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IMPORTANCE In an effort to reduce the spread of COVID-19, many states and munic_ ates ez cey

OBJECTIVES Our study provides a discussion of the impact of COVID-19 on business interruption losses in the U.S. as
[illegible]

EVIDENCE Although COVID-19 losses generally appear to be excluded from coverage, either by way of language that is
[illegible]

FINDINGS Business interruption losses due to COVID-19 are estimated to potentially exceed $300 billion per month for
[illegible]

In addition to these private actions, both state and federal governments have proposed legislation regarding indemnity
[illegible]

CONCLUSION & RELEVANCE Whether or not insurance will cover COVID-19 losses remains an open question and the
[illegible]

1 Chiglinsky, K., 2020, “Insurers Worry Virus-Linked Costs May Reach $383 Billion a Month”, Bloomberg, accessed online at https://www.bloomberg.com/news/articles/2020-03-30/insurers-worry-virus-linked-costs-may-reach-383-billion-a-month.

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may result in the payment of claims stemming from both COVID-19 and future pandemic-related losses.

Introduction

On Dec. 31, 2019, the Chinese government reported a cluster of pneumonia cases in Wuhan, China. Days later, it was determined that these cases were the result of a new virus named SARS-CoV-2 (also referred to as the novel coronavirus or the COVID-19 virus). This new virus began to spread to countries around the world, infecting more than 7 million individuals in at least 177 countries and resulting in more than 400,000 deaths as of early June 2020 (Calfa89(,)- ries o7(0fies)resus the virus sp

Once cities and states in the U.S. began implementing shelter-in-place orders, business owners and public policymakers began to question whether the loss of income resulting from the COVID-19 shutdown should be covered under the business interruption coverage forms that are commonly used in the U.S. As detailed below, insurers have asserted that the policies were never intended to cover pandemic claims and point to exclusionary language found in both the unendorsed policies and policy endorsements, while policyholders and their attorneys have begun filing suits against their insurers over what they argue is inclusive policy language or ambiguities in an attempt to recoup some of their financial losses.

The purpose of this article is to provide an overview of some of the major issues surrounding business interruption insurance and the COVID-19 pandemic, possible coverages available and limitations under standard business income insurance coverage forms, and the ways in which lawmakers at the state and federal levels, as well as insurers, have proposed addressing these problems.

Issues Surrounding COVID-19

As shelter-in-place orders were mandated by state and local governments, and with guidelines or requirements to engage in "social distancing," businesses across the country were required to close or change their business practices or distribution structure.[4] In many states, non-essential businesses (e.g., beauty parlors, nail salons and tattoo parlors) were ordered closed by governmental or regulatory bodies (e.g., Alcorn, 2020), and other businesses, such as restaurants, were ordered to serve their product either curbside or by delivery only.[5] Some businesses, such as grocery stores, were permitted to continue normal operations but were encouraged or ordered to limit the number of individuals permitted in the store at any given time (e.g., Butler, 2020; Muccigrosso, 2020). These restrictions have had a significant impact on the revenue and profits of many industries. According to David A. Sampson, president and CEO of the American Property Casualty Insurance Association (APCIA), the loss of business income for small enterprises could be $220 billion to $383 billion per month.[6] It is possible that there are as many as 30 million potential business interruption claims from small businesses that suffered losses as a result of COVID-19 (Simpson, 2020a). Given the economic significance of the lost income related to the COVID-19 pandemic, policyholders

4. The U.S. Centers for Disease Control and Prevention (CDC) (2020a) defines social distancing as "keeping space between oneself and others outside the home." The CDC recommendation is to maintain a distance of at least 6 feet between any two individuals, avoid group gatherings and avoid crowded locations.

5. Essential businesses typically include grocery

are looking for ways to cover such losses. While the U.S. government committed to a $2 trillion economic relief plan (Shabad and Edelman, 2020), many businesses are seeking payment for lost income under their business interruption insurance policies.[7]

For many states, the response to COVID-19 has shifted from slowing the spread of the virus to a focus on economic reopening and recovery. Some of the first states to reverse shelter-in-place mandates and reduce restrictions in March 2020 included Georgia, South Carolina and Oklahoma.[8] As of early June 2020, all states and U.S. territories had eased restrictions that were put in place (Elassar, 2020). It is unclear how reopening will impact the spread of COVID-19; however, it is evident that it will ease some of the economic impact placed on businesses during the shutdown: unemployment figures improved significantly in May relative to the prior

Washington State Office of the Insurance Commissioner found that, as of March 15, 2020, "more than 194,000 commercial policies had at least one type of business interruption or civil authority coverage in effect" and estimated premiums for these policies were $437 million (Sams, 2020a).[12] To put this value into perspective, total commercial property (non-liability) insurance premiums in Washington in 2018 were more than $523.2 million and total direct premiums written for all property/casualty (P/C) business were approximately $12.85 billion (NAIC, 2019).[13,14]

In terms of pricing trends, as illustrated in Figure 1, quarterly reports issued by The Council of Insurance Agents & Brokers (CIAB) suggest an upward trend in business interruption insurance rate changes from the third quarter of 2017 to the first quarter of 2020, where the average rate increase in 2020 was 6.70% (CIAB, 2020).[15] While the average rate change was 6.7%, the CIAB reports significant variation in the first quarter of 2020, with a high of a 28.8% rate increase and minimum of a 4.5% rate decrease. For comparative purposes, the CIAB reports that, on average, premiums increased by 12% for commercial property insurance, 9.6% for commercial auto insurance and 17.3% for umbrella coverage in the first quarter of 2020.

