

**INSURANCE CLAIMS IN A PERIOD OF PANDEMIC**

If you are involved in the business of insurance dispute resolution, the chances are (a) that it will have occurred to you that the global economic crisis that is being caused by the COVID-19 pandemic is likely to lead to a significant number of insurance claims and disputes; (b) that you have been deluged by uninvited commentaries written by those seeking to demonstrate their legal knowledge in the hope that you might be tempted to engage them in due course to assist in resolving such disputes and (c) that the disruption being caused to your own life and livelihood by the pandemic and the battle against it are more pressing concerns at the moment than insurance law.

The truth is that the nature and extent of the insurance disputes that will emerge from the crisis is difficult to predict, and that in the vast majority of cases the resolution of those disputes will turn on the particular terms of the insurance policy and the facts of the claim involved. Anyone seeking to suggest that they can now offer novel and useful legal insights that will be applicable to a wide range of insurance disputes is probably not worth listening to (and if they had such insights they would probably not be giving them away for free).

It is, however, worth giving some thought to the types of dispute and issue that might arise, even if only to help target resources and efforts at a time when they are likely to be stretched. It is always possible that the thoughts that have occurred to some will not have occurred to others. A useful general resource is the website of the ABI (abi.org.uk) which contains a helpful consumer-oriented overview of claims that might arise out of the COVID-19 pandemic. The purpose of this note is to offer some limited thoughts from the perspective of the litigator as to (a) coverage issues that might arise and (b) the practicalities of insurance dispute resolution.

Coverage

It is possible, without claiming any great degree of foresight, to predict that the economic crisis caused by the current pandemic will lead to an increase in insurance claims across a number of areas of coverage. Some of those are:

1. Life Insurance: The direct harm inflicted by the pandemic itself is of course to human life and health. Apart from the fact that the pandemic is likely to generate an unusually large number of life insurance claims over a relatively short period, and the apparent prospect for disputes concerning the disclosure of pre-existing conditions given the apparent link between such conditions and the effects of the disease, it does not seem likely that any particular insurance coverage issues will arise.
2. Business interruption insurance: The most obvious source of insurance claims in a time of economic crisis is business interruption insurance, which provides cover against the risk of loss to a business as a result of an inability to trade (or to trade in the usual way). The question of whether or not a business interruption claim falls within the scope of coverage is likely in most cases to be relatively straightforward:



1. The majority of business interruption policies provide coverage only for interruption consequent on *property damage*. The prospect of a pandemic causing property damage so as to lead a business to close for long enough to meet standard waiting periods or excesses is remote.
2. Some policies provide for coverage for interruption consequent on contagious diseases, usually by way of a specific extension for which additional premium is charged. Where such an extension has been purchased, it is likely to respond. In many policies, coverage depends on designation of a disease as reaching a certain level of seriousness such as designation as a national event: COVID-19 is likely in most cases to trigger such cover. Whether a given business’s losses are covered and to what extent will depend on the policy terms. It is impossible to give useful generalised advice.

In the (probably unusual) case in which there is coverage, close attention will be required to identify the extent to which a business interruption has been caused by the pandemic (and measures taken in response to it) rather than by underlying business issues or voluntary decisions taken by the insured, and to the quantum of the business interruption losses properly caused. Most policies contain detailed provisions for calculating the quantum of business interruptions by reference to fixed or readily established criteria and deeming provisions. There is relatively little case law on the operation of those provisions. As with any contractual terms, the likelihood is that factual situations will arise for which the contract language does not provide a clear and unambiguous answer. In those cases, close attention to the facts and the policy terms will obviously be required.

