"ALL-RISKS" IS NOT ALL-ENCOMPASSING: ELEVENTH CIRCUIT HOLDS ALL-RISKS INSURANCE POLICY DOES NOT COVER LOST PROFITS DUE TO COVID-19 RESTRICTIONS IN *ASCENT HOSPITALITY MANAGEMENT CO. V. EMPLOYERS INSURANCE COMPANY OF WASAU, ET AL.*

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In *Ascent Hospitality Management Co. v. Employers Insurance Company of Wasau*,[1] the United States Court of Appeals for the Eleventh Circuit addressed claims brought by a hotelier seeking a declaration that its financial losses due to COVID-19 government restrictions were covered under an all-risks insurance policy along with damages stemming from "breach of contract, bad faith, fraudulent misrepresentation, and fraudulent suppression."[2] The United States District Court for the Northern District of Alabama initially dismissed all but the fraudulent misrepresentation claims against both insurers, but ultimately dismissed these remaining claims as well.[3] The Eleventh Circuit affirmed the district court's dismissal, holding that coverage under the all-risks policy was limited to "direct physical loss or damage," which does not include lost profits related to the pandemic.[4]

The appellant, Ascent Hospitality Management, ("Ascent") "manages and operates hotels and restaurants in [thirty-five] locations" throughout five states.[5] In September of 2019, Ascent purchased a protective "'all-risks'" insurance policy for its business.[6] Liberty Mutual Insurance Company ("Liberty Mutual") marketed the policy,

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[1]Ascent Hosp. Mgmt. Co. v. Emps. Ins. Co. of Wausau, No. 21-11924, 2022 WL 130722 (11th Cir. Jan. 14, 2022) (per curiam).

[2] *Id.* at *1.

[3] *Id.*

[4] *Id.* at *2–3.

[5] *Id.* at *1.

[6] *Id.* (internal quotation marks omitted).

but the policy listed Employers Insurance Company of Wausau ("Employers Insurance") as the providing company, which lead Ascent to believe that both companies issued the policy.[7] The policy provided for broad protection, covering "losses sustained due to the interruption of Ascent's business operations, *civil . . . orders that prohibit access to covered locations*, and the prevention of ingress or egress from covered locations."[8] However, the policy required a showing of "direct physical loss or damage" to Ascent's property to "trigger coverage for any type of loss[,]" subject to the policy's exclusions.[9] One such exclusion related to costs incurred due to contamination, "including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy."[10]

Just six months after Ascent obtained its policy, the World Health Organization officially recognized the COVID-19 virus as a global pandemic.[11] State and local governments In response—including the five states in which Ascent operates—responded by issuing orders aimed at protecting the population and limiting the spread of the disease, including shelter-in-place and stay-at-home orders, as well as banning non-essential travel.[12] These orders, in conjunction with various business closure orders, had a significant detrimental impact on Ascent's business.[13] Ascent alleged that as a result of these orders it suffered an estimated loss of over $40 million dollars.[14] In an attempt to recoup its losses, Ascent filed a claim in March of 2020 with its insurers under its recently obtained all-risks policy.[15] Shortly afterwards, the insurers answered by denying Ascent's claim.[16]

Ascent responded swiftly, filing suit in the United States District Court for the Northern District of Alabama against both Liberty Mutual and Employers Insurance for wrongly denying its claim.[17] Ascent sought declaratory judgment that its losses were fully covered by the all-risks policy, as well as damages for "breach of contract, bad faith,

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[7] *Ascent Hosp. Mgmt. Co.*, 2022 WL 130722, at *1.

[8] Ascent Hosp. Mgmt. Co. v. Emps. Ins. Co. of Wausau, 537 F. Supp. 3d 1282, 1284 (N.D. Ala. 2021) (emphasis added), *aff'd per curiam*, No. 21-11924, 2022 WL 130722 (11th Cir. Jan. 14, 2022).

[9] *Id.*

[10] *Id.* at 1284–85.

[11] *Id.* at 1285.

