

Finalised guidance

Business interruption insurance test case: Finalised guidance for firms

June 2020

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1 Introduction

- 1.1 This guidance sets out our expectations for insurers and insurance intermediaries when handling claims and complaints for business interruption policies during the test case brought by the FCA.
- 1.2 This guidance highlights particular steps that we consider firms should be taking to:
- identify the potential implications of the test case on their decisions regarding claims and complaints
 - keep policyholders informed about the test case and its implications
 - treat policyholders fairly during the test case and when it is resolved.
- 1.3 This is guidance on firms' obligations under:
- the FCA Principles for Businesses (PRIN), in particular Principles 6, 7 and 11
 - the Insurance Conduct of Business sourcebook (ICOBS), in particular ICOBS 2.2.2R, ICOBS 2.5.-1R and ICOBS 8.1
 - the Dispute Resolution: Complaints sourcebook (DISP), in particular DISP 1.4 and DISP 1.6.

2 Application

Who this guidance applies to

2.1 This guidance applies to:

- an insurer (as defined in FCA's Handbook of rules and guidance) which, before 9 June 2020, underwrote a relevant non-damage business interruption policy
- a managing agent (as defined in the FCA's Handbook) which, before 9 June 2020, performed functions for a member of Lloyd's for a relevant non-damage business interruption policy (and references to 'insurers' in this guidance should be read as including managing agents)
- an insurance intermediary (as defined in the FCA's Handbook) which carried out insurance distribution activities for a relevant non-damage business interruption policy before 9 June 2020 (but only the paragraphs of this guidance which specifically refer to insurance intermediaries under the heading 'Communicating with policyholders generally during the test case' apply)
- the Society of Lloyd's (but only the paragraph of this guidance which specifically refers to the Society under the heading 'Co-insurance' applies).

What this guidance applies to

2.2 This guidance has the same scope as the rules it gives guidance on. Firms should have regard in particular to ICOBS 1 and DISP 1.1.

2.3 This guidance applies only to relevant non-damage business interruption policies for which both of the points below apply:

- the policy is within the scope of ICOBS 8
- the applicable law of the policy is the law of England & Wales, Scotland or Northern Ireland.

2.4 This guidance covers actual or potential claims or complaints relating to non-damage business interruption losses arising from the coronavirus (Covid-19) pandemic.

2.5 For clarity, this guidance does not apply where an insurer has, without adjustment or deduction for general causation:

- decided to accept claims, or
- determined that its non-damage business interruption policies do respond to the coronavirus pandemic.

- 2.6 We expect insurers who fall within these categories to continue handling claims in line with their current approach and to pay agreed claims on a timely basis.

3 Interpretation

3.1 In this guidance, the terms used have the meanings set out below:

<p>Final resolution</p>	<p>When the Court has determined the questions in the test case, after all rights of appeal have been concluded. If an appeal is made about only some of these questions and not others, the final resolution will have been reached for any questions that have not been appealed within the relevant time limit.</p> <p>For any particular potentially affected claim or potentially affected complaint, the test case will have reached final resolution when the questions in the test case, that are relevant to assessment of that claim or complaint, have reached final resolution.</p>
<p>Potentially affected claim</p>	<p>A claim made under a relevant non-damage business interruption policy for losses relating to the coronavirus pandemic where the outcome of the claim, including issues of causation, may be affected by the final resolution in the test case, whether or not the insurer has declined the claim by issuing a declinature letter or has made an adjustment or deduction for general causation.</p>
<p>Potentially affected complaint</p>	<p>A complaint (as defined in the FCA's Handbook) made about the outcome of an insurer's assessment of a potentially affected claim.</p> <p>This is whether or not the insurer has issued a final response under DISP 1.6.2R and whether or not the policyholder has referred the complaint to the Financial Ombudsman Service. But this does not include any complaints which the insurer has upheld in full.</p>
<p>Relevant coverage clause</p>	<p>One or more clauses (including any relevant exclusions and 'trends clause' or equivalent wording) which provide cover for business interruption losses in circumstances where there has been no physical damage to property:</p> <ul style="list-style-type: none"> (i) if there is notifiable disease or some other categorisation of disease either at all or within a certain radius or within the vicinity of premises, or (ii) where some form of authority so acts or some happening is required as to prevent or restrict access to or use of the insured premises,

