



FCA Test Case Business Interruption Insurance

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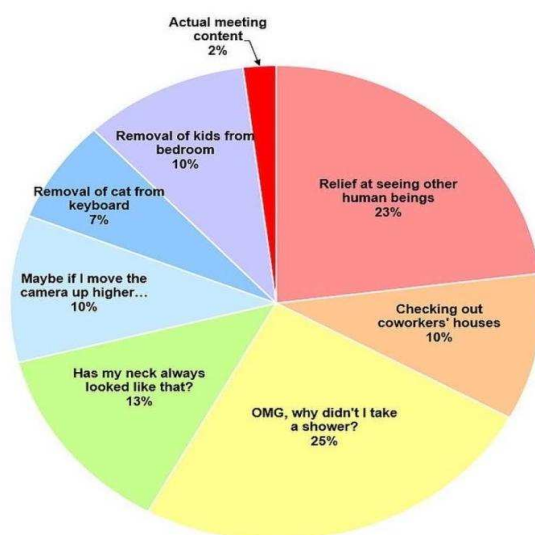


Today's event

- Thank you to your LI for hosting
- Participation is very much encouraged
- Verbal and chat forum questions welcome
- Please complete the feedback survey
- Slides will follow
- Feel free to connect with me on [LinkedIn](#).



What happens in a Zoom meeting?



What I will cover

1. Why does it matter
2. The Test Case
 - i. Is it covered?
 - ii. The importance of clear wordings
 - iii. Denial of access
3. FS20/8 - what you need to do
4. Your duties as a broker + ICOBS
5. My final thoughts



Learning objectives

This talk will give you an insight into:-

- What is happening with the FCA's test case on Business Interruption Insurance
- Why compliance with ICOBS is more important now more than ever



Just bear in mind

- There is a lot of detail and I will attempt to highlight some of the **KEY** pieces of information
- All this information is in the public domain
- Please refer to the FCA BI pages for full information
- Bear in mind this is not formal advice and do take up whatever professional help you need
- Happy to do this talk in-house



Who do you work for?



1st. Poll

Have you had a BI
claim accepted?



**1. Why does this
matter?**



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What are the key challenges faced by brokers due to the Covid-19 pandemic?
 Respondents selected and ranked four options of the below options in order of significance. 1 = biggest challenge, 2 = 2nd biggest challenge, 3 = 3rd biggest challenge, etc

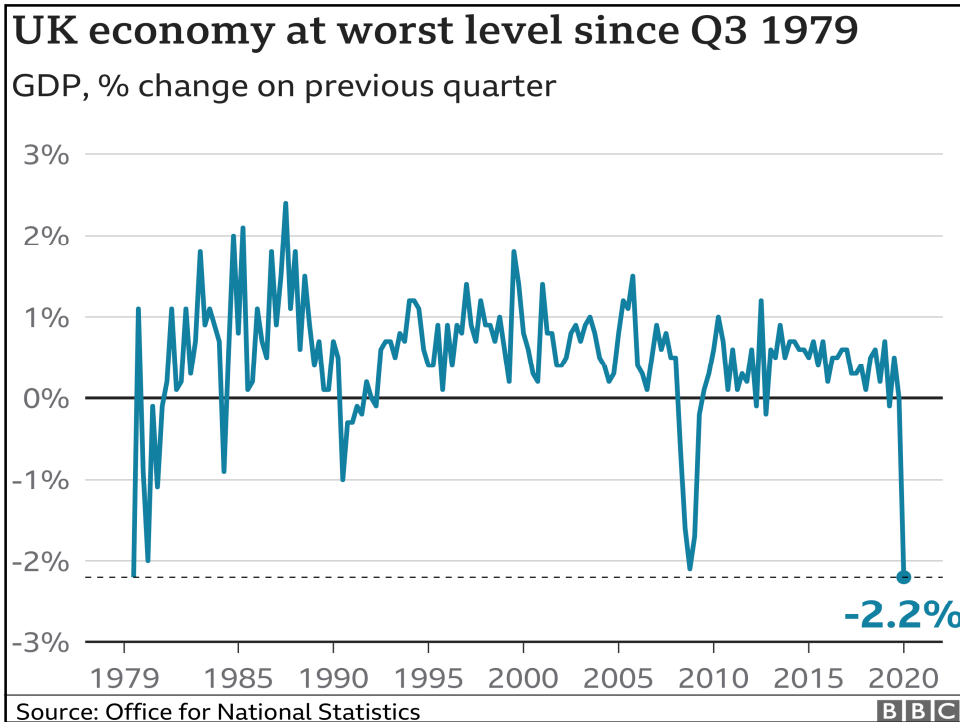
- 1 Volume of queries due to Covid-19
- 2 Difficult trading conditions
- 3 Clients trying to reduce premiums
- 4 Difficult to speak to insurers
- 5 Struggling to get claims paid
- 6 Difficulties working remotely
- 7 Having fewer staff due to furloughing
- 8 Difficult to access government furlough scheme cash
- 9 Staff off sick with Covid-19

