



LEGAL COUNSEL

Working Group

April 15, 2020

EXECUTIVE SUMMARY

The Council of Insurance Agents & Brokers' Legal Counsel Working Group convened a virtual meeting to discuss federal and state actions undertaken in response to the novel coronavirus (COVID-19).

The Working Group was chaired by Working Group Chair Andy Impastato, Vice President, Insurance Counsel and Director of Industry Affairs for BXS Insurance, and was attended by over 80 of the insurance brokerage industry's top legal counsels. The virtual meeting was staffed by The Council's General Counsel John Fielding, Chief Legal Officer Scott Sinder, Senior Vice President of Government Affairs Joel Wood, Vice President of Government Affairs Joel Kopperud, and Director of Government Affairs Blaire Bartlett.

FEDERAL UPDATES

Though the Capitol complex is quiet at the moment, the legislative agenda is constantly evolving and evaluating different proposals to stand up the economy and provide aid to industries and sectors hit hardest by COVID-19.

With all eyes on Washington, the Working Group heard from Wood, Kopperud, and Bartlett, on several buckets of federal issues, including:

- Retrospective application of business interruption coverage to the insurance industry;
- The proposed recovery fund (i.e., a fund modeled after the 9/11 Victim Compensation Fund to ensure continuity and promote recovery of struggling businesses that would involve—among other things—voluntary participation by insurers, brokers, third-party administrators, loss adjusters, etc.);
- The prospects of Phase 3B to increase funding for the small business loan programs and the potential for a Phase 4;
- The path forward for a prospective solution for future pandemics (i.e., a Pandemic Risk Insurance Program floated by Representative Carolyn Maloney (D-NY)) that mirrors the framework of the Terrorism Risk Insurance Program; other analogues that may be instructive; and potential roadblocks that such a proposal might face (e.g., cool reception by the carrier community which believes that pandemic risks are uninsurable); and
- Activity in the benefits space (e.g., continuity of health care benefits, COBRA subsidies, paid leave requirements).

As both Wood and Kopperud noted, at this point, the timing surrounding next steps remains uncertain. Please continue to use The Council's [COVID-19 Resource Center](#) as a source of the recent and pending developments at the federal level.

STATE UPDATES

Over the last few weeks, the state insurance regulators and legislators have introduced several new pain points for the industry. For example, legislatures in seven states—Louisiana, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, Ohio, and South Carolina—have introduced/are considering legislation to require retroactive coverage of COVID-19 via business interruption policies.

In Illinois, the Workers Compensation Commission issued an [emergency amendment](#) creating a rebuttable presumption for “front-line” workers (e.g., first responders, health care workers, grocery and pharmacy clerks, funeral service employees, etc.) such that if a front-line employee contracts COVID-19, they will be presumed to have contracted it at work, rendering them eligible for workers’ compensation. State legislatures across the country have also introduced proposals to retroactively codify such a presumption.

Beyond these issues, the Working Group also discussed:

- California’s refund mandate; and
- Premium payment grace periods, associated policyholder qualifications, and notice requirements.

Refund Mandates

On April 13, California’s Department of Insurance issued a [bulletin](#) requiring insurers for certain lines (e.g., private passenger automobile insurance, commercial automobile insurance, workers’ compensation insurance, commercial multiperil insurance, commercial liability insurance, medical malpractice insurance, and any other line of coverage where the measures of risk have become substantially overstated as a result of the pandemic) to make an initial premium refund for March and April to all “adversely impacted California policyholders” within 6 months. The bulletin is silent on its intended impact on the brokerage industry.

The Working Group noted that this step has caused huge concerns and heightened financial risks for the industry, particularly given the lack of clarity/gaps surrounding its terms (e.g., whether it applies to commissions, whether non-admitted markets are subject to the bulletin, whether partial refunds are satisfactory, how a company that is complying with the state’s voluntary forbearance mechanism should address premiums that it is not even receiving in the first instance, etc.). Some members of the Working Group, however, shared the informal guidance that they have received to address some of these outstanding questions, including that:

- The bulletin may not have been inclusive of the non-admitted market, though the Department hopes that non-admitted insurers will comply with the spirit of the guidance nonetheless;
- Some carriers have said that it will not affect commission payments to brokers (though that determination will likely vary from carrier to carrier and may depend on the contract provisions dictating when brokers earn their commissions); and
- If some carriers are forbearing from/deferring premiums, the refund would be offset by the deferral (i.e., the Department does not expect carriers to refund premiums that they are not receiving).

None of these statements have been confirmed by the Department or offered in writing. Ultimately, the Working Group concluded that the burden of compliance lies with the carriers, which are likely to offer responses that run the gamut. What remains to be seen is whether California will receive so much pressure from the industry that it will trigger issuance of a clarification, whether carriers will undertake legal action, and whether other states will follow suit.

Premium Payment Grace Periods

The Working Group also discussed the over forty states that have issued guidance implementing premium forbearance/grace periods. In particular, it discussed:

- The agency billing issue (i.e., how to address billing arrangements where agents and brokers are stuck in the middle of the premium transaction);
- The application of such grace periods to premium finance companies;
- Timing for sending notice of cancellation (i.e., whether to send a notice of cancellation as usual or send them with a date that is after the expiration of the grace period);
- How to address claims paid during the grace period and difficulties associated with retroactive cancellation;
- Application of the grace period to deductible billing, large self-insured plans, etc.;
- Policyholder qualifications (i.e., whether the guidance is limited in application to policyholders who have been affected by COVID-19 or whether it applies to *any* policyholder); and
- Notice requirements (i.e., guidance—like out of New York—requiring carriers and producers to provide notice to the policyholders).

With respect to agency billing, The Council has reached out to ten states to educate them about this payment structure and its potential impact. The regulators, while sympathetic, appear to be extremely reticent to issue anything in writing clarifying their prior guidance. Nonetheless, some regulators have said that if there are disputes, the regulators will intervene on behalf of the broker because the guidance was not intended to leave the broker stuck with this financial obligation.

As with the refund mandate in California, it appears that carriers have much of the control in determining how these obligations impact the broker community. Some carriers have

advised brokers that they will accept relief on a case-by-case basis and will be flexible with the broker on the guarantee.

SEE YOU SOON!

As we all continue to adjust to the new normal, we will be arranging regular conference calls for the Legal Counsel Working Group every two weeks. Additional details are forthcoming, but if you have any questions in the meantime, please email John Fielding at john.fielding@ciab.com.