

COVID-19: CONGRESS, PENNSYLVANIA, MICHIGAN, AND SOUTH CAROLINA JOIN OTHER JURISDICTIONS PROPOSING LEGISLATION ADDRESSING INSURERS' OBLIGATIONS TO PAY FOR PANDEMIC-RELATED LOSSES

Date: 6 May 2020

U.S. Litigation & Dispute Resolution Alert

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The COVID-19 pandemic has caused devastating financial losses for businesses across the country. Insurers have responded with reflexive denials of coverage. In response, a growing number of jurisdictions are considering legislation that would help policyholders, either by requiring existing property insurance policies to cover certain COVID-19-related losses or by addressing the coverage issues in other ways. The majority of these bills have focused their efforts on protecting small businesses by creating relatively similar provisions that would (1) if necessary, override policy language that may potentially preclude coverage for COVID-19-related losses; and (2) create a reimbursement framework for insurers to share in the cost of covering these claims.

Initially, bills were proposed in the legislatures of New Jersey, Massachusetts, New York, Ohio, and Louisiana.¹ More recently, bills have been introduced in the U.S. House of Representatives and the legislatures of Pennsylvania, Michigan, and South Carolina. These bills are aimed at extending business interruption insurance coverage for certain businesses due to COVID-19-related losses that may otherwise not be covered because of insurers' denials of such claims.² In addition, New York also introduced an update to its prior legislation as well as a new bill aimed at specific businesses in the health care industry.

RECENT CONGRESSIONAL ACTION

On April 14, 2020, Representative Mike Thompson (CA-05) introduced the “Business Interruption Insurance Coverage Act of 2020” (H.R. 6494) in the U.S. House of Representatives,³ which he described as “a bipartisan bill to ensure businesses who purchase interruption insurance won't get their claims denied because of major events, such as the Coronavirus pandemic” Unlike the pending state legislation, the federal bill makes no distinction between small or large businesses—promising instead to require coverage for any company with business interruption coverage regardless of size. The proposed legislation would require, among other things, that any insurer offering business interruption coverage make available coverage, prospectively and retroactively, resulting from: (1) “viral pandemics” and (2) “forced closure of businesses, or mandatory evacuation, by law or order of any government or governmental officer or agency.”⁴ In exchange, the bill would require policyholders to pay for potential premium increases resulting from such coverage to the extent that any such coverage does not “differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other

than those [described above].⁵ Further, H.R. 6494 would void any exclusions that could preclude a policyholder's coverage for any business interruption caused by the events described above.⁶

PENNSYLVANIA

Four different bills have been proposed in the Pennsylvania legislature addressing COVID-19 business interruption coverage: H.B. 2372, H.B. 2386, S.B. 1114, and S.B. 1172.

On April 3, 2020, H.B. 2372 was introduced in the House of Representatives.⁷ The bill shares many similarities with New Jersey bill A-3844. Like New Jersey bill A-3844, Pennsylvania's H.B. 2372 seeks to ensure that insurers provide coverage for business interruption "due to global virus transmission or pandemic" for the "duration of the declaration of disaster emergency" enacted in Pennsylvania.⁸ Similarly, the bill would also require that any property insurance policy that was issued to an insured with 100 or fewer full-time employees, and in effect as of March 6, 2020, which includes coverage for loss of use and occupancy and business interruption, be construed to include coverage for business interruption losses due to COVID-19 or "global virus transmission or pandemic."⁹

On March 23, 2020, H.B. 2386 was introduced in the House.¹⁰ Unlike other proposed state legislation, H.B. 2386 would not require insurers to provide coverage for business interruption losses due to the COVID-19 pandemic. Instead, the bill proposes creating a grant program to fund those businesses that have had their claims denied.

The bill, which was amended on April 21, 2020, would allow businesses employing 200 or fewer employees that have had a COVID-19-related claim under a business interruption policy denied during the duration of the governor's proclamation of disaster emergency to make a claim with the COVID-19 Disaster Emergency Business Interruption Grant Program.¹¹ The bill would require that any business benefiting from this grant program not lay off any employees for the duration of the COVID-19 disaster emergency.¹²

On April 15, 2020, S.B. 1114 was introduced in the Pennsylvania Senate.¹³ The bill would require that a policy providing coverage for losses related to property damage, including losses due to business interruption: "[B]e construed to include among the covered perils coverage for loss or property damage due to COVID-19 and coverage for loss due to a civil authority order related to the declared disaster emergency and exigencies caused by the COVID-19 disease pandemic."¹⁴ S.B. 1114 purports to override any policy language that may bar coverage for pandemic-related losses based on the inherent policy powers of the State to act for the public good in the case of an emergency.

