Neuro Offers More Than It Holds Some Key Takeaways For Coverage Lawyers

Karl Bekeny, Esq.
Tucker Ellis LLP

Ethan Weber, Esq.
Tucker Ellis LLP

This was originally published in the *Cleveland Metropolitan Bar Journal*.

Karl Bekeny, Esq.

Ethan Weber, Esq.

By now, coverage lawyers across the country know that the Ohio Supreme Court confirmed what the Sixth Circuit and lower federal courts have predicted for months: under Ohio law, "direct physical loss or damage to property" does not include loss of "use" due to COVID-19. *Neuro-Communication Servs., Inc. v. Cincinnati Ins. Co.*, ___ Ohio St. 3d ____, ___ N.E.3d ___, 2022-Ohio-4379, ¶ 25.

The opinion likely does not come as a surprise to many. And although technically a 6-1 decision, the dissent only thought the Court should have declined to take the certified question because "well-established" Ohio law on "basic contract interpretation" resolved the issue. *Neuro*, 2022-Ohio-4379, ¶¶ 31–32 (Donnelly, J., dissenting).

But a closer look reveals that the Opinion provides more than just its holding.

I. How We Got *Neuro*

A brief history sets the stage for why the Court might have decided to take this question in the first place. The legal landscape of these once-novel Covid-19 coverage claims changed drastically between when Cincinnati Ins. Co" (hereafter Cincinnati) asked to certify a question and when the Ohio Supreme Court accepted it.

In January 2021, the District Court asked the Ohio Supreme Court:

> Does the general presence in the community, or on surfaces at a premises, of the novel coronavirus known as SARS-CoV-2, constitute direct physical loss or damage to property; or does the presence on a premises of a person infected with COVID-19 constitute direct physical loss or damage to property at that premises?

Neuro-Communication Servs., Inc. v. Cincinnati Ins. Co., No. 4:20-cv-1275, 2021 WL 274318, at *1 (N.D. Ohio Jan. 19, 2021). But the Ohio Supreme Court did not accept the certified question until April 14, 2021. *See Neuro-Communication Servs., Inc. v. Cincinnati Ins. Co.*, 162 Ohio St. 3d 1427, 166 N.E.3d 29 (Table), 2021-Ohio-1202 (accepting the certified question with Justices Donnelly, Stewart, and Brunner dissenting).

Between January and April 2021, however, much changed. In the Northern District alone, published cases interpreting Ohio law went both directions, with the trend heading toward no coverage. *Compare MIKMAR, Inc. v. Westfield Ins. Co.*, 520 F. Supp. 3d 933, 939–43 (N.D. Ohio) (Calabrese, J.) (discussing the competing case law, declining to certify a question to the Ohio Supreme Court, and dismissing for failure to state a claim) *and Santo's Italian Café LLC v. Acuity Ins. Co.*, 508 F. Supp. 3d 186,

CONTINUED

197–202 (N.D. Ohio 2020) (Barker, J.) (holding insured failed to plead a threshold claim of "direct physical loss of or damage to" the insured premises and dismissing the case), with *Henderson Road Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, 513 F. Supp. 3d 808, 824 (N.D. Ohio 2021 (Polster, J.) (reaching the opposite conclusion and granting in part plaintiff's cross-motion for summary judgment on the coverage issue), *rev'd In re Zurich Am. Ins. Co.*, 15 F.4th 398, 402 (6th Cir. 2021). By late spring, the tide had squarely turned in favor of no coverage for these types of claims. [1]

Even after the Ohio Supreme Court accepted the certified question, the Sixth Circuit, the Northern District, and Southern District continued to Erie guess—with near uniformity—that under Ohio law, the State's COVID-19-related shut-down orders did not "create a direct physical loss of property or direct physical damage to it." *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 402 (6th Cir. 2021); *e.g., Troy Stacy Enters. v. Cincinnati Ins. Co.*, 563 F. Supp. 3d 738, 748–49 (S.D. Ohio 2021) (McFarland, J.) (same); *Torre Rossa, LLC v. Liberty Mut. Ins. Co.*, No. 1:20-cv-1095, 2021 WL 4519585, at *5–6 (N.D. Ohio Sept. 30, 2021) (Oliver, J.) (same).

II. A Few Broader Points about *Neuro*

The first read through *Neuro* seems to merely confirm those Erie guesses. But a closer look highlights some tactical questions for coverage lawyers defending nationwide putative class actions and affirms a few bedrock principles for those of us who make arguments about interpreting policy language.

Procedural first. In the federal action, the plaintiffs sought to certify various nationwide classes. For example, Neuro wanted to represent a putative class of insureds with Cincinnati business income coverage that "suffered a suspension of their operations" because of *either* "COVID-19 or the Ohio Civil Authority Orders (or other civil authority order related to COVID-19)." Compl. at ¶ 43 (Doc. 1, PageID #13); *Neuro*, 2022-Ohio-4379 at ¶ 11. Cincinnati had not yet challenged those class allegations when it sought the certified question. But asking federal courts to certify nationwide classes based on particularized state law presents a high hurdle. *E.g., In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) ("If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action."); *see Pilgrim v. Universal Health Card, Inc.*, 660 F.3d 943, 948–49 (6th Cir. 2011) (confirming "[o]ther circuits have come to the same conclusion"). This procedural obstacle may have doomed Plaintiffs case separate from the coverage questions.

Also, the wording and nature of the certified question raises questions of its own. Namely, the "direct physical loss or damage to property" language in the certified question did not appear in the Cincinnati policy at issue, which Justice Brunner noted. *Neuro*, 2022-Ohio-4379 at ¶ 14. But that language was in the certified question the Ohio Supreme Court accepted. As a result, *Neuro* may be more advisory than it lets on.

