

Business Interruption Insurance in the Time of COVID-19: Some Recent Judicial Consideration

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21 September 2020

The COVID-19 pandemic has caused a significant slowdown in many sectors of the economy, forcing businesses to either seek creditor protection or close their doors forever. For those businesses with commercial general liability insurance policies, claims have been made for business interruption losses. However, whether such claims will be covered is unknown in the absence of clear precedent. While commentators debate whether the pandemic is a covered risk under commercial general liability policies in the abstract, the uncertainty is beginning to prompt insureds to commence litigation. America, for example, has already seen a slew of litigation claims come from the current unresolved insurance disputes in every industry from local restaurants to academic institutions, with the expectation that these cases will ultimately answer the theoretical debate.

Recent Ontario Business Loss Coverage Litigation

In the Canadian context, important to the current discussions are two recent Ontario decisions, *MDS Inc. v. Factory Mutual Insurance Company* (discussed in a [previous blog](#)) and *Le Treport Wedding & Convention Centre Ltd. v. Co-operators General Insurance Company*, 2020 ONCA 487 (CanLII).

In the former case, the Ontario Superior Court of Justice refused to apply what the Insurer purported to be a relevant exemption under an all-risks insurance policy, and ultimately granted coverage for loss of profits caused by the interruption of the supply of radioactive isotopes.

In the latter case, the Ontario Court of Appeal partially reversed a trial judge's decision to deny recovery for water damage caused to the insured's event hall that was caused because of a torrential downpour. The trial judge had denied general coverage for the flood damage to the event hall relying on a "Surface Water" exclusion provision contained in the insurance policy and denied coverage for business loss. With respect to general coverage, the trial judge had concluded that the damage to the event hall was simply not caused by a "flood" as set out under a Flood Endorsement. The appellate court explained that the trial judge had failed to read the exclusion together with the endorsement and that reliance on the Surface Water exclusion effectively nullified coverage purchased by the insured. As interpreted by the trial judge, the Flood Endorsement would never be engaged if a flood via surface water was excluded because in most cases businesses are not located close to a body of water. Accordingly, the appellate court gave the surface water exclusion no weight and held that the insured was entitled to coverage for the damage caused by the torrential downpour.

With respect to the denial of coverage for business loss, the Court of Appeal reluctantly refused to overturn the trial judge's finding that no business losses had occurred based on the coverage wording term in the policy which provided that the insurer agreed to indemnify the insured against loss "directly resulting from necessary interruption of business." While the facts showed that the insured continued to operate despite the flood damage and that there was no evidence of loss of profit or revenue, the appellate court did not necessarily agree with the trial judge's view that an insured needed to have shutdown its business completely in order to support a claim for business interruption loss. In *obiter*, Lauwers J.A. remarked "I would not want to be taken as necessarily agreeing with the trial judge that the expression ["necessary interruption of business"] requires a total cessation of business activity for a period of time for coverage to arise." Accordingly, it may be open for businesses in other cases to obtain business loss coverage where there has been a partial rather than complete interruption of business. This proposition may be a relevant consideration for a business loss insurance claim caused by the COVID-19 pandemic.

While these cases may potentially be good news for those who have suffered business interruption losses because of the COVID-19 pandemic, they can only provide general guidance to an assessment of whether a general commercial liability policy will provide coverage where an insured argues that COVID-19 or a government order made due to COVID-19 has triggered a business loss. These cases, of course, do not deal with a loss caused by COVID-19 and, as is usual in insurance law, each case will turn on its own facts and the wording of the policy coverage available.

English High Court Test Case

But the legal community has a potentially new and relevant precedent to apply with the release of a decision by the English High Court in *The Financial Authority v. Arch Insurance Ltd.*, [2020] EWHC 2448.

In this case, the Financial Conduct Authority (FCA), a regulatory body, representing the interests of potentially 370,000 firms with insurance, brought a test case against 8 insurance companies to determine whether 21 sample insurance provisions provided coverage for business interruption caused by the pandemic. The court thoroughly analyzed each of the test case's provisions, and concluded that under most of the provisions, the business losses caused by the COVID-19 pandemic were covered claims under the language of each policy. The policies reviewed provided coverage for business interruption loss under either a "Disease" clause, a "Prevention of Access" clause or a "hybrid clause".

As a potential precedent for use in the Canadian context, the case has two important takeaways. The first relates to issues of causation. The second relates to the general approaches that apply to the categories of insurance provisions.

