

Covid-19: Insights arising from the FCA's Proposed Business Interruption Insurance Test Case



BI Policy wordings

In light of the coronavirus crisis and the ensuing lockdown, Business Interruption (“BI”) has come to the forefront among insurance risks. As a further easing of lockdown restrictions has been announced, the process of “reopening” society will be slow and staggered, with a cautious approach being taken. This will compound the already significant impact to the economy caused by the pandemic.

With lockdown restrictions and business closures causing significant lost revenue and devastating profitability across sectors the situation is critical, particularly for small businesses. Those looking to their BI insurance to meet these costs may find that such is not covered under their policy.

Most BI cover is inextricably linked to property damage. As a result, losses related to business closures arising solely as a result of Covid-19, where no physical damage to property has arisen, are unlikely to be covered. However, BI extension products, such as specified or notifiable disease cover, non-damage denial of access, and others, may (depending on their specific wording) give rise to arguments that such losses do fall within the terms of the policy. Given the expected number and value of the potential claims, both policyholders and insurers are likely to be resourceful in their interpretations in order to put specific wordings to the test.

Anticipating the number of disputes that could arise, the Financial Conduct Authority (“FCA”) announced it is taking steps to clarify BI insurance coverage in order to stem the number of disputes and provide certainty so that claims are resolved promptly.

FCA Test Case

On 1 May 2020 the FCA announced they would write to the Association of British Insurers, as well as a select number of insurance companies, inviting them to clarify to what extent each believed their standard clauses for losses arising other than from property damage will cover the BI losses arising from the pandemic.

In parallel, the FCA has also sought to resolve key contractual uncertainties by bringing an expedited test case to the High Court. The result will be binding only upon those insurers that are parties to the test case in respect of the representative sample considered. However, the FCA anticipates the result can be used as guidance when interpreting similar wordings and claims.

As well as assisting small businesses, the test case will benefit insurers by providing clarity on wordings’ issues thereby saving the cost of dealing with multiple disputes of a similar nature.

An insurance event with such a wide global impact is unprecedented in modern times, and the outcome of such a case is likely to draw public and political interest. The FCA’s intervention recognises the public policy considerations which dictate the need to clarify these issues at an early stage. After all, it is often governments that have been forced to step in as “the insurer of last

resort” when previous natural events have affected the livelihoods of those without sufficient insurance coverage.

Whilst it is arguable that a response to a global crisis such as a pandemic is better handled at a governmental level because of the scale of impact at hand, pandemic and epidemic insurance products are available. A pandemic is a foreseeable and insurable event, though one that has, in hindsight, been underinsured.

It has been widely reported that the Wimbledon Tennis Tournament was in the minority of businesses to identify the risk and seek out specific cover. It is now set to receive an insurance payout of c.£114 million for this year’s cancelled event, having paid c.£25.5 million in premiums over the 17-year period (since the SARS outbreak).

CPB Comment

The outcome of the FCA case should provide clarity for insurers and policyholders. The impact, whatever the outcome, will be significant for all involved.

Insurers should continue to review their wordings carefully to ensure that potential cover for pandemics is either firmly carved out of standard BI insurance contracts or if it is intended to be covered that premiums are set appropriately. Care should be taken to ensure products meet the policyholder’s requirements (to include whether pandemic-specific cover is to be procured), whilst allowing insurers to balance their risk exposures.

Carter Perry Bailey has significant experience in reviewing BI insurance wordings. We are able to advise on whether COVID-19 losses are likely to be covered under the terms of a policy, as well as offer advice on policy wording for both insurance providers and policyholders that are considering changes to their standard cover.



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