

MAY 2021 NEWSLETTER

POZZUOLO RODDEN, P.C.
COUNSELORS AT LAW
THE BYE-BENSON HOUSE
2033 WALNUT STREET, PHILADELPHIA, PA 19103
215-977-8200
www.pozzuolo.com



COURT GRANTED BUSINESS INTERRUPTION INSURANCE COVERAGE FOR COVID-19 RELATED BUSINESS LOSSES

FIRM ANNOUNCEMENTS

1. AWARDS:

Pozzuolo Rodden, PC is pleased to announce that Joseph R. Pozzuolo, Esquire was nominated by the American Registry as a top 1% 2020 Five-Star Attorney based on a collection of ratings and awards from trusted professional organizations, peers and media.

Pozzuolo Redden, PC is pleased to announce that the 2021 Martindale Hubbell Peer Review Rating, the gold standard in attorney rating, recognized Joseph R. Pozzuolo, Esquire for his excellence in ability and ethical standard. Martindale Hubbell, which has been in existence since 1868, is the leading global network to connect lawyers and the buyers of legal services.

2. PAST WEBINARS:

Jeffrey S. Pozzuolo, Esquire presented the following continuing legal and accounting education (CLE/CPE) webinar seminar for Clear Law Institute on Wednesday, December 23rd @ 1pm:

The Filing Process For IRS Estate and Gift Tax Returns Forms 706 & 709

Jeffrey S. Pozzuolo, Esquire presented the following continuing legal and accounting education (CLE/CPE) webinar seminar for Clear Law Institute on November 2nd @ 1pm:

Creating/Updating Your Estate Plan After COVID; and On October 9th @ 1pm: Planning For Retirement (Post-COVID)

Please contact Christine Wainwright at Chrissy@Pozzuolo.com or Clear Law Institute at gqueen@clearlawinstitute.com if you would like the online details to attend these past online CLE/CPE seminars.

3. BLOGS:

1. The following are a few of the business, tax, employment, estate planning and business litigation blogs posted on our main website www.pozzuolo.com during the past month:

- a. Claim Against An Estate Must Be Timely Filed And Reliance On Estate Counsel Is Not Excused;
- b. Fired Positive COVID-19 Nursing Home Employee Files Numerous Claims Against Employer After Being Fired For Returning To Work; and,
- c. Retirement Plans For Small Employers And Self-Employed.

Please visit our website www.pozzuolo.com for more information on these and other relevant business, tax, estate, business litigation and employment topics.

2. The following are a few of the family law blogs posted on our family law website www.pozzuolofamilylaw.com during the past month:

- a. Grandparents Awarded Primary Custody of Grandchildren Over Father;
- b. Non-Biological Grandparents Not Entitled To Intervene In Child Custody Matter; and,
- c. Trial Court Should Have Allowed Parents Request To Intervene Children On Grandparents' Visitation Request.

Please visit our website www.pozzuolofamilylaw.com for more information on these and other relevant family law topics.

COURT GRANTED BUSINESS INTERRUPTION INSURANCE COVERAGE FOR COVID-19 RELATED BUSINESS LOSSES

On March 22, 2021, the Court of Common Pleas of Allegheny County issued a decision in a case relating to whether a Pennsylvania business owner was entitled to insurance coverage for COVID-19 related business losses. This case is one of the first judicial opinions in the Commonwealth of Pennsylvania on this issue. In this case, Ungarean

v. CNA, No. GD-20-006544, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2 (Pa. Com. Pl. Mar. 22, 2021), the Plaintiff, Timothy A. Ungarean, DMD, is a dentist who owns and operates dental offices in Pennsylvania. The Defendants, CNA and Valley Forge Insurance Company, are property and casualty insurance companies.

As you are aware, in March and April of 2020, the Governor of Pennsylvania issued mandates which closed and/or restricted the operations of many businesses throughout Pennsylvania in order to combat the spread of the COVID-19 virus. Specifically, on March 19 and 23, 2020, the Governor issued orders requiring all non-life sustaining businesses to shut down and to direct employees to stay and/or work from home. On April 1, 2020, the Governor extended the stay at home order.

