

Publication

10/22/2020

Client Alert: North Carolina Restaurant Wins First Summary Judgment Decision on Business Interruption Coverage for COVID-19 Losses

There have been many decisions in recent months in cases involving business interruption coverage for losses caused by the SARS-CoV-2 virus and the disease it causes, COVID-19. Some decisions have been favorable to coverage, others not, but most of them have been on the pleadings on the threshold issue of whether insureds have stated causes of action entitling them to relief. Now, however, in *North State Deli, LLC, et al. v. The Cincinnati Ins. Co., et al.*,^[1] the North Carolina Superior Court has issued an order granting partial summary judgment in favor of the insureds, holding as a matter of law that the insurer's policies covered business interruption losses caused when the insureds were forced to shut down by state government orders issued in response to the spread of the coronavirus and COVID-19 in the state.

The plaintiff insureds in *North State Deli* are restaurants operating in North Carolina. After the government orders forced the insureds to close, they submitted claims for business interruption losses to their insurer, Cincinnati Insurance Company. When Cincinnati denied coverage, the insureds filed suit. The policies do not have a virus exclusion, so Cincinnati's main argument against coverage was that the policies' requirement of "accidental physical loss or accidental physical damage" meant that the restaurants had to suffer some "physical

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alteration.” According to Cincinnati, the coronavirus did not cause a permanent physical change to the businesses.

In granting summary judgment to the insureds, the North Carolina court rejected this argument, pointing out that the policies insured losses caused by “physical loss” or “physical damage.” The court found that “physical loss” can reasonably be read to mean “the inability to utilize or possess something in the real, material or bodily world,” and therefore that an insured can suffer a “physical loss” by being unable to access and use its property without any physical alteration to it. Cincinnati’s interpretation would mean there is no difference between “physical loss” and “physical damage,” making the term “physical loss” superfluous. In order to give effect to that term, it must mean something different from “physical damage.” The court found that the government orders caused “physical losses” to the insureds covered by the policies.

It is possible that Cincinnati will appeal the court’s order, and it is not the final word on coverage for COVID-19 business interruption losses, not even in North Carolina. For example, other courts have found that policies insuring “physical loss or damage” do require a physical alteration of property. However, as the North Carolina court pointed out, the other reading of “physical loss” is reasonable and thus the term is at best ambiguous. It therefore should be read in favor of insureds. The decision is an important milestone in the continuing road to coverage for such losses and further demonstrates that the insureds’ arguments are well-grounded in the policy language and the rules of contract interpretation.

If you have any questions about this recent decision, please contact Angela Elbert, Seth Lamden, Paul Walker-Bright or your Neal Gerber Eisenberg attorney.



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[1] Case No. 20-CVS-02569 (N.C. Super. Ct. Oct. 9, 2020).