COVID-19 LEGISLATIVE UPDATES – BUSINESS CONTINUITY

Taken from The Council daily briefing

Thursday July 9, 2020

Evan Greenberg's Chubb created some significant waves within the industry yesterday in calling for a prospective pandemic business interruption program (for both small and large businesses) that would be managed by the insurance industry with government backing. This – for the moment, at least – puts Chubb at odds with other carriers and their trade groups who want an arms-length-distancing from any such scheme and zero balance sheet risk.

As Reuters put it: "As one of the largest U.S. providers of business interruption insurance, Chubb's views are likely to significantly influence ongoing debate over policy."

So, let us keep score. First out of the gate was Marsh, with a 95% backstop but a bit of industry skin in the game. Second was the introduction of the Pandemic Risk Insurance Act by Rep. Carolyn Maloney (a ranking D on the Financial Services Committee), strongly opposed by most carriers. Then the carrier trades came up with an alternative "Business Continuity Protection Program" that would be all government money administered through FEMA and privately sold by agents and brokers. Now, Greenberg has sledgehammered a big crack in the wall of "pandemics cannot be underwritten and are uninsurable" line with this proposal.

"We believe the industry does have wherewithal to take risk here," Greenberg said in the Reuter's piece, adding that they're talking to lawmakers, brokers and other insurers about the plan. Under it, the government would offer up to $750 billion in coverage for small businesses with up to 500 employees. Of that, the industry would pay for 6% of claims, or up to $15 billion, during the program's first year, that scales up over 20 years. The proposal also includes a program for businesses with more than 500 employees, which would be voluntary for insurers and provide a total of up to $400 billion in coverage through a government reinsurance entity – also with an industry co-pay.

To date, the signaling from Republicans in the Senate is let's get through this pandemic before we address the next one.

But Chubb's proposal definitely stirs the pot. In a good way, we think.

In our decades at The Council, **trade credit insurance** has been a product we have had only a vague familiarity with. We knew only that it exists to provide stability to global supply chains; it's sold by around 10% of CIAB member firms (dominated by the globals); and it's a rather unique product in that it both mitigates risk for policyholders and serves as collateral for bank financing for them (see this *Leader's Edge* feature and this recent piece by our own Vlad Gololobov). We also knew that (despite a scare during the last big recession) it was not a product that required any particular government affairs protection.

Our conversations with expert member executives in recent weeks have been dire with respect to a potentially catastrophic supply chain collapse, and need for a governmental backstop, based on trends in the past couple of months. The retail community is coming unglued on the subject, as 60% of TCI goes to protect SMEs, mostly in retail.

Here's Scott Ettien, Global Head of Trade Credit for Willis Towers Watson:

> *"The TCI insurers have reduced their pre-COVID-19 credit capacity by over 15% during this crisis which impacts open term trade in the range of $60 billion due to the deterioration in the quality of risk. This is an opportunity for the government to leverage the TCI industry's expertise in risk to help companies manage through the current crisis and thus providing combined support to bolster open term trade, i.e., supplier credit. Under a public-private partnership, TCI carriers will provide the credit metrics and analysis to support American businesses through these unprecedented times."*

Today, this report, commissioned by the major international TCI carriers, was released (here's the abbreviated press release). Yes, it is a commissioned report, and anybody can get a white paper in D.C. that says anything you want it to. But this one was written chiefly by Robert Litan, a deeply respected financial services economist associated with the Brookings Institute.

Executive summary: "Under the proposal, TCI insurers would continue marketing, undertaking, and paying claims for TCI policies, but the government would reinsure a percentage of the losses from the risk of buyer non-payment. This type of program draws on best practices from similar approaches that have already been adopted or are under consideration in other G-7 countries."

Wednesday, July 8, 2020

July 31 is emerging as the biggest looming congressional deadline we can remember. Much of the CARES Act funding expires, appropriations bills have to get finished, and it's also because lawmakers are slated to break for the long August recess, which many view as their last opportunity to achieve any major legislative accomplishments before the November election.

Congress's fifth aid package was always going to be the most difficult to negotiate, as the two parties have only grown more divided since their initial and rare bipartisan agreement in the early months of the pandemic. And we all know Congress tends to work best when they are barreling toward a cliff.

