COVID-19 LEGISLATIVE UPDATES – BUSINESS CONTINUITY

Taken from The Council daily briefing

Friday, May 1, 2020

- **The U.K. Financial Conduct Authority** is urgently seeking the courts' clarification on unclear cases over whether businesses can claim compensation for disruption caused by the pandemic. This appears to be a shift from their early pronouncements from the British regulators indicating that generally pandemic was not covered, had not been modelled nor therefore priced. As this report states: "FCA has written to insurers and expects them to clarify their position by no later than 15 May 2020 as to whether they believe their policy wordings for BI losses arising other than from property damage provide insurance cover. Other insurers may be added to the FCA action in due course. We can therefore expect to hear more from both the FCA and the Association of British Insurers in the coming days and weeks as to the progress of the Court proceedings…"

  So, what does this mean? We turned, as usual, to our London counterpart (and great sage) Chris Croft, CEO of the London and International Insurance Brokers' Association, for his take. Says he: "It has certainly upped the ante. The tone is more confrontational, and it seems to be basically saying 'you have had a couple of weeks to sort this out yourselves and you have not made enough progress. So, we are going to sort it out for you.' … **The test cases may well bring more clarity to UK SME BI** – although even here they will have to rely on being able to identify groups of similar wordings around which to set a precedent as there are multiple versions. And thus, how binding will the judgments be? The answer probably differs between legally binding and binding in the court of public opinion. But for international business, it's a pretty murky situation."

  But there are obvious distinctions – **policy words and practices are different from company to company and country to country.** And, certainly, this development brings home that -- for better or worse -- the U.K. has national insurance regulation and the U.S. does not. Fingers crossed that this development evolves to be a positive one.

- **Majority Leader McConnell and House GOP Leader McCarthy** dug in deeper today on their "red line" of resistance to any state funding without liability relief for businesses. With the House not coming back next week, and the Paycheck Protection Program (PPP) sure to run out of money again next week, it is hard to call this anything less than a cluster. (Meanwhile, the PPP continues to get negative scrutiny.)

Monday, May 4, 2020

- There is **significant news out of D.C.**, and we can announce **the long-awaited launch of the America's Recovery Fund Coalition**. As for D.C., who would have ever thought that the D.C. City Council would top the creation of that liquidity fund?

- **Tomorrow,** the D.C. Council will vote on the Coronavirus Omnibus Emergency Act of 2020. Spearheaded by Council Chairman, Phil Mendelson, the bill would, among other things, require insurers to retroactively cover COVID-related business interruption claims liability or any business with existing BI coverage that has under 250 employees (up from 100 employees earlier today).

  Congress does have oversight authority over the activities of the D.C. government. Rep. Ralph Norman (R-SC) of the Oversight and Government Reform Committee and other Republicans are sending this letter to the D.C. City Council and Mayor tonight, and **Louisiana Sen. John Kennedy**, Chairman of the Senate Appropriations Subcommittee on Financial Services and General Government, has raised questions about the constitutionality of such a move. Having said that, while it may be gratifying that the D.C. Council's expected action is drawing the ire of some in Congress, **we are not holding our breath that the Democratic House – which overwhelmingly supports D.C. statehood and eschews overruling D.C. policymakers – will intervene.** If Mayor Muriel Bowser signs the measure (she has given no indications of her position as of this writing), this likely will be a matter for the courts.

- **Now, on to the Recovery Fund.** We've been writing you about this for weeks, and while the effort was conceived by and is uniformly supported by the property/casualty industry, it is policyholder-led (as it should be), and represents the broadest effort yet to support liquidity for American business. **We will be calling on you this week to contact your Members of Congress in strong support of this effort.**

  After six weeks of intense negotiations, the **America's Recovery Fund Coalition officially launched today**, and includes a broad swath of American businesses that are hoping for at least one more significant liquidity/recovery federal infusion. Today's *Wall Street Journal* has a very good piece that gives context for the Recovery Fund amid other efforts. Here is a summary of the Recovery Fund and some FAQs. Perhaps most importantly, here is the letter that we and **more than 100 organizations sent yesterday** to the President as well as congressional leaders.

  What is next? As noted, later this week we will be asking you and your colleagues (and, to the extent you are comfortable, your clients) to **contact House and Senate members in support of this new federal facility aimed at liquidity.** The Council has been a part of this effort since its inception—and we are on the organizing committee for the effort, which has hired an exceptional grassroots/lobbying firm to organize the efforts of the wide-ranging coalition.

  Aside from gathering congressional champions on both sides of the aisle and in both chambers, **we are obviously in a bit of a hold period for a couple of weeks as both the Democrats and Republicans have retreated to their corners awaiting the next round.** Demands are flying from every direction. The President has insisted on payroll tax deferments (supported mostly by conservative economists, opposed by Democrats, and with apparently tepid support among congressional Republicans). Democrats support much more money to be printed for pretty much everything, with a priority on state and local governments. Leader McConnell isn't for even talking about another cent going out the door in the absence of liability reform.

  The **business community is flailing for relief** both specific and broad. It is early yet, but our view that if the Recovery Fund facility is going to gather steam as the best liquidity opportunity left for American commerce, it will be as a consequence of the inadequacies of the CARES Act, and in particular the **ongoing chaos of winners and losers in the Paycheck Protection Program (PPP) and the Main Street lending platform.**

- Meanwhile, everything we have been saying about an upcoming liability (and workers compensation) crisis is now finally getting national attention, as **30 states gear up for reopening** notwithstanding the fact that **Dr. Fauci's curve has not been flattened**. This is a good above-the-fold story in today's *Washington Post*.

- Here is our *Daily* Dose aimed at the trial bar, with thanks to our old friend Tiger Joyce, who has ably led the **American Tort Reform Association** for decades. Last week, a lawsuit filed in federal court alleged a food manufacturing plant created a **"public nuisance"** in continuing its operations during the pandemic. As the release notes, attorneys are increasingly pitching their potential lawsuits to state and local government officials and others on a contingency fee basis—employing a centuries-old legal theory known as "public nuisance" in order to sue companies for allegedly causing various environmental and social harms.

