



## Alerts

### Update on Proposed COVID-19 Insurance Coverage Legislation and Litigation: Are Cooler Heads Beginning to Prevail?

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*Insights for Insurers*

In the wake of government quarantine/shut down orders being executed in response to the pandemic, a flurry of bills were introduced in several states to retroactively create—by government fiat—business interruption insurance under property insurance policies where none had existed. Some of those bills remain pending, while others have now been tabled.

As previously reported, these bills—no matter how well-intended—are misplaced, poorly drafted, and short-sighted. Retroactively changing policies by legislative fiat is simply a bad idea. It would undermine the sanctity of contract and interpose risks upon insurers that they did not agree to undertake. It would absolve policyholders of paying premiums commensurate with risks. It would undermine the state insurance regulatory process in which the subject policy forms were submitted and approved. It would hoist upon the insurance industry obligations that only the government can shoulder, and the responsibility for which belongs to government. It would lead to the insolvency of many insurers or the insurance industry at large, destroying an industry that is necessary for economic growth and stability. The adverse consequence would be profoundly negative, resulting in insurers being unable to pay other claims that actually are covered. In sum, the proposed legislation would create many more problems than it solves.

It is too soon to tell for sure, but the defeat of some of the bills—along with the lack of forward movement on others—may signal that, with the benefit of additional time, thought, and information, cooler heads may be prevailing, at least in some states.

#### Legislative Update

Here is a brief update on some of the state COVID-19 business interruption insurance bills.

**Washington, D.C.:** Earlier this month, after six of its 12 members raised concerns about its legality of the proposal and the costs it would impose on insurers, the Washington, D.C. Council opted not to move ahead with a proposal that would provide coverage for business interruption insurance when it did not exist under insurance policies. Council Chairman [Phil Mendelson](#) struck the language from a broader pandemic emergency bill to allow for more debate.

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In opposing the legislation, the American Property Casualty Insurance Association (APCIA) warned that the hundreds of millions of dollars in money business interruption losses "dwarf the premiums for all relevant commercial property risks in the key insurance lines for D.C., which are estimated at \$16 million a month." The rejected bill would have applied only to companies with 50 full-time employees or fewer, and gross receipts of no more than \$2.5 million. Earlier versions of the legislation required businesses to have at least 250 employees with no revenue maximums, or contained a 100-employee limit. At a 250-employee cap, APCIA estimated that businesses would be able to claim damages of \$300 million to \$1.1 billion per month; at 100 employees, that figure ranged from \$180 million to \$780 million per month.

**New Jersey:** The New Jersey General Assembly passed a bill that would force property insurers to cover certain business interruption losses arising from COVID-19. Before reaching the New Jersey Senate, however, the bill was pulled from consideration with little explanation. Its future is uncertain.

**Massachusetts:** On May 21, 2020, the Joint Committee on Financial Services of the Massachusetts Senate completed a hearing on [Bill S.2655](#), which would mandate coverage for COVID-19-related business interruption losses and prohibit insurers from denying claims based on a virus exclusion or the absence of physical damage to property. The outcome of the hearing is not yet known.

**Louisiana:** Much more measured legislation than bills previously proposed by Louisiana legislators are now moving forward in the state. The Louisiana State Senate has shelved the portion of Senate Bill No. 477 that would have mandated retroactive and prospective coverage for COVID-19 business interruption losses. A revised [version of the bill](#), which requires policies providing business interruption coverage to contain a notice of all exclusions in a form to be prescribed by the commissioner of insurance, is headed to the Louisiana House of Representatives. Another bill defeated in committee was SB 506 by Senator Regina Barrow, which would have required property insurance policies to insure commercial & residential buildings to cover the cost of disinfecting fumigation. The bill was voluntarily deferred in the House Committee on Insurance Wednesday.

**Illinois:** Legislation proposed in Illinois on May 21, 2020 is much more modest than that proposed in other states. The proposed [amendment to Senate Bill 2135](#) would require the Illinois Department of Insurance to appoint a task force on business interruption insurance consisting of no more than 10 members representing the Department and the insurance industry. The task force would be charged with studying the impacts of the COVID-19 pandemic on businesses and the need for changes to business interruption insurance policies based on those impacts, including recommendations for legislation. The task force would be required to submit its findings and recommendations to the Governor and the Illinois General Assembly by December 31, 2020. The task force would be dissolved on December 31, 2021.

