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ATTORNEYS  
AT LAW

Intervention  
Switzerland:

COVID-19  
Losses –  
covered or  
not covered?

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## COVID-19 Losses in Switzerland – covered or not covered?

- Scope of this Intervention:
  - Business Shutdown Losses
  - a.k.a. Business Closure losses
  - a.k.a. Business Interruption (BI) Losses
- Not dealt with herein:
  - All other types of losses, including
    - Travel insurance
    - Health insurance
    - Event cancellation

# COVID-19 Losses in Switzerland – covered or not covered?

- What is uncontested in Switzerland:
  - COVID-19 Business Shutdown is not covered under plain Property BI insurance;
  - Business Shutdown for any disease is covered only if a special Business Shutdown cover exists;
  - Such Business shutdown cover is normally a (voluntary) component of a property business policy that can be added to the basic property policy against an additional premium
  - This Business Shutdown insurance is a.k.a. “Epidemic Insurance”
- What was (or: is) contested in Switzerland
  - Are Business Shutdown losses for COVID-19 covered under Epidemic Insurance?

## COVID-19 Losses in Switzerland – covered or not covered?

- The initial position of (the majority of) insurers:
  - COVID-19 is a pandemic and not an epidemic. Thus, it does not fall in the scope of cover of on epidemic insurance ➡ Not covered.
- Other insurers held:
  - Exclusions apply ➡ Not Covered.
- Very few insurers:
  - Settled the losses ➡ Covered.

# COVID-19 Losses in Switzerland – covered or not covered?

- Reaction of the Policyholders
  - They filed a variety of complaints with the Swiss insurance Ombudsman
- The Ombudsman
  - Instructed an external expert to provide an opinion as guidance for the insurance industry
- The expert (Prof. Fellmann)
  - Mainly took the side of the policyholders

# COVID-19 Losses in Switzerland – covered or not covered?

- The Expert (Prof. Fellmann) held:
  - A pandemic is not an *aliud* to an epidemic but rather a particularly large epidemic → cover cannot be denied by this sophisticated game of words
  - Exclusion clauses excluding losses due to
    - *Influenza and pandemic influenza, or*
    - *influenza viruses (...) and due to pathogens for which the WHO pandemic phases 5 or 6 apply nationally or internationally*
  - do not exclude COVID-19 losses because
    - Influenza is not the Corona virus
    - The reference to pandemic phases 5 and 6 is „*nonsensical in every respect*”

# COVID-19 Losses in Switzerland – covered or not covered?

## ■ What happened then?

- The result of the Fellman opinion was surprising to the insurance industry (in particular with regard to „pandemic levels 5 or 6“ exclusion).
- The Fellman opinion is not binding (neither on insurers nor on any Swiss court)
- Most insurers decided to settle amicably often on a 50% basis with their policyholders to avoid long court proceedings
- Very few policyholders went to court. To my knowledge no court decision has been made yet.
- Whatever the primary courts will decide, you can expect that it will finally be the Federal court who takes the final decision on „covered or not covered“.

# ANNEX – Samples of insuring/ exclusion clauses

Sample Clause 1 Wording	Comments <a href="#">Fellmann Opinion</a>
<p>Business interruption (Additional cover) Insured Events Business interruption losses because of an insured event according to →→ additional epidemic cover (Z11) Z11 Epidemic Insured Events If the competent authority [...] according to legal provisions and in order to reduce the spreading of infectious diseases</p> <ul style="list-style-type: none"><li>• orders or recommends disinfection or elimination of goods in that entity ;</li><li>• <u>orders or recommends the shutdown</u>, a partial shut down or a limitation of the business activities; bans employees in that business to pursue their activities.</li></ul> <p>Infectious diseases are diseases caused by pathogens that are transmissible to humans and are usually notifiable. The infestation of mites and swab beetles equal to infectious diseases</p> <p>No cover is granted for Losses [...] Resulting from flues (influenzas) of any kind including avian influenza and pandemic influence.</p>	<p><b>Covered</b></p> <p>COVID-19 Losses fall within the scope of cover as no individual shutdown of an individual business is required according to the terms of the clause (N 58)</p> <p>The exclusion clause does not apply as COVID-19 is not a flue (N 52)</p>



# ANNEX – Samples of insuring/ exclusion clauses

<b>Sample Clause 2 Wording</b>	<b>Comments</b> <a href="#"><u>Fellmann Opinion</u></a>
<p>Covered are: losses directly resulting from an order or written recommendation of an authority that has been made with the aim to prevent communicable diseases, including:</p> <ul style="list-style-type: none"><li>• Shutdown of the busines;</li><li>• [...]</li></ul> <p>Infectious diseases are diseases and their pathogens, which are notifiable according to Annex 1 – 3 of the “Regulation concerning infectious diseases of humans” of the Federal Health Authority.</p> <p>No cover applies to</p> <p>Losses</p> <ul style="list-style-type: none"><li>• Resulting from flus (Influenzas) of any kind including avian flu</li><li>• Resulting from pathogens, for which nationally or internationally the WHO pandemic phases 5 or 6 apply</li></ul>	<p><b>Covered</b></p> <p>COVID-19 Losses fall within the scope of cover as no individual shutdown of an individual business is required according to the terms of the clause (N 58)</p> <p>Not relevant that COVID-19 is a new disease not yet mentioned in the Regulation (N 62)</p> <p>The flu exclusion does not apply (N 52)</p> <p>Exclusion of pandemic phases 5- 6 is nonsensical, unusual, untransparent and would likely not be expected by a policyholder. Thus, it is void. (N 49 et seq.)</p>

# ANNEX – Samples of insuring/ exclusion clauses

Sample Clause 3 Wording	Comments <u>Fellmann Opinion</u>
<p>Covered are: measures ordered or recommended by a competent Swiss or Liechtenstein authority [...] based on legal provisions including</p> <ul style="list-style-type: none"><li>• Shut down of business, partial shutdown of business, quarantine or limitation of the business activities</li><li>• Elimination or treatment of infected goods in the business entity</li></ul> <p>With the aim to avoid any danger to human health <u>caused by food, commodity, or consumable supplies and by water from swimming pools.</u></p>	<p><b>Not Covered</b></p> <p>COVID-19 Shutdowns had not the aim to avoid any diseases <u>caused by</u> food, commodity, or consumable supplies and by water from swimming pools. etc.</p>

# About me



- Ulrike Mönnich has many years of experience and specialization as a lawyer in insurance and reinsurance and liability law. She advises national and international insurers, reinsurers and customers in the industry on insurance, reinsurance and liability matters. She represents the interests of her clients in legal proceedings, including in arbitrations. recently she advised and represented her clients on the following topics:
- Establishment of branches by EU insurers in Switzerland
- Transnational insurance business within the EU and the EEA (Liechtenstein, Germany, Ireland, Austria, etc.)
- Advice on international insurance programs
- Liability of Directors and Officers (D&O claims)
- Distribution of insurance products (including in relation to cross-border issues)
- Regulatory issues related to the operation of private health insurance
- Portfolio transfers
- Insurance business and services between Liechtenstein and Switzerland
- Structuring and design of ART products
- Advising reinsurers on COVID-19 losses