Insurance policies and the impact of COVID-19

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The widespread loss and damage consequent on the COVID-19 pandemic will inevitably cause a large number of businesses and individuals to consider the means by which they may recover their loss, either by suing potential wrongdoers (e.g. employers who insist on employees coming to work, resulting in contraction of the virus) or by making claims under insurance policies.

On 5 March 2020, the Government added COVID-19 to the list of "notifiable diseases" under the Health Protection (Notification) Regulations 2010, in part, according to the Department of Health and Social Care, to help companies seek compensation through their insurance policies for losses arising as a result of the pandemic.[1]

However, as with any question regarding the scope of insurance cover, whether a given policy responds to losses arising from COVID-19 will depend on the precise terms of the policy in question. Nevertheless, it is possible to make some general observations as to the various types of insurance policy that might be engaged by the pandemic, and some of the issues that may arise in relation to each.

Business interruption

In response to a mass shutdown of businesses, business interruption (BI) policies are the most obvious type of policy to consider. Many business owners will no doubt feel strongly that their losses ought to be covered; after all, business has been interrupted by a natural phenomenon completely out of their control. An article in the The Spectator magazine recently asked "If the insurance industry can't cope with an event like COVID-19 then what is it for?"[2]

The reality is rather less clear-cut. To start with, many BI policies only respond to losses caused by physical damage. It can, therefore, be expected that assureds may try to expand the scope of their cover through creative arguments as to the meaning of damage to property. For example, one argument that may conceivably be raised is that a property that is proven to have harboured the virus has suffered 'damage' – as to which, see cases such as *Losinjska Plovidba v Transco Overseas Ltd* (The Orjula) [1995] 2 Lloyd's Rep. 395, establishing that damage, defined as "*injury impairing value or usefulness*", can be sustained without permanent change to the damaged property. However, such an argument is far from straightforward.

Even where cover under an insurance policy is not predicated on damage to the assured's property, it would be an unusual policy that responded to interruption to business *simpliciter*. Rather, there will likely be one or more specified trigger events, one of which must be satisfied for liability to attach, such as the presence of a notifiable disease within a specified area close to business premises.

Where (as is not uncommon) a policy contains a specified list of diseases that trigger coverage, that again may not avail an assured; either the policy pre-dated the emergence of COVID-19, in which case it could not, absent clairvoyance, be a listed disease, or post-dated it, in which case the insurer is hardly likely to have agreed to cover the consequences.

Arguments may be made that COVID-19 (the virus's scientific name being SARS-CoV2) is sufficiently similar to SARS that, if SARS is a listed disease under the Policy, so is COVID-19. However, many policies expressly exclude SARS, and even for those that do not, a difficult argument, possibly depending in part on expert virology evidence, faces those looking to make a claim. On the other hand, it should also be noted that virology is unlikely to be determinative; the question will be what, objectively, the parties intended, which may or may not be the same as a scientist's answer.

A better case for business owners arises in respect of policy wording that covers loss triggered by the occurrence of a notifiable disease without the policy containing a specified list, or where the policy responds to losses arising on closure as a result of the actions of a 'competent authority'. However, as noted above, many policies contain an exclusion for SARS; in this circumstance, it would be the insurer, not the assured, trying to argue that 'SARS' included, as a matter of interpretation, COVID-19, and thus is excluded from cover.

Even if an assured can clear this initial hurdle, and a trigger event is identified, there may still be difficult questions of causation. One obvious example is whether a decision by a business to

1. https://www.bbc.co.uk/news/business-51730412

2. https://life.spectator.co.uk/articles/COVID-19-has-exposed-the-hypocrisy-of-insurance-companies/

close in order to minimise the spread of the virus (and to protect its staff) is caused by the virus, or by that decision, in circumstances where there is no legal requirement to close.

A less obvious example arises where a business is forced to close by the virus but the virus means that the market for its services is in any event devastated, and so there were no, or significantly reduced, profits to be made in any case. So, for example, suppose that a brewery that supplied beer exclusively to pubs closed after an employee contracted the virus, and it were accepted that its BI policy responded to business losses caused by this event. An insurer might argue that the losses caused by the outbreak of the disease on the premises are minimal, because, even if the brewery had stayed open, the market for its beer would have dried up, because all pubs are shut. Whilst this is loss caused by the pandemic, it is less obvious that the assured is truly seeking to recover loss caused by the interruption to its business; rather, it is arguably seeking protection from a loss of its market. Put another way, it might be argued that the trigger event is not a but-for cause of loss.

This is similar to the issues discussed by Hamblen J (as he then was) in *Orient-Express Hotels Limited v Assicurazioni Generali Spa (UK)* [2010] EWHC 1186 (Comm). In that case, the assured owned a hotel in New Orleans damaged by Hurricanes Katrina and Rita. Hamblen J upheld the decision of an arbitral tribunal that the policy required business interruption loss to be assessed on the hypothesis that the hotel was undamaged but the city was as devastated as in fact it was, i.e. it was necessary to look at what loss flowed from the damage to the hotel alone. Since substantial business interruption loss would have been suffered even had the damage to the hotel not occurred, the claim on the policy was reduced accordingly.

In short, whilst business interruption insurance is the obvious type of policy to turn to, assureds seeking to bring claims may face several challenging obstacles to their claim.

