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Business Interruption Coverage for Loss as a Result of COVID-19: Finally a Win for the Policyholders

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Many businesses throughout the country have suffered losses resulting from COVID-19, including closures as a result of government orders or because of the presence of the virus. In many cases, businesses have made insurance claims based on their insurance policies that (1) don't contain an exception for viruses such as COVID-19, and (2) provide business interruption coverage. Most insurance policies that provide business interruption coverage contain language that the policyholder must suffer "direct physical loss or damage" at or in the vicinity of the covered premises before such business interruption coverage will be triggered. The reference to physical loss or damage typically applies to covered events such as storm damage, burst pipes, power outages, etc.

After the onset of the global pandemic, when faced with the question of whether government shutdown orders entered on an emergency basis to slow the spread of an invisible, incredibly resilient and easily communicable virus would trigger business interruption coverage, the insurance companies responded swiftly with a resounding and emphatic, "No" — and quickly denied all such claims. In lock step, the insurance companies all took the same position: i.e., that there must be tangible or structural damage to satisfy the physical loss or damage requirement as a pre-condition for business interruption coverage.

Such denials resulted in hundreds, if not thousands, of insurance coverage lawsuits, including many purported class actions.

Early decisions, including those in Michigan state court, Washington, D.C., and in the Southern District of New York, favored the insurance companies. One judge from the Southern District of New York ruled in favor of an insurance company by concluding that, "[The virus] damages lungs. It doesn't damage printing presses." See *Social Life Magazine v. Sentinel Ins. Co. Ltd.*, No. 1:20-cv-03311-VEC, May 20, 2020 Hearing for Prelim. Inj., Dkt No. 24 at 5:3-4 (S.D.N.Y. 2020)

A recent decision from the Western District of Missouri, however, in favor of the policyholders, provides a well-reasoned counterpoint to the earlier adverse decisions. In *Studio 417, Inc., et al v. The Cincinnati Ins. Comp.*, No. 20-cv-03127-SRB, Order Denying Mot. to Dism., issued August 12, 2020 (W.D. Mo.), the court determined that, because the coverage trigger is set forth as physical loss *or* damage, the court "must give meaning to both terms." The court further stated that to hold otherwise would fail to distinguish between and conflate physical loss and physical damage.

The plaintiffs in *Studio 417* alleged that the virus "is a physical substance," that it "live[s] on" and is "active on inert physical surfaces," and is "emitted into the air." *Id.* at 4. The plaintiffs further alleged that the presence of the virus "renders physical property…unsafe and unusable" and that plaintiffs "were forced to suspend or reduce business" at the covered premises. *Id.*

In ruling in favor of the plaintiffs/policyholders, the court cited the maxim of contract law that it must give meaning to all words in an agreement, thus including both direct physical *loss* and direct physical *damage*, as set forth in the insurance policies. The court then turned to dictionary definitions of *direct*, *physical* and *loss* to determine the "plain and ordinary meaning" of the phrase "direct physical loss." *Id.* at 8. Relying on the cited dictionary definitions, the court ultimately ruled that plaintiffs had provided sufficient allegations of the virus's physical presence at the premises such that the property was unsafe and unusable, thus satisfying the requirement of direct physical "deprivation" or "loss."

While the landscape of court rulings remains far from settled, at least one court has now ruled in favor of policyholders by finding that the virus has a physical presence, that it caused "deprivation" or "loss" at the subject property, and that such findings are sufficient to invoke business interruption coverage. Retailers finally have at least one favorable ruling to point to in their ongoing efforts to recover COVID-19 losses.