  This alarming new trend reveals a little-known legal tool is being utilized as the basis to pin the blame on businesses for societal ills, including COVID. The trend is driven by attorneys who claim to represent the broader public interest, but their cases often fail to prove who actually is at fault or possibly caused the harm in question.

Tuesday, May 5, 2020

- You know from our coverage yesterday of the launch of the America's Recovery Fund Coalition that **we've been champing at the bit to launch deep grassroots to get the message to Congress** to use this as the basis of the next round of fiscal stimulus/recovery/business continuity/liquidity. Hold on just another couple of days. We view it as essential that the policyholder community take the lead on this legislation, and not be perceived as an insurance industry-led effort (which it is only to the degree that we need our clients to survive). Thanks for your patience, but **thanks mostly in advance for responding when we do hit the switch.**

- **We so want to put this retro-Business Interruption matter to rest politically** and just let it work its way on out in court, which cannot be avoided. Here is a fresh letter from seven House Democrats (led by the chairman of the Financial Services Committee's Insurance Subcommittee, **Rep. Lacy Clay of Missouri**) that basically says, let's move along now. **We thank them all for signing.**

Wednesday, May 6, 2020

- As this morning's *Axios* newsletter noted, **the hundreds of billions of dollars for the Paycheck Protection Program were meant to stop the economic bleeding**, "to buy time while the wound cauterizes." **Secretary Mnuchin, meanwhile,** told "Face the Nation" on March 29 that "the entire package provides economic relief overall for about 10 weeks." His window expires June 5. The feds have created a "back to normal" deadline for businesses, even though the decisions are made by states. But no one expects to see a CARES 2 package in the next month, nor a full-scale reopening of the economy. The *Axios* conclusion: **"The small business loans and individual checks were designed as bridges to reopening. But if they only delayed layoffs and economic pain by a couple of months, then they'll be remembered as bridges to nowhere."**

- It is our hope that we can politically put the nail in the coffin of the forced Business Interruption retro issue on Capitol Hill, we are comforted by this letter today to President Trump authored by the chairman and ranking Republican of the Insurance Subcommittee of the House Financial Services Committee, respectively, **Lacy Clay of Missouri,** and **Steve Stivers of Ohio**. Says the letter: "We worry that even if insurers are forced by lawmakers to pay for excluded policies, litigation would ultimately prevent or greatly slow any payments to America's small businesses that need help *today*, defeating the goal of providing speedy relief to companies struggling to make it through these difficult times." Clay, we would note, is an urban Democrat whose record on paper is liberal – but he is thoughtful and moderate. Stivers, we would note, is a suburban Republican whose record on paper is conservative – but he is thoughtful and moderate. **We thank them both. And need more Members of Congress like them.**

Thursday, May 7, 2020

- **For decades, we've enjoyed the ignominious take-downs of the trial bar** in the editorial pages of *The Wall Street Journal*, so our lead item today isn't surprising, and would have been more effective in moving public sentiment if it came from *The New York Times*. Still, we would say **it is deliciously satisfying if it were not for how dire the looming liability crisis is**.

  Says the *Journal*: "Congress has passed nearly $3 trillion in virus spending for hospitals, struggling businesses and state and local governments. **The money should be used to save jobs and businesses**, not be siphoned into trial-lawyer bank accounts. The government lockdowns put the economy into a deep recession. Now **government has a duty to help businesses reopen without fear of crippling litigation**."

Friday, May 8, 2020

- Now **with more than 40 states within weeks of "re-opening,"** with a massive scramble on for businesses to figure out how this is going to work, the same liability crisis seems to be playing out across the business community writ large. **Republicans have drawn a bright red line in the sand** – no further massive spending bills without liability reform. Will this, or *can* this be different, based on the historic political allegiances (simplistically – Democrats supportive of worker rights and thus the trial bar, Republicans supportive of business owners)? Here and here are the latest good snapshots of big-picture palace intrigue on the Hill.

  The posturing today is not that reassuring on the liability front. Sure, Leader McConnell has come under greater pressure to relent to the Democratic top demands for state and local aid relief, and he has been showing a bit of leg in his willingness to consider it in return for liability reforms. And we have seen some Democrats (even Majority Leader Hoyer, who has a long history of getting under the skin of Speaker Pelosi) have suggested that there is a need at least for greater protections for frontline, essential businesses.

We could fill this copy with all kinds of evidence that a solution cannot be found. But we can squint hard enough, and we are just optimistic enough, to imagine perhaps a grand compromise – tons of spending, yes, but rather than traditional tort reform, a set of guiding principles that constitute safe harbors for American businesses. Comply with OSHA and CDC guidelines, and all other state and local requirements and you will be less exposed to legal action. **Something like that.**

- Speaking of the Chamber, here is a working outline of a Chamber notion for how Congress might move ahead on liquidity relief post-June. In retrospect, it was aspirational but naïve that the Administration viewed relief as a 10-week slog of curve-bending, followed by rapid recovery. **In the absence of such a miracle, what next, then?** While there is nothing yet formal about this Chamber proposal (but it has been flying around D.C. today), it is worthy of a serious look. How does it fit into the Recovery Fund that we and other policyholders have been advocating for CARES 2? It would not be hard to reconcile them, in our view, but that is a subject for next week.

- **Still more on BI** … Here is a relatively cheap shot today from *USA Today* trying to drive a wedge between the venerated U.S. Chamber of Commerce and its own business members based on BI exclusions.

  We are greatly intrigued by developments abroad wherein insurers are voluntarily paying portions of BI claims… we ran this item earlier this week, and we're not sure what implications to make of it in the U.S. given our ravenous legal system, but it is interesting. So, too, is this press release from Allianz, announcing its settlement with the hospitality industry in Bavaria.

