Insurance in focus: From crisis to coverage

Nick Bonsall	Hello and welcome to the latest instalment in the Slaughter and May podcast series. I am Nick Bonsall, I'm the Co-Head of Financial Institutions at Slaughter and May and I am delighted to be joined by Efstathios Michael, one of our Disputes Partners and Tahlia Brysha-Pullen, a Senior Counsel in our Disputes Group. Then we are going to look at the recent reinsurance litigation case of *Covéa v Unipol Re* and then also look at some of the context that led up to that, the lessons that we've learned over the five years since the COVID pandemic hit and a bit of crystal ball gazing, key lessons to learn for drafting insurance and reinsurance contracts and where the next novel catastrophe might come from. So with that in mind Effy, you were involved in the *Covéa v Unipol Re* case. Fascinating situation. Perhaps you can give us an overview of what that was about?
Efstathios Michael	Sure. Thanks Nick. Yes we acted for *Covéa*, the successful reinsured in that case. It dealt with novel issues about the application of reinsurance policies to non-damaged BI insurance losses that were generated by COVID pandemic. It particularly raised the questions of firstly whether the COVID pandemic was itself a catastrophe within the meaning of the excess of lost reinsurance coverage and secondly if it is a catastrophe, how many hours in that policy worked in relation to non-damage BI losses? Pleased to say we won on both those points at the arbitration and fortunately to some extent for the market, the fact that the arbitration clause didn't preclude appeals, meant that the case was then heard both by the court of first instance and the Court of Appeal so it provided some much needed published clarity about reinsurance coverage in this situation.
Nick Bonsall	So hold on a second Effy, surely we didn't need to go to the Court of Appeal to establish that COVID was a catastrophe?
Efstathios Michael	That's a good point Nick, and it won't surprise you that's a point we made in the case. But there were some aspects, I think reflective of the reinsurance largely more broadly, which made it possible for reinsurers to argue the contrary position and in particular they embarked on something of an archaeological exercise to try to show that there must be a mismatch between the coverage offered by the insurance policies and the coverage offered by the reinsurance policies and they went back and showed that these reinsurance policies had not really changed since they were introduced into the market in the 1960s and that they focused on the literature describing those clauses from that time, including from the eminent underwriter who drafted them and that indicated that those reinsurance policies and the wording in them was designed to address physical perils. Now that was entirely unsurprising in the 1960s because that's exactly the business that was being underwritten in a property insurance book but the insurance wording evolved from that period and now everyone accepts, it includes non-physical perils including the denial of access type cover that we saw in the COVID cases

	but the fact that the reinsurance wording remained exactly the same then the reinsurers could argue that the reinsurance *only* covered physical perils and the catastrophe *only* related to physical perils and so could not cover the COVID BI losses. Now obviously we ultimately defeated that argument but I think it is important to consider and try to ensure as we'll come on to that we don't have mismatch between our insurance wording and our reinsurance wording
Nick Bonsall	Yeah I see, so effectively a catastrophe would be an archetypal type - it would be a storm, it would be a fire on their interpretation but it's simply because it hadn't contemplated back in the 60s, it shouldn't be viewed as including a non-physical pandemic style catastrophe.
Efstathios Michael	Exactly so. When you look at the sorts of example that are given within the wording itself, for example, in the hours clause, it is all about hurricanes, fires, those sorts, of floods, those sorts of physical perils that at the time you would typically see in your insurance book.
Nick Bonsall	But interestingly it didn't exclude, and this is kind of relevant when it comes to the inwards side of the debate. It didn't exclude the concept of the non-physical catastrophe.
Efstathios Michael	That's right. It didn't exclude it, but I think that the reinsurance position was what it didn't exclude because it didn't include...
Nick Bonsall	…It wasn't intended to.
Efstathios Michael	Yeah.
Nick Bonsall	And what about the hours clause, what was that about?
Efstathios Michael	Well that raised the operation of the hours clause in completely new context as well. I mean as people will know, the purpose of the hours clause is principally to define the period over which losses can be aggregated for the purposes of the reinsurance policy.
Nick Bonsall	Of course.
Efstathios Michael	And while there seems to be a common market understanding at least of how that operated in circumstances of physical damage where you could claim for and aggregate your ongoing losses, even those which related to periods after the hours clause, as long as the physical damage occurred within the hours clause period, there was far more uncertainty, and it seemed to be unprecedented, about how that would work in a lockdown scenario which commenced within the hours clause period and then continued after it. So reinsurers argued that the losses should be cut off at the end of the hours clause window, whereas we successfully

