

FSCA COMMUNICATION 34 OF 2020 (INS)

COVID-19 - REGULATORY RESPONSE: THE FINANCIAL SECTOR CONDUCT AUTHORITY'S STANCE ON BUSINESS INTERRUPTION INSURANCE

1. Purpose

This Communication sets out the position of the Financial Sector Conduct Authority (FSCA) on certain aspects of Business Interruption (BI) insurance cover. On 30 March 2020, the FSCA published FSCA Communication 12 of 2020, which required that where any new exclusions or requirements are introduced during the period of the Covid-19 pandemic crisis, such exclusions must be discussed with the FSCA. This Communication was followed, on 12 May 2020, by the Joint Communication 5 of 2020: Covid-19 – Regulatory response: Business Interruption Insurance (Joint Communication 5 of 2020) issued by the FSCA and the Prudential Authority (PA). Joint Communication 5 of 2020 dealt, in broad terms, with two types of BI insurance cover, i.e. one type of cover termed “Standard BI Cover” and BI Cover with “an extension for infectious and/or contagious diseases”. Mid-term endorsements and pending BI insurance claims were also addressed.

Following the issuing of the above communications, BI insurance claims (largely the ones containing the extension for infectious and/or contagious diseases) have received extensive attention from many affected stakeholders, mainly due to concerns that relate to:

- 1.1. The various policy wording clauses that exist in the industry;
- 1.2. The application of the different policy wordings by the insurers underwriting this type of cover;
- 1.3. The requirements placed on policyholders to prove a valid claim; and
- 1.4. The repudiation of these claims.

2. Engagements with insurers

Following the analysis of the insurers' responses to FSCA Communication 12 of 2020, the FSCA engaged insurers further and requested copies of their current policy wordings that related to BI insurance cover. The purpose of the request was to establish how different insurers worded and interpreted clauses that related to BI insurance cover, to compare the current wording to the proposed endorsements to the policy wording and to understand the reasons for the various endorsements. The process followed by insurers to notify policyholders of the proposed endorsements was also reviewed. The FSCA also received complaints relating to delays experienced by policyholders in the processing of BI insurance claims and repudiations of BI insurance claims by insurers.

From the analysis of the BI policy wordings received and the complaints relating thereto, the FSCA noted the following, which will be discussed further below:

- 2.1. Although there seems to be slight nuances in the BI policy wordings, they may broadly be grouped in six different categories;
- 2.2. Some insurers have more than one clause that applies to different types of policies; and
- 2.3. The application of some of the policy wordings by insurers in the assessment of their claims seems to translate into different burdens of proof placed on policyholders, depending on the different insurer.

3. The six categories of policy wordings

3.1. Radius and Notification

Most insurers have policy wordings which indicate that a policyholder will have a valid BI claim if the business were to be interrupted as a result of a contagious disease at the premises or within a certain radius, provided the local authority has formally declared that a disease exists within the area and/or it has imposed quarantine regulations or restricted access to the area. This first category is referred to as the "Radius and Notification" category.

3.2. Radius

Some of the insurers have policy wordings which indicate that the trigger for a valid claim by a policyholder is interruption of the business by a contagious or infectious disease at the premises or within a specified radius of the premises to which the insurance relates.

These insurers do not require the policyholder to evidence that there was a notification by a competent authority. The policyholder must evidence that the contagious disease is within the specified radius only. This second category is referred to as the “Radius” category.

3.3. *Notifiable disease*

Some insurers have policy wordings which indicate that the insured’s business must have been interrupted by a notifiable disease. “Notifiable disease” is defined in the wording to mean “an illness sustained by any person, resulting from an outbreak of which the competent local authority has stipulated to be notified to it (the competent authority)”. This category differs from the first “Radius and Notification” category where one of the requirements is that the competent authority must have declared that a disease exists within an area. In this third category, the competent authority should have been notified of the disease, presumably by the policyholder, or someone on behalf of the policyholder.

3.4. *General Exclusion*

Some insurers have policy wording extensions which indemnify the insured against losses resulting from the insured’s business being interrupted by a contagious or infectious disease at the premises, or a contagious or infectious disease within a specified radius of the premises. These insurers, however, also apply a General Exclusion clause which overrides the aforementioned extension if there is an infectious Epidemic/Pandemic disease at the insured’s business premises or if the disease exists within a specified radius of the business premises. This fourth category is referred to as the “General Exclusion” category.

