

The coronavirus disease 2019 (COVID-19) global pandemic is imposing significant economic consequences on millions of businesses. In addition, coverage under many business interruption (BI) insurance provisions is not being triggered by the pandemic, due to the lack of physical damage to property or because of exclusions, such as those for contagion or communicable disease.

So, it is not surprising that policyholders, insurers, the insurance industry, governmental agencies and legislators are considering alternative ways to support impacted businesses. This alert summarizes some of the current proposals for federal action.

## Is a Pandemic Risk Insurable?

Remember those insurance basics – risk spreading, frequency and severity? A worldwide pandemic by definition is worldwide, making risk spreading difficult. In addition, the occurrence of a pandemic is a low-frequency event, but when it does occur, its impact is a high-severity event. These characteristics make pandemics among the most difficult events to insure. Many commercial insurance policies require physical damage to property to trigger BI coverage, and many exclude coverage for events related to contagious disease. As a result, a large portion of policies that typically cover risks like BI, event cancellation and travel cancellation may not cover business interruption claims resulting from the COVID-19 pandemic.

Legislative proposals have been introduced in seven states (i.e., LA, MA, NJ, NY, OH, PA and SC) that would retroactively require insurers to pay BI claims arising from the COVID-19 pandemic, regardless of whether insurers collected premium or reserved for the risk. Many in the industry, including many [state insurance regulators](#), and some [state legislators](#), believe these proposals raise significant insurer solvency concerns, as well as potential constitutional and other legal issues. There is a growing view that only the US federal government has the capital and scale to address business interruption resulting from the COVID-19 pandemic. Proposals for a federal response to these issues are beginning to receive attention in Washington DC.

## Recent Proposals

### 1. Marsh & McLennan – Pandemic Risk Insurance Program (PRIP or PRIA)

On March 30, 2020, Marsh & McLennan sent two letters, one to the [Treasury Department and the National Economic Council](#) and one to [congressional Leadership](#), proposing a new general framework for pandemic risk insurance. The proposal is intended to create a new market for pandemic-related business interruption insurance. It proposes that insurers will offer pandemic risk insurance and that risk will be shared across policyholders, insurance companies and the federal government.

[P]olicyholders would absorb initial losses up to specified deductibles. Insurers would then provide business interruption coverage between that threshold and a higher limit. The federal government would then backstop the overall program by bearing a portion of the damages above a certain level.

*March 30, 2020, letter from John Q. Doyle, President & CEO, Marsh and Vice-Chair Marsh & McLennan*

This proposal looks similar to the general structure of the 2002 Terrorist Risk Insurance Act (TRIA), enacted following September 11, 2001, and reauthorized two times since then, along with various extensions in between. The Marsh proposal is intended to create a new market for pandemic risk insurance. It does not address insurance coverage for current losses related to the current COVID-19 pandemic. The proposal does not suggest extensive details as to how the program should be structured. However, the legislation described in section 4, below, is more detailed and would implement a pandemic risk insurance program like that in this Marsh proposal.

### 2. Joint Trade Associations – COVID-19 Business and Employee Continuity and Recovery Fund (Recovery Fund)

On March 31, 2020, more than 30 trade associations [proposed](#) to the President, the Secretary of the Treasury and congressional leadership that the federal government create a [Recovery Fund](#) patterned after the September 11th Victims Compensation Fund.

The numerous trade associations endorsing the Recovery Fund proposal include the American Property Casualty Insurance Association (APCIA), the National Association of Mutual Insurance Companies (NAMIC), the Council of Insurance Agents and Brokers (CIAB), the Independent Insurance Agents and Brokers of America (IIABA), the National Association of Professional Insurance Agents (PIA), the Reinsurance Association of America (RAA), and the Wholesale and Specialty Insurance Association (WSIA).

This proposal would establish a federally funded mechanism for businesses experiencing significant business interruption as a result of the COVID-19 pandemic. It proposes that the fund be administered by a federal administrator from within the Treasury Department, authorized to contract with others to administer claims submitted to the Recovery Fund.