	contended that the whole loss could be aggregated as long as it started within the hours clause.
Nick Bonsall	Ah so this is the difference between a storm that lasts two days and it is very clear and easy to define the loss arose within those two days verses as we remember from the first lockdown in 2020 the relevant event extended for much longer than that.
Efstathios Michael	Yeah or another way of looking at it is that the storm may go on for longer but it's very clear which bits of the damage caused by that storm occurred within the particular window and then you project forward the ongoing loss of that. But you're right when you look at in the context of a non-damage situation, it is an ongoing basis about how long a lockdown will continue and the argument that was around this, that accrues on a day-to-day basis and so at the end of your window you are cut off.
Nick Bonsall	Fascinating – thanks, Effy. And Tahlia if I bring you in. So I suppose what is interesting here the people may be wondering, why has it taken us five years to get to a place where we're post-COVID and we're still litigating all of this.
Tahlia Brysha-Pullen	Indeed, That's a really good question. So the FCA Test Case in 2020 and 2021….
Nick Bonsall	The Supreme Court in 2021 of course.
Tahlia Brysha-Pullen	Yes exactly. [It] Was particularly important for the industry in clarifying key issues of contractual uncertainty on policy coverage and causation in respect of COVID-19. So that case came on really quickly. So it commenced in May 2020, High Court judgment in September 2020 and Supreme Court judgment in 2021, as you mentioned before. But of course the test case only concerned a representative sample of certain policy types issued by eight insurers and didn't answer and obviously could not realistically have answered all of the questions on COVID-19 BI coverage. So what we have therefore seen since 2021 are further cases exploring further questions on coverage and causation in different policies, the application of limits and how government support is to be treated in the indemnity calculations.
Nick Bonsall	So things like furlough.
Tahlia Brysha-Pullen	Exactly. Its interesting that you mention furlough because several of the cases that have come through have also gone on an appeal from the High Court to the Court of Appeal and furlough is one in Bath Racecousre where there may potentially be a further appeal to the Supreme Court.

	So these cases do take time to come through but there's also a number of different policy wordings and applications which have needed some time to go through the courts. They're also of course material in terms of the financial impact, so they're worth fighting for. I also think its worth noting that you know Effy was mentioning before in terms of the *Covéa* case, that we've now seen reinsurance court determinations coming through the courts. That was obviously a slightly unique scenario in terms of the appeal, the arbitral rules and the appeal right through that, but we have seen insurers waiting to get clarity on their inwards position waiting for a number of cases to come through the courts before looking to claim under reinsurance. But then also looking to see how the *Covéa* appeal plays out before making claims as well.
Nick Bonsall	Of course. So there's a bit of a lead time. There's the updating and presenting to your reinsurers in real time as things go on but clearly that will shift as the…
Tahlia Brysha-Pullen	…as the case law develops.
Nick Bonsall	The case law develops
Tahlia Brysha-Pullen	Exactly.
Nick Bonsall	And then of course people will have had their eye on *Covéa v Unipol Re* to see where the court came out on such an important question as catastrophe.
Tahlia Brysha-Pullen	Exactly.
Nick Bonsall	Yeah. I guess one of the interesting themes that does come through on the inward side is how many different permutations of similar concepts there were and although it is extremely helpful to have received the clarity from the Supreme Court back in 2021, how many complex issues that have still been to sort after that because of the number of different permutations.
Tahlia Brysha-Pullen	Agreed. So we've seen that in a number of different cases. One example is the At the Premises Test Case, which concerned you know causation in respect of clauses providing for disease at the premises as opposed to in the vicinity….
Nick Bonsall	Which was what the Supreme Court test case and Supreme Court was concerned.

