TRAUB LIEBERMAN

COVID-19 BLOG

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Pending Legislation - Update 11/4/20

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The COVID-19 pandemic has led to various stay-at-home orders and declarations of states of emergency across the country. Businesses are being forced to close or limit operations, lay off or furlough employees, and/or vacate office space in the face of the pandemic.

A number of state legislatures have taken steps towards providing small businesses with relief, or at least, the expectation of future relief for losses suffered as a result of COVID-19. Specifically, state legislatures are introducing bills aimed at requiring insurers to provide mandatory insurance coverage for business interruption caused by COVID-19. In general, business interruption coverage is triggered by direct physical loss or damage to property causing business interruption. Business interruption insurance is often subject to an exclusion for viruses. The bills being proposed attempt to alter the terms of existing insurance policies by requiring coverage regardless of whether the policy coverage is triggered.

As of the date of this posting, ten states and Puerto Rico have proposed bills that would mandate coverage for COVID-19-related business losses under business interruption policies. Mandatory coverage contemplated by these proposed bills will certainly spur questions of constitutionality based on the Contracts Clause, retroactivity, and the depravation of right of property.

NEW JERSEY

A proposed New Jersey bill, Assembly Bill No. 3844, would require insurers to construe the COVID-19 pandemic and resulting business interruptions induced by the state of emergency as a covered peril under “every policy of insurance insuring against loss or damage to property, which includes loss of use and occupancy and business interruption.” If enacted, insurers would be forced to indemnify the insured for their business losses during the state of emergency, even if the policy contains a virus exclusion. If enacted, A.B. 3844 would apply to any insured business with less than 100 eligible employees in the state of New Jersey. A.B. 3844 also provides a process for insurers that indemnified their insureds to seek relief and reimbursement from the Commissioner of Banking and Insurance.

A.B. 3844 would be retroactive to the date the Governor of New Jersey declared a Public Health Emergency and State of Emergency, March 9 2020, and would run through the duration of that emergency. Currently, the New Jersey legislature pulled A.B. 3844 from consideration. The sponsor, Assemblyman Roy Freiman, told NJBIZ that this was “an opportunity” for insurers to choose whether or not to provide coverage and then insureds can make their own judgment on the reputations of those companies.

Additionally, on August 24, 2020, the NJ legislature introduced Assembly Bill No. 4551. The bill, if passed, would authorize insurers issuing business interruption insurance against loss or damage to property to offer a rider for global virus transmission and pandemic coverage. It also would require the Commissioner of Banking and Insurance to review and approve any insurance policy rider submitted by an insurer pursuant to this bill. The bill is currently under consideration by the Assembly Financial Institutions and Insurance Committee.

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In order to evaluate the feasibility of such bills as described above, the NJ legislature introduced Assembly Bill No. 4675 on September 17, 2020. The bill would establish the “Commission on Pandemic Insurance Coverage” to effectuate this evaluation. The commission would consist of five members: the Commissioner of Banking and Insurance; two members from the state Senate, to be appointed by President of the Senate; and two members from the General Assembly, to be appointed by the Speaker of the General Assembly. The commission would organize as soon as its members are appointed or no later than 60 days after the bill’s passage. The bill is currently under review by the Assembly Financial Institutions and Insurance Committee.

Lastly, the assembly has introduced Assembly Bill No. 4805. The bill would require the Department of Banking and Insurance to publish on its website a one-page summary of common insurance clauses concerning business interruption coverage that may be used in a commercial insurance policy. An insurer must provide this summary to potential purchasers of, or any policyholders seeking renewal of, a policy that provides business interruption insurance. This condition also applies to current policyholders. Insurers must deliver this summary to current policyholders with business interruption protection within 90 days of the publication of the summary if the policy is in effect on the date that the summary is published. This bill was introduced on October 8, 2020 and referred to the Assembly Commerce and Economic Development Committee. On October 22, 2020, the bill was reported from the Assembly Commerce and Economic Development Committee as a substitute.

OHIO

On March 24, 2020, Ohio introduced House Bill 589 intended to “protect small businesses from catastrophic losses” caused by the pandemic. H.B. 589 is similar to the bill introduced in New Jersey in that it would apply to property insurance policies that include business interruption coverage for companies in Ohio with 100 or fewer full-time employees. The proposed law would require insurers to provide “coverage for business interruption due to global virus transmission or pandemic” subject to the limits under the policy. The proposed law would apply to losses accrued from March 9, 2020, when Ohio issued its state of emergency order, through the duration of the state of emergency order. The law would not apply to policies that go into effect after the law takes effect but before the state of emergency declaration is rescinded. The bill also includes a provision for insurers to seek reimbursement from the Superintendent of Insurance. House Bill 589 is currently under review by the House Insurance Committee.

