Published on *The National Law Review* https://natlawreview.com

COVID-19: States Attempt to Shift Economic Burden to Insurance Industry with New Legislation on Business Interruption Coverage

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In recent weeks, an increasing number of state legislatures have taken drastic measures to force the insurance industry to shoulder much of the burden of the economic downturn brought on by the global COVID-19 pandemic. The crux of these bills center on “business interruption” coverage – a type of insurance coverage typically applicable only to losses resulting from physical damage to property, such as that caused by a fire or earthquake, and generally inapplicable to losses caused by viral or bacterial pandemics.

These bills would force many commercial property insurers to provide retroactive coverage to insureds for losses resulting from the COVID-19 pandemic regardless of the policies’ exclusions and the existence of physical damage to the insured’s property and regardless of premiums charged and the underwriting considerations made by the insurance companies when they issued these policies. We are following and tracking what states are doing and the bills that have been introduced to date.

Proposed Bills Require Retroactive Coverage of Business Interruption Losses

Seven states currently have proposed bills that would require commercial property insurers to retroactively cover losses that insureds statewide have accumulated because of the pandemic. As we reported in a recent update, the New Jersey legislature introduced the first such bill, New Jersey Bill A-3844, on March 16. Before it reached the General Assembly, the bill’s sponsors pulled it, reportedly to give insurers and lawmakers more time to discuss a solution. Discussions are still ongoing as the bill has not yet been scheduled for a vote before the General Assembly.

Insurers now face similar proposed legislation in six additional states: Ohio, Massachusetts, New York, Louisiana, Pennsylvania, and South Carolina.

- On March 24, Ohio introduced House Bill 589.
- On March 24, Massachusetts introduced Bill SD.2888, and on April 6, the Massachusetts bill was referred to the Joint Committee on Rules.
- On March 27, New York introduced Assembly Bill A10226. The New York bill was amended on April 8 and again referred to the Insurance Committee.
- On March 31, Louisiana introduced House Bill 858 and Senate Bill 477, which await referral from the House and Senate, respectively.
- On April 3, Pennsylvania introduced House Bill No. 2372, and the bill has been referred to the Committee on Insurance.
- On April 8, South Carolina introduced Bill S.1188, and that bill has also been referred to the Committee of Banking and Insurance.

All draft bills would take effect immediately upon approval. The Louisiana bills stipulate that if the bill is vetoed by the governor and subsequently approved by the legislature, the law would take effect the day following such approval. Massachusetts closed the traditional 90-day gap between the bill's approval date and effective date by declaring the bill to be an emergency law. Ohio also declared its bill to be an emergency measure, allowing the bill to expedite through the legislature.

All of the draft bills would require private insurers to cover business interruption losses not covered by the plain language of their policies and/or were excluded from their policies. The Massachusetts, South Carolina, and newly amended New York draft bills are the only ones to expressly address viral exclusions and/or the physical damage requirement. For example, in the following text, the New York bill has declared viral exclusions in business interruption coverage to be null and void:

Any clause or provision of a policy of insurance insuring against loss or damage to property, which includes, but is not limited to, the loss of use and occupancy and business interruption, which allows the insurer to deny coverage based on a virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease illness, or physical distress shall be null and void[.]

While many of the other draft bills do not contain the same express language, all the draft bills achieve the same result by broadening business interruption coverage more generally.

Minor Variations Among the Draft Bills

While all of the draft bills share the same foundation and other significant common features, the pending bills also present minor differences, as explained below.

Coverage required is limited to policy limits and most are limited to insureds with a certain number of employees. Like the New Jersey bill, the Pennsylvania and Louisiana House draft bills apply to insureds with fewer than 100 full-time employees (i.e. employees working at least 25 hours on a normal week), while the Ohio draft bill applies to insureds employing 100 or fewer full-time employees. Meanwhile the Massachusetts and South Carolina draft bills cover insureds employing 150 or fewer full-time employees. The newly amended New York bill limits coverages to insureds with less than 250 full-time employees. The Louisiana Senate bill, by contrast, does not limit coverage to small businesses with a certain number of employees.

Application date of coverage varies. For example, while most of the draft bills would apply to policies in effect at the time the bill becomes law, the Massachusetts and South Carolina bills would also apply to policies that become effective prior to the date the emergency declaration executive order related to COVID-19 is rescinded by the governor. In contrast, the Pennsylvania bill would only apply to policies already in force on March 6, 2020 – the date of the state's Proclamation of Disaster Emergency.

The Ohio, Massachusetts, New York, Pennsylvania, and South Carolina draft bills include provisions for partial reimbursement from state funds collected from other insurers in the state. Insurers forced to indemnify policyholders under these bills must apply to their state's regulatory authority in order to obtain partial relief or reimbursement. Like the New Jersey bill, the five new draft bills would effectively shift a portion of the business losses resulting from the COVID-19 pandemic to insurers within the state, even if those insurers do not write business interruption coverage. As currently written, the Louisiana bills do not include a similar provision for insurers to acquire reimbursement after indemnification.

The Louisiana Senate bill includes a requirement for notice of exclusions. Every insurance policy including business interruption coverage issued on or after August 1, 2020, must include a notice of all exclusions on a certain form provided by the commissioner of insurance. Once properly signed, the form creates a rebuttable presumption that the insured knowingly contracted for coverage with the stated exclusions.

Potential Legal Challenges

These bills have not yet become law. While the legislation remains pending, insurance companies nationwide have the opportunity to voice the myriad legal challenges this legislation would present. As written, the bills would unilaterally alter the terms of existing contracts, potentially posing violations of the Contracts Clause and other provisions of the U.S. Constitution. Other more practical problems with these bills include the seismic shift of the economic burden of COVID-19 related losses to insurers who did not agree to cover such losses, placing the viability of the insurance industry at risk and further imposing the economic load upon other policyholders through inflated premiums.

More states nationwide may undertake the same kind of extreme legislative measures in the coming days. Schiff's Coronavirus Task Force continues to address the significant business, legal, and economic challenges that accompany the COVID-19 pandemic. Stay tuned for additional Insights on ongoing coronavirus pandemic issues facing businesses.

Pending State Legislation on Business Interruption Coverage in Light of COVID-19

Draft Bill	Date Introduced or Amended	Legislative Status	Cap of Employees	Provision for Reimbursement
Ohio House Bill 589	3/24/2020	Introduced		