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COVID-19 ASSISTANCE HUB

A commercial barrister and a reinsurance broker discuss whether Hiscox is liable to pay out under £3.2bn worth of business interruption policies.

Today, I interview a friend of mine who is broker at a major reinsurance company in the City of London, who wishes to remain anonymous. We discuss whether Hiscox's standard business interruption policy covers loss caused by Covid-19 and, if so, what the consequences would be.

Read the Q&A here:

F. Hi E, we started talking the other day about the effect of Covid-19 on the insurance market and, in particular, on the claims that were likely to be made under business interruption policies. You mentioned in particular, Hiscox. Why Hiscox?

E. Hi F, good question. On Hiscox's standard business interruption policy it would *prima facie* be liable for the consequences of Covid-19. That doesn't mean they definitely would be liable, but it looks like there is a strong chance they will be.

F. OK, that makes sense. But why all the press? Can't Hiscox just pay out the claims?

E. Well yes, in theory (although they are already contesting liability), but assuming claims were made for all those businesses and Hiscox was liable, the sums are so big it would likely send Hiscox bust. To put it in context, by our reckoning Hiscox has around a 5% share of the UK SME market. SMEs represent about half of GDP (annual UK GDP is c. £2,000bn, so £500bn per quarter, £250bn per quarter for SMEs). The decline in GDP is projected to be 25% (possibly higher), so 25% of £250bn is £62.5bn. A 5% share of their economic loss would be 3.1bn (average c. £10k per policy), which would be a significant loss even with reinsurance applied.

F. Wow, OK. So Hiscox would stand to lose £3.1bn if all these policyholders claimed?

E. As a rough estimate, yes. Even if only a fraction of those claimed it would still be a HUGE write off for Hiscox.

F. But isn't the whole point of the insurance industry that they have enough capital backing to pay out their insurance claims?

E. Yes, but in reality insurance is a risk-based model and the capital backing underpinning that risk is dependent on the likelihood of it happening. In short, insurers also go bust, when exceptional events happen. It happened in 1989 with the LMX spiral and it also happened in the wake of the 2008 financial crash.

F. So you're saying that policy holders who have bought policies might be faced with an insolvent insurer despite having paid out premiums to that insurer in the meantime.

E. Unfortunately, yes. The capital requirements for insurers is now better than it was (the EU introduced a regulation called Solvency II in the wake of the last financial crash to address the solvency of insurers), but it still isn't fool proof.

F. OK, in view of that, how likely do you think it is that Hiscox will be held liable under this standard policy? Since we spoke I actually managed to obtain a copy of the policy wording and it might be useful to look at the clause in question in a bit more detail. It's 11(b) of the policy and clause 11 as whole says you are covered if the policy holder suffers an:

> inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following:
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> a. a murder or suicide;
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> b. an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority;
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> c. injury or illness of any person traceable to food or drink consumed on the insured premises;
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> d. defects in the drains or other sanitary arrangements;
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> e. vermin or pests at the insured premises;

F. On its face that looks pretty clear. Covid-19 is an occurrence of any human infectious/human contagious disease surely?!

E. Well, yes. A lot of us in the industry think so. When insurers write policies they are quite specific about what is covered and, on its face, Covid-19 appears to be covered. (The situation is slightly different for reinsurers where the wording tends to be more "catch all".) I'd be interested to hear what you think about the policy as a commercial barrister.

F. Having looked at clause 11 and spoken to colleagues, we think Hiscox's most likely arguments to deny cover would be:

> a) that all the other sub-clauses in clause 11 relate to something happening at the insured premises and so clause 11 should be interpreted to cover outbreaks on the premises/in the local area, not a worldwide pandemic. That is why the reference is there to being required to notify the local authority. If we're dealing with a pandemic there is obviously no need to notify a local authority as they're already well aware of it by the time a claim would be made.