S.B. 1114 would tie a business' potential recovery to its size. Small businesses, defined as those that meet the requirements of 13 C.F.R. § 121 or have received funding through the U.S. Small Business Administration, would receive 100 percent of the policy limits for eligible claims.¹⁵ Other businesses would receive 75 percent of the policy limits for eligible claims.¹⁶ Notably, the bill would grant the Pennsylvania Supreme Court exclusive jurisdiction to hear any challenges to the validity or constitutionality of the bill.¹⁷

On April 30, 2020, S.B. 1127 was introduced in the Senate.¹⁸ What distinguishes this bill from others is that this bill focuses its efforts on creating rules of interpretation applicable to first-party insurance policy provisions dealing with COVID-19 related losses in Pennsylvania.¹⁹ Below is a list of some of the bill's most salient rules of interpretation:

- If a person positively identified as having been infected with COVID-19 has been present in, or if the presence of the coronavirus has otherwise been detected in, a business location, that location are deemed to have experienced property damage.²⁰
- Businesses or organizations located within municipalities where the presence of a person with COVID-19 has been identified, or in which the presence of the coronavirus has otherwise been detected, are deemed to have experienced property damage.²¹
- Similarly, businesses or organizations located within municipalities where the presence of COVID-19 has been identified, with or without the presence of a COVID-19 positive individual, shall be “deemed to have experienced the actual, and not merely suspected, presence of a communicable disease.”²²
- The governor's March 19, 2020 Order, requiring the closure of non-essential businesses, “constitutes an order of civil authority under a first-party insurance policy limiting, prohibiting or restricting access to non-life-sustaining business locations in this Commonwealth as a direct result of physical damage at or in the immediate vicinity of those locations.”²³
- Similarly, the governor's Order constitutes “an order prohibiting ingress to and egress from all non-life sustaining business locations in this Commonwealth as a direct result of physical damage at or in the immediate vicinity of those locations namely, the presence of the COVID-19.”²⁴

If enacted, the bill would apply to all active insurance policies with effective dates on or before March 6, 2020.²⁵ The bill contains a “savings clause” providing that the rules of interpretation in the legislation may be superseded by the mutual intent of the parties as clearly and expressly communicated to each other. Notably, like S.B. 1114, the bill grants the Pennsylvania Supreme Court exclusive jurisdiction to hear any challenges to its validity or constitutionality.²⁶

MICHIGAN

On April 24, 2020, H.B. 5739 was introduced in the Michigan House of Representatives.²⁷ The relatively straightforward bill would require that insurers providing business interruption coverage provide coverage for business interruption for COVID-19-related losses to qualifying policyholders.²⁸ The bill would apply to those policyholders who employ fewer than 100 employees and would be in effect for the duration of the State's declared state of emergency pursuant to Executive Order No. 2020-04.²⁹

SOUTH CAROLINA

On April 8, 2020, S.B. 1188 was introduced in the South Carolina Senate.³⁰ The bill would require that business interruption coverage include, as a covered peril, loss of use and occupancy or business interruption resulting from the COVID-19 pandemic.³¹ The bill would also prevent insurers from denying coverage claims for: (1) COVID-19 being a virus, (2) there being no physical damage to the property of the insured, or (3) losses due to a governmental, or civil authority, order.³²

Like some of the other pending state legislation, the bill proposes a reimbursement framework for insurers who pay for claims pursuant to the act.³³

NEW YORK UPDATE

New York A-10226, which was previously discussed here, has since been amended twice.³⁴ On April 8, 2020,³⁵ the bill was amended to broaden the applicable category of businesses, defining eligible businesses as those employing 250 or fewer employees (in contrast with the initial definition of businesses employing 100 or fewer employees).³⁶ The bill was also amended to include a provision that explicitly overrules any policy provision that would preclude coverage for business interruptions due to a virus or disease.³⁷ Lastly, the bill would now require the automatic renewal of policies providing business interruption coverage that expire during a declared state of emergency due to COVID-19.³⁸ On April 29, 2020, the bill was amended to expand its applicability to policies providing business interruption as well as contingent business interruption coverage.³⁹

