

Vermont high court first to rule in policyholders' favor in COVID litigation

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The Vermont Supreme Court on Friday became the first state high court to rule in policyholders' favor in COVID-19-related business interruption litigation, holding in a divided ruling that the virus may have caused direct physical damage.

The 3-2 ruling in *Huntington Ingalls Industries Inc. et al. v. Ace American Insurance Co. et al.* overturned a trial court that had dismissed the lawsuit filed by the Newport News, Virginia-based company, which is described in the ruling as the largest military shipbuilding company, and its Burlington, Vermont-based captive, Huntington Ingalls Industries Risk Management LLC, against its reinsurers, which include Chubb Ltd. unit Ace American and numerous others.

The decision follows pro-insurer rulings by state supreme courts in Iowa, Massachusetts, Oklahoma, South Carolina, Washington and Wisconsin, as well as by many federal district and appeals courts on the issue.

The ruling held that the complaint sufficiently pleads that the virus causes direct physical damage. "The virus causing COVID-19 has been continuously present at insured's shipbuilding facilities" and adheres to surfaces, the ruling said.

"This process of the virus 'adhering' to surfaces caused 'detrimental physical effects' that 'altered and impaired the functioning of the tangible material dimensions' of the property, the ruling said, in quoting the complaint.

Because of this alteration, the property cannot function for its intended purposes, and to redress these physical alterations the insured will take "steps that involve physical alterations to its insured locations," such as installing barriers.

“Taken together, these statements in the complaint adequately allege that the virus physically altered property in insured’s shipyards when it adhered to surfaces,” the ruling said, in reinstating the litigation and remanding the case for further proceedings.

The minority opinion stated that “as matter of law, human-generated droplets containing SARS-CoV-2 cannot cause ‘direct physical loss or damage to property’ under this insurance policy. No future litigation can change that reality.”

Huntington Ingalls said in a statement, “We believe that the court correctly applied Vermont law with respect to pleading standards and insurance policy interpretation, and we thank the court for its careful consideration of the issues. We look forward to proceeding with the case in the Vermont Superior Court.”

Commenting on the ruling, Marshal Gilinsky, a shareholder with Anderson Kill P.C., in New York, who had submitted a brief supporting Huntington on behalf of United Policyholders, a policyholders advocacy group, said in a statement, “The Vermont Supreme Court’s meticulous reasoning and adherence to pre-pandemic precedent is a powerful rebuttal to the too-common conclusion that the damage wrought by COVID-19 does not constitute ‘direct physical loss or damage.’”

Chubb said in a statement, “As a matter of policy, we do not comment on legal matters.”