Figure 1
Business Interruption Insurance Rate Changes, Q1 2009 to Q1 2020

Values reported on the y-axis represent business interruption insurance percentage rate changes. Data used for the construction of this figure were obtained from quarterly surveys conducted by The Council of Insurance Agents & Brokers (CIAB), which are available at https://www.ciab.com/market-intel/pc-market-index-survey/historical-pc-market-index-surveys

12. To our knowledge, this level of information is currently only publicly available for the state of Washington.

13. As noted previously, premiums for business interruption insurance are not separately reported by insurers and thus cannot be separated from the reported values.

14. Direct premiums written in Washington account for less than 2% of total premiums reported by U.S. P/C insurers (NAIC, 2019).

Although relatively little is known about the size of the business interruption insurance market or the primary writers of this line of business in the U.S., some evidence exists regarding the demand for this important line of business. A survey conducted by Nationwide in 2017 found that only 29% of small business owners that were surveyed had business interruption insurance (Nationwide, 2017). This is particularly significant as the U.S. Small Business Association's (SBA) Office of Advocacy reports that 99.9% of all business in the U.S. are "small businesses" (SBA, 2019) and that small businesses "account for almost 44 percent of U.S. economic activity" (SBA, 2018).[16]

While not used by all businesses, Wilson (2020) states that the ISO Business Income (and Extra Expense) (BIEE) Coverage Form (CP 00 30 10 12) is "probably the most common business income coverage policy found in the insurance marketplace."[17] The business income insuring agreement located in the unendorsed BIEE states the following:

> "We will pay for the actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the "period of restoration". The 'suspension' must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss."

In addition to providing coverage for loss of income, the BIEE can also cover additional expenses that are incurred in order to continue operations following the occurrence of a covered loss. Furthermore, coverage is also available for instances where net income declines due to civil authorities' prohibiting access to the insured's premises as a result of a covered loss at property not owned or used by the insured. However, as we discuss below, differing interpretations of key terms found in the BIEE result in significant disagreement as to whether the policy should in fact cover business interruption claims stemming from the COVID-19 pandemic.

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16. The SBA's Office of Advocacy defines a business as "small" if it has fewer than 500 employees (SBA, 2019), while the Nationwide survey classifies a business as "small" if it has fewer than 300 employees.

17. It should be noted that not all insurers use the ISO form discussed in this article and some have their own coverage forms that may offer broader or more restrictive coverage. Furthermore, smaller businesses frequently use the ISO Business Owners Policy (BOP), which contains coverage for property damage, liability and business interruption.

"physical damage" is not defined in the policy, many courts have interpreted the term to mean a "distinct, demonstrable, physical alteration of the property" (Plitt, 2013). Using this definition of "phy perils that are covered, while the opens peril cause of loss forms are often interpreted to cover perils that are not explicitly excluded in the form. Neither the Basic nor Broad cause of loss forms list communicable diseases or "bacteria" as covered causes of loss and both include exclusions related to "Fungus," "Wet Rot," "Dry Rot" and "Bacteria." While the term "Fungus" is defined in the policy, the term "bacteria" is not. A similar exclusion is also found in the ISO Special Cause of Loss Form (CP 10 30 10 12), which would seem to eliminate coverage in the event that the term "bacteria" were to include a virus. However, while the policy does provide an exclusion for "bacteria," it does not explicitly include exclusions related to viruses, communicable diseases or pandemics. The lack of an explicit exclusion in the unendorsed BIEE and cause of loss forms may then arguably afford a policyholder with coverage.[23]

Issues also arise as to whether a virus should be interpreted as a "pollutant." This is of importance, as the unendorsed BIEE does include some language addressing "pollutants." In particular, the policy states that the period of restoration:

damage occurring, courts have not required insurers to pay for these business interruption events.

Given the set of requirements that must be met in order to successfully demonstrate that the civil authority additional coverage should apply to a given claim and the unique circumstances surrounding the suspension of operations during the COVID-19 pandemic, claimants may find it difficult to recover business interruption losses through this additional coverage in the unendorsed BIEE.

