



# FCA BI Test Case - the appeal

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## Branko Ltd

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## Today's event

- Thank you to your LI for hosting
- Verbal and chat forum questions welcome
- Please complete the feedback survey
- You will get the slides
- Feel free to connect with me on **LinkedIn**.



## What I will cover

1. Supreme Court Appeal
2. What the FCA now require insurers to do
3. Your duties as a broker + ICOBS



## Learning objectives

This talk will give you an insight into:-

- The final result of the FCA's test case on Business Interruption Insurance
- Why compliance with ICOBS is important now more than ever



## Just bear in mind

- There is a lot of detail and I will attempt to highlight some of the **KEY** pieces of information (inevitably there are lots of words...)
- Please refer to the FCA BI pages for further information and do note that many claims have already been paid
- This is my personal 'take' on the judgment (as an insurance practitioner) and is not formal advice so please take up whatever professional help you may need
- Happy to do the talk in-house



# **1<sup>st</sup> Poll**

**Who do you  
work for?**



# **2<sup>nd</sup> Poll**

**Claims post  
judgment?**





Hilary Term  
[2021] UKSC 1  
On appeal from: [2020] EWHC 2448 (Comm)

## JUDGMENT

**The Financial Conduct Authority (Appellant) v Arch Insurance (UK) Ltd and others (Respondents)**  
**Hiscox Action Group (Appellant) v Arch Insurance (UK) Ltd and others (Respondents)**  
**Argenta Syndicate Management Ltd (Appellant) v The Financial Conduct Authority and others (Respondents)**  
**Royal & Sun Alliance Insurance Plc (Appellant) v The Financial Conduct Authority and others (Respondents)**  
**MS Amlin Underwriting Ltd (Appellant) v The Financial Conduct Authority and others (Respondents)**  
**Hiscox Insurance Company Ltd (Appellant) v The Financial Conduct Authority and others (Respondents)**  
**QBE UK Ltd (Appellant) v The Financial Conduct Authority and others (Respondents)**  
**Arch Insurance (UK) Ltd (Appellant) v The Financial Conduct Authority and others (Respondents)**

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## Insurers must pay small firms for Covid lockdown losses

By Kevin Peachey  
Personal finance correspondent  
1 hour ago

Coronavirus pandemic



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- Insurers must pay small firms for lockdown losses  
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CLAIMS **Briefing: BI ruling a self-made catastrophe for insurers**



**Jen Frost**  
@jeninsurance

18 Jan 2021

Indicative reading time:  
🕒 4 minutes

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CLAIMS **Frustrated policyholders call for insurers to 'take responsibility' after Supreme Court rules many are due payouts**



**Harry Curtis**

19 Jan 2021



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ANALYSIS

## Supreme Court BI ruling acts as 'rude awakening' for insurers

By Clare Ruel | 19 January 2021

The ruling following the test case appeal at the Supreme Court will see insurers pay claims to businesses, as well as review policy wordings - but how have insurers reacted to the decision?



Last week's ruling from the Supreme Court on the business interruption (BI) insurance test case is a

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CLAIMS

## Loss adjusters report 'significant' rise in BI claims volume



 Emmanuel Kenning  
@InsPostbod

20 Jan 2021  
Indicative reading time: 3 minutes





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CLAIMS

## Commission-hungry claims firms target Covid-hit businesses

Jen Frost  
@jeninsurance

21 Jan 2021  
Indicative reading time: 9 minutes

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**Covid-19 Business Interruption Claims**  
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The Supreme Court's decision has been awarded the way of the policyholder. We can now help get you the payout you deserve.

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**BREAKING NEWS**

**INSURERS MUST PAY MANY SMALL FIRMS FOR COVID LOCKDOWN LOSSES**

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Stratton Richards (a trading name of Fernard Ltd.) is a claims management c...



## Background

- Pandemic does not come into it
- Wordings have evolved from damage cover to cover all manner of BI incl disease
- FCA's aim was to clarify key issues of contractual uncertainty (not everything was considered)
- Appeal looked at only 11 wordings from 6 insurers
- Wider principles to apply to 370,000 policyholders, 700 types of policy written by 60 insurers
- What would you expect to have happened if a disease was discovered or if there was a denial of access - insurer and client?



