



WHEN THE SECOND SHOE DROPS

COVID-19 LOSSES AND REINSURANCE

BY LARRY P. SCHIFFER

The ramifications from the novel coronavirus on the insurance industry are significant. Nearly every sector of the insurance industry is or will be affected, including the reinsurance sector. This article focuses on COVID-19 reinsurance issues.

Reinsurance 101

What is reinsurance? Some call reinsurance “the insurance of one insurer by another.” Reinsurance is merely an extension of the basic theory of insurance: the spreading of risk between multiple insureds to an insurance company. In reinsurance, however, risk of loss is spread from a single policy-issuing insurance company to other insurance companies. These other insurance companies—reinsurance companies—assume a portion of the original insurance company’s risk.¹

When an insurer wishes to mitigate some of the risk it has undertaken under an insurance policy issued to an insured, it transfers or “cedes” all or a portion of that risk to another insurer. This is known as reinsurance. More formally, reinsurance is a contract between one insurer (the reinsured or ceding insurer) and another insurer (the reinsurer or assuming company) by which the reinsurer agrees to assume all or part

of the risk underwritten by the ceding insurer. In exchange for assuming a portion of the risk, the reinsurer receives a portion of the ceding insurer’s premium on the underlying insurance policy.²

COVID-19 Losses

To understand how COVID-19 losses may affect reinsurance, we first need to understand where the losses are coming from. In other words, what underlying insurance policies and potential coverages are seeing losses arising from the pandemic?

The chief executive officer of Lloyd’s of London said back in March 2020 that COVID-19 losses would affect at least 14 categories of the insurance business.³ That may turn out to be a low estimate. COVID-19-related claims have affected and likely will affect the following types of insurance: life, health, long-term care, annuity, disability, accident and health, hospital income, workers’ compensation, event cancellation, travel, supply chain, contingent business interruption, trade credit, production stop loss, professional liability (lawyers, accountants, health care), errors and omissions (insurance brokers), commercial general liability, commercial property, business owners, directors and officers, employment practices, municipal, and, of

course, business income and extra expense. There probably are others as well.

Some lines of insurance will cover COVID-19-related losses. For example, if someone dies from a COVID-19 infection and has a life insurance policy, all things being equal, the policy should respond and there should be no controversy over whether there is coverage for the loss. That is because a life insurance policy is meant to pay the beneficiary when the insured person dies, even if the death is caused by a pandemic.⁴

For other lines of insurance, coverage for COVID-19-related losses will be more complicated. For example, workers' compensation coverage is meant to cover workplace injuries. The New York Workers' Compensation Board states that "[w]orkers' compensation is insurance that provides cash benefits and/or medical care for workers who are injured or become ill as a direct result of their job."⁵ Generally, workers' compensation insurance does not cover routine community-spread illnesses like a cold or the flu because they usually cannot be directly tied to the workplace.⁶ However, during this COVID-19 pandemic, certain workers, especially those designated as "essential" workers, who fall ill as a result of COVID-19 might qualify for workers' compensation coverage. This is because individuals who work in an environment where exposure risks are significantly higher are more likely to qualify for a compensable claim.

Health-care workers, first responders, transportation workers, corrections officers, food service workers, and retail workers with high interaction with the public likely fall within the compensable criteria. Moreover, many state workers' compensation boards have altered definitions to include first responders, health-care workers, and others as presumptively covered if they contract COVID-19.⁷ Fourteen states have taken action to extend workers' compensation coverage to include COVID-19 as a workplace illness.⁸ A good example is Illinois Public Act 101-0633, which provides the following presumption:

For the purposes of this Section only, the death of any policeman as a result of the exposure to and contraction of COVID-19, as evidenced by either (i) a confirmed positive laboratory test for COVID-19 or COVID-19 antibodies or (ii) a confirmed diagnosis of COVID-19 from a licensed medical professional, shall be rebuttably presumed to have been contracted while in the performance of an act or acts of duty and the policeman shall be rebuttably presumed to have been fatally injured while in active service.⁹

Liability claims have also arisen. Lawsuits have been filed against cruise lines for negligence¹⁰ and for the wrongful acts of their directors and officers in allegedly failing to address the novel coronavirus.¹¹ There are lawsuits against some big-box stores for negligence and wrongful death where customers or workers allegedly contracted COVID-19 and

where some have died.¹² Suits have been filed against insurance brokers for placing business insurance that allegedly should have covered the pandemic but did not.¹³ Claims against legal and accounting professionals can be anticipated for alleged mistakes in providing guidance over the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and the various programs providing individuals and businesses relief from the economic shutdowns because of the pandemic.

