

A Tale of Two Policies: How Careful Interpretation Impacts Coverage Determinations

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Two recent COVID-19 insurance decisions highlight how different interpretations of the same few policy words can result in one policyholder losing the coverage for which it paid. In *Henderson Road Restaurant Systems, Inc. v. Zurich American Ins. Co.*, No: 1:20 CV 1239, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021), the Court granted policyholders coverage for COVID-19-related business interruption losses. Stay-at-home orders there forced policyholders to shut down most of their dine-in restaurants across several states, which caused severe financial damages. *Id.* The Court, applying Ohio law, interpreted the insurance policy's coverage for "direct physical loss of or damage to 'real property.'" It accepted policyholders' argument that they suffered physical loss of their restaurants as a result of the government-ordered shutdowns.

The Court focused on the word "or" between "direct physical loss of" and "damage to 'real property,'" and concluded this disjunctive word rendered the coverage grant ambiguous. The Court rejected Zurich's contention that the policy covered only physical loss to property, and not merely loss of use of property. The Court held the insurer's interpretation contradicts the policy's language covering "physical loss of" property, not "physical loss to" property.

Having found the policyholders asserted a covered business interruption claim, the Court next rejected Zurich's argument that its microorganism exclusion barred the policyholders' coverage claims, holding "[p]laintiffs' restaurants were not closed because there was an outbreak of COVID-19 at their properties; they were closed as a result of governmental orders." The Court, finally, refused to apply Zurich's "Loss of Market or Delay" exclusion on the ground such application would render illusory the policy's Loss of Business Income provision: "the Policy must be read in its entirety and disputed terms interpreted in a manner calculated to give the agreement its intended effect."

The US District Court for the District of New Jersey reached the opposite coverage conclusion in *7th Inning Stretch Llc v. Arch Ins. Co.*, Civil Action No. 20-8161 (SDW) (LDW), 2021 U.S. Dist. LEXIS 11326, at *1 (D.N.J. Jan. 19, 2021). There, policyholders owned minor league baseball teams that were forced to curtail their season as a result of COVID-19 stay-at-home orders, causing "catastrophic financial loss." *Id.* at *3. Arch's insurance

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policies contained the same language as that sold by Zurich, covering loss resulting from “direct physical loss of or damage to property.” *Id.* at *3. The Court, in a cursory opinion, granted Arch’s dismissal motion on the basis that the policyholders failed to allege physical damage to property. *Id.* at *5. The Court also found applicable the policies’ virus exclusion. *Id.* at *4.

The polar opposite coverage interpretations reached by the previously mentioned two courts, on the same day, and interpreting similar policy language, demonstrate that these policy provisions are necessarily ambiguous and subject to more than one reasonable interpretation. Indeed, the *7th Inning Stretch* decision is entirely inconsistent with other New Jersey rulings on the subject. These contrary findings also underscore the importance of careful pleading and argument in order to demonstrate how decisions like *7th Inning Stretch* render certain policy wording wholly superfluous, contrary to well-established rules of construction.