JUNE 2021

CLAIMS FOCUS

COVID-19 – How Have Courts in Germany Been Responding to Business Closure Disputes?

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Over the past year, the COVID-19 pandemic has not only fundamentally changed public life, it has also placed a significant burden on the global insurance industry. In the spring of 2020, the potential insurance loss was already being cited as the largest in insurance history. Though it will likely be many years before a reliable assessment of the ultimate loss can be made, what's indisputable is that insurers and reinsurers have been closely following developments, particularly those that have global business models.[1]

In the German market, Business Closure Insurance has traditionally played a minor role, but has become a particular burden for insurers following the arrival of the pandemic. For a relatively low premium, companies could insure themselves against the damage caused by a closure ordered by public authorities.

When the pandemic hit, many policyholders whose businesses were forced to close for weeks on end, subsequently raised claims. However, insurers have argued that the business closure insurance they had purchased had not been calculated for a pandemic and that no cover could be derived from the agreed terms and conditions of their policy.

This has resulted in hundreds of lawsuits and Germany's courts are now dealing with the conflicting interests. The purpose of this article is to attempt to give a structured account of the different judgements that are being made, which in many cases have led to conflicting results.

The overview is based on the evaluation of approximately 50 judgments published so far (as of April 1, 2021), though we appreciate that the total number of lawsuits is significantly more. Some of these judgments have not been published or have been settled comparatively. We have chosen to include decisions which reflect the core arguments of the published decisions.

Contents

About This Newsletter

Aimed at property/casualty claims assessors, these articles address various aspects of modern claims assessment – facts and trends relating to the international claims assessment scene, case depictions and information on day-to-day claims assessment practice.

Legislative foundations

Legal framework for the closure of businesses based on the Infection Protection Act (Infektionsschutzgesetz – IfSG).

The purpose of the Act is to prevent contagious diseases in humans (Section 1 (1) IfSG). To this end, certain diseases and pathogens must be reported to the Robert Koch Institute, the national authority for the prevention of contagious diseases pursuant to Section 4 (1) IfSG. In §§ 6 and 7 IfSG, the law defines such reportable diseases and pathogens. By decree of January 30, 2020,[2] COVID (2019-nCoV) was declared a reportable disease and legally added to Section 6 IfSG.[3]

As Germany has a federal system, it is the sole responsibility of the individual federal states to take the necessary measures when such diseases occur. Under § 32 IfSG, they can issue legal decrees imposing prohibitions and restrictions for the control of infectious diseases and designate appropriate authorities for this purpose. These are usually the local regulatory authorities. In the case of COVID-19, the federal states took the first step and closed most hotels and restaurants as well as retail stores and personal services (such as hairdressers and tattoo, cosmetic and nail studios) by means of general administrative orders. In this respect, the local authorities are responsible for implementing the measures decreed by the respective states.

Insurance coverage according to the model terms and conditions of the German Insurance Association (GDV).

Many of the affected companies subsequently made claims under their business closure insurance. Most insurers had based their terms and conditions on the GDV model terms and conditions. Only a few insurers had modified them. The GDV's model terms and conditions stated that compensation would be paid, *"if the responsible authority closes the insured business to prevent the spread of reportable diseases or pathogens in humans on the basis of the law on the prevention and control of infectious diseases in humans (Infektionsschutzgesetz – IfSG) in the event of the occurrence of reportable diseases or pathogens. Within the meaning of this clause, reportable diseases and pathogens are the following diseases and pathogens mentioned by name in the Infection Protection Act in §§ 6 and 7..."* (Followed by an enumerative list of diseases and pathogens also found in §§ 6 and 7 IfSG, which did not include 2019-nCoV/COVID-19).

There was no epidemic/pandemic exclusion in the model terms and conditions.

Judgements by the courts

Several issues have emerged in coverage litigation, many of which have been settled comparatively, as outlined below.

