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COVID-19 LEGISLATIVE UPDATES – BUSINESS CONTINUITY

Taken from The Council daily briefings

Wednesday, April 1, 2020

- Today, we took a big step at unpacking and digesting the most-discussed part of the CARES Act: the Paycheck Protection Loan provisions for SBA loans/grants for firms of under 500. The Council's legal counsels Scott Sinder and Kate Jensen hosted a deep-dive webinar today for upwards of a thousand of our members.

- But at 30,000 feet, the estimation of everyone we know in Washington is that the $349 billion SBA program is going to be exhausted in short order, so … what next?

  As much as we supported the enactment of CARES, and as much as we hope that it will succeed, the legislation picks winners and losers and will not be sufficient to restore the economy. Our response has been an intensive, weeks-long effort to establish the Business and Employee Continuity and Recovery Fund. Yesterday, this letter was sent to Administration and congressional leaders from a united insurance community as well as many of the major policyholder associations representing many millions of American businesses, and today we've seen additional organizations rallying behind this approach. We are socializing the plan with potential congressional champions, and **we are hopeful that the approach of a federal facility to process business continuation could sit at the center of a Phase 4 recovery bill.**

  But we have competition. LOTS of it. In no particular order, here is just some of what is out there:

  - The President last night called for the next phase to include a "BIG AND BOLD" $2 trillion in infrastructure spending. Mind you, everyone knows we need investment there, and infrastructure spending comes with a beautiful bonus of surety and other insurance spending. But as businesses shutter by the thousands, does this take priority?

  - Speaker Pelosi and other Democrats have spit-balled all kinds of other Democratic priorities in a Phase 4 – forgiveness of student loan debt, elimination of the scale-back of state and local tax (SALT) deductions (which, by the way, would mostly benefit high-income taxpayers), building more passenger rail, broadband expansion, and tens of billions of dollars in clean water initiatives. Senate Majority Leader Mitch McConnell responded quickly: "I'm not going to allow this to be an opportunity for the Democrats to achieve unrelated policy items they wouldn't otherwise be able to pass."

  - Health providers are unquestionably going need massive rounds of relief.

  The list goes on, and every interest group in Washington (55,000 registered lobbyists, for starters) is going to have hat in hand, many deservedly. But **with the exception of our healthcare workers on the front lines performing heroically, relief needs to be given broadly to the nation's businesses that did**

everything right and nothing wrong. Our policyholder/insurance coalition approach will hopefully get traction, but that traction might tragically come only when many more businesses falter.

- There is and will continue to be great reluctance on the part of many Members of Congress to come back to DC. But as the Phase 2 and Phase 3 efforts showed, there is great power and benefit to being in town in terms of framing a narrative and "holding the pen."

Thursday, April 2, 2020

- We're writing this up as we watch Jovita Carranza, the head of the Small Business Administration, standing in the press room of the White House with the President standing behind her, touting the benefits of the **Paycheck Protection Program,** hoping we're wrong in our prediction that this is going to be a chaotic rollout tomorrow of the $349 billion program. We will eat our words tomorrow night if not. (See this helpful download from The Council's legal team at Steptoe & Johnson, and watch the webinar about this from earlier this week.)

- There is no doubt that the PPP's application is vastly simpler than any other SBA loan, and generous in benefits (up to $10 million in 100% forgivable loans), and the money is going to eventually get out the door to desperately deserving businesses. But the **feedback we have gotten from client-facing commercial insurance brokerages during the last week tells us that even if the rollout is smooth, the money's going to go fast**. This, we believe, is going to necessitate a Phase 4 recovery bill – and probably much faster than Republicans (in particular Senate Republicans) want to move. It is in this environment that The Council continues work to advance the Business and Employee Continuity Recovery Fund, alongside industry colleagues and a broad swath of the trade associations representing policyholders.

  Last night in this space we bemoaned the feeding frenzy of DC interests wanting their piece of Phase 4. There are lots of good ideas for good things to spend trillions of dollars on, but **to the brokerage community, there is no more important task than the lifeline to existing businesses**. Hopefully by the time Phase 4 is negotiated, this simple fact will sink in.

- The circling trial lawyers had a good day yesterday when they persuaded 32 members of the California U.S. House delegation (30 Democrats, 2 Republicans) to sign a letter to Insurance Commissioner Ricardo Lara calling on him to force insurers to cover **business interruption** notwithstanding policy exclusions. Here is the response letter that the insurance trades (including The Council) sent to these Members this evening. As the letter points out: *"It is worth noting that recent estimates show that business continuity losses just for small businesses of 100 employees or fewer could amount to between $220 billion to $383 billion per month. Meanwhile, the total surplus for all the U.S. home, auto, and business insurers combined to pay all future losses is only $800 billion."*

Friday, April 3, 2020

- **Recognizing that liquidity is our priority**, we will start with the rollout of the SBA Paycheck Protection Plan today. Last night we predicted chaos, and this is the lead item on *Axios PM* this afternoon: "**Websites crashed, phones jammed and confusion reigned** as small businesses rushed at today's kickoff to get their chunk of the $350 billion Paycheck Protection Program." Apparently, none of the banks could even access the portal. This, despite Secretary Mnuchin literally making major liability changes at 11:00 p.m. last night before the midnight implementation, in order to assuage major banks which appeared to be on the brink of unwillingness to offer the product.

  The Council's Chief Legal Officer, Scott Sinder of Steptoe & Johnson, gently offered a rebuttal to our assertion yesterday that the $349 billion is going to run out in a heartbeat, necessitating congressional action. Correctly, he agrees that those dollars will be exhausted, but the Treasury has the ability to keep it going. The money is going out the door as a loan from a private bank. It will be later, and over a sustained period of time, that the loans will be forgiven, and banks draw from the federal fund. They could well keep the spigot open and then go to Congress for a back-end appropriation to true-up the program. So **perhaps a crisis will be averted.**

  Groups are already decrying how the program was designed and warning that nearly all the money set aside by Congress to fund the effort will not be enough. "The short-term relief made available through the Paycheck Protection Program in the CARES Act will be insufficient to ensure independent restaurants can stay open and continue to employ over 11 million workers," the **Independent Restaurant Coalition** (a new trade group formed in response to the coronavirus ravaging the industry) said in a statement. The **American Gaming Association**, meanwhile, is pushing back against the rules governing the program, which will prevent small casinos from applying for the loans, according to the trade group. The SBA "relied on antiquated, discriminatory regulations that ignore today's economic reality and the congressional intent behind the bill," said their president.

- Likewise, we have been hearing a lot from brokerage execs about the non-small business loan facility. Democrats insisted on a provision that any recipient of such loans be muted during the life of the loan (and two years thereafter) from opposing any efforts at unionization. This is going to cause a lot of hurting businesses to look very long and hard before they turn to the government's loan facility.

