COVID-19: GROWING NUMBER OF U.S. STATES PROPOSE LEGISLATION REQUIRING INSURERS TO PAY FOR COVID-19-RELATED LOSSES INCURRED BY SMALL COMPANIES

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Businesses around the world are currently reeling from the economic impact of the coronavirus ("COVID-19") pandemic. In an effort to mitigate the financial effects of the virus, a growing number of U.S. states have proposed legislation that would require existing property insurance policies to cover certain COVID-19-related losses incurred by small businesses. Massachusetts, New York, Ohio, and Louisiana have recently joined New Jersey [1] and introduced such bills, all of which contain similar requirements. If enacted, and if they survive legal challenges, [2] the pending legislation may provide small business policyholders with a new avenue to recover some of their losses.

MASSACHUSETTS

On March 24, 2020, the Massachusetts Senate introduced S.D. 2888. [3] If passed and enforced, the legislation would require any property insurance policy that includes business interruption coverage in force in Massachusetts to be "construed to include among the covered perils under such policy 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." [4]

Unlike the other state bills discussed below, S.D. 2888 explicitly states that "no insurer in [Massachusetts] may deny a claim 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." [5]

There are two important limitations in S.D. 2888.

- First, subject to any time limits in the applicable policy, the coverage required by the bill only extends "until such time as the emergency declaration issued by the governor, dated March 10, 2020, and designated as executive order number 591, is rescinded by the governor." [6]
- Second, the bill "only applies to policies issued to insureds with 150 or fewer full-time-equivalent employees in [Massachusetts]." [7] As discussed below, the majority of the other state bills only apply to policies issued to insureds with 100 or fewer full-time employees.

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The bill also creates a framework for insurers who indemnify businesses under the act to seek reimbursement from the Commissioner of Insurance. [8] In turn, the bill authorizes the commissioner to seek reimbursement from Massachusetts insurers who sell coverage for business interruption. [9]

If S.D. 2888 becomes law, insurers who fail to comply with the bill's requirements could face civil liability. S.D. 2888 states that the bill's provisions are "subject to Chapter 176D of the [Massachusetts] General Laws," which prohibits, among other things, insurers from engaging in any "unfair or deceptive act or practice in the business of insurance." [10] A violation of Chapter 176D is significant, as it may amount to a violation of the Massachusetts consumer protection statute, potentially allowing businesses to seek treble damages and attorneys' fees from insurers. [11]

NEW YORK

On March 27, 2020, the New York State Legislature introduced A-10226, which largely tracks the language of its New Jersey counterpart. [12] Like the New Jersey legislation, A-10226 would require property insurance policies that include business interruption coverage issued to companies with 100 or fewer full-time employees to be construed to include coverage for COVID-19-related losses. [13] Additionally, similar to the New Jersey bill, the New York bill provides a process through which insurers can seek reimbursement for the payment of these claims through an insurer-funded pool managed by the Superintendent of Financial Services. [14]

One small difference between the two bills is that the New Jersey bill would apply to policies issued on or before March 9, 2020, whereas the New York bill would apply to policies issued on or before March 7, 2020. [15] The coverage required by the New York bill extends "for the duration of a period of a declared state emergency due to the coronavirus disease 2019 (COVID-19) pandemic[.]" [16]

OHIO

On March 24, 2020, the Ohio General Assembly introduced H.B. 589, which the legislature declared to be an "emergency measure necessary for the immediate preservation of the public peace, health, and safety." [17] More specifically, H.B. 589 seeks to "protect small businesses from catastrophic losses" caused by COVID-19. [18]

H.B. 589 would require that qualifying property insurance policies that include business interruption coverage, issued to companies located in Ohio with 100 or fewer employees, include among the listed perils "coverage for business interruption due to global virus transmission or pandemic during the state of emergency." [19] The bill defines a qualifying property insurance policy as one that insures "against loss or damage to property, which includes the loss of use and occupancy and business interruption, in force in [Ohio] on the effective date of this section[.]" [20] H.B. 589 extends "for the duration of the state of emergency" that was "issued on March 9, 2020, to protect the well-being of Ohio citizens from the dangerous effects of COVID-19." [21] Similar to the other bills discussed herein, H.B. 589 sets out a process through which insurers who pay business interruption claims under the act could seek reimbursement from the Superintendent of Insurance through a pool funded by all insurers covering risks in Ohio. [22]

LOUISIANA

On March 31, 2020, the Louisiana House of Representatives and Louisiana Senate introduced H.B. 858 and S.B. 477, respectively. [23] If enacted, the two bills would require any property insurance policy that includes business

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interruption coverage in force in Louisiana as of March 11, 2020, to be construed to include coverage for COVID-19-related losses. [24] The coverage required by the Louisiana bills extends from the state of emergency declared by the Louisiana governor on March 11, 2020 until the end of such state of emergency. [25] Unlike the state bills discussed above, neither of the Louisiana bills contain provisions allowing insurers to seek reimbursement for amounts paid to insureds pursuant to the bills' requirements.