[The Recovery Fund] would be funded by the federal government and under the authority of a special federal administrator with the ability to enter into contracts with interested businesses to administer the Recovery Fund and facilitate distribution of federal funds and liquidity to impacted businesses and their employees. The requested relief would be tied to requirements to keep employees on the payroll, maintain worker benefits, and meet debt and rent obligations. Strong anti-abuse provisions, including post-event audits, would be included.

*March 31, 2020, Joint Trades letter*

### **3. National Council of Insurance Legislators (NCOIL) – COVID-19 Business Interruption and Cancellation Claims Fund (COVID-19 Claims Fund)**

On March 30, 2020, NCOIL sent [a letter](#) to state insurance legislators and House Small Business Committee Chair Nydia Velazquez (D-NY) suggesting that Congress create The COVID-19 Claims Fund. The COVID-19 Claims Fund also would be patterned after the September 11th Victims Compensation Fund, though the claims submitted to the fund would be administered for the federal government by the insurance industry. Notably, the proposal specifically states that due to constitutional issues, the legislation should preempt any “State efforts to mandate business interruption coverage for the virus.” The NCOIL proposal specifically references US constitutional concerns and McGarran Ferguson pre-emption concerns raised by proposals to retroactively require insurers to pay BI claims.

It also cites insurer insolvency risk, stating:

[W]e cannot compound the damage to the broader economy by forcing insurers to pay claims for which they did not contract. To do so could destabilize these insurers and render them unable to pay claims for which they did accept the risk, and did rate and reserve. This could jeopardize the solvency of any number of insurers.

*March 30, 2020, NCOIL letter to Representative Nydia Velazquez*

### **4. Representative Carolyn Maloney (D-NY) – Discussion Draft of Pandemic Risk Reinsurance Program (PRIA or PRRP)**

Representative Maloney is the lead author of a [discussion draft](#) of legislation titled the Pandemic Risk Reinsurance Act of 2020, which is currently circulating in Washington DC. This legislation, which has yet to officially be introduced, was also a component of House Financial Services Committee Chair Maxine Waters’ (D-CA) legislative package to provide a comprehensive fiscal stimulus and public policy response to the COVID-19 pandemic. According to the purported discussion draft, the goal of the legislation is to:

- 1) establish a Federal program that provides a transparent system of shared public and private compensation for business interruption losses resulting from a pandemic or outbreak of communicable disease, in order to – protect consumers by addressing market disruptions and ensure . . . widespread availability and affordability of business interruption coverage for losses resulting from a pandemic or outbreak of communicable disease; and
- 2) allow for a transition period for the private markets to stabilize, resume pricing of such insurance, and build capacity to absorb any future losses, while preserving state regulation and consumer protections.

The draft legislation describes a program in which insurers voluntarily elect to participate. Upon participating, insurers pay premium to the federal government for reinsurance of covered losses and must make BI coverage for losses from public health emergencies available to policyholders on essentially the same terms as those applicable to coverage of BI events arising from other causes. The program provides reinsurance payments only for BI events certified by the Secretary of the Treasury, includes an insurer deductible after which the federal government reimburses the insurer for 95% of covered losses up to a maximum, and caps the annual federal payments under the program at \$500,000,000,000.

## 5. National Association of Insurance Commissioners (NAIC)

On March 25, 2020, the NAIC issued [a statement](#) noting that insurance regulators are closely monitoring the financial health of insurance companies, and expressing solvency concerns about any potential actions that would require insurers to “retroactively pay unfunded COVID-19 business interruption claims that insurance policies do not currently cover.”

Business interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19 and therefore include exclusions for that risk. Insurance works well and remains affordable when a relatively small number of claims are spread across a broader group, and therefore it is not typically well suited for a global pandemic where virtually every policyholder suffers significant losses at the same time for an extended period.

[I]f insurance companies are required to cover such claims, such an action would create substantial solvency risks for the sector, [and] significantly undermine the ability of insurers to pay other types of claims. . .