Business Income, Extra Expense, and Civil Order Coverage

The most controversial and headline-grabbing area involves the claims made by businesses, predominantly from the hospitality industry, seeking insurance coverage under property insurance policies for their loss of income and additional costs resulting from the myriad stay-home or shut-down orders issued by state and local governments.¹⁴ These claims arise under property insurance coverages found in commercial property, commercial package, business owners, or other insurance policies covering first-party property losses.

Every insurance policy is different, and every factual circumstance of a loss is different. Accordingly, every claim and every policy have to be examined carefully, and the words of each policy and the facts of each claim are paramount in determining coverage. This is true with claims under property insurance policies for loss of business income and extra expense.

Property insurance policies not only cover the cost to replace or rebuild property that is damaged or destroyed by a covered peril, but many also provide coverage for loss of income and the extra expenses incurred by the policyholder to address the interruption or suspension of the policyholder's business because of a covered peril. This is commonly called business interruption coverage.¹⁵ For example, if a hurricane damages a restaurant so that its business is suspended, most property insurance policies will pay for the cost of repairing the restaurant and also cover the loss of income and any extra expenses incurred during the suspension of the restaurant's operations because of the damage.

However, business income and extra expense provisions do not cover alterations or upgrades. The business income coverage part only replaces loss of income because of the business interruption. The extra expense coverage part only covers necessary extra expenses incurred by the insured during the period of restoration that the insured would not have incurred if there had been no direct physical loss of or damage to property caused by or resulting from a covered cause of loss. Extra expense includes the cost to repair or replace property, but only to the extent the repair or replacement reduces the amount of loss that otherwise would be payable under the coverage form. Reconfiguring workspaces to reopen a business is not an expense incurred because of direct physical loss of or damage to the property.¹⁶



TIP: It is essential to review the insurance contract wording as well as the reinsurance contract wording to determine the actual scope of potential coverage.

The COVID-19-related business interruption claims have been brought under property coverage grants for business income and extra expense and civil authority orders.¹⁷ For the most part, business interruption coverage provisions require direct physical loss of or damage to covered property by a covered cause of loss.¹⁸ Most civil order coverage provisions require a nexus between the civil order and direct physical loss of or damage to property in the general vicinity of the covered premises.¹⁹

Except in a few instances where issued policies provide express coverage for losses arising from viruses or pandemics, most insurance companies have denied COVID-19 claims for business interruption.²⁰ Among the bases for denial are the lack of direct physical loss of or damage to covered property by a covered cause of loss and express exclusions, including exclusions for losses arising from viruses or bacteria.²¹ The coverage denials have resulted in over 900 declaratory judgment, breach of contract, and class actions against property insurance companies seeking coverage for COVID-19 losses.²² These disputes clearly are relevant to reinsurers because if the courts mandate coverage for COVID-19-related losses under business interruption provisions in property policies, insurance companies will look to their reinsurers to share in those losses.

The Virus and Bacteria Exclusion

There are property insurance policies that include a virus exclusion. The Insurance Services Office (ISO) issued a virus and bacteria exclusion in 2006 after the 2005 SARS pandemic.²³ The history of that exclusion indicates it was a belt-and-suspenders provision for those companies that wanted to use it; in the absence of an express coverage grant, there was never coverage for viruses and bacteria under property policies.²⁴ When read in context, business interruption provisions clearly are property coverage extensions tied directly to actual physical loss of or damage to property. There is no evidence that a virus causes direct physical loss of or damage to property, so there is no reason to think that

Larry P. Schiffer recently started *Schiffer Law & Consulting PLLP* after 38 years with boutique and global law firms. His practice includes insurance and reinsurance disputes, advice, and counseling. He is chair of the TIPS Cybersecurity and Data Privacy Committee and past chair and current vice-chair for social media and technology for the TIPS ESLR Committee. He can be reached at larry.schiffer@schifferlc.com. This article is based on the materials prepared for the May 2020 TIPS webinar “When the Second Shoe Drops: COVID-19 Losses and Reinsurance” and on the questions asked and answers given during and in writing after the webinar.

there is coverage for losses arising from a virus under policies meant to cover losses from direct physical damage.

