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Insurance

Partial shutdown of business does not preclude business interruption claim

By **James Cook and Stephen A. Thiele**

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(October 2, 2020, 10:49 AM EDT) -- As we head into the seventh month of the artificial economic lockdown ordered by Canadian governments at all levels and brace ourselves for the second wave of the COVID-19 pandemic, businesses in multiple sectors continue to seek compensation from their insurers for business interruption losses.

Recently, a vacation rental business in Canmore, Alta., commenced a $180-million class action against Lloyd's Underwriters for business interruption losses, and with the recent decision out of England in *The Financial Conduct Authority v Arch Insurance (UK) Ltd and others (Hospitality Insurance Group Action and another intervening)* [2020] EWHC 2448 (Comm), it is likely that the Canmore class action will not be the only claim to be commenced as businesses continue to struggle to survive.

While most business interruption loss cases turn on whether a loss of business is caused by physical damage, another important factor in assessing business loss, particularly as it relates to potential claims arising out the COVID-19 pandemic, is whether the business seeking recovery has been fully shut down or was able to continue to partially operate.

For example, while restaurants were forced to cease all dine-in services for a number of months because of COVID-19, some restaurants did not fully close their doors, offering takeout services to customers and eventually servicing customers on outdoor patios. Similarly, many retailers were able to pivot their operations and to service customers via online sales.

Accordingly, these businesses were not fully shut down and whether they would be able to seek recovery under their respective business loss insurance policies could turn on the single word "interference" that can be found in business interruption loss provisions.

In the recent Ontario Court of Appeal decision in *Le Treport Wedding & Convention Centre Ltd. v. Co-operators General Insurance Company* 2020 ONCA 487, Justice Peter D. Lauwers reminds us of the important difference between the word "interruption" and "interference" in an insurance policy.

Le Treport Wedding involved a claim by a banquet hall against its insurer for flood damage caused by a torrential downpour that occurred in the Greater Toronto Area in the summer of 2013. In less than two hours, 90 millimetres of rain fell within the region, causing creeks and storm drains to overflow. During the storm, water entered the banquet hall through the front door, the ceiling and through drains.

The hall was covered under an "all-risks" policy that included additional coverage for flooding and sewer backups. While the insurer provided coverage up to the limits under the sewer backup endorsement that was part of the all-risks policy purchased by the banquet hall, the insurer refused to provide coverage under the policy's flood endorsement and for business interruption loss. The trial

judge agreed with the insurer that the hall was disentitled to flood damage, which was not restricted by a monetary limit, and to business interruption losses.

With respect to business interruption losses, the facts disclosed that the hall did not shut down its business while undergoing repairs caused by the water that had entered its premises. The owner of the hall feared that if he shut down the business, the hall would suffer a loss of reputation and that scheduled events would need to be cancelled.

This decision negatively impacted the banquet hall's claim because, at trial, the banquet hall was unable to demonstrate that it had suffered an actual loss of profits. There had been no decline in revenue in the year following the rainstorm.

The trial judge also commented that under a profit endorsement form, under which the business loss claim was made, the expression "necessary interruption of business" as used therein required a "total cessation of business activity" in order for coverage to be obtained.

The relevant portion of the profit endorsement form stated as follows: "The insurer agrees to indemnify the Insured against loss directly resulting from necessary interruption of business, caused by destruction or damage by the perils insured against [the] property at the 'Premises', up to the limit(s) of insurance stated in the 'Declarations' for this Form and subject to the provisions, limitations, exclusions, conditions and other terms of this Policy including this Form."

Justice Lauwers did not necessarily agree with the trial judge's finding on this point. He explained that there was a distinction in meaning between the word "interruption" and the phrase "interfered with" and that the absence of the phrase "interfered with" from the foregoing provision might not have precluded the banquet hall from damages for business interruption because another provision in the endorsement stated: "The Insured shall with due diligence do and concur in doing and permit to be done all things which may be reasonably practicable to minimize or check any interruption of *or interference* with the business or to avoid or diminish the loss." (Emphasis added.)

The use of the word "interference" potentially opened the door to recovery had the banquet hall been able to show a loss, even though it had remained open.

Accordingly, businesses that have suffered losses because of the COVID-19 pandemic must carefully review their policies to assess whether they are covered only in the case of interruption or if they are covered in the case of both interruption and interference. Likewise, insurers will be required to assess their policies and carefully consider whether they may be exposed to a business interruption claim.

With the march to the courts having begun, claims for business interruption loss due to COVID-19 will remain a hot topic in insurance law for some time.

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