3 VERULAM BUILDINGS
BARRISTERS

3VB Insurance Litigation – COVID-19

While insurance claims typically take some time to develop, in the case of COVID-19 many policyholders are already contacting their insurers and notifying them of claims or potential claims. Policyholders and insurers are seeking legal advice as to the nature and extent of the cover available.

This is taking place against a backdrop of regulatory, political and media pressure upon insurers to show flexibility in their interpretation of policy provisions and support the economy by promptly paying out to policyholders for COVID-19 related claims.

While cover will in each case turn on the specific terms of the relevant policy and the applicable facts, members of 3VB have seen and are able to advise on the questions likely to arise in relation to the following:-

Business Interruption cover

This is a common feature of commercial insurance packages, providing protection against loss of gross profit, mitigation costs and increased costs of working caused by specified forms of interruption. The trigger for cover in most standard policies is physical damage to business premises (or, under a damage-driven prevention of access extension, neighbouring property). Accordingly, it is unlikely that such standard BI policies will respond to losses caused by COVID-19.

However, some policyholders will have bought extensions to the standard BI cover which may respond to COVID-19 losses. These include:

(a) A ‘non-damage denial of access’ extension, providing BI cover if access to commercial premises is denied due to restrictions imposed by a public authority. In relation to COVID-19, key question issues are likely to include: (i) whether the government’s exercise of its powers under the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and the Coronavirus Act 2020 has caused a legally binding denial of access (see Cat Media Pty Ltd v Allianz Australia Insurance Ltd (2006) 14 ANZ Ins Cas 61-700 where there was a relevant infectious disease but the consequent regulatory action prevented a supplier supplying but did not prevent access to the insured’s premises); and (ii) whether the relevant losses were caused by the denial of access (see Orient-Express Hotels Ltd v Assicurazioni Generali SA [2010] EWHC 1186 (Comm), in which it was held that the insured whose hotel had suffered physical damage as a result Hurricanes Katrina and Rita could not recover for BI losses which it would have suffered in any event as a result of potential customers not wishing to travel to New Orleans in the aftermath of those Hurricanes);

(b) A ‘loss of attraction’ extension, which provides cover where a relevant occurrence in the area where a business is situated reduces the turnover of the business; or

(c) An ‘infectious disease’ extension. Such extensions may only provide cover in respect of listed diseases (which, given its novelty, will not include COVID-19); others may provide cover in respect of ‘notifiable human disease’ within (say) 25 miles, which would ordinarily include COVID-19 from the date on which the relevant authority classified the disease as notifiable (5 March 2020 in England; 6 March 2020 in Wales). An illustration can be found in the Hong Kong SARS case of New World Harbourview Hotel Co Ltd v Ace Insurance Ltd [2012] HKCFAR 120, where losses were only recoverable from the date on which SARS became mandatory to be notified to the HK Government, and the downward revenue trend caused by the disease prior to it being notifiable had to be taken into account when establishing the pre-event standard revenue used to calculate the counterfactual revenue which dictated the quantum of insurer liability.

3 Verulam Buildings
BARRISTERS

Trade finance/trade credit, bond and surety

The well-documented problems with supply consequent upon the pandemic are likely to lead to payment defaults (as will any acts of "modern piracy") in a market estimated to be worth some $11bn. Debt collection, particularly from debtors in certain jurisdictions, will be very difficult if not impossible, especially if governments adopt a protectionist stance. Claims are anticipated in respect of both the commercial risk (protracted default in payment) and political risks (a failure to pay consequent upon matters outside the business' control, i.e. at this time, COVID-19) covered by trade credit policies.

Financial lines and D&O

There is a particular risk at present for financial professionals given that asset values have fallen dramatically in a short space of time; and it is likely that in due course claims will be made contending that there has been a failure to value funds properly or to sell assets at the appropriate time. Moreover, market volatility and reduced staff means that some regulated entities will fail to comply with their obligations and fail, for example, to make necessary disclosures to shareholders or investors.

Cyber risks

The employees of most businesses and institutions are currently working from home and using remote access, employing an internet or telecommunications connection, to access computer networks. Information security is far more difficult to manage in such circumstances. Given that the integrity of the relevant computer network is dependent upon the security of each individual user, the increased number of access points for cyber criminals is likely to lead to some significant breaches of security and consequent claims under cyber policies (and also under professional indemnity and other liability policies, where the breach of cyber security gives rise to a liability or potential liability on the part of the insured to third parties).

Contingency/event cancellation cover

Across the board cancellations will be the inevitable consequence of the ongoing lockdown, the consequent legislation and any follow-up measures. While many policies will not include specific pandemic cover, high-profile examples relating to the 2020 Olympics and Wimbledon tennis tournament demonstrate some insurers may be liable to make significant pay-outs. Particular relevant policy terms include the triggers for payment, which may expressly include or exclude diseases, or depend upon particular Government prohibitions or travel advice (and hence problems may arise under the UK's slightly softer-than-some lockdown terms).

Employer's liability cover

There is an obvious likelihood of COVID-19 claims against employers by employees. These may include claims by employees who have not contracted the disease but have suffered stress etc. This may give rise to issues as to coverage (depending on the terms of the relevant EL policy).

Excess layers (and Reinsurance)

The usual pattern of disputes over aggregation (including over "event" or "cause" based clauses), quantum and the basis on which settlements were agreed are likely to arise.

3 VERULAM BUILDINGS
BARRISTERS

Contributors

Rory Phillips
QC

rphillips@3vb.com

Tom Weitzman
QC

tweitzman@3vb.com

Jonathan Davies-Jones
QC

jdj@3vb.com

Nicholas Craig
QC

ncraig@3vb.com

David Quest
QC

dquest@3vb.com

Rajesh Pillai
QC

rpillai@3vb.com

Peter Ratcliffe

pratcliffe@3vb.com

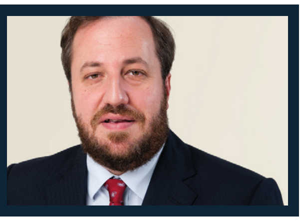
Adam Kramer

akramer@3vb.com

Kate Holderness

kholderness@3vb.com

Tom de Vecchi



tdevecchi@3vb.com