

Affirming Dismissal Of Policyholder's Suit, Fourth Circuit Rules That Physical Loss Requires Material Destruction Or Harm To Covered Property (Insurance Law Alert)

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The Fourth Circuit ruled that “physical loss or damage” is unambiguous and encompasses only losses caused by “material destruction or material harm to the covered property.” Applying this standard, the court concluded that the policyholder did not suffer physical loss or damage resulting from the COVID-19 pandemic or related government orders. *Uncork and Create LLC v. Cincinnati Ins. Co.*, 2022 WL 662986 (4th Cir. Mar. 7, 2022).

The policyholder sought business interruption coverage in the wake of government ordered shutdowns. Cincinnati denied coverage based on the absence of “direct physical loss or damage” to property. Thereafter, the policyholder filed a class action complaint, seeking a declaration that the policy provided coverage. A West Virginia district court granted Cincinnati’s motion to dismiss, ruling that neither the virus itself nor the closure orders caused physical loss or damage. As discussed in our [November 2020 Alert](#), the district court distinguished West Virginia precedent in which physical loss or damage was found notwithstanding the lack of physical alteration to insured property, explaining that in that case, a nearby rock fall made insured property uninhabitable due to physical threat, whereas here, the virus and government orders had no effect on the policyholder’s physical premises. This month, the Fourth Circuit affirmed.

The Fourth Circuit held that the plain meaning of the terms “physical loss” and “physical damage” requires material destruction or harm, and that the “need to repair, rebuild, replace, or expend time securing a new, permanent property is a pre-condition for coverage of lost business income and other expenses.” The court concluded that this requirement was not met here, emphasizing that the policyholder continued using its property during the relevant time period, albeit with certain limitations.

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