

# COVID-19: PRESSURE POINTS: PRACTICAL TIPS FOR RENEWING YOUR BUSINESS' INSURANCE PROGRAMME DURING THE COVID-19 PANDEMIC (GLOBAL/UK)

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Legal Briefings - By **Greig Anderson** and **Rachelle Waxman**

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Many businesses renew insurance programmes at this time of year or may do so over the coming months. Renewals this year will be undertaken against the background of a changed business environment and a new way of working in light of COVID-19. That will have an impact both on the risks that businesses want to insure against and the practicality of carrying out the renewal. It is vital, therefore, for businesses to get renewal right. So here are our 5 top tips for risk professionals who are renewing their programmes over the coming weeks (whilst also handling a myriad of other issues).

## **1. DON'T JUST ACCEPT COVID-19 EXCLUSIONS AT RENEWAL**

In our experience, some insurers are seeking to incorporate COVID-19 exclusions into policy wordings. The Lloyd's Market Association have produced a specific exclusion for this purpose. Other insurers may follow with their own wordings. The LMA exclusion wording is very broad and provides:

*"Your Insurance Policy does not / This Insurance does not {delete as applicable} cover any claim in any way caused by or resulting from:*

- a. *Coronavirus disease (COVID-19);*
- b. *Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2);*
- c. *any mutation or variation of SARS-CoV-2;*
- d. *any fear or threat of a), b) or c) above”.*

To the extent possible, policyholders will want to resist the insertion of such broad exclusions. This could be done by seeking to renew your policy without such exclusion, seeking to narrow the scope of the exclusion, or, if a satisfactory solution cannot be reached in time, by seeking to extend the existing policy pending renegotiation of the terms.

As noted above, if insurers require a COVID-19 exclusion to be inserted, policyholders will want to try to narrow the scope of the exclusion as much as possible. Some of the ways to narrow the exclusion may include seeking to:

- restrict the causal connection required between the claim or loss, such that loose or indirect connections will not be sufficient;
- insert wording to the effect that the exclusion will not apply where there are concurrent causes (one to do with COVID-19 and the other unconnected). Otherwise, the current legal position is that the exclusion would prevail and the loss would be excluded despite the fact that there is an unconnected concurrent cause of the loss; and/or
- limit the exclusion to the current known impacts of COVID-19 (e.g. due to measures already taken by the Government) and not unknown future impacts.

The market is fluid and evolving. Many insurers are reportedly insisting on COVID-19 exclusions. It may not, therefore, be possible (or at least may become difficult or expensive) to access insurance without a COVID-19 exclusion. Where a new policy will contain a COVID-19 exclusion following renewal, it will be critical to ensure that any existing claims, losses or circumstances are notified under the current year's policy prior to renewal, as we discuss below.

## **2. CONSIDER WHAT OTHER POLICY EXCLUSIONS MIGHT BITE FOLLOWING RENEWAL IN RELATION TO CIRCUMSTANCES KNOWN OR NOTIFICATIONS MADE PRIOR TO RENEWAL**

Even absent a COVID-19 exclusion, losses arising from COVID-19 may be excluded by virtue of a “prior known circumstances” exclusion or a “prior notice exclusion”. Many liability policies contain such exclusions.

“Prior known circumstances” exclusions typically provide in substance that the insured cannot claim under the policy for claims arising out of circumstances which the insured knew or ought to have known about prior to renewal. How such an exclusion will apply in any given situation will depend on the precise wording of the policy and the facts of the matter.

“Prior notice exclusions” operate to exclude from cover for claims arising out of matters which have been notified to a previous year’s policy. Sometimes the exclusion is narrower in scope and only applies if the insurer under the prior year had accepted the notification.