Impact of COVID-19 on the Insurance Industry

The novel coronavirus pandemic has the potential to affect the insurance industry beyond the individual COVID-19 claims themselves. For example, non-COVID-19 claims under commercial general liability (CGL) policies and other coverages may be impacted. Because claims personnel are, in many cases, working from home, the claims adjusting process has changed. Moreover, claims in suit have slowed down or paused after courts closed in many parts of the country. While the courts are starting to open up, there is a serious backlog of civil cases, including many insurance-related cases. On the other hand, the volume of non-COVID-19 claims is way down, and many claims are settling because of the court delays.²⁵

More importantly, if property insurers are forced to pay COVID-19 business interruption losses, those insurers’ ability to pay non-COVID-19 claims may be impacted. The economics associated with covering all business interruption claims arising from the novel coronavirus pandemic is well-documented.²⁶ For example, if a company has 150,000 property policies and pays each policyholder \$25,000 in business income and extra expense damages, the total cost is \$3.75 billion. If that company’s policyholder surplus is \$8 billion, it will lose nearly 50 percent of its policyholder surplus and likely have significant solvency problems going forward. Because forcing insurers to pay billions in business interruption claims on property policies that were never written to cover a pandemic (where losses are not a result of direct physical loss of or damage to property) likely will cause significant, if not catastrophic, solvency issues for the entire property and casualty industry, insurance regulators will do whatever they can to prevent that from happening.

There are also parallels that the industry has seen before on the legal issues. For instance, the coverage issues arising out of COVID-19 have similarities to those that arose out of hurricanes, September 11, and similar disaster-type exposures that suspend or shut down businesses.

Regulatory and Legislative Responses to COVID-19

Regulatory and legislative responses to COVID-19 claims are relevant to both ceding insurers and reinsurers because those governmental actions could affect what losses are covered by insurance policies and, therefore, whether those losses are covered by reinsurance contracts. For example, several states have proposed legislation that, if enacted, would require property insurers to cover COVID-19 business interruption losses retroactively to early March 2020. This retroactive coverage would apply regardless of whether the insurance policy required direct physical loss of or damage to covered property by a covered cause of loss or whether the policy contained an exclusion for losses arising out of a virus or contagion. Massachusetts Senate Bill 2655 provides in part:

Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, notwithstanding the terms of such policy (including any endorsement thereto or exclusions to coverage included therewith) which includes, as of the effective date of this act, the loss of use and occupancy and business interruption in force in the commonwealth, shall be construed to include among the covered perils under such policy coverage for business interruption directly or indirectly resulting from the global pandemic known as COVID-19, including all mutated forms of the COVID-19 virus. Moreover, no insurer in the commonwealth may deny a claim for the loss of use and occupancy and business interruption on account of (i) COVID-19 being a virus (even if the relevant insurance policy excludes losses resulting from viruses); or (ii) there being no physical damage to the property of the insured or to any other relevant property.²⁷

Clearly, if state laws force insurers to pay business interruption losses and those laws survive legal challenges to their constitutionality, insurers will look to cede those losses to their appropriate reinsurers. As discussed below, that will implicate reinsurance issues like follow-the-fortunes and follow-the-settlements and may result in reinsurance disputes.

One of the open questions is whether reinsurance contracts will have to respond to COVID-19 losses paid because of state statutes mandating business interruption coverage retroactively for COVID-19 claims. If the reinsurance contract has language stating that the reinsurer must follow any changes to the policy, including changes in law, then reinsurers likely will have no choice but to pay. Consider the following language:

The Reinsurer's liability will begin obligatorily and simultaneously with that of the Company, and all reinsurance ceded hereunder will be subject to the same terms, rates, conditions, interpretations, exclusions, waivers, modifications, cancellations, and alterations as the respective Policies of the Company insofar as they relate to the business covered hereunder. Further, the obligations of the Reinsurer will extend to any policy coverage required of the Company by any legislative, regulatory or judicial body; the intent of this Contract is that the Reinsurer will follow the fortunes of the Company on the Policies to which this Contract applies.²⁸

If, however, the reinsurance contract is silent on that subject, then the ceding insurer likely will analogize the situation under follow-the-settlements and follow-the-fortunes principles to a court judgment mandating coverage when coverage was not contemplated.

Although the proposed legislation is expansive, it only addresses the business income, extra expense, and civil order

coverage grants under the overall property coverage grant. None of the legislative proposals opens the entire policy for other coverage grants. These bills aim to force insurers to pay COVID-19 business interruption claims because of the closures from the stay-home orders and not to expand other coverages. The legislation does not implicate reinsurers.