  We have been examining the bleed of COVID-related insurance issues from BI. While not directly related to the pandemic, here is a good piece about the tremendous pressures on the D&O marketplace. Like the trucking executives we mentioned at the outset of this screed, **directors and officers all the world over have reason to be alarmed.**

Monday, May 11, 2020

- This afternoon, The Council's Government Affairs team hosted an hour-long webinar on the current pandemic legislative and regulatory state of affairs, half of which was an interview with **Congresswoman Donna Shalala of Florida**. We always enjoy her observations, particularly since she is a 79-year-old freshman whose entire career (e.g., longest serving HHS Secretary ever, and president of two major public universities) has been filled with candor. (We asked her today why she ran for the House after such a distinguished public life, and she matter-of-factly said it is because she was pissed off. We get that.) **It is gratifying to have someone so smart on health issues, and so committed to Employer Sponsored Insurance.** But it is frustrating (if unsurprising) that she, like other House Democrats, does not envision broad liability relief in whatever next relief/stimulus package that emerges. She even notes that **the subject of liability relief does not even come up in Democratic Caucus conversations.**

- President Donald Trump may have lit into the commercial insurance industry a couple weeks ago (Business owners, he said, "have been paying a lot of money for a lot of years for the privilege of having [business interruption insurance] and then when they finally need it, the insurance company says we're not going to give it.") but his Treasury Department has signaled that it will oppose any legislation that would rewrite any insurance contracts for BI coverage.

> "While insurers should pay valid claims, we share your concerns that these proposals fundamentally conflict with the contractual nature of insurance obligations and could introduce stability risks to the industry," **Treasury Principal Deputy Assistant Secretary Frederick Vaughan** wrote last Friday in response to a series of (bipartisan) congressional letters expressing alarm about forced retro BI coverage.

- **Meanwhile, more trade groups are pushing for liability protections in the next relief bill.** See this letter to lawmakers today **from airlines, amusement parks, casinos, hotels, movie theaters, and other industries.** "We fear that without Congressional action, the threat of litigation will mire our recovery and negatively impact the economy writ large by injecting great uncertainty and risk into the ability of our businesses to operate during the pandemic," the trade groups wrote. **The Senate Judiciary Committee will hold a hearing on the matter on Tuesday.**

- We got some new insight regarding **California Governor Newsom's** Executive Order on workers compensation with its "rebuttable presumption" that all workers who go back to their jobs who contract COVID got it at work. One of our close colleagues at Lockton: "Upside? At least in the near term – only essential employees can go to work in California. So, while the order technically applies to all employees, it only applies to essential workers in practice." (That sounds right, even if Elon Musk reopened his Tesla plant in the Bay Area today in defiance of a health order.)

Tuesday, May 12, 2020

- **Pandemic anxiety keeping you up at night?** Perhaps we can help with some light nighttime reading – here are 1,815 pages of legislative text of the "Heroes Act" totaling $3 trillion **(with a 't'!)** for the next round of COVID relief proposed today by Speaker Nancy Pelosi and other top Democrats in the House.

  - Here is the 90-page summary, and if that is too much for you, here is a solid *Bloomberg* analysis.

  Top lines for commercial insurance brokerage? Fully funded private employer insurance premiums for laid-off or furloughed workers between March and next January. Codification of free insurer coverage for COVID patients with no out-of-pocket expenses.

  Employers, though, will not like the bill's **expansion of COBRA benefits** for workers through next January—an administrative nightmare for the employers with a retroactive open enrollment window. **Kate Jensen, our benefits expert at Steptoe & Johnson**, notes that even if employers are made whole financially with tax credits, "they could be overwhelmed trying to administer this thing on very short notice." **Hard to keep up with former employees if they do not want to be kept up with.**

The centerpiece of the Heroes Act, of course, is $875 billion in state and local government aid, plus more direct aid for individuals, and a couple hundred billion in tax credits for employee retention. Much of the rest is a Democratic wish-list, including elimination of the 2017 tax bill's cap on state and local tax deductions. Meanwhile, **Senate Republicans are in the same place they have been for two weeks – not interested, and only willing to consider aid for states under the condition of liability relief for frontline and reopening businesses.** And that, it seems, is a nonstarter with Democrats. So as Washington breathlessly combs through and analyzes the 1,800+ pages, we are really at no different political position than we have been for a couple of weeks.

Council member executives span the political landscape, but what we hear mostly about all this is that clients continue to desperately need liquidity relief, and **they are all deeply worried about reopening without clear and consistent guidelines and liability limitations.** That is a pan-political and nonpartisan view somewhere between Pelosi and McConnell. As the two of them circle each other in the ring, we will continue to unpack the implications of the House action in the coming days. **We expect it will be passed in the House on a party-line vote as early as Friday.**

Wednesday, May 13, 2020

- **WE NEED YOU.** We have written a great deal in recent weeks about our work with a huge policyholder coalition to craft a federal facility for business continuity/liquidity, especially given the conspicuous flaws of the CARES Act. The project – **America's Recovery Fund Coalition** – is designed to help millions of businesses across the country to continue paying debt obligations and employees' salary and benefits as they endure the pandemic. **We join companies that collectively represent 58 million American workers (45% of the American workforce) from numerous sections of the economy in asking for your support for this program**. Because it has been important for this to be a policyholder-led grassroots effort, we held back from asking for your intervention with your senators and representatives after the formal launch last week. **We are now pulling the trigger.**

  Through a grant-based federal assistance program, America's Recovery Fund would provide funding to help America's businesses – of all sizes – to retain and rehire staff, pay rent, adapt to new requirements, meet certain debt obligations, and pay state and local taxes. The fund would include strict federal oversight and anti-abuse mechanisms, and be a vital lifeline to businesses, communities, workers, and state and local governments that rely on their success to support local economies.

