



Insurance broker E&O exposures: COVID-19

March 2020

As insurers brace themselves for large volumes of notifications across all lines of business relating to Coronavirus disease 2019 (COVID-19) we expect to see a second wave of E&O notifications by insurance brokers when policyholders (businesses and individuals) find themselves without adequate cover for losses relating to the pandemic. Some insurers are already seeing a spike in such notifications.

Future claims against insurance brokers seem likely to fall within two broad categories (1) broker negligence at the point of policy placement; and (2) those concerning a broker's ongoing duties to their client after policy inception including missed opportunities to recommend mid-term adjustments to policy programmes in the earlier stages of the disease's spread - before it became an acknowledged global health and financial crisis. As well as claims against brokers, we anticipate aggregation issues arising between brokers and their insurers.

The risks here for insurance brokers and their insurers are clear. On the 19th March 2020 the FCA stated when publishing its expectations of insurers in relation to COVID-19 that "In these uncertain times, brokers have a key role to play to help consumers understand the market, the impact of Coronavirus, and search the market for products that meet their demands and needs. We encourage brokers to keep abreast of market developments so they can suitably advise their customers."

In this publication the FCA was thinking forward. For many brokers though their E&O exposure will track back to professional services provided over the last 12-18 months when current policy programmes were being negotiated.

Placing the risk

As our recent briefing notes on the subject explain in more [detail](#) insurers now considering claims arising from COVID-19 will face issues many of which came to light following the SARS (severe acute respiratory syndrome) pandemic in 2003. SARS was contained locally to mainland China, Hong Kong and a limited number of other Asian countries. COVID-19 is having a much wider global impact and so those issues whilst familiar will be on a wider (geographical and by reference to business line) and more significant (volume and quantum) scale.

The SARS pandemic led to insurers changing their policy wordings by limiting the scope of cover for communicable diseases. However, this is not to say that insurance capable of responding to communicable disease outbreaks has been unavailable since SARS. Policy wordings differ markedly from insurer to insurer. Many standard wordings have sought to reduce the scope of cover by way of narrowing definitions, and the use of specific exclusions. However brokers have still had the opportunity to advise their clients about the availability of communicable disease cover by way of policy extensions and endorsements that include categories of disease

which (depending on how the disease is defined) could include COVID-19 – this can be by analogy with previous communicable diseases like SARS or via a trigger point like a government's decision to treat the disease as a 'notifiable' disease – as happened in the UK on 5 March 2020.

Critical therefore to the question of an insurance broker's liability for past placement of insurance policies will be (1) what enquiries brokers made about a policyholder's business and its exposure to disease outbreaks; (2) what policyholders were told about the availability of additional cover added on to standard wordings; (3) whether clients would have paid a higher premium for this wider cover; (4) whether those alternative policy wordings would necessarily have responded to the losses individuals/businesses are incurring – plainly there are many who would never have foreseen themselves susceptible to the consequences of a global pandemic whatever advice brokers might have provided about the issue.

A broker's continuing duties

We know that in certain circumstances that the scope/duration of a broker's duty of care to clients can extend beyond policy inception. The examples are limited and fact specific. However in a commercial setting where a broker's advice obligations are likely to be most onerous those brokers might, depending on timescales involved, be exposed to criticism from clients that as the COVID-19 crisis developed opportunities were missed at same insurer renewal or mid policy term to negotiate changes to policy T&Cs or purchase additional bespoke communicable disease cover.

These observations naturally lead us to consider some of the 'key dates' in what we expect will become a timeline of events, relating to the COVID-19 crisis, that will attract future scrutiny for a number of reasons. The dates we have selected below should not be considered a comprehensive list. However, for insurance brokers and their insurers they illustrate the pace of events and the relatively short period between initial awareness of the disease and its categorisation (1) by the UK government as a 'notifiable' disease under the Health Protection (Notification) Regulations 2010; and (2) by the World Health Organisation ("WHO") as a pandemic. Whilst that period of potential awareness might only be circa 3 months, we can see that certain types of insured may claim brokers had opportunities but failed to advise them of the developing risk earlier - which in turn might have allowed them to take pre-emptive steps to reduce their exposure if amended/additional insurance was obtainable.

