

Communicable Disease Exclusion Clauses

The COVID-19 pandemic has forced many communities, governments, and businesses to respond in a number of unprecedented ways. Insurers are potentially facing losses due to COVID-19 and most are restricting cover for renewing insurance programmes by imposing broad disease exclusions.

The scale of the COVID-19 crisis highlighted to insurers the possibility that they could be exposed to a number of coronavirus-related losses across their portfolio — whether or not there was a specific clause in the policy providing cover in respect of the pandemic.

Marsh has applied pressure to major insurers and industry bodies, and developed innovative placement and wordings solutions to seek market leading cover for our clients, despite the new exclusions.

Operation of exclusions

The insuring clause of a property and business interruption policy provides cover for property damage and the resulting business interruption. There are often business interruption extensions that also operate on a “non-damage” basis, depending on the precise set of circumstances. The insuring clause of a casualty policy provides cover for legal liability, which the policyholder has against third party claims of property damage and bodily injury.

An exclusion narrows the cover provided by a policy. The majority of communicable disease exclusions preferred by insurers are absolute exclusions, which are drafted in a similar way as exclusions for radioactive materials. They remove cover for losses connected to the excluded peril, including indirect losses and concurrent losses.

Though the words “indirect” and “concurrent” mean that the exclusion is extremely broad, the excluded element will still have to be connected to the loss for the exclusion to apply.

In the event of a loss, the policyholder carries the burden of proof to show that the loss suffered falls within the scope of the insuring clause or any extension of cover within the policy. It is then for the insurer to prove that a particular loss falls within the scope of an exclusion for the loss to be excluded by the policy.

Indirect and concurrent losses

The causal link language in many of the communicable disease exclusions which are favoured by insurers is particularly wide; often the words “directly or indirectly”, “arising out of”, “attributable to”, or “occurring concurrently” with a communicable disease are excluded.

Illustrative examples

One of the concerns about the breadth of the COVID-19 exclusions is their ability to exclude cover, that an underwriter would in fact be prepared to cover, even where COVID-19 had an indirect connection to the loss.

The following scenarios are intended to be illustrative rather than definitive, as any loss event would need to be considered in light of its specific circumstances, with coverage to be determined by insurers on individual claims.

EXAMPLE 1: A company is forced to shut down its machinery at a plant due to the lockdown. After the lockdown is lifted the client attempts to start the machinery but this causes a pressure explosion.

EXAMPLE 2: Due to unavailability of staff during a period of national lockdown, repair/maintenance activity of an asset is postponed, and thereafter, a damage occurs in which the condition of that asset plays a role.

Due to the breadth of the language used in the COVID-19 exclusions, some clients are concerned that insurers could potentially attempt to decline the claim on the basis that the losses were indirectly caused by, or at least occurred concurrently with a communicable disease which led to the lockdown.

Though the exclusionary language mentioned above broadly removes cover in respect of diseases, it does not restrict cover for those losses that are unconnected to a communicable disease. Even the language “indirect” or “concurrent” requires that there be some causal link between the excluded peril and the loss for the exclusion to apply. Put another way, the existence of the communicable disease exclusion does not automatically suspend insurance coverage for the duration of the pandemic and the insurer must show that the communicable disease was a cause of the loss. The specific circumstances of any claim would need to be considered in light of the precise wording of the exclusion clause to determine whether the exclusion clause will apply. Marsh will work closely with its clients to resist attempts by insurers to exclude claims that are unconnected or have only a tenuous connection with COVID-19.

In addition, Marsh is resisting these broad exclusions where possible, and we are seeking to negotiate alternative, less restrictive versions when pricing considerations dictate the use of an insurer who insists on a communicable disease exclusion.

Marsh response

Marsh has engaged with industry bodies, such as the London Market Association, International Underwriting Association, and London and International Insurance Brokers Association amongst others, to put forward the concerns of our clients.

Marsh has also applied pressure within the London Market and internationally by engaging the Chief Executive Officers and Chief Underwriting Officers of 30 of the key insurers, in order to mitigate against the unintended consequence of the breadth of COVID-19 exclusions. Marsh has constituted communicable disease exclusion working groups at a global level and nationally in order to share market intelligence rapidly, and, to develop solutions in this area which support our clients.

EXAMPLE BROAD COMMUNICABLE DISEASE EXCLUSIONARY LANGUAGE



This policy does not insure any loss, damage, claim, cost, expense or other sum, directly or indirectly arising out of, attributable to, or occurring concurrently or in any sequence with a Communicable Disease or the fear or threat (whether actual or perceived) of a Communicable Disease.



Marsh has also worked closely with Guy Carpenter in order to prevent the reinsurance programmes of Marsh's insurers from containing broad communicable disease exclusions, which would invariably be mirrored in the direct insurance placements, which would negatively affect our clients.

As a result of the conversations that Marsh has had with insurers, a number of market standard communicable disease exclusions for property policies were reissued with write backs clarifying that despite the breadth of the exclusionary language, losses caused by property damage perils of fire, explosion, riots etc., may be covered.

