Session 302: Business Interruption Coverage Claims in a Covid-19 Era: Legal and Regulatory Updates

It has been over almost two years since the novel coronavirus (COVID-19) pandemic impacted the world’s community. As businesses large and small were closed for months and lost significant business income, insurance coverage litigation and regulatory responses arose quickly to address such losses. Our panelists will provide important updates on Covid-19 related business interruption insurance litigation and regulatory developments in the United States as well as in other international (Canada and UK) jurisdictions. As communities continue to be vaccinated and overall case numbers drop, the panelists will offer their different perspectives on the pandemic’s impact in the industry landscape.

Moderator:
Grace Pyun, Senior Associate, d’Arcambal Ousley & Cuyler Burk LLP

Speakers:
Bonnie Lee-Wolf, Associate Vice President, Nationwide Mutual Insurance Company
Cynthia Aoki, Partner, McLennan Ross LLP
Erika M. Lopes-McLeman, Senior Managing Associate, Dentons US LLP
Spencer Y. Kook, Managing Partner, Hinshaw Culbertson
SESSION NAME:

CLE 302: BUSINESS INTERRUPTION COVERAGE CLAIMS IN A COVID-19 ERA: LEGAL AND REGULATORY UPDATES
Speakers

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Moderator

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1. Business Interruption Coverage 101: Policy Language

2. Litigation Landscape in 2021

3. International Developments

4. Legislative & Regulatory Updates
BUSINESS INTERRUPTION 101:

POLICY LANGUAGE
Business Interruption Coverage

SECTION I – PROPERTY

A. Coverage
We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

Business Income/Business Interruption

“We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration".

“The suspension must be caused by direct physical loss of or damage to property at the described premises.”

“The loss or damage must be caused by or result from a Covered Cause of Loss.”

Extra Expense

"We will pay for necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property at the described premises."
Civil Authority Coverage

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss. The coverage for Business Income will begin 72 hours after the time of that action and will apply for a period of up to three consecutive weeks after coverage begins. The coverage for necessary Extra Expense will begin immediately after the time of that action and ends:

(1) 3 consecutive weeks after the time of that action; or
(2) When your Business Income coverage ends;

Whichever is later.

The definitions of Business Income and Extra Expense contained in the Business Income and Extra Expense Additional Coverages also apply to this Civil Authority Additional Coverage. The Civil Authority Additional Coverage is not subject to the Limits of Insurance of Section I – Property.
WHEREAS, this order is given because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss and damage; and

No. C19-09
Extending the Shelter-in-Place Order No. C19-05 Beyond May 3, 2020

20. The Health Officer has determined that this Order, and its prior Orders, were and are necessary because cases of COVID-19 have been confirmed throughout Sonoma County. COVID-19 is highly contagious and has a propensity to spread in various ways including, but not limited to, by attaching to surfaces or remaining in the air, resulting in physical damage and/or physical loss.

WHEREAS, there is reason to believe that COVID-19 is spread amongst the population by various means of exposure, including the propensity to spread person to person and the propensity to attach to surfaces for prolonged periods of time thereby creating a dangerous physical condition spreading from surface to person and causing increased infections to persons, and also creating property or business income loss and damage in certain circumstances; and

WHEREAS, this Executive Order is being issued because of the propensity of COVID-19 to spread from person to person causing widespread infection and loss of life, and also because COVID-19 is causing property damage and business income loss due to its proclivity to attach to surfaces for prolonged periods of time and thereby creating a dangerous physical condition; and

WHEREAS, as a governmental civil authority action, it is necessary to impose the regulations and restrictions set forth herein in response to the dangerous physical conditions that currently exists and to stop the COVID-19 virus from spreading; and
Virus Exclusions

“The additional exclusion set forth below applies to all coverages. . . and endorsements that are provided by the policy to which this endorsement is attached, including but not limited to, those that provide coverage for property, earnings, extra expense, or interruption by civil authority.

**Virus or Bacteria** — ‘We’ do not pay for loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable disease, illness, or physical distress INCLUDING “any loss, cost, or expense as a result of any contamination by any virus, bacterium, or other microorganism; or any denial or access to property because of any virus, bacterium, or other microorganism.”
ISO Circular (7/6/2006)

Commercial Property: Exclusions of Loss due to Virus or Bacteria

Virus Exclusion Form

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease. However, this exclusion does not apply to loss or damage caused by or resulting from fungus. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.
Current Concerns

Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case. In addition, pollution exclusions are at times narrowly applied by certain courts. In recent years, ISO has filed exclusions to address specific exposures relating to contaminating or harmful substances. Examples are the mold exclusion in property and liability policies and the liability exclusion addressing silica dust. Such exclusions enable elaboration of the specific exposure and thereby can reduce the likelihood of claim disputes and litigation.

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.

In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.
SURVEY

COVID-19...

- CAUSES “DIRECT PHYSICAL LOSS”?
- CAUSES “DAMAGE TO PROPERTY?”

Emergency Stay at Home Orders...

- FALL UNDER CIVIL AUTHORITY COVERAGE?
LITIGATION LANDSCAPE IN 2021
LITIGATION LANDSCAPE: AT A GLANCE

• As of 9/14/2021: 2019 Total Cases Filed and appx. 538 decided on dispositive motions. 1 trial court has issued judgment.

• Approximately 40% of decided cases were appealed. 4 appellate decisions have been issued.

• Merits Rulings on Motions to Dismiss Stage:
  • State Court: 62.7% Full Dismissal with Prejudice; 27.1% Motion Denied
  • Federal Court: 85.3% Full Dismissal with Prejudice; 5.1% Motion Denied
2021: The stakes are higher as the cases grow larger...

- Robert Wood Johnson Fitness & Wellness Center et. al. v. Zurich American Insurance Co., ESX-L-002271-21, (Superior Court Essex County, March 25, 2021): RJW Barnabas Health System alleges $2.5 Billion in damages for property damage and losses associated with viruses and pandemic. Policy contains contamination exclusion, but virus was specifically removed from the exclusion.

- Caesar’s Entertainment v. ACE America Insurance Co. et al, A-21-831477-B (District Court Clark County) (Filed March 19, 2021): Files suit against 60 carriers seeking $2 billion in damages caused. Paid $25 million in premiums for $3.4 billion in coverage through variety of “all-risk policies”

## Policyholders vs. Insurers:
### Arguments & Issues

<table>
<thead>
<tr>
<th>Policyholder Arguments:</th>
<th>Insurer Arguments:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Covid-19 causes “direct physical loss” or physical damage to property</td>
<td>• Covid-19 does not physically alter or change property: the virus dies shortly after being cleaned and does not alter or change property.</td>
</tr>
<tr>
<td>• Government/Executive Stay at Home Orders caused direct physical loss</td>
<td>• Civil Authority Coverage language requires that action of civil authority prohibits access to the property and does not apply.</td>
</tr>
<tr>
<td>• Direct Physical Loss is caused by loss of functionality of property because the property has become unsafe and has potential to infect employees and customers</td>
<td>• Threat of loss of functionality and reliability is not sufficient to constitute direct physical loss.</td>
</tr>
</tbody>
</table>
Key Decisions

Pro-Insurer

• *Mama Jo's, Inc. v. Sparta Ins. Co.*, 823 F. App’x 868 (11th Cir., Aug. 18, 2020)


Pro-Policyholder


WHAT HAPPENS NEXT?
Pending Decisions

ON APPEAL:

• 13 State Courts Pending (CA, DC, FL, IL, IN, MA, MI, NJ, NY, OH, OK, PA, WI)
• All Federal Courts of Appeal: 4 Federal Court Opinions Issued (8th Circuit-Oral Surgeons, 11th Circuit-Gilreath and Mama Jo’s, 6th Cir.-Santo’s)

STAY TUNED...

• Mudpie Inc. v. Travelers Casualty Ins. Co., 4:20-cv-03213 (N.D. CA), 9th Circuit
• The Inns by the Sea v. California Mutual Insurance Co., 20-cv-01274 (Monterey Sup. Ct. Aug 4, 2020); 9th Circuit
• Neuro Communications Services Inc. v. Cincinnati Insurance Co., 4:20-cv-01275 (N.D. OH): Ohio Supreme Court
International Developments:

Canada/UK
Canada – Look at Policy Wording

- Coverage determination is fact – specific and policy-specific.
Canada – Sample Wording

This Form insures up to the amount shown on the “Coverage Summary”, against loss directly resulting from necessary interruption of business caused by all risks of direct physical loss, destruction or damage, except as hereinafter excluded, to “building(s)”, “equipment”, or “stock” on the “premises” shown on the “Coverage Summary”.

Canada – Physical Loss or Damage

- Often a requirement of physical loss or damage.
  - Potential for more expansive definition – *MDS v Factory Mutual Insurance*, 2020 ONSC 1924.
    - However, overturned in 2021 ONCA 594.
Canada – Class Actions

- Ongoing litigation – class action lawsuits.
  - Workman Class Action.
  - Nordik Class Action.
  - Denturists Class Action.
Canada: Workman Class Action

- Commenced on July 6, 2020 against 17 insurers.
- Certified on August 20, 2021.
- Expected to address “physical losses” language.
- Aviva claims carved out and class proceeding not certified against Lloyd’s Underwriters.
Canada – Defendants in Workman Class Action

- Co-operators General Insurance Company
- Wynward Holdings Ltd. doing business as Wynward Insurance Group
- Continental Casualty Company
- Certas Home & Auto Insurance Company
- Economical Mutual Insurance Company
- Federated Insurance Company of Canada
- Northbridge General Insurance Corporation
- The Wawanesa Mutual Insurance Company
- Gore Mutual Insurance Company
- Intact Insurance Company
- Novex Insurance Company
- The Dominion Company of Canada
- SGI Canada Insurance Services Ltd
- Royal & Sun Alliance Insurance Company of Canada
Canada – Nordik and Denturists Class Actions

- Claims against Aviva carved out based on policy wording in *Workman Optometry v Aviva Insurance*, 2021 ONSC 142.
- Two class actions against Aviva: Nordik Class Action and Denturists Class Action.
Canada – Risk for Insurers

There are two mechanisms by which insurers may be forced to provide coverage:

- Government intervention by socializing insurance for blanket coverage; or
- Broader interpretation of what constitutes “physical damage or loss” by the courts.
United Kingdom – Supreme Court

• Test case – *The Financial Conduct Authority v Arch and Others*, [2021] UKSC 1.

• Financial Conduct Authority regulates conduct of insurers and other insurance intermediaries.

• Against eight insurers to get interpretation of 21 different policy wordings.
United Kingdom: Defendants in Test Case

- Arch Insurance (UK) Ltd
- Argenta Syndicate Management Ltd
- Ecclesiastical Insurance Office Plc
- Hiscox Insurance Company Ltd
- MS Amlin Underwriting Ltd
- QBE UK Ltd
- Royal & Sun Alliance Insurance Plc
- Zurich Insurance Plc
United Kingdom – Findings in Test Case

• Generally against insurers.

• Topics addressed include disease clauses, denial of access clauses, hybrid clauses, trends clauses, and causation.

• However, notably did not address business interruption claims based on physical damage.
Sample of state legislation relating to coverage for business interruption due to virus/pandemic

1. Cal. AB 743 (rebuttable presumption) (Intro 2/16/21) (referred to Comm on Ins. 2/25/21)
   1. Cal. AB1552 (Published 6/29/20) (RB) (referred to Comm on Ins. 7/2/20)
2. Ill. HB 3166 (requiring BI coverage-prospective) (Intro 2/18/21 / Referred to Ruels Comm on 3/27/21)
   1. Ill. HB 3148 (same) (Intro 2/18/21 / Referred to Rules Comm 3/27/21)
4. NJ A3844 (requiring BI coverage and relief/reimbursement from state) (Intro 3/16/20)
5. NJ A4551/S3280 (authorizing insurers to offer riders to cover virus loss/pandemic coverage) (Intro 8/24/20)
6. NJ A4675/S3281 (creating Commission on Pandemic Insurance Coverage) (Intro 12/14/20)
7. NY A41 (directs DFS to study adequacy/affordability of BI coverage of pandemics) (Intro 1/6/21)
8. NY A498/S847 (requiring BI coverage-prospective and relief/reimbursement from state) (Intro 1/6/21)
9. NY A1937/S4711 (requiring BI coverage due to COVID 19 and relief/reimbursement from state) (Intro 1/13/21)
Regulatory Updates – State Regulatory Agencies

State Regulatory Orders, Bulletins and/or Notices:

• Suspending/Relaxing Premium Payment Requirements or Providing Grace Periods
• Waiving Late Fees and Penalties
• Imposing a temporary moratorium on Cancellations and Non-Renewals
• Relaxing reporting timeliness due to COVID-19
• Requiring Premium Reduction/Refund Orders
• *NEW* (Delayed) Approval of New Property Policies with Virus Exclusions
Legislative Updates - Federal

- The Business Interruption Relief Act of 2020
- The Business Interruption Insurance Coverage Act of 2020
- The Never Again Small Business Protection Act
- The Pandemic Risk Insurance Act
- H.R.114: Requires the Comptroller General to prepare a report on the feasibility of a national all-hazards disaster insurance program
- House Bills-referred to the House Committee on Financial Service.
ISO 2020: Optional Endorsements for BI Coverage

- In February 2020, ISO issued two advisory-only endorsements related to limited coverage for certain civil authority orders relating to Coronavirus. (No Form Number designation)
  - Limited business income or extra expense coverage for loss suffered if the insured's business is ordered closed or placed under quarantine by civil authority to avoid the spread of coronavirus.
  - Limited business income or extra expense coverage for loss suffered if a civil authority orders the closure or restricted usage of public bus, rail, or ferry lines or serving the area where the insured property is located in order to avoid the spread of coronavirus.
  - Would not cover costs of cleaning/disinfecting property, covid-testing, and loss attributable to loss of workers due to infection or suspected infection.
TAKEAWAYS AND FINAL THOUGHTS
Questions?
I. THE ISSUES

Does business interruption insurance cover losses due to COVID?

II. THE ANALYSIS

1. Canada

Most commercial property insurance policies contain coverage for losses resulting from business interruption. The purpose of this coverage is to indemnify an insured when their business sustains a physical loss affecting their ability to carry on business in a normal fashion.


Many of the sources refer to specific clauses discussing business interruptions and expenses caused by epidemics and pandemics, or standalone policies for pandemics. Angela and Mike’s presentation points to the 2003 SARS outbreak as being the catalyst behind the increase in such coverage; however, Tanner points out that a separate endorsement covering losses caused by the presence of an infectious disease were rare prior to the COVID pandemic, with the exception of some businesses and professions – for instance, he provides the example specifically of Canadian dentists, who often have business interruption insurance that includes coverage for epidemics and pandemics. He further notes that business interruption coverage determinations are very fact- and policy-specific.

Further, the sources also generally reference the requirement of physical loss, damage, or destruction for all-risks policies. For instance, Tanner’s article states:

Policy language can vary widely, but generally, the cause of any losses associated with business interruption must be the result of direct physical loss, damage, or destruction of property by a peril insured against.

[...]

Business Interruption Coverage Memorandum- 1
At first glance, the general policy requirement that business interruption losses be tied to physical damage will likely preclude many business interruption claims. The numerous knock-on effects caused by the COVID-19 pandemic, such as outbreaks at workplaces and government authorities ordering businesses to close, have clearly caused business interruptions. It is difficult, however, to argue that the losses suffered as a result of the pandemic can be brought under the definition of “direct physical loss”.

In the Alberta case of *Inland Concrete Limited v Commonwealth Insurance Company* (2011 ABQB 378), Germain J provided an often-used definition for “direct physical loss” at paragraph 79:

Direct physical loss indicates that a physical thing must be damaged before a claim can arise on this basis. Again, the PCL legal action, future purchase credit, and legal costs do not involve a physical loss, but rather a variety of non-physical things.

[...]

Many business owners suffered a loss of use of property due to the COVID-19 pandemic. The difficulty will be in arguing such interruption should be considered physical damage, the lack of which would preclude most claims. Further, some standard policies even contain exceptions for losses resulting from infectious diseases or contamination, denying such opportunity for policy interpretation.

In his Article, Tanner identifies two ways through which insurers may have to provide coverage. The first way is through government intervention by way of socializing insurance for blanket coverage. Tanner points out that there is American precedent for this following Hurricane Katrina. The second way is through a broader interpretation of what constitutes “direct physical loss” by the courts.

A recent decision in Ontario, *MDS v Factory Mutual Insurance* (2020 ONSC 1924 [*MDS SC*], 2021 ONCA 594 [*MDS CA*]), attracted a lot of attention over its interpretation of “physical damage.” In *MDS SC*, Wilson J allowed for coverage in the absence of what was traditionally considered “physical damage.” Justice Wilson placed heavy emphasis on the purpose of all-risks property insurance, which is to provide broad coverage, and allowed a looser interpretation of “physical damage” based on the facts of the case and the policy that was agreed upon. However, just over a week ago, the Court in *MDS CA* unanimously overturned the decision in *MDS SC*, denying coverage. It is important to note that *MDS SC* and *MDS CA*, while decided in the midst of COVID, do not specifically addresses whether business interruption insurance should cover losses due to COVID despite the lack of clear “physical damage.” Nonetheless, while *MDS SC* was touted by some as opening the door to a broader interpretation of “physical damage,” it appears that *MDS CA* has closed that door.
The issue of “physical damage” in the COVID context is likely to arise in the Workman Optometry v Aviva Insurance class action lawsuit. This lawsuit has progressed as follows.

On July 6, 2020, the class action was commenced by Notice of Action.

On January 26, 2021, a separate lawsuit against Aviva was carved out of Workman based on different policy wording in Belobaba J’s carriage decision in Workman Optometry v Aviva Insurance (2021 ONSC 142).

The law firms of Thomson Rogers, Lax O’Sullivan Lisus Gottlieb, and Miller Thomson have taken on part of this “carved-out” claim, and the representative plaintiff is Nordik Windows Inc (the “Nordik Class Action”).

In a separate class action, Lerners is representing denturists and legion branches (the “Denturists Class Action”).

The Nordik Class Action and the Denturists Class Action are both against Aviva.

The other lawsuit is against 15 defendant insurers other than Aviva, and the law firms representing the class are Koskie Minsky and Merchant Law Group (the “Workman Class Action”).

Meanwhile, McCarthy Tétrault filed 17 individual statements of claim against four insurers who are also defendants in the Workman Class Action (the “McCarthy Actions”). On May 27, 2021 in Workman Optometry v Aviva Insurance1 (2021 ONSC 3843), Belobaba J dismissed a joint action brought by four insurers to stay the McCarthy Actions pending the decision on certification of the Workman Class Action. Justice Belobaba declined to do so, noting that the defendant insurers have not clear the “no injustice or prejudice” hurdle, while granting a stay would be significantly unfair to the individual litigants who have chosen not to participate in the class action.

On August 20, 2021, Belobaba J partially certified the Workman Class Action. The class proceeding was not certified against Lloyd’s Underwriters. The issue that will be front and centre is how “physical loss or damage” language in business interruption insurance policies should be interpreted.

Therefore, while the general consensus among our insurance lawyers here is that there is no “physical loss or damage” giving rise to a business interruption claim, that could change pending the decisions in the Nordik Class Action, the Denturists Class Action, and the Workman Class Action. In particular, given the breadth of the claim, the Workman Class Action is likely to be reflective of how “physical loss or damage” will be interpreted in “typical” business interruption insurance policies.

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1 I am not sure why they didn’t change the style of cause. While it might help link the cases, it is confusing that Aviva remains when it has been carved out.
2. **United Kingdom**

Unlike in Canada, the ambiguity of business interruption insurance in the context of COVID has been decided by the country’s highest court.

In the test case of *The Financial Conduct Authority v Arch and Others* ([2021] UKSC 1 [*FCA*]), the Financial Conduct Authority took eight insurers to court to get an interpretation of more than 21 different policy wordings. The Financial Conduct Authority regulates the conduct of insurers and other insurance intermediaries in the United Kingdom.

On January 15, 2021, the Supreme Court of the United Kingdom released a decision that found largely against the insurers. On disease clauses, Lord Hamblen and Lord Leggatt found that each case of COVID is a separate occurrence and that disease clauses only cover cases within a certain radius. Regarding denial of access clauses, the Court found that while a mere hindrance would be insufficient, instruction given by a public authority could amount to an imposed restriction if it carries the imminent threat of legal compulsion or is an instruction in mandatory and sufficiently clear terms. Regarding causation, the Court found that all individual cases of COVID that occurred by the date that the government implemented measures were equally effective proximate causes of loss, and therefore policyholders needed to establish only that there was at least one case of COVID within the relevant geographical area set out in the policy.

Other topic covered by the Supreme Court of the United Kingdom include hybrid clauses (a combination of disease clauses and denial of access clauses), trends clauses, and the case of *Orient-Express Hotels Ltd v Assicurazioni General SpA* ([2010] EWHC 1186 (Comm)).

However, the Financial Conduct Authority notably decided not to raise, and the Supreme Court of the United Kingdom declined to address, business interruption claims based on physical damage to insured property. On this basis, insurers in the United Kingdom are taking the position that business interruption policies that do not have clauses similar to the 21 clauses dealt with in *FCA* only provide coverage if there is physical damage, which most policyholders will not be able to demonstrate.
NEW ENDORSEMENTS FILED TO ADDRESS EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This circular announces the submission of forms filings to address exclusion of loss due to disease-causing agents such as viruses and bacteria.

BACKGROUND

Commercial Property policies currently contain a pollution exclusion that encompasses contamination (in fact, uses the term contaminant in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.

ISO ACTION

We have submitted forms filing CF-2006-OVBEF in all ISO jurisdictions and recommended the filing to the independent bureaus in other jurisdictions. This filing introduces new endorsement CP 01 40 07 06 - Exclusion Of Loss Due To Virus Or Bacteria, which states that there is no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

Note: In Alaska, District of Columbia, Louisiana*, New York and Puerto Rico, we have submitted a different version of this filing, containing new endorsement CP 01 75 07 06 in place of CP 01 40. The difference relates to lack of implementation of the mold exclusion that was implemented in other jurisdictions under a previous multistate filing.

Both versions of CF-2006-OVBEF are attached to this circular.

* In Louisiana, the filing was submitted as a recommendation to the Property Insurance Association of Louisiana (PIAL), the independent bureau with jurisdiction for submission of property filings.

PROPOSED EFFECTIVE DATE

Filing CF-2006-OVBEF was submitted with a proposed effective date of January 1, 2007, in accordance with the applicable effective date rule of application in each state, with the exception of various states for which the insurer establishes its own effective date.

Upon approval, we will announce the actual effective date and state-specific rule of effective date application for each state.
RATING SOFTWARE IMPACT

New attributes being introduced with this revision:

• A new form is being introduced.

CAUTION

This filing has not yet been approved. If you print your own forms, do not go beyond the proof stage until we announce approval in a subsequent circular.

RELATED RULES REVISION

We are announcing in a separate circular the filing of a corresponding rules revision. Please refer to the Reference(s) block for identification of that circular.

REFERENCE(S)

LI-CF-2006-176 (7/6/06) - New Additional Rule Filed To Address Exclusion Of Loss Due To Virus Or Bacteria

ATTACHMENT(S)

• Multistate Forms Filing CF-2006-OVBEF
• State-specific version of Forms Filing CF-2006-OVBEF (Alaska, District of Columbia, Louisiana, New York, Puerto Rico)

We are sending these attachments only to recipients who asked to be put on the mailing list for attachments. If you need the attachments for this circular, contact your company’s circular coordinator.

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Amendatory Endorsement - Exclusion Of Loss Due To Virus Or Bacteria

About This Filing

This filing addresses exclusion of loss due to disease-causing agents such as viruses and bacteria.

New Form

We are introducing:

♦ Endorsement CP 01 40 07 06 - Exclusion Of Loss Due To Virus Or Bacteria

Related Filing(s)

Rules Filing CF-2006- OVBER

Introduction

The current pollution exclusion in property policies encompasses contamination (in fact, uses the term contaminant in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.

An example of bacterial contamination of a product is the growth of listeria bacteria in milk. In this example, bacteria develop and multiply due in part to inherent qualities in the property itself. Some other examples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella and anthrax. The universe of disease-causing organisms is always in evolution.

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses.
Current Concerns

Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case. In addition, pollution exclusions are at times narrowly applied by certain courts. In recent years, ISO has filed exclusions to address specific exposures relating to contaminating or harmful substances. Examples are the mold exclusion in property and liability policies and the liability exclusion addressing silica dust. Such exclusions enable elaboration of the specific exposure and thereby can reduce the likelihood of claim disputes and litigation.

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.

In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.

Features Of New Amendatory Endorsement

The amendatory endorsement presented in this filing states that there is no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease. The exclusion (which is set forth in Paragraph B of the endorsement) applies to property damage, time element and all other coverages; introductory Paragraph A prominently makes that point. Paragraphs C and D serve to avoid overlap with other exclusions, and Paragraph E emphasizes that other policy exclusions may still apply.

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EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.

However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.

C. With respect to any loss or damage subject to the exclusion in Paragraph B., such exclusion supersedes any exclusion relating to "pollutants".

D. The following provisions in this Coverage Part or Policy are hereby amended to remove reference to bacteria:

1. Exclusion of "Fungus", Wet Rot, Dry Rot And Bacteria; and

2. Additional Coverage - Limited Coverage for "Fungus", Wet Rot, Dry Rot And Bacteria, including any endorsement increasing the scope or amount of coverage.

E. The terms of the exclusion in Paragraph B., or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.
Amendatory Endorsement -
Exclusion Of Loss Due To Virus Or
Bacteria

About This Filing

This filing addresses exclusion of loss due to disease-causing agents such as viruses and bacteria.

New Form

We are introducing:

♦ Endorsement CP 01 75 07 06 - Exclusion Of Loss Due To Virus Or Bacteria

Related Filing(s)

Rules Filing CF-2006-OVBER

Introduction

The current pollution exclusion in property policies encompasses contamination (in fact, uses the term contaminant in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.

An example of bacterial contamination of a product is the growth of listeria bacteria in milk. In this example, bacteria develop and multiply due in part to inherent qualities in the property itself. Some other examples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella and anthrax. The universe of disease-causing organisms is always in evolution.

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement
of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses.

Current Concerns

Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case. In addition, pollution exclusions are at times narrowly applied by certain courts. In recent years, ISO has filed exclusions to address specific exposures relating to contaminating or harmful substances. Examples are the mold exclusion in property and liability policies and the liability exclusion addressing silica dust. Such exclusions enable elaboration of the specific exposure and thereby can reduce the likelihood of claim disputes and litigation.

While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.

In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.

Features Of New Amendatory Endorsement

The amendatory endorsement presented in this filing states that there is no coverage for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease. The exclusion (which is set forth in Paragraph B of the endorsement) applies to property damage, time element and all other coverages; introductory Paragraph A prominently makes that point. Paragraph C serves to avoid overlap with another exclusion, and Paragraph D emphasizes that other policy exclusions may still apply.

