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Insurance Update: Legislative, Regulatory and Litigation Activity in the U.S. in Response to COVID-19

Developments Affecting Business Interruption Insurance, Workers' Compensation and Auto Insurance

EXECUTIVE SUMMARY

The novel coronavirus ("COVID-19") pandemic and the business closures, unemployment and economic disruptions caused by the pandemic continue to generate significant insurance-related legislative, regulatory and litigation activity in the United States. This Memorandum summarizes recent key COVID-19-related developments with respect to three property and casualty insurance coverages particularly affected by the crisis. Our April 9, 2020 Memorandum to Clients summarized, as of early April 2020, many of the initial insurance-related legislative and regulatory reactions to the COVID-19 pandemic in the United States, as well as certain key actions taken by insurance regulators in the European Union and United Kingdom. This Memorandum provides an overview of U.S. developments since that date with respect to the following insurance lines:

- ***Business Interruption***: Bills have been proposed in a number of U.S states and the U.S. House of Representatives that would, if enacted, require insurers to retroactively cover business interruption claims relating to COVID-19, irrespective of virus-related policy exclusions or policy conditions that would otherwise preclude coverage for COVID-19-related business suspensions. Legislation has also been proposed at the U.S state and federal levels to establish a pandemic loss-sharing program between government and private insurers, or a grant or compensation fund program funded solely by the government. In particular, the Pandemic Risk Insurance Act of 2020 (H.R. 7011), modeled after the Terrorism Risk Insurance Act ("TRIA") enacted in response to the September 11 terror attacks, was introduced in the U.S. House of Representatives on May 26. Under the draft bill, participating insurers would agree to make business interruption insurance and event cancellation coverage available for insured pandemic-related losses in return for a government backstop providing coverage for 95% of the losses in excess of a participating insurer's deductible (proposed to equal 5% of the

insurer's total prior-year U.S. property and casualty direct earned premiums). The federal reinsurance backstop would only be triggered once aggregate industry losses of participating insurers exceed $250 million, and losses payable by participating insurers and the federal government under the program would be subject to a proposed aggregate cap of $750 billion. Insured losses under the proposal would only be available for national pandemic public health emergencies that are declared on or after January 1, 2021.

U.S. state insurance regulatory authorities and the National Association of Insurance Commissioners ("NAIC") have also issued guidance, FAQs, and in some cases data calls in regard to business interruption and related coverages. Finally, numerous litigation proceedings have been commenced across the United States seeking coverage for COVID-19-related business interruption losses or alleging bad-faith denials of coverage for such losses, including multiple purported class action insurance coverage lawsuits against insurers that have written business interruption policies nationwide and allegedly wrongfully denied coverage thereunder for losses relating to COVID-19.

- ***Workers' Compensation***: A number of U.S. states have proposed or implemented emergency measures that establish a rebuttable presumption that certain defined "essential workers" who contract COVID-19 (such as first responders or healthcare workers) were exposed to the virus through their employment, and are therefore eligible for state workers' compensation coverage for such exposure. Further, bills introduced in some U.S. states, and a few emergency orders that have already been issued, expand the application of the rebuttable presumption to a much larger set of employees, including employees working in grocery stores, pharmacies or other businesses that remain open during COVID-19-related "stay-at-home" orders. In particular, on May 6 California Governor Gavin Newsom issued an executive order requiring a rebuttable presumption of workers' compensation coverage for COVID-19-related illnesses contracted by *any* employee that has performed labor or services at the employee's place of employment (other than the employee's home) with respect to work dates occurring on or after March 1 and within 60 days of the expiration of California's COVID-19 emergency declaration. In addition, proposed legislation in some states, including New York and California, would establish a conclusive (rather than rebuttable) presumption with respect to COVID-19 infections of covered employees.

- ***Auto***: A number of auto insurers in the United States are voluntarily providing refunds, credits or other relief to auto insurance policyholders in recognition of lower claims exposure and decreased losses from driving due to "shelter-in-place," "stay-at-home" and similar orders issued by governmental authorities in response to COVID-19. In addition, a handful of state insurance regulators have encouraged, or required, all auto insurers operating in their state to issue refunds, credits or discounts to policyholders. On April 13, the California Department of Insurance ("California DOI") issued a bulletin *requiring* insurers to make an initial premium refund for the months of March and April to all adversely impacted California policyholders for not only private and commercial auto policies, but also workers' compensation, commercial multiple peril, commercial liability, medical malpractice and "any other line of coverage where the measures of risk have become substantially overstated as a result of the pandemic." The New Jersey Department of Banking and Insurance issued a substantially similar bulletin on May 12. Several state insurance departments have also issued guidance and temporary rules regarding rate and rule requirements for the issuance of auto insurance refunds, discounts or credits.

  Further, several states have issued bulletins or orders urging, or in some cases requiring, insurers to extend coverage under personal auto policies for drivers delivering food, prescriptions or other products for their employers, or to provide upon request commercial hired and non-owned auto insurance coverage to such delivery drivers under applicable commercial auto policies.

BUSINESS INTERRUPTION COVERAGE

Standard commercial property insurance policies typically provide one or more "time element" coverages that protect insureds against reduced revenues and additional expenses because of physical loss or damage to the property they use to conduct business or, in the case of "contingent business interruption" coverages, the property of clients, suppliers or others critical to the insured's business. Business interruption and other time element coverages are designed to place insureds in substantially the same financial position they would be in if the physical loss or damage had not occurred. Under these coverages, the amount recoverable generally depends on the length of the interruption in normal business operations. Time element coverages are typically subject to time limits and/or monetary limits specified in the policy.

Business interruption or "business income" insurance covers lost business income when the insured property suffers "physical loss or damage," or under some standard policy forms "*direct* physical loss or damage," from a covered peril or cause of loss resulting in interruption of the insured's business. The coverage typically pays the insured (subject to policy limits, self-insured retentions or deductibles, and the duty to mitigate losses) for the amount of revenue that the insured would have earned absent a suspension of operations, less monies saved as a result of the suspension of those operations. While there is often substantial variation in coverage language and limitations, additional time element coverages and their requirements generally include: (1) "extra expense," which covers the costs associated with mitigating covered losses, including expenses incurred for such matters as arranging, furnishing and operating out of temporary premises on account of property damage at an insured location; (2) "contingent business interruption," which extends coverage to lost revenues due to physical loss or damage of the type insured to property of a critical supplier, customer or partner, which property is sometimes required to be located within a certain proximity to an insured location; (3) "civil authority," which provides coverage for losses due to an order of civil or military authority prohibiting or impairing access to an insured location, provided the order is the direct result of physical damage of the type insured at an insured location or within a certain geographical distance of it; and (4) "ingress/egress," which provides coverage for losses resulting from the necessary interruption of the insured's business when, in connection with physical damage of the type insured, access to the insured's premises has been physically hindered or prohibited.

As indicated by the descriptions above, under standard policy terms, coverage under these time element coverages is generally conditioned on physical loss or damage to the covered property (whether the insured's property, or, as in contingent business interruption, the property of others), and the physical damage or loss must be of the type insured, i.e., must result from a covered, non-excluded peril. Whether business interruption caused by COVID-19 contamination of the air within or surfaces of covered property, or COVID-19 infection of business employees, or business closure due to fear of impending contamination or on account of governmental orders is covered by standard time element coverages, and, if so, to what

extent, remains a topic of debate and is subject to pending litigation. In that regard, there are cases that refuse to find the existence of the requisite loss or damage absent tangible damage to physical property, but there are also cases that find property damage need not be visible in order to exist and that contamination resulting in the loss of use of physical property can trigger business interruption coverage. As noted above, policy language varies, and resolution of the coverage question will depend on the particular language of the policy at issue as well as the facts and circumstances relevant to each business interruption.

In addition to policy conditions relating to physical damage or loss, many standard commercial property policies include a 2006 Insurance Services Office (ISO) form entitled "Exclusion for Loss Due to Virus Or Bacteria." This form excludes coverage for any "loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness, or disease."[1] Some policies may contain different but analogous exclusions for loss or damage caused by viruses, mold, fungus, or "pollutants or contaminants." On the other hand, there are policies with virus or bacteria exclusions that also include express time element coverage for losses due to communicable or contagious diseases.

On account of the above exclusions and coverage conditions, a number of insurers and insurance regulatory authorities have made statements indicating that business interruption and related time element losses arising from COVID-19 and related business closures are not covered under many commercial property policies. Accordingly, claims submitted for business interruption coverage arising from COVID-19-related business suspensions have often been denied, as either falling outside the relevant policy's coverage provisions, or falling within one or more policy exclusions. This has led to efforts at remedial legislation, as discussed below.

A. PROPOSED BUSINESS INTERRUPTION LEGISLATION

As businesses assess the availability of insurance for losses due to the business closures and other interruptions caused by the COVID-19 crisis, legislators in a handful of U.S. states and the U.S. House of Representatives have proposed legislation to address the income losses suffered by businesses. The bills proposed to date can be divided into two categories: (1) proposals that would *require* insurers to cover business interruption claims resulting from the COVID-19 pandemic, generally on a retroactive basis to early March 2020 and irrespective of virus-related policy exclusions or policy conditions that may otherwise preclude coverage for pandemic-related business interruption losses, and (2) proposals to establish some form of risk-sharing, reinsurance backstop, grant program or compensation fund structure for coverage of pandemic-related business interruption losses, whereby government would backstop losses incurred by insurers due to pandemic risks, subject to defined limits and deductibles, or would provide full funding for such losses. See *Appendix A* for a breakdown of the bills introduced to date.

1. Legislative Proposals to Mandate Retroactive Business Interruption Coverage

Legislative proposals to retroactively mandate business interruption coverage for pandemic risks have been introduced in the U.S. House of Representatives, Louisiana, Massachusetts, Michigan, New Jersey, New York, Ohio and Pennsylvania. Many of the bills proposed to date are modeled or build upon the first proposed bill, which was introduced in the New Jersey State Assembly on March 16 (and subsequently withdrawn).[2] Under the basic structure of the New Jersey "model," every policy of insurance "insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption," that is in force in the applicable state as of the state's relevant COVID-19 emergency declaration, shall be construed to include coverage for global pandemics, subject to applicable policy limits. Under this model, the scope of the mandated coverage is limited to businesses with fewer than 100 full-time employees in the state; further, a funding mechanism is provided whereby insurers mandated to pay pandemic-related business interruption claims under the bill would be able to seek reimbursement from the state, which reimbursement would be funded from moneys collected and made available through a special-purpose apportionment assessed against property and casualty insurers in the state. The bills based on this model generally provide that the relevant state's insurance regulatory authority will establish procedures respecting the special purpose apportionment mechanism and the submission and qualification of reimbursement claims by insurers. The bills, as currently drafted, could be read to mandate that all commercial property policies insuring the applicable types of in-scope businesses must provide business interruption coverage for pandemic losses, whether or not the commercial property policy currently offers business interruption or any other time element coverage (*e.g.*, commercial property policies covering only named perils without any business interruption coverage might be mandated to provide such coverage for pandemic risks).[3]

As indicated in more detail in *Appendix A*, many of the bills share the features noted above, although certain bills contain no scope limitation at all and thus would apply to all insureds regardless of their work-force size (*e.g.*, the Business Interruption Coverage Act of 2020 (H.R. 6494) introduced in the U.S. House of Representatives). Other bills propose broader work-force size criteria than the 100 full-time employee threshold proposed under bills in New Jersey and other states (*e.g.*, bills in Massachusetts and South Carolina propose to limit eligibility to businesses with fewer than 150 "full-time equivalent" employees, and a New York bill proposes a threshold of fewer than 250 full-time employees). Under one of the four Pennsylvania bills (S.B. 1114), businesses that are classified as "small businesses" pursuant to regulations of the U.S. Small Business Administration ("SBA"),[4] or that receive funding through a program administered by the SBA, are eligible to receive up to 100% of their applicable policy limits for pandemic-related business interruption claims, whereas businesses that are not so classified would only be eligible for 75% of their applicable policy limits. Finally, it is not clear under some of the bills whether the work-force size would be measured by the number of employees employed in the relevant state or those employed nationwide or worldwide.

As regards the special purpose apportionment mechanism, most bills containing such a mechanism would require assessments against all property and casualty insurers licensed in the state, although a few bills as drafted could cause assessments to be made against a smaller or larger set of insurers. Certain proposed bills, however, contain no funding mechanism whatsoever, such that insurers mandated to provide coverage would be unable to seek reimbursement from the state (*e.g.*, the Business Interruption Coverage Act of 2020 (H.R. 6494) and bills proposed in Michigan and Pennsylvania).

Several bills contain additional features or depart entirely from the New Jersey model. For example:

- ***Explicit virus and physical damage exclusion language***. Some bills explicitly nullify any virus or related policy exclusions. (As the operative provisions under all of the bills (other than Pennsylvania S.B. 1127, discussed below) purport to mandate coverage for any COVID-19-related business interruption losses, they would likely be interpreted that way regardless of whether the bill is silent as regards existing virus exclusions.) As an example, bills in Massachusetts and South Carolina expressly provide that insurers may not deny business interruption claims on account of virus exclusions or the absence of "physical damage" to insured property. One New York bill (A.10226B) provides that any policy clause that allows an insurer to deny coverage based on a virus, bacterium or other microorganism shall be null and void. The Business Interruption Coverage Act of 2020 (H.R. 6494) contains language with similar effect.
- ***New York A.10226B***. The primary New York bill would mandate that any policy insuring against business interruption or contingent business interruption that expires during the state's COVID-19 state of emergency must be subject to automatic renewal at the current rate of charge. The same New York bill also includes special provisions expanding the mandatory coverage to contingent business interruption coverages, and makes clear that the bill would apply to excess lines insurers. The bill further explicitly includes not-for-profit corporations as eligible businesses (subject to the 250 full-time employee limitation), and provides that lost not-for-profit revenue from donations, sponsorships and grants would be covered as lost "business income" under business interruption coverage.
- ***Pennsylvania S.B. 1114***. Under the current version of this particularly expansive bill, every policy of insurance insuring against losses to "property damage" shall be construed to include coverage for "property damage" due to COVID-19 and for losses due to a civil authority order, in each case "subject to the maximum individual policy limits." "Property damage" is defined to mean "the direct physical loss, damage or injury to tangible property, as a result of a covered peril, including, but not limited to: (1) the presence of a person positively identified as having been infected with COVID-19; (2) the presence of at least one person positively identified as having been infected with COVID-19 in the same municipality of [Pennsylvania] where the property is located; and (3) the presence of COVID-19 having otherwise been detected in [Pennsylvania]." As drafted, this could require coverage for any business interruption losses suffered during the COVID-19 pandemic up to the maximum policy limits under any commercial property policies covering Pennsylvania business locations. It is unclear whether "maximum" policy limits applies to business interruption sub-limits stated in a policy or broader policy limits.
- ***Pennsylvania S.B. 1127***. A more recent Pennsylvania bill (S.B. 1127) takes a different approach than the other bills proposed to date by setting forth rules of construction applicable to any business interruption claims in respect of insured properties located in Pennsylvania. The rules of construction would effectively deem the COVID-19 pandemic as automatically satisfying "physical damage" requirements under business interruption, civil authority and ingress/egress coverages, but would not mandate coverage where the policy contains a valid virus exclusion. Under the bill, "Pennsylvania law shall apply to each and every property, all-risk, business interruption, contingent business interruption, time element and contingent time element insurance claim where the property giving rise to the claimed loss is located within [Pennsylvania] and the losses claimed to be insured arise out of, or relate to, the

COVID-19 pandemic." As with Pennsylvania S.B. 1114, the bill purports to grant the Pennsylvania Supreme Court with exclusive jurisdiction to hear any challenge to or render a declaratory judgment concerning the constitutionality of the Act.

- ***Business Interruption Coverage Act of 2020 (H.R. 6494)***. The bill introduced in the U.S. House of Representatives is arguably the most expansive of any of the bills proposed to date. Under this proposal, every insurer that offers or makes available business interruption coverage in its policies must, following enactment of the Act, make available in all such policies coverage for losses resulting from: (1) viral pandemics; (2) any forced closure of businesses or mandatory evacuations by law or order of any governmental authorities; or (3) any power shut-off conducted for public safety measures. The bill would, therefore, prospectively mandate business interruption insurance for any future national emergencies that result in forced business closures, including on account of terrorist incidents, nuclear war or other extreme events. The bill further provides that any exclusion in a contract that is in force on the effective date of the Act shall be void to the extent that it excludes the types of coverage mandated under the Act, and thus would retroactively mandate coverage for losses arising from COVID-19. The bill would, however, permit insurers to reinstate exclusions if the exclusion is affirmed in writing by the insured, or if the insured fails to pay any increased premium charged for the enhanced business interruption coverage required under the Act (as drafted, there is no limit to the amount of increased premium that could be charged for such expanded coverage).

None of the proposed bills has been passed and each has been met with considerable resistance by industry trade groups, certain members of Congress and other industry stakeholders (see *Political Reactions to the Legislative Proposals* below). Indeed, two bills introduced in Louisiana on March 31 were amended on May 14 to eliminate the proposed provisions that would have retroactively mandated business interruption coverage for the COVID-19 pandemic, and bills proposed in New Jersey and in Washington D.C. were withdrawn from consideration.[5] If adopted, legislation modifying existing business interruption policies is certain to face court challenges alleging, among other things, violation of the U.S. Constitution's Contracts Clause and the Takings and Due Process Clauses of the Fifth Amendment to the U.S. Constitution. Accordingly, it is likely that payments mandated under any adopted legislation would not be forthcoming until after final adjudication of the constitutional and other legal challenges, which could render any relief of little value to businesses seeking immediate funds to continue operations.[6] In addition, small businesses eligible for relief under these bills may also be eligible for relief through the Paycheck Protection Program authorized by the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), which was enacted on March 18, and/or potentially other programs that have been, or may be, enacted at the federal level, which could further decrease momentum for state bills of this nature or raise significant issues as to the extent of the losses remaining to be covered. Further, any enacted federal legislation that expressly purports to regulate business interruption insurance coverage would effectively preempt state legislation.[7]

Mandating coverage for risks that were never intended to be assumed by insurers, and for which premiums were never collected, could pose serious solvency concerns for property and casualty insurers. Based on existing policy obligations (*i.e.*, assuming no bills mandating coverage beyond policy terms are enacted), Willis Tower Watson has estimated that COVID-19-related claims could cost U.S. and UK insurers $140 billion in an extreme scenario.[8] According to a Congressional Research Service ("CRS") report[9] issued to the U.S. Congress on March 31, industry sources have estimated the cost of covering COVID-19-

related U.S. business interruption claims for "small businesses" to range from $110 billion to $290 billion per month. More recent estimates indicate that business interruption losses for small businesses of 100 employees or fewer could amount to between $255 billion to $431 billion *per month*, whereas the total surplus for all U.S. home, auto and business insurers combined to pay all future losses on all types of policies is only $800 billion.[10]

2. Risk-Sharing and Related Business Interruption Legislative Proposals

Several proposals have been floated, primarily but not exclusively at the federal level, to establish a risk-sharing program modeled on TRIA, or to establish a compensation fund or grant-based assistance program. Programs of this nature would provide assistance to businesses suffering suspended operations but not mandate retroactive coverage to be fully borne, in the first instance, by insurers. To date, four bills have been introduced proposing such programs (two bills in the U.S. House of Representatives, and one each in Pennsylvania and Louisiana).

