Saturday, November 7, 2020
11:00 AM - 12:00 PM

Session [CLE 701] Insurance Law: Legal, Governmental and Regulatory Issues Concerning Insurance Coverage Arising Out of COVID-19

The novel coronavirus (COVID-19) pandemic has unalterably impacted families, businesses, and communities throughout the world resulting in, for many, devastating loss. One aspect of the damage suffered by many is loss to business and of business income, which has resulted in a significant insurance coverage litigation and related governmental legislative and regulatory activity over this past year concerning business interruption coverage. Panelists will provide an examination of various insurance coverage issues arising out of the explosion of COVID-19 litigation, from the viewpoints of both policyholders and insurance companies, a walk-through of some of the lawsuits pending across the country, and an overview of the relevant governmental and regulatory actions initiated in response to COVID-19.

Moderator:

- **Debbie Sines Crockett**
    - Shareholder, Cheffy Passidomo, P.A.

Speakers:

- **Spencer Y. Kook**, Partner, Hinshaw & Culbertson LLP
- **Grace Pyun**, Senior Associate, d'Arcambal Ousley & Cuyler Burk
- **Peter Roldan**, Partner, Emergent LLP
- **Deborah Yue**, Founder, Law Office of Deborah Yue LLC
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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF NAPA

French Laundry Partners, LP dba The French Laundry, a limited partnership; KRM, Inc. dba Thomas Keller Restaurant Group, a Corporation; Yountville Food Emporium, LLC dba Bouchon Bistro, a limited liability company,

Plaintiffs,

vs.

HARTFORD FIRE INSURANCE COMPANY, a corporation; TRUMBULL INSURANCE COMPANY, a corporation; KAREN RELUCIO, an individual, and; DOES 1 to 25, inclusive,

Defendants.

CASE NO.

COMPLAINT FOR DECLARATORY RELIEF

Plaintiffs French Laundry Partners, LP dba The French Laundry; KRM, Inc., dba Thomas Keller Restaurant Group; Yountville Food Emporium, LLC dba Bouchon Bistro; (collectively "plaintiffs"), bring this Complaint, alleging against Defendants Hartford Fire Insurance Company; Trumbull Insurance Company; Karen Relucio, and DOES 1 through 25 ("Defendants") as follows:

PARTIES

1. At all relevant times, French Laundry Partners, LP dba French Laundry ("French Laundry"), is a Limited Partnership, authorized to do business and doing business in the State of California, County of Napa. French Laundry owns, operates, manages, and/or controls the restaurant The French Laundry.

2. At all relevant times, Plaintiff KRM Inc. dba Thomas Keller Restaurant Group ("KRM"), is a Corporation, authorized to do business and doing business in the State of California, County of Napa. KRM is the managing entity for the French Laundry and Bouchon Bistro, plaintiffs herein.

3. At all relevant times, Plaintiff Yountville Food Emporium, LLC dba Bouchon Bistro ("Bouchon") is a Limited Liability Company, authorized to do business and doing business in the State of California, County of Napa. Bouchon owns, operates, manages and/or controls the restaurant Bouchon Bistro.

4. At all relevant times, Defendants Hartford Fire Insurance Company, a corporation, and Trumbull Insurance Company, a corporation (collectively "HARTFORD DEFENDANTS") are corporations doing business in the County of Napa, State of California, subscribing to Policy Number 72UUNHD8373K2 issued to the plaintiffs for the period of July 8, 2019 through July 8, 2020. HARTFORD DEFENDANTS are transacting the business of insurance in the state of California and the basis of this suit arises out of such conduct.

5. At all relevant times, Defendant KAREN RELUCIO ("RELUCIO") is an individual who is being named in her official capacity as the Napa County Health Officer.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over the matters alleged herein.

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7. Venue is proper in this Court because the acts and/or omissions complained of took place, in whole or in part, within the venue of this Court.

FACTUAL BACKGROUND

8. On or about July 8, 2019, HARTFORD DEFENDANTS entered into a contract of insurance with the plaintiffs, whereby plaintiffs agreed to make payments to HARTFORD DEFENDANTS in exchange for HARTFORD DEFENDANTS' promise to indemnify the plaintiffs for losses including, but not limited to, business income losses at several properties (hereinafter "Insured Properties").

