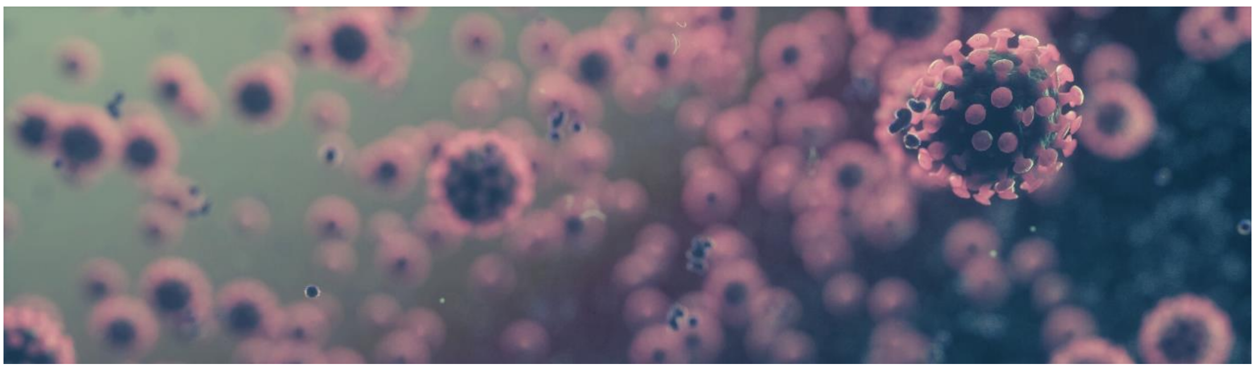
By Ingrid Sapona | 19-minute read

In this Quarterly Review we're looking at three topics – all of which are relevant to the current insurance landscape: insurance issues related to COVID-19, insuring social influencers; and brokering in a hard market.



Insurance issues related to COVID-19

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It's an understatement to say COVID-19 is top of mind around the world. While individuals and governments are focused on containing its spread, for businesses much of the concern is about managing the economic impact of the virus. So, many businesses are wondering about whether – and to what degree – commercial insurance coverage might respond. In this section we look at some business/activities impacted by COVID-19 and specific types of coverage that may apply, as well some of the issues and limitations insureds may face.

Business leaders and risk managers have had pandemic on their radar for some time, but it's not been of particularly high concern. In the AON 2019 Global Risk Management Survey (admittedly published well before COVID-19 hit the news), for example, Pandemic Risks/Health Crises ranked 60th of 69. But, as COVID-19 has shown, a wide-spread epidemic can have a bigger impact than other risk categories – such as

Business Interruption (which ranked 4th in the AON 2019 survey) Supply Chain Failure (which ranked 20th in the 2019 survey) and Employee Absenteeism (which ranked 32nd).

Hardest hit businesses and activities

The businesses/activities that seem hardest hit by the epidemic are:

- **The travel and leisure industry** – hotels, casinos, cruise lines, and so on have been hard hit. For example, casinos in Macau were forced to close for 15 days in February. In early March the Hyatt hotel chain announced it was withdrawing its 2020 financial forecast because of reduced travel demand and corporate travel restrictions. More recently the US announced restrictions on flights from Europe, Canada has prohibited the docking of cruise ships with more than 500 passengers until July, and Italy is in virtual lockdown.
- **Major events and conferences** – a number of international (and local) events have been cancelled to date, while events like the Chinese Grand Prix have been postponed. (At the time of writing it's unclear whether the Tokyo Olympics, which is scheduled to begin July 24, 2020, might be postponed to later in the year, or perhaps scrapped.)
- **Supply chains** – because of amount of manufacturing in China and other regions where the virus has caused extensive closures, many businesses' supply chains have been disrupted.
- **Liability due to exposure** – a business that fails to protect others from exposure to infection on their premises may face liability exposure.

Liability exposure (as well as possible workers comp cases in the US stores) could well be a factor weighed in the recent decision by Tim Hortons to not use the paper cups in it its Roll Up The Rim to Win event this year. The news stories made it clear that they don't want their employees to have to handle paper cups that have been in peoples' mouths.

