



Via Email to HouseCorporations@rilegislature.gov

January 25, 2024

Representative Joseph J. Solomon, Jr.
Chair, House Corporations Committee
Rhode Island State House
Providence, RI 02903

RE: House 7144 – An Act Relating - To Insurance COVID-19 Pandemic Insurance Recovery Act

Dear Chair Solomon:

The American Property Casualty Insurance Association (APCIA) writes to you to again express our grave concerns regarding legislation retroactively changing insurance contracts to require coverage of business interruption losses¹.

The COVID-19 pandemic at various points, caused the governor to require many businesses to shut down or otherwise curtail their operations. These actions led to discussion over the past several years in Rhode Island and elsewhere, about the potential availability of business interruption coverage under a commercial insurance policy as a source of financial relief for affected businesses.

House 7144 would require insurance companies to retroactively approve claims for business interruption insurance notwithstanding the provisions of the policy. This the fifth session such legislation has been filed here. The bill is similar to a bill introduced in New Jersey and several other states in 2020 that attracted considerable negative attention at the time, but failed to pass. The story was the same in 2021 and 2022 with a decreasing number of states having similar bills filed and all failing to pass. In 2024, Rhode Island is now, for the second time, the only state where a retroactive coverage bill has been filed.

Given the refiling of this legislation and the broader, though noticeably lessening, national discussion of business interruption coverage in relation to the COVID-19 pandemic, this letter provides you with information about business interruption coverage, the catastrophic financial impact of such legislation on insurers, the constitutionally suspect nature of such proposals, and its harmful impact on the state's economy. In short, APCIA continues to strongly oppose H.7144.

Business Interruption Coverage

¹ Representing over 60% of the U.S. property casualty insurance market, APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers. APCIA represents the broadest cross-section of home, auto, and business insurers of any national trade association. APCIA members represent all sizes, structures, and regions, which protect families, communities, and businesses in the U.S. and across the globe. Several APCIA members are located in Rhode Island and many more do business here. Together, APCIA members write almost 70% of the commercial insurance sold in the state.

Business interruption typically covers financial losses such as income and operating expenses when a business is unable to function because of physical damage to the insured commercial property (e.g., when a fire damages a restaurant). The coverage is usually a component part of a commercial property or business owner's policy ("BOP"). Only about 40% of commercial policyholders opt to purchase business interruption coverage (the take-up rate for small businesses is even lower—approximately 30%)². In addition, the standard commercial property policies include a provision that expressly **excludes** coverage for any losses due to viruses and bacteria. This exclusion has been upheld by virtually every appellate court that has considered the issue and trial court activity on COVID business interruption cases has slowed to a trickle.³

As devastating as the business losses caused by the pandemic are, they would not be reimbursable under business interruption insurance. The claims do not, as court after court has held, meet the long-standing initial requirement of being related to physical damage of the insured premises and, perhaps more important, the virus exclusion would apply, meaning insurers are not obligated to pay for any loss or damage caused by the virus.

Business interruption insurance and other commercial policies are not designed to, nor did they contemplate coverage for, closures of businesses due to a global pandemic. At its core, this legislative concept will violate the foundational legal and public policy principle of insurance, that a policyholder and insurer voluntarily contract to transfer prospective risk of loss exposure of the policyholder to the insurer for specifically agreed upon accidental occurrences and for specific types of legal damages.

House 7144 would essentially rewrite existing insurance contracts by retroactively mandating coverage for exposures that had not been contemplated by insurers, properly priced nor paid for by the policyholders. This remains unprecedented. Such a change would profoundly upset the insurance marketplace in the Rhode Island and elsewhere.

Catastrophic Financial Impact on Insurers

Whether mandated business interruption coverage is retroactive or prospectively applied, it will cause catastrophic financial harm for the property casualty insurance industry. Many Rhode Island domestic insurers that write commercial property coverages would suffer significant financial harm and could become insolvent if forced to pay business interruption claims arising out of the COVID-19 pandemic. We

²https://content.naic.org/cipr_topics/topic_business_interruptionbusinessowners_policies_bop.htm#:~:text=Preliminary%20results%20show%20that%20nearly,having%20more%20than%20500%20employees

