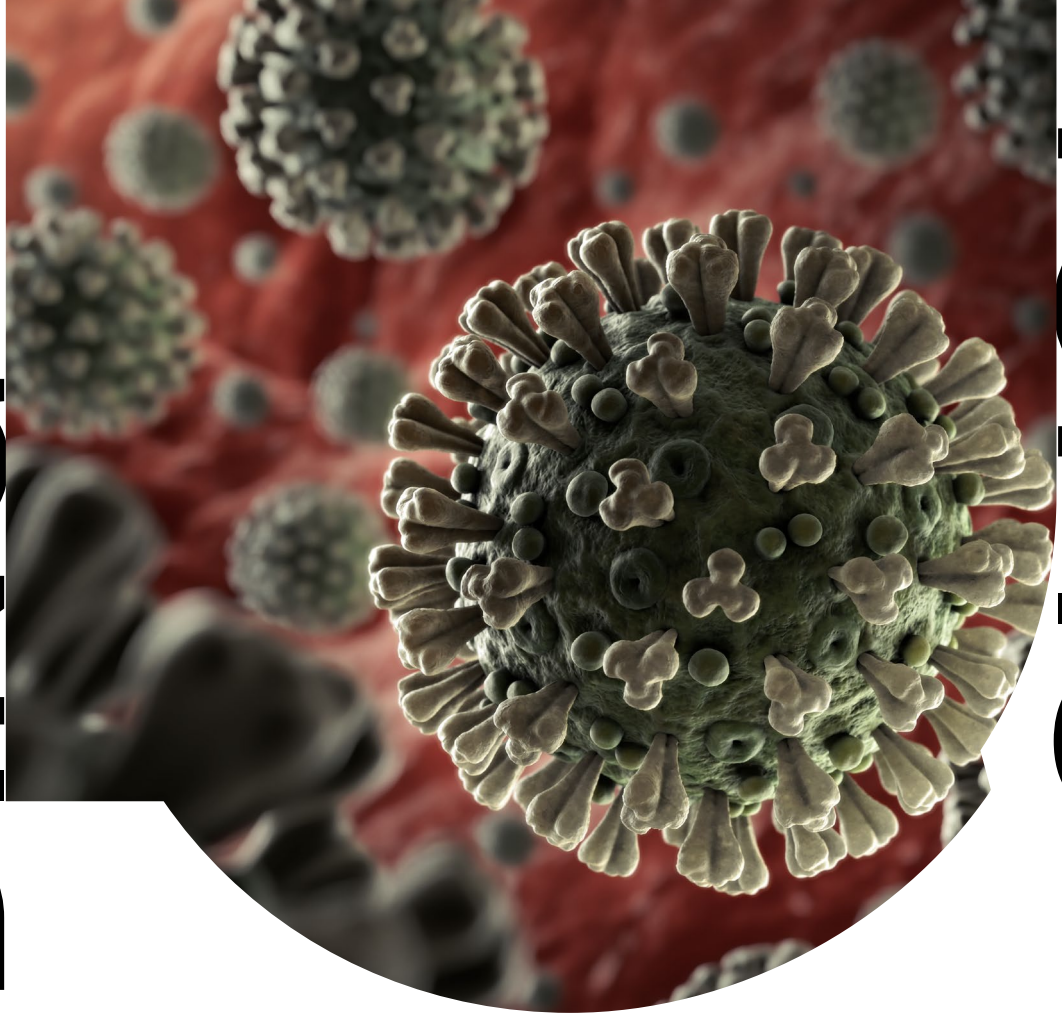
TRENDING TOPIC



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INSURANCE

Coronavirus: Business interruption insurance and COVID-19

The judgment of the United Kingdom Supreme Court

In the initial phase of the COVID-19 pandemic – March 2020 – the large number of different clauses circulating in the business interruption insurance market became apparent. This COVID-19 situation created enormous uncertainty as to the interpretation of these clauses and their possible activation by small and medium-sized enterprises ("SMEs"), which had begun to suffer significant losses. The discussion reached a global scale, but in the UK, the case went even further.

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On 1 May 2020, the Financial Conduct Authority ("FCA"), the body that oversees the insurance industry in the United Kingdom, announced that it wanted to obtain a ruling from the English courts on the meaning and effect of the sample of business interruption clauses that it selected from eight insurers in particular. The case was brought under the Financial Market Test Case Scheme and the court of first instance was asked to consider the clauses of 21 business interruption policies. Specifically, the court was asked to look at clauses falling into three categories:

- Disease clauses;
- Prevention of access/public authority clauses; and
- Hybrid clauses.

