PROFESSIONAL LINES CHALLENGES AND MARKET RESPONSE DURING THE COVID-19 CRISIS

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The COVID-19 crisis has created a host of new management and professional liability exposures, as well as uncertainty in how claims will develop. In this rapidly evolving climate, it's important for retailers to stay on top of the market response in order to help prepare their insureds for rate and coverage changes. In this article, our specialists share general themes taking place across the marketplace and explore how individual segments of the Professional Lines market are being impacted by this pandemic.

OVERALL MARKET RESPONSE

Regardless of whether the account is impacted by COVID-19, underwriters are tightening the reigns across most lines of coverage in the Professional Lines sector. While claims have not yet begun to trickle in, carriers are anticipating losses. Accounts which were straightforward and could essentially name their own terms a year ago are now proving to be very tough with numerous markets declining even to quote. Some carriers are issuing moratoriums for all Private D&O and EPLI business in New York and New Jersey, there is additional hardening and further limiting of carrier appetites in California, and go-to writers of tough risks have started to pull out of the space entirely.

When a quote is provided, insureds are looking at a 25-50% rate increase with little to no room for negotiating terms and conditions. Retailers should begin conversations with insureds early and bring accounts to market well before the renewal date to account for this difficult marketplace. Where applicable, insureds may be better served by sticking with the incumbent carrier(s) to retain continuity during these turbulent times, rather than change carriers to save a nominal amount of money.

Underwriters are asking many questions about how the insured is handling their business and workforce during the pandemic. For Management Liability packages, even those that don't include EPLI, underwriters are including questions in the application around the company's expectation of layoffs over the next year as a result of COVID-19. The application may also ask if layoffs occur, does the company intend to bring all employees back after the pandemic ends? These are difficult questions to answer unless the company has already made layoffs and carriers could use these statements to deny claims down the road. Our specialists advise insureds not to give a definitive yes or no answer, but rather to add a note in the margin that they are monitoring the situation carefully as it develops.

EXPOSURES AND COVERAGE CONSIDERATIONS BY LINE

Directors & Officers (D&O)

A company's directors and officers face many exposures in the wake of the COVID-19 pandemic, including assertions that not enough was done to prepare the business ahead of time; employees, shareholders or customers were put in harm's way; or the company's connectivity or actions taken in the wake of the pandemic were inadequate, unsafe or discriminatory.

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Additionally, allegations could arise in the form of derivative claims from shareholders including inadequate cash reserves, an unhealthy balance sheet or debt loads which became magnified when limited revenue made debt payments more difficult. It is important to note that stock prices do not have to drop for lawsuits to be brought against a company's directors and officers.

Prior to the pandemic, the D&O market was already under significant stress. There has been a rise in event-driven litigation over the past few years and with the scale of the COVID-19 crisis, more litigation is likely to occur.[1] The vast majority of claims are not expected to surface until the pandemic is over and lawsuits begin.

To date, only a few D&O carriers have added communicable disease exclusions, primarily on Private and Healthcare D&O policies. However, another coverage limitation to be mindful of is the bodily injury exclusion, which has two preamble versions. In "For" preamble exclusions, the policy excludes any claims **for** bodily injury. In this instance, coverage is afforded except for direct bodily injury costs such as medical bills. In "Absolute" preamble exclusions, the policy excludes anything based upon, related to or attributed to bodily injury. Carriers are now moving toward absolute preamble exclusions to avoid being on the hook for any disease, sickness or death-related claims, whether the situation is a direct result of or simply related to COVID-19.

Which exclusion is used on an existing policy depends on what was negotiated prior to the outbreak. Retailers may get lucky and be able renew the "for" preamble wording that was in place prior. If the carrier does change to absolute wording on the renewal, carveouts could be added to the exclusion to mitigate the impact or existing coverage could be tailed out to address claims that arise from past acts. Thorough review of policy wording and partnering with a wholesaler that has in depth product knowledge is critical to ensure the most favorable terms are secured for insureds.

Employment Practice Liability (EPLI)

EPLI was one of the first lines of coverage to see impacts from the pandemic. Some carriers have completely stopped writing this business, incumbents have refused to grant higher limits to risks mid-term, and other responses vary based on the class of business involved. For example, restaurant groups and other companies associated with the hospitality sector are seeing terms on renewals change drastically.