In addition to these proposals, which are discussed further below, various trade associations and insurance regulatory associations have submitted risk-sharing or compensation fund proposals to Congress and/or the Trump administration:[11]

- ***National Restaurant Association Proposal***. On March 18, the National Restaurant Association wrote a letter to President Trump, Speaker of the House Pelosi and Senate Majority Leader McConnell urging the implementation of a series of proposals, including $100 billion in federally backed business interruption insurance. In addition to a recovery fund, block grants, federal loan programs, unemployment assistance and various tax measures directed to the restaurant and food-service industries, the letter proposes that, "rather than engage in a protracted dispute and arbitration process" with respect to coverage for business interruption and contingent business interruption, Congress should approve a timely $100 billion insurance program that would allow businesses to receive business interruption payments under an expedited time frame.
- ***NCOIL Proposal***. On March 25, the National Council of Insurance Legislators ("NCOIL"), a legislative organization comprised principally of legislators serving on state insurance and financial institutions committees, sent a letter to Rep. Nydia Velazquez, Chair of the House Committee on Small Business, stating that state legislative efforts to enact business interruption coverage into existing policies despite express conclusions for communicable diseases "would violate the Contract Clause within Article I of the United States Constitution." NCOIL proposes instead an alternative solution, modeled after the Victims Compensation Fund established following the September 11 attacks, that would create a COVID-19-related fund to assist businesses with business interruption or event cancellation claims. NCOIL proposes that Congress create a "COVID-19 Business Interruption & Cancellation Claims Fund" that would "incorporate the usage of the insurance industry's claims processing systems to handle claims processing for the Fund in order to ensure all claims are validated prior to payment, removing any that do not meet the established criteria." The proposal states that due to constitutional issues, the legislation should preempt any "state efforts to mandate business interruption coverage for the virus."
- ***Marsh Proposal***. On March 30, Marsh & McLennan sent two letters, one to the Treasury Department ("Treasury") and the National Economic Council and one to leaders in Congress, proposing a new general framework for pandemic risk insurance. The framework, which bears similarities to TRIA, proposes that insurers would offer pandemic insurance, the risks of which would be shared among policyholders, insurance companies and the federal government. Under the proposal, policyholders

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

- ***Recovery Fund Proposal***. On March 31, a group of 36 trade associations, including the American Property Casualty Insurance Association ("APCIA"), National Association of Mutual Insurance Companies ("NAMIC"), Independent Insurance Agents & Brokers of America ("IIABA") and Reinsurance Association of America ("RAA"), as well as trade groups representing the hotel, real estate, franchise, food-service, travel and other industries, sent a letter to President Trump, Treasury Secretary Mnuchin and House and Senate leaders requesting that Congress "advance a proposal to further assist with economic recovery and mitigate a larger financial crisis resulting from widespread disruption of economic activity." Although the letter acknowledges that the loan programs instituted by the CARES Act "provide a down payment on economic support for Main Street businesses," the groups contend that "additional liquidity will be required for impaired industries and businesses to avoid an unprecedented systemic, economic crisis." In particular, the letter proposes the establishment of a "COVID-19 Business and Employee Continuity and Recovery Fund" modeled after the September 11 Victims Compensation Fund. The fund would be administered by a federal administrator within Treasury authorized to contract with others to administer claims submitted to the Recovery Fund. Small businesses, nonprofits, veterans' organizations and tribal businesses (with 500 or fewer employees) would be eligible for relief, as well as businesses of any size that can demonstrate impairment by COVID-19, with prioritization for businesses most impacted by COVID-19, that have high proportions of employees who would otherwise be employed or that provide "essential critical infrastructure." The requested relief would be tied to requirements to keep employees on the payroll, maintain worker benefits and meet debt and rent obligations.
- ***America's Recovery Fund Coalition***. On May 3, the recently established "America's Recovery Fund Coalition," comprised of more than 100 trade associations (including APCIA, NAMIC, IIABA and RAA) and business organizations spanning 30 business sectors and representing 58 million employees (45% of the U.S. workforce according to the Coalition), sent a letter to U.S. Congressional leaders, President Trump and Treasury Secretary Mnuchin advocating for a grant-based federal assistance program. According to the letter, the Coalition believes Congress must urgently create a federal direct assistance fund to provide rapid liquidity to businesses impaired by the COVID-19 national emergency. The fund would be designed to help businesses maintain ongoing capital obligations during the prolonged crisis and the following months of economic recovery, enabling employees to continue receiving pay and maintain benefits, and helping employers rehire former employees while workplaces reopen to the public.
- ***Business Continuity Protection Program***. On May 21, NAMIC, APCIA and IIAB unveiled a new proposal for a federal program designed to assist businesses meet financial challenges from future pandemics. The proposed "Business Continuity Protection Program" ("BCPP") would provide revenue replacement assistance for payroll, employee benefits and operating expenses following a federal pandemic emergency declaration. The BCPP proposes to provide business revenue replacement assistance that would reimburse up to 80% of payroll, benefits and expenses for three months. Businesses would purchase their desired level of revenue replacement assistance through state-regulated insurance entities voluntarily participating in the BCPP. Under the BCPP, the Federal Emergency Management Agency (FEMA), with limited assistance from private contractors, would administer the proposed relief to businesses. The BCPP would be able to purchase private reinsurance to protect taxpayers. Businesses obtaining relief would have to certify that they will use any funds received for retaining employees and paying necessary operating expenses.

Four bills have been introduced to date in U.S. state and federal legislatures that propose some form of government backstop, compensation fund or grant-assistance program, including the proposed Pandemic Risk Insurance Act of 2020.

Pandemic Risk Insurance Act. On May 26, Rep. Carolyn Maloney (D-NY) announced the introduction of the Pandemic Risk Insurance Act of 2020 (H.R. 7011) ("PRIA").[12] The stated purpose of PRIA is to establish a federal program that would achieve the following two objectives: "(1) protect consumers by addressing market disruptions and ensure the continued widespread availability and affordability of business interruption coverage" and "(2) allow for a transitional period for the private markets to stabilize, resume pricing of such insurance, and build capacity to absorb any future losses, while preserving state insurance regulation and consumer protections." According to Rep. Maloney's press release, the legislation is designed to create a system of shared public and private compensation for business interruption losses resulting from future pandemics or public health emergencies.[13]

PRIA is closely modeled after TRIA. TRIA, which established a federal backstop for insurance claims related to acts of terrorism, was enacted into law in November 2002 in response to the September 11 attacks and has since been extended four times and is currently reauthorized through 2027. Under TRIA, insurers that write commercial property and casualty insurance (other than certain excluded lines of coverage) are *required* to participate in the Terrorism Risk Insurance Program ("TRIP") and make terrorism insurance coverage available to commercial policyholders under all TRIA-eligible lines of property and casualty business, although customers are not required to purchase the terrorism risk coverage. TRIP provides federal reinsurance coverage for losses arising from "certified" acts of terrorism (requiring certification by Treasury in consultation with the Secretaries of the Department of Homeland Security and the Department of State). Under TRIA as currently in effect, once aggregate industry losses for a covered terrorism event exceed $200 million, the federal government will reinsure 80% of insurers' losses once the insurer has met its deductible under the program. Federal assistance under the program is capped at $100 billion. TRIA also provides for mandatory and discretionary recoupment mechanisms designed to allow the federal government under certain conditions to recoup payments through policyholder premium surcharges—the PRIA proposal contains no mandatory recoupment mechanism.[14] Coverage under TRIA has never been triggered since its passage in 2002.[15]

Under the bill as introduced, a Pandemic Risk Reinsurance Program ("PRRP") would be established and administered by Treasury. Unlike TRIA, under which insurers providing certain insurance products are *required* to make terrorism risk insurance available, eligible property and casualty insurers[16] would be able to elect to participate in the program voluntarily on an annual basis. Each participating insurer would be required to make available in all of its business interruption policies coverage for "insured losses" that does not differ materially from the terms, conditions, amounts, limits, deductibles and other coverage limitations and exclusions applicable to other covered losses. "Insured loss" is defined to mean any loss resulting from a "covered public health emergency" that is covered by primary or excess business interruption insurance[17] issued by a participating insurer, as long as the loss occurs within the United States and during the period that the covered public health emergency "for such area" is in effect. A "covered public health

emergency" is any outbreak of infectious disease or pandemic for which an emergency is declared on or after January 1, 2021 under the Public Health Service Act[18] and that is certified by the Secretary of Health and Human Services as a public health emergency. Under the proposed bill, the PRRP would terminate on December 31, 2027.

The bill provides that the Act "may not be construed to affect any policy for business interruption insurance in force" on the date the Act is enacted. However, the bill also provides that any exclusion in a contract of a participating insurer for business interruption insurance that is in force as of the effective date of the Act shall be void to the extent it excludes losses that would otherwise be "insured losses" under PRRP, and that any state approval of such exclusions would also be null and void. A participating insurer may reinstate preexisting exclusions set forth in a policy that is in force as of the effective date of the Act if the policyholder affirmatively authorizes the exclusion in writing or (for contracts in effect for less than five months) the insured fails to pay the increased premium charged for such coverage after due notice, provided that the premium does not increase by more than 15%.

The federal share of compensation under PRRP would be equal to 95% of the insured losses that exceed the participating insurer's annual deductible. A participating insurer's deductible would be equal to 5% of the value of its direct earned premiums for U.S. property and casualty insurance during the immediately preceding calendar year. No federal compensation would be paid unless aggregate industry losses experienced by participating insurers resulting from the covered public health emergency exceed $250 million. The federal share of compensation for insured losses would be reduced by the amount of federal compensation provided to any person under other federal programs for such losses. Further, payments under PRRP would be capped at $750 billion, such that if aggregate losses exceed $750 billion neither the Treasury nor any participating insurer that has met its deductible would be liable for any portion of the amount of such losses that exceeds such cap. The Treasury Secretary is to determine the *pro rata* share of incurred losses to be paid by participating insurers when insured losses exceed $750 billion, which determination would be based on a methodology to be promulgated by Treasury within 90 days of enactment of the Act, provided in no case would a participating insurer who has met its deductible and paid its share of losses prior to the $750 billion cap be required to make any payment in excess of such amounts. Participating insurers would be permitted to purchase reinsurance through the private market for deductible amounts or insured losses retained by the insurers, and such reinsurance would not affect the calculation of the insurer's deductible or retentions, except that reinsurance recoveries together with federal assistance under PRRP may not exceed the aggregate amount of the insurer's "insured losses" for the calendar year. The program would only cover losses on policies that include "clear and conspicuous" disclosure language pertaining to the PRRP coverage, including disclosures pertaining to the annual $750 billion cap. The bill provides that such amounts as may be necessary to pay the federal share of compensation shall be

appropriated out of funds in the Treasury not otherwise appropriated, including amounts as may be necessary to administer the Program.

The bill includes various data submission and report requirements. Participating insurers would be required to submit to Treasury certain data pertaining to losses arising under business interruption insurance coverage resulting from public health emergencies. This collected data would serve as the basis for annual studies and reports on the Program that, pursuant to the bill, the Treasury Secretary must submit to the House Financial Services Committee and the Senate Committee on Banking, Housing and Urban Affairs on an annual basis. The bill would also require, among other one-time or periodic reports, a one-time study conducted by the Treasury Secretary (in coordination with the NAIC and other stakeholders) on the availability and affordability of insurance for risk of public health emergencies.

The Treasury Secretary would have the authority to investigate and audit claims, prescribe regulations and procedures, and issue interim final rules or procedures (which, according to Rep. Maloney's section-by-section description of the Act, may include procedures for discretionary recoupment of federal compensation under PRRP). The bill would preempt any provision of state law that is inconsistent with the Act's definition of "covered public health emergency," and proposes that, until December 31, 2020, rates and forms for business interruption insurance covered by the Act and filed with a state would not require prior approval or be subject to any waiting period under state law, although states would be permitted to invalidate rates that are excessive, inadequate or unfairly discriminatory.

According to Rep. Maloney's press release announcing PRIA, the bill is supported by several industry and trade association leaders, including, among others, Marsh & McLennan, the Council of Insurance Agents & Brokers, the National Retail Federation, the Risk Management Society and the U.S. Travel Association. The PRIA proposal is, however, opposed by some within the insurance industry, including APCIA and NAMIC. Opponents of TRIA-like pandemic risk-sharing proposals argue that pandemic risk is fundamentally different from terrorism risk, insofar as terrorism risks historically and by nature impact discrete properties within limited geographic areas, and are therefore more susceptible to the pooling and diversification of risk that is essential to the insurance business model than a pandemic event such as COVID-19 that simultaneously impacts all manner of businesses across the globe.

In addition to PRIA, three other risk-sharing or compensation-fund proposals have been introduced in the United States to date:

- ***Never Again Small Business Protection Act of 2020 (H.R. 6497)***. On April 14, Rep. Brian Fitzpatrick (R-PA) introduced legislation that would require an insurer that offers or makes available business interruption insurance coverage to also make available to for-profit and nonprofit businesses and "other entities" optional additional coverage that would cover losses resulting from business interruption due to orders by federal, state or local government requiring cessation of operations during a national emergency. Coverage would be provided for a continuous period of at least 30 days from the date of the emergency declaration. The bill would only take effect once the Treasury Secretary issues a

certification in the Federal Register that a federal backstop mechanism to reinsure insurers for excessive losses for coverage required by the Act is in place. The bill would direct the Federal Advisory Committee on Insurance to conduct and submit to Congress within 180 days of the bill's enactment 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 mandated by the law. The bill would require that the additional coverage required by the Act not cover the losses of a business that, during the national emergency, has "involuntarily terminated the employment of any employee" or terminated any employee's health insurance, if provided. The additional coverage may only be excluded from a contract for business interruption insurance if the insured affirmatively authorizes the exclusion in writing or the insured fails to pay the premiums charged for such coverage after due notice.

- ***Louisiana S.B. 495***. Under a bill proposed on March 31, a Business Compensation Fund (the "Compensation Fund") would be established in Louisiana for the purpose of providing a method for expediting certain property insurance claims, resolving disputes and providing coverage for losses sustained as a result of the COVID-19 pandemic. Insurers writing any kind of commercial insurance in Louisiana would be able to participate in the Compensation Fund by submitting an application and contributing to the Fund the greater of $50 million or 80% of the aggregate limits of all its in-force commercial policies in Louisiana during the declared state of emergency. Participants in the Fund would be immune from claims of bad faith brought by any person seeking payment for claims under a policy written in the state for losses associated with the COVID-19 pandemic. An insured could apply for a payment from the Compensation Fund if the policy for commercial loss was in force on March 11, 2020 or anytime thereafter during the state of emergency and the insured sustained loss of commercial income or revenue due to the imminent threat posed by COVID-19. Under the proposal, policyholders would agree to accept 80% of actual losses up to the applicable policy in satisfaction of all claims for income or revenue loss. After final disposition of all claims, any remaining moneys in the Fund would be returned to participating insurers in proportion to their contributions.
- ***Pennsylvania H.B. 2386***. Under the original version of the bill, which was initially introduced on April 6, a COVID-19 Disaster Emergency Business Interruption Grant Program ("Program") would be established to provide funding for the continuing operation of businesses during and after the COVID-19 disaster emergency declared in Pennsylvania. Pennsylvania's Department of Community and Economic Development ("CED Department") would award grants to eligible businesses, to the extent money is appropriated therefor. Businesses would be eligible for grants if: (1) the business has submitted a claim under a business interruption insurance policy and the claim was denied prior to applying for the grant; (2) the business demonstrates that it has been adversely impacted by the COVID-19 disaster emergency; and (3) the business is based in Pennsylvania and employs not more than 250 individuals. If a business receives a grant, the business must remain open and not lay off any employee for the duration of the disaster emergency; if the business does not comply, it must repay the amount of the grant plus 10%. The bill was amended in its entirety on May 27 and now merely proposes to establish a program within the CED Department to encourage businesses to purchase business interruption insurance and to provide financial assistance, subject to the availability of funding, to eligible businesses for business interruption insurance premium costs.[19]

3. Political Reactions to the Legislative Proposals

The state and federal legislative proposals outlined above have generated letters and statements, in support or opposition of such measures, from members of Congress, insurance trade organizations, insurance regulatory associations and newly formed coalitions.

- On March 18, a bipartisan group of 18 members of the U.S. House of Representatives sent a letter to four leading insurance industry trade organizations (APCIA, NAMIC, IIABA, and the Council of Insurance Agents and Brokers ("CIAB")) to urge their member companies and brokers "to make financial losses related to COVID-19 and other infectious disease-related losses part of their

commercial business interruption coverage for policyholders." In response, the chief executive officers of the four trade organizations sent a letter on March 18 to Rep. Nydia M. Velazquez, Chair of the House Committee on Small Business and one of the signatories of the letter, stating that "[b]usiness interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19."

