The Sixth Circuit keeps the insurers' COVID-19 coverage streak alive: Insurers 3-0

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In Santo's Italian Café v. Acuity Ins. Co., __ F.4th __, 2021 WL 4304607 (6th Cir. September 22, 2021), the Sixth Circuit held that the phrase "direct physical loss of or damage to" property requires some tangible alteration in order to trigger coverage for lost income under a business income provision in a commercial general liability policy. The Sixth Circuit is now the third federal appellate circuit to say so.[1]

After more than 200 lower courts have said the same thing, one wonders what more could possibly be said. Yet, the Santo's court made this language come alive in an energetic explication that would cause Solomon to re-think his proverbial lament. Indeed, there really is something new under the sun – just not coverage for COVID-driven economic losses.

Santo's is an Italian restaurant that was forced to reduce hours and offer only take-out service as the result of the closure order issued by Ohio's Department of Health at the outset of the COVID-19 pandemic. When Acuity denied its claim for business interruption coverage, Santo's sued, claiming that the emergency order deprived it of the use of its premises.

The Sixth Circuit framed the issue this way: "Does a pandemic-triggered government order, barring in-person dining in a restaurant, count as 'direct physical loss of or damage to' the property?" The court answered its own question with another: "How could one say that the pandemic or Ohio's shut-down order physically altered the property or for that matter affected the 'structural integrity' of the restaurant?"

The court first acknowledged that "[t]here is nothing common about the language of insurance contracts." Still, "they often

generate an ordinary meaning when anchored in the special context in which they are written." The dictionary tells us that the words "direct" and "physical" lead to one conclusion: "The policy does not cover this loss" because "the owner has not been tangibly or concretely deprived of" any of the property. "A loss of use is simply not the same as a physical loss."

Other terms in the policy support this conclusion. Like the "period of restoration," for example, which is the time during which lost business income may be recovered. It starts 24 hours after the physical loss, and lasts until the property is either "'repaired, rebuilt, or replaced,'" or when the "business is resumed at a new permanent location." Where there "is nothing to repair, rebuild, replace that would allow the resumption of in-person dining," there has been no physical loss. The court observed that here, "[w]hat the restaurant needed was an end to the ban on in-person dining, not the repair, rebuilding, or replacement of any of its property."

The court also dispelled one of the most common arguments used to avoid application of the leading case in Ohio, Mastellone v. Lightning Rod Insurance Company. Santo's argued that Mastellone doesn't apply because it was based on a homeowner's policy with different coverage language. No matter, the court said, because Mastellone "still construed similar language." Besides, Santo's offered "no affirmative authority under Ohio law to support [a] contrary position."

The court's most interesting observation came at the end of the decision, where it expressed the "hard reality about insurance. It is not a general safety net for all dangers." The court continued:

> Fair pricing of insurance turns on correctly accounting for the likelihood of the occurrence of each defined peril and the cost of covering it. Efforts to push coverage beyond its terms creates a mismatch, an insurance product that covers something no one paid for and, worse, runs the risk of leaving insufficient funds to pay for perils that insureds did pay for. That is why courts must honor the coverage the parties did—and did not—provide for in their written contracts.

The Sixth Circuit has settled the issue for federal courts applying Ohio law. But, will the state courts in Ohio follow suit? Now, all eyes are on the Ohio Supreme Court, as it considers this issue on a certified question, in Neuro-Communication Services, Inc. v. The Cincinnati Insurance Company, et al., Case No. 2021-0130. The case is awaiting oral argument, and a decision is likely sometime in 2022.

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[1] The first federal appellate win came in Oral Surgeons, P.C. v. Cincinnati Insurance Company, 2 F.4th 1141 (8th Cir, July 2, 2021). The second came in Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Insurance Company, ___ Fed. Appx. ___, 2021 WL 3870697 (11th Cir. Aug. 31, 2021).

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