



Loss of Rent claims and COVID-19

By Ross Macpherson ACII FCILA FUEDI-ELAE, Director at QuestGates

CILA Claims Management Special Interest Group

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Introduction

The response and application of Business Interruption (BI) policies to COVID-19 remains a fluid area, with a variety of wordings in the market and various insurers taking a different approach on the intention of the policy as well as on fundamental issues, such as what actually triggers cover, the definition of key words (such as occurrence, event, vicinity etc.), when indemnity periods start, how standard turnover should be measured pre lock down and the application and increasingly thorny issue of savings, (in particular those centred around Government incentives, such as grants, payment holidays and the Furlough scheme.)

Whilst it seems to be generally accepted that there is no liability under conventional BI cover, as there is no material damage trigger, many policies have Notifiable Disease and Competent Authorities extensions, where depending on the wording, cover may exist, albeit subject to limits and / or shorter maximum indemnity periods.

People are watching developments with interest, particularly if there is growing government and / or regulatory pressure, as well as the influence from other countries, where there are already signs of legislation, including retrospective measures being introduced and litigation being prepared.

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My advice at this stage is to be alive to all of the salient issues, such as wordings, interpretation of cover, insurer instructions and philosophy and the opportunities for savings and keep up to date with the press reports and market updates as to how things are moving. Also, don't forget to use the Lloyd's CAT code "CORO" on any cases written on Lloyd's paper.

Loss of Rent claims

Another area to consider is Loss of Rent (LOR) claims. With both residential and commercial tenants feeling the effects of the lockdown, it is inevitable that there will be significant numbers of cases where they are unable to meet rental liabilities, which may in turn give rise to LOR claims. It is important to note that this is distinct from Rent Guarantee policies, which are outside the scope of this paper.

The areas to consider are detailed below:

- Has the Insured suffered an irrecoverable loss or is payment just deferred?
- What does the lease say in terms of rent cessation?
- What does the policy cover?

The first point is critical as most tenants will still be required to pay the rent, albeit they may be able to delay / defer it in the short term. On this basis the income has simply been deferred rather than irrecoverably lost and as such there is no ultimate financial loss to the Insured. This may change if the tenant goes out of business as a result of being closed and is thus unable to pay rent liabilities including any deferred amount. In this case the landlord would have a claim against the tenant like any other creditor.

In terms of the lease, most cessation of rent clauses refer to the building being damaged or destroyed as a result of an insured risk. This would preclude cessation of rent due to COVID-19, as the building hasn't been damaged or destroyed and the definition of an insured event doesn't usually include a virus. As such there would appear, in the majority of cases, to be no contractual relief on the tenant to withhold rent.

Finally and most importantly perhaps is what does the policy cover? In common with the points I raised about BI claims in the early part of this paper, similar considerations apply to LOR covers in terms of the policy wordings, which maybe on a different basis.





For example, some are more aligned to BI covers, where cover exists until matters return to normal versus perhaps more conventional wordings where the cut off kicks in when the property is habitable / usable / serviceable again.

However, in the majority of cases there is still a requirement for there to be a physical damage trigger for the cover to operate, which in the majority, if not all the cases, will not be the case.

Having said this I am aware of wider covers, including Notifiable Disease, which don't specify either the disease having to be on the premises, exclude a particular type of disease or require there to be physical damage and Acts of Competent Authorities, without particular qualification in terms of what such instruction or advice has to relate to, which may cover the loss.

Summary

In summary therefore, where the cover is more conventional, LOR covers are unlikely to respond. However wider covers may trigger a claim, but if so, be sure to check the financial loss is irrecoverable and remember most leases won't allow the cessation of rent.

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