

Three State Supreme Courts Dismiss Suits Seeking Coverage For Pandemic-Related Losses (Insurance Law Alert)

10.03.22



(Article from *Insurance Law Alert*, September 2022)

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In *Hill & Stout, PLLC v. Mutual Enumclaw Ins. Co.*, 515 P.3d 525 (Wash. Aug. 25, 2022), the Washington Supreme Court ruled that “direct physical loss” of property does not include loss of intended use of property due to government orders and thus that coverage was unavailable. The court stated:

HS was still able to physically use the property at issue. The property was in HS’s possession, the property was still functional and able to be used, and HS was not prevented from entering the property. Under the Proclamation, HS was not able to use the property in the way that it wanted, but this alleged “loss” is not “physical.”

The court ruled that in any event, coverage was barred by a virus exclusion. The policyholder argued that under the efficient proximate cause test, there may be coverage if the predominating cause of the loss is determined to be the government orders rather than the virus. Rejecting this assertion, the court held that the causal chain here was clear: the virus (an excluded peril) led to the proclamations, which led to the business losses.

In *Sullivan Mgmt., LLC v. Fireman’s Fund Ins. Co.*, 2022 WL 3221920 (S.C. Aug. 10, 2022), the South Carolina Supreme Court, answering a certified question, ruled that the presence of COVID-19 in or near insured property, and/or related government orders, did not constitute “direct physical loss or damage” to property. The court explained that while government orders affected business operations, the mere loss of access to a business is not the same as physical loss or damage. The court further held that allegations of actual viral presence did not alter its conclusion, noting that the policy’s restoration provision indicated that “damage” requires repair or replacing, which was not required here.

The Oklahoma Supreme Court also ruled that “direct physical loss or damage” requires “immediate, actual or tangible deprivation or destruction of property,” and does not encompass a loss of use of property during the pandemic. *Cherokee Nation v. Lexington Ins. Co.*, 2022 WL 4138429 (Okla. Sept. 13, 2022). A district court had ruled that several insurers were obligated to cover business losses sustained by the Cherokee Nation in the wake of government-mandated shutdowns (see [February 2021 Alert](#)). Reversing the decision, the Oklahoma Supreme Court reasoned that “direct physical loss or damage” does not include an inability to use property for its intended purpose.

Authors and Contacts

Bryce Friedman

Partner

bfriedman@stblaw.com

+1-212-455-2235

Joshua Polster

Partner

joshua.polster@stblaw.com

+1-212-455-2266

