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CORONAVIRUS: THE INTERACTION BETWEEN A PANDEMIC AND INSURANCE COVERAGE, PART IV

Like almost every other economic sector, the insurance market's response to the Wuhan Covid-19 virus has had to evolve rapidly to maintain pace with global developments. On Good Friday President Trump weighed into the debate, creating what one financial journalist described as the insurance sector's 'uh-oh moment '; Trump said he "*would like to see the insurance companies pay if they need to pay*", also saying that there's an exclusion for pandemics "*in some cases*" but "*in a lot of cases, I don't see it.*"

Coverage for business interruption (BI) has become the focus of criticism for insurers in the past few weeks, with several interesting legal cases looming already. Yet only a few weeks ago the UK's insurance trade body (the ABI) stated in guidance that "*On valid claims, only a very small number of businesses choose to buy any form of cover that includes business interruption due to a notifiable or infectious disease*". This was reinforced last week by the UK insurance regulatory body, the FCA, in a 'dear CEO' letter which stated: "*our estimate is that most policies have basic cover, do not cover pandemics and therefore would have no obligation to pay out in relation to the Covid-19 pandemic.*"

However, public opinion (perhaps encouraged by sentiment like that expressed so forcefully by President Trump) has hardened against the insurers, as we predicted in our second article on this topic. With the economy in meltdown it is easy to see why; moreover, the insurance market has been here before. Following Hurricane Katrina in 2005, much of New Orleans was flooded; many of the insurance policies in force that covered hurricanes specifically excluded damage caused by flood, leading to widespread cover rejection.

The US Government backed National Flood Insurance Programme (NFIP) instead was designed to cover the flood aspect of any weather loss; however, many policyholders were unaware or had not bought flood cover. Simply because the amounts at stake were so high, many policyholders resorted to litigation and high-profile attacks on insurers to get them to pay. Ultimately the insurance market paid out over $40 billion in claims, with the NFIP paying an additional $16 billion, making Katrina the most expensive insured loss ever. We are beginning to see a similar pattern play out with this pandemic – as the economic impact grows, the search gathers pace for any deep pocket to help pay for the loss.

In our previous blogs, we have explained the reasons why BI cover generally will not respond – this rationale is what is behind the statements above from the FCA and ABI. However, as economic losses mount, many businesses and lawyers are looking much closer at insurance policy wordings to see whether a claim can be made; these investigations are currently focused on three aspects of a typical policy:

1. **Physical damage to property -** Most normal BI cover requires physical damage to property before it can be activated. Can the virus be considered as physical damage, so triggering a BI loss? Insurers have won cases that have defined physical damage as something that needs to affect the structural integrity of the property, but have lost cases where the property has been rendered unusable by some form of contamination. This pandemic will surely test the language and intent of these policies.

2. **Local or civil authority closedown -** Many policies offer some cover for business closure due to civil authority action; could cover granted under these sections offer a route to a

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claim? Two recent claims (the Chickasaw Tribe and Media Zoo) are relying on this aspect to make a claim; no doubt there will be many more

3. **The general absence of an exclusion -** In 2006 the US Insurance Services Office (ISO) published an exclusion clause for '*any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease*'. The intention was to widen traditional pollution exclusions to ensure losses from viruses were excluded, including those to '*business income*', in the wake of SARS and other avian 'flu' outbreaks. Potential claimants (and President Trump) are now asking why, if the industry has had an exclusion for 15 years, it isn't on all policies? Its absence from a normal 'all-risks' property/BI policy surely must indicate there is coverage for pandemic after all?

What is certain is that losses will be paid to a greater extent than insurers first thought; some welcome recent clarification of UK BI coverage from some firms illustrates possible routes to claim, although no doubt the debate on BI coverage will continue in and out of the courts. Ultimately insurance policy wordings are already adapting and will tighten further to ensure the insurance sector isn't again caught out by a global pandemic that could cause a systemic solvency-threatening event.

Previous articles in this Series:

Previous Articles in this series can be seen here: Part 1, Part 2, Part 3.

Prospect Group Webinar on Insurance Coverage in the Face of Covid-19 Related Claims

Prospect Law is organizing a webinar to cover the business interruption and insurance related issues which have been raised by Mark Tetley in his recent series of articles.

Please let Adam Mikula know at adm@prospectlaw.co.uk whether you would like to be invited to this.

About the Author

Mark Tetley has wide experience gained from senior positions across the London insurance market as both an underwriter and a broker , in a variety of sectors. He provides advice and assistance on a wide range of insurance and risk issues, including comprehensive nuclear liability and property insurance assistance, complex infrastructure project programme design and review, claims and policy reviews, assistance with project insurance design and implementation in developing countries, and many other aspects of risk mitigation.

Prospect Law is a multi-disciplinary practice with specialist expertise in the energy, infrastructure and natural resources sectors with particular experience in the low carbon energy sector. The firm is made up of lawyers, engineers, surveyors and other technical experts.

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