This is not surprising given the significant exposure facing employers including a variety of employment-related claims arising from discrimination, harassment or other grounds. Potential claim scenarios include:

- Discrimination or harassment claims resulting from unfair targeting of certain employees during furloughs/layoffs due to race, sex or nation of origin.
- Invasion of privacy concerns arising from employees being questioned about personal travel or their or their family's health history, including exposure to the virus.
- Disability discrimination (ADA) claims arising if proper accommodations are not provided to employees while working from home or employees not given the option to work remotely.
- Negligent evaluation claims resulting from management asking employees to return to the office too soon.

While carriers are reluctant to give risk mitigation advice, some are now requiring companies to consult with an attorney prior to any layoffs. Our specialists agree that when a company is forced to lay off or furlough employees, they should consult with an employment attorney to ensure proper procedures are followed, including having waivers or release forms signed to absolve the company of liability.

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Cyber

Cyber criminals are not only capitalizing on the public's fear and distraction associated with the pandemic, they are also taking advantage of security vulnerabilities resulting from employee use of personal devices. This has increased the risk of cyber-attacks faced by all companies. Examples of cyber-attacks taking place during the pandemic include:

- An email falsely sent from a company CEO addressing COVID-19 disruptions and containing links which, once clicked, give access to the user's computer systems.
- Phishing emails purportedly coming from the World Health Organization or other hospitals with embedded malware. For example, in February 2020 there was a post on the "dark-web" hacking forum selling malware that could be inserted in the John's Hopkins real-time infographic map of confirmed COVID-19 cases.
- Seemingly official text messages providing links which, when tapped, expose targeted phones to malware. For example, a text may state: "You have received a new message regarding COVID-19 symptoms and where to get tested in your area. Visit this link for more information."

These attacks are often targeted at older generations who are most at risk and concerned about contracting the virus. Throughout March 2020, malware was the most common (39%) cyber-attack technique, followed by account hijacking (17%) and targeted attacks (12%).[2] Many insurance carriers are providing their own risk mitigation tips and tools for insureds.

With the majority of corporate America working from home, there is increased pressure on IT departments to maintain accessibility and defend their companies from cyber-attacks. Since even the best of systems are not completely impenetrable and subject to human error, securing a robust Cyber Liability insurance policy is a key component of a company's risk management strategy.

Since many organizations are unable to issue a laptop to every employee, they rely on personal devices that often don't have the same level of encryption as company-issued devices. Because of this, it is important to be aware of exclusions that limit or remove coverage for unencrypted devices and to make sure that coverage applies to employee-owned devices including computers, tablets, smartphones, etc. Some policies define "Computer Systems" as such devices owned or leased by the organization, not an employee. Other policies only extend coverage for claims where an employee device is lost or stolen.

We have yet to see many claims reported as a result of COVID-19 cyber-attacks and there have not been any new communicable disease exclusions added to Cyber policies to-date. In general, there is still a significant amount of capacity in this space and Cyber carriers are using this as an opportunity to write more business.

Crime

In the crime sector, a general uptick is expected in fidelity and theft losses associated with layoffs and economic downturn, as well as burglaries at facilities that store medical equipment. Social Engineering, False Pretense, Fraudulently Induced Transfers and Computer Fraud also expect an increase in loss activity as criminals use the pandemic as a scare tactic in hopes of getting people unfamiliar with working remotely or overwhelmed by the increased volume of email to respond with payment or other confidential information.

There are no communicable disease exclusions yet in the Crime market. Although carriers continue to monitor the situation and draft exclusion wording, they don't have a coverage trigger to tie it to yet.

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MOVING FORWARD

The lasting impact of COVID-19 on the Professional Lines marketplace remains to be seen as the bulk of claims will be brought to the table as businesses return to normal. Until then, retailers should be proactive and go to market early for new business and renewals as placements in most areas of Professional Lines are anything but easy.

The Professional Lines specialists at AmWINS have unparalleled market access and product expertise to handle a wide range of account sizes and complexities. With nearly 300 dedicated practice members nationwide, we are continuously sharing knowledge and market insight to help our clients stay abreast of changes and navigate this challenging marketplace. We remain in close contact with our carrier partners regarding their current position on terms and coverage response. If you have questions on a specific account or carrier, please reach out to your current AmWINS relationship or David Lewison, AmWINS' National Professional Lines Practice Leader.

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SOURCES

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