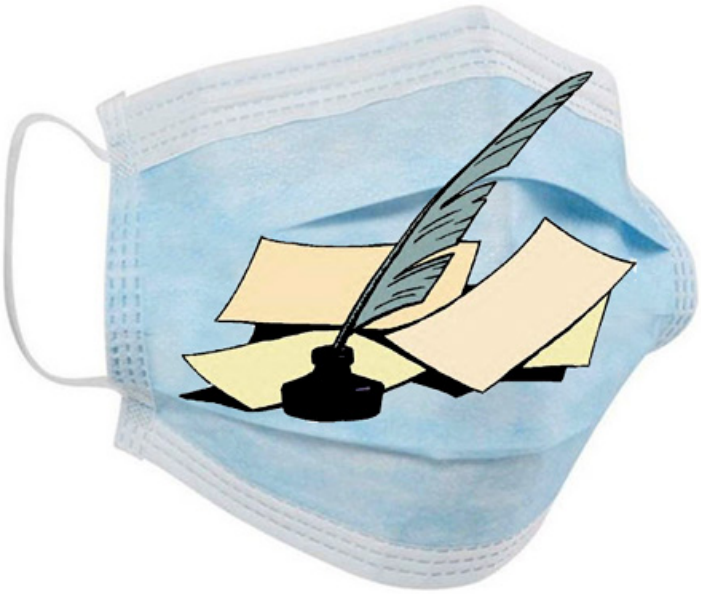
A Real Government Impact On Covid-19 Business Interruption Claims

State Insurance Commissioner Addresses Claims Investigation



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Never before has there been so much attention given to an insurance coverage issue. It all started about six weeks ago. Coverage lawyers, representing both policyholders and insurers, began pounding their keyboards, addressing whether financial losses, on account of the coronavirus, are covered under business interruption policies. The resulting articles were legion. Not since Y2K has there been such a literary frenzy of coverage prognostication by lawyers.

All kinds of previously unknown property coverage decisions, addressing whether the effect of hard-to-see substances qualify as physical damage, have been held up by the authors, like Wonka Golden Tickets, claiming to hold the answer to the business interruption question.

To take one example, the heretofore obscure 2014 unpublished New Jersey federal trial court decision in *Gregory Packaging v. Travelers*, which policyholders have characterized as the ah-ha case that establishes coverage, has been the subject of more study than *Marbury v. Madison*.

In the end, these articles, written by experienced advocates on both sides of the issues, full of arguments believed by the authors to cogently support their legal positions, reached predictably opposite conclusions.

While the lawyers were doing their thing, lawmakers got into the act. State legislatures, seemingly seeing the insurer-side articles, expressing reasons for the absence of business interruption coverage, began their own keyboard assault. At least seven introduced legislation to mandate such coverage, notwithstanding anything those lawyers had to say about it.

Some federal legislators were not content to sit on the sidelines. Several members of the House of Representatives sent a letter to the heads of insurer trade associations, urging then to "work with [their] member companies and brokers to recognize financial loss due to COVID-19 as part of policyholders' business interruption coverage."

Enter the lawyers again. Some began filing suit, placing the coverage question in the hands of trial court judges. And appellate court judges will likely answer it after that. Judges will also get to decide whether any bills, that become law, mandating business interruption coverage, are constitutional.

Next President Trump weighed in, declaring, during a Covid-19 media briefing, that insurers should pay business interruption claims. Although he seemed to acknowledge that coverage was not owed under policies containing "pandemic" exclusions. He no doubt meant "virus" exclusions.

So, in six short weeks, the question whether financial losses, on account of the coronavirus, are covered under business interruption policies, has been addressed by, or been presented to, all three branches of government. Not since Schoolhouse Rock and Hamilton have I learned so much about civics.

While all these actions vary in their means to an end, they share one thing in common: None of the maneuvering has had any actual impact on the avalanche of claims that have been, and will be, made by businesses seeking coverage for their financial losses on account of the coronavirus. In other words, despite all the noise over the past six weeks, we're not much further than when we started when it comes to resolving the business interruption coverage issues.

