POLLYANNA DEANE'S INSURANCE COLUMN: JUNE 2020

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In her column for June 2020, Pollyanna considers the impact of the COVID-19 pandemic on the insurance sector both now and in the longer-term.

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I was hoping to get away with not mentioning the current situation or coronavirus – given the number of lawyers who've written on aspects of it and mostly the same kind of articles on the same topics. Initially I am sure that a lot of pieces received many views but, as fatigue has set in, there's not much to be gained (in my view) from re-hashing old news.

So, I thought I'd look at the current events and see what interesting matters there were to be considered.

BAD PR OR POOR INTERPRETATION – BI AND OTHER INSURANCE

Hiscox (along with QBE and Aviva) have been in the news because of their failure to respond under Business Interruption (BI) policies, leading to a class action by SMEs against Hiscox. Around 400 firms were reported to have joined the Hiscox Action Group. The emotive language on the HAG website is interesting, but equally attempts to make the insurance industry pay for the pandemic are surely doomed to failure. Isn't it the case that there simply isn't the capital? Meanwhile, the destruction of one of the industries that might just be able to help going forward is obviously not sensible. So how could the insurance industry assist going forward?

The FCA is taking a test case over the BI problems. Lloyd's chairman, Bruce Carnegie-Brown, has called for a focus on the actual contractual position on COVID-19 covers – Courts do not allow anyone to negate cover simply to avoid catastrophic losses to the industry. But the regulator is clearly concerned – as Christopher Woolard, the FCA's interim chief executive said on 1 May 2020:

> "We have been clear that we believe in the majority of cases, business interruption insurance was not purchased to, and is unlikely to, cover the current emergency. However, there remain a number of policies where it is clear that the firm has an obligation to pay out on a policy ... Our intended court action is designed to resolve a selected number of key issues causing uncertainty as promptly as possible and to provide greater clarity for all parties, both insured and insurers."

This is undoubtedly going to be helpful, but one of the problems that is going to remain is the bad taste left by people having been sold policies which they thought gave them comfort and then turn out not to. The brokers association, BIBA, has described the industry as getting "hammered" by COVID-19 but when you look at the explanation, it's rather more the case that the bad publicity is what is doing the hammering rather than the payment of an increased number of claims. Brokers who sold these policies are also likely to come under fire for exaggerating the protection that they offered. I anticipate more to come on that in due course. Still, we are already seeing revised forecasts from insurers usually anticipating losses caused as a result of the virus and an increased number of articles in the mainstream media on insurance, for example, The Daily Telegraph, 16 May 2020 "Insurers become villains of the Covid-19 crisis" – at least more than I'm used to, which suggests that there is a problem growing for insurers, not to mention brokers, which needs to be addressed.

Remember the famous San Francisco earthquake telegram that cemented the reputation of Lloyd's in America for so long? I think it makes sense for the industry to work with the regulator and look at what is needed both now and in the near future, and whether or not they can clarify terms and continue to offer cover – particularly focused on what is working, instead of just bolstering exclusions and adding the carve outs (which are also flowing thick and fast). Traditionally, as the old saw has it, insurers have underwritten policies easily and only engage on the occasion of refusing a claim. Changes driven by the Insurance Act 2015 and earlier have changed matters, moving from the duty of utmost good faith to a duty of fair presentation, but there are still policies out there which have not been scrutinised carefully enough or where advice given at the time of sale will be found wanting. Finally, are we going to see the end of the Delegated Underwriting Authority or perhaps far more scrutiny and greater control over those wielding the pen? Given the extensive number of wordings which companies appear to have had to cover business interruption, it seems to come from a rather laissez faire attitude to outsourcing, which surely, for capital preservation alone, cannot be allowed to continue.

The Act itself makes it clear that more due diligence up front is where the insurer benefits and a bit more focus on what the contract actually says would help – ideally, policies are tested for clarity before agreeing to something with (potential) policyholders. "Wordings" which have long been disregarded are key here. But, as we are all increasingly finding, the stonking benefits of hindsight are not to be underestimated and it is insurance's role to manage the foresight. It is that which means we need to consider the role of insurance post-crisis and where and how it would be best placed to help.

