



BEALE&CO

INSURANCE

COVID-19 and Insurance Brokers E&O

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Introductions



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Scene-setting

- + UK Government has stepped in to maintain economy as best it can in light of its quarantine measures
- + But commercial market is still decimated.
- + All businesses will be looking at ways both to save money and to recoup their losses
 - Litigation will inevitably rise
 - Insurance claims will also be made against whatever insurance cover businesses may carry
- + Where insurance does not respond, desperate businesses will look to others to meet their losses, and their insurance broker will inevitably come under scrutiny

Where might claims arise?

Business Interruption Claims

- Unlikely to respond in most cases (albeit see mounting FCA/Government pressure)
- Typically linked to buildings insurance policies so require element of “physical damage” to trigger coverage – can COVID-19 be classed as physical damage? Most UK commentators think not but situation continues to evolve...
- Can policyholder demonstrate presence of COVID-19 on premises?
- Non-damage extensions
- Infectious disease extensions may be more likely to respond, but
 - Again difficult to show presence on premises and for what duration; and
 - Normally there is a list of specified diseases, which won't include COVID-19. But may be ok if extension language refers to 'notifiable diseases', which COVID-19 became on 5/3/20 in England.
- Denial of access extensions require closure of premises due to something in/at/around the premises. Does a Government order count?

Types of Claim

You failed to elicit my Business Interruption needs and...

For pre January 2019 inceptions ...

- You failed to advise me about the risks I faced from a pandemic and for the need to insure against it.
- You failed to advise me at all about the meaning of the BI cover and/or BI Extensions in my policy. I thought I had very broad BI cover that would include this type of Government ordered shut down affecting my business including what has happened now with Covid 19
- You failed to advise me that insurer X's business interruption Extension/cover was broader in scope than the cover in my policy. Properly advised, I would have gone with insurer X's policy which would have covered my Covid -19 losses.
- Properly advised about the risks, standard BI cover and the Extensions available, I would have instructed you to obtain bespoke pandemic cover which would have covered me for my Covid-19 losses.

For January –February 2020 inceptions you failed to ...

Advise me [as above] in the context of increasing public knowledge about the developing Covid-19 issue.

Duty and Breach

- + The Broker is required to exercise reasonable skill and care
- + The FCA's ICOBS sourcebook also imposes specific requirements on the broker including Rule 5.2.2 – prior to policy inception the Broker “....*must specify, on the basis of information obtained from the customer, the demands and needs of that customer*” and *Rule 5.3.1, a Broker “..must take reasonable care to ensure the suitability of its advice for any customer who is entitled to rely upon its judgement.”*
- + The Broker therefore has an obligation to make enquiries of its client as to its insurance needs and to question the client so as to elicit relevant information which may not otherwise be volunteered
- + Expert evidence as to the practice of Brokers dealing with BI matters will carry great weight before the Court

Duty and Breach (Continued)

+ The Broker's BI placement obligations in summary:

- The nature and scope of the Broker's obligation to assess its client's business interruption insurance needs will depend upon the particular circumstances of the case, including the client's sophistication and the advice the Broker has given the client in the past. "It cannot be assumed that an SME ... will have any understanding of the nature of [Business Interruption] insurance" (*Eurokeys Recycling v Giles* 2014).

+ The Broker's key obligations are therefore:

- To take reasonable steps to identify the type and scope of cover which the client needs and to advise the client accordingly;
- To take reasonable steps to arrange the insurance cover which the client has instructed him or her to obtain, and which is suitable for and clearly meets the client's requirements;
- If the Broker is unable to arrange the requested cover, then he/she should advise the client as to the scope of cover that has and has not been arranged;
- Once the cover has been placed, the Broker should consider and explain to the client what cover has been arranged; and
- At renewal of an existing policy, the Broker should go through the same exercise as above that was carried out at the first inception of the policy.

Causation

- + Likely to be significant battleground in COVID-related E&O claims.
- + Question will be “If the Broker had advised you of the existence of pandemic cover / better BI cover with insurer X, would you have bought it?”
- + Cost and Availability
 - Cost - Bespoke pandemic cover will have been prohibitively expensive. Cost of ‘better’ BI cover is also likely to have been higher.
 - Availability – what markets did Broker have access to? Would markets have quoted this risk at all? If so, on what terms?
- + ‘20:20 hindsight’

Quantum

- + The usual rule is that the Broker is liable for the insurance monies that the insured would have received but for the Broker's negligence/contract breach
- + However, where the loss relates to business interruption insurance and the insured has insufficient funds to get back up and running, the Broker may also be liable for consequential losses (*Arbory v West Craven* 2007)
- + The business interruption policy indemnity calculation terms will be key – see *Orient Express Hotels v Generali* 2010
- + Usual mitigation of loss rules will apply
- + Recoverable loss might include litigation costs of pursuing the insurer
- + Contributory negligence is fact specific - possible but unlikely
- + Remember to consider the exposure of any sub-broker involved

Conclusions and Commentary

- + While there will be common underlying insurer wordings, ultimately each case will turn on its specific facts
- + We expect to see many claims against insurers as to the meaning of BI policy wording extensions
- + Paradoxically, the more cases that succeed against insurers, the more this may encourage claims against Brokers
- + For claims up to £350,000, the FOS will also have jurisdiction for small businesses with less than £6.5m turnover and
 - i. less than 50 employees or
 - ii. less than £5m balance sheet
- + Brokers will need to exercise caution going forward as regards Insurers' attempts at adding blanket Covid-19 exclusions to avoid additional Covid-19 related claims