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## Restaurants Say Structural Damage Unneeded In Virus Claims

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*By Mike Curley*

Law360 (August 18, 2020, 3:05 PM EDT) -- A group of Florida restaurants fighting certain underwriters at Lloyd's of London over business interruption coverage stemming from the COVID-19 pandemic are pushing back against the insurer's call to toss the suit, telling the court "physical loss" that triggers the policy includes not just structural damage, but loss of function and intended use.

In a brief filed Monday, the El Novillo Restaurant group, which has two eateries in Miami and Hialeah, said despite Lloyd's argument that the insurance policy's coverage of "physical loss" only covers actual damage or alteration to a property's structure, insurers like Lloyd's have covered nonstructural "physical loss" claims for years and are using an "unreasonably narrow" interpretation of the term to deny coverage.

According to the brief, the Lloyd's policy defines a covered cause of loss as "any direct physical loss," unless excluded, and among the listed exclusions are nonstructural causes, such as power failure and nuclear radiation.

If the policy only covers structural losses, those exclusions would not be necessary to deny coverage for those types of events, El Novillo argued, saying if the insurer wanted to exclude events like the pandemic from its coverage, it must do so clearly and specifically.

The restaurant added that the policies do not expressly define the terms

"direct physical loss or damage," and by law the court must give undefined terms their least restrictive meaning and settle ambiguity in favor of granting coverage.

The El Novillo Restaurant group sued the Lloyd's underwriters in April, asking the court to declare that governments' stay-at-home orders to stop the spread of the novel coronavirus have caused catastrophic business disruptions and must trigger coverage under holders' all-risk commercial property insurance policies.

In the proposed class action, the restaurant group says it anticipates that the Lloyd's entities will breach their contractual obligations under common all-risk commercial property insurance policies. They seek a declaratory judgment on behalf of the El Novillo restaurants as well as all proposed class members that the policies don't contain an exclusion for a viral pandemic.

In June, the underwriters argued that the proposed class action fails to show that the businesses shut down because of physical damage, adding that the pandemic falls under several exclusions in the policies.

According to the June brief, language in the policies for business interruption coverage says they cover costs between when the physical loss takes place and when the premises are "repaired, rebuilt or replaced," known as the "period of restoration." That language shows that the policies only apply to physical damage, not to preemptive shutdowns to slow down a pandemic, according to Lloyd's.

In Monday's brief, the restaurant group argued that Lloyd's took the period of restoration language out of context, saying that "repair" can also mean restoring to a healthy state, not just that a physical structure has been fixed.

The group added that the microorganism and pollution exclusions don't apply to the coverage they seek, as those exclusions cover when contaminants and other substances are present at the property. The restaurants' claim, by contrast, is that they were shut down because of state and county emergency orders, not the actual presence of COVID-19 at the restaurants.

While COVID-19 was not known to be present at the restaurants, it did cause a dangerous physical condition throughout the county that gave rise to the government's orders, triggering the civil authority provision in the policy, the

group argued.

The restaurant also argued that the Lloyd's bid to dismiss class allegations is premature, because certification is an evidentiary question to be resolved after discovery and after the court is able to hear motions and responses regarding the viability of the proposed classes.

"Our client has the facts and the law on its side, as do all the other businesses with similar policies," Benjamin Widlanski of Kozyak Tropin & Throckmorton LLP, representing El Novillo, told Law360 on Tuesday. "We look forward to Lloyd's of London being forced to honor its contractual obligations."

Representatives for the underwriters could not immediately be reached for comment Tuesday.

El Novillo Restaurant is represented by Harley S. Tropin, Benjamin Widlanski, Gail A. McQuilkin, Javier A. Lopez, Rachel Sullivan, Robert Neary and Frank A. Florio of Kozyak Tropin & Throckmorton LLP.

The underwriters are represented by Armando P. Rubio of Fields Howell LLP.

The case is El Novillo Restaurant et al. v. Certain Underwriters At Lloyd's London et al., case number 1:20-cv-21525, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Joyce Hanson. Editing by Gemma Horowitz.