INSURANCE POLICYHOLDER ALERT

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Encouraging News for Policyholders Seeking Coverage for COVID-19 Business Interruption Losses

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On August 12, 2020, a federal district court delivered a big win for businesses that were shut down due to the COVID-19 pandemic, holding that the presence of COVID-19 on insured property can constitute "direct physical loss" for purposes of triggering coverage under a property insurance policy. Although many property insurance policies cover business interruption losses resulting from "direct physical loss" to the insured's premises, property insurers have refused to cover claims for direct physical loss caused by COVID-19 with near uniformity. Business owners across the country have been forced to file more than 700 lawsuits against their property insurers to recover business interruption losses caused by the COVID-19 pandemic.

Although policy language can differ from policy to policy, the two main issues in most of the COVID-19 property insurance lawsuits are: (1) whether the presence of COVID-19 and/or SARS-CoV-2 (the virus that causes COVID-19) is "physical loss or damage"; and, if so (2) whether coverage is eliminated by exclusions that purport to apply to losses caused by viruses, contamination, communicable diseases, or pollution. In a coverage case brought by a group of restaurants and hair salons that were shut down due to state Closure Orders, the United States District Court for the Western District of Missouri answered "yes" to the first issue. *See Studio 417, Inc. v. The Cincinnati Insurance Co., No. 20-cv-03127*.

Noting that the insurance company could have defined "direct physical loss or damage" in its policy but failed to do so, the *Studio 417* court looked to the Merriam-Webster dictionary for guidance. Based on the dictionary definitions of "direct," "physical," and "loss," the court held that allegations that the insureds were deprived the use of their premises due to the presence of COVID-19 on their properties were sufficient to withstand the insurer's motion to dismiss. In consulting the dictionary to determine the meaning of "direct physical loss," the *Studio 417* court followed an approach to policy interpretation that is followed in most jurisdictions across the country: when a term is undefined in a policy, the court must rely on the term's plain and ordinary meaning.

The insureds' complaint alleged that the policies at issue did not include "any exclusion for losses caused by viruses or communicable diseases." Accordingly, the *Studio 417* decision does not address the second main issue in COVID-19 property insurance cases, i.e., whether an exclusion eliminates coverage for the direct physical loss caused by COVID-19.

The *Studio 417* decision denying the insurer's motion to dismiss does not necessarily mean that the insureds will recover their business interruption losses in that case. That litigation is just beginning. As the court explained, the insureds "have merely pled enough facts to proceed with discovery . . . all rulings herein are subject to further review following discovery." Nevertheless, the *Studio 417, Inc.* court's interpretation of "direct physical loss" makes good sense and policyholders should expect other courts wrestling with the same language to find the decision to be highly persuasive.

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