

NEWS ALERT**INSURANCE RECOVERY GROUP****Proposed Legislation Related to Business Interruption Insurance and COVID-19**

By Rachel Snow Kindseth and Marilyn B. Fagelson | May 14, 2020

Massachusetts and New York are among a growing number of states that have proposed legislation to ensure business interruption insurance coverage for losses related directly or indirectly to the coronavirus pandemic.

The proposed legislation attempts to ensure that policyholders who purchased business interruption insurance can access such coverage for losses related to the COVID-19 pandemic, notwithstanding exclusions for viruses or other challenges to coverage asserted by insurance carriers. In addition, the legislation proposes funding for this coverage through industry assessments in order to spread the risk. The insurance industry has pushed back hard against the legislation arguing that such laws would overwrite private contracts. Proponents of these bills reason that the laws would provide for the creation of funds to reimburse insurers for losses paid by the industry and are another form of government stimulus funding which utilizes the insurance industry to administer the distribution of those funds.

Although it is unknown whether the proposed legislation will be enacted, it is important to recognize that not all policies need this legislative assistance. Some [business interruption policies](#) likely provide business interruption and other [types of coverage](#) for COVID-19 related losses under their terms, as written, and the enactment of legislation would not change such coverage.

Here is a summary of the proposals for Massachusetts and New York. As of the time of this writing, neither proposal has been enacted into law.

Massachusetts

Senate Docket No. 2888 (related to Senate bill 2655) is a proposed Act to provide business interruption coverage for losses due to “business interruption directly or indirectly resulting from the global pandemic known as COVID-19, including all mutated forms of the COVID-19 virus.” The Act requires “every policy of insurance insuring against loss or damage to property, notwithstanding the terms of such policy (including any endorsement thereto or exclusions to coverage included therewith) which includes, as of the effective date of this act, the loss of use and occupancy and business interruption in force in the commonwealth, shall be construed to include” such coverage for COVID-19. “Moreover, no insurer in the commonwealth 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.” The coverage should be afforded for the span of time during which the governor’s emergency declaration (executive order number 591, dated March 10, 2020) is in place, subject to policy limits and the maximum length of time afforded by the policy. The legislation applies to policies issued to businesses with 150 or fewer full-time employees. The Commonwealth’s laws against unfair methods of competition and unfair and deceptive acts and practices in the business of insurance apply to the Act.

Insurance companies can apply to the commissioner of insurance for relief and reimbursement of amounts paid on claims through a fund that is created by the Act, subject to eligibility and reimbursement procedures to be established by the commissioner. The fund will be funded by assessments to all licensed domestic and foreign insurers which sell business interruption insurance in the commonwealth at rates to be established by the insurance commissioner. This annual assessment will be in addition to the assessments authorized by Chapter 26, Section 8C of Massachusetts' General Laws.

As of this writing, the current status of legislation is that it has been referred to the Joint Committee on Financial Services.

New York

New York's Assembly Bill No. A10226B is similar to Massachusetts' proposal but applies to potentially larger businesses because it applies to policies issued to insureds with less than 250 "eligible employees" which is defined to mean a full-time employee who works a normal work week of 25 or more hours. New York's bill provides that every policy of insurance insuring against loss or damage to property including loss of use and occupancy and business interruption, shall be construed to include among the covered perils under that policy, coverage for business interruption during a period of a declared state emergency due to the coronavirus disease 2019 (COVID-19) pandemic. Similarly, contingent business interruption coverage, based upon loss or damage to supply chain, shall also be construed to provide coverage for contingent business interruption during the COVID-19 state emergency. During the period of a declared state of emergency (commenced on March 7, 2020), all such policies shall be subject to automatic renewal at current premium rates. Any provision that creates an exclusion "based on a virus, bacterium, or other microorganism that causes disease, illness, or physical distress shall be null and void; provided, however, the remaining clauses and provisions of the contract shall remain in effect for the duration of the contract term." Coverage is subject to the duration of the state emergency up to the policy limit.

An insurer that indemnifies an insured for a claim under this Act, may apply to the superintendent of financial services for relief and reimbursement by the department from funds collected for this purpose. The superintendent of financial services is authorized to impose a special apportionment to establish a fund based upon proportionate shares of the market for each company based upon premium or premium taxes received on business interruption insurance within the state during the last calendar year.

As of this writing, the current status of legislation is that it is in assembly committee.

The Insurance Recovery Group at Murtha Cullina LLP is closely monitoring these pandemic-related legislative developments and litigation concerning coverage during this rapidly evolving situation. We will provide updates as appropriate. If you have questions about whether your current insurance policies provide coverage for losses arising out of the Coronavirus, do not hesitate to contact us.

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