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Third Straight Appellate Court Joins in Unanimous View: No Coverage for COVID-19 Business Interruption Claims

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The United States Court of Appeals for the Sixth Circuit issued a highly anticipated decision on September 21, 2021 in *Santo's Italian Café LLC v. Acuity Insurance Co.*, No. 21-3068 (6th Cir. Sept. 22, 2021). In the third ruling by a federal appellate court on COVID-19 related business interruption claims, the Sixth Circuit joined the Eighth and Eleventh Circuits in finding no coverage. This case concerned losses suffered as a result of the suspension of in-person dining operations at an Ohio restaurant.

The Sixth Circuit held that the lost business income sustained from the COVID-19 pandemic and related government-imposed restrictions did not constitute "direct physical loss of or damage to property" under the Acuity Insurance Company policy. Reviewing the issues *de novo* and applying Ohio law, the Court affirmed the district court's ruling granting Acuity's motion to dismiss, concluding that Santo's Italian Café LLC was not entitled to declaratory judgment.

Santo's contended that the COVID-19 pandemic and the related government-imposed restrictions on in-person dining constituted a "direct physical loss of" property because it was unable to fully use its restaurant. The Sixth Circuit recognized that "[w]hether one sticks with the terms themselves (a 'direct physical loss of' property) or a thesaurus-rich paraphrase of them (an 'immediate' 'tangible' 'deprivation' of property), the conclusion is the same. The policy does not cover this loss." Slip op. at 5. The Court noted that the restaurant was not tangibly destroyed, nor was the owner "tangibly or concretely deprived of" the restaurant. *Id.* Because the coronavirus did not physically alter the property in a way a fire or water damage would, and the governmental orders did not create a direct physical loss of or damage to property, the Sixth Circuit held coverage does not exist under the policy. *Id.*

Using a number of examples, the Court concluded that "[a] loss of use simply is not the same as a physical loss," and to hold otherwise "would create problems of its own." *Id.* at 5, 9. The owner "can still put every square foot of the premises to use, even if not for in-person dining use." *Id.* at 5. The Sixth Circuit found the policy unambiguous on the meaning of physical loss. *Id.* at 10.

The Court cited as instructive the two appellate courts that previously decided this issue, *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141 (8th Cir. 2021) and *Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co.*, No. 21-11046, 2021 WL 3870697 (11th Cir. Aug. 31, 2021) (per curiam), and found other policy terms, such as the "period of restoration," and the "traditional uses of commercial property insurance" reinforce these courts' conclusion. Slip op. at 6. When interpreting the "period of restoration" language, the court recognized that "[b]aked into this timing provision is the understanding that any covered 'direct physical loss of or damage to' property could be remedied by repairing, rebuilding, or replacing the property or relocating the business." *Id.* Santo's did not need one of these physical remedies but rather an end to the on-premises dining ban. *Id.* The Sixth Circuit panel stated that commercial property insurance does "not cover losses indirectly caused by a virus that injures people, not property." *Id.* at 7 (citing 10A Steven Plitt et al., *Couch on Insurance* § 148:3 (2021)).

Concluding that the Supreme Court of Ohio would agree with the outcome, the panel relied on the decision in *Mastellone v. Lightning Rod Mutual Insurance Co.*, 884 N.E.2d 1130, 1133 (Ohio Ct. App. 2008). Slip op. at 8. The Ohio decision supports the

finding that the policy clearly requires a physical change or alteration that affects the "structural integrity" of the property to trigger business interruption coverage. *Id.*

Finally, the Court noted there is no need to rely on exclusions in this case because "the absence of initial coverage for this claim suffices to reject it." *Id.* at 11.

The Court emphasized this "leaves a hard reality about insurance," namely, that "[i]t is not a general safety net for all dangers." *Id.* at 13. "Fair pricing of insurance turns on correctly accounting for the likelihood of the occurrence of each defined peril and the cost of covering it." *Id.* When policyholders "push coverage beyond its terms," it "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." *Id.* For those reasons, the Sixth Circuit held that courts must abide by the contracts made between the parties and "honor the coverage the parties did—and did not—provide for in their written contracts of insurance."

Crowell & Moring LLP served as co-counsel for *amici curiae* American Property Casualty Insurance Association and National Association of Mutual Insurance Companies in this appeal.

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