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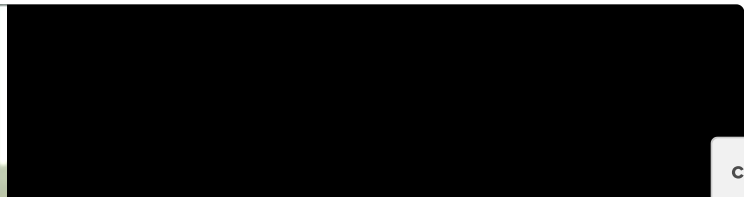
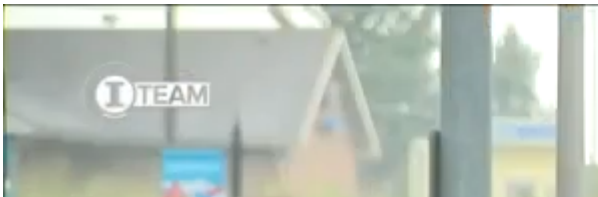
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Ohio Supreme Court hears arguments on pandemic insurance coverage

Debate excludes 'smoking gun' email



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The Ohio Supreme Court has been asked to decide if COVID-19 causes property damage. I-Team reporter Dan Monk has been following this case for months. He says attorneys uncovered new evidence the court refused to consider.



By: [Dan Monk](#)

Posted at 4:56 PM, Feb 08, 2022 and last updated 12:44 AM, Feb 09, 2022

CINCINNATI — Taste of Belgium owner Jean-Francois Flechet was disappointed when his insurance company refused to pay his losses from government ordered shutdowns during the pandemic.

He was even more disappointed when he learned about an email in which Cincinnati Financial Corp. executives argued damages should be paid in certain circumstances.

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And he was further disappointed when the Ohio Supreme Court decided not to consider that email as it ponders a key issue that could impact his lawsuit against the company.



Lot Tan

Owner Flechet says insurance payments could have helped Taste of Belgium return to "business as usual" more quickly.

"That email is kind of a smoking gun," Flechet said. "I just hope that they don't close the doors to any filing from businesses because this is the very reason why we take insurance. We pay a lot of money for insurance to be covered for things like that."

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Flechet is pursuing a class-action lawsuit alleging companies were improperly denied business-interruption coverage. Cincinnati Financial has defended itself

against Flechet's claim – and hundreds of others – by repeating what it has told customers, investors and courts all over the country for more than 21 months.

“Virtually all of our commercial property policies do not provide coverage for business interruption claims unless there is direct physical damage or loss to property,” said the company's quarterly financial statement on April 27, 2020. “Because a virus does not produce direct physical damage or loss to property, no coverage exists for this peril.”

An attorney for Primavista restaurant in Price Hill asked Ohio's highest court to consider the email “an admission” by Cincinnati Financial that “coverage is triggered” by the presence of a person with Coronavirus on a covered property.

Attorney Matt Metzger found the email when it was filed as part of a federal lawsuit in Missouri last November. Cincinnati Financial won that case, but Metzger asked the Ohio Supreme Court to consider the email because it directly answers a question that a federal judge asked the court to decide in January 2021: “Does the presence on a premises of a person infected with COVID-19 constitute direct physical loss or damage to property at that premises?”

The March 10, 2020 email is part of a chain in which company officials discussed how its policy language should be interpreted, even as government emergency orders were causing non-essential businesses to close. In the email, former Cincinnati Financial Product Manager Tim Schmittou described a conversation he had with Tore Swanson, a property claims manager for the company.

“Once someone who is a carrier is on our premises, then I think, and Tore agreed, that constitutes some type of property damage,” Schmittou wrote to his boss, Cincinnati Financial Vice President Thomas Huberty. “Tore thought we would pay for cleanup/disinfectant costs.”

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Subject: RE: Coronavirus Insurance - Legal Alert

Just waded through thisIMO our statement "In the absence of any direct damage" supports our stance there is no property coverage. Once someone who is a carrier is on our premises, then I think, and Tore agreed, that constitutes some type of property damage and Tore thought we would at least pay for clean-up/disinfectant costs (e.g. a student is diagnosed with the disease and we pay to disinfect dorm room). It gets a little dicey if we had to disinfect every classroom the college student attended.

Glad we added that our dependent property forms only provide cover in coverage territory.

Thank you,

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Mettzger argued Schmittou and Swanson were not "low-level Cincinnati employees speculating about coverage. Rather, they are among the most qualified people at Cincinnati to speak on this issue."

Cincinnati Financial didn't refute that argument. It merely objected to the introduction of new evidence on procedural grounds. The court sided with the insurer without explanation. Cincinnati Financial declined to comment on the email or the court's decision not to consider it.

"They realize that if we let the dominos fall, it's going to be a lot of dominos all over the country," Flechet said. "And that is a massive exposure for Cincinnati Financial."

[As the WCPO 9 I-Team has previously reported](#), Cincinnati Financial could lose billions of dollars if courts started ruling against the industry's position that COVID-19 does not cause property damage. That's because it has "hundreds of thousands of business interruption policies outstanding and they lack the viral exclusion that is standard for this" kind of coverage, said Paul Newsome, senior research analyst for Minneapolis, Minn. -based Piper Sandler Cos.

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Still, insurers have won more than 90% of the 808 court decisions in 2,122 business-interruption cases filed since March 2020, according to the COVID Litigation Tracker, created by Penn Law Professor Tom Baker. But most of the insurance industry's wins have come on motions to dismiss and summary

judgment orders that were issued before plaintiff attorneys were able to obtain evidence that contradict the industry's prevailing arguments.

"Cincinnati and other insurance companies have worked very hard to keep these kinds of internal discussions and communications from getting out into the public," said Gagan Gupta, a North Carolina attorney who won a judgment against the company that's now on appeal. "I can only imagine that there is a treasure trove of this kind of information out there."

Not surprisingly, Gupta said the Ohio Supreme Court should have allowed the email to be considered at today's hearing.

"All the policyholder needs to show is that the coverage language 'physical loss' or 'physical damage' is ambiguous," Gupta said. "So, if Cincinnati internally cannot even sort out whether there should be coverage, then certainly this language is ambiguous, and the court should grant coverage to policyholders."

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