

Cinemark's Virus Losses Aren't Covered, Texas Judge Says

By Riley Murdock

Law360 (March 21, 2023, 8:43 PM EDT) -- A Texas federal judge sided with Factory Mutual Insurance Co. on Tuesday in its COVID-19 coverage dispute with Cinemark, finding the movie theater chain can't show any "physical loss or damage" to its property caused by the virus.



A federal Texas judge found that Cinemark did not show the required physical loss or damage to its property in its COVID-19 coverage suit against its insurer. (Photo by Scott Olson/Getty Images)

U.S. District Judge Amos L. Mazzant granted Factory Mutual's dueling motion for summary judgment and permanently tossed Cinemark's claims against the insurer in his **Tuesday order**, ending the company's bid to recover pandemic-related losses by tapping into up to \$1 billion in property damage and business interruption coverage between two so-called all-risk policies. In a previous filing, Cinemark referred to the suit as a "\$400+ million dispute."

All nine provisions Cinemark sought coverage under required "physical loss or damage" to property, something Judge Mazzant held that COVID-19 can't do as a matter of law. He cited the Fifth Circuit's **January 2022 ruling** in [Terry Black's Barbecue LLC v. State Auto Mutual Insurance Co.](#), which applied Texas law to find that physical loss language requires a tangible alteration of property to trigger coverage.

"The parties agree that the key issue for determining coverage is whether Cinemark can carry its burden of establishing that it suffered 'physical loss or damage' to its properties within the meaning of the

policies," Judge Mazzant wrote. "The court concludes that it cannot."

Despite facing what Judge Mazzant called an "overwhelming body" of case law, Cinemark argued that its suit is unique because communicable diseases like COVID-19 can cause physical loss or damage under its policy. The company also claimed that it had entered "undisputed scientific" evidence showing that the virus transformed the surfaces and air within its properties.

But the Fifth Circuit had already explicitly rejected arguments that the presence of the virus itself can tangibly alter property, Judge Mazzant said, citing *Ferrer & Poirot GP et al. v. Cincinnati Insurance Co.* In that case, **the panel found** the virus hadn't physically altered a law firm's offices nor had the firm been deprived of its property while its employees worked remotely.

"There is nothing unique or ambiguous about the policies that prevents the court from interpreting them as a matter of law," Judge Mazzant wrote.

Cinemark argued that mitigation efforts like installing plexiglass shields were "repairs" made to fix physical loss and damage caused by the virus, but Judge Mazzant found those measures were intended to protect people, not "replace or remedy damaged property." Unlike threats like asbestos or mold, COVID-19 does not cause any long-term change to the condition of physical property, Judge Mazzant said.

"Simply put, the harm claimed by Cinemark does not meet the definition of 'physical loss or damage' required under the policies because COVID-19 does not tangibly alter, harm, or deprive Cinemark of its property," Judge Mazzant wrote, adding that "underlying these cases is the understanding that, although COVID-19 poses a risk to individuals, it is ultimately a transitory virus that poses no long-term risk to inanimate property."

Judge Mazzant previously refused to toss Cinemark's suit in May 2021, citing the company's then-novel argument that the virus had physically altered the air in its theaters. Cinemark pointed to that ruling to argue the court had acknowledged a virus can physically damage property, according to the order. However, the ruling was issued more than a year before the Terry Black's Barbecue decision and the Fifth Circuit had since rejected that exact argument in *Ferrer & Poirot*, Judge Mazzant said.

Cinemark closed its theaters March 2020 in response to the COVID-19 pandemic, then started reopening them in June 2020 using mitigation measures like air purifiers and social distancing requirements, according to filings in the case.

After submitting its initial claim, Cinemark received roughly \$1 million in coverage payments from Factory Mutual under a pair of communicable disease coverage provisions that didn't require "physical loss or damage," according to the order. However, the companies were unable to reach an agreement on coverage under nine other provisions that did include that requirement. The company's policies each had a per-occurrence limit of up to \$500 million in coverage for property damage and business interruption, with lower sublimits for additional coverages like the communicable disease provisions, filings show.

Cinemark sued Factory Mutual in November 2020 in Texas state court, according to case filings. The company's most recent amended complaint, filed in June in federal court, seeks a declaratory judgment and alleges breach of contract, bad faith and Texas Insurance Code violations.

FM moved for summary judgment in October, arguing that Cinemark hasn't shown a physical loss or damage to its property that would trigger coverage and that its claims otherwise fall under two policy exclusions. In its dueling motion for partial summary judgment, Cinemark argued that the presence of the virus caused physical damage to its properties, according to filings in the case.

Federal district courts around the country have permanently tossed about 52% of the 1,442 suits from policyholders against their insurance companies seeking pandemic loss-related coverage, according to **Law360's COVID-19 Insurance Case Tracker**. Another 20% of the pandemic insurance suits filed in federal courts have been voluntarily dismissed, the tracker shows, though about 25% have yet to be fully decided.

Representatives of the parties did not immediately respond to requests for comment.

Cinemark is represented by Melissa R. Smith of Gillam & Smith LLP and Michael S. Levine, Christopher J. Cunio, Geoffrey B. Fehling, Nicholas D. Stellakis, Rachel E. Hudgins, Kevin V. Small, Joseph T. Niczky and Casey L. Coffey of Hunton Andrews Kurth LLP.

Factory Mutual is represented by James V. Chin, Shannon M. O'Malley and Lindsey A. Davis of Zelle LLP, Emileigh S. Hubbard of Henry Oddo Austin & Fletcher PC and Eric W. Pinker of Lynn Pinker Hurst & Schwegmann LLP.

The case is Cinemark Holdings Inc. v. Factory Mutual Insurance Co., case number 4:21-cv-00011, in the U.S. District Court for the Eastern District of Texas.

--Additional reporting by Ben Zigterman, Ganesh Setty and Lauren Berg. Editing by Emma Brauer.

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