  * A **description of the COVID-19 BUSINESS AND EMPLOYEE CONTINUITY AND RECOVERY FUND** and what we are seeking to achieve.
  * A **draft letter** for you to send to your member of the House of Representatives & U.S. Senate.
  * A **draft letter**, if you choose, to send to any of your interested clients to the same effect.
  * **Here** is where you can access the best staffer to email the letter to your Member of Congress
  * **Here** is where you can access the best staffer to email the letter to your Senators
  * And **here** is where you can determine who is your Member of Congress

- Given the fact that House Democratic leaders yesterday introduced a $3 trillion relief package, and given the fact that Senate Republican leaders are reluctant to embrace any massive new stimulus programs (especially if unaccompanied by liability relief for businesses) – **what are the prospects of a separate new federal facility?** It is hard to say, but the policyholder coalition is strong, and it is going to be weeks before the next major package from Congress emerges. In that time period, the Paycheck Protection Program (PPP) is likely again to run out of money, and even more of the winners/losers construct of the CARES Act will emerge. What we know is that **our clients continue to need liquidity relief.**

That said, the House package does include several provisions that we strongly support:

Health Policy: Subsidies for Continued Employer Coverage

- Responding to the calls of the Council and the Alliance to Fight for Health Care (organized by the Council), H.R. 6800 would provide a 100% subsidy of health plan premiums for terminated workers enrolled in COBRA, as well as furloughed workers remaining on employer plans, from March 2020 through January 2021.

Health Policy: Increased Flexibility for Cafeteria plans, Health FSAs and Dependent Care FSAs

- H.R. 6800 includes a number of provisions to provide flexibility for cafeteria plans, health flexible spending arrangements (FSAs), and dependent care FSAs, as the Council has urged in light of the COVID-19 pandemic, including:
- Permitting cafeteria plans and health flexible spending arrangements to allow participants to carry over up to $2,750 in unused benefits or contributions from 2020 to 2021.
- Permitting cafeteria plans and dependent care flexible spending arrangements to allow participants to carry over up to the annual maximum amount of unused dependent care assistance benefits or contributions from 2020 to 2021.
- Permitting cafeteria plans to allow participants to carry over unused paid time off from 2020 to 2021.
- Permitting cafeteria plans and health flexible spending arrangements to allow participants to make one-time increases or decreases in the contribution amount to a health FSA or to the amount of paid time off.
- Permitting cafeteria plans, health flexible spending arrangements, and dependent care flexible spending arrangements to provide an extension of the grace period during which unused funds from the 2020 plan year can be used from a maximum of two and a half months after the end of the 2020 plan year to 12 months after the end of the 2020 plan year.

Health Policy: New Group Health Plan Requirements

- H.R. 6800 includes a number of new requirements for group health plans, including:
- Coverage for items and services related to the treatment of COVID-19 without cost-sharing requirements during the COVID-19 public health emergency.
- Notification about prescription drug refills during an emergency period. Specifically, group health plans must notify each participant and beneficiary whether the plan will waive any time restrictions on authorized refills.
- Enhanced notification to qualified beneficiaries about the availability of coverage in the Affordable Care Act marketplace.

- Retroactive coverage for testing of COVID-19 before enactment of the Families First Coronavirus Response Act (FFCRA).

Health Policy: Prohibition on Balance Billing

- Although H.R. 6800 Act does not include comprehensive surprise billing legislation, it does include a provision conditioning the receipt of health care provider relief funds on the provider not balance billing patients.

Paid Leave

- H.R. 6800 would expand the emergency paid sick leave and paid family and medical leave requirements in the FFCRA to employers with 500 or more employees. The current problem employers are facing would be exacerbated if there were now a federal requirement as well as additional and/or conflicting state and local mandates.
- **The administration of the COBRA subsidies will be complicated**, as noted by our legal team, but we strongly believe that the threats facing ESI from high unemployment rates requires federal intervention to see the ESI system through this crisis. Speaker Pelosi always made it clear that the initial package would be a partisan measure, a necessary move to get the support of her own caucus. But she also made it clear that there are no redlines in this bill, and you can see which provisions could garner the necessary bipartisan support to make it to the President's desk. We are cognizant of the dwindling support for the PPP that this bill underscores, and of efforts to look for alternative channels to get funds onto the books of the businesses that need them the most. We think our proposed Recovery fund does that.

- Republicans universally rejected this $3 trillion stimulus measure, but the draft plan has the seeds for eventual, smaller compromise. With Speaker Pelosi pushing the House toward a Friday vote on the Democratic package, a Senate Republican aide said that Majority Leader **McConnell does not plan to move on any GOP alternative until June at the earliest.** Continuing economic misery and a still rising death toll, though, would put pressure on both sides to reach one last deal before campaigns for the November elections are fully engaged. The framework for a compromise - probably still weeks away - likely will be built on state and local government aid, expanded tax breaks and legal protections for businesses, and assistance for unemployed workers.

  There are several pressure points looming that will increase the stakes, including expiring pandemic unemployment insurance at the end of June, the end of the special period for spending PPP money at the end of July and the September 30 ending of grant funding for airlines, as well as the fiscal year. Republicans are counting on the lifting of lockdowns in many states along with the previous stimulus money still flowing out to juice the economy enough that another big spending package will not be necessary. That aligns them with President Trump, who has said he's in "no rush" for another stimulus package as his aides attack the Democratic plan.

Thursday, May 14, 2020

- The most-discussed issue in the working group was the **Ongoing saga of the Paycheck Protection Program.** FAQ that launched Tuesday night from the SBA, changed the rules yet again, and now yet another change has been made. Instead of TODAY being the last day for otherwise solvent and creditworthy businesses to return dollars to the Treasury, **the deadline has been stretched to next Monday, May 18.**

  We have heard lots of frustration, particularly the three-card-Monte of SBA criteria. First, they establish straightforward rules, then two weeks later they change the rules and threaten jail for anyone who got dollars but could have found credit elsewhere. *Then* in the final days, they say, well, we did not really mean it, if you got less than $2 million, we are not going to audit you. As one of our West Coast executives wrote to us this morning, **"This is salt in the wounds for the thousands of businesses that returned their money. What a joke."**

- Contributors to **CouncilPAC**, our association's federal political action fund, got to participate this afternoon on a Zoom call with **Congressman Tom Emmer of Minnesota**, who is the chairman of the National Republican Campaign Committee. *(It puts him in the GOP House leadership, and he is the one whose job it is to reclaim House control. After the CA special election on Tuesday, he needs to flip 17 seats to achieve that goal.)* We asked Emmer about the massive divide between the $3 trillion relief bill the House will pass tomorrow (most likely), and the GOP Senate's unwillingness to consider any bigger spending in the absence of liability reform. **His thoughts were consistent with what we hear from virtually all GOP Members of Congress.** "We've put $3 trillion in spending out there, and we have no idea about what we need to do because most of those dollars haven't even yet gone out the door."