1. Travel insurance: While the travel industry is undoubtedly suffering particularly badly from the effects of the COVID-19 pandemic, the scope for consumers to make claims on their travel insurance is probably limited. In the great majority of cases, travel arrangements will have been cancelled by the provider and the consumer will be looking to the provider (and not their insurer) for a refund or other recompense. It will only be in the (hopefully rare) cases in which a consumer has had to cancel arrangements themselves due to illness or other inability to travel caused by the pandemic that a travel insurance claim is likely. In such cases, attention will probably focus on establishing that the decision to travel was genuinely involuntary in the sense required by the policy.
2. Performance guarantees and credit insurance: Unless measures are implemented to avoid or mitigate the application of insolvency law as businesses struggle to pay debts when due as a result of loss of income caused by the pandemic and the measures taken to fight it,[[1]](#footnote-1) it is likely



that there will soon be an unusually high rate of debt defaults, which in turn will trigger cross-default provisions, application of insolvency measures and further events of default as a result. All of these things are likely to trigger an unusually high level of claims on performance guarantees and credit insurance, including in relation to companies that appeared to be relatively low-risk at the time policies were issued.

1. Fidelity/crime insurance: It is not necessarily the case that an economic crisis will lead to an increase in dishonest conduct. However, fraudsters are always with us (as the fraudulent text messages some have already received inviting recipients to ‘click’ to receive their COVID-19-related government assistance money remind us) and the disruption caused by a pandemic inevitably presents them with fresh opportunities to cause misery. The fact that a large number of business transactions that would previously have involved in-person contact are now being conducted remotely must increase the risk that those transactions will be affected by fraud. The transmission of increased amounts of confidential data over public networks to those working from home (and the increased importance of individuals being able to access computers and computer files that are susceptible to hacking and viral attack) creates additional risks. It is important that businesses check that their fidelity and crime policies are broad enough to cover all potential forms of fraud and extortion to which that business might be vulnerable where communications and transactions are being conducted remotely (the cases suggest that some policies are worded in ways that suggest that they only cover loss of physical property, which seems odd in the modern world but could lead to disputes, see e.g. *Proudfootplc v Federal Insurance Co* [1997] LRLR 659), and that insurers rate that cover with the increased risks caused by the pandemic in mind.
2. Professional liability, D&O and EL insurance: It is a fact of modern life that when someone suffers a significant loss, they will look for someone to blame and in many cases (particularly in the US or where encouraged by claims lawyers) someone to sue. The pandemic is likely to lead to an increase in claims against medical practitioners and the bodies for which they work, accused of negligence in their handling of treatment or testing or preparedness related to the virus; claims against company directors whose company share prices have fallen and whose every utterance will be scrutinised for something that could be said to have been inaccurately upbeat or missing some detail leading shareholders to lose out; claims against accountants and auditors of companies that fail and who will be accused of missing the signs; claims against employers accused of failing adequately to protect their employees; claims against insurance brokers who will be accused of failing to advise on the need for insurance cover that would protect against losses caused by the pandemic and claims against lawyers who will be accused of giving wrong advice and mishandling claims relating to all of the above. All of these people will look to their insurers to handle and cover the claims. Whether or not claims are covered will depend on the facts of each case and the policy terms in the usual way. An important issue in fighting underlying claims is likely to be whether the current pandemic and its effects were



reasonably foreseeable. We are all familiar with the idea of global pandemics causing havoc from the movies, but to what extent would it be fair to criticise us for not having the threat at the forefront of our minds before it was realised?

1. Excess liability insurance and Reinsurance: The fact that the pandemic could lead to claims from a variety of sources leads to the possibility that issues might (in due course) arise as to the aggregation of such claims for the purposes of excess liability and reinsurance policies. This may lead to interesting questions as to whether particular claims arise out of the pandemic as an “originating cause” (or whether the pandemic merely forms part of the background against which the loss arose and not an effective cause at all) and whether the pandemic or specific government actions taken in response to it constitute a single “event”. The latter in particular may be a question on which differing views can be taken: the fact that the terrorist attacks in New York on 11 September 2001 were regarded for the purposes of different insurance claims as constituting two ‘events’ (*Aioi Nissay Dowa Insurance Co Ltd v Heraldglen Limited* [2013] Lloyd’s Rep IR 281) and one ‘event’ (*Simmonds v Gammell* [2016] 2 Lloyd’s Rep 631) suggests that there will be scope for considerable argument as to whether claims said to arise out of the pandemic and/or the measures taken to fight it can be said to constitute claims arising from one event or from different events (or a ‘series of related events’ – another basis on which policies sometimes provide for claims to be aggregated).