Senate Republicans released a new poll this week showing that 80% of voters — including 76% of independents and 73% of Democrats — support legislation to shield restaurants, workers and schools from being sued over the coronavirus if they reopen during the pandemic.

The Council's priority in the next round is, of course, as broad a possible liquidity relief for impacted businesses, plus workable liability relief, and good extended COBRA benefits to preserve the employer-based system. We also continue to work with our champion Sen. Tim Scott to make ALL (not just health insurance) insurance payments forgivable under PPP terms. This may hinge on whether there will be a new iteration of the PPP, and/or a second bite at the apple for teetering businesses. Right now, the sentiment we hear is in support of a revised PPP, but a couple more weeks of bad stories about the unsympathetic businesses that got PPP loan/grants (versus some white-hats who didn't) could change things.

Trial lawyer John Houghtaling did a big Zoom call today updating his clients and prospective ones about his Business Interruption Group (BIG). He continues pressing for passage of a bill (re-) introduced by Rep. Mike Thompson (D-CA) to force retroactive BI coverage with federal recoupment so that trial lawyers like him will not have to litigate their cases for years. He indicated the bill would pass but for the opposition of the insurance industry. We have been on scores of Zoom calls with Members of Congress – both sides of the aisle, both chambers – with gaggles of insurance lobbyist colleagues, and there has not been a whiff about the Thompson bill in more than a month. It such a lost legislative cause.

Houghtaling took a couple of shots at brokers, as in: "You have to have someone look at the policies themselves, not have the broker look for you." And: "Carriers go to agents and brokers and woodshed them."

And he kept to the standard script about how the industry's got so much money and never actually excluded pandemics, but are trying to loophole/fine-print their way out of paying claims: "There's going to be a challenge of the virus exclusion in general. There is a reason why pandemics do not appear in these policies. They intentionally did not use the word pandemic. After SARS when they wanted to exclude pandemics, if they admit they are excluding pandemics, then they had to go to rate negotiations. They said well viruses are the same as bacteria, so they excluded viruses."

Monday, July 6, 2020

Curator Jerry Sullivan shares a piece from Best's Review on The BI Challenge written by Howard Mills, the former N.Y. Insurance super.

There has been bunch of industry trade press on fresh California and Rhode Island legislative initiatives on retroactive imposition of BI, and here is a good thrashing of the California initiative from the largest carrier trade association.

The most impressive industry document to hit the inbox in the last week came from Lloyd's calling for multiple levels of industry engagement in utilization of the commercial insurance framework for current and future pandemic relief. We hear from too many of our carrier partners (not all, but too many) the familiar refrain: pandemics are uninsurable, so keep us the hell away from it. This is at odds with The Council's Board policy leaning in on existing insurance mechanisms with, of course, massive government backstops. The Lloyd's proposals lean in even more.

Three key proposals:

- **ReStart:** a potential non-damage business interruption solution (loss of revenue without a physical damage trigger) for future waves of COVID-19 being developed by the Lloyd's market, specifically focuses on supporting SMEs.

- **Recover Re:** a proposed 'after the event' insurance product framework, which could provide immediate relief and cover for non-damage business interruption, including the current COVID-19 pandemic, over the long-term.

- **Black Swan Re:** a reinsurance framework for government and industry partnership that could better protect customers from the devastating and long-term impacts of systemic catastrophic events – from another pandemic, to global supply chain disruption, to the interruption of critical infrastructure or utilities.

Wednesday, June 24, 2020

- Good afternoon everybody. For those who think that transparency is the first key step in bending the healthcare cost curve, there was a good court decision yesterday. The Council has joined with policyholder groups in calling for a federal trade credit insurance backstop to protect international supply chains… Another day, another set of developments on the BI litigation front... The PPP is set to expire in a few days, *with money left in the program*...

