

Insurer Prevails In 1st COVID-19 Coverage Jury Trial

By **Shane Dilworth**

Law360 (October 28, 2021, 8:41 PM EDT) -- The Missouri federal jury handling the first jury trial in a COVID-19 business interruption coverage lawsuit found for Cincinnati Insurance on Thursday, deciding that the insurer didn't breach a property policy issued to a Kansas City restaurant and bar operator by denying a claim for pandemic-related losses.



A Missouri federal jury found that Cincinnati Insurance didn't breach a property policy issued to a restaurant and bar operator by denying a claim for pandemic-related losses. (AP Photo/Steven Senne)

The verdict, which concluded a three-day trial, came several hours after U.S. District Judge Stephen R. Bough denied Cincinnati Insurance Co.'s motion for judgment as a matter of law in the dispute with policyholder K.C. Hopps Ltd. The insurer had argued that the case should be taken away from the jury because K.C. Hopps failed to show its properties were physically damaged by the virus and needed to be restored before operations could resume.

The jury delivered the defense verdict for Cincinnati after deliberating for just one hour and 45 minutes, according to court records. The verdict sheet offered no further details on the jury's reasoning.

"We thank the jury for its time and attention through the trial," a spokesperson for Cincinnati Insurance told Law360 in an emailed statement. "We are pleased that it agreed with us that our commercial property insurance policy does not provide coverage for these COVID-19 losses"

Earlier in the day, Cincinnati argued that it should prevail in K.C. Hopps Ltd.'s suit because

the policyholder has failed to show its properties were physically damaged by the virus and needed to be restored before operations could resume.

One of the restaurant operator's experts, Marc Goodman, an academic molecular epidemiologist, testified that there was no testing for the presence of the virus at any of the policyholder's nine restaurant locations, Cincinnati noted.

Similarly, Alexander M. Klibanov, a chemical enzymologist, testified that the novel coronavirus can be removed and inactivated by cleaning and can decay on its own, the insurer said.

Cincinnati told U.S. District Judge Stephen R. Bough that the experts' testimony, as well as that of K.C. Hopps' founder Ed Nelson, prove that the restaurant owner's losses were caused by government shutdown orders, which are subject to an exclusion in the commercial property policy. Specifically, the insurer pointed out that Nelson testified that K.C. Hopps' restaurants did not shut down in February 2020 despite knowledge of the coronavirus.

"Even if plaintiff's evidence showed physical contamination at any of its properties, which it does not, the evidence introduced by plaintiff demonstrates that its alleged loss was not caused by any physical loss, physical damage or physical contamination caused by the virus, but was instead caused solely and completely by plaintiff's compliance with governmental orders that impacted its operation of its premises," the insurer argued.

In a September ruling, Judge Bough said a jury **should decide** whether K.C. Hopps' properties were contaminated by the coronavirus, thereby serving up Cincinnati's potential liability for coverage. The judge rejected the insurer's bid for a win before the case went to trial after finding that expert testimony from the parties about the virus' ability to cause physical damage raised a triable issue.

The trial began this week. K.C. Hopps, which operates restaurants named O'Dowd's Gastrobar, Barley's Kitchen & Tap, Blue Moose Bar and Grille and Stroud's, said Cincinnati is required to cover losses it incurred from the pandemic.

Counsel for K.C. Hopps did not respond to requests for comment about the verdict Thursday.

K.C. Hopps is represented by Brett A. Emison, J. Kent Emison and Patricia L. Campbell of Langdon & Emison, by J. Stueve, Bradley T. Wilders, Curtis Shank and Abby E. McClellan of Stueve Siegel Hanson LLP, by John J. Schirger, Matthew W. Lytle and Joseph M. Feierabend of Miller Schirger LLC and by Richard F. Lombardo of Shaffer Lombardo Shurin PC.

Cincinnati is represented by Daniel G. Litchfield and Ericka Hammett of Litchfield Cavo LLP and by Michael L. Brown of Wallace Saunders.

The case is K.C. Hopps Ltd. v. Cincinnati Insurance Co., case number 4:20-cv-437, in the U.S. District Court for the Western District of Missouri.

--Additional reporting by Shawn Rice and Eli Flesch. Editing by Amy Rowe.

