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Policyholder Alert

Coverage for Business Losses from COVID-19: A Louisiana Appellate Court Opens the Door


By Rhonda D. Orin
and Jason Kosek

Key points:

Louisiana appeals court found it plausible that the coronavirus pandemic had caused "direct physical loss or damage" to a New Orleans restaurant's property and accordingly found coverage for the resulting losses under the restaurant's property insurance policy.

The court recognized precedents in Louisiana and many other states finding coverage for causes of loss that do not cause structural alteration of property.

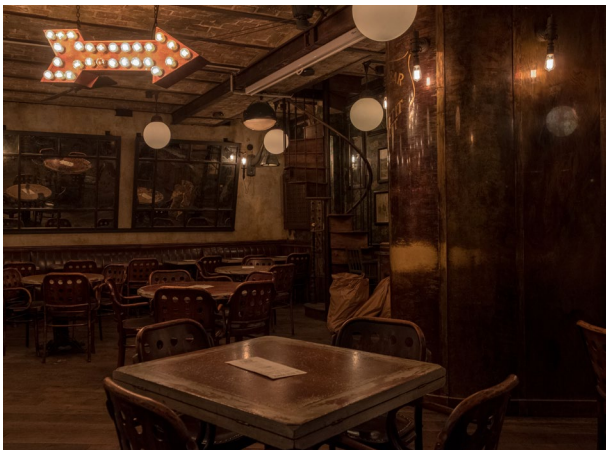
The decision may stem the tide of federal court rulings in COVID-19 coverage cases that ignore relevant state precedents.

In Cajun Conti, LLC et al. v. Certain Underwriters at Lloyd's, London et al., Case No. 2021-CA-0343 (La. Ct. App.) (*"Cajun Conti"*), policyholders seeking insurance coverage for the shutdowns and slowdowns of their physical operations from the COVID-19 pandemic got their first big win on the state appellate level.

The Louisiana Appellate Court found that the requirement in *Cajun Conti's* all-risk property insurance policy that coverage must be triggered by "physical loss or damage" was satisfied by evidence presented at trial regarding the impact of coronavirus on the property. A concurring opinion also found coverage, but on the alternative ground that the policyholder's business income losses were covered because the coronavirus rendered the property unusable.

This ruling has widespread implications because many property policies have the same policy language as the policy in *Cajun Conti*: they require "physical loss or damage" to trigger business interruption claims. In denying policyholders' claims for COVID-19 losses, insurance companies nationwide have contended that there must be "distinct, demonstrable, physical alteration of the property" for there to be physical loss or damage. That is the argument that the Louisiana appellate court rejected.

Many courts have adopted that argument wholesale, despite the potential for other reasonable interpretations



of the standard-form policy language. Approximately **86%** of all cases filed by policyholders seeking business interruption coverage have been dismissed with prejudice (though many of those dismissals were triggered by a virus exclusion, which was not included in Cajun Conti's policy).

Cajun Conti was one of the first cases to be filed by policyholders seeking coverage for their COVID-19 losses—and the first actually to be tried. So the ruling carries much greater signifi-

cance than the many rulings that arise from motion practice alone.

Cajun Conti was filed in March 2020 by a corporation running a restaurant called the Oceana Grill ("Oceana Grill"). It sought coverage for business interruption loss under an "all-risk" property policy that was purchased from Certain Underwriters at Lloyd's, London ("Lloyd's"). The policy does not have a virus exclusion.

In November 2020, a Louisiana trial court denied Lloyd's Motion for Summary Judgment. The case proceeded to a bench trial where the trial court ruled in Lloyd's favor on February 10, 2021. The court found that the pandemic did not cause any "direct physical loss of or damage to" property.

That same month, Oceana Grill filed notice of its intent to appeal the Trial Court's denial. In the appeal, Oceana Grill argued that there can be "direct physical loss or damage to" property without structural alteration, as there is no requirement for such alteration in the policy.

