

U.K. High Court COVID-19 Victory for Policyholders May Set a Trend in the U.S.

On September 15, 2020, in a matter entitled *The Financial Conduct Authority v. Arch & Others*,¹ the High Court of Justice of England and Wales, the equivalent of a trial court in the U.S., issued a ruling on a COVID-19 business interruption insurance case (the "Judgment"). Significantly, the Court sided with policyholders on most key coverage issues under specific non-damage business interruption insurance coverage forms. U.S. policyholders should review whether any of their policies issued by U.K.-based carriers, which may be subject to English law and have the forms discussed below, are impacted by this favorable decision.

The Financial Conduct Authority ("FCA"), the U.K. financial regulatory body, brought the case to establish liability under 21 lead representative sample policy wordings from eight insurer defendants. The case was filed on an expedited basis on June 9, 2020 under the Financial Market Test Case Scheme, which is used for claims of general importance that require authoritative court guidance. Although the Judgment is legally binding only on the carriers who were parties to the action, the FCA estimates the case could affect 700 types of policies across 60 different insurers, and 370,000 small to medium-sized enterprises policyholders ("SME") in the U.K. While the Judgment may be appealed, it is expected to incentivize insurers to settle their claims before the outcome of an appeal is known.

Generally, in the U.K., the U.S., and worldwide, business interruption insurance covers loss of profits and additional expenses suffered by insureds because of direct physical loss or damage to property. However, some policies include coverage for causes other than physical damage to property. The 21 policies that were the subject of the Judgment included such non-damage type of coverage as follows: (1) coverage for losses from causes such as infectious or notifiable diseases ("Disease Clauses"); (2) non-damage denial of access and public authority closures or restrictions ("Denial of Access/Public Authority Clauses"), and (3) a hybrid coverage for restrictions imposed on-premises in connection with a notifiable disease. The Court reviewed these three categories of coverage to determine whether policyholders were entitled to coverage in the context of the COVID-19 pandemic.²

Disease Clauses

Disease clauses provide coverage for business interruption claims arising from the occurrence of a notifiable disease within a radius of the insured location specified in the policy. The insurers contended they only afforded coverage if the effects of a local occurrence of COVID-19 could be distinguished from broader impacts. In other words, insurers only covered localized notifiable disease, but not a pandemic. The Court disagreed mainly because the clause did not expressly provide COVID-19 should only occur within the relevant radius stated in the policy. Coverage was granted when the disease came near the insured premises regardless of whether discrete local occurrences happened, and regardless of whether COVID-19 is a pandemic. The Court reasoned that

¹[2020] EWHC 2488 (Comm) (FCA Case). The 150-page High Court decision can be found [here](#).

²This case alert does not cover all coverage issues considered in the Judgment and will focus on these three clauses.

notifiable diseases are, by nature, capable of widespread transmission. Thus, COVID-19 cases within the policy radius are not independent of, or a separate cause from, cases outside the policy radius. The Court, therefore, held that a local area impacted by COVID-19 is indivisible from the broader worldwide spread of the disease and should be covered under a Disease clause regardless of whether or not there were local instances of it. The Court further held coverage is triggered from the point in time when cases of the disease occur in the relevant policy radius.

Denial of Access/ Public Authority Clauses

The U.K. Government announced a lockdown order in March 2020, which included the closure of non-essential businesses. In this case, Denial of Access or Public Authority clauses contained in the sample policies provide coverage when governmental authorities prevent access to or the use of premises during an emergency likely to endanger life, or an incident within an area specified in the policy. The Court concluded coverage under these clauses would depend on the precise terms of the policy, the restrictiveness of a governmental order (whether an advised or required lockdown), and the extent to which the business was affected by a public authority order. Thus, coverage will depend on the application of government advice and orders to the insured's particular business, such as whether the specific business was directly mandated to close or whether the business was disrupted but did not suffer complete interruption.

Hybrid Clauses

The Hybrid clause provides coverage for business interruption due to the inability to use the premises or restrictions imposed by a public authority following the occurrence of a disease. This type of extension is a mix of Disease coverage and Denial of Access/Public Authority coverage. In interpreting Hybrid clauses, the Court took the same approach as it did for the Disease Clauses, rejecting the insurers' argument that coverage was afforded only for local outbreaks. With respect to the denial of access/public authority coverage, the Court found that coverage will depend on a policyholder's type of business, and whether it was deemed essential for operation during the COVID-19 pandemic.

Implications for U.S. Policyholders

Although the Judgment is not binding on U.S. policyholders and did not discuss the critical question in the U.S. of whether the presence of COVID-19 constitutes direct physical loss or damage to property or the interpretation of virus/pollution exclusions contained in certain policies in the U.S., there are significant implications. For instance, the Court found that the presence of COVID-19 within a radius of insured premises can, in certain circumstances, trigger civil authority coverage. Some civil authority coverage forms in the U.S. are not necessarily tied to physical damage to property. Further, some courts have held that loss of use of property is enough to meet the direct physical loss or damage coverage trigger in policies issued in the U.S. In the U.S., like in the U.K., the specific policy language and circumstances surrounding COVID-19-related claims will control the outcome. SDV will continue to monitor and provide updates on COVID-19-related judicial decisions in the U.S. and worldwide.

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