

University of Colorado System Scores COVID-19 Property Insurance Coverage Win

A Colorado state court recently joined a growing chorus of courts across the country rejecting insurance companies' arguments that there is no coverage for COVID-19-related losses and costs under commercial property insurance policies because COVID-19 cannot cause "physical loss or damage" to property as a matter of law. In a written order on January 26, 2022, the court denied Factory Mutual Insurance Company's motion for partial judgment against the Regents of the University of Colorado and granted the regents the opportunity to amend their pleading to add critical facts.

Background

The Regents of the University of Colorado brought a 2021 lawsuit against leading global property insurer Factory Mutual Insurance Company seeking coverage under the company's "all risks" commercial property policy. The suit seeks recovery for the more than \$300 million in losses, costs, and expenses incurred by the university system as a result of the COVID-19 pandemic. The lawsuit also seeks damages for Factory Mutual's wrongful and bad faith denial of the regents' insurance claim.

Factory Mutual sought to prematurely end this case by filing motions for partial judgment and to stop discovery. Factory Mutual also resisted the regents' desire to amend their initial complaint to provide newly developed factual evidence about a novel communicable disease and Factory Mutual's understanding of how its policy form responds to disease-related losses. In so doing, Factory Mutual sought to deprive the court of the opportunity to understand the science behind COVID-19 and how COVID-19 damages property, as well as to keep out evidence of Factory Mutual's pre-COVID-19 understanding of its policy's communicable disease coverage that contradicts Factory Mutual's present litigation position and coverage denial.

Prior to the January 26 decision, the Colorado court denied Factory Mutual's attempt to stop discovery. In two January 26 orders, the court determined the following:

- **The commercial property policy's trigger requiring policyholders to show a "physical loss or damage" to property is "ambiguous."** Relying on long-standing Colorado Supreme Court precedent and the fact that courts across the country have split on this critical issue, the court concluded that the term "physical loss or damage" was ambiguous and susceptible to more than one reasonable interpretation. The court recognized that "it is possible that an average purchaser of insurance might understand that 'physical loss' could include altering the structure of the insured property ... or the inability to maintain a presence on the property." Thus, the court reasoned that the regents' allegations about the science of COVID-19 and its presence throughout the university system made it "plausible to conclude that a property could become so saturated with [COVID-19] contaminated objects, aerosols, and droplets, that its buildings were uninhabitable."
- **Regents plausibly alleged "physical loss or damage" because COVID-19 rendered its properties unusable for their intended purposes and physically altered them.** The court also recognized that the regents' complaint stated a claim under either interpretation of "physical loss or damage" because the regents alleged "both that COVID-19 prevented it from using its property and also that it altered the

structure of the property by contaminating objects and lingering in the air."

- **The policy's "Contamination Exclusion" does not bar coverage.** Recognizing again that courts across the country are split, the court rejected Factory Mutual's assertion that the policy's "Contamination Exclusion" clearly and unambiguously barred coverage for the regents' losses.
- **The policy's "Loss of Use" and "Loss of Market" exclusions do not bar coverage.** The court held that, based on the pleadings, the "Loss of Use" and "Loss of Market" exclusions in the policy do not bar the regents' insurance claim. As a result, the court recognized that the regents' interpretation of these exclusions plausibly makes all policy provisions effective, unlike the contrary interpretation offered by Factory Mutual.

Takeaway

This ruling reflects a growing trend of state courts breaking with the early and premature decisions from federal courts across the country. These later decisions open the door for policyholders who faced crippling losses, costs, and expenses from the COVID-19 pandemic and related shutdown orders to finally obtain the coverage they bargained for.

Policyholders seeking more information about the ruling and its effects on them should consult with experienced counsel.

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