

HOT TOPICS FOR INTERMEDIARIES

Last month a partner and a senior associate at Clyde & Co LLP presented a Technical Forum focusing on a number of topical issues for intermediaries. They considered some recent developments in case law and discussed two FCA Consultations that are currently underway. They also considered some evolving risks and touched on what they considered may be in store in future. The Technical Forum covered a great variety of issues and this Bulletin intends to provide only a high-level summary of those matters. The PowerPoint slides and a full recording of the Technical Forum are available on the Member Portal. We recommend that this Bulletin is considered in tandem with the slides and recording.

DUTY OF FAIR PRESENTATION

The Insurance Act 2015 (the “Act”) imposes a duty on business insureds to disclose material circumstances that they know or ought to know. A material circumstance is anything that would influence the judgment of a prudent insurer in deciding whether to accept the risk and on what terms. The insured’s knowledge encompasses actual knowledge, ‘blind eye’ knowledge (things you would know if you were not deliberately looking away) and constructive knowledge (matters coming to light from a reasonable search). There is no definition of ‘reasonable search’ in the Act, as this will depend on the size, nature and complexity of the business. It may also extend to information held by you as the client’s intermediary.

There are a number of duties that brokers owe in this regard, aside from the obvious of advising the client that a duty of fair presentation exists:

- Explain what types of matters need to be disclosed.
- Consider the types of questions that may coax information that the insured might otherwise not consider relevant.
- Explain the consequences of failing to make a fair presentation.

The English courts recently handed down the first decision concerning the application of the Act, the only previous case having been decided in Scotland. In *Berkshire Assets v AXA Insurance*, the court held that the insured had failed to undertake a reasonable search, which would have revealed that one of the insured’s directors had previously been charged with a fraud-related offence. Previous case law had found that the charge of a criminal offence is material. The court in this case held that this criminal charge was material to the risk, the insured should have made enquiries of all directors to check for such history, and that the insurer would not have written the risk if it had known. Therefore, the insurer was entitled to avoid coverage. The case demonstrates that the court still considered pre-Insurance Act case law to be relevant and applicable. Although this is just the first case decided by the English courts under the new regime, it is likely to be indicative of the future approach.

Risk Management Message

There are some practical steps that can be taken to help ensure a smooth disclosure process and a fair presentation of the risk:

- Advise your client as to what a reasonable search means and ask the right questions to elicit relevant information from the insured. Do not assume your client will remember advice that may have been given at previous renewals – repeat the advice.

- Ensure that the renewal process starts in good time, to allow for reasonable searches to take place. Remember that any information that you, as broker, are aware of may be material to the risk.
- Do not assume that an insurer will remember information previously disclosed – treat each renewal as a completely blank slate.
- Always keep written records of the renewal process. This will help record what information has been requested or provided, and will lend clarity in the event of a dispute.

AGGREGATION

Where an aggregation clause is included in a policy wording, two or more separate losses may be treated as a single loss for the purposes of limits of indemnity and deductibles / excesses. This principle is not as simple as it sounds due to the wide variety of language used in these aggregation clauses. Whether or not a particular clause will respond in any given scenario will depend on the words it contains, and the facts of the particular case.

The 2022 Court of Appeal decision in *Spire Healthcare v RSA* affirmed that the wording “*all claims... consequent on or attributable to one source or original cause*” is well-known to have a broad meaning and wide effect. In this case, the original cause was a pattern of deliberate behaviour by a surgeon who operated on hundreds of patients over 14 years in hospitals run by Spire.

Previous case law has indicated that aggregation language that includes references to “*acts or omissions*” is to be interpreted narrowly – mis-selling a pension, for instance, is a single act, but multiple mis-sellings based on a lack of training across a company may not be. “*Events*” are to be interpreted more widely, as they take place at a particular time, e.g. the destruction of multiple planes during the military capture of an airport. “*Occurrences*” may be held to be broader in scope than events, but can be held to be the same. “*Causes*” or “*originating causes*” are broader still.

Trigger language can also be drafted to be narrow or broad in scope. “*Resulting from*” is generally accepted to be as narrow as possible. “*Arising from*” has been interpreted more broadly, a “*related series*” is broader still, and “*consequent upon*” and “*in connection with*” are the broadest possible triggers.

Clearly, aggregation is a difficult topic and there is no cookie-cutter analysis that one can apply to a particular set of words. The words cannot be considered in isolation, as the facts of each notification will determine how the wording should be analysed.

