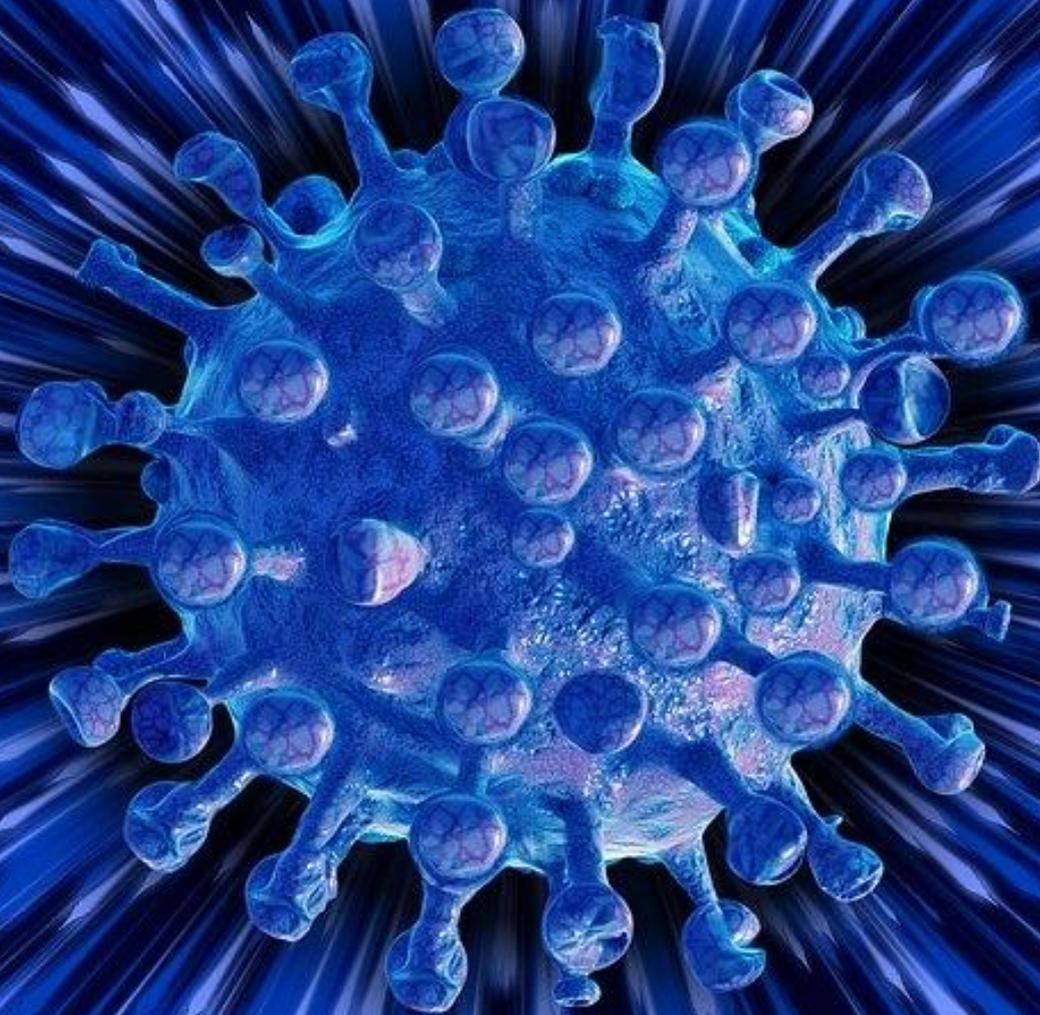


# COVID-19 Newsletter

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*Edition 10*

*5<sup>th</sup> June 2020*



# Beach

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## General Outlook

As the FCA named 8 insurers to be actively involved within the High Court business interruption test case in July, a letter signed by some of the UK's largest insurers reached the desk of the Economic Secretary of the Treasury, requesting that £1bn of surplus reserves be released by Pool Re to establish an SME relief fund. Unsurprisingly, there were common members across both groups. It is understood that this request – the first formal version of its kind – is opposed by the board of Pool Re.

Looking more to the future of pandemic risk, Stephen Catlin is gathering momentum behind his Pandemic Re Steering Committee. Amber Rudd has been assigned as its liaison to Downing Street. We consider the contents of the committee's six working groups in more detail later.

As civil unrest continues to rage in the United States, some market commentators are moved to consider 2020 as being a potential capital event year for carriers. With the hurricane season underway, the Beach Hurricanes Team reported that the consensus of forecasts is indicating an above average season. High Atlantic sea surface temperature (SST) and a potential La Niña are the main drivers of the forecasts. The COVID19 pandemic could mean that disruption and cost caused by a hurricane landfall or near miss this year, would likely be considerably amplified. The marine market also faces aggregation concerns, as vessels ranging from pleasure yachts to cruise ships are sitting dormant along the East coast of America and the Caribbean, currently unable to depart. We might be set to see a black swan swimming in a perfect storm.

