

Physical Loss, Virus Exclusion, Direct Physical Loss of, Damage to Property Coverage Update

October 15, 2021

Physical Loss and Virus Exclusion – Ninth Circuit (California Law)

Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.

--- Fed. Appx. ---, No. 20-16858, 2021 WL 4486509 (9th Cir. Oct. 1, 2021)

Chattanooga Pro. Baseball, LLC v. Nat'l Cas. Co.

--- Fed. Appx. ---, No. 20-17422, 2021 WL 4493920 (9th Cir. Oct. 1, 2021)

Selane Prod., Inc. v. Cont'l Cas. Co.

--- Fed. Appx. ---, No. 21-55123, 2021 WL 4496471 (9th Cir. Oct. 1, 2021)

The U.S. Court of Appeals for the Ninth Circuit recently upheld three separate dismissals of lawsuits seeking insurance coverage for losses related to the COVID-19 pandemic.

First, in *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am. (Mudpie)*, the Ninth Circuit held that COVID-19 does not cause physical loss, and, thus, is not covered under an insurance policy. Mudpie, Inc. (Mudpie) owns a store and purchased insurance from Travelers Casualty Insurance Company of America (Travelers). After California state and local governments issued stay-at-home orders in response to the COVID-19 pandemic, Mudpie made a claim to Travelers, stating that the governmental orders prevented it from operating its store. Travelers denied the claim, and Mudpie filed a complaint. The district court granted Travelers' motion to dismiss because Mudpie had "not alleged ... any facts demonstrating that [it] suffered a 'direct physical loss of or damage to' insured property" and because the Travelers policy contained a virus exclusion. On appeal, Mudpie argued that under California law "direct physical loss of or damage to" property does not require actual damage to the property "but merely requires that the property no longer be suitable for its intended purpose." The appellate court rejected Mudpie's argument, stating that the complaint did not identify a "distinct, demonstrable, physical alteration of the property," which permanently dispossessed Mudpie of its property, where the governmental orders were temporary in nature. The appellate court reasoned that "'direct physical loss of or damage to' property" requires physical alteration of property. The appellate court further held that coverage was not available because the Travelers policy contained a virus exclusion that barred coverage for Mudpie's claimed COVID-19 losses.

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On the same day, the appellate court, in *Chattanooga Pro. Baseball LLC v. Nat'l Cas. Co.* (*Chattanooga*), held that virus exclusions in insurance policies preclude coverage for COVID-19 related losses. In *Chattanooga*, several professional baseball teams (teams) filed a complaint against National Casualty Company, Scottsdale Indemnity Company, and Scottsdale Insurance Company's (insurers) for breach of contract and anticipatory breach of contract for their COVID-19 related losses. The teams argued that the virus exclusions in the insurers' policies do not apply to their losses because they were attributable to other causes not implicated by COVID-19, such as "attendant disease, resulting pandemic, governmental responses to the pandemic, and Major League Baseball (MLB) not supplying players." On appeal, the appellate court agreed with the district court and held that the teams' argument failed because COVID-19 was the "efficient proximate cause" that set the other causes in motion, that all of the teams' alleged losses "patently flow from the COVID-19 virus," and that the teams' losses were not caused by "'efficient intervening cause[s]' that broke the causal chain stemming from the COVID-19 virus." The appellate court further disregarded the teams' argument that even if the virus exclusion applies, it is unenforceable due to regulatory estoppel and equitable estoppel because the argument was unsupported by authority or facts. Therefore, the appellate court held that the virus exclusions in an insurance policy preclude coverage for COVID-19 related losses.

Finally, in *Selane Prod., Inc. v. Cont'l Cas. Co.* (*Selane*), the appellate court held that coverage is unavailable for COVID-19 losses where COVID-19 does not cause physical loss or property damage. In *Selane*, Selane Products, Inc., along with other class members (collectively Selane), were forced to stop their business operations after state and local governments ordered a shut down due to the COVID-19 pandemic. As a result, Selane sought coverage under policies issued by Continental Casualty Company (Continental). After Continental denied the claims, Selane filed a class action lawsuit. Continental moved to dismiss the complaint, arguing that Selane did not allege any "'direct physical loss of or damage to' property," as required under the Continental policies, as a result of the COVID-19 virus. The district court agreed and dismissed Selane's complaint. The appellate court affirmed the district court's ruling, reasoning that Selane must establish that it suffered "physical alteration of its insured property," as required under California law. The appellate court reasoned that Selane did not allege that its property sustained physical alterations because it did not prove that the virus that causes COVID-19 was present on its property or that the stay-at-home orders caused physical alterations to its property. Therefore, the appellate court held that COVID-19 losses are not covered under an insurance policy where COVID-19 did not cause physical loss or property damage.

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Direct Physical Loss of or Damage to Property – Sixth Circuit (Ohio Law)

In re: Zurich Am. Ins. Co.

No. 21-0302, 2021 WL 4473398 (6th Cir. Sept. 29, 2021)

On interlocutory appeal, the U.S. Court of Appeals for the Sixth Circuit vacated the U.S. District Court for the Northern District of Ohio's order that determined Zurich American Insurance Company was obligated to cover the COVID-19 pandemic-related business income losses of some of its restaurant policyholders. The district court had reasoned that "the COVID-19-related interruption of Plaintiffs' dine-in operations amounted to 'direct physical loss of or damage to [Plaintiffs'] property' under Ohio law." However, the appellate court, citing its recent decision in *Santo's Italian Café LLC v. Acuity Ins. Co.*, No. 21-3068, --- F.4th ---, 2021 WL 4304607 at *3 (6th Cir. Sept. 22, 2021), held that "a pandemic-triggered government order, barring in-person dining at a restaurant[,] does not qualify as "direct physical loss of or damage to" the property under Ohio law. Consistent with its prior decision in *Santo's*, the appellate court vacated the district court's order that granted summary judgment in favor of the insured.

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