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Brokers FAQ regarding COVID-19

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1. Introduction

As the COVID-19 pandemic takes hold, brokers are coming under increasing pressure. They are facing an ever-rising tide of queries, notifications and claims from policyholders regarding coverage of their losses arising from the current crisis. Despite pressure to respond quickly (and positively) to coverage questions, brokers cannot provide simple, standardised answers – the coverage issues at play may be complex and even seemingly minor changes in wording between policies can render the scope of their COVID-19 coverage incomparable.

Brokers are also being forced to make practical changes to their businesses now that they are working from home. One example is the electronic placement of policies. Whilst this approach is favoured by many who cite benefits such as increased record keeping, it has its disadvantages such as it is unclear when the policy is considered formed.

There are also claims handling challenges. The large volume of claims being received means it is more important than ever for brokers to have robust systems and controls in place.

If there is any issue you would like to discuss then please do not hesitate to contact your usual CMS contact.



2. Coverage issues

Will there be coverage for COVID-19 losses?

- Although Life and Accident & Health policies are likely to respond, most non-life policies now exclude communicable disease or epidemics/pandemics, partly because of the SARS outbreak of 2003. The Health Protection (Notification) Regulations 2010 were amended on 5 March 2020 to include COVID-19; as a result, 'notifiable disease' exclusions were triggered across a range of policies.
- Most business interruption policies will not respond to COVID-19, as traditionally cover is contingent upon and triggered by property damage. Business has been interrupted due to a government order mandating closure of the premises, rather than any physical damage to the property. Some policies may have specific extensions which may provide cover, such as Denial of Access, or Notifiable/Infectious Disease extensions, but in many cases such clauses only provide cover for a list of specified diseases – at the time of placement, this would not have included COVID-19 – or they have low sub-limits.
- However, certain lines of business – including contingency policies written for event cancellation risks - may not have excluded such matters and insureds may be able to recover significant sums, depending on the specific facts of the cancellation and the policy conditions. Furthermore, policies covering trade credit risk may also respond to the seismic impact of disrupted supply chains and cash flow across many industries.

Will insurers provide cover anyway?

- Brokers should also be aware that insurers are coming under pressure in certain jurisdictions (particularly the U.S.) to retrospectively cover COVID-19 risks, despite them being specifically excluded under the initial policy. Some policyholders may benefit from these pressures on insurers which may result in cover or ex gratia settlements.
- However, the UK government and Lloyd's of London have indicated that equivalent legislation will not be introduced in the UK. Furthermore, insurers will face their own solvency challenges as a result of this crisis and therefore 'ex gratia' settlements are unlikely to be a common feature of the market.

How will losses be covered in practice?

- Many notifications are being made on a broad and pre-emptive basis and are often 'optimistic' in their interpretation of policy wording. Brokers must be cognisant of their duty to explain the cover that is available and how it is triggered under the policy.
- Although Accident & Health and Life policies may have been triggered by the disease itself, cover under policies in other lines of business may only be triggered by events or occurrences such as the UK government's order on 23 March 2020 mandating the closure of retail and other premises, or perhaps the establishment of the insured's legal liability by a court. An employer's liability policy, for example, may only be triggered if and when a court finds that a duty was breached in failing to provide PPE to staff. Although COVID-19 may be the underlying cause of the policyholder's loss, there may need to be a separate event or occurrence triggering cover which may or may not have occurred.

How should brokers handle COVID-19 questions?

- Many insureds are facing cash flow issues and will seek fast and effective assistance from their brokers. Insureds may pressure brokers to advise on the merits of their coverage position, but it is crucial that brokers do not overstep their role.
- The broker will need to explain the implications of coverage triggers to the policyholder and provide support in the bringing of a notification or claim based on this process. Brokers must focus on ensuring that the insured has met the notification conditions under their policy, assist in the making of notifications or bringing of any claims, and explain to the insured that it is for the underwriters to provide a conclusive response on coverage.
- Effective communication between the insured and broker is key, and this is a prime opportunity for brokers to demonstrate their commitment to their customers' needs and any additional expertise. Brokers must relay and clarify information in a manner appropriate to each insured's experience.
- There may be challenging conversations in which brokers must explain to insureds why they may not have the cover they expected. In many cases, brokers will need to inform their clients (particularly in the SME sector) that they will need to rely on government support, rather than their insurance, for their business interruption losses.

How will this affect upcoming renewals?

- Brokers should be mindful (and should make sure that their policyholders are aware) that the renewal process may take longer than usual and should therefore set ample time aside. Requesting short extensions of cover may give both the insured and the insurer breathing space to prepare and consider the proposal. In addition, insurers may be using new technology in placing risks electronically (see below) and may require more greater detail in responses to their questions.
- It is vital that policyholders are reminded that their duty to disclose material information— which may include full details of the damage caused to their business by COVID-19 - is an ongoing one and there are serious consequences of failing to do so.
- Insurers' forecasts have been disrupted by the crisis and underwriters are likely to be facing escalating demands and restrictions internally, which in turn may limit the coverage offered. New policies are highly likely to specifically exclude losses arising from COVID-19 and any future strains of COVID-19. Furthermore, COVID-19 will now be treated as a 'known event' and will therefore not be covered. Brokers must also be aware of their duty to ensure that policyholders are aware of this and of any new onerous or unusual terms, or significant changes in their policy wording, which may have an impact on the scope of cover.
- In equal measure, brokers should consider whether any extensions are necessary in the light of any emerging risks. There may be increased appetite for 'premium' policies offering pandemic cover, particularly in light of analysis suggesting that pandemic outbreaks may become a regular occurrence.



