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Bill Analysis

Version: As Introduced

Primary Sponsors: Reps. Crossman and Rogers

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SUMMARY

- Requires certain policies of property and casualty insurance to provide coverage for business interruption losses to cover losses attributable to pandemic.
- Applies to policies of insurance in effect on the effective date of the bill for losses accrued during the State of Emergency declared by the Governor on March 9, 2020.
- Enables insurers providing the required coverage to apply to the Superintendent for reimbursement.
- Requires the Superintendent to impose an assessment on all property and casualty insurers to recoup amounts reimbursed to insurers.
- Declares an emergency.

DETAILED ANALYSIS

Overview

The bill requires certain policies of property and casualty insurance to be construed to include coverage for business interruption losses attributable to global virus transmission or pandemic during the state of emergency declared by the Governor on March 9, 2020, related to the spread of COVID-19.[1] Losses incurred after the end of the declared state of emergency would not be covered.

Business interruption insurance provides protection to businesses that experience business-closure losses attributable to unforeseeable circumstances. For example, if a business were to experience a fire and the business were forced to close while the fire damage was

[1] See **COMMENT** 1 and 2.

being repaired, the business loss portion of a policy of insurance would "replace," subject to the limits of the policy, the revenue that the business lost during the closure. According to Investopedia, this type of insurance is typically not sold as a separate policy but is either added to a property and casualty policy or included in a comprehensive package policy as an add-on or rider. According to the Ohio Department of Insurance, business interruption policies typically exclude losses attributable to pandemics.

The bill authorizes the Superintendent of Insurance to adopt rules as needed to carry out the requirements of the bill. These rules are not subject to a provision of existing law prohibiting certain state agencies, including the Department of Insurance, from adopting a new regulatory restriction unless it simultaneously removes two or more other existing regulatory restrictions.[2]

Application

The bill would apply only to policies of insurance that meet all of the following:

- The business in question is located in Ohio;
- The business employs 100 or fewer employees who work a normal work week of 25 or more hours;
- The business was covered by an applicable policy of insurance effective on the bill's effective date.[3]

Because the bill only applies to policies in force on the bill's effective date, policies issued after that date would not be covered by the bill. Also, note that, if the bill were to go into effect during the state of emergency, the bill would not apply to policies issued after the bill's effective date, but during the state of emergency.

Reimbursement of insurers

The bill makes provision for insurers providing coverage in accordance with the bill to be reimbursed. Such insurers may apply to the Superintendent for reimbursement. Accordingly, the Superintendent is required to establish procedures for the submission and qualification of claims by insurers. These must include standards as needed to protect against the submission of fraudulent claims by insureds, and appropriate safeguards for insurers to employ in the review and payment of claims made by businesses. The Superintendent is provided with certain flexibility in the payment of claims and may either pay the claims as they are received from such funds as are available to the Superintendent or may pay the claims from funds generated

[2] Section 1(A)(3), (B), (C), and (H); R.C. 121.95(F), not in the bill; Ohio Department of Insurance, *Business Interruption*, https://insurance.ohio.gov/wps/portal/gov/odi/companies/resources/tipsheet-business-interruption, accessed April 9, 2020, and Investopedia, *Business Interruption Insurance*, https://www.investopedia.com/terms/b/business-interruption-insurance.asp, accessed April 9, 2020.

[3] Section 1(A)(1) and (D).

via the assessment, discussed below under "**Assessment**" and **"Business Interruption Insurance Fund**."[4]

Assessment

To pay for these claims, the bill requires the Superintendent to establish an assessment to be imposed on property and casualty insurers. The assessment is to be in an amount as necessary to recover the amount paid to reimburse insurers and is to be distributed in proportion to the net written premiums received in Ohio by each company during 2019. "Net written premiums received" are gross direct premiums written, less return premiums thereon and dividends credited or paid to policyholders, as reported on the company's annual financial statement.[5]

Business Interruption Insurance Fund

Funds collected under the assessment are to be deposited into the Business Interruption Insurance Fund, which is to be used to either pay claims or reimburse other funds for claims already paid. Any amounts remaining in the Business Interruption Insurance Fund after the final claim has been paid to insurers, or other Department of Insurance funds are reimbursed, must be returned to insurers in a manner prescribed in rules adopted by the Superintendent. When the fund's balance is zero, the fund is to be dissolved.

Finally, note that the bill's requirements are enacted in uncodified law, as opposed to codified law. Therefore, once the final claim has been paid and the Business Interruption Insurance Fund is dissolved, the law will have no practical function.

