

THOUGHT LEADERSHIP

News

## U.S. DISTRICT COURT MAGISTRATE JUDGE RECOMMENDS DISMISSAL OF RESTAURANT'S COVID-19 BUSINESS-INTERRUPTION CLAIM

Newsbrief

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Last week, the Magistrate Judge for the United States District Court for the Western District of Texas recommended dismissal of restaurant's COVID-19 business-interruption claim, after concluding the claim was not covered under various policy provisions. In *Terry Black's Barbecue, LLC v. State Automobile Mutual Ins. Co.*, No. 1:20-CV-665-RP, 2020 WL 7351246 (W.D. Texas [Austin Division], Dec. 14, 2020), Plaintiffs Terry Black's Barbecue, LLC and Terry Black's Barbecue Dallas, LLC ("Terry Black's BBQ"), which own and operate restaurants in Austin and Dallas, filed suit against their insurer, State Automobile Mutual Insurance Company ("State Auto"), alleging that the shut-down orders issued in connection with COVID-19 forced them to cease their operations, resulting in business interruption and loss of business income. Terry Black's BBQ alleged that such losses were covered under their policies with State Auto, and that State Auto's denial of their claim was a breach of contract.

In response, State Auto filed a motion for judgment on the pleadings, arguing that the claim for business interruption losses was not covered because the loss was purely economic and the policies covered only "direct physical loss of or direct physical damage to property."

The court began its analysis by rejecting Terry Black's BBQ's argument that the term "direct physical loss" was ambiguous and, consequently, should be construed in favor of Terry Black's BBQ to encompass its inability to have its restaurants operational. The court concluded that Terry Black's BBQ's interpretation was "unreasonable because it focus[d] on the word 'loss' while ignoring the Policy's unambiguous requirement that there must be a 'direct physical loss of or damage to property' in order to trigger coverage."

Next, the court concluded that COVID-19 and related civil authority orders do not qualify as a "physical loss of or damage to property" under property insurance policies, because a "physical loss" requires some distinct, demonstrable, physical alteration of the property."

Next, the court concluded that the civil authority provision of the policies –i.e. coverage when there is damage to a property within one mile of the insured property and an order of civil authority prohibiting access to the neighboring property– was not applicable. "Just as COVID-19 did not cause direct physical loss to [Terry Black's BBQ's] property, [Terry Black's BBQ] did not allege that the pandemic caused direct physical loss to other property."

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Lastly, the court concluded that the Restaurant Extension Endorsement was inapplicable. That endorsement provided coverage for the suspension of operations due to the order of a civil authority resulting from the actual or alleged exposure of the described premises to a contagious or infectious disease. The court reasoned that the civil authority orders were not issued as a result of actual or alleged exposure to COVID-19 at Terry Black's restaurants; instead, the civil authority orders were issued in response to the global pandemic.

**Editor's note:** MDJW had the privilege of representing State Automobile Mutual Insurance Company in this matter and we take this opportunity to congratulate them, along with our attorneys Christopher Martin, Melinda Burke, and Clinton Wolbert, in securing this victory.