9. The Insured Properties include two different prominent restaurants located in Napa Valley County, The French Laundry and Bouchon Bistro, which are owned, leased by, managed, and/or controlled by the plaintiffs.

10. The French Laundry is a world-renowned, three-Michelin-starred restaurant which serves Chef's daily nine-course tasting menu and nine-course vegetable tasting menu made with the finest quality ingredients available. The restaurant is open all three hundred and sixty-five days of the year between the hours of 5:00 p.m. to 8:45 p.m. from Monday through Thursday, and from 11:00 a.m. to 4:45 p.m. and 5:00 p.m. to 8:45 p.m. on Friday to Sunday. The French Laundry is located at 6640 Washington Street, Yountville, California 94599. This address is listed as an Insured Property under the Policy.

11. Bouchon Bistro is a one-star rating recipient from the France-based Michelin Guide San Francisco, Bay Area & Wine Country, a three-and-a-half star rating from the Santa Rosa Press Democrat, as well as a three star rating from the San Francisco Chronicle. Bouchon's seasonal menu and raw bar selections change throughout the year, while staples like roast chicken, leg of lamb, and trout amandine remain as consistent, year-round favorites. The restaurant is open all three hundred and sixty-five days of the year. Bouchon Bistro is located at 6534 Washington Street, Yountville, California 94599. This address is listed as an Insured Property under the Policy.

12. The Insured Properties are covered under a policy issued by the HARTFORD DEFENDANTS with policy number believed to be 72UUNHD8373K2 (hereinafter "policy").

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13. The policy is currently in full effect, providing property, business personal property, business income and extra expense, and additional coverages between the period of July 8, 2019 through July 8, 2020.

14. Plaintiffs faithfully paid policy premiums to HARTFORD DEFENDANTS, specifically to provide additional coverages under The Property Choice Business Income and Extra Expense Form in the event of business closures by order of Civil Authority.

15. Under the policy, insurance is extended to apply to the actual loss of business income sustained and the actual, necessary and reasonable extra expenses incurred when access to the scheduled premises is specifically prohibited by order of civil authority as the direct result of a covered cause of loss to property in the immediate area of plaintiffs' scheduled premises. This additional coverage is identified as coverage under "Civil Authority."

16. The policy is an all-risk policy, insofar as it provides that covered causes of loss under the policy means direct physical loss or direct physical damage unless the loss is specifically excluded or limited in the policy.

17. The policy's Property Choice Deluxe Form specifically extends coverage to direct physical loss or damage caused by virus.

18. Based on information and belief, the HARTFORD DEFENDANTS have accepted the policy premiums with no intention of providing any coverage under the Property Choice Deluxe Form or the Civil Authority extension due to a loss and shutdown from a virus pandemic.

19. While some rogue media outlets have called the 2019-2020 Coronavirus an exaggerated mass hysteria that will unlikely create significant physical damage, the scientific community, and those personally affected by the virus, recognize the Coronavirus as a cause of real physical loss and damage.

20. The global Coronavirus pandemic is exacerbated by the fact that the deadly virus physically infects and stays on surfaces of objects or materials, "fomites," for up to twenty-eight days.

21. China, Italy, France, and Spain have implemented the cleaning and fumigating of public areas prior to allowing them to re-open publicly due to the intrusion of microbials.

22. On March 18, 2020, the health officer of Napa County, Defendant Karen Relucio, issued an order directing all individuals living in the county to stay at home except that they may leave to provide or receive certain essential services or engage in certain essential activities ("The Order"). The Order further requires all non-essential businesses located within the County to "cease all activities at facilities located within the County, except Minimum Basic Operations […]."

23. The Order specifically states that it is being issued based on evidence of physical damage to property. The property that is damaged is in the immediate area of the Insured Properties.

24. Except for delivery or takeout, the Order does not specifically exempt restaurants and has caused a shutdown of plaintiffs' business operations. As a direct and proximate result of this Order, access to the Insured Properties has been specifically prohibited.

25. As a further direct and proximate result of the Order, plaintiffs have been forced to furlough over 300 employees.

26. The virus is physically impacting public and private property, and physical spaces in cities around the world and the United States. Any effort by the HARTFORD DEFENDANTS to deny the reality that the virus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger policyholders and the public.

27. A declaratory judgment determining that the coverage provided under the policy will prevent the plaintiffs from being left without vital coverage acquired to ensure the survival of their businesses due to the shutdown caused by the civil authorities' response is necessary. As a result of this order, plaintiffs have incurred, and continue to incur, a substantial loss of business income and additional expenses covered under the policy.