- The NAIC issued a public statement on March 25 urging Congress to oppose proposals that would require insurers to retroactively pay unfunded COVID-19 business interruption claims that insurance policies do not currently cover.[20] According to the NAIC statement, "[b]usiness 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. … 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."
- On March 31, Rep. Gil Cisneros (D-CA) along with 32 House Members representing California sent a letter to California Insurance Commissioner Ricardo Lara urging the Commissioner to use his authority to ensure insurance companies comply with their business interruption policies. According to the letter, "many businesses have in good faith purchased and paid for business interruption insurance to cover the loss of business income sustained due to a necessary suspension of the business operations … [but] some insurers are choosing to deny these business interruption claims and not uphold their responsibility to cover these insured losses."
- On April 2, APCIA, NAMIC, IIABA, CIAB and the RAA sent a letter to Rep. Cisneros stating that standard business interruption policies "do not, and were not designed to, provide coverage against communicable diseases such as COVID-19, and as such, were not actuarially priced to do so."
- In early April, it was reported that world-renowned chefs Thomas Keller, Wolfgang Puck, Daniel Boulud and Jean-Georges Vongerichten had a call with President Trump, asking the President to buoy the restaurant industry by compelling insurers to make faster and broader payouts with the help of federal subsidies. These chefs along with others, including chef-activist José Andrés, have formed a group called Business Interruption Group, or BIG, with insurance attorney John W. Houghtaling II, and have already been involved in several lawsuits over denied claims (see *U.S. Regulation Relating to Business Interruption* below).
- On April 10, during a press conference relating to COVID-19, President Trump addressed business interruption insurance, stating in pertinent part:

> *I would like to see the insurance companies pay if they need to pay—if it's fair. And they know what's fair and I know what's fair, I can tell you very quickly. But business interruption insurance, that's getting a lot of money to a lot of people and they've been paying for years, you know sometimes they've just started paying but you have people that have never asked for business interruption insurance and they have 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.*

- Following and on the same day as President Trump's remarks, Senator Tim Scott (R-SC) and fellow Senate Banking Committee members Mike Crapo (R-ID), Thom Tillis (R-NC), Mike Rounds (R-SD), Pat Toomey (R-PA), Ben Sasse (R-NE) and David Perdue (R-GA) sent a letter to President Trump opposing proposals to fund recovery of the economy by attempting to "ex-post facto rewrite" business interruption insurance contracts that do not cover pandemics and viruses. "Any attempts to legislatively or administratively rewrite insurance policies . . . could be litigated in the courts for years, guaranteeing that no money would make it to the small businesses that need it." The letter also expressed skepticism about the PRIA proposal, saying there is doubt "that any such proposal would be able to provide the

appropriate coverage at an appropriate price for our nation's small businesses," and recommending that legislators debate that and other proposals once the COVID-19 crisis is over.

- On April 13, Rep. Pramila Jayapal (D-WA) sent a letter to nine insurance companies expressing concern about reports that commercial insurance companies are "not interpreting their commercial liability insurance policies to cover losses related to COVID-19" and are "declining to cover COVID-19 related claims filed by small and medium-sized businesses." Rep. Jayapal requested information on, among other topics: (1) contingent business interruption coverage claims that the companies have received related to COVID-19 and (2) how the companies are "working directly with U.S.-based state offices of insurance commissioners, or their equivalents, to resolve disputes over COVID-19 coverage."
- On April 16, 22 House Financial Services Committee Republicans sent a letter to President Trump raising concerns about proposals that would retroactively amend business interruption policies to require coverage of claims related to pandemics, warning that, if adopted, these proposals "could jeopardize insurers' solvency and endanger other policyholders." Noting that such policies "generally mandate that claims result from physical damage and exclude pandemic risk," the lawmakers stress that, accordingly, insurers "have not charged businesses for this coverage and consequently . . . have not reserved funds to pay out these claims." They stress, moreover, that these payments would "require using the reserves of other policyholders for protection against risks such as fire, wind, hail, tornados, and hurricanes." In addition, the lawmakers caution that such proposals could endanger the future market for standard business interruption coverage and therefore deprive small businesses of a critical form of protection and support they currently have.
- On April 17, 12 House Republicans sent a letter to President Trump raising concerns about proposals that would retroactively amend business interruption policies to cover claims related to COVID-19, arguing that such proposals are "unworkable and would fail to deliver financial relief to small business owners," and severely compromise insurers' ability to pay covered claims. In addition, they contend that Section 10 of Article I of the U.S. Constitution prohibits states from "enacting laws that 'impair the Obligation of Contracts'" and note that federal action is "similarly constrained by the Fifth Amendment's Due Process and Takings Clauses." In response to this letter, Treasury sent a reply letter on May 8 to Sen. Ted Budd (R-NC), noting that Treasury is "actively monitoring the various proposals being discussed in Congress, state legislatures, and the private sector." While stressing that "insurers should pay valid claims," Treasury noted that it "share[s] [the lawmakers'] concerns that these proposals fundamentally conflict with the contractual nature of insurance obligations and could introduce stability risks to the industry."
- On April 29, the U.S. Chamber of Commerce sent a letter to the leaders of the Senate Banking and House Financial Services Committees outlining several "initial principles" for lawmakers as they craft a "federal program to manage the extraordinarily unique financial risks of potential future pandemics that challenge traditional private market-oriented solutions." Specifically, the organization suggests that any federal pandemic system must, among other measures, avoid mandating that insurance companies write or service policies associated with any federal program to cover pandemics, and "be established through a federal trust fund or through government sponsored insurance" as pandemics are not an "insurable risk" in the aggregate given the high likelihood that every policyholder will simultaneously have a claim.
- On May 1, seven House Democrats sent a letter to Speaker Nancy Pelosi and Minority Leader Kevin McCarthy raising concerns about recent legislative and regulatory proposals intended to provide economic relief to "a relatively small number of businesses" by forcing insurance companies to pay claims for business interruption losses that are not covered. Observing that "only a small portion of companies purchase [business interruption] policies, and all but a very small portion of those policies exclude pandemic coverage" and that the "take-up rate for such policies decrease the smaller the business is," the lawmakers express concern that "retroactively altering pre-existing insurance contracts to require pay outs for losses caused by COVID-19 (even if such coverage is paid for by the federal government) would only benefit a few and would ultimately not provide the broad relief for smaller businesses."[21] Accordingly, they urge the Administration and Congress to advocate for

solutions to ensure that all businesses, employers, and workers that have been impacted by COVID-19 are provided the support that they need, whether through the SBA's Paycheck Protection Program, further direct economic support to individuals, a creation of a new economic recovery program or a combination of all of those efforts.

- On May 4, seven House Republicans sent a letter to Washington D.C. Mayor Muriel Bowser and Council Chairman Phil Mendelson expressing concern about a legislative provision then pending before the Washington D.C. Council that would have required insurers to retroactively amend contracts to provide for business interruption coverage for businesses below a certain size, regardless of any specific policy language.[22] The lawmakers argued that "[f]orcing insurers to pay for losses that are not covered by contract and for which they never collected premium is merely shifting the burden from one party to another with no basis in fact or legality" and warned that, if enacted, the measure would "drive up the cost of insurance and call into question whether contracts in the city are worth the paper on which they are written." Chairman Mendelson withdrew the relevant provision from the proposed legislation on May 5.
- On May 7, the International Association of Insurance Supervisors ("IAIS") issued a statement cautioning 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," and warning that such initiatives "could create material solvency risks and significantly undermine the ability of insurers to pay other types of claims." The IAIS further noted that the COVID-19 pandemic "has highlighted the limits on the types of coverage that can reasonably be offered by the insurance sector alone. Under such circumstances, the pooling and diversification of risks necessary to support viable insurance cover are difficult to achieve."
- On May 18, seven Republican State Attorneys General sent a letter to President Trump urging the federal government not to "take any action that expands insurance company liability beyond the plain terms" of business interruption insurance policies in light of the COVID-19 pandemic. The Attorneys General cautioned that "[a]ltering insurance law to cover all pandemic claims under business interruption policies would devastate the capital stores for paying other insurance claims" and that the "resulting harm from draining those cash reserves would undermine any benefit of covering pandemic claims." In the "few cases" where "policies do not explicitly address communicable diseases or pandemics," they "trust that those . . . can be resolved in view of the price paid and a fair reading of the policy language at issue, as one normally would engage in contract interpretation."
- On May 21, the U.S. House Small Business Committee's Innovation and Workforce Development Subcommittee held a virtual forum to examine "issues facing small businesses trying to make business interruption insurance claims related to COVID-19." Three of the witnesses were small business owners. The two other witnesses were John Houghtaling II on behalf of the Business Interruption Group (BIG) and Sean Kevelighan, President and CEO of the Insurance Information Institute. In connection with the virtual forum, the NAIC sent a letter on May 20 to certain House ranking members, opposing any attempts to pass legislation retroactively mandating otherwise-excluded business interruption coverage.

B. U.S. STATE REGULATORY ORDERS AND DIRECTIVES RELATING TO BUSINESS INTERRUPTION

Guidance and FAQs. Many state insurance departments have issued guidance or FAQs to consumers on the issue of coverage for business interruption loss under property insurance policies. State insurance regulators generally acknowledge that many policies may not cover business interruption losses arising on account of the COVID-19 pandemic or the associated civil authority orders compelling businesses to close, but that coverage will ultimately depend on the policy language. For example, in a recent letter to business owners, North Carolina's insurance commissioner stated: "Standard business interruption policies are not

designed to provide coverage for viruses, diseases, or pandemic-related losses because of the magnitude of the potential losses. Insurability requires that loss events are due to chance and that potential losses are not too heavily concentrated or catastrophic. This is not possible if everyone in the risk pool is subject to the same loss at the same time… Therefore, mandating coverage for this size and type of loss while canceling existing exclusions in the policies would end the very existence of the business interruption insurance market as we know it." On March 17, Georgia's insurance commissioner issued a bulletin noting that following the September 11 attacks, Hurricane Sandy, and other disasters, "insurers tightened policy language to make clear that property damage was a requirement" for coverage, and acknowledging that viruses and disease are typically not an insured peril unless added by endorsement. According to guidance issued by the Minnesota Department of Commerce, "the industry trend has been to exclude business interruption coverage for viruses, but this may not be universal. Each claim for business interruption coverage is unique to the specific underlying facts and policy language."

The New York Department of Financial Services ("NYDFS") has issued *Business Interruption FAQs* advising consumers that "business interruption coverage typically can only be triggered if you have property loss that leads to the business interruption. One example could be that a fire in your office has caused you to suspend your business activities." The NYDFS advises consumers to check to see if their policy has an exclusion that would disable coverage for an incident triggered by an epidemic or pandemic, and reminds consumers that any claim would need to be related to property damage for coverage to be triggered. Likewise, the California DOI has issued an FAQ clarifying that business interruption insurance coverage typically lists or describes the types of perils or causes of loss it covers; perils or causes of loss that are not listed on, or not described in, the policy are typically not covered; and business interruption coverage typically can only be triggered if you have direct physical property loss that leads to the business interruption ("for example, a fire or flood damaging your property that has caused you to suspend your business activities").

Analogous statements or sentiments have been expressed by other state insurance departments, including, among others, in Kansas, Louisiana, Maryland, North Dakota, Virginia, Washington, Washington D.C. and West Virginia.

Data Calls. In addition to such consumer guidance, three states have issued data calls to insurers relating to business interruption insurance coverage in the state. As reported in our April 9 Memorandum to Clients, on March 10, the NYDFS issued a *Call for Special Report Pursuant to Section 308 of the New York Insurance Law* to all New York-licensed property and casualty insurers regarding business interruption coverage written in New York, requiring insurers to submit information on the volume of business interruption coverage, civil authority coverage, contingent business interruption coverage and supply chain coverage (by direct premium, policy types and numbers of policies for each type) written by the insurer that has not lapsed as of March 10, and copies of explanations sent to policyholders regarding the coverage

afforded by each policy as applied to COVID-19, including a representation that such explanations have been provided to policyholders. On March 25, the Washington Office of the Insurance Commissioner issued a letter instructing all property and casualty insurers authorized to write business in Washington to provide the Office with details on the business interruption coverage provided and the types of policies for which the insurer has ongoing business interruption exposure. In addition, for each policy type, insurers were required to prepare and send to policyholders a "clear and concise explanation of benefits." Similarly, on March 26 the California DOI issued a notice to all admitted and non-admitted insurance companies writing insurance in California, requiring insurers to provide to the Department the volume of business interruption coverage, civil authority coverage, contingent business interruption coverage and supply chain coverage the insurer wrote that has not lapsed as of March 26.[23]

On May 13, the NYDFS sent a new Section 308 information request to all property and casualty insurance companies authorized in New York related to the impact of the COVID-19 pandemic. The letter requires all insurers that write "Commercial Liability Policies" (defined as including, but not limited to, commercial general liability, directors and officers, commercial umbrella, commercial excess, professional liability, business owner, commercial multiple peril and specialized multiple peril policies) to provide an explanation of: any communicable disease exclusions or similar exclusions that the insurer might use to deny coverage for claims relating to COVID-19; any plan to add COVID-19 exclusions to existing or new policies; any decision to stop offering products in New York to avoid COVID-19-related risks; and to provide a list of current policies for which pricing included recognition of potential coverage exposure for COVID-19-like losses.[24]

On March 26, the NAIC issued a communication to all state insurance regulators, encouraging them to not launch any COVID-19-related data calls to insurers on their own and to refrain from further inquiries to regulated insurers on COVID-19 matters pending completion of the NAIC data reporting template. The NAIC has since publicized two data call templates on business interruption, one requesting data on premiums and policies and the second on claims and losses, which were included in letters issued during the week of May 11. The premium and exposure data call has a response deadline of May 22. The claims and losses data call requires monthly reporting of the requested data beginning on June 8. Data is to be submitted on a group basis, aggregating the data for all companies within a corporate group into one premium file and one claim file for each report date. The data calls include admitted and non-admitted insurers domiciled in the United States, but exclude alien insurers.[25]

California DOI Notice on Claims Handling. On April 14 California Insurance Commissioner Ricardo Lara issued a notice to all admitted and non-admitted insurance companies, all licensed insurance adjusters and producers and "other licensees and interested parties" concerning the "requirement to accept, forward, acknowledge, and fairly investigate all business interruption insurance claims caused by the COVID-19 pandemic." The Commissioner noted that, despite the Department's ongoing guidance to businesses

statewide during the COVID-19 pandemic, it has received complaints from businesses, public officials and others asserting that certain insurers and agents are attempting to dissuade policyholders from filing a notice of claim under business interruption insurance coverage, or refusing to open and investigate these claims upon receipt of a notice of claim. Under the notice, insurance brokers are now required to transmit any oral or written notice of a claim immediately to the insurer; upon receipt of a notice of claim, subject to certain exceptions, every insurer is required to acknowledge orally or in writing the notice of claim immediately, but in no event more than 15 days after receipt of the notice. Each insurer must "conduct and diligently pursue a thorough, fair, and objective investigation of the reported claim" and insurers are prohibited from asking for information not reasonably required to resolve a claim. After conducting a "thorough, fair, and objective investigation of the claim," the insurer has up to 40 days after receipt of the proof of claim to accept or deny the claim, in whole or in part. If the insurer denies the claim in whole or in part, it must communicate the denial in writing to the insured explaining the legal and factual bases for the denial.

C. U.S. LITIGATION RELATING TO BUSINESS INTERRUPTION

Public statements from insurers, regulators and others that business interruption claims are likely not covered under the terms of most standard commercial property policies, and the coverage denials that have already been issued by insurers with respect to many business interruption claims have led to a number of lawsuits by policyholders across the United States. The plaintiffs in most of these coverage actions have been restaurants, bars, theaters, retailers, casinos, dentists, optometrists and other retail businesses that have been adversely impacted by the pandemic and by governmental closure orders. The majority of cases are breach of contract and/or "declaratory judgment" actions. Under the latter, the plaintiff seeks a court declaration that the applicable policy provides coverage for the losses claimed, with damage amounts being subject to later agreement by the policyholder and insured or adjudication through litigation. The declaratory judgments generally seek resolution of whether COVID-19 and the related civil authority orders constitute "physical damage or loss" for restaurants and other retail stores. Some cases involve policies with virus exclusions, but seek coverage under various theories (*e.g.*, that the property damage/loss is due to the civil authority orders as opposed to the virus). Many cases also allege bad faith or similar causes of action on account of claim denials issued by insurers, or allege that denials were issued without proper investigation of the claim.

An increasing number of cases are proposed class actions, and certain claimants are pressing for the establishment of coordinated multidistrict litigation (MDL) in federal court to consolidate the growing number of similar cases emerging nationwide. Many of the class action lawsuits seek certification of nationwide classes of policyholders and assert breach of contract and declaratory relief claims against certain insurers, although it remains to be seen whether such cases will be able to satisfy the commonality, typicality, and adequacy requirements of Federal Rules of Civil Procedure 23(a) given the varying nature of factual

circumstances (relating to the policyholders, their varying locations and policies, and the relevant civil authority orders involved).[26] Relatedly, certain claimants are seeking consolidated and expedited review in state courts. For example, on May 14, in *Joseph Tambellini, Inc.* v. *Erie Insurance Exchange*, the Pennsylvania Supreme Court denied a request to consider the numerous COVID-19 cases filed in Pennsylvania under what is called "Kings Bench Powers," which permits the Pennsylvania Supreme Court to review "an issue of immediate public importance," in a short decision. .

A key threshold issue presented in the cases filed to date is whether the direct physical loss or damage requirement to trigger coverage under commercial property policies is satisfied by the presence or threat of COVID-19 and/or acts of civil authority prohibiting access to business properties. On the one hand, insurers and other commentators have taken the position that the presence of COVID-19 neither causes nor constitutes direct physical loss or damage, and that when a business remains habitable but has been closed as part of a mandatory or voluntary closure to protect against contamination, it has not suffered a direct physical loss. Policyholders and other commentators argue, on the other hand, that the virus causes actual, though not visible, property damage; loss of use of insured property as a result of actual or suspected presence of the virus or disease constitutes the requisite loss of use of physical property; the civil orders barring access to the property, rather than the virus, have caused loss of use of physical property; or policy language on this point is ambiguous and should be construed in favor of the policyholder.[27] On May 14, in *Social Life Magazine, Inc.* v. *Sentinel Insurance Co. Ltd*., filed in the U.S. District Court for the Southern District of New York, the court denied an emergency request for a preliminary injunction to require an insurer to pay its policyholder while the coverage case is pending. According to the ruling, the policyholder had not made the showing required for injunctive relief that physical damage, within the meaning of the policy, prevented the policyholder from entering the property. The court explained that "New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going," and COVID-19 "damages lungs," not "printing presses."