- Yesterday, The Council signed on to this letter to the Administration and the Fed asking them to shore up the supply chain insurance market – just as have the governments of the U.K., Germany, France, Canada and other countries. As the letter notes, **circumstances are dire**: "*Many retailers and vendors are now overextended as a result of the unprecedented shutdowns and interruption we have experienced over the past three months. This means that U.S. jobs, including many U.S. manufacturing jobs, supported by our supply chains are at risk. The available credit insurance capacity now represents only a fraction of what was available just a few months ago, and the situation continues to deteriorate. The short-term implications of this acute problem are devastating, particularly for the many U.S. companies that will be forced to absorb nearly all the risk of new business or walk away from those business opportunities simply because a transaction that was routine in January is now considered too risky.*"

  We are keeping really good company with policyholders on this, including the National Retail Federation. But until the letter came out, we never knew that the "National Halloween and Costume Association" existed. That is creepy. Previously our favorite trade association was the "National Pickle Institute."

Monday, June 22, 2020

- The business interruption cases against carriers now number in the hundreds, but far fewer E&O claims have been lodged against brokers for failing to enumerate any lack of pandemic coverage. Is that a good sign, or a foreboding one? Most of what we have heard in recent months is that it depends much on whether the plaintiffs have successes – particularly in cases where there was no explicit viral exclusion.

  We talked to one General Counsel of a top-five brokerage today and he said, essentially, who knows. "We all heard that was going to be the case after all the Sandy litigation, but it never really played out that way."

  Here is one lawyer who is chomping at the bit to sue brokers, but his line that they are "doing their commercial clients a disservice by advising them not to file BI claims" is not at all consistent with what we've been hearing from Council member firms.

  Even if the E&O stuff has not become a crisis, wow, the carrier caseload is getting deep. A 90-pages-and-counting of litigation to date document and a slightly less dense summary.

  Our Government Affairs intern Peter Bloomstine found this article on some Bay-area litigation, quoting a professional "expert witness" against insurers, David Frangiamore who says there could be "hundreds of thousands" of cases: "This might be the biggest set of litigations in my lifetime. There have been decades of litigation for insurance coverage: asbestos, construction, pollution, but this is going to exceed the number of lawsuits in any of those given categories…A lot of business owners are on their last legs. They have nothing to lose."

  The Council's L.A. executive Jerry Sullivan noted that this item from last Friday's Property Casualty 360 is an excellent recapitulation from 30,000 feet of where we are on BI.
  One more thing on the subject, as there has been some evolution on the issue of whether class actions are going to be certified, or even whether plaintiffs and defendants alike believe they are the best vehicle for the ultimate resolution. This piece from yet another trial lawyer notes that proposed class actions are pending in several state and federal courts. The rub on class actions, unlike asbestos or tobacco, is the state-by-state regulation of insurance, and the millions of variants in policy wordings. But it's always fun to read missives with lines like this: "With the continued influx of COVID-19 claims under business interruption policies, it's important for business owners to understand that class actions and Multi-District Lawsuits aren't necessarily a good fit in the event their business interruption coverage is sound." Translation? "Don't jump on Dickie Scrugg's class action suit because we won't be able to make money off of you then!"

Wednesday, June 17, 2020

- The Administration yesterday slashed the amount of paperwork that small businesses must fill out to avoid being stuck with debt from government-backed loans, **in response to an outcry from lawmakers and business groups that the process was too complicated.** The SBA and Treasury released a three-page "EZ" loan forgiveness form that "certain" borrowers from the PPP would be able to use. The Administration said it requires fewer calculations and less documentation than the full application. The initial version of the forgiveness form was 11 pages. Here is an updated overview of the changes and full program from Kate Jensen and **our ace legal team at Steptoe & Johnson.** And here is a link to the latest official governmental PDF, entitled "*Revisions-to-the-Third-and-Sixth-Interim-Final-Rules.pdf*". Now there is some bureaucratic poetry.

