

COVID-19 AND BUSINESS INTERRUPTION INSURANCE CLAIMS

Businesses have had enough to worry about this year without the issue of whether their insurance will pay out for business interruption. Fortunately, the judgment dated September 15, 2020 in the case of **The Financial Conduct Authority v Arch Insurance, Hiscox Insurance and Others** has provided some clarity for policyholders and insurers alike, according to **Robert Botkai and Kay Cartwright, of Winckworth Sherwood**



Most companies have some form of business interruption insurance which aims to cover the loss of profits and additional expense following an event such as flood or fire. This takes effect when the business cannot trade but will incur repair costs.

The problem here is that COVID-19 was not a physical event which affected a small number of premises, but a national shut-down due to a pandemic.

The question then is whether these companies could rely on their business interruption event to cover loss of profits when their premises were closed.

The case

Due to the national importance and the numbers which would be affected, this case was a test case expedited over the summer. The Financial Conduct Authority acted for policyholders, with eight insurers agreeing to participate.

To determine whether the insurers had to pay out on the policies, the court analysed 21 sample policy wordings, a small proportion of what is available. Its focus was on three clauses:

Prevention of access/public authority clauses;

- Disease clauses; and
- Hybrid clauses (a mixture of the two).
- This article will focus on the prevention of access

as it appears to be the most relevant for petrol forecourts.

Prevention of access

Prevention of access generally covers loss resulting from prevention/denial/hindrance of access, due to actions/advice/restrictions imposed by a government/local authority/police/other body due to an emergency likely to endanger life/neighbouring property/incident within a specified area.

The first point to note is that the court found some, but not all insurance policies would have to pay out under the prevention of access clauses. It all depended on the wording. The key words to be aware of here would be prevention/denial versus hindrance. As most forecourts did not close, there was limited prevention or denial of access. However, due to social distancing, there was a hindrance. Also the Government's 'Stay at Home' message meant fewer motorists on the road and a lower demand for fuel. This is a clear hindrance of the business but unfortunately, while guidance could be given, the court indicated that hindrance would have to be assessed on a case-by-case basis.

In addition, the court looked at the timeline of the Government's response to the pandemic, with the first mandatory lockdown announcement coming on March 23, 2020.

Those policies with wording which covered action taken on government advice should pay out from the first government messages. Those policies which required formal restrictions to be imposed could only be covered after March 23, 2020.

Furthermore, the clauses were narrowly construed to local events rather than events on a national scale. This may assist those with policies in areas which are now entering local lockdowns, but not the national lockdown experienced throughout the spring and early summer.

There are a couple of positive points to note. The first is that the court found that premises did not have to close entirely because of prevention of



access, meaning that policy holders who were able to trade can still make a successful claim.

The court focused on whether there had been a fundamental change in the business from what was described in the policy. If this occurred, there was prevention of access.

Secondly, damage was construed more widely than physical damage to take into account that losses were not caused by a physical event such as a flood or fire.

Take home points

Due to the nature of the business, it is likely that petrol forecourts could operate to an extent due to the necessity of accessing fuel. Petrol stations and food shops have been exempt from COVID-19 closure regulations throughout the COVID-19 period.

However, some petrol stations may have closed for staffing or other reasons linked to COVID-19. Revenues may have dropped because of the 'Stay at Home' message. It is therefore worth checking the wording of the prevention of access clauses to see if it allows for a valid claim, but do keep in mind that this story may continue with the insurers appealing to the Supreme Court.

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