- Meanwhile, more support is coming in to our newly named "Recovery Fund Coalition" that represents the policyholder/insurance trade associations in support of the Business and Employee Continuity Recovery Fund, which we will be aggressively pushing to be at the center of a Phase 4 bill. You will be hearing a lot more about this. (In a welcome move today, Speaker Pelosi scaled back her position that Phase 4 should be infrastructure-based.) Once our congressional champions are identified and mobilized, **this will be the most aggressive grassroots political effort that The Council has ever embarked on**. All the millions we have spent engaging with members of Congress, supporting their campaigns through CouncilPAC, using a sizeable portion of your membership dues to lobby aggressively, it may all soon come to a head, and we will need your support. Strap your seat belt on.

Monday, April 6, 2020

- **Meanwhile,** our work in advancing the **"COVID-19 Business and Employee Continuation and Recovery Fund"** continues full-bore**.** We expect that by tomorrow, the very significant group of policyholder business trade groups and the entirety of the p/c industry trades will come to agreement on the legislative language of this proposal to create a federal facility to get aid to all impacted businesses. It is tricky lobbying on this issue, especially as there's a standoff right now between Republican and Democratic leaders as to the necessity of moving to a "Stage 4" recovery bill when Stage 3 -- the CARES Act -- has yet to be implemented. But in our conversations with Republican lawmakers and staff, there is an acceptance that by the end of April or early May, a Phase 4 bill will be needed. At a minimum, supplemental appropriations for the Payroll Protection Program (PPP) of CARES -- $349 billion in forgivable loans to a wide (but not perfect) swath of America -- are expected to be necessary.

Tuesday, April 7, 2020

- Senate Majority Leader Mitch McConnell announced that he hopes to move (by unanimous consent) a measure this week to provide $250 billion in additional funding to the Payroll Protection Program in the CARES Act. This is compelling for Council member firms and their clients on a number of fronts.

  This appears to be a chess move, one designed to head off a "Phase 4" competition with the Democratic House, wherein McConnell might have to concede to a host of Democratic priorities in order to secure necessary ongoing funding for the PPP (Payroll Protection Program), which has been set up essentially as an entitlement program to qualifying businesses. Payroll Protection Program Loans - FAQs

- Treasury Secretary Mnuchin today talked with all the top leaders in both chambers, requesting $250 billion in additional funding (for the record, we still think that will run short). Speaker Pelosi said that she and other Democrats want strings attached – assurances that the beneficiaries of the fund include underrepresented and diverse businesses. This seems to be an eminently reasonable request, but the devil will be in the details. We should note that it would be weeks away before the $349 billion was exhausted due simply to the fact that forgiveness payments at a later date will trigger drawdowns from the Treasury. **So, yes, the fund will be exhausted. But will it be exhausted this week? Certainly not.**

- Throughout the day, we've been asked by member executives, how does all of this fit into our insurance/policyholder **coalition proposal for a much broader federal facility for business continuation** in the expected "Phase 4" legislation, presumably weeks away (for now, we'll call the Mnuchin/McConnell proposal Phase 3b)? The short answer is we don't know. If the expanded $2.2 trillion CARES Act is deemed within a few weeks as having provided the necessary recovery to businesses during the pandemic, we very much doubt that the COVID-19 Business and Employee Continuity and Recovery Fund will emerge as the center of the next legislation. But if, however, there is an outcry about the disparity of businesses who win and lose based on the arbitrary size of employee force, we would consider this ammunition for a broader facility approach.

We are still not quite ready to launch all-out grassroots play for congressional approval of the Recovery Fund, as we are aligning interests and building support within the policyholder community. But **our informal conversations with key staffers to representatives and senators has been quite encouraging.** The sands will continue to shift, and we will expend our political capital toward the broadest possible efforts to restore American businesses. We have got bigger and more pressing concerns with the crisis than political consequences for 2021.

- On the benefits front it is clear that the pandemic is going to translate into a major push to devolve employer-sponsored coverage and move toward a single-payer system, whether "Medicare for All" or any variant. According to recent analysis, if unemployment hits 25%, **enrollment in employer-sponsored plans could drop** to 128 million while Medicaid enrollment could reach upwards of 94 million. High unemployment would also increase the number of uninsured to 39 million – 40 million, estimates the report.

  As mentioned in previous newsletters, The Council is partnering with the Alliance to Fight for Health Care, a broad-based coalition that supports employer-sponsored health coverage. The Alliance today sent a letter to Congress urging them to provide: support for premium payments; federal subsidies to help pay for COBRA premiums; new funds or loans for businesses to preserve employee access to health benefits; and easy access to the individual insurance market.

Wednesday, April 8, 2020

- Notwithstanding a messy, chaotic rollout of the Paycheck Protection Plan provisions of the CARES Act, Senate Majority Leader McConnell and the Trump Administration laid down their poker chips yesterday on a $250 billion supplement to the fund. Today, Democratic leaders upped the ante, making several demands that could complicate swift passage of "interim" legislation to replenish the fund – and could have implications on our ongoing efforts to create a broader "business continuity recovery fund" in an alliance between leading policyholder groups and all of the p/c insurance trades.

  Speaker Pelosi and Senate Minority Leader Schumer want half of the $250 billion in new funding for small businesses to flow through "community-based" banks that serve women, veteran, and minority-owned businesses. In addition to that extra funding, they want $150 billion for state and local governments, $100 billion for hospitals, and a 15% hike to the maximum SNAP benefit. Democratic leaders have spoken to Treasury Secretary Mnuchin about their demands for an "interim" coronavirus relief package, but **it is unclear whether McConnell will acquiesce to any of their requests**. "We hope our Republican colleagues will support this 'Small Business Plus' proposal tomorrow in the Senate," a Schumer spokesperson said this afternoon.

  This is happening amid growing concerns that the CARES Act is going to be gamed in a way that benefits many at the expense of many others, and that a broader solution is necessary. Many franchisees are finding out, for example, that they do not meet the eligibility standards for the under-500 employee threshold. Many businesses have liquidity crises that are not solved by putting non-working employees back on the payroll. **We at The Council are talking with many of our friends in leadership positions on Capitol**

Hill, on both sides of the aisle, and we are hearing a clamor for a broader federal facility to dispense aid to businesses facing existential threats

Thursday, April 9, 2020

- Here in Washington and the rancor continues. See this statement from Majority Leader Mitch McConnell's office about the aborted effort today to pump an extra $250 billion into the Paycheck Protection Plan (PPP) small-business provisions of the CARES Act. Still, like the CARES Act itself, we predict that the sausage-making processes of Congress will work their way out in the next week or so (after all, it's going to take a while for the feds to dump all the PPP money out the back of the aircraft) and the resolution of this piece of the puzzle will likely be unanimous – proving Tim's point, albeit in a typically ugly DC way.

- First, from *Axios*: "Sentence from a nightmare: 6.6 million Americans filed for unemployment last week, a *decline* from the previous week's 6.9 million." We have to just let that sit out there.