### Are we falling behind in Europe?

According to P2P Protect, a French peer-to-peer insurance agency, as of the 1<sup>st</sup> of May in Thailand, 7 million COVID-specific insurance policies had been signed with premiums ranging from \$7 to \$38 (USD). Thai broker TQM and Bangkok Insurance are selling a policy offering \$1,600 of coverage for a premium of \$10. Singapore have over 20 forms of COVID insurance on offer, both on a traditional and peer-to-peer basis. China's number is well over 60.

### AD / BC

In the words of The Economist's Bartleby, we are undergoing a transition from BC (before coronavirus) to AD (after domestication). Our market continues to be wrenched into AD-modernity, as Lloyd's announced that they will be operating a virtual underwriting room, accessible anywhere and offering the best elements of the physical room but in an online world. We are well armed to dive rapidly into a new age of work, but there will be a balance to be struck. Alongside the clear benefits of the new working world, the more intricate pitfalls should be considered. Professor of Sociology at Stanford University, Mark Granovetter, stresses the "strength of weak ties" in idea generation, support networks and unity. The stronger a tie within a dyadic relationship, the greater the overlap in their social spheres, leading to a restricted pool for inspiration and knowledge. Working remotely, employees have greater control over who they communicate with and are likely to stick to a core unit – missing out on opportunities for crosspollination. The pathway ahead should be carefully considered.

This week we look into more detail at the FCA's proposed test case and the Pandemic Re Steering Committee. In addition, we will consider some recent developments in the US D&O market.

## Pandemic Re

In mid-April, Convex CEO Stephen Catlin spearheaded a new group to coordinate the insurance industry’s response to Covid-19, looking to provide an industry solution that tackles both the current crisis and any future repeats. Pan Re, as it is being referred to, includes executives with many years of combined industry experience. It is comprised of a project committee and 6 working groups as follows:

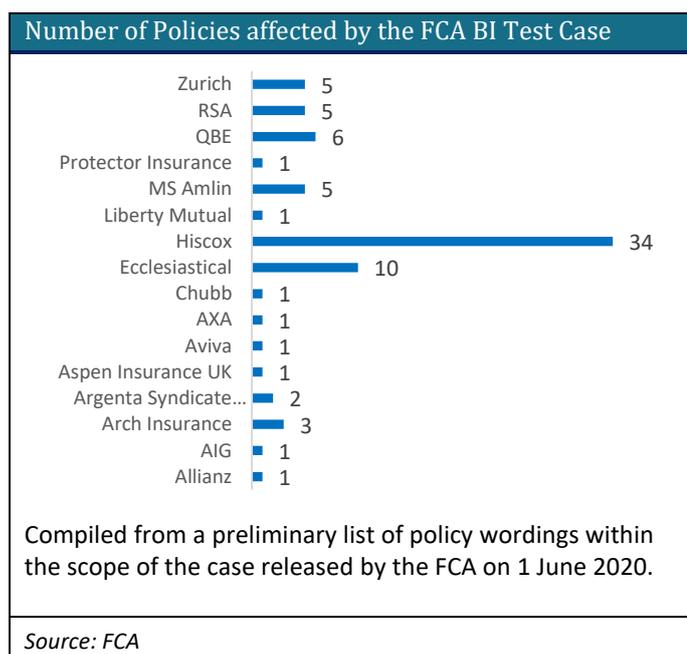
- Customer engagement and distribution – led by Aon UK CEO Julie Page with Marsh UK & Ireland CEO Chris Lay as deputy
- Technical insurance – led by Steve Coates, CUO Pool Re
- Modelling and data – led by Paul Jardine, Chairman of Asta and Chaucer
- Scheme structure and operating models – led by Michael Dawson, Nuclear Insurance
- Pandemic preparedness and mitigation – led by William Marcoux, senior corporate lawyer
- Legal regulatory and government affairs – led by Amber Rudd, former Home Secretary

In initial reporting on Pan Re, it stressed the necessity of state backing from both the Treasury and Downing Street. On 1<sup>st</sup> June 2020 it was announced that Amber Rudd, former Home Secretary, would be leading the Legal regulatory and government affairs team and would be tasked with securing buy-in from the necessary bodies. She however, is just one of many top industry executives that are devoting their time to Pan Re, which has also received backing from Lloyd’s, who have also agreed to provide resources to some of the work streams.

