



COVID-19 Briefing: Coronavirus and Business Interruption Insurance

Numerous notifications or claims are being made in Business Interruption (BI) insurance policies which are highly likely to be, if they have not already been, disputed.

In the light of this the FCA on 1 May 2020 announced that it was taking a test case to court seeking declarations regarding BI claims for COVID-19 and standard policy wordings.

On 1 June 2020 the FCA published an update and issued draft guidance as to its expectations of insurers and intermediaries (brokers) when handling BI claims pending the test case. A further update on 10 June 2020 confirmed that the proceedings have been issued.

A directions hearing is expected to take place on 16 June 2020. The FCA is seeking an expedited hearing. The FCA has said it anticipates seeking further comments from stakeholders after 23 June 2020 when the insurer parties to the test case are due to file their Defences.

WHERE WILL THIS GUIDANCE APPLY?

The guidance will apply where a claim or complaint relating to COVID-19 has been made and the insurer has either rejected the claim, or made a reduction or adjustment to the claim, or has not yet made a decision, or where the insurer has publicly stated that its standard BI policy will not respond to a COVID-19 claim.

The FCA expects the insurer to undertake a review of the test case, appoint a senior manager to oversee a review of their policy wordings, keep the insured business informed regarding the test case, and confirm within three weeks of the guidance coming into effect whether the insured business' claim or complaint is a test case.

The test case seeks the Court's declarations on a number of questions, which include:

- Whether "notifiable disease" includes COVID-19
- If the wording refers to an "occurrence" of a notifiable disease, what is the meaning of that expression
- What is the meaning of "outbreak" where that wording is used
- Questions around issues such as what is meant by an authority preventing access to or use of premises
- What the insured business has to prove or show to show that the losses claimed have been caused by the interruption of the business.

The full list of questions can be found at:

www.fca.org.uk/publication/corporate/bi-insurance-test-case-proposed-questions-for-determination.pdf

The Particulars of Claim can be found at:

www.fca.org.uk/publication/corporate/bi-insurance-test-case-particulars-of-claim.pdf

WHAT SHOULD I DO IF A BUSINESS INTERRUPTION CLAIM IS DECLINED OR ADJUSTED?

Where a BI claim has been declined or adjusted by the insurer the insured business may well look to their broker for redress. Brokers are required by the FCA to have professional indemnity insurance and so may be an attractive target, although should not be seen as effectively a insurer of last resort.

Such claims will involve complex issues both for the Claimant business and the defendant broker such as:

- Whether, where there is no BI insurance at all, should the broker have advised the business to obtain such cover
- If the cover proves to be inadequate, did the broker properly advise the business as to the limits of the cover, given the needs of the business

Civil

Commercial

Conveyancing

Family

Probate

- In relation to COVID-19 specifically should the broker have considered specialist (albeit expensive) pandemic cover or otherwise have advised on the restrictions of the cover proposed and obtained
- If there is no BI insurance, would the insured business have been able to obtain such cover in any event and/or would the insured business have been able to and willing to pay the premium
- Where there is no BI insurance the broker may be able to raise a defence that on the facts the insurer would in any event have declined the claim. This in the context of COVID-19 related cases is likely to be the defence of choice for any defendant broker.
- Is the loss claimed attributable to the alleged breach of duty and negligence of the broker? In the context of BI insurance the court has held and recognised that the purpose of BI insurance is to inject additional funds into a business following an incident to enable it to continue as a going concern, to enable the business to return to business as soon as possible and that in fact insurers will encourage over insurance for this type of cover.

FURTHER HELP AND GUIDANCE

All of the above questions and issues will require consideration by a professional advisor.

In the immediate term businesses should discuss their situation with their broker or their insurer direct. If a business has made a BI claim it should request in the first instance that the insurer confirms whether the claim is a test claim.

Notwithstanding the FCA's test case, which will take some time before there is a decision, businesses should consider their insurance policies, make claims, and if the claim is declined or insurers reserve their position may have to place their broker on notice of an actual or potential claim.

PEACE OF MIND THROUGH DIFFICULT TIMES

In uncertain times, the only thing we can say for certain is that nothing will stay the same for long.

It is entirely possible, therefore, that new legislation will have been introduced which will mean that all or part of this briefing no longer reflects the current law.

Because of this, we ask you to consider that, although correct at time of printing, information in this sheet may no longer be up to date and it is always best practice to consult with a lawyer about anything contained in this briefing.

Although our office doors are closed, our lawyers are still available to help answer any of your questions about this or any other legal concern you have.

Please contact Fraser Dawbarns directly for up-to-date information on your specific circumstances.

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- [The Changing Face of Litigation](#)
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