	<p>however the cover in (i) or (ii) has been defined.</p> <p>Such clauses have been categorised in the representative sample of policy wordings in the test case as either 'disease' or 'denial of access'.</p>
<p>Relevant non-damage business interruption policy</p>	<p>A policy containing one or more relevant coverage clauses and either condition (i) or (ii) applies.</p> <p>Condition (i) is that the insurer has received a claim or complaint under the policy for losses arising from the coronavirus pandemic and has decided to reject the claim, has made an adjustment or deduction for general causation, or has not yet made a decision.</p> <p>Condition (ii) is that the insurer has told policyholders or said publicly that the policy specifically, or their business interruption policies with non-damage cover generally, do not respond to coronavirus pandemic.</p> <p>For clarity, this definition extends to policies that are neither within, nor similar to, the representative sample of policy wordings in the test case.</p>
<p>Test case</p>	<p>The proceedings brought by the FCA to resolve uncertainty as to whether certain non-damage business interruption insurance policies respond to claims related to the coronavirus pandemic (Claim number FL-2020-000018).</p>

4 How to implement this guidance

Oversight of tasks under this guidance

- 4.1 A senior manager (as defined in the FCA's Handbook) should be appointed to oversee all the expectations on an insurer in this guidance.

Responsibility for delegated tasks or functions in relation to this guidance

- 4.2 Where an insurer delegates any aspect of claims or complaints handling to a third party and appoints the third party to carry out any task or function in relation to this guidance, the insurer should consider SYSC 3.2.3G. In particular, the firm should ensure that the third party is aware of this guidance and applies it as appropriate for any task or function they perform in relation to relevant non-damage business interruption policies on behalf of the insurer.
- 4.3 Insurers are reminded that they cannot contract out of their regulatory responsibilities (ICOBS 2.5.3G). So, for example, under Principle 3 an insurer should take reasonable care to supervise the discharge of outsourced functions by its contractor (SYSC 3.2.4G).

Co-insurance

- 4.4 A relevant non-damage business interruption policy may have been underwritten by more than one insurer. In such cases, the insurer responsible for fulfilling the expectations under this guidance is:
- the insurer with responsibility for claims where this responsibility has been assigned, or
 - where this does not apply, the lead insurer if one has been nominated.
- 4.5 In the event that claims responsibility has not been assigned and no lead insurer has been nominated, the co-insurers should discuss between themselves and agree on one insurer to fulfil the expectations under this guidance.
- 4.6 The insurer who carries out the review should provide the outcome of the review to the other insurers who have underwritten the policy.
- 4.7 For complaints that have moved to the second stage of the Lloyd's complaints handling procedure, the Society of Lloyd's complaints department is responsible for fulfilling the complaints expectations in this guidance.

The scope of the test case

- 4.8 Insurers should consider the following documents published by the FCA about the test case to familiarise themselves with its scope: the representative sample of policy wordings, questions for determination by the court and matrix. They may also wish to refer to the FCA's Particulars of Claim, in particular section P setting out the Declarations sought from the Court.
- 4.9 In summary, the core questions that the test case seeks to resolve are: (i) issues of coverage in relation to 'disease' and 'denial of access' clauses (including any relevant exclusions); and (ii) causation (including any relevant 'trends clause' or equivalent wording). The test case is not seeking to resolve, in particular:
- coverage issues relating to clauses that have an exhaustive list of diseases which does not include Covid-19 (see box C in the questions for determination)
 - coverage issues relating to clauses which require the disease to be present on the insured premises (see box C in the questions for determination)
 - issues concerning misselling of policies
 - other issues flowing from the determination of the questions in the test case such as aggregation, additional causation issues specific to loss of rent and similar claims under a property owner's policy, and the specific quantum of any particular claims (see recital I(b) in the Framework Agreement).
- 4.10 Policies containing clauses within the first two bullet points above will be 'relevant non-damage business interruption policies' and those clauses will be 'relevant coverage clauses' but they can be categorised below as 'outcome on claims not affected'.

