

CLIENT ALERT

Sixth Circuit Vacates Henderson Road Ruling That Had Favored Policyholders on Covid-19 Claims

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A week after the United States Court of Appeals for the Sixth Circuit's highly anticipated decision issued on September 21, 2021 in *Santo's Italian Café LLC v. Acuity Insurance Co.*, No. 21-3068 (6th Cir. Sept. 22, 2021), the Court issued an Order on September 29, 2021 in *In re: Zurich American Insurance Co.*, No. 21-302, vacating the district court's decision for the policyholders on COVID-19 related business interruption claims. The decision vacated is *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 1:20-CV-1239, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021), vacated (6th Cir. Sept. 22, 2021), possibly the ruling most heavily relied on by policyholders of the handful of trial court opinions permitting their claims to survive early motions to dismiss or for summary judgment.

In *Henderson Road*, the trial court focused on policy language covering "direct physical loss of or damage to real property" (emphasis added). The court employed the rule of contract construction that all words must have meaning and, therefore, concluded there must be a difference between "physical loss of" and "damage to" real property. The policyholders urged that under this wording even if there was no damage to the property, "physical loss of ... real property" could include "when the state governments ordered that the properties could no longer be used for their intended purpose." The trial court agreed. It held that "Because Zurich's Policy is susceptible of more than one interpretation and because Plaintiffs have shown that they incurred "loss of 'business income' due to the necessary 'suspension' of their 'operations' during the 'period of restoration'" "caused by direct physical loss of or damage to property at a 'premises,'" they are entitled to summary judgment on the issue of coverage under the Policy." It also concluded that the Microorganism exclusion and Loss of Use exclusion did not bar coverage. Finally, it granted the insurer summary judgment on the bad faith claim finding that, given the weight of authority holding there is no coverage for Covid-19 related business interruption claims, Zurich had a reasonable justification for denying coverage. The trial court certified for appeal its interlocutory ruling finding coverage to exist under the physical loss of or damage to property language, and its rulings on the other two issues were final judgments.

The Sixth Circuit granted the 1292(b) appeal on the property damage issue, finding a substantial difference of opinion existed regarding the correctness of the district court's decision. It then reported that the district court reasoned that the COVID-19-related interruption of Plaintiffs' dine-in operations amounted to "direct physical loss of or damage to [Plaintiffs'] property" under Ohio law. It also noted that in *Santo's* it had since held, however, that "a pandemic-triggered government order, barring in-person dining at a restaurant" does not qualify as "'direct physical loss of or damage to' the property" under Ohio law. *Santo's Italian Café LLC v. Acuity Ins. Co.*, No. 21-3068, ___ F.4th ___, at *3 (6th Cir. Sept. 22, 2021). The Sixth Circuit held:

the petition for permission to appeal is GRANTED, the district court's order is VACATED as to the insurance coverage issue alleged in Counts I and III, and the case is REMANDED for further proceedings consistent with this order.

This is insurers' fourth straight win in federal appellate courts on the Covid-19 business interruption cases. Because it vacates *Henderson Road*, it is a significant milestone in this growing body of law.

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