  > **We continue to envision a compromise that America's Recovery Fund Coalition and a measure of "safe harbors" for employers to reopen their doors without the fear of lawsuits.**

- We do note, though, **major news items today** that probably will expand the willingness of Republican lawmakers to consider even deeper stimuli. **To wit: Minneapolis Fed President Neel Kashkari** said lawmakers will have to do more to support Americans financially in the coming months.

  > "*They are going to need more. If this is a slow recovery, the way I think it is - I think we're in this for months, a year, 18 months - there are going to be a lot of families that are going to need direct financial assistance," he said today during a virtual event with CBS. "I think a V–shaped recovery is off the table.*"

  His call for congressional action follows those from **Fed Chair Jerome Powell**, who warned yesterday that downside risks facing the U.S. economy may necessitate more aid.

- This story today in *The Wall Street Journal*, correctly notes the controversy within the industry over a **prospective insurance program for pandemic risk**, currently promoted by Marsh and criticized by carrier organizations in the piece. We note that everything in this story is accurate, but we also are more upbeat about the long-term prospect of the industry and policyholders coming to some sort of a resolution on prospective (post-COVID) pandemics. **The Council's Board has asked us to lean in on solutions that would deploy existing mechanisms for insurance coverage as a part of an eventual framework of BI resolution going forward.** The Marsh proposal, which we expect to see introduced in Congress within a few days, may not be the be-all, end-all, but it is an appreciated step in a forward-looking resolution.

Friday, May 15, 2020

- House approves $3 trillion coronavirus relief package – and among Democrats, arguing whether it should be $4 trillion. As *Politico* puts it: "In some ways, Pelosi is taking a huge gamble — pushing through a massive messaging bill that will be ignored by the GOP-controlled Senate, while opening up the most vulnerable Democrats to nasty attacks from Republicans over some of the bill's most controversial provisions."

  There is a bunch of good stuff in the House bill, especially measures that protect **employer-sponsored group health insurance (ESI)** and provide massive **COBRA subsidies**. We likewise believe that state and local aid is essential. And we agree with Senate Republicans on the "red line" of **necessary liability protections for businesses** so they can reopen (not a bit of it is in the House bill). And we still want Congress to embrace the alternative framework of America's Recovery Fund. Alas, it appears we will be writing about all this for weeks.

- We do find comfort being in an industry (as consultant Bobby Reagan noted in a recent email) where our work remains largely uninterrupted as we can effectively serve clients from remote locations. "People and businesses cannot stop buying insurance. We are not selling optional luxury goods," Reagan wrote. "The majority of agent/broker income will continue despite the downturn in payroll and receipts." And this story from today's *Wall Street Journal* reminds us of much goodness within the industry.

- We could probably start a regular feature in this newsletter about the actions of **California Insurance Commissioner Ricardo Lara** to inflict reputational damage and make life difficult for the insurance industry. No sooner had we hit send on last night's dispatch than we received this item from one of our California executives, **a bulletin from Lara's office, offering "protection" from unfair claims settlements from insurers**. "The Department has been informed that some insurers and other persons engaged in the business of insurance in this state are unfairly taking advantage of the COVID-19 crisis and providing unjustifiably low settlement offers knowing financial need is high and recourse to the civil court system in the state is currently severely limited," says the missive. "The Department has also been informed that certain insurers and other persons engaged in the business of insurance in this state are lowering or failing to make settlement offers with full knowledge that, because of the reduced California court schedules, policyholders are unable to obtain prompt redress in the California court system. This lack of access to the California court system puts policyholders who are already in severe financial hardship at a disadvantage and vulnerable to unjust settlement practices." **Are we just drinking the Kool-Aid or does that bulletin just not ring true?**

  Lara made California the first state (New Jersey followed this week) to demand insurer rebates on a wide variety of coverages, when most insurers were doing so without the boot of government fiat. And Lara is projecting that workers comp carriers not be allowed to figure COVID claims into experience rating—notwithstanding the fact that every workers comp claim in the state now presumes employees became ill at work. It's hard to believe that less than a year ago, Lara was accused of being too "cozy" with the industry. We will say one thing for him – that rap sure does not seem to fit right now.

THIS JUST IN. This afternoon the commissioner issued yet another bulletin demanding even further rebates – covering private passenger auto, commercial auto, workers comp, commercial multi-peril, commercial liability, med mal, and "any other insurance line where the risk of loss has fallen substantially as a result of the pandemic." **We wonder what next week will bring from the Golden State.**

Monday, May 18, 2020

- Pretty much every day of the work week, your Council lobbyists are convening and participating in video calls with industry colleagues and members of Congress on both sides of the aisle. Today your loyal correspondent only took part in one, with an **up-and-coming Rust Belt Republican** – whose comments confirmed that getting to a "CARES 2.0" package agreement between the Democrat-led House and Republican-led Senate is going to be **exceptionally difficult**. There has been widespread acknowledgment that states, and municipalities need help—**even Majority Leader McConnell has shown willingness to entertain bailouts if accompanied by liability relief**. The congressman today amplified the GOP talking points, though, that mega-billion-dollar payouts to states and local governments "would only incentivize their lockdowns" and delay economic activity, and "reward chronic mismanagement" by states. He claimed that to date in this crisis, Congress has expended 9 percent of last year's GDP, whereas "the Marshall Plan was only 2 percent." This particular Member of Congress sits on the Judiciary Committee, but he is not holding his breath on broad, preemptive liability reforms. But **we were encouraged that he seemed to agree with our view** that with regard to this pandemic alone, **some series of safe harbors** with regard to businesses complying with government mandates **could be a resolution that could encourage safe reopening's**.

Tuesday, May 19, 2020

- Trial lawyers and the whole retroactive Business Interruption matter keeps making the news, and that news will keep coming. Here is a piece from this afternoon's *Washington Post* on the subject. You will not learn anything new from it, but it is an accurate reflection of the reputational hit the insurance industry is taking.

