

Insurance Company Market Update  
ICPL/E&O and D&O Insurance

Q3 2020



# Executive summary

We are pleased to present FINEX's Insurance Company market update for Q3 2020. In this issue, we assess the current state of the Directors & Officers Liability (D&O) and Insurance Company Professional Liability (ICPL) market. Many of the issues addressed in this edition apply to both publicly traded and privately held insurance companies. However, the scope of our insurance market commentary does not extend to public company D&O insurance, as this is addressed separately in our [Global FI Market Conditions](#) publication.

As we enter the final quarter of 2020, the insurance market continues to be in a very challenged state. ICPL premiums are generally increasing by 10 – 30% on a primary basis, with certain industry subsets and those risks with less favorable loss history subject to changes of 30% or more as competition is extremely limited. While the pool of excess carriers is not quite as limited, insurers are revisiting price adequacy and seeking to improve upon increased limit factors where possible.

In addition to tremendous scrutiny regarding premium, additional pressure is being applied to both retentions and the breadth of coverage available under ICPL policies. Limited to no flexibility can be expected for exposures such as sales and marketing and cost of insurance litigation, where primary carriers have been emboldened to impose higher or split retentions and restrictive coverage. For the first time, U.S. ICPL insurers have started to address the concept of “silent cyber” through broad exclusionary language, which necessitates a comprehensive review of ICPL and cyber policy wording to identify any potential gaps in coverage.

We expect that both the insurance market and the insurance company industry will continue to face numerous challenges as 2020 comes to a close and a new year begins. We hope this publication, however, offers valuable insights as to how to successfully navigate through these turbulent times. Should you have any questions or would like to discuss any of these issues in greater detail, please reach out to myself or any member of your Willis Towers Watson team.

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# Insurance Company Market Update

## ICPL Insurance Market: Q3 2020 Update

### Cost and retentions



- **Pricing:**
  - Premium increases are accelerating, with favorable accounts subject to rate increases of 10 – 30%.
  - Those insureds with poor claims experience and/or more challenging risk profiles can expect increases of 30%+.
- **Retentions:**
  - A lack of primary competition has allowed carriers to continue to push retentions higher.
  - If available, sales & marketing coverage for life insurers typically requires a split retention which can be multiples of the base level.

### Capacity



- Carriers are applying fresh scrutiny on limit deployment and largely unwilling to provide more than \$5 million – \$10 million.
- Primary ICPL remains a loss leader for carriers, relative to other financial institutions, so packaging with opportunities on more profitable lines of coverage is necessary to drive meaningful interest.
- While excess layers remain more competitive, several insurers have become more conservative in their minimum attachment point.

### Markets



- Appetite for primary ICPL is increasingly limited with little to no competition available for large and complex risks.
- Even middle market insurers now face a marketplace with no more than 10 viable primary carriers.
- ICPL insurers are content to attain premium targets through renewal pricing increases and less likely to compete on new business.
- The London and Bermuda markets have very little appetite for U.S. insurers, often limited to opportunistic or high excess attachments.

### Coverage



- P&C insurers with business interruption exposure can expect insurers to impose exclusionary language for COVID-related matters on a go-forward basis. In these cases, a free extended reporting period of 12 months is typically offered for COVID claims.
- AIG is adding far-reaching “cyber” exclusions to ICPL policies which encompass all 1st and 3rd party claims related to a security, privacy or business interruption events. Such insureds should work closely with their broker and claims representatives to understand gaps in cover.
- Sales and marketing coverage for life insurers is increasingly difficult to obtain, with many markets solely affording sub-limits, higher split retentions or excluding altogether.
- Coverage for cost of insurance litigation is extremely limited and often restricted to defense costs only.
- For middle market insurers, certain carriers have started to require that policies be written on a “duty to defend” basis.

### Targeted segments



- **Favorable:** Subsets include mutual insurers, reinsurers and middle market insurers (less than \$2 billion in revenue).
- **Unfavorable:** P&C (particularly with significant BI exposure), life, auto, travel and long term care insurers.
- Greater scrutiny on insurers with substantial exposure to COVID-19 both in terms of liability and investments exposure. Along with a sharp increase in questions and information requests, carriers are now reluctant to release formal terms more than 30 days prior to renewal.

