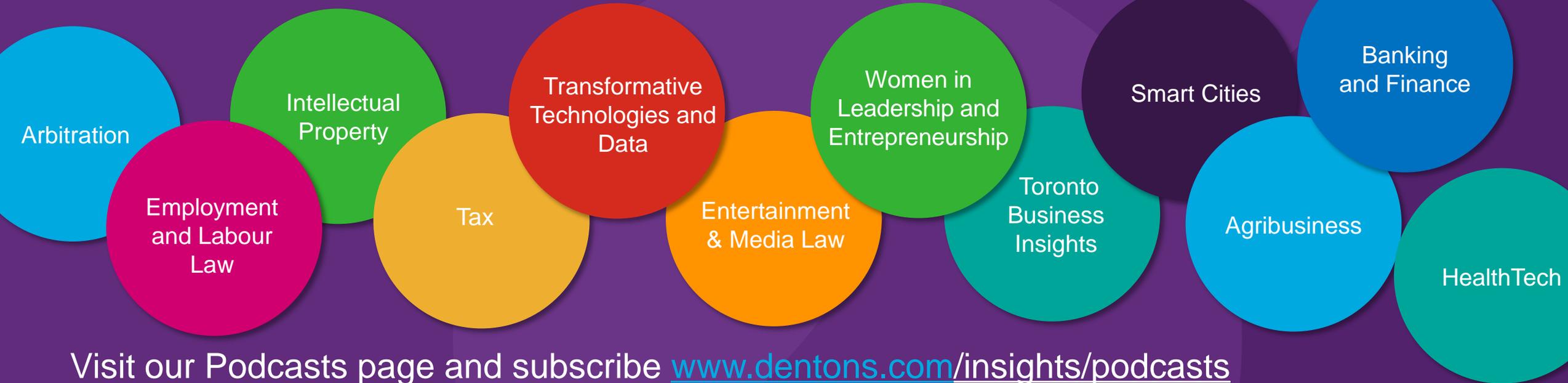


COVID business interruption claims – a year in review

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COVID-19 Business interruption claims: a year in review



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COVID-19 & insurance coverage

COVID-19

Insurance coverage

- COVID-19 definition
 - Coronavirus respiratory disease transmitted by way of infectious droplets or aerosols coming into direct contact with or being inhaled into the mucous membranes of another person's nose, mouth or eyes
- Relevant insurance policies that claims for coverage may be made under
 - Various types of policies. Usually property, but some claims made under commercial general liability, construction, environmental/pollution
 - Extensions for business interruption losses
 - Sometimes a separate form in the policy
 - Usually has general indemnification provision for losses arising from property damage, which requires physical loss or damage to property but each policy's language should be checked as language differs
 - There may be special extensions of coverage provided under the business loss section such as Restricted Access; Negative Publicity; Ingress/Egress, which could be relevant, especially if they contain reference to coverage for communicable disease

COVID-19

General principles of insurance policy interpretation

- Insured has the burden of establishing that the damages or loss suffered falls within the coverage of insurance provided;
- The insurer has the burden of establishing whether any exclusions apply that would result in the denial of coverage;
- The language of the policy should not be interpreted in a manner that results in a commercially unrealistic situation, or is inconsistent with other similar policies in the market; and
- If there is any ambiguity, it is generally interpreted in favour of the insured.
- Principles of interpretation will be important in cases deciding business loss claims since many of the provisions at issue have not been considered in these types of circumstances

COVID-19

Relevant provisions of policies

- Business interruption
- Disease clause
- Ingress/egress clause
- Civil order/authority
- Virus exclusions

