

Publication

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Client Alert: Policyholder Wins in Missouri and Florida Represent a Major Boon for Insureds Seeking COVID-19 Business Interruption Coverage

Two recent decisions by courts denying motions to dismiss brought by insurers against insureds seeking COVID-19 business interruption coverage could be harbingers for other such decisions due to their focus on the omnipresence of the airborne coronavirus and its attachment to surfaces as well as the expectations of a reasonable insured. The *Blue Springs Dental Care* court, in particular, homed in on recent developments on the nature of the coronavirus and the causes of its dismay.

In *Blue Springs Dental Care v. Owners Ins. Co.*,¹ the United States District Court for the Western District of Missouri examined closely the “direct physical loss of or damage to” language present in most policies providing business interruption coverage in a suit brought by four dental care clinics seeking coverage for COVID-19-related business income losses. Unlike in many previous lawsuits, the insureds in *Blue Springs Dental Care* alleged that the COVID-19 virus was present on their properties and caused physical loss or damage: “[i]t is likely customers, employees, and/or other visitors to the insured property over the recent months were infected with the coronavirus” and that they “suspended operations due to COVID-19 to prevent physical damages to the premises by the presence or proliferation of the virus and the physical harm it could cause persons present there”² The insureds

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explained that “COVID-19 is physically transmitted by air and surfaces through droplets, aerosols, and fomites that remain infectious for extended periods of time.”³ Taking the insureds’ allegations as true for the purposes of deciding the insurer’s motion to dismiss, the court held that the insureds “plausibly allege[d] that COVID-19 physically attached itself to their dental clinics, thereby depriving them of the possession and use of those insured properties.”⁴ In reaching its decision, the court further held that a “physical loss” to property does not require a “physical alteration.”⁵ The court rejected the insurer’s argument that the insureds’ allegations were merely “naked conclusions” which could not prevent dismissal.⁶ The court also found that even a partial cessation of operations could support a finding of coverage.⁷ Insureds should look at *Blue Springs Dental Care* as potentially providing a roadmap to use when articulating claims for coverage. It should be noted, however, that the policy at issue did not contain an exclusion barring claims pertaining to losses caused by virus.

In *Urogynecology Specialist of South Florida v. Sentinel Ins. Co.*,⁸ the United States District Court for the Middle District of Florida was faced with an insured’s claim for business interruption and civil authority coverage stemming from the COVID-19-related closure of its business, which was the result of an executive order issued by the governor, and the insurer’s motion to dismiss, which argued that the policy’s “virus” exclusion barred coverage for the insured’s losses.⁹ The policy excluded coverage for losses caused by the “[p]resence, growth, proliferation, spread or any activity of ‘fungi,’ wet rot, dry rot, bacteria or virus.”¹⁰ The insured argued this provision was ambiguous and did not clearly exclude losses stemming from COVID-19 shutdown orders.¹¹

The court denied the insurer’s motion to dismiss. The decision was largely based on the fact that the court was not provided with copies of the policy forms the virus

exclusion cited by the insurer was said to have modified.¹² As a result, the court indicated it would “not make a decision on the merits of the plain language of the Policy to determine whether Plaintiff’s losses were covered.”¹³ Nevertheless, the case provides useful insight as the court went on to state that “[d]enying coverage for losses stemming from COVID-19, however, does not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses.”¹⁴ Thereafter, the court distinguished cases relying on what it called “pollution exclusions.”¹⁵ Thus, while the court did not make a definitive coverage decision, it did implicitly recognize a difference between exclusions specifically relating to viruses and traditional “pollution exclusions” that happen to reference viruses.

Blue Springs Dental Care and Urogynecology Specialist of South Florida are significant wins for insureds because they address the exceedingly common insurer arguments that “physical loss of or damage to” property requires physical or structural alteration and that a broad exclusion which merely includes “virus” among a list of perils is nevertheless sufficient to exclude COVID-19-related losses. Insureds will no doubt look to these cases when seeking coverage.

If you have any questions about this recent decision, please contact Angela Elbert, Paul Walker-Bright, Nicholas Graber or your Neal Gerber Eisenberg attorney.

1. 2020 U.S. Dist. Lexis 172639 (W.D. Mo. Sep. 21, 2020)

2. *Id.* at *10, 12.

3. *Id.* at *12.

4. *Id.* at *13.

5. *Id.*

6. *Id.*

7. *Id.* at *17.

8. Case No. 20-cv-1174-Orl-22EJK (M.D. Fla., Sept. 24, 2020).

9. *Id.* at pp. 2, 4.

10. *Id.* at p. 5.

11. *Id.* at p. 6.

12. *Id.* at pp. 6-7.

13. *Id.* at p. 7.

14. *Id.*

15. *Id.*

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