

COVID-19 - Reinsurance Questions

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The COVID-19 crisis is generating insurance claims across the global industry, from event cancellation to property business interruption, travel, health insurance and trade credit, amongst others. As corporate failures gather pace, D&O claims cannot be far behind.

Wherever insurance coverage issues arise, it is only a matter of time before they translate into issues under contracts of reinsurance. In those cases where the reinsurance is on full follow terms with the underlying policies, coverage issues might prove to be limited. So long as the underlying claim was settled honestly and in a proper and business-like manner, the reinsurer will generally be obliged to follow the underlying settlement¹. The position is otherwise, however, where there is no follow clause, or where the clause is overlaid with specific limiting provisions in the reinsurance not found in the underlying policy. If, for example, the reinsurance contains a specific exclusion against communicable disease, then the exclusion will override the follow terms². Reinsurers will be entitled to assert a defence based upon any applicable exclusion in the reinsurance contract, independently of coverage positions taken on the underlying claim.

Other issues for consideration at the reinsurance level include the question of aggregation. The eligibility of losses for aggregation at the reinsurance level depends in large part upon the aggregation language in the reinsurance. Does the contract aggregate losses on an event basis, or occurrence, or cause (or originating cause?). What is the event, occurrence or cause in this case? Is it each individual contraction of the disease, or each outbreak in each locality? Perhaps the unifying factor is the relevant governmental instruction given in each state or municipality? Questions of reinsurance aggregation have been considered many times by the courts in England and elsewhere, but never before in a context such as the present. What is more, aggregation rarely boils down to a binary dispute between reinsureds and reinsurers, because different aggregation outcomes may serve different players in different ways; not enough aggregation can leave the reinsured short of the reinsurance attachment point. Conversely, too much aggregation sends the loss far in excess of the programme limit, leaving the reinsured with a substantial unreinsured excess exposure.

Closely aligned with the question of aggregation is that of allocation. Put simply, when did the claimed loss occur, for reinsurance purposes? All the signs are that COVID-19 is a problem here to stay for some time, meaning that COVID-19 losses are likely to straddle more than one reinsurance year. It may serve a given reinsured to split losses into different reinsurance years, and thereby access more than one limit, or indeed the reverse may be true. What is clear is that we can expect the debate to gather pace in the coming weeks and months.

[1] *Insurance Company of Africa v. Scor* [1985] 1 Lloyd's Rep 312

[2] *Aegis Electrical & Gas International Services Ltd v. Continental Casualty Company* [2007] EWHC 1762

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