FS20/8: Business interruption insurance test case: Guidance for firms

17 June 2020

Contents

1 Summary

1.1 This document summarises the feedback received to our draft guidance published on 1 June 2020. The draft guidance set out our expectations for insurers, Lloyd's managing agents (in this feedback statement 'insurer' should be read as also referring to a Lloyd's managing agent) and insurance intermediaries when handling claims and complaints for business interruption policies during the test case brought by the FCA.

1.2 The guidance was subject to a short consultation period which closed at 5pm on Friday 5 June. We explained that to act quickly to protect consumers we would not publish a formal consultation on the proposed guidance or produce a cost benefit analysis. We considered that the delay in doing so would be prejudicial to the interests of consumers. However, we invited comments on our proposals and received 22 responses from interested stakeholders including firms, trade bodies, consumer representatives and law firms.

1.3 Most respondents agreed there was a need for the proposed guidance to give clarity to all parties regarding expectations during the test case. This includes the expectation that insurers should review the test case and then determine whether or not their decisions on claims (including questions of causation of loss) for each relevant business interruption policy may be affected by the final resolution of the test case. They also accepted that the FCA needs to be provided with the outcome of the review to publish a consolidated list of affected policies.

1.4 Some respondents asked us to clarify the scope of the guidance and the implications of the definitions used. Some firms asked about how they should apply the guidance and what this meant when considering the impact of the test case upon their own portfolio of policies. Some respondents raised concerns about reviewing policies to identify those affected by the test case, reporting the outcomes of those reviews to the FCA and the proposed timelines for doing this. Some also had concerns about our expectations of firms' communications with policyholders during the test case, and asked for greater clarity in some areas. In this document, we respond to this feedback and explain the amendments we have made to the guidance to address the concerns raised and clarify our expectations.

1.5 This guidance supports our consumer protection and market integrity objectives. It clarifies our expectations of firms handling potentially affected claims and complaints during the test case and sets expectations on the provision of appropriate information to policyholders. The test case is intended to resolve many of the key issues causing uncertainty about business interruption claims as promptly as possible and to give greater clarity to both insured and insurers.

1.6 We are now publishing our finalised guidance. This includes changes or additions in light of feedback to:

- Clarify that the scope of our guidance is restricted to relevant non-damage business interruption policies.
- Confirm that the guidance has the same scope as the rules it gives guidance on. So firms should have regard to ICOBS 1 and DISP 1.1 in determining whether

and how the guidance applies to their portfolio of relevant non-damage business interruption policies.

- Make clear within the guidance that coverage issues relating to clauses that have an exhaustive list of notifiable diseases which does not include Covid-19 or to clauses which require the disease to be present on the insured premises are not included in the test case.
- Clarify our expectations of insurers' reviews of their relevant non-damage business interruption policies to allow them to classify and report all 'disease' or 'denial of access' or similar coverage clauses in two categories; those where the outcome on claims generally (including questions of causation of loss) may be affected by the final resolution of the test case, or those where that outcome won't be affected.
- Extend the proposed timelines for review and communication to the FCA to 3 weeks, and for individual communication to policyholders who have made claims or complaints to 4 weeks.
- Provide more details and clarity on our expectations of how firms should handle claims and complaints during the period when the test case is ongoing and the parameters around their actions.

1.7 This guidance applies to:

- an insurer which is a party in the test case
- any other insurer which, before the date that the test case began, underwrote a relevant non-damage business interruption policy
- an insurance intermediary or insurer which handles claims on another insurer's relevant non-damage business interruption policy
- a managing agent that manages a Lloyd's syndicate which has underwritten a relevant non-damage business interruption policy

1.8 This guidance comes into immediate effect upon being published on Wednesday 17 June.

Next steps

1.9 We expect the insurers covered by this guidance to review their relevant non-damage business interruption policies to classify them as set out and to report the outcomes of these reviews to us by Wednesday 8 July. This will enable us to publish a list of relevant non-damage business interruption policies affected by the test case.

