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FOR IMMEDIATE RELEASE:

NEW JERSEY TRIAL COURT ALLOWS COVID-RELATED BUSINESS INTERRUPTION CLAIM TO PROCEED AND DENIES DEFENDANT INSURER'S MOTION TO DISMISS

Livingston, N.J., September 30, 2020 – The Bergen County Superior Court recently rejected a defendant insurer's claim that COVID-19 related losses cannot qualify as covered losses under a business owners' policy which included coverage for business interruption, and the Court denied the defendant insurers' motion to dismiss the Plaintiff policyholders' Complaint. In *Optical Services USA/JCI vs. Franklin Mutual Insurance Co.*, the Plaintiff policyholders asserted they had purchased business interruption insurance coverage to protect their businesses from an "unanticipated crisis" and that such a crisis struck in March 2020 when COVID-19 caused New Jersey Governor Murphy to issue Executive Orders requiring nonessential businesses to close. Plaintiffs alleged that they closed their businesses in compliance with Governor Murphy's Executive Orders and suffered resulting significant financial losses that were covered by the defendant's insurance policy.

The defendant insurer denied coverage for the Plaintiffs policyholders' business interruption claims and filed a motion to dismiss the Plaintiffs' Complaint. Relying on policy language that defined "covered loss" as the "fortuitous direct physical damage to or destruction of covered property by a covered cause of loss," the defendant insurer argued that the subject insurance policy defined a "covered loss" as requiring "physical impact." Because "[t]here is no known instance of COVID-19 transmission or contamination within the premises of Plaintiffs' businesses," the defendant insurer argued there was no "direct physical loss" as required to state a claim under the subject policy and that Plaintiffs' Complaint should be dismissed as a matter of law.

During the hearing on the defendant insurer's motion to dismiss, the defendant insurer conceded that there was no specifically applicable exclusion set forth in the subject policy, and that the policy's contamination exclusions did not apply to the situation presented in the action, but instead emphasized that the coverage definition under the subject policy had not been satisfied. The Plaintiff policyholders responded they "were forced to close their businesses because the Executive Order issued by the State ... [and] across the country in emergency response to the Pandemic found that there is a dangerous condition on plaintiffs' property." At the hearing, Plaintiff policyholders asserted two main bases for coverage being triggered under the subject policy.

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First, Plaintiffs argued that a dangerous condition on property can constitute physical loss. Second, Plaintiffs argued Governor Murphy’s Executive Orders “not only affected Plaintiffs’ businesses, but they affected ... all properties around Plaintiffs’ businesses,” thereby triggering civil authority coverage under the subject policy.

The trial court denied the insurer’s motion to dismiss the Complaint, noting the key issue of the “interpretation of a direct covered loss under the policy and whether there was physical damage to the Plaintiffs’ business” could not yet be decided on the limited record before it. The trial court found that the defendant insurer did not provide it with any controlling legal authority to support its interpretation of the subject policy, but instead found that the Plaintiffs’ argument was supported by some analogous case law in both New Jersey and other jurisdictions. Relying on that prior case law, the trial court in *Optical Services* held that “[s]ince the term ‘physical’ can mean more than material alteration or damage, it is incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided.”

The trial court in *Optical Services* thus concluded the Plaintiff policyholders “should be afforded the opportunity to develop their case and establish that the COVID-19 closure may be a ‘covered event’ when occupancy of the described premises is prohibited by civil authorities.” The court in *Optical Services* further noted that “there is an interesting argument made before this Court that physical damage occurs where a policyholder loses functionality of its property and by operation of civil authority such as the entry of an executive order results in a change to the property.” The court concluded that Plaintiff policyholders’ coverage theory warranted a denial of the defendant insurer’s motion to dismiss at such an early stage of the litigation and allowed the case to proceed.

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