Impact on the industry

On 14 May 2020, Lloyd's estimated:

- The Lloyd's market alone will pay out claims in the range of \$3 to \$4.3bn
- The insurance industry as a whole will suffer underwriting losses of about \$107bn
- Anticipated exposure is akin to war and nuclear
- The total loss to the insurance industry is estimated to be in the order of \$203bn
- The anticipated losses are likely to exceed 9/11 and the combined impact of hurricanes Harvey, Irma and Maria in 2017





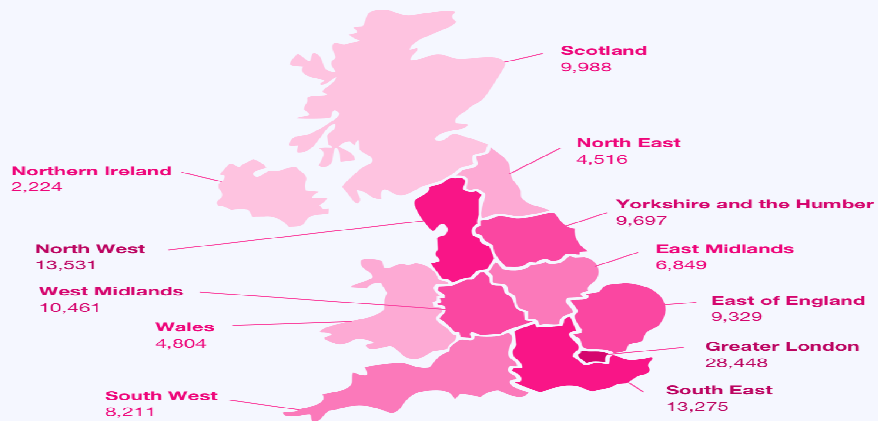
Numbers

- March to mid June - 10,028 companies have gone into liquidation or administration
- 441% increase same period 2019
- Main casualties were in food, restaurants, construction and engineering
- These businesses therefore no longer need insurance (but may have made a claim)



Restaurants, Pubs and Cafés Affected by the Easing of Lockdown on 4th July

114,484 companies



Classifications shown are from SIC 2007 Sections:

561: Restaurants And Mobile Food Service Activities

56101: Licensed Restaurants

56102: Unlicensed Restaurants and Cafés

56103: Take Away Food Shops and Mobile Food Stands

56302: Public Houses And Bars

Powered by DueDil Business Information Graph™ June 2020

Others

- 25,000 B&Bs
- 13,189 hotels
- 12,000 campsites/caravan parks
- 12,010 dental surgeries
- 7,239 gyms
- 3,170 swimming pools
- 52,000 beauty salons
- 13,505 nightclubs
- 1,100 theatres



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NEWS

Two-thirds of UK brokers don't think the industry has responded well to the Covid-19 crisis

By [Kate Scott](#) | 15 June 2020

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News

ABI criticised for "callous and wrong" stance; July timetable for pioneering UK court hearing

10 May 2020

An open letter to the Association of British Insurers (ABI) has once again highlighted the impact on the industry's reputation from the Covid-19 business interruption claims strategy of some of its members.



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COMMERCIAL

Insurance risks damaging reputation 'for a decade' warns dispute expert



Harry Curtis

24 Apr 2020

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A typical journey

- Whilst I was working for the Royal Bank of Canada, I saw the impact in Canada of SARs and the number of insurance claims that were rejected
- Against this background I took out a Commercial Combined Policy with MS Amlin via our brokers Towergate
- Our policy explicitly provides cover for Business Interruption brought about by an unspecified notifiable disease within 25 miles of our premises
- Following government advice we stopped operating on Wednesday 18th March, although business was rapidly declining before this



Section 2 - Business interruption – optional cover

| Additional covers and limits | Automatically included? |
|---|-------------------------|
| Bomb hoax £500,000 in total in any one period of insurance. | ✓ |
| Unspecified suppliers £250,000 or 10% of the sum insured, whichever is the less, for any one loss | ✓ |
| Unspecified customers £250,000 or 10% of the sum insured, whichever is the less, for any one loss | ✓ |
| Storage at other locations £100,000 any one loss | ✓ |
| Essential personnel £25,000 in total in any one period of insurance | ✓ |
| Exhibitions £100,000 in total in any one period of insurance | ✓ |
| Failure of utilities supply £250,000 any one loss | ✓ |
| Failure of utilities supply – terminal ends - £250,000 any one loss | ✓ |
| Fines, penalties and damages £25,000 in total in any one period of insurance | ✓ |
| Loss of attraction £250,000 whichever is the lesser for any one loss | ✓ |
| Motor vehicles £500,000 in total in any one period of insurance | ✓ |
| Notifiable disease, vermin, defective sanitary arrangements, murder and suicide £500,000 in total in any one period of insurance | ★ ✓ |