COVID-19

Relevant policy provisions

(1) Physical damage requirement

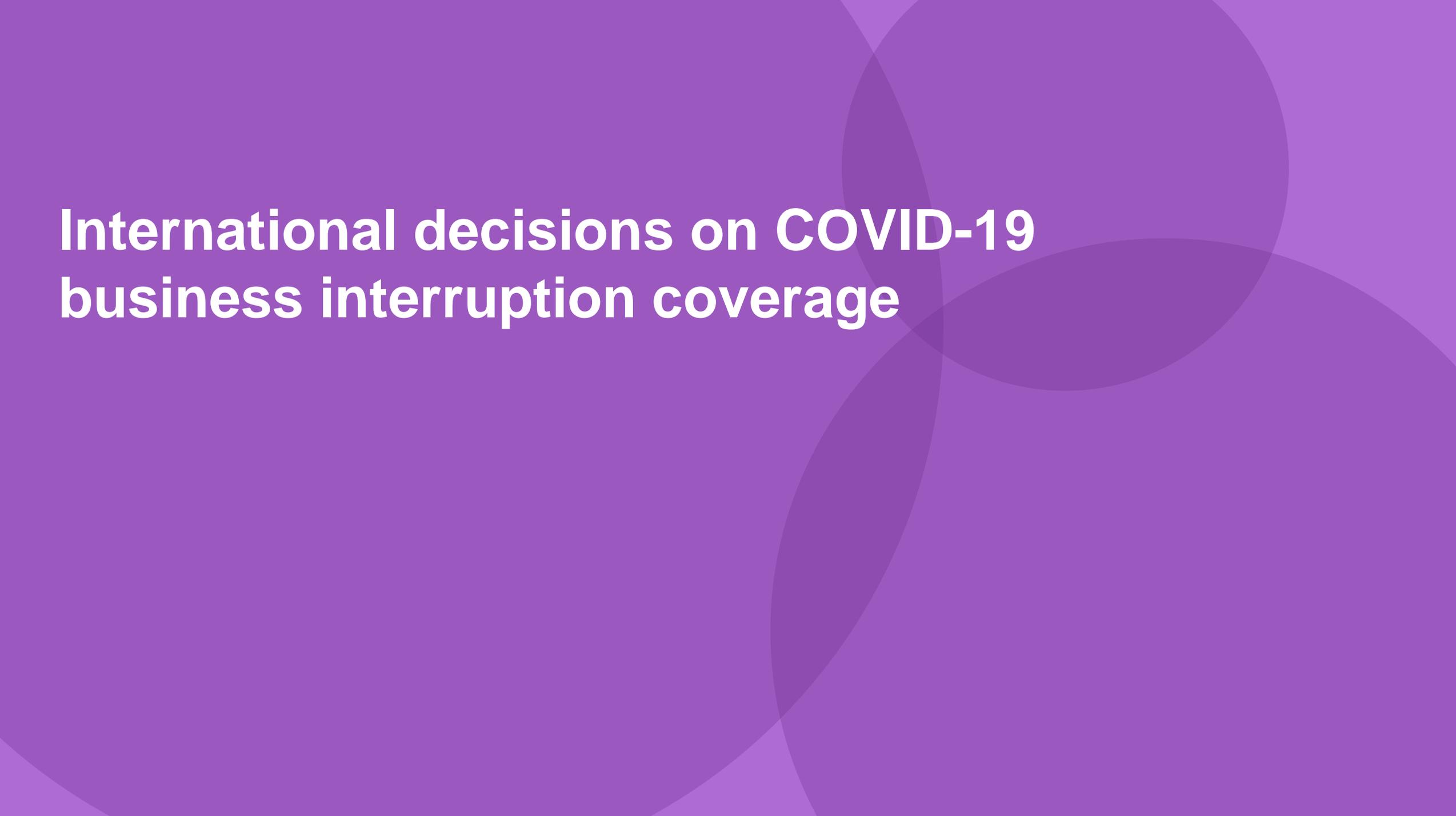
- Most policies, as an overarching term of the Insuring Agreement, provide coverage only where there is direct physical loss or damage
 - E.g.: ...we will pay for all risks of direct physical loss or damage by a covered cause of loss to covered property at a covered location...
- In the context of COVID-19, insurers are arguing that pursuant to this requirement, insured's must demonstrate that the presence of the virus on the property caused a loss
- Focus in these provisions is on “tangible” requirement: impact on insured's property (not people)

COVID-19

Relevant policy provisions

(2) Special wording

- Inclusion of certain words to limit liability and exposure
- Provides time and distance limitations with respect to coverage stemming from, e.g., orders of civil authority or outbreaks of disease
 - E.g. If indemnity provided by this Extension of Coverage is from x, y, z, such indemnity will not exceed the shorter of 30 days from the date of the declaration by Civil Authority or “public health authority”

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International decisions on COVID-19 business interruption coverage

United Kingdom

Financial Conduct Authority Test Case (“FCA Test Case”)

- First case brought under Financial Markets Test Case Scheme
- Against 8 insurers
- Expedited proceeding on agreed set of facts
 - Heard in the High Court in July 2020
 - Judgment given in September 2020
 - Appeal granted shortly thereafter: due to importance of case, the appeal “leapfrogged” over the Court of Appeal and proceeded directly to the Supreme Court
 - Supreme Court Appeal heard in November 2020
 - Supreme Court decision rendered on January 15, 2021

United Kingdom

FCA Test Case Cont'd

- Only concerned with policies that include non-damage extensions to standard business interruption cover (i.e. no provisions in any policy with a physical damage requirement were considered)
- Decision was favourable to policyholders in finding in the various provisions at issue bases for coverage for business interruption losses sustained during the Covid-19 pandemic lock down
- Decision overturned a previous authoritative precedent on business interruption coverage in which coverage was not found because the insured property was not damaged