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EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease. However, this exclusion does not apply to loss or damage caused by or resulting from fungus. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy.

C. With respect to any loss or damage subject to the exclusion in Paragraph B., such exclusion supersedes any exclusion relating to "pollutants".

D. The terms of the exclusion in Paragraph B., or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy.
Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus

The Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus endorsement is one of two commercial property policy endorsements that were made available by Insurance Services Office, Inc. (ISO), to its insurance company customers on an advisory-only basis in February 2020. It has a 2020 ISO copyright notice but no form number designation.

In a standard all risks commercial property policy, the special causes of loss form (CP 10 30) specifically excludes loss due to fungus, wet rot, dry rot, and bacteria—but not virus. However, in nearly all jurisdictions, ISO Commercial Lines Manual (CLM) rules make mandatory the attachment of the Exclusion of Loss Due to Virus or Bacteria (CP 01 40) endorsement. This endorsement excludes loss or damage resulting from "any virus, bacterium, or other micro-organism that induces or is capable of inducing physical distress, illness, or disease." It also deletes the references to bacteria in two provisions found in the causes of loss forms: the Group 1 exclusion of fungus, wet or dry rot, and bacteria; and the additional coverage for fungus, wet or dry rot, and bacteria. This has the effect of eliminating the limited coverage that would otherwise apply under the fungus additional coverage for loss or damage resulting from bacteria.

This endorsement is designed to be attached to a commercial property policy that includes the Business Income (and Extra Expense) Coverage Form (CP 00 30), Business Income (without Extra Expense) Coverage Form (CP 00 32), or Extra Expense Coverage Form (CP 00 50). It adds limited business income or extra expense coverage for loss suffered if the insured's business is ordered closed or the described premises are placed under quarantine by a civil authority, in an attempt to avoid, or limit the spread of, infection by a coronavirus.

If the policy includes the Off-Premises Interruption of Business—Vehicles and Mobile Equipment (CP 15 06) endorsement, references in the endorsement to the described premises include these vehicles and items of mobile equipment, so that coverage applies to loss suffered if they are placed under quarantine. Also, if the policy includes coverage for business income or extra expense coverage for loss suffered if the insured's business is ordered closed or the described premises are placed under quarantine by a civil authority, in an attempt to avoid, or limit the spread of, infection by a coronavirus.

Coverage applies with respect to the described premises shown in the endorsement schedule. It begins immediately on the suspension of the insured's operations due to the order of civil authority and applies for the amount of time shown (in days, weeks, or months) in the schedule as the coverage period, subject to the annual aggregate limit of insurance shown in the endorsement schedule. The annual aggregate limit of insurance is the most the insurer will pay for all covered loss and expense from occurrences in a 12-month annual policy period, regardless of the number of occurrences that take place.

No coverage applies to the following.

- Loss from any intentional introduction or spread of the virus
- Cost of cleanup or disinfection of premises or property due to contamination or suspected contamination
- Cost of replacing or disposing of any property that is contaminated or suspected of being contaminated
- Cost of disinfecting or disposing of any bodily fluids or waste materials
- Cost of testing or monitoring for the presence of a coronavirus
• Loss attributable solely to fear of contracting a coronavirus, such as when customers avoid a portion of the premises not under quarantine
• Loss attributable to absence of workers due to infection or suspected infection, except when due to a suspension of operations covered under this endorsement
• Fines or penalties imposed on the insured

There is another advisory-only commercial property endorsement that provides business income or extra expense coverage for loss from civil authority orders related to coronavirus. Its title is Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus (Including Orders Restricting Some Modes of Public Transportation).

View a copy of the Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus endorsement.

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BUSINESS INTERRUPTION: LIMITED COVERAGE FOR CERTAIN CIVIL AUTHORITY ORDERS RELATING TO CORONAVIRUS

This endorsement modifies insurance provided under the following:

BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM
BUSINESS INCOME (WITHOUT EXTRA EXPENSE) COVERAGE FORM
EXTRA EXPENSE COVERAGE FORM

SCHEDULE

<table>
<thead>
<tr>
<th>Described Premises</th>
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<tbody>
<tr>
<td>Coverage Period (Specify number of days, weeks or months)</td>
<td></td>
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<tr>
<td>Annual Aggregate Limit of Insurance $</td>
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</table>

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. The Business Income coverage provided under this endorsement applies only if your policy otherwise covers Business Income. The Extra Expense coverage provided under this endorsement applies only if your policy otherwise covers Extra Expense.

B. We will pay for the actual loss of Business Income you sustain and/or necessary Extra Expense you incur to the extent that such loss and expense are caused by order of a civil authority to close your business or to place all or part of the described premises under quarantine, in an effort to avoid infection by a Coronavirus or limit the spread of such infection, even if such order is undertaken based on suspicion of a risk of contagion.

C. If your business operates from a vehicle or mobile equipment identified in the Off-Premises Interruption Of Business - Vehicles And Mobile Equipment endorsement, then references to the described premises in Paragraph B. include such vehicles and mobile equipment.

D. If this policy includes coverage arising out of "dependent property", then the following applies but only with respect to "dependent property" that is named and described in this policy:

Coverage as described in Paragraph B. applies when a civil authority orders the closure of such "dependent property" or places all or part of such "dependent property" under quarantine in an effort to avoid or limit the spread of infection by a Coronavirus, with the result that you sustain a "suspension" of "operations" due to interruption in your normal business dealings with such "dependent property".
E. There is no coverage under this endorsement:

1. If the virus was introduced or spread by any person or on behalf of any person, group, organization or sovereign state when there is reason to believe that such action was intentional and designed to cause disease, damage, fear or anxiety;

2. For the cost of clean-up or disinfection of your premises or any of your property or the premises or property of others due to contamination or suspected contamination;

3. For the cost of replacing any of your property or the property of others that is contaminated or suspected of being contaminated;

4. For the cost of disposing of any of your property or the property of others that is contaminated or suspected of being contaminated;

5. For the cost of disinfecting or disposing of any bodily fluids or waste materials;

6. For the cost of testing for or monitoring the presence or absence of a Coronavirus;

7. For any loss or expense attributable solely to fear of contraction of a Coronavirus, for example, in the situation in which customers, tenants or vendors avoid a part of the described premises not under quarantine;

8. For any loss or expense attributable to absence of any worker(s), including managers, due to infection or suspected infection of that worker(s), except to the extent that there is a "suspension" of "operations" covered under the terms of this endorsement; or

9. For any fines or penalties levied against you by any organization or authority.

F. With respect to Paragraphs B. and C., coverage under this endorsement will begin immediately upon "suspension" of your "operations" due to the order of civil authority and will apply for up to the amount of time shown in the Schedule, while such order is in force.

With respect to Paragraph D., coverage under this endorsement will begin immediately upon "suspension" of your "operations" due to interruption in your normal business dealings with the "dependent property" and will apply for up to the amount of time shown in the Schedule, while the order of civil authority is in force at the premises of the "dependent property".

G. The Limit of Insurance shown in the Schedule is an annual aggregate limit and as such is the most we will pay for all covered loss and expense caused by all occurrences in a 12-month period (starting with the beginning of the present annual policy period), regardless of the number of occurrences during that period of time. Thus, if the first occurrence does not exhaust the Limit of Insurance, then the balance of that Limit is available for a subsequent occurrence. If an occurrence begins during one annual policy period and ends during the following annual policy period, any Limit applicable to the following annual policy period will not apply to that occurrence.

The Limit of Insurance shown in the Schedule applies in total to all coverage provided under this endorsement and therefore does not apply separately to the coverage or situations described under Paragraphs B., C. and D.

H. Additional Coverages, Coverage Extensions and Optional Coverages in this policy do not apply to the coverage provided under this endorsement.

If this policy is endorsed to revise the Coverage Period of the Civil Authority Additional Coverage, such change does not apply to this endorsement.

I. This endorsement does not serve to remove, modify or invalidate any exclusion under this policy, such as a virus, bacteria or pollution exclusion. However, the aforementioned exclusions do not apply to the coverage provided under this endorsement.
Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus (Including Orders Restricting Some Modes of Public Transportation)

The Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus (Including Orders Restricting Some Modes of Public Transportation) endorsement is one of two commercial property policy endorsements that were made available by Insurance Services Office, Inc. (ISO), to its insurance company customers on an advisory-only basis in February 2020. It has a 2020 ISO copyright notice but no form number designation.

In a standard all risks commercial property policy, the special causes of loss form (CP 10 30) specifically excludes loss due to fungus, wet rot, dry rot, and bacteria—but not virus. However, in nearly all jurisdictions, ISO Commercial Lines Manual (CLM) rules make mandatory the attachment of the Exclusion of Loss Due to Virus or Bacteria (CP 01 40) endorsement. This endorsement excludes loss or damage resulting from "any virus, bacterium, or other micro-organism that induces or is capable of inducing physical distress, illness, or disease." It also deletes the references to bacteria in two provisions found in the causes of loss forms: the Group 1 exclusion of fungus, wet or dry rot, and bacteria; and the additional coverage for fungus, wet or dry rot, and bacteria. This has the effect of eliminating the limited coverage that would otherwise apply under the fungus additional coverage for loss or damage resulting from bacteria.

This endorsement is designed to be attached to a commercial property policy that includes the business income and extra expense coverage form (CP 00 30), the business income coverage form without extra expense (CP 00 32), or the extra expense coverage form (CP 00 50). It adds limited business income or extra expense coverage for loss suffered if

- the insured's business is ordered closed or the described premises are placed under quarantine by a civil authority, in an attempt to avoid, or limit the spread of, infection by a coronavirus, or
- a civil authority orders the closure or restricted usage of public bus, rail, or ferry lines or related stations or terminals serving the area where the described premises are located, in an attempt to avoid, or limit the spread of, infection by a coronavirus.

If the policy includes the Off-Premises Interruption of Business—Vehicles and Mobile Equipment (CP 15 06) endorsement, references in the endorsement to the described premises include these vehicles and items of mobile equipment, so that coverage applies to loss suffered if they are placed under quarantine. Also, if the policy includes coverage for business income or extra expense loss arising out of dependent property (available under several endorsements), coverage is extended to apply to loss suffered if a civil authority orders the dependent property closed or places it under quarantine, to avoid or limit the spread of infection.

Coverage applies with respect to the described premises shown in the endorsement schedule. It begins immediately on the suspension of the insured's operations due to the order of civil authority and applies for the amount of time shown (in days, weeks, or months) in the schedule as the coverage period, subject to the annual aggregate limit of insurance shown in the endorsement schedule. The annual aggregate limit of insurance is the most the insurer will pay for all covered loss and expense from occurrences in a 12-month annual policy period, regardless of the number of occurrences that take place.

No coverage applies to the following:

- Loss from any intentional introduction or spread of the virus
• Cost of cleanup or disinfection of premises or property due to contamination or suspected contamination
• Cost of replacing or disposing of any property that is contaminated or suspected of being contaminated
• Cost of disinfecting or disposing of any bodily fluids or waste materials
• Cost of testing or monitoring for the presence of a coronavirus
• Loss attributable solely to fear of contracting a coronavirus, such as when customers avoid a portion of the premises not under quarantine
• Loss attributable to absence of workers due to infection or suspected infection, except when due to a suspension of operations covered under this endorsement
• Fines or penalties imposed on the insured

There is another advisory-only commercial property endorsement that provides business income or extra expense coverage for loss from civil authority orders related to coronavirus. Its title is Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus.

View a copy of the Business Interruption: Limited Coverage for Certain Civil Authority Orders Relating to Coronavirus (Including Orders Restricting Some Modes of Public Transportation) endorsement.

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BUSINESS INTERRUPTION:
LIMITED COVERAGE FOR CERTAIN CIVIL AUTHORITY
ORDERS RELATING TO CORONAVIRUS
(INCLUDING ORDERS RESTRICTING SOME MODES OF
PUBLIC TRANSPORTATION)

This endorsement modifies insurance provided under the following:

BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM
BUSINESS INCOME (WITHOUT EXTRA EXPENSE) COVERAGE FORM
EXTRA EXPENSE COVERAGE FORM

SCHEDULE

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Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. The Business Income coverage provided under this endorsement applies only if your policy otherwise covers Business Income. The Extra Expense coverage provided under this endorsement applies only if your policy otherwise covers Extra Expense.

B. We will pay for the actual loss of Business Income you sustain and/or necessary Extra Expense you incur to the extent that such loss and expense are caused by order of a civil authority as set forth in B.1. or B.2., when such action is taken in an effort to avoid infection by a Coronavirus or limit the spread of such infection, even if such order is undertaken based on suspicion of a risk of contagion:

1. The civil authority orders the closure of your business or places all or part of the described premises under quarantine; or

2. The civil authority orders the closure or restricted usage of public bus, rail or ferry lines or related stations or terminals serving the area where the described premises are located.

C. If your business operates from a vehicle or mobile equipment identified in the Off-Premises Interruption Of Business - Vehicles And Mobile Equipment endorsement, then references to the described premises in Paragraph B. include such vehicles and mobile equipment.

D. If this policy includes coverage arising out of "dependent property", then the following applies but only with respect to "dependent property" that is named and described in this policy:
Coverage as described in Paragraph B. applies when a civil authority orders the closure of such "dependent property" or places all or part of such "dependent property" under quarantine in an effort to avoid or limit the spread of infection by a Coronavirus, with the result that you sustain a "suspension" of "operations" due to interruption in your normal business dealings with such "dependent property".

E. There is no coverage under this endorsement:
1. If the virus was introduced or spread by any person or on behalf of any person, group, organization or sovereign state when there is reason to believe that such action was intentional and designed to cause disease, damage, fear or anxiety;
2. For the cost of clean-up or disinfection of your premises or any of your property or the premises or property of others due to contamination or suspected contamination;
3. For the cost of replacing any of your property or the property of others that is contaminated or suspected of being contaminated;
4. For the cost of disposing of any of your property or the property of others that is contaminated or suspected of being contaminated;
5. For the cost of disinfecting or disposing of any bodily fluids or waste materials;
6. For the cost of testing for or monitoring the presence or absence of a Coronavirus;
7. For any loss or expense attributable solely to fear of contraction of a Coronavirus, for example, in the situation in which customers, tenants or vendors avoid a part of the described premises not under quarantine;
8. For any loss or expense attributable to absence of any worker(s), including managers, due to infection or suspected infection of that worker(s), except to the extent that there is a "suspension" of "operations" covered under the terms of this endorsement; or
9. For any fines or penalties levied against you by any organization or authority.

F. With respect to Paragraphs B. and C., coverage under this endorsement will begin immediately upon "suspension" of your "operations" due to the order of civil authority and will apply for up to the amount of time shown in the Schedule, while such order is in force.

With respect to Paragraph D., coverage under this endorsement will begin immediately upon "suspension" of your "operations" due to interruption in your normal business dealings with the "dependent property" and will apply for up to the amount of time shown in the Schedule, while the order of civil authority is in force at the premises of the "dependent property".

G. The Limit of Insurance shown in the Schedule is an annual aggregate limit and as such is the most we will pay for all covered loss and expense caused by all occurrences in a 12-month period (starting with the beginning of the present annual policy period), regardless of the number of occurrences during that period of time. Thus, if the first occurrence does not exhaust the Limit of Insurance, then the balance of that Limit is available for a subsequent occurrence. If an occurrence begins during one annual policy period and ends during the following annual policy period, any Limit applicable to the following annual policy period will not apply to that occurrence.

The Limit of Insurance shown in the Schedule applies in total to all coverage provided under this endorsement and therefore does not apply separately to the coverage or situations described under Paragraphs B., C. and D.

H. Additional Coverages, Coverage Extensions and Optional Coverages in this policy do not apply to the coverage provided under this endorsement.

If this policy is endorsed to revise the Coverage Period of the Civil Authority Additional Coverage, such change does not apply to this endorsement.

I. This endorsement does not serve to remove, modify or invalidate any exclusion under this policy, such as a virus, bacteria or pollution exclusion. However, the aforementioned exclusions do not apply to the coverage provided under this endorsement.
In response to Georgia's shelter-in-place order, as well as federal guidance, Gilreath Family & Cosmetic Dentistry postponed routine and elective dental procedures at the beginning of the COVID-19 pandemic. That obviously led to financial pain, at least in the short term. So Gilreath filed a claim for business-interruption coverage with its insurer, Cincinnati Insurance, seeking to recover the income that it had lost. After Cincinnati Insurance denied the claim, Gilreath sued, alleging that the insurer had breached the terms of its policy. The district court dismissed the complaint because Gilreath had not alleged any “direct physical loss or damage” to property, as necessary for coverage under the policy. We agree and affirm.

I.

In Spring 2020, as COVID-19 spread throughout the United States, Georgia's governor declared a public health state of emergency and later ordered Georgia residents and visitors to “shelter in place” where they lived. That “shelter-in-place” order was not absolute; people could leave their homes to (among other things) conduct and participate in “Essential Services,” which included medical care necessary for health and safety. The Centers for Disease Control and Prevention soon detailed what kinds of medical care it thought should continue. In its guidance, the CDC recommended that healthcare providers reschedule non-urgent outpatient visits and elective surgeries and, more specifically, that dental practices postpone elective and non-urgent dental visits.

Gilreath Family & Cosmetic Dentistry, a dental practice in Marietta, Georgia, followed that guidance and canceled its routine and elective dental procedures. But because those procedures made up the bulk of the business, Gilreath lost a “substantial portion” of its usual income. To recover that lost income, Gilreath filed a claim for business-interruption coverage with its insurer, Cincinnati Insurance. The claim hinged on three provisions in Gilreath's insurance policy. The “Business Income” and “Extra Expense” provisions require Cincinnati Insurance to pay for income that Gilreath lost “due to the necessary ‘suspension’ ” of its operations and for extra expenses that it sustained during that suspension. That coverage is not unlimited though. The suspension and expenses must have been the result of a “direct ‘loss’ to

I.
property” at the insured premises—here, Gilreath's dental office—and that “loss” must have been the result of a “Covered Cause of Loss.” The insurance policy defines a “Covered Cause of Loss” as a “direct ‘loss’ ” not excluded or limited under the policy, and “loss” as “accidental physical loss or accidental physical damage.”

The third provision Gilreath filed under, the “Civil Authority” provision, applies when “a Covered Cause of Loss causes damage to property other than Covered Property,” which for the most part entails damage to property off the dental practice’s premises. (Emphasis added.) If, for listed reasons, a civil authority (for example, a city or state) “prohibits access” both to the dental practice and to the area immediately surrounding the physically damaged property, Cincinnati Insurance must pay for any income the business loses and extra expenses it sustains as a result. This provision may come into play if, for example, trees fall and damage the only road providing ingress and egress to a property.

*2 Cincinnati Insurance determined that Gilreath had not asserted any physical loss or damage to property, either at or off the dental practice's premises, and thus denied Gilreath's claim. In response, Gilreath sued on behalf of itself and similarly situated dental practices, alleging that Cincinnati Insurance had breached the policy. A district court dismissed Gilreath's complaint, concluding that the complaint failed to state that any direct physical loss or damage to property had occurred. This appeal followed.

II.

We review de novo a district court's dismissal of a complaint for failure to state a claim. See McGroarty v. Swearingen, 977 F.3d 1302, 1306 (11th Cir. 2020). In doing so, we accept the complaint's factual allegations as true and view them in the light most favorable to the plaintiff. See id. But a complaint survives a motion to dismiss only if the plaintiff's claim for relief is plausible—that is, if the plaintiff pleaded facts that allow a court to reasonably infer “that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

III.


Gilreath contends that the “Business Income” and “Extra Expense” provisions required Cincinnati Insurance to pay for its lost income and extra expenses while the government restrictions were in effect. But those provisions apply only if the events alleged here—the COVID-19 pandemic and related shelter-in-place order—caused direct “accidental physical loss” or “damage” to the dental practice's property. And the Georgia Court of Appeals has already explained the “common meaning” of “direct physical loss or damage,” holding that there must be “an actual change in insured property” that either makes the property “unsatisfactory for future use” or requires “that repairs be made.” AFLAC Inc. v. Chubb & Sons, Inc., 260 Ga. App. 306, 308, 581 S.E.2d 317 (2003).

Gilreath has alleged nothing that could qualify, to a layman or anyone else, as physical loss or damage. Here, the shelter-in-place order that Gilreath cites did not damage or change the property in a way that required its repair or precluded its future use for dental procedures. In fact, though the practice postponed routine and elective procedures, Gilreath still used the office to perform emergency procedures. Gilreath finds it problematic that its office is an enclosed space where viral particles tend to linger, and where patients and staff must interact with each other in close quarters. Even so, we do not see how the presence of those particles would cause physical damage or loss to the property. Gilreath thus has failed to state a claim that Cincinnati Insurance breached the policy's “Business Income” or “Extra Expense” provisions.

Gilreath also contends that the “Civil Authority” provision required Cincinnati Insurance to pay for the lost income and extra expenses. But that provision too is contingent on a “Covered Cause of Loss” damaging property—albeit, as relevant here, property off the business premises. See Assurance Co. of Am. v. BBB Serv. Co., 265 Ga. App. 35, 36, 593 S.E.2d 7 (2003) (applying a similar civil-authority
provision when a county issued a hurricane evacuation order, and the hurricane damaged property south of the affected business). The allegations about off-premises property are no different than those about the property at the dental practice—Gilreath offers no allegation of physical loss or damage. So Gilreath's reliance on the “Civil Authority” provision fails for the same reason as its reliance on the other two provisions. Because all of Gilreath's claims are contingent on a breach of those policy provisions, it has failed to state a claim.

*3 AFFIRMED.

All Citations

--- Fed.Appx. ----, 2021 WL 3870697

No. 18-12887 |
(August 18, 2020)

Synopsis
Background: Insured filed suit against insurer, arising out of insurer's denial of claims for property damage and loss of business income, under all risk commercial property policy. The United States District Court for the Southern District of Florida, No. 1:17-cv-23362-KMM, K. Michael Moore, Chief Judge, struck insured's proffered experts' testimony, and then entered summary judgment for insurer, 2018 WL 3412974, and insured appealed.

Holdings: The Court of Appeals, R. David Proctor, United States District Judge for the Northern District of Alabama, sitting by designation, held that:

[1] opinion of insured's proffered expert in audio and lighting that damage to restaurant lighting and audio equipment was caused by dust from road construction and debris that entered restaurant, for which interior was exposed to street during hours of operation, was not scientifically reliable, as prerequisite to admission, in action against insurer arising out of insurer's denial of claim, under commercial property policy; although expert identified what he thought to be sole diagnostic test to determine reason why speaker or light would not work, he did not perform that test because it was more cost effective to replace system, he performed no testing that would permit him to conclusively determine that dust he observed two years after construction project was completed was due to construction, and he provided no testimony or any evidence from which district court could have concluded that his methodology was reliable. Fed. R. Evid. 702.

[2] opinion of insured's proffered expert that purported damage to restaurant awnings and retractable roof was caused by dust and debris from road construction that entered restaurant was not scientifically reliable;

[3] opinion of insured's proffered causation and origin expert that damage to interior of restaurant was caused by dust and sediment that entered interior was not based on scientifically reliable methodology;

[4] insured did not suffer “direct physical loss” to restaurant, under Florida law; and

[5] under Florida law, insured's failure to show that it suffered direct physical loss to restaurant interior necessarily precluded recovery on claim for loss of business income.

Affirmed.

West Headnotes (5)
[1] Evidence ⇐ Cause and effect
Opinion of insured's proffered expert, that damage to restaurant lighting and audio equipment was caused by dust from road construction and debris that entered restaurant, for which interior was exposed to street during hours of operation, was not scientifically reliable, as prerequisite to admission, in action against insurer arising out of insurer's denial of claim, under commercial property policy; although expert identified what he thought to be sole diagnostic test to determine reason why speaker or light would not work, he did not perform that test because it was more cost effective to replace system, he performed no testing that would permit him to conclusively determine that dust he observed two years after construction project was completed was due to construction, and he provided no testimony or any evidence from which district court could have concluded that his methodology was reliable. Fed. R. Evid. 702.

[2] Evidence ⇐ Cause and effect
Opinion of insured's proffered expert, that purported damage to restaurant awnings and retractable roof was caused by dust and debris from road construction that entered restaurant was not scientifically reliable;
restaurant, for which interior was exposed to road construction during restaurant hours of operation, was not scientifically reliable, as prerequisite to admission in insured's action against insurer arising out of insurer's denial of claim under commercial property policy; expert visually inspected awnings and retractable roof from his position on ground, for approximately one hour, more than two years after road construction was completed, he observed broken drive belt on retractable roof, but could not say what caused it to break, he did not test retractable roof system but simply determined that it had to be replaced because parts for system could no longer be obtained in United States, and he performed no testing of sediment on awnings and roof system. Fed. R. Evid. 702.

**Evidence**  Cause and effect

Opinion of insured's proffered expert, that damage to interior of restaurant, for which interior was exposed to road that was subject of construction project during restaurant's hours of operation, was caused by dust and sediment that entered interior, was not based on scientifically reliable methodology, as prerequisite to admission in insured's action against insurer arising out of denial of claims for property damage; although he gave scientific explanation about how dust and debris could damage property, he did not actually attribute any damage to restaurant as result of that circumstance, his “testing” consisted solely of visual inspection of restaurant and photographs two years after road construction was completed, and he did nothing other than touch dust and look at pictures before opining as to its origin. Fed. R. Evid. 702.

**Insurance**  Risks or Losses Covered and Exclusions

Insured did not suffer “direct physical loss” to restaurant, for which interior was exposed to road during hours of operation, due to entry of dust and debris from road construction project that fronted restaurant, under Florida law, and thus, insured was not entitled to recover on claim for costs of daily cleaning and painting of interior, under all risk commercial property policy, where merely cleaning interior and items within interior was all that was required to maintain property, and there was no actual change to physical structure restaurant due to accumulation of dust.

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Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:17-cv-23362-KMM

Before NEWSOM, TJOFLAT, Circuit Judges, and PROCTOR, * District Judge.

**Opinion**

PROCTOR, District Judge:

In this insurance coverage case, we are called upon to assess whether the district court properly excluded the opinions
of Plaintiff's experts and granted Defendant's motion for summary judgment based upon the conclusion that Plaintiff failed to establish that it suffered a direct physical loss that would trigger coverage. We conclude the district court correctly ruled on both questions. Therefore, for the reasons more fully discussed below, we affirm.

I. Background
Appellant Mama Jo's Inc. d/b/a Berries (“Berries”) owns and operates a restaurant located at 2884 SW 27th Avenue, Miami, FL 33133. (Doc. 107-1 at 8-9). The restaurant is located less than one mile from the ocean (Doc. 111-5 at 4; Doc. 111-6 at 57-58, 104), and is partially enclosed by a retractable awning, wall, and roof system. (Doc. 109-4 at 4, 31; Doc. 109-5 at 66-68, 75-81; Doc. 110-8 at 104). When the system is opened, the restaurant's interior areas are exposed to the elements. (Id.). The restaurant's front entrance, bar, and seating areas are adjacent to SW 27th Avenue. (Doc. 107-1 at 95-97; Doc. 109-5 at 51-54, 66-71, 80; Doc. 116-8 at 4-5).