A final word on this: regardless of the language used, you cannot aggregate claims notified across policy years.

FCA CONSULTATION 21/34 ON APPOINTED REPRESENTATIVES

This Consultation on Appointed Representatives (ARs) launched on 3 December 2021 and closed on 3 March 2022. There are around 40,000 ARs and around 3,600 principals operating under the AR regime in the UK conducting all types of business, including insurance. On average, principals cause 50 to 400% more complaints and supervisory cases than non-principals. The aim of the Consultation was to determine the appetite for tighter controls around AR arrangements including:

- a requirement for additional information on ARs to be included on the Financial Services register;
- annual assessments of the financial position, control and resources of ARs, and whether their senior management is acting appropriately;
- greater monitoring of any activities outside the scope of appointment;
- self-assessment for principals; and
- a possible limit on the number of ARs that each principal is permitted to engage with.

Additionally, HM Treasury has called for evidence on whether it may be appropriate to:

- change the scope of the regulated activities that ARs are permitted to carry out;
- require principals to obtain specific permission to be able to appoint ARs;
- impose further regulations on ARs; and
- extend the scope of the FOS complaints regime.

AR arrangements are potentially high risk for principals. They need careful consideration before being entered into, and appropriate monitoring going forward, in view of the liability the principal can incur arising out of the acts of the AR. These proposed regulatory changes may increase the potential for a principal to incur such a liability, but that may not be bad news if it encourages greater scrutiny before such arrangements are entered into. It will certainly enhance the need for regular and robust oversight, by the principal, of the AR's activities, once the arrangement is in place. Although it is not clear how many of the proposed changes will be adopted, the expectation is that there will be significant overhaul of the existing regime.

FCA CONSULTATION 21/36 ON A NEW CONSUMER DUTY

This Consultation on a proposed new consumer duty launched on 7 December 2021 and closed on 15 February 2022. The FCA wants to see a higher level of consumer protection in retail financial markets and the new duty is intended to increase expectations as to the standard of care provided to clients. The duty is likely to be framed in terms of delivering good outcomes for retail clients, and will include duties to act in good faith, avoid causing foreseeable harm to customers and enable customers to pursue their financial objectives.

The FCA is aiming to publish its policy statement and final rules by the end of July and the expectation is that firms will have fully implemented the new requirements by the end of April 2023.

THE FUTURE...

ESG (Environmental, Social and Governance) has been a key buzzword throughout the economy for some time but its significance is increasing on a daily basis. The focus on ESG represents opportunities for new areas of business in the insurance sector but with every opportunity comes some risk. The key is to ensure that any foray into a new area is supported by the appropriate expertise. Climate change is a good example: all three aspects, physical change, transitional change and liability change are moving very quickly and those developing new products and advising clients need to have a solid foundation of expertise and ensure that it is kept up to date.

Cyber threats are another constantly evolving area and these have the capacity to translate into professional liabilities. There have been some recent good news stories concerning data breaches but these have tended to concern consumers where the claimant had not really suffered any loss. In particular, the *Lloyd v Google* decision from the UK's Supreme Court late last year affirmed that a data protection breach in isolation, without demonstrable loss, is

unlikely to sound in damages. However, this is only likely to provide comfort if a data protection breach is minor, self-contained and did not harm the data subject. The issue is more complex where the data breach concerns a professional firm and there has been significant loss. This might be the result of a professional firm being debilitated by an IT security event. This raises issues as to where the cost of any resultant losses will lie, depending upon whether or not it was a 'no fault' incident on the part of the firm. Alternatively the data breach may be due to information having been leaked. In the case of large-scale data protection breaches, the underlying contracts are more likely now to have wide-ranging and extensive data protection language. Practically, it is likely that entities may fall foul of at least some of these provisions.

An interesting question is whether the adequacy of an entity's IT security will be a defence to a claim arising out of social engineering fraud – we know from case law that the inexperience of individual brokers is not a defence to allegations of negligence, so whether this principal applies to the strength of a company's IT security is an area that remains to be tested.

This bulletin is for general information purposes only and does not provide a comprehensive or complete statement of the law relating to the issues discussed nor does it constitute legal advice. In addition, by its nature, this bulletin may be superseded by subsequent regulatory or legal developments. Professional advice should be sought where appropriate in relation to any particular circumstances.

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