

Michigan Court Of Appeals And Sixth Circuit Affirm Dismissals Of Restaurants' COVID-19 Coverage Suits (Insurance Law Alert)

02.28.22



(Article from Insurance Law Alert, February 2022)

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A Michigan appellate court affirmed a trial court's dismissal of a suit seeking coverage for losses incurred in the wake of government closure orders under a commercial property policy. *Gavrilides Management Co., LLC v. Michigan Ins. Co.*, 2022 WL 301555 (Mich. Ct. App. Feb. 1, 2022).

The appellate court ruled that the insurers properly denied coverage based on the restaurant's failure to allege direct physical loss or damage to property. The court explained that even assuming that loss or damage need not be permanent to qualify as "direct physical loss of or damage to" property, there would still be no coverage because "physical" requires the loss or damage to "have some manner of tangible and measurable presence or effect in, on, or to the premises." The court emphasized that the complaint did not allege that the restaurant was contaminated with the virus and that even if it did, such contamination would likely constitute an "indirect" loss rather than a "direct physical loss." The court also held that a civil authority provision was inapplicable because there were no allegations of damage to nearby property, which was required under that coverage provision.

Additionally, the court held that coverage was barred by two provisions: an exclusionary clause that applied to loss or damage caused directly or indirectly by "enforcement of any ordinance or law" and a virus exclusion. As to the first exclusion, the court held that the executive orders constituted ordinances or laws within the meaning of the policy, and as to the virus exclusion, the court deemed it irrelevant that the provision did not include phrases such as "directly or indirectly" or "regardless of any other cause."

Citing the appellate court's decision in *Gavrilides*, the Sixth Circuit affirmed the dismissal of restaurants' business loss claims and predicted that the Michigan Supreme Court would rule that allegations of loss of use of property due to government shutdown orders are not sufficient to allege "direct physical loss." *Brown Jug, Inc. v. Cincinnati Ins. Co.*, 2022 WL 538221 (6th Cir. Feb. 23, 2022). The court noted that general, conclusory allegations that the virus "impaired some unidentified property in some unidentified manner" are not sufficient to withstand a motion to dismiss and that allegations of harm to individuals are not the same as harm to property. In addition, the court explained that allegations that viral particles were present on surfaces and were capable of spreading the virus do not allege actual harm to property because such particles can be eliminated with cleaning. Finally, the court ruled that there could be no civil authority coverage because (1) the complaints failed to allege more than conclusory statements of loss to other property, and (2) the shutdown orders did not prohibit access to

insured property and in fact encouraged businesses to remain operational for takeout or delivery service.

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