

Massachusetts Joins the Fray, Introduces Bill Forcing Insurers to Pay for COVID-19-Related Business Interruption Losses

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Insurance Coverage and Bad Faith Alert

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Before the ink could even dry on our latest alert, regarding Ohio's proposed bill, we learned that Massachusetts legislators had introduced their own COVID-19 bill — making it the third such bill in the span of about two weeks. Doubtless it will not be the last.

The Massachusetts bill — S.D. 2888 — goes further than the New Jersey and Ohio bills we previously reported, and explicitly mandates coverage even in the face of unambiguous policy language:

[E]very 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 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.

Moreover, **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.

Section 1(a) (emphasis added).

The Massachusetts bill then provides that “the coverage required by this section shall cover the insured for any loss of business or business interruption 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emergency declaration issued by the governor, dated March 10, 2020, and designated as executive order number 591, is rescinded by the governor.” Section 1(b). Insurers wouldn't be liable for any payments beyond the “monetary limits of the policy,” and would be subject to “any maximum length of time set forth in the policy for such business interruption coverage.”

While the New Jersey and Ohio bills would apply to insureds with 100 employees, the Massachusetts bill would apply to insureds with “150 or fewer full-time equivalent employees” in Massachusetts. Section 1(c).

Like the New Jersey and Ohio bills, the Massachusetts bill holds out the promise of restitution in the future: it provides that insurers who are required to pay COVID-19-related losses “may apply to the commissioner of insurance for relief and reimbursement from funds collected and made available for such purpose as provided” in the proposed law. The law would require the commissioner to establish procedures for the submission and qualification of claims by insurers which are eligible for reimbursement, and pay those claims with funds collected from “assessments” imposed “against licensed insurers in [Massachusetts] that sell business interruption insurance as may be necessary to recover the amounts paid, or estimated to be paid, to insurers” seeking reimbursement. The nature and mechanics of this future “assessment” are somewhat vague.

Finally, “[f]or the avoidance of doubt,” the Massachusetts bill subjects insurers making these mandatory payments to MASS. GEN. LAWS CH.176D — which, among other things, “provides a list of acts and omissions by insurance companies that constitute ‘unfair claim settlement practices.’”[1]

The Massachusetts bill is, to our knowledge, the third such bill aimed at forcing insurers to pay for business-interruption losses resulting from COVID-19, even if an insurer’s policy unambiguously excludes or does not cover such losses. If passed, the bill would eliminate insurers’ ability to deny coverage for COVID-19 claims based on the absence of physical loss or damage to covered property, and would compel coverage for COVID-19 claims even though the parties explicitly negotiated a virus exclusion when the policy was written.

Legal and constitutional objections are certain. As they make their way through the legislatures, we are tracking the New Jersey, Ohio, and Massachusetts bills closely.

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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](#).

[1] *Capitol Specialty Ins. Corp. v. Higgins*, 2020 U.S. App. LEXIS 7616, at *19-20 (1st Cir. Mar. 11, 2020) (examining Mass. Gen. Laws ch.176D).

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