3.5. *Closure or Restriction*

Some of the insurers have policy wordings which indicate that the insured’s business must have been interrupted by a closure or restrictions placed on the premises by the authorities as a result of a contagious disease occurring at the premises. This fifth category is referred to as the “Closure or Restriction” category.

3.6. *Closure by Order*

The last category of policy wording indicates that the trigger for a valid BI claim would be the interruption of business by the outbreak of a notifiable disease or illness, or disease occurring at the premises of the insured, resulting in the closing or partial closing or other

interference with the business by order of the state or government, local authority or any other competent authority. This sixth category is referred to as the “Closure by Order” category.

4. Requirements under each category

The FSCA has received queries regarding whether the National lockdown imposed by the South African government can be interpreted as a trigger for BI insurance cover. Based on the information received and analysed by the FSCA to date, the FSCA found no evidence in support of the view that the National lockdown could be a trigger for a valid BI insurance cover claim. The FSCA is therefore of the firm view that the National lockdown was not intended and cannot reasonably be interpreted to be a trigger for BI insurance cover claims.

The burden of proof for each of the categories discussed under point 3 above follows below:

4.1. Radius and Notification Category

The two main requirements that must be proven for a valid BI claim are:

- (1) the insured’s business was interrupted by a contagious or infectious disease either at the business premises or within the radius specified in the policy; and
- (2) a competent authority has declared that the particular contagious or infectious disease exists within the specified radius of the insured’s business premises.

The insured’s business premises would have been interrupted by a contagious or infectious disease if, for example, any staff member employed by that business owner tested positive for Covid-19 and the business had to be closed for a certain period. This is not an onerous requirement. The second leg of the first requirement mentioned above relating to the contagious and infectious disease existing within the radius specified in the BI policy, is onerous. It is the FSCA’s view that what would constitute sufficient proof of the existence of a contagious or infectious disease with the radius specified in a BI policy would include that a major facility such as a hospital or large retail store (within the specified radius of the insured’s business premises) was closed for a certain period due to a positive case of Covid-19 at its premises and that the insured’s business premises are situated within one of the metros or districts that have been declared Covid-19 hotspots by Government. These are some of the examples that should serve as sufficient proof by any policyholder that it has met this policy condition.

The second requirement relating to the declaration of a contagious or infectious disease within the specified radius is also onerous, as there is no known competent authority that has made such a declaration despite well-known cases that have been widely reported in the media. It is the FSCA's view that this requirement is unfair as it means that the reimbursement of a policyholder for loss of business income is dependent on something which is totally beyond the control of the policyholder and particularly where the response to the national disaster is being addressed at national level. Therefore, it would seldom happen that a policyholder would be able to prove this requirement and claim successfully on its BI policy. It is the FSCA's view that BI claims which have been instituted and lodged with the relevant insurer which contain this condition, but where the policyholder is unable to discharge the obligation placed on it with the application of this requirement by the insurer (but the other requirements have been met), those claims should be paid.

4.2. Radius Category

It appears from the various policy wordings that the only requirement that must be proven in respect of this category is that the business of a policyholder was interrupted by a contagious or infectious disease either at the business premises or within the specified radius. The FSCA refers to its view expressed in paragraph 4.1 above and believe that BI claims instituted with insurers falling within this category should be paid by insurers as long as the interruption to its business can be proven.

4.3. Notifiable Disease Category

The requirements under this category appear to be that (1) there must be a notifiable disease and (2) which a competent authority has declared it shall be notified of, presumably by a policyholder or someone on behalf of a policyholder. The FSCA has already discussed a similar requirement in paragraph 4.1 above and repeat its view that such a requirement is unfair.

For the purposes of this category under discussion, the view is that if a policyholder was infected with Covid-19, such policyholder must be reimbursed by an insurer irrespective of whether or not a competent authority has been notified of a Covid-19 infection.

4.4. General Exclusion Category

This is the only category where cover for Covid-19 which has been declared as a pandemic by the World Health Organisation, is explicitly excluded. It is the FSCA's view

that policyholders who had cover for infectious or contagious diseases prior to the outbreak of Covid-19 will not have a successful claim in terms of these policies.