A. The Road Construction
From December 2013 until June 2015, there was roadway construction at different locations along SW 27th Avenue in the general vicinity of the restaurant. (Doc. 102 at 2; Doc. 107-1 at 58-60; Doc. 116-5 at 11). During that time, dust and debris generated by the construction migrated into the restaurant. (Doc. 116 at 3-5; Doc. 110-8 at 56-57; Doc. 116-8 at 9-12; Doc. 116-9 at 24-27). Berries performed daily cleaning using its normal cleaning methods, employing dust pans, hoses, rags, towels, and blowers. (Id.).

Berries was open every day throughout the time period of the roadwork. (Doc. 116 at 3-5; Doc. 110-8 at 56-57, 95-97; Doc. 116-8 at 7-10; Doc. 116-9 at 25). Although the restaurant maintained the ability to serve the same number of customers as it had before the construction began, customer traffic decreased during the roadwork. (Doc. 116 at 3-5; Doc. 107-1 at 73-74; Doc. 110-8 at 56-57; Doc. 116-8 at 9-12; Doc. 116-9 at 24-27).

B. The Insurance Policy
From September 19, 2013 to September 19, 2014, Berries was insured by Appellee, Sparta Insurance Company (“Sparta”). (Doc. 110-1 at 5, 31-54). Sparta issued an “all risk” commercial property insurance policy, which included, in relevant part, a Building and Personal Property Coverage Form and a Business Income (and Extra Expense) Coverage Form. (Doc. 110-1 at 31-54).

The Building and Personal Property Coverage Form contained in the policy covers “direct physical loss of or damage to Covered Property ... caused by or resulting from any Covered Cause of Loss.” (Id. at 31). The policy defines “Covered Causes of Loss” as “Risks of Direct Physical Loss unless the loss is” excluded or limited. (Id. at 33, 63).

The policy's Business Income (and Extra Expense) Coverage Form provides that Sparta will pay for “the actual loss of Business Income you sustain due to the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration.’ ” (Id. at 46). The policy provides that the “suspension” must be caused by direct physical loss of or damage to” covered property. (Id.).

C. The Initial Insurance Claim
On December 12, 2014, Berries submitted a claim to Sparta under the policy. (Doc. 143 at 4). Berries asserted that the claim was related to dust and debris generated by the roadway construction. (Id.). Sparta assigned Corey Buford, an insurance adjuster, to review the claim on behalf of Sparta. (Doc. 116-10 at 5). Berries hired a public adjuster, Robert Inguanzo of Epic Group Public Adjusters, to assist with its claim. (Doc. 110 at 3).

In December 2014 and January 2015, Buford requested information about the claim from Berries. (Doc. 116-10 at 6-8, 17-19). In January 2015, Inguanzo responded to these requests and informed Buford that the claimed loss “occurred as early as December of 2013 in the form of construction debris and dust from the [roadwork]” and that, “the construction related debris and dust ... caused damage to the insured's building. The scope of loss includes but is not limited to, cleaning of the floors, walls, tables, chairs and countertops.” (Id. at 17).

In March 2015, Inguanzo provided Berries with an estimate in the amount of $16,275.58 to clean and paint the restaurant. (Doc. 110-10 at 1-10; Doc. 116-11 at 11-15, 23-25; Doc. 116-12 at 5-6). Inguanzo testified that, “based on our inspection back then” the estimate encompassed “the work that we felt was necessary to bring the property to its pre-loss condition includ[ing] the cleaning and painting,” and that, “[a]t that time, we didn't have anything for removal or replacement...” (Doc. 116-11 at 14-15).
In April 2015, Inguanzo sent Buford a “Sworn Statement in Proof of Loss” for the building claim, including a preliminary damage estimate in the amount of $13,775.58. (Doc. 116-10 at 21). This amount was calculated based on the amount of the estimate -- $16,235.58 -- minus a deductible. (Id.). Inguanzo also sent Buford a “Sworn Statement in Proof of Loss” and supporting documentation regarding a business income claim in the amount of $292,550.84. (Id.). Berries contended that its 2014 sales were lower than expected when compared to its rate of sales growth in previous years. (Doc. 109-2).

On January 30, 2017, Sparta denied the claim because it was “not covered under the [ ] policy.” (Doc. 110-13). As Sparta explained: “[w]ith regard to Building coverage, ... the Proof of Loss Form does not reflect the existence of any physical damage. It is also questionable whether a direct physical loss occurred.” (Doc. 110-13 at 5). Sparta also stated that:

Under the Business Income Coverage Form, coverage is provided for the actual loss of business income the insured sustains due to the necessary “suspension” of “operations” during the “period of restoration.” The “suspension” must be caused by direct physical loss of or damage to property at the premises....
(Doc. 110-13 at 6) (emphasis in original).

D. The Litigation and Presentation of a New Claim for Damages
Berries initiated this action in Florida state court in May 2017. (Doc. 1-2). Sparta removed the action to the United States District Court for the Southern District of Florida based on diversity jurisdiction. (Doc. 1). In its initial disclosures in the lawsuit, Berries claimed the same damages it had before the suit was filed: $16,275.58 for cleaning and painting the restaurant, and $292,550.84 for lower-than-expected sales in 2014. (Doc. 20 at 4).

On February 26, 2018, Berries also served amended answers to interrogatories. (Doc. 116-5 at 8). In those responses, it identified for the first time new categories of damages totaling $319,688.57. (Id.). Berries contended that the newly claimed damages were due to replacement of the restaurant's awning and retractable roof systems, HVAC repairs, and replacement of the restaurant's audio and lighting systems. (Id. at 8-9).

1. Berries’ Experts
Berries relied on three experts to causally link its newly-claimed damages to the construction dust and debris generated more than two and a half years earlier, i.e., during Sparta's policy period ending on September 19, 2014. First, Alex Posada offered opinion testimony about Berries’ audio and lighting systems. Second, Christopher Thompson opined about the awning and retractable roof systems. Third, Alfredo *873 Brizuela proffered his opinion about “engineering” and “the cause and origin of the loss.” (Doc. 105-1 at 5-6; Doc. 113 at 2-4).

a. Alex Posada
Posada's firm, United Audio, had “been in the audio and special lighting industry for over 15 years providing integrated audio, video, lighting & control solutions....” (Doc. 109-1 at 2). Posada's proposed methodology included performing a “QC diagnostic” which would have involved, among other things, “[d]ismantl[ing] all Audio & Lighting Equipment, ... [t]est[ing] all existing wiring and terminations[,] [d]isassembl[ing] each and every speaker and lighting fixture[ ],[t]est[ing] all audio devices[, and] [e]xamin[ing] all components in every lighting fixture.” (Id. at 2-3; Doc. 108-1 at 51-53). However, Posada did not perform the QC diagnostic. (Doc. 108-1 at 53). Rather, in February 2018, he performed a two-hour site inspection and concluded that “it [wa]s more cost effective to replace the system.” (Id. at 24-34).

At Posada's deposition, the following exchange occurred:

Q: So is it fair to say if you want to find out a specific reason why a speaker or light is not working, you have to run this diagnostic? [ ]
A: It's an option.

Q: What other options are there?
A: There are no other options ... it[‘]s either this or replace it which, I mean -- as of looking at it, I can already tell you it's not going to be worth doing this.

Q: If you want to find out the specific reason why a subwoofer or speaker or light is not working, do you need to perform the diagnostic?
A: It's an option. Yeah
Q: But are there any other options?
A: No, there is no other option.

Q: That's the only option?

A: That is correct.

(Doc. 108-1 at 55-56). Posada’s inspection consisted of visually observing some of the system's audio and lighting components, and listening to some of its audio components. (Doc. 109 at 3; Doc. 108-1 at 51-53).

Posada did not inspect all of the restaurant's speakers and components because some were out of reach and, during his inspection, there were patrons in the restaurant whom he did not wish to disturb. (Doc. 108-1 at 24-25, 31-39). He only walked around the perimeter of the restaurant. (Id. at 34). Posada testified that the speakers outside the restaurant's entrance were “probably” damaged, and although he did not inspect the subwoofers, he assumed that they were not working. (Id. at 43, 68-69). Posada nevertheless testified that all of Berries’ audio systems were damaged by construction dust and debris, to the exclusion of all other causes, because they produced sounds that were “tedious,” “distorted,” and “hard to explain in words.” (Id. at 88, 93-94).

Posada's inspection of Berries’ lighting system involved observing components from ground level, about 15 feet below the fixtures. (Id. at 45). Posada testified that the lights did not turn on at all and were “full of dust.” (Id. at 33, 44-45). Although he opined that the light fixtures’ motherboards were damaged, Posada conceded that he could not see those components, and did not inspect them. (Id. at 87-88, 97-98). He did not know the age of the lighting fixtures, or when they stopped working. (Id. at 76, 87).

b. Christopher Thompson

Thompson is employed by Awnings of Hollywood, the company that originally installed the awnings and retractable roof. *874 “several” (i.e., “more than three [-] four”) years before his inspection. (Doc. 108-3 at 17-18, 32-33). Thompson’s inspection of the restaurant's awnings and retractable roof consisted of a visual inspection from the ground floor, and lasted approximately one hour. (Doc. 108-3 at 29, 34, 83). His inspection took place more than two years after the roadwork ended. (Id. at 26-29, 34-37). He did not take notes. (Id. at 34). Based on his one-hour inspection, Thompson concluded that the awnings and retractable roof systems were damaged beyond repair by sediment that he “assumed” was construction dust. (Id. at 46, 54; Doc. 109-3 at 1). Thompson took no samples of the sediment, and did no testing to determine its origin. (Doc. 108-3 at 45-46). Thompson had eaten at the restaurant during the road construction. (Doc. 108-3 at 46).

Thompson did not test the retractable roof system because he observed that the drive belt was broken. (Doc. 108-3 at 69). But, the belt was the only thing Thompson observed that was broken. (Id. at 69-70). In his report, Thompson noted that the system had to be replaced, rather than repaired, because the components were no longer available in the United States. (Doc. 109-3 at 1; Doc. 108-3 at 69). When asked why the drive belt snapped, Thompson testified: “I could not tell you. I have an opinion, but I couldn't tell you seriously.” (Doc. 108-3 at 71).

c. Alfredo Brizuela

Brizuela has a degree in architecture and structural engineering, and is a Florida licensed civil and structural engineer. (Doc. 108-5 at 26-27). His inspection of the restaurant consisted of a one-hour visual inspection conducted in December 2017 and a review of photographs taken in 2014 and 2015. (Doc. 108-5 at 42, 76-77). He also ran his “fingers across” dust (which he believed was construction dust), although it had been over two years since the construction had been completed. (Doc. 108-5 at 45, 57-59, 115, 154). Based on this inspection, he offered the following opinion:

[It] is evident that the source of the damage was from the nearby roadway construction on 27th [A]venue in front of the property. Simply stated, the migration of the dust and its resulting paste was a sudden and accidental occurrence that damaged the equipment, awning, windows, railings, and stucco. (Doc. 109-5 at 7). Brizuela's report explains how construction dust combined with water can be corrosive. (Doc. 108-5 at 117). But, on the question of the source of the corrosive material in this case, Brizuela acknowledged that his “testing was strictly [his] observation through [his] inspection and [his] review of the photographs.” (Doc. 108-5 at 116). That is, Brizuela did nothing other than touch the dust and look at pictures before opining as to its origin. (Id.). His opinion, like Thompson's, was based on his assumption that the construction dust was the source of the corrosive material. (Id.).
2. The District Court's Decision Ruling on the Motions in Limine Regarding Berries' Experts

In April 2018, Sparta filed a motion to preclude the testimony of Plaintiff's expert witnesses: Posada, Thompson, and Brizuela. (Doc. 105). That same day, the parties filed Cross Motions for Summary Judgment. (Docs. 106, 110). After briefing, the district court entered an omnibus order granting Sparta's Daubert and summary judgment motions. (Doc. 146). The district court found that, although Berries’ causation experts were minimally qualified to render their opinions, their methodologies on the issue of causation were unreliable or nonexistent, and their testimony was speculative. (Id. at 5-15). The district court further concluded that, without expert testimony, *875 Berries could not prove that construction dust and debris generated in 2014 caused the “new” damages (first claimed in 2018) to Berries’ awnings, retractable roof, HVAC system, railings, and audio and lighting system. (Id. at 15-17).

The district court determined that Berries’ initial claim for cleaning was not covered because property that must be cleaned, but is not damaged, has not sustained a “direct physical loss.” (Id. at 17-19). The district court also concluded that direct physical loss refers to tangible damage to property, which causes it to become unsatisfactory for future use or requires repairs. (Id. at 17-19). Finally, the district court decided that Berries’ claim for lower-than-expected sales in 2014 was not covered because Berries could not establish that it suffered a “necessary ‘suspension’ ” of its “operations” as the result of a “direct physical loss.” (Id. at 19-20). Because of its determinations, the district court declined to address any of the parties’ arguments related to the policy’s exclusions or limitations. (Id. at 16, n. 14).

This appeal followed.

II. Standard of Review

We review a district court's order granting summary judgment de novo, “considering all of the evidence in the light most favorable to the nonmoving party.” Nesbitt v. Candler County, 945 F.3d 1355, 1357 (11th Cir. 2020). “Summary judgment is proper ‘if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’ ” Id. (quoting Fed. R. Civ. P. 56(a)).


III. Analysis

Berries argues that the district court erred in three ways: first, by concluding that “direct physical loss” does not include cleaning, but rather requires a showing that the property be rendered uninhabitable or unusable; second, by requiring Berries to show that a suspension of operations was the result of physical damage in order to establish business income coverage; and third, in striking Berries’ causation experts. We begin by addressing the exclusion of Berries’ experts and then turn to the other two issues.

A. Exclusion of the Experts

In Daubert, the Supreme Court explained that trial courts must act as “gatekeepers” and are tasked with screening out “speculative, unreliable expert testimony.” *876 Kilpatrick v. Breg, Inc., 613 F.3d 1329, 1335 (11th Cir. 2010) (citing Daubert, 509 U.S. at 597, 113 S.Ct. 2786). In that important role, trial courts may consider a non-exhaustive list of factors including: (1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential error rate of the technique; and (4) whether the technique is generally accepted in the scientific community. Kilpatrick, 613 F.3d at 1335. Later, in Kumho Tire, the Court explained that the gatekeeping function governs all expert testimony, including...
“scientific, technical, or other specialized knowledge,” not just singularly scientific testimony. 526 U.S. at 147-49, 119 S.Ct. 1167. The factors identified in Daubert “do not constitute a definitive checklist or test.” Kumho, 526 U.S. at 150, 119 S.Ct. 1167 (internal quotation marks omitted). Admittedly, they are designed to guide a district court's assessment of the reliability of scientific or experience-based expert testimony. Id. But, the district court's “gatekeeping inquiry must be tied to the facts of a particular case.” Id. (internal quotation marks omitted). The goal of gatekeeping is to ensure that an expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” Id. at 152, 119 S.Ct. 1167.

Federal Rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

F.R.E. 702. “We have distilled from Daubert, Kumho, and Rule 702 these three requirements: First, ‘the expert must be qualified to testify competently regarding the matter he or she intends to address’; second, the expert's ‘methodology ... must be reliable as determined by a Daubert inquiry’; and third, the expert's ‘testimony must assist the trier of fact through the application of expertise to understand the evidence or determine a fact in issue.' ” Kilpatrick, 613 F.3d at 1335.

To be sure, experience, standing alone, is not a “sufficient foundation rendering reliable any conceivable opinion the expert may express.” U.S. v. Frazier, 387 F.3d 1244, 1261 (11th Cir. 2004). Even experienced experts “must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.” Id. at 1261 (quoting Fed. R. Evid. 702 advisory committee note (2000 amend.s.)). “[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert.” Joiner, 522 U.S. at 146, 118 S.Ct. 512.

1. Alex Posada

[1] The district court found that Posada, the audio and lighting expert, was qualified, but concluded that his methodology was unreliable. (Doc. 146 at 7, 10). We agree. Berries failed to establish that Posada's methodology was reliable.

Posada listened to the audio system and looked at the lighting system in 2018. From this brief inspection, he opined that any damage was caused by construction dust and debris from 2014. Posada identified what he thought to be the only diagnostic test to determine the reason why a speaker or light would not work, but he did not perform that test because “it [wa]s more cost effective to replace the system.” (Doc. 108-1 at 24-34, 55-56). Posada performed no testing that would permit him to conclusively determine that the dust he observed in 2018 came from much earlier road construction. To the extent it can be said that Posada even identified a methodology for reaching his conclusions, he provided no testimony (or anything else) from which the district court could have concluded that his methodology was in any way reliable. See Kilpatrick, 613 F.3d at 1335 (the expert's “methodology ... must be reliable”). Nothing about Posada's methodology is capable of being tested or being subjected to peer review, and Berries presented no evidence indicating that Posada's technique is generally accepted in the scientific community. Kilpatrick, 613 F.3d at 1335.

Under Daubert, a “district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation.” Chapman, 766 F.3d at 1306. Here, the district court did not abuse its discretion in determining that Posada's testimony provided nothing more than speculation about the cause of the damage to the audio and lighting systems.

2. Christopher Thompson

[2] The district court found that Thompson was at least minimally qualified as an expert based on his years of experience, but concluded that “Thompson's testimony is nothing more than unexplained assurances and unsupported
speculation.” (Doc. 146 at 12). Again, we agree. Berries did not establish that Thompson's opinions are reliable.

Like Posada, Thompson merely visually inspected the awnings and retractable roof, and did not do so until more than two years after the road construction. (Doc. 108-3 at 26-29, 34-37). Thompson observed a broken drive belt on the retractable roof, but candidly admitted he could not say what caused it to break. (Doc. 108-3 at 71). Although Thompson did not test the retractable roof system, he determined that it had to be replaced. (Doc. 109-3 at 1). This conclusion was based on Thompson's knowledge that parts for this system could no longer be obtained in the United States. (Id.). And, although Thompson performed no testing on the sediment on the awnings and retractable roof two years after the construction ended, he nonetheless opined that it came from that construction. (Id.; 108-3 at 27, 44-45).

Again, to the extent that Thompson even employed a methodology, there was nothing against which that methodology could be compared to determine whether it was reliable or even scientific in nature. See Chapman, 766 F.3d at 1306 (recognizing the court must ensure the “evidence is genuinely scientific, as distinct from being unscientific speculation.”). Therefore, the district court did not abuse its discretion in excluding Thompson's testimony as unreliable.

3. Alfredo Brizuela

Berries offered Brizuela as a cause and origin expert. He opined as to the source or origin of the damage to the restaurant. Brizuela opined that “[i]t is evident that the source of the damage was from the nearby roadway construction on 27th [A]venue in front of the property.” (Doc. 109-5 at 7). In reaching this conclusion, he conducted a visual inspection of the restaurant, again over two years after 878 the road construction ended. He conducted no sampling or testing of the dust and sediment he found at that time. His “methodology” was simply observation and a review of photographs. (Doc. 108-5 at 116).

Brizuela gave a scientific explanation about the general issue of how dust and debris can damage property. But, even if one accepted the general proposition that construction dust and debris can damage or corrode property, Brizuela did not actually attribute any damage to the restaurant as a result of that circumstance. (Doc. 146 at 12-15). His “methodology” in this respect consisted of an assumption. Therefore, we conclude that the district court did not abuse its discretion in excluding Brizuela's proposed testimony as unreliable under Daubert.

Here, given its considerable leeway in assessing expert testimony, the district court did not err in concluding that Berries failed to establish that its experts’ methodologies have been (or, for that matter, can be) tested. Berries also failed to show that its experts’ methodologies have been subjected to peer review and publication. Berries also failed to address the known or potential error rates of its experts’ techniques. And, Berries failed to establish that its experts’ techniques are generally accepted in the scientific community. Simply stated, Berries did not satisfy any of the factors which indicate a reliable and admissible expert opinion. Accordingly, the district court did not abuse its discretion in excluding the experts. See Kilpatrick, 613 F.3d at 1335.

The district court correctly excluded the expert opinions proffered by Berries and this inexorably led to the swing of the summary judgment axe. “[A]n insured claiming under an all-risk policy has the burden of proving that the insured property suffered a loss while the policy was in effect.” Jones v. Federated Nat'l Ins. Co., 235 So. 3d 936, 941 (Fla. 4th DCA 2018) (citation omitted). Berries relied on the expert reports of Brizuela, Thompson, and Posada to prove that the “new” damages to Berries’ awnings, retractable roof, and audio and lighting system, first claimed in 2018, were caused by construction dust and debris from 2014. That is, it was necessary for Berries to tie the damages it claimed in 2018 to construction occurring during the much earlier policy period, ending on September 19, 2014. Without the properly excluded experts’ testimony, the district court properly granted Sparta summary judgment on Berries’ newly claimed damages.

B. Berries Failed to Show any “Direct Physical Loss or Damage”

Under Florida law, the interpretation of an insurance contract, including resolution of any ambiguities contained therein, is a question of law to be decided by the court. Dahl–Eimers v. Mutual of Omaha Life Ins. Co., 986 F.2d 1379, 1381 (11th Cir. 1993) (citing Sproles v. Amer. States Ins. Co., 578 So. 2d 482, 484 (Fla. 5th DCA 1991)). In construing an insurance contract, a court must strive to give every provision meaning and effect. Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000); Excelsior Ins. Com. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 941 (Fla. 1979). A party claiming coverage (here, Berries) generally bears the burden of proof to establish that coverage exists.
v. Bove, 347 So. 2d 678, 680 (Fla. 3rd DCA. 1977). The policy at issue is an "all risks" policy. However, as the Florida Supreme Court has noted, "an ‘all-risk’ policy is not an ‘all loss’ policy, and thus does not extend coverage for every conceivable loss." Sebo v. Am. Home Assurance Co., 208 So. 3d 694, 696-97 (Fla. 2016) (citation omitted).

*879* Berries’ initial claim had two components: one for cleaning the restaurant, and another for Business Income Loss. (Doc. 110-10). The insuring agreement in the policy's Building and Personal Property Coverage Form states that Sparta "will pay for direct physical loss of or damage to Covered Property ... caused by or resulting from any Covered Cause of Loss." (Doc. 110-1 at 31). The policy's Business Income Coverage Form provides that Sparta will pay for "the actual loss of Business Income you sustain due to the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration.’ " (Id. at 46). The ‘‘suspension’’ must be caused by direct physical loss of or damage to” covered property. (Id.).

Florida's District Court of Appeals for the Third District has addressed the definition of "direct physical loss": "A ‘loss’ is the diminution of value of something [ J. Loss, Black's Law Dictionary (10th ed. 2014). ‘Direct’ and ‘physical’ modify loss and impose the requirement that the damage be actual.” Homeowners Choice Prop. & Cas. v. Maspons, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017); see also Vazquez v. Citizens Prop. Ins. Corp., —— So.3d ———, ———, 2020 WL 1950831, at *3 (Fla. 3d DCA 2020).

[4] With regard to the cleaning claim, Berries's public adjuster, Inguanzo, testified that "cleaning and painting" was all that was required. (Doc. 76-1 at 35-36). He also testified that there was no need for removal or replacement of items at that time. (Id. at 36). Based on this testimony, the district court held that Berries had failed to establish that it had suffered a “direct physical loss” as that term is defined under Florida law. (Doc. 146 at 18-19). We conclude that the district court correctly granted summary judgment on Berries’ cleaning claim because, under Florida law, an item or structure that merely needs to be cleaned has not suffered a “loss” which is both “direct” and “physical." See Maspons, 211 So. 3d at 1069 (recognizing that “damage [must] be actual”); Vazquez, —— So.3d at ———, 2020 WL 1950831, at *3 (same). See also Universal Image Prods., Inc. v. Fed. Ins. Co., 475 F. App’x 569, 573 (6th Cir. 2012) (“[C]leaning ... expenses ... are not tangible, physical losses, but economic losses.”);

[5] As to the Business Income Loss claim, the Business Income Coverage Form requires that a “suspension” of operations “be caused by direct physical loss of or damage to property.” (Doc. 110-1 at 46). Again, as discussed above, even if Berries had shown a “suspension” of operations, Berries did not put forward any Rule 56 evidence that it suffered a direct physical loss of or damage to its property during the policy period. Therefore, the district court's entry of summary judgment on Berries' Business Income Loss claim was also proper. Berries failed to show it suffered a “direct physical loss.”

C. Berries Did Not Establish that it Suffered a Covered Suspension of Operations

The policy's Business Income Coverage Form provides that Sparta will pay for “the actual loss of Business Income you sustain due to the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration.’ “ (Id. at 46). Berries argues that the district court erred when it held that Berries did not suffer a “suspension” of its operations, and when it ignored evidence *880* that Berries had been required to close sections of the restaurant for cleaning. Conceivably, a slowdown caused by closing parts of the restaurant for cleaning could be attributed to a “period of restoration.” But, even if Berries is correct that the district court got this part of the analysis wrong, Sparta was still entitled to summary judgment on the Business Income Claim because any “ ‘suspension’ must be caused by direct physical loss of or damage to property.” Berries failed to show it suffered a “direct physical loss.” (Id.).

IV. CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment in favor of Sparta is

AFFIRMED.

All Citations

823 Fed.Appx. 868
Footnotes

* Honorable R. David Proctor, United States District Judge for the Northern District of Alabama, sitting by designation.
ORAL SURGEONS, P.C., Plaintiff - Appellant
v.
The CINCINNATI INSURANCE COMPANY, Defendant - Appellee

No. 20-3211
| Submitted: April 14, 2021
| Filed: July 2, 2021

Synopsis
Background: Insured oral surgery clinic brought state-court action against property insurer for breach of contract, bad faith, and declaratory judgment that policy covered lost business income and extra expense resulting from government-imposed restrictions on performing non-emergency dental procedures to deal with COVID-19 pandemic. Insurer removed case. The United States District Court for the Southern District of Iowa, Charles R. Wolle, Senior District Judge, 491 F.Supp.3d 455, granted insurer's motion to dismiss. Insured appealed.

[Holdings:] The Court of Appeals, Wollman, Senior Circuit Judge, held that policy provided no coverage.

Affirmed.

West Headnotes (6)
[1] Insurance  Business Interruption; Lost Profits
Under Iowa law, oral surgery clinic's lost business income and extra expense due to government-imposed restrictions on performing non-emergency dental procedures to deal with COVID-19 pandemic were not covered by policy requiring “accidental physical loss or accidental physical damage” to property; policy required some physicality to the loss or damage of property, e.g., a physical alteration, physical contamination, or physical destruction.