To avoid these points of conflict in the future, insurers published new model terms and conditions which include a general epidemic/pandemic exclusion effective commencing January 1, 2021.[4]

Business closure by administrative act

Is a closure based on a legal order (in the sense of a general administrative order pursuant to Section 35 Sentence 2 VwVfG) sufficient for coverage under the policy terms and conditions, or is a specific individual administrative order addressed to the business within the meaning of Section 35 Sentence 1 VwVfG required?

There is no explicit regulation on this in the terms and conditions. According to court rulings, it makes no difference in which legal form the closure order is issued, because *"in the general order and the subsequently issued orders, the closure is 'ordered' purely in fact"*.[5]

Clarification of this point can be found in the new model conditions.

Does the illness have to occur on the insured premise?

The existence of a so-called intrinsic hazard is sometimes considered as necessary for coverage.[6] Only three courts seem to have ruled on this so far. While the Munich District Court rejects this requirement,[7] the High Court Schleswig and the Stuttgart District Court considers it necessary for the illness to occur within the insured business in order to be covered, since the insurance conditions already expressly refer to the "insured business".[8]

In this respect, too, the new model terms and conditions contain an exclusion.[9]

2019-nCoV/COVID-19 as a covered disease/pathogen

Almost all rulings deal with the question of whether 2019-nCoV/COVID-19 is included in the insurance conditions of the respective business closure insurance. Decisions here have been very different, and not only with regard to the outcome.

In cases where clauses were phrased much more precisely with regard to the listed diseases and pathogens than, for example, the GDV's model terms and conditions, courts have consistently rejected coverage.[10] For example, by explicitly mentioning that diseases/pathogens other than those listed are not insured, or by clearly expressing through the addition of the word "only" that: *"notifiable diseases and pathogens are only the diseases and pathogens mentioned by name in the following.."*, coverage was already semantically limited compared to the GDV model terms and conditions.[11]

Nevertheless, case law is not always consistent in its interpretation of terms and conditions and even chambers of the same court have reached different conclusions.

While in some cases the wording of the terms and conditions is interpreted to mean that it is obvious to the average policyholder that the list of diseases and pathogens is exhaustive,[12] other courts have argued that the terms and conditions of insurance are far too complex for a legally untrained policyholder to recognize that 2019-nCoV/COVID-19 is excluded from the large number of diseases and pathogens listed.[13] In addition, both the general reference to the IfSG and the naming of §§ 6 and 7 IfSG, which in § 6 para. 1 no. 5 and § 7 para. 2, sentence 1 IfSG contain catch-all facts for diseases/pathogens not listed, speak to the fact that the list is not static, but dynamic.

In this context, it is also interesting to note a ruling that rejected coverage because COVID-19 or SarsCoV2 was not included in the IfSG as a pathogen until May 23, 2020,[14] but the claimed loss period was before that date.[15]

The GDV's new model terms and conditions provide for (for both indemnity and aggregate insurance) models with dynamic references with and without an opening clause, as well as terms and conditions in which the list of named diseases and pathogens is explicitly exhaustive.

Partial closure

Another aspect that has come up in many cases, but only to have been decided on once so far, is the question of whether the partial closure of a business also leads to an insured event, insofar as this is not expressly deemed to be covered. In this regard, it is argued that the very term "business closure insurance" suggests that it is not a business restriction insurance, a partial closure insurance, or similar.[16] Ultimately, there was also no need to decide whether a de facto closure – i.e., the continuation of a business to a completely insignificant extent – is in principle suitable to justify a claim for benefits, since the plaintiff was able to continue business to a considerable extent.[17]

The Bavarian Solution

In the course of the disputes over coverage of the fallout from the closure orders issued by German states as a result of the pandemic, the Bavarian state government, the Bavarian Hotel and Restaurant Association (DEHOGA), the Bavarian Business Association (vbw), and various insurers grouped to attempt to find a solution that would satisfy all interests. It was decided that the insurers would agree to offer their customers from the hotel and restaurant industry *"...voluntarily and without acknowledging any legal obligation, a payment of 10-15 percent of the respective agreed daily compensation for the duration of the agreed liability period."*

Working on the assumption that government aid measures such as benefits for those placed on *"Kurzarbeit"* (i.e., reduced working hours and pay) and other emergency aid, as well as the expenses saved, would reduce a company's economic loss by around 70% on average, the insurers offered policyholders a voluntary contribution amounting to half of the remaining loss.