FIRST CAUSE OF ACTION

DECLARATORY RELIEF

(Against All Defendants and DOES 1 to 25)

28. Plaintiffs re-allege and incorporate by reference into this cause of action each and every allegation set forth in each and every paragraph of this Complaint.

29. Under California Code of Civil Procedure section 1060 et seq., the court may declare rights, status, and other legal relations whether or not further relief is or could be claimed.

30. An actual controversy has arisen between plaintiffs and the HARTFORD DEFENDANTS as to the rights, duties, responsibilities and obligations of the parties in that Plaintiffs contend and, on information and belief, the HARTFORD DEFENDANTS dispute and deny, that: (1) the Order by Karen Relucio, in her official capacity, constitutes a prohibition of access to plaintiffs' Insured Premises; (2) the prohibition of access by the Order is specifically prohibited access as defined in the Policy; (3) the Order triggers coverage because the policy does not include an exclusion for a viral pandemic and actually extends coverage for loss or damage due to virus; and (4) the policy provides coverage to plaintiffs for any current and future civil authority closures of restaurants in Napa County due to physical loss or damage from the Coronavirus under the Civil Authority coverage parameters and the policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the insured premises or immediate area of the insured premises. Resolution of the duties, responsibilities and obligation of the parties is necessary as no adequate remedy at law exists and a declaration of the Court is needed to resolve the dispute and controversy.

31. Plaintiffs seek a Declaratory Judgement to determine whether the Order constitutes a prohibition of access to plaintiffs' Insured Premises by a Civil Authority as defined in the Policy.

32. Plaintiffs further seek a Declaratory Judgement to affirm that the Order triggers coverage because the policy does not include an exclusion for a viral pandemic and actually extends coverage for loss or damage due to virus.

33. Plaintiffs further seek a Declaratory Judgment to affirm that the policy provides coverage to plaintiffs for any current and future civil authority closures of restaurants in Napa County due to physical loss or damage from the Coronavirus and the policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the insured premises.

34. Plaintiffs do not seek any determination of whether the Coronavirus is physically in the insured premises, amount of damages, or any other remedy other than declaratory relief.

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PRAYER FOR RELIEF

Wherefore, Plaintiffs herein, French Laundry Partners, LP dba French Laundry; KRM Inc., dba Thomas Keller Restaurant Group; Yountville Food Emporium, LLC dba Bouchon Bistro; and each of them, pray as follows:

1) For a declaration that the Order by Karen Relucio, in her official capacity, constitutes a prohibition of access to plaintiffs' Insured Premises.
2) For a declaration that the prohibition of access by the Order is specifically prohibited access as defined in the Policy.
3) For a declaration that the Order triggers coverage because the policy does not include an exclusion for a viral pandemic and actually extends coverage for loss or damage due to virus.
4) For a declaration that the policy provides coverage to plaintiffs for any current and future civil authority closures of restaurants in Napa County due to physical loss or damage from the Coronavirus under the Civil Authority coverage parameters and the policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the insured premises or immediate area of the insured premises.
5) For such other relief as the Court may deem proper.

DATED: March 25, 2020

DICKENSON, PEATMAN & FOGARTY

By: _____
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2020 WL 4782369
Only the Westlaw citation is currently available.
This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

MAMA JO'S INC., d.b.a. Berries, Plaintiff - Appellant,
v.
SPARTA INSURANCE COMPANY, Defendant - Appellee.

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

Attorneys and Law Firms

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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:

***1** 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. 110-3 at 51-55; Doc. 110-8 at 54; Doc. 116-8 at 3-7; Doc. 116-9 at 3-15, 19-29). 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

***2** 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

***3** 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 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

***4** Thompson is employed by Awnings of Hollywood, the company that originally installed the awnings and retractable roof "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:

> [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. 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, 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).

***5** 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)).

"We review for abuse of discretion a district court's evidentiary ruling under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)." Adams v. Lab. Corp. of Am., 760 F.3d 1322, 1327 (11th Cir. 2014) (parallel citations omitted). " 'A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous.' " United States v. Alabama Power Co., 730 F.3d 1278, 1282 (11th Cir. 2013) (quoting Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1309 (11th Cir. 2001)). The deference we show on evidentiary rulings includes giving the court "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999). Even where a district court's ruling excluding expert testimony is "outcome determinative" and the basis for a grant of summary judgment, our review is not more searching than it would otherwise be. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 142-43 (1997).

