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State Of The Law For Business Interruption Insurance Coverage For COVID-19 Claims

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It's been a year since COVID-19 caused a torrent of insurance coverage litigation regarding business interruption and extra expense coverage for losses due to governmental orders, shut down requirements, and the spread of the coronavirus. With more than 335 decisions having been issued as of early May 2021, the numbers show significantly better odds for policyholders than the insurance industry and many media reports suggest.

'So you're saying that there's a chance!'

There are more than 50 decisions in which courts have either granted summary judgment to policyholders or denied insurance companies' motions to dismiss in the context of business interruption and extra expense insurance claims resulting from the pandemic.

The earliest decisions largely favored insurance carriers, with courts granting motions to dismiss in those cases. But many of those early cases involved policies with express virus exclusions. More recent decisions have rejected

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insurance carrier arguments and either denied their motions for dismissal or judgement on the pleadings, or ruled in the policyholder's favor on dispositive motions.

Key points from favorable rulings

The central argument in the majority of these cases is whether there is physical loss or damage to the policyholder's locations (for business interruption coverage), or whether communicable disease coverage was triggered (for those policies with such coverage). Certain insurance policies with communicable disease coverage do not include "physical loss or damage" within the coverage part.

The insurance industry's central argument is that the phrase "physical loss or damage," and all variations of that language, requires some sort of physical and permanent alteration to the premises at issue. The insurance industry asserts that the inability to use a business location – in whole or in part – does not consist of physical damage or as physical loss. Even where there is proof the virus was present at the location, the insurance industry contends that the virus does not cause physical loss or damage.

Several cases, however, have rejected that argument. The following cases granted summary judgment in the policyholders' favor:

- *North State Deli, LLC v. Cincinnati Insurance Company*
  In its Oct. 9, 2020, decision, the North Carolina Superior Court granted a motion for summary judgment: "[T]he phrase 'direct physical loss' includes the loss of use or access to covered property even where that property has not been structurally altered."

- *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Company*
  In its Jan. 19, 2021, decision, the United States District Court for the Northern District of Ohio granted the plaintiff's motion for summary judgment. It ruled that the requirements for physical loss and suspension were satisfied, and that the microorganism exclusion and loss of market or delay exclusion did not apply.

- *Cherokee Nation v. Lexington Insurance Company*
  In its Jan. 28, 2021, decision, the Oklahoma district court granted the motion for summary judgment, stating that business closures due to the pandemic meet the requirement for direct physical loss. For more on this decision, see our prior blog post on tribal property insurance.

- *Choctaw Nation of Oklahoma v. Lexington Insurance Company*
  In its Feb. 15, 2021, decision, the Oklahoma district court granted the motion for summary judgment, agreeing with the Nation's position that direct physical loss occurs when property is "rendered unusable for its intended purpose." For more on this decision, see our prior blog post on business interruption claims for Native American tribes.

- *Boardwalk Ventures CA v. Century National Insurance Company*
  In its Mar. 18, 2021, decision, the California Superior Court denied a motion for judgment on the pleadings, rejecting insurer's argument that there must have been a "distinct, demonstrable, physical alteration of the property" for coverage to apply.

- *Ungarean, DMD v. CAN*

In its Mar. 25, 2021, decision, the Pennsylvania Court of Common Pleas granted the plaintiff's motion for summary judgment. It ruled that the inability to use property could be physical loss, and that civil authority coverage applies. It also rejected the application of a contamination exclusion and a fungi, wet rot, dry rot and microbes exclusion.

Even more cases denied motions to dismiss or motions for judgment on the pleadings. Those cases include:

- *Studio 417, Inc. v. Cincinnati Ins. Co.*
  In its Aug. 12, 2020, decision, the U.S. District Court for the Western District of Missouri denied the motion to dismiss allegations that the presence of coronavirus on surfaces and in the air amounts to "physical loss." It also rejected the premise that "loss" "require[s] a tangible, physical alteration," and refused to dismiss claims for civil authority, ingress and egress, dependent property, and sue and labor coverage.

- *Blue Springs Dental v. Owners Ins. Co.*
  In its Sept. 21, 2020, decision, the U.S. District Court for the Western District of Missouri denied a motion to dismiss alleged direct physical loss based on assertions of suspected or actual presence of coronavirus.

- *Francois, Inc. v. Cincinnati Ins. Co.*
  In its Nov. 9, 2020, decision, the Ohio Court for Common Pleas denied the motion to dismiss, using the same reasoning as in Studio 417.

- *Chapparells Inc. v. Cincinnati Ins. Co.*
  This case survived the motion to dismiss in the Ohio Court for Common Pleas Oct. 21, 2020, because of well-pleaded allegations.

- *Hill & Stout PLLC v. Mutual of Eunumclaw Insurance Company*
  In its Nov. 13, 2020, decision, the Washington Superior Court denied the motion to dismiss: "The Court therefore finds that the phrase 'physical loss of' is ambiguous because it is fairly susceptible to two reasonable interpretations . . ."

