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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

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## Texas Judge Cuts State Farm From Barbershops' Virus Suit

By **Jeff Sistrunk**

Law360 (August 13, 2020, 8:50 PM EDT) -- A Texas federal judge ruled Thursday that State Farm Lloyds is not obligated to cover losses that the operators of several barbershops in the San Antonio area sustained due to COVID-19 closure orders, finding there was no covered "direct physical loss" to the barbershops' properties.

Senior U.S. District Judge David Ezra granted State Farm's motion to dismiss the suit brought by six barbershops, including Diesel Barbershop LLC and Henley's Gentlemen's Grooming LLC, saying coverage is unavailable for their claims under the business income and "civil authority" provisions of their policies.

State Farm and the barbershops had clashed over what circumstances can satisfy the business income provision's threshold requirement that a claim be attributable to an accidental direct physical loss to the policyholder's property.

State Farm argued that only tangible physical damage to property fits the bill, and the novel coronavirus does not cause any such damage. The barbershops countered that the policy condition was fulfilled by their loss of the ability to use their properties due to state and local authorities' COVID-19 shutdown orders.

While Judge Ezra acknowledged that some courts have found that a direct physical loss can occur without "tangible destruction" to a policyholder's property, he said he was "more persuaded" by a line of cases supporting State Farm's position that tangible damage is indeed required.

For instance, in 2011, the Fifth Circuit ruled in [Dickie Brennan & Co. v. Lexington Insurance](#) that a New Orleans restaurant owner could not force its insurer to pay losses it suffered when local officials issued a mandatory evacuation order in advance of Hurricane Gustav, because the order was not issued on account of any previous property damage in the city.

"It appears that within our circuit, the loss needs to have been a 'distinct, demonstrable physical alteration of the property,'" Judge Ezra wrote. "Thus, the court finds that plaintiffs fail to plead a direct physical loss."

The district judge further held that, even if the barbershops had shown a direct physical loss, their claims would be barred by an exclusion in their policies for any loss stemming from a virus.

The barbershops asserted that the exclusion should not apply because their losses were caused not by the presence of COVID-19 on their premises, but rather by the government shutdown orders.

But Judge Ezra found that "anti-concurrent causation" language in the exclusion indicates that coverage is barred if a virus is anywhere in the chain of causation for a policyholder's loss, even if non-excluded causes also contributed to the loss. Here, the judge said the barbershops have "pleaded that COVID-19 is in fact the reason for the orders being issued and the underlying cause of plaintiffs' alleged losses."

"While the orders technically forced the properties to close to protect public health, the orders only

came about sequentially as a result of the COVID-19 virus spreading rapidly throughout the community," Judge Ezra wrote. "Thus, it was the presence of COVID-19 in Bexar County and in Texas that was the primary root cause of plaintiffs' businesses temporarily closing."

The judge concluded that the virus exclusion precludes the barbershops from recovering their losses under both the business income and civil authority prongs of their policies.

The barbershops' financial woes began on March 23, when a Bexar County judge issued an order requiring non-essential businesses, including barbers, to temporarily close their doors to help stem the spread of COVID-19. That directive was followed by orders from Texas Gov. Greg Abbott that shuttered non-essential businesses through April 30.

After State Farm rejected their insurance claims, the barbershops sued in Texas state court in early April, accusing the insurer of breaching their policies and flouting the Texas Insurance Code and the duty of good faith and fair dealing. The insurer removed the case to federal court shortly thereafter and then filed its motion to dismiss in May.

Thursday's decision adds to a burgeoning body of case law concerning coverage for businesses' losses during the COVID-19 pandemic. State judges in **Michigan** and **the District of Columbia** have previously granted insurers' motions to dismiss policyholders' suits, while a Missouri federal judge on Wednesday allowed a **putative class action** filed by Cincinnati Insurance Co. policyholders to proceed to discovery.

In a phone interview, the barbershops' attorney, Shannon E. Loyd of The Loyd Law Firm PLLC, told Law360, "obviously we are disappointed," but thanked Judge Ezra for engaging in a "thoughtful analysis." She said she and her client have not yet decided whether to appeal.

Loyd said the State Farm policies' requirement of "direct physical loss to" property sets them apart from many other business interruption policies that require "direct physical loss or damage to" property.

"We always knew that State Farm's policy would be the toughest for policyholders," she said. "That disjunctive 'or' broadens that coverage."

Loyd also noted that the Fifth Circuit precedent cited by Judge Ezra looked to sources like Black's Law Dictionary and the prominent insurance law treatise Couch on Insurance to define direct physical loss.

"My client is not a lawyer or in the insurance industry, so we do not think using Black's Law Dictionary or Couch on Insurance is appropriate when Texas law says you are supposed to look to the common and ordinary meaning," she said.

In an emailed statement, State Farm spokesman Chris Pilcic said, "We accept the court's sound decision since we do not collect premiums to protect against viral pandemics."

"Commercial losses caused by, or resulting from viruses are not covered and are, in fact, specifically excluded within our commercial policy. Still, we know this is a difficult time and empathize with all those who have suffered amidst the COVID-19 pandemic," Pilcic said. "As a company, we continue to look for ways to support our customers, such as by providing flexible payment options and philanthropic relief."

The barbershops are represented by Shannon E. Loyd of The Loyd Law Firm PLLC.

State Farm is represented by Douglas W. Dunham and Bert L. Wolff of Dechert LLP, and W. Neil Rambin and Susan E. Egeland of Faegre Drinker Biddle & Reath LLP.

The case is Diesel Barbershop LLC et al. v. State Farm Lloyds, case number 5:20-cv-00461, in the U.S. District Court for the Western District of Texas, San Antonio Division.

--Editing by Adam LoBelia.

*Update: This story has been updated to add additional counsel information for State Farm.*

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