# Insurance Company Industry Trends

## Key issues to watch

### 'Silent Cyber'



#### Observation:

Insurance companies in the P&C space have been increasingly tasked with identifying the true aggregate exposure that they may have to claims arising from cyber events across all their product offerings. Review of various property and E&O contracts, among others, has highlighted the potential for multiple policies to be impacted by a single event – this dynamic is referred to as “silent cyber.”



#### Concern:

In order to address the accumulation of “silent cyber” exposure, carriers have begun to add clarifying language specifically noting the extent to which coverage would apply under non-cyber policies in relation to a cyber matter. A key U.S. carrier has recently been adding exclusionary language to all E&O policies which materially restricts coverage available for claims in any way related to cyber.



#### Considerations:

Accepting broad exclusions which incorporate any claims related to security, privacy and business interruption under a traditional E&O policy may create substantial gaps in coverage. Clients should work closely with brokers and claims advocates in conducting a review of the separate cyber and E&O policy wordings.

### Political Uncertainty



#### Observation:

Going into the 2020 U.S. presidential and Senate elections, the possibility of an overwhelming shift toward control by the Democratic party meant that the insurance industry could see substantial changes in their business. While Biden has been named president-elect by various outlets, it appears that the Senate will remain relatively split between the two parties and sweeping regulatory changes may not be possible.



#### Concern:

A comprehensive victory by the Democratic party across the Executive and Legislative branches could impact a wide swath of the industry. Speculated changes include an overhaul of health insurance, adjusting the disparate impact standard under the Fair Housing Act and reviving the defeated Fiduciary Rule.



#### Considerations:

While the outcome of the elections appears to have been favorably received by the insurance industry, a significant amount of uncertainty remains regarding the future actions and priorities of the new administration. The expectation is that a pandemic risk insurance bill will be legislated in 2021, which is of great importance to P&C carriers.

# Insurance Company Industry Trends

## Key issues to watch (continued)

### Technology – Disruptor



#### Observation:

The **successful IPO** of Lemonade is an example of the belief that streamlined InsureTech firms pose a significant threat to traditional insurance companies. Lemonade has recently entered the pet insurance space and some other InsureTech ventures (i.e., Hippo, Root and Metromile) aim to leverage AI in an effort to disrupt the insurance industry.



#### Concern:

Absent continued innovation and adaptation, longstanding insurance companies stand to lose market share to AI-based InsureTech firms. This dynamic is especially true among the younger generations, where ease of use and social consciousness are viewed as increasingly necessary characteristics.



#### Considerations:

Tenured insurance companies can expect underwriters to ask questions about any initiatives being implemented to combat this potential shift in the marketplace – whether created in-house or through acquisition. Highlighting improvements or achievements in terms of social governance and charitable giving would also be viewed favorably by carriers.

### Technology – Opportunity



#### Observation:

The coronavirus pandemic forced many insurance companies to quickly convert to agile working arrangements. With many of the initial technological hurdles addressed, insurers now have a framework for deploying tools, such as **virtual claims adjusting** to more efficiently evaluate property claims, without needing to be in an office or on-location.

Additional benefits can include improved employee satisfaction, which results in lower turnover and less reliance upon costly travel as a means of accessing insured locations.



#### Concern:

Adjusting claims without traditional in-office oversight of claims handlers could raise concern among ICPL insurers regarding oversight of adjusters and escalation when issues arise.



#### Considerations:

Underwriters have inquired about plans to implement remote working arrangements for adjusters. It is important that insurance companies can articulate how they plan to implement and enforce robust controls outside of the office.

# Insurance Company Industry Trends

## Key issues to watch (continued)

### Cost of Insurance – Universal Life



#### Observation:

With interest rates at historic lows and stock markets experiencing unprecedented volatility, carriers with Universal Life Insurance exposure are struggling to keep associated cash value accounts above water. In order to sustain the policies, insurers have been forced to adjust the premiums charged to policyholders and have faced significant litigation as a result.



