



**Needing Insurance is like needing a parachute. If it isn't there the first-time, chances are you won't be needing it again.**



### Policyholders looking for cover

There is a well-known saying within Insurance that "*needing Insurance is like needing a parachute. If it isn't there the first-time, chances are you won't be needing it again.*" Such a cliché seems particularly relevant to Irish business owners when COVID 19 effectively ceased all economic activity overnight. Admirably, businesses have adapted to ensure some revenue stream is maintained; however, despite this the unfortunate reality is that many businesses have suffered significant (and potential fatal) financial loss. Businesses are now looking to their Insurer to provide cover for any business interruption arising from COVID 19. The response from Insurers to such claims has come under significant scrutiny.

### The Contra Proferentem Rule

The Contra Proferentem rule dictates that any ambiguity in an exemption clause will be interpreted against the person seeking to rely on it. The Central Bank of Ireland ("CBI") have used the application of this rule to seek to have Insurers manage claims arising from COVID 19 in favour of the Policyholder by stating that if there is a doubt about the meaning of a term within an insurance policy, the interpretation most favourable to the consumer (the Policyholder) should prevail. The CBI have said that there is an expectation of consumer-focused solutions and that CEOs ought to take responsibility for the oversight of how their firm is managing determinations of whether claims are covered in the context of COVID 19.

The CBI's willingness to stick their head above the parapet will provide an element of hope to Policyholders who are relying on Insurers to "*act honestly, fairly and professionally in the best interest of consumers*" which is one of the core principles of the CBI's Consumer Protection Code.

### Business Interruption

Following on from the announcement of the CBI's position, Insurance Ireland (a body that represents approximately 130 companies that provide insurance domestically and internationally from Ireland) echoed the sentiments of the CBI by stating that the benefit of the doubt should be given to Policyholders in relation to any ambiguity arising from the business interruption clause. Insurance Ireland did concede that our own government's advice to close a business on account of COVID 19 is tantamount to a direction and will be recognised as such for the purpose of business interruption insurance policies.

While this may seem like a positive development for Policyholders there is a cautionary note to add. The "standard" business interruption policy will only cover physical damage at the property or if there is an outbreak of COVID 19 on that specific premises, otherwise the policy will not respond.

### Recent Developments

In anticipation of COVID 19 arriving in Ireland Insurers began to draft policies specific to the virus in the early part of this year. The drafting of these policies has given rise to litigation. It has been confirmed that four pubs have taken cases in the Commercial Court against a domestic Insurer with a hearing for the first three cases listed for October 2020 while the fourth case has been adjourned as mediation is currently ongoing.

Coverage disputes are by their nature complex. The Insurer involved has been steadfast in their view by stating they are confident of their interpretation of policy coverage. Evidently this interpretation is at odds with the Policyholder publicans who have taken legal action. While the outcome of the case remains uncertain, one certainly remains; the decision made by the Commercial Court will be far reaching. There is a stay on all other similar legal proceedings with the aim of using this as a "test case" to provide clarity for more than a thousand pubs as to whether their losses due to COVID 19 are covered under business interruption.

Whilst the Court will undoubtedly scrutinize the terms of the relevant policies themselves in order to formulate its views, one must also consider how the Court may consider any wider public interest aspect to any such claim succeeding or not.

The outcome of the test case will also provide helpful guidance for the interpretation of similar (but not identical) policy wordings in other sectors of the economy. The Financial Service & Pensions Ombudsman ("FSPO") will no doubt have a role to play in this issue. The FSPO uses an informal mediation process to expedite the resolution of disputes and they have stated that they are aware of complaints made to them arising from business interruption. This represents a less expensive and quicker resolution for Policyholders and Insurers alike, it may be the case that FSPO will wait for outcome of the "test case" before making their own related determinations.

## **Foreign Developments**

The Irish courts may be influenced by rulings made in other European jurisdictions. In France last week the Commercial Court ruled that Axa should pay an owner of four Michelin star restaurants two months' worth of revenue losses caused by COVID 19. Axa have said they plan on appealing the ruling but will seek to reach an "amical solution" to meet the bulk of the claims from restaurant owners whose insurance policy ambiguity in them.

In the UK, the Financial Conduct Authority (FCA) have decided to ask the courts to resolve the issue of whether businesses are covered by business interruption. Ordinarily it would be left to Policyholders to resolve such disputes. However, it is thought that many businesses would go bust before a determination is made and that the FCA will achieve a quicker outcome. The FCA's core principles include, much like the CBI's, "treating customers fairly".

## **What should Insurers do?**

Insurers should tread carefully when considering whether a policy responds to a Policyholder as a result of the COVID 19 particularly in situations which may give rise to the application of the Contra Proferentem rule.

In a time like this the accuracy of policy wording comes under significant analysis. Insurers should review all wording and consider whether there is any ambiguity or grey area relating to COVID 19 or indeed other infectious diseases that could lead to a lengthy and expensive legal dispute based on interpretation of policy wording.

## **Further Information**

Given the generality of the note it should not be treated as specific advice in relation to a particular matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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