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FCA Test Case Litigation: COVID-19 BI Losses– What Next For Insurers?

Background

The UK Supreme Court has come to a decision on the FCA Business Interruption Test Case, concluding the litigation. The judgment was published on Friday 15 January 2021. This litigation was initiated by the FCA in May 2020 with a view to bringing clarity to the extent of cover available to policyholders for COVID-19 business interruption losses under certain non-damage business interruption extensions.

The litigation is unlikely, however, to resolve all outstanding issues between insurers and their policyholders who have suffered business interruption losses as a result of COVID-19. It is possible that further litigation and regulatory intervention may follow. Many outstanding issues will continue to relate to the extent of cover available under applicable policy terms. In addition, we have already seen issues arise between insurers and their policyholders outside of the application of the terms of cover and we anticipate that those issues will continue to emerge now that the Supreme Court decision has brought some clarity regarding which policies will respond to COVID-19 BI losses, and which will not.

Claims for mis-selling

The outcome of the FCA test case has been received as broadly positive for policyholders, as the extensions under consideration were mostly found to respond to business interruption losses caused by COVID-19. Of course, not all policyholders will have business interruption cover on those terms. Many policyholders will not have any non-damage business interruption extensions to their standard material damage cover — and many who do will find that their cover is provided on different terms to those policies considered by the Court.

It follows that certain policyholders will remain without cover in respect of COVID-19 business interruption losses. In circumstances where those policyholders were under the impression from their insurers (for example as a result of statements or representations made at the point of sale) that cover would be available for these types of loss, there is the potential for damages claims to follow.

> *Where such allegations are made, insurers may be able to access cover under their own professional indemnity policy for associated defence costs and also potentially for damages, depending on the nature of relief claimed.*

Damages for late payment

Section 13A of the Insurance Act 2015 implies a term into insurance contracts requiring insurers to pay claims within a reasonable time. Breach of that term will allow policyholders to claim damages. The period of time that will be considered

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"reasonable" is not prescribed and will be considered in the context of all the circumstances.

Section 13A has not been tested to date and it is unclear how it might apply in the context of COVID-19 BI claims. Given the unprecedented nature of the COVID-19 pandemic and the FCA test case litigation it may be that claims for damages for late payment on a policy impacted by the test case where an insurer was awaiting for the outcome of the litigation, will gain little traction. The FCA has made it clear that following the outcome of the judgment they expect covered claims to be settled promptly and as such any delay going forward in making interim or final payments of claims will be carefully scrutinised. Reliance on Section 13A Insurance Act 2015 is already something that has been cited by policyholders and continues to be identified as a potential basis for a damages claim.

Whether such a claim could fall for cover under an insurer's professional indemnity policy will depend on its terms and, in particular, the extent of the exclusionary language in relation to payments made under a contract of insurance or reinsurance.

Regulatory

While the FCA action is at an end, the FCA has made it clear that it continues to have an interest in the way that insurers resolve claims and complaints in respect of COVID-19 BI losses. In their recent Dear CEO letter (see here - https://www.fca.org.uk/publication/correspondence/dear-ceo-letter-business-interruption-insurance-january-2021.pdf) the FCA stated that it expects insurers to indemnify policyholders that hold in scope policies without delay and that it expects insurers to take a *"pragmatic, transparent and consistent approach"* to evidencing and adjusting claims. The FCA has also set out its expectations in relation to revisiting claims and complaints that were settled prior to the outcome of the Supreme Court judgment.

Furthermore, the FCA will be interested to understand any concerns that may come to light in relation to insurer sales practices relating to cover for notifiable disease risk. This will be of particular concern where such practices may fall short of the requirements of the FCA's Insurance: Conduct of Business Sourcebook — for example, in terms of ensuring that products meet the demands and needs of customers and that information provided is not misleading.

There is therefore the potential for continued regulatory scrutiny in this area, either on an individual basis or potentially on a wider industry basis.

Some professional indemnity policies may contain cover for regulatory investigations, either as an extension or as part of their core cover.

Next steps

In the UK, claims for business interruption losses have been in a holding pattern, in most cases pending the outcome of the FCA test case litigation. Now that litigation is at an end, policyholders will once again begin to drive their claims for indemnity as well as related claims in relation to the broader service provided by their insurer. Insurers are likely to find themselves needing to deal with the quantification and indemnification of valid claims, high volumes of complaints, and further litigation from individual policyholders and Group Actions alike — all of which they must manage under the watchful scrutiny of the regulator.

It will likely pay dividends in the long term if insurers take a step back and consider the extent to which matters need to be notified to their own professional indemnity insurers or, where such a notification has been made, the extent to which that notification should be updated, or a new notification should be made. It will be of vital importance for insurers to engage proactively with their broker regarding potential notifications to their professional indemnity policies and reporting information material to their risk.

Whilst the Supreme Court judgment may not have gone in insurers' favour for the most part, it does provide clarity on a number of key issues and offers an opportunity for insurers to enhance the reputation of the industry through the efficient administration and resolution of outstanding claims.

For more information about the impact of the FCA judgment and other solutions from Marsh, visit marsh.com, or contact your local Marsh representative.

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