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# Policyholders See New Developments in COVID-19 Case Law

## Insurance Counseling & Recovery

Insurers across the nation continue to file motions to dismiss COVID-19 cases brought by policyholders on three primary grounds:

1. there is no "physical loss or damage" to the covered property,
2. there is no "prohibition by a civil authority" to access the property and
3. there is a virus exclusion.

### What is a "Physical Loss"?

Recently, in North Carolina, a state court judge held that the policyholder restaurateurs were entitled to coverage despite the insurers' arguments that no "physical loss or damage" had occurred when the restaurants were closed. In *North State Deli et. al v. Cincinnati Insurance Co.*, North Carolina Superior Court Judge Orlando F. Hudson, Jr. ruled that government closure orders requiring restaurants to close constituted "direct physical loss" covered by a restaurant group's all-risk policy. That insurance policy read:

#### Business Income

We will pay for the actual loss of "business income" and "rental value" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss.

A "Covered Cause of Loss" was defined in the policy as a direct loss. A "loss" was defined as "accidental physical loss or accidental physical damage." The restaurant group argued that the government closures caused direct loss to property, in that they forced plaintiffs to lose the physical use and access to their restaurant property and premises. Following the trend, Cincinnati Insurance argued that direct physical loss requires some alteration to the property – not just pure economic loss.

On October 7, 2020, the *North State Deli* court acknowledged this common interpretation but did not accept it, saying that at the very least it meant that there were two reasonable interpretations, rendering the meaning of "physical loss" ambiguous. Therefore, the court would interpret the wording against the insurance company. The court also reviewed the definitions for "physical" and "loss," taking each one by one. Where "physical" means "material things" and "loss" means "the act of losing possession", the court found that direct physical loss "describes the scenario where business owners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property." Additionally, the court focused on the inclusion of the word "or" in the wording "accidental physical loss or accidental physical damage." If physical loss requires damage, the term physical damage would be redundant.

Good news for policyholders! While the policy at issue in *North State Deli* did not include a virus exclusion, we hope the court's thoughtful analysis is a sign of good things to come.

### Another Day in Court for Some Policyholders

Moreover, even in the cases in which insurance companies are successful in dismissing actions, those dismissals are not necessarily final. A University of Pennsylvania [litigation tracker](#) reveals that about as many of these cases were dismissed *without prejudice* as those with prejudice. What does this mean? It means the cases can be refiled with allegations designed to secure coverage. In one case here in the Northern District of Illinois, *Sandy Point Dental PC v. The Cincinnati Insurance Company*, 20-CV-2160, N.D. Ill. 2020 (Gettleman, J.), the court dismissed the plaintiff's case. In response, the plaintiff asked the court to reconsider the dismissal and accept an amended complaint containing new explanations for coverage. The plaintiff relied on Blue Springs Dental, a case [we wrote about](#) in an earlier post, in asking for another chance at relief. Their new complaint states that the nature of the virus is elusive, lingering in the air, attaching to surfaces, and living for days. In other words: COVID-19, mysterious and ever-present, requires a new way of assessing damage. We'll be watching this case closely.

#### **Across the Pond ... a Harbinger of Broader Policy Interpretation?**

With the insurance world watching, earlier this year England's Financial Conduct Authority, regulator of insurers, brought a test case, *The Financial Conduct Authority (FCA) v. Arch et al.* The goal was to determine whether "the advice of and restrictions imposed by the UK Government" constituted a business interruption. On September 15, 2020, the High Court of Justice provided a win for policyholders, ruling that business "interruption" need not be a complete cessation, that the inability to use a premise need not require the inability to physically access the space, and that COVID-19 may "manifest" in the sick yet undiagnosed. Following the ruling, the FCA instructed insurers to pay valid claims "in full at the earliest possible date to support business and consumers during the current situation." On October 2, the High Court issued [declarations](#) summarizing its lengthy order. Since then, many insurers have paid on claims, with some dropping their appeals.

These are early days in COVID-19 coverage litigation, and we'll continue to update you on trends as we see them. [As we wrote about last month](#), the outcome of these cases is necessarily policy-specific, where words matter and ambiguity has its advantages for the policyholder.

*For additional information or questions about insurance coverage litigation, contact a member of [Gould & Ratner's Policyholder Insurance Coverage Practice](#).*