

Update following Supreme Court judgment on COVID-19 Business Interruption cover – The FCA Test Case

You may have heard on the National News that the FCA test case concerning the response of non-damage business interruption insurance policies and their response to COVID-19-related losses concluded Friday following the judgment provided by the Supreme Court. It was unfortunate in that the reporting was perhaps misleading over the potential for customers to be able to claim. The following is a brief reminder of the circumstances leading up to the case and its impact on customers.

This test case was brought by the FCA and several interested parties and presented a sample of 21 types of policies issued by 8 insurers. The purpose was to provide a degree of legal clarity as to whether the wording of certain policies, unintentionally provided some cover to customers regarding COVID-19 losses.

Business interruption policies across the industry were never intended to cover pandemic risks, particularly of the scale that we have seen during the COVID-19 pandemic, for this type of cover to be available and affordable, it would have required significant subsidy from the government. Nevertheless, the FCA test case has demonstrated that a small number of policies can be interpreted to provide cover for Business interruption losses which do arise.

It is important to make clear that the Supreme Court decision does not compel all insurers to provide cover for small businesses losses during the pandemic. The decision of the Supreme Court, clarifies that certain policies within the test sample, and policies that closely match the sample wordings, should not cover COVID-19 losses, but also makes clear that certain policies will not respond.

Policy wordings/extensions that remain unaffected by the Supreme Court decision

You should consider your policy wording carefully and seek advice from Ryan's if you need to. If your policy's business interruption cover falls into any of the following three categories then it will unfortunately not be affected by the Supreme Court decision.

Prevention/Denial of access requiring damage nearby or the property.

The test case specifically focused on business interruption policies that provide cover without physical damage. Most business interruption policies require some damage causing event such as a flood before your losses will be met, but often there are business interruption extensions allowing for non-damage events such as food poisoning, vermin or disease outbreak. If your policy requires some physical damage event, then it will not cover COVID-19 losses. The FCA test case was never intended to challenge this position.

Notifiable disease/infectious disease occurring on the premises.

The FCA made clear at the start of its legal challenge that policies with non-damage business interruption wordings that actually require physical evidence of the virus being on the business premises, as opposed to being within the local vicinity are outside the scope of the test case, as such insurers will still reject claims where this wording is within the policy.

Specified illness/disease lists.

If your policy refers to disease or illness, even notifiable disease but then goes on to specifically list or define what those diseases are, the policy will only respond to those diseases. COVID-19 will invariably not appear on those lists owing to its novel nature. The FCA test case was not intended to challenge policies of this nature so the Supreme Court decision will not affect customers with these types of policies.

Policies affected by the Supreme Court's judgment

During the course of the FCA test case Ryan's has considered customer's policies which may respond to COVID-19 business interruption losses. Many of you have already contacted us and received advice from us concerning the possible implications of the test case to your policy. We will shortly be writing to all customers who have enquired, and any customers we have identified after review of the judgment to advise on the next steps.

Typically the policies affected by the test case have referred to disease or emergency within a certain vicinity or radius of your business premises, refer to public or local authority restriction and mention disease or notifiable disease without defining the term.

Next Steps

The judgment will shortly be issued as a series of declarations for insurers. The FCA will also be providing questions and answers for customers and guidance including a list of policy types that potentially respond to the pandemic and assistance in how to now present your claim.

Customers should continue to refer to the FCA website for updates on COVID-19 Business interruption insurance; <https://www.fca.org.uk/firms/business-interruption-insurance>

Insurers with affected policies have a period of 5 working days to review the judgment and their affected claims and write to policyholders either directly or via Ryan's.

For now we must continue to ask for your patience while the judgment is considered by all concerned parties. All eligible customers will be contacted concerning a Business interruption claim, but you must have the appropriate cover on your policy and be able to demonstrate a loss during the lockdown period.

Claiming for lockdowns 2 & 3

As we mentioned, business interruption policies were not intended to cover losses of the nature we have seen in 2020, as such most insurers during your policy renewal will have added exclusions or amended their policies to remove any accidental cover previously provided for business interruption.

I do hope that this update will help clarify the situation for you, and confirm that you will hear from either us or your insurers should you have an eligible claim.