

HIGA ADVICE CLINIC

20 AUGUST 2020

1. We hope that you were able to attend the HIGA Advice Clinic. If you are insured by Aviva Insurance Limited or QBE (UK) Ltd and have the following policies listed below, please register your details on our website: www.higaction.com.
 - a. Aviva: Material Damage & Business Interruption policy
 - b. QBE: PHOT010419 (Hotel Insurance Policy), PLSC010419 (Leisure Combined), PBCC170619 (Business Combined Insurance Policy) and PNML010119 (Nightclub and Late Night Venue Policy).
2. Thank you to all of you that sent us questions. Please find a list of questions and answers below from the Advice Clinic, including some other questions which we did not have time to answer on the call.
3. If you have any further questions, please email them to HIGA@mishcon.com and we will try to answer them as quickly as possible.
4. The content of this document is confidential. The questions and answers detailed below have been taken from the general discussion of legal and practical issues relating to Business Interruption insurance and Covid19 issues discussed during the Advice Clinic. No action should be taken in reliance on any matters discussed at the Advice Clinic and as set out below in the questions and answers without specific legal advice.

QUESTIONS AND ANSWERS

1. **Q: Do I have cover if the definition of "notifiable disease" in my policy contains a list of specified diseases which don't include Covid-19?**

A: The judgment in the FCA proceedings has not yet been received, and a definitive answer on any policy interpretation therefore cannot be given. We would, however, suggest that an exhaustive list that does not contain Covid-19 could lead to difficulties with a claim. If the list of diseases contains SARS, we think there is an argument to show that the policy was intended to cover pandemics since Covid-19 is also known as SARS-2.

Where the insurance policy refers to diseases which are notifiable under The Health Protection (Notifications) Regulations 2010, this includes Covid-19. Covid-19 was added to the list of diseases in the Health Protection (Notifications) Regulations 2010 on 5 March 2020.

2. **Q: If my Business Interruption cover or any of the extensions include a requirement for "damage to property", do I have cover?**

A: This has tended to be interpreted as a requirement for physical damage to the property. This will not have occurred as a result of Covid-19, so there is unlikely to be cover under sections of the policy with such a requirement.

3. Q: What does it mean if I have a distance limit in one of the extensions in my policy?

A: We have seen a variety of wordings relating to distance from the premises in our policy reviews. Examples include "in the vicinity" or 1 / 5 / 25 miles from the premises. The distance requirements can also relate to a number of clauses, such as the outbreak of a disease needing to occur within that radius for the loss or access to the premises being prevented by an incident within that radius.

The FCA test case judgment is likely to have an impact about how these types of clauses are construed.

4. Q: My policy has now expired, does that limit my ability to claim losses from them?

A: Cover is likely to be on a "claims made" basis which means that you need to notify your claim during the policy period. However, some policies may contain wording which enables an insured to notify within a certain period after the policy has expired.

5. Q: The sub-limit in my policy is only £50,000. If other people can claim up to £100,000 does that put me at a disadvantage?

A: No. The sub-limit in your policy is the maximum you can claim, but the amount of your claim will otherwise be based upon the amount your business has actually lost. Many businesses will have suffered losses greater than their limit of cover so the cap will apply to them but some will have lost less. The value of your claim does not affect your ability to participate in the litigation or put you at an advantage or disadvantage over anyone else in those proceedings. If the claim were successful or settled, the funds received from the insurer would be distributed on a pro rata basis, based on the size of your individual claim.

6. Q: How are losses calculated?

A: This will depend on your policy wording. Most policies will have an indemnity period which means that business interruption cover, if granted, lasts for a specified period (i.e. 3 months/6 months/1 year). We have seen that some insurers say there could be cover for shorter periods for example 3 days, because the government advised to stay at home on Monday, and a forced closure began for hospitality businesses on the Thursday. This is something that we hope will be clarified from the judgment in the FCA test case.

7. Q: Do I have an obligation to mitigate losses as a policyholder?

A: Insurance policies often contain conditions specifying that policyholders make a notification to their insurer about events which could give rise to a claim under the policy. There are also conditions requiring insureds to minimise their losses. The two ways insureds can do this are 1) make supplemental revenue in alternative ways (i.e keep the business operating as best you can) and 2) save costs where possible. Business interruption losses will be calculated based on lost revenue compared to previous profit year, minus costs.

8. Q: Why should we sign up to the action now and not wait for the outcome from the FCA test case proceedings?

A: 1) The FCA proceedings will not consider or resolve the claims of any individual policyholders. You would still have to continue your claim after the FCA proceedings are concluded and there is no guarantee that it would succeed, even if the FCA found in favour of policyholders generally.

2) For Aviva policyholders, Aviva is not a party to the FCA case and is therefore not technically bound by the decision, although one of the RSA wordings is effectively the same as the Aviva wording we are proposing to claim under, and the FCA decision should therefore impact the interpretation of this policy.

3) Even if a ruling is giving in relation to certain relevant clauses in your policy, it does not guarantee that the insurer will not still deny your claim based on other clauses which are not being considered by the FCA.

9. Q: Do I have a claim against my broker for mis-selling me the policy?

A: This is something that is being raised more regularly. At this stage, these sorts of claims would be difficult for insureds to bring unless you were specifically advised that your insurance extended to pandemics and you were advised that your policy would respond. Generally, these types of claims are difficult to bring.

Mishcon de Reya

21 August 2020