



Insight

Assessing Financial Support for Businesses During the Pandemic – The State of Play

THOMAS KINGSLEY | SEPTEMBER 28, 2020

Executive Summary

- Six months after the national emergency declaration, the Federal Reserve has been extraordinarily slow to offer relief via its emergency lending programs; the Main Street Lending Program has provided only \$2 billion of the \$600 billion in funding it is capable of backing.
- Despite most insurance policies explicitly excluding viral risks, insurers face enormous pressure to pay business-interruption claims; a possible solution in the future is to create a federal reinsurance program with a backstop, allowing insurers to write pandemic-related policies.
- One area of growing concern to businesses is the anticipated growth of employment lawsuits relating to the coronavirus, as, without assistance of some kind, many companies could face costly legal bills at a time when business is already scarce.

Introduction

As of mid-July, Yelp reports that over half of 132,500 business closures due to the coronavirus pandemic are now permanent. Even as many of the healthiest businesses reopen, concerns about the future business climate under the ongoing threat of coronavirus remain. Against this backdrop, financial relief in some form may be warranted.

This analysis provides a brief overview of some key issues facing businesses during the recession and the threats posed by the coronavirus pandemic: the Federal Reserve's (Fed) emergency lending facilities; pandemic business interruption insurance and the potential for a federal pandemic program; and protecting businesses from the costs of an entirely new class of coronavirus-related litigation that businesses were not and could not be prepared for.

The Fed's Emergency Lending Facilities

The Fed deserves enormous credit for the speed with which it deployed *some* of its monetary policy authorities in response to the coronavirus. The Fed's decisive response began on March 15, over a week before the administration declared a [national emergency](#), by [slashing the federal funds rate to zero](#) and announcing an ambitious quantitative easing effort of at least . In [its most recent statement](#), on September 16, the Fed committed to keep interest rates at or near zero for as long as necessary. The Fed took also this occasion to reiterate, as it has done several times since the onset of the crisis, a commitment to continuing to increase its holdings of Treasury securities. While the Fed has not been explicit as to the exact levels of assets obtained or purchase goals for the future, the easiest way to see the state of the Fed's quantitative easing is to inspect its [balance sheet](#). Just as with any other firm, securities that the Fed purchases are considered assets and thus are

represented on the Fed's balance sheet. This therefore is the most reflective guide of the state of quantitative easing and, by extension, the degree to which the Fed has deemed it necessary to intervene in the economy. As of **September 16**, the Fed's balance sheet stands at **\$7.1 trillion**, up from \$4 trillion at the beginning of 2020.

The third, and less well received, aspect of the Fed's response to the coronavirus has been the launch (and in some cases re-launch) of emergency lending facilities. The third, or "Phase Three," legislative response to the coronavirus, the [Coronavirus Aid, Relief, and Economic Security \(CARES\) Act](#), made \$454 billion available to the Secretary of the Treasury to make loans and other investments in the support of emergency lending programs established by the Fed. Between March and April, the Fed announced what would become [nine emergency lending facilities](#), five of which would be backed explicitly by funds appropriated by the CARES Act. Of these, particular media focus has been placed on the Main Street Lending Program, designed to purchase \$600 billion in debt from businesses impacted by the pandemic. The Main Street Lending Program was comparatively slow to get off the ground; announced on April 9, the program was not operational until June 15 with significant uncertainty as to program details or loan term sheets. Despite repeated expansions to the scope of all nine emergency lending programs and increasingly generous terms, program take-up appears to have been concerningly low. Of the \$600 billion in funding the Main Street Lending Program can support, as of [September 22 only \\$2 billion](#) has been funded or committed. This stands in stark contrast to the Paycheck Protection Program (PPP) administered out of the Small Business Administration (SBA). Provided what was eventually \$659 billion by the CARES Act, the SBA had disbursed to small businesses over [\\$500 billion by the beginning of May](#). Further, the Treasury still possesses roughly \$260 billion in uncommitted funds authorized by the CARES Act not even backing a Fed lending program.

