

Physical Loss or Damage Coverage Update

May 15, 2023

Physical Loss or Damage – Oregon

The Oregon Clinic, P.C. v. Fireman's Fund Ins. Co.

Case No. 22-35047 (Or. May 8, 2023)

The Oregon Supreme Court declined to accept a certified question from the U.S. Court of Appeals for the Ninth Circuit regarding whether commercial property insurance may provide coverage for the presence of the COVID-19 virus.

Prior to the COVID-19 pandemic, The Oregon Clinic, PC (Oregon Clinic) purchased commercial property insurance from Fireman's Fund Insurance Company (Fireman's) with coverage for business income lost because of "direct physical loss or damage" to its property. Between March and November 2020, Oregon Clinic's net revenue dropped by over \$20 million dollars as a result of the COVID-19 pandemic.

Fireman's Fund denied Oregon Clinic's request for coverage under the Fireman's Fund policy for its lost revenue. The insured filed a declaratory action against Fireman's Fund in the U.S. District Court of Oregon. Oregon Clinic argued that coverage existed under 10 policy provisions, each of which expressly required "direct physical loss or damage" to property. The district court relied on a long line of cases from district courts in the Ninth Circuit holding that neither COVID-19 nor the governmental orders associated with it cause or constitute property loss or damage for purposes of insurance coverage.

On appeal, the Ninth Circuit acknowledged that no Oregon appellate court has interpreted the phrase "direct physical loss to property" as it pertains to COVID-19 and a commercial property insurance policy. For that reason, the Ninth Circuit certified the following question for the Oregon Supreme Court:

Can the actual or potential presence of the COVID-19 virus on an insured's premises constitute "direct physical loss or damage to property" for purposes of coverage under a commercial property insurance policy?

Upon consideration, the Oregon Supreme Court entered a one-sentence order, stating that it "declines to accept the certified question." The action now returns to the Ninth Circuit to determine whether to affirm the trial court's ruling that there is no coverage.