

DREW | ECKL FARNHAM

ATTORNEYS AT LAW



New COVID-19 Ruling: Two Additional Courts Deny Insurers' Motions to Dismiss

In the last week, two federal district courts have denied insurers' motion to dismiss COVID-19 related lawsuits filed by insureds. The first court applied its previous definition of what constitutes a "physical loss" to hold the insureds stated a claim for relief while the other court found there was no binding state law case interpreting the policy's Virus Exclusion allowing it to make a coverage decision on a motion to dismiss.

The first opinion was issued on September 21, 2020 by a Missouri Federal District Court. *Blue Springs Dental Care v. Owners Ins. Co.*, Case No.: 20-CV-00383-SRB (W.D. MO 9/21/20). The issue in Blue Springs was whether the insureds stated a claim that it suffered a direct physical loss as required by the terms of the policy. The Missouri Court held that the Plaintiffs "plausibly allege that COVID-19 physically attached itself to their dental clinics, thereby depriving them of the possession and use of those insured properties." The Court adopted the definition of "physical loss" it found in a previous case, *Studio 417, Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385 (W.D. MO. 8/12/20) ("physical" – "having material existence; perceptible especially through the senses and subject to the laws of nature" and "loss" – "the act of losing possession" and "deprivation.") The Court also found that the insureds did not need to suffer a complete suspension of their business, rather "suspension of operations includes scenarios where an insured's operations are able to continue at a reduced volume or capacity."

Three days later, on September 24, 2020, a Florida Federal Court denied an insurer's motion to dismiss in *Urogynecology Specialist of Florida, LLC v. Sentinel Ins. Co. Ltd*, Case No.: 6:20-cv-01174-ACC-EJK (M.D. FL 9/24/20). In that case, the insured, a medical practice, filed suit after Sentinel denied coverage for the insured's loss of use of its office, loss of business and loss of accounts receivable following the Florida Governor's state of emergency order.

Sentinel determined that the Virus Exclusion precluded coverage for the losses. The insured argued that the exclusion was ambiguous, and the Court found that there are "several arguably ambiguous aspects of the Policy [that] make determination of coverage inappropriate at this stage." The Court first noted that the Virus Exclusion provided that modified certain coverage forms, which were not provided to the Court. In addition, the Court found certain other exclusions were not provided. The Court held that without such corresponding forms which were modified by the exclusions, it would not make a decision regarding the plain language of the Policy to determine whether the losses were covered. In addition, the Court notes that losses stemming from COVID-19 "does not logically align with the grouping of the virus exclusion with other pollutants [gundi, wet rot, dry rot, bacteria or virus] such that the Policy necessarily anticipated and intended to deny coverage" for COVID-19 related business losses.

The Court found that none of the cases cited by Sentinel "dealt with the unique circumstances of the effect COVID-19 has had on our society – a distinction this court considers significant." Without any binding Florida law, the Court held that the insured stated a plausible claim for coverage.

It is likely that the Plaintiff's bar will use the Federal Court's comment that previous cases applying the Virus Exclusion did not deal with the "unique circumstances of the effect COVID-19" as an additional argument to persuade courts to allow the case to proceed with discovery.

If you have any questions or request further information, please feel free to contact:



Karen Karabinos
karabinosk@deflaw.com
(404) 885-6313