In the Ungarean case, as a result of the COVID-19 pandemic and the Governor's orders, Plaintiff was forced to shut down its offices except for performing emergency dental procedures. Due to this involuntary shut down, the Plaintiff suffered a significant decrease in business income and was forced to furlough some employees. Subsequently, Plaintiff submitted a claim for coverage under its business insurance policy with the Defendants. Defendants denied Plaintiff's claim and Plaintiff filed a complaint in the Court of Common Pleas of Allegheny County. The complaint had one count for declaratory judgment asking the court to determine whether Plaintiff was entitled to coverage for the business losses it suffered due to the COVID-19 pandemic and related closure orders under the business insurance contract with Defendants. Plaintiff filed a Motion for Summary judgment and Defendants filed Cross Motions for Summary Judgment. In its recent decision, the Court granted Plaintiff's Motion for Summary judgment and denied both Defendants' Cross Motions for Summary Judgment.

In its decision, the Court looked at the specific language and wording of the applicable business insurance policy, specifically the Business Income and Extra Expense provisions of the policy. Significantly, it is important to point out that Plaintiff's policy did not include a "virus exclusion", which is often present in business interruption insurance policies.¹ In a footnote, the Court noted that the "dispositive question with regard to whether Plaintiff is entitled to coverage for Business Income and Extra Expense is whether Plaintiff suffered a 'direct physical loss of or damage to' Plaintiff's property." The Court found that even though the policy did not define direct physical loss of or damage to property, the Plaintiff was entitled to coverage for its Business Income losses and Extra Expenses because the policy language specifically said that the claimant must sustain "direct physical loss of or damage to its property." *emphasis added*. The Court interpreted the use of the disjunctive "or" to mean that loss and damage must mean different things. The Court found that "loss" focuses on the act of losing possession and/or deprivation of the property and "damage" means all forms of harm to the property.

The Court therefore concluded that:

- i) Plaintiff's loss of use of its property due to COVID-19 was both direct and

¹ The Court found that the "contamination" exclusion in the policy did not apply in this case and if the Defendant insurers had wanted to exclude coverage for viruses, they could have easily included that exclusion, as it is included in many business interruption insurance policies. The Court also found that the "Fungi, Wet Rot, Dry Rot, and Microbes" exclusion did not apply when using the plain meaning of "microbes" and "viruses"

- physical and that Plaintiff was prevented from using the physical buildings of the property;
- ii) “direct physical loss of...property” would encompass the loss of “use” of the property due to COVID-19, even absent actual damage to the property; and,
 - iii) Plaintiff was entitled to coverage for the loss of actual income during the “period of restoration”.

The Court explained that the “period of restoration” in this case could include the many physical changes that business owners were forced to implement due to the COVID-19 pandemic. These changes could include installing partitions, additional handwashing and sanitizing stations, and/or installing new or upgrading ventilation systems. The Court found that these changes would qualify as “repairs” or “rebuilding” under the policy. The Court concluded that whether or not Plaintiff implemented any of those changes did not matter because “period of restoration” does not require repairs, it is merely a time limit of available coverage². The Court determined that the “period of restoration” would be from the time the damage occurred until the business is operating at normal capacity or reasonably could be operating at normal capacity.

It is important to note that this case is highly fact specific, based on the explicit language contained within the business interruption insurance policy. To date, there is not much case law relating to business interruption insurance and the impact of COVID-19, likely because most claims that have been filed in court have been dismissed due to a virus exclusion in the policy and/or a different interpretation of how physical loss or damage is applied and/or defined based on the specific language of the applicable policy. We will continue to monitor the new developments in COVID-19 related litigation and will provide updates as they become available.

If you have suffered a business interruption due to the COVID-19 pandemic and you have business interruption insurance, please contact our office to arrange a meeting, a telephone meeting, or Zoom video conference to discuss your specific situation and the specifics of your policy.

This newsletter is courtesy of Pozzuolo Rodden, P.C.

To subscribe, unsubscribe, or for any questions, please contact us at INFO@POZZUOLO.COM.

² The Court also concluded that Plaintiff was entitled to coverage under the Civil Authority provision of the insurance contract because under a reasonable interpretation of the contract as a whole: “1) there was ‘direct physical loss of or damage to property’ or than Plaintiff’s property, and; 2) the ‘direct physical loss of or damage to property’ other than Plaintiff’s property caused civil authorities to take action(s) that prohibited access to Plaintiff’s property...”