

## COVID-19 Insurance Considerations For UK Cos.

By Richard Mattick, Alex Leitch and Will Carter

(March 23, 2020, 5:44 PM EDT) -- The regulation of March 5, passed urgently by the U.K. government, added COVID-19 to the list of notifiable diseases. This measure was intended in part to facilitate insurance claims by businesses affected by the virus, because it fulfills at least one common precondition in insurance policy wordings: a disease formally designated as notifiable.

Nonetheless, policyholders should be aware of additional conditions that will require their attention when they consider the extent to which insurance coverage may protect their business against the effects of the virus — or at last partially mitigate the financial impact of the pandemic.



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### The Likely Claims

In considering the extent of its insurance coverage for the effects of COVID-19 and the claims it may assert under its various lines of insurance, a business needs to identify what those effects are likely to be, and what kind of losses or liabilities they are likely to cause. Some of the most likely consequences of the imminent threat or actual presence of the virus are the following:

- Closure of business premises and other suspensions or reductions of business activities as a result of government directives or an actual local outbreak, causing (1) financial loss to a business's operations, and/or (2) cleanup costs and other extra expense, where the virus has been found;
- Cancellation of profit-making events as a result of the same causes, with the same consequences;
- Inability of the business to fulfill specific commercial obligations as a result of the virus's impact on the business itself or its suppliers;
- Inability of third parties to proceed with orders from the business, causing loss of revenue; and



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- Liability claims from individual employees or third parties alleging that the business negligently exposed them to the virus.

A further potential complicating factor is that many businesses may conclude that they need to close their premises or cancel events as a reasonable preventative measure before COVID-19 has directly affected any staff or premises, and before they have been required to do so under government compulsion.

So what types of insurance policies might respond to the losses listed above?

### **Potential Insurance Coverage**

#### ***Closure of Business Premises and Other Suspensions/Reductions of Activities***

Where an infectious disease has resulted in the closure of business premises, the most obvious port of call is a business interruption cover, which is often provided as part of a property policy. It indemnifies businesses for loss of profits as a result of an insured event that interrupts the business.

The standard basic business interruption policy wording does not usually mention infectious diseases, but it often requires physical damage to property to trigger coverage; this requirement may call for careful attention to, and documentation of, the evidence of damage.

A policyholder may, however, have purchased an extension of cover that will respond to the occurrence of infectious diseases without the need to show damage to property. While the existence of an infectious disease extension may offer the easiest option for the policyholder to pursue a claim, various other preconditions may have to be met before a closure will give rise to a covered claim. For example:

- The disease may have to be notifiable — the regulation of March 5, has already cleared this hurdle away;
- Closure or cancellation may have to be by order, or following advice of, national or local authorities; and
- The wording may suggest that the closure must have been caused by an outbreak of the disease at the premises.

The extended infectious disease cover may be subject to sublimits that are lower than the general limits for the business interruption cover, as well as to shorter indemnity periods than under the standard business interruption cover.

Business interruption policies may also contain an extension of the standard cover that grants so-called nondamage denial of access cover. This additional cover does not require proof of property damage and is usually triggered by actions or advice of national or local government taken where there is danger to life or property at, or in the vicinity of, the premises that affects the policyholder's business.

Once again, this cover may be subject to a lower sublimit and/or a shorter indemnity period than under the standard business interruption cover.

Where policyholders lack these coverage extensions for infectious diseases or no-damage denial of

access, they will need to rely on their general business interruption cover. Under standard policy forms, to trigger this cover, there must generally have been some form of damage to property, often described as physical damage, that has caused the business interruption.

English case law suggests that if a virus attaches to machinery or other property on the premises, it can constitute physical damage, and this may even be the case where the virus is simply present on the premises where the premises are generally insured.

Thus, this cover could apply where the virus was present at or on the relevant property. Policyholders must, however, be prepared to investigate and carefully document the viral intrusion on their property, in anticipation of insurers' resistance to coronavirus-related claims.

If the policy contains a contamination exclusion, insurers may also invoke this provision; whether it applies will depend on the specific wording and any policy definition of contamination.

If the general business interruption cover applies, the policyholder may also be able to take advantage of any general denial of access coverage extension added to the policy. This would provide cover on the same basis as the nondamage denial of access cover mentioned above.

