

Alert 10-081

ReedSmith

Insurance Recovery Alert

Where Will the Dust Settle?

Recriminations start as the flight ban is lifted

For nearly 200 years, the volcano under the Eyjafjallajökull glacier in Iceland was dormant. Business worldwide will no doubt agree that 200 years was not nearly long enough, and for some business sectors, the impact of the recent eruption is disastrous. The airline industry has seen the greatest turmoil since World War II, surpassing the impact caused by the terrorist events of 9/11. As a result of the eruption, the cost to the airlines, airports, tourist industries and other business sectors dependent upon the free movement of passengers and cargo has resulted in losses exceeding £100 million per day and in excess of £1 billion in total. However, as the flight ban has been lifted, the arguments as to who ultimately is responsible for the cost have started, with accusations being made against the role played by the Civil Aviation Authority, the airlines' response to and interpretation of the EU regulations, and the government contribution.

In circumstances where there is obvious uncertainty and open disagreement over who should be footing a very sizeable bill, the focus almost inevitably will be directed to the insurance protection purchased by businesses worldwide to cover events causing an interruption to normal business operations. If there is a silver lining to the ash-filled cloud, it is that insurance policies may provide coverage notwithstanding the lack of clarity in the current position.

Certain commentators, and a number of insurers, have suggested that this may be one disaster that they do not have to pay for. However, the situation is far from simple, and if the volcano has succeeded in clouding the air, it may have done the same for matters of coverage interpretation. An insurance policy is not an instrument that creates a vague promise. It is a legal contract and its precise language will be interpreted objectively to decide whether it covers the loss that has been suffered by the insured. While the insured has an initial obligation to show that the policy covers the peril that has arisen and the loss suffered, the insurer, if it wishes to argue for the application of a policy exclusion, has the burden. This has particular importance in the context of an "all risk" property policy.

With losses resulting from the volcanic eruption, it is easy to see issues arising on the precise cause of the loss, and the interpretation of relevant policy exclusions.

Business interruption insurances will have specific language identifying the triggering event following which losses may be recovered. Policies covering cancellations and other interruptions to services may contain exclusions for losses that are caused by an "Act of God." However, in this case, it is by no means clear whether a loss has been caused by an Act of God, as opposed to actions of third parties. The ban was the result of a series of judgment calls and a combination of factors. Similarly, ingress/egress coverage should be considered. It may also be relevant to consider the true scope and meaning of clauses identifying the impact of certain types of weather conditions.

One thing is clear—the insured must assess its own position under the various insurance protections that it had purchased prior to the volcano erupting and determine if potential coverage exists. The insured must make its own decision as to whether it believes policies respond to the losses suffered. All insureds should:

- Assess the scope and language of relevant insurances, looking in particular for the triggering event, the nature of the insured perils and the language of material exclusion clauses

Notify insurers promptly and, if necessary, on a precautionary basis to protect against the expiry of material time-limits and deadlines

- Recognize that unusual events are rarely anticipated precisely by policy language
- Realize that a response of "the policy was not intended to respond to such an event" is rarely the right answer, and the courts will rarely permit such an approach to policy interpretation

The loss will be covered if a precise and objective assessment of the policy terms and conditions leads to the conclusion that losses are protected. The fact that these occurrences are rare and unusual is no answer.

Reed Smith's 70+ insurance recovery lawyers worldwide act only for policyholders. They have extensive experience in assisting policyholders to maximize their property and business interruption claims, including in circumstances of large-scale disasters such as hurricanes, tornadoes, floods and fires.

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