It is also believed that the inclusion of Pool Re in this organisation may hint that the £6.6bn surplus that Pool Re currently holds could be used to help Pan Re. This would not only require a unanimous decision from Pool Re’s board but a super-majority vote of its c.150 members. This notion therefore, is purely speculative at this stage.

## FCA Test Case Update

The FCA has approached 56 insurers, reviewing over 500 different policies to amass a representative group of policy wordings to be examined in their test case. It has identified a sample consisting of 17 policy wordings that captures the majority of issues involved in BI disputes. The chart alongside lists the 16 insurers who directly use at least one of the representative samples of policy wordings, with Hiscox reportedly having 34 affected policies compared to the next highest from Ecclesiastical, with 10.



The initial list of insurers and policy wordings used is not exhaustive, and so the FCA is also now publishing a consultation on draft guidance, further asking all insurers to check their policy wordings against those that are intended to be tested, to see if theirs will be impacted by the case. The FCA plans to publish a list of all relevant insurers and policies that may have impacted wordings in early July. This consultation on draft guidance also sets out the FCA's expectations for how firms should handle BI claims, as well as any relevant complaints.

The thinking behind the test case is to provide clarity in an unprecedented situation, allowing legal guidance for the masses, without the need for individual SMEs to undergo expensive and lengthy legal battles. Although not all policy wordings will undergo screening, the expectation is that the policies selected will provide guidance for the interpretation of many other BI policies. The test case will become a case study, and the basis for many future BI related disputes.

As a result of these recent steps taken by the FCA, multiple insurers have admitted liability to company owners under BI insurance policies. In a statement on Monday, the FCA said "A number of the relevant insurers decided to accept claims from policyholders with certain policies which included particular wordings which had previously been in dispute." Others however, have taken a different approach; several insurers who underwrite policies in the representative sample have agreed to assist the FCA by participating in the High Court test case. This list includes Arch, Argenta, Ecclesiastical, Hiscox, QBE, RSA, and Zurich.

### Future Timeline<sup>1</sup>

- 9<sup>th</sup> June: FCA files claim form and particulars
- 11<sup>th</sup> June: Case management conference, at which the court will be invited to fix the timetable for the case
- 23<sup>rd</sup> June: Insurers file defences
- 26<sup>th</sup> June: Further case management conference
- 3<sup>rd</sup> July: FCA files reply
- 1st half July: Skeleton arguments and replies served
- 2nd half July: 5-10 day court hearing

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<sup>1</sup> Source: <https://www.fca.org.uk/news/press-releases/update-fca-test-case-validity-business-interruption-claims>

## Class Action COVID

Prior to COVID-19, the D&O insurance market was already undergoing a period of remedial correction in terms of both pricing and carrier appetite, following years of soft market trading conditions and heavy losses. However, the initial impact of the pandemic alongside some of the longer-term effects is already being realised, such as the largest rises in unemployment since the 1930's. This is set to generate a genuine threat of a global economic slump, only comparable to the economic contraction experienced in the 1930's Global Depression.

These circumstances have caused an even greater pricing surge within both the Public and Private D&O market, where in some sectors, namely US listed companies in the aviation, retail and hospital sectors, triple digit rate rises have become a norm, as underwriters attempt to value of risk of future litigation against financially distressed entities.

Rather than looking towards future claims, this article summaries the litigation that has been filed to date regarding COVID-19 related claims.

### D&O Claims To Date

#### Xperi & TiVo Merger

On 15<sup>th</sup> May, Xperi shareholder, Local 464A United Food and Commercial Workers Union Pension Fund, filed a class action complaint in the Delaware Court of Chancery against Xperi's board of directors. On behalf of all holders of Xperi's common stock as of February 21, 2020, the suit concerns the agreed \$3 Billion stock-for-stock merger between Xperi and TiVo, dating back to December 18, 2019, (before the coronavirus outbreak). On the 22<sup>nd</sup> April 2020, Xperi issued the final proxy statement with respect to the merger; the special meeting to vote on the merger was scheduled for the 29<sup>th</sup> May, which went ahead successfully. Among other things, the plaintiff details the shareholders belief that the defendant board members breached their fiduciary duties by failing to provide investors with adequate disclosures about the impact of the coronavirus outbreak on the deal and failing to reassess it in view of the fact that the pandemic represents a 'material adverse event' under the merger agreement.

#### Elanco Animal Health

On the 20<sup>th</sup> May, a plaintiff shareholder filed a securities class action against the Elanco Animal Health board of Directors. The complaint alleges the directors failed to disclose to investors that, after reducing the company's distributors from eight to four, the company increased the amount of inventory held by each distributor, with the distributors then experiencing insufficient demand to sell through the inventory, and as a result, that the company's revenue was likely to decline. The lawsuit is on behalf of all investors who purchased company securities between January 7<sup>th</sup> and May 6<sup>th</sup>, 2020. According to the complaint, share prices declined over 13% on news of Elanco's 9 percent revenue decline in their Q1 report.