The proposed legislation does not distinguish between captive carriers and noncaptive carriers and thus would seem to apply to captive insurance companies as well as independent insurance companies. If a captive insurance company is domiciled in a state or licensed or authorized to do business in that state, and that state enacts a retroactive business interruption insurance law, then the captive likely

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will have to pay those losses on its policies just like any other insurance company.

On the federal legislative side, on May 26, 2020, the Pandemic Risk Insurance Act (PRIA) was introduced into Congress.²⁹ PRIA would establish a federal backstop for those insurers who voluntarily choose to issue business interruption coverage for a pandemic similar in structure to the Terrorism Risk Insurance Act (TRIA). PRIA is drafted to be optional for insurers just like TRIA. The proposed state and federal retroactive business interruption insurance coverage legislative measures are not optional. They mandate that every insurer that issued a property policy with business interruption coverage as of early to mid-March 2020 must pay all business interruption claims arising from COVID-19 regardless of physical damage requirements or viral exclusions. As discussed above, that may mean reinsurers will have to follow their ceding insurers and pay.

Other legislative and regulatory activity also bears on how COVID-19 claims will be handled. For example, enacted and proposed federal and state "immunity" legislation protects businesses, individuals, and entities against third-party claims brought against them for actions taken during the pandemic.³⁰ These immunity grants will provide insureds with defenses, reducing the expenses of defending a lawsuit and potentially eliminating any indemnity payments. If coverage applies (mostly liability), direct insurers of those defendants will have lower loss payments. Immunity, however, is not being suggested for

insurance companies to shield them from coverage obligations—quite the opposite.

What Do Ceding Insurers Expect from Their Reinsurers during and after the Pandemic?

By now, most ceding insurers have identified the lines of business implicated by COVID-19 losses and the applicable reinsurance contracts. Internally, they are coordinating between the direct claims, ceded reinsurance, and legal operations to determine what is known and what is not known about these claims.

Disputes over the cession of COVID-19 business interruption losses likely will focus on whether the loss payment was reasonable, made in good faith, and within the contracts' terms.

In the business interruption context, a key concern for ceding insurers is maintaining the attorney-client privilege while litigating coverage disputes or adjusting underlying claims. This has been a controversial subject in the reinsurance relationship. Because of the uncertainty over whether property insurance policies with business income, extra expense, and civil order coverage must respond to COVID-19 claims, ceding insurers will want to avoid claims of waiver of privilege on underlying claim files when they share defense or coverage counsel reports with reinsurers. In the context of these business interruption losses, advice ceding insurers may obtain from coverage counsel on whether their policies must respond—and if so, how those losses may be aggregated for reinsurance purposes—is something ceding insurers will want to keep confidential. Because many communications go through reinsurance intermediaries, ceding insurers must be judicious about passing confidential communications seeking and providing legal advice through the brokers. If a privileged communication is provided to a reinsurance broker, the privilege may be waived.³¹ The best way to avoid waiver is by not providing the broker with that type of communication.

To prepare for possible cession of COVID-19-related losses, ceding insurers should carefully review their in-force reinsurance contracts. Specific attention should be given to the following provisions: follow-the-fortunes and follow-the-settlements; aggregation or accumulation; hours

clauses; specific exclusions; notice and reporting; claims, consent, cooperation, and control clauses; extra-contractual obligations and losses in excess of policy limits; ex gratia; reinstatement; premium (refunds); cancellation and renewal; and dispute resolution.

At renewal of reinsurance contracts, ceding insurers need to anticipate reinsurers' questions and issues about COVID-19 losses. They should expect requests for data (in addition to the regulator's data calls) and, based on April 2020 renewals, the imposition of exclusions for viruses and similar exposures. They should also anticipate an increase in reinsurance rates, which has already happened with renewals earlier this year.

Ceding insurers will have to consider whether their reinsurance programs are adequate and whether they will be covered for future pandemics. They also need to be cognizant of government intervention. Ceding insurers' expectations from their reinsurers include compliance with follow-the-fortunes and follow-the-settlements on claim payments (including where compelled by law or regulation) and flexibility on premium, cancellation, reporting, and accounting issues. Ceding insurers expect reinsurers to understand that because of the coronavirus pandemic, not all information will be accessible or available.