With regard to “prior known circumstances” exclusions, as a general rule, there must be some causal connection between the facts or circumstances and the claim or loss which occurs. The fact of COVID-19 may not itself be regarded as a known circumstance, but its (known) impact on the business might be to the extent that is relevant to the potential for insured events. For example, whilst each matter is highly fact and policy specific, a business might have a known issue with servicing customers, have cancelled an event, had to make difficult decisions in relation to members of staff, or paused construction on a building site – each of which might result in a future claim against the business.

This has two key practical impacts.

Firstly, claims arising out of circumstances known about before renewal might be excluded from cover under the new policy. Whether or not such issue will amount to a circumstance will depend on the precise factual circumstances. A “prior known circumstances” exclusion will only engage if you do in fact have a circumstance within the meaning of that exclusion.

In any event, policyholders will have to give a fair presentation of the risk to insurers prior to inception of the new policy (as discussed below), including disclosing any material circumstances. In the usual way, insurers might seek to incorporate specific policy exclusions. It may thus become clear during renewal discussions whether insurers consider there to be any circumstances which would be excluded from cover following renewal.

Secondly, if a notification of a claim, loss or circumstance is made to the expiring year, then it is important to gauge in advance what impact that might have on coverage under the new policy in light of any “prior notice” exclusion, particularly if there is any risk that the exclusion under the new policy might have broader application than the language under the expiring policy which attaches the notified matter (and often causally related matters) to that policy. Otherwise, gaps in coverage could result. It will be particularly important to ensure that there is a smooth transition between cover under the different policy years where you are changing insurer.

It is important, therefore, to review the proposed exclusions in the new policy wording holistically and to understand what COVID-19 losses might or might not be covered, taking account of existing knowledge and notifications prior to renewal. Where there is a potential risk of a gap in cover (e.g. due to an unduly broad “prior circumstances” exclusion), then curing that issue should also be front and centre in any renewal discussion.

### **3. ENSURE YOU NOTIFY ALL CIRCUMSTANCES, CLAIMS AND LOSSES TO EXPIRING POLICIES PRIOR TO RENEWAL**

To minimise any risk of falling foul of exclusions in next year’s policy, including not least COVID-19 exclusions, it is strongly advisable for policyholders to take the time to consider now what if any matters, such as claims, losses and circumstances in respect of potential claims/losses, are potentially capable of notification to the expiring policy year. This should be kept under review up to renewal – and beyond if grace periods for notifications apply.

When notifying a circumstance to an expiring policy, care should be taken to get the notification right. This sounds easy, but frequently gives rise to insurance disputes. The object is to make the notification in such a way as to attach future claims or losses to the policy year to which the notification was made on as broad a basis as possible. This involves identifying what the insured knows and striking the right balance as to the scope of the notification that can be permissibly made in light of those known facts.

It is possible to notify a circumstance in respect of a problem (or a hornet’s nest of problems), even if the insured does not currently know what the cause or impact of the problem may be. For example, on renewal of a D&O policy, consideration could be given to notifying issues with critical decision making outside of usual governance parameters or a drop in the company’s stock price if that could lead to a securities action. There is, of course, a balance to be struck because a broad blanket notification of circumstances may not be valid if it is too vague. Ultimately, whether a notification is valid will depend on the precise factual circumstances.

As ever, the policy will typically contain conditions as to how and when notifications may be made, and the insured should take care to comply with these: the golden rule is to ‘do what it says on the tin’.

As part and parcel of the above, where a claim or loss has been notified to the expiring policy year, it is also worth considering whether there should also be an accompanying notification of circumstances, particularly where the claim relates to a potential issues that might affect other potential claimants.

### **4. ENSURE YOUR WORDING IS FIT FOR PURPOSE IN LIGHT OF YOUR NEW RISK PROFILE**

The risk profile of businesses will have changed to some extent in light of the current pandemic. The most obvious example perhaps is that businesses have had to adapt and change their ways of working, albeit this may be temporary. It is therefore important for policyholders (together with their brokers) to review the current risk in detail against any proposed new wording, and not simply to roll over existing wording. For example, some property damage policies set a maximum period of time for which premises are permitted to be unoccupied. Such clauses may need to be disapplied or amended to permit longer periods of unoccupancy in the current circumstances. Some insurers are already offering revised terms in that regard. Similarly, practical issues may arise if a notification clause requires notification by a particular means or to a particular person, if that mechanism does not reflect how the recipient insurer is currently operating.

