

BBQ WITH A SIDE OF BUSINESS INTERRUPTION: KC COURT FINDS RESTAURANT'S COVID-19 INSURANCE CLAIM COVERED

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The path to a business interruption insurance payout for companies shuttered by the COVID-19 pandemic has always been fraught with peril. A united insurance industry has told anyone who will listen that their policies simply don't cover business interruption losses caused by the COVID-19 pandemic. Insurers have argued that coverage is not triggered because there is no physical damage to insured properties and virus or microorganism exclusions apply.

As we predicted, insured businesses are finding that their insurer's positions with respect to these claims will not be accepted by many Missouri courts.

Ja-Del, Inc v. Zurich American Insurance Company et al. Case No. 2016-CV11209 Ja-Del, Inc., the operator of the popular Fiorella's Jack Stack Barbecue restaurant chain in the greater Kansas City area, filed a claim with its insurer for business interruption arising from the COVID-19 pandemic. Ja-Del purchased a Zurich policy that covered "all risks" to business income loss. Ja-Del asserted that it sustained and will continue to sustain losses at its insured restaurant properties due to the mandatory government shutdowns and stay-at-home orders issued in Missouri and Kansas. Zurich, however, denied the claim for business income loss due to mandatory government shutdowns, or civil authority orders. Ja-Del then sued in Jackson County, Missouri.

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In part, Ja-Del argued that the microorganism exclusion that Zurich relied on does not exclude coverage for loss caused by viruses. It excludes claims arising from "microorganisms" but COVID-19 is not a living organism; thus, it is not a "microorganism" as defined by the policy. Further, people infected with COVID-19 leave droplets on objects and surfaces that can infect other people if touched. Those droplets, known as fomites, attach themselves to Plaintiff's property causing a "direct physical loss." Ultimately, the Jackson County Circuit Court found the Zurich policy ambiguous and, as a result, interpreted the policy in a manner favoring the insured. Summary judgment was entered in favor of Ja-Del and against the insurance company.

Support for Coverage for COVID-19 Closures

Ja-Del is not an isolated insured-favorable ruling. A small but growing body of Missouri precedent supports coverage for closures due to the pandemic.

- In *Studio 417, et. al v. The Cincinnati Insurance Company*, Case No. 20-cv-03127-SRB (W.D. Mo. August. 12, 2020) the Court denied an insurer's motion to dismiss reasoning that the property was unsafe and unusable, thus satisfying the requirements of direct physical loss.
- In *Blue Dental Care, LLC v. Owners Ins. Co.*, 20-CV-00383-SRB, 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020) the insurance company's motion to dismiss was denied because the insured business alleged that COVID-19 caused the loss of use of their clinics.
- In *C. Hopps, Ltd v. The Cincinnati Ins. Co., Inc*, 20-CV-00437-SRB, 2020 WL 6483108 (W.D. Mo. Aug. 12, 2020) the Court denied the insurer's motion to dismiss for the same reasons as *Studio 417* reasoning that the insureds in both cases alleged that COVID-19 caused direct physical loss by making the properties unusable.

While courts in other jurisdictions have found that certain policies do not cover COVID-19 business interruption claims, a majority of Missouri opinions to have reached the merits have ruled in favor of insured businesses.

So, what to do about it?

Insurers have attempted to defeat potential COVID-19 business interruption claims with narrow interpretations of their policies and broad pronouncements of "no coverage here." However, as we predicted, Missouri courts have been unwilling to read insurance policies as the insurers prefer. Insurers' initial comments that there cannot be coverage because there is no physical damage to the covered property cannot be taken at face value, and the insurer's denial of COVID-19 claims should be independently evaluated based on the policy language, precedent, and the claim. In light of longstanding rules of interpretation favoring coverage, as well as recent favorable Missouri authority, impacted policyholders should continue to assert aggressive positions.

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