

COVID-19: Risk, Reputation and Response

Advice for the Insurance Industry

The COVID-19 virus has dislocated every aspect of normal social, family and business life. There are no precedents. There is no guide as to how we should respond. The situation is fast-moving and extremely concerning. People and businesses are looking for advice, support and guidance.

For insurers the challenges are enormous. Every class of business is affected. At the same time commerce and consumers look to insurers, as ever, in a time of crisis. It will be essential to have access to up-to-the-minute expert advice every step along this hazard-strewn path. Insurers need a partner, not just an adviser.

DWF's multi-disciplinary teams in the UK and around the world understand that and are uniquely well-positioned to rise to this critical challenge.

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Risk, Reputation and Response

Class-by-class insurers will have to evaluate the risks underwritten, calculate liabilities and exposures. Often this will be against a legacy of policy wordings that were understandably not designed to insure a global pandemic on this scale, or which has such a profound impact on the way we live our lives and conduct business.

No-one could have foreseen a world where most countries have closed their borders, almost all international travel has ceased, people in free countries are being asked to produce official papers just to leave their homes, educational institutions have been shut indefinitely and hundreds of millions of people are working from home. The list of profound changes to our lives is enormous and no country, no business, no family can honestly say they were prepared for it. It started with travel insurance, quickly moved onto event cancellation cover and in parallel alighted on business interruption.

Quality advice is essential in facing up to the potential reputational risks.



Setting priorities that are deliverable, fair and sustainable will be essential and that will have to be done within the context of a deep understanding of the legal, regulatory and political contexts.

The COVID-19 virus has reminded us forcefully of how we now live in an inter-connected world. Every country is suffering and all are developing their own strategies to combat the virus's spread and impact. For globally connected businesses and their insurers this adds an enormous layer of complexity to their response to the crisis. Drawing on broad UK and international expertise will be vital.

Working with you

Our client-focussed teams pride themselves on being able to see the world through their client's eyes, not through lawyer's eyes.

We are working round-the-clock to understand how this pandemic impacts you and your policyholders. We will stand by you as we work together to develop the right responses, giving you confidence that you are doing the right things in the right way. Our long-standing emphasis on building deep and genuine partnerships with clients means we are there to help in any way you need us.

It is a time for us all to work together to meet this challenge, and we will do whatever we can to provide timely advice, help you come up with practical solutions to a multitude of difficult and new issues, whilst all the time giving commercial advice with the best interests of your business and customers at the core.

The impacts

COVID-19 knows no boundaries, least of all those traditionally adopted by the insurance industry. Every class will be impacted and many of the issues will be similar. It will, however, be important to deploy expertise that can understand the granular issues in the context of the big picture.

DWF's expertise in the Insurance Sector is deep and broad. It can also be supported by a first class Employment team, as well as our Commercial Services and Connected Services teams, which add huge value with our unique multi-disciplinary offerings.



The Impacts

Business Interruption

This has quickly become a major issue for insurers. Although the government has indicated that it does appreciate that policies cannot be retrospectively re-written, the crisis will continue to be a test of “non-damage” extensions, including aspects such as notifiable disease, non-damage denial of access and loss of attraction covers.



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Property

The main impact being faced under property covers is in respect of a significant number of Business Interruption claims (discussed above). Some relatively modest material damage claims are expected, in particular for the costs of deep-cleaning of premises where it is established that cases of COVID-19 have occurred at the premises. Policy indemnity will need to be carefully examined in the usual way, including for example as to meaning of (and proving the existence of) ‘damage’, the inter-play of pollution and contamination exclusions, and generally the question of policy response to preventative measures.



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DWF Claims and DWF Forensic

Business Interruption claims are now being received in ever greater volumes, some speculatively. Policy coverage advice must be sought on the specific policy first as to whether these claims are covered or not. However if they are covered then it is imperative that insurers are able to deal with such claims in a timely manner – businesses have not been able to trade fully for some time.

Our team of highly experienced claims handlers are working together with our in-house team of Chartered Accountants to provide a specialist blended solution to handle those claims, which includes support with the quantification and challenge of business interruption losses where those are covered. Amongst other matters, complex legal causation of loss questions arise in many claims, and the emergence of governmental financial support schemes may make many claim assessments and adjustments ever more challenging. DWF’s lawyers work closely in conjunction with DWF Claims and DWF Forensic to pro-actively deliver incisive advice and solutions.