Emergency clause

The bill declares an emergency, giving it an immediate effective date. As stated by the bill, the reason for such necessity is to protect small businesses from catastrophic losses caused by commercial decline necessary to prevent the spread of COVID-19.[6]

COMMENT

1. Scope

The scope of the bill is unclear. The text of the bill indicates it applies to "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 section." There appear to be two possible interpretations of this provision. The first would be more narrow, including only policies *that* include the "loss of use and occupancy and business interruption." The second is more broad, applying to all property and casualty insurance policies, *including* those that cover the "loss of use and occupancy and business interruption."

[4] Section 1(E), (F), and (G)(3).

[5] Section 1(A)(2) and (G).

[6] Section 2.

2. Constitutional questions

The bill's requirement that already existing policies of insurance provide additional coverage not already required under the policy raises several constitutional questions. These matters are discussed below.

Contracts clause

Under the Contracts Clauses of the U.S. and Ohio Constitutions, the General Assembly is prohibited from enacting laws that impair contractual obligations. These prohibitions are not absolute, however. They do not absolutely prevent a state from abridging contractual obligations when exercising its police power and passing laws for the protection of public health, safety, and welfare.

Rather, they prohibit a "substantial" impairment of contractual obligations unless the state can *justify the impairment on the basis of an overriding public interest and the impairing measure is appropriately tailored to serve that interest*. The more substantial the impairment, the more closely a court will scrutinize the law. In looking at whether an impairment is substantial, courts look to (1) the extent to which reasonable expectations in the contract are disrupted and (2) whether a party has relied on an obligation that is impaired by legislation, such as when the legislation impairs the express terms of a contract.[7]

Retroactivity

Imposing a new requirement that would apply to already existing contracts could be viewed as retroactive legislation. The Ohio Constitution provides that the General Assembly has no power to pass retroactive laws. This provision prohibits the General Assembly from enacting laws imposing new substantive duties and obligations upon a person's past conduct and transactions. A law may run afoul of this prohibition if it does any of the following:

- Impairs or takes away vested rights;
- Affects an accrued substantive right;
- Imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction;
- Creates a new right out of an act that gave no right and imposed no obligation when the act occurred;
- Creates a new right; or
- Gives rise to or takes away the right to sue or defend actions at law.

[7] U.S. Constitution, Article I, Section 10; Ohio Constitution, Article II, Section 28; *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849; *City of Middletown v. Ferguson*, 25 Ohio St.3d 71 (1986), *cert. denied, Sticklen v. Middletown*, 479 U.S. 1034 (1987); and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

While this provision protects the rights of private individuals and of political subdivisions, it does not protect the rights of the state or its agencies.

Remedial laws, however, can be applied retroactively. A remedial law affects only the remedy provided and includes laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right. Laws relating to procedures are ordinarily remedial in nature.[8]

Regulatory takings

Finally, the required coverage, and the related assessment imposed to reimburse insurers for that coverage, could be viewed as unjust regulatory takings. The United States and Ohio Constitutions guarantee that private property cannot be taken for public use without just compensation. The right of property is a fundamental right.[9] The public-use test requires flexibility and consideration of diverse local conditions rather that rigid, uniform application.

A regulatory taking results from an interference of property rights arising from a public program adjusting the benefits and burdens of economic life to promote the common good – if regulation goes too far, it will be recognized as a taking. If a real property owner is asked to sacrifice all economically beneficial uses in the name of the common good, to leave his property economically idle, the U.S. Supreme Court has determined that a taking has occurred. With respect to regulatory impacts to property temporarily or partly eliminating a property's economic use or value, the Court has examined a number of factors balancing the public and private interests, including: the nature of the governmental regulation, the economic impact of the regulation on the claimant, and the extent to which the regulation interfered with distinct investment-backed expectations.[10]

HISTORY

Action	Date
Introduced	03-24-20

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[8] Ohio Const., Art. II, Sec. 28; *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583; *Rubbermaid, Inc. v. Wayne County Auditor*, 95 Ohio St.3d 358, 2002-Ohio-2338; *Bd. of Educ. of the Cincinnati Sch. Dist. v. Hamilton County Bd. of Revision*, 91 Ohio St.3d 308, 2001-Ohio-46; *Lakengren, Inc. v. Kosydar*, 44 Ohio St.2d 199 (1975); and *Kumler v. Silsbee*, 38 Ohio St. 445 (1882).

[9] U.S. Const., Ams. 5 and 14; Ohio Const. Art. I, Sec. 19; *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799; and *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 2002-Ohio-1627.

[10] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).