Possible stumbling blocks insureds may face

Property insurance is normally triggered by physical damage to insured property as a result of a covered peril. So, the initial obvious difficulty with trying to bring forward a claim is that introduction of the virus doesn't cause a physical loss to property. Some insureds may try to argue that introduction of the virus to insured property should be treated the same as an unforeseen, fortuitous event, as such events are typically covered under such policies.

Standard policy exclusions, however, likely apply. Such a claim could be denied, for example, based on a contamination exclusion if a virus is caught within the definition of contaminant. It is worth noting, however, that some policyholders – for example, those in the hospitality or healthcare sector – might have express coverage for losses caused by communicable or infectious disease.

Standard business interruption policies require some form of property damage to apply. As a result, even where a business is shut down due to a government edict, would likely not be covered. As well, business interruption policies typically exclude epidemics. However, Allianz Global Corporate & Specialty (AGCS) reports that there may be some business interruption policies with extensions that cover non-damage business interruption for things like infectious disease that may close a particular location due to a virus.

Some businesses may look to their contingent business interruption(CBI) insurance for coverage. However, because CBI coverage is meant to protect against economic losses stemming from supply chain disruptions resulting from physical damage on the premises of the insured or at a named supplier of the insured, disruptions due to COVID-19 likely would not be covered. (Disruption due to actual contamination at a specified supplier might, in some cases, be sufficient, though often CBI wording specifically include bacteria and virus exclusions.)

Credit insurance, which protects an insured when the underlying obligor has a legal obligation to pay the insured, is meant to protect against credit risk, not legal risk. Furthermore, whether such coverage might apply will depend on the *force majeure* provisions of the policy. Interestingly, the China Council for Promotion of International Trade has started issuing *force majeure* certificates to shield Chinese firms from liabilities arising from their inability to fully perform contractual obligations in relation to COVID-19.

Force majeure provisions in a contract excuse a party from not performing its contractual obligations that become impossible or impracticable, due to an event or effect that the parties could not have anticipated or controlled.

Travel and leisure companies sometimes have coverage for public health risks, but it usually comes with strict conditions. When the Chinese government order casinos in Macau closed for 15 days to prevent the spread of the virus in February, though some of the casinos had insurance to cover closure caused by an infected person, it would not cover a government ordered closure.

Coverages that may respond

Commercial General Liability policies cover liability for bodily injury, so such policies ought to provide a legal defense against a claim for failing to protect others from exposure to infection on the insured's premises.

Industries like hospitality or retail may have coverage under extensions to standard property policies for Loss of Attraction provisions, or if they have Communicable Disease coverage, or even "Special Perils Business Interruption". However, such coverage is often subject to low sublimits and it only covers extra expenses incurred to evacuate and disinfect the building – it does not cover loss of income.

In the event a "civil authority" prohibits or impairs access to an insured business premises, their commercial property policy may provide coverage for losses sustained during the restriction. The policy language, however, must be carefully reviewed to determine whether an actual physical loss is required. As well, though political risk coverage usually is meant to cover expropriation or contract frustration as a result of government edict, the specific policy wording may be broad enough to cover business interruption in the event of a government edict.

Organizations that host major events sometimes carry event cancellation insurance. The first question is whether the policy contains an exclusion for communicable diseases, as many do. Some event organizers, like the Hong Kong Rugby Union, learned a lesson from the SARS epidemic and they specifically require that their event cancellation insurance cover communicable diseases. As well, AGCS has said that some event cancellation coverage claims may succeed with respect to events cancelled by order of a government authority.

Some disinfection/decontamination environmental insurance may cover the cost of cleanup, disinfection and decontamination required on account of the virus. However, the specific policy wording must be reviewed carefully, as it may exclude disinfection expense associated with communicable diseases or it may require that the disinfection be required by a government or public health agency.