MASSACHUSETTS

On March 24, 2020, the Massachusetts Senate proposed S.D. 2888, which provides expanded protections for insureds in addition to those included in the proposed bills in New Jersey and Ohio. S.D. 2655 (referred to by some news sources as S.D. 2888) specifically states that insurers may not deny a claim under this law for policy exclusions for viruses and lack of physical damage to the property. S.D. 2888 would apply to insured businesses with 150 or fewer full-time employees. S.D. 2888 would apply when passed and also apply to those policies that go into effect after the law but prior to the date that the emergency declaration is rescinded. The Massachusetts bill similarly would allow for insurers to receive restitution and repayment from the commissioner of insurance. S.D. 2888 is under review by the Massachusetts Senate committee on Financial Services.

NEW YORK

On March 10, 2020 the New York Department of Financial Services (NYDFS) issued an order requiring property and casualty insurers to explain the benefits and protections their policies provide in regards to COVID-19. Under the order, insurers are required to supply NYDFS with the insurer’s volume of “business interruption coverage, civil authority coverage contingent business interruption coverage and supply chain coverage” at the time of the Order. Insurers must also create an explanation of the coverage offered in each policy in regard to COVID-19 “both presently and as the situation could develop” in a way that is “suitable for policyholder review.”

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On March 27, 2020, the New York Assembly proposed A-10226. The bill has been amended twice and is now referred to as A-10226B. The proposed law would force property insurance policies containing business interruption coverage issued to companies with 250 or fewer full-time employees to include coverage for losses related to COVID-19. As of the most recent amendment on April 29, 2020, the bill now also applies to policies providing business interruption as well as contingent business interruption coverage. The bill explicitly nullifies exclusions in applicable policies "based on virus, bacterium, or other microorganism that causes disease, illness, or physical distress." If enacted, A-10226B would apply to applicable policies in effect beginning on March 7, 2020. The proposed bill also allows for insurers to seek relief and reimbursement from the superintendent of financial services based on procedures to be established. A-10226 is under review by the New York Assembly's Insurance Committee.

LOUISIANA

On March 31, 2020, both the Louisiana House and the Senate put forth bills, House Bill 858 and Senate Bill 477, respectively, which would force insurers to cover business interruption losses due to COVID-19. The Louisiana Senate also introduced for consideration Senate Bill 495, which calls for a compensation fund that would provide insurers that participate in the fund bad faith immunity.

House Bill 858 is essentially identical in concept to the bill proposed in New Jersey. H.B. 858 would apply to policies issued to insured businesses with less than 100 full-time employees. H.B. 858 would apply retroactively to policies in force as of March 11, 2020, the date on which Louisiana declared a state of emergency. H.B 858 does not contain any provisions allowing for reimbursement to insurers for claims made pursuant to this proposed law. HB 858 is pending before the House Insurance Committee.

Senate Bill 477 is also almost conceptually identical to the bill proposed in New Jersey, except it does not provide a set number of employees an insured must have to qualify for forced coverage. S.B. 477 would also require that any policy issued in Louisiana after August 1, 2020 which covers business interruptions include a notice of all exclusions in the policy which must be signed by the insured. A signed notice would create "a rebuttable presumption that the insured knowingly contracted for coverage with the stated exclusions." S.B 477 also does not contain any provisions allowing for reimbursement to insurers for claims made pursuant to this proposed law. On May 15 an amended Senate Bill 477 was proposed. The amended bill removes the requirement for insurers to retroactively provide coverage for business interruption as a result of the pandemic, and, instead, mandates that all policies issued after January 1, 2021 include a notice of exclusions. SB 477 passed by a vote of 31 yeas and 4 nays in the Senate and was sent to the House for consideration. SB 477 is now under review by the House Insurance Committee.

Senate Bill 495, if enacted, would create a private Business Compensation Fund to "expedite certain property insurance claims, resolve disputes, and provide coverage for losses sustained as a result of the COVID-19 pandemic." S.B. 495 would require that an insurer who elects to participate submit the greater of $50 million or 80% of the aggregate policy limits for commercial policies issued in Louisiana during the state of emergency. By participating in this fund, the insurer would be immunized from bad faith claims brought by insureds under proposed law. SB 495 is under review by the Senate Insurance Committee.

