



Many businesses and professional practices have been and will be affected by the Covid-19 outbreak. They are seeking advice upon and making claims in respect of insurance cover (or the lack of insurance cover). 39 Essex Chambers has a long-established and wide-ranging insurance practice. Here we outline some of the topical insurance issues and the services that we are able to provide to both insurers and to businesses and professional practices.

If you have any Covid-19 related enquiries then please do not hesitate to contact the clerks whose details can be found on page 7.

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BUSINESS INTERRUPTION

Neil Block QC

Businesses of whatever size and in every sector are suffering financial loss as a direct or indirect consequence of the current Covid-19 “lockdown”.

Some businesses such as in the hospitality and entertainment industries have been forced to cease operating. Other businesses have been advised to cease operating but are not subject to any closure order. Some of these businesses have business interruption insurance cover. However, the ABI has said that only a small number of insurance policies include cover for business interruption of the type caused by Covid-19. This is because policy terms and conditions often require associated property damage, denial of access, or notifiable disease (Covid-19 is presently a notifiable disease, but was not at the beginning of lockdown).

The Chancellor of the Exchequer has made the Government position clear – “..for those businesses which do have a policy that covers pandemics, the Government action is sufficient and will allow businesses to make an insurance claim against their policy.” This may seem clear, but is likely to prove far too simplistic. For example, those businesses that have continued to operate but have been adversely affected by supply chain interruption or other trade disruption.

There has already been a steady stream of notifications of loss. It is too early to say how widely the Courts will construe the business interruption sections of insurance policies. Early indications are that many insurers will maintain that their policies were not intended to and do not cover Covid-19 related losses. On the other hand the FCA is saying that the change in behaviour resulting from the recommendations to self-isolate and stay at home should be taken into account by insurers who should act fairly.

There is no simple rule of thumb. Each case will turn upon different facts and the relevant policy terms and conditions will vary greatly. Standard

policy wording is generally unlikely to provide cover, but extensions such as non-damage denial of access, loss of attraction, and infectious disease may apply. Clearly there is much at stake for insureds and insurers and expert legal advice should be sought at the earliest opportunity.



LIABILITY INSURANCE

Edmund Townsend

On 11 February 2020 the International Committee on Taxonomy of Viruses (ICTV) named the virus responsible for the current pandemic “Severe acute respiratory syndrome coronavirus 2” (SARS-CoV-2) and the World Health Organisation (WHO) named the disease which is caused by the virus “coronavirus disease” (Covid-19). Given the need to avoid conflation with the SARS outbreak which started in 2002 the current outbreak has been referred to by reference to the disease.

This note seeks to identify the scope for claims under liability policies arising from the Covid-19 outbreak.

There will be some issues that may arise across the spectrum of liability insurance. For example,

- a) Deductibles and limits of indemnity: most policies will apply a deductible to each claim or a maximum level of indemnity which may be calculated on the basis of each loss or claim or aggregate of all losses in the period of insurance. Where there is a ceiling which applies to each ‘loss’ or ‘claim’ it will be necessary to review the definitions of those terms within the policy concerned. In general terms the caselaw on liability policies indicates that the courts regard a series of related incidents as a single claim, and regard a number of different forms of breach of duty giving rise to a loss as a single claim;
- b) ‘Reasonable precautions clauses’: many liability policies contain a clause requiring the insured to take reasonable precautions to avoid a loss from occurring. Such clauses are construed narrowly, since, if they were interpreted broadly

they would exclude loss wherever negligence on the part of the insured were established – which is the very conduct a liability policy is designed to respond to. They tend only to apply where the insured intended to cause harm or where the insured acted with reckless disregard for the consequences;

- c) There is likely to be an increase in insolvency as a result of the measures introduced to mitigate against the scope and effect of the Covid-19 outbreak. The Third Parties (Rights Against Insurers) Act 2010 may therefore increasingly be brought into operation; and
- d) Where liability policies do not respond to a liability which is incurred, there may be an increase in claims brought against brokers for failure to adequately take instructions as to the insurance needs of their clients and/or failure to advise their clients in relation to the terms of the policies they have arranged on their behalf.

