

Restaurant's Losses From COVID-19: Not Covered by Insurance By: Thomas Dorn

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New Jersey business owners typically obtain insurance for protection against losses or damage to their business. In a recent unpublished opinion, Grand Cru LLC d/b/a Restaurant Nicholas v. Liberty Mutual Insurance Company, et. Als., A-0619-21, the Appellate Division was asked to decide whether a restaurant's insurance policy provided coverage for losses suffered because of the COVID-19 pandemic.

Plaintiff Purchased Business Loss and Damage Insurance

Plaintiff Grand Cru LLC, doing business as Restaurant Nicholas, operated a restaurant in New Jersey. Before the COVID-19 emergency, plaintiff purchased an all-risk insurance policy from defendant Ohio Security Insurance Company. The policy was in effect from August 15, 2019, until August 15, 2020. The policy provided coverage for business income loss and other losses.

The specific language of the Business Income provision stated:

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to your covered building or business...

The policy also contained an Exclusion of Loss Due to Virus or Bacteria provision that stated that the policy would not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism.

Effect of COVID-19 on Plaintiff's Business

In March 2020, Governor Phil Murphy, in response to the COVID-19 pandemic, declared a state of emergency in New Jersey and issued executive orders suspending non-essential business operations, including restaurants. Plaintiff's business was forced to close to the public. Plaintiff limited its operation to take-out and reduced its hours of operation. Plaintiff suffered a substantial loss of business and income when the executive orders were in effect. As a result, plaintiff filed a claim against its insurance policy with defendant. Defendant denied coverage based upon the policy language and virus exclusion.

Litigation Filed in Superior Court is Denied and Appealed

Based upon the coverage denial, plaintiff filed a lawsuit in Superior Court seeking benefits for its business losses from defendant. Defendant moved to dismiss the case and the trial court agreed. The trial court dismissed the lawsuit because there was no direct physical loss of or damage to plaintiff's property and the virus exclusion applied because the Governor issued the executive orders in response to the COVID-19 virus.

Plaintiff appealed the trial court's dismissal to the Appellate Division and presented the following arguments:

1. The usage limitation of plaintiff's restaurant imposed by the executive orders constituted physical loss of or damage to the property.
2. The virus exclusion does not bar coverage because the executive orders, not the virus itself, caused the restaurant closure.
3. If the virus exclusion does apply, the doctrine of regulatory estoppel bars defendant from claiming it.

The Appellate Division rejected each of plaintiff's arguments. The court noted that when interpreting insurance policy language if the terms are clear and unambiguous, the language should be given their plain ordinary meaning. The policy must be enforced as written when its terms are clear so the expectations of the parties will be fulfilled. However, if the language is ambiguous, courts will conform the policy terms in favor of the insured/policy purchaser.

Agreeing with the recent decision of Mac Property Group LLC & The Cake Boutique LLC v. Selective Fire & Casualty Insurance Co., 473 N.J. Super. 1 (App. Div. 2022), the appeals court found that the terms “direct physical loss of or damage to your covered property” were not confusing or ambiguous. There was no damage to plaintiff’s equipment or property of the business. The court explained that the executive orders did not physically deprive plaintiff from possessing its restaurant; plaintiff was still allowed to provide take-out services to its customers. The court rejected plaintiff’s argument that the executive orders caused the restaurant to close. The proximate cause of plaintiff’s losses was the COVID-19 virus. The executive orders were issued to curb the pandemic. Plaintiff’s losses were caused by or resulted from the COVID-19 virus.

Plaintiff’s argument about regulatory estoppel did not apply because regulatory estoppel applies when an insurance company makes misrepresentations to a regulatory body about the meaning and effect of policy language. There was no evidence in the record showing that defendant made a false statement or misrepresentation to a regulatory body about the scope of the virus exclusion.

To avoid a flood of litigation dealing with COVID claims, the court upheld the clear, direct language in defendant’s insurance policy. This case shows the importance of having business insurance policies reviewed by an [attorney](#) who is experienced with handling insurance disputes, prior to purchase of the policy. Business owners must anticipate all types of potential catastrophes or potential sources of damage or business loss.