3. Electronic placement

What has been the impact of COVID-19 on electronic placement?

- Post lockdown, electronic placement has become a lifeline for many brokers and underwriters working from home. Since the Lloyd's underwriting room closed on 19 March 2020, the number of users of electronic placing systems has risen significantly, and many more people are learning how to use them.
- Before the lockdown, many brokers were using electronic placement systems as filing systems after a transaction had taken place, as opposed to placing the business on the system at the time of transacting. With fewer filing systems at their disposal, it may be that this trend becomes even more prevalent as a result of COVID-19.
- It is difficult to know whether the increase in electronic placement will continue post lockdown. For many, there is no substitute for face-to-face interaction that is perceived to be fundamental in the insurance market. We suspect the answer will depend on the length of the lockdown and the extent to which these platforms become an integrated tool for businesses. It will be some time before their impact is known on the level of claims and types of risks adopted by insurers.

How will an increase in electronic placements affect brokers?

- A rise in electronic placements will hopefully result in an increase in accurate document production, clear audit trails and ease of reporting, which will hopefully mean fewer claims against brokers by insureds and fewer regulatory issues.
- Some brokers and underwriters have found that electronic placement is less suitable for complex transactions, which are easier to handle face-to-face. Brokers need to ensure that these complex risks are fully understood, and all necessary paperwork is obtained. Brokers may also find electronic placement of these risks is more time consuming so additional time should be allowed for these placements.
- It may be harder for brokers to maintain their relationships with insurers, and therefore harder to draw on the goodwill and bargaining power earned over the years. Brokers should consider how best to maintain these relationships virtually, in order that the best outcome can be obtained for their insureds.
- When a policy is placed electronically, it is less clear when the contract, i.e. the policy, is concluded between the parties. This could lead to a rise in disputes between brokers, insureds and insurers on the point:
 - With paper placements, the issue is more clear-cut; the policy is concluded when the underwriter accepts the prospective insured's offer by writing his line on the slip. The writing of the line and initialling of the slip by the underwriter is sufficient to create a binding contract; it is not necessary for the insurer's stamp to be put down on the slip.
 - Whereas, when the policy is concluded by email or electronic placement, more questions are raised. Whilst the courts have held that the contract is complete when acceptance is received by the party making the offer, it is unclear when the email is considered 'received'. The law on instantaneous electronic communication is limited and it is unclear whether the email is considered received when it reaches the recipient's Internet Service Provider, or whether it has to be received at the email address of the intended recipient.
 - The conclusion of the court seems to be that no universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie. The law is therefore much more open to interpretation, which parties will seek to use to their advantage.

4. Claims handling – What will the impact be?

- COVID-19 has already led to a significant increase in claim notifications across many classes of business, in particular travel, business interruption and event cancellation. In addition, a significant volume of claims is expected under liability policies, including D&O.
- Handling a large volume of claims will put increasing pressure on brokers when carrying out their duties as agent of an insured, given that they themselves will likely be facing logistical and risk management challenges as a result of working remotely.
- Brokers must maintain robust systems and controls, especially in respect of notification of claims and the claims handling process and ensure adequate supervision of less experienced members of the team in order to mitigate against the risk of E&O claims. In particular:
 - **Notification of claims** – brokers should be mindful of policy time limits for notification and should ensure that the date a claim is notified, as well as all steps taken to pursue it on behalf of a client is clearly recorded, including any reasons for delay. Failure to notify claims correctly may entitle insurers to deny cover in relation to a claim and this could lead to the insured seeking redress against the broker.
 - **Duty to assist in claims submissions** - brokers should consider carefully what details or particulars need to be provided to insurers in support of a claim, mindful of the fact that it may take longer than usual for insureds to provide information and insurers may take longer to respond and seek information. Brokers should keep their client updated and should endeavour to pass on information without delay.
 - **Duty to retain documents** – brokers should remain cognisant of their duty to retain documents for as long as they reasonably consider a claim on the policy remains a possibility, particularly whilst working remotely, and should ensure they continue to maintain accurate records i.e. by taking detailed attendance notes where calls are not recorded.
- In light of the disruption, there may be delays to insurers paying properly made claims, which may cause hardship to an insured, particularly given the economic impact of the pandemic. Brokers should be alive to the potential application of s.13A of the Insurance Act 2015, which implies a term requiring payment of sums in reasonable time into all contracts of insurance after 4 May 2017 in order to advise insureds on their entitlement to make a claim.

5. Practicalities

What are the challenges with obtaining instructions from insureds?