5 Checking how the test case affects policies

How insurers should check if the test case affects their policies

- 5.1 This section applies only for relevant non-damage business interruption policies underwritten before 17 June 2020.
- 5.2 Insurers should determine for each relevant coverage clause in their relevant non-damage business interruption policies whether:
- the outcome on claims generally (including questions of causation of loss) may be affected by the final resolution of the test case, or
 - that outcome will not be affected.
- 5.3 Each relevant coverage clause in every relevant non-damage business interruption policy should be allocated to one of the two categories above. There are no exceptions for policies within the scope of this guidance as set out under 'What this guidance applies to' above (even if there is only a single policyholder or a small number of policyholders or the policyholder is a large company).
- 5.4 Insurers should record a relevant coverage clause as 'outcome on claims not affected', even where the test case may provide guidance on the interpretation or effect of a clause (or clauses) within the relevant coverage clause (for example, because of similarity of the clause with one in the representative sample of policy wordings or the relevance of one of the questions for determination), if the insurer believes that the outcome on claims generally will nonetheless not be affected for a reason that is not being tested in the test case.
- 5.5 For example:
- An insurer has been denying claims on a relevant non-damage business interruption policy which includes a relevant coverage clause providing cover for notifiable diseases within a radius of 25 miles of the premises. The test case should provide guidance on the interpretation of this clause (see questions C4 and C6 of the questions for determination). The only exclusion clause relevant to the insurer's relevant coverage clause is an exclusion for loss or damage arising out of or relating to a micro-organism (see question F21 of the questions for determination). There is no trends clause. The insurer notes that general causation issues are being considered in the test case (see section E of the questions for determination). There is no other peculiarity about the wording of the relevant coverage clause or other reason for declining claims generally that is not addressed through the questions for

determination. In this case, the insurer would record the relevant coverage clause as one where the outcome on claims generally may be affected by the outcome of the test case.

- A different insurer has been denying claims on a relevant non-damage business interruption policy which includes a relevant coverage clause that provides cover where use of or access to the premises is prevented or hindered by public authority actions in an emergency likely to endanger life. The test case should provide guidance on the interpretation of this clause (see questions D11, D12, D15 and D16 of the questions for determination). However, the insurer's policy contains an exclusion stating that all losses arising from or relating to pandemics are excluded. The insurer believes that this exclusion means that the relevant coverage clause will not respond to the coronavirus pandemic, and that any questions of causation are therefore irrelevant. In this case, the insurer would record the relevant coverage clause as one where the outcome on claims generally will not be affected and would record their reasons for this conclusion.
- A different insurer has been denying claims on a relevant non-damage business interruption policy which includes a relevant coverage clause that has an exhaustive list of diseases which does not include Covid-19. This type of coverage clause is not being tested in the test case (see box C in the questions for determination). The policy also includes a trends clause which is the same as or similar to the QBE type 1 trends clause in the representative sample stating that adjustments will be made for circumstances affecting the business that would have affected the business had the damage not occurred. The test case should provide guidance on the interpretation of the insurer's trends clause (see in particular question E19 in the questions for determination). The insurer would record the relevant coverage clause as one where the outcome on claims will not be affected and would record their reasons for this conclusion.

5.6 Insurers should record the conclusions under their reviews.

5.7 Insurers should update their reviews as the test case develops or in the light of other changing circumstances, for example changes in their decisions on claims or the settlement of claims.

5.8 For clarity, it is not intended that insurers' reviews consider individual claims; it is accepted that the actual effect of the test case cannot be determined until its final resolution; and it is accepted that the assessment of any particular claim will depend on its facts.

Time frame for review, and communication with the FCA

5.9 Insurers should complete their review of relevant coverage clauses by 8 July 2020. The insurer should make and retain clear review documentation. We may ask an insurer to confirm the work completed.

- 5.10 Insurers should provide us with the results of their completed review using the reporting medium we provide.
- 5.11 Insurers should promptly notify us of any changes to that information as a result of updates to their review using the reporting medium we provide.
- 5.12 Insurers should also notify the results of their review and any updates to the review to any third party to whom they have delegated claims or complaints handling authority.
- 5.13 We may publish the names of insurers, the policies notified and the insurers' conclusions in respect of those policies, as permitted by Regulation 3 and/or 5 of the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001/2188).

