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Is my business insured?

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We all take out insurance to cover everything from our homes to our business. Many of us have been in the position, where just as we need the cover, we are informed that the particular incident is not insured. The lesson learnt, is that we must read and understand the terms of our policies carefully. With the current COVID-19 lockdown in effect, many business owners have been studying their business insurance policies and in particular whether are they covered under business interruption insurance ("BII").

Interestingly, on 12 May 2020 the Financial Sector Conduct Authority ("FSCA") and the Prudential Authority ("PA") issued a joint communication (no. 5 of 2020) in terms of the Insurance Act of 2017, on the issue of BII.[1] Insurers have received a plethora of such claims during the past few weeks as businesses have been forced to close their doors. There is much uncertainty on whether the COVID-19 pandemic would be covered under these BII policies. In the UK the Financial Conduct Authority ("FCA") will be launching multiple court actions in order to seek clarity for policy holders and insurers alike. They have invited 16 insurance companies to participate in the proceedings. In the USA, many insurance companies had already amended their policies to exclude viruses, pursuant to the Severe Acute Respiratory Syndrome ("SARS") epidemic in 2003. There are now moves to get state legislatures to force insurance companies to cover COVID-19 losses.

This creates a large amount of uncertainty within the global insurance industry. On the one hand there is a clear need by the business owner to be covered during this unprecedented period in our history. On the opposite side, the insurance industry may be bankrupted when one considers the amount of businesses affected globally and the extent of the losses. The statement issued by the FSCA and PA even mention that insurers were discussing amendments to the policies and the exclusion of the COVID-19 pandemic, as a ground for claims. They warned that any unilateral amendments may not be accepted and that they must ensure that any amendments are fair and in line with the terms of the policy contract.

Amidst all of the uncertainty, where does this leave the small business owner? Firstly, ensure that you understand which BII cover your business has. When one analyses BII, it may be classified into two categories: (i) standard BII and (ii) BII with an extension for infectious/contagious diseases. Standard BII offers indemnity to the policyholder for a loss of income where physical damage or alteration to the structure of the property has been proven, whereas BII (with extensions) offers indemnity to the policyholder in specific instances where there is not necessarily physical damage to the property. The aforesaid reiterates the importance of the "*business interruption*" wording and the policy structure in assessing the validity of a policyholder's claim.

The interpretation of what constitutes damage, as defined in the policy, will determine the validity of the policyholder's claim. By way of example, where a business ceases operation due to the COVID-19 pandemic, this may be perceived as *"an impairment of the use and function"* of the workplace/property, but it may not suffice as physical damage, since the property is still habitable. Alternatively, where there is actual physical contamination of the property by the coronavirus, it could potentially constitute "physical damage". The validity of the latter would depend on whether our courts will interpret the impairment of use and function due to the contamination, to constitute physical damage.

Business owners should take particular note of catch-all exclusions, often evident from the "general conditions and exceptions" section of policy contracts, as it could expressly exclude coverage for infectious diseases.

BII with extensions for infectious and/or contagious diseases, does offer indemnity to the policyholder for a loss of income, caused by the business being interrupted by a localised COVID-19 infection. This type of extended coverage is only offered in a small percentage of policies.

Policyholders are again advised to consider the "business interruption" wording and policy structure. Many policies that seem similar could vastly differ due to the interpretation of the wording and structure of the policies.

Business owners are advised to actively communicate with insurers to avoid misunderstandings regarding the nuances of the specific policy and the extension coverage thereof. In their joint communication, the FSCA and PA amplified the importance of clear communication between the insurer and policyholder.

Additionally, business owners are advised to put the necessary measures in place and to take reasonable steps in order to minimise the risk of exposure for their employees. The failure to do so may invalidate any policy and in addition expose them to negligence claims. Directors in particular may be faced with claims regarding staff members that were not adequately protected from the coronavirus.

When navigating through such uncertainty it is important to have the correct expert advice available, to ensure that your business survives the current pandemic. Should you manage to receive the requested insurance pay out, this may just be the necessary boost that is the difference between keeping the doors of your business open and filing for liquidation.

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1. Joint communication issued by the Financial Sector Conduct Authority ("FSCA") and the Prudential Authority ("PA") in terms of the Insurance Act of 2017, dated 12 May 2020.

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