

# COVID-19 Direct Physical Loss Coverage Update

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*The e-POST*

## **Direct Physical Loss – U.S. District Court for the District of Minnesota (Minnesota Law)**

### ***Seifert v. IMT Ins. Co.***

--- F. Supp. 3d ---, 2020 WL 6120002 (D. Minn. Oct. 16, 2020)

The U.S. District Court for the District of Minnesota held that IMT Insurance Company (IMT) did not owe coverage for lost income resulting from a shutdown of the insured's businesses as a result of the COVID-19 pandemic. The insured businesses, The Hair Place and Harmar Barbers Inc., owned by Kenneth Seifert (Seifert), were shut down in March due to Minnesota's closure orders. Seifert subsequently filed a claim with IMT for the losses suffered and IMT denied coverage. Following the denial, Seifert filed an action against IMT for breach of contract and declaratory judgment. IMT countered with a motion to dismiss, arguing in part that Seifert failed to plead sufficient facts alleging lost business income caused by a direct physical loss of or damage to his businesses.

The court first examined the argument that the businesses were damaged by the COVID-19 shutdown. The court determined that the "[a]ctual physical contamination of the insured property" required to establish physical damage under Minnesota law was not present in this case. Because the businesses were shut down due to state closure orders, and not because of COVID-19 itself, there was no direct physical loss. Next, the court found that the policy's civil authority coverage was not applicable because neither Seifert nor his neighbors lost access to their property because of COVID-19 contamination. Lastly, the court held that the policy's virus and bacteria exclusion barred coverage for the losses because the exclusion was an anti-concurrent loss provision, which excludes coverage for a loss when a virus makes up any part of the causal chain resulting in the loss.

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## **Direct Physical Loss – North Carolina**

### ***North State Deli, LLC v. The Cincinnati Ins. Co.***

No. 20-CVS-02569 (Durham County Superior Court Oct. 9, 2020)

A North Carolina trial court granted summary judgment in favor of a group of restaurants, ruling that The Cincinnati Insurance Company and The Cincinnati Casualty Company (collectively, Cincinnati) owe business income and extra expense coverage for COVID-19-related losses. Each restaurant purchased

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an all risk policy from Cincinnati, which included business interruption coverage for a “covered cause of loss,” defined as a “direct ‘loss’ unless the ‘loss’ is excluded or limited” under the policy. In response to the government mandated closure of certain businesses across North Carolina due to the COVID-19 pandemic, the restaurants made claims for business interruption coverage under their policies with Cincinnati. After coverage was denied, the restaurants filed suit and shortly thereafter filed a motion for summary judgment.

In analyzing whether business interruption coverage was available, the trial court reasoned that the plain meaning of “‘direct physical loss’ includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions.” The trial court further explained that “‘direct physical loss’ describes the scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property.” Given that the government orders prohibited the restaurants from “putting their property to use for the income-generating purposes for which the property was insured” and resulted in the “immediate loss of use and access without any intervening conditions,” the trial court found that there was a “direct physical loss.”

In so ruling, the trial court recognized the validity of Cincinnati’s argument that “direct physical loss” does not include purely economic harm. However, the trial court ultimately found that its interpretation of “direct physical loss” was also reasonable, and, therefore, the phrase was ambiguous. Given the ambiguity, the trial court interpreted the phrase in favor of coverage.

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