

Business interrupted: the disputes begin

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Battle lines are drawn up in the insurance industry as it becomes apparent that insureds and their lawyers are preparing to contest in Court any refusals by insurers to pay out on claims for business interruption (“BI”) and associated losses in the wake of the Government’s COVID-19 lockdown. Group actions are apparently being brought together and litigation funders now underwriting the legal costs of Court proceedings against insurers in the UK.

In this blog we look at just some of the legal issues likely to arise for insureds, insurers and brokers over the coming months and years as policy coverage disputes begin to increase.

In the first place, the question of whether an insurance will cover BI related losses at all is likely to be highly contentious as Court will have to pore over the meaning of specific clauses in their policies. Sometimes case law flowing from previous pandemics may help, but other times litigants will simply be operating in uncharted territory. The sheer number of different policy wording used by different insurers and the individual nuances will complicate matters further.

One of the challenges is likely to be whether the wording of BI policies should cover lost revenue from 24 March 2020 when the lockdown began in the UK. As we have already reported on here, cover for BI is usually linked to property damage. One highly significant question for the Courts could then be whether the presence of COVID-19 at a business premises will be regarded as property damage from which certain BI losses then flowed. Such a finding could possibly widen the scope for more claims to be covered by BI policies, although the covered losses may be less extensive.

Another challenge will be that some coverage under certain policies is triggered by reference to a defined list of diseases under the terms of the policy, which range from the SARS virus to smallpox. But others are less specific, offering cover for any “notifiable disease” outbreak, a disease required by law to be reported to public authorities (COVID-19 was added to the list of notifiable diseases in England and Wales on 5 March 2020), or by reference to “communicable diseases”.

Other policies cover losses flowing from central or local government mandated shut downs, for example denial of access to sites in some construction all risks policies. But again policy wordings vary dramatically. Policyholders will also need to consider issues of causation arising from their policies. Losses arising “solely and directly” from restriction imposed by a public authority will need scrutinising in light of the lockdown. It may be arguable that certain losses would still have occurred even if businesses had not been closed because the Government had previously suggested and then

ordered the public to stay at home.

Policyholders whose claims are declined in whole or in part by their insurers may also be asking questions of their brokers. What advice was asked for and given on policy coverage for pandemics? What insurances were available in the market at the relevant times? Should brokers have been keeping an eye on developments in China at the start of 2020 and reviewing their clients' cover as a result of what the World Health Organisation was saying about the rise of COVID-19?

Alternatives to the Court

Many rejected claims under insurance policies could eventually result in litigation, however many more will be dealt with by as complaints by the Financial Ombudsman Service (“**FOS**”). The FOS limits compensation to £355,000 and is available to companies that have an annual turnover of less than £6.5 million and employ fewer than 50 staff. And importantly the FOS' dispute resolution services are free to complainants and generally move quicker than the Court.

The FCA has already said that “*in due course, the Ombudsman will share details of the approach it will be taking to deciding complaints about business interruption insurance, most likely through a series of lead cases*”.

Comment

There is no doubt that this marks the start of an intense period of litigation for all participants in the insurance industry. Indeed, it is likely that this litigation could change how the industry underwrites future policies, what it will and will not cover in the future and the cost of that cover. In addition, companies and individuals affected by the Coronavirus are faced with an arduous review of the small print to see whether their insurance policies covers costs and losses.

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