- The other breathtaking economic news of the day came from the Fed, as we detailed in a red alert to you today. The central bank announced a new $2.3 trillion round of loans that include even more support for small businesses and consumers — and, for the first time, for states, cities and municipalities, too. We would like to think that this is going to be a smooth rollout as the Fed pumps the cash into the banking system, but as the PPP/SBA process has certainly indicated, it will be deeply challenging.

  We strongly support the proposed Business and Employee Continuation and Recovery Act and are pleased at how the insurance industry got on the same page with policyholder/business groups. But we have heard crickets today since the Fed's announcement. Everyone is trying to digest and unpack the implications of another $2.3 trillion in liquidity dollars being released. In many ways, it bears similarity to the political effort we launched with the goal of the widest possible liquidity access, given all the holes in the CARES Act. We will put this in the "to be continued" department, so stay tuned.

Friday, April 10, 2020

- We note with resignation that the Senate has twisted itself into knots over President Trump's aid request, as Democrats refused to rubber stamp his proposal for $250 billion more to boost small businesses under the Paycheck Protection Program (PPP) under the CARES Act, demanding modifications along with an additional $250 billion for health care providers and states. Republicans would not go along.

  The standoff Thursday doesn't end the pursuit of more rescue funds, but it came as the government reported that 6.6 million more people filed for unemployment benefits last week, increasing worries that the economy is sliding toward a severe recession. The small business program at issue is off to a rocky rollout, and regulations governing use of the forgivable loans in the $349 billion PPP are coming out on a rolling basis. Like the first three "phases" of COVID response legislation, this standoff will get resolved, because it is imperative that the PPP be more fully funded. **Unquestionably, $349 billion will not be enough.**

- Particularly with regard to how to access federal assistance, we encourage all our clients and partners to **utilize the resources of:**

  - **The Council,** and the material put together by The Council's legal team at **Steptoe & Johnson**

  Today, chief legal officer Scott Sinder and his colleague Kate Jensen did the second in a series of webinars for thousands of clients of our member firms about the PPP program. ***Their depth of knowledge about the Act is unparalleled, and we hope you find it of value.***

Monday, April 13, 2020

- **Two new assaults were launched** from congressional Democrats attempting to force pandemic business interruption payouts. Not to mention the California Insurance Department announcing mandatory (and probably unconstitutional) takings from insurers (see more on that below). Also, not to mention this comes just a couple days after the President of the United States exhorted the industry to pay claims and cast doubt on the validity of policy exclusions that have been pervasive in the industry ever since the SARS outbreak.

  Rep. Mike Thompson (D-CA) launched a "Dear Colleague" letter today asking for original cosponsors for his legislation that is a trifecta of fantasies – it would force insurers to pay existing claims, would force them into paying them going forward, and, for good measure, would even put coverage requirements of Business Interruption (BI) policies on steroids – viruses/pandemics, power shut-offs in the area, any civil authority closures, regardless of cause. Here is our industry response letter to Thompson.

  Thompson's bill retroactively nullifies *any* exemption (not just virus) in every BI policy and overrides State DOI approvals of such exemptions. Exemptions can be reinstated if the insured says yes or cannot pay the increase in premiums that this bill would obviously bring about. We wonder whether Rep. Thompson consulted with any actuaries to figure out what *that* price tag would be exactly. As one industry colleague noted today: "Thomas Keller and his $1,500-a-plate restaurant in Napa might actually be the only policyholder that could afford this coverage." Thompson's staff *claims* to us that the bill is prospective, not retrospective, and will not negate contractual obligations. But that is not what we read. As Lincoln said, "calling a tail a leg doesn't mean a dog's got five legs."

  Meanwhile, **Rep. Primila Jayapal (D-WA)** hurled this letter at major commercial insurers demanding they force themselves into insolvency and seeking all kinds of detailed information about the companies' policies relating to approving and denying claims. **Our favorite part of her missive was this:** *"Commercial insurance companies should honor all clearly covered coronavirus-related losses, work closely with the offices of state Attorneys General to resolve disputes, and set up accessible means by which policyholders can get answers on their coverage and resolve disputes quickly without having to resort to time-consuming and expensive litigation."*

- **California** insurance commissioner Ricardo Lara has ordered insurance companies to return premiums for at least six lines of business, citing a reduced risk of loss due to shelter in place restrictions. The order covers partial or full refunds paid by consumers and businesses for at least the months of March and April and may continue into May. Refunds are also required in “any other insurance line where the risk of loss has fallen substantially as a result of the COVID-19 pandemic,” Lara’s office said in the statement. Insurers are required to provide a premium credit, reduction, return of premium no later than August 2020. This most recent order (announced today), follows Lara’s previous request of at least a 60-day grace period for insureds to pay their premiums.

Our inboxes blew up on this California issue. What does it mean for commissions? Will it spread to other opportunistic state commissioners? This will clearly evolve this week, but here was the instant analysis from The Council’s chief legal officer Scott Sinder to a West Coast executive:

> *“I don’t see how they can do this, especially mid-year. I am sure the carriers are flipping out. Will be interesting to see how quickly they are able to launch a coordinated response. Although one route is to just not do anything and let the department come after them. Then the legal issues are a defense. My bet is they send something into the department challenging the action and then maybe file a declaratory judgment lawsuit. That would slow everything down at least.”*

Other states have issued bulletins or advisories encouraging carriers to refund premiums for auto insurance (including commercial auto) – and providing some regulatory relief to make it easier, but California appears to be the first that is mandating refunds and including other lines of coverage, as well. The California notice raises many questions – not the least of which is the legality of the order. We anticipate much more to come on this.

- A thoughtful Republican member of the House Ways & Means Committee – a guy who gets along well with folks on both sides of the aisle – rang us up today just to check in and get our thoughts on all of the insurance-related issues in the crisis. We wanted to know what the endgame is going to be on a “Phase 4” bill, especially as the Paycheck Protection Program (PPP) will be running out of money in the coming days, perhaps even this week. Republican leaders want a straight $250 billion infusion of the PPP, and Democratic leaders want lots of strings attached, plus hundreds of billions of dollars even more for other programs. “I wish I knew,” he said. “Unfortunately, I think the clamor and anguish of small businesses are going to force some action when the PPP is depleted, and unfortunately we’re probably going to have to eat even more spending.”

- **Worth your time:** Lloyd Dixon, director of the RAND Center for Catastrophic Risk Management and Compensation, and a senior economist at the nonprofit, nonpartisan RAND Corporation, covered both sides of the business interruption insurance coverage debate in this blog.

Legal Challenges on Business Interruption

The **El Novillo restaurant** group in **Florida** **filed suit** against several Lloyd’s of London syndicates, joining other businesses and groups across the U.S. in attempting to force their insurers to pay BI claims stemming from civil authority closures. “This action seeks a declaratory judgment that affirms that the COVID-19 pandemic and the corresponding response by civil authorities...triggers coverage…and finds that the underwriter defendants are liable for the losses suffered by the policyholders,” said the filing. The suit also seeks a declaration that future losses from civil authority closures will also be covered.

The judgment will not only apply to the El Novillo Group, but also to hospitality businesses like bars, hotels, etc., as long as their policies do not contain exclusions for COVID-19 BI losses.

