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FCA TEST CASE IMPACT ON U.S. INSURERS

Oct 19, 2020

Insurers and policyholders worldwide have been embroiled in litigation seeking clarity on whether or not their policies cover various losses caused by the COVID-19 Pandemic. Of particular interest to many businesses (and their insurers and reinsurers) is whether business interruption losses from the Pandemic will be held to be insured. This is a hotly contested matter in the United States with over 1,000 cases currently pending in U.S. Courts and early decisions breaking both ways (albeit leaning in favor of insurers) depending upon the policy language and jurisdiction.[1]

English insurers received some measure of clarity on September 15, 2020, when the English High Court handed down a decision in *The Financial Conduct Authority v. Arch and Others* (the "Test Case"). The Test Case considered whether 21 insurance policy wordings provided coverage for business interruption losses as a result of the COVID-19 Pandemic. The opinion focused heavily on specific policy wording in determining that some policies may well provide cover. In particular, the Court analyzed three main categories of policy language, that is, "disease," "prevention of access/ public authority" and "hybrid" wordings. While the wordings in each category varied slightly, the "disease" wording generally provided coverage for losses resulting from: interruption or interference with the business arising from any human infectious or human contagious disease manifested by any person, within the "vicinity" of the premises. The "prevention of access/ public authority" wordings generally provide coverage for losses resulting from prevention … of access to the premises, due to actions… imposed by order of, a government authority due to an emergency likely to endanger life/ neighbouring property within a specific area, Lastly, the hybrid wordings generally contained a combination of the language above.

In short, the Test Case found that, under "disease" and "hybrid" policy wording, coverage is generally triggered by the presence of the virus in a local area and that the "interruption" did not require a complete cessation of operations. The Test Case also found that coverage was more restricted under the "prevention of access/ public authority" policy wordings. Overall, the decision is generally viewed as a win for Policyholders in the United Kingdom, but only a partial win as coverage was found not to exist under certain wordings and expected insurer losses were less than feared. For more details on the Test Case ruling specifically, click here. U.S. policyholders and insurers appear unlikely to be heavily impacted by the decision, however, for two principal reasons. First, the policy wording interpreted by the English High Court varies substantially from typical U.S.

business interruption policy wordings. Second, U.S. courts are generally less likely to look to foreign courts when ruling on issues controlled by U.S. state or federal law.

U.S. Policy Wording

Physical Damage Requirement

In the United States, business interruption policies drafted by the Insurance Services Office ("ISO") and adopted by many insurers, generally require "direct physical loss of or damage to" the insured premises or to a location other than the insured premises that leads to an order of a civil authority limiting access to the insured premises.[2] This is starkly different from the language from the Test Case policies which merely requires a business interruption arising out of the presence of a notifiable disease in a particular area or the denial of access to the insured premises as a result of a government order based on some dangerous condition. As such, the application of the policies to COVID-19 losses originating under U.S. based policies is distinct.

The threshold question in U.S. business interruption claims (before addressing the possible presence of a virus type exclusion) is instead whether policyholders can establish "physical damage or physical loss" to property. This threshold may not be met if there are orders of a civil authority limiting or prohibiting access to the property or even if the presence of the virus on the property can be proven.[3] For example, several cases asserting property damage by virtue of the virus settling on a surface have not found traction with the courts. In contrast, at least one court has focused on the "physical damage **or** physical loss" (emphasis added) language in the policies finding, at the motion to dismiss stage, that even absent "physical damage," "physical loss" may be caused by the local shutdown orders based on the presence of the virus.[4] However, even in that order, the Court recognized that further discovery surrounding the actual presence of the virus at the insured location and other factors may show that the claim is without merit.[5]

Moreover, even in those cases where a court finds that there could be physical loss or physical damage, many of the shutdown orders have not completely limited access to the establishments, but rather, have limited the types of services they can provide. This is leading judges to find no coverage under the civil authority coverage part even where the presence of the virus allegedly caused the restrictions. As mentioned above, some of the Test Case policy wordings included language like "hindrance of access" to the premises, which could be interpreted as reduced access. On the other hand, the ISO Civil Authority coverage requires, in part, that "access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage…"[6] The ISO language appears to contemplate only a complete lack of access to the premises rather than a partial shutdown.

Virus Exclusions

In 2006, as a result of the SARS outbreak, a wide variety of insurers and the ISO adopted some form virus exclusion on many of their property insurance policies. The ISO version of the exclusion applies to all forms and endorsements providing business interruption, extra expense or civil authority coverage.[7] The language broadly excludes "loss or damage caused by or resulting from any virus, bacterium or microorganism that induces or is capable of inducing physical distress, illness or disease."[8] This exclusion, and similar versions, are largely upheld and have been interpreted to bar coverage for business interruption claims as a result of COVID-19 where there are allegations or could be allegations that the virus was present on the insured property or was the root cause of the civil authority action.[9] The UK policies interpreted in the Test Case lacked an analogous exclusion. As such, at least for those policies that include a virus exclusion, the Test Case does not provide much insight.

