

LEGISLATIVE RESPONSES AND LEGAL CHALLENGES TO VIRAL EXCLUSIONS FOR BUSINESS INTERRUPTION LOSS COVERAGES

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By [Luke Schmitt](#)

All eyes are on the New Jersey Legislature, which is currently discussing and reviewing a bill that could force coverage under business interruption insurance for coronavirus-related losses even in the presence of a “virus” related exclusion.

After the SARS outbreak in 2003, which saw devastating effects, insurance companies made serious changes to their insurance policies relating to coverage for interruptions stemming from the disease. Specifically, many businesses that purchased business interruption coverage had “virus and bacteria” exclusions added to their policies.

Business interruption policies generally cover direct property damage, which leads to periods of in-operation of the company. Arguably, pandemics, like COVID-19, could lead to property damage if there is contamination of the property or HVAC system, which caused property damage, but such claims may be difficult to demonstrate.

Many insurers have added “Exclusion for Loss Due to Virus or Bacteria” provisions or similarly named exclusion provisions. As seen in reports out of New Jersey, these exclusions may bar first-party recovery for companies who suffer “loss or damage caused by or resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease.” Many business interruption policies contain slightly different language; however, the effect is still the same: no coverage for viral-related damage during pandemics.

Fast forward to 2019, when the world sees its second coronavirus-related pandemic in the 21st Century, COVID-19 (a virus in the coronavirus family similar to that of SARS).

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To battle business losses stemming from the required social distancing and other related damage, the New Jersey legislature appears to be the first to attempt to negate or void these existing insurance exclusion provisions. On March 16, 2020, New Jersey's legislature proposed the following:

"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 purpose behind this proposed legislation is to ease the burden on local, state, and federal governments, which would most likely need to provide nationwide bailouts, and of course, to aid the businesses who paid premiums for business interruption loss coverage. The New Jersey proposed legislation only intends to provide two changes: 1) to eliminate the virus exclusion, and 2) to eliminate the need to prove direct physical property damage under the business interruption policy. Aside from the myriad financial effects that this bill will have on the public and the insurance industry, this type of prospective legislation raises constitutional issues and will likely be reviewed by the courts in New Jersey and anywhere else similar legislation is adopted.

This is not the first time that a legislature has retroactively acted to influence liability determinations. Following the Minnesota I-35W Bridge Collapse in 2007, which resulted in thirteen deaths and many injuries, the Minnesota legislature voluntarily established a \$37 million fund for the compensation of affected families. To offset these payments, the state sought recovery from the engineering companies that had designed the bridge between 1962 and 1965. Typically, such a claim would be barred by the applicable statute of repose due to the passage of significant time since construction. Since the design professionals' liability had been extinguished by way of that statute of repose, the Minnesota legislature revised its statutes to permit claims for indemnity and reimbursement against the designers. Specifically, the laws were amended to retroactively revive these time-barred claims arising out of one specific incident. The design professionals argued that the legislature's action was unconstitutional; however, the Minnesota Supreme Court disagreed and allowed the state's claims for indemnity against the engineer to stand.

Not wishing to wait for their respective legislatures to act, some businesses are resorting to the courts to seek relief from these types of coverage exclusions. March 16, 2020, marked the date for the first of many anticipated declaratory actions brought in light of COVID-19 related business losses. Oceana Grill, a restaurant in New Orleans, filed suit seeking a declaration of coverage under their "all risks" property policy, which provided an extension of coverage for business closure by order of Civil Authority. The business is seeking a declaration that "the policy provides coverage to plaintiffs for future civil authority shutdowns of restaurants in the New Orleans area due to physical loss from Coronavirus contamination and that the policy provides business income coverage in the event that the coronavirus has contaminated the insured premises." In advancing these arguments, businesses are relying upon the nature of the virus, specifically its propensity to stay on surfaces or materials, "fomites" for up to 28 days, and its ability to infect individuals physically. The outcome of these declaratory actions will likely not be seen for months, or even years.

Moreover, legislatures that pursue similar measures to the one advanced in New Jersey will likely see their actions challenged on constitutional and other grounds. Which path West Virginia will follow will be determined in the coming weeks, months, and even years.

Until then, Flaherty is here for your needs, whether they are part of your routine business or new in the face of unprecedented actions taken to combat COVID-19. In these fluid times, you can count on us to have current information that will help your business take advantage of opportunities as they become available. Please reach out if you have any questions or concerns about how these new requirements may impact your business or employees.

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