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## C A S E A L E R T

### **Appellate Division Affirms Dismissal of Business Interruption Claims Arising Out of Covid-19 Global Health Crisis**

For two years M&W has been litigating the insurance implications of business interruption loss on account of COVID-19 shutdowns. On June 20, 2022 the Appellate Division provided a degree of much-needed finality, accepting the coverage arguments we have consistently advanced on behalf of the industry regarding a policyholder's claim for business interruption coverage for loss arising out of the COVID-19 global health crisis.

In several matters consolidated under the lead case of [Mac Property Group LLC, et al. v. Selective Fire and Casualty Insurance Company](#), the Appellate Division directly confronted the questions that we and our clients have been litigating in the trenches since March of 2020: whether, in the absence of actual physical damage, a business policy covered business losses incurred by businesses forced to close or limit operations as a result of Executive Orders issued by the Governor to curb the effects of the pandemic.

The panel unequivocally upheld dismissal on the pleading of all cases, determining that the trial courts were correct in dismissing all of the complaints with prejudice for failure to state a claim as the plaintiffs' loss of use due to Executive Orders did not constitute 'direct physical

loss of or damage to" covered property. The panel also concluded that based on the factual allegations, the civil authority coverage requirements were not met and that the companies' denial of coverage was not barred by regulatory estoppel. Finally, the Appellate Division recognized that even if the losses otherwise would have qualified as "direct physical loss" or "damage," the virus exclusions would bar coverage.

Prior to the issuance of this opinion, there were no published New Jersey cases interpreting these exact issues. While the Court focused on the plain language of the policies, it also relied upon the weight of out-of-state and federal authority, concluding that "we discern no reason to depart from the persuasive reasoning expressed" in earlier COVID-19-related rulings by federal and state appeals courts that rejected similar claims, adding that the plaintiffs' insurance claims "are restricted by the clear and plain meaning of their insurance policies, which we cannot rewrite to cover their unfortunate losses."

Whether or not this issue will head to the New Jersey Supreme Court remains to be seen. However, absent the granting of a Petition of Certification, this opinion provides finality on this novel issue which

posed an existential threat to many insurers whose losses would have been catastrophic if the courts were to require them to act as a backstop to state and federal governments in bolstering businesses harmed by COVID. While many cases were resolved at the trial level, some remain and were stayed pending this appeal. Prudent defense counsel across the State, including our own, are likely to seek dismissals if the pending cases are not abandoned.

The Appellate Division's ruling in Mac Property Group affirms the outcomes of the many cases we have won on motions to dismiss and vindicates our position on claims the trial courts have stayed or refused to dismiss based on a prior lack of controlling New Jersey law. With the

exception of those cases that were stayed pending this appeal, all of our cases ultimately were dismissed with prejudice upon rulings in our favor.

These efforts - combined with our efforts in coordination with our carrier clients in lobbying legislators at the time COVID struck in March of 2020 to prevent the reformation of insurance policies to compel coverage - have allowed the industry to dodge a bullet which could have been fatal.

We will keep you apprised of any developments regarding this important issue. Interested clients should feel free to [contact our partners](#) with any questions.

*The Methfessel & Werbel Case Alert is published solely for the interest of friends and clients of Methfessel & Werbel and should in no way be relied upon or construed as legal advice or counsel. For specific information on recent developments or advice regarding particular factual situations, the opinion of legal counsel should be sought.*

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