State and Federal Responses to COVID-19 Claims

As discussed above, significant uncertainty exists regarding how courts will interpret the language in the ISO BIEE coverage form or any attached endorsements. However, a potentially more important source of uncertainty arises from proposed state-level legislation. In response to questions regarding whether BIEE policies were intended to cover business interruption due to communicable diseases or viruses, state lawmakers in at least nine U.S. states and the District of Columbia initially proposed bills that would require insurers to cover these losses on a retroactive basis.[27] In general, the bills would require insurers to offer retroactive coverage for business interruption losses stemming from the coronavirus and pandemics (e.g., Adriano, 2020; Wilkinson, 2020a). The bills typically focus on providing this retroactive coverage for small business (i.e., those with fewer than 100 to 150 full-time employees); some bills would allow those insurers paying these claims to apply for reimbursement from the state, with reimbursement funds coming from an assessment on insurers writing P/C business in the state.[28] However, several proposed bills have already been withdrawn or amended to remove wording related to retroactive coverage for BIEE. For instance, Louisiana SB 477—which originally called for insurers doing business in the state to retroactively cover BIEE claims—is being amended to remove the retroactive coverage. The proposed amended bill would require insurers to clarify exclusions on BIEE policies (Wilkinson, 2020c). The District of Columbia City Council also decided not to move forward with a retroactive insurance coverage mandate (Weinberger, 2020).

Louisiana proposed an alternative approach that differs from those discussed above. Under SB 495, insurers would have the option to contribute to a "Business Compensation Fund." Insurers that chose to contribute to this fund would receive

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27. These states include Louisiana, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island and South Carolina (Giordano et al., 2020; National Association of Mutual Insurance Companies (NAMIC), 2020).

28. Although the passage of laws requiring retroactive business interruption coverage has been discussed in a number of states, questions remain as to whether the U.S. Constitution would prohibit this type of action (e.g., Nevins and Lewin, 2020a; Pierson and Gallagher, 2020; Tager, White and Hamilton, 2020).

reinsurance backstop would be available that would have the effect of limiting total insurer losses. According to H.R. 7011, a bill proposed by U.S. Rep. Carolyn Maloney (D-NY), the PRIA program would be voluntary and the federal government would begin participating once aggregate industry losses exceed $250 million. Once triggered, the federal government would be responsible for 95% of losses in excess of an insurer-specific deductible (equal to 5% of the insurer's prior-year direct premiums earned) and aggregate losses would be capped at $750 billion annually (Sclafane, 2020).[30]

$812 billion in policyholders' surplus in the third quarter of 2019 (Insurance Journal, 2020a).[31] Industry advocates argue that the policies were not priced to include coverage for communicable diseases such as the COVID-19 virus, so paying these claims would not only result in significant loss payments, but could also reduce the ability of some insurers to pay for other covered claims and ultimately increase insolvency risk for some insurers.[32,33] Additional claim costs would also have the effect of reducing insurers' available investable funds, which are an important source of insurer profit.

Rather than the industry bearing the large costs associated with these claims, insurers have supported the "COVID-19 Business and Employee Continuity and Recovery Fund," which would be responsible for providing federal assistance to businesses and workers that are adversely affected by the pandemic. In particular, the fund would "help businesses retain and rehire employees, maintain worker benefits, and help cover operating expenses such as rent. It may also provide funds for payroll, lost income of sick employees, and lost business revenues but not profits" (Simpson, 2020c). This particular approach would be similar to the September 11th Victim Compensation Fund that was created to address losses associated with the 9/11 terrorist attacks.[34] While insurers (as well as agents and brokers) may be involved in the process of handling application filings and reviewing those filings, they would not actually be financially responsible for the loss payments (Wilkinson, 2020b). Another proposal offered by P/C trade organizations is the Business Continuity Protection Program (BCPP). This program would operate similar to the National Flood Insurance Program (NFIP) and would provide businesses with the option to purchase "revenue replacement coverage" which would provide coverage for up to 80% of the business's payroll and other expenses. Under this arrangement, loss payments would be made by the federal government through the Federal Emergency Management Agency (Insurance Journal, 2020b).[35]

Conclusion

The COVID-19 pandemic caused the states to place restrictions on the ability of businesses to operate, which has resulted in substantial economic losses across the country. As the states have begun either easing restrictions or completely eliminating “shelter-in-place” mandates, there currently exists a debate over the coverage of COVID-19 business interruption claims by U.S. insurers. In support of coverage for these claims are arguments revolving around the interpretation of the term “direct physical damage,” the definition of “pollutants,” the exclusion of “bacteria” and whether the civil authority additional coverage should apply. From a policy interpretation perspective, the existence of endorsements that specifically prohibit coverage for losses stemming from viruses will likely be used to fend off many of these claims. However, even with such language, it appears the most significant risk facing insurers is not necessarily potential ambiguity that exists in the policy, but rather uncertainty regarding government-required retroactive coverage. In the event the states and/or the federal government do in fact pass laws that require insurers to pay for these losses, which presumably were never intended to be covered, it is anticipated that insurers will dig in for a prolonged legal battle with the government and policyholders. Even without federal intervention, litigation stemming from denied COVID-19 business interruption claims has been described by one attorney as potentially “the largest civil litigation battle in human history” (Ayers, 2020c).

While insurers moved to exclude viruses, pandemics and epidemics from business interruption policies following the SARS outbreak in 2002–2003, it appears that some of the language used in at least the ISO standard business interruption policy remains open to some interpretation. Following the COVID-19 pandemic, it may be expected that the ISO and insurance carriers that provide their own business interruption policies will revisit this policy language. Insurers that continue to offer insurance against epidemic or pandemic business interruption will likely want to provide precise wording about coverages and to consider an appropriate premium for this coverage.

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