

Sixth Circuit Rejects Coverage Claim Under Communicable Disease Provision

11.30.21



(Article from *Insurance Law Alert*, November 2021)

For more information, please visit the [Insurance Law Alert Resource Center](#).

The Sixth Circuit ruled that a communicable disease and water-borne pathogen provision did not provide coverage for a policyholder's COVID-19-related business losses. *Dakota Girls, LLC v. Philadelphia Indem. Ins. Co.*, No. 21-3245 (6th Cir. Nov. 5, 2021).

Dakota, a private preschool company, sought coverage for losses incurred during the government shutdown period under four policy provisions: (1) business and personal property; (2) business income; (3) civil authority; and (4) communicable disease and water-borne pathogens. An Ohio district court dismissed the suit and Dakota appealed. While the appeal was pending, the Sixth Circuit issued a decision foreclosing coverage under the first three provisions. *See Santo's Italian Café v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021) (discussed in our [September 2021 Alert](#)). The sole remaining issue in the present appeal was whether the communicable disease and water-borne pathogen provision provided coverage. The Sixth Circuit ruled that it did not.

The provision covered loss resulting from a government shutdown “due directly to an outbreak of a communicable disease or water-borne pathogen that causes an actual illness at the described premises.” Dakota argued that this provision had “two distinct triggers” for coverage—either any communicable disease-related shutdown order (regardless of actual illness at insured premises), or an order due directly to a water-borne pathogen that causes an actual illness at the insured premises. The court deemed this interpretation unreasonable, noting that Dakota “never explains, much less convincingly so, why the drafters would have made one coverage trigger super-broad and the other super narrow.” Instead, the court ruled that the provision required Dakota to plausibly plead an “actual illness” at the insured premises from either a communicable disease or water-borne pathogen. Because Dakota made no such allegations, the court held that there could be no coverage.

Alternatively, the Sixth Circuit held that even if Dakota alleged “actual illness,” its claims would nonetheless fail because it did not plead that the statewide shutdown order was “due directly” to an outbreak at its schools.

In recent months, federal appellate courts in the Eighth, Ninth and Eleventh Circuits have similarly upheld district court dismissals of COVID-19 coverage suits. Appeals are currently pending in the First, Second, Fifth, Seventh and Tenth Circuits.

Authors and Contacts

[Bryce Friedman](#)

Partner

bfriedman@stblaw.com

+1-212-455-2235

[Joshua Polster](#)

Partner

joshua.polster@stblaw.com

+1-212-455-2266