1.10 We expect firms to consider what general communications they need to make to their non-damage business interruption policyholders. This includes promptly updating previous statements regarding how their relevant non-damage business interruption policies respond to the Covid-19 pandemic.

1.11 We expect firms covered by this guidance to consider what communications they need to make to individual policyholders who have made a claim or complaint in the light of the guidance and the review of relevant non-damage business interruption policies. Firms should make any necessary communication to policyholders by Wednesday 15 July.

1.12 We expect relevant firms to identify claims and complaints (included those already declined or where the firm has made an adjustment or deduction for general

causation) that are potentially affected by the test case and to take account of this guidance when handling these claims and complaints.

2 General issues

Scope and application of guidance

2.1 In the draft guidance we set an expectation that insurers should also take appropriate account of the guidance as far as the insurers' other policies, including their other business interruption policies, contain terms whose interpretation or response may be affected by the outcome of the test case.

2.2 Many respondents, while generally supportive of the guidance, felt that the meaning of this expectation was unclear. They also felt it and appeared to go beyond the relevant scope of the test case and the resolution of certain issues and uncertainty over non-damage business interruption policies. They felt that this could create confusion and place an additional burden on insurers.

2.3 Some respondents requested greater clarity about the scope of the guidance in relation to different customer types and policyholder locations.

2.4 Some respondents asked for clarification on the role of brokers and other intermediaries.

Our response

2.5 The proposed guidance was drafted solely in the context of our work to give all parties clarity about non-damage business interruption claims. So we have removed the expectation for insurers to take appropriate account of the guidance as far as their other policies contain terms whose interpretation or response may be affected by the outcome of the test case.

2.6 However, the outcome of the test case will still provide guidance on the meaning of other policies containing terms or clauses whose interpretation or response may be affected by its outcome. So, in our supervisory activities, we may consider whether insurers have undertaken work to consider the impact of the test case on other policies containing terms or clauses whose interpretation or response may be affected by the test case outcome.

2.7 The proposed guidance 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 2.5.-1R and ICOBS 8.1
- the Dispute Resolution: Complaints sourcebook (DISP), in particular DISP 1.4 and DISP 1.6

We have now explicitly set out that the guidance has the same scope as the rules it gives guidance on. So firms should have regard to ICOBS 1 and DISP 1.1 in determining how the guidance applies to their activities carried on in relation to any relevant non-damage business interruption policy. We have also clarified that the guidance applies to relevant non-damage business interruption policies within the scope of ICOBS 8 and for which the applicable law is England & Wales, Scotland or Northern Ireland.

2.8 We have more clearly identified in the guidance which parts of the guidance apply to insurance intermediaries, and detailed where the responsibility sits for delegated tasks and functions.

Definitions

2.9 Some respondents highlighted the need for greater clarity on the identity of the test case and the definition of a 'relevant non-damage business interruption policy' and 'relevant policy wording'. They asked whether 'relevant non-damage business interruption policy' should be more narrowly defined as policies that are identical or substantially identical to the test case or should be defined, as in a previous data request, as only SME policies or policies with more than 500 policyholders.

2.10 Some respondents proposed that the guidance should be clear in identifying certain non-damage business interruption wordings or clauses which are not being considered in the test case. These include clauses that have an exhaustive list of notifiable diseases which does not include Covid-19 and clauses which require the disease to be present on the insured premises. Some firms also raised a concern that the use of the phrase 'to the insured property' in the draft guidance could imply that claims triggered by damage to third party properties may be included.

2.11 One respondent was concerned that we had not defined the meaning of 'intermediary' within the draft guidance.

Our response

2.12 We have more clearly identified the test case within the guidance, by explicitly referring to Covid-19 and including the claim number.