In addition, A-10327 was introduced in the New York Assembly on April 22, 2020. The bill aims to secure business interruption coverage for COVID-19-related losses incurred by certain companies that operate in the health services industries.⁴⁰ Some of those companies include mental health outpatient providers and substance abuse treatment providers.⁴¹

CONCLUSION

If enacted into law, one or more of these proposed laws could provide additional relief for eligible businesses seeking to recover COVID-19-related losses. Of course, the insurance industry has given every indication that they will fight against the enactment of any of these bills. Moreover, insurers are likely to raise vigorous legal challenges to their enforcement if enacted. Nevertheless, even if the bills are not enacted, existing business interruption policies, as well as a variety of other insurance policies, may already provide coverage, despite insurer protests to the contrary. Businesses may benefit from a thorough review of their policies to identify potential coverage for COVID-19-related losses.

FOOTNOTES

¹ For a description of these earlier bills introduced in New Jersey, Massachusetts, New York, Ohio, and Louisiana, see Frederic J. Giordano, Steven P. Wright, Christopher J. Valente, Michael R. Creta & Reymond E. Yammine, *COVID-19: Growing Number of U.S. States Propose Legislation Requiring Insurers to Pay for COVID-19-Related Losses Incurred by Small Companies* (Apr. 6, 2020).

² While many policyholders reasonably believe that coverage for business interruption losses resulting from COVID-19 already exists under their property and business interruption insurance policies, the bills, if passed, would streamline access to coverage for many businesses.

³ H.R. 6494, 116th Cong. (2020).

⁴ *Id.* § 2(1).

⁵ *Id.* §§ 2(2), 3(c).

⁶ *Id.* § 3(a).

⁷ H.B. 2372 (Pa. 2020).

⁸ *Id.* § 3(b).

⁹ *Id.* § 3(a)–(c).

¹⁰ H.B. 2386 (Pa. 2020). Although the statement accompanying H.B. 2386 reasons that unknown sources have indicated that coverage for such losses would not be available, many policyholders believe that, notwithstanding the legislature's understanding of the insurance industry's position, coverage for business interruption losses resulting from COVID-19 already exists under certain property insurance policies.

¹¹ *Id.* § 3(b)–(d).

¹² *Id.* § 3(e).

¹³ S.B. 1114 (Pa. 2020). K&L Gates' partner John Sylvester provided his analysis of the bill in a recent article. See John Sylvester, *Pa. COVID Insurance Bill Differs From Other States' Proposals*, LAW360 (Apr. 19, 2020).

¹⁴ *Id.* § 4(a).

¹⁵ *Id.* § 4(b).

¹⁶ *Id.*

¹⁷ *Id.* § 7.

¹⁸ S.B. 1127 (Pa. 2020).

¹⁹ *Id.* § 3.

²⁰ *Id.* § 7(a).

²¹ *Id.* § 7(a)–(b).

²² *Id.* § 8(a)–(b).

²³ *Id.* § 9.

²⁴ *Id.* § 10.

²⁵ *Id.* § 12.

²⁶ *Id.* § 13.

²⁷ H.B. 5739 (Mich. 2020).

²⁸ *Id.* § (1)–(3).

²⁹ *Id.*

³⁰ S.B. 1188 (S.C. 2020).

³¹ *Id.* § 1.

³² *Id.* § 1(A).

³³ *Id.* § 1(C)–(E).

³⁴ A. 10226 (N.Y. 2020), <https://www.nysenate.gov/legislation/bills/2019/a10226A>.

³⁵ The Senate version of A-10226, S.B. S8211, is also currently under committee review. S.B. S8211 (N.Y. 2020).

³⁶ *Id.* § 1(e).

³⁷ *Id.* § 1(c).

³⁸ *Id.* § 1(b).

³⁹ A. 10226B (N.Y. 2020).

⁴⁰ A. 10327 (N.Y. 2020).

⁴¹ *Id.* § 1(c).

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