Travel insurance policies that include trip cancellation and interruption coverage are another area where claims can be expected. Whether an insured will be able to collect under a travel policy will depend on many factors, including the timing of when the claim arises. For example, whether the insured is mid-trip, or whether they have not yet departed.

And finally, directors of public companies may find themselves having to defend against claims by shareholders that management didn’t disclose the risks posed by COVID-19 may have to the business’s financial performance. Depending on the wording of the policy, they may have coverage under their Directors and Officers (D&O) policies.

Bottom line

Insurers learned from the SARS epidemic in 2002-2003 and many refined or clarified their policy wordings that might have covered pandemics like COVID-19. As is always the case, whether a claim related to COVID-19 is covered – and if so, to what extent – will depend on the specific policy wording. You can bet insureds and their lawyers are closely reviewing policy wordings, and insurance companies are assessing their potential exposure and preparing responses to potential claims and litigation.

No doubt, when this crisis ends, insurers and businesses will re-assess the potential risks from pandemics. Insurers may think about specialty products and coverages they might offer, and businesses will be thinking about how they can prepare and protect themselves in the event of future pandemics.

Insuring social influencers

The internet has been around for just under four decades. Social media platforms have been around for less than half that time. Though such platforms are relatively young, one-in-three people in the world use social media. Put another way, of the 3.5 billion people who are online, two-thirds of them use some form of social media. Indeed, nearly 70% of Canadians are active social media users.

As social media has grown (or perhaps because of the growth of social media), so too has the phenomenon of "social media influencers" and the rise of the social media industry. As a result, more-and-more social influencers are entrepreneurs and, as such, are looking to protect their income and business activities. In this section we take a look at some of the risks and exposures social influencers face – and insurance coverage that's available to mitigate the risks.

What is a social media influencer?

There's no agreed upon definition of what a social media influencer is, but most would agree they:

- have a large following on social media, and
- what they say or do influences others (for example, influencing others' purchasing decisions or others' social or political decisions – for example, celebrities that are outspoken anti-vaxxers)

Social media influencers typically have a particular niche, for example, fashion, fitness, travel, food, and so on. It should be noted that in the social media influencer world, one's "niche" can be pretty broad – for example, a lifestyle or "wellness" influencer like Gwyneth Paltrow influences her followers on a variety of products and activities. There is no common measure of followers either. Measuring how many followers someone can be as simple as the number of people who pro-actively click to follow the person (whether on a particular social media platform, or across multiple platforms). But, because followers can be bought, some argue that's an unreliable measure. Instead, advertisers and digital media marketing firms often use "engagement rate", which is "the average percentage at which a user's followers engage with their content".

The risks of being a social media influencer

The types of risks a social media influencer might face will depend on their activities and actions. For example, if they create content – such as blog posts – they may end up exposed to claims for breach of trademark or copyright, defamation, or even breach of privacy. (For example, if a blogger uses someone else's photo without getting permission, they could face a claim of breach of copyright.) If they endorse a product or make a claim about a product, they could face a lawsuit related to the underlying product. Another endorsement-related type of claim could be brought if the influencer has a contract with an exclusivity clause and they are later photographed using a competitor's product. As well, if the influencer engages in a high-risk activity without including some sort of "don't try this trick at home" disclaimer, they could end up being sued by followers who engage in copy-cat activities to their detriment.

Andrew Clark, President & CEO of ALIGNED Insurance Inc. says they've been offering stand alone policies for social media influencers for about a year-and-a-half. "It's a liability insurance policy that typically includes professional liability, media liability, and commercial general liability coverages," he says. "We were looking at different trends and risks and thought this is a growth area with not a lot of information available, so we thought we'd start writing about it and publicizing it." Clark says that potential clients start to think about such coverage when they start to monetize their social media activities.