A Houston dine-in theater company is also **suing** “certain underwriters” at Lloyd’s after being told its pandemic insurance doesn't cover COVID-19 because it is “not a named disease.”

Tuesday, April 14, 2020

- This week, a **California** trial lawyer filed five separate suits against Travelers for business interruption coverage related to the coronavirus pandemic. Similarly, River Twice Restaurant in Philadelphia sued W.R. Berkley. All suits, much like the ones we have covered in previous newsletters, seek declaratory judgments that affirm the business interruption policies held by the plaintiffs cover losses due to government-ordered closures.

  The latest suits are part of a wave of litigation in state and federal courts across the country, including some seeking class action status, in which policyholders argue that business interruption policies should cover coronavirus-related losses.

  - In responding to the anticipated surge of lawsuits stemming from the COVID-19 pandemic, the **American Tort Reform Association** released this white paper which explores tort liability concerns and considers potential solutions. ATRA’s white paper outlines policy prescriptions to address COVID-19 liability, including legislation:

    - Limiting the liability of businesses that design, manufacture, sell, or donate protective equipment, medical devices, drugs, or other products for use by health care providers and facilities (and possibly the general public) in response to a declared public health emergency.

    - Providing health care providers with greater discretion to make decisions about medical care without the fear of liability during a pandemic or other health emergency; and,

    - Prohibiting lawyers from suing employers on behalf of individuals who did not develop COVID-19, were asymptomatic, or experienced common flu-like symptoms.

  - Treasury’s **Small Business Administration** updated its FAQ on the Paycheck Protection Program (as of April 14).

- Treasury also updated its CARES Act website to include specific sections on:
  - Assistance for American Workers and Families
  - Assistance for Small Businesses
  - Assistance to State and Local Governments
  - Preserving Jobs for American Industry

- This white paper penned by **Wakely's Broker Consulting Services** takes a deep dive into COVID-19 healthcare cost considerations for employers. From the paper: "Insurers will likely be conservative when setting 2021 premium rates, either in their assumptions or risk margin. Both fully insured and self-funded employers should expect an increase in premium equivalent costs in 2021, although estimates vary widely at this point."

- This **ALIRT Insurance Research** report outlines the financial impact of retroactive business interruption payments on the U.S. P&C insurance industry.

Wednesday, April 15, 2020

- Last week, we predicted the Paycheck Protection Program (PPP) in the CARES Act would run out of its $349 billion in spending authority by Thursday of this week. **We were apparently just a tad off.** As of this morning, the SBA reported $289 billion had been allocated, and *The Wall Street Journal* reported this afternoon that the money will run out tonight. That is the bad news. **The good news** is that congressional leaders and Secretary Mnuchin have been negotiating all day and perhaps they can come to an agreement on a **$250 billion infusion**. (Democrats want half of the increase to be earmarked to distressed and underserved businesses and want hundreds of billions in other spending.)

- **Want to see how corroded the relationship between Democratic leaders and Trump is right now?** Just read this letter Nancy Pelosi sent to her Democratic colleagues yesterday. Sheesh.

- Just as we also predicted two weeks ago, there are reports about disparity between potential winners and losers in the PPP.

- This afternoon, all the key property/casualty insurance trades and the policyholder coalition *finally* concluded negotiations on the creation of a **COVID-19 Business and Employee Continuation and Recovery Act**, which we hope might form the framework for the next major "phase" of stimulus/recovery – and avoids the pitfalls and holes of the CARES Act. We're pleased about this, but it is entirely unclear whether this approach will be embraced by the Administration and congressional leaders. **For starters**, Majority Leader McConnell wants the nation to digest the $2.2 trillion of CARES, plus the $250 billion in extra dollars, plus the $2.3 trillion liquidity loan play of the Fed last week. **Secondly**, all the focus seems to be on the PPP as the principle mechanism for relief to the economy, and we don't know how much appetite there will be for an entirely new facility. Still, we will make a valiant effort and we have deeply respected partners (with tons of political clout) in the policyholder/business community.

- Meanwhile, our disappointment with the President's embrace of the trial lawyer version of retroactive BI coverage notwithstanding, Republicans in the House of Representatives have been stepping up in the industry's defense. **Not one, but two, "Dear Colleague" letters are gathering signatures**, one authored by Representative Steve Stivers of Ohio (he's the ranking Republican on the Insurance Subcommittee of the Financial Services Committee), and the other by Representative Ted Budd of North Carolina, who is viewed as an even more conservative member. Last Friday, we reported how Senator Tim Scott and six other prominent GOP senators penned a similar letter to the White House. As for our Democratic friends, for the most part they roll their eyes on the efforts of some liberal members to demagogue the issue, but **crickets to date on actually asserting a defense of the industry on paper.**

Thursday, April 16,2020

- In other news, the Paycheck Protection Program (PPP) is already out of money, and Congress is deadlocked over how to top it up, with Democrats continuing to oppose Republican efforts to infuse an additional $250 billion as they demand equal funding for hospitals and local government – and want half of the earmarked additional PPP funds to be directed to "underbanked" small businesses.

  Here is Leader McConnell's Senate floor speech today, and here is the most recent statement of House Speaker Pelosi.

  Like the CARES Act itself, which broke down into acrimony for more than a week after seemingly being created, **we expect there will be a resolution to infuse the program**. But darned if we know how congressional leaders get there.

- **One good sign is this statement this afternoon from House Rules Committee Chairman Jim McGovern**, outlining a temporary, "low-tech" remote proxy-voting for the House of Representatives, which **offers some semblance of congressional normalcy and continuity.** We have been friends with Congressman McGovern since he was a Hill staffer in the early 1990s working for then-Chairman Joe Moakley. When you are the chairman of the Rules Committee, you are an arm of the leadership, and so you have to jab some partisan elbows from time to time. But Jim is an old-school, thoughtful leader who remembers the days of Tip O'Neill and Ronald Reagan brawling during the day, sharing beers at night.

  Plus, it is just crazy to contemplate in these dark days 435 Members of Congress (plus a hundred staffers) swarming around on the House floor. Hopefully, the Senate can find a similar way forward.

- ***Another* piece of good news:** As you may recall, many states have issued notices requiring or mandating the granting of premium payment grace periods to policyholders. **We have been reaching out to state insurance regulators to ask them to clarify that agents and brokers are not on the hook if a policy is cancelled after the grace period with the premiums for the grace period left unpaid**. This afternoon, Commissioner Lori Wing-Heier of **Alaska** issued this order making just that point. The Commissioner writes "[w]here carriers do not collect premium payments directly, carriers nonetheless bear the credit risk if policyholders do not satisfy their payment commitments under applicable agency bill or premium finance agreements after the grace period ends…” **We are very grateful Commissioner Wing-Heier has issued this clarification and hope other states will follow her lead.**

- **The Council’s Board of Directors**, chaired by Cottingham & Butler CEO Dave Becker, convened by call today. Much of the meeting was about the association itself, our financial preparedness, and our shift to a virtual world of trying to provide value to our member firms during the crisis.

