A Survey Of Recent Biz Interruption Insurance Legislation

By **Pat Hatler, Brandon Roman and Kelly Mihocik** (June 9, 2020)

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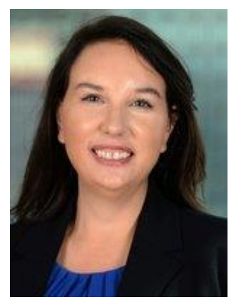

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The COVID-19 global pandemic is imposing significant negative economic consequences on millions of businesses. Many commercial insurance policies require physical damage to property to trigger business interruption coverage, and many exclude coverage for events related to contagious disease.

Although coverage is available for pandemic-driven business interruption events, it is expensive, and most businesses have not purchased these kinds of endorsements. As a result, a large portion of polices that typically cover business interruption-type risks, such as business interruption, event cancellation and travel cancellation policies, may not cover business interruption claims resulting from the COVID-19 pandemic.

So, it is not surprising that policyholders, insurers, the insurance industry, governmental agencies and legislators are considering alternative ways to support impacted businesses. This article summarizes some of the current proposals for federal action. To date, there have been several proposals for federal legislation — some would create new pandemic insurance programs available for future pandemic events, and some that would create federally funded programs to compensate businesses with current business interruption losses not covered by their existing business interruption insurance policies.

Although each proposal has its own variations, the primary difference between the proposals rests on divergent views about how to structure the risk of pandemic business interruption events. Some proposals would result in shared risk-taking between policyholders, the commercial insurance industry, and the federal government. Others would have the federal government take on the full risk of these events.

This article summarizes recent insurance industry policy proposals and federal legislative activity related to business interruption insurance issues.[1]

Public Policy Perspectives

As of June 3, legislative proposals have been introduced in nine U.S. jurisdictions: Washington, D.C., Louisiana, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania and South Carolina. These proposals, if passed, would retroactively require insurers to pay excluded business interruption claims arising from the current COVID-19 pandemic.[2]

Many in the insurance industry, as well as insurance regulators and some state legislators, object to these proposals. They assert that requiring retroactive coverage of claims for which no premium was collected and no reserves established raises significant insurer solvency concerns, as well as potential constitutional and other legal issues.

On April 13, 2020, five insurance industry trade associations[3] estimated COVID-

19 business interruption losses for U.S. small business at $220-383 billion per month, and the total surplus of the U.S. home, auto and business insurance industry at only $800 billion.

Industry trade associations have issued a number of statements analyzing the significant financial impact of retroactively requiring coverage under policies that were priced to exclude the coverage. Examples are these recent American Property Casualty Insurance Association statements released on May 11, 2020,[4] and April 28, 2020.[5]

There is a growing industry view that pandemics are essentially uninsurable and that only the U.S. federal government has the capital and scale to address business interruption losses resulting from the COVID-19 pandemic.[6] Policy proposals for a federal response to these issues are beginning to receive attention in Washington, D.C.

Policy proposals to date are of three general types. Some are similar to the post Sept. 11 Victims Compensation Fund.[7] These would create a federally funded program to provide some compensation directly to businesses for uninsured COVID-19 losses. While the details of these proposals vary, they all share the key element of using federal funding to make payments to impacted businesses, rather than payments funded in some part by insurance companies.

The second type of proposals are similar to the Terrorist Risk Insurance Act,[8] passed after the Sept. 11 terrorist attack (and subsequently reauthorized several times). These proposals are intended to create a new market for pandemic risk insurance, in which risk would be shared by policyholders, insurers and the federal government.

Although the specifics vary, the proposals generally require insurers that offer general business interruption coverage also to offer business interruption coverage for pandemic interruptions on essentially the same terms. These proposals provide for a portion of insurer losses to be repaid by the federal government, up to an annual cap.

The third type of proposal is for the creation of a new federally funded and administered insurance program. This approach is most similar to the National Flood Insurance Program[9] structure, in which the federal government underwrites the risk, policyholders purchase varying amounts of coverage from the government, and the federal government buys private reinsurance to offset some of the losses.

Pandemic Risk Insurance Program

On March 30, Marsh LLC CEO John Q. Doyle sent letters to the U.S. Department of the Treasury and National Economic Council[10] and to congressional leadership[11] proposing a new general framework for pandemic risk insurance. Like the Terrorism Risk Insurance Act enacted after Sept. 11, this proposal is intended to create a new market for pandemic-related business interruption insurance. It does not address insurance coverage for current losses related to the current COVID-19 pandemic.