There will no doubt be other types of insurance coverage where claims are indirectly triggered by the pandemic and its consequences. The overall message must be that, while the fact that the immediate harm caused by the pandemic is to human life and health rather than to property means that the scope for non-life insurance claims based directly on the disease is relatively limited, the likelihood is that (as with any large-scale catastrophe) the pandemic and its consequences will lead indirectly to a significant increase in insurance claims of various kinds, and that those claims will give rise to disputes that raise familiar questions against the backdrop of novel factual situations.

The Practicalities of Dispute Resolution

The business of insurance dispute resolution operates on two timescales. On the one hand, it is important that valid claims can be assessed and paid quickly so that the insured with a covered claim is not left out of pocket. On the other hand, some claims properly require what can be years of investigation and argument before the question of whether or not they are valid can be resolved.

In the short term, insurers are likely to find themselves walking the familiar fine line between ensuring prompt payment of valid claims, and conducting sufficient investigation and consideration to ensure that invalid claims (and in particular fraudulent claims) are not paid. Determining the appropriate course to adopt will involve a consideration of the precise circumstances of each claim, and no doubt both commercial and reputational considerations will play a part, as well as the legal question of whether a claim is covered. In *Aspen Underwriting Ltd v Credit Europe NV* [2020] UKSC 11 the Supreme Court has repeated that the duty of utmost good faith applies not only to the formation of an insurance contract but also to its performance (referring to the judgment of Lord Sumption in *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2017] AC 1). The most obvious consequence of that is that an



insured who presents fraudulent claims is in breach of duty, but the ongoing duty of good faith also has implications for the way in which insurers handle claims.

During the pandemic itself, the need to deal with matters remotely presents its own challenges. For litigators in particular, it is important to bear in mind the increased importance of written submissions at a time when arbitrators and courts are holding fewer in-person hearings and where many of the hearings that are occurring are being held remotely. Though remote hearings can work well, they inevitably tend to be more stilted than in-person hearings, making the development of points in debate with the tribunal or examination of witnesses more difficult.

In the long term, these particular difficulties will pass. It is tempting in the depths of a crisis to feel as though life has been changed forever, and to forget the extent to which life, in general, returns to normal once the crisis is past. It will not be long before we are back in arbitration tribunals and in court arguing over the meaning of a comma and the mutual absurdity of each other’s contentions as to the way an insurance policy is supposed to work. Perhaps, for a short while, we might even appreciate the fact that such things are all we have to worry about, and deal with each other more kindly than we did before. But that may just be the cabin fever talking.

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1. Incidentally, one wonders whether it might be possible and desirable to bring about a situation in which temporary liquidity problems caused by the pandemic should be held not to trigger insolvency measures for otherwise healthy businesses. This would probably require legislation providing that for the purposes of s.123 Insolvency Act 1986 a business shall not be regarded as unable to pay its debts if (a) the reason why debts cannot be paid on time is a temporary reduction of income due to the pandemic and (b) there is no reason to believe that the business will be unable to resume profitable trading after the pandemic ends. Such an approach would be consistent with the “realistic” approach to insolvency that courts have been encouraged to adopt when asking whether a company can pay its debts (see e.g. *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc* [2013] 1 WLR 1408 and *Re Casa Estates* [2014] EWCA Civ 383). If the liquidation of Lehman Brothers teaches us anything, it is surely that taking a short-term view of the viability of a business during a time of market crisis has the potential to lead both to the liquidation of businesses that could have survived and the exacerbation of the crisis itself, neither of which is the purpose of insolvency law. [↑](#footnote-ref-1)