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The National Council of Insurance Legislators Statement for the Record

U.S. House Committee on Small Business Hearing on

Business Interruption Coverage: Are Policyholders Being Left Behind? May 21, 2020

Chair Velazquez, Ranking Member Chabot, and Members of the Committee, the National Council of Insurance Legislators (NCOIL) appreciates the opportunity to submit this written statement for the hearing on “Business Interruption Coverage: Are Policyholders Being Left Behind?”

NCOIL is a national legislative organization comprised principally of legislators serving on State insurance and financial institutions committees around the nation. NCOIL writes Model Laws in insurance and financial services, works to both preserve the State jurisdiction over insurance as established by the McCarran-Ferguson Act seventy-five years ago and to serve as an educational forum for public policy makers and interested parties. Founded in 1969, NCOIL works to assert the prerogative of legislators in making State policy when it comes to insurance and educate State legislators on current and longstanding insurance issues.

As you know, since the start of this global health emergency, business interruption insurance coverage for COVID-19 has been a highly debated issue. NCOIL has been closely following and communicating with a wide array of stakeholders on this issue, particularly with regard to the federal and state legislative efforts which seek to enact business interruption coverage into existing policies despite an absence of the physical damage required in property policies and/or express exclusions for communicable diseases in those policies.

NCOIL has taken the position that such legislation would not only be inadvisable for policy and economic reasons, but very likely unconstitutional as violating the Contract Clause within Article I of the United States Constitution, which prohibits the Legislature from impairing the obligation of contracts.

It is important to remember that an insurance policy is a contract between two parties. The vast majority of such contracts that include business interruption coverage have this explicit exclusion



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mentioned above for interruptions caused by communicable diseases, and virtually all require physical damage as a precursor to coverage attaching. Accordingly, the rates for these policies were determined with this risk expressly excepted, and companies did not reserve for such claims. Our concern is that for legislatures or Congress to add such coverage after the fact would lead to a run on these companies, because virtually every business would have such a claim and there are no reserves at all to pay them.

We understand that professionals and businesses will be facing unprecedented, dire economic challenges; however, we cannot compound the damage to the broader economy by forcing insurers to pay claims for which they did not contract. To do so could destabilize these insurers and render them unable to pay claims for which they did accept the risk, and did rate & reserve. This could jeopardize the solvency of any number of insurers.

Typically, NCOIL reaches out to urge Congress to abstain from action in the insurance area due to the jurisdiction granted the States under the McCarran-Ferguson Act; however, this truly is a time of national and global emergency that calls out for Congressional action and a federal, national solution. Thus, we suggest an alternative to the legislative proposal mentioned above, one that will both bring relief to professional and business claimants while also maintaining insurance company solvency so they can pay the claims for which they did reserve.

Following the tragedy of 9/11/2001, Congress enacted the Air Transportation Safety and System Stabilization Act and included within it the Victims Compensation Fund (VCF). We urge a similar solution now for the legion of businesses & professionals who are suffering from unprecedented costs from the interruption of their businesses as well as the many associations who have had to cancel their events, virtually all of whom have an exclusion in their business interruption and event cancellation policies for communicable diseases.

In the VCF it was necessary to construct an entire claims adjudication process. We believe this can be avoided for the current emergency. The reason is that these claims, while contractually excluded, are not novel; they are the very type of claims that U.S. insurers have been adjudicating for over a century. Accordingly, we suggest that a Congressional Act creating a COVID-19 Business Interruption & Cancellation Claims Fund (COVID Claims Fund) incorporate the usage of the insurance industry's claims processing systems to handle claims processing for the Fund in order to ensure all claims are validated prior to payment, removing any that do not meet the established criteria. We also would suggest that legislation establishing the COVID Claims Fund be preemptive of any State efforts to mandate business interruption coverage for the virus, for the constitutional reason discussed above.

We are also aware of the proposed "Pandemic Risk Insurance Act of 2020" (PRIA) which would create the Pandemic Risk Insurance Program (PRIP) to provide a federal backstop for insured pandemic losses. While we have not yet completed an exhaustive analysis of PRIA, we note that it is based on the Terrorism Risk Insurance Act (TRIA, now TRIPRA), which NCOIL does support. Accordingly, we believe it is likely that NCOIL will be supportive of PRIA.

However, we do note that PRIA would provide a backstop for insured losses. The losses for which we believe the COVID Claims Fund is necessary are uninsured losses because they fall specifically within the communicable disease exclusion contained in business interruption and

event cancellation policies. PRIA though would operate prospectively, enabling businesses, professionals and associations to procure pandemic coverage in the future because insurers will not exclude it once a federal backstop is in place, much like terrorism insurance became available once TRIA passed.

Therefore, we believe that enacting a PRIA-like measure in conjunction with a COVID Claims Fund would meet the goals of guarding against future harm related to a pandemic or outbreak of communicable disease, and helping those that have already been harmed by COVID-19.

Thank you again for allowing us the opportunity to provide this statement for the record and please know that we are of course available to discuss this further.