- As insureds and brokers are faced with the day-to-day difficulties of working from home, be it through managing childcare commitments or dealing with IT issues stemming from remote working capabilities, each may have less time available to provide or receive instructions on cover, which could lead to delays in risks being placed. Such delays increase the risk that brokers will fail to place sufficient cover in time (as insureds and brokers may not have enough time to discuss the details of risks fully) for policy renewals or initial placement, which subsequently exposes brokers to potential claims later down the line (see below). Brokers should therefore ensure that detailed notes are taken of all conversations with insureds which reflect the urgency of any instructions and the reasonable steps taken to elicit information
- Irrespective of the fact that it might be more difficult to obtain instructions, brokers should use some of the time they do have to remind insureds of the importance of disclosing as far as possible the likely implications of COVID-19 on their businesses, so that suitable cover may be obtained. This may lead to even further delays, as those implications on insureds' businesses might be far from certain at this stage, with insureds wanting to take some time to carry out risk assessments and before confirming the extent of cover they require.
- Such delays may be exacerbated where there are: (i) complicated broking structures with numerous brokers in the chain; and (ii) international brokers and insureds who may be facing even greater restrictions on their working practices.

Will brokers need to advise insurers about continuing to comply with policy terms?

- Insureds will also need to be aware of policy provisions that may now be impossible to comply with, for example an obligation in a property policy that an insured should not leave premises unoccupied for more than a certain number of days (with any employees currently in lockdown). After carrying out a detailed risk assessment, brokers should remind insureds of any relevant policy provisions that require compliance (even with circumstances as they are), so that they are not left exposed and unable to comply, which could lead to problems if they were to ever make claims.
- Where an insured is going to struggle to comply with certain policy provisions, clarification should be sought from insurers (in general terms) as soon as possible in terms of the approach they are taking, if and when claims are made.

What about reviewing business continuity plans?

- Brokers will need to review their business continuity plans and update these as appropriate in order to take into account novel risk factors of having their staff, clients and insurers working from home. For example, there may be an increased risk of scams or inability through IT issues to finalise the placement of risks. Further, the pandemic has led to an increased number of claims being made particularly in relation to travel, property/business interruption and contingency policies, which (in terms of sheer volume) may prove harder to manage whilst working from home.
- Compliance personnel working for brokers may wish to ensure that staff are aware of these increased risks and that any staff impacted should let the business know where they are struggling to carry out their work to required standards. Compliance personnel may also wish to offer refresher training on new and existing risks to staff in order to remind them of the challenges facing the business.



What are the pressures facing client relationships?

- Generally speaking, where there is a lack of communication between brokers and insureds i.e. relationships that typically involve regular interaction (be it face-to-face or otherwise) may not be as strong as they once were. Brokers may have to take extra steps to ensure client care is maintained, such as arranging regular conference calls or check-ins with clients were appropriate.
- Greater patience may be required (and insurers' expectations may have to be managed accordingly) where clients, particularly those responsible for SMEs, take longer to pay premiums due to the financial difficulties caused whilst their customers are in lockdown - which is likely to impact the time taken to receive commission payments.

6. Resolving disputes

How has Covid-19 affected court proceedings?

- Since 30 March 2020 certain “priority” courts have remained open for essential face to face hearings (this includes the Business and Property Courts).
- The courts are increasing their use of telephone, video and other technology to hold as many hearing as possible remotely.
- The courts have also shown increased flexibility regarding court deadlines, in light of potential difficulties arising from the COVID-19 outbreak.
- It is likely that disruption caused by Covid-19 could lead to delays and backlog when normal service resumes.

Are there any other options for resolving disputes?

- Brokers may experience increased queries for alternative methods of resolving disputes and policyholders may turn to the Lloyds Complaints Scheme.
- It is advisable to check the policy for the procedure of referring a complaint under the Lloyd’s Complaint Scheme.
- Complaints should be resolved under the Lloyds Complaints Scheme within eight weeks. However, COVID-19 is likely to have an impact on turnaround times and therefore policyholders may still experience delays.
- If a policyholder is dissatisfied with a response under the Lloyd’s Complaints Scheme they may refer the complaint to the Financial Ombudsman Service (FOS).

How will Covid-19 impact complaints to the (FOS)?

- The FOS is currently experiencing a high demand for its service. In this regard it is worth recalling the increase in the FOS limit to an award of £350,000 relating to acts or omissions post April 2019.
- The Financial Conduct Authority has said that firms must treat customers fairly and consider the needs of those potentially affected by the impact of coronavirus.
- The FOS is looking at complaints in respect of the following areas of insurance, in particular:
 - Travel
 - Business interruption
 - Wedding
- Regarding complaints made against the insurance industry generally, the FOS is advising that the general principles of dealing with any complaint still apply.
- Questions that brokers may wish to consider in determining how to handle complaints are:
 - What is the specific issue that the customer is complaining about?
 - Who is responsible – is the issue to do with the sale (broker-related) or the underwriting criteria/cover (insurer-related)?
 - Is the issue to do with the sale (e.g. a significant limitation or exclusion was not highlighted)?
 - If the complaint relates to a decision that has been made – who made that decision?



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