

## COVID-19: Insurance and Risks Q&A

### Introduction

COVID-19 has had a profound impact on businesses across the globe. But as the tide begins to turn and businesses move from a state of resilience, to recovery and renewal, many policyholders will look to their insurance policies to help shoulder some of their financial burden.

There has been much commentary on how insurance policies and the insurance sector as a whole may respond to the COVID-19 pandemic. Whether your company's losses are covered however, is a complicated question, requiring careful review of policy terms, and consideration of your company's unique situation. Likewise, whether insurance can help your business adapt to the changing working environments, and what effect COVID-19 will have on your renewal premiums and future coverage are complex issues.

In this note, we answer some of the key questions your business is likely facing.

### Are business losses covered?

Although BI insurance is perhaps the most obvious source of cover for COVID-19 business losses, it will not provide an indemnity in all circumstances. Cover will depend on the precise wording of each policy, and every clause should be read with care. At the same time, companies should be careful not to ignore potential COVID-19 cover under other (non-BI) insurance policies.

#### 01 Will Business Interruption ("BI") insurance respond?

BI insurance traditionally covers losses caused by physical damage to a policyholder's premises (for example, lost revenue caused by a flooded office). As COVID-19 does not cause physical damage (in the same way a flood does) it is likely that the majority of standard form BI insurance policies will provide no, or no substantive, BI cover for COVID-19 related losses.

Companies should however, review their policies carefully. Definitions of "physical damage" and triggers under BI insurance vary from policy to policy, and some definitions of "physical damage" may be drafted broadly enough to cover COVID-19 losses. In addition, BI policies may have extensions to the cover they provide, which are explicitly designed to respond to COVID-19-type scenarios, (for example, infectious disease extensions) or can be interpreted to apply to losses caused by COVID-19 (for example, denial of access extensions).

#### 02 Does the Government recognising COVID-19 as a "notifiable disease" make a difference?

On 5 March 2020, the UK Government added COVID-19 and SARS-COV-2 to the Health Protection (Notification) Regulations 2010. In effect, this is the date on which the UK Government (like many governments), officially recognised COVID-19 and SARS-COV-2 as diseases. This date will likely be significant for infectious disease policy extensions, as many of these extensions require a disease to

be officially recognised as a "notifiable disease" by the Government, before its related losses can trigger cover.

Not all disease extensions rely on a "notifiable disease" trigger. Some for example will require the disease to be one of a number listed in the policy, or be officially recognised on the date the policy was taken-out. It is possible that COVID-19 is encompassed in a policy's list of diseases, if the diseases are drafted broadly (for example, if the policy's list simply says SARS related diseases), but if the policy prescribes an exhaustive list of specific diseases, COVID-19, as a new disease, will not be present and thus not trigger cover.

#### 03 What about "Contingent BI" cover?

Contingent BI insurance is usually broader than BI insurance, insuring losses arising from the loss, damage or destruction of property operated by third-parties. This often includes the property of suppliers, distributors and even customers on whom the insured depends for its business. Companies may therefore be able to bring a claim under contingent BI cover where losses have been suffered due to the forced closures of others. As with BI insurance however, any potential coverage will turn on the wording of the policy and in the absence of a diseases extension, establishing coverage will likely be difficult.

## 04 Might other policies respond?

Depending on the precise nature of the losses suffered by your business, any number of company insurance policies may provide cover, for example:

- Event Cancellation insurance may provide cover for losses arising from the cancellation of one-off events;
- Political and Terrorism Risk insurance may provide cover for losses resulting from lockdown restrictions imposed by a Government;
- Trade Finance or Credit insurance may provide cover for the non-payment of debts;
- Workers Compensation insurance may provide cover for workforce shortages (although policies often exclude cover for 'ordinary diseases of life', which may include COVID-19).

## 05 How quickly will insurers pay?

Insurers are under public pressure to process claims quickly and ensure that where cover exists, payments are made promptly. Indeed, in its "Dear CEO" letter to SME insurers dated 15 April 2020, the FCA stated its expectation that where possible, insurers should pay claims on an interim basis, whilst the precise scope of cover is investigated.

## 06 What if the policy isn't clear?

You may find that on reviewing the wording of your insurance policies, that the level or quantum of your cover is unclear. If this is the case, we would suggest that you first speak to your brokers and if necessary your lawyers to obtain advice on the scope of your cover. Your lawyers will also be able to help you manage discussions with your insurance brokers, insurers and loss adjusters, and ultimately, help resolve your insurance position as quickly as possible.

In response to COVID-19, Governments and regulatory bodies have placed pressure on insurers to take a flexible approach to insurance coverage. An awareness of these pressures may assist the claims making process, as it may encourage insurers to pay-out where the policy is ambiguous. Companies can further increase their chances of a successful claim by ensuring they comply with all notification requirements under the policy, including the provision of any financial modelling for loss of revenue claims.