2.13 We have not amended the definition of 'relevant non-damage business interruption policy' to restrict the scope of this guidance solely to SME policies or to policies with more than 500 policyholders. This is because the intention of the guidance is for firms to consider the impact of the test case and perform the expected reviews for all non-damage business interruption insurance policies where there has been a claim or statement by the insurer that the policy does not respond to Covid-19. This will enable us to publish a comprehensive list. As detailed in para 2.7, this is subject to the qualification that the guidance has the same scope as the rules it gives guidance on. We have clarified that the guidance only applies to policies within the scope of ICOBS 8, so firms should have regard to ICOBS 1 in determining how the guidance applies to them.

2.14 We have now set out clearly within the guidance a summary of the scope of the test case. This clarifies that coverage issues relating to clauses with an exhaustive list of notifiable diseases which does not include Covid-19 or to clauses which require the disease to be present on the insured premises are not included in the test case. This will assist firms in reviewing their policies and categorising them.

2.15 We have also replaced the definition of 'relevant policy wording' with 'relevant coverage clause' to make clearer that this is referring to one or more clauses setting out the coverage of the policy in relation to disease or denial of access or similar matters.

2.16 We have not included a definition of insurance intermediary in the guidance but have clarified that it is the same as the definition in the FCA's Handbook.

Appropriate use of FCA guidance powers

2.17 Two respondents asked whether we were improperly using our guidance powers in this instance and should instead be making rules and undertaking a full cost benefit analysis (CBA) rather than setting expectations. One of these respondents also questioned the implications of applying the guidance to mutual insurers.

Our response

2.18 We are confident that the proposed guidance is within the scope of our power to give guidance. We acknowledge that the guidance applies to all types of insurance firm, including mutual insurers. On the lack of a CBA, FSMA does not oblige us to conduct a CBA for guidance. We explained in the consultation why we had not conducted a CBA for this guidance. We have reviewed all the comments we received and made adjustments to the final guidance, where appropriate, to reflect them, including amending the timing and our expectations on the level of communication.

Application to London market insurers and co-manufacturers

2.19 Some respondents asked how the guidance applies to London market insurers and policies which are co-manufactured, including the obligations and roles of lead and follow insurers (in both the Lloyd's and companies market) and the role of co-manufacturer intermediaries.

Our response

2.20 We have made changes to the guidance to clarify how it applies to co-manufactured policies. In particular, we have clarified the claims and complaints handling expectations in light of the specific arrangements in the Lloyd's market.

3 Firm reviews of policies, reporting, timelines and publication

Review of policies

3.1 Many respondents said the policy categorisation set out in the draft guidance was unclear and involved overlapping categories. Several respondents proposed that we reduce the number of categories to just two – policies that are affected by the test case and those that are not.

3.2 Some respondents requested clarification on which policies should be reviewed. Questions included whether the review was of all non-damage business interruption policies, whether it was restricted to generic wording and whether it included policies with a specified list of diseases.

3.3 Some respondents asked for clarification on the role of intermediaries in the review.

3.4 One respondent asked whether they could rely on the FCA's communications and correspondence, and decision on which insurers to invite to be parties to the test case, in carrying out their review.

3.5 Another respondent asked for specific clarification that the impact of the test case on each claim would also depend on the individual facts of the case.

Our response

3.6 We have addressed many of the points on which policies are covered by the review, and clarified that the individual facts of each claim will be relevant to the impact of the test case, in our amendments to the definition and application sections of the guidance.

3.7 We agree with the comments made on the categories identified in the draft guidance. We have reduced the number of categories to two. We expect insurers to categorise their 'relevant coverage clauses' into ones where the outcomes on claims generally (including questions of causation of loss) may be affected by final resolution of the test case and those where the outcome won't be affected. We have reflected this change in the template we will provide to insurers for submitting the results of their review of their policies to us.

3.8 We agree with the comments made on clarifying both the role of intermediaries and that the outcome of a claim will depend on the facts of the case. We have provided clarity on both these matters in the guidance.

3.9 We do not agree that insurers should rely on any discussions we have had in the process of identifying a representative sample of policy wordings when conducting their review. We expect firms to review their policies taking into account the published documents in the test case.