4.5. *Closure or Restriction Category*

This wording clearly excludes the closure of the business as a result of the lockdown which was imposed by government to limit the spread of Covid-19. The wording requires that there must be a contagious disease at the business premises of a policyholder.

Unless a policyholder can prove that the insured's business was closed down as a result of Covid-19, at its premises, the FSCA's view is that a policyholder would not have a valid BI claim.

4.6. *Closure by Order Category*

The requirements under this category are not very much different from the ones under the previous category. Under this category, a policyholder's business must have been interrupted by a notifiable infectious disease at the premises, resulting in the closing or partial closing of the business by an order of the state or government.

For this category, the trigger is a Covid-19 infection at the business premises of a policyholder which resulted in the business being closed completely or partially by an order of state or government. Whilst the National lockdown could well qualify as such an order, a policyholder must prove that the lockdown was imposed because of a person contracting the Covid-19 at its business premises and was not imposed for any other purpose.

5. Burden of proof

It has further come to the attention of the FSCA that insurers are requiring policyholders to provide very specific information and/or documents for purposes of proving a claim. Examples of such requirements are:

- Proof that a hospital, close to the insured premises, was closed due to the COVID 19 or it is known that there were people treated at the hospital that were tested positive;
- Confirmation from the relevant Health Authority of a confirmed COVID-19 case within a certain radius of the insured's business; and

- Submission of medical records of someone who has been infected with Covid-19 within the radius stipulated in the policy.

In this regard, the FSCA provides the following guidance to insurers:

- 5.1. Carefully consider whether the burden of proof amounts to a barrier for the policyholder to claim;
- 5.2. Consider reasonable and practical alternatives to satisfy the burden of proof; and
- 5.3. Consider obtaining the proof itself (e.g. in respect of confirmation from a Health Authority mentioned above) as opposed to placing that burden on the policyholder, especially where such information is not in the public domain and easily accessible by a policyholder.

6. Conclusion

- 6.1. While the FSCA acknowledges that BI claims are complex in their nature, insurers that have policy wordings which fall under the (1) Radius and Notification, (2) Radius; and (3) Notifiable Diseases categories must, when they have received all relevant documentation from a policyholder, not delay the payment of any claim provided policyholders are able to prove the requirements highlighted and discussed in paragraphs 4.1, 4.2 and 4.3 above.
- 6.2. There is no sound basis for the FSCA to direct insurers that have policy wordings that fall under the “General Exclusion” category to pay any BI claims.
- 6.3. For the categories of “Closure or Restriction” and “Closure by Order”, the trigger for a valid claim is the contagious or infectious disease at the business premises of a policyholder and not the National lockdown. Therefore, unless a policyholder can prove that the insured’s business was interrupted by the presence of Covid-19 at its business premises, the policyholder would have no valid claim.
- 6.4. All insurers affected are requested to action BI insurance claims in line with this Communication. Any insurer which holds a view contrary to that expressed by the FSCA in this communication, should inform the FSCA of its view and the basis upon which this view was formed as a matter of urgency.
- 6.5. Insurers should take note that it is the intention of the FSCA, that insurers who do not deal with BI claims as stated in this Communication will be directed to do so in terms of section 144(1)(b) of the Financial Sector Regulation Act, 9 of 2017 (FSR Act) which provides that:

“The Financial Sector Conduct Authority may issue to a financial institution a written directive requiring the financial institution to take action specified in the directive if –

(b) the financial institution’s treatment of its financial customers is such that the institution will not be able to comply with its obligations in relation to the fair treatment of financial customers”

- 6.6 The FSCA is aware that should it direct any insurer(s) to pay BI claims, such an insurer may appeal to the Financial Services Tribunal established under section 219 of the FSR Act. As decisions of this Tribunal may be taken on review to the High court and may result in further legal proceedings, the duration of which may not serve the best interests of policyholders who have already suffered huge financial losses due to Covid-19 and the National lockdown, the FSCA will explore alternatives to bring about the expeditious finalisation of such matters in order to avoid costly and protracted litigation.

7. Enquiries

Requests for further information about this communication may be submitted via email to Makgompi.Raphasha@fsca.co.za

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