6 Communicating with policyholders

Communicating with policyholders generally during the test case

- 6.1 Insurers and insurance intermediaries should consider how they can meet the policyholders' information needs about the test case. Where a policyholder bought their policy through an insurance intermediary, an insurer should consider providing appropriate information to the insurance intermediary to pass on to the policyholder.
- 6.2 Insurers and insurance intermediaries should ensure that their communications about the test case are balanced.
- 6.3 Insurers should publish sufficient details with appropriate prominence and signposting to keep all policyholders with relevant non-damage business interruption policies updated about the test case and its implications for potential claims under their policies. Insurers may publish this information on the firm's website or by other general means. This information should be published promptly after 17 June 2020.
- 6.4 Where insurers have made statements or other communications (directly or indirectly) to policyholders on whether insurers' relevant non-damage business interruption policies respond to claims for losses resulting from the coronavirus pandemic they should review those statements and communications and:
- promptly amend or supplement any statements or communications as necessary in light of the test case
 - take appropriate and timely steps to ensure that policyholders are made aware of any amendments or supplements to previous statements or communications using the same method of communication
 - inform any insurance intermediaries or other third parties (such as loss adjusters) who have contact with policyholders of the amendments or supplements to previous statements and communication.
- 6.5 Policyholders should be provided with:
- an explanation of the nature and purpose of the test case
 - the key steps taken and likely timetable of the test case
 - an explanation of the implications for existing and potential claims
 - a link to the FCA's webpage for the test case, a suggestion that policyholders may wish to subscribe for email updates from the FCA on the FCA's webpage for the test case and a link to any material issued by the Financial Ombudsman Service concerning business interruption insurance cases.

- 6.6 This information should be given to policyholders who have made potentially affected claims and complaints by the insurer in its communications under the section headed 'Individual updates for policyholders who have made claims or complaints' below.
- 6.7 For other policyholders, the information in the first and last bullet points should be included in the publication of sufficient details (on the firm's website or by other general means) referred to above. Any general communications about the test case may make clear that they are directed at policyholders with relevant non-damage business interruption policies only. Paragraph numbering updates automatically depending on the Chapter number.

Identifying claims and complaints affected by the test case

- 6.8 Insurers should filter claims and complaints for business interruption losses related to the coronavirus pandemic (including those received before this guidance came into effect) to identify whether all or part of a claim or complaint is a potentially affected claim or a potentially affected complaint.

Individual updates for policyholders who have made claims or complaints

- 6.9 By 15 July 2020, insurers should individually notify policyholders whose claims or complaints for business interruption losses related to the coronavirus pandemic under relevant non-damage business interruption policies are outstanding or have already been declined (or had an adjustment or deduction for general causation) of:
- whether their claim or complaint is a potentially affected claim or a potentially affected complaint and the implications of that (including the FCA's expectations of the insurer in respect of such claims or complaints under this guidance), or
 - the reasons why their claim or complaint is not a potentially affected claim or potentially affected complaint, and the implications of that.
- 6.10 Insurers should also provide the information in the bullet points above to policyholders who make new claims or complaints for business interruption losses related to the coronavirus pandemic under relevant non-damage business interruption policies.
- 6.11 Insurers should give all policyholders who have made a potentially affected claim or a potentially affected complaint appropriate updates about the test case and its implications for their claim or complaint. In particular, they should keep policyholders updated on whether their decision may be affected by the final resolution of the test case.
- 6.12 But it is not necessary to provide updates if the policyholder has accepted an offer in full and final settlement of their potentially affected claim or potentially affected complaint.
- 6.13 Updates should include communications to policyholders who have made a potentially affected claim or a potentially affected complaint at the following times:

- when all judgments at first instance or appeals on substantive issues in the test case are given
- when the test case reaches final resolution
- if the scope of the test case changes at any time in a way that affects whether a policyholder has a potentially affected claim or complaint.

6.14 These updates should be made as soon as possible after the event is identified by the insurer, and in any event within one week of the event being reported on the FCA's webpage for the test case.

6.15 The method of communicating updates should be appropriate to the update being given. For example, an update on the stage the test case has reached may be appropriately given through website updates. However, an update setting out a change to the scope of the test case that affects whether a policyholder has a potentially affected claim or complaint should be given individually via the same method used to inform the policyholder that they have a potentially affected claim or complaint.

7 Handling claims and complaints

Handling potentially affected claims and complaints during the test case

- 7.1 An insurer may propose to wait until final resolution of the test case before coming to a decision on a potentially affected claim or potentially affected complaint (see DISP 1.6.2R(2)). Where an insurer proposes to do this, they should ensure that this is explained to the policyholder along with the information expected under 'Individual updates for policyholders who have made claims or complaints' above. The policyholder should be informed that the decision on the claim or complaint will be taken promptly on final resolution of the test case.

