

HBN
Newsletter
Dutch
Caribbean

THE SAFEGUARDING OF RIGHTS UNDER PROPERTY INSURANCE WHEN TEMPORARILY CLOSING DOWN BUSINESSES DURING COVID-19



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1. INTRODUCTION

Due to COVID-19 multiple companies have temporarily closed their business, whether forced by ministerial order or voluntarily based on preventive or economical considerations. Our previous newsletter addressed force majeure and business interruption insurance. In this newsletter we focus on the safeguarding of the right of claim under property insurances.

2. COMMON CLAUSES

Property insurances provide property protection coverage and/or liability coverage for property owners. The owner of the property (and its contents) will be financially reimbursed in case of damage or theft. In case of liability, the person other than the owner will be indemnified, if that person is injured on or by the insured property. Hereafter we will discuss some common clauses that are conspicuous when temporarily closing businesses due to COVID-19. Please note that these examples are non-exhaustive.

Alterations and Removals

The general conditions applicable to a company's property insurance will most likely contain a clause stating that the insurer will not make any payment under the policy in case of

changes in the insured risk, unless they have supplemented the coverage accordingly upon prior notification.

Example of such policy wording:

“Under any of the following circumstances the insurance under this policy ceases to attach as regards the property affected unless the insured before the occurrence of any loss destruction or damage obtains the sanction of the insurer signified by endorsement upon the policy by or on behalf of the insurer:

- (a) If the trade carried on will be altered or if the nature of the occupation of or other circumstances affecting the building insured or containing the insured property is changed in such a way, that it will increase the risk of loss or damage;*
- (b) If the building containing the insured property becomes unoccupied and so remains for a period of more than 30 days;*
- (c) If the insured property will be removed to any building or place other than that in which stated in the policy, except as is provided under “Temporary Removal” Clause;*
- (d) If the interest in the insured property passes from the insured otherwise than by will or operation of Law;*
- (e) If the insured's business will be wound up or carried on by a liquidator or receiver or permanently*

discontinued.”

When applying the above common clause to the situation where a business is being closed and the property is being unstaffed, this could give rise to the obligation to proactively inform the insurer of the changes in the risk and request to temporarily endorse same by means of supplemental coverage.

Since the word “unoccupied” tends not to be included in the policy’s definitions, it could be open to discussion whether a business that is temporarily closed and unstaffed is considered to be unoccupied. In case the policy wording is unclear, it is recommendable to obtain clarity from the insurer in this respect. In any event, in case the building containing the insured property becomes unoccupied for a longer period than permitted by the policy, it is recommendable to explicitly ask for extension of this period. The example wording above mentions a 30 days period, but other policies might state a much shorter period, as is mostly the case with high value trade, such as jewelry.

Safeguards/Protection Maintenance

As part of the general conditions, the insured will also have the obligation to prevent and limit damages as much as possible. By means of an

“observation of conditions”-clause, the compliance with such obligation will be condition precedent to any liability of the insurer to make payments under the policy.

Examples of such policy wordings:

“The insured shall at all times and as far as is reasonably practicable take steps to safeguard the insured property and maintain it in a proper state of repair. The Insured shall also take steps to enforce the observance of all statutory provisions manufacturer’s recommendations and other regulations relating to the safety, use and inspection of the insured property. ”

“It is agreed that any protection provided for the safety of the insured property shall be maintained in good order throughout the currency of this policy and shall be in use at all relevant times, and that such protection shall not be withdrawn or varied to the detriment of the interests of the insurer without its consent.”

When applying the safeguard and protection obligation to the situation where a business is being closed and the property is being unstaffed, this could give rise to the obligation to increase preventive measures. One could think of the hiring of temporary security service, the

placement of security cameras with night vision, additional illumination, sprinkler system and the installing of an adequate alarm system connected to an emergency control centre. If already in place, one should check that these are in working order.

Pandemic exclusion

As part of the exclusions, there might be a pandemic exclusion clause in the policy. However, such exclusion should be applied as per the nature and purport of such clause.

Example of such policy wording:

“This policy excludes and does not cover any loss or loss adjustment expenses arising out of or related to, including, but not limited to interruption or interference with the use of any insured property in consequence of:

- a) Infectious or contagious disease manifested by any person while on the insured premises or within 25 miles of the insured premises.*
- b) Murder or suicide occurring on the insured premises.*
- c) Food or drink poisoning or contamination, or, closure by any competent authority due to infectious or contagious disease or pest.”*

The question arises whether this exclusion exonerates the insurer

from having to pay for damages in case of fire, theft or burglary in regards of insured property that has been closed for business due to COVID-19. We are inclined to say this is not the case. One could argue that there is tenuous link, while it can be deemed unreasonably onerous that during a pandemic all properties will be uninsured for fire and theft (also to the detriment of mortgage lenders). An even stronger argument can be made upon endorsement of the changed risk discussed above. In that case the insurer has explicitly excepted to insure same.

3. PRACTICAL SUGGESTIONS

- Review the insurance policy conditions including its endorsements containing coverage extensions, exclusions or additional warranty clauses.
- Consider which preventive measures can be taken to mitigate potential damages (e.g. temporarily security service, security cameras with night vision, additional illumination, adequate sprinkler system, alarm system connected to an emergency control centre).
- Contact your insurer to give notice of any change of circumstances which may increase the risk of loss or damage, as well as the preventive measures that have been taken.

- In case of lack of clarity, contact your insurer and ask for clarification by specification of their interpretation of the insurance clause at hand and/or its applicability under the current circumstances.
- Where necessary, ask for extension of the period that a building can remain unoccupied, and/or exemption of those clauses that the company in all reasonbleness can not comply with temporarily.



For further information please contact:

Aruba Office:

Eline J.M. Lotter Homan

Senior associate

Eline.LotterHoman@hbnlawtax.com

Bonaire Office:

Chris de Bres

Partner

Chris.DeBres@hbnlawtax.com

Curaçao Office:

Eric R. de Vries

Managing Partner

Eric.DeVries@hbnlawtax.com

Sint Maarten Office:

Joanneke Deelstra

Senior Associate

Joanneke.Deelstra@hbnlawtax.com

Amsterdam Office:

Jan Pas

Partner

Jan.Pas@hbnlawtax.com

Amsterdam

Concertgebouwplein 7
1071 LL Amsterdam
The Netherlands

T. +31 20 303 3020

E. info@hbnlawtax.com

Aruba

L.G. Smith Boulevard 54
Oranjestad, Aruba

T. +297 583 9311

E. info@hbnlawtax.com

Aruba

Beatrixstraat 38
Oranjestad, Aruba

T. +297 588 6060

E. info@hbnlawtax.com

Bonaire

Kaya Korona 40
Kralendijk, Bonaire
Dutch Caribbean

T. +599 717 6944

E. info@hbnlawtax.com

Curaçao

L.B. Smithplein 3
Willemstad, Curaçao

T. +5999 4343300 (general)

T. +5999 7325400 (tax)

E. info@hbnlawtax.com

Rotterdam

Weena 505
3013 AL Rotterdam
The Netherlands

T. +31 10 800 5483

E. info@hbnlawtax.com

Sint Maarten

W.G. Buncamper Road 33
Philipsburg, St. Maarten

T. +1 721 542 2272

E. info@hbnlawtax.com

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