It should be noted that business interruption coverage under some policies may be limited to the length of time reasonably required for the insured to restore the insured property and remove the physical loss or damage that triggered the business interruption coverage. As COVID-19 contamination on surfaces could presumably be removed fairly quickly, it has been suggested that coverage may be limited under policies with such requirements. Other policies, however, may contain broader language that extends business interruption coverage until such time as the insured is reasonably able to resume normal operations. Civil authority and ingress/egress coverage, on the other hand, are often limited to a specified number of days during which the civil authority order is in effect or the ingress/egress is prohibited or impeded, and/or are limited to a monetary sublimit for losses incurred under such coverage.

This Memorandum does not attempt to list or summarize all of the business interruption litigation pending in the United States, or comment on the merits of the theories involved. An overview of a select few of the pending actions is provided below to provide a sense of the types and kinds of cases pending.

- ***El Novillo Restaurant***. In *El Novillo Restaurant et al* v. *Certain Underwriters at Lloyd's London et al*, filed in federal district court in Florida, a restaurant group has filed a putative class action suit against its commercial property insurer. The plaintiffs allege that they each purchased "standard uniform all-risk commercial property insurance policies" which cover loss or damage to the covered premises from all risks, unless specifically excluded, and which include lost business income and extra expense coverage, and that the policies do not contain an exclusion for a viral pandemic. The plaintiffs seek a declaration that the orders imposed by civil authorities to stop the spread of COVID-19 caused physical loss or damage to commercial property as required to trigger coverage under their respective policies. The putative class action includes a cause of action for anticipatory breach of contract, alleging that the insurer intends to refuse performance under policies by denying coverage for business income losses and extra expenses incurred, although the insurer had not formally denied any business interruption claims as of the time of the suit. The plaintiffs are in essence asking the court to declare that civil authority stay-at-home orders have, in and of themselves, caused catastrophic business disruptions and must trigger coverage.
- ***French Laundry***. In *French Laundry Partners, LP dba The French Laundry, et al.* v. *Hartford Fire Insurance Company, et al*., filed in California state court, two Napa valley restaurants owned by the Thomas Keller Group (The French Laundry and Bouchon Bistro), filed suit against their insurer following the denial of business interruption claims. The restaurants allege they have coverage under an all-risk policy extending coverage to direct physical loss or damage caused by the COVID-19 virus, including time element coverage under a civil authority extension. The complaint alleges that an order issued by the Napa County Health Officer instructing all individuals to stay at home, with the exception of providing or receiving essential services and/or activities, was necessary because virus "physically infects and stays on surfaces of objects or materials, 'fomites,' for up to twenty-eight days." The insureds argue that their losses are based not only on physical damage to the property, as a result of the potentially infected fomites, but also damage to the immediate area of the insured properties. The action seeks declarations that coverage is triggered because the policy does not include an exclusion for a viral pandemic, and that it actually extends coverage for loss or damage due to the virus. The plaintiffs are represented by New Orleans-based law firm Gauthier Murphy & Houghtaling LLC (led by John Houghtaling II, one of the founders of the Business Interruption Group mentioned in Section B above).[28]
- ***Geragos & Geragos APC***. Mark Geragos, his Los Angeles law firm and several other businesses have filed five lawsuits[29] against Travelers in California state court, claiming the insurer is wrongly refusing to cover claims. The suits accuse Travelers of failing to honor property insurance policies that do not contain a virus exclusion. The suits allege that the "currently raging pandemic" has caused physical loss and damage and that the California Governor's "stay-at-home" order has prohibited access to their properties. In response, Travelers filed a suit in federal district court in California on April 20 against Geragos & Geragos APC (*Travelers Casualty Insurance Co. of America* v. *Geragos & Geragos APC*), seeking a declaration that the law firm's business losses due to COVID-19 are not covered because the virus has not caused "physical loss or damage" to the firm's offices. According to Travelers' complaint, the policy only covers physical loss or damage to the property that results from a covered cause under the policy; the presence of COVID-19 does not cause physical damage; and the civil authority coverage in the applicable policy also depends on there being "direct physical loss of or damage to" property nearby. Travelers has further alleged that the policy includes an exclusion for loss "due to virus or bacteria," which would bar coverage even were the business closure considered to constitute physical loss.
- ***Gio Pizzeria, Caribe Restaurant, and related class actions***. A group of attorneys from three law firms has launched putative class action suits against six insurance companies in federal courts over their denials of coverage for businesses shut down because of the COVID-19 pandemic. The cases

are: *Gio Pizzeria & Bar Hospitality LLC et al.* v. *Certain Underwriters at Lloyd's, London*, in the U.S. District Court for the Southern District of New York; *Rising Dough Inc. et al.* v. *Society Insurance*, in the U.S. District Court for the Eastern District of Wisconsin; *Bridal Expressions LLC* v. *Owners Insurance Co*., in the U.S. District Court for the Northern District of Ohio; *Caribe Restaurant & Nightclub Inc.* v. *Topa Insurance Company*, in the U.S. District Court for the Central District of California; *Dakota Ventures LLC* v. *Oregon Mutual Insurance Co*., in the U.S. District Court for the District of Oregon; and *Christie Jo Berkseth-Rojas DDS* v. *Aspen American Insurance Co.*, in the U.S. District Court for the Northern District of Texas. These suits allege that none of the policies contain a communicable disease exclusion, that the presence of COVID-19 in or around a property constitutes physical damage under the terms of the policies, and that coverage is also triggered by civil authority clauses in the policies. The proposed class includes subclasses for Business Income Breach, Civil Authority Breach, Extra Expense Breach and other subclasses.

- ***Newchops Restaurant/LH Dining***. Two Philadelphia-based restaurants that have sued for business interruption insurance coverage[30] are now seeking a new federal multidistrict litigation program to consolidate the growing number of similar cases emerging nationwide. The plaintiffs told the U.S. Judicial Panel on Multidistrict Litigation ("JPML") that the availability of business interruption insurance in light of COVID-19 will be a key question requiring a uniform answer, and have argued that orders from Philadelphia's mayor and Pennsylvania's governor requiring nonessential businesses to shut down constitute the kind of "civil authority" action contemplated under their policies. In addition to their cases against Admiral Insurance, the petition with the JPML seeks to consolidate cases against other insurers, including Society Insurance Inc., certain underwriters at Lloyd's of London and Owners Insurance Co.

- ***Proper Ventures***. In *Proper Ventures LLC* v. *Seneca Insurance Co. Inc.*, filed in the Superior Court of the District of Columbia, a policy issued to the insured bar and restaurant excludes coverage for "loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." The plaintiff alleges, however, that its loss of business income "was not 'caused by or resulting from' a virus as its loss occurred as a result of the Mayor's Order." The insurer denied the claim on the basis that the property did not suffer physical damage and that COVID-19 falls under a virus exclusion. Proper Ventures argues it should be granted coverage despite the virus exclusion because the mayor's order, not the virus itself, caused the business closure.

- ***SCGM, Inc***. In *SCGM, Inc.* v. *Certain Underwriters at Lloyd's London*, filed in federal court in Texas, the insured movie theater group argues that there is business interruption coverage under the policy because the policy contains a "pandemic event endorsement," which the policyholder purchased after the 2014 Ebola outbreak. The insurers denied coverage because COVID-19 is not a named disease under the endorsement. The endorsement covers "mutations or variations" of "Severe Acute Respiratory Syndrome-associated coronavirus SARS-CoV." The insured alleges the endorsement is designed "to provide coverage for insureds who experience financial damages from business interruption during pandemics," an event allegedly defined as "the announcement by a Public Health Authority that a specific Covered Location is being closed as a result of an Epidemic declared by the [Centers for Disease Control and Prevention] or [World Health Organization]." The endorsement further lists specific covered diseases, including SARS-CoV disease. The insured concedes it has not received a formal denial of coverage but seeks a declaratory judgment of coverage that, among other things, the COVID-19 pandemic satisfies the definition of Epidemic under the policy, that various governmental orders satisfy the term Pandemic Event and that the COVID-19 pathogen is a Covered Disease under the Pandemic Event Endorsement. The action also alleges anticipatory breach, breach of the duty of good faith and fair dealing, and gross negligence.

- ***Thor Equities, LLC.*** In *Thor Equities, LLC v. Factory Mutual Insurance Co*., filed in the Southern District of New York, an owner of commercial real estate in various cities and countries has filed suit for business interruption insurance against an insurer that provided express coverage for communicable disease, but only at a sublimit far lower than the insured's actual business income

losses. Thor Equities seeks a declaration from the court that it is entitled to coverage under other sections of the insurer's policies, including order of civil authority and contingent business interruption.

Reinsurance considerations. It remains to be seen to what extent reinsurers that have assumed business interruption risks will contest liability for payment of COVID-19-related losses, particularly in situations where a policy excludes by its terms coverage for losses resulting from viruses or for which there is no physical-damage nexus, but where cedents pay such claims for public relations or reputational reasons, or because of court rulings adjudicating that coverage exists notwithstanding such exclusions, or where retroactive legislation mandates such coverage. If ceding insurers pay business interruption claims for public relations reasons and are not mandated to do so, and the losses are clearly not covered by the terms of the underlying policy, such payments would likely not be covered under reinsurance treaties, unless the reinsurance contract provides coverage for *ex gratia* payments. If the legal result of a coverage suit against the insurer is uncertain, however, or there has already been a judicial decision against the insurer finding coverage, then the "follow the fortunes" or "follow the settlement" provisions often found in reinsurance agreements—and sometimes held to exist regardless of policy language—may require the reinsurer to reimburse the insurer for reasonable settlements with the underlying policyholder despite good faith arguments against coverage. The extent to which the insurer can aggregate its settlements of COVIID-19 business interruption claims in a manner minimizing the impact of self-insured retentions is apt to be another hard-fought issue that will depend on the wording of the reinsurance agreement as well as the reasonableness and good faith of the insurer's aggregation decision.

To what extent reinsurers may deny liability where a cedent is compelled to pay claims on account of legislatively mandated retroactive policy enhancements is unsettled, and may depend on whether the legislature is purporting to "clarify" terms that already exist in the policies or, instead, is expressly mandating coverage that eviscerates existing contractual rights of the insurer. Reinsurers may have a more difficult time avoiding coverage with respect to alleged clarifications of policy language as opposed to express after-the-fact invalidation of policy exclusions. In either event, though, the scope and effect of follow-the-fortunes, and follow-the-settlements clauses, which are all broadly designed to make reinsurance "follow" and operate in parallel with the underlying insurance coverage, are likely to be important. The analysis will be further complicated by the fact that constitutional and other legal challenges to retroactive business interruption legislation may not be available to reinsurers in the context of indemnity agreements between cedents and reinsurers, as the reinsurers are only indirectly affected and many reinsurance policies may be governed by English or other non-U.S. laws. Ultimate net loss and salvage and subrogration clauses in reinsurance contracts might also be implicated where there is a mechanism for the insurer to recover from special state funds or federal government backstops (such as the proposed PRIA federal backstop), to the extent such funds or backstops are established and available. Whether a cedent would need to first attempt to collect from a fund, and then seek recovery from its reinsurer for any remaining amounts, or be able to collect from reinsurers immediately and pass along recoveries to it later will depend on the reinsurance

contract provisions. With respect to bad faith claims that courts may render against cedents, or which cedents may settle with policyholders, reinsurance coverage would likely not be available for such amounts where the reinsurance contract expressly does not assume risk for extra-contractual obligations, at least where the reinsurer is not responsible for the insurer taking the position that resulted in the bad faith award.

WORKERS' COMPENSATION

Workers' compensation provides cash and medical benefits to workers who are injured or become ill in the course of their employment and provides cash benefits to the survivors of workers killed on the job. Benefits are generally provided without regard to fault and are the exclusive remedy for workplace injuries, illnesses and deaths. With the exception of federal employees and some small groups of private-sector employees covered by federal law, workers' compensation is provided through state programs and governed by state insurance laws. Employers generally purchase insurance to provide workers' compensation benefits (or self-insure up to a limit and insure excess amounts with third-party insurers). By this means, workers receive guaranteed, no-fault benefits for injuries, illnesses and deaths, but forfeit their rights, subject to some exceptions, to sue their employers, and employers receive protection from lawsuits but provide no-fault benefits through insurance. In some states, workers' compensation insurance is provided by private insurers, and in others the state operates a state insurance fund, which in some states competes with private insurers, and in others is the exclusive market for the purchase of workers' compensation insurance in the state.

By law in every state, the injury or illness that triggers workers' compensation benefits must be work-related and arise out of and in the course and scope of employment. An employee's injury or illness may be presumed work-related if, based on factual medical evidence, the injury is of a type that was caused in the workplace. In some jurisdictions, the presumption does not normally attach to "ordinary diseases of life." Occupational disease and illness must generally be incurred as a characteristic directly pertaining to the employment's trade, occupation or industry in order for workers' compensation coverage to be triggered. Therefore, while workers with COVID-19 arguably may be eligible for workers' compensation benefits if they can prove they contracted the virus at work, establishing this may be challenging given the ubiquitous nature of the virus and the fact that many carriers of the virus are asymptomatic. As communicable diseases that are widespread in communities and not specific to particular occupations have not been traditionally covered under workers' compensation, premiums collected for workers' compensation insurance have not included costs related to pandemic events.

Against this backdrop, regulators and lawmakers in several states have proposed, and in certain instances enacted, legislation, regulatory directives or emergency measures that create a new legal presumption of compensability under workers' compensation insurance for "essential employees," including public safety workers, first responders and healthcare workers, although under some measures such presumption would

be extended to a broader universe of workers. Proponents led by the AFL-CIO are urging states to apply this coverage presumption to all essential workers exposed to COVID-19, including workers in grocery stores, agriculture and other businesses that have remained open during the pandemic.

These measures would allow certain workers who test positive for COVID-19 to no longer be required to prove that they were exposed on the job; the claims process would start with the presumption that the exposure was work-related and it would be left to employers or insurers to prove otherwise. To that end, a number of states have passed measures making it easier for doctors, nurses, police, firefighters and other first responders to claim workers' compensation benefits. Other states have enacted measures that would apply such presumptions to a much larger set of workers, including grocery, pharmacy and postal workers, or, in California, virtually any worker performing labor or services outside his or her home during the COVID-19 emergency. Legislative proposals introduced in California, New York and Illinois have gone further, by proposing a *conclusive* presumption of workers' compensation coverage for COVID-19 for a wide range of workers. Actions proposed or enacted in states to date vary in terms of the scope of the presumption and the workers covered by the presumption, and also with respect to whether clear and convincing evidence, preponderance of the evidence, or some other standard is sufficient for rebutting the presumption. Proving under any such standard that an employee's COVID-19 illness was not contracted at work but instead at home or another location will likely be challenging in practice for employers and insurers given the widespread nature of COVID-19. Nevertheless, many employers favor permitting workers who contract COVID-19 to seek workers' compensation in order to gain protections from lawsuits seeking damages beyond the payments provided as workers' compensation.

Below is a summary of measures enacted to date, and the status of proposals pending in other states. As several states are considering legislation or regulations (or amendments thereto) pertaining to this topic, the below summary is not intended to be comprehensive and the measures below may be superseded by pending or later actions taken by state regulators or legislators.

- ***Alaska***. On April 9, legislation (S.B. 241) was passed establishing a presumption of compensability under the state's Workers' Compensation Act for emergency response and healthcare employees who contract COVID-19 during the state's declared public health disaster, provided the employee is employed as a firefighter, emergency medical technician, paramedic, peace officer, or healthcare provider; is exposed to COVID-19 in the course of employment; and receives a confirmed or presumptive COVID-19 diagnosis or test.[31]
- ***Arkansas***. Governor Asa Hutchinson issued an executive order on April 14 that takes a different approach than other workers' compensation bills and orders.[32] Rather than establishing a presumption of work-relatedness, the order suspends certain provisions of the state's workers' compensation act that generally preclude benefits for diseases to which the general public is exposed, referred to as "ordinary diseases of life." The order suspends this provision and another provision of the statute that requires the alleged exposure to have occurred in a "hospital or sanitarium." The order only applies to front-line healthcare providers and first responders and requires that such individuals prove a causal connection between their employment and contraction of the virus to qualify for benefits. Under the order, claims for workers' compensation due to COVID-19 exposure must be actually incurred due to

one's employment and not due to exposure outside the line of duty. On April 21, the Governor issued another executive order clarifying the definition of front-line healthcare worker.[33]

- ***California***. On May 6, Governor Gavin Newsom issued an executive order ("Executive Order N-33-20") requiring that any COVID-19-related illness of an employee shall be presumed to arise out of and in the course of employment for purposes of awarding workers' compensation benefits, provided the employee tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor or services at the place of employment (other than the employee's home or residence) and at the employer's direction, and provided such day occurred on or after March 19.[34] The presumption may be "controverted by other evidence" and only applies to injuries occurring during California's declared COVID-19 state of emergency or within 60 days after the expiration of such emergency. California's Division of Workers' Compensation will adopt regulations to implement the order. Executive Order N-33-20 cites as a basis for the Governor's authority the California Emergency Services Act, which gives the executive branch broad powers in issuing executive orders during a state of emergency. Opponents of the order are likely to argue that it is unlawful because California's Constitution gives the state legislature—not the executive branch—plenary powers in the creation and enforcement of the workers' compensation system. In addition, as with retroactive business interruption legislation, opponents may argue that the order violates the U.S. Constitution's Contract Clause.

