PASICH LLP

COVID-19 LEGAL ALERT:

MAJOR ENGLISH DECISION A WIN FOR INSUREDS

September 15, 2020

Since the "coronavirus" was first identified in Wuhan, Hubei Province, China, the World Health Organization ("WHO") has confirmed that more than 29,000,000 people have been infected with the SARS-CoV-2 virus and more than 925,000 people have died from the disease COVID-19. [1]

This outbreak has been matched by the unprecedented outbreak of insurance coverage litigation around the world. In the United States alone, more than 1,150 lawsuits have been filed over the question of insurance coverage for economic losses associated with SARS-CoV-2, COVID-19, and the orders restricting travel, closing businesses, and directing individuals to "stay at home."[2] These lawsuits typically focus on the question of whether the presence of SARS-CoV-2 in the airspace of buildings and on the surface of property constitutes "direct physical loss or damage to property," typically a requirement for coverage under property and business interruption policies.[3] The early results are split in favor of insurers, although most of the insurer wins are in cases in which the insureds conceded that they had no physical loss or damage to their property.

Other key issues in the U.S. coverage litigation include whether businesses must be completely closed to qualify for coverage and whether the various orders issued by government authorities qualify as "orders of civil authority" that trigger coverage under extensions of coverage for economic losses from such orders.

In the United Kingdom, the government initiated a comprehensive lawsuit to bring clarity and certainty to pandemic-related business interruption insurance claims. Specifically, the Financial Conduct Authority ("FCA"), the U.K.'s regulator of the financial services industry, including insurance, brought a test case against eight insurers to obtain

---

[1] https://covid19.who.int/.

[2] https://cclt.law.upenn.edu/.

[3] For a discussion of some of these issues and the potential for coverage under property and other types of insurance policies, please refer to our broad Legal Alert, which can be found here: https://pasichllp.com/insurance-coverage-for-losses-and-claims-associated-with-the-coronavirus/.

judicial interpretations of the rights of insureds under 21 representative business interruption policy wordings. The eight insurers are:

- Arch Insurance (UK) Ltd
- Argenta Syndicate Management Ltd
- Ecclesiastical Insurance Office Plc
- MS Amlin Underwriting Ltd
- Hiscox Insurance Company Ltd
- QBE UK Ltd
- Royal & Sun Alliance Insurance Plc
- Zurich Insurance Plc

Following lengthy submissions by the parties and an eight-day trial, the High Court of Justice, Business and Property Courts, Queen's Bench Division, rendered its decision on September 15, 2020—and it is a big win for insureds, the significance of which cannot be overstated.

In *Financial Conduct Authority v. Arch Insurance (UK) Ltd.*.[4] the Court pointed out the potential impact of its decision:

> [T]he FCA estimated that, in addition to the particular policies chosen for the test case, some 700 types of policies across over 60 different insurers and 370,000 policyholders could potentially be affected by the test case.[5]

Over the course of its 162-page decision, the Court addressed key issues affecting 42 types of businesses, including banks, cinemas, concert venues, medical service providers, retailers, and storage and distribution facilities.[6] However, the Court did ***not*** address the issue at the heart of most of the U.S. coverage litigation, whether the presence of SARS-CoV-2 constitutes "direct physical loss or damage to property."[7]

Instead, the Court focused its discussion on policy wordings containing extensions to coverage that it generally described as "disease clauses"—that is, policies extending coverage to losses arising from the occurrence of a "Notifiable Disease," typically defined to include "any human infectious or human contagious disease . . . an outbreak of which the competent local authority has stipulated shall be notified to them," or words to similar

---

[4] https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-judgment.pdf.
[5] *Id.* ¶ 7.
[6] *Id.* ¶ 52.
[7] *See id.* ¶ 80 ("There is no dispute before the Court about whether there is cover under such standard [business interruption] cover.").

effect.[8] However, the Court's decision provides guidance on many of the coverage issues being addressed in the United States.

The Court began its analysis by stating that it could take into account "facts or circumstances which existed at the time that the contract was made, and which were known or 'reasonably available' to both parties."[9] This material "includes the relevant legal background," with the underlying principle being that the parties know that "both statute law and the common law develop over time," meaning that the parties "can be taken as having agreed that their agreement be interpreted in light of the general law from time to time."[10] The Court rejected the various insurer arguments against coverage under these extensions.

In doing so, the Court commented on the overarching purpose of business interruption coverage. As it explained,

> The object of the loss of income . . . provisions in these wordings is to put the insured in the same position as it would have been in if the insured peril had not occurred.[11]

The Court then addressed the circumstances under which there could be coverage for losses arising from orders of civil authority, a coverage extension commonly found in U.S. policies. The Court noted that the policy language was such as to "convey a restriction which is mandatory, not merely advisory, in other words a restriction which has the force of law."[12] As it further explained:

> It follows that government advice or recommendations, whether before or after either set of Regulations came into effect, cannot have imposed or ordered a denial of access or a hindrance in access, however strongly worded the advice or recommendations were, since they did not have the force of law.[13]

The Court next addressed the question of whether a drop in business rather than a total closure would suffice to trigger coverage. It addressed this issue in the context of a coverage commonly found in U.S. policies—coverage under a "loss of attraction" provision. Under such provisions, coverage typically is provided for economic losses caused by a loss of "attraction" to a business—for example, when a nearby concert or sporting venue