Now substantive. First, the opinion confirmed "accidental physical loss or accidental physical damage" has a clear meaning under Ohio law, even though it may be undefined in a particular policy. Given that Ohio law requires interpreting an insurance contract "as a whole," when the "language is clear," that is the only step required to determine what the parties intended. *Neuro*, 2022-Ohio-4379 at ¶ 13 (citations omitted). It was clear on the Policy's face that "physical" modified "loss" or "damage," and therefore "the policy distinguishes between covered losses … that are physical and those that are nonphysical[.]" *Id.* at ¶ 18. The "accidental physical loss" language also transcends policies—from property to auto to homeowners—offering broad confirmation of what "physical loss" entails. *See id.* at ¶¶ 22–24 (distinguishing between various types of physical losses where there were hazardous flaws that made those premises "wholly uninhabitable" versus Neuro's property that was "unsafe only to the extent that they served as an indoor space" where COVID 19 "might be transmitted").

Second, a change in policy language or terms of other policies—even those issued by the same carrier—constitute parol evidence that cannot be used to *create* ambiguity where none exists. *Id.* at ¶ 20. Instead, ambiguity must appear on the document's face. *See id.* (quoting S*hifrin v. Forest City Ents., Inc.*, 64 Ohio St. 3d

Continued

635, 638 (1992)). This confirms that on the merits, these types of legal questions may be ripe for resolution at the motion to dismiss or judgment on the pleadings stage. The motion-to-dismiss strategy certainly worked in most of the COVID-19 coverage cases. *See Covid Coverage Legal Tracker, UNIV. OF PENN.* (Jan. 3, 2023, 9:40 AM), https://cclt.law.upenn.edu/. But in other contexts that strategy may pose a risk that a trial court would interpret the policy at issue *without* a record, which otherwise may help resolve claims at summary judgment.

And third, the totality of policy language, not just the disputed term, can provide clarity to an undefined—yet unambiguous—term. *See id.* at ¶¶ 19, 21. In Neuro, the Court looked to a different section of Cincinnati's policy that provided damages for a covered loss would be calculated by measuring from the date of loss through the "period of restoration," which ended when either "the property at the premises should be repaired, rebuilt, or replaced" or when business "resume[s] at a new location." *Id.* at ¶ 19 (cleaned up). With COVID-19, however, instead of requiring the property to be "rebuilt" or "replaced," all that had to happen was for Ohio to lift the Shutdown Orders. *Id.* (citing *Santo's Italian Café,* 15 F.4th at 403). Reading those sections together supported the conclusion that there was no "physical loss" or "physical damage" due to the virus. *See id*.

In sum, *Neuro* reiterates that despite the "singular challenges" faced by insureds during a "once-in-a-century pandemic[,]" a "hard reality about insurance" remains: "It is not a general safety net for all dangers." *Santo's Italian Café*, 15 F.4th at 407. And in Ohio—like elsewhere in the country—interpreting contracts requires looking first to the plain language and the document as a whole. *Neuro*, 2022-Ohio-4379, ¶ 13. When that language is clear, Neuro reminds that lower courts should go "no further" to determine intent. *Id.*

Endnote

1 See, e.g., Family Tacos, LLC v. Auto Owners Ins. Co., 520 F. Supp. 3d 909, 925 (N.D. Ohio 2021) (Calabrese, J.); Ceres Enters., LLC v. Travelers Ins. Co., 520 F. Supp. 3d 949, 965 (N.D. Ohio 2021) (Calabrese, J.); Equity Planning Corp. v. Westfield Ins. Co., 522 F. Supp. 3d 308. 328 (N.D. Ohio 2021) (Barker, J.); Dakota Girls, LLC v. Phila. Indem. Ins. Co., 524 F. Supp. 3d 762, 772 (S.D. Ohio 2021) (Morrison, J.); Bridal Expressions, LLC v. Owners Ins. Co., 528 F. Supp. 3d 775, 781 (N.D. Ohio 2021) (Oliver, J.); Dharamsi v. Nationwide Ins. Co., 540 F. Supp. 3d 749, 755–56 (S.D. Ohio 2021) (Morrison, J.).

The Sixth Circuit recently affirmed several cases on appeal, issuing decisions which were ostensibly held until the Ohio Supreme Court ruled on Neuro. See MIKMAR, No. 21-3230, 2022 WL 17832178 (6th Cir. Dec. 21, 2022) (affirming "direct physical loss of or damage to" does not include loss of use because of COVID-19); Family Tacos, No. 21-3224, 2022 WL 17830762 (6th Cir. Dec. 21, 2022) (same); Ceres Enters., No. 21-3232, 2022 WL 17830722 (6th Cir. Dec. 21, 2022) (same); Brunswick Panini's, LLC v. Zurich Am. Ins. Co., No. 21-3222, 2022 WL 17830725(6th Cir. Dec. 21, 2022) (same); Equity Planning Corp., No. 21-3229, 2022 WL 17832176 (6th Cir. Dec. 21, 2022) (same).

Karl Bekeny, Esq., Tucker Ellis Trial Department Chair, represents insurers in connection with a wide range of claims in both individual coverage litigation and as part of his nationwide class action practice. Karl is the co-author of Ohio Insurance Coverage, published annually by Thomson Reuters, and he is ranked in Chambers USA in the area of Insurance (Ohio). He can be reached at 216.696.2699 and by email at karl.bekeny@tuckerellis.com.

Ethan Weber, Esq., is an associate in Tucker Ellis LLP's Appellate and Legal Issues Group. Ethan represents clients in complex litigation and regularly defends insurers in individual and class litigation. He can be reached at 216.696.3629 and by email at ethan.weber@tuckerellis.com.

Visit the OACTA website for information on OACTA seminars and activities...

WWW.OACTA.org