

## CLIENT ALERT

### In First Federal Appeals Court Ruling, Eighth Circuit Finds No Insurance Coverage for Covid-19 Related Business Losses And Affirms Dismissal of Action Under Iowa Law

July 2, 2021

Today the United States Court of Appeals for the Eighth Circuit issued its much-anticipated decision in Oral Surgeons, P.C. v. Cincinnati Insurance Company, No. 20-3211 (8th Cir. July 2, 2021). In the first ruling by a federal appellate court on COVID-19 related business interruption claims, the Court found no coverage for losses suffered as a result of the suspension of non-emergency procedures by an oral and maxillofacial surgery practice with four Iowa locations.

The Eighth Circuit held that the lost business income and certain extra expense sustained from COVID-19 pandemic and the related government-imposed restrictions did not constitute direct “accidental physical loss or accidental physical damage” under the Cincinnati Insurance Company policy. Reviewing the issues de novo and applying Iowa law, the Court affirmed the district court’s ruling granting Cincinnati’s motion to dismiss, concluding that Oral Surgeons was not entitled to declaratory judgment and that it had failed to state claims for breach of contract and bad faith.

Oral Surgeons contended that the COVID-19 pandemic and the related government-imposed restrictions on performing non-emergency dental procedures constituted a “direct ‘loss’ to property” because Oral Surgeons was unable to fully use its offices. The Eighth Circuit recognized that the policy clearly requires direct “physical loss” or “physical damage” to trigger business interruption and extra expense coverage, which it held means “there must be some physicality to the loss or damage of property—e.g., a physical alteration, physical contamination, or physical destruction.” Slip op. at 3. The Court also noted that “[t]he unambiguous requirement that the loss or damage be physical in nature accords with the policy’s coverage of lost business income and incurred extra expense during the ‘period of restoration.’” *Id.* at 4.

The Court cited as instructive its rulings under Minnesota law in Source Food Tech., Inc. v. U.S. Fid. & Guar. Co., 465 F.3d 834 (8th Cir. 2006) and Pentair, Inc. v. Am. Guar. & Liab. Ins. Co., 400 F.3d 613, 616 (8th Cir. 2005), finding that “Minnesota law is not materially distinguishable from Iowa law” on the meaning of the policy terms. Slip op. at 5.

The Court emphasized that Oral Surgeons did not allege any physical alteration of property where the complaint pleaded generally that Oral Surgeons suspended non-emergency procedures due to the COVID-19 pandemic and the related government-imposed restrictions. It concluded that “[t]he policy clearly does not provide coverage for Oral Surgeons’ partial loss of use of its offices, absent a showing of direct physical loss or physical damage.” *Id.* at 6.

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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