Thursday, June 11, 2020

- Today we turn to the *Insurance Journal* for an article on attorney John Houghtaling, the organizer of the "Business Interruption Group" that is stalking carriers and recruiting clients, containing **the most eye-rolling line** we've seen of the year "In Houghtaling's mind, battles over ambiguous language shouldn't enrich plaintiffs lawyers or defense lawyers." The BIG story line is that **Houghtaling is telling restaurateurs that Congress is about to pass his proposal** to allow insurers to pay BI losses and simply be indemnified by the federal government, and that *THAT* is his true goal – instead of litigation that could stretch for years. **It. Is. Not. Happening.**

- More on BI, as we continue to try to unravel the relative importance (or lack thereof) of the **court judgment in Paris against AXA** on a restaurant claim, and their subsequent agreement to pay the business and others with the same policy coverage language. Chris Croft of LIIBA clarified in an "*Axamination*": "In the case involving the Paris restaurant, the wording was ambiguous and there was no exclusionary language. AXA has agreed to settle all claims on this type of policy but may still appeal to get a legal opinion on the responsiveness of the cover – although nobody seems sure whether they are going to or not." More to come.

- **One of the best 30,000-foot arguments for carriers excluding pandemics** has been that the product was available through Munich Re, was extremely expensive, and had virtually no take-up. Here is Munich Re's fact sheet on their products that are offered.

Wednesday, June 10, 2020

- **Mnuchin today strongly backed the move for new legislation to put more money into the economy** but said the aid must be targeted at helping specific businesses reopen, and he announced still more changes to the beleaguered-yet-popular $670 billion PPP.

> "*We're open-minded, but we absolutely believe small businesses — and by the way many big businesses in certain industries — are absolutely going to need more help,*" he testified, noting that aid must be aimed at certain recipients such as the travel and restaurant industries.
>
> "*Whatever we do going forward needs to be much more targeted particularly to the industries and small businesses that are having the most difficulty in reopening as a result of COVID-19.*"
>
> Mnuchin also said "***we're going to need to fix unemployment***" **insurance.**

- Police reform, of course, is by far the **most predominant issue on the Hill right now**. Council lobbyists have participated in many Zoom calls with members of Congress, and there is **increasing conversation of the possibility that police reform and the next stimulus/recovery package potentially could be coupled**. It will be a tortuous process, made even more so by the fact that the Senate will go into recess for weeks starting on July 3rd.

- **The House Financial Services Committee will hold a hearing on June 26** on Congresswoman Carolyn Maloney's **Pandemic Risk Insurance Act**, in something of an open salvo that currently divides the carrier community and policyholders (as **CIAB Treasurer Bob Klonk** says, "we're for anything that gives relief to our clients, period.") Meanwhile, this piece **dives deeper into pandemic coverage**, noting the evolution of parametric insurance: "Unlike traditional property coverage, parametric insurance is a type of insurance that does not indemnify the pure loss, but rather issues a set payment upon the occurrence of an objective triggering event, such as an earthquake of a certain magnitude or a hurricane of a specific intensity. Sometimes referred to as index-based insurance, this type of coverage has been around for more than 20 years, but it may now be reaching a new level of popularity as organizations look for additional alternative risk transfer options." Count on reading much more about this in coming months.

Monday, June 8, 2020

- With the reform to the **Paycheck Protection Program (PPP)** now signed into law, the head of SBA and Secretary Mnuchin will issue **new rules and even more guidance**, according to this statement released today on the enactment of the Paycheck Protection Program Flexibility Act.

  Here is an analysis with completely updated information on **PPP reforms** signed into law last Friday from The Council's legal team at **Steptoe & Johnson**.

- The Labor Department today released a **compendium of workplace guidance** to assist employees and employers with maintaining safe working conditions. The OSHA and CDC links on page 4 of this document provide very good recommended information on specific industry sectors – restaurants, nursing homes, grocery stores, and the like. **Majority Leader McConnell still has a "red line" demand for liability relief in the next recovery package, but until that happens, it is best for all to keep focus on the guidelines.**

  As San Antonio restaurateur Geronimo Lopez said on last night's edition of "60 Minutes": **"***What we decided to do was follow the higher standard. So, that's how I think we can clear all the misinformation. Just whatever is the higher standard for safety, that's the one that we're gonna follow.***"**

- Last week, *Forbes* ran a good piece on work-from-home, **noting the real phenomenon of Zoom fatigue.**

- This piece in today's *Insurance Journal* outlines a major behind-the-scenes effort by U.S. trade credit insurers, seeking financial backing for claims payments to support business supply chains hit by the pandemic. **Trade credit insurance**, which ultimately benefits SMEs, covers $600 billion (that is billion with a 'b') in transactions annually from the risk that insolvent buyers will not pay them. For more on the topic, see this piece from our friends at *Leader's Edge*.

