

The complaint

A limited company, which I'll refer to as P, complains that ERGO Versicherung Aktiengesellschaft (Ergo) unfairly declined its damage claim.

Mr F, a director of P, brings the complaint on P's behalf.

What happened

P took out a Commercial Combined Insurance policy in November 2020. In February 2022 it made an accidental damage claim for five treadmills which P said were damaged beyond repair as a result of anti-bacterial spray being applied to the equipment by gym members during the COVID-19 pandemic. P said the screens on the treadmills had frozen and became entirely unresponsive.

ERGO appointed a loss adjuster to investigate the claim. The loss adjuster was told that three of the treadmills became intermittent around September 2021 and then they broke down completely within a few weeks. The other two treadmills were reported as damaged in October 2021.

ERGO concluded that the damage occurred gradually and been caused by repeated use of the anti-bacterial spray rather than a one-off event. And as gradual deterioration was excluded under the policy, ERGO declined the claim.

P didn't agree with ERGO's reasoning for declining the claim. In response, it said the cleaning regime implemented was in line with the government's direction during the COVID-19 Pandemic. More than 100 treadmills were cleaned in the same way, and of those, only five were damaged. P therefore didn't agree that the damage was as a result of gradual deterioration over time. P referred to the expert report which said the treadmills they reviewed had failed because of a large amount of liquid found within the consoles. P said this was likely a one-off event where too much liquid had been used. P pointed out that there was nothing in the expert's report which said it occurred gradually over time.

ERGO said that there was no evidence that a large amount of liquid had been spilt over the machines and also the five treadmills were damaged around the same time, therefore it was unlikely they would all be associated with a random one-off event.

Unhappy that ERGO wouldn't change their stance on the case, P brought its complaint to the Financial Ombudsman. Our investigator upheld the complaint. In summary, she said she was satisfied there was a case of accidental damage here. From what she had seen, she felt it was likely that the liquid from the anti-bacterial spray built up over time, but she didn't think that gradual build-up was equivalent to gradual deterioration. She felt if the treadmills were deteriorating, they would be wearing out over time and ERGO hasn't been able to show that this happened. She concluded that ERGO hadn't applied the exclusion fairly. She recommended that ERGO meet the claim for all five treadmills.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I uphold this complaint. I'll explain why.

Both parties have provided detailed submissions to support their position. I want to assure them I've read and carefully considered everything they've said, but my findings focus on what I consider to be the central issues, and not all the points raised.

The issue for me to decide in this instance is whether or not it is fair and reasonable for ERGO to decline P's claim on the basis they have set out in their final response to P's complaint; that the damage is not a one-off event but as a result of gradual deterioration, cover for which is excluded.

I should note at the outset of this decision that P's policy is not a "perils based" policy but an "all risks" policy, subject to certain exclusions. This being the case, the onus is not on P to prove that an insured event has taken place but rather for ERGO to prove the operation of a relevant exclusion.

In this case, the exclusion which ERGO has sought to apply is that of 'gradual deterioration'. In order to prove this exclusion, ERGO would need to be able to evidence that the damage for which P is claiming has been caused gradually over time by an issue about which P should have been aware.

I'm satisfied that P has cover for damage and there's no dispute that there's damage to the five treadmills being claimed for.

ERGO has relied on the following policy exclusion to decline P's claim:

"Section 2 – Material Damage All Risks...

Exclusions Applying to Section 2

The following exclusions apply to this section...

f. **Damage** to any **Property Insured** and/or any consequential loss directly or indirectly caused or contributed by:...

v) moth, termites, vermin or insect, wear, tear, gradual deterioration, rust or oxidisation, rot, mould or mildew, inherent vice, latent defect..."

The onus is on ERGO to show it would be fair to rely on the above policy exclusion. I therefore need to consider whether ERGO has correctly applied the exception in the policy when declining P's claim.

ERGO said for a large amount of liquid to cause damage on one occasion, the spray bottle would have to be used improperly and liquid poured onto the machines, and there was no indication that anybody was alleged to have acted on this basis.

I have reviewed a report provided by ERGO's appointed loss adjuster. They said the damage has been caused as a result of the anti-bacterial spray being used on the treadmills. Overtime, it has seeped into the console causing them to break.

I have also reviewed an expert report provided by ERGO which states the screens are beyond repair due to being damaged from an overuse of anti-bacterial spray. And that large amounts of liquid were found within console which will be as a result of spray being applied directly onto consoles.

I am therefore persuaded that the cause of the damage was the use of the anti-bacterial spray on the treadmills. ERGO commented on it being unusual that all five treadmills broke down around the same time. I think it's likely this was a coincidence as the spray would have been used on the treadmills for around the same length of time, causing the build-up of fluid which then damaged the machines.

The evidence does suggest that the application of the anti-bacterial spray over-time has caused a gradual build-up of fluid and then eventually resulted in damage. The policy exclusion which ERGO have relied on is one for gradual deterioration, but I don't think ERGO has shown that it's what happened here. I say this because, if something were to gradually deteriorate, I would expect to see it slowly declining, which happens over time, like wear and tear. I'm aware that P said some of the treadmills became intermittent for a few weeks before their complete breakdown. I don't think a few weeks would be considered as gradual. The gradual action here appears to be the build-up of fluid, i.e. the cause of damage, rather than the damage itself.

Additionally, even if I were to accept the damage was gradual, I would then need to consider whether P would have been reasonably aware of the gradual damage and could have done anything to stop it from getting worse. In the circumstances, it might have been difficult for P to have been aware that the fluid was building up inside the console. Even when the treadmills became intermittent, if P had reported the issue, it may be that there would not have been enough time to identify the problem and prevent it from getting worse. I make no finding on this aspect. It is not a point that has been previously raised, and the parties have not had the opportunity to comment on it. However, this is not an issue in this particular case, as I am not persuaded that the damage was gradual in nature.

While I think there was gradual build-up of fluid, I agree with our investigator that this isn't the same as something gradually deteriorating over time. I'm not persuaded that ERGO has shown that the damage was caused by gradual deterioration. So, I don't think it's fair that this exclusion would apply.

My final decision

I uphold this complaint. My decision is that ERGO Versicherung Aktiengesellschaft should settle P's claim, subject to the other terms of its policy.

Under the rules of the Financial Ombudsman Service, I'm required to ask P to accept or reject my decision before 24 October 2023.

Ankita Patel
Ombudsman