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## Magistrate Says Fla. Eatery's COVID-19 Suit Should Be Tossed

By **Jeff Sistrunk**

Law360 (August 26, 2020, 10:50 PM EDT) -- A Florida magistrate judge on Wednesday recommended the dismissal of a Miami Italian restaurant's suit seeking to force Greenwich Insurance Co. to cover its losses because of government-mandated closures amid the COVID-19 pandemic, saying the eatery didn't claim to have suffered any covered "direct physical loss" to its property.

In a 23-page report and recommendation, U.S. Magistrate Judge Edwin G. Torres said a federal district judge should dismiss restaurant operator Malaube LLC's suit, which alleged Greenwich had wrongfully denied coverage for its "significant business losses" after orders issued in March by local and state authorities required it to shutter onsite dining at its Miami-based eatery, Spris Artisan Pizza.

Judge Torres found Malaube's claims failed to satisfy the threshold requirement in its Greenwich commercial property policy that business income losses be attributable to "direct physical loss of or damage" to its restaurant. Both state and federal courts applying Florida law have construed that phrase as requiring tangible damage or alteration to a structure, which Malaube does not allege occurred in this case, the magistrate judge noted.

Malaube had urged the judge to find that the direct physical loss prerequisite can also be satisfied if the insured property is rendered "uninhabitable" or "substantially unusable."

But Judge Torres held that the restaurateur's insurance claim would not fulfill even this more expansive interpretation, because the government orders did not cause Malaube's eatery to become uninhabitable or unusable. In fact, the judge pointed out, the orders permitted Malaube to continue takeout and delivery services, although the company's complaint "never makes clear whether it undertook either of these options."

"Therefore, under no definition of 'direct physical loss or damage' has plaintiff stated a claim where coverage exists under this insurance policy," Judge Torres wrote.


Based on his conclusion that Malaube did not fulfill the threshold requirement for business income coverage, Judge Torres did not address whether the restaurateur's claim would also be barred by the Greenwich policy's exclusion for losses tied to viruses.

Malaube must submit any written objections to Judge Torres' findings within 14 days, according to court records.

Malaube had initially filed suit against Greenwich in Florida federal court in April, after the insurer denied its claim for coverage of losses that followed March orders from Miami-Dade Mayor Carlos Gimenez and Florida Gov. Ron DeSantis that required restaurants to close indoor dining operations. Greenwich removed the case to federal court two months later, and Malaube filed an amended complaint on June 30.

After the insurer moved to dismiss the amended suit and Malaube filed its opposition brief, U.S. District Judge Kathleen Williams on Aug. 7 referred the case to Judge Torres to issue a recommendation on the motion.

In Wednesday's report, Judge Torres said ample Sunshine State case law supports Greenwich's core stance that direct physical loss or damage must be a tangible alteration to a building.

The judge pointed to the Eleventh Circuit's **recent decision** in **Mama Jo's v. Sparta Insurance Co** , which affirmed that Sparta was not obligated to cover a Miami restaurant's lost income and extra cleaning costs because of debris from nearby roadwork. The Eleventh Circuit found that the restaurant had not suffered any direct physical loss or damage — which the appeals court characterized as tangible damage that renders a property "unsatisfactory for future use or requires repairs" —because it was able to clear its premises of the debris.

Judge Torres said the analysis of the Mama Jo's decision applies with equal force to Malaube's dispute with Greenwich. He opined that, when "comparing Mama Jo's to the allegations in this case, [Malaube's] allegations are far weaker." Unlike policyholders in some **other COVID-19 coverage cases**, Malaube did not claim that the novel coronavirus was ever physically present at its restaurant.

"Although the plaintiff in Mama Jo's failed to put forth any evidence that his cleaning claim constituted a direct physical loss, he at least alleged that there was a physical intrusion (i.e. dust and debris) into his restaurant," Judge Torres wrote. "Plaintiff has done nothing similar in this case. Plaintiff merely claims that two Florida emergency orders closed his indoor dining. But, for the reasons already stated, this cannot state a claim because the loss must arise to actual damage."

Counsel for Malaube and Greenwich did not immediately respond to requests for comment late Wednesday.

Malaube is represented by Lyle Shapiro and Krystina T. Endara of Herskowitz Shapiro and Jacob K. Auerbach of Gallup Auerbach.

Greenwich is represented by Christine M. Renella and Dan Millea of Zelle LLP.

The case is Malaube LLC v. Greenwich Ins. Co., case number 1:20-cv-22615, in the U.S. District Court for the Southern District of Florida.

--Editing by Amy Rowe.