Section 2– Business Interruption

12. Notifiable disease, vermin, defective sanitary arrangements, murder and suicide

consequential loss following:

- a) i. any occurrence of a **notifiable disease** at the **premises** or due to food or drink supplied from the **premises**;
- ii. any discovery of an organism at the **premises** likely to result in the event of a **notifiable disease**;
- iii. any **notifiable disease** within a radius of twenty five miles of the **premises**; ★

13. Prevention of access

consequential loss as a result of **damage** to property within a 1 mile radius of **your premises** which prevents or hinders the use of the **premises** or access to it.
The maximum **we** will pay in total in any one **period of insurance** is stated in the **schedule**.

14. Prevention of access – non damage

consequential loss resulting solely and directly from an interruption to **your business** caused by an incident within a 1 mile radius of **your premises** which results in a denial of access or hindrance in access to **your premises** during the **period of insurance**, imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 hours. ★

The maximum **we** will pay in total in any one **period of insurance** is stated in the **schedule**.

Declinature

We have reviewed the information provided **but have not been able to establish that the Insured has suffered a loss...**as detailed under the Notifiable Disease Extension which provides cover for losses caused by:

- the presence of any **Notifiable Disease at your premises**;
- the presence of any organism at your premises which might result in a Notifiable Disease; or
- the **presence of any Notifiable Disease within a 25 mile radius of your premises**.

COVID-19 was **added** to the UK Government's list of Notifiable Diseases on **5th March 2020** such that cover would be available from that date in the event that COVID-19 is present at the Insured's premises or within a 25 mile radius.



Cover is not available for any losses due to the presence of SARS-Cov-2 or COVID-19 in the **wider population or in the country generally**. If the Insured have suffered losses because of a general decrease in business which cannot be attributed to any **localised incidence** of SARS-Cov-2 or COVID-19 then the policy **will not respond**.

It also follows that **losses due to any restrictions imposed on the movement of the wider public by the UK Government will not be covered**

The **prevention of access non damage extension** is not designed to cover pandemics. It is designed to cover a specific incident within a 1 mile radius of your premises. The current situation does not constitute an 'incident'.



2nd. Poll

Why have insurers
declined claims?



2. The Test Case



Watch live

From 10.30am on 20 July

<https://fl-2020-000018.sparq.me.uk>



Area 1 – The Policy wording

- Action Groups: the policies respond to this situation. ABI: “*Such add-on policies are not designed to cover a global, viral pandemic.*”
- Unfavourable headlines from insurers’ perspective such as “*Insurers warned to stop ‘callous’ denial of claims*” – The Times 9 May 2020.

Area 2 – The extent to which insurers should/can be flexible

- Action groups are calling for insurers to: “*consider payments on claims they might usually reject*”
- ABI have made points such as insurers have obligations not to take steps that may endanger their solvency and that paying a significant volume of claims for which no premium was charged could endanger solvency and mean valid claims are not paid.

Area 3 – How policies were sold

- Action groups say they purchased policies in the expectation there would be cover for this situation.
- ABI – the policies were not priced to cover a global viral pandemic.
- Wimbledon has been paying about £1.5 million in premium per year since the SARs outbreak in 2003.



Sign up for BI insurance updates

[Sign up to receive email updates](#) on BI insurance and the High Court test case.

Latest updates

3 July 2020

Publication of Reply

The FCA has now served its [Reply](#), which sets out its response to the [Defences](#).

Since 24 June we have received more than 90 detailed submissions from policyholders and other stakeholders on the Defences. We considered these when drafting the Reply. We also conducted numerous meetings with policyholders and other stakeholders as part of this process.

Other publications

We have also published:

- The FCA’s [Amended Particulars of Claim](#)
- The [Amended Defence](#) of Royal & Sun Alliance Insurance Plc
- The [court’s ruling](#) from the Case Management Conference on 16 June

What will it decide?