## Initial thoughts...

The Supreme Court has recognised that insurers were wrong to argue that:-

1. Coverage was applicable only if there were narrow local restrictions
2. They could deny claims because the cover had not been intended to be provided
3. As the interruption, and therefore losses, would have happened in any event

- The judgment is legally binding on the insurers that were parties to the test case but also provides authoritative guidance for the interpretation of similar wordings

- We are now definitely in "new territory"



## Clearly

- Momentous
- Insurance is an economic necessity
- A common sense attitude has prevailed - “what would a reasonable person have understood the language of the contract to mean?”
- Why are insurers still denying cover then and what is now at dispute?
- Declarations are awaited



## And post March 2020?

- Insurers have tightened wordings and covid is most definitely excluded
- Ironic then considering the wordings that were disputed (stable door reaction)
- Third lockdown? Future lockdowns? Tiers?
- The future of BII + notifiable disease cover?
- A need for a PandemicRe?



## Worst hit sectors?

- Airlines + Tourism + Hotels
- Arts + Theatres + Entertainment
- Hospitality
- High Street Retail
- Hair + Beauty
- Face to face business activities
- What hit have they had as a result of no payout?



### Latest updates

15 February  
2021

#### Submissions to the Supreme Court on the declarations


The FCA and the other parties to the test case have made written submissions to the Supreme Court on the form of the declarations to be issued by the Court. These declarations will be the culmination of the judgments in the test case and will declare whether the policies in the representative sample potentially cover business interruption losses arising from the coronavirus (Covid-19) pandemic.

We have published:

- a [draft of the declarations](#) showing which parts are agreed and which remain in dispute
- submissions of [the FCA](#)
- joint submissions of [Arch](#), [Argenta](#), [Hiscox](#), [MS Amlin](#), [QBE](#) and [RSA](#) in relation to common declarations
- submissions of [Arch Insurance \(UK\) Ltd](#) in relation to its specific declarations
- joint submissions of [Ecclesiastical Insurance Office plc](#) and [MS Amlin Underwriting Limited](#) in relation to their specific declarations
- submissions of [Hiscox Insurance Company Ltd](#) in relation to its specific declarations
- submissions of [Royal & Sun Alliance Insurance Plc](#) in relation to its specific declarations
- submissions of the [Hiscox Action Group](#)

We expect that the Supreme Court will issue the declarations without a further hearing, but we do not know when.

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## Business interruption insurance - policy checker

First published: 29/01/2021 | Last updated: 29/01/2021

Use our policy checker and policyholder frequently asked questions (FAQs) to find out if your insurance policy may cover business interruption losses caused by coronavirus (Covid-19) as a result of the FCA's test case and what you can do next.

What you will need: your insurance policy wording including any 'schedule'

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**In this section**

- [General FAQs for policyholders with business interruption insurance](#)

**More information**

- [Business interruption insurance main page](#)

# 1. Supreme Court Appeal



## Supreme Court Appeal

- i. Causation
- ii. Disease clauses
- iii. Prevention of access clauses
- iv. Trends clauses
- v. Pre-trigger losses



## Crux of judgment

- Insurers' appeals were unanimously dismissed despite insurers saying that pandemics were not BI and that policies were never written or priced to cover this
- Policies will provide cover for BI caused by the occurrence of a notifiable disease
- + competing causes will be covered
- + claims cannot be reduced due to covid pre-triggering a downturn
- However, each policy still needs to be considered against the detailed judgment to work out what it means for that policyholder but bear in mind the national response was the same everywhere



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## Section 2 - Business interruption – optional cover

Additional covers and limits	Automatically included?
Bomb hoax £500,000 in total in any one period of insurance.	✓
Unspecified suppliers £250,000 or 10% of the sum insured, whichever is the less, for any one loss	✓
Unspecified customers £250,000 or 10% of the sum insured, whichever is the less, for any one loss	✓
Storage at other locations £100,000 any one loss	✓
Essential personnel £25,000 in total in any one period of insurance	✓
Exhibitions £100,000 in total in any one period of insurance	✓
Failure of utilities supply £250,000 any one loss	✓
Failure of utilities supply – terminal ends - £250,000 any one loss	✓
Fines, penalties and damages £25,000 in total in any one period of insurance	✓
Loss of attraction £250,000 whichever is the lesser for any one loss	✓
Motor vehicles £500,000 in total in any one period of insurance	✓
Notifiable disease, vermin, defective sanitary arrangements, murder and suicide	✓
£500,000 in total in any one period of insurance ★	
Prevention of access – non damage	✓
Prevention of access	✓
Rental charges	✓
Transit £25,000 any one loss	✓

