# Presence of Coronavirus at a Business May Not Result in Property Damage

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There can be no doubt that our lives are fundamentally different now than they were in March of this year. Virtual Zoom meetings have become the norm. We eat take-out rather than dine in. We shop online rather than visit brick-and-mortar stores. Many businesses here and all over the country are feeling the effects of this pandemic and some many may not survive. Understandably, businesses are looking at ways to stem the tide of mounting losses and are looking to their all-risk insurance policies for help. Most of these claims, however, have been or likely will be denied and, as a result, hundreds of businesses all over the country are filing lawsuits against their insurance carriers.

These plaintiffs will have a difficult time making it past the motion to dismiss stage because of a common condition precedent to obtaining benefits under a business interruption policy. Most of these policies require that the insured suffer some form of physical property damage or loss. In Florida, the prevailing view has been that a direct physical loss requires a tangible change in the property. However, some courts in other jurisdictions have allowed recovery in cases where an imperceptible substance contaminates a property making it uninhabitable or unusable. This divergence in the law is likely to be a deciding factor in many of the lawsuits seeking coverage for business losses related to the COVID-19 pandemic.

Until recently, no court had determined whether COVID-19 business losses are covered by business interruption insurance. Two federal district courts have now taken on the issue and have come to opposite conclusions.

The first of these cases, *Studio 417, Inc. v. The Cincinnati Insurance Co.,* involved a group of restaurants, led by Studio 417, Inc., which filed a lawsuit to recover under various different coverages in their all-risk policies. Judge Bough of the United States District Court for the Western District of Missouri denied the insurer's motion to dismiss after rejecting the physical alteration theory of "direct physical loss". Notably, Studio 417's policy provided coverage for "direct physical loss" or "direct physical damage". Judge Bough carefully analyzed the plain meaning of the terms "physical" and "loss" in contrast to the term "damage," essentially finding that "physical loss" was broader than "physical damage." Accordingly, under Studio 417's policy, a tangible, physical alteration to the property was not required and because Studio 417 had alleged that the coronavirus was a "physical

substance" that was deposited on the surfaces of its business, the lawsuit survived a motion to dismiss.

The next day, Judge Ezra of the of the United States District Court for the Western District of Texas applied the physical alteration theory and dismissed a similar lawsuit without granting an opportunity to amend. In *Diesel Barbershop, LLC v. State Farm Lloyds*, a group of barbershops led by Diesel Barbershop, LLC, as in *Studio 417, Inc.*, filed a lawsuit to recover COVID-19 losses under an all-risk policy, but Diesel Barbershop did not allege the physical presence of COVID-19 on their property. That decision might have been fatal to the claim because Judge Ezra was more persuaded by cases requiring physical alteration of property.

In his order, Judge Ezra acknowledged that some jurisdictions do not require a physical alteration to property and even cited Texas case law supporting that position, but, nonetheless, he found that, unlike many of the invisible substances that have caused property loss in the past, COVID-19 does not, for example, produce a noxious odor rendering a property uninhabitable. Judge Ezra might not have been able to make that observation if Diesel Barbershop had alleged the presence of COVID-19 on their property. Unfortunately for Diesel Barbershop, without a reversal, it will not be able to amend because Judge Ezra also found that the claim is precluded by the policy's exclusion for losses arising from fungi, viruses, or bacteria.

These cases demonstrate the importance of understanding the prevailing case law in your jurisdiction, as it could mean the difference between life and death for a business interruption claim. In fact, here, in Florida, the issue already appears to be playing out in favor of insurers. Recently, the U.S. Court of Appeals for the Eleventh Circuit confirmed the physical alteration requirement when it affirmed a finding that having to clean a restaurant of dust and debris was not a "direct physical loss". And Magistrate Judge Torres of the Southern District of Florida has recommended dismissal because a plaintiff did not allege any physical harm to its restaurant. While not addressing any of the policy's exclusions Judge Torres noted that any further amendment to the complaint should "ensure that it can service any other exclusion under the policy." Accordingly, it is clear that, plaintiffs seeking to recover their COVID-19 losses in Florida will have an uphill climb even if they can allege the presence of the coronavirus on their property.

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