

In Multi-District Litigation, Business Interruption Claims Survive, While Civil Authority And Contamination Claims Are Dismissed

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An Illinois federal district court overseeing multi-district litigation denied an insurer's motion to dismiss claims seeking business interruption coverage, but granted the motion to dismiss claims under civil authority and contamination coverage provisions and a sue and labor clause. *In re: Society Ins. Co. COVID-19 Bus. Interruption Protection Ins. Litig.*, MDL No. 2964 (N.D. Ill. Feb. 22, 2021).

Restaurants and other hospitality businesses across several states sought coverage from Society Insurance for business losses incurred after the enactment of government-ordered restrictions designed to reduce the spread of COVID-19. The regulations required the policyholders to modify their standard business operations and to suspend in-person dining. Society denied coverage for the policyholders' lost revenue. In ensuing coverage litigation, Society moved to dismiss and for summary judgment, arguing that the policyholders failed to allege losses "caused by direct physical loss of or damage to covered property."

The court denied Society's motion to dismiss the claim for business interruption coverage. Society argued that the policyholders' business losses were caused by the shutdown orders, not the virus itself, and therefore, even assuming that COVID-19 qualified as a "direct physical loss," there would be no coverage because causation could not be established. Rejecting this argument, the court held that under Illinois, Wisconsin and Minnesota law, coverage under a business interruption provision requires only proximate causation between the business losses and the direct physical loss or damage. The court further held that a reasonable jury could find that COVID-19 proximately caused the policyholders' business interruptions.

As to the "direct physical loss" requirement, the court held that policyholders sufficiently alleged "direct physical loss" to withstand dismissal. The court explained that a reasonable jury could find that the restrictions on the policyholders' use of their premises constituted physical loss. In particular, the court reasoned that the government orders restricting the use of physical space at the insured premises could constitute "physical limit[s]."

However, the court dismissed the policyholders' claims for civil authority coverage because none of the government orders "prohibit[ed] access" to the insureds' premises. The court stated:

[E]ven if the general public is prohibited from congregating in the covered premises, there is no allegation that employees are outright prohibited from accessing the premises—or from accessing the immediately surrounding areas, for that matter. Indeed, for some of the Plaintiffs, take-out customers and in-room dining guests may access the premises (and the immediately surrounding areas).

Claims for coverage under a contamination provision were also dismissed based on the absence of allegations alleging a suspension of operations, as required by the provision. Finally, the court dismissed a sue and labor coverage claim, holding that the sue and labor clause is not a coverage grant, but rather a mitigation condition with which policyholders must comply.

In another COVID-19-related coverage case governed by Texas law, *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617 (N.D. Ill. Feb. 28, 2021), the court also dismissed a civil authority coverage claim but allowed a business interruption coverage claim to proceed, citing *In re: Society Ins. Co. COVID-19 Bus. Interruption Protection Ins. Litig.*

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