- The result will be legally binding on the insurers in respect of the interpretation of the representative sample of policy wordings
- It will also provide persuasive guidance for the interpretation of similar policy wordings and claims
- It is not intended to encompass all possible disputes, but to resolve some key contractual uncertainties and 'causation' issues to provide clarity for policyholders and insurers
- It will not determine how much is payable but will provide the basis for doing so



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Latest updates

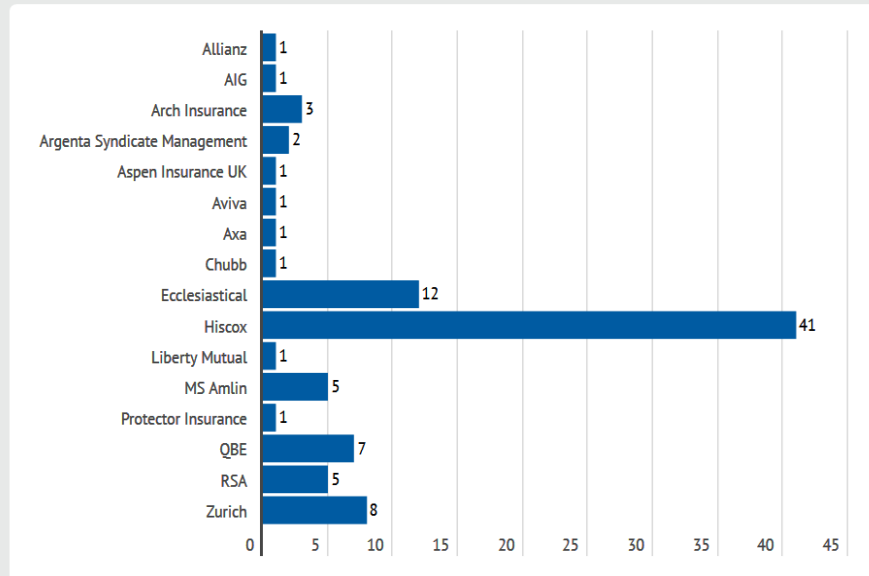
10 June 2020

Start of proceedings in the High Court

We have started proceedings in the High Court and published the court documents related to this:

- **Claim Form**, which is a procedural document initiating legal proceedings and summarising what we are seeking.
- **Particulars of Claim**, which is the FCA's 'pleading' in the case, setting out our claim in writing.
- **Representative Sample of Policy Wordings**, which are a selection of policy wordings which the FCA believes captures the majority of the key issues that could be in dispute. Read a [tracked changes version](#) so that you can see how this document has developed to date from the proposal published on 1 June 2020 (which is also available below).
- **Assumed Facts** (or 'fact patterns'), which are a set of illustrative factual assumptions, for example the nature of the affected business(es), how they were affected by the pandemic and whether they closed entirely or partially (and why). These are a menu of potential fact patterns to assist the court, and not all of the assumed facts will be applied to all of the representative sample of policy wordings. Read a [tracked changes](#)

UPDATED: Number of policies affected by the FCA BI test case



Expectations

- Authoritative declaratory judgment regarding the meaning and effect of some BI policy wordings where there remains unresolved uncertainty
- Is there a gap between firms' and customers' understanding of what they thought was covered by the policy?
- **What did the customer request or instruct?**
- **What was the customer told was being provided?**
- Bear in mind no recent precedent and only 15 pandemics in the last 2,000 years



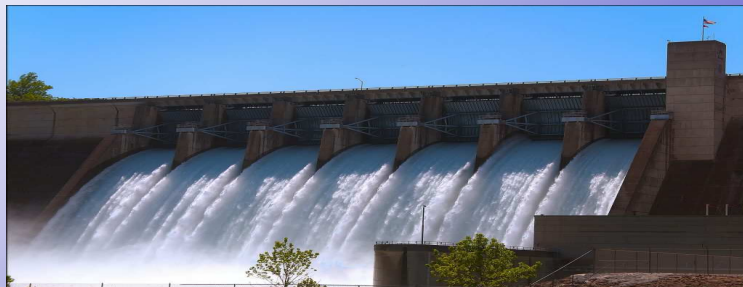
In a nutshell

1. Does the policy provide **wide enough scope of cover**, i.e. some will only cover consequential loss following material damage to the insured premises
2. Does COVID-19 itself fall within the set of **disease definitions** to be covered?
3. Is there actual evidence of the **existence** of COVID-19 within the defined operating radius?
4. Denial of **access** cover - what has been prevented and by whom and why closed?



General insurer argument

- Whether it is the pandemic or government which has caused the problem (Sweden)
- And if the government's actions have caused 'frustration' to the contract of insurance



Definitions!

NOTIFIABLE HUMAN DISEASE

illness sustained by any person resulting from

(a) ...

(b) any human infectious or human contagious disease an outbreak of which the competent local authority has stipulated shall be notified to them excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition.

notifiable human disease

Any human infectious or human contagious disease, an outbreak of which must be notified to the local authority.

