

Mo. Restaurants Can Pursue COVID-19 Coverage Suit

By Jeff Sistrunk

Law360 (August 12, 2020, 4:25 PM EDT) -- In an apparent first, a Missouri federal judge allowed a group of hair salons and restaurants to proceed with a proposed class action claiming Cincinnati Insurance Co. wrongfully refused to cover their losses during COVID-19 shutdowns, holding Wednesday that the businesses adequately alleged they suffered a covered "direct physical loss."

U.S. District Judge Stephen R. Bough denied Cincinnati's motion to dismiss, permitting the group of five business owners to continue pursuing coverage under multiple prongs of their "all-risk" policies with the insurer, which do not contain a common exclusion for virus-related losses. The ruling marked the first known instance of a policyholder's COVID-19 coverage suit surviving a dismissal bid.

Critically, Judge Bough rejected Cincinnati's assertion that the policies' core requirement of direct physical loss or damage to property can be satisfied only by an "actual, tangible, permanent, physical alteration," which, according to the insurer, does not occur even if COVID-19 is present in a building.

The district judge said Cincinnati's position conflates "loss" and "damage," when in fact the terms have distinct meanings. Since the policies do not define either term, Judge Bough turned to the dictionary definition of loss: the "act of losing possession" or "deprivation."

Applying that definition, the judge held that the businesses' amended complaint sufficiently alleged a direct physical loss because they claimed the presence of COVID-19 on their premises hobbled their operations.

"COVID-19 allegedly attached to and deprived plaintiffs of their property, making it 'unsafe and unusable, resulting in direct physical loss to the premises and property,'" Judge Bough wrote. "Based on these allegations, the amended complaint plausibly alleges a 'direct physical loss' based on 'the plain and ordinary meaning of the phrase.'"

The business owners — including the operator of two hair salons in Springfield, Missouri, and four proprietors of restaurants in the Kansas City area — initially filed their putative class action against Cincinnati in Missouri federal court in late April, and lodged an amended complaint in early June. They are seeking to represent both a nationwide class and a Missouri subclass of Cincinnati policyholders that have been denied coverage for losses tied to government stay-at-home orders.

Cincinnati filed its motion to dismiss in late June, asserting that coverage for the businesses' losses is

unavailable under any of five policy sections cited in the amended complaint, including the heavily litigated "business income" and "civil authority" coverage provisions.

All five prongs require the existence of direct physical loss or damage, either to the policyholder's property or to a nearby property. The business income provision, for example, extends coverage for the policyholder's loss of income due to a suspension of operations caused by direct physical loss or damage to its own property.

In Wednesday's order, Judge Bough said the business owners plausibly claimed they have suffered a direct physical loss under the business income provision through their allegations that employees, customers or other visitors are likely to have brought COVID-19 onto their premises. He rebuffed Cincinnati's contention that a ruling adopting the businesses' interpretation of the term "loss" would result in a finding of direct physical loss "whenever a business suffers economic harm."

"That is not what the court holds here," Judge Bough wrote. "Although plaintiffs allege economic harm, that harm is tethered to their alleged physical loss caused by COVID-19 and the closure orders."

The judge then turned to the civil authority provision, which provides coverage for losses the policyholder suffers when it is unable to access its property due to an order issued by an authority, such as a government agency. That provision specifies that the government order must result from direct physical loss or damage to a property within a certain distance of the policyholder's.

Judge Bough said the business owners sufficiently alleged that civil authority coverage applies because Missouri's stay-at-home orders stemmed from the likely presence of COVID-19 at nearby properties.

Cincinnati had also argued that civil authority coverage is unavailable because the stay-at-home orders did not fully bar the business owners from accessing their premises. But Judge Bough pointed out that the policies do not state that a civil authority order must prohibit "all access" or "any access" to a policyholder's property.

In this case, the judge said, the business owners' complaint alleged the stay-at-home orders hindered access to their properties because they required hair salons to temporarily cease all operations and limited restaurants to takeout, delivery and drive-thru services.

"At the motion to dismiss stage, these allegations plausibly allege that access was prohibited to such a degree as to trigger the civil authority coverage," Judge Bough wrote.

The district judge emphasized that his ruling means only that the business owners presented enough facts to defeat Cincinnati's dismissal motion and move forward to discovery.

"Discovery will shed light on the merits of plaintiffs' allegations, including the nature and extent of COVID-19 on their premises," the judge wrote. "In addition, the court emphasizes that all rulings herein are subject to further review following discovery. Subsequent case law in the COVID-19 context, construing similar insurance provisions, and under similar facts, may be persuasive."

Brandon J.B. Boulware of Boulware Law LLC, who represents the business owners, praised the ruling as a "significant win for insureds and an important first step in forcing Cincinnati Insurance to pay for the losses covered in the insurance policy."

"The Cincinnati policy is an 'all risks' policy and does not contain any exclusion for losses caused by a virus," Boulware said in an emailed statement. "The court's order correctly recognizes that. We look forward to plowing ahead with this case."

Cincinnati spokeswoman Betsy Ertel told Law360 that, "We respect the legal process" and, as "this case continues, we believe that the court will ultimately enforce the language of our policy contract."

"Our commercial property insurance policies require direct physical damage or loss to property and do not provide coverage in this case," Ertel said in an emailed statement.

Robin Cohen of McKool Smith PC, who is representing numerous policyholders in COVID-19 coverage disputes, told Law360 the ruling is significant because Judge Bough "closely analyzed the policy language, not what the carrier wanted the language to be."

"The carriers have strategically decided to try to not let discovery develop on whether the virus causes direct physical loss or damage, and they are trying to go in for the kill early," Cohen said. "It is very helpful that the judge saw through what they were trying to do and took the issue head-on."

The businesses are represented by Brandon J.B. Boulware and Jeremy M. Suhr of Boulware Law LLC, Todd Johnson of Votava Nantz & Johnson LLC and Thomas A. Rottinghaus, Tyler W. Hudson and Jack T. Hyde of Wagstaff & Cartmell LLP.

Cincinnati is represented by Michael L. Brown and Kelvin J. Fisher of Wallace Saunders PC and Daniel Litchfield and Ericka Hammett of Litchfield Cavo LLP.

The case is Studio 417 Inc. et al. v. The Cincinnati Insurance Co., case number 6:20-cv-03127, in the U.S. District Court for the Western District of Missouri.

--Editing by Orlando Lorenzo.