³ Recent decisions track with the near-unanimous trend of state and federal trial and appellate courts across the country that have rejected policyholder claims seeking business interruption and/or civil authority coverage for losses arising from COVID-19. Pandemic-related claims have now been rejected by every federal circuit court except the D.C. Circuit, which has one case pending; by state high courts in Connecticut, the District of Columbia, Iowa, Louisiana, Maryland, Massachusetts, Nevada, New Hampshire, Ohio, Oklahoma, South Carolina, Washington, and Wisconsin; by intermediate appellate courts in several other states (some of whose supreme courts have declined to review lower court decisions); and by the overwhelming majority of state and federal trial courts. The few outlier decisions have been on non-dispositive procedural grounds and driven by very lenient pleading standards or have adopted coverage theories repeatedly and soundly rejected elsewhere. The United States Supreme Court declined to accept review in a Covid-19 business interruption coverage case where a central question was whether federal courts had sufficiently considered certifying COVID coverage questions to state high courts. Decisions are pending from state high courts in Alaska, California, New Jersey, New York, and Pennsylvania.

estimate that the total cost of business interruption claims for property casualty insurers in Rhode Island businesses with <100 employees could range from: \$188 to \$814 million per month!

In Rhode Island, past business losses and potential continuing losses are astronomical. The annual Rhode Island premium collected for all commercial property policies in the state continues to amount to approximately \$200 million per year--and the business interruption component represents only a small portion of that total. Plus, while it is increasingly unlikely, if other states were to enact similar legislation, the financial chaos will grow exponentially and could spell financial ruin for insurers. This would be especially harmful to Rhode Island as much of the capacity for the insurance markets here is provided by companies based elsewhere.

Insurers must remain in a position where they possess the wherewithal to pay for covered losses from large catastrophic events such as hurricanes and floods and smaller catastrophes such as an auto accident or house fire. The people who rely on their promises to do so should not be put at risk.

Legislatively Rewriting Existing Insurance Contracts Would Be Unconstitutional

In 2020, APCIA engaged Lauren Jones to write a whitepaper entitled: "Constitutional Limits On Retroactively Expanding Insurance Coverage For Losses Related To COVID-19". Given that H.7144 is virtually identical to each of the previously filed bills, the conclusions contained in the paper remain both unchanged and relevant.

Any legislative attempt to rewrite existing property and casualty insurance policies to require the insurers to cover COVID-19 business interruption losses is bound to be void under Rhode Island law.

The property and casualty insurance companies relied on existing law in writing their policies and determining the coverage provided, the premium charged, and the reserves to be maintained to cover the risks they insured. They relied on the validity under existing law of the contract terms in their policies: those very contract terms were approved by the Department of Business Regulations. The General Assembly cannot retroactively change the terms of insurance policies to cover claims that (1) were specifically excluded under the terms of the insurance policies and (2) create immense potential liabilities that did not exist at the time the insurance companies issued the policies to their insureds. Placing the financial burden of the COVID-19 pandemic on property and casualty insurers whose policies expressly do not cover such losses is a clear violation of due process, would be substantially unfair to the insurers, and will not stand up to judicial scrutiny.

A copy of the full whitepaper is included with our statement.

Insurers Are A Vital Component of the Economy

The National Association of Insurance Commissioners (NAIC) provided a good overview of the effects of insurers being required to provide payments for business interruption losses caused by COVID-19 in the following statement issued on March 25, 2020:

. . . [A]s Congress considers further legislative proposals to address the devastating impacts of the COVID-19 pandemic, we would caution against and oppose proposals that

would require insurers to retroactively pay unfunded COVID-19 business interruption claims that insurance policies do not currently cover.

Business interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19 and therefore include exclusions for that risk. Insurance works well and remains affordable when a relatively small number of claims are spread across a broader group, and therefore it is not typically well suited for a global pandemic where virtually every policyholder suffers significant losses at the same time for an extended period. While the U.S. insurance sector remains strong, ***if insurance companies are required to cover such claims, such an action would create substantial solvency risks for the sector, significantly undermine the ability of insurers to pay other types of claims, and potentially exacerbate the negative financial and economic impacts the country is currently experiencing.*** (emphasis added)

This statement also remains relevant today.

To be clear, insurers continue to recognize the importance of business continuity and resiliency. Insurers continue to do their best to conduct operations appropriately and to settle claims fairly. At practical level, many of our member companies continue to work with our valued policyholders and policy makers to ensure that the homes, businesses, and properties of their policyholders remain protected. Insurers remain focused on our promises — paying covered claims for motorists, injured workers, homeowners, renters, and business owners.

For all the above reasons, APCIA opposes H.7144 and requests that the bill, as has been the case in the past several sessions, be held for further study.

Very truly yours,

A handwritten signature in black ink that reads "Francis C. O'Brien". The signature is written in a cursive style with a large initial 'F' and a distinct 'O'Brien'.

Francis C. O'Brien
Vice President, State Gov't. Relations

Attachment