Instead, it proposes that insurers will offer pandemic risk insurance for future events, and that the insurance risk will be shared across policyholders, insurance companies and the federal government. The Marsh proposal is for policyholders to absorb initial losses up to specified deductibles, with insurers then providing business interruption coverage above that threshold and up to a higher limit. The federal government would backstop the overall program by bearing a portion of the damages paid out by insurers above a certain level.

The Marsh proposal does not offer extensive details as to how the program should be structured. However, Rep. Carolyn Maloney's draft Pandemic Risk Insurance Act legislation described below is more detailed and would implement a pandemic risk insurance program similar to that described in the Marsh proposal.

Federally Funded Compensation Programs

On March 31, more than 30 trade associations, including large insurance trade associations, proposed to the president, the secretary of the treasury and congressional leadership that the federal government create the Business and Employee Continuity and Recovery Fund[12] patterned after the Sept. 11 Victims Compensation Fund.

This proposal would establish a federally funded mechanism to assist businesses experiencing significant business interruption as a result of the COVID-19 pandemic. Impacted businesses would submit claims to the government, the fund would be administered by a federal administrator, and payments would be tied to requirements to keep employees on the payroll, maintain worker benefits, and meet debt and rent obligations.

Another example of proposals for federal funding of pandemic business interruption losses is the April 2020 Workplace Recovery Act proposal by the Texas Public Policy Foundation.[13] That proposal calls for expansion of several existing federal programs to create an extensive set of federally funded programs to compensate businesses for business interruption losses.

A New Federally Underwritten Insurance Program

On May 21, three significant insurance trade associations[14] announced a proposal for a new federal insurance program called the Business Continuity Protection Program.[15] This proposal calls for creation of a federally funded revenue replacement assistance program that would provide for assistance of up to 80% of payroll, employee benefits and operating expenses for three months following a presidential viral emergency declaration.

The purpose of the BCPP is said to be to provide protection against widespread economic shutdowns due to viral outbreaks and to "bolster the country's economic resilience by providing timely and efficient financial protection and payroll support to the private sector." The program would be automatically triggered upon declaration of a federal public health emergency. It is forward looking and would apply to future pandemic business interruption events. Charles Chamness, National Association of Mutual Insurance Companies President and CEO, announced the program, saying:

Pandemics simply are not insurable risks; they are too widespread, too severe, and too unpredictable for the insurance industry to underwrite ... As we've seen in the past few months, pandemics are a national problem, and we need a national solution. NAMIC, APCIA, and the Big "I" had one goal in mind in developing the BCPP — crafting a solution that would provide meaningful support for employees, businesses, and the economy as a whole.

The BCPP is a solution . . . to provide protection against widespread economic shutdowns due to a future viral outbreak. Much of the dialogue to date has involved a program modeled after the Terrorism Risk Insurance Program, created after the 9/11 terrorist attacks under the Terrorism Risk Insurance Act (TRIA). However, a TRIA-like program, with an industry financial role, does not square with the fundamental notion that pandemics are not insurable risks.The risks are too fundamentally different in nature and scope.

The BCPP program appears to be based on several of the same structures as the federal National Flood Insurance Program. Key elements of the BCPP are:

- BCPP would be administered by the Federal Emergency Management Administration.

- Businesses would be able to purchase varying levels of revenue replacement protection from the BCPP, lasting up to three months, covering up to 80% of payroll and other expenses.

- Businesses receiving funds would certify that they will:

- Use the funds to retain employees and pay necessary operating expenses; and

- Follow applicable federal pandemic guidance.

- Protection under the BCPP must be purchased at least 90 days before a presidential emergency declaration.

- Protection is purchased through voluntarily participating state licensed insurance companies.

- The BCPP would provide for post-relief auditing and oversight.

- The BCPP would be authorized to purchase private reinsurance.

Insurance Regulator Policy Perspectives — NAIC, IAIS, and U.S. Treasury

Both the National Association of Insurance Commissioners and the International Association of Insurance Supervisors have issued public statements expressing concern that retroactive business interruption coverage requirements could trigger instability and insolvency risks across the insurance industry. On May 7, 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.[16]

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.[17]

On May 15, the NAIC and the Wisconsin School of Business released the results of a survey of insurance experts about pandemic business interruption coverage.[18] The survey includes questions about respondents' views on the effectiveness of different private and federal approaches to pandemic business interruption insurance.