## Section 2– Business Interruption

### 12. Notifiable disease, vermin, defective sanitary arrangements, murder and suicide


**consequential loss** following:

- a) i. any occurrence of a **notifiable disease** at the **premises** or due to food or drink supplied from the **premises**;
- ii. any discovery of an organism at the **premises** likely to result in the event of a **notifiable disease**;
- iii. any **notifiable disease** within a radius of twenty five miles of the **premises**; 

### 13. Prevention of access

**consequential loss** as a result of **damage** to property within a 1 mile radius of **your premises** which prevents or hinders the use of the **premises** or access to it.  
The maximum **we** will pay in total in any one **period of insurance** is stated in the **schedule**.

### 14. Prevention of access – non damage

**consequential loss** resulting solely and directly from an interruption to **your business** caused by an incident within a 1 mile radius of **your premises** which results in a denial of access or hindrance in access to **your premises** during the **period of insurance**, imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 hours. 

The maximum **we** will pay in total in any one **period of insurance** is stated in the **schedule**.

#### Consequential loss

Loss resulting from interruption of or interference with the **business** carried on by **you** at the **premises** following **damage** to property used by **you** at the **premises** for the purpose of the **business**.

#### Damage(d)

Physical accidental loss of or destruction of or damage to the property insured.

#### Indemnity period

The period beginning when **damage** occurs, and ending when the results of the business cease to be affected because of the damage, but not exceeding the **maximum indemnity period**.

**However for the Notifiable disease additional cover the following definition applies:**

the period during which the results of the **business** will be affected following the loss, discovery or accident beginning:

- a) in the case of a), d), e) and f) with the date of the loss or discovery; or
- b) in the case of b) and c) with the date from which the restrictions on the **premises** are applied and ending not later than the **maximum indemnity period** after that.

60

#### Notifiable disease

Illness sustained by any person resulting from:

- a) food or drink poisoning; or
- b) any human infectious or contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS)) an outbreak of which the competent local authority has stipulated will be notified to them.

# 3<sup>rd</sup> Poll

## Which part should respond?



≡ Eastern Daily Press

### 'Crisis' appeal as heritage railway loses £765k in year

 Stuart Anderson



Published: 10:56 AM January 25, 2021





## Non-damage?

- 257 - The reference to “damage” is inapposite to business interruption cover which does not depend on physical damage to insured property such as the cover with which these appeals are concerned. It reflects the fact that the historical evolution of business interruption cover was as an extension to property damage insurance. It was held by the court below, and is now common ground, that for the purposes of the business interruption cover which is the subject of these appeals, **the term “damage” should be read as referring to the insured peril.**



## i. Causation

- SC found that causation could be satisfied when the insured event, along with other linked events, all caused one inevitable result
- As a result, local cases of covid + worldwide pandemic + actions, measures and advice of the government + reaction of the public in response to the disease = **one** proximate cause resulting in interruption to a business
- “Absurd” arguments from insurers
- Individual cases of illness within an applicable radius are the proximate cause of loss and insured peril (combined with occurrences of cases of illness outside of the radius which were not excluded from cover)
- This conclusion does not depend on the particular terminology used in the relevant policy



## ii. Disease clauses

- Argenta, QBE, Amlin and RSA wordings were considered - insurers stated that losses were only covered if the disease had occurred in the insured area
- Disease clauses will cover BI resulting from local cases of covid and the wider pandemic and the resulting actions and should be treated as one cause
- Disease clauses will therefore respond to BI caused by government action in response to the disease, provided there has been at least one occurrence of the illness within the specified radius