- It is early, yet, to foresee whether the trade credit insurance community (which includes a number of brokerages) will be successful in adding a federal backstop for those deals to the next congressional round of relief. The dialogue to date is mostly with Treasury and the Federal Reserve. It is remarkable, though, that **four countries – Germany, Britain, France, and the Netherlands – have already extended their umbrella of protection for this market.** More to come.

- Tropical Storm Cristobal made landfall late Sunday afternoon in Southeastern Louisiana between the mouth of the Mississippi River and Grand Isle, and it has now downgraded to a Tropical Depression. The New Orleans rain apparently pumped out quickly as the storm shifted, giving the Mississippi, Alabama, and Florida coasts more rain and wind than expected. Coastal areas just outside New Orleans levee system like Venetian Isles, Delacroix, and Slidell are seeing flooding from storm surge. Cristobal is now heading to Arkansas where rain and wind will cause havoc, followed by Missouri, Iowa, and Wisconsin.

  A report from **The Council's, Patty Templeton Jones of Wright Flood**, reports that there aren't too many flood claims yet, but fortunately, the first named tropical storm of the year to hit the U.S. was fast moving and the storm surge is hitting areas that aren't too heavily populated.

Thursday, June 4, 2020

- **MEA CULPA:** This newsletter led you astray yesterday. Our report was that two Republican members of the Senate were thwarting Majority Leader McConnell's efforts to secure unanimous consent for a bill to reform the Paycheck Protection Plan. This was true at the moment the "send" button was hit, but moments later Senator McConnell "persuaded" his two colleagues to drop their objection (we would like to have overheard that conversation). The PPP reform measure then zipped through a normally ossified Senate. President Trump is expected to sign it into law shortly.

The new Paycheck Protection Program flexibility will:

- **Increase the loan forgiveness period from eight to 24 weeks**
- **Reduce the proceeds required for payroll from 75% to 60%**
- **Increase the loan repayment period from two to five years**
- **Extend the June 30 rehiring deadline**

- Participants in this afternoon's "Happy (Half) Hour" for CouncilPAC members got a chance to hear from one of the industry's Democratic champions on Capitol Hill, **Congressman Jim Himes of Connecticut**. A senior member of the House Financial Services Committee and Wall Street veteran, Himes has been instrumental on all kinds of insurance issues and is a thoughtful moderate. He was asked what he thinks the bottom line will be for the next round of stimulus/recovery, given the glaring contrast between McConnell's "wait and see" approach with a demand for liability relief and the House's latest $3 trillion Heroes Act. His answer was encouraging. He noted that Speaker Pelosi has no "red lines" on COVID-related liability relief in the form of some kind of safe harbors, as long as such a measure doesn't encourage "recklessness." The devil, of course, will certainly be in those details.

  On that principle, The Council today joined many other business associations around the country in signing **a U.S. Chamber letter to all members of Congress** asserting the need for liability provisions.

  A highlight paragraph: "We ask that you quickly enact temporary liability protections for: (1) businesses, non-profit organizations, and educational institutions that work to follow applicable public health guidelines against COVID-19 exposure claims; (2) healthcare workers and facilities providing critical COVID-19-related care and services; (3) manufacturers, donors, distributors, and users of vaccines, therapeutics, medical devices, as well as PPE and other supplies (such as hand sanitizer and cleaning supplies) that are critical to the COVID-19 response; and (4) public companies targeted by unfair and opportunistic COVID-19-related securities lawsuits. In addition to being temporary, we believe that these liability protections should be limited in scope and preserve recourse for those harmed by truly bad actors who engage in egregious misconduct."

  The conclusion: "The need for liability protections and relief is clear. Several governors and state legislatures have already implemented COVID-19-related liability protections for key sectors in their states, but a uniform national response is necessary. Now is the time for Congress to take strong action to stop a growing wave of lawsuits from getting in the way of what we all want and need: healthy citizens and a strong economy."

