

## Insights: Litigation Post COVID-19 In England and Wales - What to Expect

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The coronavirus crisis and measures put in place by governments to halt the spread of the pandemic has led to huge disruption to business activity. Businesses continue to adjust to these challenges and are adapting to protect their business, employees, shareholders, and other stakeholders. This will inevitably lead to virus-related litigation.

Many businesses have had to suspend or severely restrict operations and others are having cash flow difficulties and showing signs of financial distress. Some may be struggling to comply with contractual obligations, others may be looking to extricate themselves from what has become a bad deal even if they could strictly speaking perform their obligations. Globally, we are already starting to see insolvency-related claims and also a number of insurance, breach of contract, employment, and securities class actions across numerous sectors, with the travel, financial services and manufacturing sectors being the most frequently targeted. Many more claims in a variety of sectors are expected in the coming weeks and months.

We have set out in more detail below the types of claims that we expect to see.

### Expected Claims

First, there may be **insolvency-related disputes** for companies in or around insolvency:

- The UK government is rushing through new legislation implementing debtor-friendly provisions to seek to protect businesses, and litigation is likely as these new legislative provisions are tested.
- We expect litigation around companies who may have been in financial distress irrespective of the impact of COVID-19. Many of the temporary legislative measures put in place to protect companies in the short-term are stated only to apply where COVID-19 is a significant contributing factor to the solvency issues. There are questions as to how that can be reasonably assessed, and in what circumstances companies and their officers will be liable if it is shown not to be the case.
- When temporary measures (such as the provisions preventing the presentation of winding-up petitions in certain circumstances, and rent holidays) expire, there will be a back-log of overdue debt and impatient creditors. The ensuing administrations (or analogous proceedings) will result in creditor vs creditor claims, creditor vs company claims, and claims against directors and other officers.
- The financial circumstances created by COVID-19 will also test the “covenant-lite” finance documents that are in place across many finance structures, and litigation and contentious restructuring actions will no doubt focus on valuation issues and removal of assets from the reach of certain creditors.
- There are also likely to be claims against States, for their immediate or longer-term responses to the COVID-19 crisis. Where governments have bailed-out or propped-up companies, there may be litigation

around State aid issues. Where governments have not stepped-up, constitutional protections and governance / oversight requirements may be used to put liability on the State.

- In the UK, all of these issues may be exacerbated by the economic impact of Brexit, and the uncertainty it creates in many legal and financial contexts.

Other areas where issues are emerging are, for example:

Where there are disputes over **insurance coverage**.

- These include disputes over coverage for a host of coronavirus-related issues including property insurance claims, commercial general liability claims and travel interruption and cancellation claims.
- We expect that business interruption insurance claims, in particular, will be a substantial area of risk for potential litigation. Insurance groups are defining business interruption clauses as protecting damage to buildings, not closure costs arising from a pandemic. The FCA is seeking a declaratory judgment from the English High Court on a sample of 17 policy wordings from 8 insurers to provide clarity on exactly what is covered on business interruption insurance and this is expected to be heard in July. Many other insurers with the same or similar wording will be caught by any court finding. It is no surprise that the insurance industry has warned that the pandemic is on track to be the most expensive event ever to hit the industry.

Where there are **contractual disputes**, which could become widespread. Many businesses are having difficulties meeting their contractual obligations or they may find that counterparties in the supply chain are unable or unwilling to perform. In these circumstances, parties may be seeking to avoid or delay performance or escape liability for non-performance or even terminate the relevant contract.