Ceding insurers anticipate sharing information and knowledge about COVID-19 claims with their reinsurers while at the same time preserving confidentiality and privilege. Where ceding insurers take a position on difficult issues, they expect their reinsurers to support them. They also count on their reinsurers to consider the long-term relationship (e.g., mutual benefits) and the value that it brings to both parties even in the face of these unusual circumstances. Communication, as it always is, is key.

There is the danger that insurers who do not properly respond to COVID-19 business interruption claims will face bad faith-type allegations (many are facing such allegations in the suits filed to date), which could result in a bad faith judgment. If ceding insurers sustain bad faith-type damages, they may have the ability to cede some of that exposure if their reinsurance contracts allow it.³²

What Do Reinsurers Expect from Their Ceding Insurers during and after the Pandemic?

What reinsurers expect from their ceding insurers is often similar to what ceding insurers expect of their reinsurers. Both are taking similar steps to evaluate their potential exposure. Reinsurers should be examining their existing assumed reinsurance contracts and assessing where the claims may come from, including potential loss accumulation by line of business and by geographic location. Like the ceding insurers, reinsurers should review the underlying policy wording, such as coverage

grants and definitions of “loss,” “accident,” “occurrence,” and “event.” Reinsurers will want clear communication with their ceding insurers on reporting of incoming losses.

When examining existing reinsurance contracts, reinsurers should look for the key provisions that will determine the scope of reinsurance protection offered, including definitions of terms like “accident,” “loss occurrence,” and “event.” Other provisions that reinsurers should review are exclusions, aggregation or similar clauses, sole judge clauses, follow-the-settlements and follow-the-fortunes, access to records, and dispute resolution.

Reinsurance renewals are equally important to reinsurers as they are to ceding insurers. From the reinsurer perspective, COVID-19 may cause a tightening up of reinsurance contract wording. Reinsurers likely will enhance their ability to perform claim, underwriting, and accounting reviews remotely. Pre-renewal audits and quarterly or annual reviews may increase. The big question is whether a pandemic should be excluded going forward on the property excess-of-loss and catastrophe reinsurance contracts. While negotiations are ongoing at each renewal period and market power is going to govern whether losses from pandemics will be excluded, it seems like exclusions are being added to many reinsurance contracts.³³ Given that underlying property premiums are increasing, renewals in the spring and summer of 2020 indicate that reinsurance premiums are increasing in part because COVID-19 losses are affecting many lines of coverage.³⁴

What Are the Likely Reinsurance Dispute Touchpoints?

Whether there will be a surge in reinsurance disputes because of COVID-19 losses will depend on what COVID-19 claims ceding insurers pay. Certainly, there will be many COVID-19 claims paid because many insurance contracts cover those claims. For the most part, reinsurers will accept those loss cessions and disputes will not arise.

The business interruption claims may be a different story. Should ceding insurers decide to pay business interruption claims, and do so without judicial rulings compelling coverage or legislation requiring coverage, reinsurers very well may question the basis for those reinsurance cessions. The likely areas of dispute include the scope and meaning of “accident,” “loss occurrence,” or “event” under both the underlying insurance policy and the reinsurance contract. If the reinsurance contract has a sole judge provision,³⁵ reinsurers may question the scope and reasonableness of the ceding insurer’s determination of what constitutes a loss under the reinsurance contract.

A likely significant point of contention will be the interpretation of property excess-of-loss and catastrophe reinsurance contract aggregation provisions.³⁶ Will ceding insurers be able to aggregate all or some of the individual business interruption losses they paid into a single loss occurrence under their catastrophe programs?

Most property excess-of-loss and catastrophe reinsurance contracts contain provisions that allow for aggregation, such as “The term ‘Loss Occurrence’ shall mean the sum of all individual losses directly occasioned by any one disaster, accident, or loss or series of disasters, accidents, or losses arising out of one event which occurs anywhere in the world.” Many aggregation clauses rely on event-based language, which requires that the individual losses relate to each other temporally and spatially.³⁷ For COVID-19-related losses, which spanned the country and took place over many months, the key question is what caused the underlying losses: Was it a civil authority order; was it multiple civil authority orders; was it the novel coronavirus itself; or was it a series of individual losses separated by time and space that cannot be combined for reinsurance purposes?

No doubt, follow-the-fortunes and follow-the-settlements issues³⁸ will arise if ceding insurers pay business interruption claims and cede them to their reinsurers. But what if a ceding insurer accepts and pays COVID-19 losses based on a determination that the virus is causing direct physical damage to insured property? Is that something reinsurers will also accept?

