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Québec Court Refuses to Certify Class Action for Recovery of COVID-Related Business Interruption Losses

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The Québec Superior Court has refused to certify a class action proceeding seeking the recovery of business interruption losses related to the COVID-19 pandemic. This decision, in *Centre de santé dentaire Gendron Delisle inc. v La Personnelle, assurances generales inc.*, is among the first in Québec to address whether business interruption losses resulting from the COVID-19 pandemic are recoverable in the absence of any actual physical loss or damage to the insured's property, and will have meaningful implications for the insurance industry and the wider business community. *Centre de santé* is one of three decisions rendered on the same day by the same Québec Superior Court judge on similar motions to certify class actions, and addresses policy language most commonly found in property damage and business interruption policies. One of the other two motions was granted based on much less common language found in the policy at issue, which the Court determined to be more ambiguous and potentially more liberal.

In *Centre de santé*, a class action proceeding had been brought on behalf of all dentists and dental clinics in the province of Québec that, as of March 16, 2020, had contracted for "business interruption" or "operating loss" insurance coverage and suffered income loss as a result of government-ordered closures related to the COVID-19 pandemic. The claims were brought under insurance policies issued by the defendant insurers that included coverage for property damage, civil liability and business interruption. The policies in question – as is the case with most policies of this nature – covered the insured property against "all risks of physical loss or damage directly caused to the insured property."¹ The term "physical damage" was defined in the policies to mean either a "deterioration or destruction of tangible property, including any loss of use resulting therefrom," or "the loss of use of tangible property that has not suffered damage, which loss of use is deemed to have occurred at the time of the peril having caused it." "Peril" was defined to mean "any event directly causing damage." Similar definitions are found in most property insurance policies.

As is typical of property insurance policies available to businesses and professionals, and "subject to the conditions, limitations and exclusions" contained in each respective policy, the policies issued by the defendants included coverage for business interruption losses sustained during the policy period "as a result of a covered peril affecting the insured property on the insured premises."

The plaintiffs argued that the coverage was sufficiently broad to cover business interruption losses caused by government-ordered closure of their practices, even in the absence of tangible damage to the insured property. They also argued that the definition of physical damage was ambiguous and therefore opened the door to the argument that business interruption losses were recoverable.

The Court agreed with the insurers and found that, as a matter of contractual interpretation, the business interruption coverage was available only where losses resulted directly from an occurrence that caused direct physical damage to insured property. The Court noted that the plaintiffs had not alleged any deterioration to insured property nor even any contamination or alteration of property by COVID-19 (notably, the policies contained exclusions for damages caused directly or indirectly due to "deterioration by contamination." The Court also dismissed the plaintiffs' argument that the definition of physical damage was ambiguous. In this regard the Court held that direct physical loss or damage to property was a prerequisite for business interruption coverage. No such physical loss or damage had been alleged in the present case. The Court concluded that, in the circumstances, the plaintiffs had not demonstrated a viable cause of action and their demand for certification was, therefore, dismissed.

The Court's decision is consistent with the majority of decisions issued by courts in the United States, which have dismissed claims for COVID-related business interruption losses. It was also followed by a decision of the Ontario Court of Appeal in *MDS Inc. v Factory Mutual Insurance Company*. Although that decision did not involve a COVID-related business interruption claim, it will most probably influence

how courts treat such claims. In *MDS*, the Court of Appeal held that even in the case of all risk policies, simple “loss of use” untethered from tangible damage to property does not allow for recovery of economic losses unless the policy specifically provides otherwise.

¹Text quoted from the court decision has been translated here.

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