Outwest Restaurant Group, Inc. v. Affiliated FM Inc. Co.

Year: 2021
Court: United States Court of Appeals for the Ninth Circuit
Case Number: 21-15585

In its brief, UP sets out to clarify the flawed legal arguments that were set forth by the magistrate judge at the trial court level in this case. The magistrate judge concluded that this insuring agreement requires "a physical change in the condition or a permanent dispossession of the property" to trigger coverage, relying on *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am*. UP argues that issues of insurance coverage turn on the language that the insurer used in the insurance policy, and not on general rules or on cases construing differently worded policies. UP also points out that the magistrate judge erred further in relying on district court opinions addressing different insurance policies. Those cases construed property policies issued on Insurance Services Office forms, or variations on those forms, with policy language designed to cover small businesses, while Affiliated FM caters to mid-market companies and provides quite different coverage.

Appellants pleaded facts that are more than adequate to support an insurance claim for physical loss or damage as those terms are used in the Affiliated FM Policy. The magistrate judge instead granted judgment on the pleadings based on two fundamentally incorrect assumptions: first, that no coverage is available for physical loss if it can be repaired quickly—an assumption contrary to the plain policy language and common sense; and, second, that no coverage is available for physical loss unless the insured is permanently deprived of the property, relying for the latter holding on the district court opinion in *Total Intermodal*. Finally, although the magistrate judge did not address the "contamination" exclusion in the Affiliated FM Policy, this brief explains why that exclusion does not provide an independent ground for affirming the ruling below. UP uses the following five points to support its claim:

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I. California Law Broadly Defines “Physical Loss” and “Damage”

II. Out West Has Alleged (and Can Further Allege) Facts Showing That Viral Outbreaks Caused Direct “Physical Loss” or “Damage”

III. Cases Concerning Intangible Property or Inherently Defective Property Are Inapposite

IV. The Federal District Court Cases Cited by the Court Below and Relied Upon by Affiliated FM are Inapposite and Unpersuasive

V. The Contamination Exclusion Does Not Bar Coverage for Out West’s Business Interruption Losses

This brief was authored pro bono by David B. Goodwin, Benedict Lenhart, and Jad Khazem of Covington and Burling LLP

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