Insurance considerations

In determining the appropriate coverage for a social influencer, there are a number of factors insurers take into consideration, such as:

- The scope of the influencer's following and whether that's measured based on engagement rate, numbers of followers, or other metric
- Platforms the influencer is active on
- Category(ies)/spheres they are influencers in
- Geographic reach of their influence
- Media activities – for example, blogging, columnist, public speaking, public appearances, brand ambassador
- Income from social media – current income and expected
- Sponsorships – current and previous
- Contract management practices
- Past claims against the influencer

Insurance coverages available

Social media influencer liability insurance is available through various Lloyds syndicates, says ALIGNED's Clark. "It's something that should be considered by individuals who generate income from their social media profile," he says. Though the coverage needs of social media influencers can overlap with traditional public figure protection, given the nature of their activities, social media influencers have are some unique coverage requirements.

- The coverages social media influencers should consider include:
- Defence costs and damages – in the event the influencer is sued and must defend him/herself
- Unauthorized access to insured's social media
- Defamation
- Intellectual property infringement
- Breach of confidentiality/breach of privacy
- Breach of promotional contract – for example, for a claim against the insured related to the quality of their promotion or endorsement
- Negligence

- Breach of advertising statutes or codes – in the event the insured unintentionally is sued for breaching an advertising law or code.

If a social media influencer has invested in particular equipment, such as cameras, editing software and computers, they should consider commercial property coverage for it. As well, given that social media influencers rely on the availability of media platforms, cyber insurance is another type of coverage they should consider seeking. If an influencer has, for example, a contractual obligation to post to a given deadline and their account is hacked, they may not be able to fulfill their contractual obligation.

Brokering in a hard market

"A hard market is the time when the value of brokers can really stand out." *Ray Arndt, Lyon & Butler Insurance Brokers Ltd.*

The January 2020 Quarterly Review's lead topic was about the debate about whether the current insurance market qualifies as a "hard market". Now, three months into the year, there seems more consensus that the commercial market has hardened and will likely remain this way for the balance of 2020.

"Yes, it's a hard market, particularly in some industries like waste management, condominium corporations, snow removal, and licensed restaurants," says Ray Arndt, President of Lyon & Butler Insurance Brokers Ltd., in Vaughan, Ontario. Tyson Peel, Vice-President of Burns & Wilcox Canada, agrees the market is hard and he anticipates it "will continue through the rest of 2020 and maybe even into 2021 – it will all depend on where the loss ratios are and where companies are going to allocate their funds," he says.

In this section we take a look at what brokers could – and should – be doing as they navigate the hard market.

Sources/resources for brokers

The Insurance Council of British Colombia (Insurance Council) has always been in the forefront in terms of reminding B.C. brokers of their responsibilities during a hard market. The last time the property and casualty market was hard – 2003 – the Insurance Council issued a Notice with guidance on how to best operate in a "difficult market". That Notice provided practical suggestions about what brokers should do in a hard market in specific situations, such as:

- in advance of renewals,
- when dealing with new clients when attempting to find coverage for them,
- when submitting applications to insurers for new coverage,
- how to alleviate pressure on insurers when submitting renewal applications

On March 5, 2020 the Insurance Council published a new advisory for their licensed brokers: Notice ICN 20-001 Brokering Best Practices.

The new notice mainly reminds BC licensees of Code of Conduct duties and obligations they should keep in the forefront as they deal with clients, for example, requirements regarding:

- how much notification brokers must give clients prior to the expiration of existing policies and where the coverage may be difficult to place;
- the duty to advise clients and the requirement to disclose information relevant to the client's needs and circumstances; and
- putting clients' interest above their own interests.

The March advisory also stresses the importance of providing education to consumers about the current market conditions and reminds brokers of the vital role they play in protecting the interests of the public.

As a "best practices" guide, the March advisory mainly reminds brokers of their duties under the Code of Conduct – it does not set out specific, practical steps brokers can take. For such information, the Insurance Council recommends brokers refer back to the guidance they issued in 2003.

"It's a tough market for insurance, and while brokers don't set insurance rates, pricing and market conditions do have an impact on their ability to provide clients with the coverage they are seeking at the premiums they are used to. An additional challenge for brokers is that the general public may not make a distinction between the insurance agent and the insurance company that offers the product and sets the premiums," says Kandace Hopkins, Director, Practice and Quality Assurance, Insurance Council of British Columbia.

