COVID-19: FCA FILES BUSINESS INTERRUPTION INSURANCE TEST CASE

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UK Insurance Alert

The Financial Conduct Authority (FCA), which regulates the conduct of insurers and other insurance intermediaries in the UK, has confirmed that the test case on business interruption (BI) insurance claims was launched in the High Court on 9 June 2020. The aim of the test case is to obtain court declarations aimed at resolving the contractual uncertainties around the validity of certain BI claims arising from COVID-19 and the controls imposed by the UK government. The action has been prompted by the widespread concern regarding the "lack of clarity and certainty" for policyholders making these claims, particularly small and medium-sized enterprises (SMEs), and the grounds on which some insurers are seeking to deny cover.

WHAT WILL THE TEST CASE DECIDE?

The results of the test case will be legally binding only on those insurers who are parties to the action in respect of the interpretation of the sample policy wordings underwritten by those insurers which will be considered by the court.[1] However, the FCA suggests that the case will provide "persuasive guidance" for the interpretation of similar policy wordings and claims, the intention being that this can be taken into account by the FCA (and by the Financial Ombudsman Service) in looking at whether other insurers are handling claims fairly. The FCA expects to publish a list in early July 2020 of other insurance policies which may be affected.

The FCA has acknowledged that the test case will not encompass all possible disputes and its aim is to resolve "some key contractual uncertainties and "causation" issues" in the interests of providing some clarity to policyholders and insurers. It will not determine how much is payable under individual policies but the intention is that the case will provide the basis for doing so.

The FCA has already been through an initial consultation process during which it sought input from policyholders and insurance intermediaries in relation to the factual and legal issues to be determined by the court. It is clear from this process, and from the pleadings in the action, that the FCA has decided not to include BI claims based on physical damage to insured property. The action will focus on BI claims under coverage extensions which are not dependent on physical damage, commonly referred to as "denial of access" and "notifiable disease" extensions. The test case may therefore be of particular interest to policyholders that have the benefit of such extensions. The action will also address causation issues, including uncertainty around the operation of "business trends" clauses, and the potential applicability of certain policy exclusions relating to pollution and contamination.

WHAT DOES THIS MEAN FOR POLICYHOLDERS?

The FCA has acknowledged that many BI claims will already be the subject of negotiation or other dispute resolution process. The proposed action is not intended to impact this normal claims process but is designed to assist policyholders, particularly SMEs, whose claims are being refused in circumstances where they think the

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policy should respond. The FCA makes clear that the test case will not prevent policyholders from pursuing claims through negotiated settlement, arbitration, or court proceedings, nor will it prevent individuals (or small businesses) from making eligible complaints to the Financial Ombudsman Service.

The FCA proposes an expedited timetable with defences from insurers being filed by 23 June 2020 and a court hearing in the second half of July 2020. This is an ambitious timetable by any standards and the FCA has acknowledged that there remain a number of uncertainties to the timeline, which has not yet been approved by the court.[2] These uncertainties, along with the fact that the final outcome of the test case may be subject to appeal, mean that policyholders will need to consider carefully whether their interests will be best served by simply awaiting the outcome, particularly if their insurers are not defendants to the action. At the very least, policyholders need to ensure that notice has been given to insurers in respect of any business interruption losses, particularly if the policy is coming up for renewal. The indications are that insurers will be imposing widely drafted exclusions for COVID-19 related losses going forward.

Policyholders with more significant and complex business interruption claims may need to adopt a more pro-active approach and continue taking steps to progress their claim in the normal manner. Given that the primary focus of the test case is on SMEs, larger commercial organisations, particularly those with multiple locations and/or multiple businesses operations impacted in different ways, may determine that the test case will have no or only limited impact, particularly in so far as their policies differ from the sample wordings put forward by the FCA.

Whatever approach individual policyholders decide to take, the FCA has stated that it proposes to continue engaging with policyholders and insurance intermediaries at key stages during the test case. The FCA is willing to consider legal arguments and factual circumstances communicated to them by policyholders or their representatives. There will be an express invitation for comments to be provided by policyholders shortly after the insurers have filed defences (currently anticipated by 23 June 2020) to ensure such comments are reflected in the FCA's reply (which it expects to file on 3 July 2020) and in the written submissions prepared for the final court hearing. We have already made submissions to the FCA on behalf of certain policyholder clients and would be happy to assist other policyholders with particular concerns.

FOOTNOTES

[1] The insurers named as defendants are Arch Insurance (UK) Limited, Argenta Syndicate Management Limited, Ecclesiastical Insurance Office plc, Hiscox Insurance Company Limited, MS Amlin Underwriting Limited, QBE UK Limited, Royal & Sun Alliance Insurance plc and Zurich Insurance plc.

[2] The FCA has filed an application for expedition that includes a draft Order, which anticipates an eight-day trial being listed on 20 July 2020. The High Court will decide whether to approve this expedited timetable at a Case Management Conference on 16 June 2020.

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