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Event Cancellation

There will be complex issues of causation and policy response thrown up as events large and small are cancelled. Many policies will be clear on the cause needing to be governmental action, others may be less clear. Large events have complex relationships with venues and a range of suppliers, as well as multi-million pound revenues from a variety of sources.



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Financial Lines

Extreme stock market volatility has had a major impact on fundraising and M&A activity. Financial institutions and advisers are at the eye of the storm with systems and processes being tested to their limits. The failure of any of these could give rise to major claims. Institutional investors in particular will be expected to look at ways of recovering some of the losses they are suffering. Pension trustees will also be challenging advisers and asset managers on how much they have done to protect their assets against collapsing values.



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Directors & Officers

All businesses are under huge pressure and many face enormously difficult exercises in balancing the interests of the business along with those of staff, investors, suppliers, creditors and all of those connected to the business. The UK Government, along with most other major countries, is for example promising extensive financial support for firms but decisions of how and when to access this will weigh heavily on boards. Many boards will face tough questions about how rigorous their planning was for major incidents and purported 20:20 hindsight will at some point abound, set against a raft of decisions having to be taken hourly by most businesses in the face of real life challenges. D&O insurance policies will become a target for a broad range of claimants, such as insolvency practitioners seeking to recover where they can on behalf of creditors.



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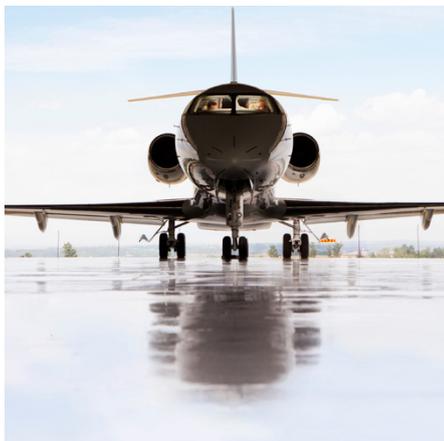
Healthcare & Medical Malpractice

Clearly our clients are at the heart of the issue and the pandemic will hit our healthcare clients and their insurers hard. Private hospitals, their consultants and staff are being co-opted into the NHS to treat COVID-19 victims. This is fraught with potential liabilities around training, maintaining the quality of care expected in the NHS and the consequent issues in relation to indemnity. Retired nurses and doctors and other clinicians are being recalled to treat patients. The quality of training and support they are given will be under the microscope. Private practitioners have many questions about whether their current indemnity arrangements are adequate and our insurer clients are seeking advice on how they might assist with their responses. The availability of adequate insurance cover for part-time GPs is already an issue and could become acute.

Care homes could be under increasing focus as they 'lock down'. Patient and relative groups are already raising serious concerns about Denial of Liberty and the right to family life guaranteed under the Human Rights Act. There could be early judicial reviews in addition to subsequent litigation.



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Aviation & Travel

With the cessation of most flights the general and commercial aviation sectors and accompanying businesses (to include maintenance operators and ground handlers amongst others) are experiencing difficulties that they have never faced before on this scale. Legal issues span product safety, employment, contractual liabilities, financing and business interruption to name but a few and DWF is well placed to provide a complete one stop solution for all claims and legal advice no matter the value.

The travel sector was impacted very early in the crisis and continues to face considerable challenges. Consumer travel insurance policies, in particular, have come under heavy scrutiny. The greater clarity of Foreign and Commonwealth Office travel advice may have reduced the potential for contested claims but there are still many people out of pocket and looking for compensation. The UK Government is expected to intervene shortly to strike a balance between the interests of the travel industry and consumers. Meanwhile, the Financial Conduct Authority has issued some tough guidance on renewals of annual policies and the need to treat customers fairly if policy conditions are changed. The impact of the potential delay on Brexit and the day-to-day effect on cross-border litigation is not to be underestimated.



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Construction

We are already seeing a significant scaling back in the amount of construction and building work and questions regarding the impact on contracts about to be let, works progress, extensions of time and loss and expense. Many sites will face difficult challenges in terms of security and the safety of partially completed buildings, something that will be monitored by the Health & Safety Executive. Some workers will need to be kept on site and that raises issues about their potential exposure to infection. Although post-Brexit there has been a slight decline in the number of European construction workers, there are still many employed in the sector and the need to communicate with them adequately will be crucial. The actions taken and advice given by construction consultants in the face of these challenges, both during the present crisis and in its aftermath towards securing successful projects, will be under scrutiny.