- *Dino Palmieri Salons, Inc. v. State Auto Mut. Ins. Co.*
  This case survived the motion to dismiss in the Ohio Court for Common Pleas Nov. 17, 2020, because of well-pleaded allegations.

- *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company*
  In its Dec. 9, 2020, decision, the U.S. District Court for the Eastern District of Virginia denied the motion to dismiss, ruling that direct physical loss can be satisfied when a "property is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-structural, sources."

- *Goodwill Industries of Orange County, CA v. Philadelphia Indemnity Company*
  In its Jan, 28, 2021, decision, the California Superior Court denied demurrer because the complaint alleged that the coronavirus caused direct physical loss and damage to the insured's property.

- *Colectivo Coffee Roasters, Inc. v. Society Insurance*
  In its Jan. 29, 2021, decision, the Wisconsin Circuit Court denied the motion to dismiss: “I don’t think it’s so clear that direct physical loss actually requires damage to the covered property.”

- *In re: Society Insurance Company COVID-19 Business Interruption Protection Insurance Litigation*
  In this Feb. 22, 2021, slip opinion, the U.S. District Court for the Northern District of Illinois denied the motion to dismiss, finding that shut down orders could satisfy the physical loss requirement.

- *Derek Scott Williams PLLC v. Cincinnati Insurance Company*
  In its Feb. 28, 2021, slip opinion, the U.S. District Court for the Northern District of Illinois denied the motion to dismiss, finding that “physical loss” could include “a deprivation of the use of [the insured’s] business premises”

- *Southern Dental Birmingham LLC v. Cincinnati Insurance Company*
  In its March 19, 2021, decision, the U.S. District Court for the Northern District of Alabama denied the motion to dismiss, ruling that inability to use a property could be physical loss.

- *Kingray Inc. v. Farmers Group, Inc.*
  In its March 4, 2021, decision, the U.S. District Court for the Central District of California denied the motion to dismiss. It ruled that direct physical loss could be established by physical dispossession, whether by a virus in the air or civil authority closure orders.

- *Cinemark Holdings v. Factory Mutual Insurance Company*
  In its May 5, 2021, decision, the U.S. District Court for the Eastern District of Texas denied the motion for ruling on the pleadings, noting allegations “that COVID-19 was actually present actually damaged the property by changing the content of the air; noting that the policy “expressly covers loss and damage caused by ‘communicable disease[,]’” and that the insurance carrier and policyholder “agree ‘communicable disease’ encompasses COVID-19.”

- *Serendipitous LLC/Melt v. Cincinnati Insurance Company*
  In its May 6, 2021, decision, the U.S. District Court for the Northern District of Alabama denied the motion to dismiss, recognizing the distinction between “loss” and “damage.” It also held that closure of restaurants and physical deprivation of property because of the presence of a virus and governmental closure orders is loss; and distinguishes this ruling from the one in Mama Jo’s Inc. v. Sparta Insurance Company out of the 11th Circuit in 2020.

- *Susan Spath Hedgedu dba Kern v ACE Fire Underwriters Insurance Company*
  In its May 7, 2021, decision, the U.S. District Court for the Eastern District of Pennsylvania denied the motion to dismiss. Applying California law, it found that government closure orders caused direct physical loss and that virus exclusion did not apply.

Takeaways

There are two important takeaways from these cases. The first is that even though there are many decisions favoring insurance carriers, there is a significant number of decisions ruling that closures of premises (in whole or in

part) constitutes direct physical loss.

The divergence of decisions is a key point under principles of insurance coverage law. The percentage of cases ruling in favor of insureds is not what controls. Rather, the fact that there are numerous decisions that interpret "direct physical loss" as encompassing governmental shut down or stay-home orders, as well as closures due to the presence of the coronavirus and COVID-19, shows that there is more than one reasonable way to interpret "direct physical loss."

Further, under certain states' insurance coverage law, when courts interpret insurance policy language differently, that is evidence of ambiguity. See, e.g., *St. Paul Mercury Ins. Co. v. F.D.I.C.*, 774 F.3d 702, 709 (11th Cir. 2014) (citing *Boston Ins. Co. v. Gable*, 352 F.2d 368, 370 (5th Cir. 1965) (applying Georgia law)) (when "nearly identical or similar language has been construed differently by other courts," that is "an important indication of ambiguity in a policy"); *Travelers Indem. Co. v. Summit Corp. of Am.*, 715 N.E.2d 926, 938 (Ind. Ct. App. 1999) (A "disagreement among the courts further indicates the ambiguity of the [disputed policy] . . . provisions.").

The law of most (if not all) states is that when an insurance policy is ambiguous, it must be construed in favor of coverage.

The second takeaway is that although insurance companies are forcing their policyholders to go to court to get coverage, there are many decisions on the books ruling in favor of coverage and against insurance carriers. Further, even though many of the decisions have gone in favor of the insurance industry, the litigation is far from over. As of this writing, there are very few appellate decisions on the merits yet, and insurance law is state-by-state. Overall, policyholders should be mindful of this developing body of authority when considering how to respond to denials of coverage.