

Proving causation—business interruption insurance coverage amid coronavirus (COVID-19)

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Insurance & Reinsurance analysis: Steven Gee QC, commercial barrister and arbitrator, and Kristina Lukacova, barrister, both at Monckton Chambers, discuss coverage under business interruption insurance during the coronavirus (COVID-19) pandemic.

What is the current situation as regards policyholders' coronavirus business interruption insurance claims?

The Financial Conduct Authority (FCA) has reviewed over 500 business interruption policies, identifying policies, which may cover pandemic-related losses unrelated to property damage. They have selected a sample of 17 policy wordings, which are said to give rise to the key recurring issues. These policies are the subject of a test case brought in the High Court.

An unusually tight timetable has been agreed, providing for the filing of the claim form and the particulars of claim by the FCA by 9 June 2020 and a hearing in July 2020.

Why is the meaning of 'damage' important to business interruption cover in relation to coronavirus?

Business interruption cover indemnifies policyholders for lost income caused by the insured risks, subject to exclusions. The meaning of 'damage' is key because basic business interruption policies usually only cover business interruption losses resulting from 'damage' to insured property. Many policyholders will therefore not have a claim unless they have suffered 'damage'—ie damage to tangible property.

Contamination of surfaces, which requires cleaning may amount to damage (*Losinjaska Plovidba v Transco Overseas Ltd (The Orjula)* [1995] 2 Lloyd's Rep 395). However, some policies include a general exclusion in relation to 'damage caused by pollution or contamination', which may apply. In any event, the periods of closure resulting from coronavirus contamination are likely to be short and the recoverable losses relatively modest.

Most policyholders' main concern is likely to be whether they can recover losses resulting from business interruption due to various government measures or reduced customer demand due to the pandemic. Whether such losses are recoverable will depend on the wording of any 'non-damage' clauses or extensions.

What hurdles do policyholders face in relation to causation?

Policyholders will invariably need to establish a causal link between the relevant trigger (eg property damage or the occurrence of a notifiable disease) and the business interruption, and the business interruption and the losses suffered.

The trends clause (also referred to as the other circumstances clause) will often adopt the but for test of causation, requiring policyholders to establish that they would not have suffered their losses but for the damage or incident covered by the policy.

This test has been applied in *Orient-Express Hotels Ltd v Assicurazioni General SpA (UK) (t/a Generali Global Risk)* [2010] EWHC 1186 (Comm). The policyholder's hotel in New Orleans suffered significant physical damage from Hurricane Katrina and Hurricane Rita in 2005, resulting in the closure of the hotel for a period of time. At the same time, a state of emergency was declared and the city of New Orleans was evacuated.

The insurer argued that the policyholder could not recover under the main business interruption clause because it only covered losses which would not have occurred but for the damage to the hotel. In circumstances where New Orleans was effectively closed in any event, the hotel would have suffered the same losses whether or not it had suffered physical damage. These submissions were accepted by the court.

These issues are likely to resurface in the context of losses caused by the pandemic. For example, if a policyholder has the benefit of the notifiable disease extension (but no other extensions) and its restaurant is temporarily closed due to the occurrence of the coronavirus at the premises or their vicinity, any losses which would have been suffered in any event, for instance as a result of reduced customer demand due to the pandemic, may not be recoverable.

Could you briefly outline the different types of business interruption cover available, and how each is affected by the coronavirus pandemic?

A basic business interruption policy will usually cover losses resulting from property damage at the policyholder's premises only.

Policyholders may have purchased extensions in relation to losses resulting from:

- property damage suffered by their suppliers or customers
- loss of attraction
- denial of access
- notifiable disease
- act of competent authority

The basic cover, without any extension, are likely to be of limited assistance in relation to coronavirus business interruption losses.

The loss of attraction extension covers losses suffered as a result of a fall in the number of customers attracted to the vicinity of the policyholder's premises. However, loss of attraction extensions usually require damage to property in the vicinity of the policyholder's premises. Similarly, the denial of access extension often requires the denial of access to have been caused by an incident involving property damage in the vicinity of the premises.

In contrast, the notifiable disease extension and the act of competent authority extension do not usually require property damage.

The act of competent authority extension usually covers losses resulting from business interruption caused by acts of the authorities following a danger or disturbance in the vicinity of the premises. Sometimes, this extension is framed as a sub-category of the denial of access extension.

The notifiable disease extension usually covers losses as a result of business interruption following the occurrence of a notifiable disease at the insured's premises or the vicinity of the premises, often defined as a 1 or 25-mile radius. Coronavirus became notifiable in England on 5 March 2020.

In relation to any of these extensions, the full wording of the policy must be carefully considered, with particular attention to any exclusions. For example, while some act of competent authority extensions expressly cover losses as a result of public authority restrictions following an outbreak of a notifiable disease, other extensions may exclude losses arising in these circumstances.

Moreover, an extension may be subject to its own (usually lower) recovery limit.

The FCA has recently sought legal clarity on business interruption insurance, as multiple group actions have been brought against insurers for refusing to pay out due to the coronavirus. What is the importance of this legal clarification and the class actions brought against insurers?

The FCA will be asking the court a number of questions in relation to the application of the sample policies, by reference to assumed facts. While the outcome of a claim will depend on its facts and the full wording of the policy in question, the test case ought to clarify the position in relation to recurring issues arising out of common 'non-damage' clauses and extensions.

Moreover, the 17 policy wordings in the test case have been selected as a representative sample. The test case is likely to have an impact on a far larger number of policies. The FCA has indicated that they expect to publish a list of other insurers and business interruption policies on which they expect the test case to have an impact in early July 2020.

How does the test case relate to the different types of business interruption cover available?

FCA's test case focuses on 'non-damage' clauses and extensions. The representative sample of policy wordings includes several versions of the notifiable disease extensions and the act of competent authority extensions. The latter is usually framed as a sub-category of the denial of access extension.

Basic cover for business interruption as a consequence of property damage is not the subject of the test case. The selected policy wordings also do not include notifiable disease clauses with an exhaustive list of notifiable diseases where coronavirus is not listed.

What law firms are representing which groups in the other group actions and which insurers are they targeting?

Mishcon de Reya act for The Hospitality Insurance Group Action, which is preparing a group action against Aviva and QBE. Mishcon de Reya have also been advising the Hiscox Action Group. Edwin Coe LLP act for the group targeting Allianz.

Interviewed by Tom Inchley.

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