

## [Food manufacturer may amend COVID business interruption suit](#)

### Business Insurance

An organic and vegetarian food manufacturer should be allowed to amend its COVID-19 business interruption lawsuit to allege coverage under its communicable disease policy provision, a California appeals court has ruled, in overturning a lower court ruling that dismissed the case.

Petaluma, California-based Amy's Kitchen Inc., which has facilities in California, Oregon and Idaho, purchased a comprehensive property policy from Allianz SE unit Fireman's Fund for a one-year period ending in July 2020, according to the ruling by the California Court of Appeal in San Francisco in Amy's Kitchen Inc. v. Fireman's Fund Insurance Co.

The policy included coverage extensions for communicable disease and for loss avoidance and mitigation, the ruling said. The communicable disease coverage extension states Fireman's will pay for direct physical loss or damage caused by, or resulting from, a "covered communicable disease event" including costs incurred for cleanup.

It defines a "communicable disease event" as one in which a public health authority has ordered a location be "evacuated, decontaminated or disinfected" because of a communicable disease outbreak.

Amy's filed suit against Fireman's Fund in California state court in Santa Rosa after the insurer had denied coverage under its policy, stating there was no "direct physical damage to the covered property."

The court ruled in Allianz's favor, without giving Amy's leave to amend its complaint, stating the company had failed to allege direct physical loss or damage to the property, as required by the communicable disease extension, and that its claim under the loss avoidance or mitigation extension also failed.

A three-judge appeals court panel said the trial court “correctly sustained” the insurer’s denial of coverage, “but for the wrong reason, and that it wrongly denied Amy’s leave to amend.”

“The trial court held that the phrase ‘direct physical loss or damage,’ as used in the communicable disease extension, must be construed as it has in other contexts to require a ‘distinct, demonstrable physical alteration of the property’ or a ‘physical change in the condition of the property,’” the ruling said.

“By focusing on that single phrase, and on how it has been construed in different policy provisions, the court erred,” the ruling said.

“Although the “definitions” section of the policy defines over 80 terms, it does not define ‘direct physical loss or damage’ or any of its component terms. Nor does the operative paragraph define that phrase,” it said.

None of the cases cited by the insurer “focus on the reasonable interpretation of a communicable disease extension in which the coverage is triggered by a communicable disease event causing costs to be incurred” to mitigate the disease’s effects, it said.

The lower court “never considered whether Amy’s could amend to properly allege a ‘communicable disease event,’” it said, in reversing the lower court ruling and remanding the case for further proceedings.

Insurer attorney John P. Phillips, a partner with DLA Piper LLP in San Francisco said, “We are pleased that the Court of Appeal sustained Fireman’s Fund’s demurrer to the Complaint. However, we respectfully disagree with the Court of Appeal’s decision to review the issue of leave to amend de novo.”

Rani Gupta, a partner with Covington & Burling LLP in Palo Alto, California, whose law firm submitted an amicus brief in support of Amy’s on behalf of United Policyholders, said in a statement, “We’re pleased that the Court recognized that the COVID-19 virus can cause physical loss or damage that triggers this insurance policy, and rejected the insurer’s narrow interpretation of the policy it sold to its insured. This is one of several recent cases showing signs that more courts handling these COVID-19 cases will finally interpret policies according to their text and pursuant to California law.”



Amy's Kitchen said in a statement it does not comment on active litigation.

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