- The news out of New York in recent days has been good for carriers. A publishing firm on Sunday filed an appeal to a federal court ruling in favor of The Hartford on the issue of whether the presence of coronavirus constitutes actual physical damage. District Judge Valerie Caproni of the Southern District said that the policyholder's attorney earned a "gold star for creativity" but the publishing company was not covered.

- Coming up on Thursday on Capitol Hill, more on the subject from the House Small Business Committee's Subcommittee on Innovation and the Workforce. (We have spent decades on the Hill and were not aware of this subcommittee.) It is not a hearing, but rather a virtual "forum" entitled "Business Interruption Coverage – Are Policyholders Being Left Behind?" The only insurance participant (the sole witness allowed for the Republican minority) will be Sean Kevelighan, CEO of the Insurance Information Institute. Among the other witnesses is Thomas Keller of the French Laundry (and Business Interruption Group - BIG).

We tend to agree with one of our industry colleagues who commented this afternoon that he'd "expect a significant amount of discussion on policies that have virus exclusions versus inclusions, the word pandemic versus virus in policies, and the stipulation that a virus is not property damage/physical damage." He noted, too, that he would "discount any comments from staff that this forum is a routine exercise, check-the-box, etc. …Someone is driving the train on this and they're doing it exceedingly well."

- The BIG group run by the trial lawyers has their own proposal that's a twist on retroactive BI coverage with federal indemnity and they've created a bunch of hoopla that it's going to get tons of bipartisan congressional support. If somebody could wave a magic wand and just have the feds pay all property claims – no harm, no foul, no lawsuits – that would be great, but it is not going to happen. As we noted last night, however, their proposal *is* a convenient distraction for the BIG lawyers to demonstrate devotion to their clients, knowing this is the long game.

Wednesday, May 20, 2020

- A subcommittee of the **House Small Business Committee** is going to have a virtual "forum" (not technically a hearing) on May 21st regarding BI. The **witnesses will include** three presumably aggrieved small business owners. One of them is very affirmatively aggrieved – **the French Laundry's Thomas Keller**, though we never really thought of his 13 acclaimed restaurants as a small business, but we digress. **Sean Kevelighan of III drew the short straw to defend carriers**. Today, as if the bias was not already complete, **the committee added Keller's lawyer, John Houghtaling, to the panel.**

  Here is the "briefing" paper from the committee's Democratic staff, which offers this explanation of the hearing:

  > "*As the small business economy continues to struggle, Congress must continue to seek solutions that help entrepreneurs keep workers employed and maximize their chance of long-term survival. Many small businesses attempted to do so by purchasing business interruption insurance products. However, too many policyholders currently believe like (sic) they are being unfairly penalized by not having losses covered, despite taking the prudent step of purchasing business interruption insurance in the first place. This forum will give Members of the Committee the ability to hear from policyholders and interested stakeholders about this important issue impacting small businesses.*"

- The **NAIC** sent a strong letter to the subcommittee.

Boom on this:

> *"As state officials we are perhaps closer to small businesses than other financial regulators and see the impact this virus is having on our communities first-hand. We understand the financial stress that small businesses are under throughout this country and if they have valid claims for their insurers, we will make sure those claims are paid.* ***But where there is no coverage, policymakers should not look to solve one type of financial crisis for small businesses by creating another for their insurers."***

- We got this letter, that was authored by **Oklahoma AG Mike Hunter**, from seven (Republican) **state attorneys general opposing any legislative or regulatory intervention on BI:**

  > *"In our view, the federal government should not take any action that expands insurance company liability beyond the plain terms of those policies because such redrafting of insurance contracts would cause more harm than good. …We believe that a legal system must honor the contractual aspect of any insurance policy to protect the availability of insurance at affordable prices for everyone."*

- Noting the current coronavirus pandemic represents "an unprecedented situation," the **U.S. Chamber of Commerce** along with 51 of its member organizations sent lawmakers a letter today **pressing for Congress to approve "temporary and targeted liability relief legislation."** The letter underscores the fact many U.S. businesses have continued in operation to combat the virus and continue to provide critical services and supplies. "This is an unprecedented situation and despite employers' best efforts to comply with public health guidance, many are concerned that they will be forced to defend themselves against a wave of lawsuits," the Chamber wrote. "Their concern is driven by the fact that each day brings news of more lawsuits that have already been filed. **That is why Congress should provide a safe harbor** that holds truly bad actors accountable, but that protects those employers who are working to follow public health guidance."

  In an interview with *Politico*, **Neil Bradley**, the Chamber's chief policy officer, said the group was continuing to try to win over Democrats, who have been much more skeptical of such provisions than Republicans. "We continue to have conversations with Democrats," he said. "Initially, there was a lot of confusion about what was being asked for. We're trying to dispel that confusion." **He's told lawmakers the Chamber is asking for protections for businesses that have taken precautions but not for immunity from coronavirus-related lawsuits.** "We actually don't believe immunity is appropriate," he said.

- There was an excellent op-ed today in the *Wall Street Journal* on the liability relief issue, authored by Michael Luttig and David Rivkin. Highlight: "OSHA and other federal agencies have the expertise to evaluate scientific, practical and cost-effective standards governing operations of a wide range of businesses. What they need is new statutory authority to issue safe-harbor guidelines for businesses that pre-empt tort liability under state law. Companies and trade associations would work with OSHA and propose industry- or business-specific guidelines to the agency, such as for meat-packing plants or package-sorting facilities. OSHA would promptly review each proposal, make necessary modifications, and then issue it as an immediately effective regulation with the legal force to override lawsuit liability. Businesses that comply with these regulations can rest assured that they've met their legal obligations."

- Meanwhile, **Speaker Pelosi is reportedly** seeking to transform **the small business Paycheck Protection Program when the House returns for a brief session next week**. Pelosi wants to loosen the restrictions on how employers can use the loans, easing the requirement that 75% must be used for payroll and allowing for more time to use the loans for payroll expenses. Under the expanded regulations businesses would still be eligible to have the loans forgiven if they meet specified criteria. House Leadership hopes to vote on the measure next week.