**H.R. 7011, The Pandemic Risk Insurance Act Of 2020 (H.R. 7011):** Representative Carolyn Maloney, D-N.Y., a senior member of the House Financial Services Committee, officially announced the introduction of the Pandemic Risk Insurance Act of 2020 (PRIA), which would establish a federal backstop for business interruption and event cancellation losses resulting from a future pandemic or public health emergency declared on or after January 1, 2021. It would not apply retroactively to the instant COVID-19 pandemic.

Several changes were made to the draft previously circulated. Business interruption is expanded to include event cancellation insurance. The covered public health emergency would be certified by the Secretary of Health and Human Services instead of the Secretary of Treasury. The definition of insurer was expanded to include captives and self-insurance arrangements. The aggregate annual coverage cap was increased from \$500 Billion to \$750 Billion. The language requiring the Department of Treasury to charge a premium to participating insurers was stricken, making it unclear now as to how the act would be funded. Finally, the federal preemption language was stricken. Insurer participation would still be voluntary.

Representative Maloney stated during a news conference, "[w]e all recognize that pandemics are unique, and the economic effects of pandemics can be devastating. Without a government backstop for this insurance, it's not clear that insurers would or could cover pandemics." There remains considerable doubt about the ability to successfully address a pandemic through this mechanism.



**The Business Continuity Protection Program:** The National Association of Mutual Insurance Companies (NAMIC), APCIA, and the Independent Insurance Agents & Brokers of America Inc. have come up with an alternative to the proposed federal PRIA legislation. The Business Continuity Protection Program (BCPP) would provide immediate revenue relief for payroll, employee benefits, and operating expenses, following a viral emergency declaration by the President. The program would be run by the Federal Emergency Management Agency (FEMA) and funded by taxpayer dollars. Businesses would purchase revenue replacement for three months' relief—for up to 80% of payroll and other expenses—through insurers that voluntarily participate in the BCPP. Protection must be purchased at least 90 days before the presidential declaration, according to the proposal. Businesses would be required to certify that they would use any funds received for retaining employees and paying necessary operating expenses and that they would follow federal pandemic guidelines.

"Pandemics simply are not insurable risks; they are too widespread, too severe, and too unpredictable for the insurance industry to underwrite. . . . Pandemics are a national problem, and we need a national solution," said Charles Chamness, president and CEO of the NAMIC.

## Litigation Update

There also are a couple case developments favorable to insurers to report.

**Pennsylvania High Court Declines King's Bench Jurisdiction:** On May 14, 2020, the Pennsylvania Supreme Court denied [an emergency application](#) made by an insured restaurant, asking the court to assume extraordinary jurisdiction over its business interruption coverage suit on the basis of immediate public importance. The petition also sought to establish a coordinated system to resolve all similar business interruption cases in the state.

**First Substantive BI Decision Goes Insurer's Way:** On May 22, 2020, *Social Life Magazine* filed a [notice of dismissal](#) of its business interruption coverage suit, which had been filed in New York federal court on April 29. The magazine had sought an injunction requiring the insurer to immediately pay its claim. During a telephonic show-cause hearing on May 14, Judge Caproni denied the insured's emergency application and stated: "I feel bad for your client. I feel bad for every small business that is having difficulties during this period of time. But New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going. You get an A for effort, you a gold star for creativity, but this is not what's covered under these insurance policies." A copy of the hearing transcript can be viewed [here](#). The [insured wrote](#) to Judge Caproni requesting that "a written order relating to the preliminary injunction hearing on May 14, 2020 is not required." The policyholder voluntarily dismissed the case and its interlocutory appeal to the U.S. Court of Appeals for the Second Circuit.

## Final Thoughts

Legislative efforts will continue to play out in the coming months, but if cooler heads do indeed prevail, the extreme state legislative proposals will not become law. Hopefully, courts will apply the policies as written in coverage litigation and reject improvident efforts to circumvent traditional coverage litigation through class actions, King's Bench jurisdiction, and other mass joinder attempts. Although insurers have scored a couple early wins, the COVID-19 insurance coverage wars have only just begun.