Public liability insurance

A public liability policy covers general liability to the public. Such policies typically indemnify “against all sums which they shall become legally liable to pay as compensation in respect of loss of or damage to property”. Public liability policies may also provide cover for liability for damages arising from accidental bodily injury.

Individuals may seek to bring claims against businesses alleging that the business failed to exercise reasonable care in protecting them against, or warning them of, the risk of exposure to the virus which causes Covid-19. Given how widespread SARS-CoV-2 has become, Claimants alleging that they have developed Covid-19 may face difficulties establishing causation. However, there may be cases in which causation will readily be established. For example, where individuals have been quarantined in a hotel or on a cruise ship.

Employers liability insurance

The Employers’ Liability (Compulsory Insurance) Act 1969 requires employers to obtain liability insurance for the benefit of their employees. There

is regulation of the extent to which contractual defences can be relied upon as against the injured third party. Given the compulsory nature of such insurance, the wording of policies tend to be relatively homogenous. However, there is still some variation. Of particular relevance may be the scope of the definition of ‘employees’ within the policy concerned. Some policies adopt a broader definition than others.

There is likely to be claims made by frontline employees. It is foreseeable that there may be complaints made about the provision of personal protective equipment. Complaints may be made about the efforts made to sanitise workplaces in situations where there have been confirmed cases of Covid-19 amongst part of the workforce.

There may also be an increased number of claims brought by employees unhappy with how their employer treated them during the pandemic which are likely to fall outside the scope of an employers’ liability policy. Such claims are the subject matter of Employers Practices Liability insurance.

Product liability insurance

In circumstances where some businesses are changing what they produce to meet surges in demand for particular products as a result of Covid-19 (for example, Covid-19 testing kits, sanitisers or various food or medical lines) it is foreseeable that mistakes may be made.

Issues may arise in relation to product liability insurance. Such policies usually provide an indemnity for damages and costs if the insured becomes legally liable to pay in respect of bodily injury or property damage. Many policies contain policy wording such that only liability for the damage caused by the product would be covered. The product failing to fulfil its intended function would not be covered.

Product liability policies typically have an occurrence trigger which allows the insured to report claims during or after the policy period provided that the event or occurrence to which the claim relates occurred during the policy term.

Product liability insurance would not cover the costs associated with product recalls. Product recall policies provide cover for the cost associated with removing a batch or production run of products from the market place. For example, the costs associated with notifying purchasers, the costs of disposing or destroying products, transport and storage costs. Manufacturers of medical devices will typically have bespoke policies based on their product lines whereby underwriters are aware of the products before they are manufactured and distributed. There is, therefore, the potential for both coverage and quantification issues in relation to claims under product liability policies arising out of the Covid-19 outbreak.

D&O insurance

Directors' and Officers' insurance policies may respond to litigation arising from errors and omissions in the response to Covid-19. For example, inadequate contingency planning or failures to disclose the risk posed to financial performance.

In the United States shareholder lawsuits have already been issued. It is therefore foreseeable that there could be shareholder claims alleging errors or omissions on the part of directors or officers in their response to the pandemic which have caused loss to the company.

The Financial Conduct Authority has stressed that businesses should have adequate contingency plans in place for emergencies.

Bodily injury exclusions, conduct exclusions and pollution/contamination exclusions will need to be reviewed by all parties concerned with such claims.

D&O policies tend to state that all losses based on a single wrongful act are to be treated as a single loss or claim, so that any per loss or claim cap will apply to the aggregate of losses.

The Covid-19 outbreak has affected the profitability of business across a wide spectrum

of industries. The UK Government has announced that it will be introducing legislation to amend insolvency laws to suspend the wrongful trading regime that will have retrospective effect from 1 March 2020.

Professional Indemnity insurance

Most healthcare providers have insurance in place which covers errors and omissions which cause bodily injury – Hospital Professional Liability Coverage. Such policies exclude bodily injury to employees (which fall to be dealt with under the relevant employers Liability policy).

There is likely to be a spike in the number of clinical negligence actions brought after the pandemic.

There may be scope for issues of double insurance as the Government and NHS have announced additional safeguards against any clinical negligence incidents to reassure healthcare professionals, and others, who work as part of the response to Covid-19. This additional indemnity also covers those who are backfilling other people's roles, working in different ways or locations and any existing arrangements that do not cover a particular activity. There may, therefore, be issues as to how such extended indemnity interacts with any liability cover already in place, which would need to be considered in light of the respective wordings of the existing policy and the Government's extended safeguard.