Wednesday, June 3, 2020

- **Majority Leader Mitch McConnell** unsuccessfully attempted to get unanimous consent for the Senate to take up the House-passed reforms to the Paycheck Protection Plan. Yesterday, two GOP holdouts put a hold on the legislation:

  Sens. Mike Lee of Utah and Ron Johnson of Wisconsin are holding up the bill designed to make the program more flexible because they want the program to expire in August instead of December, according to Senate Small Business Chairman Marco Rubio of Florida. By preventing quick passage via unanimous consent, Lee and Johnson would force McConnell to spend valuable floor time on the measure, something he traditionally is loath to do.

"Sen. Lee does believe that PPP was intended to be a short-term solution and that loan applications should be limited to August 15," according to a Lee spokesman. While Congress has provided $659 billion for loans, only about $149 billion remained as of May 30, according to the Small Business Administration. McConnell said Monday he wants to take up the bill that passed the House last week "soon." The measure would modify a handful of the program's provisions, which offer companies forgivable loans that act like grants as long as the money is used mostly to pay employees. Details here.

Monday, June 1, 2020

- As we were watching looting on TV real time only blocks from The Council's D.C. offices, our thoughts were of course about the human consequences, but we worried as well about the insurance consequences for all of the pillaged businesses. Notwithstanding a few billion dollars in pandemic-related rebates to consumers, the insurance industry has taken its hits in recent months (from mom-and-pop businesses all the way to POTUS) and already we are seeing stories about the coverage consequences of looting. Fortunately, most reports underscore that there typically is coverage for civil commotion, riots, and vandalism in most commercial policies – and it appears to be relatively straightforward.

  - Here is the information from Insurance Information Institute on Civil disorders and Insurance.

  - Here, too is a good quick analysis that is largely reassuring, but even it underscores some uncertainty: "On top of the business interruption claims for shutdowns due to the coronavirus, **claims for damages or closures due to the actions of civil authorities are likely to increase**. According to one report from a business owner on social media, his carrier has pre-emptively said there is no coverage for damages from violence after a protest in his area. These claims, like the business interruption claims, are sure to be complicated and lead to litigation." The piece also underscores how a majority of businesses are under-insured or have no BI coverage at all.

  The issue has gotten some ink, too, in Dallas and Los Angeles.

- Even before the 1968 riots, standard fire insurance policies excluded losses caused by "insurrection, invasion, bombardment, rebellion, revolution or by order of any civil authority," which led to an extensive availability/affordability crisis for inner cities. Congress responded by passage of the **"Urban Property Protection and Reinsurance Act of 1968."** The program was always pretty modest – with about 74,000 policyholders at its peak – and was allowed to expire in 1982. Under the program, coverage for burglary, robbery, theft, and similar crimes was available to residential and commercial property owners in states where crime insurance was "not available through the private market or statewide programs or where it is prohibitively expensive."

  Based on evolved industry practices, good underwriting, and good regulation, we doubt there will be any need whatsoever for another political debate on a federal crime insurance plan. **We are just hoping the worst is behind us.**

- Meanwhile, last Friday, this item ran in *Barron's*, entitled "What Catastrophe? It's Time to Buy Insurance Stocks." It's way too early to anticipate whether the riot losses will have material impact on insurer balance sheets amid a marketplace that was significantly hardening even before the pandemic. *The Insurer's* top-line analysis this afternoon: "Equity analysts have said that the ongoing U.S. riots currently don't look like having a significant impact on the insurance industry in isolation, but warned that the combination with COVID-19, H1 weather losses and an active hurricane season could compound to be a capital event for some carriers in 2020."

- **It's hurricane season**, and the climatologists are saying it's going to be a doozy. An area in the Atlantic is developing into what could be our next named storm. Right now, it is just a bunch of thunderstorms, but the **National Hurricane Center forecasts a high chance (80%) of development for this area in the next five days.** For an otherwise upbeat publication, *Vox* ran a pretty dark piece last week on preparing for a Katrina-level event during a pandemic.

Previous COVID-19 Legislative Updates – Business Continuity Documents:

MAY **APRIL** **MARCH**