COVID-19 Insurance Disputes Need Creative Solutions

By **John Bickerman** (June 23, 2020)

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Absent some coordinated prophylactic measures, litigation over insurance coverage for business interruption resulting from the COVID-19 pandemic will spiral out of control. Thoughtful, creative alternatives to litigation that are deemed fair by all participants could forestall the free-for-all that is gaining steam every day.

Neither carriers nor businesses fully understood the magnitude of the risks that a pandemic like COVID-19 has now created. While the SARS epidemic raised red flags, carriers did not address with objective precision the risk posed by a pandemic. Nor could policyholders be expected to have considered the impact a pandemic like COVID-19 would cause their respective business or the economy.

Neither policyholders nor their carriers are at fault. Yet, both sides are about to embark on protracted litigation that the insurance industry contends exposes it to severe financial hardship if it loses and that policyholders contend is forced upon it because of the insurance industry's wholesale refusal to cover pandemic-related losses. These intractable positions are not sustainable.

In many ways this pandemic resembles a national disaster, and, as such, society must play a role in addressing the consequences, including being a financial backstop. Congress has recognized the role of the federal government and has already authorized aid packages unrivaled in modern history that provide short-term relief to workers and businesses. Proposals have just begun to circulate in Congress to address business interruption insurance. It should not hesitate to act. Thoughtful federal participation could leverage available funds from both businesses and their insurers to avoid bankrupting either group.

A notable example of shared responsibility for catastrophic insurance losses occurred after the 9/11 terrorist attacks. Congress created the Terrorism Risk Insurance Act, a federal program of shared public and private compensation for certain insured losses resulting from acts of terrorism.

The key elements of the TRIA are that (1) losses must exceed a preestablished minimum that rises over time; (2) carriers pay a deductible equal to a percentage of their premiums that is adjusted upward over time; (3) the industry as a whole must cover a certain amount of the losses before federal assistance is available; (4) reinsurance provides a 90% quota share, making carriers liable for 10% of claims; and (5) the federal contribution can be recouped from commercial policyholders through a surcharge.

A second approach would build on the model of mass tort claims facilities that have been widely used as the preferred mechanism for resolving large corporate liabilities for a variety of alleged wrongs. Well-known examples of global resolutions of mass injuries include the 9/11 Victim Claims Fund, the BP Oil Spill fund, General Motors ignition switch defect settlement, and numerous personal injury settlements related to product liabilities.

For business interruption claims, the federal government could participate in the funding of the settlements with insurers. Payments to claimants would be made by using a grid that would incorporate objective criteria to determine payments. Businesses would receive less

in compensation than if they won their cases in court but would also incur less risk and expense.

A procedural approach could supplement the trust fund concept. Specialized mediation and arbitration panels with neutrals that have demonstrated expertise in insurance could be assembled. These forums would use standardized procedural rules that would systematize and expedite the process.

A more ambitious approach would tackle the substance of the coverage dispute and invite key participants to negotiate a global pattern settlement that carriers and their policyholders could adopt. Short of a global plan to adjust claims, establishing a forum and procedures where claims could be mediated or adjudicated would also be extremely advantageous compared to the alternative of 50-state litigation.

Having standardized rules, common discovery repositories, expert neutrals and a well-known, neutral and established forum would certainly reduce legal costs and expedite resolution.

Speed is of the essence. Court litigation is too slow to avert large scale business failures that need funds now to weather a horrible economy. Additionally, litigation will likely result in disparate and inconsistent treatment in different jurisdictions thereby increasing uncertainty. It will take courage for the normally combative participants in coverage disputes to step out of their traditional roles and acknowledge that the normal manner of resolving coverage disputes is itself a very risky proposition and that there is more to gain in exploring nontraditional creative approaches.

History has taught that the key to success is that the procedural processes or substantive compromises must rely on objective and observable criteria. All participants must have skin in the game, any process must be voluntary and provide off ramps if the expected benefits do not materialize, and it must be administered by a neutral third party that has the confidence of the parties and the wherewithal to perform effectively.

To develop a collaborative plan requires negotiation. Like the proverbial three-legged stool, it will only stand if carriers, businesses and the government each participate fairly and no one leg is called upon to shoulder more weight than the others. Gaining the trust of parties to negotiate is a key precondition.

If action is not swift, it's more likely than not that the courts will be flooded. The outcome of litigation could be one side prevailing but at a cost so high that the economic failure of the other side would be a pyrrhic victory. As John Maynard Keynes remarked, "In the long run we're all dead." We cannot afford to wait.

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