

## **Maryland Joins 10 State High Courts in Rejecting Coverage for COVID Losses**

Claims Journal

The Maryland Supreme Court joined high courts in 10 other states in ruling that coronavirus did not cause a direct physical loss or damage covered by an all-risk commercial property policy.

The high court on Thursday released a unanimous decision that answered a certified question from the US District Court of Appeals for Maryland. The ruling dooms a claim made by Tapestry Inc. against Factory Mutual Insurance Co. that sought damages of more than \$700 million caused by the forced closure of its luxury fashion accessory stores because of the coronavirus pandemic.

Tapestry asserted that SARS-CoV-2 damaged its property by contaminating the air inside its stores and clinging to surfaces.

“Tapestry does not allege that any aspect of its property was either lost or structurally altered by its contact with coronavirus particles,” the opinion says. “That particles rested for some period of time on those surfaces and later may have become dislodged and reentered circulation in the air, thus posing a health risk to humans, simply does not constitute damage to property in the absence of a physical or structural alteration of the property.”

State high courts in Delaware, Iowa, Massachusetts, North Carolina, Ohio, Oklahoma, South Carolina, Virginia, Washington and Wisconsin have also ruled against policyholders seeking coverage for income lost because of COVID shutdowns.

Tapestry operates 1,400 US stores that sell its luxury brands, which include Coach, Kate Spade New York and Stuart Weitzman. After the March 2020 coronavirus outbreak forced it to temporarily close its stores, the company filed a claim with FM for income lost during the shutdowns.

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The company's all-risk commercial insurance policy provided up to \$1 billion in coverage and included additional coverage for "communicable disease response" with a \$1 million per-occurrence sublimit.

FM paid damages under the communicable disease response provision of the policy, but denied Tapestry's claim for reimbursement of lost business income. Tapestry filed a lawsuit in Baltimore County. The case was removed to the US District Court.

FM Global submitted a motion to dismiss the lawsuit. Tapestry filed a motion to submit a certified question to the Maryland Supreme Court, (which was called the Court of Appeals until Dec. 14, when the name changed in response to a ballot initiative.)

The Supreme Court reformulated the District Court's question, but addressed the meat of the issue in Thursday's ruling. The court noted the numerous court decisions, including rulings by Maryland appellate courts, that have ruled coronavirus cannot cause a physical damage or loss that is covered by a commercial property insurance policy.

The court said the relatively small number of appellate court decisions — including a 3-2 decision by the Vermont Supreme Court — that found coverage was owed for business interruptions caused by COVID-19 were unpersuasive.

Amy Bach, executive director of United Policyholders, said some courts are not buying insurer arguments. Specifically, she pointed to the California 2nd Appellate District's ruling in *Shusha Inc. v. Century-National Insurance Co.* On Wednesday, the appellate court reversed a Los Angeles Superior Court decision that dismissed a lawsuit filed by the owner of the La Cava restaurant in Los Angeles seeking coverage for income lost during a state-ordered shutdown.

"Factory Mutual admitted in internal documents that loss of use is, in fact, physical loss or damage for purposes of determining coverage, yet because they hired good lawyers and benefitted from courts buying the trope that the entire insurance industry would go bankrupt if COVID-19 BI claims get paid — got off the hook in this decision," Bach said in email.