

JULY 2021 NEWSLETTER

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BUSINESS INTERRUPTION INSURANCE COVERAGE FOR COVID-19 RELATED BUSINESS LOSSES AND EXPENSES

1. AWARDS:

Pozzuolo Rodden, PC is pleased to announce that Joseph R. Pozzuolo, Esquire was recognized by the American Registry as in the top 1% of America's Most Honored Lawyers for 2021 based on a collection of ratings and awards from trusted professional organizations, peers and media.

Pozzuolo Rodden, PC is pleased to announce that Joseph R. Pozzuolo, Esquire was selected by Suburban Life/Philadelphia Life Magazine as a 2021 Top Lawyer in Business law/Commercial Litigation and Estate Planning and Administration in Pennsylvania.

2. 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. No-Poaching/No-Hire Agreement Between Companies Ruled Unenforceable;

- b. The Best Way To Transfer A Business Within The Family ; and,
- c. Choosing A Retirement Plan.

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

BUSINESS INTERRUPTION INSURANCE COVERAGE DENIED FOR COVID-19 RELATED BUSINESS LOSSES AND EXPENSES

In our May, 2021 e-newsletter, we [discussed](#) the Allegheny County Court of Common Pleas decision in the case Ungarean v. CNA, No. GD-20-006544, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2 (Pa. Com. Pl. Mar. 22, 2021), which was one of the first judicial opinions in the Commonwealth of Pennsylvania ruling that a Pennsylvania business owner is entitled to insurance coverage for COVID-19 related business losses and expenses. This decision has been appealed and we will provide updates as the appeal progresses.

In what is the first ruling by a Federal Circuit Court regarding business interruption insurance coverage claims, the United States Court of Appeals for the Eighth Circuit issued a decision in the case Oral Surgeons, P.C. v. Cincinnati Insurance Company, No. 20-3211 (8th Cir. July 2, 2021). Oral Surgeons stopped performing non-emergency procedures at its four offices in late March 2020 after the governor of Iowa declared a state of emergency and imposed restrictions on dental practices because of the COVID-19 pandemic.

Oral Surgeons submitted a claim to The Cincinnati Insurance Company for losses it suffered as a result of the suspension of non-emergency procedures. The policy insured Oral Surgeons against loss business income and certain extra expenses sustained due to the suspension of operations “caused by direct loss to property”. The policy defines “loss” as “accidental physical loss or accidental physical damage”. The Cincinnati Insurance Company responded that the policy did not afford coverage because there was no direct physical loss or physical damage. The district court ruled in favor of The Cincinnati Insurance Company.

The Federal Court of Appeals in Oral Surgeons affirmed the district court’s decision and held that under Minnesota law, the plaintiff insured failed to state a claim for breach of contract or bad faith because the subject insurance policy did not provide coverage for partial loss of plaintiff’s use of its office unless plaintiff could show a direct “physical” loss or “physical” damage to the office space. Plaintiff’s complaint only pled facts showing that plaintiff suspended non-emergency in office procedures due to the COVID-19 pandemic and related government shutdowns and restrictions - not because of any direct accidental “physical” loss or “physical” damage to the office space at the subject property. The Court held that the subject policy clearly did not provide coverage for plaintiff’s partial loss of use of its offices, absent a showing of direct “physical” loss or “physical” damage. The Court found that plaintiff did not allege any physical alteration to the property and the lost business

income and any extra expenses incurred were not the result of a direct loss to property. As such, the business interruption insurance coverage did not apply to impose liability on the insurer, Cincinnati Insurance Company.

Notwithstanding the Oral Surgeon's appellate decision, with very similar facts, in *Brown's v. The Cincinnati Insurance Company*, a lower court judge in Lackawanna County, Pennsylvania refused to dismiss a COVID-19 business interruption lawsuit filed by the gym and fitness center. The gym owner filed suit against the same insurer, Cincinnati Insurance Company, maintaining it suffered great loss when the coronavirus shut down its entire operation. The gym maintains it is entitled to relief because it was issued an all-risk insurance policy from Cincinnati that did not have a virus exclusion.

Similar to the above Oral Surgeon's litigation, Cincinnati denied the gym's coverage claims on the grounds that the Gym did not suffer "direct physical loss or direct physical damage" to its property and that the gym's claims were barred by the "pollutant exclusion".

Notwithstanding the Oral Surgeon's opinion, the presiding judge in this very recent lower court Pennsylvania opinion ruled that: i) the gym has sufficiently alleged "direct physical loss or damage" to its property under the "physical contamination" theory as a necessary condition to business interruption insurance coverage"; and, ii) at this very early stage, taking the factual allegations in the gym's complaint as true, the gym owner was allowed to proceed and refused to dismiss the lawsuit.

As this week's Pennsylvania Law weekly stated "The topic is a touchy one nationally" This office will continue to monitor the 2,000 plus federal and state lawsuits regarding the implications of the COVID-19 Pandemic and business interruption insurance and provide updates and comparisons as they develop.

If you have suffered a business interruption due to the COVID-19 pandemic and you have business interruption insurance, please contact our office to set up 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.