

Albany pandemic bill could change commercial insurance industry forever

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Albany is trying to intervene on behalf of [small businesses](#) to force [insurance companies](#) to pay up for losses suffered due to the pandemic shutdown.

Assemblyman Robert Carroll has introduced a bill seeking to hold the entire industry liable for business interruption [insurance claims denied](#) to businesses because of fine print in insurance contracts.

Carroll is targeting the clauses that exclude liability for traditional business interruption induced by a virus—ones typically reserved for e-coli on food—for the coronavirus.

“It is within the state’s power to say that we are retroactively finding these clauses unconscionable and null and void, starting on day one of the emergency and running through when the emergency is over,” Carroll said. “Furthermore, we are saying it’s for businesses under 250 employees, legit small businesses that don’t have bargaining power.”

Carroll’s bill allows for the Department of Financial Services and the state’s other insurance regulators to create a backstop, a fund, out of the commercial insurance industry’s surplus capital to reinsure small businesses. Carroll estimates the entire industry’s surplus to be as high as \$1 trillion.

“They say if they paid out every bill of every claim in New York State that it would cost them \$30 billion a month and they are sitting on \$1 trillion in reserves,” he said.

Carroll told *Crain’s* his bill has 40 co-sponsors in the Assembly and 16 co-sponsors in the Senate. He said he expects it to be taken up after lawmakers confront the social justice legislation related to the ongoing Black Lives Matter protests.

But those who work in the insurance industry and arbitrate insurance disputes question both the legality of the bill and the feasibility of asking the insurance industry to use the money it keeps in reserve for traditional claims to establish a retroactive fund.

Marc Dedman, an attorney at Barton LLP and a business and insurance specialist, estimates the commercial insurance industry took in \$600 billion in premiums in 2019. He believes if all industry reserves are taken together—and this includes worker’s compensation, fire insurance, property insurance, and casualty insurance—then that would equal \$800 billion, giving the industry a total of \$1.4 trillion, in theory, to cover pandemic losses.

“We can take \$1.4 trillion in theory and apply it,” he hypothesized. “But it’s not going to solve the problem and you will bankrupt the property and casualty industry.”

Dedman said the estimated business interrupted insurance losses of all U.S. companies are between \$250 billion and \$350 billion per month. He said Carroll’s bill, if adopted across the United States after becoming law in New York, is enough to cover only four months of claim payouts, while leaving the entire industry bankrupt.

"I'm not saying the efforts are not appropriate. Something has to be done. But the simple assumption that the insurance industry has the money to pay for this is not accurate," he explained.

Others have questioned the bill's constitutionality. Article 1, Section 10 of The Constitution states the state shall make no laws impairing the obligation of contracts.

"Problem one is retroactively forcing an insurance policy to cover what it does not cover," said Erin Collins, vice president of state affairs at the National Association of Mutual Insurance Companies. "It is problematic in that it changes the contract retroactively, which is unconstitutional."

Dedman agreed with this assessment, citing the dangers retroactive policy would have on all contracts.

"If you can do it for an insurance policy does that mean they can do it for any other contract we enter into?" he wondered. "It's potentially a very dangerous precedent for the stability of the markets and contracting."

Carroll defended his bill and believes he has history on his side.

"It's totally constitutional," Carroll said. "This idea that we're going to upend 500 years of property rights is crazy."

Carroll cited how housing contracts in the 1950s and 1960s were voided due to discriminatory language in the deeds against minorities. He also attacked the fact that insurance companies hid the clauses excluding pandemic coverage and did not disclose the exclusion to those owners who signed their contracts.

"Insurance companies tricked them," he said, arguing actuaries, lawyers, and epidemiologists realized in the early 2000s that a global pandemic in the future would put their entire economic model at risk and warned insurance companies ahead of time. "New York is a fair arbiter. We won't allow large corporation to take advantage of small businesses and consumers."

As for the concern that the insurance industry doesn't have enough capital to pay out the business interruption claims, Carroll argues that many policyholders won't be able to make a claim because their businesses weren't interrupted, as some restaurants moved to online delivery services, while other businesses were able to mitigate damage to their business models that would lower the claim amount.

Some small business owners feel the protections offered by the bill are long overdue. Susannah Koteen's Harlem Italian restaurant, Lido's, was just one of many that had to shut its doors during the pandemic. After fighting for her PPP loan, Koteen feels relieved some help could be coming on the insurance side.

"It would be amazing," she said. "There's such a huge problem. We don't have any income coming in. There's rent, there's vendors, there's insurance, and none of that goes away when you're closed."

Koteen admits she signed her insurance policy under the assumption that pandemic coverage would be included.

"I was surprised. When we were ordered to close, I contacted my broker and he told me that no insurance covers it," she said. "Seems like it's always the case, just exactly when you need it, they don't cover what you need."

Other restaurant owners admit they should've read the fine print more carefully before they signed their insurance policy and that it doesn't seem legal to void the contract.

"This is a document, we paid the bill, I hate to say it's on me, but I probably should've paid more attention," said James Mallios, owner of the Greek restaurant Calissa in Southampton. "I'm not a fan of retroactively passing laws that invalidate contracts that were valid when you signed them."

One alternative solution to the plight of business owners might be a federal program structured along the same lines at the Terrorism Risk Insurance Act (TRIA) that was passed in 2002 after 9/11 to give business owners and the insurance industry mutual protection in the event of a terrorist attack.

TRIA is a joint effort by insurance companies to pay additional monies into a state fund. The federal government subsidizes it as well so there is money available to subsidize losses that otherwise wouldn't be available.

Dedman believes a pandemic risk insurance act would be an equitable solution to the massive losses small businesses suffered during Covid-19.

"TRIA, exactly," Dedman said. "That's a good prototype to look at."

Representative Carolyn Maloney has introduced a bill into Congress that would backstop insurers coverage of pandemic events with the promise that the government would cover a portion of their losses, up to \$750 billion per year.

The difference between Maloney's federal bill and Carroll's state bill is one seeks to protect businesses from future pandemics while the other seeks payouts for Covid-19 losses.

"It's the job of the state to protect small businesses that by some estimates employ 60% of state workers," Carroll said.