Florida's Southern District Court Tosses Out COVID-19 Complaints

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Irene Thaler, Esq.

The wave of COVID-19 litigation is hitting South Florida, but as the old adage goes, the suits seem to be crashing before hitting the shoreline. Recent decisions from the U.S. Southern District dismissed two different lawsuits stemming from COVID-19 claims. The opinions offer a glimpse of how courts are analyzing COVID-19 policy language and may offer insight into the future (or perhaps, more fittingly, the nonfuture) of COVID-19 litigation in Florida.

In *Mena Catering v. Scottsdale Insurance,* (Case No. 1:20-cv-23661-BLOOM/Louis) and *Carrot Love v. Aspen Specialty Insurance Companies(* Case No. 20-23586-Civ-Scola.), U.S. District Judges Beth Bloom and Robert N. Scola Jr. dismissed two complaints after the insurers filed motions to dismiss. In *Mena Catering,* the plaintiff claimed it experienced a business income loss due to the sudden closure of nearby businesses, group gatherings and events, resulting in the spoilage of perishable food. The catering company also claimed the coronavirus caused a distinct alteration of its property that "could not be repaired through a one-time disinfection and ha[d] permanency" and it was prevented from accessing its own property due to civil authority orders in March 2020.

In *Carrot Love,* a restaurant owner claimed losses due to closures suffered as a result of COVID-19. The restaurant alleged COVID-19 deposited on various surfaces such as countertops, tables and chairs, affecting the restaurant's ability to operate.

Both claims involved commercial policies that included coverage for loss of business income but required a suspension of operations caused by "direct physical loss of or damage to" the property for coverage to be triggered. Relying on the recent decision of *Mama Jo's v. Sparta Insurance* in which the 11th Circuit held an item or structure that merely needed to be cleaned had not suffered a loss that was both direct and physical, Bloom ruled the presence of the coronavirus on a physical structure of a premises did not constitute a direct physical loss to the property. (On alternate grounds, the *Mena Catering* court further dismissed the catering company's complaint based on the virus exclusion endorsement made a part of the relevant insurance policy.) The decision referenced an out-of-state ruling from the Northern District of Illinois, which noted the coronavirus did not physically alter the appearance, shape, color, structure, or other material dimension of the property—and thereby did not constitute direct physical damage, which is a

necessary component of coverage for a business income loss claim.

In *Carrot Love,* Scola appreciated the "personal impact the pandemic has had on every American —COVID-19 has devastated business in Florida and throughout the country" and noted the court was sympathetic to the plaintiffs position. However, the court agreed with the reasoning in *Mena Catering* and acknowledged there was "a nearly unanimous view that COVID-19 does not cause direct physical loss or damage to a property sufficient to trigger coverage under the policy."

Ultimately, both decisions turned on the applicability and analysis of the policy provision requiring a direct physical loss or damage to the property and make clear business income interruption claims stemming from the COVID-19 pandemic will not withstand dismissal without plausible proof of a physical loss.

Irene Thaler is a shareholder in the Fort Lauderdale office of Marshall Dennehey Warner Coleman & Goggin. A member of the insurance services-coverage and bad faith litigation practice group, she devotes her practice to insurance coverage, bad faith litigation and first-party property defense litigation. Contact her at 954-832-3962 or iithalerqmdwcg.com.