Cancellation insurance

Many events in the entertainment industry, from sport to music to drama, have been cancelled, at significant loss to those organising them. Inevitably, the organisers are starting to turn to any event cancellation policies they may have had.

Similar issues to those in BI are likely to arise, namely, whether the pandemic triggered coverage under the policy's wording. However, such policies normally do not require any physical damage to be triggered. Further, a number of high-profile institutions, perhaps recognising that (since the vast majority of their revenue is earned in a short period) they are especially vulnerable, are now known to have invested in pandemic insurance to protect against disruption to that period. The All-England Club is reported to be due a payment of over £100 million[3], and the Royal and Ancient Club (host of golf's Open Championship) apparently also has a pandemic clause in its cancellation insurance policy.[4]

Similar causation issues may also arise, such as whether the true cause of an event's postponement or cancellation was COVID-19 or a cautious decision on the part of the organisers. Insurers may run arguments to the effect that the event could in fact have gone ahead as planned (analogous to arguments in the business interruption context that businesses may not have needed to shut).

However, event cancellation insurance also raises difficult questions of its own, such as the response to events that are or could be postponed, rather than cancelled. For instance, supposing that a scheduled event is stated to have been "postponed indefinitely" or "postponed until further notice", difficult questions arise as to when the tipping point is reached that turns a postponed event into a cancelled event.

Further, if a decision to cancel is formally announced, questions of mitigation may arise; insurers may look to argue that the event reasonably could have been postponed, so that any losses recoverable are capped at the losses that would have been incurred had the event merely been postponed, or that out-of-pocket expenses could be recouped from force majeure or similar clauses in contracts already entered into by organisers.

Reinsurance

The existence of a pandemic causing widespread loss may prove a fertile ground for reinsurance disputes; insurers that are liable may well face claims large enough to encroach upon their excess layers. Even in cases where the reinsurance cover contains a 'follow the settlements' clause, insurers will still need to establish that the loss in question fell within the scope of cover of the reinsurance.

This issue may become especially acute if the insurance contract and reinsurance contract have different governing laws, or if, in order to protect small businesses, Parliament were to introduce legislation designed to maximise their recovery from insurers (analogous to s.3 of the Compensation Act 2006, in respect of mesothelioma victims). If such an approach were to be adopted, disputes may well arise between insurers and reinsurers as to whether the cost to insurers of such a measure falls to be passed on to

3. https://www.dailymail.co.uk/sport/tennis/article-8183419/Wimbledon-set-net-huge-100m-insurance-payout-tournament-cancelled.html
4. https://www.cbssports.com/general/news/how-pandemic-insurance-is-helping-wimbledon-stave-off-the-brunt-of-the-financial-impact-caused-by-COVID-19/

reinsurers, on a proper construction of individual reinsurance policies.

Further issues may arise with regard to claims aggregation. Reinsurance policies commonly contain provisions providing for aggregation, which enables two or more separately covered losses to be treated as a single loss, normally when linked by a unifying common occurrence, cause or event.

Whether aggregation favours an insurer or reinsurer will depend on the policy terms and the losses suffered. Many policies contain a cap on liability per event or occurrence (in relation to which aggregation will favour the reinsurer) whereas the advantage of aggregation from an insured's perspective is that it will only have to pay one 'deductible', rather than a separate deductible for each insured event.

The outcome of disputes raising these issues can be difficult to predict; see, for example, the divergence of views between the High Court and Court of Appeal in *Mann v Lexington* [2001] 1 Lloyd's Rep. 1 (arising out of riots in Indonesia), and the different treatment of the September 11 terrorist attacks in *Aioi Nissay Dowa Insurance Co Ltd v Heraldglen Limited* [2013] Lloyd's Rep IR 281 (holding that they were two events) and *Simmonds v Gammell* [2016] 2 Lloyd's Rep 631 (holding that they were one event). Consequently, it is reasonable to expect that, if insurers find themselves footing substantial bills, they may also find themselves embroiled in disputes with their reinsurers regarding the extent to which these losses can be passed on.

Professional, D&O and employers' liability insurance

Those who have contracted the virus at their place of work may be contemplating claims against their employers. There have already been reports that NHS staff have not been issued with adequate protective gear to minimise their risk of contracting the virus in the course of treating victims; tragically, several members of NHS staff have died. These events seem likely to end in litigation against the responsible NHS Trust(s).

Further, failed claims under business interruption policies (or advice that claims would likely fail) may cause aggrieved business owners to round on their insurance brokers to ask why their policy does not provide them with protection.

These types of case are likely to raise more familiar questions as to the scope of the insurance cover, since the trigger will not be the virus or its consequences directly, but the assured's negligent or otherwise wrongful conduct in response to it. Nevertheless, the substantive claims will raise difficult questions concerning what level of foresight defendants can be expected to have, both before the virus emerged at all, and subsequently with respect to how it might develop and the impact that may have on employees or a company's solvency.

Conclusion

The above provides a short, although necessarily non-exhaustive, summary of some of the types of issues that COVID-19 may raise. However, it seems inevitable that the virus will result in many looking to find ways to claim under insurance policies, and, if so, the courts may be dealing with litigation arising from COVID-19 long after the virus itself has been brought under control.

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