# Covid -19 and Insurance –How many events or occurrences or causes have we got?

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## Overview

It is a fair bet that the last few weeks has seen much scouring of pots and pans and also of insurance policies - by businesses, insurers and re-insurers alike.

The first question will be whether the particular loss or liability is covered by the insurance contract at all. But after that, and of as much commercial importance, is "*for how much*?" And it is in that context that aggregation clauses in insurance and re-insurance contracts are likely to have a further substantial impact.

Whilst there are several clauses in common use, and even more bewildering bespoke wordings, the majority of aggregation clauses seek to link claims or losses by reference to them arising from one "*event*" or "*occurrence*" or "*cause*." This article summarises the English Law approach to those words and gives a framework for consideration of the issues.

However, beware generalisations. The insurance market faces calls, both internal and external, to treat insureds fairly and with some form of unified position on Covid-19 and its consequences but care needs to be exercised. Market co-ordination in the aftermath of the September 11th terrorist attacks led, amongst other things to an investigation by the European commission on the basis that certain co-ordinating measures were potentially anti-competitive in nature and in potential breach of EU law. And at the end of the day, as every lawyer will tell you, all will depend on the subject matter and wording of the particular policy.

## But what useful generalisations can we offer you?

As a starting point, the purpose of an aggregation clause is to enable two or more separate losses covered by a policy to be treated as a single loss when they are linked by a unifying factor of some kind. However, the construction of an aggregation clause hits a perhaps unusual hurdle because such a clause can, depending on where it appears, benefit the insured or the insurer. For example, it will benefit the insured where it appears in relation to deductibles, by reducing the number or total amount of the deductible to be paid in respect of linked claims. Whereas the same clause will benefit the insurer where it appears within overall limits, by capping the total sum payable in respect of the linked claims. Thus the Courts do not (at least overtly) approach the construction of such clauses with a pre-disposition towards narrowing or broadening their effect. As Lord Hobhouse said in ***Lloyds TSB General Insurance v Lloyds Bank Group Insurance*** [2003] Lloyds Rep IR 623, "*aggregation clauses may favour the assured or the insurer and... require a construction which is not influenced by any need to protect the one party or the other. They must be construed in a balanced fashion giving effect to the words used.*"

The "words used" have tended to fall within certain categories and it is clear that the widest form of aggregation clause is one which links claims or losses arising out of or attributable to "one source" or "original cause" or "originating cause". In ***Axa Insurance v Field*** [1996] 1 WLR 1026, Lord Mustill contrasted such wide clauses against the narrower phrase "arising out of one event", explaining that "*A cause to my mind is something altogether less restricted. It can be a continuing state of affairs, it can be the absence of something happening...*" whereas an event is "*something which happens at a particular time, at a particular place, in a particular way.*"

Thus, most recently in ***Spire Healthcare v Royal & Sun Alliance Insurance*** [2019] 1 All E.R. 294 the claims of 700 people who suffered injury over a 7-year period because of various acts of negligence of a consultant breast surgeon were aggregated under the insurance cover as having arisen from one cause, notwithstanding the differential in time, location and act of negligence.

Similarly, and of relevance to Covid-19, a liability insurance/reinsurance policy covering the negligent failure by an employer to provide adequate equipment or safe working conditions, which manifests in many different losses in different locations and at different times, could see the losses aggregated as having arisen from one cause or source. (As to which see also the ***Simmonds*** case discussed below) And in terms of business interruption, losses arising to a nationwide company with regional franchises can be expected to be aggregated as having arisen from the single cause of the UK Government mandated closure of businesses.

But with cause or source wording, the argument may well go further – will further multiple losses suffered by an insured, say in the preceding week of social distancing or even earlier, be aggregated on the basis that they arose from the underlying source or cause of "Covid-19" or "Covid-19 in the UK" or even simply the state of affairs of "fear of Covid-19"?

The narrower unifying factor in many aggregation clauses of "event" or "occurrence" has a substantial body of case law explaining the proper approach, including ***Caudle v Sharp*** [1995] L.R.L.R. 433, ***Kuwait Airways Corporation v Kuwait Insurance Co*** [1996] 1 Lloyds Rep 664 and ***Scott v Copenhagen Reinsurance*** [2003] Lloyd's Rep. I.R. 696. The principles are easy enough to state, but the application of these principles to a complex factual situation such as that currently engulfing individuals and businesses world-wide is likely to be anything but simple.

As for the principles: -

(1) An event or occurrence (generally interchangeable words) is something which has happened as opposed to the reason why it has happened. So, on conventional wisdom, it would be said that a state of affairs such as Covid- 19/ fear of Covid-19/lack of equipment/lack of training is not an event;

(2) Losses arising from the alleged event must be examined by reference to what has become known as the unity test. Whilst not an over-arching rule, a useful test is whether the losses are sufficiently closely connected by the "unities" of time, locality, cause and motive so as to justify them being described as arising from the same event;

(3) There must be a causal link between the various losses and the alleged unifying event. But the Courts have made clear that the test is not the usual rule of proximate cause – something lesser but which can be said to be a significant causal link will do;

(4) The losses must not be too remote for the purposes of the particular clause.