EVENT CANCELLATION INSURANCE

Jonathan Bellamy

The current situation of the Covid-19 pandemic has caused the cancellation and postponement of numerous

expensive and otherwise profitable major business, sporting and entertainment events. The losers have ranged from professional conference organisers, sports governing bodies such as the Premier League, theatre and film production companies, and parties involved in the supply chains.

The prudent may have taken out event cancellation insurance cover as part of their risk management strategy. The more prudent, the better advised or in all likelihood simply the luckier ones, may have cover that does not exclude communicable diseases.

There is a developed market in event cancellation insurance products and policy wordings, with cover offered by major corporate insurers and Lloyds Syndicates and available directly or through specialist brokers. Policies are typically written on a single-event basis, a multiple-event basis or an annual basis. The cover may comprise first party loss cover and/or third-party liability cover. Event cancellation is a special financial lines underwriting risk and is very unlikely to be covered by general words in more general policies.

Cover typically attaches where an event is "cancelled, postponed, abandoned, curtailed or relocated". It is normally a policy requirement that this occurs as a "sole and direct result" of a cause which is entirely beyond the insured's control. The operative clause may of course vary from policy to policy.

The measure of indemnity is written on a number of alternative bases. Cover may be bought on a "gross revenue" basis, on a "gross profit" basis or on an "expenses-only" basis. The basis of cover offered is an underwriting issue and will

be reflected in the premium charged. In some cases, policies offer an alternative of profits or "irrecoverable expenses". Many policies offer additional cover for mitigation losses incurred to prevent or, more likely minimize, loss otherwise recoverable under the policy; e.g. re-arrangement costs following postponement rather than cancellation.

Will cancellation, or postponement, for reasons related to the Covid-19 pandemic, such as travel and gathering restrictions, trigger a successful claim under an event cancellation policy? The answer is, as is so often the case, that it depends on the policy wording, and specifically on whether there is a communicable diseases exclusion and its scope.

Some policy wordings provide a general cover subject only to typical market exclusions such as terrorism, financial failure of a supplier, trading risks such as lack of sales, interest, support or finance and protracted industrial action. Other policies contain a specific communicable disease exclusion, some of which refer specifically to "any strain, virus or syndrome that is related to influenza". The origin of these clauses is likely to have been the previous and far less serious and widespread outbreaks of SARS and "bird flu".

Policyholders suffering loss from events cancelled or postponed due to the current Covid-19 pandemic and the associated travel restrictions, government orders and Coronavirus primary and secondary legislation, and insurers who have written covers, would therefore be well-advised to consult their policies and to take experienced technical legal advice on policy coverage when notifying or defending a claim.



**INSURANCE BROKER
E&O/PI CLAIMS:**

Neil Block QC

As the flow of claims relating to business interruption, travel, events cancellation, and other insurance are met by refusals, limits of indemnity, aggregation clauses and other obstacles to full recovery, and as businesses and individuals come to appreciate that they have no cover or inadequate cover, the focus has shifted to the liability of their brokers. Claims are likely to fall into two main categories: i. advice at time of placement/inception of policy; and ii. ongoing duties of brokers to their clients after inception to advise them of possible adjustments to their policies prior to the spread of Covid-19 to the UK.

On 19th March 2020 the FCA stated, *"In these uncertain times, brokers have a key role to play to help consumers understand the market, the impact of Coronavirus, and search the market for products that meet their demands and needs. We encourage brokers to keep abreast of market developments so they can suitably advise their customers."*

Whilst many policies do not provide cover for events such as Covid-19, some do. It will no doubt be alleged that it was incumbent on brokers to make adequate enquiries of their clients to ascertain the nature of their business, the potential risk/exposure of the business to widespread disease, and to advise upon available cover and additional premium cost. Similar allegations will be made about the ongoing duties of the brokers.

We have a strong and wide-ranging insurance and professional indemnity practice and are able to advise policyholders and brokers upon the range of claims that will arise from the current exceptional circumstances.

CLERKS



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