Federal Legislative Activity on Business Interruption Insurance[1]

US – May 14, 2020

NewsFlash: The HEROES Act is out. House Democrats released their long awaited next phase COVID-19 stimulus proposal on Tuesday, May 12, 2020 – *The HEROES Act,* which they are promoting as "a bold response to the coronavirus pandemic and the economic collapse." There was much speculation in advance of its release about whether the package would include provisions addressing business interruption (BI) insurance – either retroactive coverage of BI claims from recent months, or the creation of new programs relating to future BI events. **The HEROES Act does neither, nor does it include any provisions relating to BI insurance.**

Other Pending Federal Legislative Proposals. Prior to the release of the HEROES Act, there were at least three other legislative proposals circulating in the House of Representatives. The two bills sponsored by Representatives Mike Thompson (D- CA) and Bryan Fitzpatrick (R-PA) are unchanged and have not progressed beyond their initial introduction. Representative Thompson's bill, HR 6494, Business Interruption Insurance Coverage Act of 2020, now has 10 cosponsors, and Representative Fitzpatrick's bill, H.R. 6497, Never Again Small Business Protection Act of 2020, now has six co-sponsors.

However, a discussion draft of legislation circulated in April by Representative Carolyn Maloney (D-NY), The Pandemic Risk Insurance Act of 2020, is again getting some attention, and reports suggest the bill will be formally introduced this week. That proposal would create the Pandemic Risk Reinsurance Program within the Treasury Department, and includes several provisions similar to the post 9-11 Terrorist Risk Insurance Act (TRIA). It is forward-looking and would not provide coverage for earlier, uncovered business interruption losses. The purposes of the bill are described as to (1): protect consumers; and "(2) allow for a transitional period for private markets to stabilize, resume pricing of [BI] insurance, and build capacity to absorb future losses, while preserving State insurance department regulation and consumer protections."

Key elements of the draft legislation include:

- Creation of the federal Pandemic Risk Reinsurance Program to be administered by the Treasury Department and to apply to public health emergencies declared under the Public Health Services Act and certified by the Secretary of Health and Human Services.
- Voluntary insurer election to participate in the program.
- Participating insurers required to:
  - Make BI coverage for public health emergency events available on materially the same terms as coverage for other BI events, and
  - Provide notice to insureds of the premium charged for the program and of the maximum cap on federal payments under the program
- A program threshold trigger of aggregate insured losses of US$250,000,000.
- Insurer deductibles, and federal payments of 95% of insured losses above the insurer deductible.
- A maximum aggregate annual cap on federal payments of US$750,000,000,000.

Public Policy Perspectives

The Insurance Industry

A coalition of insurance and other industry trade associations continues to object vigorously to any proposals that would require insurers to retroactively pay for BI claims that are not covered under current policies. This coalition and other groups have suggested instead creating a federally funded program similar to the post 9-11 Victims Compensation Fund to assist organizations with BI losses. The industry trade associations have issued a number of statements analyzing the impact of retroactively requiring coverage under policies that were priced to exclude the coverage. Examples are these recent statements from the American Property Casualty Insurance Association released on May 11 and April 28.

Another example of proposals for federal funding of pandemic business interruption losses is the April proposal of the Texas Public Policy Foundation for creation of extensive federally funded programs to compensate businesses for these losses, the Workplace Recovery Act.

1 This client alert relates only to federal legislative activity. For information on state BI legislative activity, see "Fighting State COVID-Related Insurance Coverage Mandates," Squire Patton Boggs Client Alert, April 21, 2020.

US Department of the Treasury

The Treasury Department has weighed in to express concerns that proposals to require insurance companies to retroactively pay uncovered COVID-19 BI claims could compromise the stability of the entire insurance industry. On May 8, 2020, Frederick Vaughan, Principal Deputy Assistant Secretary for Legislative Affairs for the Treasury Department, shared on Twitter a copy of a letter he wrote to members of Congress. The letter states: "While insurers should pay valid claims, we share your concerns that these proposals fundamentally conflict with the contractual nature of insurance obligations and could introduce stability risks to the industry."

Insurance Regulators

Both the National Association of Insurance Commissioners (NAIC) and the International Association of Insurance Supervisors (IAIS) have issued public statements expressing concern that retroactive coverage requirements could trigger instability and insolvency risks across the insurance industry. On May 7, 2020, the IAIS issued a statement saying:

> …the IAIS cautions against initiatives seeking to require insurers to retroactively cover Covid-19 related losses, such as business interruption, that are specifically excluded in existing insurance contracts. In such cases, the costs of claims against losses have not been built into the premiums that policyholders have paid for their insurance. Requiring insurers to cover such claims could create material solvency risks and significantly undermine the ability of insurers to pay other types of claims. Such initiatives could ultimately threaten policyholder protection and financial stability, further aggravating the financial and economic impacts of Covid-19.

Similarly, on March 25, 2020, the NAIC issued a statement saying:

> 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. While the U.S. insurance sector remains strong, if insurance companies are required to cover such claims, such an action would create substantial solvency risks for the sector, significantly undermine the ability of insurers to pay other types of claims, and potentially exacerbate the negative financial and economic impacts the country is currently experiencing.

Other Policy Proposals

Others, such as John Q. Doyle, President of the Marsh organization, have expressed support for the creation of a TRIA-type program to create a market for pandemic risk insurance in letters to both Congress and the Administration. These proposals are similar to the program envisioned under Representative Maloney's proposal, described above, that would create the Pandemic Risk Reinsurance Program.

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