

# **New Jersey, Ohio and Massachusetts Legislatures Attempt to Mandate Eradication of “Virus Exclusion” in Business Interruption Policies**

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On March 16, 2020, the New Jersey Legislature proposed Assembly Bill [3844](#), which seeks to force insurers to pay COVID-19 business interruption claims notwithstanding a “Virus or Bacteria” exclusion. The law would apply to existing insurance policies as of March 9, 2020, that insured businesses with fewer than 100 eligible employees (full-time who work 25 or more hours per week) in New Jersey.

The draft bill specifically provides:

Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption in force in this State on the effective date of this act, shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic ... concerning the coronavirus disease 2019 pandemic.

## **Background**

In 2006, property policies adopted a mandatory exclusion for business interruption policies designed to expressly preclude coverage for losses related to viruses or bacteria. Specifically, the Insurance Services Office exclusion, CP 01 40 07 06, “Exclusion for Loss Due to Virus or Bacteria,” precludes first-party coverage for “loss or damage caused by or resulting from any virus ... that induces or is capable of inducing physical distress, illness or disease.”

Through this draft bill, the New Jersey Legislature seeks to eliminate the virus exclusion from policies, requiring property insurers covering risks in New Jersey to pay for business interruption losses due to coronavirus even if their policies expressly excluded coverage for losses due to viruses. In proposing such a bill, New Jersey wants to create coverage for COVID-19 losses, even under policies where coverage is specifically excluded, based on the Legislature’s concern over the virus exclusion in the policies. The Legislature is essentially attempting to force private insurers to

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provide coverage and financial resources to small businesses that purchased insurance policies containing a virus exclusion.

On or about March 19, 2020, New Jersey's proposed bill was "held indefinitely." The bill was removed from the legislative calendar, reportedly to allow legislators and insurers to weigh in on the bill's provisions and impact.

"The bill is thus on pause for now and may or may not be voted on in the future," said Dana Walter, spokeswoman for Assemblyman Roy Freeman, one of the proposed bill's principal sponsors, in an email late Thursday, March 19. Continuing, the email stated: "However, the Assemblyman is continuing to work with fellow legislators and insurance trade groups on hopefully devising a new solution – whether legislative or administrative within the industry – to still help business owners recover their losses."

Importantly, it is worth noting that if the bill proceeds in the future, it will pose potential violations of the Contracts/Impairments Clause of Article I of the United States Constitution, which provides "[n]o state shall ... pass any ... Law impairing the Obligation of Contracts." (U.S. Const., Art. I, § 10, *emphasis added*.)

In essence, the proposed law requires insurers to provide coverage for business interruption losses in circumstances where the relevant insurance contracts do not cover, and in fact expressly exclude, such losses arising from a virus. Such a law, on its face, appears to substantially impair the rights and obligations of the parties to such a contract in violation of Article I of the United States Constitution. One of the few limitations on state power embedded directly in the text of the Constitution, the Contracts Clause, was designed to preclude states from enacting laws that abridge contracts as "contrary to the first principles of the social compact, and to every principle of sound legislation." (*The Federalist* No. 44 (Madison).)

To address such issues, the Supreme Court has employed a two-part test to determine the constitutionality of proposed state laws that mandate the eradication of policy provisions and exclusions. First, the Court examines whether the state law has operated as a "substantial impairment" of a contract. Unless this showing is made, the Court will uphold the statute and will not proceed to the second step. The second step is a review of the "purpose and necessity" of the state law. *El Paso v. Simmons*, 379 U.S. 497, 506-507 (1965); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

## Ohio and Massachusetts Follow New Jersey

Additional jurisdictions have proposed bills similar to New Jersey's Assembly Bill 3844. On or about March 24, 2020, Ohio and Massachusetts directed similar bills, H.B. [589](#) and S.D. [2888](#), respectively, which would retroactively expand business interruption policies to cover losses in connection with the outbreak of the coronavirus.

The Ohio bill would apply to business interruption policies held by Buckeye State-based companies with 100 or fewer full-time employees, provided the policies were issued by March 9, 2020, the date of the emergency declaration in Ohio. The Massachusetts bill would apply to policies sold to businesses in the Commonwealth with 150 or fewer full-time employees, so long as the policies were in place by March 10, 2020, the date of the emergency declaration in Massachusetts. The Ohio bill proposes to supersede various terms and conditions contained in business interruption policies, such as exclusions for losses due to viruses and the requirement that an interruption in a policyholder's

operations be attributable to “direct physical loss” or damage to its property. The Massachusetts bill is more specific, asserting that insurers cannot deny business interruption claims based on “COVID-19 being a virus, even if the relevant insurance policy excludes losses resulting from viruses” or “there being no physical damage to the property of the insured or to any other relevant property.”

In light of the proposed New Jersey, Ohio and Massachusetts bills, other jurisdictions may attempt to issue similar mandates on insurers, either through legislative efforts or through a directive from the department of insurance. The recently proposed bills may only be the tip of the iceberg.

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