Insurers lose bid to appeal COVID-19 business interruption test case

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Introduction

Back in January, we wrote about an important test case that considered whether insurers could deny liability for small business insurance claims amid the pandemic. Insurers argued that exclusion clauses in its policies excluded cover for business interruptions caused by COVID-19.

However, those policies failed to reference the correct legislation, so the exclusion clauses were not applicable as COVID-19 is not a 'Quarantinable Disease' under the *Quarantine Act 1908* (Cth) (**Quarantine Act**).

The Supreme Court of NSW held that insurers were still liable under the policies for business interruptions attributable to COVID-19. Click here for a full summary of that decision.

The insurers indicated that they would appeal the decision to the High Court of Australia. However, on 25 June 2021, the High Court dismissed the application to appeal the decision.

Consequences of this decision

The High Court's refusal to consider the appeal means that the NSW Supreme Court's decision sets the precedent in this area. An exclusion clause that just references the Quarantine Act does not exclude COVID-19. Accordingly, an insurer cannot rely on those exclusion clauses to deny liability for COVID-19 business interruption claims.

Despite the big win for policy holders, the dispute is far from over. Insurers have already lodged another test case in the Federal Court of Australia.

Insurers still seek to deny liability for COVID-19 related claims, but now rely on different arguments relating to the definitions of diseases, proximity of an outbreak to a business, and prevention of access to premises due to a government mandate. These phrases commonly appear in insurance policies and exclusion clauses, so the Federal Court's decision will have significant consequences.

What does this mean for you?

Insurers will be reluctant to accept business interruption claims until the Federal Court hands down its decision, as the outcome may give insurers grounds to continue refusing claims. However, this doesn't mean you have to wait around for the Federal Court to deliver its verdict

If your claim is refused, you should lodge a formal appeal with your insurer. Many insurers will have an internal dispute resolution mechanism. If you are not satisfied with the insurer's response, you can escalate the complaint to the Australian Financial Complaints Authority (**AFCA**).

AFCA will attempt to mediate the dispute between the insurer and policy holder. If mediation is unsuccessful, AFCA has the power to hear the dispute and make a binding determination. This determination is binding on the insurer, but it **is not** binding on the policy holder.

This provides policy holders a flexible and inexpensive option of responding to a refused claim. It also allows a policy holder to commence legal proceedings at a later stage if the outcome is unsatisfactory.

We will provide further updates on the Federal Court test case when a decision is handed down. In the meantime, if you would like advice on a dispute with your insurer, or an assessment of your insurance contract, please contact Chris Kintis on 02 8235 1251 or your usual ClarkeKann contact.