

Pa. COVID Insurance Bill Differs From Other States' Proposals

By **John Sylvester** (April 19, 2020)

A bipartisan group of Pennsylvania state senators have introduced a bill, S.B. 1114, titled the COVID-19 Insurance Relief Act, to provide assistance to policyholders seeking coverage under their business interruption insurance policies.

In the face of insurers' swift denial of business-interruption claims made by companies that have been adversely impacted by the COVID-19 pandemic, this proposed legislation, if enacted, would provide clarity on a number of disputed coverage issues involved in such claims. Significant aspects of S.B. 1114 include the following:



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- Defining "property damage" in an insurance policy to mean, in the context of a commercial establishment or other area of business activity, the presence of a person positively identified as infected with COVID-19 within the property or within the municipality where the property is located, or the presence of COVID-19 having otherwise been detected in the Commonwealth of Pennsylvania.
- Declaring that an insurance policy insuring against a loss related to property damage, including loss of use and occupancy and business interruption, shall be construed to include among the policy's covered perils coverage for loss or property damage due to COVID-19, as well as coverage for loss due to a civil authority order related to Gov. Tom Wolf's disaster emergency declaration and his subsequent business shutdown orders caused by the COVID-19 pandemic.
- Requiring insurers to indemnify policyholders for losses relating to property damage and business interruption up to a policy's maximum limits of coverage and/or up to the separate limits for business interruption losses, subject to the distinction that policyholders classified as small businesses are entitled to receive up to 100% of policy limits for eligible claims and covered losses, whereas policyholders not classified as small businesses are entitled to receive up to 75% of their respective policy limits for eligible claims and covered losses.
- The act would apply to all active insurance policies with effective dates prior to March 6 and to insurance companies providing coverage for property damage, loss of use and/or business interruption in Pennsylvania, and the act would take effect immediately upon enactment.
- The Pennsylvania Supreme Court is given exclusive jurisdiction to hear any challenge or render a declaratory judgment regarding the constitutionality of the act, with the

ability to take appropriate action to engage in fact finding or to expedite a final judgment.

In some respects, S.B. 1114 merely clarifies that Pennsylvania law is consistent with the reasonable interpretation of certain insurance policy language in property and business interruption policies — interpretations that are advanced by policyholders but often disputed by insurers.

For example, among other things, the bill defines “property damage” in the context of such policies to include within its meaning the direct physical loss, damage or injury to tangible property arising from the presence of a person infected with COVID-19 within the insured property or within that property’s municipality. Such an interpretation of this policy term is consistent with existing Pennsylvania law.

For example, in *Motorists Mutual Insurance Co. v. Hardinger*,^[1] the U.S. Court of Appeals for the Third Circuit, applying Pennsylvania law, held that infectious bacteria present in a household water system could constitute direct physical loss under a homeowners’ policy to the extent it impairs or eliminates the functionality of the house.

Thus, declaring that the presence of the infectious coronavirus in a business location constitutes property damage under an insurance policy sets forth a definitive statement of Pennsylvania law that will avoid coverage disputes that might otherwise require lengthy and expensive litigation between policyholders and insurers to resolve.

Similarly, S.B. 1114 defines “civil authority order” to include Wolf’s March 19 order “prohibiting or restricting the access to non-life sustaining business locations in this Commonwealth as a direct result of property damage at, or in the immediate vicinity of, those locations.”

This statement of the reasonable interpretation of civil authority order in a property and business interruption policy makes clear that, under Pennsylvania law, the shutdown of business locations arising from the governor’s orders satisfies any requirement under a property policy that the shutdown is the direct result of physical damage at or near the insured property.

This interpretation is supported by the recent Pennsylvania Supreme Court decision in *Friends of DeVito v. Wolf*,^[2] which found that the COVID-19 pandemic constitutes a “catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life,” under Pennsylvania’s Emergency Code, thereby empowering the governor to issue the March 19 order.^[3]

Again, an insurer may otherwise dispute such reasonable interpretation of this civil authority policy provision, and this legislation obviates the need for policyholders to litigate this dispute in order to obtain coverage.

Finally, to the extent it is argued that S.B. 1114 impairs any provision in an insurance contract, such as the so-called virus exclusion in a policy that may otherwise serve as the basis for an insurer to deny coverage, the legislative findings in S.B. 1114 set forth a predicate basis for the Legislature to act.

Specifically, the legislative findings recite the inherent police powers of the legislature to enact laws that are necessary for the good of the public, including “impairment of contract

rights when the legislature has a significant and legitimate public purpose, such as remedying a social or economic problem.”

This is particularly the case with the contracts of insurance because the insurance industry is heavily regulated by the states. In this regard, a number of courts have upheld state laws regarding insurance coverage that arguably impair a provision of an insurance contract on public policy grounds.