- Given the current level of confirmed cases, it is thought these disease clauses should respond where covid has occurred within the required distance and, as a result, they should be entitled to cover
- Illness needs to be manifested by a person within 25 miles of the premises
- Query - what proof needed if cover applies to cases ON the premises (balance of probabilities)
- SC - what is rational, clear and simple to apply
- Most unreasonable to 'bury' exclusions (RSA)



### iii. Prevention of access

SC reached the same conclusion as it did for the disease clauses

The appeals focussed on:-

1. The nature of the public authority intervention to trigger the clause, in particular, was legal force required
2. The nature of the prevention or hindrance



### Nature of intervention

- Arch, Hiscox and RSA wordings - SC did not accept that a restriction must always have legal force before it can fall within the description
- SC “restriction imposed” may include instructions in anticipation that legal measures will follow shortly afterwards or will do so if restrictions not followed
- An instruction by a public authority may amount to a “restriction imposed” if in clear enough terms to allow reasonable certainty as to what compliance requires
- In most cases the relevant instructions would be directed at the insured premises/use of them



## Key dates

- **5 March:** covid becomes a notifiable disease in England/Wales
- **11 March:** WHO declares covid to be a pandemic
- **16 March:** gov directs people to stay at home, stop non-essential contact and unnecessary travel, work from home where possible, and avoid social venues
- **20 March:** gov directs various categories of business to close, such as pubs, restaurants, gyms etc (given legal effect by regulations on **21 March**)
- **23 March:** gov announces lock-down involving closure of further businesses including all non-essential shops and restrictions on individual movement (given legal effect by regulations on **26 March**)



	Example Businesses	Govt requirement
1	Restaurants, cafes, bars	No customers on the premises, but can do delivery
2	Cinemas, theatres, nightclubs, gyms, museums, galleries	No customers, Close entirely
3	Food retailers, pharmacies, off licenses, banks, dry cleaners	Explicitly allowed to stay open
4	Sale of goods/services, including retailers	No customers on the premises, but can do delivery
5	Accountants, solicitors, professional services, manufacturers, construction	Not explicitly referred to in the regulations
6	Businesses offering holiday accommodation	Restriction on use
7	Places of worship, nurseries, schools	Restriction on use

## What did this mean?

- The announcement given on 20 March 2020 (named businesses should close) was capable of being a “restriction imposed” - these businesses would reasonably understand that compliance was required
- Regulation 6 - 26 March Regs (which did not order particular businesses to close but prohibited us from leaving our homes without reasonable excuse) possibly not a “restriction imposed” and so not an “inability to use”
- “Inability to use” is not the same as a “hindrance” or “disruption” to normal use as businesses could operate (Hiscox wordings) and QBE require “closure”
- “It appears to us that the cases in which Regulation 6 would have caused an “inability to use” premises would be rare. Whether there were such cases would be a question of fact.” Policy wording dependent.



## What will trigger the clause?

- SC held that a business could be covered if it has been unable to use its premises for *a certain part of its business activities* or it has been unable to use *a certain part of its premises* for its business activities
- Golf course - can stay open but clubhouse had to close - inability to use a discrete part of the club for a discrete but important part of the business (provision of food and drink and hosting of functions)
- Restaurant or shop that stayed open for take-away or mail order may now claim for the loss in person part of the business same for a dept store with a pharmacy
- Even a slight disruption which does not bring about a complete cessation would be enough



## iv. Trends clauses

- Trends clauses (part of quantification machinery) are intended to ensure that indemnity is not reduced or inflated by factors unrelated to the cover
- Insurers said they were not liable for losses which would have occurred regardless of the insured peril
- SC considered this as a form of exclusion as they are there to quantify losses and not scope of cover
- Trends clauses therefore should not take away cover
- No deduction is to be made for matters which are “inextricably linked” - covid and various consequences will not be trends or circumstances



## v. Pre-trigger losses

- Many insureds suffered a downturn in business due to covid before the insured peril was triggered and insurers said this should be taken into account as a trend and deducted from the claim
- SC decided that indemnity is there to ensure the insured's financial results are the same as what would have been achieved had the insured peril (+ underlying or originating cause) not occurred
- Insurers should focus on what would have been earned had there been no covid ignoring any revenue drop prior to the policy being triggered



