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COVID-19: The Real Operation of New Jersey's Proposed Insurance Legislation

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The New Jersey legislature recently introduced a bill designed to compel insurance companies to pay some business interruption claims arising out of the coronavirus. The law's drafters are aware that, to do so, they are required to excise a provision of the insurance policies. But what they don't seem to appreciate is just how wide their scalpel extends.

Trenton took action since the terms and conditions of most business interruption policies preclude coverage for financial losses growing out of the pandemic. The bill, designed to protect New Jersey businesses with fewer than 100 employees, is currently on hold to allow insurers to take stock of the measure. [Today's Philadelphia Inquirer](#) reports on the status of the bill, the sponsor's objective and the industry's response.

The Garden State's proposed law describes its impetus this way: "Industry sources have indicated that global virus transmission and pandemic are generally excluded from the list of covered perils under the existing standard business interruption insurance policy."

This explanation is no doubt referring to the "virus" exclusion, introduced by ISO in 2006, for use on business interruption policies. So, to achieve its purpose, the New Jersey law requires elimination of a policy provision that the state's own regulators approved.

But, despite the New Jersey legislature's stated concern, the "virus" exclusion is not the principal hurdle to coverage for losses tied to the coronavirus.

One of the fundamental prerequisites, to the potential availability of business interruption coverage, is that there be a necessary suspension of the insured's operations. Such suspension must have been "caused by direct physical loss of or damage to" the insured's premises.

This "physical damage" requirement – and not the "virus" exclusion – is first and foremost why it will be a challenge to find coverage for coronavirus-caused financial losses under business interruption policies.

We are aware that some policyholder lawyers have been arguing that the presence of the virus in a structure, even if it can't be seen by the naked eye, qualifies as physical damage. Along those lines, there has been discussion, in the coverage context, of scientific research into how many days the virus may live on different surfaces such as cardboard, plastic and stainless steel. There is case law on this "physical damage" issue that both sides will argue supports their position.

But, even if the microbial existence of the coronavirus on surfaces satisfies the “direct physical loss of or damage to” requirement, most businesses have not shut down because the virus was present in their facilities. Rather, businesses are shut, and people are working from home, to avoid contact with others, in hopes of stemming the spread of the virus.

This is why any legislative action, to compel insurers to pay business interruption claims arising out of the coronavirus, is so breathtaking. To achieve their result, lawmakers would not only obviate the “virus” exclusion, but, in addition, the fundamental “physical damage” requirement of business interruption coverage.

The New Jersey legislature has premised its actions on the need to take out the “virus” exclusion from business interruption policies. But that’s a tonsillectomy compared to what it is really doing – removing the heart of the policy.