3.10 We have clarified that the review should be done for every policy within the definition of 'relevant non-damage business interruption policy', irrespective of the number of

policyholders for that policy, the size of the customer or whether the policy has bespoke wording.

Definition of senior manager, reporting to FCA and timelines

3.11 Many respondents raised concerns that the time frame in the guidance was too short to allow them to complete the review of their policies. These respondents, including both insurers and trade bodies, suggested variously that a 3-week, 4-week or 6-week timeframe would be appropriate.

3.12 One respondent asked whether the reference to senior manager meant a senior manager as defined in the FCA Handbook.

Our response

3.13 We have amended the time frame for completing the review to three weeks from the date the guidance comes into force. We consider this provides a reasonable balance, taking into account the timetable for the test case, between allowing insurers enough time to complete the review, whilst still ensuring that policyholders are made aware of whether their claim or complaint is affected before the test case commences on 20 July.

3.14 We can confirm that senior manager does have the same meaning as in the FCA Handbook.

Supervision and review of categorisation

3.15 Some respondents asked whether we would validate or otherwise review the categorisation of policies under the guidance.

3.16 Respondents also asked for clarity on how we will supervise compliance with the guidance.

Our response

3.17 We do not propose to carry out a comprehensive validation of insurers' policy categorisation. However, we will consider the reports submitted under the guidance, undertake a sample review of submissions and may take supervisory action if it appears that the categorisation has been carried out incorrectly.

Publication

3.18 Some respondents sought clarity on what we would publish after the review had been completed. Several asked us to confirm that we would consult with insurers before publishing any details.

Our response

3.19 In our statement on 1 June 2020, we published an indicative list of policies affected by the test case and stated that we will publish a consolidated list in July. The policy review and reporting set out in the guidance will support us in publishing the consolidated list. The consolidated list will detail the name of the firm, firm reference number, the name of the policy and whether the insurer thinks it is affected or not by the test case.

3.20 We confirm that we do not intend to publish commercially sensitive information or information that would fall within the scope of GDPR.

4 Policyholder communication and timelines

General communications with policyholders during the test case and timelines

4.1 Some respondents said the expectations in the guidance on general communications during the test case are onerous, involve unnecessary repetition and would confuse policyholders. These respondents proposed that all general information should be provided on our website and that their communications should only be with policyholders who have made claims.

Our response

4.2 We consider it is important that policyholders are made aware of the test case and its progress. We also consider that it is important that previous messages are clarified where necessary. We do not agree that our expectations on general communications are unduly onerous or would cause confusion for policyholders. Firms may communicate updates in whichever way they consider appropriate, having regard to Principle 7 and ICOBS 2.2.2R.

Updating policyholders who have made claims or complaints

4.3 Respondents had varying views about the points at which firms should update policyholders who have made claims or complaints. Some respondents asked for a longer timeframe. One respondent asked us to provide template wording for the updates. They also asked us to clarify who should receive updates and whether it should just be policyholders whose claims have been declined or just SME policyholders.

Our response

4.4 We have clarified the updates and timings of these in the final guidance as we accept that some of the original proposals would no longer be practicable given the date we are issuing the final guidance. We have also provided further clarification on how firms may consider communicating different types of updates. We do not think it appropriate to provide template wording. Firms are best placed to determine the content of their communications to their policyholders in light of their particular policy wording and previous communications. The guidance encourages firms to provide links to our webpage for the test case.

4.5 We have also clarified that our expectation that claims and complaints are filtered to identify whether any are affected by the test case applies to claims and complaints for all relevant non-damage business interruption policies, without limit for number or size of policyholders.

5 Handling claims and complaints during the test case

Handling claims or complaints partially affected by the test case

5.1 Respondents asked whether it would be possible to defer all elements of a claim until after the test case is concluded and whether a response to non-test case parts of claim would amount to a final response for the purposes of DISP.

Our response

5.2 We have clarified our expectations of what firms should do when deferring handling of claims. Our expectation remains that firms will endeavour to handle and assess unaffected parts of claims and complaints, but we recognise this may not be possible in every instance. Firms should communicate this clearly to policyholders.