Business Interruption Insurance

Both the coronavirus and national quarantine efforts to contain it have resulted in businesses [shuttering](#) across the United States. Many of these firms hold business interruption insurance coverage, and despite the fact that this insurance typically does not cover losses due to pandemics, some are suing to force [their insurers](#) to pay their claims. [Policymakers](#) are engaging in this fight, too: The [president of the United States](#) at least initially called for insurers to pay out to businesses in distress, and some legislators have gone even further, with multiple states [proposing legislation](#) that would retroactively expand coverage and require insurers to pay business interruption coverage claims, a development that undercuts the entirety of U.S. contract law.

For insurance carriers to be forced to pay insurance claims not covered by contract is not a new phenomenon and was first seen after the 2002-2003 SARS outbreak (the same outbreak that lead most insurance providers to explicitly include viral exclusion clauses in their policies). Now, as then, the primary battleground for insurers are courts [across the world](#); in the United States a [growing number of courts](#) appear to be finding in favor of insurers by noting the necessity of physical damage as a trigger to business interruption insurance.

Looking forward, there is some interest in creating a federal pandemic risk program, a Pandemic Risk Insurance Act (PRIA) to mirror similar government programs designed to mitigate the risks posed by flood and terrorism. Rep. Carolyn Maloney, a senior member of the House Financial Services Committee, is the [lead sponsor on PRIA legislation](#) that would create a federal reinsurance program with a backstop to ensure that insurers have the capacity to provide business interruption policies that include viral risks. The Act has [not yet been voted](#) out of the House of Representatives. While a federal program may backstop privately insured pandemic risk, such a program would of course be inordinately expensive and suffer from the same weaknesses of the national flood and terrorism insurance programs. Other proposals exist, including the [Business Continuity Protection Program \(BCPP\)](#) introduced by a variety of national trade associations. What this and other public-private partnerships share with the proposed PRIA is at that government must assume at least *some* risk, if not all, and that

participation can be voluntary.

Protecting Businesses from a New Class of Coronavirus Litigation

The coronavirus has upended usual working and business practices, and it is difficult to find a sphere in which businesses have not had to make some adjustments. The same is also true for litigation claims and employment lawsuits, which have [increased in number](#) and involve [entirely new classes](#) of coronavirus-related lawsuits (the law firm Hunton Andrews Kurth has a live tracker of these suits [here](#)). Coronavirus lawsuits span the spectrum from wrongful death, to workplace safety, to unfair dismissal and privacy violations in what CNN called a potential “[tidal wave](#)” of lawsuits. While lawsuits in and of themselves are not necessarily a problem – and remain for many employees their most effective or only means of holding their employers to account – many businesses will find themselves, already in straightened circumstances, unable to cope with rising litigation costs irrespective of whether “fault” lies with the employer or more broadly with the pandemic.

The issue has received significant attention in Congress and in particular from Senate Republicans, with Senate Majority Leader Mitch McConnell on several instances insisting that the inclusion of language shielding businesses as [necessary for any future pandemic aid package](#). Sen. McConnell released his own proposal, the [SAFE TO WORK Act](#), that would prevent the filing of suits against employers for potentially exposing employees or customers to the coronavirus for five years. While the proposed legislation has proved controversial, critics question whether it is even impactful, noting that very few coronavirus lawsuits concern exposure and instead focus on retaliation or discrimination.

Conclusions

The wave of lockdowns, restrictions on movement, and overall reticence to engage in normal commerce have choked off the income of businesses around the United States. Without further government aid, the temporary closure of hundreds of thousands of small businesses could be permanent by the time the national emergency is lifted. The government’s role must be to provide the financial relief required to keep businesses afloat and not choose winners or losers by vilifying certain industries, from insurers to [landlords](#). Consideration must also be given not just to businesses struggling now but also in the future by providing a federal reinsurance program backing private pandemic risk offerings and by ensuring that businesses have a way of coping with an “[epidemic](#)” of potential lawsuits.