36 Cases that cite this headnote
[2] Insurance  Intention
Under Iowa law, a court must construe an insurance policy to give effect to the intent of the parties.

[3] Insurance  Language of policies
Under Iowa law, intent of the parties is determined by the language of an insurance policy itself, unless there is ambiguity.

1 Cases that cite this headnote
[4] Insurance  Ambiguity in general
Under Iowa law, ambiguity exists in an insurance policy only when policy language is subject to two reasonable interpretations.

3 Cases that cite this headnote
[5] Insurance  Plain, ordinary or popular sense of language
Generally speaking, the plain meaning of an insurance contract prevails under Iowa law.

[6] Insurance  Function of, and limitations on, courts, in general
Where no ambiguity exists, court will not write a new policy to impose liability on the insurer under Iowa law.

1 Cases that cite this headnote

*1142 Appeal from United States District Court for the Southern District of Iowa - Central

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Before LOKEN, WOLLMAN, and STRAS, Circuit Judges.

Opinion

WOLLMAN, Circuit Judge.

*1143 Oral Surgeons, P.C., offers oral and maxillofacial surgery services at its four offices in the Des Moines, Iowa, area. Oral Surgeons stopped performing non-emergency procedures in late March 2020, after the governor of Iowa declared a state of emergency and imposed restrictions on dental practices because of the COVID-19 pandemic. Oral Surgeons resumed procedures in May 2020 as the restrictions were lifted, adhering to guidance from the Iowa Dental Board.

Oral Surgeons submitted a claim to The Cincinnati Insurance Company (Cincinnati) for losses it suffered as a result of the suspension of non-emergency procedures. The policy insured Oral Surgeons against lost business income and certain extra expense sustained due to the suspension of operations “caused by direct ‘loss’ to property.” The policy defines “loss” as “accidental physical loss or accidental physical damage.” Cincinnati responded that the policy did not afford coverage because there was no direct physical loss or physical damage to Oral Surgeons's property. This lawsuit followed. The district court granted Cincinnati’s motion to dismiss, concluding that Oral Surgeons was not entitled to declaratory judgment and that it had failed to state claims for breach of contract and bad faith. Reviewing de novo and applying Iowa law in this diversity action, we affirm. See Sletten & Brettin Orthodontics, LLC v. Cont'l Cas. Co., 782 F.3d 931, 934 (8th Cir. 2015) (standard of review).

[1] Oral Surgeons maintains that the COVID-19 pandemic and the related government-imposed restrictions on performing non-emergency dental procedures constituted a “direct ‘loss’ to property” because Oral Surgeons was unable to fully use its offices. Oral Surgeons argues that the policy's disjunctive definition of “loss” as “physical loss” or “physical damage” creates an ambiguity that must be construed against Cincinnati. To give the terms separate meanings, Oral Surgeons suggests defining physical loss to include “lost operations or inability to use the business” and defining physical damage as a physical alteration to property. Appellant's Br. 41. Amicus Restaurant Law Center contends that “physical loss” occurs whenever the insured is physically deprived of the insured property.

[2] [3] [4] [5] We must construe the policy to give effect to the intent of the parties. Boelman v. Grinnell Mut. Reinsurance Co., 826 N.W.2d 494, 501 (Iowa 2013). Intent is determined by the language of the policy itself, unless there is ambiguity. Id. Ambiguity exists “[o]nly when policy language is subject to two reasonable interpretations.” T.H.E. Ins. Co. v. Est. of Booher, 944 N.W.2d 655, 662 (Iowa 2020); see Cairns v. Grinnell Mut. Reinsurance Co., 398 N.W.2d 821, 824 (Iowa 1987) (“Ambiguity exists if, after the application of pertinent rules of interpretation to the face of the instrument, a genuine uncertainty results as to which one of two or more meanings is the proper one.”) (cleaned up)). “Generally speaking, the plain meaning of the insurance contract prevails.” Est. of Booher, 944 N.W.2d at 662.

*1144 The policy here clearly requires direct “physical loss” or “physical damage” to trigger business interruption and extra expense coverage. Accordingly, there must be some physicality to the loss or damage of property—e.g., a physical alteration, physical contamination, or physical
destruction. See Milligan v. Grinnell Mut. Reinsurance Co., No. 00-1452, 2001 WL 427642, at *2 (Iowa Ct. App. Apr. 27, 2001) (concluding that “direct physical loss or damage” “unambiguously referred to injury to or destruction of” insureds’ property and finding support for the conclusion “in the fact that the loss or destruction must be physical in nature”); see also The Phx. Ins. Co. v. Infogroup, Inc., 147 F. Supp. 3d 815, 823 (S.D. Iowa 2015) (“The common usage of physical in the context of a loss therefore means the loss of something material or perceptible on some level.”); 10A Steven Plitt et al., Couch on Insurance § 148:46 (3d ed. 2021) (“The requirement that the loss be ‘physical’ … is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.”) (footnotes omitted). The policy cannot reasonably be interpreted to cover mere loss of use when the insured's property has suffered no physical loss or damage. See Pentair, Inc. v. Am. Guar. & Liab. Ins. Co., 400 F.3d 613, 616 (8th Cir. 2005) (“Once physical loss or damage is established, loss of use or function is certainly relevant in determining the amount of loss, particularly a business interruption loss.”); Infogroup, 147 F. Supp. 3d at 825 (“While a loss of use may, in some cases, entail a physical loss, the Court does not find ‘loss of use’ and ‘physical loss or damage’ synonymous.”).

The unambiguous requirement that the loss or damage be physical in nature accords with the policy's coverage of lost business income and incurred extra expense during the "period of restoration." The “period of restoration” begins at the time of “loss” and ends on the earlier of:

1. The date when the property at the “premises” should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

2. The date when business is resumed at a new permanent location.

Property that has suffered physical loss or physical damage requires restoration. That 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.

Our precedent interpreting “direct physical loss” under Minnesota law is instructive here. See Source Food Tech., Inc. v. U.S. Fid. & Guar. Co., 465 F.3d 834 (8th Cir. 2006); Pentair, 400 F.3d 613. The policy in Pentair covered “all risk of direct physical loss of or damage to property described herein.” 400 F.3d at 614. Pentair filed an insurance claim after an earthquake caused a two-week loss of power to Taiwanese factories that supplied products to a Pentair subsidiary. Pentair shipped the delayed products via airfreight, at great expense. We upheld the district court's determination that the power outages merely shut down manufacturing operations, which did not cause direct physical loss of or damage to Pentair's supplier's property. Id. at 616. We rejected the argument that loss of use or function necessarily constitutes “direct physical loss or damage,” explaining that such an interpretation would allow coverage to be “established whenever property cannot be used for its intended purpose.” Id.

The policy in Source Food Technology similarly covered certain losses caused by *1145 “direct physical loss to Property.” 465 F.3d at 835. Source Food filed an insurance claim after beef product manufactured in Canada could not be imported into the United States because of an embargo. Source Food was unable to fulfill orders, was forced to find a new supplier, and lost its best customer as a result of its inability to deliver beef product. The beef product was not “physically contaminated or damaged in any manner,” however. Id. at 838. We rejected the argument that “impairment of function and value of a food product caused by government regulation is a direct physical loss to insured property,” because to hold otherwise “would render the word ‘physical’ meaningless.” Id. at 836, 838. Minnesota law is not materially distinguishable from Iowa law, and we conclude that the reasoning set forth in Pentair and Source Food Technology applies here.

Oral Surgeons did not allege any physical alteration of property. The complaint pleaded generally that Oral Surgeons suspended non-emergency procedures due to the COVID-19 pandemic and the related government-imposed restrictions. The complaint thus alleged no facts to show that it had suspended activities due to direct “accidental physical loss or accidental physical damage,” regardless of the precise definitions of the terms “loss” or “damage.” We reject Oral Surgeons’s argument that the lost business income and the extra expense it sustained as a result of the suspension of non-emergency procedures were “caused by direct ‘loss’ to property.”

[6] The policy clearly does not provide coverage for Oral Surgeons’s partial loss of use of its offices, absent a showing of direct physical loss or physical damage.3 “[W]here no ambiguity exists, we will not write a new policy to impose
liability on the insurer.” Nat’l Sur. Corp. v. Westlake Invs., LLC, 880 N.W.2d 724, 734 (Iowa 2016); see Boelman, 826 N.W.2d at 501 (“We will not strain the words or phrases of the policy in order to find liability that the policy did not intend and the insured did not purchase.”).

The judgment is affirmed.

All Citations

2 F.4th 1141

Footnotes

1 The Honorable Charles H. Wolle, United States District Judge for the Southern District of Iowa.

2 This appeal presents only the question whether the COVID-19 pandemic and the related government-imposed restrictions constitute direct “accidental physical loss or accidental physical damage” under the policy.

3 Iowa state and federal courts have uniformly determined that the COVID-19 pandemic and the related government-imposed restrictions do not constitute direct physical loss. Lisette Enters., Ltd. v. Regent Ins. Co., No. 4:20-cv-00299, —— F. Supp. 3d ———, ———, 2021 WL 1804618, at *1–2 (S.D. Iowa May 6, 2021) (Iowa Court of Appeals’s decision in Milligan “is consistent with the principle that coverage for ‘loss’ or ‘damage’ under Iowa law at least requires the presence of a physical condition on or affecting the property located at the insured premises.”), appeal docketed, No. 21-2238 (8th Cir. June 4, 2021); Gerleman Mgmt., Inc. v. Atl. States Ins. Co., 506 F.Supp.3d 663, 670 (S.D. Iowa 2020) (“It is a settled matter in Iowa law that direct physical loss or damage requires tangible alteration of property and that loss of use alone is insufficient.”), appeal docketed, No. 21-1082 (8th Cir. Jan. 12, 2021); Palmer Holdings & Invs., Inc. v. Integrity Ins. Co., 505 F. Supp. 3d 842, 856 (S.D. Iowa 2020) (same), appeal docketed, No. 21-1040 (8th Cir. Jan. 7, 2021); Whiskey River on Vintage, Inc. v. Ill. Cas. Co., 503 F. Supp. 3d 884, 899 (S.D. Iowa 2020) (same), appeal docketed, No. 20-3707 (8th Cir. Dec. 29, 2020); Wakonda Club v. Selective Ins. Co. of Am., No. LACL148208, slip op. at 6 (Iowa Dist. Ct. Polk Cnty. March 3, 2021) (“Wakonda claims no injury to or destruction to realty or other loss physical in nature and therefore [its claim is] not covered under the policy.”), appeal docketed, No. 21-0374 (Iowa Ct. App. Mar. 16, 2021).
Santo's Italian Café LLC v. Acuity Insurance Company, --- F.4th ---- (2021)

SANTO'S ITALIAN CAFÉ LLC, Plaintiff-Appellant,
v.
ACUITY INSURANCE COMPANY, Defendant-Appellee.

No. 21-3068
Argued: September 16, 2021
Decided and Filed: September 22, 2021

Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 1:20-cv-01192—Pamela A. Barker, District Judge.

Attorneys and Law Firms


Before: SUTTON, Chief Judge; BATCHELDER and LARSEN, Circuit Judges.

OPINION

SUTTON, Chief Judge.

*1 Santosuososs is an Italian restaurant in Medina, Ohio. The COVID-19 pandemic was not good for the restaurant's business or for that matter most hospitality services. First came an understandable reluctance by patrons to enter enclosed public spaces such as restaurants. Then came the State of Ohio's order to suspend all in-person dining operations at restaurants to slow the spread of the virus. Through it all, Santosuossos lost considerable revenue and understandably blamed the pandemic and shut-down order for its economic woes. The owner of the restaurant sued its insurer, Acuity Insurance Company, for coverage under its commercial property insurance policy, which covers business interruption “caused by direct physical loss of or damage to property.” R.7-7 at 29. The district court granted Acuity's motion to dismiss, reasoning that the policy did not cover this kind of peril. We agree and affirm.

I.

In March 2020, the Governor of Ohio declared a state of emergency in connection with the COVID-19 pandemic. A few days later, the Director of the Ohio Department of Health ordered restaurants across the State to close their doors to in-person diners. The order forced Santosuososs “to halt ordinary operations.” R.1-1 at 3. Although the closure order permitted restaurants to offer takeout services, in-person dining generates the “substantial majority of [Santosuososs's] revenue.” Id. The restaurant sustained significant losses and laid off employees as a result of the order.

The owner of the restaurant, Santo's Italian Café LLC, filed a claim with its insurance company, Acuity, seeking recovery under its commercial property insurance policy. After Acuity denied coverage, the owner filed a complaint in Ohio state court, seeking a declaration that required Acuity to reimburse it for the income lost while the closure orders were in place. Acuity removed the lawsuit to federal court and filed a motion to dismiss for failure to state a claim. See Fed. R. Civ. P. 12(b) (6). The district court granted the motion, reasoning that the policy did not cover lost income attributable to the pandemic and any shut-down orders.

II.

Ohio law governs this dispute. An insurance policy amounts to a contract, the meaning of which presents a question of law. Lager v. Miller-Gonzalez, 120 Ohio St.3d 47, 896 N.E.2d
In Ohio, as in all States (we expect), the state courts construe the terms of a contract in accordance with their conventional meaning. *Laboy v. Grange Indem. Ins. Co.*, 144 Ohio St.3d 234, 41 N.E.3d 1224, 1227 (2015).

The text of the policy answers the question at hand. Two big-picture provisions initially orient the policy. At the outset, it says that “[w]e will pay for direct physical loss of or damage to Covered Property... caused by or resulting from any Covered Cause of Loss.” *Id.* at 25. It then says that, with respect to “Covered Causes of Loss,” the policy applies to “Risks of Direct Physical Loss.” *Id.* at 26.

Later, it provides eighteen “Additional Coverages,” one of which includes coverage for “Business Income and Extra Expense.” *Id.* at 29. Under this provision, Acuity must reimburse the owner of the restaurant for business income lost due to the necessary suspension of its operations if the “suspension” was caused by direct physical loss of or damage to property at the restaurant. *Id.* The policy defines a “suspension” as either “[t]he partial slowdown or complete cessation of... business activities” or when “a part or all of the described premises is rendered untenable.” *Id.* at 30. Thus: If the restaurant (1) lost business income (2) due to a business suspension, it may recover the lost income (3) caused by (4) “direct physical loss of or damage to property.”

*2 Everyone agrees that the shut-down orders required Santosuossos to suspend its in-premises dining operations, that the restaurant lost business income due to that suspension, and that the orders caused the shutdown. What separates the parties is disagreement over whether the suspension arose from a covered cause. Does a pandemic-triggered government order, barring in-person dining at a restaurant, count as “direct physical loss of or damage to the property?”

The policy does not define these words, requiring us to give them their “common and ordinary” meaning. *Olmstead v. Lumbermens Mut. Ins. Co.*, 22 Ohio St.2d 212, 259 N.E.2d 123, 126 (1970). That is cold comfort in one sense. There is nothing common or ordinary about insurance contracts. Ordinary people do not speak in the way the authors of insurance policies write. Consider the reaction you would receive if at the next social gathering you expressed your fears in the manner of this insurance contract: (1) “I’m afraid of ‘loss or damage by theft’ of my ‘jewelry, watches, watch movements, jewels, pearls, precious and semi-precious stones, bullion, gold, silver, platinum and other precious alloys or metals,’ ” *Id.* at 26; (2) “My home ‘shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion,’ ” *Id.* at 29; (3) “Where are the ‘papers and records?’ ” “In whose ‘care, custody or control’ are they?” *Id.* at 36; or (4) “I’m afraid of ‘[w]ar, including undeclared or civil war, ... [w]arlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents,’ and ‘[i]nsurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these,’ ” *Id.* at 39.

There is indeed nothing common about the language of insurance contracts. Then again, there is nothing common about the task at hand—capturing risk and what to pay for it, pricing unknowable future perils in a fair and predictable way. This is a specialized field of language, and aptly so. Hence the 26 pages and many words, sometimes overlapping words, needed to complete this contract. While there may be nothing common about the words found in insurance contracts, they often generate an ordinary meaning when anchored in the special context in which they are written.

That is true of the phrase around which this dispute revolves —“direct physical loss of or damage to” covered property —and the context in which it appears. Nothing unexpected arises from consulting dictionary definitions of the key disputed terms of this clause: “direct physical loss of” property. “Direct” means “[e]ffected or existing without intermediation or intervening agency; immediate.” *Oxford English Dictionary Online* (3d ed. 2021). “Physical” means “natural; tangible, concrete.” *Id.* “Loss” means “[p]erdition, ruin, destruction; the condition or fact of being ‘lost,’ destroyed, or ruined,” or “being deprived of.” *Id.* And “property” means “any residential or other building (with or without associated land) or separately owned part of such building (as an apartment, etc.),” as well as “[s]omething belonging to a thing; an appurtenance; an adjunct.” *Id.*

Whether one sticks with the terms themselves (a “direct physical loss of” property) or a thesaurus-rich paraphrase of them (an “immediate” “tangible” “deprivation” of property), the conclusion is the same. The policy does not cover this loss. The restaurant has not been tangibly destroyed, whether in part or in full. And the owner has not been tangibly or concretely deprived of any of it. It still owns the restaurant and everything inside the space. And it can still put every square foot of the premises to use, even if not for in-person dining use.
*3 Think of the different potential sources of the restaurant's lost income—the virus and the State's shut-down orders—and whether either one created a “direct physical loss of or damage to” property. The novel coronavirus did not physically affect the property in the way, say, fire or water damage would. No one argues that the virus physically and directly altered the property. The restaurant indeed makes no such argument. The Governor's shut-down orders also did not create a direct physical loss of property or direct physical damage to it. They simply prohibited one use of the property—in-person dining—while permitting takeout dining and through it all did not remotely cause direct physical damage to the property. It was as if the government temporarily rezoned all restaurants in the State solely for takeout dining. Even as restaurant owners no doubt would suffer from such a decision and no doubt would have reason to object to it, the government regulation would not create a direct physical loss of property. A loss of use simply is not the same as a physical loss. It is one thing for the government to ban the use of a bike or a scooter on city sidewalks; it is quite another for someone to steal it. See generally Image Dental LLC v. Citizens Ins. Co. of Am., No. 20-cv-02759, —— F.Supp.3d ———, 2021 WL 2399988, at *7 (N.D. Ill. June 11, 2021) (noting that if a driver “drop[ped] his keys in Lake Michigan,” that would be “a loss of the keys, but only a loss of use of the car”); MIKMAR, Inc. v. Westfield Ins. Co., No. 1:20-CV-01313, 520 F.Supp.3d 933, ———, 2021 WL 615304, at *5, *8 (N.D. Ohio Feb. 17, 2021).

The imperative of a “direct physical loss” or “direct physical damage,” moreover, does not suddenly appear in the policy's section for additional coverage, such as business interruption losses. It is the North Star of this property insurance policy from start to finish. Recall how the policy starts: “We will pay for direct physical loss of or damage to Covered Property ... caused by or resulting from any Covered Cause of Loss.” R.7-7 at 25. It then generally describes “Covered Causes of Loss” as “Risks of Direct Physical Loss.” Id. at 26. Direct physical loss or direct physical damage are the general touchstones of coverage for this policy—and indeed of coverage for most commercial property insurance policies. 10A Steven Plitt et al., Couch on Insurance § 148:46 (2021) (“In modern policies, especially of the all-risk type, the coverage trigger is frequently ‘physical loss or damage’ ...”); 4 Andrew B. Downs & Linda M. Bolduan, Law and Practice of Insurance Coverage Litigation § 52:4 (2021) (describing how first-party property insurance policies typically cover “all direct physical losses not excluded”). It pays little heed to these omnipresent words in the policy, if not erases them, to construe them to cover business losses generated by a statewide shut-down order. All in all, the cause of the suspension of operations—the prohibition on in-person dining—did not arise from a physical loss of property or physical damage to it. See Oral Surgeons, P.C. v. Cincinnati Ins. Co., 2 F.4th 1141, 1143–44 (8th Cir. 2021) (rejecting oral surgeon's claim that Iowa's gubernatorial order prohibiting non-emergency dental procedures was a “direct 'loss' to property”); Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co., No. 21-11046, —— Fed.Appx. ———, 2021 WL 3870697, at *1 (11th Cir. Aug. 31, 2021) (per curiam) (rejecting dentistry practice's claim that Georgia's shelter-in-place order caused “‘direct physical loss or damage’ to property”).

Other terms in the policy reinforce this conclusion. Acuity promised to pay for lost business income only during the “period of restoration.” R.7-7 at 29. That period begins 24 hours after the “time of direct physical loss or damage” and ends either when the insured property “should be repaired, rebuilt or replaced with reasonable speed” or when “business is resumed at a new permanent location,” whichever comes first. Id. at 50. Baked into this timing provision is the understanding that any covered “direct physical loss of or damage to” property could be remedied by repairing, rebuilding, or replacing the property or relocating the business. But what would that mean under Santo's Café's interpretation of the policy? It has not alleged any problem with the building. There is nothing to repair, rebuild, or replace that would allow the resumption of in-person dining operations. What the restaurant needed was an end to the ban on in-person dining, not the repair, rebuilding, or replacement of any of its property.

*4 The traditional uses of commercial property insurance also support this interpretation. Even when called “all-risk” policies, as these policies sometimes are, they still cover only risks that lead to tangible “physical” loss or damages, say by fire, water, wind, freezing and overheating, or vandalism. See Couch on Insurance § 148:3; 4 Philip L. Bruner & Patrick J. O’Connor, Bruner & O’Connor on Construction Law § 11:39 (2021) (describing the “traditional property insurance product” as a method of insuring against “fire, windstorm, and the like”); 2 Myron Kove et al., Real Estate Transactions § 18:95 (2021) (explaining that property insurance covers “damage or destruction by the action of the elements” and has its origins in coverage for damage by fire or lightning).
In each case, the subject property suffers a direct physical change, whether by damage to it that requires repair or the total loss of it that requires replacement. These policies do not typically apply to losses caused by government regulation. See Couch on Insurance § 148:3 (explaining that the “major risk categories” covered by property insurance are “deliberate theft”; “misplacement, misdelivery, or unexplained loss”; “contamination, pollution, and the like”; and “breakage/physical damage/destruction” (capitalization altered)); id. § 167:15 (“Because business interruption policies generally require some physical damage to the insured's business in order to invoke coverage, losses due to curfew and other such restrictions are not generally recoverable.”). And they do not cover losses indirectly caused by a virus that injures people, not property. See id. § 148:3 (explaining that, when it comes to property insurance, “illness” is a “major risk category” that “only livestock face”).

An Ohio decision also supports this reading. At issue in Mastellone v. Lightning Rod Mutual Insurance Co. was a claim by two homeowners seeking insurance coverage for mold growth. 175 Ohio App.3d 23, 884 N.E.2d 1130, 1133 (2008). The policy covered a “direct loss to property ‘only if that loss is a physical loss to property,’” which the court analogized to “physical injury.” Id. at 1143. In defining the terms, the court relied in part on a treatise that explained what it generally means for a “loss” to be “physical,” relying on the “ordinary definition” of the words. Id. (quotation omitted). That authority provided that a “physical loss” typically excludes the situation where one “merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.” Id. (quotation omitted). Relying on that guidance, the court concluded that the policy did not cover mold growth. The evidence indicated that the stains “could be cleaned from the siding by using a solution of bleach and trisodium phosphate,” and that, while the staining might redevelop, the siding had not “been structurally altered such that it would need to be replaced.” Id. at 1144. Because the mold did not “adversely affect[] the structural integrity of the house,” it did not qualify as a “physical loss to property.” Id. at 1143.

Mastellone is the harder case. It at least involved some physical change to the property, the mold covering the property. Not so in today's case. How could one say that the pandemic or Ohio's shut-down order physically altered the property or for that matter affected the “structural integrity” of the restaurant? All Santo's Café can say is that the restaurant cannot be put to one of its intended uses. Mastellone offers a good reason to think that the Supreme Court of Ohio, if faced with the question, would conclude that Santo's Café has not alleged a “physical loss of or damage to” its property. So do other Ohio decisions that have relied on Mastellone. See, e.g., Cincinnati Ins. Cos. v. Motorists Mut. Ins. Co., 18 N.E.3d 875, 882 n.5 (Ohio Ct. App. 2014); Ohio Cas. Ins. Co. v. Hanna, Nos. 07CA0016-M, 07CA0017-M, 2008 WL 2581675, at *3 (Ohio Ct. App. 2008); cf. Universal Image Prods., Inc. v. Fed. Ins. Co., 475 F. App'x 569, 573 (6th Cir. 2012).

*Santo's Café offers several responses to this conclusion. It first argues that, if “physical loss of or damage to” property does not cover the deprivation of a specific use of property, that transforms the phrase “physical loss” into surplusage. We have no quarrel with the canon against surplusage in the abstract, so long as it does not distract the interpreter's eyes from “the text of the contract” and the context in which it appears—here an insurance contract that rejoices in overlapping terms and concepts. Beverage Holdings, L.L.C. v. 5701 Lombardo, L.L.C., 159 Ohio St.3d 194, 150 N.E.3d 28, 33 (2019). But even on its own terms, the anti-surplusage canon does not take the restaurant where it wants to go. There is no need to read “physical loss” to include a deprivation of some particular use of a property in order to give the phrase independent meaning. That possibility could occur whenever a policy holder is deprived of property without any damage to it, say a portable grill or a delivery truck stolen without a scratch.

*Santo's Café adds that “loss” is a synonym for “deprivation” and that it was deprived of its ability to use the premises for its intended purpose. It then points out that the closure orders have “forced [it] to halt ordinary operations”; that the “premises is unsafe, dangerous and unfit for its intended use”; and that Santo's Café “cannot access” the restaurant “for th[e] purpose” of “dine-in operations.” R.1-1 at 3, 6. But this argument skates over the unrelenting imperative that the policy covers only “physical” losses. Ohio's prohibition on indoor dining no doubt caused an economic loss for Santo's Café. But it did not cause a direct, physical loss of property, which is a precondition for the business suspension coverage in the policy and in fact for most coverage in the policy.

If we accepted the restaurant's invitation and construed any loss of use to be a physical loss of property, that would create problems of its own. What if the pandemic or a worker shortage made it difficult for the restaurant to hire cooks and waiters? Would that not prevent the restaurant from
using the kitchen or offering in-person dining services? Or what if the State had taken no action in response to the pandemic, but most people had stayed home anyway for fear of catching COVID-19? Would that not prevent the restaurant from using the restaurant space as well? There are many questions surrounding the restaurant's interpretation of this policy. And the answers to each of them suggest the policy has no such application here.


