NEWSLETTER
Second Edition |December 2020|

Welcome to the second edition of our Newsletter, where we will look into "Corona virus Crisis and Insurance Claims (Potential Legal Disputes And Possible Legal Defenses)"

> ***"The issue of determining the defenses that insurance companies can rely on in order to avoid being held liable for paying compensation to the insured and narrowing the scope of insurance coverage as much as possible depends mainly on the content of insurance policies and the terms utilized in them."***

It is no secret that the world has been taken over by a pandemic (Corona virus–COVID-19), a contagious, fast spreading disease, the impact of which is not seen merely on health, but it has also affected the economy and has overwhelmed it. Institutions and facilities in the trade and industry in particular have witnessed various facets of financial losses since the start of the pandemic. Considering the decrease in their profits and the interruption of their businesses they have resorted to requesting from insurance companies to pay them compensation – based on what insurance contracts contain in the way of provisions that allow business owners to make such requests – and as a result of this, the claims raised against insurance companies worldwide are in a constant increase to this day.

These claims have stirred up a jurisprudential, legal and judicial debate on the extent to which insurance policies cover losses that arise as a result of the spread of the Corona virus and/or the restrictions imposed by the government. Since this debate has not been settled yet and since court rulings have been issued in favor of both parties[1], we see it appropriate through this legal opinion to address the most important defenses that insurance companies can resort to in Jordan to refute claims from the insured for business interruption.

This brief is comprised of two sections; the first section addresses the most important grounds that the insured may rely on in their claims to insurance companies for compensation, whereas the second section addresses the most important defenses that insurance companies can raise in order to refute these claims.

Image Source: Pixabay

COVID-19: a global infectious disease

[1] Initially, the courts in other countries were disposed towards supporting the position of the insurance companies, but several judicial rulings have appeared recently that ruled for compensation due to their conviction of the arguments presented by the insured.

Section One: The Grounds On Which The Insured Can Rely On To Claim Compensation

The insured may establish their claims and demands for compensation for business interruption and/or loss of profits as a result of the spread of the Coronavirus and the restrictions imposed by the government to deal with it based on property insurance policies or based on all risks insurance policies that include an extension or a clause on loss of profits for a policy that provides comprehensive insurance coverage. In rare cases, there may be insurance policies for interruption of business/loss of profits in particular.

We have noted that the insurance coverage for business interruption and/or loss of profits takes either one or both of the following two forms:

- The traditional and usual form, which provides coverage if material damage is caused to property due to an insured risk.

- The unusual form – and rarely does this form appear in insurance policies – which provides for coverage of loss resulting from the occurrence of a specific situation or situations without requiring realization of damage to the property. For example, the policy may provide for compensation in the event of an infectious disease or in the event that the public authority imposes restrictions on facilities.

It should be noted that if the named perils insurance policy does not include the risk coverage of diseases and/or restrictions by the authorities or if those are excluded in the all risks insurance policy, then the insurance company can simply rely on the policy not including these risks without the need to address any other defenses.

Section Two: The Defenses That Can Be Raised In Refuting The Foundations And Arguments Of The Insured

The issue of determining the defenses that insurance companies can raise in order to avoid being held liable for paying compensation to the insured and narrowing the scope of insurance coverage as much as possible depends mainly on the content of insurance policies and the terms utilized in them. The recently issued Test case in Britain highlighted the importance of identifying each term used and treating it in context with the entire insurance policy, not in isolation from it[2]. This is the approach taken by the Jordanian judiciary, as the

[2] [2020] EWHC 2448 (Comm), Case No: FL-2020-000018, https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-judgment.pdf

judgment of the Jordanian Court of Cassation No. 1302/2020, in its ordinary assembly, on 30th of June 2020, states that:

> ***"Since the insurance policy mentioned above is a binding contract for the two parties, including the conditions and exclusions it contained, and the appealer/plaintiff adheres to this document and the contractual liability resulting from that, the plaintiff cannot disavow the exemptions contained in the contract, as this contract is considered complete. It is not permissible to adhere to some of the terms and leave out the other terms."***

The following is an overview of the most important defenses that we reached through our experience, our knowledge of insurance policies and our access to judicial rulings issued in other countries:

The First Argument: The concept of material damage as a condition for entitlement to compensation

This argument is the strongest and hardly any court ruling related to this type of insurance does not mention it. It has formed the trump card for many insurance companies in other countries, and therefore we see the possibility and even the necessity for insurance companies in Jordan to rely on this basis in the event that lawsuits are filed against them. Damage to the insured property is a condition that must be met to provide insurance coverage for loss of profits/business interruption, in addition to being one of the basic principles on which the insurance policy has been based on since its inception.

