Insurance Times

# In Focus: Broker litigation 'inevitable' one year on from FCA's BI test case

By Clare Ruel | 17 June 2021

**Brokers are 'still squeaky about whether they advised their customers correctly about the products they were buying'**

Although July marks the one-year anniversary of the FCA's business interruption (BI) insurance test case hearing, the impact of the resulting High Court and Supreme Court judgments on the insurance industry is still ongoing. For example, litigation involving brokers is "inevitable", according to Sedgwick's Damian Glynn, director and head of financial lines, UK.

He told *Insurance Times*: "Once people have exhausted discussions with their insurers, it's inevitable that there will be litigation involving brokers. Where there is a price pressure and the market is harder, clearly that is more challenging.

"The Supreme Court case leaves policy construction pretty much as everyone had assumed - these Covid cases will be settled in due course.

"The new challenge is the harder market for brokers. The hard market is good news for brokers with technical acumen because it gives them the opportunity to differentiate. If it's all about price, can you really differentiate one cover from the next?"

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The FCA revealed in its latest data, published in June, that insurers have paid more than £750m in interim and final BI payments since the appeal ruling in January, but there are still many more businesses awaiting claims payouts.

The regulator calculated that 20,347 policyholders out of 37,702 who have had BI claims linked to the test case accepted have received at least an interim payment so far.

The uptick in pandemic-related BI claims came about due to the government ordering a national lockdown on 16 March last year, which saw all non-essential businesses shut down to mitigate the spread of coronavirus in the UK.

As these businesses undertook temporary closures, many opted to make up the financial shortfall of lost custom and empty premises by claiming on their business interruption insurance policies.

Inundated with claims, insurers swiftly paused claims decision-making processes to review policy wordings - the different interpretations and the intended meaning of BI policy clauses formed the basis of the test case brought by the FCA as insurers and policyholders clashed over coverage expectations.

Bottlenecked claims caught in this process also led many businesses to form action groups like the Hiscox Action Group (HAG) and the Hospitality Insurance Action Group (HIGA), both of which also participated in the test case action.

*Insurance Times* takes a deep dive into BI one year on, examining the impact on brokers and the wider insurance industry.

## Requisite clarity

For Stuart Dobbins, Romero Insurance's technical claims manager, brokers must move forward by tackling the expectation gap between insurers and policyholders.

He explained: "In the future, the thing that occupies brokers will be the same thing that should be occupying all insurers at present – namely ensuring that their policy contains the requisite clarity to avoid future divergences between policyholder interpretations and those of the underwriters.

"Whilst it would seem possible to achieve this clarity through simple terminology and construction, sadly a number of insurers seem to have adopted a 'more is more' approach and are seeking to apply an endorsement to every endorsement in an attempt to address all possible eventualities."

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In his opinion, the next BI battlefront is around clients whose policies only responded to Covid-19 "at the premises".

"A huge number of policyholders quite understandably [inferred] from the Supreme Court judgment that should they be able to prove an instance of the disease on the [insured] premises, their policy should respond in the same way as those with [a] 25-mile radius [clause] built into their conditions," he added.

This refers to the fact that many disease clauses within non-damage BI policies specified that insureds could receive a payout if an occurrence of a notifiable disease could be evidenced within a 25-mile radius of the insured business premises.

While Romero has put these arguments to insurers and the FCA, Dobbins said "the jury is still out on how these cases may be resolved".

Other questions that will also require greater clarification include specifying the formal dates of lockdown and what constituted an 'enforced closure'. These issues are expected to be addressed in a declarations order, which will collate the established facts from the test case rulings.

## Uncertainty never helps

Speaking on the expectation gap, Glynn continued: "Insurers have to be able to set a scope to match that with the price. You can't charge a premium unless there is some delineation about what the cover is for.

"I would expect most insurers to review their wording even if they don't undertake an update. That is of benefit to everybody because uncertainty never helps anyone. On claims, nobody likes a surprise."

BI cover historically surrounds "damages on premises", however over the years, Glynn said various extensions have been offered - such as supply chain - which is where the disease extensions came in.

"The non-damage denial of access came about with the terrorist bombings in the 80s and the fact that it isn't just damage that might stop you using the premises," he said.

However, Glynn pointed out that parametric policies work differently, using a pre-set trigger, therefore damage on the premises is irrelevant - this could provide an alternative form of BI policy moving

forward.

"So long as there is a measurable trigger, anything can be insured [using a parametric policy]," he said.

"You need to do quite a bit of work with parametric to work out what the [payout] should be. They are problem specific and [are] probably going to be more relevant in the developing world," Glynn continued. This is because there may not be access to a mature broking community in certain geographies, so pre-determined triggers can fill potential advice gaps.

For example, last July insurtech startup Machine Cover began developing a new parametric BI policy, triggered by a downturn of economic activity.

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## 'Squeaky' on advice

Brokers' exposure to BI-related risks dipped in January, however, as the Supreme Court concurred with the majority of the High Court's judgment to rule mainly in favour of policyholders, said Sara Ager, chief executive of business management consultancy Greenkite Associates.

She said: "The risk to brokers was greater before the [case] was overturned because they definitely would have been at the coalface of dealing with all the damages claims."

However, lots of brokers are "still squeaky about whether they advised their customers correctly about the products they were buying", she added.

In her opinion, the industry "fell foul" last year when customers bought cover that did not respond in the way they thought it should when a claim was made.

Ager added: "We didn't really shroud ourselves in glory this time last year. One of the long-term impacts of the BI case is that customer trust has been dented even further."

## Consumer protection moving forward

Following the test case appeals judgment at the beginning of the year, the FCA published a consultation paper in May - *CP21/13: A New Consumer Duty.*

"This paper follows quickly in the footsteps of the court hearing and addresses some of those greater issues about consumer protection," explained Sara Ager, chief executive of business management consultancy Greenkite Associates.

"[It] hopefully adds fuel and traction to this ongoing debate around offering consumers products that are fit for purpose and respond as they need to," she continued.

In the consultation paper, the FCA said it wants "to see higher levels of consumer protection in retail financial markets where firms are competing vigorously in the interests of consumer". The regulator also wants to see "firms putting themselves in their customers shoes".

Therefore, it is proposing a new "consumer duty" to set higher expectations for the standard of care shown to consumers. Firms will be required to:

• Ask themselves what outcomes consumers should be able to expect from their products and services.

• Act to enable rather than hinder these outcomes.

• Assess the effectiveness of their actions.

The scope of the consultation's proposals applies to products and services sold by regulated firms to retail clients, excluding professional clientele such as large corporate entities and government bodies. In most cases, the proposals would also be applicable for SMEs.

The consultation closes on 31 July.

For Ager, the consultation is one of the outcomes from the BI test case "that should be prevalent in insurers' minds" as it is about fair pricing.