PENNSYLVANIA

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On April 3, 2020, the Pennsylvania House of Representatives introduced House Bill No. 2372 known as the “Business Interruption Insurance Act.” H.B. 2372 would require insurers to include “global virus transmission or pandemic” among the covered perils for business interruption coverage. The coverage under H.B. 2372 would require insurers to indemnify insureds “subject to the broadest or greatest limit and lowest deductible afforded to business interruption coverage under the insurance policy, for any loss of business or business interruption” during the declared state of emergency. The proposed law would apply to policies with business interruption coverage issued to insured businesses in Pennsylvania with fewer than 100 full-time employees. The policies must have been in force as of March 6, 2020, the date Pennsylvania declared the pandemic a Disaster Emergency. Like many of the other bills introduced in state legislatures, H.B. 2372 allows insurers that pay for losses under the proposed law to seek relief and reimbursement from the commissioner. HB 2372 is currently under committee review.

On April 6, 2020, the General Assembly also introduced House Bill 2386, which would create the COVID-19 Disaster Emergency Business Interruption Grant Program to provide “continuing operation of businesses during and after the COVID-19 disaster emergency.” The first eligibility requirement is that the business was denied an insurance claim under a business interruption insurance policy, and the second requirement is that the business was adversely impacted by the pandemic. Grant amounts would not be greater than the amount of the denied insurance claim. H.B. 2386 requires businesses receiving grants to remain open and not lay-off employees with a requirement for repayment plus 10% if those conditions are violated.

On May 27, 2020 an amended version of H.B. 2386 was introduced that removed all of the language of the bill as originally presented. The amended H.B. 2386 does not call for insurers to provided business interruption coverage for COVID-19 related losses, but instead calls for the establishment of a business interruption coverage program designed to encourage businesses to seek appropriate business interruption coverage from providers. The amended version of the bill also provides for “business interruption insurance financial assistance” for qualifying businesses up to 10% of the cost of insurance premiums. On September 1, 2020, the House removed the bill from the table.

Additionally, on April 15, 2020, the Pennsylvania Senate introduced Senate Bill 1114, which would require insurers to construe loss or property damage due to COVID-19 and loss due to civil authority orders related to the declared emergency to be among covered perils for insurance policies insuring against a loss related to property damage, including loss of occupancy and business interruption. Senate Bill 1114 also attempts to address constitutional issues by representing that the legislature may impair contract rights when it has “a significant and legitimate public purpose.” The bill provides that insureds that qualify as a small business receive 100% of policy limits for covered losses, and those not classified as small businesses receive 75% of policy limits for covered losses. The bill would apply to all policies insuring against loss or damage to property, including loss of use and occupancy and business interruption effective in Pennsylvania prior to March 6, 2020. Senate Bill 1114 is currently before the Banking and Insurance Committee.

The Pennsylvania Senate introduced Senate Bill 1127 on April 30, 2020 which creates "rules of construction" for first-party insurance providers that essentially interpret policy terms combined with Covid-19 related issues to provide coverage under "property damage, business interruption, contingent business interruption, time element, [or] contingent time element" language. The Bill states that Covid-19 positive individuals in a building or area of business activity constitutes "property damage". It also finds that any "buildings, offices, retail spaces, structures, plants, facilities, commercial establishments and other areas of business activity located in a municipality" of Pennsylvania where at least one person tested positive for Covid-19 are "deemed to have experienced property damage" and "have experienced the actual, and not merely suspected, presence of a communicable disease." The bill would apply retroactively to insurance policies in effect on or before March 6, 2020. It is currently before the Banking and Insurance Committee.

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The Pennsylvania General Assembly presented House Resolution 842, which calls for the United States Congress to pass legislation that would “channel reimbursement and aid through insurance companies” and provide federal stimulus funds to reimburse those insurance companies that voluntarily paid claims to businesses through business interruption insurance. The Resolution is currently in front of the Insurance Committee of the Pennsylvania House of Representatives.

On August 7, 2020, the Pennsylvania General Assembly introduced House Bill No. 2759 entitled the Business Interruption Insurance Act. The bill would require insurers which provide coverage against business interruptions to include coverage for business interruption losses or damages caused by the Covid-19 pandemic. The bill applies to policies issued to an insured that has fewer than 100 eligible employees and would be in force on the date of the proclamation of the disaster emergency. Insurers that indemnify an insured under this bill may apply to the commission for reimbursement from funds made available through the bill for this purpose. The bill is currently under consideration by the House Insurance Committee.

SOUTH CAROLINA

On April 8, 2020, the South Carolina Senate introduced Senate Bill 1188, which would mandate business interruption coverage for COVID-19 related losses for businesses in South Carolina with 150 or fewer full-time employees. S.B. 1188 would require coverage for any mutations of the COVID-19 virus, as well. S.B. 1188 explicitly states that no insurer may deny claims under the proposed law on account of exclusions for viruses, lack of physical damage to the property, orders issued by civil authority, or acts by the government.