Notifiable Human Infectious or Contagious Disease

Acute Encephalitis, Acute Poliomyelitis, Anthrax, Chickenpox, Cholera, Diphtheria, Dysentery, Legionellosis, Legionnaires Disease, Leprosy, Leptospirosis, Malaria, Measles, Meningococcal Infection, Mumps, Ophthalmia Neonatorum, Paratyphoid Fever, Plague, Rabies, Rubella, Scarlet Fever, Smallpox, Tetanus, Tuberculosis, Typhoid Fever, Viral Hepatitis, Whooping Cough or Yellow Fever

Specific wording defences

- Arch argues that actions or advice on social distancing or working from home technically did not prevent access to insured premises, even if they resulted in less or no use being made of the properties



- Argenta's wording does not include a pandemic exclusion but they state that such an exclusion is not necessary because only specific insured perils are covered which does not include global or national pandemic plus premises have to be directly affected by local occurrence of an infectious disease within 25 miles of the insured premises



- Ecclesiastical and MS Amlin - the cover did not extend to such perils in the first place neither access to nor use of the premises is prevented unless it is rendered physically or legally impossible and government announcements...did not prohibit any conduct
- QBE - they do not provide, and were not intended to provide cover in respect of a national pandemic or the government response. The fact it is not excluded does not mean it is covered in the first place



- Hiscox “The FCA starts from the false premise that the policies are to be construed on the presumption that they should provide an indemnity...thus approaches the case on the basis...that there ought to be coverage...”
- Hiscox 1-4 need to be construed, contrary to the FCA’s approach, with no predisposition in favour of (or indeed against) coverage, and without any presumption that they cover pandemics or their consequences
- “The correct questions are, first, whether or not on the facts which occurred there was in principle an insured peril and, secondly, whether that insured peril in principle caused the losses sustained.”
- “There has never been more than advice that people should observe two-metre social distancing.”



- RSA - the pandemic amounted to a public health emergency which is not the same as an emergency in the vicinity of the premises (close spatial proximity)
- Zurich - the UK government is not a ‘civil authority’ and so its response was not to a localised danger but to a nationwide pandemic and none of its actions actually prevented access to the premises as no physical obstruction took place



Disease clause

We will insure **you** for **your** financial losses and other items specified in the schedule, resulting solely and directly from an interruption to **your activities** caused by:

...

Public authority

[11.][12.][13.] **your** inability to use the **insured premises** due to restrictions imposed by a public authority during the **period of insurance** following: ★

a...

b. an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority; ★

Denial of access clause

We will insure **you** for **your** financial losses and other items specified in the schedule, resulting solely and directly from an interruption to **your activities** caused by:

Non-damage denial of access ★

3. an incident occurring during the **period of insurance** within a one mile radius of the **insured premises** which results in a denial of access or hindrance in access to the **insured premises**, imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 consecutive hours;

FCA reject defences

- Unduly restrictive meanings of words such as 'occurrence' and 'prevention'
- Proof of presence of COVID-19
- Denial of apparent and intended scope
- Insureds are SMEs and unsophisticated buyers
- Policies ought to be readily comprehensible
- Off the shelf purchases
- Stay at home did mean closure of the business
- Government did prohibit access via mandatory and compulsory instructions/rules/guidance



Cont...

“The distribution channel is irrelevant. These are all insurer standard form wordings. They were, typically and as the Defendants all must have known, sold not to a sophisticated policyholder, but rather...an SME which is the business equivalent of a consumer, i.e. a business with little experience of the insurance market, potentially limited broker advice and discussion (such as in the case of online sales, which essentially involved the completion of online proformas), and no knowledge of previous insurance case law.”



Amanda Blanc

“I don’t think anybody can deny the reputational damage from BI over the last few months to the insurance industry, I certainly would not pretend to walk away from that.

However, I do think the position that Aviva [is] in, I think we were very clear at the May update around our position that the vast majority of our policies do not have cover. We do have some policies that provide cover and those **we are already paying claims on, but those are specific broker wordings. We are supportive of the FCA’s stance.**”



2. Compulsory Closure

Interruption of or interference with the **childcare business** in consequence of compulsory closure by a public body authorised to prevent or restrict access to the **premises** arising from:

- (a) discovery of a **notifiable human infectious or contagious disease** at the **premises**
- (b) foreign or deleterious matter in food or drink sold, supplied or provided at the **premises**
- (c) the occurrence at the **premises** of murder, manslaughter, suicide or rape
- (d) defective sanitation of the **premises** or the presence at the **premises** of vermin or pests
- (e) the occurrence within 25 miles of the **premises** of a **notifiable human infectious or contagious disease**.

For the purpose of this Extension the **maximum indemnity period** is restated as 6 months.

Our liability under each of 2. (a), (b), (c), (d) and (e) will not exceed £100,000 in any one **period of insurance**.

7. Government or Local Authority Action

Interruption of or interference with the **childcare business** in consequence of access to the **premises** being hindered or prevented as a result of the actions or advice of a government or local authority following an emergency which is likely to endanger life or property.

