

# Physical Loss, Property Damage Coverage Update

November 16, 2020  
*The e-POST*

## Physical Loss and Property Damage – Southern District of Mississippi (Mississippi Law)

***Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.***

2:20-cv-00087, --- F. Supp. 3d ---, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020)

The U.S. District Court for the Southern District of Mississippi held that a Hattiesburg restaurant, Ed's Burger Joint (Ed's), was not entitled to insurance coverage from its insurer, Travelers Casualty Insurance Company of America (Travelers) for its business losses stemming from the COVID-19 pandemic. Ed's brought a cause of action against Travelers for breach of contract and declaratory judgment for coverage under its "all-risk" commercial property insurance policy after the Mississippi Governor and Hattiesburg Mayor declared a state of emergency, restricting all restaurants' dine-in services as a result of the COVID-19 pandemic. The Travelers policy provided coverage for "physical loss of property or any physical damage to property."

Ed's argued that the emergency orders affected its dining operations, triggering coverage under the policy's Business Income/Extra Expense provisions. Ed's contended that the language of that provision did not require "physical alteration to property" and that "loss of the usability of the business premises qualifies it for coverage." Ed's agreed that it did not suffer property damage, but stated that it would "never be able to recoup the damage done to its business operations by the Coronavirus."

Travelers, however, argued that Ed's did not allege physical loss of property or any physical damage, which is a prerequisite to coverage under the Business Income/Extra Expense coverage provision, because Ed's closure, due to the government orders, did not constitute direct physical loss of or damage to property. Further, Travelers contended that even if the district court were to find property loss or physical damage at the premises, Ed's claims were precluded by the policy's virus exclusion. The district court found Travelers' arguments persuasive, holding that although there was a suspension of Ed's operations, that suspension was not caused by physical loss of or damage to Ed's premises. In addition, the district court held that even if there was a physical loss at the premises, the virus exclusion bars coverage. Thus, the district court dismissed Ed's claim for coverage as unsustainable.

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## **Physical Loss and Damage – Southern District of West Virginia (West Virginia Law)**

### ***Uncork and Create LLC v. The Cincinnati Ins. Co..***

2:20-cv-0040, 2020 WL 6436948 (S.D. W. Va. Nov. 2, 2020)

The U.S. District Court for the Southern District of West Virginia held that a Barboursville and Charleston art and cooking class company, Uncork and Create LLC (Uncork), was not entitled to insurance coverage from its insurers The Cincinnati Insurance Company, The Cincinnati Casualty Company, and The Cincinnati Indemnity Company (collectively Cincinnati) for its COVID-19 economic losses. Uncork brought a cause of action for declaratory judgment against Cincinnati for coverage under its “all-risk” commercial property coverage insurance policy after the West Virginia Governor declared a state of emergency and ordered all non-essential businesses to temporarily close as a result of the COVID-19 pandemic. The policy provided coverage for loss, including “loss of business income during a suspension of operations, including such a suspension sustained due to civil authority prohibiting access to the premises.”

Uncork argued that the West Virginia Governor’s emergency order and the COVID-19 virus itself “deprived it from using the property for its intended purpose,” and argued that “a property that is unsafe to inhabit has physical loss or damage, even absent structural alteration.” Furthermore, it emphasized that the policy’s Pollution Exclusion was inapplicable because the policy did not include a specific virus exclusion and, thus, any loss as a result of the COVID-19 virus should be covered under the “all-risk” policy.

Cincinnati, however, argued that Uncork’s suspension of its operations and resulting economic loss were not covered losses under the policy because there was no direct physical loss at the premises. Further, Cincinnati noted that the Pollution Exclusion was applicable to exclude coverage for damages as a result of COVID-19. The district court found Cincinnati’s arguments persuasive, holding that “COVID-19 does not threaten the inanimate structures covered by property insurance policies.” In holding that Uncork failed to state a claim for coverage, the district court noted that the COVID-19 pandemic “impacts human health and human behavior, not physical structures.”

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