Tahlia Brysha-Pullen	Exactly and that case again went to the Court of Appeal and the Court of Appeal confirmed that the same concurrent causation approach applied by the Supreme Court in the test case would apply to those wordings but it still had to go through the courts for that determination to finally be made.
Nick Bonsall	And I guess Effy from a insurance/reinsurance relationship point, I mean one of the lessons that we might take from this is in order to limit the risk of dispute or delayed payment with reinsurers is improve clarity of what's being written on the direct side and helping reinsurers to understand what they may be on the hook for as time goes on.
Efstathios Michael	Yes I think so. I think it's important that obviously insurers know what they're writing and reinsurers have clarity as to what that means. I think it's also, as I was indicating earlier, important that we do periodically revisit the reinsurance wording itself because we've seen a huge evolution in the insurance wordings and there is an annual consideration of what insurers want to write and not write and the fact that the reinsurance wording has not changed over that period is precisely why you get these arguments about the mismatch arising, so I think one of the lessons you take to come out of this is, you should be periodically reviewing the reinsurance wording to make sure it is still fit for purpose, taking into account the type of business that's now coming through from the insurance side.
Nick Bonsall	Yes and, as we know, changing market standard wording, wording that's been market standard now for 60 years is going to be difficult but there's at least a conversation between insurers and reinsurers to be had, to ensure that there's clarity on the two sides on what is believed to be covered or not.
Efstathios Michael	I think that's right because we need to make sure that it's revisited. It may not require amendment but where the inwards insurance business has really quite dramatically changed in terms of what is being written, I think just reviewing the reinsurance, it may not require a lot of changing, but just clarity about whether its then intended to flow through or not flow through, I think will help everyone.
Nick Bonsall	Yes, and Tahlia – what do you think insurers and I guess policy holders as well should take or reflect on given the novel catastrophic circumstance that we've been observing over the last few years, as the case law has come through?
Tahlia Brysha-Pullen	I think that one of the things that's really come through in the litigation is that the courts have generally taken an approach that policies should be interpreted with sufficient flexibility to address novel situations and provide cover unless there's express wording to the contrary, and I emphasise the last point because has come through in a number of cases recently in Bath Racecourse, in respect of composite policies and so I think insurers and policy holders need to be thinking about what is expressly included and what is expressly excluded in policy wording, to provide clarity.
Nick Bonsall	Yeah. And also the exemptions, all the exclusions I should say. Absolutely.

	But I guess one of the points that we saw coming off the back of the test cases and the whole lack of clarity that arose in 2020 as to what was and what wasn't covered, were express exclusions being put into policies against pandemic cover for example. And I think insurers have spent their time also thinking about the other novel catastrophes that could arise, whether they're in the pandemic space but also whether they're cyber viruses or other things that could have these kind of material impacts and thinking about how they can expressly include or exclude cover depending on what policy holders are willing to pay for. That raises a question doesn't it and I guess that it raises a question of when the next novel catastrophe comes along and there probably will be one, if the past performance is any guide to the future, there may not well be any cover because it's been excluded and what do we do about that? Should policy holders just expect to be uninsured? Or should there be a government backstop, or should there be some private sector combined pooled arrangement that provides protection in that situation?
Efstathios Michael	Yes that's really good question and not an easy one I think. I mean it certainly should be considered, because the idea that businesses will have no cover in circumstances where, as we've seen, there can be huge losses, I think its problematic. And in some ways its easier when you've already identified the type of loss that you're concerned about so in the nuclear space we know that that's manageable and it may be now that if we've identified a sort of pandemic space as being another one, you could cater for that. But I think what's in truth more difficult is precisely what you're talking about, which is the next big unknown loss because trying to craft some sort of backstop cover which when you don't know what it is that you're trying to cover, I think is particularly difficult.
Nick Bonsall	There's a known / unknowns point and an unknown / unknowns point isn't there. Very good, well look - I think that's all we've got time for in this instalment. Thank you all very much for listening to this latest instalment from the Slaughter and May Insurance Podcast Series and do get in touch if you have any questions, particularly those about novel catastrophes.