United Kingdom

FCA Test Case: Findings

- **Disease clauses**: cover would be triggered if a person contracted Covid-19 within the radius specified in the policy. However, each occurrence of Covid-19 was found to be an equal cause of the government and public responses to the pandemic.
- **Prevention of access clauses**: applied where government restrictions (including mandatory instructions without the force of law) required the closing of premises (or a discrete part of them) in relation to at least a discrete business activity.
- **Causation**: losses were recoverable when caused by the insured peril or other (uninsured but non-excluded) consequences of the same underlying or originating cause (i.e. the Covid-19 pandemic) acting in combination with the insured peril

United Kingdom

FCA Test Case: Trends clause

Trends clauses: subject to the specific policy wordings, matters arising from the same underlying cause (i.e. Covid-19) are not trends that should be taken into account to reduce the amount recoverable.

- E.g.:

"The amount we pay for loss of gross profit will be amended to reflect any special circumstances or business trends affecting your business, either before or after the loss, in order that the amount paid reflects as near as possible, the result that would have been achieved if the damage had not occurred."

United Kingdom

TKC London Limited v Allianz Insurance plc, [2020] EWHC 2710 (Comm)

- Summary judgment finding in favour of insurer by English High Court
- First UK case to be dismissed due to lack of evidence of "physical loss" to property
- Policy did not contain any "disease clause" exclusion

United States

General trends

- Trend in US of line of cases rejecting the idea that COVID-19, by virtue of its presence/existence alone, causes physical damage or loss to the insured's property
- Numerous summary judgment motions: mostly in favour of insurer, dismissing claims
- Trial court decisions
 - More than 60 cases decided addressing whether direct physical loss or damage has been established
 - More than 45 favourable to insurers
 - Majority of courts have generally held business income, civil authority and extra expense claims barred by virus exclusion

United States

Significant decisions: Favourable to insurer

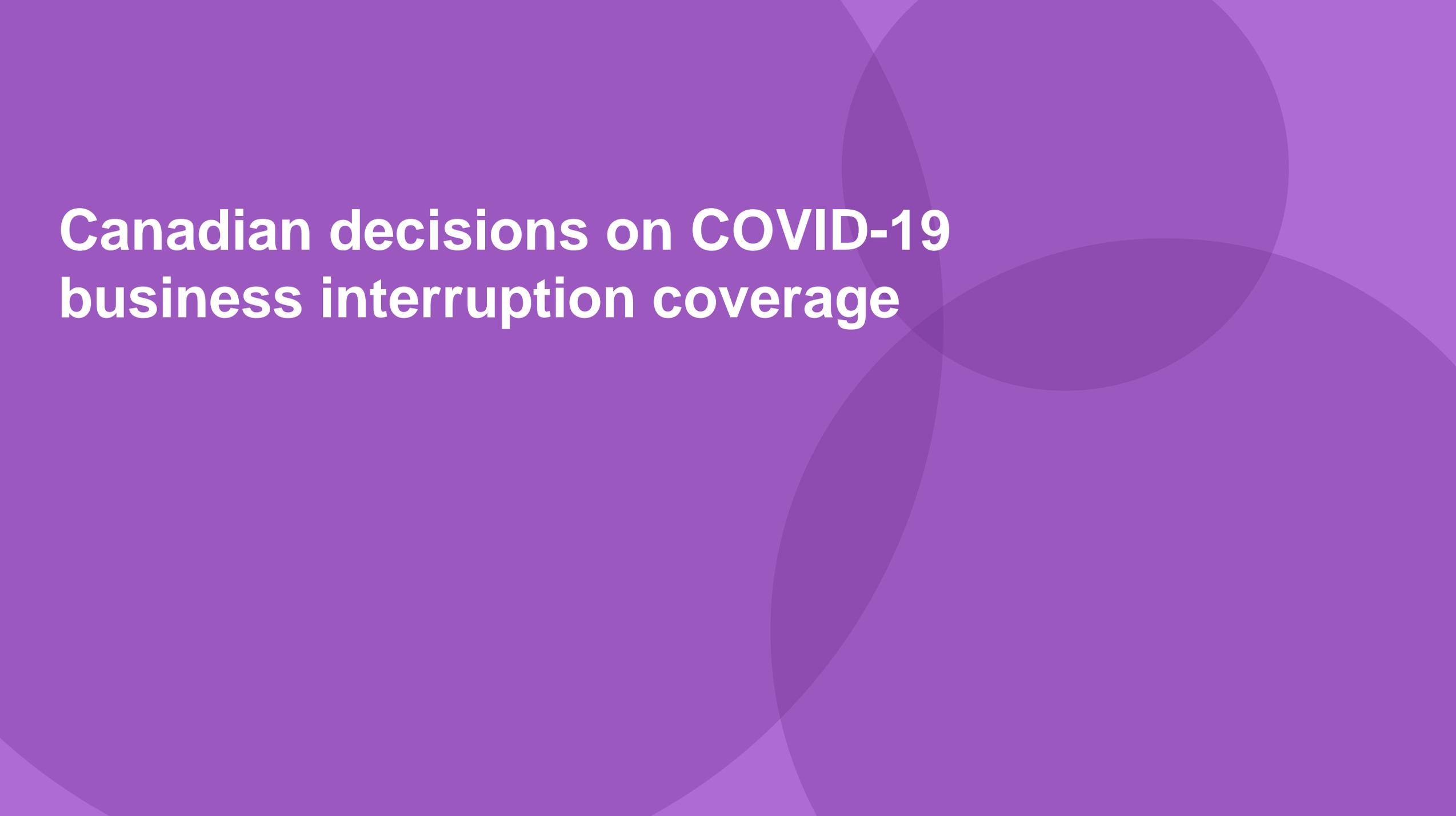
- *Zwillo V, Corp. v. Lexington Ins. Co.*, No. 4:20-cv-00339-CV-RK, 2020 WL 7137110 (W.D. Mo. Dec. 2, 2020)
- *Henry's Louisiana Grill, Inc., et al., v. Allied Insurance Company of America*, No. 1:20-CV-2939-TWT, 2020 WL 5938755 (N.D. Ga. Oct. 6, 2020)
- *Uncork and Create, LLC v. The Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 W 6436948 (S.D. W. Va. Nov. 2, 2020)