Not all current reinsurance contracts have the traditional follow-the-fortunes or follow-the-settlements clauses, or the traditional utmost good faith language that older reinsurance contracts often contained. If the reinsurance contract does not have language requiring the reinsurer to follow the ceding insurer’s claims determinations, it is more likely that the cession of a COVID-19 loss under a business interruption cover may be rejected by a reinsurer on the basis that there is no direct physical loss and that COVID-19 is not a covered peril. This is because a reinsurer’s obligation is limited to losses that fall within the terms and conditions of the underlying insurance policy and the terms and conditions of the reinsurance contract.³⁹ But, if the reinsurance contract has a more traditional follow-the-settlements clause, does that make a difference?

Ceding insurers will likely argue that under a traditional follow-the-settlements provision, a reinsurer must follow the ceding insurer’s claims determination and pay the loss.⁴⁰ Reinsurers, on the other hand, will argue that the claims determination has to be made in good faith and businesslike to be followed.⁴¹ The traditional principles of follow-the-settlements support the notion that if the ceding insurer pays a claim reasonably and in good faith, and the claim falls within the terms of the underlying contract and the reinsurance contract, the reinsurer must pay, and the ceding insurer’s claims determination will not be second-guessed.⁴²

Disputes over the cession of COVID-19 business interruption losses, if they happen, likely will focus on whether the loss payment was reasonable and made in good faith and comes within the terms of the ceded insurance contract and the reinsurance contract. Put another way, is the loss

payment and its cession to the reinsurance contract objectively reasonable?⁴³

If the underlying insurance contract contains the virus and bacteria exclusion, it will be very hard for a ceding insurer to seek reinsurance coverage for a COVID-19 claim under those circumstances. If the business income and extra expense coverage, as it normally does, requires direct physical loss of or damage to covered property by a covered cause of loss, the dispute will come down to whether the novel coronavirus caused direct physical damage to property. However, if these provisions are absent, or if the underlying policy affirmatively

Open communications between insurance companies and reinsurers will help reduce disputes.

covers contagions or pandemics, as some policies do, the reinsurance response may be different.

These issues will be exacerbated if legislative intervention forces insurers to pay business income and extra expense losses even if a virus and bacteria exclusion exists and even if there is no direct physical damage to property from a covered peril. When an insurance company denies a claim but a court determines that the policy covers the claim, the loss likely will find its way into a loss cession to a reinsurance contract. Under those circumstances, a reinsurer generally cannot take the position that the court is wrong because the policy does not cover that loss. If an enacted law changes how an insurance policy must respond to a claim, reinsurers likely will have to accept losses ceded to reinsurance contracts based on loss payments made under the force of that law.

What happens if regulatory, political, or business pressure compels a ceding insurer to pay claims on a “voluntary” basis that it would not ordinarily have paid? Most reinsurance contracts do not permit the cession of these voluntary, ex gratia payments.⁴⁴ Will reinsurers feel the same market/regulatory pressure to fall in line? What then happens at the retrocessional level, especially if the retrocessionaires are outside the U.S.? Will non-U.S. reinsurers accept a loss cession of COVID-19 business interruption claims if there is no direct physical loss of or damage to property?

Other disputed issues may include extra-contractual obligations claims for bad faith damages resulting from the alleged mishandling of COVID-19 losses, and whether certain expenses can be ceded to the reinsurance contract—especially declaratory judgment expenses in the ongoing coverage

litigation. Reinsurers may dispute whether the ceding insurer properly investigated the underlying COVID-19 claims in a businesslike manner. Reinsurers may question whether ceding insurers properly reported the COVID-19 claims. Finally, there may be disputes over the sharing of subrogation or other recoveries, including from government programs concerning COVID-19.

Conclusion

The ramifications of COVID-19 on society are significant. Claims being made to insurance companies by policyholders for COVID-19-related losses cover multiple lines of business and millions of insurance policies. Many of these claims, if and when paid by insurance companies, will find their way to the reinsurance market. It is in the reinsurance market where the theory of insurance—the spreading of risk—demonstrates its strength and resilience.

Nevertheless, the nature and complexity of some of the COVID-19 issues raise significant issues for both insurance companies and reinsurers to consider. A careful review of individual insurance policy and reinsurance contract terms and conditions will guide parties as to whether and how claims should be reinsured. Open communications between insurance companies and reinsurers will help reduce disputes and will allow legitimate, covered claims to be paid and reinsured in a timely manner. ◀

Notes

1. INSURANCE LAW PRACTICE ch. 15 (John M. Nonna & Christopher W. Healy eds., 2019).

2. *Id.*

3. L.S. Howard, *Lloyd's Faces COVID-19 Claims from Multiple Insurance Lines, Says CEO Neal*, INS. J. (Mar. 27, 2020), <https://www.insurancejournal.com/news/international/2020/03/27/562590.htm>.