#### Concern:

Insurers face challenges both from regulators and from [class action policyholder suits](#) as to whether adjustments to premiums are illegal or outside contractual bounds. Several such cases have settled with amounts in excess of \$100M. According to the WSJ, regulatory bodies were already aiming to implement new disclosure rules prior to equity markets being decimated by COVID-19.



#### Considerations:

Insurance companies need to secure the broadest regulatory and investigations coverage possible. Care must also be taken to limit the applicability of exclusions pertaining to underwriting, contractual liability and inadequacy of reserves. Coverage specific to sales and marketing practices may also be implicated.

### Cybersecurity Requirements for Insurers



#### Observation:

The National Association of Insurance Commissioners (NAIC) proposed a [Data Security Model Law](#) in 2019 which has been adopted by eight states, with other states likely to follow the lead of NY and CA in implementing their own regulations. Outside the U.S., [General Data Protection Regulation \(GDPR\)](#) in Europe applies stringent guidelines and threatens substantial penalties for failure to implement appropriate controls and procedures.



#### Concern:

Failure to juggle an increasingly complex and evolving regulatory framework could result in substantial fines and penalties. Insurers must be able to demonstrate that they have maintained a robust information security program.



#### Considerations:

Insurers – particularly those operating on a national or international basis – must ensure that all applicable regulations are being accounted for and adhered to. Interplay between the D&O, E&O/ICPL and Cyber insurance policies should be carefully considered, especially where the market may look to address “silent cyber” through an exclusion.

# Insurance Company Industry Trends

## Key issues to watch (continued)

### Climate Change



#### Observation:

Insurance companies face exposure to climate change on multiple fronts. There is risk for P&C carriers who insure against **natural disasters**, reputational risk in insuring companies connected to fossil fuels and challenges both as an investor (in selecting which firms to invest in) and as an **investment** (attracting partners seeking ESG adherence).

Failing to address any of the foregoing exposures could result in liability for directors and officers, coming from regulators, **shareholders** and potentially sovereign nations as a **human rights issue**.



#### Concern:

Leadership at insurance companies – particularly those which are publicly traded – may be held liable for taking inadequate steps to prepare against climate change risks.



#### Considerations:

Coverage for investigations and special sublimits, such as public relations costs and asset protection costs are especially important given the focus on individual accountability.

### Social Inflation



#### Observation:

The term “**social inflation**” has featured prominently in recent earnings calls and commentary among leadership in the P&C insurance industry. Many executives have attributed challenges in profitability to this dynamic, particularly when it comes to commercial auto insurance and general liability.



#### Concern:

Social inflation is anticipated to drive an increase in frequency, cost to defend and ultimate settlements for certain classes of business.



#### Considerations:

Limit purchase should be revisited to account for the substantial increase in settlement values – particularly as it applies to extra-contractual liability.

Conversely, insurers of ICPL are looking to impose higher retentions and premiums to counter this same dynamic.

# COVID-19 Insurance Company Industry Trends

## Key issues to watch

### COVID-19: Business Interruption Claims Handling



#### Observation:

The first U.S. trial for a claim filed against an insurer for denying coverage for business interruption losses caused by COVID-19 **has now started**. The expectation among writers of ICPL coverage is that nearly all insurers with this exposure will be subject to one or more such lawsuits.



#### Concern:

Most insurers in the ICPL marketplace have been imposing exclusionary language to ensure that their exposure to such claims against their insureds is capped at a single policy limit. Others have required that insurers make representations regarding the extent to which such claims were reported to prior policy periods – particularly non-incumbent carrier considering a new opportunity on the ICPL program.



#### Considerations:

While bad faith statutes vary by state, P&C insurers can expect to be challenged regarding the extent to which they have investigated each individual claim on its own merits.

Insurance companies should consult with their brokers and claims advocates in evaluating any proposed exclusionary language and representations requested by insurers.