#### Sorrento Therapeutics

Sorrento is a Biopharma company that researches human therapeutic antibodies for treatment of cancer, inflammation, and infectious disease. On May 8<sup>th</sup>, they announced a collaboration with Mount Sinai Health System, with the sole purpose of "generating antibody products that would act as a

protective shield against SARS CoV-2” potentially blocking and neutralising the activity of the virus in recently infected individuals.

In a press release on May 15<sup>th</sup>, Sorrento announced they had discovered an antibody that had “demonstrated 100% inhibition of SARS-CoV-2 virus infection”. Their share price subsequently rose 281.7% from the end of trading the day prior to the announcement to an intraday high price on May 18, 2020. May 20<sup>th</sup>, online research firm Hindenburg Research issued a report detailing scepticism of Sorrento’s claims, referring to these claims as “nonsense” and “too good to be true”. Further, claiming employees at Mount Sinai said, “nothing in medicine is 100%”. The CEO of Sorrento appeared on Yahoo Finance the same day, rebutting the Hindenburg report. Following news of these events, share prices fell 43%.

A plaintiff shareholder filed a securities class action on May 26<sup>th</sup> against the directors and officers of Sorrento, on behalf of investors who purchased securities between May 15<sup>th</sup>, and May 22<sup>nd</sup>, (inclusive). The complaint alleges the defendants misinterpreted or failed to disclose that:

- 1) The company’s initial finding of “100% inhibition” in a vitro virus infection will not necessarily translate to success or safety in vivo, or in person.
- 2) The company’s finding was not a ‘cure’ for COVID-19.
- 3) As a result, defendants’ positive statements about the company’s business, operations and prospects were materially misleading and/or lacked reasonable basis.

### Carnival Corporation

Carnival Corporate is the world’s largest cruise ships company. On February 5<sup>th</sup>, 2020, the Diamond Princess cruise ship owned by a unit of Carnival, was quarantined. By March 5<sup>th</sup>, seven of the company’s cruise ships accounted for 49 of the then 70 cruise ship coronavirus related fatalities. Bloomberg later published an article, “Carnival Executives Knew They Had a Virus Problem, But Kept the Party Going”, fuelling belief that Carnival were failing to adequately protect passengers and continued to operate new cruise ship departures despite knowledge of COVID-19. This article was published April 16<sup>th</sup>, Carnival still had two cruise ships at sea at this time.

The ‘Wall Street Journal’ followed with the publishing of “Cruise Ships Set Sail Knowing the Deadly Risk to Passengers and Crew, May 1<sup>st</sup>, including information from an Australian investigation that showed Carnival and its cruise ships may have misled shore officials by concealing those exhibiting COVID-19 symptoms before docking. That same day, a congressional committee initiated a records request to Carnival.

A class action was filed May 27<sup>th</sup> against certain directors and officers of Carnival; on behalf of investors who purchased securities between Jan 28<sup>th</sup> and May 1<sup>st</sup>, 2020. The complaint alleges that the defendants failed to disclose to investors during the class period that:

- 1) Company Medics were reporting increasing events of COVID-19 illness on the company’s ships.
- 2) Carnival was violating port of call regulations by concealing the amount and severity of COVID-19 infections on board its ships.
- 3) In response to the outbreak, Carnival failed to follow its own health and safety protocols developed in the wake of other communicable disease outbreaks.
- 4) By continuing to operate, were responsible for continuing to spread COVID-19 at various ports and as a result of everything mentioned, the defendants positive statements about the

company's business, operations, and prospects, were materially misleading and/or lacked a reasonable basis.

### Summary

There is currently a total of nine coronavirus related securities class action lawsuits, which remains a relatively low number. Industry opinion remains sympathetic towards insureds in the event of litigation relating to preparedness towards COVID-19, due to the systematic nature of the event. Therefore, plaintiff firms continue to focus efforts on event driven litigation at present.

A fear renders amongst market participants regarding market developments as we begin to move past the initial health crisis and progress in the wider economic downturn that will likely ensue. Further lawsuits will likely arise in larger volume as a result of the actions taken during this period, including insolvencies, government anti-trust investigations due to a consolidation in market supply and cyber security standards.

Interested in seeing more Beach content? Take a look at our Pre-Season Hurricane Report through the link below.

<https://beachgp.com/who-we-are/news/>

As always, if you have any questions about any of the content in this newsletter or you might have any enquires regarding the suite of services offered by the Beach team, please do not hesitate to contact any member of the team on the contacts page below. Stay safe.

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