[12] *Ascent Hosp. Mgmt. Co.*, 2022 WL 130722, at *1.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

fraudulent misrepresentation, and fraudulent suppression."[18] The district court initially dismissed Ascent's claims in part and then subsequently issued a judgment on the pleadings dismissing the remaining claims against both insurers.[19] Ascent then appealed the dismissal of all five claims.[20]

Reviewing the district court's decision *de novo*,[21] the Eleventh Circuit primarily addressed whether Ascent's all-risks insurance policy covered the losses it incurred as a result of the pandemic orders,[22] as the remaining tort claims were dependent on the court's finding as to this issue.[23] First, the court acknowledged that the insurance contract would be interpreted under New York law due to a choice-of-law provision in the policy.[24] Under New York law, when an insurance policy like Ascent's "explicitly covers 'direct physical loss or damage,' that coverage is 'limited to instances where the insured's property suffered direct physical damage.'"[25] Ascent, however, alleged its losses stemmed from "government closure orders" rather than "physical damage to its property."[26] The Eleventh Circuit believed New York law to be clear on this issue as the language "'direct physical loss or damage' unambiguously requires some form of actual, physical damage to the insured property in order to 'trigger loss of business income and extra expense coverage.'"[27]

The Eleventh Circuit then addressed Ascent's counterarguments, the first being that the plain language was ambiguous as it "could reasonably read to include the 'deprivation' of its property as a result of government responses to the COVID-19 pandemic[;]" thus, the provision should be construed in Ascent's favor.[28] The court was not persuaded by this argument as the plain language of the policy

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[18] *Ascent Hosp. Mgmt. Co.*, 2022 WL 130722, at *1.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *See id.* at *2.

[23] *See id.* at *3.

[24] *Ascent Hosp. Mgmt. Co.*, 2022 WL 130722, at *2; *see also* Ascent Hosp. Mgmt. Co. v. Emps. Ins. Co. of Wausau, 537 F. Supp. 3d 1282, 1286 (N.D. Ala. 2021). While the insurance contract was interpreted under New York law, the district court acknowledged that New York law was in accord with Georgia law with respect to the interpretation of the phrase "direct physical loss or damage." *See id.* at 1286–87.

[25] *Ascent Hosp. Mgmt. Co.*, 2022 WL 130722, at *2 (quoting Roundabout Theatre Co. v. Cont'l Cas. Co., 751 N.Y.S.2d 4, 8 (N.Y. App. Div. 2002)).

[26] *Id.*

[27] *Id.* (quoting Tappo of Buffalo, LLC v. Erie Ins. Co., No. 1:20-cv-00754, 2020 WL 7867553 (W.D. N.Y. Dec. 29, 2020)).

[28] *Id.*

specifically limited coverage to direct "*physical* loss or damage[.]"[29] Moreover, because New York courts have repeatedly followed this interpretation, the Eleventh Circuit concluded there to be "no ambiguity in the all-risks provision."[30]

Next, Ascent argued that "the phrase 'physical loss or damage' must include more than actual physical damage," as the term "loss" would lose its meaning under a narrower interpretation.[31] The court found this argument equally unpersuasive as New York courts have previously explained that the terms "direct" and "physical" effectively restrict the "permissible meaning of 'loss' in the insurance policy."[32] Relying on the district court's reasoning, the Eleventh Circuit explained that "physical damage and physical loss differ only in 'the degree of harm they describe[.]'"[33] As a result, the court found that Ascent's profit loss stemming from COVID-19 restrictions could not trigger coverage under the plain meaning of the policy language.[34]

Finally, Ascent argued that controlling New York caselaw was inapplicable since it did not address a virus such as COVID-19, and that virus particles satisfy "the necessary direct and physical element required" for policy coverage.[35] While the court did recognize the threat of the global pandemic, it found this argument to be the least convincing: "The danger of COVID-19, however real, does not expand the scope of the all-risks policy."[36] Again, relying on the district court's reasoning, the court explained that COVID-19 particles were incapable of causing the type of "direct physical loss or damage" required under the all-risks policy "because [such] a contamination . . . can be immediately restored . . . by cleaning and disinfecting[.]"[37] Finding that Ascent's lost profits were not covered by the policy, the Eleventh Circuit affirmed the district court's dismissal of Ascent's claim for declaratory judgment.[38]