  Complaints about the government loan program have become **too big of a political problem to be ignored**, according to lawmakers and aides, with members of both parties in the House pushing for changes in recent days. "In this case we were hearing the exact same thing from all of the small businesses in our districts," Rep. Dean Phillips (D-MN) said about working with conservative GOP Rep. Chip Roy (R-TX) to draft the bill. "We were perfectly aligned and we both recognized that to move legislation under these circumstances there has to be bipartisan genesis."

Thursday, May 21, 2020

- **Treasury Secretary Mnuchin** today said there is a "strong likelihood" that another coronavirus relief bill will be needed as more states start to reopen and the economy struggles to stabilize. "We're going to carefully review the next few weeks," Mnuchin said during a virtual event sponsored by *The Hill*. "I think there is a strong likelihood we will need another bill, but we just have $3 trillion we're pumping into the economy. We're going to step back for a few weeks and think very clearly how we need to spend more money and if we need to do that," he said. **Mnuchin's comments are somewhat at odds with White House economic adviser Kevin Hassett**, who said earlier this week that he thinks another coronavirus bill might not be necessary. **On Capitol Hill, Republicans and Democrats are divided over how to tackle additional legislation**.

  Given continued pressure from state and local government officials seeking immediate federal assistance, **top Senate Democrats believe a compromise deal on a fifth coronavirus relief package can be achieved by the end of June**. However, several serious disagreements will have to be overcome if that is to happen. McConnell, for example, has **told House Republicans the $600-per-week boost to unemployment** insurance added in a previous relief bill **cannot be extended in a future package**. Republicans originally balked at including the added UI money, contending that workers would be able to make more money on UI than back at work. They suggest it is, therefore, a disincentive for people to return to work. Democrats, however, strongly favor the added money as a means of helping the millions of workers who have lost their jobs. They included the extension in the House-passed HEROES Act. **Secretary Mnuchin weighed in today saying "we do need to fix the quirk" that results in some workers making more money on UI than their wages from work.**

- Another area of serious disagreement continues to be **liability protections** for workers and businesses opening up. Republican Leader McConnell and Senator Cornyn are working on a plan with input from the

U.S. Chamber. **McConnell has indicated this is a "red line" issue for the GOP**. However, Democrats are turning a cold shoulder to any such plan that will essentially grant employers a legal pass if they make a "good faith" effort to protect workers. (Our thanks to our friend **Bob Stevenson at the OB-C Group** for helping us distill all this.)

- In the meantime, the issue of a **massive new infrastructure stimulus package** has reemerged, revealing fault lines among Republicans as noted here. This morning, we were on a Zoom call with **Rep. Bob Latta of Ohio** and our friends at the Surety and Fidelity Association of America were understandably swooning over the prospect.

  Sen. Lindsey Graham, a close Trump ally and chairman of the Senate Judiciary Committee, said he's **pushing Trump to get behind a plan to pump more money into infrastructure projects** — even though that idea has gotten an icy reception from McConnell so far. "'I want to do infrastructure,' Graham … said to CNN. 'I told Trump, this is the time. We got it teed up. This is the time to go big. … It really is a once-in-a-lifetime opportunity to give a facelift to the country.'"

  Graham is not alone. Other powerful members of the Senate GOP Conference, including two committee chairmen — **Sens. Roy Blunt of Missouri and Roger Wicker of Mississippi** — want to move on an infrastructure package to pump money into roads, bridges, and transportation projects. "'I think June doesn't need to come and go without a phase four,' said Wicker, chairman of the Senate Commerce, Science and Transportation Committee, referring to a fourth major rescue package after nearly $3 trillion has been approved by Congress this spring alone."

Tuesday, May 26, 2020

- Prospective pandemic reform legislation modeled after TRIA was introduced in the House today, marking something of an opening salvo in what will be a protracted and potentially divisive debate… It looks as though the PPP will be revised in a bipartisan reform… The issue of extended COBRA subsidies is heating up (though should we headline that one "No One Knows What's Going to Happen"?). Nursing homes are looking for liability relief.

  Rep. Carolyn Maloney (D-NY) today introduced **the Pandemic Risk Insurance Act** as a prospective approach for how BI claims can be covered when another (non-COVID-19) pandemic hits. The legislation, modeled after TRIA, would provide up to $750 billion in taxpayer funds to pay insurance claims for business loss revenue during pandemics. Insurers would first have to pay out a total in $250 million in losses, according to the bill, based on a "deductible" of 5% of annual premiums.

- At the same time, **carrier trade groups have proposed putting the Federal Emergency Management Agency (FEMA) in charge of a fully taxpayer-backed program to protect businesses from future pandemic revenue losses.** The fault line appears to be over the "insurability" to any degree possible of pandemics, as well as the bandwidth of the industry to process claims. There has been a tremendous amount of activity and discussion on prospective pandemic BI coverage, and there is a good likelihood that the House Democratic leadership will approve a proposal such as that proposed by Congresswoman Maloney and include it in future relief measures. We would note again, though, that it took Congress 14 months after 9/11 to pass TRIA, and that was *with* industry consensus, which does not exist today.

- We also would note again that **The Council's Board of Directors has leaned in** on having existing insurance mechanisms deployed in any prospective pandemic BI solution on behalf of our clients. We thus thank the congresswoman for her efforts to move the issue forward, and as this stage of the game we support her bill and any other efforts that would create an ultimate solution for policyholders. And **we fear that too many under-educated legislators are going to see "pandemic BI reform" and think it is for the next wave of COVID, *not* the next pandemic**. As Mike Ryan, the World Health Organization's executive director today said, "right now, we're not in the second wave. We're right in the middle of the first wave globally." **Expect to see much more on the topic.** In a virtual news conference late this afternoon, even Congresswoman Maloney said her legislation is a work in progress. "Let's sit down at a table and try to work it out," she said.

- The House is *sort of* in session this week, as voting by proxy kicks in, and the Senate is on recess. However, **both chambers appear to be coming to consensus on the Paycheck Protection Program (PPP)** that will offer more flexibility to companies affected by the coronavirus after widespread concerns by some businesses about strict mandates.

