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Washington Legislature Attempts to Create Coverage for COVID-19 Business Interruption Claims

By Daniel R. Bentson, Bryce J. Adams

The majority of courts across the country have denied policyholder claims for business interruption coverage linked to COVID-19 stay-at-home orders. Consequently, some policyholders seek to use legislation to avoid similar outcomes in pending and future lawsuits. Legislators in Olympia, Washington, recently introduced Senate Bill 5351 to assist policyholders in their efforts to recover business interruption coverage for claims related to COVID-19. If enacted into law, however, the bill would not change the interpretation or undermine the impact of pertinent policy exclusions (e.g., virus, pathogenic organisms, etc.).

SB 5351 is a short bill, which would (among other things):

- Impose a minimum two-year contractual suit-limitations period on all first-party property insurance policies;
- Mandate that coverage grants for "direct physical loss of or damage to property shall be construed to include the deprivation of such property and the loss of the ability to use such property[;]" and
- Apply retroactively to causes of action related to the Washington Governor's February 29, 2020 proclamation declaring a state of emergency due to COVID-19.

The bill's authors claim that these provisions track two recent unpublished trial court decisions that addressed business interruption claims related to COVID-19. But opponents of SB 5351 dispute this characterization of the trial court orders (both of which are currently being appealed) and question the bill's constitutionality. According to the bill's opponents, SB 5351 interferes with the private right to contract, which is protected under the Washington State and U.S. Constitutions. These opponents further question how lawmakers can expect insurers to cover the high volume of claims that SB 5351 would potentially unleash, since the insurers did not charge sufficient premiums or maintain the reserves needed to cover claims arising out of a catastrophic event that occurred everywhere at the same time.

Legislators held hearings on SB 5351 in the Committee on Business, Financial Services & Trade on February 2, 2021. Speakers for and against the bill have included insurer representatives, small business owners, and policyholder advocates. If SB 5351 passes out of committee, it will go to debate before the full Washington State Senate. If the senate passes it, the bill will proceed to the Washington State House of Representatives.

Similar legislative efforts were made in a number of other states in 2020. None of those bills were enacted due, in part, to effective education by the insurance industry regarding the constitutional, legal, and actuarial consequences of retroactively mandating coverage through legislation.