



8th Circuit denies COVID-related business income claim in first federal appellate ruling

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In a relatively concise ruling, the 8th Circuit U.S. Court of Appeals [issued](#) the first U.S. Appellate Court decision on insurance coverage for COVID-19 related claims. The 8th Circuit ruling affirmed that the insurance policy at issue did not cover loss of business income due to the COVID-19 pandemic and related government restrictions.

Oral Surgeons P.C. (OSPC) is an Iowa-based oral and maxillofacial surgical practice. In late March 2020, following the Iowa governor's state of emergency declaration, OSPC halted all non-emergency procedures in their four offices. In May 2020, the state of emergency was lifted and OSPC was permitted to resume a regular schedule, following COVID-19 health and safety guidance from the Iowa Dental Board.

OSPC submitted a claim to their insurance provider, The Cincinnati Insurance Company (Cincinnati), under their policy's business interruption and loss of income clause. OSPC asserted that it suffered a business interruption and loss of income as a result of the COVID-19 pandemic and the subsequent government-imposed restrictions that limited their performance of non-emergency dental procedures.

OSPC's policy language with Cincinnati stated that coverage included payment for the actual loss of "Business Income and certain extra expense sustained due to the suspension of operations" during the "period of restoration." The suspension must have been caused by "direct 'loss' to property" at a premises. The policy itself defined "loss" to mean "accidental physical loss or accidental physical damage." Cincinnati argued that the policy's definition of loss covers only physical loss to property, and not the kind of

economic loss which OSPC sought recovery for.

The 8th Circuit reviewed and rejected OSPC's argument that the policy's disjunctive separation of "physical loss or physical damage" in the policy language created ambiguity and should be interpreted to include "lost operations or inability to use the business" as a covered type of loss.

Reviewing de novo and relying on Iowa state law, the 8th Circuit recognized that the use of "physical" in the policy's phrase "physical loss or physical damage" requires a showing of some physicality to the loss or damage of property. Of note, the state law citations included in the 8th Circuit's ruling all dealt with similar insurance policy language but were not analyzing COVID-19 coverage specifically. The 8th Circuit's ruling included a comparison of three different Iowa court analyses of "physical loss or physical damage" within insurance policy language.

The 8th Circuit relied on *Milligan v. Grinnell Mut. Reinsurance Company*, an Iowa Court of Appeals case which held the policy language "direct physical loss or damage" only included injuries or destructions that were "physical in nature." The 8th Circuit also cited *The Phoenix Insurance Company v. Infogroup, Inc.*, where the Iowa District Court held that "the common usage of physical in the context of a loss therefore means the loss of something material or perceptible on some level." The *Infogroup* court also pointed out that "loss of use" and "physical loss or damage" are not synonymous. The 8th Circuit concluded the analysis by citing *Pentair, Inc. v. American Guarantee and Liability Insurance Company*, where their court concluded that "loss of use or function" is only relevant to determine the amount of loss after "physical loss or damage" has been established.

The 8th Circuit affirmed that the three distinct approaches taken by the Iowa courts all resulted in the same conclusion – that "physical loss or physical damage" unambiguously requires a showing of physicality, such as a "physical alteration, physical contamination, or physical destruction." The 8th Circuit held that a policy requiring a showing of physical loss or physical damage "cannot reasonably be interpreted to cover mere loss of use when the insured's property has suffered no physical loss or damage."

The 8th Circuit also cited the provision of the "period of restoration" language within the policy as further evidence of the meaning of "physical loss" within the policy. According to the policy language, the "period of restoration" commences at the time of the loss and ends either at the date when the property is repaired, rebuilt or replaced with reasonable speed and similar quality, or the date when business is resumed at a new, permanent location. The 8th Circuit, reading the policy as a whole, affirmed that in order to assert a "physical loss," the business must have been able to identify a "period of restoration" in which it either repairs, rebuilds or relocates its business operations.

The 8th Circuit found OSPC did not assert any type of physical alteration of their premises to constitute a "loss" under the policy. Iowa's suspension of non-essential business functions, including non-emergency dental procedures, did not qualify as the type of actual "physical loss" or "physical damage" defined in the policy.

Citing a 2016 Iowa Supreme Court decision, the 8th Circuit affirmed that it would choose not to "strain the words or phrases of the policy in order to find liability that the policy did not intend and that the insured did not purchase." The 8th Circuit's reliance on pre-COVID related case law is notable in that it indicates the Court's view that the issue of physicality as it relates to the definition of "physical loss" or "physical damage" is not novel to the present situation and has been already been thoroughly analyzed and disposed of in prior case law, requiring no further unique analysis in this COVID-19 coverage landscape.

Unlike many of the COVID-19 insurance claim cases circulating state courts across the country, OSPC's complaint did not assert that the presence of the virus tangibly or materially altered the physical structure of their premises. As such, the 8th Circuit did not provide any indication as to the validity of such an argument, leaving uncertainty as to how future appellate courts might deal with those contentions. However, the 8th Circuit's language, particularly in its inclusion of the three approaches to defining "physicality" aforementioned, would suggest the same narrow interpretation of "physicality" as it applies to the presence of the virus failing to materially alter a physical structure.

Moving forward, state courts are not bound by the 8th Circuit's decision in this case. However, the analysis provides some much-

needed clarity from federal courts on the issue of “physical loss.” Here are the key takeaways:

1. There is nothing novel about the definition of physicality when it comes to COVID-19 coverage cases. Pre-COVID state law insurance coverage decisions provide all of the guidance that courts need.
2. “Physicality” is the key to defining “physical loss” and “physical damage” to property.
3. Neither loss of use nor economic loss satisfy the showing of “physicality” required to maintain a coverage claim for business interruption or loss of income.

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