

COVID-19: FCA ASKS THE HIGH COURT TO CONSIDER COVID-19 BUSINESS INTERRUPTION CLAIMS

Date: 6 May 2020

UK Insurance Coverage Group Alert

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On Friday 1 May 2020, the Financial Conduct Authority (the “FCA”), which regulates the conduct of insurers and other UK-based financial institutions, [announced](#) that it was seeking legal clarity from the High Court to resolve doubt for businesses facing uncertainty on their Business Interruption insurance claims. The FCA observed that there are “a number of policies where it is clear that the firm has an obligation to pay out on a policy. For these policies, it is important that claims are assessed and settled quickly.”

The announcement is timely, in light of the immediate and harsh impact COVID-19 has had on businesses in the UK. Initially, many organisations faced reduced demand from customers that were unable or unwilling to spend money on any goods and services deemed non-essential. Government guidance, issued early on in the crisis, had the effect of reducing commercial activity, and more recently, restrictions imposed by the UK Government have brought many businesses to a complete halt.

In these very challenging circumstances, many organisations have been considering the cover available under their Business Interruption insurance, which is typically bought in combination with Property Damage cover. However, many insurers have been signalling a reluctance to confirm the availability of cover, and claims have been rejected on a range of grounds, some of which may be considered questionable.

In particular, there is some uncertainty and disagreement concerning the application of many common policy clauses and extensions included in Business Interruption policy wordings.

The FCA has stated that it will seek “an authoritative declaratory judgment regarding the meaning and effect of some BI insurance policy wordings where there remains unresolved uncertainty”. The declaration sought by the FCA is likely to relate to common extensions of cover which do not require property damage to trigger cover. Such extensions can include cover for a variety of loss scenarios including, for example, infectious/notifiable diseases, non-damage denial of access, and public authority closures/restrictions.

Even on an “urgent and agreed basis”, it may take some time for the High Court to consider these issues and hand down its decisions. In the meantime, it is important for policyholders to take steps now to preserve their position, by identifying any cover which is potentially available under Property Damage/Business Interruption policies, and by taking steps to ensure they are able to maximise recoveries in the event of a claim.

It is particularly important for any insureds considering a claim for business interruption losses to ensure they are in compliance with all relevant policy terms and conditions, in particular, in relation to notification of losses and circumstances which may or are likely to give rise to losses. Some insurance policies have stringent notice

requirements, ranging from a requirement to give notice of any losses/potential losses immediately, as soon as possible or within a specified time limit. Failure to give notice on a timely basis may result in the insurer seeking to deny or reduce the amount of cover available. It is therefore particularly important to identify any notice provisions and take steps to comply with them.

Even where the coverage position seems doubtful, it may prove beneficial to notify insurers on a precautionary basis in case legal developments highlight or improve the prospects of cover being available. This is particularly important where the policy is coming up for renewal, as insurers are likely to impose COVID-19 related exclusions at renewal which may preclude any prospect of recovery going forward.

Organisations should consider proof of loss requirements, and begin the process of collating evidence recording any losses, such as decreases in revenue and profits, or increases in costs of working. Those businesses which adopt a pro-active approach and present a properly substantiated claim may improve their chances of having their claim considered on a timely basis.

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