  As Executive Order N-33-20 is not limited to first responders, the costs to California's workers' compensation system could be enormous. On April 20, the Workers' Compensation Insurance Rating Bureau of California ("WCIRB") released a study completed in response to an April 8 request from the California State Assembly Insurance Committee to assess the impact of a conclusive presumption that COVID-19 claims arising from certain front-line workers are presumed to be work-related. The WCIRB was requested to provide the cost impact of a conclusive COVID-19 presumption only for healthcare workers, firefighters, EMS and rescue employees, front-line law enforcement officers and other essential critical infrastructure employees. The WCIRB estimated that the annual cost of COVID-19 claims of such essential/critical workers under a conclusive presumption would range from $2.2 billion to $33.6 billion, with an approximate mid-range estimate of $11.2 billion, representing 61% of the annual estimated cost of California's total workers' compensation system prior to the impact of the COVID-19 pandemic.[35] On May 22, the WCIRB released an evaluation of the cost impact of Executive Order N-33-20, finding that the cost of COVID-19 claims filed by workers subject to the order would range from $0.6 billion to $2.0 billion with a mid-range estimate of $1.2 billion, representing 7% of the $18.3 billion estimated annual cost of workers' compensation claims in California prior to the pandemic.[36]

  In addition to the Governor's order, there are currently four bills pending in California relating to workers' compensation presumptions. Two of the bills would establish a conclusive as opposed to rebuttable presumption of workers' compensation coverage for classes of workers who contract COVID-19 (*e.g.*, under one bill (A.B. 196) a conclusive presumption of compensable injury would be established for any employee who is employed in an occupation or industry deemed essential under California's COVID-19 emergency declaration).[37]

- ***Florida***. Florida Chief Financial Officer and State Fire Marshal Jimmy Patronis has directed the Florida Division of Risk Management to provide workers' compensation coverage to state employees who are fighting COVID-19.[38] The directive provides coverage for state employees whose responsibilities require them to interface with individuals who are potentially infected with COVID-19. Eligible workers include law enforcement, firefighters, emergency medical technicians, paramedics, correctional officers, healthcare workers, child safety investigators and Florida National Guard members. Claims for such workers who have tested positive for COVID-19 will be processed as compensable claims arising from an occupational disease unless the state can show, by a preponderance of evidence, that the employee contracted the virus outside his or her scope of employment.

- ***Illinois***. On April 27, the Illinois Workers Compensation Commission unanimously voted to repeal an emergency rule that would have allowed most workers in the state who contract COVID-19 to seek coverage for the virus under workers' compensation. The Commission's emergency rule, issued on April 13,[39] revised the state's Workers Occupational Diseases Act to provide workers' compensation

protections for workers who are exposed to or contract the virus by creating a rebuttable presumption. The rule extended beyond first responders and healthcare workers to include front-line workers in the following industries: grocery and pharmacy; food, beverage and cannabis production; charitable and social service organizations; gas stations and businesses needed for transportation; financial institutions; hardware and supply stores; critical trades; mail, post, shipping, logistics, delivery and pick-up services; educational institutions; laundry services; restaurants for consumption off-premises; essential business and work-from-home suppliers; home-based care and services; residential facilities and shelters; professional services; day-care centers for children of essential workers; manufacture, distribution and supply chain for critical products and industries; critical labor union functions; hotels and motels; and funeral services. The Illinois Manufacturers Association and Illinois Retail Merchants Association filed a lawsuit against the Commission, arguing that the Commission exceeded its statutory authority by enacting substantive changes through a rule change rather than through the legislative process. The Sangamon County Circuit Court thereafter issued a temporary restraining order, preventing the emergency rule from taking effect. The Commission has indicated it is working on a replacement rule.

On May 26, both houses of the Illinois legislature passed an omnibus labor bill (H.B. 2455)[40] that provides a rebuttable presumption of compensability for first responders and front-line workers, which are defined to include all healthcare workers and any individuals employed by essential businesses and operations (as defined by the state's COVID-19 emergency declaration), as long as such individuals are required by their employment to encounter members of the general public or to work in locations of more than 15 employees. Under the bill, employers can rebut claims under certain conditions, including if they can demonstrate the workplace was following current public health guidelines for two weeks prior to when the employee claims he or she contracted the virus; can provide proof that the employee was exposed by another source outside of the workplace; or the employee was working from home for at least 14 days prior to the injury claim. Illinois Governor Pritzker has 10 days from the bill's passage to sign the bill into law.

- ***Kentucky***. On April 9, Governor Andy Beshear issued Executive Order 2020-277, which creates a presumption that removal of specified workers from work by a physician is due to occupational exposure to COVID-19, without a corresponding need for a positive test or proof that the exposure occurred at work.[41] Specified workers eligible for the presumption include not only first responders, but any employees of healthcare facilities, corrections officers, grocery store workers, postal service workers and other specified categories. The Governor's order did not specify whether the new rules apply retroactively or prospectively. On April 15, the Kentucky Department of Workers' Claims issued an interpretation of the Governor's order in which it states the order applies prospectively and is to be applied only to occupational exposures. According to the guidance, an employer or insurer may deny a claim of a worker subject to the Order's presumption if it has a good faith basis for the denial.[42] "For example, if a grocery worker's spouse tests positive for COVID-19 and the worker is removed from work solely due to that exposure, the employer may deny the claim since the evidence rebuts the presumption that the exposure was occupational."

- ***Louisiana***. A proposed bill in Louisiana (S.B. 475) would mandate workers' compensation coverage for COVID-19 contraction for "essential workers," defined as workers in "public safety, government, disaster response, healthcare, or private business as designated and deemed necessary or critical for response to the COVID-19 pandemic by their employer or by virtue of their official commission." The bill was referred to the Committee on Labor and Industrial Relations on May 5.[43]

- ***Massachusetts***. Legislation (H. 4749) has been introduced that would provide that "in any claim for compensation where the employee has been diagnosed with COVID-19, it shall be *prima facie* evidence" that (i) the employee was performing his or her regular duties at the time of contracting COVID-19; (ii) the claim comes within the provisions of the workers' compensation laws; and (iii) sufficient notice of the injury has been given. This proposed legislation would only apply to persons employed as emergency medical technicians, emergency room and urgent care medical personnel, and emergency room and urgent care non-medical staff.[44]

- ***Michigan***. Under emergency rules issued on March 30 by Michigan's Workers' Disability Compensation Agency, first response employees are eligible for workers' compensation benefits if they suffer a personal injury that arises out of and in the course of employment, provided the first response employee is quarantined at the direction of the employer due to confirmed or suspected COVID-19 exposure and receives a COVID-19 diagnosis from a physician, a presumptive positive COVID-19 test, or a laboratory-confirmed COVID-19 diagnosis. First response employees covered under the rule include those working in health facilities or agencies, healthcare practitioners and professionals, paramedics, police officers and firefighters.[45] In addition, three bills were introduced in the Michigan legislature on April 30 that would create rebuttable presumptions of compensation for "emergency responders" or "essential employees," depending on the bill.[46]

- ***Minnesota***. On April 8, Minnesota enacted H.F. 4537, which provides that specified employees (first responders, child care workers, healthcare providers, corrections workers, and similar employees) who contract COVID-19 (which must be confirmed by a test or medical diagnosis) are presumed to have an occupational disease arising out of and in the course of employment.[47] The presumption may only be rebutted if the employer or insurer shows the employment was not a direct cause of the disease. The legislation is scheduled to sunset on May 1, 2021. In addition, on May 18, the Minnesota Senate passed S.B. 4564, which would create a COVID-19 relief fund with stipulations that such funds would help state government organizations cover workers' compensation costs related to COVID-19, among other needs generated by the pandemic.[48]

- ***Missouri***. Effective April 22, pursuant to an emergency rule filed on April 7 by the Missouri Department of Labor and Industrial Relations, Division of Workers' Compensation, Missouri's workers' compensation statute will provide a presumption that first responders contracting COVID-19 were infected in the course of their employment.[49]

- ***New Jersey***. A bill has been introduced in the New Jersey Senate (S. 2380),[50] and a companion bill in the New Jersey Assembly (A. 3999), that would expand access to workers' compensation for "essential workers" who contract COVID-19, and be retroactive to March 9. Essential workers are defined broadly and would include employees "in the public or private sector with duties and responsibilities, the performance of which is essential to the public's health, safety and welfare." The bills would establish a rebuttable presumption that the contraction of COVID-19 by an essential employee is work-related, provided the employee performs functions pertaining to an "essential employee" role and his or her employment involves interactions with the public during the state's emergency declaration. The presumption may be rebutted by a preponderance of the evidence showing that the worker was not exposed to the disease. The New Jersey Senate passed the bill on May 14 on a 27-11-2 vote and is under consideration by the New Jersey Assembly.

- ***New York***. In early March, language was added to the New York state budget that would have amended the Workers' Compensation Law to create an absolute presumption that exposure to COVID-19 is an occupational disease for any individual and therefore compensable under New York's Workers' Compensation Law. By predicating compensability on exposure instead of illness, the proposal would effectively have made most if not all workers eligible for benefits without testing positive for the illness. The Business Council, an organization of business leaders in New York, sent a memo to lawmakers in March saying the cost of the proposal is "incalculable" and would likely bankrupt the state insurance fund, as well as some commercial insurers. The New York Compensation Rating Board assessed the proposal and determined that the law could, assuming a 40% infection rate, exceed $31 billion in costs to the state's workers' compensation system.[51]

  The budget language was withdrawn, but a bill similar to the defeated budget proposal (S. 8117A) was introduced in the New York Senate on March 23 and subsequently amended on April 8.[52] Under the proposed bill, all "essential employees" would be eligible for workers' compensation benefits if they contract COVID-19. Any employee who has worked at an "essential business"[53] since January 1, 2020 would be covered under the bill, as long as the employee tests positive for COVID-19 while working for an essential employer during the COVID-19 outbreak. According to the bill, employers/insurers are liable for 50% of any such COVID-19-related claim, and the state

is liable for the other 50%. For persons who participate as volunteers at a non-profit organization that provides essential services during the pandemic, New York's Uninsured Employer's Fund would be deemed to be the employer. No legislative action has been taken on the bill since April 8.

On May 1, a second bill was introduced in the New York Senate, S. 8266, which would add COVID-19, if contracted by certain essential employees, to the list of occupational diseases that shall be presumptively deemed to have been due to the nature of their employment. "Essential employees" is defined broadly in the bill to include, among other things, any employment that causes workers to be in contact with the public, patients, inmates, clients, students, diners and customers during the COVID-19 pandemic. The bill has been referred to the Senate's Labor Committee.[54]

- ***North Carolina***. Legislation (H. 1057) has been introduced that proposes to establish a rebuttable presumption of compensability for covered employees who contract COVID-19 in the course of their employment. "Covered employees" would include first responders, healthcare workers, and employees required to work during a pandemic for a business declared essential by an executive order of the North Carolina Governor or by order of a local governmental authority, including food service, retail and other essential personnel.[55]
- ***North Dakota***. On March 25, Governor Doug Burgum issued an executive order extending workers' compensation coverage to first responders, healthcare workers and certain other occupations who contract COVID-19. A second executive order extended such coverage to funeral directors and funeral home workers. Employees covered under the executive orders who are exposed to COVID-19 in the course of their employment may file a claim for coverage but are only eligible for up to 14 days of wage replacement and medical coverage if quarantined.[56]
- ***Pennsylvania***. Legislation (H.B. 2396) was introduced on April 13 that proposes to establish a presumption of workers' compensation coverage for any individual employed by a life-sustaining business or occupation who is required to work and who contracts, has symptoms or is exposed to an infectious disease (including COVID-19) during a declared public health emergency in the state, and which results in a period of hospitalization, quarantine or isolation or other control measures. The presumption would establish that the individual's medical condition or inability to work is "work-related hazardous duty." Covered employees would include, but not be limited to, first responders, corrections officers, healthcare workers, food services and grocery store workers, food and agriculture workers, pharmacists, trash collectors and warehouse workers. The legislation has been referred to the Labor and Industry Committee.[57]
- ***South Carolina***. Legislation (H. 5482) was introduced on May 12 that would create a rebuttable presumption of compensability for first responders, healthcare providers, and corrections workers who contract COVID-19.[58]
- ***Utah***. The Utah legislature passed H.B. 3007 on April 22.[59] The legislation creates a rebuttable presumption of work-relatedness for first responders who contract COVID-19 between March 21 and June 1, 2020. The presumption can be overcome with a preponderance of the evidence. The definition of "first responder" is based on a definition in the Code of Federal Regulations.
- ***Vermont.*** On April 29, the Vermont Senate passed a bill (S. 342) that presumes death or disability resulting from COVID-19 to be compensable under the state's workers' compensation law if the employee is a "front-line worker" and receives a positive test or diagnosis for COVID-19 between March 1, 2020 and January 1, 2021.[60] "Front-line workers" include first responders, correctional officers, healthcare workers, childcare providers, pharmacy or grocery store workers, and other workers who perform services the Vermont Commissioner of Insurance determines place the worker at a similarly elevated risk of exposure. For employees who are not front-line workers, the same presumption applies, but only if the worker receives a positive test or diagnosis for COVID-19 between March 1, 2020 and January 1, 2021 and either had documented occupational exposure in the course of employment to an individual with COVID-19, or performed services at a residence or facility where other persons at the location had COVID-19 at the time the services were performed or were diagnosed

with COVID-19 within a reasonable time thereafter. The presumption does not apply if it is shown by a preponderance of the evidence that the disease was caused by non-employment-connected risk factors or exposures. The presumption would not be available if an employer offers a COVID-19 vaccine and the employee refuses it. The bill is currently in the Vermont House Committee on Commerce and Economic Development.

- ***Wisconsin***. On April 15, Wisconsin passed omnibus COVID-19-related legislation (A.B. 1038) providing that, for purposes of workers' compensation, an injury caused to a first responder during the state's emergency order (or up to 30 days after its expiration) is presumed to be caused by the individual's employment; the presumption requires a diagnosis or positive test for COVID-19, and may be rebutted by specific evidence that the injury was caused outside of employment.[61] First responders are defined to mean an employee or volunteer for an employer that provides firefighting, law enforcement, medical or other emergency services, and who has regular, direct contact with, or is regularly in close proximity to, members of the public requiring emergency services.
- ***Wyoming.*** Legislation was passed on May 20 that creates a presumption of compensable injury for employees infected with COVID-19 during the course of employment throughout 2020. According to the legislation, "[f]or the period beginning January 1, 2020 through December 30, 2020, if any employee in an employment sector for which coverage is provided by this act is infected with the COVID-19 Coronavirus, it shall be presumed that the risk of contracting the illness or disease was increased by the nature of the employment."[62] The legislation further provides that no injury related to COVID-19 which is compensated under the Act will be chargeable to an employee's experience rating under Wyoming's workers' compensation laws.

AUTO INSURANCE

Our April 9 Memorandum to Clients summarized various directives, bulletins, guidance and orders issued by state insurance departments, including with respect to health insurance, operational preparedness, support for consumers, travel insurance, and data calls. Since that time, state insurance regulators have continued to issue guidance and orders, particularly in the areas of health insurance and support for consumers. At this date, all state insurance departments have issued bulletins or directives that provide some form of relief to insurance consumers, including providing grace periods for premium payments (typically 60-day or 90-day grace periods but this varies by state and by business line), and/or flexibility around or moratoria on cancellations and non-renewals of insurance policies. Many of the premium grace periods or other customer support measures will continue until expiration of the state's applicable state-of-emergency orders, while others are scheduled to terminate on a date certain, although several states whose orders expired have extended the orders for further periods of time. State insurance departments have also issued bulletins or guidance encouraging insurers to relax time frames for claimants to submit proofs of loss and supporting claims information.

Auto insurance has been particularly affected by these and similar measures. Specifically, Insurers and state insurance regulators have taken measures with respect to providing premium grace periods and/or premium refunds or other credits to auto insurance policyholders, and state insurance regulators have issued other guidance or requirements with a particular impact on auto insurance.

Premium Refunds—Voluntary

Several U.S. auto insurers announced in April that they would be voluntarily providing premium refunds, credits or other relief to auto insurance policyholders (typically personal auto only) during April and May. This may take the form of refund checks sent to policyholders or credits applied when the policyholder renews her coverage. For example, Allstate announced in early April that as "shelter-in-place" orders mean fewer people on the roads and fewer accidents, personal auto insurance customers would receive a 15% refund based on their monthly premiums in April and May. Chubb announced on April 13 that its U.S. personal auto insurance customers would receive a credit on annual renewal premiums as a result of reduced driving activity; upon renewal, customers are to receive a credit reflecting a 35% premium reduction for the months of April and May, with additional discounts for subsequent months, as the situation warrants. Similar refunds or credits of between 15% and 25% have been announced by many other insurers, including, among others, Farmers, GEICO, Hartford, Liberty Mutual, MetLife, Progressive, State Farm and USAA. Some insurers have also announced that customers who drive their personal vehicles commercially to deliver essential supplies during the COVID-19 emergency will be eligible for coverage under their personal auto insurance policies. Finally, many insurers have also announced that no late fees will be charged and no policies will be canceled because of unpaid premiums during the emergency.[63]

Premium Refunds—Regulatory Actions

Some state insurance departments have issued bulletins or guidance "urging," "advising" or "encouraging" auto insurers in the state to offer immediate reductions in premium to reflect reduced exposure. For example, the Alabama Department of Insurance issued a bulletin on April 8 "urging all Alabama automobile insurers to consider offering an immediate reduction in premium to reflect" reduced exposure, which can be accomplished through premium credit or return of premium. The bulletin states that an informational rate filing should be submitted via SERFF (the "System of Electronic Rates and Forms Filing" used by insurers and regulators across the country), which is to include the timeframe, individual premium impact and whether the action applies to new business and/or renewals. Insurance departments in Connecticut, New Mexico and Washington have issued similar guidance, and (as discussed below) the California DOI has affirmatively required such premium refunds. These pronouncements do not distinguish between personal and commercial auto insurance policies.

More commonly, several state insurance departments have issued guidance on rate and rule filings required in connection with voluntary premium refunds or rate reductions issued by auto insurers. For example, the Ohio Department of Insurance issued guidance that requires filing such relief initiatives in SERFF so that the Department can expeditiously review the filings. The Ohio Department will require actuarial justification for such adjustments, but "recognizes that there is very little historical data that can be utilized." Accordingly, in lieu of historical data, insurers are required to set forth the assumptions being used to justify the proposed adjustments, including the amounts of the premium relief. In addition, insurers

are asked to: (1) explain whether the proposed adjustment is being applied uniformly to all policyholders and, if not, justify any different treatment of policyholders, (2) explain the mechanism for providing adjustments (*e.g.*, premium credit, direct payment to policyholders, etc.), (3) provide descriptions of any notifications that will be sent to policyholders explaining the relief and (4) provide data about the number of Ohioans being provided relief and the expected aggregate amount of adjustment in Ohio (such information does not have to be included in the filing and may be provided after the fact). The Ohio Department will consider the filings as "file and use," meaning that insurers may begin implementing them on the effective date provided in the filing.