4. Nupur Gambhir, *Does Life Insurance Cover Coronavirus?*, POLICYGENIUS (Sept. 14, 2020), <https://www.policygenius.com/life-insurance/does-life-insurance-cover-coronavirus>.

5. *Introduction to the Workers' Compensation Law*, N.Y. ST. WORKERS' COMPENSATION BOARD, <http://www.wcb.ny.gov/content/main/onthejob/WCLawIntro.jsp> (last visited Oct. 12, 2020).

6. Josh Cunningham, *COVID-19: Workers' Compensation*, NAT'L CONF. ST. LEGISLATURES (Aug. 28, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx>.

7. *Id.*

8. *Id.*

9. Ill. Pub. Act 101-0633, § 10 (2020) (codified at 40 ILL. COMP. STAT. 5/5-144(a)).

10. *See, e.g., O'Neill v. Carnival Corp.*, No. 2:20-cv-06218 (C.D. Cal. filed July 13, 2020).

11. *See, e.g., Serv. Lamp Corp. Profit Sharing Plan v. Carnival Corp.*, No. 1:20-cv-22202 (S.D. Fla. filed May 27, 2020).

12. See, e.g., *Evans v. Walmart, Inc.*, No. 2020L003938 (Ill. Cir. Ct. filed Apr. 6, 2020).

13. See, e.g., *Magna Legal Servs., LLC v. Hartford Fire Ins. Co.*, No. 200500735 (Pa. Ct. Com. Pl. filed May 13, 2020).

14. See, e.g., *French Laundry Partners, LP v. Hartford Fire Ins. Co.*, No. 20CV000397 (Cal. Super. Ct. filed Mar. 25, 2020), removed, No. 3:20-cv-04540 (N.D. Cal. July 8, 2020); *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, No. 2020-02558 (La. Civ. Dist. Ct. filed Mar. 16, 2020).

15. *Business Income Coverage*, IRMI GLOSSARY, <https://www.irmi.com/term/insurance-definitions/business-income-coverage> (last visited Oct. 12, 2020).

16. See, e.g., *Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp.*, 486 S.E.2d 249 (N.C. Ct. App. 1997) (finding no coverage for loss of profits even though car dealership sustained minor property damage as a result of a snowstorm because the interruption in business income was not caused by the minor direct physical loss of or damage to property but by the inaccessibility of the dealership due to the snowstorm).

17. Most property insurance policies include coverage for damages incurred by the suspension of the policyholder's operations because of orders issued by governmental entities or officials that preclude ingress or egress into the policyholder's business because of a covered loss. This is often referred to as civil order coverage. See Douglas Berry & John V. Garaffa, *COVID-19—When Civil Authorities Take Over, Are You Covered?*, IRMI EXPERT COMMENT. (Mar. 2020), <https://www.irmi.com/articles/expert-commentary/when-civil-authorities-take-over-are-you-covered>.

18. See, e.g., *Ins. Servs. Office, Inc. (ISO), Business Income (and Extra Expense) Coverage Form CP 00 30 10 12*.

19. See *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686 (5th Cir. 2011).

20. See, e.g., Amelia Lucas, *Insurers Are Denying Coronavirus Claims. Restaurants Are Fighting Back*, CNBC (Apr. 20, 2020), <https://www.cnbc.com/2020/04/20/insurers-are-denying-coronavirus-claims-restaurants-are-fighting-back.html>.

21. See *COVID-19: Business Interruption General Information*, TRAVELERS, <https://www.travelers.com/about-travelers/covid-19-business-interruption> (last visited Oct. 12, 2020).

22. *Covid Coverage Litigation Tracker*, U. PA. CAREY L. SCH., <https://cclt.law.upenn.edu> (last visited Oct. 12, 2020).

23. See ISO, *Exclusion of Loss Due to Virus or Bacteria Endorsement CP 01 40 07 06*.

24. See Edward Koch et al., *ISO Excluded Coronavirus Coverage 15 Years Ago*, WHITE & WILLIAMS LLP (Mar. 15, 2020), <https://www.whiteandwilliams.com/resources-alerts-ISO-Excluded-Coronavirus-Coverage-15-Years-Ago.html> (discussing ISO's July 6, 2006, circular LI-CF-2006-175).