For example, in *Campanelli v. Allstate Life Insurance Co.*,^[4] the U.S. Court of Appeals for the Ninth Circuit upheld a California law retroactively reviving property insurance claims of earthquake victims otherwise barred by contractual limitations periods. Also, in *Vesta Fire Insurance Corp. v. Florida*,^[5] the U.S. Court of Appeals for the Eleventh Circuit upheld a Florida law restricting insurers from refusing to renew insurance policies that they wanted to terminate following a hurricane.

The legislative findings in S.B. 1114 explain the compelling public policy justifications for this legislation as follows:

Permitting coverage for business losses during the Covid-19 disease pandemic and Statewide outbreak is necessary to prevent further economic disruption and allow businesses to remain functioning in the face of continued and uncertain closures.... Covid-19 is unlike anything we have experienced, and the social and economic effects must be mitigated to ensure the stability and well-being of the residents of this Commonwealth and the businesses that employ them.

S.B. 1114 differs from proposed business interruption insurance legislation introduced in other states, such as New Jersey,^[6] Ohio,^[7] New York^[8] and Massachusetts,^[9] in several significant respects.

First, S.B. 1114 applies to benefit commercial policyholders of all sizes, rather than being limited in application to only small businesses, which are typically defined as those with fewer than 100 or 150 employees.^[10]

Second, S.B. 1114 does not purport to create a state reimbursement fund for insurers providing business interruption payments that would be financed by the states’ insurance commissioners making subsequent assessments on property/casualty insurers doing business within those states. Rather, S.B. 1114 relies on insurers to pay their policyholders’ COVID-19 business interruption claims out of the insurers’ existing reserves and other assets, built up from collection of premiums over the years, as well as the reserves and assets of their reinsurers.^[11]

Third, importantly, S.B. 1114 provides relevant definitions of phrases commonly used in business interruption policies such as “property damage” and “civil authority order,” thereby clarifying the meaning of those phrases to include the presence of a person with COVID-19 or the detection of COVID-19 at or near the property as constituting a predicate for recovery under the policies. These definitions avoid the need for policyholders to litigate with insurers over the proper interpretation of those phrases when processing a business interruption claim.

Finally, S.B. 1114 includes detailed legislative findings within the text of the bill to support the constitutionality of the legislation if it is enacted and then subsequently challenged in court by insurers. Moreover, by granting the Pennsylvania Supreme Court exclusive jurisdiction to hear any such constitutional challenges, S.B. 1114 seeks to have those

challenges heard and resolved as quickly and efficiently as possible, rather than requiring lengthy lower-court proceedings before the Supreme Court can adjudicate the issues in dispute.

No doubt this proposed legislation will enjoy widespread support among Pennsylvania businesses seeking to recover under their property and business interruption insurance policies to help alleviate the severe adverse impacts to their business caused by the COVID-19 pandemic.

While the insurance industry as a whole is sure to lobby against this legislation, perhaps some individual, enlightened insurance companies may see this as an opportunity to distinguish themselves from their industry peers by participating constructively in the legislative process so as to be part of the solution to a vexing problem facing many of their valued policyholders.

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[1] [Motorists Mutual Insurance Co. v. Hardinger](#) , 131 Fed. Appx. 823, 825-27 (3d Cir. 2005).

[2] [Friends of DeVito v. Wolf](#), 68 MM 2020, 2020 WL1847100.

[3] April 13, 2020, slip. op. at 17-26.

[4] [Campanelli v. Allstate Life Ins. Co.](#) , 322 F.3d 1086, 1098-99 (9th Cir. 2003).

[5] [Vesta Fire Insurance Corp. v. Florida](#) , 141 F. 3d 1427 (11th Cir.1998).

[6] New Jersey Assembly A.3844, introduced March 16, 2020.

[7] Ohio General Assembly H.B. 589, introduced March 24, 2020.

[8] New York Assembly A10226, introduced March 27, 2020.

[9] Massachusetts S.D. 2888, introduced April 6, 2020.

[10] As noted, Pennsylvania senate bill S.B.1114 does make the distinction that small businesses are entitled to receive up to 100% of their policy limits for Covid-19 pandemic-related business interruption losses, whereas larger businesses are limited to recovering 75% of their policy limits for such losses. S.B. 1114 adopts federal Small Business Administration criteria for determining whether a company constitutes a "small business."

[11] It should be noted that a bill introduced in the Pennsylvania House of Representatives,

H.B. 2372, introduced on April 3, 2020, follows the structure of legislation proposed in New Jersey, Ohio, New York, Massachusetts and other states in limiting its application to small businesses (defined as fewer than 100 employees) and providing for the Insurance Commissioner to create a state fund for reimbursement of insurer payments financed by subsequent assessments on property/casualty insurers doing business in the state.