

The FSCA's current position on Contingent Business Interruption Insurance

1. Purpose

This Communication sets out the FSCA's current position on certain aspects of CBI insurance cover as well as its expectations of non-life insurers and policyholders in respect of CBI claims, in order to ensure that the processing of these claims is not unduly delayed and in line with the legal certainty that has been obtained in recent judgments.

2. Position regarding legal certainty

Following recent discussions with the non-life insurers with CBI cover exposure, it was confirmed that they hold the view that legal certainty has been obtained. Insurers have proceeded to review previous and current claims to make sure that claims decisions are in line with the recent court judgments.

3. Time processes and claims requirements

The FSCA received some complaints from policyholders regarding the 'burden of proof' requirements for CBI claims. Insurers are reminded to consider the guidance that the FSCA issued in this regard in [FSCA COMMUNICATION 34 OF 2020 \(INS\)](#) and to finalise these claims as expeditiously as possible. Most importantly, insurers must ensure that policyholders do not face unreasonable post-sale barriers to submit CBI claims.

In order to assist policyholders with the information to be submitted to insurers for the claim assessment process, the FSCA considers it advisable for insurers to develop a set of 'Frequently Asked Questions' (FAQ's) related to CBI claims and host these

questions with responses that are clear and visible on their websites where it is easy for policyholders to access it. The FSCA will be engaging further with insurers on such a measure.

Several insurers indicated that some policyholders have only sent claims notifications to them and have not provided the necessary supporting documentation to enable them to assess the claims. Policyholders are urged to liaise with their brokers and contact their insurers urgently with the necessary information. Likewise, it is expected that insurers provide detailed guidance to policyholders in this regard as CBI claims are of a technical nature.

4. The Trends Clause

The FSCA and the PA also engaged the non-life insurance industry regarding the “trends clause”¹ and the possible application thereof by insurers in the claims assessment process. The FSCA requested insurers to be mindful of the factors to be considered when applying the “trends clause” and to ensure that it is applied in line with the court judgment. This means that no insurer may, when it considers adjusting the loss that a policyholder has suffered as a consequence of Covid-19 and the government’s response to it (composite insured peril), take into consideration circumstances which are part and parcel of the composite insured peril. The FSCA will closely monitor how the “trends clause” will be applied by the non-life insurance industry.

5. Indemnity period

After discussions with the non-life insurance industry, the FSCA ascertained that the dispute regarding the indemnity period does not apply to most of the insurers providing CBI insurance cover. Thus, the dispute will not affect the majority of CBI claims that have been lodged.

¹ The FSCA explained a “trends clause” as a clause in an insurance contract the purpose of which “*is to adjust the loss an insured has suffered as a consequence of the insured peril, so that the insured is put in the same trading position after the business interruption, as if it had not happened*”.

6. Interim Payments

In July 2020 the FSCA and PA reached an understanding with the non-life insurance industry that interim relief payments would be made to policyholders, while legal certainty was being obtained from the courts. Some insurers provided these payments to policyholders on a “full and final” basis. Where a policyholder accepted the interim relief payment on a “full and final” basis, the policyholder is bound by such agreement with an insurer provided an insurer has complied with the requirements set out in the FSCA press release titled [FSCA’s latest stance on Business Interruption insurance cover](#), dated 24 July 2020. Where a full and final settlement has been reached, a policyholder will not be entitled to any additional payment from an insurer.

A policyholder who, on the other hand, accepted interim relief payments on a without prejudice or not on a “full and final” basis may be entitled to receive additional payment, if applicable, from the insurer.

Some insurers have indicated that they will be making interim payments to policyholders following the initial assessment of CBI claims and prior to completing the full claims assessment process. The FSCA supports this approach as the interim payments are likely to assist policyholders while their claims are still being assessed in full.

7. Reinsurers

Affected insurers have indicated that they are in discussions with reinsurers following the relevant court judgments.

8. Prescription and time barring clauses

Policyholders are reminded to submit all valid claims as soon as possible to prevent the prescription of their claims. As advised in the FSCA press release titled [FSCA’s update on Contingent Business Interruption insurance cover](#) dated 12 August 2020, policyholders are again reminded to be cognisant of time barring clauses in their CBI policies so that they may take the necessary legal steps within the set time period.

9. Conclusion

The FSCA is heartened by the responsible manner and transparency with which management of non-life insurers have engaged with and responded to the Authority and encourages both policyholders and insurers to co-ordinate and collaborate effectively, to ensure the speedy resolution of outstanding valid CBI claims.

Requests for further information about this communication may be submitted via email using the details below.

ENDS

Enquiries: Financial Sector Conduct Authority
Email address: fscacommunications@fsc.co.za
Telephone: 0800 203 722