California and New Jersey premium refund bulletins. On April 13, California Insurance Commissioner Ricardo Lara issued a bulletin addressed to all property and casualty and workers' compensation insurers on premium refunds, credits and reductions in response to the COVID-19 pandemic.[64] According to the Bulletin, the COVID-19 pandemic has "severely curtailed activities of policyholders in both personal and commercial lines," such that projected loss exposures of many insurance policies have become "overstated or misclassified." The Bulletin notes this is especially true for policies where premiums are based partly on measures of risk that have dropped significantly due to COVID-19, such as miles driven, revenue and payrolls, and notes that while this reduced exposure has impacted automobile insurance most directly, "these reductions in risk extend beyond the automobile line of insurance."

The Bulletin accordingly orders insurers to provide an initial premium refund for the months of March and April to "all adversely impacted California policyholders" in the following lines of insurance, as promptly as practicable but in any event within 120 days of the order (*i.e.*, August 11): (1) private passenger auto insurance; (2) commercial auto insurance; (3) workers' compensation insurance; (4) commercial multiple peril insurance; (5) commercial liability insurance; (6) medical malpractice insurance; and (7) "any other line of coverage where the measures of risk have become substantially overstated as result of the pandemic." It is not at all clear that measures of risk under all of these identified lines of insurance have in fact become substantially overstated as a result of COVID-19. On May 15, Commissioner Lara issued a new bulletin extending the premium refund requirements in the April 13 Bulletin through May 31, 2020.[65]

The Bulletin grants insurers "reasonable flexibility" in determining how best to achieve the refunds. The order may be complied with by providing a premium credit, reduction, return of premium or other appropriate premium adjustment. The Bulletin permits the following actions without obtaining prior approval of rates or rules by the California DOI, provided they are done consistently with the insurer's existing rate plan: reclassification of exposures to comport with current exposure, or reduction of the exposure base to reflect actual or anticipated exposure. In addition, the refund does not require prior approval by the California DOI so long as the refund applies uniformly to all policyholders in an individual line of insurance. Such across-the-board premium reductions may be an average percentage of the change in risk or reduction in exposure.

Along with the refund, insurers are to provide notification to insureds that includes the amount of the refund, an explanation of the basis for the adjustment and a description of any changes to the classification of exposure. Insurers are also to allow insureds to provide actual or estimated experience, such as updated mileage estimates in automobile policies.

Finally, the Bulletin requires all insurers affected by the order to file a report with the California DOI within 60 days of the order (*i.e.*, by June 12), that describes the actions the insurer intends to take to comply with the premium refund requirements, including an explanation and justification for the amount and duration of the refund, and how those measures reflect actual or expected reduction of exposure to loss. Additionally, the report must include a range of data including, among other things, the percentage of refund applied, the average premium before and after refund, and the number of policyholders receiving a refund.

On May 12, the New Jersey Department of Banking and Insurance ("NJDOBI") issued Bulletin 20-22, which is substantially similar to the California bulletin summarized above, and applies to the same business lines covered by the California bulletin. The NJDOBI bulletin orders insurers that write business in such lines to make an initial premium refund or other adjustment to all adversely-impacted New Jersey policyholders, "for each month that the [New Jersey] public health emergency is in effect," and in any event no later than June 15. NJDOBI issued a companion order, A20-03, ordering insurance groups writing in any of the covered lines of business to provide claim and payment activity reports to NJDOBI, and reports summarizing all actions taken, and contemplated future actions, to refund or adjust premium in response to the NJDOBI bulletin.[66]

Delivery Drivers

A number of states, including Alabama, California, Colorado, Connecticut, Florida, Kentucky, Maryland, Montana, North Dakota, Oregon, Rhode Island, Tennessee, Washington and Wisconsin, have encouraged, or in some cases required, insurers to allow personal auto insurance to cover losses incurred when performing delivery service or otherwise offer such an endorsement to policies. For example, the Colorado Division of Insurance has instructed automobile insurers to honor accident claims incurred while using a personal vehicle to deliver food, even if such use is otherwise excluded from coverage. Further, on March 23, the Wisconsin Office of the Commissioner of Insurance issued a bulletin that requires personal auto insurers to provide coverage for delivery drivers for restaurants during the COVID-19 public health emergency, even if those drivers or restaurants did not have coverage for such activities.[67] The extra coverage must be provided at no extra cost to the insured. Further, under the Wisconsin order, commercial general liability insurers are required to notify restaurant-insureds that hired and non-owned auto coverage is available and, if requested, insurers must provide this coverage. As another example, on April 9, the California DOI released a notice requesting insurers to not deny claims under a personal auto insurance policy solely because the insured was engaged in providing delivery service on behalf of a California essential business impacted by the COVID-19-related closures, so long as the delivery driver was operating

within the course and scope of his or her duties on behalf of the essential business. As a final example, the Connecticut Insurance Department "encourages insurers to assist business owners who have had to begin deliveries by affording them coverage for those who request commercial Hired and Non-owned automobile insurance to protect their businesses, at least until the Governor's Emergency Order has been lifted."

NAIC Statutory Accounting Relief

With respect to statutory accounting consequences that may arise from premium deferral and premium refund requirements imposed on insurers, the NAIC has adopted four interpretations of statutory accounting rules related to the COVID-19 pandemic, and is considering another interpretation that would address premium refunds. The statutory accounting exceptions allow insurance reporting entities to comply with grace periods and related premium support and address mortgage loan modification or forbearance requests, while mitigating insurance reporting entity concerns on the impact of such measures under current statutory accounting rules.[68] In respect of the various regulatory measures designed to benefit policyholders, such as requiring the extension of grace periods for overdue premium payments and imposing moratoria on cancellations for non-payment of premiums, the NAIC has adopted *INT 20-02T*, which modifies Statement of Statutory Accounting Principles ("SSAP") No. 6 and SSAP No. 65 by providing a one-time extension of the 90-day rule, which otherwise requires that uncollected premium balances which have been outstanding for more than 90 days be accounted for as non-admitted assets.

The NAIC is also in the process of considering a new statutory accounting interpretation relating to premium refunds. According to an exposure draft released by the NAIC Statutory Accounting Principles (E) Working Group, it is proposed that COVID-19 credits and refunds on auto policies be reported as either a reduction of premium or a policyholder dividend. Under the exposure draft, premium refunds on in-force business and future renewals would be treated as a reduction to premium (and not as an expense).

* * *

ENDNOTES

[1] The ISO Form states that the exclusion applies to all coverage under all forms and endorsements, including "forms or endorsements that cover business income, extra expense or action of civil authority." The explanatory introduction to the ISO form, which was drafted following the 2002-2004 SARS outbreak, states that "[w]hile property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent."

[2] A bill similar to the New Jersey proposal was also included in draft COVID-19-related omnibus legislation considered by the Washington D.C. Council, but on May 5 the proposed business interruption language within the broader legislation was stricken from the omnibus act, which later passed. Under the withdrawn language, "[n]o insurer may deny a claim for loss of use and occupancy and business interruption due to: (A) Losses arising from actions an insured takes in response to [a mayor's order issued during a public health emergency], even if the relevant insurance policy excludes losses resulting from viruses; or (B) There being no physical damage to the property of the insured or to any other relevant property."

[3] For example, the New York Assembly Bill (A10226B) provides that "every policy of insurance insuring against loss or damage to property, *which includes, but is not limited to*, the loss of use and occupancy and business interruption, shall be construed to include among the covered perils under that policy, coverage for business interruption." Likewise, the proposed bill in Michigan (H.B. 5739) defines "business interruption insurance" to mean "coverage against loss or damage to property, *including* the loss of use and occupancy and business interruption," and then provides that an insurer that delivers, issues for delivery or renews in Michigan a "business interruption insurance" policy shall include in the policy coverage for business interruption due to COVID-19.

[4] The SBA's criteria to qualify as a small business are set forth under 13 CFR Pt. 121, available at: https://www.ecfr.gov/cgi-bin/text-idx?SID=8eb7a20a4356b1f9b7a081b28699d7ae&mc=true&node=pt13.1.121&rgn=div5

[5] Although language mandating retroactive business interruption was stricken from one of the amended bills in Louisiana (S.B. 477), that bill as-amended would still require that every policy covering business interruption that is delivered or issued in Louisiana on or after January 1, 2021 must include a notice of all exclusions on a prescribed form, which notice must be signed by the named insured or its legal representative; the signed form would create a "rebuttable presumption that the insured knowingly contracted for coverage with the stated exclusions." Two other bills introduced in Louisiana have not been amended but are reportedly unlikely to be considered by the legislature.

[6] Some commenters supporting such legislation have, however, argued that liberalization and "conformity to statute" clauses that are present in many insurance policies should automatically support claims for coverage with respect to insured locations located within jurisdictions where such legislation is enacted. Liberalization clauses permit insurers to expand coverage under a policy to comply with regulatory changes without issuing a new policy endorsement or notifying the policyholder (*e.g.*, a liberalization clause may provide that "any filed rules or regulations affecting this Policy are revised by statute so as to broaden the insurance provided without additional premium charge, [and] such broadened insurance will inure to your benefit only within such jurisdiction").

[7] Under the McCarran-Ferguson Act (15 U.S.C. §§ 1011-1015), passed by Congress in 1945, state laws governing the business of insurance may be invalidated, preempted, impaired or superseded by a federal law, subject to conditions and exceptions set forth in the Act, if the federal law expressly relates to the business of insurance.

ENDNOTES CONTINUED

[8] To arrive at its estimates, Willis Tower Watson examined general insurance lines of business that it expects to be affected by the COVID-19 pandemic in the U.S. and UK markets, including U.S. and UK business interruption, contingency business interruption, U.S. directors' and officers' liability, U.S. employment practice liability, U.S. general liability, U.S. mortgage insurance, trade credit and surety and U.S. workers compensation. Similarly, Lloyd's of London recently estimated that 2020 underwriting losses covered by the insurance industry as a result of COVID-19 could reach approximately $107 billion.

[9] Congressional Research Service, *Business Interruption Insurance and COVID-19*, March 31, 2020.

[10] See *APCIA Releases Update to Business Interruption Analysis*, April 28, 2020, available at: http://www.pciaa.net/pciwebsite/cms/content/viewpage?sitePageID=60522. According to this analysis, covering all small businesses with fewer than 500 employees would involve claims of $393 billion to $668 billion per month.

[11] Similar proposals are under contemplation in the UK. UK insurance industry executives have been working together with UK terrorism reinsurer Pool Re to find a common response to the surge in COVID-19-related claims, including potential plans for a pandemic reinsurer. Pool Re, founded after the Irish Republican Army attacks on London in 1992, relies on all members to contribute for major property losses caused by terrorism. The Association of British Insurers has also called for the UK government to subsidize pandemic insurance coverage for domestic businesses, modeled on the UK government-backed reinsurance scheme, Flood Re, which guarantees affordable home insurance for homeowners living in areas prone to flooding. In addition, on April 22 France's insurance association, the Fédération Française de l'Assurance, announced it is working on a plan to create a pandemic mechanism, which it aims to have ready to send to the government before the end of 2020. With respect to trade credit insurance, which provides insurance to business entities involved in international trade protecting their account receivables from losses due to default or insolvency of customers and other creditors, the UK government has announced that it will backstop trade credit insurance until December 2020 for companies struggling to keep up with payments. The backstops are intended to cover trading by domestic and exporting businesses and will operate through reinsurance agreements with trade credit insurers.

[12] Pandemic Risk Insurance Act of 2020, H.R. 7011, available at: https://www.congress.gov/bill/116th-congress/house-bill/7011/text?r=11&s=1. A section-by-section analysis of the bill is available at: https://maloney.house.gov/sites/maloney.house.gov/files/PRIA%20Section%20by%20Section.pdf

[13] Rep. Carolyn B. Maloney, *Rep. Maloney Joins with Industry and Trade Association Leaders to Introduce the Pandemic Risk Insurance Act*, May 26, 2020, available at: https://maloney.house.gov/media-center/press-releases/rep-maloney-joins-with-industry-and-trade-association-leaders-to

[14] After an act of terrorism is certified and following payment of claims, TRIA requires Treasury to recoup part of the federal share of losses if insurers' uncompensated insured losses are less than a certain amount (up to $41 billion for 2020). Treasury must impose policyholder premium surcharges on commercial property and casualty policies until total industry payments reach 140% of any mandatory recoupment amount.

[15] On April 20, 2020, the U.S. Government Accountability Office ("GAO") issued a report on terrorism risk insurance and TRIA. The report examines the current market for terrorism risk insurance and the TRIA program's role in the market, and the Department of Treasury's ("Treasury") processes to certify acts of terrorism and fulfill claims. The report makes various recommendations, including that Treasury publicly communicate when it is considering reviewing an event for TRIA certification and document agreements with the Departments of Homeland Security and Justice on the agencies' roles in the process. According to the report, some insurers and insurance associations have raised issues about Treasury communications on certification. For example, such stakeholders cited confusion over why the 2013 Boston Marathon bombing was not certified when

insurers viewed it as a terrorist attack, and expressed concern that Treasury never communicated whether it was reviewing the event for certification or its reasons for not certifying it, thereby creating uncertainty as to whether to pay claims and putting insurers at risk of violating state laws and their policyholder agreements.

16 Under the current draft, "property and casualty insurance" is defined to mean commercial lines of property and casualty insurance, including excess insurance, workers' compensation, and event cancellation insurance (but is defined to exclude federal crop, private mortgage, financial guaranty, medical malpractice, flood, commercial auto, burglary and theft, surety, professional liability, farm owners multiple peril, life and health insurance, as well as reinsurance and retrocessional reinsurance). Insurers eligible to participate in PRRP would include any licensed or admitted insurers, as well as excess and surplus lines carriers, state residual market insurance entities, state workers' compensation funds, captive insurers, and other self-insurance arrangements by municipalities and other entities (including workers' compensation self-insurance programs and reinsurance pools). The proposal states that the Treasury Secretary may, in consultation with the NAIC and appropriate state regulatory authorities, apply PRRP to other classes or types of captive insurers and self-insurance arrangements, provided such application is determined prior to the commencement of the relevant covered public health emergency.

17 "Business interruption insurance" is defined to mean commercial lines of property and casualty insurance coverage, including event cancellation insurance or other non-property contingent business interruption insurance, provided or made available for losses resulting from periods of suspended business operations, including losses from a covered public health emergency, or a civil order related to a covered public health emergency, whether provided under broader coverage for property losses or separately.

18 The Public Health Service Act (42 U.S.C. ch. 6A § 201 et seq.) authorizes the Department of Health and Human Services to lead federal public health and medical responses to public health emergencies, determine that a public health emergency exists, and assist states in their response activities.

19 In addition to the foregoing bills, Senator Steve Daines (R-MT) has circulated a proposal referred to as the "Workplace Recovery Act" to create a fund with payouts intended to remedy operational losses of businesses closed due to COVID-19, but not lost profits. The proposal would apply both retroactively and prospectively, including by providing direct reimbursement to every business for operating losses, limited to 90% of past revenues through a federal automated security trust program, covering payroll, operating expenses, rent and debt service through December 31, 2020. Prospectively, the proposal would establish a new government funded business interruption insurance add-on for every privately administered commercial insurance plan to protect against future pandemics. Businesses would be required to pay a small premium to cover transaction and processing fees, while the government would backstop all national emergency operating losses not otherwise covered. Legislation for the Workplace Recovery Act has not been formally introduced in Congress.

20 The NAIC letter was in part a reaction to a proposal issued on March 19 by the Problem Solvers Caucus, a group of 48 U.S. Representatives. In connection with debate involving passage of the CARES Act, the Caucus proposed to legislatively declare COVID-19 "a public health crisis and, as such, a qualifying event for all existing force majeure contract provisions and business interruption insurance policies."

21 According to a Nationwide Insurance survey conducted by Harris Interactive, two-thirds of small businesses (66%) do not hold policies containing businesses interruption insurance coverage.

22 The legislation was similar in most respects to the legislation proposed in Massachusetts but would have applied to businesses with fewer than 100 full-time employees.

23 Similar data calls and regulatory actions have occurred in the UK. For example, a parliamentary Treasury Committee has written to the Association of British Insurers requesting extensive data on

how its members plan to approach claims for losses in connection with COVID-19. On April 15, the UK Financial Conduct Authority ("FCA") issued guidance to insurers on its expectations with respect to insurers' conduct concerning business interruption. The FCA acknowledged that most policies do not cover pandemics, and create no obligation for insurers to pay COVID-19-related business interruption claims.

[24] Also on May 13, the NYDFS sent a different Section 308 letter to all life insurers authorized in New York. That letter has two sections, the first applying to life and annuity insurers generally and the second to life insurers that offer an accelerated or algorithmic underwriting program. The 308 letter requests, among other things, information regarding changes in New York life and annuity insurers' business sales and underwriting practices related to "recent changes in the equity and financial markets and the impact of the COVID-19 pandemic."

[25] Further information on the NAIC data call may be found at: https://content.naic.org/industry_property_casualty_data_call.htm

[26] The UK FCA has announced that it will seek a UK High Court judgment later this year over the liability of insurers in a selection of policy examples. The FCA has reported that it plans to go to the High Court with a sample of policy wordings that have triggered the greatest uncertainty over liability as it attempts to gain what it called an "authoritative declaratory judgment."

[27] According to the CRS report issued to Congress, "[i]f a property has become physically contaminated and uninhabitable due to coronavirus, there may be a basis to claim that a direct physical loss has occurred. Some orders shutting businesses, such as that issued by the Mayor of New York, have specifically cited property damage from COVID-19 as one of the underlying reasons for shutdowns in which it discussed the issue of BI insurance coverage." There is some case law that supports an interpretation of direct physical loss to include damage that is not structural but could make the insured premises unfit for occupancy, although there is also case law favorable to the view that viral contamination does not constitute direct physical loss.