## Insurer learning outcomes?

- Clarity in wordings - once you establish your intentions, define what is meant carefully (utilise exclusions if need be) and ensure the whole wording is clear and understood by **all** parties
- Covid has not gone away and businesses are still interrupted - same policy, new policy?
- How current were defined diseases policies - court did not look at these - who is to blame?
- Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) is the name of the new virus (11 Feb 2020). Whilst the virus is genetically related to the coronavirus responsible for the SARS outbreak of 2003 the two viruses are different



## 2. FCA requirements



## **Draft guidance: Business interruption insurance test case - proving the presence of coronavirus (Covid-19)**

11 December 2020

### **Prevalence**

- HC did not make any findings of fact as to where covid has occurred or manifested and this was not appealed by the FCA nor insurers
- Insurers conceded that the categories of evidence put forward by the FCA - specific evidence, NHS and ONS Deaths Data and reported cases - are in principle capable of demonstrating the presence of covid
- Insurers did not suggest that absolute precision is required and that otherwise claims will fail but that a reliable method would suffice
- FCA guidance to follow





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22 January 2021

Dear CEO,

**Business Interruption (BI) Insurance**

On 15 January, the Supreme Court handed down its judgment on the BI test case. Our aim was to get clarity for as wide a range of parties as possible, as quickly as possible, and the judgment achieves this.

I am grateful for the work of the 8 insurance firms that were parties to the case, as well as all firms impacted by the test case, who co-operated from a shared desire to quickly achieve clear outcomes for policyholders and insurers and avoid protracted litigation. I am also grateful that the Courts delivered the judgment quickly. The speed with which it was reached reflects well on all parties.

## Dear CEO 22 Jan 2021

- All claims must be re-assessed in light of SC judgment and valid claims to be paid ASAP (although most policies still won't cover NDBI losses)
- Following the judgment some claims are now valid (or they should be paid more) and a re-visit is now needed (incl complaints)
- Should have written to all affected by 29 Jan
- Slow payment should not exacerbate financial pressures
- Cover may now also be available for partial/mandatory closure orders that were not legally binding
- Valid claims should now not be reduced where paid on the basis that a loss would have resulted in any event



- Insurers should not include the period from 17 June 2020 and the date of SC declarations when relying on any time limits or for any delay in making a claim
- Pragmatic, transparent and consistent approach is now needed rather than creating additional barriers or delays
- August 2020 statement on deductions for some types of government support (grants)
- Data provided by insurers to FCA will be published
- Where further legal proceedings occur to clarify any remaining areas of uncertainty the insurer should bear the costs of the insured and should not seek to recover any of their costs in this process (FOS limit £6.5m turnover and compensation capped at £355,000)
- Thoughts and interpretation of the impact had on your business and the wider sector will be sought



**Insurance POST**  
**Government hits out at insurers over grant deductions from BI claims**



Emmanuel Kenning

[@InsPostbod](#)

28 Sep 2020

Indicative reading time: **1 minute**

**John Glen MP, economic secretary to HM Treasury, has rebuked insurers deducting government grants from business interruption claims payments and warned of further action.**

"It is the government's firm expectation that grant funds intended to provide emergency support to businesses at this time of crisis are not to be deducted from business interruption insurance claims," he stated.

Glen, *pictured*, noted that the effect of making the deductions – **an issue previously reported on by Post** – was that rather than supporting businesses and protecting jobs during the pandemic "taxpayer funds are being channelled into savings for insurers".

He called on providers making deductions to "respect the spirit" of the

## Finalised guidance

### Business interruption insurance test case: Finalised guidance for firms

June 2020

- 6.3 Insurers should publish sufficient details with appropriate prominence and signposting to keep all policyholders with relevant non-damage business interruption policies updated about the test case and its implications for potential claims under their policies. Insurers may publish this information on the firm's website or by other general means. This information should be published promptly after 17 June 2020.

## So?

- Insurers should ensure all valid claims are identified (brokers have a job here too)
- If claims are delayed (incl interim payments) compensation could become payable under Enterprise Act 2016 (has this caused any insolvencies?)
- Businesses remain under threat and the general reaction post March has been to exclude rather than engage (but that is insurance!)
- Reputation has been badly damaged



## Post HC judgment

We continue to review the FCA test case judgment, assess the decisions made and how it impacts the claims we have received.

