Editor-in-Chief
**Jeffrey I. Ehrlich**
THE EHRLICH LAW FIRM

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2022

# Appellate Reports

## BAD-FAITH FAILURE TO SETTLE EXAMINED BASED ON CONTRACT LAW PRINCIPLE; ALSO, COVID BUSINESS INTERRUPTION COVERAGE

**Contracts; insurance bad faith; failure to settle; dispute over contents of release; breach of contract**

***CSAA Ins. Exh. v. Hodroj*** (2021) __ Cal.App.5th __ (Sixth Dist.)

Hodroj was injured while riding as a passenger in a vehicle involved in a single-car collision. The driver was insured by CSAA. Hodroj offered, through a letter from his attorney, to settle his claim against the driver if CSAA tendered its policy limits, provided a face page of the relevant policy, and provided a declaration confirming policy limits. The offer noted that CSAA could condition its acceptance on Hodroj signing a written release of all bodily injury claims against CSAA's insured. The offer was also conditioned on written acceptance within 21 days.

Before the offer expired, CSAA sent a written acceptance of the offer. It provided the requested declaration and policy information, and CSAA agreed to tender the check for the policy limits upon Hodroj signing a release, which CSAA attached. The next day Hodroj reneged on the settlement. He contended that the release that CSAA provided included terms that he had not agreed to, such as a release of his property-damage claims. Hodroj later filed a lawsuit against CSAA's insured.

In response, CSAA filed its own lawsuit against Hodroj for breach of contract, alleging that its acceptance of the settlement offer created a binding agreement to settle Hodroj's personal-injury claims against its insured. Hodroj cross-complained for declaratory relief confirming that there had been no binding contract.

The trial court granted summary judgment for CSAA. Affirmed.

"A well-established principle of contract law dictates the result here: when parties agree on the material terms of a contract with the intention to later reduce it to a formal writing, failure to complete the formal writing does not negate the existence of the initial contract." If the parties do not agree on the content of the formal writing (for example because one party wants to include something not agreed on in the first place, as Hodroj contends happened here), the proposed writing is not a counteroffer; rather, the initial agreement remains binding and a rejected writing is a nullity.

Here, the communications between Hodroj's counsel and CSAA "reflect a settlement which could be later memorialized in a formal writing. No reasonable trier of fact would find otherwise."

**Insurance; business-interruption coverage for COVID-19 pandemic-related losses**:

***Inns by the Sea v. Cal. Mut. Ins. Co***. (*"Inns"*) (2021) 71 Cal.App.5th 688 (Fourth Dist. Div. 1.)

Inns operates five lodging facilities in Northern California. Inns suffered business-interruption losses as a result of government orders issued in March 2020 restricting the movement of citizens and the operation of businesses. Inns made a business-interruption claim to its commercial-property insurer, Cal. Mutual, which denied the claim. Inns filed suit and the trial court sustained the insurer's demurrer without leave to amend. Affirmed.

Under the policy, coverage would require Inns to prove either that it suffered direct physical damage to its property, or direct physical loss of the property. The court concluded that Inns could not prevail on either theory.

With respect to physical damage, while Inns alleged that the virus causing COVID-19 was present on its premises, "it had not identified any direct physical damage to the property [caused by the virus] that caused it to suspend its operations." Rather, as another court put it, "[T]he property did not change. The world around it did. And for the property to be useable again, no repair or change can be made to the property – the world must change. Even if a cleaning crew Lysol-ed every inch of the restaurant, it could still not host indoor dining at full capacity. Put simply, Plaintiff seeks to recover from economic losses caused by something physical – not physical losses."

With respect to physical loss of property, the court rejected Inns's contention that "a policyholder can reasonably expect that a claim constitutes physical loss where the insured property cannot function as intended." The court found that this argument failed because it collapses coverage for "direct physical loss" into "loss of use" coverage. Rather, case law and the language of the Policy as a whole establish that the inability to use physical property to generate business income, standing on its own, does not amount to a "'suspension'... caused by direct physical loss of property within the ordinary and popular meaning of that phrase."

The court further found that the Policy's focus on repairing, rebuilding or replacing property or moving entirely to a new location is significant because it implies that the "loss" or "damage" that gives rise to Business Income coverage has a *physical* nature that can be *physically* fixed, or if incapable of being *physically* fixed because it is so heavily destroyed, requires a complete move to a new location. Put simply, "[t]hat the policy provides coverage until property 'should be repaired, rebuilt or replaced' or until business resumes elsewhere assumes physical alteration of the property, not mere loss of use."

*Jeffrey I. Ehrlich is the principal of the* Ehrlich Law Firm, *in Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of Advocate magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award.*