Finally, where the virus can be said to have damaged property, the policyholder may be able to take advantage of the general (non-business interruption) property cover, at least for cleanup costs and any diminution in value of the property caused by the damage.

Policyholders intending to close premises or suspend business activity should review their policies to ascertain the preconditions to their application of the policy: for example, an actual outbreak of the infection at the business premises or a government order requiring closure.

The relevant policy may provide that any preventative or mitigating measures, such as voluntary closure, are at the expense of the policyholder, and the English legal position in this area is far from straightforward.

In these circumstances, it may be in the business's interest, having first ensured that it is fully conversant with the applicable policy conditions and applicable law, to engage its insurer in early discussions of the protective steps it proposes — which the insurer may well find mutually beneficial.

On March 16, the U.K. government, through Public Health England, issued guidance on new recommended social distancing measures. These included a recommendation that people avoid gatherings in smaller public spaces including pubs, cinemas, restaurants, theaters, bars and clubs.

A statement by the Chancellor of the Exchequer on March 17 suggests that the government believes its recent guidance means that hospitality, leisure and other retail venues that have cover for business interruption for infectious diseases will be covered by their insurance if they choose to close in light of the recent guidance.

The relevant policy wording may not necessarily reflect this view, but the government statements may support an argument that the government has, in essence, required businesses in the hospitality, leisure and retail sectors to close.

### ***Cancellation of Events***

While a policyholder that cancels an event on account of the virus should be able to rely on business interruption cover as mentioned above, it may also have the benefit of cancellation cover.

The scope of cancellation cover will depend on the policy wording: if the policy does not specifically mention infectious diseases, it may also have a catch-all other-perils cover for all causes not specifically excluded, in which case the exclusions will be key: for example, it may have a contamination exclusion, in which case the definition of contamination (if any) will be crucial.

### ***Inability of the Business to Fulfill Specific Commercial Obligations***

Liabilities to third parties flowing solely from breaches of contract tend to be excluded from most insurance policy forms. However, if the virus has directly affected the operations of the business and the relevant preconditions have been met, and assuming no force majeure clause protection is available under the relevant commercial contract, then the business interruption policy may cover these losses as part of the overall loss of profits claim.

In addition, some business interruption policies are extended to provide contingent business interruption, covering a business for the effect of a business interruption of a third party (in a similar way to denial of access cover).

### ***Inability of Third Parties to Proceed With Orders, Causing Loss to the Business***

Particularly if its business interruption policy has a contingent business interruption extension, a business may have coverage protection for its losses caused by the inability of a contracting party to proceed with orders due to the virus. In addition, trade credit insurance may cover the third party's liability, subject to relevant exclusions.

### ***Liability to Individuals Alleging Negligent Exposure to the Virus***

Where the business is accused of negligently exposing or failing to protect its employees or third parties from the virus, it may have cover for defense costs and any resulting liability under the personal injury cover provided by an employer's liability policy (in the case of an employee) or by a general liability policy (in the case of a third party, which would include an independent contractor). In both cases, the business should look out for exclusions that may bar coverage.

### ***General Advice***

Where a business believes that it is likely to have to take action connected with the COVID-19 pandemic, it should check the notice requirements under all potentially responsive policies: English law is strict on compliance with notice provisions, particularly where such compliance is stated to be a condition precedent for the insurers' liability. General liability policies, for example, may require notice of circumstances that may give rise to a claim, in addition to notice of an actual claim.

Businesses should consider with their brokers, in conjunction with a careful review of their coverage, whether in fact to provide precautionary notice to all their insurers at the earliest possible moment.

Insurers will need to be notified and/or consulted in any event where a business proposes to take a decision that may give rise to a claim under a potentially responsive policy. While such a notice may receive only a noncommittal answer, it may eliminate at least one point of dispute in any later coverage controversy.

Policyholders must also ensure that they create and retain sufficient documentary evidence to support any claim: for example, evidence of the company's grounds for any decision to close premises or cancel events; forensic evidence of where the virus has actually affected premises; all documents relating to the specific case and responsive actions; and all necessary financial documentation.

If a policyholder is coming up to renewal during this difficult time, it should also be alert to insurers' efforts to add last-minute endorsements or other supplemental provisions imposing blanket exclusions for infectious diseases or otherwise restricting previously available coverage.

Although some such changes may be inevitable in the present market conditions, they should at least be presented transparently and well in advance of the renewal date so as to permit adequate time for negotiation.

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