Updates
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UK COVID-19 Business Interruption Disputes Process May Offer Guidance to US Policyholders

The insurance industry in the United States continues to thwart legislative solutions for disputed COVID-19-related losses under property/business interruption policies and resists efforts to group lawsuits together into multi-district federal litigation or class actions. Meanwhile, the independent regulator of insurers in the United Kingdom, the Financial Conduct Authority (FCA), is trying to take a more organized and direct approach. Although the FCA indicated that it did not believe coverage existed for most claims for COVID-19-related losses, the FCA has identified the key language at issue in the various insurance policies, the universal or prevalent facts presented, and the legal questions posed. The regulator has announced an initiative to begin resolving these disputed claims by bringing a series of test cases in U.K. courts to answer these coverage questions. Though the test cases are being resolved under the law of the United Kingdom, the outcomes are likely to influence American courts that are grappling with many of the same issues under similar insurance policy language. Depending on the success of the test cases in streamlining these disputes in the U.K., U.S. policyholders may want to consider adopting a similar approach to fast-track their claims towards settlement.

The FCA's First COVID-19 COVERAGE Test Case

The first test case being conducted by the FCA presents an attempt to resolve some of the most contentious business-interruption issues raised. The case has now proceeded to the phase of introducing sample clauses, assumed facts, and questions presented (case status is available here). Claims and defenses were recently filed, and briefs are to be filed in the next couple of weeks. There will be an eight-day hearing starting on July 20, 2020, with a decision expected shortly thereafter in August 2020. The FCA plans to publish in early July 2020, a list of all policies with claims that would be affected by the first test case.

The first test case addresses the following types of sample clauses/policies:

1. Coverage of Contamination of a business by notifiable disease or vermin. The list of notifiable diseases does not include virus, but it does include viral hepatitis and refers to human infectious or contagious diseases.
2. Coverage of Action of a Competent Authority which closes a business—denial of access due to an order of a civil authority—definitions of a government or local authority.
3. Compensation for loss of standard turnover (revenue) including trends.
4. Coverage for occurrence of a notifiable disease for a guest house, bed and breakfast, holiday home, and self-catering accommodation.
5. Exclusion for microorganisms.
6. Denial of access to a church, child care facility, or gunsmith.
7. A pollution exclusion that does not expressly identify a "virus" as a pollutant.
8. Insuring clauses that do not cover all risks in Hiscox, QBE, Zurich, and Sun Alliance policies.

With respect to the final group of policies, none of the insuring clauses at issue appear to cover "all risks" and/or require "property damage," which are major issues in the United States. However, QBE's defenses address an all-risk property clause and the lack of physical damage to property from COVID-19, which may lead the test

case to address these issues.

The "Assumed Facts" broadly cover all types of businesses and various effects on them, such as:

1. Businesses closed by government regulation.
2. Businesses partially closed by government regulation, i.e., restaurants limited to carry-out or curbside delivery only or medical facilities that could only provide emergency medical services in the facility and not elective procedures.
3. Businesses that were not closed, but suffered a loss of revenue because customers were barred from going to the business.
4. Businesses that suffered a loss of revenue because customers followed general public health advisories to stay home.

The questions presented in the first test case include:

1. If the clause covers closure due to a listed disease, must the terms "virus" or "COVID-19" be included in a list to be covered?
2. How does one prove the existence of COVID-19? Can it be done from general probabilities or the existence of a hospital or other building in the vicinity that unquestionably contains COVID-19?
3. How does one prove that a disease must be notified to a local authority?
4. How does one prove that an order of a local authority caused closure or denial of access? What is a competent public authority? Is closure due to a pandemic as opposed to a local disease covered? How is this analysis affected by the "trends" clause, which includes revenue trends when measuring the amount of business interruption?
5. If people are forced to stay at home, is that a denial of access to a retail facility or pub? Can it be a partial closure?
6. How does one prove that a closure caused the loss of business income?
7. Does the microorganism exclusion refer to COVID-19?
8. Do pollution and contamination refer to diseases such as COVID-19?

