

Insurance Recovery and Counseling

State and Federal Legislation May Combat Insurance Coverage Denials for COVID-19



By: [Jan A. Larson](#)

As the crisis arising out of the COVID-19 virus and disease continues, efforts are already underway at the state and federal level to enact legislation to help corporate policyholders obtain insurance coverage for business interruption losses and closures arising out of the pandemic. Progress on these pieces of legislation will be closely watched by corporate policyholders everywhere and can serve as a model for those that seek to advocate for similar legislation elsewhere.

I. State Legislative Efforts

Last week, New Jersey became the first state to lead efforts to introduce legislation that would require insurers to provide insurance coverage for business interruption losses arising out of the COVID-19 virus and the resulting disease. While the legislation underwent an initial vote on March 16, 2020 in the New Jersey Assembly Homeland Security and State Preparedness Committee, in which it was approved to be considered on an emergency basis, the legislation was then shelved a few days later on March 19, 2020—reportedly for additional work.

As proposed, Assembly Bill No. 3844, would apply to businesses with less than 100 eligible employees and provides that “every policy of insurance for loss or damage to property, which includes the loss of use and occupancy and business interruption, in force on the date of the executive order [Executive Order 103, dated March 9, 2020], shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic.” The coverage provided pursuant to the bill would still be subject to the limits of liability otherwise available under the policy and would apply to losses incurred during the period of the state of emergency, as declared by the New Jersey Governor beginning on March 9, 2020. Insurers that reimburse policyholders for business interruption claims pursuant to the bill can apply to the New Jersey Commissioner of Banking and Insurance for relief and reimbursement from a collection of funds made available for this purpose. The bill contemplates that such funds will later be repaid by future special purpose assessments on insurance companies.

The motivating factor for the legislation, according to its drafters, is the fact that “[i]ndustry sources have indicated that global virus transmission and pandemic are generally excluded from the list of covered perils under the existing standard business interruption insurance policy.” Assembly Bill No. 3844. Indeed, in July 2006, the Insurance Services Office (ISO) submitted an exclusion for loss due to virus or bacteria that was later approved by regulators and some form of which appears in many commercial property insurance policies today. “This bill is intended to hold harmless a certain portion of the business sector, which had the foresight to purchase business interruption insurance, for losses sustained as a result of the current health emergency, but for which no such coverage is currently offered,” according to the proposed legislation. Assembly Bill No. 3844. In effect then, Assembly Bill No. 3844 appears designed to override application of an existing virus exclusion to business interruption losses caused by the COVID-19 virus and the resulting disease.

It is not clear, however, whether Assembly Bill No. 3844 similarly seeks to supersede the preliminary requirement that a policyholder demonstrate “physical loss” or “physical damage” as a result of a covered cause of loss in order to recover under a commercial property insurance policy. Such policies

commonly require “direct physical loss of or damage to” covered property in order to trigger coverage. As a result, a policyholder must first demonstrate the existence of covered loss or damage and only then seek recovery for business interruption losses flowing from that loss or damage.

To the extent Assembly Bill No. 3844 is *not* intended to supplant the physical loss or physical damage requirement, policyholders may still have available arguments that can be advanced. One argument may be that the presence of the virus on items, surfaces or through person-to-person airborne contact within covered premises can constitute the necessary physical damage. As knowledge regarding the manner in which the virus can be transmitted continues to grow, this appears to be an argument increasingly supported by scientific evidence. Another argument may be that a total loss of use of the property (*e.g.* due to an order of civil authority related to the virus, if the virus is otherwise deemed a covered cause of loss) will trigger coverage even if the property itself is not physically injured on the basis that the use of the phrase “of” before the disjunctive “or” in policies containing the “direct physical loss of or damage to” covered property requirement supports such a construction. *See, e.g., Total Intermodal Services, Inc. v. Travelers Prop. & Cas. Co.*, 2018 WL 3829767 (C.D. Cal. 2018) (holding that “to interpret “physical loss of” as requiring “damage to” would render meaningless the “or damage to” portion of the same clause, thereby violating a black-letter canon of contract interpretation—that every word be given a meaning”); *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, No. 2:12-cv-04418, 2014 WL 667 5934, at *6 (D.N.J. Nov. 25, 2014) (finding that ammonia discharge inflicted direct physical loss of or damage to the insured’s facility because the release, which made the air unsafe, rendered the facility unfit for occupancy); *Motorists Mutual Insurance Co. v. Hardingerl*, 131 F. App’x 823, 824-26 (3d Cir. 2005) (finding that e-coli bacteria in the well of a house, which induced respiratory, viral and skin conditions in the home’s inhabitants, could constitute physical loss or damage to a structure).

