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Business interruption due to COVID-19: first court decision against insurer

For the first time in Austria, a court has now confirmed the payment obligation of an insurer under a business interruption insurance policy (BII)

Since March 2020, the so-called epidemic clauses in business interruption insurances (BII) have come into the focus of many entrepreneurs whose business had to close down due to measures of public authorities or Parliament to combat the COVID-19 pandemic.

Coverage of the risk of business interruption due to epidemics must always be explicitly added to an insurance package.

The wording and content of these so-called epidemic clauses in insurance policies may vary depending on the insurer. Therefore, insurers use different arguments to defend against business interruption claims. For example that COVID-19 is not expressly mentioned in the policy, only official and complete business closures due to the Epidemic Act are insured etc. Obviously, unclear conditions in the insurance policy often need to be settled in courts.

First judgment in favour of the insured

In Austria, a first judgment has been handed down on 4 August 2020 in such a court case: The Feldkirch State Court has confirmed the claim of a hotel operator under a BII policy.

The hotel was initially forced to close for 11 days due to a regulation of the district authority based on the Epidemic Law (*Epidemiegesetz*). After that, a regulation of the state governor prohibited tourists from entering the hotel on the basis of the COVID-19 Measures Act (*COVID-19 Maßnahmengesetz*).

The business interruption insurance of the hotelier provided for insurance cover in case "*due to the Epidemics Act [...] the [...] establishment is closed by the competent authority to prevent the spread of epidemics.*"

The insurer paid compensation for the first 11 days, because the business was suspended by public authorities on the basis of the Epidemic Act in order to prevent the spread of an epidemic. However, the insurer refused to pay any further compensation, arguing that only measures under the Epidemics Act (but not under the COVID 19 Measures Act) and only a suspension of business (but not any entry bans) were covered under the BII policy.

Author:

Mag. Ingo Braun

✉ ingo.braun@benn-ibler.com
☎ +43 1 531 55 700

Benn-Ibler Rechtsanwälte GmbH
Tuchlauben 8, A-1010 Vienna

In the opinion of the court, however, this prohibition of entry was equal to a "de facto suspension of business". In addition, the court found that the regulation of the state governor served no other purpose than the regulation of the district authority, namely to prevent the further spread of COVID-19. This is also confirmed by the legal materials for the COVID-19 Measures Act.

Therefore, an on average reasonable insurance taker could assume that a subsequent change of law during a factually continuously suspended business due to regulations of public authorities, does not lead to a loss of insurance cover under the terms of the policy. The court held a change of the accepted risk only due to a change in the law to be unfair.

A similar situation in Germany

Not only in Austria, but also in Germany, insurers refuse payment under BII policies because the suspension of business due to COVID-19 are not explicitly mentioned in the policy's terms and conditions. According to newspaper reports, at the beginning of October also the Regional Court Munich awarded a restaurant owner a compensation under a BII policy and, thereby, also considered the insurance conditions to be not transparent.

Leading decision?

The first-instance decision of the Feldkirch State Court does indeed give hope to the entrepreneurs concerned. Different views may be taken due to different policy wordings and different affectedness of businesses by COVID-10 measures. A hotel operator may have been differently affected by COVID-19 measures than a restaurant owner or a shop keeper. Consequently, each case needs to be assessed individually. Also, we need to wait which view the Supreme Court has concerning the obligations of insurers under BII policies in case of COVID-19 measures.

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