### COVID-19: Investment Portfolio of Life and Health Insurers



#### Observation:

Despite improved equity markets that have seen the S&P 500 rebound to +9% YTD through the election, the **Dow Jones US Life Insurer Index** remains a significant laggard at -18% during 2020.

Rather than being tied to expected losses on the insurance side, much of the market sentiment is that life insurers have significant exposure on the **investment side**. Fitch Ratings cut its outlook on the life and health insurance industry to negative, citing lower interest rates and leveraged equity and corporate bond holdings as material challenges for the industry.



#### Concern:

With shares of public life and health insurers seeing tremendous volatility, the likelihood of shareholders bringing suit increases. D&O carriers have been extremely cautious in deploying capacity, often reducing limits.



#### Considerations:

Carriers are very wary of life insurers – especially those which are publicly traded. Clients can expect to see their insurers revisit their total capacity on the D&O side and look to impose higher retentions.



# COVID-19 Insurance Company Industry Trends

## Key issues to watch (continued)

### COVID-19: Regulatory Environment



#### Observation:

State mandates, like cost-sharing waivers for health care expenses, may lead to significant additional costs for insurers. Several countries and states have **explored legislation** compelling insurers to reimburse policyholders for claims which are explicitly excluded.



#### Concern:

As states are applying new mandates around policyholder notification, barring standard cost-sharing practices and potentially requiring insurers to pay uncovered claims, insurance company clients need to stay on top of these evolving requirements for all jurisdictions that they are exposed to.

For all insurers, an increase in regulation is generally viewed as being negative due to increased operating costs and the possibility of higher taxes.



#### Considerations:

Insurance companies must have robust processes in place to monitor and adhere to the rapidly changing regulatory landscape. The scope of regulatory coverage under policies remains a key priority to address any potential lapses or oversights.

### COVID-19: Sales and Marketing



#### Observation:

The chairman of the House Oversight and Reform Subcommittee on Economic and Consumer Policy has **launched an investigation** into travel insurance industry practices after carriers have indicated that coverage may not apply for coronavirus-related claims. Similar exposure may arise for other lines of coverage (i.e., health care and business interruption) where policyholders may have thought coverage would have applied due to advertising practices. In the U.K., more than 10,000 **COVID-19 complaints** have been filed with the Financial Ombudsman Service relating to travel insurers.



#### Concern:

With policies (event cancellation, health care, travel, etc) being tested more than ever before, the disclosures and representations made in the marketing of products – especially when it comes to individual and unsophisticated customers – may be scrutinized.



#### Considerations:

Affirmative coverage for sales and marketing practice remains of paramount importance. This coverage is not widely available among the limited group of carriers willing to write primary, so insurance companies may need to accept either sublimits or higher retentions.

# COVID-19 Insurance Company Industry Trends

## Key issues to watch (continued)

### COVID-19: Business Continuity Planning and Disclosures



#### Observation:

Business continuity planning is being stressed to the maximum and any perceived failures that negatively impact performance of insurance companies could lead to claims for failing to adequately prepare. Lack of accurate risk disclosures and perceived over-concentration to certain industries, classes of business and/or geographies could also lead to D&O claims.



#### Concern:

Shareholders may allege that stated risk factors do not address the significant challenges resulting from the coronavirus outbreak. For publicly traded insurers, any negative impact upon share price as a result of failure to adequately function during quarantine could give rise to a **D&O claim**.

From an IT perspective, underwriters are scrutinizing the ability of insurance companies as well as any vital third-party services providers (i.e., TPAs) to operate remotely without a negative impact on service and claims handling.



#### Considerations:

Clients should be prepared to speak to their carriers regarding the evolving risk landscape and how the company is updating its disclosures to reflect such.

# Challenging Venues and Jurisdictions

According to the American Tort Reform Foundation

## Top 10 least favorable states, cities, counties and courts

### Philadelphia Court of Common Pleas

A preferred jurisdiction for asbestos litigation and home to a \$8 billion product liability verdict in 2019.

### California

Stance against arbitration and broad application of employment law liability.

### New York City

Significant amount of ADA claims against small business as well as consumer suits targeting the food and beverage industries.