E. Classic lawyer. Yes, I see the point about the local authority, but that does seem to me to be a pretty technical reading of a policy, when what we're dealing with is SMEs, many of whom don't have in-house lawyers, who are buying this policy in good faith and who, on its face, are covered

by the policy. There is also a huge amount of pressure on insurers to treat customers fairly, so you'd have thought Hiscox will have difficulty denying cover. What do you think are the best counter-arguments against Hixcox's likely stance?

F. In my view there are many good answers to it, but perhaps the best argument, or series of arguments, is this:

> a) The other sub-paragraphs in clause 11 include reference to the "premises" either expressly or implicitly, because those examples are naturally geared towards things happening on or near the insured premises;
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> b) the absence of similar words in sub-paragraph 11(b) suggests the drafters deliberately excluded them when they were drafting that clause: a breakout of contagious disease is not so restricted and does not include the words "insured premises" on purpose. Accordingly, from an objective perspective, Hiscox must have meant to include outbreaks that started further away than the insured premises; this also makes sense when one considers an outbreak because there is no reason why it would naturally only occur only on the premises itself (in fact it is far more likely to be broader, as in the instant case).
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> d) Because of this 11(b) is distinguishable from the other sub-clauses in the rest of clause 11 and, in fact, the other sub-clauses ***assist*** policy holders in their interpretation point, rather than the insurer. The insurer, if they wanted to limit the type of breakout to something at the premises, could have included a clause to that effect like they did in the other clauses, but they did not, intimating that policy holders would be covered for this type of event.

There is a further good point to make which is this:

> a) The requirement to notify the local authority in clause 11(b) doesn't go to the question of scope of cover, it is a notification provision which should arguably be read as discontinuous with the first part of the clause; and
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> b) Let us imagine the Hiscox policy was provided to the owner(s) of the food market in Wuhan where Covid-19 actually started. If the outbreak occurred there, and the policy holder was required to notify the local authorities (as they ultimately did in Wuhan) would that mean that the policy holders should not be covered simply because the outbreak turned into a global pandemic? No.
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> c) If that is right, then it should matter whether the outbreak starts on your premises or whether it comes ***to*** your premises from somewhere else. There is nothing in sub-paragraph 11(b) that addresses where the outbreak must have started. If Hiscox wanted to require that the outbreak must have started on the premises in question they could have done, but they chose not to.

There is an additional point worth mentioning here that is quite technical. Sometimes parties can argue that the court should "imply" a term into a contract. And Hiscox might try and argue that a term should be implied into the contract to the effect that the outbreak had to originate on

the premises or in the local area. But the threshold for requiring the court to imply in a term to a contract is high; broadly-speaking you need to show that it is "necessary" for the purposes of business efficacy to imply in the term. But, at least in my view, it simply isn't necessary to imply in any term here. The contract functions perfectly well without anything else. Of course, the court still has to interpret what the contract means, but it is a dangerous precedent where courts use contractual interpretation to imply in terms through the back door. The starting point for all contractual interpretation is that the contract means what the contract says. On that basis, I think Hiscox should be liable. That may lead to Hiscox paying out a lot of claims, but that is the risk of being an insurer. They can hardly complain about making a bad bargain when they write the policies.

E. Wow. OK, yes, nice law lesson. On a slightly different point, presumably lots of these SMEs are currently struggling to stay afloat and are unlikely to have the time and resources to fight a case against a massive insurance company who can afford to hire the best lawyers and barristers to defend their position?

F. Good question. I've been speaking to a number of litigation funders who are thinking of setting up a class-action on behalf of these policy holders. Effectively, the litigation funder pays for the litigation and takes a cut of any damages if Hiscox loses. That means that policy holders wouldn't get paid out in full (because they'd have to pay the litigation funder something), but they also wouldn't have to pay to fight the battle. Someone else does that for them. So they minimize their risk and administrative burden but have something to gain from it at the end, hopefully! All I can say at the moment on that is watch this space.

Francis Hornyold-Strickland

36 Commercial
Telephone: + 44 (0) 207 421 8051
Email: clerks@36commercial.co.uk
https://36group.co.uk/commercial