...and avoid any unnecessary delay in concluding **whether this affects our decision to decline your claim, and also your subsequent complaint. On a strictly without prejudice basis** (i.e. without prejudice to the policy position and all your rights) to let us know the total of the losses **you will be seeking to recover under your policy as a result of the impact of Covid 19 on your business**, together with all the evidence you seek to rely on in support - pre & post period of loss if applicable.

Standard turnover accounts;

Profit & loss accounts;

Expense accounts;

Order books (or equivalent) for 6 months pre lockdown and 6 months post lockdown;

Diary/booking confirmations;

Records of Employee wages/Staff costs and records of Employee absence;

Details of any payments received under the Government Furlough Scheme and/or Small Business Grant Fund; and

Business decisions taken during this period.



## Post SC judgment

- "We are now considering the detail of the Supreme Court's judgment this and will write to individual clients shortly outlining the key elements of the judgment and its implications.
- In addition, we will again provide them with links to further information and resources, including a link to the FCA's website so they can follow latest developments there.
- Our intention is to follow that up by contacting clients again with details of how the judgment affects their own claim and explain how we intend to progress their claim.
- Although the Supreme Court's judgment has now provided the clarity needed to move forward, applying the judgment to the circumstances of each individual claim is likely to be **complex.**"



## Have insurers got it?

- “Having reviewed the claim, this policy extension is not engaged by the present circumstances. While we appreciate that the insured premises may have been forced to close by the...Regulations...do not constitute actions taken within the vicinity of the insureds premises.”
- “...as there has been no physical damage to the property, the loss falls outside of the scope of policy cover.”
- “...the Security of State who issued the close down order was neither the police or competent authority so no cover applies”



## 3. Broker's duties



# Broker's duties

- **Assessing the insured's needs**
- Not obtaining insurance
- Not obtaining the insurance the insured wanted
- **Not obtaining insurance meeting the insured's needs**
- Not exercising discretion in a reasonable way
- Failing to act with reasonable speed
- Liabilities associated with Non-Disclosure
- Liabilities associated with Misrepresentation
- **Not advising adequately on the existence of and terms of cover**
- **Other failure to give competent advice**
- Liabilities during the currency of the policy
- Failure in respect of notification and in respect of claims

Based on Jackson & Powell Professional Liability Chapter 10.



## Demands and needs



ICOB 5.2.2

**R**

01/10/2018



(1) Prior to the conclusion of a *contract of insurance* a *firm* must specify, on the basis of information obtained from the *customer*, the demands and the needs of that *customer*.

(2) The details must be modulated according to the complexity of the *contract of insurance* proposed and the type of *customer*.

(3) A statement of the demands and needs must be communicated to the *customer* prior to the conclusion of a *contract of insurance*.

[Note: articles 20(1) and 20(2) of the *IDD*]

ICOB 5.2.2A

**G**

01/10/2018

A *firm* may obtain information from the *customer* in a number of ways including, for example, by asking the *customer* questions in person or by way of a questionnaire prior to any *contract of insurance* being proposed.

ICOB 5.2.2B

**R**

01/10/2018

When proposing a *contract of insurance* a *firm* must ensure it is consistent with the *customer's* insurance demands and needs.

[Note: recital 44 to, and article 20(1) of, the *IDD*]

ICOB 5.2.2C

**G**

01/10/2018

*ICOB 5.2.2BR* applies whether or not advice is given and in the same way regardless of whether that contract is sold on its own, in connection with another *contract of insurance*, or in connection with other goods or services.

## ICOBS 5.3 Advised sales

### Suitability

**ICOBS 5.3.1** A *firm* must take reasonable care to ensure the suitability of its advice for any *customer* who is entitled to rely upon its judgement.

