

UK Business Interruption Policies and COVID-19

by Joseph Lewin

As the economic impacts of the pandemic continue, many businesses in the UK will be turning to their insurance providers to claim under their Business Interruption policies in respect of financial losses arising from COVID-19.

Business Interruption (“BI”) Insurance

BI cover is designed to protect a business from loss of income which results from business interruption or interference caused by certain events.

Each BI policy will be different and exactly what is covered will depend on the precise wording of the policy.

Insurance companies have been seen to be resistant to claims under BI policies for COVID-19 losses. This led the Financial Conduct Authority (“FCA”) to announce on 1 May 2020 that it intends to seek a judicial declaration to resolve policy wording uncertainty in relation to business interruption claims.

This article considers the most common types of BI insurance policies, and the issues that might be faced in seeking to make a claim for COVID-19 related loss under them.

Property Damage Cover

Generally, BI insurance is purchased alongside a property damage policy to provide cover for loss of income caused by damage to property, for example, flood or fire. Such a policy typically requires the insured to demonstrate that physical damage to property has occurred before it can claim for the losses arising from it.

If an insured seeks to claim for COVID-19 related loss under such a policy, the trigger for the claim will need to be actual property damage caused by COVID-19.

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Whilst it may be possible to assert that the virus has caused physical property damage by contamination, it is likely that insurers will seek to argue that the insured property has not been damaged by COVID-19. It is necessary in each case to consider the precise wording of the policy; some BI policies specifically exclude damage to property caused by contamination.

Equally, it has yet to be shown that COVID-19 causes property damage; indeed, current science appears to suggest that it does not and that it “dies” on surfaces after the expiry of a limited number of days. And even where actual property damage can be shown to have resulted from COVID-19, insurers may well seek to argue that losses have been caused by the Government’s lockdown and not by the virus.

Whilst in general “physical damage” requires there to be a physical change in the property, in non-COVID-19 cases, there have been successful arguments that damage has been caused to property when contaminated or overlaid by a dangerous substance. Therefore, in the context of COVID-19, there is an argument that when premises are contaminated, the “material damage proviso” may be satisfied.

Non-Damage Cover

Certain BI policies are not contingent on damage to the insured’s property and provide cover for loss of income in situations where there has been no damage to the insured’s premises, otherwise known as pure BI policies.

These types of policies may be triggered if business interruption is caused when access to an insured’s premises has been prevented, for example, by a Government order or by the declaration of a “notifiable disease”.

Whether or not the policy is triggered will again require a careful analysis of the policy wording and the factual circumstances of the claim.

Notifiable Disease

Some BI policies provide cover for business interruption caused by notifiable diseases. A notifiable disease is a disease which must be reported to public health authorities when it is diagnosed. COVID-19 was declared a notifiable disease in England and Wales on 5 March 2020.

In respect of policies which provide cover for business interruption caused by notifiable diseases, it is possible that COVID-19 may be covered, depending on the wording of the policy, including precisely how “notifiable disease” is defined. The policy may often include an exhaustive list of such notifiable diseases. It is likely that most policies will not include COVID-19 in such lists if it was not a known disease at the inception of the policy. Arguments are currently being advanced that where SARS is listed, the policy should be interpreted as covering COVID-19. Whilst “influenza” would not be deemed to include COVID-19, “virus” probably would be sufficient.

Other non-damage BI policies may define a notifiable disease with reference to public health legislation or the actions of public bodies. COVID-19 is likely to fall within that definition with effect from the date that it was declared a notifiable disease in the relevant jurisdiction.

Policy Trigger

Whether a BI policy will be triggered by the COVID-19 pandemic will depend on whether the business interruption has been caused by the pandemic or the steps taken in response to the pandemic.

Policies may not provide cover where the business interruption was caused by voluntary steps taken by the business even if those steps are in accordance with advice from the Government. Cover is also likely to be excluded where the loss would have occurred despite the triggering event, for example, in the case of a policy that is not linked to property damage, loss that would have occurred even if the business had not been ordered to close by the Government, such as losses that would have been caused in any event as a result of the public staying at home. The wording of BI policies varies greatly and the issue of causation will need to be considered in light of the wording of each specific policy.

Recent Updates

As yet, the UK Government has not passed measures that would compel insurers to indemnify businesses for revenue losses regardless of the terms of their BI insurance policies.

By contrast, some US states (including New York) are expected to introduce legislation that would require insurers to pay out under BI policies irrespective of any exclusions.

In reality, many businesses have found that their BI policies do not cover for losses arising as a result of the COVID-19 pandemic. That is not entirely surprising, given that on 15 April 2020, the FCA said *“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”*.

The uncertainty over BI insurance claims relating to the COVID-19 pandemic has already given rise to litigation: on 23 April 2020 it was announced that several businesses that had seen their claims denied by their insurer, Hiscox, had appointed lawyers to pursue legal action. Hiscox is resisting business interruption claims on the basis that pandemic-related disruptions are excluded from BI policies. The progress of this case will provide helpful insight on the position that the courts will take to BI insurance claims in light of the current pandemic.

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information regarding the matters discussed in this article. We have also created a Coronavirus Resource Center containing other briefings and information related to the current crisis: www.dorsey.com/coronavirus.