U.S. Non-Reliance on International Case Law

The U.S. Judiciary historically avoids looking to international decisions when determining domestic issues. This American focused approach to domestic issues has been noted several times by legal scholars.[10] In fact, Chief Justice John Roberts has viewed citations to international decisions when interpreting domestic laws, in particular, the Constitution, as a breach of the doctrine of political accountability.[11] That is, international courts and judges were not put in place by a President or a Congress that can be held accountable to the American people. As such, U.S. courts have typically been reluctant to rely on international decisions.

Compounding this, the volume of COVID-19 cases has allowed the federal and state courts in the United States to steadily build precedent regarding the applicability of various insurance policies to COVID-19 losses. Where a U.S. court can look to domestic opinions, it is much less likely that it would look to those of other nations. This reluctance by United States judges to look beyond national borders, in particular when dealing with what may be viewed as a purely domestic issue, may reduce the utility of the Test Case to U.S. policyholders and insurers in interpreting U.S. policies.

Conclusion

So, while the Test Case provides meaningful analysis of various UK based policies, the combination of vastly different policy wording, coupled with a general reluctance of U.S. Courts to look to international decisions in deciding domestic issues may limit the impact of the decision on U.S. policyholders and insurers. That said, given the largely policyholder favorable ruling, it would not be surprising to see policyholders cite some parts of the Test Case, particularly when it addresses similar policy language or novel issues under U.S. law. While seminal in England, the Test Case will likely have little effect on U.S. decisions.[12]

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1. See e.g., Mark's Engine Co. No. 28 Restaurant, LLC v. The Traveler Indem. Co. of Conn., et al, No. 20-04423, Order (C.D. Cal. Oct 2, 2020) (granting insurer's motion to dismiss on basis that Mark's did not plausibly allege it suffered physical loss and, even if it could that the virus exclusion precludes coverage); Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's of London known as Syndicate PEM 4000 et al, No. 20-cv-1605, 2020 WL 5791583, Order (M. D. Fla. Sept. 28, 2020) (granting insurer's motion to dismiss on basis that economic damage is not synonymous with physical loss and as such, there was no direct physical loss as needed to trigger coverage under the policy); Studio 417, Inc. v. Cincinnati Ins. Co., Order Denying Defendant's Motion to Dismiss (W.D. Mo. Aug 12, 2020) (allowing policyholder's complaint to progress past a motion to dismiss holding that physical loss as opposed to physical damage may have been caused by the shutdown order and further discovery is needed).

2. See Insurance Services Office Form CP 00 30 10 12.

3. See e.g. Social Life Magazine, Inc. v. Sentinel Ins. Co., No. 20-cv-03311, Telephonic Conference (S.D.N.Y. May 14, 2020) (in denying policyholder's application for a preliminary injunction, ruling that even when COVID-19 is on the premises, it does not cause damage to physical property); Oral Surgeons, P.C. v. The Cincinnati Ins. Co., No. 4-20-cv-222-CRW-SBJ, Order Granting Insurer's Motion to Dismiss (S.D. Iowa Sep. 29, 2020) (holding no allegations of physical damage even when policyholder alleged that the presence of a harmful substance may constitute property damage or direct physical loss).

4. See Studio 417, Inc. v. The Cincinnati Ins. Co., No. 20-cv-03127-SRB Order Denying Insurer's Motion to Dismiss (W.D. Mo. August 12, 2020).

5. See id.

6. See Insurance Services Office Form CP 00 30 10 12.

7. See, Insurance Services Office Form CP 01 40 07 06.

8. See id.

9. See, e.g., Mauricio Martinez DMD, P.A. v. Allied Ins. Co. of America, No. 20-00401, Order Granting Insurer's Motion to Dismiss (M.D. Fla. Sep. 2, 2020); Diesel Barbershop et al v. State Farm Lloyds, Case No. 5:20-cv-00461, Order Granting Defendant's Motion to Dismiss (W. D. Texas Aug. 13, 2020).

10. See, e.g. Shirley S. Abrahamson & Michael J. Fisher, All the World's a Courtroom: Judging in the New Millennium, 26 Hofstra L. Rev. 273, 276 (1997); Rebecca Lefler, A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by The United States Supreme Court, The Supreme Court of Canada, and The High Court of Australia, 11 S. Cal. Interdisc. L.J. 165, 166 (1999).

11. See Adam Liptak. Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa. N.Y. TIMES. Apr. 12.2009. at A14.

12. While outside the scope of this Article, we note that the Test Case may have considerably more influence on the jurisprudence in other common law jurisdictions, which historically have been more likely to follow precedent from England, such as Australia, New Zealand, South Africa and possibly Canada. We offer no opinion on the effect that the Test Case will have in those jurisdictions.

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