Chronology of a pandemic

31 December 2019	WHO China Office was informed of a pneumonia of unknown cause detected in the city of Wuhan in Hubei province China.
10 January 2020	WHO issues its first guidance on the novel Coronavirus.
13 January 2020	First case of novel Coronavirus outside of China confirmed.
22 January 2020	Public Health England announces it is moving the risk level to British public from "very low" to "low".
29 January 2020	The UK's first two patients test positive for Covid-19.
30 January 2020	WHO Director-General declares the 2019-nCoV outbreak a Public Health Emergency of International Concern.
24 February 2020	WHO-led team of experts travel to Italy.
5 March 2020	UK Government adds COVID-19 to the list of notifiable diseases under the Health Protection (Notification) Regulations 2010.
11 March 2020	WHO characterizes COVID-19 as a pandemic.
19 March 2020	FCA publishes its expectations of insurers in relation to COVID-19.

Once the immediate health and financial crisis caused by COVID-19 stabilises in the coming months, as it surely must, brokers and their insurers may wish to reflect, in particular, on those policy renewals during Q1 2020 and whether there is scope for legitimate criticism that underlying insureds were not advised about the future risk of this pandemic occurring and how their financial exposure to it might have been capable of mitigation.

Aggregation issues for insurers

Aggregation is often and complex and difficult claim issue for insurers and insureds to determine when multiple related claims are presented. It is commonly said with frustration that the area is highly fact specific and dependent on the wording used in the subject insurance policy. COVID-19 will undoubtedly trigger disputes between insurers and insured brokers facing multiple similar claims whether or not they are linked together by a unifying factor in order to aggregate.

The 'related claims' clauses in broker E&O policies vary. Many though will refer to multiple claims aggregating if those claims "arise out of" (and other connecting language) unifying factors that include trigger words "same cause" or same "act" or "related acts". COVID-19 of itself would seem unlikely to constitute a unifying factor for claims made by different clients where the advice and policy placement has been done by different individuals at larger broking houses. The analysis may be different though if there is evidence that brokers deployed blanket policies/practices not to advise certain individuals or business types about the availability of communicable disease related policy extensions/products. This might be enough to establish that the "cause" of all those claims was the same practice by the broker. If the policy wording uses very wide "directly or indirectly caused by" language (our emphasis) it may even be possible to aggregate based on the disease itself.

Conclusion and Claims considerations

Publication of this briefing takes place less than 72 hours after the UK government introduced the most significant measures to preserve public health since WWII. The financial impact of COVID-19 on insurance brokers is presently a secondary concern. However, as insurers start to predict and make provision for claims exposures, not directly resulting from the immediate crisis, they may wish to consider their exposure to a secondary wave of claims against their insured insurance brokers. Brokers themselves should review their suite of commercial policies and advice given to assess whether circumstances exist meriting a notification.

These are very early days. We highlight the likely basis of claims above and the obvious issue of aggregation. We anticipate attempts will be made to block notify circumstances if only on a precautionary basis. The reasons given will need careful analysis. In terms of the claims themselves, how will they be formulated? For businesses that survive the crisis "loss" due to inadequate business interruption cover and event cancellation will require careful quantification but insurers in these markets have experience of adjusting such claims. Calculating "loss" in claims against brokers will give rise to more causation arguments. Insureds already in financial difficulties when the pandemic struck will claim that their predicament is due to lack of cover. However, many recent collapses arguably were businesses facing insolvency in any event. What will be claimed and how will loss be adjusted accordingly? This is a great unknown until the impact of the Government's unprecedented financial aid package has worked its way through the system – vital now but a novel issue for quantum experts to grapple with in the future. Claims against brokers will come from the insured entities and individuals and, for businesses that collapse, liquidators. The litigation dynamics will differ accordingly. How many claims against brokers are made and when will be determined by events over the coming months but if recoveries via litigation against brokers is necessary for a business's survival, we might see them sooner than we would otherwise predict. In the interim for brokers to protect themselves right now claims handling systems (especially claim/circumstance notification protocols) in a world of remote working need to be maintained to risk manage ongoing errors and omissions.

This briefing note has highlighted what the former US Secretary of Defence, Donald Rumsfeld famously/infamously described as "known knowns" and "known unknowns". The extraordinary events of the last few weeks suggest that

the insurance industry will face what are currently the "unknown unknowns". Brokers will have a key role to play in advising their clients but may also see themselves in the firing line.

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