

MA, NJ, NY, PA, LA and OH, Consider Legislation Clarifying that Business Interruption Coverage Applies to COVID-19 Claims

Coronavirus Legal Advisory

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Lawmakers in New Jersey, New York, Massachusetts, Ohio, Pennsylvania, and Louisiana have proposed legislation clarifying that property policies' business interruption coverage extends to losses attributable to the coronavirus pandemic and social distancing. These bills allow policyholders to avoid costly and unnecessary disputes with their insurers over the meaning and scope of insurer-drafted insurance provisions relating to physical loss and damage requirements, and so-called "virus" exclusions.

New Jersey

The first state to take such action, New Jersey, issued bill A. 3844, requiring property insurers to pay COVID-19 business interruption claims. The bill's accompanying Statement explains that the proposed law is intended to hold harmless that portion of the business community that had the foresight to purchase business interruption insurance for losses sustained as a result of the current health emergency. The bill requires every presently in-force business interruption policy, insuring against loss or damage to property, be construed to cover the perils associated with the "global virus transmission or pandemic" and "the coronavirus disease 2019 pandemic."

Insurers would be required to indemnify, up to a policy's limits, lost business income for the duration of the declared State of Emergency (Executive Order 103 of 2020). The bill offers relief to all commercial insureds with less than 100 eligible employees (i.e., full-time employees working more than 25-hours per week in New Jersey).

Although the bill is opposed by the insurance industry, insurers paying claims may apply to the Commissioner of Banking and Insurance for reimbursement from funds collected pursuant to a special purpose assessment made against all carriers insuring risks in New Jersey. The New Jersey Assembly Homeland Security and State Preparedness Committee approved the bill. The New Jersey Assembly has not yet voted on it.

New York

New York's assembly introduced draft bill A10226 for debate on March 27, 2020. It too requires property insurers to cover business interruption losses (up to policy limits) resulting from the

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COVID-19 pandemic. The New York bill applies to policies offering business interruption and loss of use and occupancy coverage as of March 7, 2020. The bill applies to insureds with less than 100 eligible employees (those working full-time, at least, 25-hours per week in New York).

Massachusetts

On March 24, 2020, Massachusetts introduced Senate Docket 2888, requiring every property insurance policy then effective and offering business interruption coverage to be construed to include “coverage for business interruption directly or indirectly resulting from the global pandemic known as COVID-19, including all mutated forms of the COVID-19 virus.” The bill disallows insurers from denying claims “for the loss of use and occupancy and business interruption on account of (i) COVID-19 being a virus (even if the relevant insurance policy excludes losses resulting from viruses); or (ii) there being no physical damage to the property of the insured or to any other relevant property.” Indeed, this proposed law would effectively eliminate what the insurance industry has announced are its two primary coverage defenses. The bill applies to policies issued to corporate insureds with 150 or fewer full-time, Massachusetts employees. As in other states, an insurer may apply to the commission of insurance for reimbursement from funds collected via assessments to Massachusetts insurers.

Ohio

On March 24, 2020, the Ohio legislature introduced, H.B. No. 589, requiring insurers to cover “losses attributable to viruses and pandemics” under their property policies’ business interruption coverage. This proposed law applies to policies issued to Ohio businesses with 100 or fewer eligible employees. Like similar proposals, the Ohio bill would allow insurers paying claims for COVID-19 losses to seek reimbursement from funds collected by the Ohio Superintendent of Insurance from assessments to insurers engaged in the business of insurance in Ohio.

Pennsylvania

On April 3, 2020, the General Assembly of Pennsylvania introduced H.B. No. 2372, providing an insurance policy that insures against loss or damage to property, “which includes the loss of use and occupancy and business interruption, ... shall be construed to include among the covered perils under the insurance policy coverage for business interruption due to global virus transmission or pandemic.” This bill requires the broadest or greatest limit, and lowest deductible be afforded an insured with business interruption losses. The proposed law applies to policies in effect on March 6, 2020, and issued to insureds with fewer than 100 eligible employees. Like other states, this bill enables insurers to apply to the Insurance Commissioner for relief and reimbursement, which may be paid through “special purpose apportionments” or funds the Commissioner collects from property and casualty insurers.

Louisiana

The Louisiana House and Senate each introduced bills confirming business interruption coverage. These bills apply to policies in effect on March 11, 2020. House Bill No. 858 regards covered perils “due to global virus transmission or pandemic” to be covered. Senate Bill No. 477 includes as covered perils interruption “due to imminent threat posed by COVID-19.” The Senate bill is not limited to small businesses, although the House bill applies to insureds with less than 100 full-time Louisiana employees. Unlike other states, neither bill provides an express mechanism for an insurer to seek reimbursement. The Senate bill also requires every insurance policy covering business interruption issued on and after August 1, 2020, to include a notice of all exclusions on a form prescribed by the Commissioner of Insurance.

Takeaways

The insurance industries' objections ignore states' and insurance regulators' proper role in overseeing and controlling risk transfer, the nature and scope of policies issued to their citizens, and the conduct of insurers selling insurance in their states. Indeed, these bills are not the first legislation aimed at protecting policyholders and attending to risk transfer. When thousands of Connecticut homes were affected by crumbling foundations due to the presence of pyrrhotite in concrete, that state responded when insurers refused to accept this risk. The state recognized that repairing these homes typically required replacing the entire foundation, at a cost exceeding \$100,000, and offered relief. The Connecticut General Assembly created the Connecticut Foundation Solutions Indemnity Company to reimburse qualified homeowners from funds, in part, collected from insurers and a surcharge placed on homeowners insurance policies issued in the state.

Today, small businesses are undeniably suffering. These policyholders purchased business interruption coverage, paying a premium for their respective insurers' promise to reimburse them when they suffered loss of business revenue because they could not use their property or conduct their operations. They should not now have their losses compounded by having to battle insurers for the insurance coverage due them.