## **5. COMPLY WITH THE DUTY OF FAIR PRESENTATION IN A WORLD OF DISPERSED WORKING**

The Insurance Act 2015 requires the insured to make a fair presentation of the risk to the insurer. This involves disclosing every material circumstance which the insured knows or ought to know – or, at least, disclosing sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances. An insured ought to know what should reasonably have been revealed by a reasonable search of information available to the insured. The Act requires the insured to make the disclosure in a manner which would be reasonably clear and accessible to a prudent insurer. This duty will still apply notwithstanding the COVID-19 pandemic. It does present insureds with a number of practical challenges. That said, our understanding to date is that renewals have been proceeding relatively smoothly with the necessary adaptations.

Risk managers will need to work out how to carry out a reasonable search whilst many people in the business will be working remotely. That will involve identifying early on the individuals within the organisation who will have access to the relevant information and knowledge, and asking them for their input in good time. It will also be important to work out how to present the information to insurers in a clear manner. If the insurer would usually undertake a site visit, that might need to be replaced with a virtual video tour. Likewise, in-person risk presentations can be substituted with online video calls and presentations.

It is worth bearing in mind that insurers will also be adjusting their underwriting methods and getting to grips with remote working themselves. They will be interested in understanding any changes to the business' risk profile in light of COVID-19, as this may affect the pricing of the risk and renewal terms. The renewal process may therefore take longer than usual. It is a good idea to engage early with insurers and have an open dialogue about what underwriting information they will need and how they would like it to be presented to them.

Where an insured or insurer is practically unable to undertake a search or present the risk in the usual way, early communication will be key. For the policyholder in particular, it will be important to make sure the insurer knows what can and can't be achieved. What counts as a 'reasonable search' may be different in the current circumstances, but rather than the parties debating after the event what was reasonable, the safer course would be to obtain an acknowledgement from the insurer upfront that the duty of fair presentation is qualified by any limitations which the insured encounters.

The insured should also consider whether their policy contains the best available innocent non-disclosure clauses or other terms dealing with presentation of the risk, in order to minimise the risk of insurers having a remedy, particularly where there has been an inadvertent breach of the duty of fair presentation in consequence of the current circumstances.

Finally, it is worth being aware that there is a possibility that you may be able to obtain a policy extension for a short while if renewal looks like it will need to be delayed. There are a number of auto-extension clauses available in the market e.g. from the LMA. However, if this is an option that you are considering, a new duty of fair presentation will apply to anything relevant to the extension unless insurers agree expressly or impliedly to waive any further disclosure requirement. Again, early communication and appropriate protective steps will be key.

## **CONCLUSION**

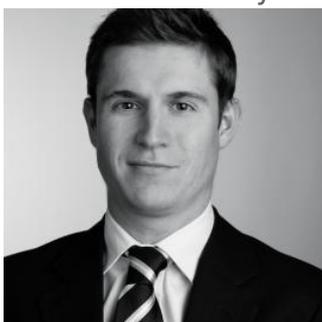
As always, the best way for an insured to protect its position on renewal is to start early, communicate well and take appropriate steps to lock-in coverage under expiring wordings and seek best in class wordings on renewal. An insured that fails to take appropriate steps, and simply goes through the usual motions, could well find itself with gaps in cover for COVID-19 related claims that could have been avoided. This sounds straightforward, but a proactive and diligent approach could make all the difference to a business's balance sheet where it is faced with COVID-19 related impacts.

[Navigating the COVID-19 Outbreak](#)

[COVID-19 UK](#)

## **KEY CONTACTS**

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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