Correctly decided or not, these cases stand a significant step removed from today's dispute. Santo’s Café has not alleged that its property is unusable or uninhabitable, only that it is “unsafe, dangerous and unfit for its intended use.” R.1-1 at 6. One paragraph of the complaint, it is true, alleges that the orders closing the restaurant “prohibit” [Santo’s Café] and the public from having access to the building. Id. at 4. But the theory is implausible, as it is inconsistent with the remainder of the complaint and above all with the text of the shut-down order itself. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

The restaurant's efforts to marginalize Mastellone do not create a net gain. True, the decision did not interpret identical language. True also, the decision involved homeowners’ insurance, not commercial insurance. But the court still construed similar language, a limit that the policy would “insure against direct loss to property ‘only if that loss is a physical loss to property.’ ” Mastellone, 884 N.E.2d at 1143. And it still insisted on a direct physical form of damage when it came to the claim for coverage, honoring a similar limitation on coverage. Materially speaking, that is this case. No less significantly, Santo’s Café offers nothing better—no affirmative authority under Ohio law to support its contrary position.

If all else fails, the restaurant contends, the provision at a minimum is ambiguous and thus should be construed in favor of the policyholder. But the policy is not ambiguous. “[D]irect physical loss of” property does not mean what Santo’s Café says it means. It refers to direct physical loss of property, not the inability to use property. The restaurant's reliance on Retail Ventures, Inc. v. National Union Fire Insurance Co. of Pittsburgh, 691 F.3d 821 (6th Cir. 2012), does not help matters. The restaurant claims that the case establishes that a contract is necessarily ambiguous if it separately addresses “physical loss of” property and “damage to” property. But that overreads Retail Ventures. That case held only that the phrase “loss of proprietary information ... or other confidential information” was ambiguous. Id. at 832–33. Today's terms did not make an appearance there.

*6 Also mistaken is the restaurant's suggestion that any potential surpluses in an insurance contract—say some overlap between “direct physical loss” and “direct physical damage”—creates ambiguity sufficient to construe the contract against the insurer. As we have said before, “surplusage alone does not make an insurance policy ambiguous.” TMW Enters., Inc. v. Fed. Ins. Co., 619 F.3d 574, 578 (6th Cir. 2010) (quotation omitted) (applying Michigan law). The anti-surplusage canon, it is well to remember, “is one among many tools for dealing with ambiguity, not a tool for creating ambiguity in the first place.” Id. The canon needs to be deployed with special care in a setting—insurance contracts—in which “redundancies abound” and particularly in a 26-page contract in which “iteration is afoot throughout.” Id. at 577. It is no overstatement to say that it would not be an insurance contract if it did not come with some surplusage.

Nor is it just insurance contracts that flood us with words from time to time, saying two or more things where one will do. Lawyerly doublets and triplets sometimes amount to nothing more than manners of speaking and emphasis, not sources of ambiguity. See Bryan A. Garner, The Redbook: A Manual on Legal Style § 12.2(f) (4th ed. 2018). Judges are not above it all either. We are known for applying “arbitrary and capricious” review to agency actions. And the United States Supreme Court features its goal—“Equal Justice Under Law”—above the main entrance to its building. But what agency action has ever been capricious but not arbitrary? And does not a legal system devoted to “Justice Under Law” necessarily require providing it equally to everyone? While the anti-surplusage
canon remains an essential tool for interpreting language, it remains acutely sensitive to the setting in which it is deployed. The canon has no meaningful role to play in this case.

In the last analysis, this commercial property insurance policy does not cover this business loss.

In view of this conclusion, we need not rely on—or finally construe—two coverage exclusions in the policy, each offering potential additional explanations for denying this claim. One is a virus exclusion. It says that Acuity “will not pay for loss or damage caused directly or indirectly by ... [a]ny virus ... capable of inducing physical distress, illness or disease.” R.7-7 at 38–39. Broad as this language is, especially the “directly or indirectly” phrase, and clear as it is that a coronavirus is a “virus,” it remains a legitimate question for a future court to determine how far the “indirectly” language extends. For now, the absence of initial coverage for this claim suffices to reject it.

The second exclusion warrants more discussion, though we need not relies on it either in the end. Labeled “Ordinance or Law,” it says that Acuity “will not pay for loss or damage caused directly or indirectly by ... [r]egulating the construction, use or repair of any property.” Id. at 38 (emphasis added). At one level, this caveat seems to cover today’s claim. The restaurant's losses arose from executive-branch orders “regulating” the “use” of the “property.” *Santo’s Café* counters that the State’s shut-down order does not count as an “ordinance” or “law.” That is doubtful. Under American separation of powers, governors and other state executive officials rarely have inherent authority. They may enforce or implement laws enacted by the legislature. That is indeed what the Director of the Ohio Department of Health purported to do in Ohio when she promulgated this order under the emergency powers the Ohio General Assembly delegated to her under the statute setting forth the authority of the Department of Health. Ohio Rev. Code Ann. § 3701.13. That sounds like a law to us. And that conclusion makes all the more sense given the policy’s later references to “enforcement” and to government actions “[r]egulating” the property. In truth, the ordinance or law dichotomy seems more likely to capture the difference between local government regulations on one side of the ledger and statewide and nationwide regulations on the other.

The neighboring provisions of “use”—“construction” or “repair”—might suggest that this section does not deploy “use” in a broad sense. Context is everything in interpretation, central to all that we have said so far. It may be that “use” has a restricted meaning in this section, anchored to the restoration phase of dealing with an owner's property damage or loss. That leaves us inclined to save for another day the resolution of the meaning of the “ordinance or law” exclusion and its application to “use.”

Even so, this back and forth generates one last insight. The essence of the restaurant's claim is that “physical loss” of property covers all inabilities to “use” that property. Having come to appreciate that “use” might have more than one meaning in the context of a provision in which the word actually appears, we are doubly wary of inserting its broadest meaning in a part of the policy in which it does not appear.

* * *

The singular challenges facing restaurants, bars, and other hospitality services over the last eighteen months are not lost on us. Staying in business through a once-in-a-century pandemic (let us hope) that has prompted all kinds of new government regulations, including prohibitions on many in-person services, has to be trying. Sure, state and federal loans and grants have offered some support for entities that suffered government-created losses of this sort, and surely that aid has allowed some companies to survive. But that truth provides little solace to those that did not.

That leaves a hard reality about insurance. It is not a general safety net for all dangers. If risk is not having money when you need it, insurance is one answer to perilous events that could prompt a sudden drop in revenue. Fair pricing of insurance turns on correctly accounting for the likelihood of the occurrence of each defined peril and the cost of covering it. Efforts to push coverage beyond its terms creates a mismatch, an insurance product that covers something no one paid for and, worse, runs the risk of leaving insufficient funds to pay for perils that insureds did pay for. That is why courts must honor the coverage the parties did—and did not—provide for in their written contracts of insurance.

We affirm.

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APPEARANCES

Appearances noted by way of CourtCall Appearance Calendar, attached hereto and incorporated herein by reference.

Defendant Philadelphia Indemnity Insurance Company's (“Philadelphia”) general demurrer to the First, Third and Fifth Causes of Action

Tentative Ruling posted on the Internet.

The Court hears oral argument and confirms the tentative ruling as follows:

Defendant Philadelphia Indemnity Insurance Company's (“Philadelphia”) general demurrer to the First, Third and Fifth Causes of Action is OVERRULED. Defendant is ordered to file its answer within 10 days.

A general demurrer challenges the legal sufficiency of a complaint on the ground that it fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc. § 430.10(e).) The allegations in the complaint as a whole must be reviewed to determine whether a set of alleged facts constitutes a cause of action. (People v. Superior Court (Cahuenga's the Spot) (2015) 234 Cal.App.4th 1360, 1376.) A complaint need only meet fact-pleading requirements, which requires a statement of facts constituting a cause of action in ordinary and concise language, and should allege ultimate facts that, as a whole, apprise defendant of the factual basis of the claim. (Code Civ. Proc. §425.10(a)(1); Navarrete v. Meyer (2015) 237 Cal.App.4th 1276, 1284.)
In ruling on a demurrer, the court is guided by the following long-settled rules: The court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. The court may also consider matters which may be judicially noticed. Further, the court gives the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

In a demurrer based on insurance policy language, the insurer "must establish conclusively that this language unambiguously negates beyond reasonable controversy the construction alleged in the body of the complaint." (*Columbia Casualty Co. v. Northwestern Nat. Ins. Co.* (1991) 231 Cal.App.3d 457, 468-473, 282 Cal.Rptr. 389.) To meet this burden, an insurer is required to demonstrate that the policy language supporting its position is so clear that parol evidence would be inadmissible to refute it. (*Id.* at p. 469, 282 Cal.Rptr. 389.) Absent this showing, the court must overrule the demurrer and permit the parties to litigate the issue in a context that permits the development and presentation of a factual record, e.g., summary judgment or trial." (*Palacin v. Allstate Ins. Co.* (2004) 119 Cal. App. 4th 855, 862.)

Philadelphia demurrers to the 1st, 3rd and 5th causes of action on the ground that Plaintiff has not alleged sufficient facts to show "direct physical loss" under the Business Income and Extra Expenses and Civil Authority provisions in its insurance policy because coronavirus and COVID-19 do not physically alter the structure. In response Plaintiff contends (a) that "direct physical loss" does not require physical tangible alteration of the property and that allegations of loss of use are sufficient, and (b) that if physical tangible alteration is required, Plaintiff has satisfied this requirement.

Whether Plaintiff has alleged sufficient facts to overcome Philadelphia's demurrer depends on the interpretation of "direct physical loss". The interpretation of an insurance policy is a question of law and applies the well-settled rules of contract interpretation. (*Waller v. Truck Ins. Exch.* (1995) 11 Cal. 4th 1, 18; *Vardanyan v. AMCO Ins. Co.* (2015) 243 Cal. App. 4th 779, 792.)

"The mutual intention of the parties as it existed at the time of contracting governs interpretation. (Civ. Code, § 1636.) "Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.] The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" [citation], controls judicial interpretation." (*Waller v. Truck Ins. Exchange, inc.* (1995) 11 Cal.4th 1, 18, 44 Cal.Rptr.2d 370, 900 P.2d 819.) "Any ambiguous terms are resolved in the insureds' favor, consistent with the insureds' reasonable expectations." (*Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758, 763, 110 Cal.Rptr.2d 844, 28 P.3d 889.) Policy exclusions are strictly construed; exceptions to exclusions are broadly construed in favor of the insured. (*E.M.M.I.*, at p. 471, 9 Cal.Rptr.3d 701, 84 P.3d 385.)

(*Vardanyan v. AMCO Ins. Co., supra, 243 Cal. App. 4th at 792.)

In *MRI Healthcare Center of Glendale v. State Farm General Ins. Co.* (2010) 187 Cal.App.4th 766 ("MRI Healthcare"), on cross-motions for summary judgment, the court considered whether plaintiff insured suffered "direct physical loss" to an MRI (magnetic resonance imaging) machine within the meaning of a business insurance policy. (*Id.* at 769-770, 777-778.) The *MRI Healthcare* court stated: "A direct physical loss 'contemplates an actual change in insured property' then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." [*Citation.*] ... *For loss to be covered, there must be a 'distinct, demonstrable, physical alteration' of the property.*" (*Id.* at 779, emphasis added.) The *MRI Healthcare* court further explained: "For there to be a 'loss' within the meaning of the policy, some *external force* must have acted upon the insured property to cause a *physical change in the condition of the property*, i.e., it must have been 'damaged' within the common understanding of that term." (*Id.* at 780, emphasis added.) Thus, the MRI machine did not suffer any "actual physical 'damage' " by virtue of the fact that it was turned off and could not be turned back.
Neither party has cited to any California state cases that have resolved the question whether coronavirus or COVID-19 may cause "direct physical loss" to property.

Here, the Complaint expressly alleges the coronavirus and COVID-19 caused direct physical loss and damages to its property. The Complaint makes the following specific factual allegations: coronavirus and COVID-19 are contained in respiratory droplets called aerosols that stay on surfaces and in the air for up to a month, physically alters the air and surfaces to which it attaches and causes them to be unsafe, deadly and dangerous (Complaint, at ¶¶ 20, 22-26); that "[r]ecognizing the ability of the coronavirus to attach onto surfaces," researchers have begun to develop technology to test for the presence of COVID-19 on the surfaces of buildings (Complaint, at ¶ 21); and that coronavirus and COVID-19 were present at its properties at the time of the State and County closure orders, that when Plaintiff reopened its properties, its employees tested positive, and that it was required to conduct "additional cleaning and sanitization to respond to and remove the coronavirus and COVID-19 from physical surfaces in its insured premises and properties in accordance with public health orders that require such measures to protect against the coronavirus and COVID-19 (Complaint, at ¶¶ 42-44).

Construing these allegations as true as the Court must on a demurrer, the Court cannot determine as a matter of law that these allegations do not show a "direct physical loss" in accordance with MRI Healthcare. (See Studio 417, Inc. v. Cincinnati Insurance Company (W.E. Mo. August 12, 2020, Case No. 20-cv-03127-SRB) F. Supp.3d, 2020 WL 4692385, 4-5 [plaintiff adequately plead a claim for "direct physical loss" by alleging COVID-19 is a physical substance that lives on surfaces and in the air making its property unsafe and unusable and resulting in direct physical loss].)

The Court recognizes that California federal cases have interpreted MRI Healthcare to require a physical change in the property or permanent dispossession of the property to qualify as "direct physical loss" and have generally rejected arguments that business losses due to coronavirus and Covid-19 are covered under Business Income, Extra Expenses and Civil Authority provisions. See Amended Mem. Supp., at pp. 12 -14. However, these federal California cases are not binding on this Court and were decided under a different standard. While these cases are instructive, the allegations in those cases are largely distinguishable from those alleged here. (See e.g, 10E, LLC v. Travelers Indemnity Co. of Connecticut (C.D. Cal. September 2, 2020, Case No. 2:20-cv-04418-SVW-AS) F. Supp.2d, 2020 WL 5359653, 1, 5 [no allegations of physical alteration]; Mudpie, Inc. v. Travelers Casualty Ins. Co. of America (N.D. Cal. September 14, 2020) 2020 WL 5525171, *1, 4-5 [no allegations of any external physical force that induced detrimental change; West Coast Hotel Management, LLC v. Berkshire Hathaway Guard Insurance Companies (C.D. Cal. October 27, 2020, Case No. 2:20-cv-05663-VAP-DFMx) F. Supp.3d, 2020 WL 6440037 *4-5 [no allegations of physical transformation or requiring that anything needed to be repaired, rebuilt or replaced]; Pappy's Barber Shops, Inc. v. Farmers Group, Inc. (S.D. Cal. September 11, 2020, Case No. 20-cv-907-CAB-BLM) 2020 WL 5500221, *1,5 [no factual allegations to support arguments of physical damages].)

More importantly, given the high standard that must be met to prevail on a demurrer on an insurance policy, any doubts must be resolved in favor of the Plaintiff. The Court is not satisfied that there is a sufficiently full record at this demurrer stage to make the determination as a matter of law that the coronavirus and COVID-19 have not, in some manner, caused physical damage to property.

Accordingly, the demurrer is overruled.

The Court overrules Plaintiff's objections to Exhibits B -G and grants Philadelphia's request for judicial notice.

Status Conference
Status Conference continued to April 2, 2021 at 9 AM in this department pursuant to Court's motion.

The parties are ordered to file a joint status report not later than March 26, 2021.

Moving Party is ordered to give notice.
Synopsis
Background: Insured brought class action against insurers for declaratory judgment, breach of contract, and breach of covenant of good faith and fair dealing under all risk commercial property insurance policy, arising from insurers' denial of insured's claim for loss of business income and extra expenses due to closing of massage parlor because of Executive Orders imposing COVID-19 restrictions. Insurers moved to dismiss for failure to state a claim.

Holdings: The District Court, Raymond A. Jackson, J., held that:

[1] insured submitted to insurer good faith plausible claim for direct physical loss covered by all risk commercial insurance policy;

[2] civil authority coverage provision did not apply to provide coverage for insured's claim;

[3] virus exclusion in all risk commercial property insurance policy did not apply to preclude coverage for insured's claim;

[4] ordinance or law exclusion in all risk commercial insurance policy did not apply to preclude coverage for insured's claim;

[5] acts and decisions exclusion in all risk commercial insurance policy was not available to preclude coverage for insured's claim; and

[6] consequential loss exclusion of all risk insurance policy applied to preclude coverage for insured's claim.

Motion granted in part and denied in part.

West Headnotes (45)

[1] Federal Civil Procedure • Evidence; pleadings and supplementary material
In order to certify a suit as a class action, the proponent of class certification has the burden of establishing that the conditions enumerated in the rule of federal civil procedure governing class actions have been met. Fed. R. Civ. P. 23.

[2] Federal Civil Procedure • In general; certification in general
In order to certify a suit as a class action, the District Court must conduct a rigorous analysis in determining whether the requirements of the rule of federal civil procedure governing class actions have been met. Fed. R. Civ. P. 23.

Federal Courts • Class actions
Whether the proponent of class certification has met his or her burden is left to the trial court's discretion and will be reversed only for abuse of such discretion. Fed. R. Civ. P. 23.

[4] Federal Civil Procedure • In general; certification in general
**Federal Civil Procedure ➔ Hearing and determination; decertification; effect**

In conducting its rigorous analysis of the rule of federal civil procedure governing class actions, the District Court must take a close look at the facts relevant to the class certification question and, if necessary, make specific findings on the propriety of certification. *Fed. R. Civ. P. 23.*

[5] **Federal Civil Procedure ➔ Hearing and determination; decertification; effect**

**Federal Civil Procedure ➔ Consideration of merits**

When determining whether to certify a suit as a class action, specific findings on the propriety of class certification can be necessary even if the issues tend to overlap into the merits of the underlying case. *Fed. R. Civ. P. 23.*

[6] **Federal Civil Procedure ➔ Matters considered in general**

District Court would only consider insured's breach of contract and breach of good faith and fair dealing claims as they applied to insured and not on behalf of any members of proposed class for purposes of insurers' motion to dismiss for failure to state claim, where insured had not yet moved to certify class. *Fed. R. Civ. P. 12(b)(6), 23.*

[7] **Declaratory Judgment ➔ Diversity of citizenship**

**Federal Courts ➔ Insurers**

District Court had diversity jurisdiction over insured's claims for declaratory judgment, breach of contract, and breach of covenant of good faith and fair dealing under all risk commercial property insurance policy, arising from insurers' denial of insured's claim for loss of business income and extra expenses due to closing of massage parlor because of Executive Orders imposing COVID-19 restrictions, where insured was Virginia corporation and its principal place of business was located in Virginia, and insurers were Illinois companies organized under laws of Illinois and headquartered in Illinois. *28 U.S.C.A. § 1332.*

[8] **Declaratory Judgment ➔ Insurance**

**Federal Courts ➔ Insurers and insurance**

Insurers personally availed themselves to jurisdiction in District, and thus District Court had personal jurisdiction over insurers, in insured's action for declaratory judgment, breach of contract, and breach of covenant of good faith and fair dealing under all risk commercial property insurance policy arising from insurers' denial of insured's claim for loss of business income and extra expenses due to closing of massage parlor because of Executive Orders imposing COVID-19 restrictions, where insurers marketed, advertised, and sold insurance policies, including insurance policy sold to insured, within District, including through numerous agents doing business in Virginia.

[9] **Federal Courts ➔ Substance or procedure; determinativeness**

In a diversity action, district courts apply federal procedural law and state substantive law.

[10] **Contracts ➔ Date or time of making contract**

**Insurance ➔ Sufficiency and effect**

Under Virginia law, a contract is made when the last act to complete it is performed, and in the context of an insurance policy, the last act is the delivery of the policy to the insured.

[11] **Contracts ➔ Grounds of action**

Under Virginia law, the elements of a breach of contract action are (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation.
[12] **Contracts** Effect of breach in general

For a breach of contract to be actionable under Virginia law, a plaintiff must establish that the breach was material.

[13] **Contracts** Effect of breach in general

Under Virginia law, a “material breach” is a failure to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract.

[14] **Contracts** Presumptions and burden of proof

Under Virginia law, a plaintiff bringing a breach of contract claim bears the burden to establish the element of damages with reasonable certainty.

[15] **Damages** Certainty as to amount or extent of damage

**Damages** Breach of contract in general

Under Virginia law, damages that are contingent, speculative, and uncertain are not recoverable on a breach of contract claim because they cannot be established with reasonable certainty.

[16] **Insurance** Language of policies

Under Virginia law, courts interpret insurance policies, like other contracts, in accordance with the intention of the parties gleaned from the words they have used in the document.

[17] **Insurance** Construction or enforcement as written

**Insurance** Plain, ordinary or popular sense of language

Under Virginia law, when the language in an insurance policy is clear and unambiguous, courts give the language its plain and ordinary meaning and enforce the policy as written.

[18] **Insurance** Function of, and limitations on, courts, in general

When interpreting an insurance policy under Virginia law, it is not the function of the Court to make a new contract for the parties different from that plainly intended and thus create a liability not assumed by the insurer.

[19] **Insurance** Ambiguity, Uncertainty or Conflict

Under Virginia law, insurance companies bear the burden of making their contracts clear.

[20] **Insurance** Ambiguity, Uncertainty or Conflict

Under Virginia law, if an ambiguity exists in an insurance policy, it must be construed against the insurer.

[21] **Insurance** Ambiguity in general

Under Virginia law, an insurance policy provision is “ambiguous” when, in context, it is capable of more than one reasonable meaning.

[22] **Insurance** Plain, ordinary or popular sense of language

In determining whether insurance policy provisions are ambiguous under Virginia law, the District Court gives the words employed their usual, ordinary, and popular meaning.

[23] **Insurance** Ambiguity in general

**Insurance** Construction to be unstrained

An ambiguity in an insurance policy, if one exists under Virginia law, must be found on the face of the policy, and courts must not strain to find ambiguities.
[24] **Contracts** ➔ **Existence of ambiguity**

Contractual provisions are not ambiguous under Virginia law merely because the parties disagree about their meaning.

[25] **Insurance** ➔ **Burden of proof**

Under Virginia law, the policyholder bears the burden of proving that the policyholder's conduct is covered by the insurance policy.

[26] **Insurance** ➔ **Burden of proof**

Under Virginia law, where an insured has shown that his loss occurred while an insurance policy was in force, if the insurer relies upon exclusionary language in the policy as a defense, the burden is upon the insurer to prove that the exclusion applies to the facts of the case.

[27] **Insurance** ➔ **Accident, occurrence or event**

Under Virginia law, a “fortuitous loss” under an all risk insurance policy which covers all accidental or fortuitous direct physical losses, unless the cause of the loss is explicitly excluded under the contract, is defined in various ways, but is essentially an event that is dependent on chance, an accident, or is unexpected.

[28] **Insurance** ➔ **Burden of proof**

Under Virginia law, the insured has the initial burden of proof to establish that a claimed loss under an all risk insurance policy which covers all accidental or fortuitous direct physical losses, unless the cause of the loss is explicitly excluded under the contract, was fortuitous.

[29] **Insurance** ➔ **Entire contract**

**Insurance** ➔ **Repugnant or conflicting clauses**

Under Virginia law, when making a determination as to whether a term in an insurance policy is ambiguous, the policy's provisions must be considered and construed together, and any internal conflicts between provisions must be harmonized, if reasonably possible, to effectuate the parties' intent.

[30] **Insurance** ➔ **Construction or enforcement as written**

**Insurance** ➔ **Plain, ordinary or popular sense of language**

When a disputed policy term is unambiguous under Virginia law, the District Court must apply its plain meaning as written.

[31] **Insurance** ➔ **Ambiguity, Uncertainty or Conflict**

**Insurance** ➔ **Favoring coverage or indemnity; disfavoring forfeiture**

If disputed insurance policy language is ambiguous and can be understood to have more than one meaning under Virginia law, the court must construe the language in favor of coverage and against the insurer.

1 Cases that cite this headnote

[32] **Insurance** ➔ **Ambiguity, Uncertainty or Conflict**

Under Virginia law, when various constructions of a term in an insurance policy are equally possible, that most favorable to the insured will be adopted.

[33] **Insurance** ➔ **Exclusions and limitations in general**

Under Virginia law, language in an insurance policy purporting to exclude certain events from coverage will be construed most strongly against the insurer.

[34] **Insurance** ➔ **Risks or Losses Covered and Exclusions**

Under Virginia law, the term “direct physical loss” in an insurance policy is traditionally,
though not exclusively, defined as covering incidents that result in structural damage to the property caused by, for example, fires, floods, hurricanes, and rainwater.

3 Cases that cite this headnote

[35] **Insurance** ➔ Business Interruption; Lost Profits

Insured submitted to insurer good faith plausible claim for direct physical loss to property covered by all risk commercial insurance policy, as required to state claims for declaratory judgment and breach of contract, arising from insurers' denial of insured's claim for loss of business income and extra expenses due to closing of massage parlor because of Executive Orders imposing COVID-19 restrictions; although massage parlor was not structurally damaged, it was plausible that insured experienced direct physical loss when property was deemed uninhabitable, inaccessible, and dangerous to use by Executive Orders because of its high risk for spreading lethal COVID-19 virus.

14 Cases that cite this headnote

[36] **Insurance** ➔ Proximate Cause

Insured failed to show causal link between physically damaged or dangerous surrounding properties proximate to insured's property and civil authority prohibiting insured from accessing or using their property, and thus civil authority coverage provision in all risk commercial insurance policy did not apply to provide coverage for insured's claim for loss of business income and extra expenses due to closing of massage parlor because of Executive Orders imposing COVID-19 restrictions, where Executive Orders were issued because COVID-19 presented ongoing threat to communities and not because of prior actual physical damage to insured's property or surrounding properties.

15 Cases that cite this headnote

[37] **Insurance** ➔ Questions of law or fact

As with the other provisions of an insurance policy, the interpretation of an exclusionary clause is an issue of law.

[38] **Insurance** ➔ Exclusions, exceptions or limitations

**Insurance** ➔ Exclusions and limitations in general

To be enforceable under Virginia law, the insurer must draft the language of an insurance policy exclusion conspicuously, plainly and clearly set forth any limitation on coverage to the insured.

[39] **Insurance** ➔ Proximate Cause

Insured failed to show direct connection between virus and claimed loss, and thus virus exclusion in all risk commercial property insurance policy did not apply to preclude coverage for insured's claim for loss of business income and extra expenses due to closing of massage parlor because of Executive Orders imposing COVID-19 restrictions, where insured neither alleged that there was presence of virus at covered property nor that virus was direct cause of property's physical loss, and insured did not allege that Executive Orders were result of growth, proliferation, spread, or presence of virus contamination at property.

15 Cases that cite this headnote

[40] **Insurance** ➔ Ordinance or law

Ordinance or law exclusion in all risk commercial insurance policy did not apply to preclude coverage for insured's claim for loss of business income and extra expenses due to closing of massage parlor because of Executive Orders imposing COVID-19 restrictions, where Executive Orders were not ordinances or laws such as safety regulations or laws passed by legislative body regulating construction, use, repair, removal of debris, or physical aspects of property, there was no ordinance or law from legislative body that prohibited physical use of property, exclusion applied to ordinances related to structural integrity, maintenance,
construction, or accessibility due to property's physical structural state, and physical structural integrity of insured's property was not central issue in case.