In the context of Covid-19 and business interruption, the Government mandated closure of businesses in the UK will have led to multiple branches of a chain (restaurants, pubs, clothes shops), insured under a single policy, to have closed. One can certainly see the Courts finding the UK government mandate affecting UK companies to be a relevant event and a sufficient link of unities for the purposes of an aggregation clause. Not necessarily so, however, for US companies where different states have issued mandates at different times.

But even in the UK, the Government mandate undoubtedly gave rise to a discretion for many businesses. Some companies providing "essential services" continued for a period, only closing their branches later and after assessing risks for their staff and customers. Is there any sufficient "event" here or merely a state of affairs – fear of Covid-19? And different businesses have taken different approaches to whether they are providing essential services. Take companies providing DIY or similar materials where some have continued to operate while some closed shop immediately. For those who closed shops perhaps at different times in different regions, is there a single event or multiple different decisions? (See by analogy ***Midland Mainline v Commercial Union Assurance*** [2004] Lloyds Rep IR 22.

The diverse litigation following the September 11 atrocities could be said to be factually too far removed to be of any relevance to this latest crisis but it is instructive to note the varying approaches that different tribunals can bring to bear on the same, but extraordinary, facts. In ***P&C Insurance v Silversea Cruises Ltd*** [2004] Lloyd's Rep. I.R. 217 the parties and the Court proceeded on the assumption that the separate plane attacks on the two Twin Towers were a single event, the issue being whether each further warning by the US Government not to travel was then a separate event (a suggestion which Tomlinson J regarded as absurd). Whereas in ***Aioi Nissay Dowa Insurance Co v Heraldglen Ltd*** [2013] Lloyd's Rep. I.R. 281,

Field J upheld the finding of the arbitrators that the crashing of Flights 11 and 175 into the Twin Towers of the World Trade Centre constituted two events for the purposes of deductible and policy limits under aviation treaties.

Then came ***Simmonds v Gammell*** [2016] Lloyd's Rep. I.R. 693 where the Port of New York had settled the claims of some 10,000 policemen, firemen and clean-up workers who had been engaged in clean-up and rescue operations following the two attacks and who had suffered respiratory disease. Notwithstanding that the liability of the Port of New York had been based on alleged negligence in failing to provide PPE, a failing which had occurred over many weeks and months on many separate occasions, it was held that the liabilities to all these workers were losses that had all arisen from one event, that single event being the September 11 attacks.

This last decision has been criticised as taking too liberal an approach to the necessary causal link between the event and the losses and also as reaching a result more appropriate to an "originating cause" clause. The reasoning of the Judge was also limited, the case coming to the Commercial Court as an appeal against an arbitration award which was described by Cooke J as merely disclosing no sufficient error of law.

So if there are to be liability claims in relation to Covid-19 - say alleged negligent failings to provide adequate training or PPE to workers - would these, following ***Simmonds***, fall to be aggregated under a "cause" clause as sufficiently caused by Covid-19 or will ***Simmonds*** (rightly in our view) be regarded as going too far? And given the pandemic status of Covid-19 and the unprecedented world-wide lockdown reaction, will Courts and Tribunals faced with an event based clause be moved to regard the outbreak of Covid-19 as not just a state of affairs but instead an event or occurrence, at least as from when the first case was reported in each jurisdiction? We can see the temptation.

And is the aggregation of business interruption claims to be subjected to the sorts of nuanced questions as to e.g. motivation, timing and essential services discussed above? Perhaps the answer will lie in the underlying wording of the insured peril itself, but a detailed consideration of the differing factual circumstances of different businesses seems inevitable.

Litigation in relation to Covid-19 may run for many years. In the meantime, the authors of this article sincerely hope that the spread of Covid-19 is harnessed and its extraordinary impacts swiftly ended.

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*"Pragmatic, clear-sighted and very user-friendly." "Very much dedicated to the case and a pleasure to work with."* (Chambers UK, 2019)

Poonam Melwani QC is a commercial silk who practises across the full spectrum of commercial, insurance, energy and shipping law, providing advisory and advocacy services. Praised as "... always in demand, she is as good on her feet as she is adept at mastering complex legal, factual and expert material...." (Chambers UK) Poonam has been ranked as a 'Leading Silk' over many years by the Legal Directories. She represents clients in a wide variety of jurisdictions and arbitral regimes including ICC, LCIA, LMAA and ad hoc, as well as English High Court Litigation, mainly in the Commercial Court and the Appellate Courts.

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