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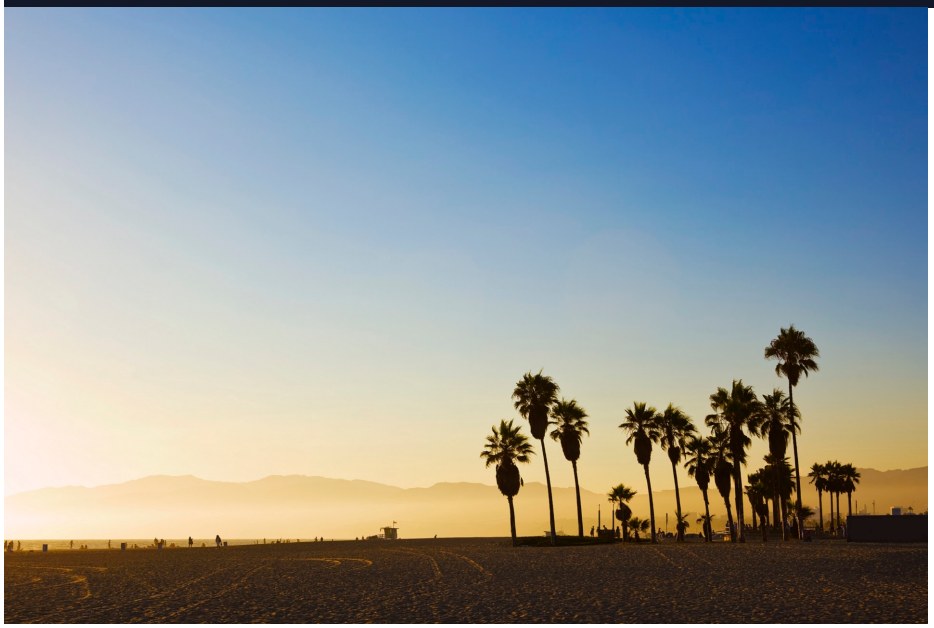

Watershed California Decision Finds For Policyholder In COVID-19 Business Interruption Appeal

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In a huge victory for policyholders in the Golden State, Division Seven of California's Second District Court of Appeal allowed by unanimous decision a COVID-19 business interruption dispute to go forward. The appellate court in *Marina Pacific Hotel & Suites, LLC et al. v. Fireman's Fund Insurance Company* reversed the trial court's order, in which the trial court ruled that COVID-19 cannot, as a matter of law, cause direct physical loss or damage sufficient to trigger business interruption coverage under a commercial property policy. As the Court of Appeal itself recognized, this is one of the only decisions that rejected the insurance industry's argument that COVID-19 business interruption claims are not covered under first-party all risk insurance policies.

Hotel Erwin – a boutique beachfront hotel in Venice Beach, California – was insured under a commercial property policy issued by Fireman's Fund. The insurance policy provided, along with other coverages, business interruption and communicable disease coverages triggered by direct physical loss or damage to insured property. Hotel Erwin alleged, among other things, that COVID-19 had been actually present through sick persons and that COVID-19 had bonded and/or adhered to various surfaces and objects at the hotel through physico-chemical reactions involving cells and surface proteins causing damage to insured property. Hotel Erwin also alleged that it was required to close or suspend operations in whole or in part at various times, incurred expense in trying to remediate the affected insured property, and

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suffered business interruption losses from COVID-19.

Expressing disbelief at Hotel Erwin's allegations, the trial court disagreed that COVID-19 could cause property damage under any circumstances, and further found that the policy's "mortality and disease" exclusion applied to bar coverage.

Division Seven reversed, holding that the trial court erred in dismissing the case at the pleading stage. Division Seven recognized the long-standing California rule that trial courts must accept as true the allegations of a pleading when ruling on a demurrer, and determined that Hotel Erwin's allegations of direct physical loss or damage sufficed to plead coverage. Division Seven also found that the policy's express coverage for communicable disease – which coverage required direct physical loss or damage – reinforced the conclusion that a communicable disease such as COVID-19 could in fact cause direct physical loss or damage. Otherwise, that coverage would be illusory.

The appellate court also held that the policy's "mortality and disease" exclusion did not apply to bar coverage, determining that such exclusion was fundamentally inconsistent with the policy's communicable disease coverage and interpreting such exclusion to apply only to losses involving death at the hotel (which had not occurred).

In reaching this decision, Division Seven recognized that its holding was at odds with various decisions of state and federal courts across the country, including those in California. Division Seven, however, noted that Hotel Erwin's well-pleaded allegations of direct physical loss or damage caused by COVID-19 distinguished its pleading from the previous complaints considered by other California appellate courts in evaluating coverage for COVID-19 business interruption claims.

In a stunning rebuke of Fireman's Fund's position that "common sense" confirms that COVID-19 does not cause property damage, Division Seven stated as follows:

We acknowledge it might be more efficient if trial courts could dismiss lawsuits at the pleading stage based on the judges' common sense and understanding of common experience rather than waiting to actually receive evidence to determine whether the plaintiff's factual allegations can be proved. **But that is not how the civil justice system works in this state.** (Emphasis added).

This ruling demonstrates that policyholders can successfully plead COVID-19 business interruption claims in California. The ruling also confirms that the multibillion dollar battle for business interruption coverage for COVID-19 losses is far from over, and that policyholders are entitled to proceed on these claims and present evidence regarding their losses.