MURTHA CULLINA

NEWS ALERT

INSURANCE RECOVERY GROUP

Missouri Court Rules Policyholders State Claim For Coverage Of Pandemic-Related Losses

By Marilyn B. Fagelson and Rachel Snow Kindseth | September 15, 2020

Good news for policyholders arrived last month when a Federal Court in Missouri ruled that a lawsuit brought by business owners (a hair salon and restaurants) against their insurance carrier properly alleged claims for coverage of losses caused by the COVID-19 pandemic and state-mandated closure orders. In *Studio 417, Inc. v. Cincinnati Insurance Company*, the policyholders sought coverage for their pandemic-related losses under all-risk policies that did not contain a virus exclusion but the insurer refused to provide coverage. Case No. 20-CV-03127-SRB, 2020 WL 4692385 (Aug. 12, 2020). The insurer's principal argument was that a virus cannot cause the "direct physical loss" required under several of the policies' coverage provisions including business interruption and civil authority provisions. The court rejected this argument, holding that "physical loss," which is not defined in the policies, can occur when property becomes uninhabitable or unusable for its intended purpose.

In denying the insurer's motion to dismiss, the court began its analysis by noting that the policies do not define "direct physical loss" so it looked to the definition in the Merriam-Webster dictionary for each of those words. Reasoning that the policies provide coverage for two distinct types of loss – "accidental physical loss **or** accidental physical damage" – the court rejected the insurer's attempt to conflate the terms loss and damage as both requiring tangible, physical alteration. Instead, the court relied upon case law that has "recognized that even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose."

The court emphasized that the plaintiffs have alleged that the physical substance, which makes up the highly contagious virus COVID-19, is likely on their premises and caused them to cease or suspend operations. Additionally, "the presence of COVID-19 on premises . . . is not a benign condition." Thus, "Plaintiffs here have plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable." These allegations are "enough to survive a motion to dismiss."

The court also rejected the insurer's argument that a finding of physical loss here will result in a finding of physical loss "whenever a business suffers economic harm." The plaintiffs have "tethered" their alleged economic harm to their alleged physical loss caused by COVID-19 and the closure orders.

The court also found that the plaintiffs plausibly stated a claim for civil authority coverage, and policy provisions related to ingress and egress coverage, dependent property coverage, and "sue and labor" coverage. For the same reasons that the court found that the plaintiffs had adequately alleged a direct physical loss, "such loss is applicable to other property" and that access to their premises "was prohibited to such a degree as to trigger the civil authority coverage." The insurer's argument that access to the plaintiffs' business was not prohibited because the closure orders permitted restaurants to remain open for takeout was also rejected by the

court. It noted that the policies do not use the words "all access" or "any access," but merely require that "civil authority prohibit access." When the civil authorities issued closure and stay at home orders throughout Missouri, the closure orders mandated that "hair salons and all other businesses that provide personal services to suspend operations," that "all inside seating is prohibited in restaurants," and "that every person in the State of Missouri shall avoid eating or drinking at restaurants . . . with limited exceptions for drive-thru, pickup, or delivery options."

In denying the motion to dismiss, the court "emphasize[d] that Plaintiffs has merely pled enough facts to proceed with discovery." The court stated that all rulings are subject to further review following discovery and subsequent case law in the COVID-19 context may be persuasive.

Nonetheless, this is a promising pivot from the decisions that have granted motions to dismiss or summary judgment in favor of insurers' arguments that the circumstances surrounding the COVID-19 pandemic and several states' stay-at-home orders do not result in direct physical loss to implicate business interruption or civil authority coverages. See *Gavrilides Management Co. LLC v. Michigan Ins. Co.*, No. 20-258-CB-C30, 2020 WL 4561979 (Mich. Cir. Ct. July 21, 2020); *Rose's I, LLC v. Erie Ins. Exchange*, No. 2020 CA 002424B, 2020 WL 4589206 (D.C. Super. Aug. 6, 2020). As we have previously noted, construction of these policies is likely to vary from state to state. This was predictable because, pre-pandemic, many states came to divergent opinions as to the meaning of physical loss. For instance, courts in Connecticut and Massachusetts have concluded that property loss is satisfied by business closures caused by asbestos, lead paint or carbon monoxide (*e.g. Yale University v. CIGNA Ins. Co.*, 224 F. Supp. 2d 402 (D. Conn. 2002); *Matzner v. Seaco Ins. Co.*, 1998 WL 566658 (Mass. Super. Aug. 12, 1998)) while New York courts have refused to apply such a broad construction (*e.g. Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D. 2d 1, 2 (N.Y. App. Ct. 2002)). Hundreds of cases seeking coverage for pandemic related losses have been filed around the country and, as rulings in those cases accumulate, we will report further.

If you have questions about the information contained in this bulletin or whether your current insurance policies provide coverage for losses arising out of the Coronavirus, do not hesitate to contact us.

Marilyn B. Fagelson at 203.772.7725 or mfagelson@murthalaw.com
Rachel Snow Kindseth at 203.772.7774 or rkindseth@murthalaw.com

Marilyn B. Fagelson, Chair
203.772.7725
mfagelson@murthalaw.com

Terence J. Brunau
203.772.7785
tbrunau@murthalaw.com

George A. Dagon, Jr.
860.240.6039
gdagon@murthalaw.com

Michael J. Donnelly
860.240.6058
mdonnelly@murthalaw.com

David P. Friedman
203.653.5438
dfriedman@murthalaw.com

Rachel Snow Kindseth
203.772.7774
rkindseth@murthalaw.com

Benjamin H. Nissim
203.653.5419
bnissim@murthalaw.com

James F. Radke
617.457.4130
jradke@murthalaw.com

Emily McDonough Souza
203.772.7711
esouza@murthalaw.com

Andrew G. Wailgum
617.457.4006
awailgum@murthalaw.com

Kristen L. Zaehringer
203.653.5406
kzaehringer@murthalaw.com