### Louisiana

Auto insurance outcomes and judicial misconduct.

### The City of St. Louis, Missouri

Decisions have ignored state and federal precedent, expanding liability.

### Georgia

Premises liability, medical liability and nuclear jury verdicts are all on the rise.

### Cook, Madison & St. Clair Counties, Illinois

Prominent venue for no-injury class action lawsuits, asbestos litigation and have been flexible in permitting questionable Biometric Information Privacy Act suits to proceed.

### Oklahoma

Questionable handling of opioid litigation and Supreme Court interpretation has expanded liability.

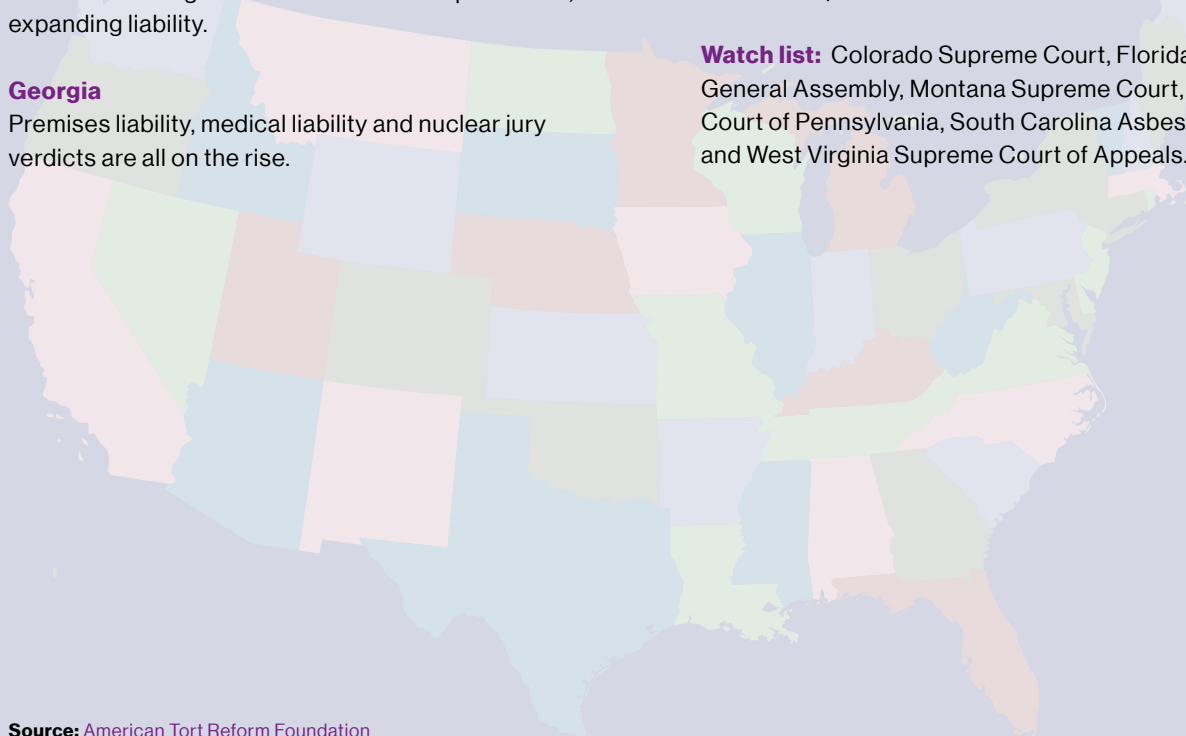
### Minnesota Supreme Court / Twin Cities

Expanded medical liability and employer liability under workers compensation laws, while upholding disputed sanctions against an in-state employer.

### New Jersey Legislature

Anti-arbitration and introduced a "Wage Theft" bill with substantial penalties.

**Watch list:** Colorado Supreme Court, Florida, Maryland General Assembly, Montana Supreme Court, Supreme Court of Pennsylvania, South Carolina Asbestos Litigation and West Virginia Supreme Court of Appeals.



Source: American Tort Reform Foundation



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