  But the Board **took a strong “lean-in” position on the issue that is among the most controversial within the industry today:** whether the existing insurance industry platform should be a part of any going-forward strategy for how the nation will deal with pandemic risks. Certainly, many carriers (justifiably) have been opposed to the idea based on a pervasive view that pandemic risks are inherently uninsurable, and concerns about the bandwidth of the industry to handle such claims. For weeks in this space, we have been reporting anecdotally that we hear great enthusiasm (not unanimous, but strong) among Council members to be engaged as a part of any going-forward solution. **The Board’s action today is reflective of the desire to be “on the field” as this congressional battle unfolds.**

The following are now officially The Council’s guiding principles for a prospective federal pandemic program:

1. *The Council supports establishment of a federal forward-looking risk transfer solution to address future pandemic scenarios like COVID-19. If or when another global pandemic of this magnitude occurs, we strongly favor having a program already in place with no new enactment of law required.*

2. *Several different models exist or have existed to address risk transfers and consumer protections in times of widespread losses and massive social and economic disruption, including the Terrorism Risk Insurance Act (2002), National Flood Insurance Act (1968), Price-Anderson Act (1957), War Damage Insurance Act (1942), and the War Risk Insurance Act (1914).*

3. *Any solution put in place to address future pandemics deserves careful study and stakeholder engagement, and should not be based on an assumption that any one model from the past is wholesale appropriate for, or transferable to, this very different set of risks and circumstances.*

4. *The Council is uniquely positioned to help advise on insurance-related aspects of any forward-looking federal solution and would welcome the opportunity to participate in those discussions as a policy is formulated.*

- Yesterday, we noted with alarm that the only representative of the insurance industry invited to the Trump Administration’s “Great American Economic Revival” panel is Evan Greenberg of Chubb (meanwhile, the restaurant industry alone has 19 representatives). Here is a good story that ran today on Greenberg’s views.

- Of course, the prospective debate over a federally backed business interruption program is different than the retrospective debate that continues amid even further trial-lawyer-led PR hits, such as this one. To back us up, we have been talking to all our allies on both sides of the aisle, and we are optimistic that any legislation forcing retrospective BI payments lacks momentum. We are hopeful that members of the House Financial Services Committee will ask the President and his partners pushing for retrospective BI claims to stop distracting and start focusing on more viable solutions that can actually help the business community, right now. We reported yesterday on a letter to the President led by **Congressman Steve Stivers.** Here's the final edition with almost all of the Republican members of the House Financial Services Committee joining.

- Speaking of trial lawyers, **more than 20 conservative groups have signed a letter** to Leader McConnell and Speaker Pelosi asking Congress to **take measures to protect companies from "frivolous coronavirus lawsuits."** The letter, obtained by The Hill, urges Congress to enforce "stronger liability protections" for industries that are "currently on the frontlines of the nation's coronavirus response and relief efforts" to "create shields from trial lawyers' frivolous, costly, and job-killing litigation schemes."

  "While the rest of America has come together to fight this pandemic, some trial lawyers have instead plotted to line their pockets with COVID-19 related lawsuits," the letter states. "Their greed is hurting America in this time of crisis, and lawmakers must put their exploitation of this public health crisis into check."

  The letter warns that trial lawyers may seize the opportunity to bring massive claims against hospitals, nursing homes, manufacturing plants, grocery stores and other industries that are already under immense financial pressure to stay in business.

- **There is a saying in politics: The more you explain, the more you lose**. Never truer for us than right now as we to explain why pandemics are excluded from Business Interruption policies. The Insurance Information Institute (Triple I) hosted a webinar today on the impact of COVID-19 on the property/casualty market. **The biggest takeaway is that the insurance industry cannot handle what's happening right now; no risk model would have prepared the best manager for this – it's like if Hurricane Katrina happened five times in one month and then five times again the following month.**

  Put simply, if insurers were to pay out a BI claim for every small to medium business, regardless if they had coverage—according to Triple I, only 40% of small to medium sized businesses have BI policies; this number is considerably less if you're in the top Fortune 100—the industry would lose roughly $300 billion in a month, going from approximately $700 billion surplus to about $400 billion in just a matter of weeks. This dramatic loss in surplus would most likely push credit agencies to downgrade ratings. If insurers would be required to pay another month, the surplus would go below $200 billion, which would then push regulators to take over business.

- We should note that one of our members developed a product with a carrier, but because of the super high premiums (high risk=high premium!), the take up rate was negligible.

- Much like after 9/11, we may see a withdrawal of business interruption coverage.

Friday, April 17, 2020

- **Speaking of the trial lawyers** who are already filing lawsuits against businesses providing products or services in the wake of the coronavirus pandemic: It will be months, if not years before these lawsuits go to trial, and much will be forgotten in that time. Governors across the country have issued executive orders offering limited liability protections in an effort to protect certain frontline workers, like those in manufacturing and healthcare. A new white paper issued by the **American Tort Reform Association (ATRA)** explains why legislative action is needed to protect critical workers from liability in the long run.

  And speaking of ATRA, we ran this as a small item at the bottom of our newsletter last week, but it's worth a quick scan. The report reveals that more than 90% of class action members in consumer fraud cases receive no benefit whatsoever from this type of litigation.

- **Washington Insurance Commissioner Mike Kreidler** polled insurance carriers in Washington State and found that most business interruption insurance policies offered in the state exclude pandemic and virus coverage. Kreidler issued a press release today noting that two insurers in the state offer coverage for pandemics through their base policies, and an additional 15 offer limited coverage through endorsements to standard policies. But "the vast majority specifically exclude coverage for economic loss due to a viral pandemic."

  A number of states have issued guidance regarding business interruption insurance – general information describing what risks are covered and what are (generally) excluded. And, as we noted here a couple weeks ago, the NAIC and NCOIL have both chimed in, with the NAIC noting that BI "policies were generally not designed or priced to provide coverage against communicable diseases."

  Kreidler's statement is notable, however, because it is more than guidance. His department has done its work – reviewing 226 sample notices to policyholders from 84 insurance companies and insurance groups doing business in the state. And moreover, the Commissioner himself has a strong reputation as a consumer advocate and sometime-industry critic, making his findings all the more compelling and interesting.

- For a comprehensive review of state activity, our legal team at Steptoe & Johnson has updated the following documents:

  - State Insurance Regulatory COVID-19 Update
  - State Regulatory Responses to COVID-19
  - State Insurance Premium Forbearance Requirements

Monday, April 20, 2020

- We are glad we took a weekend hiatus from reporting to you, as we would have followed the pack mentality that a deal to reinfuse the Paycheck Protection Program (PPP) was imminent. Congressional leaders and the Administration remained divided (and acrimonious) throughout the day. Meanwhile, the proposal has swelled from $250 billion to $300 billion. A major impasse is the demand for more relief for states and municipalities that is opposed by the White House and congressional Republicans. And while Speaker Pelosi and Minority Leader Schumer support the infusion for the PPP, they continue to insist that much of it be targeted to Community Development Financial Institutions. And the Democrats want more money for testing. One lobbying colleague today said both sides are still "struggling with the dynamic of trying to make changes to operating programs – like repairing the transmission on a moving car."