We will not be liable under this Extension for:

- (a) any restriction of use of less than 4 hours
- (b) any period when access to the **premises** was not prevented or hindered
- (c) any Industrial action
- (d) a **notifiable human infectious or contagious disease**
- (e) any cause that is within **your** control.

Provided that the **maximum indemnity period** under this Extension will not exceed 3 months from the date of interruption of or interference with the **childcare business**.

Our liability will not exceed £100,000 any one **period of insurance**.

3rd. Poll

Your thoughts on all of this?



3. FS20/8



Finalised guidance

Business interruption insurance test case: Finalised guidance for firms

June 2020

What is the guidance for?

- Identify the potential implications of the test case on their decisions regarding claims and complaints
- Keep policyholders informed about the test case and its implications
- Treat policyholders fairly during the test case and when it is resolved



Who this guidance applies to

2.1 This guidance applies to:

- an insurer (as defined in FCA's Handbook of rules and guidance) which, before 9 June 2020, underwrote a relevant non-damage business interruption policy
- a managing agent (as defined in the FCA's Handbook) which, before 9 June 2020, performed functions for a member of Lloyd's for a relevant non-damage business interruption policy (and references to 'insurers' in this guidance should be read as including managing agents)
- an insurance intermediary (as defined in the FCA's Handbook) which carried out insurance distribution activities for a relevant non-damage business interruption policy before 9 June 2020 (but only the paragraphs of this guidance which specifically refer to insurance intermediaries under the heading 'Communicating with policyholders generally during the test case' apply)
- the Society of Lloyd's (but only the paragraph of this guidance which specifically refers to the Society under the heading 'Co-insurance' applies).

What should happen

Insurers should determine for each relevant coverage clause in their relevant non-damage business interruption policies whether:

1. the outcome on claims generally (including questions of causation of loss) may be affected by the final resolution of the test case, or
2. that outcome will not be affected

Each relevant coverage clause in every relevant non-damage business interruption policy should be allocated to one of the two categories above



6 Communicating with policyholders

Communicating with policyholders generally during the test case

- 6.1 Insurers and insurance intermediaries should consider how they can meet the policyholders' information needs about the test case. Where a policyholder bought their policy through an insurance intermediary, an insurer should consider providing appropriate information to the insurance intermediary to pass on to the policyholder.
- 6.2 Insurers and insurance intermediaries should ensure that their communications about the test case are balanced.
- 6.3 Insurers should publish sufficient details with appropriate prominence and signposting to keep all policyholders with relevant non-damage business interruption policies updated about the test case and its implications for potential claims under their policies. Insurers may publish this information on the firm's website or by other general means. This information should be published promptly after 17 June 2020.

- Firms should consider what communications they need to make to individual policyholders, by 15 July, who have made a claim or complaint in the light of the guidance and the review of relevant non-damage business interruption policies



4. ICOBS



Broker's duties

- **Assessing the insured's needs**
- Not obtaining insurance
- Not obtaining the insurance the insured wanted
- **Not obtaining insurance meeting the insured's needs**
- Not exercising discretion in a reasonable way
- Failing to act with reasonable speed
- Liabilities associated with Non-Disclosure
- Liabilities associated with Misrepresentation
- **Not advising adequately on the existence of and terms of cover**
- **Other failure to give competent advice**
- Liabilities during the currency of the policy
- Failure in respect of notification and in respect of claims

Based on Jackson & Powell Professional Liability Chapter 10.



Demands and needs



ICOBBS 5.2.2

R

01/10/2018



(1) Prior to the conclusion of a *contract of insurance* a *firm* must specify, on the basis of information obtained from the *customer*, the demands and the needs of that *customer*.

(2) The details must be modulated according to the complexity of the *contract of insurance* proposed and the type of *customer*.

(3) A statement of the demands and needs must be communicated to the *customer* prior to the conclusion of a *contract of insurance*.

[Note: articles 20(1) and 20(2) of the *IDD*]

ICOBBS 5.2.2A

G

01/10/2018

A *firm* may obtain information from the *customer* in a number of ways including, for example, by asking the *customer* questions in person or by way of a questionnaire prior to any *contract of insurance* being proposed.

ICOBBS 5.2.2B

R

01/10/2018

When proposing a *contract of insurance* a *firm* must ensure it is consistent with the *customer's* insurance demands and needs.

[Note: recital 44 to, and article 20(1) of, the *IDD*]

ICOBBS 5.2.2C

G

01/10/2018

ICOBBS 5.2.2BR applies whether or not advice is given and in the same way regardless of whether that contract is sold on its own, in connection with another *contract of insurance*, or in connection with other goods or services.

ICOBS 5.3 Advised sales

Suitability

ICOBS 5.3.1 A *firm* must take reasonable care to ensure the suitability of its advice for any *customer* who is entitled to rely upon its judgement.