[28] In another case filed by John Houghtaling II (*Simon Wiesenthal Center Inc.* v. *Chubb Group of Insurance Cos et al*, filed in district court in California), a nonprofit focused on fighting anti-Semitism has sued its insurer, arguing that the organization has been forced to cancel fundraising events and close operations due to government-ordered lockdowns intended to stem the spread of COVID-19. According to the complaint, the Chubb policy provides coverage for income loss due to civil authority orders and does not include a virus or pandemic exclusion.

[29] *Geragos & Geragos APC.* v. *The Travelers Indemnity Co. of Connecticut et al*; *Mark J. Geragos* v. *The Travelers Indemnity Co. of Connecticut*; *2420 Honolulu Ave. LLC* v. *The Travelers Indemnity Co. of Connecticut*; *837 Foothill Blvd. LLC* v. *The Travelers Indemnity Co. of Connecticut*; and *10E LLC* v. *The Travelers Indemnity Co. of Connecticut*.

[30] *LH Dining LLC* v. *Admiral Indemnity Co,* and *Newchops Restaurant Comcast LLC* v. *Admiral Insurance Co,* both filed in federal court in Pennsylvania. Under the initial suits, the restaurants allege that orders closing "nonessential" businesses triggered "civil authority" coverage for lost income, and that the insurer is obligated to insure the costs of decontaminating the restaurant in addition to covering for lost income.

[31] See Bulletin No. 29-05, COVID-19 Presumption of Compensability for Emergency Response and Health Care Employees, available at: https://labor.alaska.gov/wc/bulletins.htm.

[32] State of Arkansas Executive Department Proclamation, EO 20-19, April 13, 2020, available at: https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-19._.pdf.

[33] State of Arkansas Executive Department Proclamation, EO 20-22, April 21, 2020, available at: https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-22._.pdf.

[34] California Executive Order N-62-20, May 6, 2020, available at: https://www.gov.ca.gov/2020/05/06/governor-newsom-announces-workers-compensation-benefits-for-workers-who-contract-covid-19-during-stay-at-home-order/.

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36 WCIRB, Evaluation of Cost Impact of Governor Newsom's Executive Order on Rebuttable Presumption for California COVID-19 Workers' Compensation Claims, May 22, 2020, available at: https://www.wcirb.com/news/wcirb-evaluates-governor%E2%80%99s-covid-19-executive-order-impact-workers%E2%80%99-compensation-costs

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38 Florida Department of Financial Services, Office of the Chief Financial Officer, Chief Financial Officer Directive 2020-05, March 30, 2020, available at: https://www.myfloridacfo.com/sitePages/newsroom/pressRelease.aspx?id=5515.

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41 Executive Order 2020-277, April 9, 2020, available at: https://governor.ky.gov/attachments/20200409_Executive-Order_2020-277_Workers-Compensation.pdf.

42 Kentucky Labor Cabinet Department of Workers' Claims, Guidance re: Executive Order 2020-277, available at: https://labor.ky.gov/Documents/COVID-19%20Executive%20Order%202020-277.pdf.

43 Louisiana S.B. 475, available at: https://legiscan.com/LA/bill/SB475/2020.

44 Massachusetts H.4749, available at: https://malegislature.gov/Bills/191/HD4949.

45 For more information on the Michigan emergency rule, see: https://www.michigan.gov/documents/leo/WDCA_COVID-19_First_Response_ER_686779_7.pdf

46 Michigan H.B. 5743 (rebuttable presumption for emergency first responders who contract infectious diseases); S.B. 906 (similar to the prior bill but limited to COVID-19 contraction); and S.B. 5758 (rebuttable presumption for "essential employees").

47 Minnesota H.F. 4537, available at: http://www.dli.mn.gov/sites/default/files/pdf/COVID-19_work_comp_presumption.pdf

48 Minnesota S.B. 4564, available at: https://legiscan.com/MN/bill/SF4564/2019.

49 Information on the Missouri emergency rule can be found at: https://labor.mo.gov/dwc.

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51 NYCIRB, Potential Cost Impact of the COVID-19 Virus Exposure Compensability Proposal, available at: https://www.namic.org/pdf/20memberadvisory/200422_ny_cirb_wc_presumption_analysis.pdf.

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53 "Essential business" is defined by means of New York's Executive Order 202.6 and guidance issued by Empire State Development in conjunction therewith, and includes many categories of businesses allowed to continue operations during the state's "stay-at-home" orders. See https://esd.ny.gov/guidance-executive-order-2026.

54 New York S. 8266, available at: https://www.nysenate.gov/legislation/bills/2019/s8266.

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56 North Dakota Executive Order 2020-12, available at: https://www.governor.nd.gov/sites/www/files/documents/executive-orders/Executive%20Order%202020-12%20WSI%20extension%20for%201st%20responders.pdf. See also, Executive Order 2020-12.1, available at: https://www.governor.nd.gov/sites/www/files/documents/executive-orders/Executive%20Order%202020.12.1%20Extending%20Workers%20Compensation%20to%20Funeral%20Directors%20and%20Funeral%20Home%20Workers.pdf.

57 Pennsylvania H.B. 2396, available at: https://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?syear=2019&sind=0&body=H&type=B&bn=2396.

58 South Carolina H. 5482, available at: https://www.scstatehouse.gov/sess123_2019-2020/bills/5482.htm.

59 Utah H.B. 3007, available at: https://le.utah.gov/~2020S3/bills/static/HB3007.html.

60 Vermont S. 342, available at: https://legislature.vermont.gov/bill/status/2020/S.342.

61 Wisconsin A.B. 1038, available at: https://docs.legis.wisconsin.gov/2019/proposals/reg/asm/bill/ab1038.

62 Wyoming S.F. 1002, available at: https://legiscan.com/WY/bill/SF1002/2020/X1

63 Conditions and exceptions may apply and vary among companies with respect to all of these measures; details are typically available on the company's website or by contacting the company. Note that insurers in the UK and EU are offering similar refunds and credits (*e.g.*, AXA has announced $21.4 million in refunds to auto insurance customers, Allianz Ireland has announced it will refund $9.7 million to its Irish auto insurance customers, and the UK's largest motor insurer, Admiral, has announced it will give $135 million back to customers).

64 California Insurance Commissioner Ricardo Lara, Bulletin 2020-3, April 13, 2020, available at: http://www.insurance.ca.gov/0400-news/0100-press-releases/2020/release038-2020.cfm.

65 California Insurance Commissioner Ricardo Lara, Bulletin 2020-4, May 15, 2020, available at: http://www.insurance.ca.gov/0400-news/0100-press-releases/2020/release044-2020.cfm

66 The NJDOBI bulletin is available at: https://www.state.nj.us/dobi/bulletins/blt20_22.pdf .

67 Wisconsin Bulletin, Coverage for Delivery Drivers for Restaurants during the COVID-19 Public Health Emergency, March 23, 2020, available at: https://oci.wi.gov/Pages/Regulation/Bulletin20200323COVID-19Restaurants.aspx.

68 The NAIC adopted interpretations, and related exposure drafts under consideration, may be found at: https://content.naic.org/cmte_e_app_sapwg.htm.

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APPENDIX A

BUSINESS INTERRUPTION – PROPOSED LEGISLATION
(as of May 28, 2020)

I. BILLS MANDATING RETROACTIVE COVERAGE

Legislative Body	Bill	Date Introduced	Status	Operative Provision	Eligible Workforce Size	Funding Mechanism	Other Features	Primary Sponsor(s)
U.S. House	HR 6494[1]	April 14	Referred to Committee on Financial Services	Effective upon enactment, (1) each insurer that offers or makes available business interruption coverage shall make available, in all of its policies providing business interruption insurance, coverage for losses resulting from: (a) any viral pandemic; (b) any forced closure of businesses, or mandatory evacuation, by law or order of any government or governmental officer or agency; or (c) any power shut-off conducted for public safety purposes; and (2) shall make available business interruption insurance coverage for losses specified in paragraph (1) that does not differ materially from the terms, amounts and other coverage limitations applicable to losses arising from events other than those specified in paragraph (1). "Business interruption insurance coverage" is defined as property and casualty insurance coverage provided or made available for losses resulting from periods of suspended business operations, whether provided under broader coverage or separately. "Insurer" has the same meaning provided under TRIA.	N/A	N/A	Any exclusion in a contract for business interruption insurance that is in force on the date of enactment shall be void to the extent that it excludes losses specified in the Act; and any state approval of any such exclusion shall also be void. Notwithstanding the above provisions or any state law, an insurer may reinstate a preexisting provision in a contract for business interruption insurance and that excludes coverage for losses specified in the Act if: (1) the reinstatement is affirmatively authorized by the insured in writing; or (2) the insured fails to pay any increased premium charged by the insurer for providing such business interruption coverage, and the insurer provided at least 30-days' notice of the increased premium for the coverage and the date upon which the exclusion would be reinstated if no premium is received.	Rep Thompson, Mike (D-CA)

[1] H.R. 6494, "Business Interruption Insurance Coverage Act of 2020," available at: https://www.congress.gov/bill/116th-congress/house-bill/6494/text?r=21&s=1.

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New Jersey Assembly	AB 3844[2]	March 16	Held from vote and reported out of Assembly	Notwithstanding the provisions of any other law, rule or regulation to the contrary, 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 Act, shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic, as provided in [the Emergency Declaration issued by the Governor of New Jersey concerning COVID-19]. The coverage required under the Act shall indemnify the insured, subject to the limits under the policy, for any loss of business or business interruption for the duration of the declared State of Emergency.	Act only applies to policies issued to insureds with fewer than 100 eligible employees in New Jersey, and in force on the effective date of the Act. Eligible employee means a full-time employee who works a normal work week of 25 or more hours.	An insurer that indemnifies an insured pursuant to the Act may apply to the Commissioner for reimbursement from funds "collected and made available" for this purpose. The Commissioner is authorized to establish a special purpose apportionment to be imposed on property and casualty insurance companies doing business in New Jersey and collect from them such additional amounts as may be necessary to recover the amounts paid as reimbursement to insurers mandated to pay claims under the Act. The special purpose apportionment shall be distributed in the proportion that the net written premiums received by each applicable company for risks	Proposed to take effect immediately upon enactment and to be retroactive to March 9	Roy Freiman; Louis Greenwald; Annette Chaparro

[2] New Jersey A.3844, available at: https://legiscan.com/NJ/bill/A3844/2020.

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						written or renewed in New Jersey for the prior calendar year, bears to the total sum of all such net written premiums received by all such companies within the state during the calendar year.		
Louisiana Senate	SB 506[3]	March 31	Read and calendared for second reading; reported with amendments on May 14; passed Senate by 30 votes to 5 on May 19 and sent to House; referred to House Committee on Insurance (marks indicate May 14 amendments)	Any contract to insure a commercial or residential building ~~shall~~ may include coverage of the cost of disinfecting fumigation of the building if a person who works or resides in the building has a positive diagnosis for COVID-19 based upon ten cents per square foot of the area fumigated	N/A	N/A	Becomes effective upon enactment	Regina Barrow
Louisiana Senate	SB 477[4]	March 31	Read and calendared for second reading; reported with amendments on May 14; re-amended and passed in Senate by 31 votes to 4 on May 19 and sent to House; referred to House Committee on Insurance (marks indicate May 14/19 amendments)	~~Notwithstanding any other provision of law to the contrary, every policy of insurance in force in Louisiana on March 11, 2020, and thereafter insuring against loss or damage to property that includes the loss of use, loss of occupancy, or business interruption shall be construed to include among the perils covered under that policy, coverage for business interruption due to imminent threat posed by COVID-19 as provided in [the~~	N/A	N/A	Every policy of insurance covering business interruption delivered or issued for delivery in this state on or after ~~August 1, 2020~~ January 1, 2021 shall include a notice of all exclusions on a form prescribed by Commissioner, which form shall be signed by the named insured or its legal representative. Signed form shall be conclusively presumed to become a part of policy and creates a rebuttable presumption that insured knowingly contracted for	Rick Ward

[3] Louisiana S.B. 506, available at: https://legiscan.com/LA/bill/SB506/2020.

[4] Louisiana S.B. 477, available at: https://legiscan.com/LA/bill/SB477/2020.

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				~~state public health emergency order].~~ ~~The coverage required under the Act shall indemnify the insured, subject to the limits under the policy, for any loss of business or business interruption for the duration of the declared State of Emergency~~.			coverage with the stated exclusions. Signed form becomes part of policy for life (no need for new form upon renewal, amendments, etc.). These requirements apply to any property insurance covering any business interruption which occurs in Louisiana and involves a Louisiana business. ~~Act shall be applied retroactively to March 11 and shall apply to losses incurred during the state of emergency.~~	
Louisiana House	HB 858[5]	March 31	Referred to Committee on Insurance on May 4	Substantially the same as New Jersey bill	Act applies to policies issued to insureds with fewer than 100 full-time employees in Louisiana, and in force on the effective date of the Act.	N/A	Act shall have prospective and retroactive effect and be applied retroactively to March 11.	Royce Duplessis
Massachusetts Senate	SD 2888 / S.2655[6]	March 24	Senate bill was referred to the Senate / House Joint Committee on Financial Services on April 21	Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, notwithstanding the terms of such policy (including any endorsement thereto or exclusions to coverage included therewith) which includes, as of the effective date of this Act, the loss of use and occupancy and business interruption in force in Massachusetts, shall be construed to include among the covered perils under such policy coverage for business interruption directly or indirectly resulting from the global	Act applies to policies issued to insureds with 150 or fewer full-time equivalent employees in Massachusetts, and which are in force on effective date of Act or become effective prior to end of Emergency Declaration	Similar to New Jersey bill but assessments to be made only against licensed insurers that sell business interruption insurance (but based on net premiums written under all lines of business)	No insurer may deny a claim for the loss of use and occupancy and business interruption on account of (i) COVID-19 being a virus (even if the relevant insurance policy excludes losses resulting from viruses); or (ii) there being no physical damage to the property of the insured or to any other relevant property.	James Eldridge

[5] Louisiana H.B. 858, available at: https://legiscan.com/LA/bill/HB858/2020.

[6] Massachusetts S.2655, available at: https://malegislature.gov/Bills/191/SD2888/Committees.

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				pandemic known as COVID-19, including all mutated forms of the COVID-19 virus. Subject to any monetary limits of the policy and any maximum length of time set forth in the policy for such coverage, the coverage required by this Act shall cover the insured for any loss of business or business interruption until such time as the [Emergency Declaration] is rescinded.				
Michigan	HB 5739[7]	April 24	Referred to Committee on Insurance	An insurer that delivers, issues for delivery, or renews in Michigan a business interruption insurance policy shall include in the policy coverage for business interruption due to COVID-19. Coverage under this Act must indemnify the insured, subject to the limits under the policy, for any loss of business or business interruption for the duration of the [state emergency declaration].	Act applies to business interruption policies in force on the effective date of Act and that are issued to insureds with less than 100 eligible employees. Eligible employees is defined the same as New Jersey bill.	N/A	"Business interruption insurance" is defined to mean coverage against loss or damage to property, including the loss of use and occupancy and business interruption.	Brian Elder
New York Assembly	A 10226[8]	March 27	Referred to Committee on Insurance (COI); amended on April 8, and recommitted to COI; amended again on April 29 and recommitted to COI (*italics* indicate changes in first amendment; ***bold italics*** indicate	Notwithstanding any provisions of law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes, *but is not limited to,* the loss of use and occupancy and business interruption, shall be construed to include among the covered perils under that policy, coverage for business interruption during a period of a	Act applies to policies issued to insureds with less than *250* eligible employees in force on the effective date of the Act. Eligible employee definition same as New Jersey bill.	Similar to New Jersey bill but (1) ***makes clear that insurers eligible for reimbursement and assessments include excess lines insurers (with premium taxes being used as basis for***	*Every policy insuring against loss or damage to property, which includes, but is not limited to, the loss of use and occupancy and business interruption, which policy expires during the state's COVID-19 state of emergency, shall be subject to an automatic renewal of the policy at the current rate of charge.*	Robert Carroll; Patricia Fahy

[7] Michigan H.B. 5739, available at: http://www.legislature.mi.gov/(S(dpv5n5een0v0yc11tevetdwa))/mileg.aspx?page=BillStatus&objectname=2020-HB-5739.

[8] New York A10226B, available at: https://www.nysenate.gov/legislation/bills/2019/a10226.

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			changes in second amendment)	declared state emergency due to the COVID-19 pandemic. The coverage required under the Act shall indemnify the insured, subject to the limits under the policy, for any loss of business or business interruption ***and contingent business interruption*** for the duration of a period of a declared state emergency due to the COVID-19 pandemic.		***assessment as opposed to premiums written in state)***; and (2) the bill indicates assessment will be imposed on companies "engaged in business pursuant to the insurance law," although the sponsors' memoranda contemplate the assessments are to be collected from companies "other than life and health insurance companies."	***Every policy of insurance or endorsement thereto insuring against an insured's business income loss resulting from loss, damage or destruction of property owned by others, including direct suppliers of goods or services to the insured and/or direct receivers of goods or services manufactured or provided by the insured, shall be construed to include among the covered perils under the policy, coverage for contingent business interruption during the declared COVID-19 state emergency; and any such policy that expires during the state of emergency shall be subject to an automatic renewal at the current rate of charge.*** *Any clause or provision of a policy insuring against loss or damage to property, which includes, but is not limited to, the loss of use and occupancy and business interruption* ***and contingent business interruption****, which allows the insurer to deny coverage based on a virus, bacterium or other microorganism that causes, or is capable of causing, disease, illness or physical distress shall be null and void.* ***"Business" is defined to include not-for-profit corporations; "income" for purposes of business interruption insurance coverage is defined to***	

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							include traditional business income as well as not-for-profit revenue from donations, sponsorships and grants. Act shall take effect upon enactment and be retroactive to March 7.	
New York Senate	S 8178[9]	April 13	Referred to COI; stricken on April 17	Same as NY Assembly bill (A10226) prior to its amendments	Same as NY Assembly bill (A10226) prior to its amendments – limited to businesses with less than 100 eligible employees	Same as NY Assembly bill (A10226) prior to its amendments	Same as NY Assembly bill (A10226) prior to its amendments	Shelley Mayer
New York Senate	S 8211[10]	April 17	Referred to COI; amended and recommitted to COI on May 1	Same as NY Assembly bill (A10226) as amended	Same as NY Assembly bill (A10226)	Same as NY Assembly bill (A10226) as amended	Same as NY Assembly bill (A10226) as amended	Andrew Gounardes
New York Assembly	A 10327[11]	April 22	Referred to COI	Same as NY Assembly bill (A10226) prior to its amendments	Act applies to insureds with business interruption coverage that are specified healthcare, mental health, public health, community-based health or other specified healthcare providers	Same as NY Assembly bill (A10226) prior to its amendments	Same as NY Assembly bill (A10226) prior to its amendments	Linda Rosenthal
Ohio House	HB 589[12]	March 24	Referred to Committee on Insurance on May 5	Substantially the same as New Jersey bill	Act only applies to policies issued to insureds where (1) the business is located in Ohio; (2) the business employs 100 or fewer eligible employees; and	Similar to New Jersey bill but reimbursement claims would either be paid as the claims are received from	Funds collected from the special assessment would be deposited into a Business Interruption Insurance Fund. Any amounts remaining in the Fund after all claims have been paid would be returned to	Jeffrey Crossman; John M. Rogers

[9] New York S.8178, available at: https://www.nysenate.gov/legislation/bills/2019/s8178.

