

FHMS COVID-19 Resource Center

Insurer Prevails on Business Interruption Claim in D.C. Superior Court

To respond to the ongoing COVID-19 pandemic, state and local authorities across the United States have mandated that businesses close or modify operations. These business closures have caused unprecedented effects, especially in the retail and restaurant industries. Many businesses have sought coverage for lost income caused by shutdown orders through property insurance policies containing business interruption coverage. The insurance industry has generally denied those claims on the grounds that business income loss caused by the pandemic and related shutdown orders are not covered claims, and that business interruption coverage in standard property insurance policies was not designed to provide coverage in the event of a pandemic. We previously [reported](#) on legislative and judicial developments in the field of business interruption insurance coverage.

Some of these cases have moved to resolution in trial courts. Erie Insurance Exchange recently obtained summary judgment in the District of Columbia Superior Court in coverage litigation filed against it by ten restaurants and bars located in Washington D.C. The case is *Rose's 1, LLC v. Erie Insurance Exchange*, No. 2020-CA-2424-B.

The restaurants had purchased Erie's Ultrapack Plus Commercial Property coverage, which covers "loss of 'income' and/or 'rental income'" sustained "due to partial or total 'interruption of business' resulting directly from 'loss' or damage" to the insured property. Washington D.C. went under a state of emergency on March 11, 2020. In a series of orders, the mayor limited, then closed, restaurants and bars. These orders required the insured restaurants to close their businesses, resulting in a substantial loss of income. After Erie denied the restaurants' claims, they sued. Erie and the restaurants filed cross-motions for summary judgment.

The court characterized the issue as whether Washington D.C.'s shutdown orders constituted "direct physical loss" as defined by the Erie policies. On August 6, 2020, the court held that the COVID-19 shutdown orders did not constitute direct physical loss. It granted Erie's motion for summary judgment and denied the restaurants' motion for summary judgment.

The restaurants argued that the shutdown orders directly led to loss of use of their properties. The court rejected this argument, finding that the shutdown orders merely required businesses and individuals to take certain actions, and did not effect any direct change to the restaurants' properties. The restaurants next argued that the damage to their properties was "physical" since COVID-19 and the novel coronavirus are a material and tangible harm, and not an abstract phenomenon. The court rejected this argument, too. The restaurants lacked evidence showing that COVID-19 was present on their insured properties at the time of closure, and the shutdown orders did not affect those properties. Finally, the restaurants argued that "loss" included "loss of use," requiring that the restaurants show only that they were deprived of the ability to use their properties, instead of showing physical damage to the properties. The court rejected this argument, ruling that the words direct and physical modified the term "loss" in the policy. The court also noted that none of the restaurants' cited cases held that a government edict constituted a direct physical loss.

The court also notably rejected the restaurants' argument that their business interruption claims were covered because the Erie policy lacked a pandemic exclusion. Even absent such an exclusion, the court ruled that the restaurants had not proved a covered loss.

The *Rose's 1* decision appears to be one of the first written decisions to determine whether business interruption coverage applies to COVID-19-related losses. In May 2020, a judge in the Southern District of New York denied a motion for a preliminary injunction in an oral ruling. See *Social Life Magazine, Inc. v. Sentinel Ins. Co. Ltd.*, No. 20-3311 (S.D.N.Y. May 14, 2020). And in *Tambellini v. Erie Insurance Exchange*, the Pennsylvania Supreme Court declined to exercise extraordinary jurisdiction over all business-interruption litigation in Pennsylvania state court. The *Rose's 1* decision is specific to the particular policy language at issue, and other insurance policies may have different language that applies. This decision is subject to further review on appeal. However, it does provide a guide on how courts across the country may consider business interruption COVID-19 claims.

FHMS continues to monitor business interruption litigation and is well-equipped to assist you with all insurance-coverage questions related to COVID-19.

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