The participating insurers explicitly referred to the "Bavarian Solution" in their offers to policyholders. The non-participating insurers – for the most part – offered policyholders a settlement and based the amount on the percentage specified in the Bavarian Solution (without specifically referencing it by name).

There is currently a debate as to whether these settlement offers were effective or whether they stand up to legal review. To date, only one ruling has addressed this issue.[18] It has examined the issues that could lead to the invalidity of the settlement agreement in detail and has denied the existence of such issues. It saw neither a starting point for fraudulent deception under Section 123 of the German Civil Code ("arglistige Täuschung", § 123 BGB)[19], an error in explanation under Section 119 of the German Civil Code ("Erklärungsirrtum", § 119 BGB)[20], nor other reasons for invalidity of the settlement under Section 779 of the

German Civil Code ("Irrtum über die Vergleichsgrundlage", § 779 BGB)[21]. Meanwhile, others argue that insurers have acted in "bad faith".[22]

Generally, courts have been reluctant to declare settlement agreements invalid: Even settlement declarations in the context of settling the most serious personal injury cases have almost always withstood judicial review since the judiciary in Germany is also committed to protecting private autonomy – the right to shape one's private legal relationships according to one's own decision is part of the general principle of human self-determination and is protected by the German Constitution (Articles 1 and 2).[23]

According to the principle of private autonomy applicable in civil law, the contracting parties are generally free to determine both the service and the compensation; in the absence of statutory requirements, a standard of review is also regularly lacking in this respect.[24] These principles also apply to settlement agreements.[25] Only sub-agreements that have indirect effects on price and performance, but do not determine whether and to what extent the services are to be rendered, are subject to a content review.[26] For this reason, settlement agreements have so far only been declared invalid in the event of very serious violations of applicable protective laws.

We will continue to monitor further decisions in Germany and in other markets around the world.

About the Author

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Endnotes

1 Impact of the COVID-19 pandemic on the insurance sector (as of March 1, 2021), https://www.jura.uni-muenster.de/de/fakultaet/fakultaetsnahe-einrichtungen/forschungsstelle-fuer-versicherungswesen/covid-19/auswirkungen-covid-19-pdf-stand-2021-03-01/

2 https://www.bundesanzeiger.de/pub/de/amtliche-veroeffentlichung?1

3 In force since 23 May 2020: now § 6 para 1 no. 1 t); Law of 19 May 2020 BGBl. I p. 1018 (No. 23), Second Act for the Protection of the Population in the Event of an Epidemic Situation of National Significance (2nd COVIfSGAnpG).

4 https://www.gdv.de/de/betriebsschliessungsversicherung-65006

5 District Court I of Munich, 22 October 2020 – 12 O 5868/20 and District Court Stuttgart, 17 November 2020 – 41 O 35/20 KfH, VersR 2021, 175 et seq. Although this legal issue is raised by insurers in many cases, it is not usually decided by the courts, as the courts consider other aspects to be decisive for coverage.

6 Günther/Piontek, Die Auswirkungen der "Corona-Krise" auf das Versicherungsrecht – Eine erste Bestandsaufnahme, r+s 2020,242, 244 f.

7 District Court I of Munich, 22 October 2020 – 12 O 5868/20.

8 High Court Schleswig, 10 May 2021 – 16 U 25/21; District Court Stuttgart, 17 November 2020 – 41 O 35/20 KfH VersR 221, 175, 177.

9 A2-6 in all model terms and conditions: "Insurance coverage does not extend to when official measures have been ordered though neither a disease nor pathogen has occurred within the insured company itself."