THE ROLE OF INSURANCE IN HEALTH PROVISION

Health insurance and the support that it could give us in the provision of healthcare has long been talked about – but perhaps the changes in approach which are being speeded up thanks to the pandemic could be harnessed. Indeed, we are seeing commentary to this effect, helped along by some of the more egregious failures on the part of our bureaucracy in managing the crisis – PPE supply, testing services and public messaging to name but a few. We have seen, unprecedented in recent times, collective responsibility being shown by the populace, if not the politicians. But this really gives us an opportunity to look at how this could be better done, looking after the bits that worked and taking charge of the bits that didn't. There is much to be said for the insurance companies who have managed to keep working and assessing and paying claims in the current situation – indeed, BAU has largely been just that albeit that we are working remotely. Moreover, it is clear that insurance has worked well for those countries whose healthcare follows the social insurance model. Some serious consideration needs to be given to funding our health services going forward, with less emphasis on the centralised model and more ability to flex a local and individual model that could be provided with the support of the insurance industry. I know that the Swiss wrestle with costs increasing annually and there are pros and cons, but we should definitely be discussing this and surely it would be a useful area that the insurance industry is well-placed to help with.

Companies with a mutual-type model, such as Laka, could be used as a basis to harness the virtue of collective responsibility (which is one reason suggested as to why the Swiss approach works well). The collective responsibility extends further than simply the policyholders, it is a wider public/private healthcare system which insurers could certainly back, linking with doctors and healthcare professionals. We have seen local initiatives being undertaken in a thoroughly centralised system, showing the folly of a straitjacket-ed approach. We will also need to look at potential reform to tort and negligence – moving the NHS indemnity scheme for medical staff to the private sector and using the funds to manage the new provision of healthcare through social insurance might be a way forward.

The Swiss federal system allows that to happen and with 80 insurers in the business of health insurance provision there, competition with constraints – a basic product which is offered to everyone, for no profit, supplementary services charged at a profitable rate and an after the event risk mitigation programme, all suggest that the system is worth looking at and shouldn't simply be rejected because "we don't need to change". It is the point of disasters that they force change – something of the figures for the Royal Navy which point to 9 out of 10 changes being driven out of a disaster. When I make these suggestions to those of my friends who are GPs, they dismiss the idea, but changes will undoubtedly be coming and it seems to me that one of the growth areas will and should be health insurance. While the growth of the "nanny state" has been all too evident over the last few months, few can now doubt the wisdom of insurers having detailed questionnaires and asking for increased premia where underlying problems are in evidence. Increased exercise in lockdown is something that we are reportedly taking. I live opposite the Marsh building and am somewhat entertained by a regular jogger – running around the offices inside the building. Personally, I prefer the idea of fresh air and exercise, but it's a City of London equivalent of the Mall walk – I suppose.

LIFE ...

I am also interested in the discussion in the life industry over the actuarial impact of the virus – Milliman have set out their thoughts in their latest papers on underwriting in the light of coronavirus ... but note that there is little that can be relied on and time will tell. Interestingly, they comment that now is not the time to be automating your underwriting "Underwriters are probably more important now than ever, so don't move to automating more decisions at this point". Talking to underwriters at this time, they have reported making more judgement calls than usual – so the thought of loading all those comparators into an algorithm is clearly not ideal. We imagine that automation is going to be the buzz word at the moment – I imagine that the only way we are going to be able to get socially distanced train and public transport travel will be with more trains and thus their automation looks to be fast-tracked.

Of course, the likelihood is that the numbers of deaths are within the manageable parameters for the life industry, certainly I've not heard of any suggestion that this is not the case. Those in general insurance are wondering at this, but those in the health and life sectors see it as only to be expected. I wonder what would move the dial, but am not inclined to seek out yet more Armageddon-type projections at the moment.

GETTING AWAY FROM IT ALL

Whatever the situation for health and life, travel insurance now looks to have been remarkably cheap and only possible to achieve at the low levels thanks to volume. The retail sector does appear to be bearing the brunt of the crisis. Talking to a lot of the commercial carriers, they are not reporting anything like the bad news and being thankful for the diversity of the covers that they offer. Are we looking at the diversity ushered in by the 2008 financial crisis, Solvency II and the demise of the monolines set to save the industry? While the regulators have been doubling down on customer experience and detriment, with strictures being issued from Stratford to this effect and the BI test case to back it up, it would be helpful to know if the regulator is thinking how best to support the insurance industry and consider some innovation and strategy to help get things moving again, rather than regulate, regulate and regulate.