Meanwhile, Politico's Anna Palmer this morning said that like Seinfeld, this debate has been about nothing. "Why? Because Democrats and Republicans mostly agreed about all the items that they were fighting for. At some point, Congress is going to have to send hundreds of billions of dollars to states and local governments. So, the Republicans' protest here will be short-lived. President Trump on Sunday night even conceded he is in favor of sending state and local [municipalities] cash. Democrats held out and got modest wins – items Republicans mostly agreed with. This was a debate about the immediate order of operations, not long-term priorities. State and local out, hospitals in -- who cares? It is all going to happen at some point anyway."

- One timely SBA loan issue: Our friends at Hylant raised a question about the challenges associated with forgiving projected health plan expenditures through the Small Business Administration (SBA) Paycheck Protection Loan (PPL) program for smaller businesses with self-insured plans. Because smaller employers do not typically earmark funds to be used to pay future plan expenditures—and instead pay claims as they come—we plan to submit this letter to the SBA tomorrow morning asking for clarification on how loan forgiveness would work in those cases.

- Continuing a growing list of policyholder lawsuits against insurers, a group of law firms together filed six class-action lawsuits against insurers in federal courts from California to New York on Friday on behalf of commercial policyholders seeking business interruption coverage for coronavirus-related losses. These latest filings continue to address common themes including assertions that the presence of the coronavirus in or around a property constitutes physical damage under the terms of the policies and coverage is also triggered by the civil authority clauses in business interruption policies.

  In the latest batch of federal lawsuits seeking class-action status, policyholders represented by four law firms in Chicago, Houston, and Madison (WI), represent a variety of businesses including restaurants, a bakery, a bridal wear company and a dentist, in a variety of states. All the law firms are listed as co-counsel on each of the suits. The suits make similar allegations and hold that none of the policies have "any exclusion for losses caused by viruses or communicable diseases."

  Also, on Friday, a group of **Pennsylvania** personal injury lawyers filed two lawsuits seeking class-action status against Erie Insurance Group in state court in Pittsburgh. The two suits, *Joseph Tambellini Inc. v. Erie Insurance Exchange* and *HTR Restaurants Inc. d/b/a Siebs Pub v. Erie Insurance Exchange*, assert that the all risks policies issued do not exclude coronavirus-related losses.

- Meanwhile, the Pennsylvania Supreme Court invoked its Kings Bench jurisdiction last week to decide, and ultimately deny, an emergency application for extraordinary relief challenging Governor Tom Wolf's executive order compelling closure of the physical operations of all non-life-sustaining businesses in response to the COVID-19 pandemic.

- The Council is archiving all relevant business interruption-related lawsuits in the Property/Casualty section of its Resource Center.

Tuesday, April 21, 2020

- The Senate passed a $484 billion interim coronavirus funding bill via voice vote late Tuesday afternoon with the House set for passage later this week. The **most important thing** about the latest stimulus/ recovery bill is the $322 billion of the agreement is for replenishing the Paycheck Protection Program (PPP), which dried up last week, and roughly **$60 billion** of that total will be allocated to small lenders and community banks. **What is breathtaking to us** is news from banking industry colleagues that the **burn rate is $50 billion a day**.

  Another $75 billion is coming for hospitals and $25 billion for expanded testing, with the **possibility of a bill reaching President Trump's desk before the weekend**.

  One of the biggest issues that the PPP faced in the rollout of the program was that small businesses in underserved communities struggled to compete with bigger businesses that had existing relationships with banks. This bill has carve-outs so that community businesses and lenders do not have to fight bigger businesses and banks for the same funding, a provision that Democrats fought hard for.

  The House is beginning to return to Washington for a vote as early as Thursday. **President Trump** urged **Congress** to pass the bill in a tweet, signaling that he is ready for the legislative branch to move on to a fourth stimulus package.

  Read the bill here

- For weeks now, we have been **angling for our position in the "Phase 4" negotiations** – creation of a federal facility for broader business continuity. Recognizing that there are only so many trillions of dollars to be printed, it is not yet clear that deep bipartisan support can be found within the Administration and on the Hill. But **keep an eye out tomorrow** for another effort that we are making with fellow major organizations in the benefits space about the necessity for Congress – in the next round of negotiations – to shore up the employer-sponsored group health insurance marketplace.

Wednesday, April 22, 2020

- We have got a bunch of great tidbits below on the benefits front. Our "insider" stuff takes us to a virtual meeting attended today by our top Democratic lobbyist **Joel Kopperud** with top Democratic House staffers, looking ahead to "Phase 4" negotiations on yet another stimulus/recovery bill. (Joel was participating as part of our "Fight for Healthcare" coalition, which is an extension of the group that knocked out the ACA's Cadillac Tax last year.) We're not at liberty to give all the details based on confidentiality of the call, but clearly **"Phase 4" will be benefits-centric**, **but we're pleased to report that there was**

strong sentiment that the future of economic recovery and health insurance continuity hinges on maintaining the role of the employer in providing coverage for the employees. Expect to see a lot more in COBRA subsidies, among many other provisions.

Joel closed his email with this line: “We can look to the Pelosi Cares 3 bill as the House starting point for Cares 4.” To which our thoroughly Republican lobbyist **Blaire Bartlett** responded: “Of course we can look to that bill because absolutely everything under the sun is included in that bill.”

- Unsaid, of course, is the emerging GOP line that we need to digest the near-$3 trillion in spending and debt for several weeks before we even consider another trillion-dollar package. See: *Senate Majority Leader Mitch McConnell full article here*.

- **APCIA President and CEO David Sampson** appeared yesterday on *CNBC’s “Closing Bell”* stating the property/casualty insurance industry is supportive of federal public policy solutions to assist small businesses struggling due to the coronavirus. Sampson noted that business interruption coverage excludes virus-and bacteria-related events, and "there is no way that an insurer, even global reinsurers, can diversify their risk in the midst of a pandemic.”