*NAIC March 25, 2020, Statement on Congressional Action Relating to COVID-19*

## 6. Representative Mike Thompson (D-CA) –The Business Interruption Insurance Coverage Act of 2020

On April 14, 2020, Representative Thompson introduced H.R. 6494, the Business Interruption Insurance Coverage Act of 2020. Our review of the [yet-to-be published legislative text](#) indicates that the bill – which as of the date of this publication has nine co-sponsors – would void existing and state-approved insurance policy exclusions. It would require that BI insurance policies cover losses resulting from (1) any viral pandemic; (2) any forced closure of business or evacuation mandated by state or federal governmental order; and (3) any power shut off conducted for public safety purposes. It allows reinstatement of voided exclusions regarding pandemics if (1) the customer agrees to the reinstatement; or (2) the customer has received a written notice of increased premium for the coverage 30 days before the reinstatement has not paid the increased premium. As of April 15, 2020, the timing of the notice, the period for which increased premium would be charged and the timing of exclusion reinstatement are not clear.

We understand that on April 13, 2020, five insurance industry trade associations (i.e., NAMIC, IIABA, APCI, RAA and CIAB) sent a letter to Representative Thompson opposing this proposed legislation due to insurer solvency concerns.

## 7. Representative Bryan Fitzpatrick (R-PA) –The Never Again Small Business Protection Act of 2020

On April 14, 2020, Representative Brian Fitzpatrick (R-PA) introduced [H.R. 6497](#), the Never Again Small Business Protection Act of 2020, which has three co-sponsors as of April 17, 2020. The legislation would require business interruption policies to provide coverage during a national emergency or disaster declared by the President. It would be effective only after formal certification by the Secretary of the Treasury that there is a federal backstop in place to reinsure “excessive losses under coverage made available pursuant to . . . this Act.” The bill requires the Secretary of the Treasury to establish a Federal Advisory Committee on Insurance, which must conduct a study “regarding the effectiveness and efficiency of using a federal backstop mechanism, private equity pools, risk assessments, and market pricing to reinsure insurers for excessive losses under coverage made available under [the Act].” The results of the study must be reported to Congress 180 days after enactment. Effective upon publication of the Secretary’s certification about the existence of reinsurance for excessive insurer losses, then:

[E]ach insurer that offers or makes available business interruption insurance coverage, shall make available . . . optional additional coverage that:

- (1) Covers solely losses that
  - (A) result from business interruption due to any order, by any officer or agency of [local, state or federal government] requiring cessation of operations during a national emergency; and
  - (B) occur in any area to which such national emergency applies . . . ; and covers such losses for a continuous period that begins upon the declaration of the national emergency and is not shorter than 30 days.

## What Is Next?

Given that BI issues are receiving increased attention and scrutiny across the country, it is no surprise that Washington DC is beginning to focus in on this issue as well. In fact, during the April 10, 2020, White House Coronavirus Task Force Daily Briefing, the President [expressed concern](#) about coverage of BI claims, saying:

You have people that have never asked for business interruption insurance, and they've been paying a lot of money for a lot of years for the privilege of having it, and then when they finally need it the insurance company says 'we're not going to give it'. We can't let that happen.

That same day, six Republican Senators wrote [a letter](#) to the President expressing concern about the possibility of retroactive requirements to force insurance companies to pay otherwise-not-covered business interruption claims. It also was reported in *The Wall Street Journal* on April 13, 2020, that Congressional Progressive Caucus Chair Pramilla Jayapal (D-WA) wrote to the CEOs of three large insurance companies asking them to establish mechanisms to expeditiously address coverage disputes in lieu of expensive claims litigation.

We understand that on April 16, 2020, a group of 20 Republican Congressmen sent a letter to President Trump objecting to legislation that would require insurers to cover claims for risks for which they did not receive premium, and expressed concern about insurer solvency.

Looking ahead, the sheer number of proposals under discussion to address BI insurance issues underscores the growing possibility that Congress may pursue a solution as part of its legislative response to the COVID-19 pandemic. As of April 17, 2020, Congress is working to reach agreement on legislation to provide immediate additional funding for small businesses, after which, it will likely turn its attention to improving and expanding on the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Beyond that, however, congressional Democrats are pushing for further "recovery" legislation, which could potentially include a federal legislative solution to address lawmakers' concerns about how business interruption claims related to COVID-19 are being handled. As such, given the divergent and competing approaches, it is critical that all with an interest in how Congress ultimately addresses the current BI dilemma begin to engage and take appropriate action to protect those interests.

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