The Treasury Department also has weighed in to express concerns that proposals requiring insurance companies retroactively to pay uncovered COVID-19 business interruption 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.[19]

Federal Legislative Proposals

On May 12, House Democrats released their long-awaited next phase COVID-19 stimulus proposal — the Health and Economic Recovery Omnibus Emergency Solutions Act,[20] which they are promoting as "a bold response to the coronavirus pandemic and the economic collapse." The legislation passed the House on May 15.

There was much speculation about whether the package would include provisions addressing business interruption insurance — either retroactive coverage of business insurance claims from recent months, or the creation of new programs relating to future business insurance events. The HEROES Act does neither, nor does it include any provisions relating to business interruption insurance.

Prior to the release of the HEROES Act, other legislative proposals were suggested, and they are still under consideration. Particularly notable are bills sponsored by Rep. Mike Thompson, D-Calif. — the Business Interruption Insurance Coverage Act, or H.R. 6494[21] — and by Rep. Bryan Fitzpatrick, R-Penn. — the Never Again Small Business Protection Act, or H.R. 6497.[22] While both bills remain pending before Congress, neither has progressed beyond their initial introduction.

On May 26, Rep. Carolyn Maloney, D-N.Y., introduced the Pandemic Risk Insurance Act, or H.R. 7011,[23] which had been circulating in Washington for several weeks as a discussion draft. Of the three bills, this legislation has so far received the most attention.

The Pandemic Risk Insurance Act of 2020, H.R. 7011

Maloney's PRIA legislation is forward-looking and would not provide coverage for current, uncovered business interruption losses. It would create a new market for pandemic risk insurance coverage. The purposes of the bill are stated as to:
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

(1) 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 communicative [sic] disease; 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 legislation include:

- Creation of a federal Pandemic Risk Reinsurance Program to be administered by the Department of the Treasury;
- Application 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, apparently annually;
- Requirements for participating insurers to:
- Make business interruption coverage for covered public health emergencies available on materially the same terms as coverage for other business interruption events; and
- Provide notice to insureds of the premium charged for the coverage and of the maximum cap on federal payments under the program.

- Program threshold trigger of $250,000,000 aggregate insured losses;

- Insurer-specific deductibles;

- Federal payments of 95% of insurer losses above the insurer deductible; and

- A maximum aggregate annual cap of $750,000,000,000 on federal payments.

The Business Interruption Insurance Coverage Act of 2020, H.R. 6494

This bill was introduced by Thompson on April 14. The legislation would void existing and state-approved insurance policy exclusions that would interfere with the business interruption coverage it requires. The bill would mandate that business interruption insurance policies cover losses resulting from:

- Any viral pandemic;

- Any forced closure of business or evacuation mandated by and any governmental officer or agency (local, state or federal); and

- Any power shut off conducted for public safety purposes.

It allows reinstatement of voided exclusions 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 and has not paid the increased premium. As of June 3, the timing of the customer notices, the period for which increased premium would be charged, and the timing of exclusion reinstatement are not clear. We understand that five insurance industry trade associations[24] sent a letter to Thompson opposing this proposed legislation due to insurer solvency concerns.

The Never Again Small Business Protection Act of 2020, H.R. 6497

This bill was introduced by Fitzpatrick on April 14. The legislation would require business interruption policies to provide certain coverages during a national emergency or disaster declared by the president or a public health emergency declared by the secretary of health and human Services under the Public Health Service Act.

Notably, the mandate 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 to 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, insurers that offer business interruption coverage must also make available coverage that:
(1) Covers solely losses that

> (A) result from business interruption due to any order, by any officer or agency of the Federal Government, or of any State or local government, requiring cessation of operations during a national emergency; and
>
> (B) occur in any area to which such national emergency applies... and

(2) Covers such losses for a continuous period that begins upon the declaration of the national emergency and is not shorter than 30 days.

The coverage would not be extended to any business that, during the emergency: (1) involuntarily terminates the employment of any employee or (2) terminates the health care insurance coverage for any employee. The bill would allow business interruption insurance contracts to exclude coverage for interruptions resulting from national emergencies if the policyholder agrees or fails to pay premium charged for the coverage.

What's Next?

Given that business interruption issues are receiving increased attention and scrutiny across the country, it is no surprise that Washington, D.C., is beginning to focus on this issue as well. Looking ahead, the sheer number of proposals under discussion to address business interruption insurance issues underscores the growing possibility that Congress may pursue some sort of solution as part of its ongoing legislative response to the COVID-19 pandemic.

