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## SHOULD YOU NOTICE YOUR CARRIER OF COVID-19-RELATED BUSINESS-INTERRUPTION LOSSES?

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Businesses have a lot to focus on in responding to COVID-19. It is easy to lose sight of the insurance implications of the current crisis. But there are a few things to keep in mind.

### BUSINESS-INTERRUPTION LOSSES

As noted in our [March 19, 2020 Client Alert](#), the COVID-19 pandemic gives rise to various types of losses that may or may not be covered by insurance policies. As many businesses have already learned, COVID-19, the government's response to COVID-19, and related supply chain issues can and will temporarily prevent many businesses from conducting some or all operations. Depending on the nature of the business, closing down for even a short period of time can have serious financial consequences.

### FEDERAL LEGISLATION

Whether a particular policy covers business-interruption losses resulting from the pandemic presents complex questions. For example, policies typically require that business-interruption losses stem from "physical loss or damage." Does the presence of COVID-19 cause this sort of tangible harm? Issues like these are still percolating through the courts. In the meantime, however, lawmakers are entertaining legislation that could potentially cover precisely such losses. This Client Alert provides a high-level summary of two pieces of legislation: The Pandemic Risk Reinsurance Act of 2020, and the Business Interruption Insurance Coverage Act of 2020. The potential passage of either act makes it worthwhile for insureds to consult with counsel to determine whether they should notice their carriers of any losses that, as of this moment, would not otherwise implicate coverage.

### THE Pandemic Risk Reinsurance Act of 2020

The Pandemic Risk Reinsurance Act of 2020 is still in the drafting stage—its stated purpose is to establish a Federal program that provides for a transparent system of shared public and private compensation for business interruption losses resulting from a pandemic or outbreak of communicable disease, in order to:

- (1) protect consumers by addressing market disruptions and ensure the continued widespread availability and affordability of business interruption coverage for losses resulting from a pandemic or outbreak of communicable disease; 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.

Under the program, participating insurers will be charged a premium for reinsurance coverage; those premiums would then be deposited into a “Pandemic Risk Reinsurance Fund” maintained by the U.S. Department of the Treasury to pay covered losses (and to cover the costs associated with the program’s administration). Significantly, the draft requires insurers to make coverage available in all business-interruption policies; covered losses would include those resulting from a “public health emergency,” which the bill defines as an outbreak of infectious disease or pandemics. In addition, the bill would render invalid exclusions barring recovery of virus-related business-interruption losses. The draft bill sets an aggregate-industry-loss trigger of \$250 million in order for compensation to be paid, and an annual liability cap of \$500 billion; losses falling between those numbers would be covered jointly by the Treasury Department and the participating insurers.

The bill also establishes an exclusive federal cause of action for losses arising from covered public health emergencies and preempts all causes of action “for property damage, personal injury, or death arising out of or resulting from a covered public health emergency that are otherwise available under State law.” To manage litigation, the bill provides that the Judicial Panel on Multidistrict Litigation will establish one or more courts of original, exclusive jurisdiction to hear “any claim (including any claim for loss of property, personal injury, or death) relating to or arising out of the covered public health emergency.”

Interestingly, the proposed draft shares some structural similarities to the Terrorism Risk Insurance Program (TRIP), which Congress passed into law in the wake of the September 11 attacks; the TRIP allows for certain owners and operators in high-risk cities to purchase terrorism risk insurance, and has been reauthorized multiple times since 2002. And, like TRIP, an insurer’s participation in the Pandemic Risk Reinsurance program would be voluntary.

### **THE BUSINESS INTERRUPTION COVERAGE ACT OF 2020**

Other federal legislation—the “Business Interruption Insurance Coverage Act of 2020”—has been introduced as well. This proposed legislation would require insurance companies to cover business interruption losses due to “viral pandemics, forced closures of businesses, mandatory evacuations, and public safety power shut-offs,” and would void existing exclusions for losses resulting from the specific perils (*i.e.*, losses resulting from “any viral pandemic”). It would also preempt any State approval of such exclusions. However, the proposed act’s mandatory nature subjects it to a myriad of legal issues and other obstacles.

### **CONCLUSION**

Both pieces of legislation provide an opportunity for insureds to initiate a meaningful conversation with their counsel to determine whether their losses could be covered down the road and, if so, whether they should notice their carriers of those losses.

Failure to timely notify a carrier of business-interruption losses may have negative implications on potential claims; thus, irrespective of any pending legislation, concerned insureds should consult with counsel.

If you have any questions about the information contained in this Client Alert, please contact the Thompson & Knight attorney with whom you regularly work or one of the attorneys listed below.

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*This Client Alert is sent for the information of our clients and friends. It is not intended as legal advice or an opinion on specific circumstances. Furthermore, due to the rapidly evolving nature of the COVID-19 pandemic, you should consult with counsel for the latest developments and updated guidance.*

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