Like many of the other proposed laws, S.B. 1188 provides a mechanism for relief and reimbursement for those insurers that are required to provide coverage under this section. The proposed law would apply to policies in force on the date of approval or those that “become effective prior to the date on which the Governor’s state of emergency declaration expires.” S.B. 1188 is currently before the Senate Committee on Banking and Insurance.

CALIFORNIA

California does not currently have any proposed legislation, but on March 26, 2020, the California Department of Insurance (CDI) issued a survey to all insurers in the state requesting information on their business interruption policies. New York issued a somewhat similar order a few weeks before its proposed legislation was introduced. The survey requests the “volume of business interruption coverage, civil authority coverage, contingent business interruption coverage, and supply chain coverage” issued as of March 26, 2020. For each of the previously mentioned coverages, the CDI requests information regarding:

1. How many policies are under each coverage?
2. How many of those policies are with businesses with more than 500 employees, or “meet your definition of large business”?
3. How many fall under business with less than 500 employees, or “meet your definition of medium size business”?
4. How many policies fall under businesses with less than 100 employees, or “meet your definition of small business”?

All responses were due as of April 9, 2020.

On April 14, 2020, the California Insurance Commissioner issued a Notice requiring all insurance companies, adjusters, producers, other licensees and interested parties to “accept, forward, acknowledge, and fairly investigate all business interruption insurance claims caused by the COVID-19 pandemic.” The Notice cites several regulations under the California Fair Claims Settlement Practices Regulations and requires insurers to follow a framework for approaching COVID-19 related claims.

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First, insurers must “accept any communication from the policyholder or its representative indicating that the policyholder desires to make a claim against a policy that reasonably suggests that a response is expected as a notice of claim.” These notices of claims need to be acknowledged immediately and in no more than 15 days after receipt. After acknowledging the claims, insurers must provide any necessary forms, instructions and reasonable assistance to show proof of claim or support the beginning of an investigation.

The Notice next mandates that all insurers “conduct and diligently pursue a thorough, fair and objective investigation” of the claim. Insurers may not, however, seek information that is not material or reasonably required to determine acceptance or denial. After the investigation, insurers must accept or deny the claim, in whole or in part, immediately and no more than 40 days after receipt of proof of the claim. The amount accepted or denied, if not whole, must be clearly documented.

Finally, any denial, in whole or in part, requires the insurer to provide written documentation to the policyholder of all factual and legal bases for the denial. Any denial for first party claims based on statutes, laws, or policy provisions, conditions or exclusions must include an explanation of the application of the statute, law, or policy provision, condition or exclusion. Any denial of third party claims or dispute as to liability or damages must be done in writing.

While there is no further activity in California at the state level, California Congressman Mike Thompson introduced HR 6494 to Congress which requires insurers to provide business interruption insurance coverage for losses based on any viral pandemic, any forced closure of business or mandatory evacuation, or any power shut-off conducted for public safety. The bill would also nullify any exclusions for business interruption insurance in force on the date of enactment where those exclusions apply to viral pandemics, forced closures or power shut-offs for public safety. The bill goes further than others in that it would preempt any State approval of exclusions under business interruption insurance. Unlike many of the business interruption insurance legislation at the state level, HR 6494 does not include a provision allowing the insurance companies to seek reimbursement from the government. The bill is currently in the House Financial Services committee.

MICHIGAN

On April 24, 2020 Michigan House Bill 5739 was introduced which would require any insurer who issues policies in the state of Michigan to provide coverage for business interruption insurance for loss of business during the state of emergency order. The coverage would apply to insureds with less than 100 full-time employees. The bill, if passed, would apply to those policies in effect on the date of passage. H.B. 5739 is currently before the House Committee on Insurance.

RHODE ISLAND

On June 18, 2020, House Bill 8064 was introduced into the Rhode Island House of Representatives. H.B. 8064 mandates insurers to include coverage for business interruption due to global virus transmission or pandemic in every insurance policy for loss or damage to property that was in force on March 9, 2020. If passed, H.B. 8064 would apply to all business covered by a business interruption policy with less than 100 full-time employees. The bill is currently before the House Corporations Committee.

PUERTO RICO

The Puerto Rican House of Representatives introduced House Bill No. 2469. The bill, if passed, would amend Law 77 of 1957, the Insurance Code, in order to establish that during a government-declared emergency due to a pandemic, a virus or disease exception shall not apply in commercial insurance policies regarding loss due to business interruption if the insured is forced to close their business by order issued by the Government of Puerto Rico as necessary to combat the pandemic. The bill is currently under review by the House Committee on Consumer Affairs, Banking, and Insurance.

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