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Marine

Ships carrying essential cargoes will still be sailing and the health of their crews will be a crucial factor for shipowners and for the ports of arrival. The once-booming cruise industry is on its knees. Many of the operators of ships subject to quarantine restrictions are likely to face significant claims from passengers which might give rise to complex disputes between operators, the ports and the governments that detained them.



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Excess Liability, Product Liability and Life Sciences

A key issue here will be the rush to produce more ventilators. Many production lines are being re-purposed but ensuring the quality of the products coming off them will be a challenge. Looking further ahead the urgency of producing an effective vaccine could lead to short cuts and compromises in testing. There is also a burgeoning market in a wide range of fake goods from face masks and sanitiser to other protective products. Some sellers could face major claims and criminal action. Shortages of key materials and key components could lead manufacturers to turn to sub-standard alternatives. More generally, maintaining standards of products when staffing levels are severely reduced will be a challenge.



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Employers Liability, Occupational Health and Health & Safety

All employers face huge challenges, not least keeping their workforce safe. This has many ramifications. The obvious are making sure anyone who is not essential can work from home and that those vital to have in work are well protected. Perceived failures on those fronts will give rise to claims. Less immediately obvious and potentially challenging is the need to ensure that people asked to work from home have the right equipment, are given adequate advice about how to set it up and use it and are adequately supported in both physical and mental needs.



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Policy Wordings and Drafting

Long before there is any opportunity to pause and consider quite what impact COVID-19 has had, the insurance industry is commonly a first port of call for those cruelly suffering, financially and otherwise. That is an understandable first reaction in many ways but, as the UK Government has expressly acknowledged, it is not possible to effectively seek to retrospectively re-write the insurance that was purchased and what it was intended to cover. However the values involved on all sides will often be so high that it is inevitable that coverage disputes will be alleged and pursued, across all classes of business.

The Business Interruption policy coverage issues have already had a high profile but there are many more potentially tricky areas. The Financial Conduct Authority has already flagged up the potential problems with Household and Motor insurance as millions of people are asked to work from home, but without necessarily understanding that conventional policies may not normally cover them. Some will expect their employers to pick this up, further extending the scope for disputes.

DWF has the broadest and deepest range of policy coverage experts, able to work through these problems with you from the outset.



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GDPR, Data Protection and Privacy

The pandemic creates significant challenges in data protection and data security. A dispersed, remote workforce and a huge increase in the use of mobile devices as well as issues around security of physical documents will add risk and test existing policies and procedures.

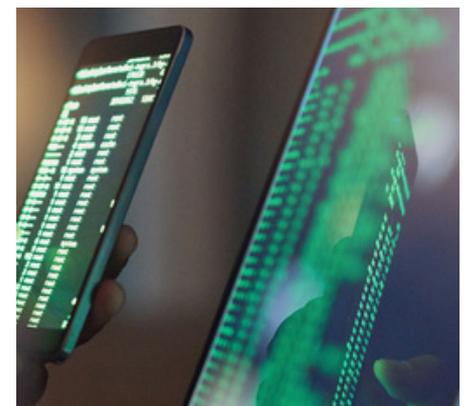
Core data protection principles remain however. All processing of personal data must have a lawful basis, be necessary to achieve a specific purpose and not be excessive. Measures in place to protect personal data need to keep pace with changing levels of risk and additional risk assessments may be required.

Many organisations will face a heightened risk of data breaches occurring as fraudsters and hackers seek to take advantage of the world-wide chaos. It is crucial that incident response and notification procedures are reviewed, tested and updated.

The Information Commissioners Office has said it will take a pragmatic approach during this period, indicating that some flexibility may be applied to compliance delays, but it remains to be seen how the regulator responds as time goes by and the nature of claims which will almost inevitably be brought by third parties.



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Cyber Security and Cyber Liability

The responsibility of businesses to protect their systems and data is not lessened by the COVID-19 crisis: it is just made ten times harder to discharge. Systems are going to be very vulnerable and the potential for significant losses greatly increased. Many cyber policies feature the deployment of expertise to tackle a cyber attack but the difficulty of delivering this when buildings are in lockdown and key employees are working remotely will be an issue.