II. Federal Legislative Efforts

At the federal level, a bipartisan group of members of the US House of Representatives sent an initial letter on March 18, 2020 to national insurance company and insurance agent/broker associations, including the American Property Casualty Insurance Association, the National Association of Mutual Insurance Companies, the Council of Insurance Agents and Brokers, and the Independent Insurance Agents and Brokers of America, regarding the impact of COVID-19 on corporate policyholders nationwide.^[1]

In the letter, the federal lawmakers “urge[d] [the associations] to work with [the associations’] member companies and brokers to recognize financial loss due to COVID-19 as part of policyholders’ business interruption coverage,” citing the fact that “[b]usiness interruption insurance is intended to protect businesses against income losses as a result of disruptions to their operations and recognizing income losses due to COVID-19 will help sustain America’s businesses through these turbulent times, keep their doors open and retain employees on the payroll.”^[2] The lawmakers further indicated that the federal government is “ready and willing to work with [the associations] on any future measures that might be necessary to see our country through this trying time.”

The letter was met later the same day with an immediate “no” from the national insurance company and insurance agent/broker associations, who responded that “[b]usiness interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19” and instead suggested that the crisis “will require federal assistance that provides funding directly to those American individuals and businesses most in need.”^[3]

Related forward-looking legislative efforts to rebuild the economy are also already underway at the federal level as the long-term economic forecast and impact across sectors, including the insurance industry, become increasingly dire. On March 18, 2020, Congresswoman Maxine Waters (D-CA) announced plans for a voluminous legislative package that would include, in relevant part, provisions for a Pandemic Risk Insurance Act that would function as a federal reinsurance backstop by capping total losses faced by the private insurance industry, much like the Terrorism Risk Insurance Act (TRIA) or the National Flood Insurance Program (NFIP).^[4]

As the pandemic and resulting crisis continue, these existing and proposed pieces of legislation, and soon to be others like them, may prove a necessary step in supporting corporate policyholders, particularly small business owners facing existential threats to their ability to maintain their businesses and continue to pay their employees due to the continued spread of the COVID-19 virus and resulting disease. Policyholders are encouraged to closely monitor the further progress of these existing and proposed pieces of legislation and any similar legislation that arises in other states or at the federal level.

[1] The members of the US House of Representatives that signed the letter include: Nydia Velazquez (D-NY); Andy Kim (D-NJ); Grace Napolitano (D-CA); Marc Veasey (D-TX); Alcee Hastings (D-FL); Rashida Tlaib (D-MI); Gilbert Cisneros (D-CA); Scott Peters (D-CA); Max Rose (D-NY); Kathleen Rice (D-NY); Joe Cunningham (D-SC); Andy Levin (D-MI); Brian Fitzpatrick (R-PA); Jim Hagedorn (R-MN); French Hill (R-AR); Rick Crawford (R-AR); Steve Womack (R-AR); and Bruce Westerman (R-AR).

[2] [https://cunningham.house.gov/sites/cunningham.house.gov/files/wysiwyg_uploaded/Signed Bill Letter_Final.pdf](https://cunningham.house.gov/sites/cunningham.house.gov/files/wysiwyg_uploaded/Signed%20Bill%20Letter_Final.pdf)

[3] [Letter from Chair Velazquez](#)

[4] https://financialservices.house.gov/uploadedfiles/fsc_covid-19_legislative_package_-_03.18.20.pdf

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

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