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." Kilpatrick v. Breg, Inc., 613 F.3d 1329, 1335 (11th Cir. 2010) (citing Daubert, 509 U.S. at 597). 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. The factors identified in Daubert "do not constitute a definitive checklist or test." Kumho, 526 U.S. at 150 (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.

***6** 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 amends.)). "[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.

1. Alex Posada

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.

***7** 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

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 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.

***8** 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-risks 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. U.S. Liab. Ins. Co. 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).

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 [ ]. 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., 2020 WL 1950831, at *3 (Fla. 3d DCA 2020).

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, 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."); MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co., 187 Cal. App. 4th 766, 779, 115 Cal. Rptr. 3d 27, 37 (2010) ("A direct physical loss 'contemplates an actual change in insured property."); AFLAC Inc. v. Chubb & Sons, Inc. (2003) 260 Ga.App. 306, 581 S.E.2d 317, 319 (same).

***9** 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 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

--- Fed.Appx. ----, 2020 WL 4782369

Footnotes

[*] Honorable R. David Proctor, United States District Judge for the Northern District of Alabama, sitting by designation.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MONTEREY

THE INNS BY THE SEA, a California Corporation,

Plaintiff,

v.

CALIFORNIA MUTUAL INSURANCE COMPANY, a California Corporation, and DOES 1 through 25, Inclusive,

Defendants.

CASE NO. 20CV001274

~~[PROPOSED]~~ ORDER GRANTING DEFENDANT CALIFORNIA MUTUAL INSURANCE COMPANY'S DEMURRER TO PLAINTIFF'S COMPLAINT

MATTER DEEMED COMPLEX, and assigned for All Purposes to Judge Lydia M. Villareal

Hearing Date:	**August 4, 2020**
Time:	**8:30 a.m.**
Dept.:	**13**
Action Filed:	**April 20, 2020**
Trial:	**None Set**

Defendant CALIFORNIA MUTUAL INSURANCE COMPANY's ("California Mutual") Demurrer to the Complaint filed by Plaintiff The Inns by the Sea ("Plaintiff") came before the Honorable Lydia M. Villarreal in Department 13 on August 4, 2020. The Court, having reviewed the papers filed in support of and in opposition to, and good cause appearing therefor, the Court hereby makes the following orders:

1. IT IS HEREBY ORDERED that the California Mutual's Demurrer to Plaintiff's entire Complaint is sustained without leave to amend on the grounds that the allegations fail to state facts sufficient to constitute a cause of action.

IT IS SO ORDERED.

Dated: **August 6, 2020**, 2020

Judge Lydia M. Villarreal
Judge of the Superior Court of Monterey

.

CASE NAME: **The Inns by the Sea v. California Mutual Insurance Company, et al.**
CASE NO.: **Monterey County Action No.: 20CV001274**

PROOF OF SERVICE

I am a resident of the State of California. My business address is 999 Skyway Road, Suite 310, San Carlos 94070. I am employed in the County of San Mateo where this service occurs. I am over the age of 18 years, and not a party to the within cause. I am readily familiar with my employer's normal business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S. Postal Service the same day as the day of collection in the ordinary course of business.

On the date set forth below, following ordinary business practice, I served a true copy of the foregoing document(s) described as:

[PROPOSED] ORDER GRANTING DEFENDANT CALIFORNIA MUTUAL INSURANCE COMPANY'S DEMURRER TO PLAINTIFF'S COMPLAINT

☒ (BY EMAIL) [WITH PRIOR APPROVAL] by transmitting via email the document(s) listed above to the corresponding email address(es), or as stated on the attached service list, on this date before 5:00 p.m.

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☒ *(State)* I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 18, 2020 at San Carlos, California.

Dolores A. Mayorga

Dolores A Mayorga

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:20-cv-04418-SVW-AS	Date	August 28, 2020
Title	*10E, LLC v. Travelers Indemnity Co. of Connecticut et al.*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: ORDER GRANTING DEFENDANT'S MOTION TO DISMISS [26] AND DENYING PLAINTIFF'S MOTION TO REMAND [24]

I. Introduction

On June 12, 2020, Plaintiff 10E, LLC ("10E") filed a motion to remand this case to state court. Dkt. 24. On June 26, 2020, Defendant Travelers Indemnity Co. of Connecticut ("Travelers" or "Defendant") filed a motion to dismiss Plaintiff's First Amended Complaint ("FAC"). Dkt. 26. For the reasons explained below, the Court DENIES Plaintiff's motion to remand and GRANTS Defendant's motion to dismiss.