Congress is currently working to reach agreement on its fifth legislative package to address the current economic crisis and, while business interruption issues are not addressed in the HEROES Act, they could potentially be addressed in whatever legislation is enacted as a result of this or a potential future round of negotiations.

Finally, the property damage inflicted under the cover of protests across the U.S. since May 29 also may impact congressional and insurance industry perceptions about business interruption insurance. As such, given the divergent and competing approaches, it is critical that all with an interest in how Congress ultimately addresses the current business interruption dilemma begin to engage and take appropriate action to protect those interests.

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[1] For information on state BI legislative activity, see "Fighting State COVID-Related Insurance Coverage Mandates," Squire Patton Boggs Client Alert, April 21, 2020.

[2] For information on state BI legislative activity, see "Fighting State COVID-Related Insurance Coverage Mandates," Squire Patton Boggs Client Alert, April 21, 2020.

[3] National Association of Mutual Insurance Companies (NAMIC), Independent Insurance Agents and Brokers association (BIGi), American Property Casualty Insurance Association (APCIA), Reinsurance Association of America (RAA), and Council of Independent Agents and Brokers (The Council).

[4] May 11, 2020 APCIA Letter http://www.pciaa.net/pciwebsite/cms/content/viewpage?sitePageId=60726.

[5] April 28, 2020 APCIA Letter http://www.pciaa.net/pciwebsite/cms/content/viewpage?sitePageId=60522.

[6] WSJ May 14, 2020 https://www.wsj.com/articles/insurance-firms-plan-to-fight-federal-pandemic-liability-proposal-11589459400.

[7] 9-11 Victims Compensation Fund https://www.vcf.gov/.

[8] TRIA 2019 Reauthorization, Division I Title V https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-116HR1865SA-RCP116-44.PDF.

[9] NFIP https://fas.org/sgp/crs/homesec/R44593.pdf.

[10] March 30, 2020 Marsh Letter to Treasury https://www.mmc.com/content/dam/mmc-web/Files/Administration_PRIP_Letter.pdf.

[11] March 30, 2020 Marsh Letter to Congress https://www.mmc.com/content/dam/mmc-web/Files/Congress_PRIP_Letter.pdf.

[12] March 31, 2020 Recovery Fund https://www.namic.org/pdf/20memberadvisory/200331_joint_trades_covid-19_business_and_employees_fund_letter.pdf.

[13] Workplace Recovery Act https://files.texaspolicy.com/uploads/2020/04/02184520/Bordelon-Annotti-Workplace-

Recovery-Act.pdf?utm_source=hs_email&utm_medium=email&_hsenc=p2ANqtz--M4Pj7PdbxrqVhytv0XrSKpUpPuYl1n4uYnlTv5s7KYClnwcx7GST7je9eAc7vZUOA_SY3.

[14] National Association of Mutual Insurance Companies (NAMIC), American Property Casualty Insurance Association (APCIA), and Independent Insurance Agents and Brokers of America (BIGi).

[15] May 21, 2020 Business Continuity Protection Program http://www.pciaa.net/pciwebsite/cms/content/viewpage?sitePageId=60933.

[16] May 7, 2020 IAIS Statement.

[17] March 25, 2020 NAIC Statement https://content.naic.org/article/statement_naic_statement_congressional_action_relating_covid_19.htm.

[18] May 15, 2020 NAIC and Wisconsin School of Business Insurance Expert Survey https://content.naic.org/article/statement_naic_statement_congressional_action_relating_covid_19.htm.

[19] May 8, 2020 F. Vaughn Treasury Twitter Letter https://www.iii.org/insuranceindustryblog/u-s-treasury-weighs-in-on-debate-surrounding-business-interruption-insurance/.

[20] HEROES Act https://www.congress.gov/bill/116th-congress/house-bill/6800/text.

[21] Thompson H.R. 6494 https://www.congress.gov/bill/116th-congress/house-bill/6494?s=2&r=4.

[22] Fitzpatrick H.R. 6497 https://www.congress.gov/bill/116th-congress/house-bill/6497?q=%7B%22search%22%3A%5B%22brian+fitzpatrick%22%5D%7D&s=1&r=1.

[23] Maloney H.R. 7011 https://www.congress.gov/bill/116th-congress/house-bill/7011?s=1&r=3.

[24] National Association of Mutual Insurance Companies (NAMIC), Independent Insurance Agents and Brokers Association (BIGi), American Property Casualty Association (APCIA), Reinsurance Association of America (RAA), and Council of Independent Agents and Brokers (The Council).