While these clauses, questions, and facts are not identical to the issues raised in the myriad U.S. cases, the answers obtained through the FCA's test cases may provide some insight into how the various U.S. courts might address similar issues. The FCA's previously announced view that there is no coverage may unduly prejudice the outcome of these proceedings, but the FCA has also made efforts to establish balance in the proceedings by retaining a reputable firm of solicitors to bring the case; the solicitors have aggressively stated their claims seeking coverage.

The main issues raised by the carriers seem to be: (1) the scope of a clause that covers contamination from listed notifiable diseases; (2) whether a clause covering closure due to civil authority applies to COVID-19; (3) whether the cause of the lost income is COVID-19 or an ordered closure; (4) whether these clauses only apply to local diseases, but not pandemics; (5) the scope of exclusions regarding viruses in concert with the meaning of the presence or absence of a pandemic exclusion; and (6) the meaning of a trends clause, and whether loss of business due to advisories and simple decisions by customers to avoid businesses due to risk of COVID?19 is a non-covered trend.

Some Reasons for Skepticism About the FCA's Approach and Potential Outcomes

The FCA's approach at least seems designed to provide an efficient way of obtaining some answers to questions that remain unresolved in the United States and other jurisdictions; however, some U.K. policyholders are

perhaps rightfully skeptical about the fairness or purported swiftness of the FCA test-case process. It was reported on June 22, 2020, that 350 policyholders had filed a $50 million arbitration demand against Hiscox Action Group, one of eight insurers with policy language at issue in the first FCA test case. Counsel for the policyholders demanding the arbitration made it clear that they do not believe the FCA test-case process will move rapidly enough, especially since the insurers have indicated they would appeal any pro-policyholder result.

Moreover, the FCA test cases may ultimately not be particularly determinative of U.S.-based claims because of substantive differences in policy language and applicable law. In the first instance, the list of specific policy language identified by the FCA for test cases appears to be considerably different than the language generally used in policies issued in the United States. Indeed, other than standard Insurance Services Office (ISO) policies, there are dozens of versions of property/business interruption policies in the United States.

Even where there may be similarities between the language in the U.K. and U.S. policies, the differences in how U.K. and U.S. courts interpret those policies are profound. As insurance policies are almost always drafted entirely by insurers, and are usually contracts of adhesion, U.S. courts generally resolve ambiguities in the meaning of policy language in favor of the policyholder, under the doctrine of contra proferentem. However, although the doctrine ostensibly exists in the U.K., courts applying the law of England and Wales, which governs the FCA test cases, are expected to make every effort not to apply the doctrine because the policies are not sufficiently one-sided or were negotiated in any way by the policyholders, the policyholders are sophisticated entities, or the policies contain language overriding such rules of construction. In contrast, courts in most U.S. jurisdictions have explicitly found that even the largest U.S. companies have unequal bargaining power in relation to the insurance industry; they will therefore apply contra proferentem in most instances. In other words, if the plain language of a policy could result in two competing reasonable interpretations—one resulting in coverage and one resulting in no coverage—the FCA test case may find no coverage while a U.S. court would find coverage.

Similarly, a key emerging argument in U.S. coverage disputes is the application of the doctrine of regulatory estoppel to the ISO standard-form virus exclusion issued in 2006. Policyholders argue that the insurance industry misrepresented the purpose, legal, and factual background, and scope of the exclusion when seeking approval to add the exclusion to standard ISO policies in the 50 states, so that insurers are therefore estopped from enforcing the exclusion. The law of England and Wales does not recognize regulatory estoppel. Likewise, another strongly contested point is whether the causes of business-interruption losses related to COVID-19 are physical damage or government shut-down orders. U.S. courts generally recognize that where there are competing concurrent causes of loss—one an uncovered cause and the other a covered cause—but the real final cause of the loss (or the "efficient proximate cause") is the covered cause, then the policy responds and provides coverage. The law of England and Wales would likely find no coverage in that instance. *See* Concurrent Proximate Cause.