"It's therefore important that brokers help their clients understand the nature of current market conditions, and make sure they are informed of any changes in coverage in a timely way. We believe that, through diligent and ethical practice, brokers have an important role to play in ensuring that consumers' interests are protected," says Hopkins.

In addition to regulatory-type guidance, some insurance companies are providing information and tools for brokers to help them as they explain the hard market. RSA, for example, has published a simple infographic designed to help brokers "understand and explain hard market trends to your clients". It sets out in very straightforward language factor driving premium rate increases.

"Many insurance companies are trying to help brokers in terms of explaining the hard market because ultimately, the better armed brokers are with the facts and explanations the better off everyone is – the customer, the broker, and the insurer," Arndt says.

Practical advice

The most practical advice seems to be for brokers to really be proactive about communicating with clients and educating them about what's driving the hard market and offering advice about risk management techniques that might help their risk profile. Or, as one commentator from the U.S. put it, brokers can help mitigate "some of the hard feelings around the hard market by increasing their value proposition."
"It's a very difficult time for brokers, but we think they should be talking to their customers as early as possible before renewal time. They should be explaining why premiums are going up and helping them understand why. They should also be advising clients on ways they may be able to manage some of their risks to make themselves more attractive at renewal time," says Peel. "For example, maybe a pre-inspection to point out to the client things they can clean up to make them a more attractive risk for the insurers. And discuss options like increasing deductibles to help reduce the premium, or maybe consider accepting a lower limit," he says.

"Communicating with clients ought to be a day-to-day thing so that clients understand what's driving the market," says Arndt. There are the usual factors to explain to clients – like the interplay between underwriting profits and investment income that contribute to insurance companies' bottom lines. There's also the impact claims payouts have on underwriting profits. Another big change since the last hard market is the role of data and improved analytics, which have provided insurers with a trove of information that can drive decisions about exiting certain markets. But, Arndt also thinks part of the story worth talking about with clients is that "to a large extent, the credit for why we haven't had the usual seven-year cycle has to do with the fact that insurance companies have improved their way of doing business and that has really helped smooth the bumps that used to drive the seven-year cycle," he says.

Arndt also stresses to brokers in his firm that they should always go back to basics. "I think brokers should be advising clients, for example, to look at different things they might do to better manage their risks. We should be encouraging clients to look at what potential losses they could have, and how to reduce the chance of something happening. So maybe the client should look at what industrial risks they face and what systems and processes they have in place to lessen the severity in the event something happens. It's all back to the basics," he says.

Arndt sees another reason why it's so important at this point to educate staff and clients about what a hard market means. "The last hard market we had was 2003 so really, there's a whole generation of insurance professionals that have never faced a hard market. It used to be hard markets were on about a seven-year cycle – but now it's been over 15 years. So, we're finding that we have to educate our staff about it because about 70% of them have never gone through a hard market.

Arndt also makes the point that it's not just a generation of brokers than haven't seen a hard market, "it's true of every involved – staff at the insurance companies and clients too. So there's a lot of talking about what I call getting back to basics," he says.

Ethical issues

Though brokers may find themselves having harder conversations with clients these days, the hard market in and of itself doesn't present unique ethical issues or dilemmas. Regardless of market conditions, "you always try to understand your client's needs – for example, do they view insurance primarily as a risk framework and they figure that the business can absorb the risk up to a certain deductible, or are they unable to do so. Things like that," says Arndt.

Weathering the market

As hard as it might be for brokers to weather a hard market, doing so has its rewards. "A hard market is the time when the value of brokers can really stand out," says Arndt. "It may seem counter-intuitive but a hard market is when well established brokers who really know what they're doing and who have long-established relationships – can make a difference. Having the experience and relationships doesn't necessarily mean you can mitigate the difficulties for all your clients, but you can help," says Arndt.

"In this kind of market, brokers are able to prove the value they offer and to really be of help to their clients, which is really why we got into this business – it's very satisfying to help people," he says.