10 For express clarification: District Court of Bielefeld, 5 October 2020; regarding the addition of the word "only": High Court Hamm, 15 July 2020 – 20 W 21/20, District Court Bochum, 15 July 2020 – 4 O 215/20, District Court Essen, 16 June 2020 – 18 O 150/20.

11 In some wordings this is highlighted in bold.

12 District Court Oldenburg, 18 November 2020 – 13 O 1272/20, District Court Aurich, 2 December 2020 – 3 O 487/20, District Court Göttingen, 13 January 2021 – 5 O 111/20, District Court Essen, 21 October 2020 – 18 O 167/20, District Court Bochum, five verdicts from 4 November 2020 – 13 O 40, 65, 66, 67, 68/20, District Court Cologne, 2 December 2020 – 20 O 139/20 and 17 December 2020 – 24 O 277/20, District Court Mannheim, 29 April 2020 – 11 O 66/20, District Court Ravensburg, 12 October 2020 – 6 O 190/20, District Court Stuttgart, 29 October 2020 – 35 O 32/20, District Court Heidelberg, 8 December 2020 – 2 O 156/20, District Court Ellwangen, 17 September 2020 – 3 O 187/20, District Court Bayreuth, 15 October 2020 – 22 O 207/20, District Court II of Munich, 12 March 2021 – 10 O 2676/20, District Court Kempten, 8 December 2020 – 31 O 714/20, District Court Regensburg, 11 December 2020 – 3 O 1277/20.

13 How to define the "average policyholder" as defined by the Supreme Court is questioned by a recent expert opinion. (Prof. Dr. Walter Seitz, "Gedanken zur Auslegung der AVB Betriebsschließungsversicherungen", May 2021) The author is of the opinion that evidence must be taken about this "average policyholder" and his understanding of the terms and conditions due to evidentiary reasons (by expert opinion or/and hearing of the parties).

14 See endnote 2.
15 District Court Schweinfurt, 8 February 2021 – 23 O 538/20.
16 District Court I of Munich, 17 September 2020 – 12 O 7208/20, note 41.
17 Ibid, note 44.
18 District Court Flensburg, 17 December 2020 – 4 O 143/20.
19 Deception is given if the assertion of untrue facts or the concealment of facts that need to be revealed causes the policyholder to be mistaken. In its letter to the policyholder, the insurer clearly expressed that its assessment of the legal situation was only its own assessment. Therefore, the policyholder could not understand this to be a representation of a generally valid description of the legal situation.
20 A error in explanation can be defined as an error about the meaning and scope of the declaration. The starting point and legal consequences of the settlement are correctly described in the settlement letter, so that the plaintiff could not have developed a different idea about this on a reasonable reading of the settlement text. Rather, the insured was aware that he was making a legally significant declaration when he signed the settlement.
21 A settlement is invalid if the facts on which the settlement is based, which are deemed to be established according to the content of the contract, do not correspond to reality. In fact, neither the insurer nor the policyholder assumed a uniform legal assessment of the insurance coverage under the business closure insurance. Nor was there any superior factual or legal knowledge on the part of the insurer, since there had been no situation in the past comparable to the occurrence of the Corona virus with the necessity of a nationwide business closure to reduce personal contacts. Therefore, it must have been clear to the policyholder that the legal assessment of coverage under the business closure insurance was still completely open at that time.
22 With reference to BGH, 15 February 2017 – IV ZR 280/15.
23 Supreme Court, 29 January 2019 KZR 4/17, note 108 f. with further evidence.
24 Constant case law, cf. only BGH v. 5.10.2017: III ZR 56/17, NJW 2018, 534, note 15 with further references.
25 High Court Karlsruhe, WM 2007, 590, 592; Palandt/Grüneberg, BGB, 78. Aufl., § 307 note 46.
26 Supreme Court, 29 January 2019 KZR 4 /17, note 109 with further references.

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