

Parting Ways With Majority Of Federal Courts, Missouri District Court Allows Some COVID-19 Coverage Claims To Proceed, But Dismisses Others

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A Missouri federal district court granted in part and denied in part an insurer's summary judgment motion in a suit seeking coverage for COVID-19-related business losses. *K.C. Hopps, Ltd. v. Cincinnati Ins. Co., Inc.*, 2021 WL 4302834 (W.D. Mo. Sept. 21, 2021).

A restaurant owner sought coverage under policy provisions for business income, extra expense, civil authority and ingress/egress. The insurer denied coverage, and in ensuing litigation, both parties moved for summary judgment. Applying Kansas and Missouri law (after finding that no conflict of law existed), the court denied the insurer's motion as to claims under the business income and extra expense provisions, finding that the policyholder raised material issues of fact as to the existence of "direct physical loss" or "direct physical damage" to insured property. In particular, the court held that those undefined terms could be satisfied by proof of physical contamination of the COVID-19 virus—evidence of which was submitted by the policyholder's expert witnesses. In so ruling, the court explained that policy exclusions for contaminants would be rendered meaningless if contamination could never constitute a covered loss. The court rejected the insurer's contention that the contaminants listed in the exclusion were distinguishable from COVID-19 in that each of the excluded conditions "could be reasonably expected to cause actual, tangible alteration to property," whereas the COVID-19 virus could be eliminated easily and "over a period of time, dies off without any need for repair."

The court distinguished *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2020 WL 2753874 (8th Cir. July 2, 2021), in which the court, faced with identical policy language, dismissed COVID-19-related coverage claims based on the absence of direct loss to property (see [July/August 2021 Alert](#)). The court reasoned that *Oral Surgeons* precludes coverage where a policyholder alleges physical loss based on government orders, but does not where, as here, the policyholder submits proof of physical contamination. The court also distinguished *Promotional Headwear, Int'l v. Cincinnati Ins. Co.*, 504 F. Supp. 3d 1191 (D. Kan. 2020), in which the court stated that even "assuming that the virus physically attached to covered property, it did not constitute direct, physical loss or damage required to trigger coverage because its presence can be eliminated," noting that case did not have the benefit of discovery and expert testimony.

However, the court dismissed the civil authority and ingress/egress coverage claims, explaining that while the government orders limited the policyholder's operations, they did not prevent the policyholder from accessing the premises. In addition, the court denied the policyholder's summary judgment motion, finding that issues of material fact existed as to the actual presence of the virus on insured premises, whether such

presence caused physical loss or damage, and the extent of damages.

Finally, the court addressed the following additional issues:

Expert testimony: The court held that the policyholder raised a triable issue of fact as to physical loss or damage by viral contamination on the premises even though its experts never specifically tested the insured premises. The court deemed it sufficient that the expert relied on data related to the community spread of the virus in the relevant geographic region, together with testimony that numerous employees were infected with the COVID-19 virus during the relevant time frame.

Continued, limited use of insured property: The court rejected the insurer’s assertion that the policyholder’s continued, albeit reduced use of insured premises throughout the relevant time period indicated the absence of direct physical loss or damage. The court explained that “while the fact that the premises were still used in some capacity is relevant to the extent of Plaintiff’s damages, that fact does not preclude coverage.”

Exclusions: The court ruled that policy exclusions entitled “Ordinance or Law,” “Delay or Loss of Use,” and “Acts or Decisions” did not preclude coverage because the cause of the policyholder’s loss was the alleged presence of the COVID-19 virus on its premises, not government orders or decisions.

Damages: The insurer argued that the policyholder did not sustain damages because the amount it received in pandemic relief, including forgiven government loans, exceeded the amount it allegedly lost as a result of the virus and shutdown orders. Rejecting this assertion, the court noted that the purpose of such governmental relief was to keep employees paid, not to compensate businesses for lost income.

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