



Cincinnati Insurance COVID-19 BI Case Gets First Appellate Court Review

AM Best

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An appeals court for the first time has heard oral arguments in a case that could decide a central argument in the scores of lawsuits by businesses demanding insurance coverage for losses related to the COVID-19 pandemic.

The question boils down to whether the presence of the coronavirus, which led to government orders to shut down businesses, constitutes a direct physical loss or damage to the premises.

A panel of the 8th Circuit Court of Appeals heard oral arguments in an appeal filed by an Iowa oral surgery practice arguing that the virus indeed created a physical loss.

Oral Surgeons P.C. filed its lawsuit last year after Cincinnati Insurance Co. denied its claim for business interruption coverage.

Senior District Judge Charles Wolle in Iowa dismissed the complaint, saying recent case rulings in other courts did not find the virus caused physical loss or damage. The few contrary cases cited by Oral Surgeons, he said, are distinguishable on their facts and not as well analyzed as the cases cited by Cincinnati, he said in his ruling to dismiss the case.

The appellate court justices sounded skeptical of Oral Surgeons' legal argument that the physical loss occurred.

"What was the physical loss or the physical damage?" one of the panelists asked attorney Tyler Smith, representing Oral Surgeons, according to an audio recording of the court exchange.

"The physical damage was the COVID-19 community spread of the virus," he said.

He also noted no physical examination of Oral Surgeons has occurred because the case has not gotten to the discovery stage.

The case is a simple dispute over a contract that spells out clearly that physical damage or loss must have occurred to trigger coverage, said Cincinnati's attorney, Daniel Litchfield. Oral Surgeons sued, he said, because they lost business and revenue.

"There's nothing physical about that," he said.

Michael Miguel, a principal with McKool Smith's Insurance Recovery Practice, said the justices seemed dubious about Oral Surgeons' legal argument because appellate courts lean on prior cases to inform their judgment.

"Judges want certainty," he said. "They're grasping for the side that is going to do the best job of analogizing the current situation to one that has come in the past."

To that point, he said it sounded as if Cincinnati had the stronger argument.

The justices “certainly seemed focused on the lack of proof of actual structural damage of property as being the keystone for getting coverage,” said Miguel, who is not representing any party in the case.

While Miguel said the case is not a bellwether, he also said it would not be entirely surprising if the court ended up agreeing with Oral Surgeons. He likened that possibility to the U.K. Supreme Court’s ruling in the business interruption test case that largely favored plaintiffs over insurers ([BestWire, Jan. 15, 2021](#)).

The American Property Casualty Insurance Association and the National Association of Mutual Insurance Companies filed a brief in the case on behalf of Cincinnati Insurance.

In a letter, attorney Lindsey Davis of the Zelle law firm asked the court to consider a recent ruling in *Town Kitchen v. certain underwriters at Lloyd’s*. The court in that case said economic losses do not constitute physical loss.

“The key difference between the plaintiff’s loss of use theory and something clearly covered — like a hurricane — is that the property did not change,” Davis said, citing the Florida Southern District Court ruling. “The world around it did. And for the property to be usable again, no repair or change can be made to the property — the world must change.”

An Illinois federal judge in March allowed a dentist’s proposed class action seeking COVID-19-related business interruption coverage to proceed, saying he did not need to show a “physical alteration” of the property to file a valid claim ([BestWire, March 2, 2021](#)).

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