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Viewpoint: What Do Power Outages, Wildfires, and Vaping Bans Have in Common?

At the outset, power outages, wildfires, and vaping bans do not appear similar at all, but in the rush to protect consumers and constituents from harm, companies and state legislators may be creating an entirely new, uninsured claim type.

Insurance Services Office provides the insurance industry with standardize wordings for policies. Carriers use the ISO forms as a base to build a policy for its insureds. Although it is common for insurers to write their own policies, called ‘manuscript’ forms, this article will focus on the standardized, base forms for commercial property and general liability.

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Pacific Gas & Electric, a large California utility provider, began cutting power to nearly 800,000 customers across northern and central California on October 9, 2019. PG&E wanted to reduce the potential of wildfires caused by the 60-70 mph Santa Ana winds which could push trees into powerlines creating wildfire inducing sparks. San Diego Gas & Electric also cut power to its customers; at the time of this article, Southern California Edison is contemplating doing the same.

PG&E’s power lines have been linked to the deadliest and most destructive wildfire in the state’s history. Despite PG&E’s advance notice of power outages, having no electricity creates a burden to businesses such as grocery and convenient stores with refrigerators and freezers. The store has two types of coverage available for reimbursement of product loss and downturn in sales: its business interruption policy and PG&E’s liability policy. The store’s standard business interruption policy would not respond to the loss, because, despite an ‘occurrence’ being present, the policy has an exclusion for the “failure of power…or other utility service supplied to the described premises…” when the power outage happens away from the insured location.[i]

PG&E’s liability carrier would not respond to the store’s claim either. The ISO liability policy responds if PG&E becomes “legally liable” for the damage, but the ISO limits this coverage with the exclusion of “expected or intended injury.” Since PG&E counseled its customers to put perishables on ice, it expects there will be spoiled food during the blackouts. This expectation triggers the liability exclusion. PG&E is still “legally liable” for the losses, but if its liability policy does not respond to the loss, then PG&E would become directly responsible for the claims and would have to pay for the losses out of its own pockets.

PG&E filed for bankruptcy protection, which is important from a claims’ standpoint. If the store had a business interruption policy which responded to off-premises power outages, the carrier would not have a subrogation claim against a bankrupt entity.

Like the convenience stores above, vape stores have the same two policies available. Nearly every day there is a news article about another state temporarily banning part or all of the e-cigarette and vape pen spectrum from flavored tobacco to THC to CBD oils. The pens vaporize a liquid mixture of nicotine/THC/CBD oil, flavorings and other chemicals.Currently seven states have a ban of vape products in some form.[1]

Colorado marijuana regulators have finalized rules for a ban on additives such as Polyethylene glycol (PEG), Vitamin E Acetate, Medium Chain Triglycerides (MCT oil) in vape products.

Vape store owners accuse the government of over-reaching and state they will not be able to continue their business even with a temporary ban of selling vape products. The shop owners point to the fact that it is not legal vape oils that is the problem: it is the illegal additives in the oil which have caused the injuries. The state legislators are hoping to use the ban period to separate the chaff from the grain.

If it is illegal additives coming from an illicit market that are causing the injuries, then stores selling legal products would not have insurance policies to cover these losses. There is not an "occurrence" for a business interruption claim; therefore, the store's business interruption policy cannot respond to its need for income to sustain it during the ban. Further, if the store does not sell vape pens or oils with illicit materials, its product liability policy would not respond for the same reason—an occurrence has not taken place on a defective product—assuming the insured could make a claim on its own liability policy, which it cannot.

It may seem litigation against the state is the only option for these business owners. Litigation, even on a fast track, can take years to resolve. The bans are for a few months; so, suing the states may be a pyrrhic victory since the ban would be lifted by the time the owners and the states tried their cases. A Michigan judge blocked the states' ban on favored e-cigarettes on Oct. 14.

The Vapor Technology Association filed suit in US District Court in Boston against Massachusetts governor and Public Health Commissioner for its four-month ban. New York and Massachusetts face lawsuits from local vape shop owners who have requested preliminary injunctions to halt the statewide bans. A New York Supreme Court judge will hear arguments on Oct. 18.

The legal aspects of suing a state government or its officers engaged in the protection of public health is beyond the scope of this article, but the specter of sovereign immunity can appear. Governmental policies, if there are ones, may have consent to settle provisions. Alternatively, the states' liability policies may respond to the shopkeepers' claim, but timing is again an issue if the ban continues to remain in effect. Many state liability programs are self-insured, which are not necessarily overseen by the state's department of insurance. This can complicate the issue of the vape store owners filing a claim against the state for loss of business.

The New York State Insurance Department Office of General Counsel opined on July 18, 2003 that an independent adjuster's license "is not required for an entity to adjust property/general liability claims that are within the limits of the self-insured retention program of a commercial property management corporation which acts as a self-insurer for property/general liability claims arising out of its ownership and/or management of properties."[ii]There is no regulatory oversight of the state if it adjusts claims and instructs counsel regarding the defense of lawsuits. Even if the state retained a third-party claim administrator to handle the losses, that firm and the adjuster handling the claim need not be licensed because it does "not adjust claims under a policy of insurance, as all monies used to pay claims are secured directly from the client."[iii]New York believes there is a difference because the adjuster is retained by the self-insured, not an insurer.

Small businesses without the ability to obtain or maintain generators during rolling blackouts may have similar problems in California for their losses against PG&E. Without a policy which would respond to self-induced, liability claims, the utility company may become self-insured for these types of losses. The California Fair Claims Settlement Practices Regulations, Section 2695.1 Preamble states there are 16 settlement practices prohibited by the insurance code. These rules do not apply to a "self-funded or self-insured plan, to the extent it is not covered by insurance, which is lawfully conducting business in this state."

Power outages, wildfires, and vaping bans may not be emerging-market claims, but the way companies and state legislators are reacting to them may have created a need for a different type of coverage. The answer to the riddle that headlines this article is that all three circumstances are a new type of claim for which there is no coverage from the insurance industry's standard ISO forms.

[1]Michigan; New York; Massachusetts; Rhode Island; Washington; Oregon; Montana

[i]ISO, Cause of Loss-Special, CP1030 10/12. B.1.e.(1).

[ii]The Office of General Counsel for New York State Insurance Department. "Re: Adjusting claims for a self-insurer." *Department of Financial Services*, accessed 16 November 2018; https://www.dfs.ny.gov/insurance/ogco2003/rg030719.htm

[iii]Ibid.

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