R

01/10/2018



Advice on the basis of a fair analysis

ICOBS 5.3.3 If an *insurance intermediary* informs a *customer* that it gives:

R

01/10/2018



(1) advice on the basis of a fair analysis, it must give that advice on the basis of an analysis of a sufficiently large number of *contracts of insurance* available on the market to enable it to make a recommendation; or

(2) a *personal recommendation* on the basis of a fair and personal analysis, it must give that *personal recommendation* on the basis of an analysis of a sufficiently large number of insurance contracts available on the market to enable it to make a *personal recommendation*;

and in each case, it must be in accordance with professional criteria, regarding which contract of insurance would be adequate to meet the customer's needs. [Note: article 20(1) third paragraph of the *IDD*]

Personalised explanation

ICOBS 5.3.4 Where a *firm* provides a *personal recommendation* (other than in relation to a *connected travel insurance contract*) the *firm* must, in addition to the statement of demands and needs, provide the *customer* with a personalised explanation of why a particular *contract of insurance* would best meet the *customer's* demands and needs.

R

01/10/2018

[Note: article 20(1) third paragraph of the *IDD*]

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ICOBS 6.1 Providing product information to customers: general

Ensuring customers can make an informed decision: the appropriate information rule

ICOBS 6.1.5

R

01/10/2018



(1) A *firm* must ensure that a *customer* is given appropriate information about a policy in good time and in a comprehensible form so that the *customer* can make an informed decision about the arrangements proposed.

(2) The information must be provided to the *customer*:

(a) whether or not a *personal recommendation* is given; and

(b) irrespective of whether a *policy* is offered as part of a package with:

(i) a non-insurance product or service (see *ICOBS 6A.3* (Cross-selling)); or

(ii) another *policy*.

(3) Appropriate information is both objective and relevant information, and includes *IPID information*.

What level of information needs to be provided?

ICOBS 6.1.6B

R

01/10/2018

A *firm* must ensure that the level of appropriate information provided takes into account the complexity of the *policy* and the type of *customer*.

[Note: article 20(4) of the *IDD*]

ICOBS 6.1.7

G

01/10/2018



The level of information required will vary according to matters such as:

(1) the knowledge, experience and ability of a typical *customer* for the *policy*;

(2) the *policy* terms, including its main benefits, exclusions, limitations, conditions and its duration;

(3) the *policy's* overall complexity;

(4) whether the *policy* is bought in connection with other goods and services including another *policy* (also see *ICOBS 6A.3* (cross selling));

(5) distance communication information requirements (for example, under the distance communication *rules* less information can be given during certain telephone sales than in a sale made purely by written correspondence (see *ICOBS 3.1.14 R*)); and

(6) whether the same information has been provided to the *customer* previously and, if so, when.

Appropriate information for commercial customers

ICOB 6.1.7A

A firm dealing with a *commercial customer*.

G

01/10/2018

(1) may choose to provide some of or all of the appropriate information in an *IPID* (see *ICOB 6.1.10AR*), a *policy summary* or a similar summary if it considers this to be a comprehensible form in which to provide that information; and
(2) should include the *IPID information* (regardless of whether an *IPID* itself is provided).

ICOB 6.1.9

Cancellation rights do not affect what information it is appropriate to give to a *customer* in order to enable him to make an informed purchasing decision.

G

06/01/2008



Concerns for brokers

- **Mis-selling** - firms may suggest that they were sold the wrong policy (did you assess fully the client's requirements with pandemics being hypothetical and of very low probability)
- **Poor advice** - there may be allegations that they were advised that the standard level of cover was adequate (on what basis was the policy recommended as suitable?)
- How much did the insured wish to **spend** if beyond standard NDBI was suggested (only 10% of insureds take up terrorism and/or cyber cover)
- Unclear or misleading **policy wordings** - who gets the blame for that then?



Sharing the love

- For the avoidance of doubt, if (which is denied) the matters pleaded in paragraph 32 are relevant to the construction of the QBE Wordings, it is also relevant that the policyholders **acted through (and had access to the professional advice of) the authorised insurance broker intermediaries**
- Each of the policyholders of policies with the QBE Wordings acted through an authorised insurance broker intermediary at the time of the placing of the policies with the QBE Wordings whose duty, inter alia, **was to advise on the suitability of the insurance being obtained**



Cont...

- RSA4, “Marsh Material Damage and BI - Resilience” and “Jelf Material Damage and BI –Resilience” were **wordings drafted by the brokers Jelf/Marsh who (acting as agents for the policyholders by which they were retained)** placed the relevant risks with a number of different insurers including AIG, Aviva, QBE, RSA and Zurich. RSA4 was used for both SMEs and larger businesses (defence now changed)



Cont...

