

New Jersey Legislature Considering Bill To Force Insurers To Pay COVID-19 Business Interruption Claims Expressly Excluded By ISO's "Virus" Exclusion

Insurance Coverage and Bad Faith Alert | March 15, 2020

By: Anthony L. Miscioscia and Randy J. Maniloff

As economic losses from the COVID-19 pandemic continue to mount, there has been much discussion about the potential availability of insurance, especially under Business Interruption policies. In 2006, ISO adopted a mandatory exclusion for its Business Interruption policies designed to preclude coverage for virus-related losses. The New Jersey Legislature is now trying to eliminate it.

According to the State's website, on **Monday, March 16** at 11:00 a.m., the Legislature will begin discussion of draft New Jersey Bill A-3844. If enacted in its current form, that law will force Business Interruption insurers — despite a "Virus" exclusion in their policies — to provide coverage for this crisis, and then spread that financial burden via a new special purpose apportionment on other, non-Business Interruption carriers insuring New Jersey risks.

ISO "VIRUS" EXCLUSION

While the current pandemic is new, the potential that policyholders would look to their business interruption insurance to cover COVID-19-related losses is not. Over a decade ago, the insurance industry took action to curtail insurance coverage for the next pandemic, including of the coronavirus type.

As we discussed in our earlier alert, in 2006, ISO submitted, and state regulators approved, form CP 01 40 07 06, titled "Exclusion for Loss Due To Virus Or Bacteria". That exclusion bars first-party property coverage for "loss or damage caused by or resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease." The form specifically states that it applies to, among other things, "business income," *i.e.*, business interruption. (The American Association of Insurance Services filed a similar exclusion in 2006, FO 0675 10 06, which also is used by some insurers.)

The ISO "Virus" exclusion clearly states that it applies to business interruption losses related to viruses. Indeed, ISO made explicit reference to SARS — another coronavirus — in its filing with state regulators.

PROPOSED NEW JERSEY LEGISLATION

Despite the existence and use of the "Virus" exclusion — approved by state regulators years ago — the New Jersey Legislature is taking the extraordinary step of proposing a new law to not only impose virus coverage on insurers that specifically excluded it, but also apparently on insurers that did not write first-party business interruption coverage at all. If enacted in its current draft form, the law would **force insurers of certain businesses to provide business interruption coverage for COVID-19 losses, even though policies may have the regulator-approved "Virus"**

exclusion.

The proposed law identifies itself as an act "concerning certain covered perils under business interruption insurance" during the 2019 coronavirus disease state of emergency. Specifically, the law would apply to policies that were in force on March 9, 2020 and issued to insureds with less than 100 eligible employees in New Jersey. The proposed law defines "eligible employee" as "a full-time employee who works a normal work week of 25 or more hours."

In its current form, the draft bill provides:

Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption in force in this State on the effective date of this act, **shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic . . . concerning the coronavirus disease 2019 pandemic.**

The bill further states that the coverage required "shall indemnify the insured," subject to the policy's limits, for "any loss of business or business interruption for the duration of declared State of Emergency." This mandate effectively eliminates the "Virus" exclusion from many policies.

The bill is being advanced by Assemblyman Roy Freiman (D) and Assemblyman/Majority Leader Louis Greenwald (D). As with all things COVID-19, the bill is proceeding rapidly. It is currently scheduled to be discussed at the New Jersey Assembly Homeland Security and State Preparedness session **tomorrow – Monday, March, 16 at 11:00 a.m.** If enacted, the law would take effect immediately and will be retroactive to March 9, 2020.

CREATION OF COVERAGE FOR COVID-19 LOSSES

Through the proposed bill, New Jersey seeks to create coverage for COVID-19 losses, even under policies where coverage is excluded, based on the Legislature's concern that ISO has developed, but no states have yet approved, a rider to provide an insured with the option of purchasing coverage for virus-related losses.

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." Although not mentioning the "Virus" exclusion directly, the proposed bill effectively revokes retroactively state regulators' express approval of the exclusion to first-party Business Interruption policies.

In short, the New Jersey Legislature is contemplating forcing private insurers – rather than the state or federal government – to provide a financial lifeline to small businesses that purchased insurance policies containing a "Virus" exclusion.

The draft bill allows insurers, required to pay business interruption claims, to recoup some of their forced payments. An insurer can file a claim for reimbursement with the Commissioner of Banking and Insurance. That claim would be paid out of a new "additional special purpose apportionment" to be imposed on and collected from carriers insuring risks in New Jersey (pursuant to subtitle 3 of Title 17 of the Revised Statutes).

Those new funds, subject to limitations, are to be distributed proportionally based on: (a) the net written premiums received by each company subject to apportionment, as compared to (b) the sum total of all net written premiums received by all companies writing in the New Jersey.

Such a move would transfer the financial burden of COVID-19 to virtually all insurers doing business in New Jersey.

TAKEAWAYS

Insurers and policyholders must watch this proposed New Jersey legislation closely — not only to see what happens in the Garden State but also elsewhere. The New Jersey bill may not be the last such bill in the United States.

Given the concern voiced by the Legislature, it would be fair to ask if this bill merely seeks to avoid application of the "Virus" exclusion (which is problematic enough), or also eliminates the fundamental prerequisite for Business Interruption coverage — that there be direct physical loss of or damage to covered property. The latter should certainly not be the case.

What is clear, however, is that New Jersey's draft bill will not be without attendant costs — to both insurers *and* policyholders. The bill would force insurers to pay for losses unambiguously excluded and for which an appropriate premium was never paid. The costs associated with redistributing such losses to insurers (which were not compensated for taking on the risk) will no doubt reach the public at large, who will pay it back in future premium charges. If such costs should be shared with others, why just those that purchase insurance in New Jersey, instead of the citizenry at large?

If the bill is enacted, it would not be surprising to see challenges under the New Jersey Constitution and/or the Fifth and Fourteenth Amendments to the United States Constitution. A bill seeking to interfere in private contractual relations — by overriding an unambiguous policy exclusion — and to redistribute potentially vast economic losses caused by COVID-19, invites judicial scrutiny of the bill's impact.

If you have any questions or need more information, contact Anthony L. Miscioscia (misciosciaa@whiteandwilliams.com; 215.864.6356) or Randy J. Maniloff (maniloffr@whiteandwilliams.com; 215.864.6311).

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult a lawyer concerning your own situation and legal questions.