II. Factual and Procedural Background

On April 10, 2020, Plaintiff, a restaurant in downtown Los Angeles, filed its initial complaint in Los Angeles Superior Court, naming as defendants Travelers and Mayor Eric Garcetti. Dkt. 1, Ex. A. On May 15, 2020, Travelers, which is incorporated and has its principal place of business in Connecticut, Dkt. 1, at 5, removed the case to this Court, arguing that Garcetti was fraudulently joined to defeat diversity jurisdiction, *Id.* at 6-10.

On May 22, 2020, Defendant filed a motion to dismiss Plaintiff's initial complaint. Dkt. 14. On June 12, 2020, Plaintiff filed its FAC. Dkt. 22.[1] The FAC asserts claims for breach of contract,

[1] The Court DENIES as moot Defendant's motion to dismiss Plaintiff's initial complaint. Dkt. 14.

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bad faith, and violation of Cal. Bus. & Prof. Code § 17200 *et seq.* ("UCL"). *Id.* Plaintiff seeks both damages and declaratory relief. *Id.*

According to the FAC, beginning on March 15, 2020, public health restrictions adopted by Mayor Garcetti prohibited in-person dining at Plaintiff's restaurant, limiting Plaintiff to offering takeout and delivery. Dkt. 22, at 5. Plaintiff alleges that these restrictions have caused a "complete and total shutdown" of its business. *Id.*

Plaintiff seeks compensation for lost business and other costs of the disruption under the Business Income and Extra Expense Coverage provision of its insurance policy with Defendant ("the Policy"). *Id.* at 3. Defendant attached a copy of the Policy to its motion to dismiss. Dkt. 27-2, Ex. 1.

The Policy covers losses and expenses "caused by action of civil authority that prohibits access to the described premises." *Id.* at 121. "The civil authority action must be due to direct physical loss of or damage to property…." *Id.*

The Policy also contains an endorsement entitled, "EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA." *Id.* at 247. This exclusion applies to "action of civil authority." *Id.* It reads as follows: "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." *Id.*

Plaintiff alleges that it is entitled to recover under the Policy because public health restrictions prohibited access to its restaurant. *Id.* at 5. The restrictions caused "physical damage" by "labeling of the insured property as non-essential" and "prevent[ing] the ordinary intended use of the property." *Id.* Plaintiff also alleges that "[t]he only virus exclusion that relates in theory to a virus is not applicable here" and that the virus exclusion "does not include exclusion for a viral pandemic." *Id.* at 6-7.

Defendant filed its motion to dismiss Plaintiff's FAC on June 26, 2020. Dkt. 26. Plaintiff filed an opposition on August 10, 2020. Dkt. 33. Defendant filed its reply on August 17, 2020. Dkt. 36.

Plaintiff filed its motion to remand to state court on June 12, 2020. Dkt. 24. Defendant filed an opposition on June 29, 2020. Dkt. 29. Plaintiff filed its reply on August 17, 2020. Dkt. 35.

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III. Plaintiff's Motion to Remand to State Court

a. *Legal Standard*

Federal courts are courts of limited jurisdiction, having subject matter jurisdiction only over matters authorized by the Constitution and Congress. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). A suit filed in state court may be removed to federal court if the federal court would have had original jurisdiction over the suit. 28 U.S.C. § 1441(a). "The removal statute is strictly construed against removal jurisdiction, and the burden of establishing federal jurisdiction falls to the party invoking the statute." *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004) (citation omitted). "Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). Diversity jurisdiction under 28 U.S.C. § 1332(a) requires both that the amount in controversy exceed $75,000, and that complete diversity of citizenship exists between the parties.

Persons are domiciled in the places where they reside with the intent to remain or to which they intend to return. *See Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). A corporation is a citizen of "every State and foreign state by which it has been incorporated and the State or foreign state where it has its principal place of business." 28 U.S.C. § 1332(c)(1). A corporation's principal place of business is "the place where a corporation's officers direct, control, and coordinate the corporation's activities." *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010).

