

# COVID-19 AND THE TORT LIABILITY INSURANCE IN PANAMA

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IT IS A FACT: ECONOMICAL ACTIVITIES WILL HAVE TO DEAL WITH COVID-19 FOR A WHILE AND ALTHOUGH WE ARE SUBJECT TO THE PENDULUM LAW BY WHICH THE QUARANTINE MEASURES BECOME MORE FLEXIBLE AND AFTERWARDS BECOME RIGID AGAIN AND VICE VERSA, THE REALITY IS THAT THERE IS NO VACCINE AND THE COVID-19 WILL CONTINUE TO STAY HERE.

THE VIRUS'S PRESENCE FORCES BUSINESS OWNERS THAT DEAL WITH PUBLIC TO APPLY CERTAIN PROTOCOLS ESTABLISHED BY HEALTHCARE AUTHORITIES, REGARDING THIRD PARTIES AND THEIR EMPLOYEES.

DO NOT COMPLY WITH SAID PROTOCOLS COULD GENERATE TORT LIABILITY IN CASE THAT A TRIBUNAL, THROUGH A FINAL RULING DECLARE A BUSINESS ESTABLISHMENT LIABLE FOR NEGLIGENCE THAT ALLOWED THE INFECTION OF COVID-19, WHEN SAID INFECTION IMPLY SOME CONSEQUENCES FOR THIRD PARTIES, FOR EXAMPLE, A LONG

HOSPITALIZATION IN A CRITICAL CONDITION THAT MIGHT LEAD TO RECUPERATION OR DEATH.

WHAT HAPPENS IF A LIABILITY OF THIS TYPE OCCUR AND THE BUSINESS OWNER HAS A TORT LIABILITY INSURANCE THAT IS IN EFFECT SINCE BEFORE COVID-19 APPEARS? WILL THE INSURANCE COVER IT?

THE ANSWER IS NOT UNIQUE FOR EVERY CASE BECAUSE THEY REQUIRE A THOROUGH ANALYSIS OF THE FACTS AGAINST GENERAL CONDITIONS, PARTICULAR CONDITIONS AND THE AMENDMENTS OF EACH INSURANCE CONTRACT.

NONETHELESS, LET US CONDUCT A HYPOTHETICAL REVIEW OF THE SUBJECT USING AS A REFERENCE ONE OF THE TORT LIABILITY POLICIES THAT CIRCULATE IN THE PANAMANIAN MARKET.

FIRSTLY, LET US SPEAK ABOUT THIRD PARTIES, WHICH ARE PERSONS THE COMPANY DOES NOT HAVE ANY CONTRACTUAL RELATION WITH. AN EMPLOYEE IS NOT A THIRD PARTY.

IF SAID BUSINESS DOES NOT COMPLY WITH THE PROTOCOLS ESTABLISHED AND THE THIRD PARTY IS AFFECTED, SAID THIRD PARTY CAN SUE THE COMPANY WITH BASIS ON SECTION 1644 AND CONCORDANT FROM THE CIVIL CODE OF PANAMA, THUS OBTAINING A FINAL RULING AND A POSSIBLE ACTIVATION OF AN INSURANCE THAT COVERS "CORPORAL LESIONS".

MANY MIGHT ASK: CAN YOU CALL CORPORAL LESION THE HEALTH DAMAGES AROUSED FROM A COVID-19 INFECTION BECAUSE OF GUILT OR NEGLIGENCE?

FOR OUR HYPOTHETICAL CASE, THE ANSWER IS YES DUE TO TWO MOTIVES:

- A JOINT INTERPRETATION OF THE SECTION 143 OF THE INSURANCE LAW OF PANAMA AND SECTION 214 OF THE COMMERCIAL CODE OF PANAMA, GIVE THE BASIS TO AFFIRM THAT THE WORDS IN THE COMMERCIAL INSURANCE CONTRACT “SHOULD EXTEND ON THE SENSE OF ITS GENERAL USE” AND WE ADD THAT SAID “GENERAL USE” IS, IN THE FIRST PLACE, THE ONE ESTABLISHED IN THE SPANISH ROYAL ACADEMY DICTIONARY BY WHICH THE CONCEPT OF “LESION”, IN ITS FIRST MEANING, IS “DAMAGE OR CORPORAL DETRIMENT CAUSED BY AN INJURY OR SICKNESS”.
- FURTHERMORE, THE GENERAL CONDITIONS FROM THE TORT LIABILITY INSURANCE POLICY THAT WE ARE REVIEWING, COVERS CORPORAL LESIONS AND EXCLUDES EXPRESSLY SOME SICKNESSES FROM WHICH, AT LEAST TWO OF THEM ARE CAUSED BY VIRUSES: “HIV (AIDS)” AND “AVIAN INFLUENZA”. IN OTHER WORDS, THE INSURANCE POLICY COVERS CORPORAL LESIONS CAUSED BY SICKNESSES EXCEPT THE ONES THAT ARE EXPRESSLY EXCLUDED.