1 Cases that cite this headnote

[41] Insurance  ⇒  Risks or Losses Covered and Exclusions

Insurance  ⇒  Acts of government or governmental actors

Acts and decisions exclusion in all risk commercial insurance policy was not available to preclude coverage for insured's claim for loss of business income and extra expenses due to closing of massage parlor because of Executive Orders imposing COVID-19 restrictions, where exclusion was so ambiguous and broad that, taken literally under its plain meaning, policy would be worthless as any act from any character of all persons, groups, or entities would have prohibited coverage, and insured was not cause of Executive Orders which issued covered property to close.

[42] Insurance  ⇒  Proximate Cause

Consequential loss exclusion of all risk insurance policy applied to preclude coverage for insured's claim for loss of business income and extra expenses due to closing of massage parlor because of Executive Orders imposing COVID-19 restrictions for period between massage parlor's closure and executive order mandating closure, where exclusion barred coverage for loss directly or immediately caused by delay, loss of use, or loss of market, and insured decided to voluntarily close parlor as result of waning business prior to issuance of Executive Orders mandating closure.

2 Cases that cite this headnote

[44] Contracts  ⇒  Terms implied as part of contract

Every contract governed by the laws of Virginia contains an implied covenant of good faith and fair dealing.

[45] Insurance  ⇒  Actions

Insured pleaded sufficient facts, which if proved, would have shown that claims fell within all risk commercial insurance policy's coverage, as required to state claim for breach of covenant of good faith and fair dealing arising from insurers' denial of insured's claim for loss of business income and extra expenses due to closing of massage parlor because of Executive Orders imposing COVID-19 restrictions, where insured alleged that claim constituted accidental direct physical loss to covered property and that no exclusions applied to preclude coverage.

2 Cases that cite this headnote

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

RAYMOND A. JACKSON, United States District Judge

Before the Court is State Farm Mutual Automobile Insurance Company's and State Farm Fire and Casualty Company's (collectively, "State Farm" or "Defendants"),
Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6). ECF No. 29. Plaintiff has responded in opposition and Defendants replied. ECF Nos. 39, 41. Having reviewed the parties' filings, this matter is ripe for judicial determination. For the following reasons, Defendant's Motion to Dismiss is DENIED IN PART AND GRANTED IN PART.

I. FACTUAL AND PROCEDURAL HISTORY

The following facts taken from Elegant Massage, LLC's ("Elegant" or "Plaintiff") Complaint are considered true and cast in the light most favorable to Elegant. ECF No. 1; see also, Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982).

Since 2016, Elegant has owned and operated Light Stream Spa which provides therapeutic massages in Virginia Beach, Virginia. On July 22, 2019, State Farm sold an insurance policy (Policy No. 96-C6-P556-1) ("the Policy") to Plaintiff. See ECF No. 1 at Exhibit 1. The Policy issued *366 to Plaintiff is an "all risk" commercial property policy, which covers loss or damage to the covered premises resulting from all risks other than those expressly excluded. Id. The Policy was effective through July 22, 2020 and Plaintiff paid an annual premium of $475.00. Id. at ¶ 27. The Policy includes coverage of "Loss of Income and Extra Expense." The standard form for Loss of Income and Extra Expense Coverage is identified as CMP-4705.1. Id. at ¶ 33. Under the provision, the policy provides for the loss of business income sustained as a result of the suspension of business operations which includes action of a civil authority that prohibits access to the Plaintiff's business property. Id. at ¶ 34-35. The Policy also states that it does not cover Exclusions for "Fungi, Virus or Bacteria," "Ordinance or Law," "Acts or Decisions," or "Consequential Loss." Id.

On March 13, 2020, President Donald J. Trump issued a National Emergency Concerning the Novel Coronavirus Disease ("COVID-19") Outbreak.¹ On March 16, 2020, the Centers for Disease Control (CDC) issued guidance recommending the implementation of "social distancing" policies to prevent the spread of the a novel strain of coronavirus, SARS-CoV-2 ("COVID-19"). On March 20, 2020, Governor Northam and the Virginia State Health Commissioner declared a public health emergency and restricted the number of patrons permitted in restaurants, fitness centers and theaters to ten or less.² On March 23, 2020, Governor Northam issued Executive Order No. 53, which ordered the closure of "recreational and entertainment businesses," including "spas" and "massage parlors." ECF No. 30 at Exhibit 1 at 1-4. On March 23, 2020, Governor Northam issued Executive Order No. 55, which ordered all individuals in Virginia to stay home unless they were carrying out necessary life functions. Id. at Exhibit 1 at 5-7. On May 8, 2020, the Governor issued Executive Order No. 61, which amended Executive Order Nos. 53 and 55 and, beginning on May 15, 2020, eased some of the restrictions. Id. at Exhibit 1 at 8-18. Under Executive Order No. 61, spas and message centers were permitted to re-open subject to certain restrictions including limiting occupancy to 50% as well as requiring six feet between workstations, workers and patrons to wear face coverings, and hourly cleaning and disinfection while in operation. However, if businesses were unable to comply with the restrictions in Executive Order No. 61, they were ordered to remain closed. Id.

As a result of the policies on social distancing and restrictions on its business, Plaintiff voluntarily closed Light Stream Spa on March 16, 2020 and remained closed through May 15, 2020. Id. at ¶ 25. Accordingly, Plaintiff suffered a complete loss of income since closing on March 16, 2020. On March 16, 2020, Plaintiff submitted a claim for loss of business income and extra expenses under the Policy. Id. at ¶ 42. On March 26, 2020, Defendants denied Plaintiff's claim ("Denial Letter"). Id. The Denial Letter stated that the grounds for denial were because Plaintiff voluntarily closed their business on March 16, 2020, there was no civil order to close the business, there was no known damage to the business space or property resulting from COVID-19, and the Loss of Income Coverage excludes coverage for loss caused by virus. Id.

*367 On May 27, 2020, Plaintiff filed the instant Class Action complaint for Declaratory Judgement (Count I) and Breach of Contract (Count II) against Defendants, pursuant to Fed. R. Civ. P. 23(b)(1), 23(b)(2) and 23(b)(3) on behalf of themselves and all members of the proposed class and sub-class. Id. at ¶ 48. On July 13, 2020, Plaintiff filed a First Amended Complaint ("FAC") stating that it is bringing Counts I and II on behalf of itself and the proposed class and sub-class, as well as adding a claim for Breach of Covenant of Good Faith and Fair Dealing (Count III). ECF No. 20 at ¶ 173. On August 11, 2020, Defendants filed a Motion to Dismiss Count II. ECF No. 29. Plaintiff responded in opposition and Defendants replied. ECF Nos. 39, 41.
II. LEGAL STANDARD

A. Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of actions that fail to state a claim upon which relief can be granted. The United States Supreme Court has stated that in order “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Specifically, “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. at 678, 129 S.Ct. 1937. Moreover, at the motion to dismiss stage, the court is bound to accept all of the factual allegations in the complaint as true. Id. However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Id. Assessing the claim is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” (Id. at 679.). In considering a Rule 12(b)(6) motion to dismiss, the Court cannot consider “matters outside the pleadings” without converting the motion to a summary judgment. Fed. R. Civ. P. 12(d). Nonetheless, the Court may still “consider documents attached to the complaint ... as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic.” Sec'y of State for Defence v. Trimble Navigation Ltd., 484 F.3d 700, 705 (4th Cir. 2007); see also Fed. R. Civ. P. 10(c).

B. Class Certification

[1] [2] [3] [4] [5] In order to certify a suit as a class action, the proponent of class certification has the burden of establishing that the conditions enumerated in Rule 23 of the Federal Rules of Civil Procedure have been met. Windham v. American Brands, Inc., 565 F.2d 59, 64 n.6 (4th Cir. 1977) (en banc) cert. denied, 435 U.S. 968, 98 S. Ct. 1605, 56 L. Ed. 2d 58 (1978). The Court must conduct a “rigorous analysis” in determining whether the requirements of Rule 23 have been met. General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982). Whether the proponent of certification has met his or her burden is left to the trial court's discretion and will be reversed only for abuse of such discretion. Windham, 565 F.2d at 65. In conducting its rigorous analysis of Rule 23, the Court must take a “close look at the facts relevant to the certification question and, if necessary, make specific findings on the propriety of certification.” Thorn v. Jefferson—Pilot Life Ins. Co., 445 F. 3d 311, 319 (4th Cir. 2004) (internal quotations omitted). “Such findings can be necessary even if the issues tend to overlap into the merits of the underlying case.” Id.

*368 III. DISCUSSION

A. Class Certification

[6] In order to conduct a proper analysis of Plaintiff's allegations on behalf of all members of the proposed classes (or any other class authorized by the Court), Plaintiff must move the Court to apply relevant facts within Plaintiffs' Complaint to Rule 23(a) and (b). However, Plaintiff has not yet moved the Court to certify the class. Therefore, the Motion to Dismiss will only address Counts II and III as they apply to Plaintiff and not on behalf of any members of a proposed class. That is, any matters pertaining to a Class may only be considered after Plaintiff moves for it.

B. Subject Matter Jurisdiction and Choice of Law

[7] [8] As an initial matter, the Court has diversity jurisdiction under 28 U.S.C. § 1332. Plaintiff Elegant Massage, LLC, doing business as Light Stream Spa, is a Virginia Corporation and with its principle place of business located in Virginia Beach, Virginia. ECF No. 20 at ¶ 22. Defendant State Farm Mutual Automobile Insurance Company is organized under the laws of the State of Illinois, is licensed in all 50 states, and has its Corporate headquarters in Bloomington, Illinois. Id. at ¶ 23. Defendant State Farm Fire and Casualty Company is organized under the laws of the State of Illinois, provides property insurance for State Farm customers in the United States, and has its Corporate headquarters Bloomington, Illinois. Id. at ¶ 24. The amount in controversy exceeds $75,000. Id. This Court has personal jurisdiction over Defendants, because they have purposefully availed themselves to jurisdiction in this District by marketing, advertising and selling insurance policies, including the insurance policy sold to Plaintiff, within this District, including through numerous agents doing business in Virginia.

C. Count II: Breach of Contract

In Virginia, the elements of a breach of contract action are (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation. Horton v. Wright, 277 Va. 148, 671 S.E.2d 132, 134 (2009). To be actionable, Plaintiff must establish that the breach was material. Horton v. Horton, 254 Va. 111, 487 S.E.2d 200, 204 (1997). A material breach is a failure to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract. Id. Plaintiff also bears the burden to establish the element of damages with reasonable certainty. Nichols Construction Corp. v. Virginia Machine Tool Co., LLC, 276 Va. 81, 661 S.E.2d 467, 472 (2008). Damages that are contingent, speculative, and uncertain are not recoverable because they cannot be established with reasonable certainty. Shepherd v. Davis, 265 Va. 108, 574 S.E.2d 514, 524 (2003).

Here, the issue at heart is whether Plaintiff has sufficiently pleaded facts to establish the plausibility that Defendants breached their duty in the contract by refusing to cover Plaintiff's “accidental direct physical loss” as a result of the COVID-19 Executive Orders.

1. General Principles of Virginia Insurance Contract Interpretation


However, “[insurance] companies bear the burden of making their contracts clear.” Res. Bankshares Corp., 407 F.3d at 636. “Accordingly, if an ambiguity exists, it must be construed against the insurer.” Id. (citations omitted). “A policy provision is ambiguous when, in context, it is capable of more than one reasonable meaning.” Id. (citation omitted). “In determining whether the provisions are ambiguous, we give the words employed their usual, ordinary, and popular meaning.” Nextel Wip Lease Corp. v. Saunders, 276 Va. 509, 516, 666 S.E.2d 317 (2008) (citation omitted). “An ambiguity, if one exists, must be found on the face of the policy.” Granite State Ins. Co. v. Bottoms, 243 Va. 228, 233–34, 415 S.E.2d 131 (1992) (citation omitted), and “courts must not strain to find ambiguities.” Res. Bankshares Corp., 407 F.3d at 636 (citations omitted). “[C]ontractual provisions are not ambiguous merely because the parties disagree about their meaning.” Nextel Wip, 276 Va. at 516, 666 S.E.2d at 321.

Finally, the policyholder bears the burden of proving that the policyholder's conduct is covered by the
policy.” Res. Bankshares Corp., 407 F.3d at 636 (citations omitted). However, “the insurer bears the burden of proving that an exclusion applies.” Bohrer v. Erie Ins. Group, 475 F.Supp.2d 578, 585 (E.D. Va. 2007) *370 (citations omitted). Therefore, “[w]here an insured has shown that his loss occurred while an insurance policy was in force, if the insurer relies upon exclusionary language in the policy as a defense, the burden is upon the insurer to prove that the exclusion applies to the facts of the case.” Bituminous Cas. Corp., 239 Va. 332, at 336, 389 S.E.2d 696 (1990); see also Am. Reliance Ins. Co. v. Mitchell, 238 Va. 543, 547, 385 S.E.2d 583 (1989) (“Exclusionary language in an insurance policy will be construed most strongly against the insurer and the burden is upon the insurer to prove that an exclusion applies.”).

2. The All-Risk Policy

a. Coverage

On July 22, 2019, Plaintiff purchased from Defendant an “all-risk” insurance policy which covers loss or damage to the covered commercial property resulting from all risks other than those expressly excluded. ECF No. 1 at Exhibit 1. Although, the Policy incorrectly names “Ladies Spa Inc.” as the insured, instead of Elegant Massage, LLC d/b/a Light Stream Spa, the Policy correctly identifies Plaintiff's principal place of business located at 665 Newtown Road, Suite 114, Virginia Beach, Virginia 23462, as the premises covered under the Policy. Light Stream Spa is the only business operating at 665 Newtown Road, Suite 114, Virginia Beach, Virginia 23462. Id. at ¶ 32.

The Policy includes coverage of “Loss of Income and Extra Expense.” Id. Under provision CMP-4705.1, the Policy provides for the loss of business income sustained as a result of the “ ‘suspension’ of ‘operations’.” Id. The suspension “must be caused by accidental direct physical loss to property at the described premises.” (emphasis added). The Policy states that it will only pay for “ ‘Loss of Income’ that [the policyholder] sustains during the ‘period of restoration’ that occurs after the date of accidental direct physical loss.” Id. Under the provision regarding “Extra Expenses,” the Policy provides that it will pay “necessary ‘Extra Expense’ [the policyholder] incur[s] during the ‘period of restoration’ that [the policyholder] would not have incurred if there had been no accidental direct physical loss to property at the described premises. The loss must be caused by a Covered Cause of Loss.” Id. According to the Policy, a Covered Cause of Loss is an “accidental direct physical loss to covered property unless the loss is (1) Excluded in SECTION 1-EXCLUSIONS; or (2) Limited in the Property Subject to Limitations Provisions.” Id. (emphasis added).

Furthermore, the Policy covers the loss of income that results from the suspension of the policyholder's operations. The Policy also covers loss of income and extra expenses “caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply: (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damaged ... [and] (2) the action of civil authority is taken in respond to dangerous physical conditions resulting from the damage or continuation of the Covered Clause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged authority.” Id. Additionally, the loss of income will be reduced to the extent that the policyholder can “resume [ ] operations, in whole or in part, by using damaged or undamaged property.” Id.

*371 b. Exclusions

Under SECTION 1-EXCLUSIONS, the Policy states:

1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these: ... a. Ordinance Or Law b. Earth Movement, c. Volcanic Eruption, d. Governmental action, e. Nuclear Hazard, f. Power failure, g. War And Military Action, h. Water, i. Certain Computer-related losses, and j. Fungi, Virus or Bacteria.

Id. at Exhibit 1, at 5-6.

There are three relevant exclusions for the instant case. First, the “Fungi, Virus, or Bacteria” exclusion does not cover for loss of income and extra expense due to “(2) Virus, bacteria or other microorganism that induces or is capable of inducing
physical distress, illness or disease” or (3) [a]ny loss of use or delay in rebuilding covered property, including any associated cost of expense, due to interference at the described premises or location of the rebuilding, repair, or replacement of that property, by ‘fungi,’ wet or dry rot, virus, bacteria or other microorganism.” Id. at 5-6.

Second, the “Ordinance or law” exclusion does not cover for loss of income and extra expenses due to the “(1) Enforcement of any ordinance or law: (a) regulating the construction, use or repair of any property; or (b) requiring the tearing down of any property, including the cost of removing its debris. (2) This exclusion applies whether the loss results from: (a) An ordinance or law that is enforced even if the property has not been damaged; or (b) the increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property or removal of its debris, following an accidental direct physical loss to that property.” Id. at Exhibit 1 at 5.

Third, the “Acts or Decisions” exclusion does not cover for “conduct, acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body whether intentional, wrongful, negligent or without fault.” Id. at 8.

Additionally, the Policy also excludes coverage for consequential losses due to “delay, loss of use or loss of market.” Id.

3. Plaintiff’s Claim

a. A fortuitous “Direct Physical Loss”

[27] [28] Based on a plain reading of the all-risk Policy, the Court finds that the Policy covers all accidental or fortuitous “direct physical loss[es]” unless the cause of the loss is explicitly excluded under the contract. See, Fid. & Guar. Ins. Underwriters, Inc. v. Allied Realty Co., 238 Va. 458, 461, 384 S.E.2d 613 (1989) (recognizing that all-risk insurance policies provide broad coverage against all risk other than those the parties know to be inevitable at the time of contracting). In this context, a fortuitous loss is defined in various ways, but is essentially an event that is dependent on chance, an accident, or is unexpected. See Id. (holding that “[a] fortuitous loss is one that does not result from any inherent defect in the property insured, ordinary wear and tear, or intentional misconduct”); see also, Ins. Co. of N. Am. v. U.S. Gypsum Co., 678 F.Supp. 138, 141 (W.D. Va. 1988), aff’d, 9th Cir. 1989) (“ ‘All risk’ insurance contracts are a type of insurance where the insurer agrees to cover all risks of loss except for certain excluded events.”). Accordingly, the insured, Plaintiff, has the initial burden of proof to establish that the loss was fortuitous. U.S. Gypsum Co., 678 F.Supp. at 141.

In the instant case, Plaintiff entered into a contract with Defendant on July 19, 2019 with the intent to cover for all foreseeable and unforeseeable, tangible and intangible, risks covered by the Policy which were not explicitly excluded. On March 16, 2020, after the Nationwide and Statewide orders and guidelines to reduce the spread of COVID-19, Plaintiff voluntarily closed Light Stream Spa. Id. at ¶ 25. However, seven days later, on March 23, 2020, Plaintiff was required by Executive Order No. 53 to close until May 15, 2020. See ECF No. 1 at ¶¶ 79-81. On March 24, 2020, Plaintiff submitted a good faith claim for loss of business income and extra expenses under the Policy for a date of loss starting on March 15, 2020 due to the unexpected loss which impacted the operations and services of the covered commercial property. ECF No. 1 at ¶ 42.

The question here is whether the mandated closures based on the Orders qualifies as a fortuitous loss which caused a “direct physical loss” to the Plaintiff’s commercial property. That is, if the Court finds that a plain reading of the Policy provides that Plaintiff’s claim was explicitly excluded then the Court must grant the instant Motion to Dismiss. However, if the Court finds ambiguity or multiple interpretations of the Policy that plausibly allow Plaintiff to recover, then the motion to dismiss must be denied.

b. “Direct Physical Loss”: A Spectrum of Legal Definitions

[29] [30] [31] The first key issue is what constitutes a “direct physical loss” in context of the Policy and Plaintiff’s circumstances. Since the Policy does not define “direct physical loss,” the Court must determine whether “direct physical loss” is ambiguous. See Lott v. Scottsdale Ins. Co., 827 F. Supp. 2d 626, at 631 (E.D. Va. 2011) (interpreting ambiguous insurance policy provisions under Virginia law and noting that “when unambiguous, [insurance policies] must be given their plain and ordinary meaning” but that “policy language is not always clear and unambiguous.”). In making this determination, the Policy’s provisions “must be considered and construed together, and any internal conflicts...
between provisions must be harmonized, if reasonably possible, to effectuate the parties' intent.” *Va. Farm Bureau Mut. Ins. Co. v. Williams*, 278 Va. 75, 677 S.E.2d 299 (2009). When a disputed policy term is unambiguous, the Court must apply its plain meaning as written. *Id.* “However, if disputed policy language is ambiguous and can be understood to have more than one meaning, [the court must] construe the language in favor of coverage and against the insurer.” *Id.*; see also, *Copp v. Nationwide Mut. Ins. Co.*, 279 Va. 675, at 681, 692 S.E.2d 220 (2010); *St. Paul Fire & Marine Ins. Co. v. S.L. Nusbaum & Co.*, 227 Va. 407, 411, 316 S.E.2d 734 (Va. 1984); *Am. Reliance Ins. Co.*, 238 Va. at 547, 385 S.E.2d 583 (“[D]oubtful, ambiguous language in an insurance policy will be given an interpretation which grants coverage[,]”); *Bituminous Cas. Corp.*, 239 Va. at 336, 389 S.E.2d 696 (“[B]ecause insurance contracts are ordinarily drafted by insurers rather than by policyholders, the courts consistently construe such contracts, in cases of doubt, in favor of that interpretation which affords coverage.”).

Defendants argue that “direct physical loss” unambiguously requires that there be “structural damage” to the covered property for the Plaintiff to recover under the Policy. ECF No. 29. Particularly, Defendants argue that various district courts in other jurisdictions have interpreted “direct physical loss” to mean perils that cause actual, tangible structural damage to property of the kind caused by hurricane winds, rainwater, and fire, for example. *Id.* However, while the Court recognizes these cases, the Court finds that they are out-of-circuit and non-binding cases which rely on out-of-state law in ruling on what constitutes a “direct physical loss to property”—an interpretation that this Court must make in accordance with Virginia State law and case law.

On the other hand, Plaintiff argues that, under Virginia law, “direct physical loss” has not been consistently interpreted to require structural or tangible damage to property. ECF No. 39 at 11. Particularly, Plaintiff argues that federal courts have interpreted “direct physical loss” to mean the inability to use the premises because of uncontrollable forces. That is, Plaintiff argues that the Executive Orders physically prohibited Plaintiff from using the commercial property between March 16, 2020 to May 15, 2020 which resulted in a suspension of its business operations and substantial loss of income. ECF No. 20 at ¶¶ 58, 63, 73, 76.

**[32] [33]** The Court finds that the phrase “direct physical loss” has been subject to a spectrum of interpretations in Virginia on a case-by-case basis, ranging from direct tangible destruction of the covered property to impacts from intangible noxious gasses or toxic air particles that make the property uninhabitable or dangerous to use. Accordingly, “[w]hen [various] constructions are equally possible, that most favorable to the insured will be adopted. Language in a policy purporting to exclude certain events from coverage will be construed most strongly against the insurer.” *Seals*, 277 Va. at 562, 674 S.E.2d 860 (quoting *St. Paul Fire & Marine Ins. Co. v. S.L. Nusbaum & Co.*, Inc., 227 Va. 407, 411, 316 S.E.2d 734 (1984)). Here, the Court is not straining to find ambiguities but rather is carefully examining the accepted definitions based on Virginia case law to apply to the unprecedented circumstances of this case. See *Rev. Bankshares Corp.*, 407 F.3d at 636. Moreover, while both parties disagree over the meaning of “direct physical loss”, “[c]ontractual provisions are not ambiguous merely because the parties disagree about their meaning.” *Nextel WIP Lease Corp. v. Saunders*, 276 Va. 509, 516, 666 S.E.2d 317 (2008) (citing *Dominion Sav. Bank, FSB v. Costello*, 257 Va. 413, 416, 512 S.E.2d 564 (1999)). Therefore, the Court is tasked with determining where “direct physical loss,” as applied to this case, falls on the spectrum of accepted interpretations.

