Recent 11th Circuit Case May Impact COVID-19 Litigation

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By Irene Thaler
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The restaurant Berries of the Grove in Miami boasts Belgian waffles, steak and Nutella pizza on its online menu. However, its name may now become center stage for arguments in COVID-19 litigation.

Berries sued its insurer, Sparta Insurance Co., after it submitted a claim in December 2014 related to dust and debris generated by nearby roadway construction. Berries alleged there was construction at different locations along SW 27th Avenue in the general vicinity of the restaurant. Due to the construction, Berries performed daily cleaning using its normal cleaning methods, including dust pans, hoses, rags, towels and blowers. The restaurant maintained that customer traffic decreased as a result of the roadwork.

In January 2017, Sparta denied Berries' cleaning and loss-of-business income claim. Sparta relied on the commercial property insurance policy it issued to Berries, and its specific language stating the policy only covered damage caused by direct physical loss. Sparta took the position Berries' damages for cleaning did not reflect the existence of any physical damage or the occurrence of a direct physical loss to the restaurant and based its denial of the loss-of-business income claim on the same policy language—a direct physical loss to the restaurant must have caused a suspension of business.

Berries initiated an action in Florida state court, and Sparta removed the suit to the United States District Court for the Southern District of Florida. During the pendency of the federal suit, among other repairs, Berries claimed charges for cleaning and painting, lower-than-expected sales, and replacement of the awning and retractable roof systems. Berries relied on three experts to causally link its damages, but the district judge found the methodologies employed by the experts were unreliable or non-existent and their testimony was speculative. The district judge concluded Berries' claim for cleaning was not covered because property that must be cleaned, but is not otherwise damaged, has not sustained a direct physical loss. The court explained direct physical loss refers to tangible damage to property that causes it to become unsatisfactory for future use or requires repairs. With respect to Berries' claim for lower-than-expected sales, the district judge held loss of sales was not covered because Berries could not establish that it suffered a necessary suspension of its operations as the result of a direct physical loss. The district judge entered summary judgment in favor of Sparta.

Berries appealed to the Eleventh Circuit, and the appeals court agreed with the district judge. In its analysis, the court explained that Berries failed to show a direct physical loss for recovery of cleaning charges or loss of sales because, 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 cited to case law holding direct physical loss contemplates an actual change in the insured property. With respect to Berries' loss of business income, the appeals court agreed with the district judge's ruling, adding that even a slowdown of operations was not recoverable because it still must have been caused by direct physical loss—a loss beyond simple dust and debris from nearby construction.

The decision includes two pages discussing the admissibility of evidence under the Daubert standard; however, its rationale with respect to the meaning of what is a "direct physical loss" to property may be far-reaching in COVID-19 litigation. While the underlying facts do not implicate COVID-19 directly, insurers may analogize virus particles to dust and debris and argue the mere (undoubtedly meticulous) process of cleaning and disinfecting a business, whether it be an office, warehouse or restaurant, does not rise to a direct, physical loss of the property for coverage to apply.

Insurers may have a strong argument to make, that a loss of sales without a causal link rendering the property unsatisfactory for future use or requiring repairs does not open the door to insurance coverage, at least for a business income loss claim. The Eleventh Circuit Court's decision may have been an unintended consequence in the anticipated coverage debate surrounding COVID-19—only time will tell how wide-reaching and impactful this decision will be in future litigation.

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