R

01/10/2018



### Advice on the basis of a fair analysis

**ICOBS 5.3.3** If an *insurance intermediary* informs a *customer* that it gives:

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(1) advice on the basis of a fair analysis, it must give that advice on the basis of an analysis of a sufficiently large number of *contracts of insurance* available on the market to enable it to make a recommendation; or

(2) a *personal recommendation* on the basis of a fair and personal analysis, it must give that *personal recommendation* on the basis of an analysis of a sufficiently large number of insurance contracts available on the market to enable it to make a *personal recommendation*;

and in each case, it must be in accordance with professional criteria, regarding which contract of insurance would be adequate to meet the customer's needs. [Note: article 20(1) third paragraph of the *IDD*]

### Personalised explanation

**ICOBS 5.3.4** Where a *firm* provides a *personal recommendation* (other than in relation to a *connected travel insurance contract*) the *firm* must, in addition to the statement of demands and needs, provide the *customer* with a personalised explanation of why a particular *contract of insurance* would best meet the *customer's* demands and needs.

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[Note: article 20(1) third paragraph of the *IDD*]

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## ICOBS 6.1 Providing product information to customers: general

### Ensuring customers can make an informed decision: the appropriate information rule

**ICOBS 6.1.5**

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(1) A *firm* must ensure that a *customer* is given appropriate information about a policy in good time and in a comprehensible form so that the *customer* can make an informed decision about the arrangements proposed.

(2) The information must be provided to the *customer*:

(a) whether or not a *personal recommendation* is given; and

(b) irrespective of whether a *policy* is offered as part of a package with:

(i) a non-insurance product or service (see *ICOBS 6A.3* (Cross-selling)); or

(ii) another *policy*.

(3) Appropriate information is both objective and relevant information, and includes *IPID information*.

### What level of information needs to be provided?

**ICOBS 6.1.6B**

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A *firm* must ensure that the level of appropriate information provided takes into account the complexity of the *policy* and the type of *customer*.

[Note: article 20(4) of the *IDD*]

**ICOBS 6.1.7**

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The level of information required will vary according to matters such as:

(1) the knowledge, experience and ability of a typical *customer* for the *policy*;

(2) the *policy* terms, including its main benefits, exclusions, limitations, conditions and its duration;

(3) the *policy's* overall complexity;

(4) whether the *policy* is bought in connection with other goods and services including another *policy* (also see *ICOBS 6A.3* (cross selling));

(5) distance communication information requirements (for example, under the distance communication *rules* less information can be given during certain telephone sales than in a sale made purely by written correspondence (see *ICOBS 3.1.14 R*)); and

(6) whether the same information has been provided to the *customer* previously and, if so, when.

## Check the following

1. Did you fully assess client requirements?
2. Were wider policy wordings/limits available to you?
3. Was pandemic cover available and at what cost?
4. What market analysis did you undertake?
5. Why did you recommend the policy as then being suitable for that client?
6. And did you state the consequences of not following your advice?
7. As wordings have changed since March 2020 how does this judgment affect the policies sold since then and current/future lockdowns? Does your continuing advice reflect this?



## Practical steps?

1. Ensure it remains on your risk register (this is a **BIG** risk)
2. Have you had any claims or notifications?
3. **PI insurance covering covid is much more expensive and you must have it covered to continue to advise clients (FCA notification)**
4. If you have an exposure how much is your excess and consider this part of TC2.4 (bear in mind the onerous financial resilience surveys)
5. Ensure advice to clients over this is very clear i.e. state pandemics will not be covered and staff are trained and up to speed (esp as WFH)





## Notification Form

(June 2020)

Firm name  ("The Firm")  
Firm Reference Number   
Address

Professional indemnity insurance (PII) cover

For example:

- cover not renewed;
- cover exhausted; and
- cover does not meet FCA or PRA requirements.



## Manchester Underwriting

- 9 out of 10 claims that we've received do not relate to wordings affected by the decision
- Brokers may well not be liable but we're going to be fighting a lot of claims still
- **And even where there is cover, it's often sub-limited at a very low level in relation to the insured's loss (why was it sold then?)**
- 50 claims/notifications - 90% clearly have no cover and the **claimant is arguing that the broker has been negligent in selling a policy that doesn't give the cover that was needed**
- Personally, I think brokers will not be liable in most (but not all) cases



## 4<sup>th</sup> Poll

**What are you  
going to do  
now?**



## Learning objectives

This talk will give you an insight into:-

- The final result of the FCA's test case on Business Interruption Insurance
- Why compliance with ICOBS is important now more than ever



**Thank you for listening**

**Questions and debate please**

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