---

[8] *Id.* ¶¶ 80, 85, 253.
[9] *Id.* ¶ 75.
[10] *Id.* ¶ 76.
[11] *Id.* ¶ 387.
[12] *Id.* ¶ 407.
[13] *Id.* ¶ 408.

attracts customers to restaurants. The Court rejected the insurers' argument that business must be closed to qualify for coverage, holding that the language

> Is clearly encompassing not just the case where the insured damage in the vicinity leads to the insured premises closing because of lack of customers but the case where the premises remain open but because of the insured damage in the vicinity, there are fewer customers.[14]

As the Court stated,

> Any suggestion that because "interruption" has to mean complete cessation and does not encompass disruption . . . would place an unwarranted limitation on the cover.[15]

Lest there be any doubt, the Court emphatically held that "interruption" is "to be interpreted as not being limited to complete cessation but as including disruption to or interference with the business."[16]

The Court then provided an example of circumstances many businesses face:

> [I]n the case of businesses where under the Regulations people were only allowed to access the premises for limited purposes, such as to run a takeaway service in a pub or restaurant and to collect the takeaway food or drink from that pub or restaurant, whilst there was not a denial of access in those circumstances, we consider that there was a hindrance in access, since no-one was allowed to access those parts of the premises which would normally be used for in-house dining or drinking. In the case of such businesses there would have been an "interruption to [the insured's] activities" on the basis that interruption also encompasses disruption for the reasons we have given.[17]

However, the Court did note that as to businesses that were allowed to remain open, "it cannot be said that there was any denial of or hindrance in access to such premised imposed by or by order of the government."[18] However, even here the Court noted an important limitation—that while there may have been "a restriction on use of the offices because [employees] could work from home," there was no "restriction on use . . . imposed by or by order of the government."[19] Therefore, this aspect of the Court's decision would not apply when the use of, as opposed to access to, premises is restricted

---

[14] *Id.* ¶ 410.
[15] *Id.* ¶ 412.
[16] *Id.* ¶ 414.
[17] *Id.*
[18] *Id.* ¶ 415.
[19] *Id.*

by an order of civil authority. According to the Court, there is an important distinction between "restrictions on movement other than for permitted purposes" and restrictions that "impose any denial of or hindrance . . . to use of . . . premises."[20]

The Court also addressed another issue important to U.S. insureds: Whether the ability to access premises for some purposes is enough to defeat coverage. The Court rejected this notion. It held:

> [I]f the other elements of the cover under the clause are satisfied, closure of the premises is sufficient to amount to access being prevented, even if the policyholder could still physically access the premises for other purposes than carrying on the business, such as essential maintenance.[21]

The Court found that even if a business were partially open, coverage still could be afforded:

> We also consider that, as in the case of the Arch wording, only total closure rather than partial closure will amount to prevention of access, from which it follows that any insured business which carried on part of its existing business, such as an existing takeaway service, as permitted by the Regulations, did not suffer total closure or, therefore, a prevention of access. In relation to businesses which, after the Regulations came into force, started up a takeaway or internet service from the premises which had not previously been carried out (and it is unclear whether there are any MSA 1 policyholders who fulfil that criterion) we would be inclined to reach the same conclusion as we reached in relation to the Arch wording, that in such a case there was still a prevention of access because the "business" which is defined in MSA 1 as the business specified in the schedule can no longer be carried on from the premises and the insured is carrying on a new "business".[22]

Finally, the Court addressed the type of evidence that might be used to show that SARS-CoV-2 was present in a particular area of vicinity. The Court said:

> The issues between the parties are really to do with what inferences can be drawn from the available types of evidence, particularly as to the timing of the presence of the disease, and the use of data aggregated by reference to geographical areas which are not the same as the relevant policy areas. These are matters which as we see it can only be

[20] *Id.*
[21] *Id.* ¶ 431.
[22] *Id.* ¶ 432.

> definitively determined at the level of individual claims, but some points can be made.[23]
>
> The Court noted:
>
> Inferences can clearly be drawn, and it appears to us likely that the relevant inference may be more obvious in some circumstances than others. For example, if an individual died in early March 2020 after testing positive for COVID-19, it appears to us prima facie likely that the disease will still have been present in the local area at the time of death, because the individual could not have tested positive very much earlier.[24]

However, the Court concluded by commenting that the "real issues" are "as to the reliability of types of methodology and proof offered, issues that it did not resolve.[25]

The judgment likely will be appealed on an expedited basis. Pursuant the Framework Agreement of the parties, it is possible that there will be a "a leapfrog appeal directly to the Supreme Court, bypassing the Court of Appeal.

The principles of English law governing policy interpretation differ in some material respects from the principles governing policy interpretation in much of the United States, being less favorable to insureds than U.S. principles usually are. However, there is no doubt that the decision in *FCA* is the result of the most comprehensive argument to date. And, while the focus is on the specific disease coverage extensions, much of the Court's discussion is relevant to U.S. insureds—either because they may have such coverage extensions or because the issues involved overlap with the issues involved in many of the U.S. coverage disputes.

© 2020. All Rights Reserved.

Authors and For Information:

Kirk Pasich
Phone: 424-313-7850
E-mail: KPasich@PasichLLP.com

Peter A. Halprin
Phone: 646-974-6470
E-mail: PHalprin@PasichLLP.com
Website: https://pasichllp.com

---

[23] *Id.* ¶ 569.
[24] *Id.* ¶ 570.
[25] *Id.* ¶¶ 578 & 579.