

## **Does Business Interruption Insurance Cover Losses Due to COVID-19? Three Federal Circuits Have Answered.**

**By David R. Chenelle**

Ever since the onset of the COVID-19 pandemic, the world as we knew it changed, slowed-down or even stopped in some instances. Individuals quarantined themselves for weeks and months at a time while businesses struggled to survive. Over the past 20 months many business owners have closed or reduced their hours or scope of operations in an attempt



to survive the pandemic storm. While struggling businesses continued to limp along, they also filed claims for lost income against their Commercial Business Insurance with an expectation that the insurance company would pay the claim. Unfortunately, this has not been the reality.

For years business owners have faithfully paid their yearly premiums for business interruption insurance to cover them if such an event as the pandemic occurred. After all the purpose of this insurance is to protect businesses from lost revenue as the result of a disaster or emergency. As with all policies, the detail is in the contract itself, which the courts have found to turn on the phrase “direct physical loss of or damage to property” which appears to be the trigger in business interruption insurance. The courts have also noted that if the emergence of a worldwide pandemic is not a specifically listed event, then the policy would not pay out. While there have been more than 335 decisions favoring both sides of the claims, there have been three favorable decisions to the insurance companies at the federal appeals courts level.

This is the scenario that played out in three of the Federal Circuit Courts of Appeals, most recently in the 6<sup>th</sup> Circuit in the case of *Santo’s Italian Café LLC v. Acuity Insurance Co.*, No.21-3068 (6th Cir. Sept. 22, 2021). In each of those decisions, the plaintiffs were service providers, generally from the food service industry. While the pandemic caused significant decreases in customer traffic, it was the

government-imposed restrictions and required closings that, in effect, forced the in-person traffic in all but essential businesses to stop.

Like all restaurants, Santo's Italian Café ("Santo's") experienced a significant reduction in its revenue. Having carried business insurance for years it filed a claim for its lost revenue believing that a worldwide pandemic would qualify. Santo's contended that COVID-19 and the related government-imposed restrictions on in-person dining was a "direct physical loss of or damage to property" because it was unable to fully use its restaurant. The 6<sup>th</sup> Circuit Court came to a different conclusion.

The court stated that "[w]hether one sticks with the terms themselves (a 'direct physical loss of' property) or a thesaurus-rich paraphrase of them (an 'immediate' 'tangible' 'deprivation' of property), the conclusion is the same. The policy does not cover this loss." The Court also noted that Santo's was not physically destroyed, nor was the owner "tangibly or concretely deprived of" the restaurant. Because the pandemic didn't physically change the restaurant such as a fire or water damage would, "governmental orders did not create a direct physical loss of or damage to property", and because the court found that business interruption insurance relies on physical damage, Santo's claim of lost revenue was not covered.

The Court cited two other appellate courts that had previously decided this issue, *Oral Surgeons, P.C. v. Cincinnati Ins. Co.* 2 F.4th 1141 (8th Cir. 2021) and *Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co.*, No. 21-11046, 2021 WL 3870697 (11th Cir. 2021). In those decisions, the courts found other policy terms, such as the "period of restoration," and the "traditional uses of commercial property insurance" to support their denial of coverage. When interpreting the "period of restoration" language, the courts determined that any covered 'direct physical loss of or damage to' property could be remedied by repairing, rebuilding, or replacing the property or relocating the business." This was not the case with Santo's. It did not need one of these physical remedies or repairs, but rather an end to the governmental on-premise dining ban.

In its decision, the Circuit stated that standard commercial property insurance does "not cover losses indirectly caused by a virus that injures people, not property" and that its decision would likely "leave a hard reality about insurance" coverage, namely that it is "not a general safety net for all damages" and that courts must abide by the insurance contracts between parties. For coverage to have been available, the policy should have had a specific rider that covered such an event.