Handling claims or complaints partially affected by the test case

- 7.2 Where a claim or complaint contains a part that is a potentially affected claim or a potentially affected complaint and another part that is not, an insurer should apply ICOBS 8 or DISP 1 as appropriate to the parts of the claim or complaint that are not affected by the test case. In particular, an insurer should:
- handle and assess any unaffected parts of a claim or complaint promptly and fairly
 - pay any settlement of that part of the claim or complete any remedial action or redress for that part of the complaint without waiting for the test case to reach final resolution.
- 7.3 When handling a claim or complaint that has unaffected parts and parts that are potentially affected, an insurer should explain clearly to the policyholder:
- which parts of the claim or complaint it has addressed
 - which parts of the claim or complaint are covered by any offer to settle, or to complete remedial action or redress, and
 - which parts, if any, the insurer proposes to assess after final resolution of the test case.

Providing information to the Financial Ombudsman Service

- 7.4 Where a policyholder refers a complaint about an insurer's relevant non-damage business interruption insurance policy to the Financial Ombudsman Service, the insurer should give the Ombudsman the results of its review of the policy under this guidance.

Offers to settle during the test case

- 7.5 During the test case, an insurer may continue to offer to settle a potentially affected claim or, in the case of a potentially affected complaint, make an offer of redress or remedial action, including on a full and final settlement basis.
- 7.6 When deciding how to progress a potentially affected claim or potentially affected complaint, including whether to offer to settle, or to offer redress or remedial action, insurers should take account of any communications from the policyholder relating to the outcomes that the policyholder says they would be prepared to consider.
- 7.7 When making an offer to settle a potentially affected claim or an offer of redress or remedial action for a potentially affected complaint, an insurer should inform the policyholder about the test case and its implications. In particular, they should tell the policyholder whether the final resolution of the test case may affect the insurer's decision about their claim or complaint, and the implications of accepting or rejecting an offer made on a full and final settlement basis.
- 7.8 An offer to settle, or an offer of redress or remedial action, may have been made before this guidance came into effect on 17 June 2020. In these cases, if it remains open to acceptance and the policyholder has not accepted it or rejected it, an insurer should give the policyholder the above information before the policyholder commits themselves to accepting or rejecting the offer. In addition, the insurer should:
- where the offer has a deadline for acceptance which is less than 14 days from expiring, extend the time for a policyholder to accept the offer to two weeks from the date when the policyholder receives the information about the test case and its implications, and
 - unless increasing the offer, not withdraw the offer within any timeframe given to the policyholder to accept it.

Time limits during the test case: stopping the clock

- 7.9 To treat their customers fairly and act in their customers' best interests, insurers should not include the period between 17 June 2020 and the final resolution of the test case when relying on any time limits within which policyholders must:
- make potentially affected claims or take any other step under the terms of their policies, or
 - refer potentially affected complaints to the Financial Ombudsman Service.
- 7.10 Insurers should not limit any payment that may be due to a policyholder because of the time period that has elapsed before the potentially affected claim or potentially affected complaint was made.

Actions following final resolution of the test case

Assessing outstanding potentially affected claims and potentially affected complaints

- 7.11 On final resolution of the test case, insurers should handle and assess all outstanding potentially affected claims and potentially affected complaints in line with ICOBS 8 and DISP 1 and apply the judgment(s) in the test case so far as relevant.

Review of rejected/reduced potentially affected claims and potentially affected complaints

- 7.12 Insurers should reassess all potentially affected claims they rejected (or where they made an adjustment or deduction for general causation) before final resolution of the test case that did not proceed to become potentially affected complaints in line with ICOBS 8.
- 7.13 This does not apply for a claim or complaint that has been settled on a full and final settlement basis in compliance with the insurer's legal obligations including under the FCA's rules.
- 7.14 Except where an insurer has received notification from the Financial Ombudsman Service that it has accepted a complaint for consideration, insurers should also reassess all potentially affected complaints they did not fully uphold before final resolution of the test case in line with DISP 1. When reassessing such claims and complaints, insurers should apply the judgment(s) in the test case so far as relevant and:
- inform the policyholder promptly of the outcome of the reassessment, and
 - if the reassessment is for a potentially affected complaint where the insurer has already issued a final response under DISP 1.6.2R, issue a revised final response informing the policyholder that the policyholder has a further six months to refer the complaint to the Financial Ombudsman Service.