

COVID-19 Insurance Coverage - - The Uncertainty Continues

By Laura (Megan) Faust

Last week we reported Judge Polster's Decision in *Henderson Road Restaurant Systems, Inc., et al. v. Zurich American Ins. Co.*, U.S.N.D. Ohio Case No: 1:20-cv-01239-DAP, wherein Judge Polster, based upon the language of the policy of insurance at issue found coverage exists for the business income loss claims of various restaurants in Ohio, Michigan, Florida, Indiana and Pennsylvania. That same day, a second decision was rendered from another Ohio federal court in the case of *Neuro-Communication Services v. Cincinnati Insurance Co.*

Prior to the *Henderson* decision, Judge Pamela Barker on December 20, 2020 dismissed the policyholder's claims for business interruption coverage on arising out of COVID in the case of *Santos Italian Café, LLC v. Acuity Ins. Co.*, N.D. Ohio, No: 1:20-cv-01192. In *Santos*, the Court found multiple reasons to deny the business interruption claims, including the applicability of the virus or bacteria exclusion as well as an analysis of the "direct physical loss of or damage to property." In *Santos*, the Court found that as there had been no "distinct, demonstrable physical alteration" of its property, beyond "mere economic effects," the business interruption claims did not apply.

In light of the conflicting decisions in the Northern District of Ohio, on the same day as Judge Polster rendered his Decision in *Henderson*, another Federal Court in Ohio in the case of *Neuro-Communication Services v. Cincinnati Insurance Co.*, requested State Appellate review of the legal questions involved before ruling completely on the merits. Citing a lack of controlling precedent from the Ohio Supreme Court and the "dozens, if not hundreds of cases" seeking coverage for COVID-19 related losses in the Ohio State and Federal Court system, the Court certified the following questions:

- The general presence in the community, or on services at a premises, of the Novel Coronavirus known as SAR-CO-V-2, constitutes direct physical loss or damage to property; and
- Whether the presence on a premises of a person infected with COVID-19 constitutes direct physical loss or damage to property at that premises.

It is anticipated that the *Neuro-Communication Services* Court certification to the Ohio Supreme Court will be closely watched in the hopes that it will provide further clarity on unresolved and conflicting questions of law in the State of Ohio on these issues.

A ruling by the Supreme Court of Ohio will help clarify - but not entirely resolve - insurer's coverage obligations for losses related to COVID-19. While the *Henderson* and *Santos*' Decisions demonstrate the differing interpretations of the phrase "direct physical loss of or damage to" property, the question in *Neuro-Communication Services, Inc. v. The Cincinnati Insurance Co., et al.*, even if the certification is accepted and decided by the Ohio Supreme Court, will likely not entirely resolve these differing interpretations. The reason being, the specific language in the Cincinnati Insurance policy in *Neuro-Communication Services* is different than that analyzed by the Courts in *Henderson* and *Santos*. For one, the Cincinnati policy language provides

coverage for “direct loss to Covered Property.” As a result, the *Neuro-Communication Services* case will not resolve the issues plaguing the Courts as to what constitutes “physical loss;” what is the significance of the conjunctive “or” in the phrase; what impact does the term “of” versus “to” have, etc.? And, then there is the question how to interpret the various, differing exclusions raised by the insurers - and the significance as to the absence of those exclusions in some policies. What is clear from all of this, however, is that policyholders and insurance carriers should look closely at their specific policy language, as it may be the difference between covered and uncovered losses.

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