- All policyholders who have purchased the Zurich Policies **were advised by and acted through authorised insurance intermediaries** at the time of placement. The majority of the Zurich Policies were sold through online portals which could be accessed **only by authorised insurance intermediaries**. No Zurich Policies were purchased directly by policyholders.



PROD 1.4 Application of PROD 4

PROD 1.4.1 *PROD 4* applies to:
R (1) an *insurance intermediary*; and
01/10/2018 (2) an *insurer*,
with respect to:
(3) *manufacturing* insurance products; and
(4) *distributing* insurance products.
[Note: articles 1(2) and 25 of the *IDD*]



When an intermediary may be considered to be manufacturing

PROD 1.4.4
EU 3(1) For the purposes of Article 25(1) of Directive (EU) 2016/97, insurance intermediaries
01/10/2018 shall be considered manufacturers where an overall analysis of their activity shows that they have a decision-making role in designing and developing an insurance product for the market.
3(2) A decision-making role shall be assumed, in particular, where insurance intermediaries autonomously determine the essential features and main elements of an insurance product, including its coverage, price, costs, risk, target market and compensation and guarantee rights, which are not substantially modified by the insurance undertaking providing coverage for the insurance product.
3(3) Personalisation of and adaptation of existing insurance products in the context of insurance distribution activities for individual customers, as well as the design of tailor-made contracts at the request of a single customer, shall not be considered manufacturing.
[Note: article 3 of the *IDD POG Regulation*]



PROD 1.4.5 The effect of *PROD 1.4.3EU* and *PROD 1.4.6R* is that an *insurance intermediary* needs to
G consider if it is *manufacturing* an insurance product and, if so, should comply with *PROD 4.2*
01/10/2018 (Manufacture of insurance products).

What does this mean?

- Did the insurer produce the wording or did you?
- Did you influence the wording/terms/conditions?
- Is this relevant now in respect of BI?
- If you have had an involvement then it is likely that the insurer will have already been in touch
- If it is still the insurer's interpretation of the meaning of key words then it's down to the court to agree or disagree with them




Broker risk registers

- Update your risk register
- Have clients' solicitors indicated action following claims being rejected?
- PI insurance will be harder to get covering COVID-19 or will be much more expensive
- If you have an exposure how much is your excess and consider this part of TC2.4
- Ensure advice to clients over this becomes clearer (i.e. state pandemics will not be covered)



More Resources:

- [Handbook Publications](#)
- [Consultation papers, Discussion papers, Policy statements](#)
- [Derivations & destinations](#)



Terms to be incorporated in the insurance

MIPRU 3.2.4 The contract of professional indemnity insurance must incorporate terms which make provision for:

R 01/10/2018

(1) cover in respect of claims for which a *firm* may be liable as a result of the conduct of itself, its *employees* and its *appointed representatives* (acting within the scope of their appointment);

(2) the minimum *limits of indemnity* per year set out in this section;

(3) an excess as set out in this section;

(4) appropriate cover in respect of legal defence costs;

(5) continuous cover in respect of claims arising from work carried out from the date on which the *firm* was given *Part 4A permission* for the *insurance distribution activity* or *home finance mediation activity* concerned; and

(6) cover in respect of *Ombudsman* awards made against the *firm*.



Final thoughts

- The court will need to interpret whether what has happened falls to be covered by the policy as written (regardless of any unknown original intentions which they have failed to adequately articulate in their wording)
- Were premises closed because of an outbreak or to prevent one?
- If specified diseases are covered why has COVID-19 been left off (some lists are very extensive)
- How much evidence is needed to establish that COVID-19 was present in the given insured area?



Cont...

- Insurers have stated what classes of body can deny access to the premises - whilst a local authority can, should the government be also able to do so?
- Wordings are key and not all claims can be covered despite what insurers may have said in the past re being on your side/not existing solely to generate profit (i.e. pay legitimate claims)
- Whilst many will consider it in the “spirit of the policy” to pay it is very difficult to explain to a customer what the implications are for all insurers and all its policyholders would be if a general “honouring the spirit” approach were to be adopted



Is this a threat to brokers?

- Have you misunderstood the client's requirements and how much cover did they actually want and what indeed was available and can the client establish that other policies were available that would have covered the loss?
- Have you failed to provide adequate advice re the appropriateness of the wording which you then advised as being suitable to the client?
- Or are the insurers wrong in their stance and you have done nothing wrong?
- Please check now the robustness of your advice process and the awareness and competence of your staff over these critical issues



4th. Poll

What are you going to do now?



Learning objectives

This talk will give you an insight into:-

- What is happening with the FCA's test case on Business Interruption Insurance
- Why compliance with ICOBS is more important now more than ever



Thank you for listening

Questions and debate please

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