United States

Significant decisions: Favourable to insured

Studio 417, Inc. v. Cincinnati Ins. Co., No. 20-CV-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020)

- Defendant insurer's motion to dismiss was denied. Matter will proceed towards trial.
- Often cited for proposition that physical loss and physical damage are different concepts and to support plaintiffs' arguments for coverage in the face of a physical loss or damage requirement

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Canadian decisions on COVID-19 business interruption coverage

Canada

3 Omnibus class actions

- *JKT Holdings Ltd. v Aviva et al*; Court File No. QBG 795/20 (Saskatchewan)
- *0476321 BC Ltd and Cory Judge dba SHI Studio v Aviva et al*; Court File No. New-S-S-230035 (British Columbia)
- *Workman Optometry et al v Aviva et al*; Court File No. CV-20-00643488-00CP (Ontario)

Canada

Actions proceeding against Aviva

- *Nordik Windows v Aviva et al*, CV-20-00643386-00CP
- *SIR Corp et al v Aviva Insurance Company of Canada*, CV-20-653557-0000
 - Application has proceeded to the hearing stage, which is ongoing
- Denturists/Legions Actions
 - *Royal Canadian Legion v Aviva*, CV-20-00001041-00CP
 - *McCallum v Aviva*; CV-20-00000981-00CP, and
 - *Roshan v Aviva*, CV-20-00001194-00CP

Other proceedings

- Numerous individual actions commenced on behalf of dentists and physiotherapists against various insurers

