

## **U.S. Insight: New York Assembly Bill Would Expand Business Interruption Insurance Coverage for Losses from COVID-19 (Coronavirus)**

New York lawmakers are seeking to expand the scope of potential insurance payouts to small businesses in the wake of the COVID-19 pandemic. On Wednesday, April 8, 2020, an amended version of [New York State Assembly Bill A10226](#) (the “Amended Bill”) was sent to the Assembly Committee on Insurance for review and consideration. If passed, the Amended Bill would obligate business interruption insurers to retroactively cover business interruption losses due to COVID-19. Similar bills were introduced in March by lawmakers in New Jersey, Massachusetts, and Ohio.

The Amended Bill provides that:

Notwithstanding any provisions of law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes, but is not limited to, the 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.<sup>1</sup>

Presently, most business interruption policies do not cover losses unless they result from property damage, such as from fire or a natural disaster. In fact, many business interruption policies specifically exclude losses for virus or bacteria, a result of large payouts by insurers after the S.A.R.S. outbreak in 2003. In 2006, the state regulator approved a standard policy form, drafted by the Insurance Services Office,<sup>2</sup> titled “Exclusion for Loss Due To Virus Or Bacteria” ([form CP 01 40 07 06](#)). The form bars first-party property coverage for loss or damage, including business interruption, caused by or resulting from any virus.<sup>3</sup>

The Amended Bill would change that, specifically rendering null and void any clause denying coverage based on a virus.<sup>4</sup>

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<sup>1</sup> Amended Bill § 1(a).

<sup>2</sup> The Insurance Services Office is organization that collects statistical data, promulgates rating information, develops standard policy forms, and files information with state regulators on behalf of insurance companies that purchase its services.

<sup>3</sup> Exclusion for Loss Due To Virus Or Bacteria § B.

<sup>4</sup> Amended Bill § 1(c).

The Amended Bill applies to policies issued to businesses with 250 or fewer full-time employees who work 25 hours per week or more.<sup>5</sup> Importantly, insurers would be able to seek reimbursement from the State for any payments made to policyholders as a result of the Amended Bill.<sup>6</sup>

To seek reimbursement, insurers would submit claims to the superintendent of financial services. The Amended Bill requires the superintendent to establish procedures for the submission and qualification of claims “necessary to protect against the submission of fraudulent claims by insureds, and appropriate safeguards for insurers to employ in the review and payment of such claims.”<sup>7</sup>

The Amended Bill is almost certain to face legal and constitutional challenges from insurers. Insurers will likely argue that the Amended Bill’s retroactive nullification of agreed contract terms – especially contract terms approved by state regulators – makes it an unconstitutional *ex post facto* law. Insurers may also argue that the Amended Bill represents undue state interference with private contractual relations, in violation of the U.S. Constitution’s Contracts Clause.

Lawmakers may maintain that the proposed reimbursement structure means there is no ultimate burden on insurers. But insurers will likely argue that there are indeed hardships, including forcing insurers to front policy payments, and expending time, effort, and expense to submit claims to the State for reimbursement. And reimbursement is not guaranteed, but will depend on the rigor of the procedures put in place by the superintendent of financial services if the Amended Bill is passed.

The law governing retroactive effect of legislation and the interaction between legislation and contracts is manifold and complex. This is especially so here, where the Amended Bill implicates overlapping issues of state legislation and regulation, federal legislation and regulation, and, ultimately, constitutionality. Legal challenges to the Amended Bill would require courts to consider the interests of insurers and the interests of others, including small business owners. Courts will also likely consider the public interest, and the reasons for and consequences of the state and national states of emergency that motivated the Amended Bill’s introduction.

The Amended Bill is currently with the Assembly Committee on Insurance. If it survives there, it will move to the Ways and Means Committee for approval before being introduced to the Assembly floor for debate and a vote. We will continue to monitor this situation, including the potential passage of and/or legal challenges to similar bills pending in New Jersey, Massachusetts, and Ohio.

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<sup>5</sup> *Id.* § 1(e).

<sup>6</sup> *Id.* § 2(a).

<sup>7</sup> Amended Bill § 2(b).

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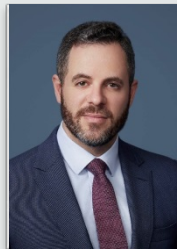


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