The Jordanian Court of Cassation affirmed in its judgments the necessity of implementing what the parties agreed upon and what they have stipulated. The Jordanian Court of Cassation Decision No. 2107/2018, in its ordinary assembly, dated 22ed of April 2018, stated the following:

> ***"The contract is the "Sharia" of the contractors and the specific law that applies to the contractual relationship between them. The basis of the contract is the consent of the contracting parties and what they have bound themselves to via contracting pursuant to Article (213) of the Civil Law."***

What is meant by material damage is damage that affects an embodiment or structure of the property and alters it. If the cause of this material damage was not

one of the risks that was insured against under the insurance policy or if it was excluded therein, then there is no basis for claiming compensation. That is, for the claim to be based on a sound basis, the business interruption must be a result of material damage to the property and the said damage must be the result of a risk covered by the insurance policy.

Based on this, the Corona virus does not fulfill this condition as it does not cause material damage to property[3]. The Corona virus, according to what one of the US courts has explained, does not physically alter the appearance, shape, color, structure or any other physical dimension of the property.[4]

The insured may try to present several arguments to prove the availability of this condition – most of which have been unsuccessful and the remainder succeeded in convincing the court[5] – they may claim that business interruption or low sales was due to some or all of their personnel being infected with the Corona virus. This can be responded to by stating that this insurance came to respond to losses resulting from damage to property and not from damage to humans. The insured may claim that the presence of the virus on the surfaces of the property or the inability to use it is considered a material harm. Here, insurance companies can rely on the absence of any material change to the property and that evidence must be provided that the virus is present on it[6].

What has been said regarding the condition of damage in relation to the Corona virus also applies to government procedures.[7] Were it not for this condition, insurance companies would likely have been obligated to pay unreasonable compensation and for a large number of insured. Consequently, they can raise this argument with regard to policies that take the traditional approach of removing everything that

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[3] The United States District Court for the Western District of Texas, Diesel Barbershop LLC v. State Farm Lloyds, Case No. 5:20-CV-461-DAE

[4] The United States District Court for the Northern District of Illinois, Sandy Point Dental, PC v. The Cincinnati Insurance Company, Case No.1- 20-cv-02160

[5] The United States District Court for the Western District of Missouri, Studio 417, Inc. v. Cincinnati Insurance Co., Case No. 20-cv-30127-SRB. See also, Superior Court of New Jersey, Optical Services USA/JCI v. Franklin Mutual Insurance Co., No. BER-L-3681-20

[6] Some of the insured have tried to adhere to the term loss - if any - in the insurance policy - not to damage on the grounds that it includes the inability to use their facilities. Here the insurance companies can refute such an argument by saying that the term loss is associated with a material quality. The words "direct" and "physical" modify the word "loss". As such, what was indicated in the above opinion about damage applies to loss, and this is the approach that what was taken by a US court.
(The United States District Court for the Southern District of Alabama, Hillcrest Optical, Inc. v. Continental Casualty Company, Civil Action No. 1:20-CV-275-JB-B)

[7] Superior Court of the District of Columbia, Rose's 1, LLC v. Erie Insurance Exchange, Case No. 2020 CA 002424 B

does not meet the condition of damage from the scope of the coverage.

The Second Argument: The nature of the restrictions imposed

The nature of the restrictions imposed by the government and the nature of the work of the insured establishment, among other factors, are of great importance in building the defenses and determining the method for presenting them. Therefore, we decided to divide the restrictions into different types to facilitate an explanation of how to refute each claim for compensation.

If the restrictions consist of recommendations and instructions by the authorities, then they are not considered that they qualify for compensation, as they are not obligatory and they did not suspend the work of the establishment, but they rather aimed at preserving the work in a manner consistent with the epidemiological situation.

