

Direct Physical Loss Coverage Update

January 15, 2024

Direct Physical Loss (New Jersey)

Wawa Inc. v. Starr Surplus Lines Ins. Co.

No. A-3820-21, 2024 WL 64216 (N.J. Super. Ct. App. Div. Jan. 5, 2024)

The New Jersey Superior Court held that the insured did not sustain direct physical loss or damage to its premises from COVID-19 and, further, that COVID-19 was a microorganism excluded under the policy's contamination provision, thus prohibiting insurance coverage.

Plaintiff Wawa Inc. (Wawa) sought insurance coverage from Starr Surplus Lines Insurance Company (Starr), alleging that it suffered damages in the form of business expense losses and extra expenses due to COVID-19. Wawa operates more than 900 convenience retail stores in six states, which provide snacks and on-the-go food items.

In March 2020, New Jersey's governor issued several executive orders to address COVID-19, which limited hours of operation, reduced social migration and required citizens to stay home. Wawa claimed that by following these orders, it suffered direct physical loss because the presence of the virus ceased its operations for on-the-go food, affected its airspace and required stores to shut down when employees tested positive.

Wawa sought a declaratory judgment as to whether COVID-19 was covered under six pertinent insurance provisions, including covered cause of loss. The trial court dismissed Wawa's complaint with prejudice, and Wawa appealed to the New Jersey Superior Court.

Wawa's covered cause of loss insurance provision insured "against all risk of direct physical loss or damage to property" and further required direct physical loss to recover under its real and personal property and "extra expense" provisions. The appellate court defined "physical loss" as "'detrimental alteration,' or 'damage or harm to the physical condition of a thing.'" The appellate court concluded that because Wawa did not lose its physical capacity to operate and undergo any repairs, rebuilding or replacement due to coronavirus, it was not entitled to coverage under such provisions.

The policies also contained contamination exclusions which barred coverage for "any kind of pollution and/or contamination or threat thereof, whether or not caused by or resulting from a peril insured." Wawa argued that the provision was ambiguous and asserted that it could only mean "traditional environmental hazards," such as mold, mildew, fungus, spores or a microorganism, which did not

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include COVID-19. The appellate court rejected this argument and held that a microorganism includes coronavirus because the provision's language broadly covered microorganisms of any type and nature, as well as a presence that poses an actual or potential threat to human health.

Finally, the appellate court held that Wawa's claims for direct physical loss or damage due to the pandemic and related governmental actions such as the stay-at-home and business closure orders, were excluded per the following authorities endorsement provision, "[w]hich precludes the insurer's liability 'for loss [or] damage [...] sustained by or imposed on the Insured at the order of any Government Agency, Court, or other Authority arising from any cause whatsoever.'" The appellate court thus affirmed the trial court's order upholding the dismissal of Wawa's complaint with prejudice.