

Ninth Circuit Affirms Dismissals Of Business Interruption Coverage Suits In Trio Of Rulings

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In *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 4486509 (9th Cir. Oct. 1, 2021), the Ninth Circuit affirmed the dismissal of a putative class action suit seeking business income and extra expense coverage based on losses incurred in the wake of government shut down orders. As discussed in our [September 2020 Alert](#), the district court ruled that the policyholder failed to allege the requisite direct physical loss of or damage to insured property. The Ninth Circuit affirmed, holding that under California law, an inability to use property for its intended purpose does not constitute “direct physical loss of or damage.” Rather, a “distinct, demonstrable, physical alteration” is necessary. The court also concluded that a virus exclusion barred coverage, rejecting the policyholder’s assertion that the losses were caused by local orders that restricted use of property, rather than the virus itself.

In a second decision, the Ninth Circuit affirmed an Arizona district court’s dismissal of a suit brought by professional baseball teams. *Chattanooga Prof. Baseball LLC v. National Cas. Co.*, 2021 WL 4493920 (9th Cir. Oct. 1, 2021). The teams argued that a virus exclusion in the applicable policies did not preclude coverage because their alleged losses were not attributable to the virus itself, but rather a host of other factors including the “attendant disease,” the resulting pandemic, governmental responses and a lack of league players. Applying the law of various states based where the teams were located, the Ninth Circuit concluded that (1) under an efficient proximate cause analysis, the virus exclusion barred coverage because the teams “do not plausibly allege that any of these other causes, and not the spread of the COVID-19 virus, were the ‘efficient proximate cause’ that set others in motion”; (2) under a concurrent causation analysis, the teams did not allege concurrent causes of losses that would be susceptible to allocation; and (3) under a proximate cause analysis, there were no intervening causes that broke the causal chain originating with the COVID-19 virus.

In a third decision, the Ninth Circuit ruled that allegations that stay-at-home orders caused the policyholder to suspend its operations did not constitute allegations of “direct physical loss of or damage to” property for purposes of coverage under business income, extra expense and civil authority policy provisions. *Selane Products, Inc. v. Continental Cas. Co.*, 2021 WL 4496471 (9th Cir. Oct. 1, 2021). The policyholder argued that a microbe exclusion demonstrated that microscopic organisms can cause physical loss of or damage to property (and thus so could virus particles). The court rejected this assertion, noting that even if it deemed this argument persuasive, coverage would still be unavailable because the policyholder did not allege the presence of the virus on its property.

As reported in previous Alerts, the Sixth, Eighth and Eleventh Circuits have similarly upheld district court dismissals of COVID-19 coverage suits. Appeals are pending in the First and Second Circuits.

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