

Most are rejected, but Sonoma County COVID business damage case continues

North Bay Business Journal

Petaluma-based Amy's Kitchen is being allowed by a judge to continue to pursue Fireman's Fund Insurance Company to payout for damages and losses as the result of SARS-CoV-2 and COVID-19, something few other companies nationally have been able to achieve.

In its lawsuit, like thousands of across the country, the packaged natural foods producer asserts its policy, with extended coronavirus-related coverage during the pandemic, would allow it to claim damages and losses.

In most cases to date, courts have ruled in favor of insurance carriers citing the lack of standing to claim damages under the traditional definition of "direct physical damage or loss." Unlike destruction and/or requiring replacement of property — as with a fire, hurricane, flood or theft — judges generally found while COVID-19 may have been present, it did not directly cause damage resulting in the need to replace property, based on the traditional, accepted definition of physical damage.

Ruling on Amy's lawsuit against Fireman's Fund Insurance, a panel of judges (including Justices Stuart R. Pollak, Jon B. Streeter and Jeremy M. Goldman) hearing this case in the Court of Appeal of the State of California, First Appellate District, Division Four, stated in their order Oct. 4 that while the Sonoma County Superior Court correctly sustained Fireman's objection and denied the company's claims in May 2020, "this decision was made for the wrong reason, since it wrongly denied Amy's chance to amend its complaint."

The effect of appellate court's ruling is that the producer of organic and vegetarian meals will get the chance to have the case heard again.

The Business Journal attempted to contact Amy's legal team, headed by attorneys Andrew Bisbas and

Andrew Reidy with Lowenstein Sandler LLP based in Washington, D.C. They did not respond with a statement except to say that they plan to file an amended complaint.

The central issue for the courts has focused on whether a virus can cause physical alterations to property as required for insurance claims, and also how much credit should the court give to factual allegations premised on a theory that requires scientific expertise to evaluate.

Other plaintiff victories have occurred.

For example, in the case Marina Pacific Hotel & Suites LLC vs. Fireman's Fund Insurance Company, the superior court dismissed the case, but the court of appeals reversed that decision. The hotels alleged that the virus caused chemical reactions that transformed the physical condition of the properties requiring the hotels to suspend operations to remediate the air and surfaces or replace property.

In July, that court held that these allegations sufficiently stated a claim for coverage of "physical loss of or damage to property" no matter how "improbable" those allegations were, according to the law firm Horvitz & Levy LLP.

With other recent California cases some judges have expanded the damage definition to include the presence of a "communicable disease" as constituting physical loss or damage, ruling in favor of plaintiffs in the case Sacramento Downtown Arena LLC vs. Factory Mutual Insurance Company. The arena is home to the Sacramento Kings team.

The judge said in his order, "No matter what might be possible to plead and prove about a different policy and viral pandemics in the abstract, the policy at the center of this case can reasonably be interpreted as defining the presence of a 'communicable disease' as 'physical loss or damage.'"

"The policy's first sentence explains that it offers coverage only for risks of 'physical loss or damage and later lists 'Additional Coverages for insured physical loss or damage' among these additional coverages—by definition, all 'for insured physical loss or damage'— the policy lists 'the reasonable and necessary costs incurred' in response to government orders regulating the actual presence of a 'communicable disease.'"

He added, "An insured could reasonably expect, given these terms, that the presence of a communicable

disease such as COVID-19 fits under the ‘physical loss or damage’ umbrella for the policy as a whole.”

In a similar case, U.S. District Court Judge J. Hatter Jr. granted the Los Angeles Lakers a motion for certification of an interlocutory appeal in the basketball team’s complaint against Federal Insurance Company alleging claims for property damage, business interruption and civil authority losses related to COVID-19.

An “interlocutory appeal” is a party’s application to an appellate court challenging a non-final trial court order that decides an issue but does not result in final judgment.

The judge said, “With the large number of nearly identical cases that are currently being litigated within the Ninth Circuit shows that the question (of whether the presence of a communicable virus constitutes direct physical damage or loss) presents a novel legal issue on which fair-minded jurists might reach contradictory conclusions.”

When Amy’s Kitchen purchased a comprehensive property insurance policy from Fireman’s for a one-year period ending in July 2020, it included policy extensions for both communicable disease coverage and loss avoidance and mitigation, according to The California Lawyers Association Appellate Law Update in October.

Amy’s policy states that Fireman’s Fund “will pay for direct physical loss or damage to property insured caused by or resulting from a covered communicable disease event at a location including the following necessary costs incurred to...mitigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove dispose of, test for, monitor and assess the effects (of) the communicable disease at insured locations (and) to avoid or mitigate potential coronavirus-related losses threatening these locations.”

This same policy defines a “communicable disease event” as one in which “a public health authority has ordered that a location be evacuated, decontaminated or disinfected due to the outbreak of a communicable disease at such location.”

The loss avoidance or mitigation coverage extension states that Fireman’s will pay “necessary expenses (Amy’s) will incur to protect, avoid and significantly mitigate potential covered loss or damage that is actually and imminently threatening property insured.”

Amy's expenses were for the purchase of temperature-screening equipment to test for COVID, protective shields to prevent transmission on assembly lines, masks and goggles, cleaning supplies, and "hero pay."

On March 31, 2020, Sonoma County Health Officer Dr. Sundari Mase mandated various required safety measures for all essential businesses, and also began ordering locations to be decontaminated or disinfected. Amy's manufactures meals at facilities in California, Oregon and Idaho with operations overseen from its headquarters in Petaluma.

According to John P. Phillips, partner with DLA Piper attorneys representing Fireman's Fund, "It's important to note that the California Court of Appeal has agreed with the insurers (in the first Amy's case) about the lack of coverage for COVID-19 under property insurance policies. He said the Amy's Kitchen court issued a fairly narrow opinion that simply held on procedural grounds that Amy's should get an opportunity to try to amend (its) complaint to state a valid claim, since its initial claim was invalid."

Phillips noted that "the overwhelming majority of trial and appellate courts around the country (including those in California) have rejected similar claims for insurance coverage under property insurance policies because COVID-19 simply doesn't cause physical loss or damage to property."

He said that his best guess is that we will hear from the trial court in November and then Amy's will have 30 days, or so, to file an amended complaint.

Amicus curiae (friend of the court) briefs addressing this subject were filed by Attorneys Rani Gupta, David Goodwin, and Sabrina McGraw of Covington and Burling on behalf of United Policyholders (UP) in support of Amy's Kitchen, and also supporting Best Rest Motel Inc., DBA Holiday Inn Express Old Town, vs. Sequoia Insurance Company, as well as Saddle Ranch Sunset, LLC, et al. vs. Fireman's Fund Insurance Company, in similar legal proceedings.

UP's position supports coverage for an insured's business interruption losses related to the SARS-CoV-2 virus and COVID-19 under the extensions of coverage in the operative property insurance policy for Communicable Disease and Loss Avoidance or Mitigation. UP is a nonprofit information resource and voice for insurance consumers nationwide.

UP argues that decades of case law demonstrate what the insurance industry and policyholders have long known: That policies that provide coverage for "direct physical loss or damage" to property are

triggered by a broad range of perils including carbon monoxide, odors, and viruses, such as the one that causes COVID-19.

What most of the cases that have been denied suggest is that the current definition of “direct physical damage or loss” is insufficient to take damage that cannot be seen into consideration — but such factors can result in major losses leading to insurance claims — calling for a new, updated interpretation that applies to a pandemic or other public health crises.