THE BROWN RECLUSE AND HOPE FOR PANDEMIC SHUTTERED MISSOURI BUSINESSES: BUSINESS INTERRUPTION POLICIES MAY COVER COVID-19 LOSSES

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In one of our prior blogs, we predicted the first round of COVID-19 business interruption coverage litigation would battle over the issue of whether closure orders result in "physical loss or damage" sufficient to trigger coverage. Indeed, one of the first courts to have considered COVID-19 business interruption claims in Missouri focused on this very issue in denying an insurer's motion to dismiss, the first major victory for insured businesses in the Midwest. The aforementioned case is *Studio 417, Inc. v. Cincinnati Ins. Co*.

This ruling, holding that "direct physical loss or damage" under the terms of the policy may include the circumstances described in the Plaintiffs' pleadings, is welcome news for businesses now turning to their insurance carriers to cover coronavirus-related business interruption claims.

Direct Physical Loss of Use During COVID-19

Studio 417, Inc. v. Cincinnati Ins. Co., No. 20-CV-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020) The plaintiffs in this case, a hair salon and several entities operating restaurants, brought suit against their insurance

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carrier after their claims had been denied. All had suffered substantial losses after COVID-19 spread rapidly across the state. They all claimed they had suffered direct physical loss of use of their premises as a result of COVID-19, and that the state and municipal closure orders had limited their right of ingress and egress to the covered property.

The plaintiffs argued that the policy allowed claims for direct physical loss or direct physical damage. They urged that damage to the physical structure of the covered premises was not a prerequisite to trigger coverage. To support its claim, Plaintiffs pointed to *Mehl v. The Travelers Home & Marine Ins. Co*.

Direct Physical Loss vs. Brown Recluse Spiders

Mehl v. The Travelers Home & Marine Ins. Co., Case No. 16-CV-1325-CDP (E.D. Mo. May 2, 2018) In *Mehl*, a homeowner's residence had been infested by brown recluse spiders. The homeowner attempted to remedy the situation but was ultimately forced to leave for the homeowner's own safety. In that case, the court rejected the insurer's argument that physical damage to the premises was required to trigger coverage.

> *Since loss or damage was not defined in the policy, the court could not grant summary judgment in the absence of policy language that would lead a reasonable person to believe that loss or damage required physical damage to the structure of the covered premises.*

The defendant insurance provider countered that any loss or damage must be physical, and that the mutual understanding of any policy is that the damage be to property, such as in a fire or storm. It relied on *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.* to further this argument.

Direct Physical Loss vs. Mad Cow Disease

Source Food Tech., Inc. v. U.S. Fid. & Guar. Co., Case No. 465 F.3d 834 (8th Cir. 2006) In *Source Food*, the plaintiff's meat shipment had been stalled in Canada as the threat of mad cow disease continued to spread and forced the U.S. Government to embargo any foreign cow products.

> *Summary judgment in favor of the carrier was granted as there was no evidence to suggest that the virus had infiltrated the plaintiff's particular product.*

The Eighth Circuit held that characterizing plaintiff's inability to receive its product due to an embargo as a direct physical loss or damage would render the word 'physical' meaningless. The court in *Studio 417* was quick to point out that *Source Food* applied Minnesota state law, and not Missouri law.

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First Major Victory for Insured Businesses in the Midwest

Faced with these two competing interpretations of the policy, the district court in *Studio 417* found them both to be equally plausible and applied the well-established rule of insurance policy construction favoring any reasonable interpretation of a policy that affords coverage over interpretations that defeat coverage. The district court also gave hope to insureds seeking related coverages. The Order held that the plaintiff may have a claim for civil authority coverage.

Civil authority coverage typically provides insurance coverage to businesses when a federal, state, or municipal actor limits access to an insured premise through government action.

Insurance providers have urged courts that no civil authority coverage exists where the loss of access is not total. This means that any limited permission to remain on the premises in any way does not meet that threshold. Here, the court rejected that argument, holding that "access" is not modified in the policy. Therefore, to imply that total loss of access would be necessary is contrary to the language of the policy.

Takeaways for Missouri Businesses: Direct Physical Loss

While the *Studio 417* opinion represents a needed win for insured businesses, the district court was keen to note that plaintiff-business owners had not yet demonstrated entitlement to relief and the court would permit re-argument of the issues at the summary judgment stage. The court also emphasized that it was not yet evaluating the applicability of a "virus exclusions." The *Studio 417* opinion puts business owners one step closer to getting the benefits of the insurance policies they purchased and the insurance payments they desperately need.

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