- Businesses may seek to rely on force majeure clauses to see if operations may be suspended. This will depend on a number of factors including:
  - a. Whether the circumstances in question fall within the definition of a force majeure event under the contract – does it cover a pandemic, a change of law or regulation or an act of government or is there sweep up wording which covers others events beyond the reasonable control of the parties?
  - b. If so, has the relevant event hindered, prevented or delayed performance depending on the wording of the clause? Generally the fact that contract is less profitable or more onerous will not be enough.
  - c. Are there any notification or mitigation requirements that have to be satisfied, as there generally will be?
- Businesses may rely on *material adverse change* or MAC clauses for example to enable lenders to prevent a borrower drawing down on a financing agreement. This is fact specific and will depend on the contract wording.
- Businesses may seek to rely on frustration, termination rights under contract or termination due to insolvency related rights. Counterparties may argue no right to terminate or that the other party was in breach of its own contractual obligations, for example, by failing to provide appropriate notice under the contract so there are many potential areas of dispute.

It is worth noting that during the 2008 financial crisis, judges tended to show little sympathy to claimants relying on force majeure type clauses, reminding parties of the risks of entering into commercial agreements, but this will certainly continue to be an area to watch.

There is potential for **class actions** arising out of the crisis. Whilst there may not be many of these in the short-term, areas for possible class actions include:

- **Employee class actions** – if there are failings by employers regarding furlough arrangements, making employees redundant or amending their employee contracts on pay and/or if failing to provide safe working conditions or taking adequate steps to protect individuals, their employees and/or clients and customers from exposure to COVID-19, for example by requiring employees to return to the office before the pandemic abates.
- **Data privacy and cyber group actions** – if there are shortcomings particularly while so many of the workforce are working remotely. As businesses have moved their work force to working environments which utilise remote working software systems such as video conferencing and cloud based data services, the risk of cyber incidents and privacy breaches has significantly increased. Any data breaches during these heightened sensitive times may result in class actions against the company in breach.
- **Securities/Market disclosure** – where companies make public disclosures about the impact of the virus and get this wrong. The regulators have warned firms to pay attention to this therefore we predict that failings will result in a penalty.
- In addition, the insurance, healthcare (including care homes) and transportation sectors may be likely targets of class/group actions. There are already claimant groups forming to take on insurers over their refusal to pay out on business interruption insurance claims. Throughout Europe, claims have been brought against the authorities trying to hold them legally and/or criminally responsible for their role in coronavirus infections and deaths, for example, in France the “C19 Collective”, a group of 600 directors have brought a claim against the French prime minister and others for failing to adequately prepare for the pandemic. Whilst replica cases in the UK will not occur as there is no route for a criminal case to be brought against the government or its ministers, some may seek accountability through a public inquiry (as occurred with the Grenfell Tower investigation), which could potentially lead to civil or criminal litigation at a later stage.

## Conclusion

The pandemic and resulting economic downturn unfortunately creates a perfect storm for illicit activity and it is therefore expected to bring about a wave of enforcement by the regulators for activities such as unfair pricing (e.g. for PPE, face masks or sanitizers) and market abuse, including insider trading (as referred to in the Financial Conduct Authority’s Business Plan and May 2020 “Market Watch”). The Financial Conduct Authority is already working with partners in law enforcement such as the National Economic Crime Centre to share information on COVID-19 related financial crime. The Serious Fraud Office has also issued a warning that it is united with its law enforcement partners in ensuring any perpetrators of fraud are held to account. There are a myriad of expected fraud claims arising out of COVID-19 across sectors. Examples include the insurance industry, which fears the challenges of policyholders faking claims or exaggerating the nature of a loss. It predicts an increase in liability and casualty fraud as businesses come under further stress, requiring greater cooperation between insurers and regulatory bodies such as the UK’s Insurance Fraud Bureau.

Whilst we expect to see a significant increase in litigation, in the current economic climate, we expect businesses will be cost savvy and, if claims are brought, will also explore resolution mechanisms such as negotiation, mediation and issue resolution.

The extent of any litigation is still unknown and may change and develop as governments globally adapt their policies around the coronavirus – and depending on how deep into recession our economies dive into – but whichever way you look at this, it is likely that lawyers and courts will be busy dealing with the aftermath of the pandemic.

## CONTACT

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