

Wash. Justices Find Losses From Virus Orders Not Covered

By **Ben Zigterman**

Law360 (August 25, 2022, 2:01 PM EDT) -- The Washington Supreme Court unanimously decided in a closely watched case Thursday that a pediatric dental practice wasn't entitled to insurance coverage for its COVID-19-related losses.

The justices affirmed a lower court's summary judgment against Hill and Stout PLLC, finding that its slowdown in operations due to government shutdown orders didn't amount to a direct physical loss that would qualify it for coverage under its policy with Mutual of Enumclaw Insurance Co.

"Under the proclamation, [Hill and Stout] was not able to use the property in the way that it wanted, but this alleged 'loss' is not 'physical,'" Justice G. Helen Whitener wrote. "It is more akin to an abstract or intangible loss than a 'physical' one."

While the Washington Supreme Court said a loss of functionality without a physical alteration could potentially be covered, the justices said the losses alleged by Hill and Stout didn't qualify.

"Contrary to the cases cited in [Hill and Stout]'s brief, in this case, there was no alleged imminent danger to the property, no contamination with a problematic substance and nothing that physically prevented use of the property or rendered it useless; nor were the dental offices rendered unsafe or uninhabitable because of a dangerous physical condition," Justice Whitener wrote.

The justices also found that a virus exclusion in the policy applies.

Mutual of Enumclaw's attorney, Deborah L. Stein, said the insurer is pleased with the ruling.

The decision "affirmed the judgment for two independent reasons," she said in a statement on behalf of the insurer. "First, property insurance insures property, and because nothing happened to Hill & Stout's, there's no coverage. Second, clarifying the law applicable to exclusions of coverage, the court expressly approved the plain language in Hill & Stout's policy stating that losses caused by a virus aren't covered."

Washington's top court accepted direct review in January to decide whether Judge Samuel S. Chung erred in ruling that the dental practice's suspension of partial operations under government-imposed restrictions didn't amount to physical loss or damage. The judge also held that a virus exclusion barred coverage.

At oral arguments in June, the justices seemed skeptical that the practice's slowdown of operations

amounted to a direct physical loss, especially since Hill and Stout's practice was able to remain open for emergency procedures.

Hill and Stout filed **its** proposed class action in June 2020 against Mutual of Enumclaw as part of the early wave of COVID-19 business interruption suits that tended to seek coverage for losses tied to government orders meant to curb the spread of the coronavirus.

Laura Foggan, an attorney with Crowell & Moring LLP who represented amici American Property Casualty Insurance Association and National Association of Mutual Insurance Cos., praised the ruling.

"It is gratifying to see another state high court unanimously agree that 'physical' must be given its plain meaning in interpreting widely used language in commercial property policies," she told Law360.

So far, the high courts in Massachusetts, Iowa, Wisconsin and South Carolina have sided with insurers that losses caused by shutdown orders aren't covered. The Massachusetts, Wisconsin and South Carolina justices went further, ruling that businesses didn't have coverage for losses caused by the presence of the virus at their premises. The Washington justices declined to address whether the presence of COVID-19 can warrant coverage.

Federal district courts around the country have permanently tossed about 48% of the 1,399 suits from policyholders against their insurance companies seeking pandemic loss-related coverage, according to Law360's COVID-19 Insurance Case Tracker. Another 17% of the pandemic insurance suits filed in federal courts have been voluntarily dismissed, the tracker shows, though about 31% have yet to be fully decided.

A representative for Hill and Stout declined to comment.

Hill and Stout PLLC is represented by Mark A. Wilner, Kasey D. Huebner and John D. Cadagan of Gordon Tilden Thomas & Cordell LLP and Benjamin Gould, Gabriel E. Verdugo and Nathan Nanfelt of Keller Rohrback LLP.

Mutual of Enumclaw is represented by Deborah L. Stein, Jeremy S. Smith and Daniel R. Adler of Gibson Dunn & Crutcher LLP and Stephen M. Rummage and Steven P. Caplow of Davis Wright Tremaine LLP.

The case is Hill and Stout PLLC v. Mutual of Enumclaw Insurance Co., case number 100211-4, in the Supreme Court of Washington.

--Additional reporting by Shawn Rice. Editing by Emma Brauer.