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Energy

Key installations are kept open, workers are sent home at others, output at some plants will cease or drop. The economics of the energy sector will be challenged and we have already seen oil prices drop dramatically. Construction projects may be put on hold or almost certainly delayed. As producers and contractors experience losses, policies will be challenged. Triggers for BI and DSU will need careful review and as ever adjustment will be key.



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Civil Disturbance/Rioting

Although we do of course hope that significant social disturbance will not be experienced, should it be so we have very significant experience in assisting with any claims. Following the last major UK riots, DWF achieved recovery results under the Riot (Damages) Act 1886 for insurers and insureds that were significantly better than the industry norm.

The same team stands ready to help with claims arising from COVID-19 related riots or other civil disturbances. The Riot Compensation Act 2016 introduced welcome clarity in a number of respects – for example in clarifying that business interruption losses / consequential losses would not be claimable under the Act, and streamlined a number of processes. It also placed a £1M cap on each claim and allowed claims in respect of motor vehicles.

We are well-placed to advise you on any aspect of the Act/claims arising from any social disturbance at whatever level.



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Reinsurance

One step removed from the frontline, Reinsurers are reviewing their response as underlying claims steadily increase. The scale of the pandemic and the multiple loss scenarios will present potential challenges regarding aggregation. Definitions of cover and exclusions will also be tested. Consistency across jurisdictions may be very hard to achieve with the diversity of law, regulation and responses of national governments.



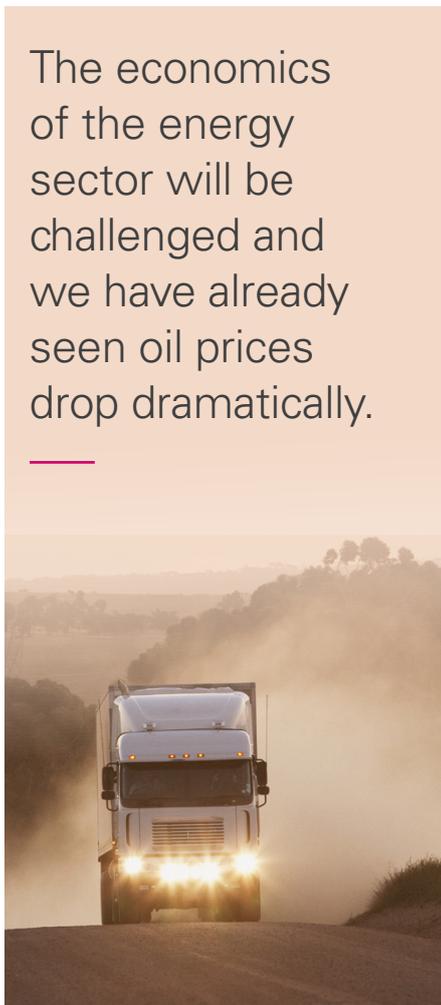
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Professional Indemnity

Professional firms will need to ensure that procedures are in place to maintain standards and service levels as staff are sent away from their offices and many fall ill. For many firms this pressure will come just as they are being expected to offer enhanced support to key clients. It will be a tension hard to resolve but doing so successfully will be key to avoiding claims later.



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The economics of the energy sector will be challenged and we have already seen oil prices drop dramatically.

The Impacts

Political Risk & Trade Credit

Supply chains are fractured and the credit status of many firms in long, complex, global supply chains is now very perilous. Some of the potential for defaults might be staved off by the growing range of government interventions. If much of that is through loans, it might defer problems rather than resolve them. Looking further ahead, it is very likely that many firms will want to review supply chains, especially where they are dependent on overseas suppliers, although the World Bank has cautioned against doing this.



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Specie and Fine Art

Many museums, galleries and jewellers are closing their operations. This will bring a new set of challenges for insureds in the fine art and specie sectors. While access to the public may be reduced, this will also make it harder for insureds to personally supervise their insured items. Insurers should work proactively with their insureds to ensure that proper safeguards are maintained for all insured items. Further, with many countries insisting on public lockdowns, it may also be harder for adjusters to promptly investigate claims. Insurers should be liaising with their preferred adjusters in such jurisdictions proactively, to check that they are still able to receive instructions and to plan for any difficulties ahead of time.