**i. Structural Damage**

* [34] First, at one end of the spectrum, Virginia case law establishes that “direct physical loss” has traditionally, though not exclusively, been defined as covering incidents that result in structural damage to the property caused by, for example, fires, floods, hurricanes, and rainwater. *See, e.g., Whitaker v. Nationwide Mutual Fire Ins. Co.*, 115 F. Supp. 2d 612, at 617 Fn.5 (E.D. Va. 1999) (holding that “[a]ssuming Plaintiffs’ loss is fortuitous, the Policy nevertheless covers only those fortuitous losses that are direct and physical. Thus, it is the definition of ‘direct physical loss’ that is dispositive.”); *Lower Chesapeake Assoc’s. v. Valley Forge Ins. Co.*, 260 Va. 77, 89, 532 S.E.2d 325 (2000) (finding that the disputed all-risk policy provision regarding “direct physical damage” was ambiguous and that rainwater damage to a home qualified as direct and physical); *Clark v. Nationwide Mut. Fire Ins. Co.*, 48 Va. Cir. 454, 1999 WL 370407 (Fairfax Cir. Ct. 1999) (fire damage as a covered loss generally); *Capitol Prop. Mgmt. Corp. v. Nationwide Prop. & Cas. Ins. Co.*, 261 F. Supp. 3d 680, 684 (E.D. Va. 2017), aff’d, 757 F. App’x 229 (4th Cir. 2018) (holding that an “insurance claim processing fee, payable to insured’s property manager under property management agreement between property manager and insured, did not qualify as
an extra expense covered under property insurance policy, which provided coverage for direct physical loss to building or business personal property."). However, Plaintiff’s claim is distinguishable because Plaintiff’s covered property did not suffer from a structural form of direct physical loss.

ii. Distinct and Demonstratable Physical Alteration

Second, some court have also found physical loss when a plaintiff cannot physically use his or her covered property, even without tangible structural destruction, if a plaintiff can show a distinct and demonstrable physical alteration to the property. See e.g., TRAVCO Ins. Co. v. Ward, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010), aff’d, 504 F. App’x 251 (4th Cir. 2013) (noting that “physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces.”); Murray v. State Farm Fire & Cas. Co., 203 W.Va. 477, 493, 509 S.E.2d 1 (1998) (“ ‘Direct physical loss’ provisions require only that a covered property be injured, not destroyed. Direct physical loss also may exist in the absence of structural damage to the insured property.” (citation omitted)); See, Capitol Prop. Mgmt. Corp. v. Nationwide Prop. & Cas. Ins. Co. 261 F. Supp. 3d 680, at 685 (E.D. Va. 2017), aff’d, 757 F. App’x 229 (4th Cir. 2018) (Holding that a payment of an insurance processing fee, on its own, does not constitute a direct physical loss to property.); see also, Mellin v. N. Sec. Ins. Co., Inc., 167 N.H. 544, 115 A.3d 799 (2015) (“ ‘Physical loss’ within meaning of homeowners policy covering direct physical loss to property may include not only tangible changes to the insured property, but also changes that are perceived by the sense of smell and that exist in the absence of structural damage; however, these changes must be distinct and demonstrable.”). Recently, in cases dealing with a similar issue as the instant matter, sister jurisdictions narrowly relied on this interpretation to dismiss plaintiff's action. See 10E, LLC v. Travelers Indem. Co. of Connecticut, No. 2:20-CV-04418-SVV-ASx, 483 F.Supp.3d 828, 836(C.D. Cal. Sept. 2, 2020) (holding that “[p]hysical loss or damage occurs only when property undergoes a ‘distinct, demonstrable, physical alteration’ ”) (quoting MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co., 187 Cal.App.4th 766, 799, 115 Cal.Rptr.3d 27 (2010)); W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Companies, No. 220CV05663VAPDFMX, 2020 WL 6440037, at *3 (C.D. Cal. Oct. 27, 2020). In the instant matter, there is no distinct, *375 demonstrable, or physical alteration to the structure of the property. However, this second plausible interpretation of “direct physical loss” does show that if Defendants wanted to limit liability of “direct physical loss” to strictly require structural damage to property, then Defendants, as the drafters of the policy, were required to do so explicitly. See Allstate Ins. Co. v. Gauthier, 273 Va. 416, 420, 641 S.E.2d 101 (2007) (noting that if insurer wanted to not provide coverage under certain circumstances “it needed to use language clearly accomplishing that result.”); see also, Res. Bankshares Corp., 407 F.3d at 636 (“[b]ecause insurance companies typically draft their policies without the input of the insured, the companies bear the burden of making their contracts clear.”). Defendants were fully aware of cases that interpreted intangible damage as a “direct physical loss” promulgated before the issuance of Plaintiff’s policy. Since Defendants did not explicitly include “structural damage” in the language, the Policy may be construed in favor of more coverage based on plausible interpretations.

iii. Uninhabitable, Inaccessible, and Dangerous to Use

Third, courts have also interpreted direct physical loss to include incidents that make the covered property uninhabitable, inaccessible, and dangerous to use for the owners and clients because of, for example, intangible and invisible noxious gasses or toxic air particles. See, e.g., TRAVCO Ins. Co. v. Ward, 715 F. Supp. 2d 699 (E.D. Va. 2010), aff’d, 504 F. App’x 251 (4th Cir. 2013) (“[u]nder Virginia law, insured’s residence sustained “direct physical loss” within meaning of homeowners policy when it was rendered uninhabitable by toxic gases released by drywall manufactured in China, even though drywall was still intact.”); Western Fire Ins. Co. v. First Presbyterian Church, 165 Colo. 34, 437 P.2d 52 (1968) (en banc) (gasoline fumes which rendered church building unusable constitute physical loss); Farmers Ins. Co. of Oregon v. Trutanich, 123 Or. App. 6, 858 P.2d 1332, 1336 (1993) (cost of removing odor from methamphetamine lab constituted a direct physical loss); Murray v. State Farm Fire & Cas. Co., 203 W.Va. 477, 509 S.E.2d 1, 17 (1998) (home rendered unusable by increased risk of rockslide suffered direct physical loss even in the absence of structural damage); See Port Authority of N.Y. & N.J. v. Affiliated FM Ins. Co., 311 F.3d 226, 236 (3d Cir. 2002) (“ ‘[P]hysical loss or damage’ occurs only if an actual release of asbestos fibers ... has resulted in contamination of the property ..., or the structure is made useless or uninhabitable ....” (emphasis added)); Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am., 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014) (holding there was a direct physical loss to property
when “ammonia physically rendered the facility unusable for a period of time”); Sentinal Mgmt. Co. v. New Hampshire Ins. Co., 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding “[a]lthough asbestos contamination does not result in tangible injury to the physical structure of a building, a building's function may be seriously impaired or destroyed and the property rendered useless by [its] presence”); Homeowners Choice Prop. & Cas. v. Miguel Maspons, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017) (“[I]t is clear that the failure of the [property] to perform its function constituted a ‘direct’ and ‘physical’ loss to the property within the meaning of the policy.”). However, the Court does not go as far as to interpret “direct physical loss” to mean whenever “property cannot be used for its intended purpose” due to intangible sources. Pentair v. American Guarantee and Liability Ins., 400 F.3d 613, 616 (8th Cir. 2005).

**376 [35]** Therefore, given the spectrum of accepted interpretations, the Court interprets the phrase “direct physical loss” in the Policy in this case most favorably to the insured to grant more coverage. See Virginia Farm Bureau Mut. Ins. Co. v. Williams, 278 Va. 75, at 81, 677 S.E.2d 299 (2009) (“[I]f disputed policy language is ambiguous ... we construe the language in favor of coverage and against the insurer.”). Based on the case law, the Court finds that it is plausible that a fortuitous “direct physical loss” could mean that the property is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-structural, sources. See US Airways, Inc. v. Commonwealth Ins. Co., 64 Va. Cir. 408, 2004 WL 1094684, at *5 (Va. Cir. Ct. May 14, 2004) (holding FAA order grounding flights at Reagan National Airport could constitute direct physical loss when “nothing in the Policy ... requires that [there] be damage to [the insured's] property.”). Here, while the Light Stream Spa was not structurally damaged, it is plausible that Plaintiff's experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus. That is, the facts of this case are similar those where courts found that asbestos, ammonia, odor from methamphetamine lab, or toxic gasses from drywall, which caused properties uninhabitable, inaccessible, and dangerous to use, constituted a direct physical loss.

Accordingly, the Court finds that Plaintiff submitted a good faith plausible claim to the Defendants for a “direct physical loss” covered by the policy. Therefore, Plaintiff's complaint has alleged “facts and circumstances, some of which, if proved, would fall within the risk covered by the policy.” Brenner v. Lawyers Title Ins. Corp., 240 Va. 185, 397 S.E.2d 100, 102 (1990); see also, Reisen v. Aetna Life and Cas. Co., 225 Va. 327, 302 S.E.2d 529, 531 (1983); See ECF No. 20 at ¶¶ 57-65, ¶¶ 79-95.

**c. Civil Authority Provision**

The Policy provides coverage for extra expenses and loss of income caused by “action of a civil authority that prohibits access to the described premises, provided that both of the following apply: (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and (2) The action of the civil authority is taken in response to dangerous physical conditions resulting from the damage of continuation of the Covered Cause of loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.” ECF No. 1 at Exhibit 1.

Plaintiff alleges that the Civil Authority Coverage applies because (1) COVID-19 caused damage to property other than Plaintiff's property, ECF No. 1 at ¶ 85; (2) the damage was caused by a Covered Cause of Loss; (3) the Orders were issued by a civil authority—state and local executives; (4) the governmental authorities limited and prohibited access to the nearby property prior to issuing the Orders, Id. at ¶¶ 38, 45–53. See, e.g., Assurance Co. of Am. v. BBB Serv. Co., 265 Ga.App. 35, 593 S.E.2d 7, 8–9 (2003) (civil authority coverage applied where order was issued in response to hurricane after storm progressed and caused damage to property other than the insured premises). Particularly, Plaintiff alleges that “[t]he Orders were issued as a result of physical damage and dangerous physical conditions occurring in properties all *377 around cities and business districts. As a result of direct physical loss stemming from the pandemic, Light Stream Spa's operations were suspended, and it lost business income and incurred other covered expenses.” Id. at ¶ 85 (emphasis added).

Defendants argue that the Civil Authority Coverage does not apply because it only applies when “access to an insured's

[36] Here, the Court finds that the Civil Authority Coverage does not apply because Plaintiff has not shown a causal link between any physically damaged or dangerous surrounding properties proximate to the insured property and a civil authority prohibiting Plaintiff's from accessing or using their property. That is, the Executive Orders were issued because “COVID-19 presents an ongoing threat to [Virginia] communities”, and not because of prior actual “physical damage” to its own property or surrounding properties. See Exec. Or. 53 at 1. Therefore, Defendant's Motion is GRANTED IN PART on this ground.

4. Defendants Shifted Burden of Proof: Exclusions

Despite the inapplicability of the Civil Authority Provision, Plaintiff has still established a plausible claim for a fortuitous “direct physical loss” under the Policy. Thus, the burden now shifts to the insurance provider, Defendants, to show that the loss is excluded under the contract. See Bituminous Cas. Corp. v. Sheets, 239 Va. 332, 389, 389 S.E.2d 696 (1990) (“Where an insured has shown that his loss occurred while an insurance policy was in force, but the insurer relies upon exclusionary language in the policy as a defense, the burden is upon the insurer to prove that the exclusion applies to the facts of the case.”); TravCo Ins. Co. v. Ward, 284 Va. 547, 736 S.E.2d 321 (2012) (“[T]he burden is upon the insurer to prove that an exclusion of coverage applies.”); see also, Reisen 302 S.E.2d at 531 (holding this burden is not especially onerous since the insurer must defend unless “it clearly appears from the initial pleading the insurer would not be liable under the policy contract for any judgment based upon the allegations.” (citing Travelers Indem. Co. v. Obenshain, 219 Va. 44, 245 S.E.2d 247, 249 (1978))).

On March 26, 2020, Defendants denied Plaintiff's claim (“Denial Letter”). Id. at Exhibit 2. The Denial Letter stated that the grounds for denial were because Plaintiff voluntarily closed their business on March 16th because of waning business, there was no civil order to close the business as of March 24, 2020, there was no known physical damage to the business space or property resulting from COVID-19, and the Policy excluded losses caused by a virus. Id. In the Denial Letter, Defendant State Farm did not provide an explanation of how the exclusions applied specifically to the Plaintiff but rather provided verbatim language of SECTION 1-EXCLUSIONS.

a. Virus Exclusion

[37] As with the other provisions of an insurance policy, the interpretation of an exclusionary clause is an issue of law. See Res. Bankshares Corp., 407 F.3d at 636. (4th Cir. 2005).

*378 In their Motion to Dismiss, Defendants argue that the Virus Exclusion applies as defined in SECTION 1-EXCLUSIONS of the Policy. ECF No. 29 at 7. Defendants argue that the Virus Exclusion unambiguously applies in this circumstance because COVID-19 is at the heart of the Executive Orders that required Plaintiff to close their business and “applies to any loss where a virus is anywhere in the chain of causation.” Id. at 10. Specifically, Defendants allege that the Virus Exclusion has an expansive anti-concurrent causation clause which excludes from coverage “for losses if virus is ‘in any sequence’ in the chain of causation, even if there are also other causes.” Id. (citing Tuepker v. State Farm Fire & Cas. Co., 507 F.3d 346, 351, 354 (5th Cir. 2007); see also Metro Brokers, Inc. v. Transportation Ins. Co., 603 F. App'x 833, 836 (11th Cir. 2015)). Notably, the Court finds that the expansive anti-concurrent causation clause is not a recognized or settled doctrine in the Court's jurisdiction.

On the other hand, Plaintiff alleges that the loss of business occurred as a result of the Orders that mandated specific kinds of businesses, like the Light Stream Spa, to discontinue operations from March 16, 2020 to May 15, 2020 to prevent the spread of COVID-19. ECF No. 1. Plaintiff also asserts that the Court should find that the Virus Exclusion does not apply because COVID-19 was not present at Plaintiff's property and is not the basis for the loss of income. ECF No. 39 at 16-18.

The Fungi, Virus or Bacteria Exclusion specifically excludes losses from: “(1) Growth, proliferation, spread or presence of 'fungi’ or wet or dry rot; or (2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease; and (3) We will also not pay for ... (a) Any remediation of “fungi”, wet or dry rot, virus, bacteria or other microorganism ....” ECF No. 20 at Exhibit 2.
The Court finds that the Virus Exclusion does not apply here and that the anti-concurrent theory has not been established as law in this jurisdiction. Thus, to be enforceable, the insurer “must draft the language of an exclusion conspicuously, plainly and clearly set forth any limitation on coverage to the insured.” Waste Mgmt., Inc. v. Great Divide Ins. Co., 381 F. Supp. 3d 673, at 683 (E.D. Va. 2019) (citation omitted).

Although the Policy does not define “Virus,” the Court will base its analysis on a plain reading of the Virus Exclusion taken together with the exclusion language as a whole. See Virginia Farm Bureau Mut. Ins. Co. v. Williams, 278 Va. 75, 80, 677 S.E.2d 299 (2009) (“Provisions of an insurance policy must be considered and construed together, and any internal conflicts between provisions must be harmonized, if reasonably possible, to effectuate the parties' intent.”); see also, Copp, 279 Va. at 681, 692 S.E.2d 220 (“Each phrase and clause of an insurance contract should be considered and construed together and seemingly conflicting provisions harmonized when that can be reasonably done, so as to effectuate the intention of the parties as expressed therein.”).

Accordingly, the Court finds that the Virus Exclusion particularly deals with the “[g]rowth, proliferation, spread or presence” of “virus, bacteria or other microorganism” just as it applies to “‘fungi’ or wet or dry rot.” Id. Indeed, the plain reading of the language indicates that the Policy excludes coverage for losses stemming from the “[g]rowth, proliferation, spread or presence” of “‘fungi’ or wet or dry rot” or “[v]irus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease[.]” Furthermore, the Policy *379 also provides that it will not cover for remediation or removal of virus, bacteria, or fungi at the property which includes “tear out and replace[ment]” of building parts to access the virus and “contain[ment], treat[ment], detoxify[ation], neutraliz[ation] or dispos[al]” of the virus. Id. This supports the interpretation that the Virus Exclusion applies where a virus has spread throughout the property. Other state and federal courts have interpreted similar virus, bacteria, and fungi exclusions in the same the way. See, e.g., Mount Vernon Fire Ins. Co. v. Adamson, 2010 WL 3937336, at *4 (E.D. Va. Sept. 15, 2010) (exclusions barring coverage for mold exposure barred claims for mold exposure); Poore v. Main Street Am. Assurance Co., 355 F. Supp. 3d 506, 512 (W.D. Va. 2018) (finding mold exclusion barred coverage from losses stemming from mold in the insured's property); Alexis v. Southwood Ltd. P'ship, 792 So. 2d 100, 104 (La. Ct. App. 2001) (communicable disease exclusion barred coverage from illness after exposure to raw sewage); Evanston Ins. Co. v. Harbor Walk Development, LLC, 814 F. Supp. 2d 635, 652 (E.D. Va. 2011) (finding pollution exclusion which barred claims stemming from bodily injury or property damaged caused by pollutants barred claims stemming from bodily injury or property damage caused by pollutants). Therefore, in applying the Virus Exclusion there must be a direct connection between the exclusion and the claimed loss and not, as the Defendants argue, a tenuous connection anywhere in the chain of causation. That is, although the Virus Exclusion does require that the virus be the cause of the policyholder's loss, the connection must be the immediate cause in the chain.

Here, Plaintiff is neither alleging that there is a presence of a virus at the covered property nor that a virus is the direct cause of the property's physical loss. Also, Plaintiff does not allege that the Executive Orders the Commonwealth of Virginia issued were as a result of “growth, proliferation, spread or presence” of virus contamination at the Plaintiff's property. Rather, Plaintiff alleges that the Orders were the “sole cause of the Plaintiff's [...] loss of business income and extra expense.” ECF No. 20 at ¶ 84. Moreover, while some businesses could continue operating despite the COVID-19 social distancing guidelines, the Executive Orders specifically classified Plaintiff's type of property, a spa, as a hotspot for COVID-19 and, thus, selectively ordered that it be closed as a preventative health measure. Therefore, Defendants have failed to meet its burden to show that the Virus Exclusion applies to Plaintiff's claim.

b. Ordinance and Law Exclusion

Defendants also assert that the Ordinance and Law Exclusion applies. ECF No. 29 at 25-26. The “Ordinance or law” Exclusion bars coverage for any loss due to “[t]he enforcement of any ordinance or law” “regulating the ... use ... of any property,” and “applies ... even if the property has not been damaged.” ECF No. 20 at Exhibit 2 at 5. The Policy states that the ordinance or law must “(a) regulate the construction, use or repair ... or (b) require[e] the tearing down of any property.” Id. The Policy also provides that the exclusion applies “whether the loss results from: (a) An ordinance or law that is enforced even if the property has not been damaged; or (b) the increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property or removal.
of its debris, following an accidental direct physical loss to that property.” *Id.*

* [40] Here, however, the Court concludes that the Executive Orders, which were temporary restrictions that impacted the Plaintiff's business, were not ordinances *380* or laws such as safety regulations or laws passed by a legislative body regulating the construction, use, repair, removal of debris, or physical aspects of the property. Therefore, there is no ordinance or law, from a legislative body, that prohibits the physical use of Plaintiff's covered property. Furthermore, it is clear that the Ordinance or law Exclusion applies to ordinances related to the structural integrity, maintenance, construction, or accessibility due to the property's physical structural state, which existed before. The physical structural integrity of the covered property is not the central issue in this case. Thus, “Ordinance or Law” exclusion is unavailable to the Defendants to dismiss Plaintiff's claims.

**c. Acts or Decisions Exclusion**

The “Acts or Decisions” Exclusion bars coverage for any loss caused by “[c]onduct, acts or decisions ... of any person, group, organization, or governmental body whether intentional, wrongful, negligent or without fault.” ECF No. 20 at Exhibit 2 at 8.

Some courts have found the “acts or decisions” exclusion in similar insurance policies to be ambiguous and concluded that coverage was not excluded. As one court explained, if the exclusion were to be taken literally, “it would exclude coverage from all acts and decisions of any character of all persons, groups, or entities. Such an interpretation would prohibit coverage. To the extent the language of the Policy is ambiguous, the Court must construe it against the insurer.” See, *Hopeman Bros., Inc. v. Cont'l Cas. Co.*, 307 F. Supp. 3d 433, 461 (E.D. Va. 2018); see also, *GenCorp, Inc. v. American Intern. Underwriters*, 178 F.3d 804, 818 (6th Cir. 1999); see also John H. Mathias et al., *Insurance Coverage Disputes* (LJP) § 1.03 (2017) (“Where the following form policy is silent on how to resolve conflicts in wording with the underlying policy or policies it purports to follow, however, the conflict should be resolved in the manner most favorable to the policyholder.”). Moreover, in this case, Plaintiff was not the cause of the Executive Orders which issued the covered property to close. Thus, the “Acts or Decisions” exclusion is unavailable to the Defendants to dismiss Plaintiff's claims.

**d. Consequential Losses Exclusion**

* [42] The “Consequential Loss” Exclusion bars coverage for “loss whether consisting *381* of, or directly and immediately caused by ... [d]elay, loss of use or loss of market.” ECF No. 20 at Exhibit 2 at 6. Between March 16, 2020 to March 22, 2020 (before the Executive Orders), Plaintiff decided to voluntarily close the business as a result of waning business. Therefore, the Court grants that during this period of time, March 16, 2020 to March 22, 2020 (or period before the mandatory closure Orders), Plaintiff was properly barred from coverage under this exclusion. Accordingly, the extent to which Plaintiff's claim is based on this limited period, March 16, 2020 to March 22, 2020, the Defendant's motion is GRANTED IN PART.

D. Count III: Breach of Covenant of Good Faith and Fair Dealing

* [43] [44] Plaintiff also makes a claim for breach of the duty of good faith and fair dealing. ECF No. 20 at ¶¶ 173-75. “Under Virginia law, the elements of a claim for breach of an implied covenant of good faith and fair dealing are “(1) a
contractual relationship between the parties, and (2) a breach of the implied covenant." Enomoto v. Space Adventures, LTD, 624 F.Supp.2d 443, 450 (E.D. Va. 2009) (citing Charles E. Brauer Co., Inc. v. NationsBank of Va., N.A., 251 Va. 28, 466 S.E.2d 382, 386 (1996)). At minimum, however, it includes “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party [to a contract].” Id. (citing Restatement (Second) of Contracts § 205 cmt. a (1981); see also RW Power Partners, L.P. v. Virginia Elec. & Power Co., 899 F.Supp. 1490, 1498 (E.D. Va. 1995) (citing, among other authorities, the commentary of Section 205 of the Restatement for a definition of “good faith”). This duty of good faith and fair dealing prohibits a party from acting arbitrarily, unreasonably, and in bad faith. It also prohibits one party from acting in such a manner as to prevent the other party from performing its obligations under the contract. See Restatement (Second) of Contracts § 205 cmt. a (1981). Moreover, the United States Court of Appeals for the Fourth Circuit has made clear that every contract governed by the laws of Virginia contains an implied covenant of good faith and fair dealing. See Va. Vermiculite, Ltd. v. W.R. Grace & Co., 156 F.3d 535, 541–42 (4th Cir. 1998); see also, Enomoto, 624 F.Supp.2d at 450; see also, SunTrust Mortg., Inc. v. Mortgages Unlimited, Inc., No. 3:11CV861-HEH, 2012 WL 1942056, at *3 (E.D. Va. May 29, 2012).

[45] In the instant case, Defendants argue that this claim should be dismissed because there is no coverage under the Policy for Plaintiff's losses. ECF No. 29 at 29. Although coverage is a pre-requisite to a claim for bad faith, the Court has found that Plaintiff has pleaded sufficient facts, which if proved, would fall within the Policy's coverage. See, Builders Mut. Ins. Co. v. Dragas Mgmt. Corp., 709 F. Supp. 2d 432, 441 (E.D. Va. 2010) (noting that “coverage is a prerequisite to a claim for bad faith”). Therefore, the Defendants' Motion is DENIED on this ground.

* * *

In summary, for Plaintiff to establish a Covered Cause of Loss under the Policy, the claim must both constitute an “accidental direct physical loss to” Covered Property and it must not be explicitly excluded by the Policy. ECF No. 20 at Exhibit 1. Here, Plaintiff has pled sufficient facts to state a claim to allow this Court to draw reasonable inferences that relief is plausible on its face for Counts II and III. See Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Also, since Defendants failed to show that any of the Policy's Exclusions clearly apply, Plaintiff's claims may proceed.

*382 IV. CONCLUSION

Based on the foregoing reasons, Defendant's Motion to Dismiss is DENIED IN PART AND GRANTED IN PART.

IT IS SO ORDERED.

All Citations

506 F.Supp.3d 360
478 F.Supp.3d 794
United States District Court, W.D. Missouri, Southern Division.

STUDIO 417, INC., et al., Plaintiffs,
v.
The CINCINNATI INSURANCE COMPANY, Defendant.

Case No. 20-cv-03127-SRB
Signed 08/12/2020

Synopsis

Background: Insureds, businesses which had purchased all-risk property insurance policies, brought action against property insurer, seeking declaratory judgment and class certification and alleging breach of contract arising from insurer's denial of coverage for losses resulting from COVID-19 pandemic. Property insurer moved to dismiss.

Holdings: The District Court, Stephen R. Bough, J., held that:

[1] insureds adequately alleged that they incurred direct physical loss;

[2] insureds plausibly stated claim for civil authority coverage;

[3] insureds plausibly stated claim for ingress and egress coverage;

[4] insureds plausibly stated claim for dependent property coverage; and

[5] insureds plausibly stated claim for sue and labor coverage.

Motion denied.

West Headnotes (15)


Federal Civil Procedure ➔ Matters deemed admitted; acceptance as true of allegations in complaint

When deciding a motion to dismiss complaint for failure to state a claim, the factual allegations of a complaint are assumed true and construed in favor of the plaintiff, even if it strikes a savvy judge that actual proof of those facts is improbable. Fed. R. Civ. P. 12(b)(6).


State law controls the construction of insurance policies where case is based on diversity jurisdiction.

1 Cases that cite this headnote

[3] Insurance ➔ Questions of law or fact

Under Missouri law, the interpretation of an insurance policy is a question of law to be determined by the court.

6 Cases that cite this headnote

[4] Insurance ➔ Construction or enforcement as written

Insurance ➔ Entire contract

Missouri courts read insurance contracts as a whole and determine the intent of the parties, giving effect to that intent by enforcing the contract as written.

1 Cases that cite this headnote

[5] Insurance ➔ Reasonableness

Insurance ➔ Favoring coverage or indemnity; disfavoring forfeiture

In Missouri, insurance policies are to be given a reasonable construction and interpreted so as to afford coverage rather than defeat coverage.
[6] **Insurance** ⇔ Understanding of Ordinary or Average Persons
Under Missouri law, insurance policy terms are given the meaning which would be attached by an ordinary person of average understanding if purchasing insurance.

[7] **Insurance** ⇔ Ambiguity in general
Under Missouri law, when interpreting insurance policy terms, the central issue is determining whether any ambiguity exists, which occurs where there is duplicity, indistinctness, or uncertainty in the meaning of the words used in the contract.

[8] **Insurance** ⇔ Construction or enforcement as written
Under Missouri law, if insurance policies are unambiguous, they will be enforced as written absent a statute or public policy requiring coverage.

[9] **Insurance** ⇔ Ambiguity, Uncertainty or Conflict
Under Missouri law, if language in insurance policies is ambiguous, it will be construed against the insurer.

[10] **Insurance** ⇔ Risks or Losses Covered and Exclusions
**Insurance** ⇔ Acts of government or governmental actors
Insureds, businesses which had purchased all-risk insurance policies, adequately alleged that they incurred direct physical loss during COVID-19 pandemic, as necessary to obtain coverage under property insurance policies; insureds alleged causal relationship between COVID-19 and their alleged losses, in that COVID-19 resulted in government orders requiring closure of businesses, and also alleged that COVID-19 was physical substance that lived on and was active on inert physical surfaces, that it was emitted into air, and that COVID-19 attached to and deprived insureds of their property and made it unsafe and unusable.

55 Cases that cite this headnote

[11] **Insurance** ⇔ Construction as a whole
**Insurance** ⇔ Entire contract
Court, in interpreting insurance policy, must give meaning to all policy terms and, where possible, harmonize those terms in order to accomplish the intention of the parties.

[12] **Insurance** ⇔ Acts of government or governmental actors
Insureds, restaurants and salon which had purchased all-risk insurance policies, plausibly stated claim for civil authority coverage under policy during COVID-19 pandemic; insureds alleged that they suffered physical loss, which was applicable to other property, and that civil authorities issued closure and stay-at-home orders throughout two states, which included property other than insureds' premises, and while insureds admitted that closure orders allowed restaurant premises to remain open for food preparation, take-out, and delivery and that they did not prohibit access to salon premises, they alleged that closure order required businesses that provided personal services to suspend operations and prohibited inside seating at restaurants.

5 Cases that cite this headnote

[13] **Insurance** ⇔ Business Interruption; Lost Profits
Insureds, businesses which had purchased all-risk insurance policies, plausibly stated claim for ingress and egress coverage under policy during COVID-19 pandemic; insureds alleged that they suffered physical loss, in that COVID-19 was physical substance that lived on inert physical surfaces and had attached to and deprived insureds of their property, and also alleged that
both COVID-19 and resulting closure orders that government issued to businesses rendered premises unsafe for ingress and egress.