[10] New York S.8211A, available at: https://www.nysenate.gov/legislation/bills/2019/s8211/amendment/a.

[11] New York A10327, available at: https://legiscan.com/NY/bill/A10327/2019.

[12] Ohio H.B. 589, available at: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-589.

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					(3) business was covered by business interruption insurance in force on effective date of Act. Eligible employee definition same as New Jersey bill.	funds available to Superintendent or paid after assessments are collected from the special assessment fund.	insurers in a manner to be prescribed by Superintendent.	
Pennsylvania House	HB 2372[13]	April 3	Referred to Committee on Insurance	Notwithstanding any other law, rule or regulation, an insurance policy that insures against loss or damage to property, which includes the loss of use and occupancy and business interruption, in force in Pennsylvania on March 6, 2020, shall be construed to include among the covered perils coverage for business interruption due to global virus transmission or pandemic. Coverage required under this Act shall indemnify the insured, subject to the broadest or greatest limit and lowest deductible afforded to business interruption coverage under the policy, for any loss of business or business interruption for the duration of the [state emergency declaration].	Applies to policies issued insureds with fewer than 100 eligible employees in Pennsylvania, and in force on March 6. Eligible employees is defined the same as the New Jersey bill.	Substantially the same as New Jersey bill	Mandated coverage would indemnify the insured "subject to the broadest or greatest limit and lowest deductible afforded to the business interruption coverage under the insurance policy."	Frank Dermody
Pennsylvania Senate	SB 1114[14]	April 15	Referred to Banking and Insurance	Notwithstanding any other law, rule or regulation, a "policy of insurance" insuring against a loss related to property damage, including the loss of use and occupancy and business interruption, shall be construed to include among the covered perils coverage for loss or property	Act applies to insureds classified as a "small business," which shall receive 100% of the policy limit for eligible claims for covered losses. Insureds not classified as a small business shall receive	N/A	"Property damage" defined as "the direct physical loss, damage or injury to tangible property, as a result of a covered peril, including, but not limited to: (1) the presence of a person positively identified as having been infected with COVID-19; (2) the presence of	Vincent Hughes

[13] Pennsylvania H.B. 2372, available at: https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2019&sind=0&body=H&type=B&bn=2372.

[14] Pennsylvania S.B. 1114, available at: https://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2019&sInd=0&body=S&type=B&bn=1114.

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				damage due to COVID-19 and coverage for loss due to a "civil authority order" related to the declared disaster emergency and exigencies caused by the COVID-19 disease pandemic. Coverage required under the Act must indemnify the insured for losses related to the declared disaster emergency subject to the policy limits for loss of business or business interruption and subject to the maximum individual policy limits. "Policy of insurance" is defined broadly to mean policies covering any lines other than ones listed (such as life, health, financial guaranty, workers' compensation, ocean marine, etc.). "Civil authority order" is defined to mean the March 19 order of the Governor prohibiting or restricting access to businesses "as a direct result of property damage at or in the immediate vicinity of" those locations.	75% of the policy limit for eligible claims for covered losses. Act applies to active insurance policies with effective date prior to March 6, 2020. "Small business" defined as any business that satisfies the U.S. Small Business Administration's criteria under 13 CFR Pt. 121, or that has received or will receive funding through a program administered by the SBA.		at least one person positively identified as having been infected with COVID-19 in the same municipality of this Commonwealth where the property is located; and (3) the presence of COVID-19 having otherwise been detected in this Commonwealth." Pennsylvania Supreme Court shall have exclusive jurisdiction to hear any challenge to or render a declaratory judgment concerning the constitutionality of the Act.	
Pennsylvania	SB 1127[15]	April 30	Referred to Banking and Insurance	Sets forth rules of construction to be applied to first-party insurance policies that are the subject of claims for losses relating to property damage, business interruption, contingent business interruption, time element, contingent time element or losses of a similar nature arising from the COVID-19 pandemic.	N/A	N/A	Pennsylvania law shall apply to each and every property, all-risk, business interruption, contingent business interruption, time element and contingent time element insurance claim where the property giving rise to the claim is located within Pennsylvania and losses claimed relate to COVID-19.	Pam Iovino

[15] Pennsylvania S.B. 1127, available at: https://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2019&sInd=0&body=S&type=B&bn=1127.

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				Act applies to all active insurance policies with effective dates on or before March 6. "Property Damage" is defined to include the situation where, and "communicable disease" is deemed to be actually present on a property if: (1) someone positively identified as having been infected with COVID-19 has been present on a business property, or (2) the business property is located in a municipality of Pennsylvania in which at least one person present in the municipality has been positively identified as having been infected with COVID-19, or in which the presence of the COVID-19 coronavirus has otherwise been detected. The March 19 emergency declaration in Pennsylvania ordering the closure of businesses is deemed to constitute an order of civil authority under a first-party insurance policy limiting, prohibiting or restricting access to (and is also deemed to be an order prohibiting ingress to and egress from) all non-life-sustaining business locations in Pennsylvania as a direct result of physical damage at or in the immediate vicinity of those locations. The rules of construction in the Act do not apply if the application of a rule results in an interpretation that is contrary to the mutual intent of the parties as clearly and expressly communicated to each other			Pennsylvania Supreme Court shall have exclusive jurisdiction to hear any challenge to or render a declaratory judgment concerning the constitutionality of the Act. The loss of market exclusion and similar exclusions in a first-party policy may not be interpreted to apply to preclude coverage for COVID-19-related losses if one of the reasons for reduced customer demand for a policyholder's goods or services is the same COVID-19 pandemic that gives rise to the policyholder's losses for which coverage is sought. Act does not apply to life, health, fidelity, workers' compensation, general liability, representations and warranties, employers' liability, or ocean marine insurance, or to government-owned or – controlled insurers.	

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				during the period of negotiating for, and agreeing to, the terms of the insurance policy that is the subject of the policyholder's claim for coverage for COVID-19-related losses.				
South Carolina	SB 1188[16]	April 8	Referred to Committee on Banking and Insurance	Notwithstanding the provision of any law to the contrary, every policy of insurance in force in South Carolina insuring against loss or damage to property, notwithstanding the terms of the policy and including any endorsement thereto or exclusions to coverage included therewith, that includes a loss of use and occupancy, or business interruption, shall be construed to include among the covered perils under the policy, coverage for loss of use and occupancy, or business interruption, directly or indirectly resulting from the global pandemic known as COVID-19, including all mutated forms of the COVID-19 virus. Coverage required by the Act is subject to any monetary limits of the policy and any maximum length of time set forth in the policy.	Applies to policies issued to insureds with 150 or fewer full-time equivalent employees in South Carolina, and that are in force on the effective date of the Act or become effective prior to end of state emergency declaration	Similar to New Jersey bill but assessments to be made against "licensed insurers" in the state and based on net premiums written under all lines of business	No insurer in South Carolina may deny a claim for a loss of use and occupancy, or business interruption, with respect to COVID-19, including but not limited to, attempted insurer denials on account of: (i) COVID-19 being a virus, even if the relevant insurance policy excludes losses resulting from viruses; (ii) there being no physical damage to the property of the insured or to any other relevant property; or (iii) orders issued by any civil authority or acts or decisions of a governmental entity.	Kimpson, Senn, and Hutto

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U.S. House	HR 6497[17]	April 14	Referred to Committee on	Effective upon certification by Secretary of Treasurer (described below), each insurer that offers or makes available business interruption insurance coverage shall make available, to for-profit and nonprofit businesses and other entities, optional additional coverage that: (1) covers solely losses that result from business	Rep. Brian Fitzpatrick (R-PA)

[16] South Carolina S.B. 1188, available at: https://www.scstatehouse.gov/sess123_2019-2020/bills/1188.htm

[17] H.R. 6497, "Never Again Small Business Protection Act of 2020," available at: https://www.congress.gov/bill/116th-congress/house-bill/6497?s=1&r=3.

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			Financial Services	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 occur in any area to which such national emergency applies and during the period of such application; 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. Coverage shall not cover any losses of any insured business which has during the national emergency involuntarily terminated the employment of any employee of the insured business or terminated the healthcare insurance coverage, if provided, for any employee of the insured business. A contract for business interruption may exclude coverage for business interruption resulting from national emergencies only if the insurer has received affirmative authorization for the exclusion in writing from the insured, or the insured fails to pay any premium charged by the insurer for such coverage. Federal Advisory Committee on Insurance is required to conduct a study on using a federal backstop mechanism, private equity pools, risk assessments and market pricing to reinsure insurers for excessive losses under coverage provided by the Act; report to be submitted to Congress within 180 days of enactment of the Act. Upon a determination that a federal backstop mechanism to reinsure losses is in effect, Treasury shall issue a certification that such mechanism is in place. "Business interruption insurance coverage" defined to mean property and casualty insurance coverage for losses resulting from periods of suspended business operations, whether provided under broader coverage or separately. "Insurer" has the same meaning as in TRIA. "National emergency" is defined as any emergency or disaster declared by President or public health emergency declared by Secretary of Health and Human Services.	
US House	HR 7011[18]	May 26	Referred to Committee on Financial Services	Pandemic Risk Reinsurance Program ("PRRP") would be established and administered by Treasury. Unlike TRIA, under which insurers providing certain insurance products are required to make terrorism risk insurance available, eligible property and casualty insurers[19] would be able to elect to participate in the program voluntarily on an annual basis. Each participating insurer would be required to make available in all of its business interruption policies coverage for "insured losses" that does not differ materially from the terms, conditions, amounts, limits, deductibles and other coverage limitations and exclusions applicable to other covered losses. "Insured loss" is defined to mean any loss resulting from a "covered public health emergency" that is covered by	Rep. Carolyn Maloney (D-NY)

[18] H.R. 7011, "Pandemic Risk Insurance Act of 2020", available at: https://www.congress.gov/bill/116th-congress/house-bill/7011/text?r=11&s=1

[19] Under the current draft, "property and casualty insurance" is defined to mean commercial lines of property and casualty insurance, including excess insurance, workers' compensation, and event cancellation insurance (but is defined to exclude federal crop, private mortgage, financial guaranty, medical malpractice, flood, commercial auto, burglary and theft, surety, professional liability, farm owners multiple peril, life and health insurance, as well as reinsurance and retrocessional reinsurance). Insurers eligible to participate in PRRP would include any licensed or admitted insurers, as well as excess and surplus lines carriers, state residual market insurance entities, state workers' compensation funds, captive insurers, and other self-insurance arrangements by municipalities and other entities (including workers' compensation self-insurance programs and reinsurance pools). The proposal states that the Treasury Secretary may, in consultation with the NAIC and appropriate state regulatory authorities, apply PRRP to other classes or types of captive insurers and self-insurance arrangements, provided such application is determined prior to the commencement of the relevant covered public health emergency.

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				primary or excess business interruption insurance[20] issued by a participating insurer, as long as the loss occurs within the United States and during the period that the covered public health emergency "for such area" is in effect. A "covered public health emergency" is any outbreak of infectious disease or pandemic for which an emergency is declared on or after January 1, 2021 under the Public Health Service Act and that is certified by the Secretary of Health and Human Services as a public health emergency. Under the proposed bill, the PRRP would terminate on December 31, 2027. The bill provides that the Act "may not be construed to affect any policy for business interruption insurance in force" on the date the Act is enacted. However, the bill further provides that any exclusion in a contract of a participating insurer for business interruption insurance that is in force as of the effective date of the Act shall be void to the extent it excludes losses that would otherwise be "insured losses" under PRRP, and that any state approval of such exclusions would also be null and void. A participating insurer may reinstate preexisting exclusions set forth in a policy that is in force as of the effective date of the Act if the policyholder affirmatively authorizes the exclusion in writing or (for contracts in effect for less than 5 months) the insured fails to pay the increased premium charged for such coverage after due notice, provided that the premium does not increase by more than 15%. The federal share of compensation under PRRP would be equal to 95% of the insured losses that exceed the participating insurer's annual deductible. A participating insurer's deductible would be equal to 5% of the value of its direct earned premiums for U.S. property and casualty insurance during the immediately preceding calendar year. No federal compensation would be paid unless aggregate industry losses experienced by participating insurers resulting from the covered public health emergency exceed $250 million. The federal share of compensation for insured losses would be reduced by the amount of federal compensation provided to any person under other federal programs for such losses. Further, payments under PRRP would be capped at $750 billion, such that if aggregate losses exceed $750 billion neither the Treasury nor any participating insurer that has met its deductible would be liable for any portion of the amount of such losses that exceeds such cap. The Treasury Secretary is to determine the pro rata share of incurred losses to be paid by participating insurers when insured losses exceed $750 billion, which determination would be based on a methodology to be promulgated by Treasury within 90 days of enactment of the Act, provided in no case would a participating insurer who has met its deductible and paid its share of losses prior to the $750 billion cap be required to make any payment in excess of such amounts. Participating insurers would be permitted to purchase reinsurance through the private market for deductible amounts or insured losses retained by the insurers, and such reinsurance would not affect the calculation of the insurer's deductible or retentions, except that reinsurance recoveries together with federal assistance under PRRP may not exceed the aggregate amount of the insurer's "insured losses" for the calendar year. The program would only cover losses on policies that include "clear and conspicuous" disclosure language pertaining to the PRRP coverage, including disclosures pertaining to the annual $750 billion cap. The bill provides that such amounts as may be necessary to pay the federal share of compensation shall be appropriated out of funds in the Treasury not otherwise appropriated, including amounts as may be necessary to administer the Program..	

[20] "Business interruption insurance" is defined to mean commercial lines of property and casualty insurance coverage, including event cancellation insurance or other non-property contingent business interruption insurance, provided or made available for losses resulting from periods of suspended business operations, including losses from a covered public health emergency, or a civil order related to a covered public health emergency, whether provided under broader coverage for property losses or separately.

Legislative Body	Bill	Date Introduced	Status	Operative Provisions	Primary Sponsor(s)
Louisiana Senate	SB 495[21]	March 31	Read second time and referred to Committee on Insurance on May 4	Creates a Business Compensation Fund (the "Compensation Fund") for the purpose of providing a method for expediting certain property insurance claims, resolving disputes and providing coverage for losses sustained as a result of the COVID-19 pandemic. Any insurer writing commercial insurance of any kind in Louisiana may participate in the Compensation Fund by submitting an application and contributing to the Fund the greater of $50 million or 80% of the aggregate limits of all in-force commercial policies the insurer has in force in Louisiana on March 11 or any time thereafter during the declared state of emergency. Participants in the Fund shall be immune from claims of bad faith brought by any person seeking payment for claims under a policy written in the state for losses associated with COVID-19 pandemic. Insurers are required to apply for participation within 60 days after expiration of the state's COVID-19 emergency declaration. An insured under a commercial insurance policy in Louisiana may apply for a payment from the Compensation Fund if: (1) the policy for commercial loss was in force on March 11 or any time thereafter during the state of emergency; (2) the insured sustained loss of commercial income or revenue due to the imminent threat posed by COVID-19; (3) in satisfaction of all claims for income or revenue loss, the insured agrees to accept 80% of actual losses up to the policy limits; and (4) the application is received no later than 90 days after expiration of state emergency. Fund participants may challenge a claim as fraudulent and contest the amount of the claim through arbitration, but waive the right to contest liability. Moneys in the Fund are private monies to be held in trust. After final disposition of all claims, any remaining moneys in the Fund will be returned to participating insurers in proportion to their contributions.	Troy Carter
Pennsylvania House[22]	HB 2386[23]	April 6	Referred to Committee on Commerce; amended on April 21; recommitted to Committee on Finance on April 28; re-amended on May 27	Original bill would establish the COVID-19 Disaster Emergency Business Interruption Grant Program ("Program") to provide funding for the continuing operation of businesses during and after the disaster emergency. Businesses would be eligible for grants if: (1) the business has submitted a claim under a business interruption insurance policy and the claim was denied prior to applying for the grant; (2) the business demonstrates that it has been adversely impacted by the COVID-19 disaster emergency; and (3) the business is based in Pennsylvania and employs not more than 250 individuals. If a business receives a grant, the business must remain open and not lay off any employee for the duration of the disaster emergency; if the business does not comply, it must repay the amount of the grant plus 10%. The bill was substantially amended on May 27, such that it now proposes to establish a program within the Pennsylvania Department of Community and Economic Development to encourage businesses to purchase business interruption insurance and to provide financial assistance, subject to the availability of funding, to eligible businesses for business interruption insurance premium costs.	Thomas Mehaffie III

[21] Louisiana S.B. 495, available at: https://legiscan.com/LA/drafts/SB495/2020.

[22] Note, further, that the General Assembly of Pennsylvania on April 13 referred House Resolution No. 842 to the Committee on Insurance. The resolution urges the U.S. Congress to facilitate payment to insurance companies through federal stimulus funds for the reimbursement of costs associated with the payment of claims made on business interruption insurance policies during COVID-19. It asks, among other things, for legislation that channels reimbursement and aid through insurance companies and provides reimbursement to insurance companies that voluntarily pay claims submitted on business interruption insurance policies.

[23] Pennsylvania H.B. 2386, available at: https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2019&sind=0&body=H&type=B&bn=2386.