Outlook

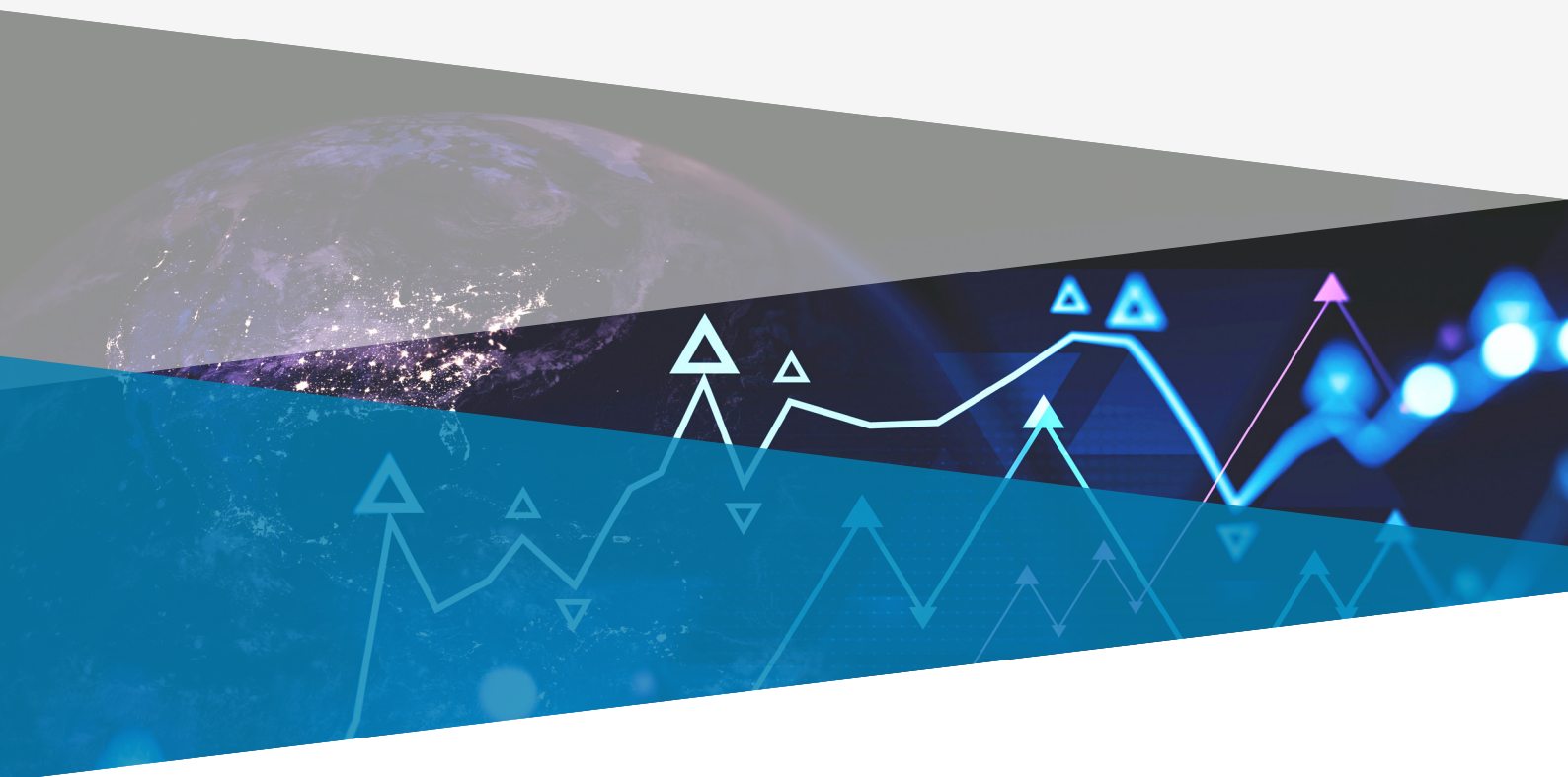
Though it has become increasingly difficult to avoid a communicable disease exclusion in its entirety on property damage and business interruption policies, policies, some insurers have demonstrated willingness to accept write-backs.

In terms of casualty policies, some insurers have attempted to impose disease-related exclusions on our clients in the travel and hospitality sectors, as well as for our clients who operate immigration and detention centres.

Marsh has broadly succeeded in resisting these exclusions on casualty policies, and will continue to resist their imposition. A specific concern for our clients with casualty policies is the potential for losing cover for legionella, which could be excluded by an overly broad disease exclusion.

The current market conditions also exacerbate the challenges in maintaining coverage and resisting communicable disease exclusions when seeking capacity. However, when the circumstances have allowed, Marsh is generating competition between insurers and is recommending insurers who are not insisting on communicable disease exclusions on casualty policies, or are willing to provide appropriate write-backs to communicable disease exclusions in property policies.

By harnessing the scale of our technical know-how and utilising our enviable wealth of placement expertise, Marsh has and will continue to advocate strongly for our clients' insurance coverage.



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