Touchstone Underwriting

22 January 2021

Tour Operators and Travel Agents Office Policies – Business Interruption Claim Declinature Prior to UK Supreme Court decision, FCA Test Case

Dear Policyholder,

XL Catlin Insurance Company (UK) Limited ("AXA XL") have now provided guidance as to whether the 15 January 2021 judgment[1] of the UK Supreme Court in the FCA Test Case (the "UKSC Decision") affects the coverage position under the Touchstone Underwriting Limited Travel Office Combined Policy (the "Policy") for Covid-19 related business interruption, where your claim has been declined by AXA XL prior to the UKSC Decision.

The answer is that the UKSC Decision does not affect the coverage position in respect of claims which have been correctly declined.

This is the case for two main reasons:

1. the claim as presented does not meet the 'disease [i.e. Covid-19] manifested at the insured premises' requirement of the Insuring Clause of the Policy; and
2. notwithstanding 1, above, in event the FCA Test case process expressly excluded from its scope 'disease on premises' clauses.

The Infectious Diseases Extension of the Policy

Section 2 of the Policy, "*Business Interruption*", contains an extension at 2 A) which provides cover for loss following:

> *"closure or restrictions placed on the Premises on the advice or with the approval of the Medical Officer of Health of the Public Authority as a result of a notifiable human disease manifesting itself at the Premises"*

In order for the Policy to respond the notifiable human disease must be "manifested" by a person at the insured premises.

The word 'manifested' in this context requires that the person concerned must either have displayed symptoms of the disease whilst they were at the insured premises or subsequently diagnosed as having had the disease (for example by means of a test) at the time they were at the premises.

AXA XL has declined your claim under the Policy because that fundamental requirement of the Insuring Clause was not satisfied.

[1] [2021] UKSC 1

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The Scope of the FCA Test Case Did Not Address 'Disease On Premises' Coverage

The FCA when establishing the scope of the Test Case process which culminated in the UKSC Decision expressly stated that the Test Case did not seek to resolve coverage issues relating to clauses which require the disease to be present on the insured premises.[2]

Since the FCA Test Case only addressed coverage under disease clauses which provided coverage for 'disease within a radius of the premises', and not 'disease on premises', the UKSC Decision is not determinative of coverage under the Policy.

We trust that the above clarification assists.

Yours sincerely
for and on behalf of AXA XL

[2] See para. 49. Finalised Guidance Business Interruption Insurance Test Case: Finalised Guidance for Firms, June 2020 https://www.fca.org.uk/publication/finalised-guidance/finalised-guidance-bi-test-case.pdf

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