

NORTH CAROLINA COURT RULES IN FAVOR OF COMMERCIAL PROPERTY POLICYHOLDERS: GOVERNMENT'S COVID-19 SHUTDOWN ORDERS CAUSED "PHYSICAL LOSS" OF PROPERTY

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Litigation and Dispute Resolution Alert

By: Carolyn M. Branthoover, Erin D. Fleury

In a first-of-its-kind decision in the United States, a North Carolina state court recently granted summary judgment to a group of restaurants' claims seeking insurance coverage for business interruption losses arising out of certain pandemic-related government orders. In two decisions dated 7 October 2020 in the case *North State Deli, LLC, et al. v. The Cincinnati Insurance Co., et al.*, Case No. 20-CVS-02569 (*North State Deli*), Superior Court Judge Orlando F. Hudson, Jr. (i) denied the defendant-insurers' motion to dismiss the policyholders' complaint and, more significantly, (ii) granted the policyholders' motion for partial summary judgment, ruling "the Policies provide coverage for Business Income and Extra Expenses for Plaintiffs' loss of use and access to covered property mandated by the Government Orders as a matter of law." See Order Granting Plaintiffs' Rule 56 Motion for Partial Summary Judgment, at 7, *North State Deli, LLC, et al. v. Cincinnati Ins. Co., et al.*, Case No. 20-CVS-05269 (N.C. Super. Ct. Oct. 7, 2020).

In *North State Deli*, a group of sixteen restaurants brought, *inter alia*, a declaratory judgment action against The Cincinnati Insurance Company and The Cincinnati Casualty Company (collectively, Cincinnati) seeking coverage under certain "all risk" property insurance policies for business interruption losses suffered as a result of certain government shutdown orders. The plaintiffs argued that the various government orders, which included stay-at-home mandates and travel restrictions on non-essential movements and were issued by various government entities to combat the coronavirus (COVID-19) pandemic, constituted covered perils under the policies because the orders forced the plaintiffs to lose the physical use of and access to their restaurant property and premises.

The policies that Cincinnati issued to the plaintiffs covered business income losses and extra expenses sustained as the result of business interruption, which required there to be a "direct 'loss' to property[.]" *Id.* at 3. The policies defined "loss" to mean "accidental physical loss or accidental physical damage." The court held that, "absent an exclusion or limitation, the Policies would provide coverage under these provisions where the policyholder shows (i) direct 'accidental physical loss' to property, or (ii) direct 'accidental physical damage' to property." *Id.* at 3–4 (emphasis in original).

The court examined the policies' "accidental physical loss or accidental physical damage" language and concluded, following examination of various dictionary definitions, that "the ordinary meaning of the phrase 'direct physical loss' includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions." *Id.* at 6. Stated more simply, the insureds' loss of

the ability to use or access their property for the income-generating purpose for which the property was insured, constituted a “direct physical loss.”

Importantly, the Cincinnati policies at issue did not contain any form of virus exclusions or any other exclusion that the court found applicable. The court rejected Cincinnati’s arguments that the “Ordinance or Law” exclusion, the “Acts or Decisions” exclusion, or the “Delay or Loss of Use” exclusion applied to bar coverage for the plaintiffs’ losses. *Id.* at 7.

It is very likely that Cincinnati will appeal the superior court’s ruling. Nonetheless, the North Carolina court’s summary judgment determination that Cincinnati’s “all risk” property insurance policies provide coverage for COVID-19-related loss of use of covered property represents a significant victory for policyholders that are facing business interruptions arising out of COVID-19 orders or other similar government restrictions.

KEY CONTACTS



CAROLYN M. BRANTHOOVER
PARTNER

PITTSBURGH
+1.412.355.8902
CAROLYN.BRANTHOOVER@KLGATES.COM



ERIN D. FLEURY
COUNSEL

PITTSBURGH
+1.412.355.7425
ERIN.FLEURY@KLGATES.COM

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