Canada

MDS Inc. v. Factory Mutual Insurance Company, 2020 ONSC 1924

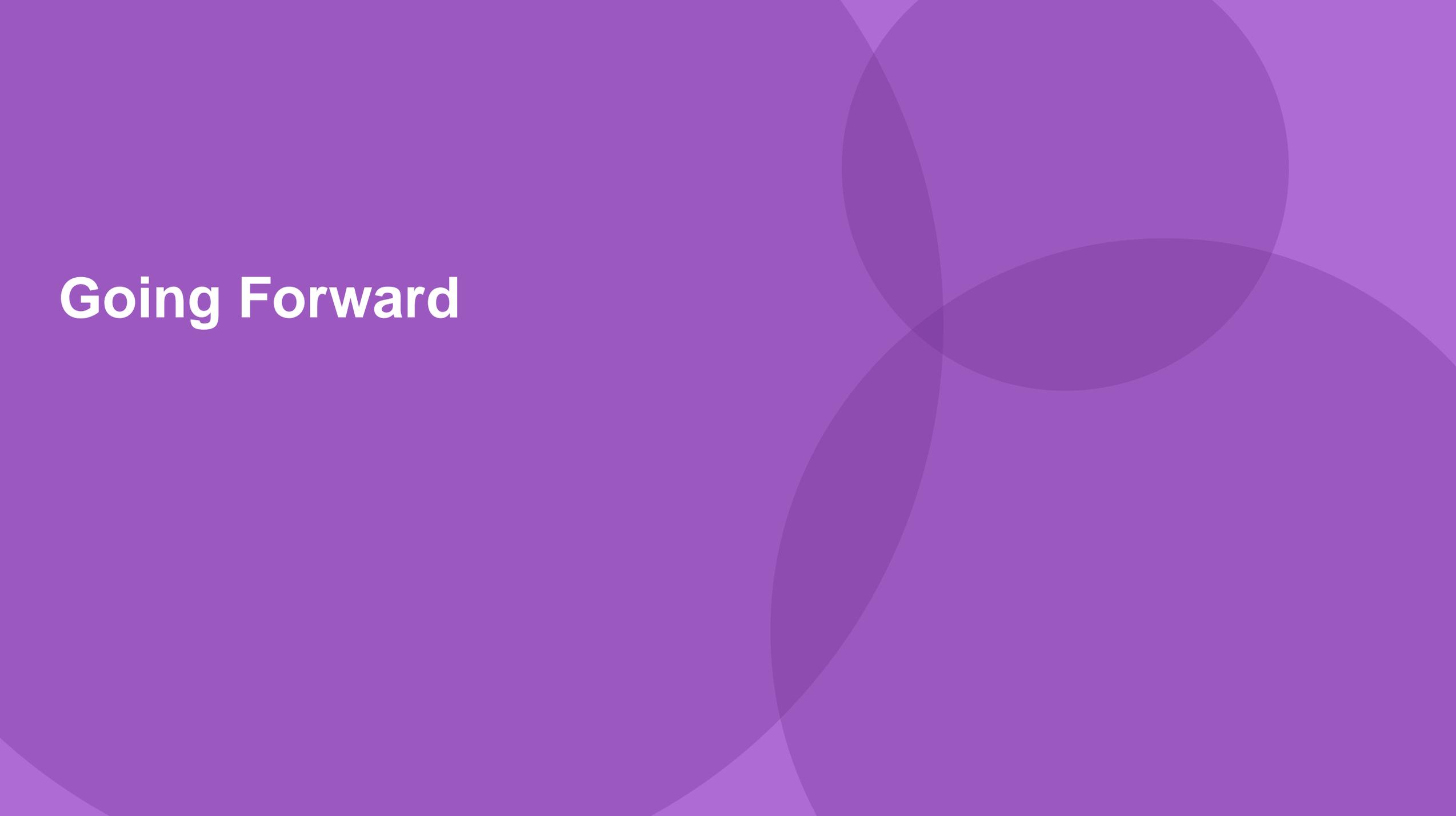
- Not in the context of COVID-19, but deals with the interpretation of physical loss or damage requirement in an all risks policy
- Ontario Superior Court of Justice broadly interpreted the term “physical damage” in an all-risk insurance policy to include the “impairment of function or use of tangible property.”
- Court’s interpretation on this issue aligned with previous case law
- Decision has been appealed
 - Appeal heard in April 2021
 - Judgment currently under reserve

Canada

202135 Ontario Inc., et al. v. Northbridge General Insurance, 2021 ONSC 4299

- Recently released decision (June 14, 2021)
- Application by insured related to the quantum of coverage under pandemic-related business income interruption provision
 - Insurer had already agreed that coverage existed and was triggered by COVID-19 pandemic
- Coverage found through:
 - B. Additional Extensions of Coverage, (l) Outbreak & Negative Publicity Coverage, (i) Indemnity Agreement
 - We agree to extend the insurance provided by Part II – Business Income to apply to your loss of “business income” including incurred necessary “extra expense” resulting from interruption of our interference to your business operation at your “scheduled risk location” directly as a result:
 - (1) A “pandemic outbreak” declared by Civil Authority or “public health authority”

Going Forward

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The year ahead

- In a year, there will be more substantive decisions; right now the landscape is uncertain and quickly evolving
- Expect US and UK decisions to proceed ahead of Canadian cases

Resources



Resources

- See, e.g., [Business interruption and insurance coverage: A four-part series brought to you by Dentons Canada](#)
 - Part 1: Business interruption coverage: What is physical damage under a Canadian commercial property policy?
 - Part 2: Business interruption: Key areas of risk for Director and Officer (D&O) liability
 - Part 3: Business interruption considerations in professional liability insurance (Canada)
 - Part 4: Business interruption coverage: Avoiding tunnel vision and looking at the big picture
- Contact the Dentons team with any specific inquiries

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