# The Future of Pandemic Coverage for Real Estate Owners and Developers

By Ashley McWilliams

Shutdowns resulting from the COVID-19 pandemic have prompted an unprecedented number of business income and business interruption insurance claims. Many claims have resulted in litigation and require judicial intervention to determine whether private insurance carriers owe policyholders indemnification for pandemic related losses. Private insurance carriers that have denied the claims, in large part, argue that they did not underwrite coverage for the pandemic and assert that pandemic coverage is much too unpredictable to underwrite. Private carriers contend that a government-backed insurance program is necessary to mitigate the economic impact resulting from pandemic claims.

The COVID-19 pandemic has significantly impacted real estate owners and developers. Real estate owners and developers have sustained business income losses in the form of lost rents at commercial properties, service disruption, labor and/or material shortages, to name a few. Questions about whether the virus caused "direct physical damage," as well as whether specific "virus exclusions" on policies, have provided hurdles to coverage under existing schemes, click here. Those that have filed lawsuits against their insurers seeking coverage under current policy terms are having mixed results, at best. Click here to view SDV's Litigation Tracker. A predictable source of indemnification for future pandemic-related losses would greatly relieve business disruption and, ultimately, the impact on the economy. However, the question remains, who will pay for such massive losses?

## Government-Backed Insurance Program for Pandemic Coverage

The idea of a government-backed program for pandemic insurance coverage arises from other government-backed insurance programs like the National Flood Insurance Act (NFIA) of 1968 and The Terrorism Risk Insurance Program Act (TRIA) of 2002. NFIA and the resulting National Flood Insurance Program ("NFIP") provide insurance to help reduce the socio-economic impact of floods. TRIA created a temporary federal program that provides for a transparent system of shared public and private compensation for certain insured losses resulting from a certified act of terrorism.

The United States House of Representatives, introduced by Carolyn B. Maloney, D-NY, proposed H.R. 7011 ("Pandemic Risk Insurance Act of 2020") to establish the Pandemic Risk Reinsurance Program. This program provides for a transparent system of shared public and private compensation for business interruption losses resulting from a pandemic or outbreak of communicable disease. The Pandemic Risk Reinsurance Program would have two functions:

(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 communicative 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.[1]

The bill specifically applies to business interruption insurance on commercial lines of property and casualty insurance, 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. The losses would include those arising from a covered public health emergency or a civil order related to a covered public health emergency, whether provided under broader coverage for property and casualty losses or separately.[2] For a more detailed discussion on the proposed Pandemic Risk Insurance Act of 2020, click here.

The broad coverage under the proposed Pandemic Risk Insurance Act would be beneficial to real estate owners and developers. Private insurance carriers would be effectively required to cover a business interruption claim arising from a pandemic in cases where the policyholder purchased the business interruption coverage.  Reinsurance for participating carriers is triggered after the aggregate loss to the insurer exceeds $250,000,000. Opponents of a government-backed program argue that the proposed structure reduces the private insurance industry's stake in the game. Some even argue that a government-backed program for pandemic losses is different from programs like NFIP and TRIA. Natural disasters are limited to certain geographic areas, and acts of terror usually target specific locations. A pandemic has no geographic boundary and can last for an indefinite amount of time. Thus, the same underwriting issues claimed by private insurers exist for a government reinsurance program.

## The Private Insurance Industry and Pandemic Coverage

Perhaps the obvious solution to indemnification for pandemic coverage is not creating something new but to perfect what already exists, allowing private insurers to underwrite pandemic risks. Private insurance carriers are not strangers to revising policy forms to clearly grant coverage for certain risks and exclude coverage for others. The private insurance industry could use the COVID-19 pandemic as a teaching tool to prepare for future catastrophic losses arising from a global pandemic.

It is not farfetched for private insurers to provide a policy endorsement for pandemic coverage. A policy endorsement will require the policyholder to make a conscious and informed decision to purchase or waive the coverage if it is otherwise excluded. The pandemic coverage can be capped at a predetermined amount based on factors such as the business' size, annual revenues, and expenses or sub-limited on policies with significant exposure. In any event, private insurance carriers must draft clear and unambiguous policy language as clear policy language is essential to avoiding insurance coverage disputes in the event of another pandemic.

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[1]Pandemic Risk Insurance Act of 2020, H.R. 7011, 116th Cong. § 2 (2020).

[2]Id.