Under the sham defendant doctrine, a defendant's citizenship should be disregarded for purposes of diversity jurisdiction when the defendant "cannot be liable on any theory." *Grancare, LLC v. Thrower by and through Mills*, 889 F.3d 543, 548 (9th Cir. 2018) (citation omitted). "If there is a *possibility* that a state court would find that the complaint states a cause of action against any of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court." *Id.* (citation omitted) (italics in original). The defendant bears a "heavy burden" to overcome the "general presumption against [finding] fraudulent joinder." *Id.* (citation omitted).

b. *Analysis*

Defendant's removal is based on an argument that Mayor Garcetti, a citizen of California, was fraudulently joined to defeat diversity jurisdiction between Plaintiff, a citizen of California, and

Defendant, a citizen of Connecticut. Dkt. 1, at 7-10. The Court agrees.

Plaintiff's only asserted claim against Garcetti is a standalone claim for declaratory relief. Dkt. 22, at 6-8. Plaintiff does not appear to argue that its FAC presently states a valid claim against Garcetti. Dkt. 24, at 2-3. Nor could it. Declaratory relief is not a standalone cause of action. *Mayen v. Bank of America N.A.*, 2015 WL 179541, at *5 (internal citations omitted) (N.D. Cal. 2015) ("[D]eclaratory relief is not a standalone claim."); 28 U.S.C. § 2201(a) (a federal court may only award declaratory relief "[i]n a case of actual controversy within its jurisdiction").

Plaintiff's failure to state a cause of action does not by itself establish that Garcetti was fraudulently joined. *See Grancare*, 889 F.3d at 549 ("[T]he test for fraudulent joinder and for failure to state a claim under Rule 12(b)(6) are not equivalent."). However, it does require the Court to find that Plaintiff could possibly amend its complaint to state a cause of action against Garcetti. *See id.* ("[T]he district court must consider … whether a deficiency in the complaint can possibly be cured by granting the plaintiff leave to amend.").

The Court is unable to imagine how such an amendment is possible. Plaintiff argues that, because "the denial of [Defendant's] policy would not have occurred absent Mayor Garcetti's order, the propriety of Mayor Garcetti's order is a significant issue that needs to be resolved." Dkt. 22, at 6-8. However, Plaintiff neither articulates a ground for some future challenge to the legality of Garcetti's order nor explains how such a challenge could be raised in the context of this insurance dispute. While its burden to show fraudulent joinder is "heavy," *Grancare*, 889 F.3d at 548, Defendant has carried that burden here. The Court concludes that Garcetti was fraudulently joined and discounts his citizenship for purposes of assessing diversity of parties.

The Court is unpersuaded by Plaintiff's other arguments supporting remand. Plaintiff argues that, because there are other insurance cases now pending in state court concerning recovery of pandemic-related losses under business interruption policies, the Court should remand the case to state court under a laundry list of prudential considerations and abstention doctrines. Crucially, as Defendant points out, although they may involve the same lawyers, these other pandemic-related insurance cases do not involve the same parties and issues as this litigation. Dkt. 29, at 18-19. Consequently, the Court has no concern that its exercise of jurisdiction here will interfere with any parallel state proceedings, and it concludes without detailed analysis that none of the doctrines raised by Plaintiff favor remand. *See Herrera v. City of Palmdale*, 918 F.3d 1037, 1043 (9th Cir. 2019) (citing *Younger v.*

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Harris, 401 U.S. 37, 43 (1971)) ("*Younger* abstention is grounded in a 'longstanding public policy against federal court interference with state court proceedings.'"); *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 841 (9th Cir. 2017) ("*Colorado River* and its progeny provide a multi-pronged test for determining whether 'exceptional circumstances' exist warranting federal abstention from *concurrent federal and state proceedings*.") (italics added); *Gov. Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998) (citation omitted) ("If there are *parallel state proceedings* involving the same issues and parties pending at the time the federal declaratory action is filed, there is a presumption that the entire suit should be heard in state court.") (italics added).

Because Defendant has met its burden to show that removal was proper, the Court denies Plaintiff's motion to remand the case to state court.

IV. Defendant's Motion to Dismiss Plaintiff's First Amended Complaint

a. *Legal Standard*

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. *See* Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the plaintiff's 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, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.*; *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678).

