



Insurance Flash January 2024

Latest Spanish case law won coverage of Covid 19's business interruption

The doctrine of the Spanish Courts of Appeal on cover for business interruption resulting from the lockdown due to Covid is developing in favour of the insurers, confirming that these claims are not covered.

I. Update on Spanish case law

Before the Christmas period, the local press published a new Spanish judgment, which upheld a claim submitted by a hotel and catering establishment for business interruption suffered during lockdown. The insurance – according to the information in the press – would have been a multi-risk insurance that covered, among other guarantees, business interruption, and the compensation awarded to the claimant amounted to EUR 112,500. The judgment is not final and is likely to be challenged before the Court of Appeal.

This is just another of the various judgments that have occasionally been handed down in line with the first Spanish judgement about BI for Covid (by the Court of Appeal of Girona on 3 February 2021), based on more formal criteria, invoking the ever-recurring jurisprudential doctrine referring to the distinction between limiting and delimiting clauses of insurance policies, and the requirement for limiting clauses to be expressly accepted by the insured according to section 3 of the Spanish Insurance Contract Act.

However, not only formalistic criteria have been upheld. It is fair to say that many Courts have also been providing solid legal grounds with rulings on the limits of property insurance.

If the controversial first judgement of the Court of Appeal of Girona was the starting point of the formalist interpretation to uphold a number of these coverage claims, the judgement of the Court of Appeal of Murcia no. 78/2022, dated 28 February 2022, set the basis for another interpretation which has then been consolidated by the majority of the Courts.

II. The majority position of the Spanish Courts of Appeal

Among this majority case law, we highlight the judgement of the Court of Appeal of A Coruña no. 146/2023, dated 4 May 2023, which provides a short summary of the bulk of judgments that had been handed down up to that date, stating that (freely translated): *The argument on the limitative clause in the judgment of the Court of Appeal of Girona was not unanimous and has been overruled by other judges who consider that the limits of coverage are delimiting clauses, being the new criterion that was fixed by an out of Court agreement reached by the judges of the same Court of Girona, followed by the judgment of 19 December 2022, among others of the same Court of Appeal*".

This judgment also invokes the rulings of the Court of Appeal of A Coruña, along the same lines and recalls the doctrine of the Supreme Court when making the difference between limiting clauses or delimiting clauses, according to which “risk delimiting clauses are those whose purpose is to delimit the object of the contract” .

The Court of Appeal of Murcia, in the aforementioned judgement, has resolved the issue of coverage in a more efficient manner and does not consider the limiting or delimiting nature of the business interruption clause to see whether or not it complies or not with the formalistic requirements article 3 of the Spanish Insurance Contract Act. The Court, quite simply, ruled that the claim at hand was not covered because Covid was not one of the risks covered in the property insurance policy.

The Court of Appeal of Madrid has also had occasion to pronounce on this matter in its judgment no. 299/2023, dated 13 July 2023, which reproduces extensively the judgment of the Court of Appeal of Murcia and confirms that this has been the majority interpretation of the Courts of Appeal, save for a few exceptions.

Other recent judgments that have rejected coverage for this type of claims are: judgment no. 718/2023 of the Court of Appeal of Girona of 16 October 2023, judgment no. 719/2023 of the Court of Appeal of Lleida, of 13 October 2023, Judgment no. 577/2023 of the Court of Appeal of Asturias, of 11 October 2023, judgment no. 718/2023 of the Court of Appeal of Girona, of 16 October 2023, judgment no. 561/2023 of the Court of Appeal of Barcelona, of 18 September 2023, judgment no. 406/2023 of the Court of Appeal of Asturias, of 11 September 2023, and judgment no. 424/2023 of the Court of Appeal of La Rioja, of 27 October 2023 (the latter refers to a notable collection of judgments in the same sense).

As for recent rulings that differ from this majority that rejects coverage, we have amongst others the judgements of the Court of Appeal of the Balearic Islands of 11 July 2023, the one of the Court of Leon of 20 February 2023, together with some other rulings handed down by the Courts of First Instance (lower Court).

III. Summary

In numbers, since the first ruling of the Court of Appeal of Girona of 3 February 2021 up to date, of the 60 rulings handed down by Courts of Appeal, 50 have ruled that the business interruption due to Covid is not covered under property insurance and only 10 have upheld the claims for coverage. Therefore, the majority position of the Spanish Courts of Appeal is clearly in favour of the insurers' position, confirming the lack of coverage for this type of claims, often with a cost order to be paid by the claimant.

However, today there is still no judgement on this topic rendered by our Supreme Court. We are all expectant, especially given the new Procedural law (in force since June 2023) by which the Supreme Court is allowed to request lower Courts of Appeal to rectify their Rulings, reinforcing the binding effect of precedents for the Courts of Appeal, similar to the legal systems of common law jurisdictions.

Finally, we cannot forget that judges will always consider every claim on a case-by-case basis and rule in accordance with the terms and conditions of each individual policy.

In summary, given the trends in the case-law, it is clear that the prospects of success for business interruption claims is increasingly reducing and that it is reasonable to expect that the majority case-law trend will be confirmed at some point by a forthcoming judgment of the Spanish Supreme Court, which will become a reinforced binding precedent for future cases once we have two Supreme Courts judgments.

For more information on this Flash, please do not hesitate to contact any of the following persons:

Our Insurance team:

Authors



Olivia Delagrangé
Partner
Dispute Resolution - Insurance
T +34 91 426 28 85
E Olivia.Delagrangé@simmons-simmons.com



Javier Montero
Supervising Associate
Dispute Resolution - Insurance
T +34 91 426 24 24
E Javier.Montero@simmons-simmons.com



Rocío Barrero
Supervising Associate
Dispute Resolution - Insurance
T +34 91 426 29 72
E Rocio.Barrero@simmons-simmons.com

Other team members



Francisco de León
Partner
Corporate & Commercial - Insurance
T +34 91 426 6103
E Francisco.deleon@simmons-simmons.com



Paloma Sánchez-Fayos
Associate
Corporate & Commercial - Insurance
T +34 91 426 2936
E Paloma.sanchez-fayos@simmons-simmons.com