  The changes to the PPP, designed to help struggling businesses stay alive and keep paying their workers during the pandemic, is gathering bipartisan support in both chambers as lawmakers on both sides of the aisle have voiced support for fixes. **It is likely to be one of the first measures the House will vote on by proxy in the next couple of days**, though exact timing on the vote has not been released yet.

  The House bill, authored by **Reps. Dean Phillips (D-MN) and Chip Roy (R-TX)** would extend the amount of time businesses have to rehire employees beyond the June 30 deadline (to December 31) while also extending the loan forgiveness period as some business are unable to reopen as quickly as others, and extend application deadlines as well. Assuming the measure passes, the House will still need to negotiate with the Senate, which last week neared a deal of its own on a version of a loan flexibility bill before senators headed home. The bipartisan group of senior senators on the Small Business Committee, including Marco Rubio (R-FL), Ben Cardin (D-MD), Susan Collins (R-ME) and Jeanne Shaheen (D-NH), would give businesses 16 weeks instead of eight weeks to spend the money while still qualifying for forgiveness; the House bill would provide businesses 24 weeks. **It is not clear if the Senate will vote on a separate bill or be willing to take up the differences from the House bill.**

- On Friday, the SBA released rules on how the loans can be forgiven Interim Final Rule on Loan Forgiveness as well as updated FAQs.

Wednesday, May 27, 2020

- A reminder of the weirdness of Capitol Hill right now… **most of the Democrats are voting by proxy, all of the Republicans have come back to town.** The Republicans have sued on the grounds that proxy voting is unconstitutional, and some are advising Trump to veto anything that comes to his desk as a result.

- In the big picture, looking toward another round of business relief, **the Paycheck Protection Program (PPP) "fix" to allow businesses more flexibility for repayment has gotten a little trickier**, with labor leaders protesting against provisions that would significantly liberalize payroll forbearance. Leader McConnell said yesterday that "in the next month or so we'll be talking about possibly another (comprehensive) bill." **Our team has organized a small industry virtual meeting tomorrow afternoon with Leader McConnell**, so we hope to be able to divine more about the contours of the next round of relief.

- Meanwhile, looks like **Whoopi's going to be fired up tonight**, and we'd be lying if we didn't say we are impressed with how the trial lawyers are pulling off this event in Times Square. **All of NYC's iconic electronic billboards are going to go dark for one minute to dramatize the plight of businesses**, followed by a series of business owners and celebrities in a brief video expected to criticize the insurance industry for failing to pay Business Interruption claims. No one is unexpected, and we of course have zero complaints with any business owner who feels aggrieved, is suffering, and wants to speak on behalf of their industry colleagues. But curiously Whoopi Goldberg got in the mix, so we will be interested in sharing the video with you tomorrow.

  The event has been organized by the **Business Interruption Group (BIG)**, which was founded by New Orleans class action lawyer John Houghtaling. Somehow he connected the dots with the billboard companies, the Times Square Alliance of Businesses and the New York City Hospitality Alliance.

  The chorus, of course, will be that insurers should pay BI claims irrespective of exclusions, and the federal government should reimburse insurers. We always try to hedge our bets here, but we'll go out on a limb and say that there is exactly a **zero percent chance** of Congress appropriating billions to insurers to pay claims that are in contest and have not been adjudicated. In other words, this stuff is going to go on for years, and that is obviously **good for the lawyers and not good for the clients.**

- Let us end the discussion for the moment with solidarity with the lawyers insofar as the labor-intensive hospitality industry has struggled with the PPP and is arguably the industry most threatened with extinction. We have high hopes that the bipartisan efforts on both sides of the Capitol to loosen repayment rules (including forbearance of ALL insurance premiums for participating businesses) will provide a significant benefit to these policyholders.

Thursday, May 28, 2020

- This afternoon, **The Council convened a 45-minute virtual event with Majority Leader McConnell** and about 20 of our industry colleagues. We did not learn an awful lot that we did not already know, but we certainly got the sensation of how emphatic the Leader is.

Everyone knows that the House has passed a $3 trillion grab bag and that Senate Republicans have said there will be no further massive packages in the absence of liability relief. **McConnell today emphasized that the liability relief must be targeted to the current pandemic** ("we're not going to re-write every state's tort laws"). One of our colleagues commended him for liability reform being near and dear to his heart. "It's not that it's near and dear to my heart," he responded. "We are *not* going to do a bill in the Senate without liability protections for businesses." He noted his desire for the liability protection to be retroactive to December 2019, and prospective "probably" through 2024.

He seems perfectly willing to take the heat for a big bill not passing, as he underscored the unprecedented $3 trillion pumped into the economy and his aversion for printing more money. He did, though, **evidence support for continuing the PPP with reforms.** And in a statement at odds with President Trump, he was emphatic that "it would be a mistake" for the next stimulus bill to be a vehicle for a large infrastructure spending program, in part because "it doesn't pay out quickly enough" to benefit the economy.

- Meanwhile, **the House voted Thursday** to give small businesses financially strapped by the COVID-19 crisis more flexibility to spend forgivable loans for payrolls and expenses from the government's popular PPP.

  The 417-1 vote sends the measure to the Senate, and **McConnell told us they will take a serious look at it next week**. The bill's sponsors say urgent action is needed because the eight-week period when proceeds must be spent for loans to be forgiven will begin expiring Friday for the first loan recipients after the Small Business Administration program opened April 3. The House measure would give companies much more time to spend the money -- within 24 weeks or until the end of the year, whichever comes first -- and still qualify to have their PPP loans forgiven. Businesses would also have up to five years, instead of two years, to repay any money owed on a loan and could use a greater percentage of proceeds on rent and other approved non-payroll expenses.

  "The true emergency period has evolved over time and this bill addresses that," said Steve Chabot, the top Republican on the Small Business Committee. "The flexibility that this allows America's small businesses is going to go a long way to address the concerns we have heard time and time again."

Previous COVID-19 Legislative Updates – Business Continuity Documents

APRIL **MARCH**