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General Litigation Issues and Operational Assistance

The Courts are still operating but at a reduced level. This may not necessarily continue for much longer. Telephone hearings are now being used for CCMC's and interlocutory hearings but there may perhaps need to be a switch to video and audio proceedings for Trials in the future. There are already problems around expert witnesses attending, and especially in obtaining medical reports, as doctors limit direct contact with patients unless essential, and loss adjusters are excluded from some site inspections.

We recognise that the restrictions on travel and working in offices will place a great deal of strain on Insurers' operations, particularly in volume areas. Whatever unfolds for the insurance market, we are able to help insurers and intermediaries with all aspects of their operations by way of temporary outsourcing where necessary.

Our technology and case management system enable us to work remotely with clients able to continue to monitor their exposure, not only in terms of reserves and payments on a claim-by-claim basis, but also the performance of a portfolio or book of business as a whole. Clients can access reports and statistics on individual claims or entire portfolios, as well as multiple years of account. In addition, a client dashboard is available which provides instant graphical analysis on claims according to statistics such as business type, location and type of claim.



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Fraud & Financial Crime

Unfortunately it is a fact that in periods of crisis entrepreneurial fraudsters have seized the opportunity to commit fraud and financial crime. With the current global and unprecedented crisis, there will be many financially distressed and vulnerable people, combined with Insurers having stretched resource and distractions – the perfect combination for fraudsters to turn crisis into opportunity and commit fraud.

We will see a huge increase in fraud across all areas both in opportunist/organised and across motor/EL/PL/property/households frauds – 1st and 3rd party claims. We will also see an increase in data breach/income protection and pension claims.

We have an award winning Legal/Predictive Analytics/Profiling and Intelligence team who can work with you to identify latest fraud trends/drivers and adopt strategies both pre/post litigation to combat the expected surge in claims. We can also work with you on ensuring your controls around identification/detection and prevention are as robust as they can be to avoid leakage.



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The Impacts

Regulatory Consulting

Never has operational resilience been so high on the agenda for the FCA and insurers alike. Whilst the priority for insurers must be staff safety and wellbeing, with many insurers adopting remote working practices, insurers must also consider operational impacts and their resultant regulatory exposure. This includes agreeing their organisational priorities in order to maintain a level of service to customers.

Insurers' response needs to do more than just effecting business continuity plans or implementing additional IT contingency plans. We are already seeing insurers effect changes to policy terms and conditions including applying exclusions for new business and policy changes. The FCA will undoubtedly be looking to firms to act in accordance with the Principles, and in the spirit of the rules, rather than maintaining strict policies (whether wordings or procedures) which might be perceived to result in consumer detriment. DWF Regulatory Consulting can help manage these risks.



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Regulatory Defence

The regulators have been pragmatic and will likely make allowances in the short term. But with their ongoing focus on capital adequacy, individual accountability and conduct risk, and their timely operational resilience agenda, regulatory breaches - and interventions - are inevitable. They are making their expectations clear, setting the standards against which firms' and individual senior managers' conduct will come to be judged.

The pandemic creates unprecedented operational and conduct risks. Dealing with them remotely is testing operational resilience and business continuity plans to the limit. Senior managers are making decisions for firms in a fast-moving and uncertain environment. When the dust settles, firms and their senior managers will need to be able to account for what they have done.

We have lawyers who specialise in insurance regulation and contentious regulatory investigations work. We are on hand to advise on risk management; in advance when making decisions, or when things go wrong.



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Employment Issues

The employment issues raised by the response to the pandemic are huge. Insurers employ tens of thousands of people and have a duty of care to them. We will be able to help in delivering everything you need to consider and then implement as a business. DWF's large and highly respected Employment Team is part of our response to clients' needs across the whole spectrum of employment related issues surrounding COVID-19, and our team has deep Insurance Sector knowledge and expertise which will be crucial in navigating the many issues clients face.



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The pandemic creates unprecedented operational and conduct risks.



International Support

Nowhere is exempt from being battered by the whirlwind of crisis caused by the pandemic.

There have been many dramatic and varied responses around the world and understanding how they impact global clients is vital. With an extensive international network of offices, DWF can provide this global perspective, tying it in with the actions of international regulators.

DWF has insurance teams around the globe, and those teams have been similarly grappling with the multitude of issues arising in the insurance sector for our clients in those jurisdictions.

Please do not hesitate to contact any of our teams on the ground in those countries for specialist advice wherever needed.



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