67 Cases that cite this headnote

[14] Insurance ➔ Business Interruption; Lost Profits
Insureds, businesses which had purchased all-risk insurance policies, plausibly stated claim for dependent property coverage under policy during COVID-19 pandemic; insureds alleged that they suffered physical loss, in that COVID-19 was physical substance that lived on inert physical surfaces and had attached to and deprived insureds of their property, and also alleged that they suffered loss of materials, services, and customers because of COVID-19 and resulting closure orders issued by government to businesses.

91 Cases that cite this headnote

[15] Insurance ➔ Minimizing loss
Insureds, businesses which had purchased all-risk insurance policies, plausibly stated claim for sue and labor coverage under policy during COVID-19 pandemic; insureds alleged that, in complying with closure orders issued by government to businesses and by suspending operations, they incurred expenses in connection with reasonable steps to protect covered property.

Attorneys and Law Firms


ORDER

STEPHEN R. BOUGH, UNITED STATES DISTRICT JUDGE

Before the Court is Defendant The Cincinnati Insurance Company's (“Defendant”) Motion to Dismiss. (Doc. #20.) For the reasons set forth below, the motion is DENIED.

I. BACKGROUND

Because this matter comes before the Court on a motion to dismiss, the following allegations in Plaintiffs’ First Amended Class Action Complaint (the “Amended Complaint”) are taken as true. (Doc. #16); Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal citations and quotation marks omitted) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)); Zink v. Lombardi, 783 F.3d 1089, 1098 (8th Cir. 2015).¹

*797 The named Plaintiffs in this case are Studio 417, Inc. (“Studio 417”), Grand Street Dining, LLC (“Grand Street”), GSD Lenexa, LLC (“GSD”), Trezomare Operating Company, LLC (“Trezomare”), and V’s Restaurant, Inc. (“V’s Restaurant”) (collectively, the “Plaintiffs”). Studio 417 operates hair salons in the Springfield, Missouri, metropolitan area. Grand Street, GSD, Trezomare, and V’s Restaurant own and operate full-service dining restaurants in the Kansas City metropolitan area.

Plaintiffs purchased “all-risk” property insurance policies (the “Policies”) from Defendant for their hair salons and restaurants. (Doc. #1-1, ¶ 26.) All-risk policies cover all risks of loss except for risks that are expressly and specifically excluded. The Policies include a Building and Personal Property Coverage Form and Business Income (and Extra Expense) Coverage Form. Defendant issued each Plaintiff a separate policy, and all were in effect during the applicable time period. The parties agree that the Policies contain the same relevant language.

The Policies provide that Defendant would pay for “direct loss” unless the “loss” is excluded or limited” therein. (Doc. #16, ¶ 27.) A “Covered Cause of Loss” “is defined to mean accidental [direct] physical loss or accidental [direct] physical damage.” (Doc. #16, ¶ 31) (emphasis supplied); (Doc. #1-1,
The Policies do not define “physical loss” or “physical damage.” The Policies also “do not include, and are not subject to, any exclusion for losses caused by viruses or communicable diseases.” (Doc. #16, ¶ 13.) A loss, as defined above, is a prerequisite to invoke the different types of coverage sought in this lawsuit. (See Doc. #21, p. 15.) These coverages are set forth below.

First, the Policies provide for Business Income coverage. Under this coverage, Defendant agreed to:

pay for the actual loss of ‘Business Income’ ... you sustain due to the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration.’ The suspension must be caused by direct ‘loss’ to property at a ‘premises’ caused by or resulting from any Covered Cause of Loss.

(Doc. #1-1, pp. 37-38.)

Second, the Policies provide “Civil Authority” coverage. This coverage applies to:

the actual loss of ‘Business Income’ sustained ‘and necessary Extra Expense’ sustained ‘caused by action of civil authority that prohibits access to’ the Covered Property when a Covered Cause of Loss causes direct damage to property other than the Covered Property, the civil authority prohibits access to the area immediately surrounding the damaged property, and ‘the action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage[.]’

(Doc. #16, ¶ 42.)

Third, the Policies provide “Ingress and Egress” coverage. This coverage is specified as follows:

We will pay for the actual loss of ‘Business Income’ you sustain and necessary Extra Expense you sustain caused by the prevention of existing ingress or egress at a ‘premises’ shown in the Declarations due to direct ‘loss’ by a Covered Cause of Loss at a location contiguous to such ‘premises.’ However, coverage does not apply if ingress or egress from the ‘premises’ is prohibited by civil authority.

(Doc. #1-1, p. 95.)

Fourth, the Policies provide “Dependent Property” coverage. This coverage applies if the insured suffers a loss of Business Income because of a suspension of its business “caused by direct ‘loss’ to ‘dependent property.’ ” (Doc. #1-1, pp. 63-64.) “Dependent property means property operated by others whom [the insured] depend[s] on to ... deliver materials or services to [the insured] ... [a]ccept [the insured’s] products or services ... [a]ttract customers to [the insured’s] business.” (Doc. #1-1, p. 64.)

Finally, the Policies provide what is commonly known as “Sue and Labor” coverage. In relevant part, the Policies require the insured to “take all reasonable steps to protect the Covered Property from further damage,” and to keep a record of expenses incurred to protect the Covered Property for consideration in the settlement of the claim. (Doc. #1-1, pp. 49-50.) The Policies do not exclude or limit losses from viruses, pandemics, or communicable diseases. (Doc. #16, ¶ 28.)

Plaintiffs seek coverage under the Policies for losses caused by the Coronavirus (“COVID-19”) pandemic. Plaintiffs allege that over the last several months, it is likely that customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus. (Doc. #1-1, ¶ 60.) Plaintiffs allege that COVID-19 “is a physical substance,” that it “live[s] on” and is “active on inert physical surfaces,” and is “emitted into the air.” (Doc. #16, ¶¶ 47, 49-60.) Plaintiffs further allege that the presence of COVID-19 “renders physical property in their vicinity unsafe and unusable,” and that they “were forced to suspend or reduce business at their covered premises.” (Doc. #1-1, ¶¶ 14, 58, 102.)

In response to the COVID-19 pandemic, civil authorities in Missouri and Kansas issued orders requiring the suspension of business at various establishments, including Plaintiffs’ businesses (the “Closure Orders”). The Closure Orders “have required and continue to require Plaintiffs to cease and/or significantly reduce operations at, and ... have prohibited and continue to prohibit access to, the[ir] premises.” (Doc. #16, ¶¶ 106-107.) Plaintiffs allege that the presence of COVID-19 and the Closure Orders caused a direct physical loss or direct physical damage to their premises “by denying use of and damaging the covered property, and by causing a necessary suspension of operations during a period of restoration.” (Doc. #16, ¶¶ 102.) Plaintiffs allege that their losses are covered by the Business Income, Civil Authority, Ingress and Egress, Dependent Property, and Sue and Labor coverages discussed above. (Doc. #16, ¶¶ 103-108.) Plaintiffs provided Defendant notice of their losses, but Defendant denied the claims. (Doc. #16, ¶¶ 110-115.)
On April 27, 2020, Plaintiffs filed this lawsuit against Defendant. The Amended Complaint asserts claims for a declaratory judgment and for breach of contract based on Business Income coverage (Counts I, II), Extra Expense coverage (Counts III, IV), Dependent Property coverage (Counts V, VI), Civil Authority coverage (Counts VII, VIII), Extended Business Income coverage (Counts IX, X), Ingress and Egress coverage (Counts XI, XII), and Sue and Labor coverage (Counts XIII, XIV). The Amended Complaint also seeks class certification for 14 nationwide classes (one for each cause of action) and a Missouri Subclass that consists of “all policyholders who purchased one of Defendant's policies in Missouri and were denied coverage due to COVID-19.” (Doc. #16, ¶¶ 117-125; see also Doc. #21, pp. 12-13.)

*799 Defendant responded to the Amended Complaint by filing the pending motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Defendant's overarching argument is that the Policies provide coverage “only for income losses tied to physical damage to property, not for economic loss caused by governmental or other efforts to protect the public from disease ... the same direct physical loss requirement applies to all the coverages for which Plaintiffs sue.” (Doc. #21, p. 8.) Even if a loss is adequately alleged, Defendant argues that the Amended Complaint fails to state a claim as to each type of coverage at issue. Plaintiffs oppose the motion, and the parties' arguments are addressed below.

II. LEGAL STANDARD

[1] Rule 12(b)(6) provides that a defendant may move to dismiss for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” Iqbal, 556 U.S. at 678, 129 S.Ct. 1937 (quoting Twombly, 550 U.S. at 570, 127 S.Ct. 1955). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ash v. Anderson Merchs., LLC, 799 F.3d 957, 960 (8th Cir. 2015) (quoting Iqbal, 556 U.S. at 678, 129 S.Ct. 1937). When deciding a motion to dismiss, “[t]he factual allegations of a complaint are assumed true and construed in favor of the plaintiff, even if it strikes a savvy judge that actual proof of those facts is improbable.” Data Mfg., Inc. v. United Parcel Serv., Inc., 557 F.3d 849, 851 (8th Cir. 2009) (citations and quotations omitted).


[6] [7] [8] [9] “Policy terms are given the meaning which would be attached by an ordinary person of average understanding if purchasing insurance.” Vogt v. State Farm Life Ins. Co., 963 F.3d 753, 763 (8th Cir. 2020) (applying Missouri law) (quotations omitted). When interpreting policy terms, “the central issue ... is determining whether any ambiguity exists, which occurs where there is duplicity, indistinctness, or uncertainty in the meaning of the words used in the contract.” Id. (quotations omitted). If the “insurance policies are unambiguous, they will be enforced as written absent a statute or public policy requiring coverage. If the language is ambiguous, it will be construed against the insurer.” Id. (quotations omitted).

*800 III. DISCUSSION

A. Plaintiffs Have Adequately Alleged a Direct “Physical Loss” Under the Policies.

Defendant's first argument is that Plaintiffs have not adequately pled a “physical loss” as required by the Policies. (Doc. #21, pp. 7-8, 15-16, 19-25; Doc. #37, pp. 2-10.) Defendant argues that “direct physical loss requires actual, tangible, permanent, physical alteration of property.” (Doc. #21, p. 19) (citing cases). Defendant claims that the Policies provide property insurance coverage, and “are designed to indemnify loss or damage to property, such as in the case of a fire or storm. [COVID-19] does not damage property; it hurts people.” (Doc. #21, p. 7.) According to Defendant, the requirement of a tangible physical loss applies to—and precludes—each type of coverage sought in this case.
In response, Plaintiffs agree that “physical loss” and “physical damage” are the key phrases in the Policies. (Doc. #31, p. 7.) However, Plaintiffs emphasize that the Policies expressly cover “physical loss or physical damage.” (Doc. #31, p. 11) (emphasis supplied). This necessarily means that either a ‘loss’ or ‘damage’ is required, and that ‘loss’ is distinct from ‘damage.” (Doc. #31, p. 11.) As such, Plaintiffs argue that Defendant’s focus on an actual physical alteration ignores the coverage for a “physical loss.” Plaintiffs further argue that Defendant could have defined “physical loss” and “physical damage,” but failed to do so. Plaintiffs argue this case should not be disposed of on a motion to dismiss because “even if [Defendant’s] interpretation of the policy language is reasonable ... Plaintiffs’ interpretation is also reasonable[.]” (Doc. #31, p. 11.)


[10] Applying these definitions, Plaintiffs have adequately alleged a direct physical loss. Plaintiffs allege a causal relationship between COVID-19 and their alleged losses. Plaintiffs further allege that COVID-19 “is a physical substance,” that it “live[s] on” and is “active on inert physical surfaces,” and is also “emitted into the air.” (Doc. #16, ¶¶ 47, 49-60.) COVID-19 allegedly attached to and deprived Plaintiffs of their property, making it “unsafe and unusable, resulting in direct physical loss to the premises and property.” (Doc. #16, ¶ 58.) Based on these allegations, the Amended Complaint plausibly alleges a “direct physical loss” based on “the plain and ordinary meaning of the phrase.” Vogt, 963 F.3d at 763.

[11] Second, the Court “must give meaning to all [policy] terms and, where possible, harmonize those terms in order to accomplish the intention of the parties.” Macheca Transp. v. Philadelphia Indem. Ins. Co., 649 F.3d 661, 669 (8th Cir. 2011) (applying Missouri law). Here, the Policies provide coverage for “accidental physical loss or accidental physical damage.” (Doc. #1-1, p. 57) (emphasis supplied). Defendant conflates “loss” and “damage” in support of its argument that the Policies require a tangible, physical alteration. However, the Court must give meaning to both terms. See Nautilus Grp., Inc. v. Allianz Global Risks US, No. C11-5281BHS, 2012 WL 760940, at *7 (W.D. Wash. Mar. 8, 2012) (stating that “if ‘physical loss’ was interpreted to mean ‘damage,’ then one or the other would be superfluous”).

The Court’s finding that Plaintiffs have adequately stated a claim is supported by case law. In Hampton Foods, Inc. v. Aetna Cas. & Sur. Co., 787 F.2d 349 (8th Cir. 1986), the relevant provision provided that “[t]his policy insures against loss of or damage to the property insured ... resulting from all risks of direct physical loss[,]” Id. at 351. Applying Missouri law, the Eighth Circuit found this provision was ambiguous and affirmed the district court’s decision that it covered “any loss or damage due to the danger of direct physical loss[.]” Id. at 352 (emphasis in original).

In Mehl v. The Travelers Home & Marine Ins. Co., Case No. 16-CV-1325-CDP (E.D. Mo. May 2, 2018), the plaintiff discovered brown recluse spiders in his home. Id. at p. 1. The plaintiff unsuccessfully attempted to eliminate the spiders, and then left the home. Id. The plaintiff considered the property uninhabitable and filed a claim under his homeowners insurance policy for loss of use of the property. Id. After his insurance company denied the claim, the plaintiff filed suit for breach of contract. The insurance company moved for summary judgment and argued that the policy only covered “direct physical loss” which required “actual physical damage.” Id. at p. 2.

Mehl rejected this argument. As in this case, the Mehl policy did not define “physical loss” and the insurance company “point[ed] to no language in the policy that would lead a reasonable insured to believe that actual physical damage is required for coverage.” Id. Although the policy in Mehl provided coverage for “loss of use,” Mehl supports the conclusion that “physical loss” is not synonymous with physical damage. Id.
Other courts have similarly recognized that even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose. See *Port Auth. of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (affirming denial of coverage but recognizing that “[w]hen the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct [physical] loss to its owner”); *Prudential Prop. & Cas. Ins. Co. v. Lilliard-Roberts*, CV–01–1362–ST, 2002 WL 31495830, at *9 (D. Or. June 18, 2002) (citing case law for the proposition that “the inability to inhabit a building [is] a ‘direct, physical loss’ covered by insurance”); *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (“We have previously held that direct physical loss can exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way.”).

To be sure, and as argued by Defendant, there is case law in support of its position that physical tangible alteration is required to show a “physical loss.” (Doc. #21, pp. 19-25; Doc. #37, pp. 3-10.) However, Plaintiffs correctly respond that these cases were decided at the summary judgment stage, are factually dissimilar, 802 and/or are not binding. For example, Defendant argues that “[a] seminal case concerning the direct physical loss requirement is *Source Food Tech., Inc. v. U.S. Fid. & Guar Co.*, 465 F.3d 834 (8th Cir. 2006).” (Doc. #21, pp. 19-20.) However, *Source Food* was decided in the summary judgment context and under Minnesota law. *Source Food*, 465 F.3d at 834-36. Moreover, the facts of *Source Foods* are distinguishable. In that case, the insured's beef was not allowed to cross from Canada into the United States because of an embargo related to mad cow disease. *Id.* at 835. Because of the embargo, the insured was unable to fill orders and had to find a new supplier. Importantly, there was no evidence that the beef was actually contaminated. 803

The insured sought coverage based on a provision requiring “direct physical loss to property.” The district court denied coverage, and the Eighth Circuit affirmed, explaining that:

[a][lthough *Source Food’s* beef product in the truck could not be transported to the United States due to the closing of the border to Canadian beef products, the beef product on the truck was not—as *Source Foods* concedes—physically contaminated or damaged in any manner. To characterize *Source Food’s* inability to transport its truckload of beef product across the border and sell the beef product in the United States as direct physical loss to property would render the word ‘physical’ meaningless. *Id.* at 838.

The facts alleged in this case do not involve the transportation of uncontaminated physical products. Instead, Plaintiffs allege that COVID-19 is a highly contagious virus that is physically “present ... in viral fluid particles,” and is “deposited on surfaces or objects.” (Doc. #16, ¶¶ 47, 50.) Plaintiffs further allege that this physical substance is likely on their premises and caused them to cease or suspend operations. Unlike *Source Foods*, the Plaintiffs expressly allege physical contamination. Finally, *Source Foods* recognized (under Minnesota law) that physical loss could be found without structure damage. *Source Foods*, 465 F.3d at 837 (stating that property could be “physically contaminated ... by the release of asbestos fibers”). Neither *Source Foods* nor the other cases cited by Defendant warrant dismissal under Rule 12(b)(6).

Defendant’s reply brief cites recent out-of-circuit decisions which found that COVID-19 does not cause direct physical loss. (Doc. #37, pp. 5-6.) For example, Defendant relies on *Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd.*, 1:20-cv-03311-VEC (S.D.N.Y. 2020). Defendant argues that “Social Life famously states that the virus damages lungs, not printing presses.” (Doc. #37, p. 6.) But the present case is not about whether COVID-19 damages lungs, and the presence of COVID-19 on premises, as is alleged here, is not a benign condition. Regardless of the allegations in *Social Life* or other cases, Plaintiffs here have plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable. 5 This is enough to survive a motion to dismiss.

803 Defendant also contends that if Plaintiffs’ interpretation is accepted, physical loss would be found “whenever a business suffers economic harm.” (Doc. #21, p. 22; Doc. #37, p. 2.) That is not what the Court holds here. Although Plaintiffs allege economic harm, that harm is tethered to their alleged physical loss caused by COVID-19 and the Closure Orders. (Doc. #1-1, ¶¶ 106-107) (alleging that the COVID-19 pandemic and Closure Orders required Plaintiffs to “cease and/or significantly reduce operations at, and ... have prohibited and continue to prohibit access to, the premises.”) 6 For all these reasons, the Court finds that Plaintiffs have adequately alleged a direct physical loss under the Policies.
B. Plaintiffs Have Plausibly Stated a Claim for Civil Authority Coverage.

[12] Defendant next argues that Plaintiffs’ claim for civil authority coverage should be dismissed for failure to state a claim. Defendant presents two arguments in support of dismissal. Defendant first contends that civil authority coverage requires “direct physical loss to property other than the Plaintiffs’ property,” and that “[j]ust as the Coronavirus is not causing direct physical loss to Plaintiffs’ premises, it is not causing direct physical loss to other property.” (Doc. #21, p. 27.)

This argument is rejected for substantially the same reasons as discussed above. Plaintiffs adequately allege that they suffered a physical loss, and such loss is applicable to other property. Additionally, Plaintiffs allege that civil authorities issued closure and stay at home orders throughout Missouri and Kansas, which includes property other than Plaintiffs’ premises.

Defendant’s second argument is that civil authority coverage “requires that access to Plaintiffs’ premises be prohibited by an order of Civil Authority. But, none of the orders Plaintiffs allege prohibit access to their premises. To the contrary, the Plaintiffs admit ... that the Closure Orders allowed restaurant premises to remain open for food preparation, take-out and delivery. Likewise, Plaintiffs concede that the Closure Orders did not prohibit access to salon premises.” (Doc. #21, pp. 28-29) (citations omitted).

Upon review of the record, the Court finds that Plaintiffs have adequately alleged that their access was prohibited. With respect to Studio 417’s hair salons, the Amended Complaint alleges that a Closure Order “required hair salons and all other businesses that provide personal services to suspend operations.” (Doc. #16, ¶ 67.) With respect to Plaintiffs’ restaurants, the Closure Orders mandated “that all inside seating is prohibited in restaurants,” *804 and that “every person in the State of Missouri shall avoid eating or drinking at restaurants,” with limited exceptions for “drive-thru, pickup, or delivery options.” (Doc. #16, ¶¶ 71-80.)

At the motion to dismiss stage, these allegations plausibly allege that access was prohibited to such a degree as to trigger the civil authority coverage. Compare TMC Stores, Inc. v. Federated Mut. Ins. Co., No. A04-1963, 2005 WL 1331700, at * 4 (Minn. Ct. App. June 7, 2005) (“Because access remained and the level of business was not dramatically decreased, the civil authority section of the insurance policy is inapplicable and the district court did not err in granting summary judgment.”). This is particularly true insofar as the Policies require that the “civil authority prohibits access,” but does not specify “all access” or “any access” to the premises. For these reasons, Plaintiffs have adequately stated a claim for civil authority coverage.

C. Plaintiffs Have Plausibly Stated a Claim for Ingress and Egress Coverage.

[13] Defendant argues that Plaintiffs’ claim for ingress and egress coverage should be dismissed for two reasons. First, Defendant argues that such coverage “requires both a direct physical loss at a location contiguous to the insured's property and the prevention of access to the insured's property as a result of that direct physical loss,” and that Plaintiffs fail to allege a direct physical loss to any location. (Doc. #21, p. 30.) For substantially the same reasons discussed above, this argument is rejected.

Second, Defendant argues that this “coverage does not apply if ingress or egress from the ’premises’ is prohibited by civil authority.” (Doc. #21, p. 24; Doc. #1-1, p. 95.) Defendant contends that “[h]ere, the Closure Orders issued by civil authorities are the only identified causes of Plaintiffs’ alleged losses.” (Doc. #21, p. 30.) However, Plaintiffs have alleged that both COVID-19 and the Closure Orders rendered the premises unsafe for ingress and egress. (Doc. #1-1, p. 3, ¶ 14 (“Plaintiffs were forced to suspend or reduce business at their covered premises due to COVID-19 and the ensuing orders issued by civil authorities[.]”). The Court finds that Plaintiffs have adequately stated a claim for ingress and egress coverage.

D. Plaintiffs Have Plausibly Stated a Claim for Dependent Property Coverage.

[14] Defendant argues that Plaintiffs’ claim for dependent property coverage should be dismissed for two reasons. First, Defendant argues that this coverage “requires both a direct physical loss to dependent property and a necessary suspension of the insured's business as a result of that direct physical loss.” (Doc. #21, p. 30.) Defendant contends that “[h]ere, again, the [Amended] Complaint does not allege any facts that show direct physical loss at any location, let alone a dependent property.” (Doc. #21, pp. 30-31.) For substantially the same reasons discussed above, this argument is rejected.

Second, Defendant argues that Plaintiffs have failed to adequately allege a suspension of their businesses because
of the lack of material or services from a “dependent property.” (Doc. #21, pp. 30-31.) As stated above, dependent property is defined as “property operated by others whom [the insured] depend[s] on to ... deliver materials or services to [the insured] ... [a]ccept [the insured’s] products or services ... [or] [a]ttract customers to [the insured's] business.” (Doc. #1-1, p. 64.) The Amended Complaint adequately alleges that Plaintiffs suffered a loss of materials, services, and lack of customers as a result of COVID-19 and the Closure Orders. The *805 Court therefore finds that Plaintiffs have adequately stated a claim for dependent property coverage.

E. Plaintiffs Have Plausibly Stated a Claim for Sue and Labor Coverage.

[15] Finally, Defendant moves to dismiss Plaintiffs’ claim for sue and labor coverage. Defendant argues that this is not an additional coverage, but instead imposes a duty on the insured to prevent further damage and to keep a record of expenses incurred in the event of a covered loss. Defendant argues that because Plaintiffs have failed to adequately allege a covered loss, a claim has not been stated for this coverage.

However, regardless of the title of this claim, Defendant acknowledges that in the event of a covered loss, “the insured can recover these expenses[.]” (Doc. #21, p. 31.) As discussed above, the Court finds that Plaintiffs have adequately stated a claim for a covered loss. Moreover, Plaintiffs allege that in complying with the Closure Orders and by suspending operations, they “incur[red] expenses in connection with reasonable steps to protect Covered Property.” (Doc. #16, ¶ 250.) Consequently, the Court finds that Plaintiffs have adequately stated a claim for sue and labor coverage.

In sum, Defendant's motion to dismiss will be denied in its entirety. The Court emphasizes that Plaintiffs have merely pled enough facts to proceed with discovery. Discovery will shed light on the merits of Plaintiffs’ allegations, including the nature and extent of COVID-19 on their premises. In addition, the Court emphasizes that all rulings herein are subject to further review following discovery. Subsequent case law in the COVID-19 context, construing similar insurance provisions, and under similar facts, may be persuasive. If warranted, Defendant may reassert its arguments at the summary judgment stage.

IV. CONCLUSION

Accordingly, Defendant The Cincinnati Insurance Company's Motion to Dismiss (Doc. #20) is DENIED.

IT IS SO ORDERED.

All Citations
478 F.Supp.3d 794

Footnotes

1 The Amended Complaint is 54 pages long and contains 253 separate allegations. This Order only discusses those allegations and issues necessary to resolve the pending motion.

2 All page numbers refer to the pagination automatically generated by CM/ECF.

3 Defendant notes that Kansas law may apply to one policy, but contends that Missouri and Kansas law are indistinguishable for purposes of the pending motion. (Doc. #21, p. 13 n.10.) Plaintiffs do not challenge this assertion. For purposes of this Order, the Court assumes that Missouri law applies.

4 See also Scott G. Johnson, “What Constitutes Physical Loss or Damage in a Property Insurance Policy?” 54 Tort Trial & Ins. Pract. L.J. 95, 96 (2019) (“[W]hen the insured property's structure is unaltered, at least to the naked eye ... [c]ourts have not uniformly interpreted the physical loss or damage requirement[.]”)

5 Defendant also relies on Gavrilides Mgmt. Co., LLC v. Michigan Ins. Co., Case No. 20-258-CB (Ingham County, Mich. July 1, 2020) (transcript regarding defendant’s motion for summary disposition). (Doc. #37-2.) Gavrilides is distinguishable, in part, because the court recognized that “the complaint also states [t]he time has Covid-19 entered the Soup Shop of the Bistro ... and in fact, states that it has never been present in either location.” (Doc. #37-2, p. 21.)

6 Defendant argues that COVID-19 does not present a physical loss because “the virus either dies naturally in days, or it can be wiped away.” (Doc. #21, pp. 24-25.) However, as stated, a physical loss has been adequately alleged insofar as the presence of COVID-19 and the Closure Orders prohibited or significantly restricted access to Plaintiffs' premises. See Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am., 2014 WL 667934, at * 6 (D.N.J. Nov. 25, 2014) (recognizing that “courts considering non-structural property damage claims have found that buildings rendered uninhabitable by dangerous gases or bacteria suffered direct physical loss or damage”). Defendant also argues that Plaintiffs have failed
to adequately allege that COVID-19 was actually present on their premises. Based on Plaintiffs’ allegations, and because of COVID-19’s wide-spread, this argument is also rejected.

Although it appears to be persuasive, the Court need not address Defendant’s additional argument that the Amended Complaint fails to allege “physical damage.”