Thursday, April 23, 2020

- **Rep. Brian Fitzpatrick (R-PA)** testified this afternoon at a very broad Small Business Committee hearing about what next steps should be taken for the economy, and he **was the only one to mention insurance, and not in a good way. Here is what he said:**

> *"We have two choices going forward. God forbid we're down this path. We either choose the path of government bailouts or we create an insurance product. Right after 9/11, we created the TRIA program, which made all the sense in the world. It was market priced; it was risk based, and it was federally backstopped. There are a lot of industry tradespeople out there who are trying to say that this is not their problem, they don't want to be a part of this solution. They have to be a part of the solution. We can create a product where they can make money that insures our small businesses. Because Madame Chairwoman, there are now small banks in our community that are now telling small businesses that they will not extend lines of credit and financing unless they show some level of insurance. That has got to be the solution going forward. These bailouts are inefficient, they miss the target, they result in endless deficits, endless printing of money, and they miss the mark as PPP has. We can fix it. Let's work together with the Treasury Department to make sure these guardrails are set up, so we protect our mom and pop small businesses and not give these loans out to people that don't need them."*

There are some very decent thoughts in there – **we especially disdain how the CARES Act has had the effect of arbitrarily picking winners and losers.** But we know that Congressman Fitzpatrick considers CIAB to be among his disparaged “industry tradespeople.” Pardon us, Congressman. Our Board of Directors has leaned in strongly on a prospective pandemic response that relies upon the machinations of the existing (property and BI) insurance industry. Here again are the principles our Board approved unanimously last week. Do we fundamentally agree with insurers that pandemics cannot be underwritten? Because, as Evan Greenberg says in this *Politico* piece, "Unlike a hurricane or an earthquake, a pandemic is not limited by geography or time. It is everywhere geographically and for extended periods of time. So, the loss potential in practical terms is almost infinite." Sure, we do. But **that does not mean that a federally backstopped insurance facility cannot be created as at least a major part of the solution for clients looking beyond the current crisis.**

- Speaking of winners and losers, we noted that the Administration to date is not releasing the names of companies receiving forgivable loans and other government money. As Obama's former chair of the Council of Economic Advisors **Austan Goolsbee** said today: "Nobody ever suppresses good news. Okay, if the list was great … they would have released it yesterday. You know perfectly well the reason they are not releasing the list, which is people will start holding them accountable for who is getting the money … It's kind of the flashbacks of 2008-09 that it's going to matter for the credibility of this program and whether we the American people think it is working and want to keep engaging in it."

- **By the time you read this,** the House will have overwhelmingly approved the $484 billion "Paycheck Protection Act and Health Care Enhancement Act" (otherwise known as "CARES 2.0") with the $325 billion infusion into the PPP. Their first vote of the day, to establish an oversight subcommittee (to provide years of recriminations on the handling of the crisis) passed on a vote of 212-182 along party lines. It is been interesting to watch the social distancing measures wherein a "15-minute vote" now requires 90 minutes. See Nancy Pelosi on your left. A vote-by-proxy system is still evolving.

- We have been seeing much traffic on the issue of **trade credit insurance** governmental backstops in order to mitigate the tatters of the worldwide supply chain. **France and Germany** have been at the tip of the spear of this issue, and their efforts to be the reinsurer of such transactions appears to have growing appeal. Here is a very good story on the issue from the *Financial Times*. *Please note, if you are not a Financial Times subscriber, you may have to fill out a registration to see the story for free, but that only takes a minute or two*.

  CIAB Board member Jochen Koerner (CEO of Ecclesia Holding in Cologne) deserves some of the credit in advancing this issue in Berlin, where the government has given assurances of a multi-billion-euro backstop. In texting with him about it, we asked about other challenges in Germany where, honestly, things seem to be going much better economically. Here was the interesting tidbit from his text to us: "Berlin now says that a company gets less bailout money of any kind if they are covered, i.e., insurance first. Problems: 1) insurers don't want to pay; 2) the (policy) wordings say, "subsidy first;" and 3) long term: Why should you buy insurance? Carriers don't pay and Merkel will bail you out anyway."

Friday 24, 2020

- First is this editorial in today's *Wall Street Journal* which has the most to-the-point lede ever: **"Millions of Americans will lose their jobs and tens of thousands will die from COVID-19. Leave it to the plaintiff bar to make money off the misery."** And this link leads you to an excellent six-page white paper out today from the **American Tort Reform Association** (ATRA) citing concerns, explanations, and solutions to the **litigation crisis** that has already begun. ATRA has been performing wonderful works for decades now, in the states and on Capitol Hill. In our view, they are right on policy prescriptions, but liability relief is likely to be significantly limited given the Democratic House's strong fealty to trial lawyers. That is not necessarily the case in the states, and we thank **New York Governor Andrew Cuomo** and others for providing much needed liability waivers for frontline healthcare workers, for example.

  ATRA rightly raises the **top concern of lawyers** attempting to circumvent the workers compensation system and bring tort lawsuits against employers for exposure to coronavirus at work. **We know with certainty this is already happening and will proliferate**, and ATRA proposes this solution: "Legislation may provide that an employee can only file a claim outside the workers compensation system when an employer intended to injure an employee. A plaintiff would need to show clear and convincing evidence of a specific intent to harm an employee to proceed in the tort system. This approach may not be needed in jurisdictions in which courts consistently apply a similar high standard for work-related tort claims, restricting lawsuits to injuries that stem from truly intentional acts."

- This was issued this afternoon by the **Society of Independent Gasoline Marketers Association**, demanding liability relief for businesses that are DHS-designated critical infrastructure. **We expect to see a lot more of this.**

- **There is unquestionably a major divide about the need for a massive "Phase 4" solution.** Senate Majority Leader Mitch McConnell has made it abundantly clear that he does not want to go there, while Democratic leaders are increasingly insistent for state and local government subsidies. McConnell calls those "blue state bailouts" and has suggested that states and localities pursue bankruptcy instead.

- On one Zoom call today with one of our favorite mainstream Republican members of the House Financial Services Committee, **we were alarmed to hear the lobbyist for one of the nation's largest banks saying their economists have modeled demand for PPP loans at $1 trillion, give or take a hundred billion (we never thought we'd write those words in a sentence).** Our math, then, shows a potential $441 billion shortfall in the program that was established essentially as an entitlement. On *another* Zoom call with House Democratic leadership, the dismay with how PPP dollars were distributed was so significant that there was **skepticism as to whether the program would ever be funded again**. We are already seeing that Republicans like the PPP more on balance than the Democrats do, so this may be a train wreck. Fingers crossed that **Henry Kissinger's** old line that "90% of the politicians give the other 10% a bad name" does not wind up applying here.

- Meanwhile, the **Small Business Association** yesterday issued clear guidance concerning the Paycheck Protection Program, mandating borrowers must need the money or else they should pay it back. **The guidance is clearly an attempt to ensure PPP loans go to small businesses hurt by COVID-19, not**

fiscally sound companies with borrowing options. As one of our executives wrote us this morning: "I think a lot of folks in our industry thought about or took these loans. But, with this apparently retroactive change, I fear that some that obtained money might need to give it back under the safe harbor provision before the SBA comes knocking looking to confirm that the business had no other access to capital."

Tuesday, April 28, 2020

- **Liability relief – or lack thereof** – has been much the conversation and theme of the day. The chess games between Senate Majority Leader McConnell and House Speaker Pelosi continued today, starting with McConnell's offer last night to dangle the prospect of hundreds of billions of dollars in state and municipality funding, but only if coupled with a "liability shield." (McConnell had been for the past week unalterably opposed to "blue state bailouts" and suggesting that cities and states look to bankruptcy before they come calling for no-strings-attached federal relief funding.)