The FCA has announced plans to bring a High Court "test-case" to probe the validity of COVID-19 BI claims. The "test-case" is scheduled to start on 20 July, and see the Court conclude on the COVID-19 BI cover provided by a representative sample of 17 BI wordings. The Court's findings from the "test-case", along with the advice of brokers and your lawyers, should provide you with a strong position from which to assess the scope of your cover.

## 07 What if you and your insurer disagree?

As a novel risk impacting a wide range of policyholders, COVID-19 has already led to an increase in insurance disputes.

If you and your insurer disagree on the scope of cover under your insurance policy, and your broker has been unable to break the impasse, you should speak to your lawyers. They will guide you through the various ways you might resolve the dispute in the most efficient way possible. In this respect, it should be remembered that the Court system has also been affected by COVID-19, and as a result, claims may take longer than usual to be resolved. As a result, alternative dispute resolution routes such as negotiation and mediation, may prove to be quicker conflict resolution paths than pursuing claims through the Courts.

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## Business continuity - can insurance help?

Many businesses will have robust business continuity plans to deal with the most common threats to their operations. Many of these plans, however, will be focused on short-term and localised events such as fire or cyber-attack. The global and protracted disruption caused by COVID-19 will likely have stretched these business continuity plans and forced many companies to adopt new working structures. As your business moves to an adjusted model of working, it may face a number of new or enhanced risks, some of which might be mitigated by its existing insurance policies.

## 08 Are messages clear?

As the COVID-19 pandemic has developed, companies have engaged in unprecedented levels of communication with employees, shareholders and even the general public regarding their financial positions. Companies should however, be sure to employ the same level of care around these communications, as they would exercise at any other time.

Inaccurate statements may expose a company and its directors to regulatory enforcement and to class-action law-suits from shareholders. Indeed, claims like this are already starting to emerge, for example, the US shareholder class-action suit against Norwegian Cruise Line Holdings Ltd. (alleging that the company breached securities laws by making inaccurate statements about COVID-19's impact on the company's financial performance), and the claim against Inovio Pharmaceuticals Inc. (which is alleged to have made misleading statements about its development of a COVID-19 vaccine).

## 09 Is it business as usual?

COVID-19 has forced most businesses to change their ways of working on an unprecedented scale and in a very short time frame - with many adopting an entirely remote working model. Accompanying such a dramatic shift in working practices are concerns that new employee working environments may not allow them to perform as effectively as before, and that human error related risks have increased. As companies continue to grapple with these challenges, they may find some protection from their Professional Indemnity, D&O, Errors & Omissions and Cyber insurance policies, which will likely continue to cover the actions of employees, regardless of where they are working.

## 10 Are regulatory expectations being met?

In response to COVID-19's strain on companies, the FCA has announced a softening of certain requirements around the SMCR. This said, for the most part, compliance and reporting obligations remain unaltered and managers should take whatever steps are necessary to ensure their obligations continue to be met, including detailing any temporary changes to compliance management and reporting.

## 11 Is the network secure?

With an unprecedented number of people working remotely, a strain on IT resources is almost inevitable. A key risk arising from this is employee use of personal IT devices. Personal devices will often use end-point security features which are not as robust as those found on corporate networks and thus their use can expose companies to an increased risk of cyber-attack.

There are also human-error risks. Criminals are taking advantage of COVID-19's disruption to working practices to increase phishing campaigns and similar on-line scams. Additionally, employees working away from the office and without their usual IT resources may be tempted to cut-corners and breach data management procedures, for example, emailing confidential data to their personal email accounts.

Cyber and/or Technology Errors & Omissions policies may continue to provide cover for employees working outside of the company's network and whilst using their own hardware, but the wordings of individual policies should be carefully reviewed to confirm this.

## How will COVID-19 affect renewal?

As noted above, COVID-19 has led to a high number of insurance claims, and while many policies will not respond, or not indemnify insureds for their full loss, insurers are still likely to incur significant losses and be forced to re-evaluate their reserves positions. Indeed, it is possible that COVID-19 may lead to solvency concerns for some insurers and an increase in M&A activity in the sector. It is also likely that insurance policies themselves will change in response to COVID-19 and that going-forward, disease exclusions across a range of policies will become more common, as occurred following the 2003 SARS epidemic.

## 12 Will COVID-19 be excluded from future BI policies?

Some insurance companies are already updating their standard policy wordings to exclude COVID-19 claims. The FCA has made it clear however, that any attempts to exclude COVID-19 claims at policy renewal should be made very clear.

Any such coverage will likely be at a significant premium and include strict limits on cover. Close monitoring of the market over the coming months will reveal whether such policies emerge, and on what terms.

## 13 Will cover for COVID-19 be possible?

While many insurers will rush to expressly exclude COVID-19 losses from future cover, some providers may offer insurance, either by way of an extension to standard BI insurance policies, or as a stand-alone policy (similar to cyber insurance policies).

## 14 Might all insurance get more expensive?

While we do not yet know the full scale of potential claims from COVID-19, it is likely that the insurance market will incur significant losses from the COVID-19 crisis. We may therefore see a "hardening" of the market and a corresponding increase in insurance premiums.

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