25. See Christopher Gavin, *Delays, Continuances, and Cancellations: Here's How COVID-19 Is Affecting Local Courts*, BOS. GLOBE (Mar. 13, 2020), <https://www.boston.com/news/local-news/2020/03/13/massachusetts-new-hampshire-courts-coronavirus>.

26. See, e.g., ROBERT HARTWIG & ROBERT GORDON, AM. PROP. CAS. INS. ASS'N, *UNINSURABILITY OF MASS MARKET BUSINESS CONTINUITY RISKS FROM VIRAL PANDEMICS* (2020), <http://www.pciaa.net/docs/>

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27. Mass. S. 2655, 191st Gen. Ct. (2020).

28. Brokers & Reinsurance Mkts. Ass'n, BRMA 78D: Follow the Fortunes (2018), http://www.brma.org/docs/Follow_the_Fortunes-BRMA_78A-D.docx.

29. H.R. 7011, 116th Cong. (2020).

30. See, e.g., Carolyn Casey, *5 States Grant Businesses Immunity from Liability for COVID-19 Claims*, EXPERT INST. (Aug. 31, 2020), <https://www.expertinstitute.com/resources/insights/5-states-grant-businesses-immunity-from-liability-for-covid-19-claims> (reporting that as of June 19, 2020, Louisiana, North Carolina, Oklahoma, Utah, and Wyoming had passed limited liability immunity laws).

31. See Robert M. Hall, *Does Passing Legal Documents through Reinsurance Intermediaries Waive Privilege?* (2016), <https://debrahhalld.files.wordpress.com/2018/02/intermedwaiveprivart.pdf>.

32. See Brokers & Reinsurance Mkts. Ass'n, BRMA 16: Extra Contractual Obligations (2001–2006), http://www.brma.org/docs/Extra_Contractual_Obligations_BRMA_16A-F.doc.

33. Matt Sheehan, *Reduced Capacity Boosts Reinsurance Pricing at US Renewals*, REINSURANCE NEWS (July 2, 2020), <https://www.reinsurancene.ws/reduced-capacity-boosts-reinsurance-pricing-at-us-renewals-willis-re>.

34. See June 1, 2020 *Reinsurance Renewal: The Impact of COVID-19 on Florida Property Catastrophe Pricing*, GC CAP. IDEAS (June 22, 2020), <https://www.gccapitalideas.com/2020/06/22/june-1-2020-reinsurance-renewal-the-impact-of-covid-19-on-florida-property-catastrophe-pricing>.

35. A sole judge clause in a reinsurance contract—for example, “the company shall be the sole judge as to what constitutes an originating cause”—gives broad discretion to the ceding insurer to make certain determinations. See Larry Schiffer, *Adventures in Contract Wording: Jury Still Out on Meaning of “Sole Judge,”* IRMI EXPERT COMMENT. (Oct. 2007), <https://www.irmi.com/articles/expert-commentary/adventures-in-reinsurance-contract-wording>.

36. An aggregation clause in a reinsurance contract allows a ceding insurer to cede a collection of individual but related smaller losses arising from an event or disaster as one single loss occurrence. See Larry Schiffer, *COVID-19 Losses and Reinsurance Aggregation*, IRMI EXPERT COMMENT. (Aug. 2020), <https://www.irmi.com/articles/expert-commentary/covid-19-losses-and-reinsurance-aggregation>.

37. See *Travelers Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London*, 96 N.Y.2d 583, 595 (2001).

38. See Larry Schiffer, *Understanding Reinsurance Terminology—Follow-the-Fortunes*, IRMI EXPERT COMMENT. (Oct. 2001), <https://www.irmi.com/articles/expert-commentary/follow-the-fortunes>.

39. See *Travelers*, 96 N.Y.2d at 596.

40. See *id.*

41. See *Christiania Gen. Ins. Corp. of N.Y. v. Great Am. Ins. Co.*, 979 F.2d 268, 280 (2d Cir. 1992).

42. See *N. River Ins. Co. v. Ace Am. Reinsurance Co.*, 361 F.3d 134, 139–40 (2d Cir. 2004).

43. See *U.S. Fid. & Guar. Co. v. Am. Re-Insurance Co.*, 20 N.Y.3d 407, 420 (2013).

44. See *Christiania*, 979 F.2d at 280.