On 15 September 2020, the court[1] issued its judgment in which it issued detailed conclusions on the 21 clauses. However, the FCA, six of the original eight insurers (the "Insurers") and the Hiscox Action Group appealed directly to the UK Supreme Court in respect of some of these findings.

On 15 January 2021, the Supreme Court of the United Kingdom handed down its ruling.

Disease clauses

As a general rule, disease clauses refer to the coverage for business interruption losses resulting from the occurrence of a notifiable disease[2], such as COVID-19, at or within a specified distance of the business premises.

"The Supreme Court held that it was sufficient for the policyholder to demonstrate that, at the time of the government measure in question, there was at least one case of COVID-19 within the required proximity."

Faced with the various sets of wording it examined, the Supreme Court interpreted the disease clauses more narrowly than the court of first instance, accepting the Insurers' arguments that: (i) each case of disease suffered by an individual is an autonomous "occurrence"; and (ii) only business interruption losses caused by disease occurring within the vicinity in question will be covered. However, as far as issues of causation are concerned, the court held that there would be coverage of losses as follows:

- Disease clauses do not limit coverage of losses resulting only from cases of a notifiable disease in the vicinity in question; and
- In interpreting disease clauses, importance should be attached to the potential for a notifiable disease to affect a wider area and for the occurrence of that disease in a particular vicinity to be part of a wider outbreak.

In addition, in order to obtain such coverage, the Supreme Court held that it was sufficient for the policyholder to demonstrate that, at the time of the government measure in question, there was at least one case of COVID-19 within the required proximity.

PL
MJ

1 With amendments added on 2 October 2020 after a final hearing.

2 "Notifiable disease" is a legal concept defined in the English legal system by the Health Protection (Notification) Regulations 2010 (SI 2010/659). On 5 March 2020, COVID-19 was added as a notifiable disease under this legislation, with SARS-CoV-2 as the causative agent.

Prevention of access/ public authority clauses

In general, the prevention of access clauses provide cover for business interruption losses resulting from public authority intervention preventing or hindering access to, or use of, the business premises.

The Supreme Court disagreed with the court of first instance, which had concluded that "restrictions imposed" by an authority means something that is expressed in mandatory terms and has the force of law. The Supreme Court accepted the FCA's arguments that this would be very restrictive and ruled that the concept of "restrictions imposed" also includes mere guidance given by the public authorities, provided that this guidance includes the imminent threat of a legal imposition, or it is expressed in mandatory or clear terms. However, the Supreme Court never indicated which of the British government's March 2020 measures falls into this category. It only noted that "enforced closure of an Insured Location" does not include "advice or exhortations, or social distancing and stay at home instructions".

The Supreme Court also opted for a broad interpretation of the term "inability to use". It stated that this requirement will be met whenever a policyholder is prevented from using only part of its premises or prevented from using the premises for only part of its business activity.

In short, in its conclusions and in the light of the findings at first instance, the UK Supreme Court broadened the range of government measures that may justify the activation of this extension of cover under existing insurance policies.

Hybrid clauses

These clauses combine the main elements of the disease extension clauses and the prevention of access extension clauses. Therefore, the Supreme Court's conclusions also apply to them.

Publication of the judgment of the Supreme Court thus marks the definitive resolution of the case and of the guidelines that insurers must follow from now on. The insurers covered by the decision – and it is hoped the FCA and other insurers too – will have to (i) inform policyholders of the outcome of this decision and of the changes to their claims, (ii) immediately decide whether there are any pending claims that are potentially affected claims, and (iii) make a reassessment of previously rejected claims, with notification of this to the policyholders in question.

Final notes

This note addresses a court judgment issued by a UK court based on contractual clauses of 21 standard commercial policies and we are not familiar with the content of these clauses. Therefore, we cannot draw any conclusions from the outcome of this court case to determine the existence of grounds and factual circumstances to trigger similar coverage in Portugal. Experience has shown that the clauses of insurance policies existing in the Portuguese market make a very strong cause/effect association between the insured material damage and the coverage of loss of profits / business interruption, which is a factor that conditions the activation of these coverages as a result of a pandemic.

As a result, this type of issue should be analysed on a case-by-case basis, according to the insurance policy that was taken out and the associated factual circumstances. ■