5.3 We have not provided any further clarification around what would constitute a final response for the purposes of DISP. This will depend on the particular circumstances of each case. Firms should consider which of the options for response in DISP 1.6.2R is the most appropriate in the circumstances.

Offers to settle during the test case

5.4 Some respondents asked us to clarify how settlements would be treated at final resolution of the test case. They also asked if firms could make offers proactively. One respondent considered that the option to settle cases was problematic in the context of vulnerable customers. This respondent felt that it would be difficult for firms to appropriately manage the risks and needs of vulnerable customers considering an offer of settlement against an uncertain outcome from the test case.

Our response

5.5 We have clarified that claims and complaints settled on a full and final settlement basis in compliance with legal obligations will not need to be reassessed at final resolution of the test case. Firms may make offers to settle proactively or in response to a policyholder proposal. Where they do make an offer, firms will need to consider their obligations, including under Principle 6 and ICOBS 2.5.-1R. We agree with respondents that the customer's vulnerability will be a factor for firms to consider when making settlement offers. Brokers acting for policyholders who are offered settlements will need to take into account Principle 8 and ICOBS 8.3.

Time limits during the test case

5.6 One respondent asked for clarification that the time periods to make claims or refer complaints to the Financial Ombudsman Service (for which the guidance suggests

firms should 'stop the clock' during the test case) were purely notification obligations and did not include indemnity periods.

Our response

5.7 We have not changed the guidance. We consider it is sufficiently clear that indemnity periods are not intended to be caught within the term 'time period that has elapsed'.

6 Actions following final resolution of the test case

Determination of quantum outside test case scope

6.1 One respondent asked us to clarify that the determination of quantum (the final amount to be paid in relation to claims) was outside the scope of the test case. They noted that quantum would depend on the facts of the individual claim.

Our response

6.2 We have amended the guidance to clarify that other issues that may arise in relation to particular policyholder claims are outside the scope of the test case. These include issues such as the measure of indemnity, 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.

Obligations and timelines for communication with policyholders

6.3 One respondent was concerned they may be asked to reassess claims in response to decisions that may be subject to appeal. Respondents also proposed a set time limit for following up with policyholders once the test case is concluded and that it should only be necessary to communicate with policyholders where the outcome of their claim has changed.

Our response

6.4 We do not expect insurers to carry out any reassessment of claims or complaints until all rights of appeal for the relevant points have expired. We will ensure full transparency around any appeals that may be made.

6.5 We consider that insurers should communicate with all policyholders with potentially affected claims and complaints when the case is concluded. This will ensure policyholders are aware of the position and enable them to consider what action they want to take, if any. We acknowledge that insurers may have a substantial number of claims to consider when the test case reaches final resolution. We do not consider it practicable at this stage to set an expectation for how long insurers should take to follow up with policyholders. Insurers should in any event handle claims and assess complaints promptly and fairly under ICOBS 8.1 and DISP 1.4.

7 Other comments

7.1 Several respondents asked for clarification of the procedure the Financial Ombudsman Service intends to adopt for business interruption cases and whether the Ombudsman proposes to put these cases on hold during the test case.

Our response

7.2 The approach of the Financial Ombudsman Service to business interruption insurance cases is outside the scope of the guidance and the FCA's remit. We have passed these comments to the Financial Ombudsman Service to consider.

Annex 1 – List of non-confidential respondents

Allianz Insurance plc

American International Group UK Limited

Arch Insurance (UK) Limited

Ardonagh Group

Association of British Insurers (ABI)

AXA Insurance UK plc

British Insurance Brokers' Association

Bryan Cave Leighton Paisner LLP

Canopius Managing Agents Limited

China Taiping Insurance (UK) Co Ltd

Federation of Small Businesses

Financial Services Consumer Panel

HDI Global SE – UK (a branch of HDI Global SE)

MS Amlin Underwriting Limited

The National Farmers Union Mutual Insurance Society Limited