SAXE DOERNBERGER & VITA, P.C.

CASE ALERT
Aug. 17, 2020

COVID-19 Win for Policyholders!
Court Approved "Direct Physical Loss" Argument

Late last week, a Missouri federal district court provided a significant victory for insurance policyholders for COVID-19 losses. In Studio 417, Inc. v. The Cincinnati Insurance Company 6:20-cv-03127-SRB (W.D. MO, So. Div., Aug. 12, 2020), the Court was called upon to decide whether allegations involving the presence of COVID-19 in and around physical structures qualify as "direct physical loss or damage" to covered property. For those actively monitoring the COVID-19 insurance coverage litigation landscape, this has been a central question – and hotly contested debate – in virtually all first-party property and business interruption claims. Through a detailed and well-reasoned discussion, the Court answered the question with an emphatic "Yes."

The Plaintiffs – a proposed class of hair salons and restaurants - purchased "all-risk" property insurance policies (the "Policies") from Cincinnati. The Policies provide that Cincinnati would pay for "direct 'loss' unless the 'loss' is excluded or limited." They also defined a "Covered Cause of Loss" as "accidental [direct] physical loss or accidental [direct] physical damage." The Policies did not contain a virus exclusion. Anecdotally, Cincinnati has been vocal about the general lack of virus exclusions on its standard forms, having recently publicized that the company considers such exclusions "unnecessary" because, in its view, "a virus does not produce direct physical damage or loss to property."[1] From Cincinnati's perspective, the insuring agreement is not triggered by these events, so there's no need to analyze exclusions. Cincinnati relied heavily on that analysis in this case.

In attempting to end the case early on a Motion to Dismiss, Cincinnati argued that the Plaintiffs did not allege a direct "physical loss" under the Policies. To wit, Cincinnati argued that "direct physical loss" requires actual, tangible, permanent, physical alteration of property and that COVID-19 cannot satisfy any of those requirements. The Court disagreed, and generally found the cases on which Cincinnati relied to be distinguishable.

In the contra argument that persuaded the Court, the policyholders began with the critical observation that the Policies expressly cover "physical loss ***or*** physical damage" – the concepts are unique. As they advocated: this "necessarily means that either a 'loss' or 'damage' is required and that 'loss' is distinct from 'damage.'" "Loss," in circumstances such as this, is generally recognized by courts as having a more expansive meaning. Further, they argued, Cincinnati failed to define "physical loss" and "physical damage," which it could have easily done. As a result of not defining the "physical loss," the terms could, at least, be considered ambiguous, subject to the policyholders' reasonable interpretation, and construed in favor of coverage.

---

[1]Ladbury, Adrian. "Cincinnati Financial Moves onto Front Foot about No Need for Virus Exclusions." Commercial Risk, 28 Apr. 2020, www.commercialriskonline.com/cincinnati-financial-moves-onto-front-foot-about-no-need-for-virus-exclusions.

The Court generally agreed with this approach, and ultimately concluded that the policyholders adequately alleged a claim for direct physical loss. Tellingly, the Court did not feel compelled to rest on an ambiguity argument but, rather, described that it was merely interpreting "the plain and ordinary meaning of the phrase." Further, the Court opined, COVID-19 is no mere "benign condition," and the policyholders plausibly alleged that particles were a "physical substance" that attached to and damaged their property, rendering them unsafe and unusable. The case will now proceed to the discovery phase, where these arguments will continue to be a focal point as applied to the actual evidence. Though the case is far from over, the Court has set a critical first precedent by specifically acknowledging that the policyholder's legal position should prevail.

In an environment where COVID-19 claims are routinely being denied without investigation via boilerplate denial letters citing this same argument, the Court's careful analysis and the correct conclusion is an essential milestone. It reinforces that policyholders – who have regularly been dissuaded by the insurance industry from fully pursuing their legal rights in this context – can withstand early dispositive motion practice, have recovery options available to them, and should be empowered to explore them fully.

For more information on this case or COVID-19 insurance recovery strategies, contact Gregory D. Podolak at gdp@sdvlaw.com or Christine Baptiste-Perez at cbp@sdvlaw.com.