



WHITE PAPER

June 2020

English Court to Provide Guidance on Whether Common UK Insurance Policy Wordings Cover COVID-19 Claims

The UK Financial Conduct Authority (“FCA”) has asked the English High Court to give an urgent declaratory judgment to address “significant uncertainty” on the scope of common business interruption insurance policy wordings in the UK market and whether they apply to COVID-19-related losses. The Court is also asked to consider the extent of covered losses under certain insurance extensions and other coverage clauses. While there are ongoing disputes between policyholders and insurers regarding whether COVID-19 causes physical loss or damage (for policies containing such cover), the FCA’s legal action (“Test Case”) focuses on addressing a number of sample policy wordings that are not triggered by physical loss or damage to property. The Court will also not decide issues relating to the measure of damages payable to individual policyholders or specific types of application. In the interim, the FCA has issued Guidance requiring all insurers to check their policy wordings against those in the Test Case to identify if their policies would be impacted by the outcome of the case. The Test Case will be heard in July 2020.

TABLE OF CONTENTS

COVID-19 Impact on Businesses in the United Kingdom.....	1
The Defendants' Refusal to Provide Insurance Cover.....	1
The FCA's Position on Key Issues.....	2
The Policy Wordings Under Review	2
How Are Other European Jurisdictions Dealing With the Impact of BI Insurance Cover?.....	3
Conclusion.....	3
Lawyer Contacts.....	3

On 1 May 2020, the FCA announced that it would seek urgent declarations from the English Court on the scope of common UK market BI insurance cover wording in light of the COVID-19 pandemic.

The FCA action is largely focused on the UK small- and medium-sized enterprises (“SME”) market, where it has observed divergent approaches by insurers to coverage and payment of claims under commonly used BI policy wording.

On 9 June 2020, the FCA issued the Test Case seeking declaratory relief in order to resolve certain legal uncertainties in relation to COVID-19 business interruption claims. The stated purpose of the proceedings is so that the FCA can determine and pursue its regulatory and supervisory policy in relation to the handling of these claims by the Defendants and other insurers. The FCA is bringing these proceedings against the Defendants pursuant to a [Framework Agreement](#) dated 31 May 2020 that has been agreed between the Parties. The Test Case will include a decision on whether losses arising from the COVID-19 business interruption claims are covered by certain insurance extensions or other coverage clauses that do not require physical loss or damage to property. In addition to not deciding whether COVID-19 causes physical loss or damage, the Court is not being asked to decide issues relating to the measure of indemnity, quantum, aggregation or issues that are only of individual or specific application.

On 16 June 2020, the Court granted the FCA’s application for an expedited hearing and partially fixed the timetable for the Test Case. The substantive hearing is expected to take place beginning in the week commencing 20 July 2020, with a time estimate of eight days before two Judges. The hearing will proceed under the English Court Financial Markets Test Case Scheme pursuant to Practice Direction 51M and CPR Part 63A. In the meantime, the FCA has issued [Guidance](#) requesting all insurers to check their policy wordings against those in the Test Case to identify if their policies would be impacted by the outcome of the case.

The Defendants to the Test Case have now served their Defences in response to the FCA’s Particulars of Claim. The FCA’s Reply, which is the written response to the Defences, is due on 3 July. The FCA is inviting policyholders, their insurance intermediaries, other stakeholders and their legal advisers to provide comments on the Defences,

which they will consider when drafting their Reply and skeleton argument.

COVID-19 IMPACT ON BUSINESSES IN THE UNITED KINGDOM

Steps taken by the UK public authorities and the UK Government in relation to COVID-19 have interrupted many businesses and their activities. The UK Government introduced legislation to prohibit certain conduct in relation to categories of business at various times under the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (together the “March Regulations”) and the Coronavirus Act 2020. The March Regulations in combination with other UK Government guidance, schemes and announcements affected the following types businesses:

CATEGORY 1	Bars, Cafes, Pubs and Restaurants Closed
CATEGORY 2	Leisure Closed
CATEGORY 3	Essential Shops Could Stay Open
CATEGORY 4	Other Goods Shops Closed
CATEGORY 5	Other Businesses Not Prohibited or Permitted
CATEGORY 6	Holiday and Similar Accommodation Closed
CATEGORY 7	Schools and Places of Worship Closed

THE DEFENDANTS’ REFUSAL TO PROVIDE INSURANCE COVER

The Defendants have received and declined claims under the BI policy wordings being reviewed by the Court. The main

purported grounds of refusal, which the FCA is challenging, are:

1. unless a business was ordered to and did close completely, there was no “*prevention, denial or hindrance of access or inability to use the premises*” and, unless the business ceased to trade completely, its activities were not sufficiently interrupted;
2. UK Government guidance on business closures was not a “*restriction*” and/or “*imposed by*” a public authority;
3. the policy wordings are not designed to and/or do not provide cover in the case of pandemics;
4. the interference, interruption, loss or public authority-imposed restrictions did not “*follow*” or “*result from*” or were not sufficiently directly or “*solely and directly*” caused by local disease occurrence or danger but instead were caused by a national pandemic, or the fall in economic activity resulting from a general loss of confidence, or national government measures;
5. as to the causation and quantum of any BI claim: all or most losses would have been suffered by the business anyway, for example, because of the broader COVID-19 pandemic, the lockdown, self-isolation, social distancing, the fall in economic activity resulting from a general loss of confidence or other national COVID-19-related measures imposed by the UK Government;
6. policy exclusions relating to pollution, contamination or epidemics apply.