But while all this chatter has been going on – much of it getting lots of press coverage – another government action recently took place. And, unlike the others, this one actually impacts some coronavirus claims.

On April 14, California Insurance Commissioner Ricardo Lara issued a Notice to "all admitted and non-admitted insurance companies, all licensed insurance adjusters and producers, and other licensees and interested parties" requiring them, among other things, to "fairly investigate all business interruption insurance claims caused by the Covid-19 pandemic."

To be sure, this is not the first action taken by a state insurance commissioner around the country to address the impact of the pandemic. Some have spoken on such things as the return of premium on account of an asserted decrease in insurer' exposure, extending grace periods for premium payments and permitting delivery drives, using personal vehicles for essential business, to be covered under auto policies if not otherwise.

But Commissioner Lara's directive goes in a different direction – it impacts coverage surrounding the coronavirus, specifically under business interruption policies. And, even more specifically, the insurers' investigation of such claims.

The Notice states that the insurance commission "has received numerous complaints from businesses, public officials, and other stakeholders asserting that certain insurers, agents, brokers, and insurance company representatives are attempting to dissuade policyholders from filing a notice of claim under its Business Interruption insurance coverage, or refusing to open and investigate these claims upon receipt of a notice of claim."

The Notice reminds insurers, and others involved in the claims process, of their contractual, statutory, regulatory and other legal obligations, including but not limited to, those contained in the California Fair Claims Settlement Practices Regulations.

The Notice details several of those obligations, including those concerning acknowledgment of claims and communications between insurers and policyholders.

But this aspect of the Notice is most interesting:

"Upon receipt of a notice of claim, the insurer is required to provide the policyholder with the necessary forms, instructions, and reasonable assistance, including but not limited to, specifying the information the policyholder must provide in connection with the proof of claim and begin any necessary investigation of the claim. (Regulations, section 2695.5(e)(2).) ***Thereafter, every insurer is required to conduct and diligently pursue a thorough, fair, and objective investigation of the reported claim, and is prohibited from seeking information not reasonably required for or material to the resolution of a claim dispute before determining whether the claim will be accepted or denied, in whole or in part. (Regulations, section 2695.7(d).)"***

The insurance commissioner's notice is addressing two aspects of the investigation of business interruption claims.

On one hand, the commissioner has received "numerous complaints" of insurers, and others involved in the claims process, of refusing to investigate business interruption claims." Presumably some insurers have been denying claims based on a conclusion, solely from the information contained in the notice, that they are not covered. Indeed, some of the early coverage actions have asserted claims for bad faith based on just such an alleged failure to investigate.

On the other hand, while the commissioner is addressing the lack of investigation of claims, he is also prohibiting what appears to be an over-investigation of claims by some insurers. There is no explanatory detail provided, but the concern seems to be that some insurers are asking too many questions, too early in the claims process. In other words, some insurers may be asking for information from policyholders that would only be relevant to the claim *if it were first determined to be covered*.

Perhaps this includes insurer requests for information about the aspects of the insured's business unrelated to its coronavirus-caused closure or financial data concerning the amount of losses caused by the closure. The latter could be time-consuming to gather, and may even require the assistance of an accounting professional. Insureds will likely see that as being asked to do a lot of work for a claim that has not yet been determined to satisfy the insuring agreement and be outside the scope of all exclusions.

It would not be surprising to see other state insurance commissioners issue notices, concerning the scope of investigation, similar to California's. When it comes to addressing unique issues arising out of the pandemic, insurance commissioners have taken cues from their counterparts.

Commissioner Lara's message for insurers, concerning investigation of business interruption claims, is clear: they must do it, but not overdo it. Insurers must consider the various coverage issues and information provided, or not, in the notice of claim, and strike the right balance when it comes to their subsequent investigation. There are few bright lines here and insurers will likely consider various options before settling on their approach. But, as sometimes happens, no matter what they direction they go, some policyholders will say they should have gone in another.


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