

Insurance Times

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The Big Question September 2020: Will insurers come out looking better or worse due to the FCA test case? Why?

The FCA test case saw eight insurers put to task in July in a hearing that lasted over a week, Insurance Times asked the industry whether insurers as a whole might look better or worse as it approaches the time for the court to reach its verdict



Branko Bjelobaba FCII, principal at Branko Ltd

The FCA test case is seismic and will set very clear guidance on what simple words like “incident” really do mean when not specifically defined within an insurance policy. The FCA estimate some 370,000 insureds are being denied a payout because insurers have interpreted their own wordings to suit them and no one else and have attached meanings to words that are simply way in excess of a common-sense interpretation.

Having provided talks to over 3,500 insurance professionals on the subject, the average percentage for not having a pay-out for their clients is 75%.

Yes, pandemics are fundamental risks like war and so insurers consider them uninsurable, yet few have chosen to exclude them specifically yet war, is very clearly excluded by all without exception.

So, what has gone wrong?! Have underwriters got it wrong or have claims departments become very hard nailed to save the skins of their employers? Is this splitting hair or are brokers and their clients simply expecting too much?

Personally speaking, I consider insurers have over-interpreted basic words and have failed to articulate clearly what cover was and was not being provided in respect of pandemics. It is clear now that wordings have tightened and that brokers are seeing their own PI cover rise hugely as a fallout which is wrong.

I am also sure that brokers have revamped their own sales processes to ensure that they cannot be blamed but time will tell once the judgment is handed down!

Peter Blanc, group chief executive, Aston Lark



If there is a bright side, it is fair to say that the overwhelming majority of the population have absolutely no interest in this matter. It directly concerns thousands of businesses, but not hundreds of thousands. I suspect that the majority of those businesses have already ‘moved on’ - accepting (grudgingly) that pandemics were never intended to be covered.

What I am increasingly being asked though is “how can we protect ourselves as a company going forward?” and on that topic the insurance profession has yet to come up with any answers.

The solutions for businesses have to be joined up with government as the fact remains that insurance as a concept doesn’t work for problems facing all policyholders simultaneously.

The profession should and could however build a framework, with a government back stop, to improve the efficiency of delivery of State aid should Covid-19 or similar rear its ugly head in the future.

A pool model able to provide immediate relief to businesses up to a relatively modest level, which is followed up by government support in the event of a prolonged problem would seem to me to be a logical solution. Insurers have effective supply chains for delivering claims monies, and the insurance market is experienced in managing surge events whilst also minimising associated fraud.

Daniel Pearce, senior insurance analyst at GlobalData

The FCA test case will undoubtedly damage the reputation of the industry regardless of the outcome and overshadow the positive actions taken by insurers throughout the pandemic.

Many of the policyholders that will be impacted by the outcome of the test case believe it should never have progressed to this stage and that insurers are simply looking for a loophole to avoid their responsibilities. This view stands to do the most damage to the industry's reputation.

Even in the event of a successful claim, policyholders will have been forced to fight for what they believe is rightly theirs, which is not the relationship any policyholder wants to have with their provider.

Given this, we should expect to see affected businesses switching provider for fear that future claims may also be subject to such an onerous claims process.



Robert Munden, chief underwriting officer, Gresham Underwriting

Regrettably, as often happens, the pandemic has allowed the insurance industry to again show itself as the bad guy rather than managing to highlight the sterling contributions that so many within the industry have made to assist in keeping the country running through this extraordinary period - through payments, advice and risk management guidance and more.

So, what of the court case itself? Eight insurers all together yet acting independently I think is confusing enough for many. For all to be there because – despite underwriters' intentions – the contracts were not drafted as tightly or as carefully as they might have been across such a cross section of the insurance industry's good and the great really doesn't show the industry in a good light.



The fact that an appeals process is already agreed long before a verdict has been passed down also surely just plays to the perception of the man on the street that this is an attempt simply to avoid paying claims.

We know, of course, that the industry seeks to settle all legitimate claims in as speedy a manner as possible (and indeed this has been the case with Covid-19 related losses where cover is in force) but this case simply reflects the fact that the industry - in its haste to attract customers and premium - left some of its professionalism at the door by failing to adequately draft certain policy wordings and by failing to make absolutely clear what is and what isn't covered in some of these. Sadly, I think we have a bit of making up to do.

Aaron Le Marquer, partner at Fenchurch Law

It is fair to say that insurers got off to a bad start with blanket declinations of claims using cut-and-paste responses with no apparent consideration of the facts.

The general insistence of insurers that their policies are crystal clear in not covering pandemic losses has also cost them credibility; the very existence of tens of thousands of policyholders who disagree and the resultant FCA test case itself establishing that the wordings were far from clear.

On the other hand, the insurers' participation in a highly expedited court proceeding was the right thing to do, and they may have regained some reputational ground in not resisting that process.

How insurers will come out of the process will depend largely on how they respond to the court's determination of the issues. If the court does find that some policyholders are entitled to coverage, insurers can redeem their positions by applying the court's findings in good faith to settle the relevant outstanding claims promptly.



If on the other hand, they are seen to be seeking to reduce their exposure by looking to reduce or decline claims on further questionable bases, they may simply do further damage to their already battered reputations.

Keith Stonell, managing director, EMEA at Guidewire Software

Like the problems caused by silent cyber, insurers need clarity about their terms when new risks suddenly impact them and their customers.

The pandemic uncovered inadvertent gaps in business interruption policies, and this has been a particularly sensitive issue for insurers.

The outcome of the FCA test case will help the industry redefine those policies when insurers and customers need greater transparency about how they are protected in these uncertain times.

Our own recent customer research showed that, since Covid-19, people now have greater awareness of the broader risks they face.

Cultivating a wider breadth of understanding around these risks will be key to reputation recovery in the insurance industry.

From our perspective, before, during and after lockdown, we see the industry exerting huge efforts to engage better with their customers through smarter use of data and technology among other measures.

Despite everything, customers still put their faith in insurers to protect their property and livelihoods, and I don't see that link being broken by the FCA cases. Don't forget how insurance was forged by disasters like the Great Fire of London. What's important is how we are open to scrutiny, understand and apply the lessons well.



Stuart Dobbins – technical claims manager, Romero Insurance Brokers



Sadly, the implications would not seem to be positive, at least in the short term. Even as a broker, and therefore with a certain knowledge of the complexity of insurance law, it has been astounding to see insurers seeking to hide behind unsubstantiated assertions over their 'intentions' regarding coverage.

Many insurers have apparently found it sufficient simply to state that one should ignore the text of the policy contract and instead be led by their unuttered 'intentions' regarding when the policy should reply.

Needless to say, this is a position that erodes general faith in the insurance industry and further undermines policyholder confidence in an area that is not known for its sparkling reputation at the best of times.

From a broker perspective, I would hope that it illustrates to clients the benefits of having a good representative on their side, fighting their corner, and not taking the advice of insurers at face value. Indeed, I suspect that this current court case will see battle lines hardening between brokers and insurers, at least from a claim's perspective.

In terms of policies and premiums, a 'win' for the FCA is likely to cause a broad stocktake by the affected insurers of their positions, both in terms of how and when they write business as well as in respect of their policy terms and conditions.

We would expect to see policy wordings becoming tighter, with less ambiguity or room for argument, as well as premiums potentially increasing as insurers seek to recoup any losses they have been forced to pay.