THE FCA'S POSITION ON KEY ISSUES

The FCA has provided a non-exhaustive initial [list of affected insurers and policies](#) (reflecting the 17 policy wordings within the scope of the Test Case), together with the [proposed assumed facts](#) for the purposes of the proceedings (including the nature of the affected businesses and how they have been affected by the pandemic), a [proposed issues matrix](#) and [proposed questions for determination](#) by the High Court. The FCA's pleadings for the Test Case submit that these policy wordings should be construed objectively and that

Defendant's subjective intentions (or their reasons behind the design of the policy wordings) are not relevant or admissible. The FCA further aver that, where the relevant BI policy wording responds in principle to an outbreak of COVID-19 in the relevant area, policyholders should be able to evidence the outbreak or impact of the outbreak by statistical analysis, the fact of certain UK Government orders or guidance and/or by inference from public information. This is particularly the case where the policyholders are SMEs.

THE POLICY WORDINGS UNDER REVIEW

The FCA has made clear that this is a test case to clear up certain market uncertainties for policyholders and that it is not seeking a declaration confirming that the sample policy wordings should respond to all claims.

We set out below a summary of the key policy wordings under review:

1. **Denial or Prevention of Access and Public Authority Restriction policy wording:** This wording covers BI losses caused by a denial of access to premises as a result of a covered peril or a public authority restriction affecting the business. The questions being considered by the English Court is whether the UK Government is a “public” or other relevant authority, and which of the Government's advice and laws (which themselves are likely to be agreed facts) are actions, advice, laws, orders or restrictions and whether or not they are “imposed” and/or whether they led to a “denial of access” for businesses.
2. **Nature of Effect on the Business policy wording:** Certain policy wordings provide cover only where there was a danger, emergency, threat, disease, public authority action or other trigger within a certain distance or vicinity of the premises. The FCA takes the position that such wording is expected to have been triggered by early/mid-March 2020 in the United Kingdom. The FCA also takes the view that policyholders do not need to prove individual cases of COVID-19 in their location and that the presence of COVID-19 can be proven by statistical evidence or evidence of the national nature of COVID-19, especially in urban areas. The FCA seeks specific declarations in this regard.

- Disease policy wording:** Certain clauses provide cover if there is a notifiable disease or some other categorization of disease (e.g., human infections or contagious disease). The FCA takes the position that, if there is a requirement for the disease to be within a certain distance or vicinity of the business premises, that requirement on its proper construction does not limit cover to loss caused by disease or other trigger only where it occurred within the relevant proximity. Rather the FCA states that the proper construction provides cover for losses caused by a disease or other trigger occurring over a wide area.
- Exclusion wording:** Certain BI policies have exclusions relating to “pollution” or “contamination,” “epidemic” or “disease.” The FCA has asked the Court to consider if these clauses are generally effective or only effective in relation to the Disease policy wording highlighted above.

Certain defendants have already elected not to rely on such exclusions in relation to the sample policy wording being considered by the Court.

HOW ARE OTHER EUROPEAN JURISDICTIONS DEALING WITH THE IMPACT OF BI INSURANCE COVER?

In recent French proceedings, the Paris Commercial Court issued an interim order determining that the insurer — AXA — must indemnify a restaurateur’s COVID-19-related business interruption losses. This is a significant victory for BI policyholders in France, especially when insurance policies expressly reference administrative closure as an extension of coverage for operating losses. For more information, please see our separate *Commentary* [here](#).

CONCLUSION

This is an unprecedented step by the FCA to intervene in one of the sectors it is responsible for regulating. The proceeding is being brought against a background of public criticism in

the United Kingdom for insurers who have declined COVID-19-related BI claims on the basis that they “*did not intend*” to cover such claims in broadly drafted policy wordings. The FCA clearly believes that this proceeding will help remove market uncertainty and provide both insurers and policyholders with guidance. Indeed, the FCA’s action has already led to concessions by individual insurers in relation to their attempted application of certain exclusions.

The judgment in this action will not determine the loss calculation methodology for any valid claims under the policies or deny policyholders access to alternative remedies such as the Financial Ombudsman Service (“FOS”) or their own court proceedings. In particular, the FOS will take this judgment into account when determining any complaints referred to it by individual policyholders.

Both policyholders and insurers will await the outcome of this hearing with interest.

LAWYER CONTACTS

Gregory J. Barden

London
+ 44.20.7039.5130
gbarden@jonesday.com

Harriet Territt

London
+ 44.20.7039.5709
hterrirt@jonesday.com

Jason B. Lissy

New York
+ 1.212.326.3676
jlissy@jonesday.com

Tyrone R. Childress

Los Angeles
+ 1.213.243.2422
tchildress@jonesday.com

Victoria Banson

London
+ 44.20.7039.5716
vsbanson@jonesday.com