

Crisis Averted! Pennsylvania Supreme Court Joins Other Courts in Finding that Covid-19 Presents No Physical Loss or Damage for Businesses

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Seeking to find some relief from business losses experienced during the COVID-19 pandemic, many businesses turned to their property insurers for coverage for their lost income. A clear national trend emerged among courts deciding the issue, as most businesses could not establish coverage because they had not experienced a "direct physical loss of or damage to their covered property" as required by most policies.

While this legal question may have become an afterthought for many attorneys, the question remained an open one in Pennsylvania while the Pennsylvania Supreme Court considered two contradictory holdings issued in the Superior Court on this topic. *Compare Macmiles, LLC v. Erie Ins. Exch.*, 286 A.3d 331 (Pa. Super. 2022) (holding there was no coverage for loss of use of a commercial property unaccompanied by any physical alteration or other physical condition that rendered the property unusable or uninhabitable) with *Ungarean v. CNA*, 286 A.3d 353 (Pa. Super. 2022) (holding that the policy at issue was ambiguous and therefore the policy covered the insured for COVID-related business losses). Last week, the Supreme Court considered the Superior Court's holdings in *Macmiles* and *Ungarean* and held, at long last, that COVID-19 did not cause a direct physical loss of or damage to covered property.

In *Ungarean*, the trial court and Superior Court held that a dental practice's insurer must cover business losses and extra expenses for the direct physical loss to the dental practice due to COVID-19 and the governmental orders issued to quell the pandemic. In reversing, the Supreme Court applied the plain meaning of the words "direct physical loss of or damage to property" and found that "there must be either a physical disappearance, partial or complete deterioration, or absence of a physical capability or function of the property (loss); or (2) a *physical* harm or injury to the property (damage)." *Ungarean v. CMA*, Nos. 11 WAP 2023, 12 WAP 2023, 2024 Pa. LEXIS 1433, *34-35 (Pa. Sep. 26, 2024)

Like most other courts, the Pennsylvania Supreme Court found that its interpretation was consistent with and required by other language in the policy. For coverage to apply under the Business Income or Extra Expense Endorsement in the *Ungarean* policy, the dental practice "must experience a suspension of operations due to a direct physical loss of or damage to the subject property and the loss of income during a 'period of restoration.'" The policy-supplied definition of "period of restoration" is a period required to "repair[], rebuild[d] or replace[]" the subject property or when "business is resumed at a new permanent location." To give the "period of restoration" language any meaning, "there must be some physical alteration to the subject property necessitating repairs, rebuilding, or entirely replacing the property either at the same location or a new one."

Ungarean alleged physical losses due to the loss of use required by the government-ordered shutdown—not a physical loss to the property. That was insufficient. The Supreme Court also considered whether the installation or renovation of protective tools such as partitions, additional handwashing or sanitization stations, and ventilation systems amounted to a physical loss of or damage to property. The Court held they were not a physical loss of or damage to property unless they corrected a "physical attribute of the property."



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By separate order, the Supreme Court affirmed the holding in *Macmiles* for the reasons stated in the *Ungarean* opinion. *MacMiles, LLC v. Erie Ins. Exch.*, No. 10 WAP 2023, 2024 Pa. LEXIS 1438, *1 (Sep. 26, 2024).

The opinions in *Ungarean* and *Macmiles* hardly break new ground on how to approach COVID-19 litigation, but those decisions finally alleviate the confusion in Pennsylvania about how to treat such claims. They also reaffirm the basic principle that words in insurance policies mean what they say.

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