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CASE UPDATES

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COVID-19 PARTICLES CONSTITUTES PHYSICAL LOSS TRIGGERING COVERAGE

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New Orleans restaurant wins ground-breaking case in which an appellate court ruled that shut-downs and partial closures due to COVID-19 particles invading a restaurant's physical space may constitute direct physical loss sufficient to trigger coverage under an all-risks insurance policy that did not contain a virus exclusion.

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Background Facts

In the case of *Cajun Conti v. Certain Underwriters at Lloyd's*, No. 2021-CA-0343 the court was tasked with deciding yet another case involving insurance coverage in the era of COVID-19. Oceana Grill is a restaurant in the French Quarter of New Orleans. Like many other establishments, Oceana was forced to close its doors to the public when the COVID-19 pandemic hit. Local regulations required complete closure for a period of time and then Oceana was allowed to re-open at a limited capacity level. In addition to the reduction in capacity, Oceana also undertook expanded cleaning and decontamination efforts in an attempt to stop the spread of COVID on its premises.

Oceana filed a petition for declaratory judgment in regard to an all-risks policy they had secured with Lloyd's. The petition was filed in civil district court and requested guidance on insurance coverage during closures and reductions in capacity. Oceana petitioned the court to declare that the all-risks policy provided coverage for direct physical loss or damage to its restaurant as a result of the prolonged exposure caused by COVID-19. Llyod's argued that COVID-19 was not a "direct, physical loss" as described under the policy and promptly moved for summary judgment.

The trial court denied the motion for summary judgment and the action was assigned to a bench trial. After hearing the case, the court denied Oceana's petition for declaratory judgment. On appeal, a panel of the Louisiana Fourth Circuit reversed this decision finding that the insurance contract contained an element of

ambiguity as to what constitutes business loss. For this reason, it interpreted the contract in favor Oceana as the insured and reversed the trial court's decision. Lloyd's filed an application for a rehearing of this judgment, or in the alternative a rehearing en banc. The rehearing was granted for clarification only and the rehearing en banc was denied.

Ambiguity in the Insurance Policy

Whether or not a contract is ambiguous is decided by the court as a matter of law. C*adwallader v. Allstate Ins. Co.*, 02-1637, p. 4 (La. 6/27/03), 848 So. 2d 577, 580 “Words and phrases used in an insurance policy are to be construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning," Id. If a court finds ambiguity in an insurance contract, the ambiguous provision is “generally construed against the insurer and in favor of coverage." Id.

The court found the insurance contract ambiguous because of the language defining suspension along with the requirement of direct, physical loss. It noted that these provisions read together could offer varying interpretations of what the policy covered and under what circumstances. Lloyd's argument that the insured must completely lose the use of the property is one valid interpretation of the policy, but Oceana's assertion that coverage comes into play when the insured is unable to fully utilize the property is also a valid interpretation. Lloyd's argues that direct, physical loss is the threshold element that must be proved before any other potential elements may be considered.

Two Reasonable Interpretations of the Contract May Deem it Ambiguous

The insurance policy that is the subject of this case provides coverage for a "period of restoration" after a "direct, physical loss of or damage to the property" caused by a suspension of business operations. The policy defines “suspension” as a stop or slowdown of business operations. The argument here is that because suspension includes a slowdown and does not require a complete shutdown, Oceana's coverage was triggered when it had to operate at reduced capacity and take extra measures to ensure cleaning and safety during COVID-19. The court found that "contract language defining suspension as a slowdown of business activities, in conjunction with the requirement for direct physical loss of or damage to the property, gives rise to ambiguity in the policy because it creates two equally reasonable interpretations of the policy provision."

Lloyd's argues that it is well-settled law that the interpretation of physical loss applies to tangible loss and that the court missed the mark here. The court disagreed pointing out that it acknowledged the requirement for "physical loss," but also found that COVID-19 particles did have a tangible nature and form even though invisible to the naked eye. This was not a standalone holding as the court in *Widder* also followed this line of reasoning in alignment with a series of cases in the Fourth Circuit.

In *Widder*, the court held that "physical damage was not necessary to trigger coverage in an insurance policy because the insured property was rendered unusable or uninhabitable." Lloyd's asserts that the *Widder* case is not applicable in the current case because Oceana was able to continue operations of the restaurant even if in a limited capacity. The property was never rendered uninhabitable.

Lloyd's also asserts that the court's interpretation of "period of restoration" was faulty. Under the agreement the period of restoration extended 72 hours after the loss or damage occurred until the property can be repaired or replaced, or in the alternative until the business can re-open in a new, permanent location. Lloyd's argues that Oceana having to close its doors, re-open at limited capacity, and employ extra cleaning protocols does not fall within the ordinary meaning of repair under an insurance policy. Instead the court applied the meaning of repair to encompass, "to restore by replacing a part or putting together what is torn or broken" and "to restore to a sound or healthy state," Lloyd disagreed and propounded that the

application of these definitions in this manner was in error.

Finally, Lloyd's also argues that the court did not have a sound basis upon which to rule that the terms of the contract were ambiguous. It points to the deliberations of the trial court wherein the definition of "direct physical loss" was examined and the court made a factual determination as to whether a suspension of operations qualified as a direct physical loss. It found that a suspension of operations was not the same as a direct physical loss. Lloyd's argues that this finding is in error. The court reasoned, however, that Oceana's interpretation of the contract was equally plausible. Their contention that direct physical loss can result from invasive disease particles was persuasive to the court because the business was not able to operate, or could only do so at limited capacity.

In examining the policy language, the court noted that the policy provided for coverage for a "period of restoration" after "direct physical loss of or damage to the property due to a suspension of business operations." The policy defines suspension as a "cessation or slowdown of business activities." Nothing in the policy provisions states that the direct physical loss must be render the premises uninhabitable to trigger coverage.

Thus, the court ruled that Oceana may recover for direct physical loss or damage caused by the contamination of COVID-19. Oceana's inability to fully use the restaurant due to particles of disease in the air and on the surfaces was a physical intrusion resulting in a clear loss and slowdown of the business. In a concurring opinion another Judge agreed, but also reasoned that the court was bound by the precedent of
Widder. The court also pointed out that the insurance company could have included a virus exclusion in the policy, but failed to do so. Therefore, the "invasion of a physical substance" in Oceana's restaurant qualified as physical loss triggering coverage under their insurance policy.

Whether the 3-2 decision will stand or be reversed by the Louisiana Supreme Court remains to be seen.