



MIKE HUNTER
ATTORNEY GENERAL

May 18, 2020

The Honorable Donald J. Trump
President of the United States of America
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President,

As the Attorneys General of Oklahoma, Alabama, Alaska, Indiana, Nebraska, South Carolina, and Texas, we write to offer our perspective on business interruption insurance policies in light of the COVID-19 pandemic. In our view, the federal government should not take any action that expands insurance company liability beyond the plain terms of those policies because such redrafting of insurance contracts would cause more harm than good.

The insurance market is based on pricing premiums to allocate risk between a group of purchasers and an insurance company. Several key factors in the price of any particular contract are the cost of the covered harms, the probability of those harms occurring, and the number of contracts likely to be sold covering those harms. The premium of any particular purchaser does not cover the pay-out under the policy. Rather, the combination of all premiums should cover all of the expected risks.

The risk of pandemics is typically not included in the price of business interruption insurance policies. As the name would imply, those policies cover a business's losses due to suspended operations. *See COVID-19 and Insurance*, NAT'L ASS'N OF INS. COMM'RS, at 3.¹ What may not be obvious from the name is that those policies typically require *physical* loss. *See id.* This requirement exists because the policy is written and priced to cover events that cause direct physical damage, like fires or weather events. *See* Julia Kagan, *Business Interruption Insurance*, INVESTOPEDIA, Jan. 29, 2020.²

Customers can generally allocate more risk to the insurance company by purchasing additional coverage beyond the standard business interruption insurance policy. For example, businesses that face damages from floods or earthquakes must pay higher premiums to include that coverage in their policy. Some businesses also pay higher premiums to have their insurance company cover their losses if a utility company or a key supplier faces interruption.

Pandemic coverage is such an expensive addition to business interruption insurance premiums that some insurance companies have never offered to cover it. They view pandemics as “fundamentally uninsurable” because of the pricing that would be necessary to account for the risk and guarantee pay-

¹ <https://content.naic.org/sites/default/files/inline-files/Insurance%20Brief%20-%20Covid-19%20and%20Insurance.pdf>

² <https://www.investopedia.com/terms/b/business-interruption-insurance.asp>

outs to anyone affected. *See, e.g.,* Kurtis Ming, *Coronavirus Battle: Chef Thomas Keller Suing Insurance Company For Denying Claim*, CBS SACRAMENTO, Apr. 17, 2020.³ Thus, after SARS affected businesses in 2002-2003, most insurance companies revised their policies or added exclusions to confirm that their policies do not include coverage for communicable diseases. *See* Credit FAQ: How COVID-19 Risks Factor Into U.S. Property/Casualty Ratings, S&P Global, Apr. 27, 2020.⁴

Other insurance companies viewed pandemics as insurable and have calculated a commensurate high premium for customers that wanted to add that coverage to their agreement. *See Wimbledon Shows How Pandemic Insurance Could Become Vital for Sports, Other Events*, Insurance Journal, Apr. 13, 2020.⁵ As you are no doubt aware, such a policy was purchased by the organizers of the Wimbledon tennis tournament, who paid the high premium of \$2 million per year for seventeen years of coverage. *See id.* Both they and their insurance company allocated the risk between them, and now the insurance company will pay almost \$142 million to honor that agreement. *See id.*

Our concern is that certain parties are trying to alter the terms of these clear business interruption policies. We believe that a legal system must honor the contractual aspect of any insurance policy to protect the availability of insurance at affordable prices for everyone. If a business paid for pandemic coverage, we would not hesitate to hold accountable any insurance company that unfairly avoided paying the amount owed under the contract. But if a business paid for a policy that *excluded* pandemic coverage, government officials should not force insurance companies to give that business a benefit it did not purchase under the contract.

We recognize that certain business interruption insurance policies may not fall into a clear category. While most insurance companies have explicit exclusions regarding communicable diseases, some businesses have indicated their policies do not explicitly address communicable diseases or pandemics. If that is true, we trust that those few cases can be resolved in view of the price paid and a fair reading of the policy language at issue, as one normally would engage in contract interpretation.

A critical aspect of the rule of law in our society is creating the stability that comes from knowing that laws and contracts will be enforced as written, not according to what we wish they said after-the-fact. Altering insurance law to cover all pandemic claims under business interruption policies would devastate the capital stores for paying other insurance claims. The cost of coverage for all small businesses with fewer than 100 employees is between \$255 billion and \$431 billion per month of the pandemic. *See APCLA Releases Update to Business Interruption Analysis*, AM. PROP. CASUALTY INS. ASS'N, Apr. 28, 2020.⁶ Covering all small businesses with fewer than 500 employees involves even larger claims, of \$393 billion to \$668 billion per month. *See id.* Just two months of coverage for the pandemic could require more than the entire \$800 billion surplus cash of all U.S. home, auto, and business insurers. *See id.*

The resulting harm from draining those cash reserves would undermine any benefit of covering pandemic claims. Businesses in our states cannot afford the drastic increase in premiums that would be needed to recover funds after that large pay-out.

³ <https://sacramento.cbslocal.com/2020/04/17/coronavirus-thomas-keller-insurance-claim-denied/>

⁴ <https://www.spglobal.com/ratings/en/research/articles/200427-credit-faq-how-covid-19-risks-factor-into-u-s-property-casualty-ratings-11454312>

⁵ <https://www.insurancejournal.com/news/international/2020/04/13/564598.htm>

⁶ <http://www.pciaa.net/pciwebsite/cms/content/viewpage?sitePageId=60522>

The pandemic harmed everyone, and all of society should work together on the recovery rather than placing unjust and financially crippling burdens on one industry. Altering past agreements to favor some industries over others will ultimately harm our economy as a whole. We believe that the federal government should focus on solutions that help the entire economy. The federal government should not attempt to force insurance companies to the brink of insolvency by expanding their liability beyond the plain terms of business interruption insurance policies.

We appreciate your leadership in responding to the COVID-19 pandemic and your consideration of our comments on this aspect of the response. We look forward to continuing to work in partnership on our economic recovery.

Respectfully,



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