However, if the restriction is a compulsory restriction, then it is necessary to distinguish between two assumptions, the first one of which is if the restriction or closure is a result of the appearance of a corona virus case in the facility or a violation of health conditions by one of those that were present in it. Here it is possible to raise the argument of the principle of the assumption of risk given that the establishment has chosen to take risks and is therefore responsible for the loss that it suffered as a result of that. The second assumption is that the closure is partial or that the restriction is related to one of the services/businesses of the insured, such as being prevented from receiving customers in a restaurant hall only, while maintaining the delivery or take-out service. In this regard, one of the US courts ruled that even under a widened interpretation, those government decisions did not make the restaurant substantially unusable or uninhabitable, and therefore there is no qualifying compensation[8]. Nevertheless, it must be noted that other courts, such as one of the French courts, have ruled otherwise, as they found that compensation for losses sustained by the restaurant as a result of the closure must be compensated and it refused to take into account the insured's argument that the take-out and delivery service was not halted[9].

In this regard, insurance companies should familiarize themselves with the insurance policies that they have

[8] The United States District Court for the Southern District of Florida, Malaube, LLC v. Greenwich Insurance Company, Case No. 20-22615-Civ-WILLIAMS/TORRES

[9] Paris Commercial Court, SAS MAISON ROSTANG v. SA AXA FRANCE IRAD, https://www.aaimco.com/wp-content/uploads/AXA-France-Decision-05222020.pdf

concluded and carefully consider the terms used. The court ruling issued in Britain distinguished between several words,[10] part of which was considered to include closure of business within the scope of insurance coverage.

The Third Argument: The will of the Parties

This defense is a general defense that can be raised in all cases, specifically with regard to documents free of the condition of damage. This argument was extracted from the provisions of the Jordanian Civil Code and in particular article 239/2 which stipulates that:

> ***"If there is a place for interpreting the contract, then the mutual intention of the contracting parties must be sought without stopping at the literal meaning of the words with reference to the nature of the deal and the trust and confidence that should be available among the contracting parties in accordance with the current custom in transactions."***

This is what the Jordanian Court of Cassation confirmed in its decision No. 4971/2018, in its public assembly, on 21st of March 2019, in which it stated:

> ***"The court of first instance has the right to interpret the contracts and extract the intention of the parties and the purpose of the conditions that are contained in these contracts and then apply the law to what it extracts from the interpretation of those conditions. As such it is restricted by what is stated in article (239) of the Civil Law."***[11]

The insurance companies are to rely on the fact that the will of the parties was not directed at all to the inclusion of such cases and that such risks are inconsistent with the intended purpose of concluding this contract and with the circumstances surrounding its organization and creation. The insurance company can argue that the preparation of the insurance policy and the determination of the premiums were not done in a way that provides absolute coverage, but rather an insurance

[10] [2020] EWHC 2448 (Comm), Case No: FL-2020-000018, https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-judgment.pdf

[11] This is supported by Article 202 of the Jordanian Civil Law, which states that "the contract must be executed in accordance with what it contains and in a manner that is consistent with what is required by good faith."

coverage that is restricted in terms of its scope by principles and conditions.

The secret of the sustainability of the insurance sector lies in the fact that the number of compensation claims remains small in relation to the number of the insured. As such, the will of the insurance companies cannot be devoted to covering a pandemic that it is certain to affect the majority of the insured. Covering such a risk can only be offered by insurance companies in return for a high premium and according to an explicit text that is not shrouded in any ambiguity.

Nevertheless, we have noticed a judicial tendency to consider the provisions for diseases that do not require the fulfillment of the condition of damage as comprehensive for the Corona virus and cover the losses resulting from it. Accordingly, we urge insurance companies to review their insurance policies and to be alert to the existence of such items in an attempt to determine whether or not they include the Corona virus coverage.

In conclusion, it should be noted that the most important defenses that we have reached are the result of an analysis of the judicial rulings issued recently in various countries worldwide, and an extrapolation of the opinions of researchers in the field of insurance. Consequently, those are subject to the discretion of the court of first instance, and each case has a specific discretion, according to the facts related to that lawsuit and the special terms and conditions included in the insurance policy. More defenses may be raised after reviewing the provisions of the insurance policy and studying the merits and facts of the dispute.

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Warm regards,

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