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FCA Test Case

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High Court largely backs insureds in UK BI Test Case

The UK's High Court has today released its judgment widely supporting the arguments put forward on behalf of insureds in the Financial Conduct Authority's (FCAs) landmark test case over disputed business interruption (BI) coverage in light of the coronavirus pandemic.

Background to the Test Case

The coronavirus pandemic has led to widespread disruption and business closures resulting in substantial financial loss. Many policyholders believed that their respective insurers wrongfully denied claims on their business interruption insurance over the loss of revenue caused by the COVID-19 outbreak.

To achieve clarity for all concerned, the UK's Financial Conduct Authority's (FCA) had asked the High Court for a ruling on how a representative sample of BI policy wordings respond to COVID-19 related losses.

The FCA represented the interests of policyholders, instructing Herbert Smith Freehills to prepare the case. Law firm Mishcon de Reya acted for two groups, the Hiscox Action Group, and the Hospitality Insurance Group Action, the only two policyholder action groups who were granted permission by the Court to intervene in the test case. Eight insurers were involved, including Hiscox, RSA and QBE, and 21 different "lead" policy wordings were examined in detail. The FCA has said that up to 370,000 UK businesses could be affected by insurers' failure to pay out on BI claims. The judgment is also likely to have significant implications for (re)insurers who operate under English Law.

The Judgment

The High Court judgment says that most, but not all, of the disease clauses in the wordings sample provide some cover. However the extent of this cover does vary, and is more restrictive particularly where the policy wording makes reference to the occurrence of notifiable disease being an 'event' or being within a 1 mile radius of insured premises (something seen particularly in two of the QBE wordings considered).

The Court has also confirmed that certain denial of access clauses in the sample provide cover, but this is dependent on the detailed wording of the clause and how the business was affected by the government response to the pandemic, including for example whether the business was subject to a mandatory closure order and whether the business was ordered to close completely.

The test case has also clarified that the Covid-19 pandemic and the Government and public response were a single cause of the covered loss, which is a key requirement for claims to be paid.

Subject to the result of any appeal, the judgment is legally binding on the eight insurer defendants to the test case in respect of the policies considered. For those policies not included specifically in the test case, whether there is cover or not will need to be determined from the general legal principles outlined by the Court and their applicability to the particular policy wording.

Next Steps

Policyholders with affected claims can expect to hear from their insurer within the next 7 days to outline next steps. The Court will now hear the parties as to appropriate declarations to be made in light of its findings. This hearing is expected to take place in October. Insurers have asked for more time to put in an application for permission to appeal, indicating that an attempt to appeal by them is likely.

The Lockton Claims Team will review the judgment thoroughly and provide further guidance shortly. Lockton will continue to robustly pursue claims on behalf of our clients.

For further information, please contact:

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