Having determined that the all-risks policy did not cover Ascent's lost profits, the Eleventh Circuit additionally affirmed the district court's dismissal of the breach of contract and bad faith claims as they

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[29] *Id.*

[30] *Ascent Hosp. Mgmt. Co.*, 2022 WL 130722, at *2.

[31] *Id.* at *3.

[32] *Id.* (citing Roundabout Theatre Co. v. Cont'l Cas. Co., 751 N.Y.S.2d 4, 8 (N.Y. App. Div. 2002)).

[33] *Id.* (quoting *Ascent Hosp. Mgmt. Co.*, 537 F. Supp. 3d at 1287).

[34] *Id.*

[35] *Id.*

[36] *Ascent Hosp. Mgmt. Co.*, 2022 WL 130722, at *3.

[37] *Id.*

[38] *Id.*

were based on the policy covering such losses.[39] Applying Georgia law to the remaining tort claims, the court held that the fraudulent misrepresentation claim failed for similar reasons, as Ascent did not show any false representation by its insurers as their coverage denial was proper.[40] Finally, a fraudulent suppression claim under Georgia law limits such claims "only . . . against a party with an 'obligation to communicate.'"[41] While such an obligation may arise under the "confidential relations of the parties[,]"[42] no such relationship "exists between an insured and the insurer" under Georgia law.[43] Ascent attempted to argue that an obligation to communicate did arise "because the insurers secretly intended to issue blanket denials to all claims like Ascent's without examining them[,]" but it cited no supporting case law.[44] As Georgia law does not recognize such a basis, the Eleventh Circuit affirmed the district court's dismissal of Ascent's fraudulent suppression claim.[45]

Although the court recognized that the COVID-19 pandemic caused the entire hospitality industry "significant financial losses[,]"[46] controlling contract interpretation principles required the Eleventh Circuit to affirm that "direct physical loss or damage" language within an insurance policy does not include COVID-19 related losses.[47] As a result, the court agreed that none of Ascent's claims were sufficient to survive a judgment on the pleadings.[48] The court's decision in *Ascent* further reinforces the Eleventh Circuit's tendency to reject imposing the pandemic related losses of business across the nation on their insurers.[49] While the Eleventh Circuit has recognized that COVID-19 is certainly a threat to both businesses and the population, it has reasoned that related financial losses do not constitute physical losses, even where such financial loss resulted from shelter-in-place orders.[50]

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[39] *See id*

[40] *Id.*

[41] *Id.* (quoting GA. CODE ANN. § 23-2-53 (West)).

[42] *Ascent Hosp. Mgmt. Co.*, 2022 WL 130722, at *3 (quoting GA. CODE ANN. § 23-2-53 (West)).

[43] *Id.* (quoting State Farm Fire & Cas. Co. v. Fordham, 250 S.E.2d 843, 845 (Ga. Ct. App. 1978)).

[44] *Id.*

[45] *Id.*

[46] *Id.* at *1.

[47] *Id.* at *4.

[48] *Ascent Hosp. Mgmt. Co.*, 2022 WL 130722, at *4.

[49] *See, e.g.*, Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co., No. 21-11046, 2021 WL 3870697, at *1 (11th Cir. Aug. 31, 2021) (per curiam) (holding that a "business-interruption" insurance claim related to COVID-19 was insufficient to trigger coverage as a "'direct physical loss or damage' to property[.]").

[50] *See, e.g.*, *Ascent Hosp. Mgmt. Co.*, 2022 WL 130722, at *4.

Thus, businesses seeking to mitigate their pandemic-related losses are more likely to obtain financial relief through government pandemic-related programs rather than insurance policies that cover the business's physical parameters.