With respect to causation, in our view, the court makes a significant ruling that favours, in most instances, insureds. While the court held that the issues of causation resolved themselves as part of the interpretation process for each clause, it heavily criticized the insurers' reliance on *Orient Express Hotels Ltd. v. Assicurazioni Generali Spa*, [2010] EWHC 1186 (Comm). Based on this decision, the insurers contended, using a broad counterfactual causation analysis, to suggest that a business interruption loss to a particular business needed to be assessed in relation to the fact that an entire area or region was negatively impacted by the COVID-19 pandemic.

Orient Express dealt with a claim for business interruption loss to an insured's New Orleans hotel as a result of Hurricanes Katrina and Rita. In that case, the court accepted that the claim for business interruption losses had to take into account the facts that the hurricanes created widespread destruction such that if the hotel had suffered no physical damage, it would not have suffered a loss due to the fact that no one would have stayed there.

This argument was rejected.

The court found that there were several problems with the reasoning in *Orient Express*, including a fundamental misidentification of the perils insured. Identifying an insured peril is important to the cause of damage as it is the proximate cause of a claimed loss. In insurance law, the court noted that the "but for" causation test cannot be the only focus of the court when determining coverage.

While the court was highly critical of the *Orient Express* case and its analysis, it nevertheless found that it was unnecessary to conclude that the case was wrongly decided. Rather, the court simply stated that the case was distinguishable from the situation involving the COVID-19 pandemic.

The importance of the rejection of the insurers' causation argument, in our view, is that if accepted for the purposes of the COVID-19 pandemic, insurers would be able to limit coverage for most business losses because they would be able to point to external factors that cause a business loss. For example, insurers would be able to contend that forced government closures that result in business losses would not be covered because other orders, such as stay at home orders, would have meant that the businesses would not have had any customers anyway.

Arguably this would not be a reasonable expectation of an insured and would render coverage under a policy useless.

Accordingly, the court's findings in connection with causation are favourable to insureds.

However, whether or not coverage will be available will still depend on the wording found in each insurance policy regardless of how it is categorized.

The category of clauses

With respect to "Disease clauses" (which in general are ones that provide coverage that is either caused or follows or arises from a "notifiable" disease within the vicinity of an insured's premises), the court explained that even though these kinds of policies share similar provisions concerning coverage, it was inappropriate to render a decision in the abstract and that each provision required a separate analysis. Nevertheless, the court noted that this kind of coverage should receive a



broad interpretation, and that, in general, a disease clause would be triggered when either a disease was diagnosable in a relevant policy area, or where it was diagnosable in a very large number of places. In interpreting one such provision, the court deemed all of England and Wales as the relevant policy area. Accordingly, for Canadian insureds that have policies which provide coverage based on “disease”, the English decision may now provide support for coverage.

With respect to Prevention of Access clauses (which are clauses designed to provide coverage in circumstances where a local authority or government prevents access to an insured premises), the court explained that each provision required individual assessment because in some cases the scope of coverage was narrow, while in other cases the scope of coverage was broad. However, overall, the court accepted that these clauses should receive a narrow reading in the context of pandemic events. Accordingly, for Canadian insurers, policies that grant an insured coverage for business interruption losses as a result of government orders, coverage may be denied.

With respect to hybrid clauses (which are those that contain a mix of wording found in a Disease clause and a Prevention of Access clause and which are triggered where restrictions imposed are connected to a notifiable disease), the court explained that these clauses require a case-by-case assessment. Despite this need, however, in general the court found that under a hybrid clause coverage would be provided where a loss arose from business interruption caused by an inability to carry on business because of government restrictions following the occurrence of disease. Accordingly, in circumstances where an insurance policy has a hybrid clause, an insured will have a better chance of being able to make a successful claim.

What lies ahead

Even though this English case may shift the debate in favour of insureds, insureds must proceed with caution. The 162-page English decision is extremely complex and it is currently unclear whether the insurers, who were largely unsuccessful, will seek to appeal the decision.

Accordingly, the decision still has an uncertain value and insureds, whose claims for business interruption loss because of COVID-19 have been denied, will likely be required to commence actions and fill the already overwhelmed justice system with a plethora of business insurance loss claims.

If you require any litigation assistance, our **Dispute Resolution Group** lawyers are available to assist you. Please contact **James Cook** at 416.865.6628.

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Authors



James R.G. Cook

Partner

416.865.6628
jcook@grllp.com



Stephen A. Thiele

Partner

416.865.6651
sthiele@grllp.com



Eli Bordman

Associate

416.865.6690
ebordman@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com