

TEXAS INSURANCE LAW NEWSBRIEF

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FIFTH CIRCUIT CONFIRMS COVID-19 SHUTDOWNS ARE NOT “DIRECT PHYSICAL LOSS”

In a pair of COVID-19 cases released last week, the Fifth Circuit for the first time affirmed two different lower courts who found that businesses who were required to reduce customer capacity or cease dine-in restaurant service due to government-ordered shutdowns in spring 2020 did not incur a “direct physical loss” as a result of those shutdowns, and thus were not entitled to business income benefits under their property insurance policies.

In *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, 2022 WL 43170 (5th Cir. Jan. 5, 2022) and *Aggie Investments, L.L.C. v. Continental Cas. Co.* 2022 WL 67333 (5th Cir. Jan. 6, 2022), the court issued an opinion by a three-judge panel and a per curiam opinion, which both swiftly disposed of the “direct physical loss” question based on examination of the policy wording, the plain meaning of a “physical loss,” and observing that business income coverage applies only to a specific “period of restoration,” which contemplates repair of a tangible loss, which did not occur in the case of the government shutdowns. The court also noted these rulings are consistent with those from the Second, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. The court rejected the insureds’ arguments that they were deprived of their physical space and had a resulting loss of use, noting they had full physical access to their premises at all times and could use the space in any manner they chose, except offering dine-in services to the public.

In the *Terry Black's* case, the court also considered a Restaurant Extension Endorsement, which provided coverage for suspension of operations due to the order of a civil authority resulting from the actual or alleged exposure of the premises to a contagious disease. The court concluded this coverage also did not apply because it required the shutdown order to result from actual or alleged exposure to a disease at the premises. However, the shutdown orders were issued not as a result of the insured’s exposure to a contagious disease, but to prevent that *exposure*.

Editor’s Note: The Fifth Circuit has thus confirmed a growing body of case law coming out of the lower courts of Texas and other jurisdictions nationwide holding that when an insurance policy requires a direct physical loss, it means what it says and will be enforced as written. We congratulate State Auto Mutual Insurance Company on the result and MDJW’s litigation team who had the privilege of representing State Auto in the *Terry Black's* case: Levon Hovnatanian, Kevin Cain, Chris Martin, and Clint Wolbert.