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News Alert

Litigation & Arbitration Department

Insurance Area

LOSS OF PROFITS DUE TO THE STOPPAGE OF ACTIVITY BY COVID-19 IS NOT ALWAYS COVERED BY INSURANCE POLICIES.

The **Sentence handed down by the Girona Provincial Court on 03/02/2021, condemning an insurance company to pay its insured - a pizzeria - compensation for the stoppage of activity due to Covid-19**, has given rise to a number of headlines in the press asking whether it is opening the door to a wave of claims from all the businesses that have had to close temporarily due to the coronavirus pandemic.

The issue is not as simple as it appears, nor can the reasons for the Court's decision be simply transposed to all cases.

By means of the insurance contract, the company undertakes, in exchange for a premium, to compensate the insured, within the agreed limits, for the damage caused when the covered loss occurs. In the specific case of loss of earnings insurance, the insurer compensates the loss of economic yield that would have been obtained with an activity if the loss described in the contract had not occurred (Art.63 of the Insurance Contract Law - LCS-). Consequently, **in order for the stoppage of the activity to be indemnifiable, it must be the consequence of damage covered by the policy**. In other words, a prior damage whose risk has been insured is unavoidably required.

In the sentence issued by the Court of Girona, it is stated that the insurer objected that neither in the general conditions, nor in the particular conditions, nor in the informative leaflet, was it included that the expenses of paralysis derived from a governmental resolution in the event of a pandemic were covered. Therefore, **it would seem that it was the company itself who raised its defence from the point of view of the restriction of the contracted cover, which, in effect, placed the axis of the debate on the requirements that the limiting clauses must fulfil**, insofar as they reduce, condition or modify the insured party's right to compensation.

Examination of the policy by the Court confirms that, on the one hand, in the particular conditions, in the clause delimiting the risk covered, the event of loss of profits due to stoppage of activity was contemplated, and on the other hand, in the general conditions, as alleged by the insurer, **the event of stoppage of activity due to government resolution in the event of a pandemic was not contemplated, which, in the opinion of the Court, implies a clear limitation of the insured's rights**, and therefore, that the provisions of Art. 3 LCS for this type of clause should be applied, with the result that, in the case examined, the requirement of such a limitation being specifically accepted in writing was not met, meaning that it has no exclusionary effect.

However, if instead of having focused the controversy from the outset on the non-inclusion of the pandemic as an event generating the risk of paralysis of activity, the debate had focused on the delimitation of the object of the risk, perhaps the result would have been different.

As indicated in the sentence, in the general conditions of the policy, depending on the type of compensation agreed and up to the economic and time limit agreed in the particular conditions (200 euros/day up to a maximum of 30 days), the coverage for loss of profits covered economic losses caused by the temporary total or partial paralysis of the insured business activity when it was the direct consequence of a loss covered by the policy included in the cover for damages that had been expressly contracted. As stated at the beginning, Art. 63 LCS, when defining loss of profit insurance, requires the occurrence of a loss described in the contract. In fact, the sentence of the Court of Appeals also points this out: *Finally, insurance and coverage referring to loss of profits or loss of benefits such as the one analysed, are normally subject to the existence of prior material damage and in the present case, this point is not even questioned by the insurer.*

The loss of profits is only covered when it is the consequence of a previous damage covered by the policy, which inevitably entails examining the objective or material coverage of the policy to determine the risk assumed in the contract, its content, and the scope to which it extends, so that not any paralysis of the activity is compensable, but only that which is within the orbit of the risk covered (fire, floods, rain, wind, vandalism, theft, sea raids, etc.). It is not a question of coverage including all loss of profits produced by any cause or incident, but only that derived from incidents covered by the insurance contract (Sentence 213/2017 of 25 April of the 1st Section of the Provincial Court of Cáceres: *...Consequently, the loss that caused the collapse of the roof of the premises was not covered by the insurance policy taken out by the parties, so that there is no claim for loss of profits derived from a loss not covered in the contract, because article 63 of the LCS requires that the loss is described in the contract in order for there to be compensation for loss of profits derived from the same, as there was no loss of profits due to any of the incidents covered by the policy. ...*).

In short, the Sentence of the Provincial Court of Girona does not allow us to affirm that any new doctrine in favour of claims against insurers for the loss of benefits derived from the temporary closures of Covid-19 is generated, but rather that each case will require a detailed study of the policy signed.