



Claims for Business Income Loss Due to Construction Dust Denied in Pre-COVID Case, *Insurance Journal*, ft. Joseph Miele

Joseph R. Miele, Jr., partner, is quoted throughout Insurance Journal's article, written by Andrew G. Simpson, on the significance of a Florida decision in a business interruption case on COVID-19 related cases published August 21, 2020.

In an opinion that could inform coronavirus business interruption claims now before various courts, a federal appeals court has ruled that a Florida restaurant is unable to collect on its insurance for business interruption losses that it says were caused by dust and debris from nearby road construction that began in 2013.

The court backed the insurer's denial of insurance payments because, although the restaurant had to clean its premises, it did not suffer any "direct physical loss of or damage to" its property.

U.S. District Judge R. David Proctor, writing for the 11th Circuit Court of Appeals, concluded that under Florida law, "an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'"

The appeals court ruling against the plaintiff upheld a ruling by the U.S. District Court for Southern Florida in favor of Sparta Insurance Co., against the plaintiff, Mama Jo's (doing business as Berries).

Florida attorney Joseph Miele expects the opinion will have an impact on business interruption insurance claims against insurers by business policyholders seeking payment of losses due to the coronavirus. Insurers have been arguing that a virus and related business shutdowns do not cause direct physical loss or damage and thus do not trigger business interruption coverage.

Impact on Others

Miele, an insurance coverage partner at Kaufman Dolowich & Voluck in Ft. Lauderdale, said insurers have cited the district court's decision in business interruption cases across the country and the fact that now a federal court of appeals has embraced that view further supports insurers' arguments.

Miele said another important consideration is the court's reasoning that the plaintiff did not meet its initial burden of bringing the claim within the coverage of the policy.

"It is a fundamental principle of insurance law that once this burden is met, the burden of proof shifts to the insurer to prove an exclusion," he explained. "Under the reasoning of Mama Jo's, an insurer never gets to that step. This will streamline resolution of these cases by eliminating protracted litigation over the various exclusions that could also apply to preclude coverage."

Insurance coverage attorney Miele said that the fact that the restaurant remained open during the period of construction will likely be argued against the rationale of Mama Jo's. However, he does not believe this difference would have compelled a different result. "The typical scenario in COVID claims is that the businesses closed by governmental order with no showing of the presence of COVID. But, even if that showing were to be made, like in Mama Jo's, the 'remedy' is sanitizing the property," he said.