- We were right about the logical progression of the DC debates – yet more calls for funding infusion into the Paycheck Protection Program (PPP), coupled with a package of Democratic priorities, mostly for the states.

- Early this morning, we got a **cheat sheet** from a wired Democratic operative and friend **detailing all the kinds of things that Pelosi's House is expected to pass in CARES 2/Phase 4** (for clarity's sake, we're going to start calling it CARES 2 henceforth): a big list of expected Democratic priorities – with a notable "no way in hell" (at least that's our translation) on the House buying in to anything McConnell wants that would stick it to the trial lawyers. No surprise there. But within a couple hours, **Majority Leader Steny Hoyer** put out a specific tweet that said the caucus has yet to have the opportunity to consider liability reforms. (Also, not a surprise – he is a moderate and wants to be business-friendly.) And then, *within two hours of that*, **Pelosi announced that the House (unlike the Senate) will NOT be coming back into session next week**, and likely not until they are ready to pass the next round of recovery/stimulus. Again, all chess-moves (which would be great theater for political junkies like us if not for the real-world consequences).

  Best educated guess here? There will be a **big CARES 2 package**, but the **liability reforms** – which have to be preemptive of state law – **will be limited again**, to front-line and critical infrastructure facilities. From there, it will be a battle among states, with a huge divide between red and blue states, as to which will address indemnity most aggressively. That may be aspirational under the assumption that **in a crisis of this dimension, political considerations will bow to necessity of action.**

- **POLITICAL SIDEBAR** for a moment. We have been on lots of Zoom calls with Members across the spectrum in the last week. For years, we have bemoaned the reality that dysfunction has prevailed as a result of Members of Congress not getting to know one another, over the congressional calendar and the reality that few Members ever move to Washington with their families. It is worse in this pandemic when they are going beyond social distancing – they are literally thousands of miles away from one another.
  From the left side of the Democratic Caucus, we hear contempt for businesses benefitting from relief that might not be fully deserving, and anguish over disenfranchised communities. **From the right side of**

the Republican Caucus, we hear concern for businesses, but increasingly an unwillingness to print any more money – perhaps for much of anything.

It is enough to remind us (forgive if you have heard before) of the **late great Congressman Mo Udall of Arizona**, who was running for Democratic Caucus chair in the early 1970s. He went to all of his colleagues and they pledged full support, but on secret ballot he lost by one vote. His quote to the press: "Today I learned the difference between a caucus and a cactus. *With a cactus, the pricks are on the outside."*

Monday, April 27, 2020

- The Paycheck Protection Program (PPP) remains wildly popular and wildly under siege, with the second troubled rollout of $310 billion in funds being unleashed (or not, depending on your perspective) today. Note in the link **concerns continuing** to remain about "whether the bailout funds will be cornered by industry insiders and large businesses that already have access to cash." At least **140 publicly held companies** received funds from the first round of PPP loans, including large restaurant chains, a Fortune 500 auto retailer and a pharmaceutical company with $14 million in cash.

  Even with demand far outstripping supply of PPP dollars (see this good piece on Bank of America's CEO Brian Moynihan's comments yesterday) we had been blithely reporting here for a couple of weeks that because the program is so popular, and because it was set up as an entitlement program, Congress would surely, find a way to continue to fund it. Now, we are not so sure. Your association's lobbyists have been hearing a **strong rhetoric of rage from Democratic Members of Congress** about the PPP dollars failing to reach the most deserving. And just as clearly, we have been hearing **GOP rhetoric of alarm** over the trillions of dollars being printed. To wit, we got a press release today from the conservative Republican Study Committee in the House. The top priority for the future for the RSC is to "flatten the curve." But **the curve they are talking about is not the disease curve, it is the "debt curve."**

- As dysfunctional as the last couple of months in Congress have been, it sure feels as if things could get even rougher. Clearly, the **Democratic priority of the moment is a massive infusion of dollars to shore up state and local governments.** Speaker Pelosi reacted sharply yesterday on the issue of the interim PPP funding versus state and local. Meanwhile, Majority Leader McConnell announcing today that the Senate will in fact come back to town next week, **bashed the effort for a massive new spending bill, saying "we cannot get distracted by pre-existing partisan wish-lists."**

  McConnell reportedly said he is **open to providing reeling states and cities with relief, but at a price.** "We're not writing a check to send down to states to allow them to, in effect, finance mistakes they've made unrelated to the coronavirus," McConnell said. McConnell wants to limit the liabilities of healthcare workers, business owners and employees from lawsuits as they reopen in the coming weeks and months. **"The next pandemic coming will be the lawsuit pandemic in the wake of this one. So, we need to prevent that now when we have the opportunity to do it,"** McConnell said.

- We are old enough to remember the famous *New York Post* headline from 1975: "FORD TO CITY: DROP DEAD." We may be headed there again in a much bigger way. Or, perhaps just as likely, they somehow see their way through to a state/local/PPP compromise and print another trillion or two…**This is for sure: CARES 2 is going to be a political Lollapalooza.** Better would be for Congress to compromise and come up with a broader federal facility without all the holes of CARES.

Wednesday, April 29, 2020

- **Friday. That is the date you need to know**. This Friday is the date we expect to roll out – yes, we know, at *long* last – the business recovery fund proposal, in the works for six weeks now with major policyholder groups plus all the major p/c insurance trades. This is our prescription of the kind of fund that is necessary for business continuation and avoids many of the pitfalls of the saw-toothed rollout of CARES. **We are going to ask you and your colleagues (and your LinkedIn list *and* your dogs and cats and cousins) to weigh in loudly with Members of Congress on this effort.**

- Speaking of CARES, here are the developments today **on the Paycheck Protection Program front.** We note as well that on a conference call with Democratic state legislators today, **Sen. Marco Rubio** – the architect of the PPP – said all recipients of funding will be made public, and he said an inhibition to recovery is that too many workers are telling employers that unemployment benefits are too lucrative.

- **Switching gears to a prospective (i.e., post-COVID, prayerfully) pandemic insurance program,** the U.S. Chamber of Commerce today released this letter to chairs and ranking members of the House Financial Services Committee and Senate Banking Committee. **We very much like the tone of this letter**: "Any legislation that would establish a prospective pandemic program should go through a full, transparent, and deliberative process. Any federal pandemic system must provide eligible businesses with adequate, timely relief that will compensate for harm and quickly put firms back on the road to growth. The program must be workable for all stakeholders in order to give businesses the certainty that they need in the face of future pandemics." And we consider this position to be largely consistent with The Council's own board-adopted principles. **The difference**, however, is that the Chamber does not want mandatory participation of insurers in any such program. The Council's principles, meanwhile, tilt toward *universal access* to some form of pandemic BI coverage beyond the COVID crisis.

- **We have gone, what, 20 column inches so far and have not done any trial-lawyer bashing?** Yes, we know, it is dated a few days, but it does the trick. Here is your daily fix.

Previous COVID-19 Legislative Updates – Business Continuity Documents

MARCH MAY