Another policyholder-favorable doctrine not recognized by the law of England and Wales is that of conforming a policy to the reasonable expectations of the policyholder. Business interruption insurance, by its very existence, is meant to cover an interruption of business such as that caused by COVID-19. As a legal product, it appears to be defective here if the insurers' position is adopted since it would then not respond to cover the very circumstances for which a policyholder would have expected coverage when the policy was purchased.

Lastly, a threshold issue presented in nearly every pending coverage case in the United States is whether COVID-19 causes property damage or loss. Prior U.S. decisions overwhelmingly support a finding that it does, but because insurance is regulated and interpreted by the 50 states, there may be differences in outcomes on this issue in different states based on prior state-level legal precedent. The law of England and Wales will not share any precedent in this area and, combined with the different rules of construction noted above, is likely to reach conclusions that are inapplicable to U.S. legal proceedings. For all of these reasons, the FCA test cases may not be particularly instructive for U.S.-based claims.

Can US Policyholders Attempt a Similar Streamlining Effort?

To achieve some efficiency and apply the correct law to these issues, the U.S. insurance regulatory or court systems could follow a similar path to get some answers to the following issues that are common to many COVID-19 insurance claims:

1. Is physical property damage required to trigger most business interruption policies?
2. Does the typical contamination exclusion apply to a business interruption claim? To a civil authority claim?
3. Does the 2005 SARS 1 virus exclusion apply to COVID-19? Does the adoption of this exclusion prove that the contamination exclusion does not apply to SARS-type viruses?
4. If a business is closed by civil authority, rather than the virus, is that the efficient proximate cause of the loss of revenue even if the closure was because of the virus?
5. If a business is partially closed by civil authority, is that a recoverable loss?
6. If a dependent (customer) property is closed by civil authority, is that a recoverable loss?
7. If a dependent (customer) property is partially closed by civil authority, is that a recoverable loss?

There are numerous other questions that could be posed in a test case, and the sheer number of cases, and the differing state law, obviously present challenges.

Though no U.S. regulatory entity has taken the lead in trying to resolve the challenges of COVID-19 insurance coverage, individual litigants have tried to mirror the FCA's test-case approach by pushing for a federal multi-district litigation (MDL) and filing class actions. The proposed MDL proceeding may provide a solution to the challenge of resolving thousands of disputed insurance claims, but there are legitimate questions about whether an MDL would be bogged down in discovery for a number of years or could even provide the desired answers given the differing factual scenarios and policy terms unique to each insured. An MDL judge could simply set a test-case trial on some or all of the issues presented above for a subset of the cases involved and allow only very limited discovery on the issues prior to the trial in an effort to resolve enough issues to force settlements. Such efforts might yield some type of answer in about six months, which would then be useful in resolving the remaining cases. Significant questions persist, however, about whether an MDL or class actions are realistic in this scenario.

Another solution for the United States might be to embrace the processes used in situations like Hurricane Katrina and the Deepwater Horizon oil spill, where the carriers retained a mediator/arbitrator to conduct a number of private test cases on specific issues. This arbiter would set questions, perhaps conduct limited discovery, and then provide sample answers to some of the issues listed above using the law of specific states. The arbiter might also try to create a multi-state answer for some questions. This process would benefit policyholders with smaller claims who simply cannot afford to pay a lawyer to litigate every issue in their standard form policies. Policyholders with larger claims or manuscript policies would retain the right to litigate their own claims and/or policies but might also benefit from the answers in these test cases. The carriers might sweeten the pot and obtain some degree of finality from these test cases by offering to provide a sum certain of settlement funds to be distributed in the test cases, in return for the claimants waiving their rights to a class-action jury trial. These types of test cases would be designed to increase efficiency, though they might not narrow the issues with binding results.

The FCA is conducting a very interesting experiment in an effort to expedite resolution of the thousands of business interruption claims related to COVID-19 filed in the U.K. The United States currently seems less inclined to try for that type of efficiency. But maybe it should consider that, especially for the small businesses and nonprofits that may not exist to collect on their claims if those claims are not resolved soon.

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