

An Examination of A-3844

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Text of A-3844

A-3844 (the “Bill”) provides that “every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption...shall be construed to include among the covered perils under the policy, coverage for business interruption due to global virus transmission or pandemic.”

The Bill would apply to policies issued to insureds with less than 100 eligible employees, defined to mean a full-time employee who works a normal work week of 25 or more hours.

Current Status of the Proposed Bill

The state of draft bill A-3844 is changing rapidly. The draft Bill was approved by a 4-1 vote with one abstention at first reading on March 16, 2020. Accordingly, the draft Bill was slated to proceed to second reading along with a series of sequentially numbered draft bills on March 19, 2020. Due to insurance industry concerns, however, the Bill was removed from the Legislative calendar even as other COVID-19 bills moved forward in session. In particular, various industry trade groups lodged objections and proposed amendments to A-3844, including the American Property Casualty Insurance Association (APCIA), the Insurance Council of New Jersey (ICNJ), the National Association of Mutual Insurance Companies (NAMIC), and the New Jersey Business and Industry Association (NJBIA). In light of the objections and concerns, the proposed Bill was removed from the calendar. It is presently unclear whether the Bill will subsequently be advanced for second reading subject to comments and amendments when the Legislature reconvenes in May, or if this version of the Bill will “die” and potentially be replaced by different proposed legislation aimed at addressing industry concerns.

In the meantime, it is critical for insurance companies writing policies in New Jersey to keep abreast of developments with the proposed Bill. Insurers writing policies in other states should also continue to monitor these developments as all state legislation impacting insurers arising from COVID-19 could well serve as a template for other states’ laws around the country.

Concerns with the Proposed Bill

A. Wide-Ranging

While ostensibly written to apply to the Business Interruption Coverage contained in Commercial Property Insurance policies, the current draft of the Bill gives rise to potential arguments that it should apply broadly to “every policy of insurance insuring against loss or damage to property” and not only business interruption coverage. In its current form, policyholders may contend that the Bill applies, for example, to commercial general liability (“CGL”) policies, which typically require some type of accidental “bodily injury” or “property damage” in order for the policy to apply. Additionally, the proposed Bill’s requirement that policies must include coverage for global virus transmission or pandemic may be interpreted to retroactively override the “Exclusion for Loss Due to Virus or Bacteria” contained in ISO

form CP 01 40 07 06. The retroactive nature of the proposed Bill as applied to policies in effect as of March 9, 2020 would be particularly problematic because the law would purport to fundamentally alter contracts entered into between insurers and their policyholders after the contracts were made, raising constitutional and other concerns discussed below.

B. Impacts on Insurers

Passage of the Bill as presently worded would arguably impact every insurer writing coverage in New Jersey in some manner. This is because the Bill permits the Commissioner of Banking and Insurance to reimburse insurers who pay claims pursuant to the Bill using funds collected by the Commissioner from other insurers in the State. Specifically, Section 2.a. of the Bill permits an insurer who pays a claim to its insured pursuant to the Bill to apply to the Commissioner of Banking and Insurance for “relief and reimbursement” by the Commissioner. It is not clear, however, from the text of the Bill how much of the claim would be reimbursed by the Commissioner, under what circumstances, and when. Importantly, Section 3.a. of the Bill authorizes the Commissioner to impose upon and collect from insurance companies “such additional amounts as may be necessary to recover the amounts paid to insurers pursuant to section 2 of this act.” This provision, in effect, transfers all of the risk of business interruption caused by COVID-19 to any insurer doing business in the state of New Jersey.

C. Effects on Policyholders

While drafted to protect policyholders, the Bill poses significant, perhaps unintended, problems for insureds as well. If forced to pay out claims for which they did not account in charging premiums, insurers will have no choice but to increase premiums on new policies and renewals. Even more drastic, depending on the volume of claims made and paid pursuant to the Bill, insurers may ultimately limit underwriting these types of risks, leaving thousands of former policyholders uninsured or underinsured. Moreover, the broad nature of the proposed Bill and its requirements may potentially open the floodgates to fraudulent and inflated claims.

D. Constitutionality

Finally, if enacted into law, the Bill poses serious concerns under both the New Jersey and the United States Constitution. For example, the New Jersey Constitution prohibits the Legislature from passing any “law impairing the obligation of contracts.” Article IV, Section VII, Paragraph 2. The United States Constitution provides substantially similar language in Article I, Section 10. If enacted into law, the Bill would do just that: impair the contractual (i.e., the insurance policies) relationship entered into between private parties, by forcing insurers to cover risks for which they did not bargain, and in some cases for risks that would otherwise be expressly excluded. In particular, the proposed Bill would purport to erase the “virus” exclusion specifically written into policies in exchange for a set premium after the premiums were established and paid, thereby giving rise to significant constitutional challenges and concerns if approved as currently drafted.

Conclusion

The situation faced by businesses and individuals coping with the impacts of COVID-19 is unprecedented and fluid. It is unsurprising, therefore, that the New Jersey Legislature is attempting to enact laws to respond to the crisis and assist constituents. However, even in the face of disaster, any proposed

response must be measured, evenhanded and well-drafted. Moreover, if elected officials wish to transfer funds to small businesses affected by COVID-19, the Legislature may seek to explore other financial options, such as cash incentives or bailouts, rather than simply passing the burden onto the insurance industry -- an industry itself significantly impacted by COVID-19. It is well-settled law in New Jersey that courts may not write a better policy for the insured than what was purchased. This fundamental rule should apply to the legislature as well.



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