WITH THE PREVIOUS REFERENCE WE CONSIDER THAT IN GENERAL TERMS, IF A THIRD PARTY IS INFECTED BY COVID-19 IN A COMMERCIAL ESTABLISHMENT AND IS GRANTED A FINAL RULING AGAINST THE COMPANY THAT OWNS THE ESTABLISHMENT, IT IS HIGHLY PROBABLE THAT THE COMPANY CAN MAKE USE OF ITS TORT LIABILITY INSURANCE EMITTED BEFORE THE ARRIVAL OF COVID-19 SO THAT THE INSURANCE COMPANY CAN INDEMNIFY THEM.

OF COURSE, EVERYTHING IS SUBJECT TO THE FULFILLMENT OF EACH OF THE REMAINING COMPROMISES OF THE POLICY SUCH AS THE PAYMENTS UP-TO-DATE AND THAT THE INSURED PARTY HAS NOT MADE ANY FALSE DECLARATIONS THAT MAY INFLUENCE THE CONTRACT AND SUCH.

WHAT HAPPENS WITH THE EMPLOYEES THAT GET INFECTED OF COVID-19 DURING THEIR JOB BECAUSE OF GUILT OR NEGLIGENCE OF THE EMPLOYER?

ACCORDING TO THE SECTION 295 OF THE LABOR CODE OF PANAMA, THIS WOULD CLEARLY REPRESENT A PROFESSIONAL RISK UNDER THE CATEGORY OF "PROFESSIONAL DISEASE" WHICH WOULD GRANT THE EMPLOYEE THE RIGHT TO OBTAIN A COMPENSATION FROM THE SOCIAL SECURITY PUBLIC ENTITY OF PANAMA (CSS) ASSUMING THAT THEY ARE AFFILIATED.

NONETHELESS, WHEN DEALING WITH AN INFECTION CAUSED BY THE NEGLIGENCE OF THE EMPLOYER, SECTIONS 301 FROM THE LABOR CODE AND 988 FROM THE CIVIL CODE, GRANT THE INJURED EMPLOYEE THE RIGHT TO SUE AND OBTAIN A TORT LIABILITY RULING IN ORDINARY TRIBUNALS.

WHAT WOULD HAPPEN WITH THE TORT LIABILITY INSURANCE POLICY IF THE INSURED COMPANY IS FOUND LIABLE? THERE ARE TWO OPTIONS FOR OUR HYPOTHETICAL CASE:

IF THE POLICY ONLY COVERS DAMAGES CAUSED TO THIRD PARTIES, THEN THE EMPLOYEES CASE IS NOT COVERED BECAUSE THEY ARE NOT THIRD PARTIES.

NOW, IF THE POLICY HAS A "EMPLOYER AMENDMENT" THEY COULD COVER THE TORT LIABILITY RECOGNIZED IN THE FINAL RULING DUE TO GUILT OR NEGLIGENCE AGAINST THE INSURED COMPANY AS AN EXCESS OF WHAT IS PAID BY THE CSS AS LONG AS THE EMPLOYEE IS DECLARED IN THE PAYROLL. ASSUMING THAT THEY ARE COMPLYING WITH EVERY REQUEST OF THE POLICY AND THE LAW.

AS A FINAL COMMENTARY, I MUST ADD THAT NONE OF THESE LEGAL EVENTS OCCUR AUTOMATICALLY. WHETHER YOU ARE THE INJURED PARTY, THE LIABLE BUSINESS OWNER THAT IS INSURED OR THE INSURANCE

COMPANY, IT IS OF GREAT VALUE THAT YOU RELY ON A LAWYER TO GET ADVICE, AND IN CASE OF LEGAL ACTIONS, IT IS MANDATORY FOR YOU TO BE REPRESENTED BY A LAWYER.

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