Oceana Grill relied heavily on *Widder v. Louisiana Citizens Prop. Ins. Corp.*, 82 So. 3d 294, 4 (La. Ct. App. 2011), which held that coverage was triggered under a homeowner policy because the insured property was "rendered unusable or uninhabitable," although it was not structurally altered. It relied as well as nationwide case law in which courts have afforded business interruption coverage when there was no such alteration – including in cases where income was lost as a result of agents including smoke, fumes, odors, bacteria and other disease-causing agents that severely impair the use of property without resulting in structural damage.

Oceana Grill also argued that it purchased the Lloyd's policy specifically because it did not include a virus exclusion.

Last week, the appellate court agreed. It held that "direct physical loss or damage" does not require structural alteration to property as it relates to the coronavirus, noting that the term is not defined in the policy.

The Court also noted that "direct physical loss or damage" is open to more than one reasonable interpretation, which is evidence of ambiguity. Possible interpretations include: (1) the presence of the coronavirus on property is direct physical loss or damage (majority opinion); (2) the inability to use property, even if there has been no physical or structural alteration, is direct physical loss or damage (concurring opinion); and (3) as the insurance companies contend and many courts have held, the presence of the coronavirus on property is not physical loss or damage (the dissenting opinion).

The Court also stated that because "Suspension" is defined as the "slowdown or cessation of your business activities," the complete cessation of operations and an uninhabitable property are not prerequisites to coverage as Lloyd's had contended. Oceana Grill suffered a suspension under this definition, as it was closed for two months and when it reopened, it was required to follow CDC guidelines that limited occupancy and required special safety activities that slowed down Oceana Grill's services.

Moreover, although not expressly relied on in the opinion, Oceana Grill's appellate brief explained that Lloyd's appeared before Louisiana's insurance commissioner in 2006, 14 years before the pandemic began, and argued that business interruption policies were triggered by contamination of surfaces in a building's interior. This position is the opposite of what Lloyd's ended up arguing in 2020, when faced with Oceana Grill's pandemic claim.

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Lloyd's is not the only insurance company to attempt to abandon—once the pandemic began—the representations they once made about what their policies covered. For example, in 2018, Swiss Reinsurance Company's ("Swiss Re") advised its investors in its Consolidated Annual Report that, "As part of the Group's ordinary course operations, the Group is subject to a variety of risks, including risks that reserves may not adequately cover future claims and benefits; risks that catastrophic events (including hurricanes, windstorms, floods, earthquakes, acts of terrorism, man-made disasters such as industrial accidents, explosions, and fires, and **pandemics**) may expose the Group to unexpected large losses" (our emphasis).

Additionally, in 2005, the Greater New York Insurance Companies ("Greater NY") asked the New York State Insurance Department for permission to include an optional virus exclusion in its property policies. It explained in an Explanatory Memorandum that the exclusion needed to be optional because many policyholders would want to continue to maintain coverage for viruses. This explanation is a far cry from the argument that insurance companies made later on—that all policies inherently exclude such coverage, whether they have virus exclusions or not.

For policyholders—and for everyone who cares about contracts being interpreted correctly—*Cajun Conti* is a giant step in the right direction. Hopefully, it will give other courts the confidence to look past the precedent created far too quickly by courts—mostly federal—that simply followed each other in dismissing COVID-19 lawsuits on motion practice alone.

RHONDA ORIN *is the managing partner of the firm's D.C. office. She is also co-chair of the COVID Task Group. Rhonda has been recognized for years as a leading attorney for policyholders, including by Chambers USA, Best Lawyers, Superlawyers, The Legal 500 and many other organizations.*
rorin@andersonkill.com
(202) 416-6549

JASON KOSEK *Jason is an attorney in Anderson Kill's New York office. He focuses his practice on insurance recovery, exclusively on behalf of policyholders, as well as on regulatory and white collar practice.*
jkosek@andersonkill.com
(212) 278-1028

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