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'Louisiana, Pennsylvania, and South Carolina Join in Introducing Legislation That Would Force Insurers to Retroactively Cover COVID-19 Losses'

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An increasing number of state legislatures have recently introduced measures that would require the insurance industry to bear much of the burden of business interruption and other losses due to the economic downturn brought on by the global COVID-19 pandemic.

Louisiana, Pennsylvania, and South Carolina are among the latest states to join in proposing legislation that would require retroactive coverage for business interruption losses related to COVID-19, despite relevant provisions in issued policies that exclude losses from viruses. These three states have followed the lead, as we previously reported, of New Jersey, New York, Ohio, and Massachusetts who have proposed similar legislation.

A summary of the more recently proposed legislation is below.

Louisiana

On March 31, 2020, Louisiana State Senator Rick Ward introduced Senate Bill 477 and Representative Royce Duplessis introduced House Bill 858, both of which call for insurers doing business in the state to retroactively cover business interruption claims due to the pandemic.

Notably, SB 477 does not limit the required coverage to policies issued to businesses having more than a certain number of employees, unlike similar bills introduced in other states. This nuance would broaden the range of policies and insurers that would be impacted by the legislation.

SB 477 would also require all insurance policies covering business interruption issued on and after August 1, 2020, to include a notice of all policy exclusions, with the notice to be signed by the insured. The notice would be assumed to be part of the policy when issued and delivered, regardless of whether it is actually attached to the delivered policy. Importantly, a properly completed notice would create a rebuttable presumption that the insured knowingly contracted for coverage with the stated exclusions.

Conversely, HB 858 would apply to policies issued to insureds with fewer than 100 full-time employees. The proposed bill would apply retroactively to insurance policies issued and in force as of March 11, 2020, when the Louisiana governor declared a public health emergency.

Louisiana State Senator Troy Carter also introduced Senate Bill 495, which proposes a business compensation fund that would provide insurers with bad faith immunity for participation in the fund. SB 495 would afford any insurer writing insurance in Louisiana the option to participate in a business compensation fund by depositing the greater of $50 million or 80% of the aggregate policy limits for “all commercial insurance policies” that the insurer has in force in Louisiana on March 11, 2020, or anytime thereafter during the state of emergency. In exchange for participation in the fund, insurers would be immune from claims of bad faith by claimants seeking compensation for losses associated with the COVID-19 pandemic.

The foregoing bills remain under review in legislative committees and have not yet been voted on by the full Louisiana Legislature.

Pennsylvania

Pennsylvania House Bill 2372 calls for any insurance policy that covers loss or damage to property, including the loss of use and occupancy and business interruption, to cover business interruption losses due to global virus transmission or pandemic. If enacted, the legislation would be retroactive for policies in force on March 6, 2020, when a proclamation of disaster emergency was first declared in the state regarding this pandemic.

The proposed bill applies to insurance policies that have been issued to insureds with fewer than 100 eligible employees in Pennsylvania, meaning full-time employees who work a normal week of at least 25 hours. The bill also provides that insurers that pay claims related to business interruption stemming from the coronavirus pandemic can apply to the Pennsylvania insurance commissioner for relief and reimbursement. This proposed bill remains under review in a legislative committee.

South Carolina

SB 1188 would amend the state's 1976 property insurance code to require insurers providing coverage for loss of use and occupancy or business interruption to cover claims directly or indirectly resulting from the global pandemic, "including all mutated forms of the COVID-19 virus." The bill would also prevent insurers from denying claims for loss of use and occupancy or business interruption arising from the virus.

The bill, which was sponsored by Democratic Sens. Marlon Kimpson and Bradley Dunn, and Republican Sen. Sandy Senn, would apply to businesses with fewer than 150 full-time employees. This bill too remains under review in a legislative committee.

Some State Insurance Departments Have Taken Contrary Positions

While we have seen an increasing number of proposed forceful state legislative measures to require the insurance industry to bear much of the burden of the economic downturn brought on by the COVID-19 losses, several insurance departments in other states are speaking up on the side of insurers.

For example, the Arkansas Insurance Department issued an advisory to business owners that COVID-19 is not an insured peril, and there will be no coverage for business interruption. The North Carolina Department of Insurance issued a similar advisory to business owners that standard business interruption policies are not designed to provide coverage for viruses, diseases, or pandemic-related losses because of the magnitude of the potential losses, and that "mandating coverage for this size and type of loss while canceling existing exclusions in the policies would end the very existence of the business interruption insurance market as we know it." The Connecticut Insurance Department, the Maryland Insurance Administration, and the West Virginia Office of the Insurance Commissioner issued nearly identical notices supporting the insurance companies' reasons for denying business interruption claims, stating that "the potential loss costs from such perils [like COVID-19] are so extreme that providing coverage would jeopardize the financial solvency of property insurers." The Georgia Office of Insurance and Safety Fire Commission issued Bulletin 20-EX-3 stating that losses from COVID-19 are excluded losses. The Kansas Insurance Department issued a similar bulletin stating that "it is unlikely that a business policy would cover losses related to COVID-19."

Summary

No state has yet enacted legislation that would compel coverage of business interruption insured losses due to COVID-19 where existing policy exclusions would otherwise preclude such coverage. One of the obstacles has been the constitutional objections that would be raised to legislation designed to override the agreed-upon terms of a private contract of insurance. Nevertheless, the proposed legislation pending in these several states is something for insurers to keep a close watch on as the business losses to insureds from the pandemic rapidly mount.

More hopeful is the indication that the movement toward such legislation is tempered by the actions of several state insurance departments indicating that such policy exclusions that would otherwise preclude coverage, such as virus exclusions, should still be given effect.

There will no doubt be further developments in both of these areas, and we will continue to monitor and report on them.

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