BRIEFING NOTE

COVID-19 Business Interruption Insurance Contract Uncertainty: The FCA Commences Declaratory Proceedings

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Introduction

Over the past three months, there has been considerable debate concerning the response of insurance policies to the financial consequences of business interruption resulting from the COVID-19 outbreak. There are a number of challenges in determining cover, particularly the diversity of the: (i) insurance policy wordings providing cover for business interruption resulting from non-damage causes; (ii) insurers providing that cover; and (iii) underlying factual matrices giving rise to claims for an indemnity under the covers provided.

This has prompted the Financial Conduct Authority, which regulates the UK insurance industry, and various insurance companies to agree to commence declaratory proceedings before the English Courts to determine the indemnity provided by certain sample wordings. The purpose of this exercise is to give clarity and certainty as to whether the insurers are obliged to indemnify their policy holders and, if so, the amount of the indemnity. Armed with the Court's decision, the insurers will take a fair and reasonable approach in settling claims.

Press Release

The press release of the FCA, which represents the interests of the policy holders, states:

"The coronavirus (Covid-19) pandemic and the Government controls imposed as a result are causing a substantial level of loss and distress for businesses, in particular for SMEs. A large number of claims are being made to insurers under the terms of business interruption (BI) insurance policies. There is continuing and widespread concern about the lack of a positive response of some of those BI insurance policies, and the basis on which some insurers are making decisions in relation to claims.

On 1 May 2020, the Financial Conduct Authority (FCA) released a statement that we intend to obtain court declarations aimed at resolving contractual uncertainty in selected BI insurance policies. Acting in the public interest, the FCA will put forward policyholders' arguments to their best advantage. We are aiming to obtain legal guidance in this way more quickly and at a lower cost to policyholders than would be the case if they took their own court actions. The FCA recognises that many claims will already be the subject of negotiation or other dispute resolution processes. This proposed action is not intended to impact the normal claims process. It is designed to assist policyholders, and particularly SMEs, whose claims are being refused when they think the firm should respond.

The intended action will not prevent individuals from pursuing issues through negotiated settlement, arbitration, court proceedings as a private party, or taking eligible complaints to the Financial Ombudsman Service. The result of the test case will be legally binding on the

insurers that are parties to the test case in respect of the representative sample considered. It will also provide persuasive guidance for the interpretation of similar policy wordings and claims, that can be taken into account in other court cases including in Scotland and Northern Ireland, by the Financial Ombudsman Service and by the FCA in looking at whether insurers are handling claims fairly. We wish to ensure that policyholders and insurance intermediaries are properly engaged throughout this process."

The Process

The process, which is akin to a form of class action, can be summarised in five steps.

First, the FCA, working with 56 insurers, have selected 17 sample wordings that may cover loss arising from business interruption resulting from COVID-19 in circumstances in which COVID-19 is assumed not to have caused physical damage. Of those various insurers, eight have agreed to participate in the proceedings (Arch, Argenta, Ecclesiastical, Hiscox, MS Amlin, QBE, Royal & SunAlliance and Zurich) and another eight use at least one of the 17 sample wordings selected (Allianz, AIG, Aspen, Aviva, AXA, Chubb, Liberty Mutual and Protector).

Second, the FCA has proposed an assumed set of facts relating to certain types of business and how they responded to the pandemic. The proposed set of facts represents an overview of what the FCA perceives to be a range of possible fact patterns for policyholders, and in particular SME businesses. It is intended as a neutral document, with high-level fact scenarios, and in a form flexible enough to enable more detailed factual scenarios (arising in respect of particular businesses and policies) to be considered within its framework.

Third, the FCA has proposed an issues matrix that identifies four issues that arise in connection with the 17 sample policies under consideration: (i) just denial or prevention of access by a government or other civil authority; (ii) outbreak of infectious disease within a particular radius or vicinity; (iii) the application of the trends clause that governs the amount of the indemnity; and (iv) the application of any exclusions within the policies considered.

Fourth, the FCA has proposed 21 questions for determination which will assist insurers and policyholders in determining whether the financial loss is covered. The list is not binding or determinative and is likely to be reduced as the trial approaches. The questions fall into six broad categories: (i) central questions; (ii) generic issues; (iii) disease cover; (iv) denial or prevention of access cover; (v) causation; and (vi) potential exclusions.

Fifth, the FCA and the participating insurers have agreed to an expedited procedure, with the case set down for a five to ten day hearing in the second half of July 2020. Although there is no date for the release of the judgment, given the urgency of the need for clarity, the judgment could be handed down within three months, and possibly by September.

Final Word

The fact that there are 17 sample wordings under consideration may seem staggering. But it is not unusual for a multiplicity of products to circulate in the insurance market addressing the same risk. By the same token, it is not unusual for the construction and application of those products to require the parties to agree a proposed set of facts, issues matrix, list of

questions for determination and up to ten hearing days in court. What is unusual is for the parties to expedite the resolution of the issues, and the clarification of the policy cover, to a period of within six months. For this, the FCA and participating insurers should be applauded. And insurers and insurance defence counsel who demand up to two years to bring less complex coverage claims to trial should take note: where there's a will, there's a way. We will of course update our readers after the English Court publishes the judgment.

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