There are two notable differences between the two Louisiana bills. First, H.B. 858 only applies to "policies issued to insureds with less than one hundred full-time employees, in [Louisiana]," whereas S.B. 477 does not contain any similar limitation. [26] As of this publication, S.B. 477 is the only state bill requiring business interruption policies to be construed to cover COVID-19-related losses that would apply to all insureds, regardless of their size. Second, S.B. 477 would require every business interruption policy issued in Louisiana on or after August 1, 2020, to include a "notice of all exclusions on a form prescribed by the commissioner of insurance" to be signed by the insured. [27] The signed form would create a "rebuttable presumption that the insured knowingly contracted for coverage with the stated exclusions." [28]

CONCLUSION

It remains to be seen whether these bills will become law and survive the inevitable legal challenges from insurers. Some insurers have raised objections to these bills arguing, for example, that the bills would violate the Contract Clause of the U.S. Constitution, which limits states' ability to interfere with private contracts. If passed, the legislation would provide additional tools for small businesses seeking to recover COVID-19-related losses.

Even if the bills are not enacted, however, existing business interruption policies, as well as a variety of other insurance policies, may provide coverage. All policyholders should identify any potentially applicable policies, carefully review the terms of such policies, and then provide their insurers with timely notification of any potentially covered losses. For more information regarding COVID-19-related losses and insurance coverage, please read these previously published alerts.

NOTES

[1] A. 3844, 219th Leg. (N.J. 2020), https://www.njleg.state.nj.us/2020/Bills/A4000/3844_I1.HTM. For more information regarding the New Jersey bill, please see this previously published alert, http://www.klgates.com/covid-19-new-jersey-assembly-introduces-legislation-to-provide-small-companies-with-business-interruption-coverage-for-covid-19-losses-03-20-2020/.

[2] Legal challenge by the insurance industry would appear to be inevitable. *See, e.g.*, Harold Brubaker, *Insurance companies may not pay for business losses from coronavirus. N.J. bill aims to change that,* PHILA. INQUIRER (Mar. 19, 2020), https://www.inquirer.com/health/coronavirus/coronavirus-small-business-losses-insurance-claims-coverage-20200319.html.

[3] S.D. 2888, 191st Gen. Court (M.A. 2020), https://malegislature.gov/Bills/191/SD2888.

[4] *Id.* § 1(a).

[5] *Id.*

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[6] *Id.* § 1(b).

[7] *Id.* § 1(c).

[8] *Id.* § 2.

[9] *Id.* § 3(a). If this were to play out, it would not be unreasonable to expect that any such costs passed along to insurers would, in turn, be passed along to policyholders in the form of higher premiums.

[10] *Id.* § 4; MASS. GEN. LAWS ch. 176D, § 2.

[11] MASS. GEN. LAWS ch. 93A §§ 2, 11.

[12] A. 10226 (N.Y. 2020), https://www.nysenate.gov/legislation/bills/2019/a10226.

[13] A. 10226 § 1. Although the statement accompanying A-10226 reasons that insurance industry sources have indicated that coverage for such losses generally is not 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.

[14] *Id.* § 2.

[15] A. 3844 § 4; A. 10226 § 4.

[16] A. 10226 § 1(a).

[17] H.B. 589, 133rd Gen. Assembly (Ohio 2020), https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-589, § 2.

[18] *Id.*

[19] *Id.* § 1(C). H.B. 589 defines "state of emergency" as the state of emergency declared by Governor Mike DeWine on March 9, 2020 pursuant to Executive Order 2020-01D.

[20] *Id.* § 1(B).

[21] *Id.* § 1(A), (C).

[22] *Id.* § 1(E)–(H).

[23] H.B. 858, 2020 Reg. Sess. (L.A. 2020), https://www.legis.la.gov/legis/ViewDocument.aspx?d=1168297; S.B. 477, 2020 Reg. Sess. (L.A. 2020), https://www.legis.la.gov/legis/ViewDocument.aspx?d=1168164.

[24] H.B. 858 § 1(A); S.B. 477 § 1(A)

[25] H.B. 858 § 1(B), 2; S.B. 477 § 1(B)–(C).

[26] H.B. 858 § 1(C).

[27] S.B. 477 § 2(A).

[28] *Id.* § 2(B).

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