In reviewing a Rule 12(b)(6) motion, a court "must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party." *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). Thus, "[w]hile legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

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b. *Analysis*

Defendant argues that the FAC should be dismissed for three reasons: 1) the Policy's virus exclusion clause precludes recovery, 2) Plaintiff fails to allege that public health restrictions prohibited access as required for civil authority coverage, and 3) Plaintiff does not plausibly allege that it suffered "direct physical loss of or damage to property" as required for civil authority coverage. *See generally* Dkt. 27. Without reaching the first two, the Court agrees with Defendant's third argument.

Although "[a]s a general rule, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion," a court can consider extrinsic material when its "authenticity … is not contested and the plaintiff's complaint necessarily relies on them." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citation and quotation marks omitted). Plaintiff does not contest the authenticity of the insurance policy attached to Defendant's memorandum. *See generally* Dkt. 33. Because Plaintiff seeks to recover under the Policy, *see generally* Dkt. 22, the FAC necessarily relies on the Policy. Therefore, the Court will consider the language contained directly in the Policy in resolving this motion. *See Khoury Investments Inc. v. Nationwide Mutual Ins. Co.*, 2013 WL 12140449, at *2 (C.D. Cal. 2013) (citing *United States ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 999 (9th Cir. 2011)) ("Because Plaintiffs refer to this insurance policy in their FAC and their claim for breach of contract relies on the terms of the policy …, this document would likely be appropriate for judicial notice as 'unattached evidence on which the complaint necessarily relies.'").

"When interpreting a policy provision, we must give terms their ordinary and popular usage, unless used by the parties in a technical sense or a special meaning is given to them by usage." *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115 (1999) (citation and quotation marks omitted). The property insurance Policy at issue here requires "direct physical loss of or damage to property" for recovery under the civil authority provision. Dkt. 27-2, Ex. 1., at 121.

Under California law, losses from inability to use property do not amount to "direct physical loss of or damage to property" within the ordinary and popular meaning of that phrase. Physical loss or damage occurs only when property undergoes a "distinct, demonstrable, physical alteration." *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010) (citation and quotation marks omitted). "Detrimental economic impact" does not suffice. *Id.* (citation and quotation marks omitted); *see also Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th 33, 39 (2018) ("[D]iminution in value is not a covered peril, it is a measure of loss" in property insurance).

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An insured cannot recover by attempting to artfully plead impairment to economically valuable use of property as physical loss or damage to property. For example, in *MRI Healthcare Ctr.*, the court held that lost use of an MRI machine after it was powered off did not qualify as a "direct physical loss." 187 Cal. App. 4th at 789. Likewise, in *Ward General Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548 (2003), the court held that a loss of valuable electronic data did not qualify as "direct physical loss or damage" without any physical alteration to the storage media. 114 Cal. App. 4th at 555-56. Finally, in *Doyle*, 21 Cal. App. 5th 33 (2018), the court held that purchasing counterfeit wine did not count as a loss to the wine covered by a property insurance policy without a physical alteration to the insured property. 21 Cal. App. 5th at 38-39.

Plaintiff's FAC attempts to make precisely this substitution of impaired use or value for physical loss or damage. Plaintiff only plausibly alleges that in-person dining restrictions interfered with the use or value of its property – not that the restrictions caused direct physical loss or damage.

Plaintiff characterizes in-person dining restrictions as "labeling of the insured property as non-essential." Dkt. 22, at 5. That "labeling" surely carries significant social, economic, and legal consequences. But it does not physically alter any of Plaintiff's property.

Plaintiff's FAC appears to suggest that Plaintiff's business hardships resulted from the physical action of the novel coronavirus itself, which "infects and stays on surfaces of objects or materials … for up to twenty-eight days." *Id.* at 4. However, Plaintiff does not allege that the virus "infect[ed]" or "stay[ed] on surfaces of" its insured property. Whatever physical alteration the virus may cause to property in general, nothing in the FAC plausibly supports an inference that the virus physically altered Plaintiff's property, however much the public health response to the virus may have affected business conditions for Plaintiff's restaurant. Even if Plaintiff could somehow recover for physical loss or damage to other property, such loss or damage could hardly qualify as "direct." *See MRI Healthcare Ctr.*, 187 Cal. App. 4th at 779 (internal citation and quotation marks omitted) ("[D]irect means [w]ithout intervening persons, conditions, or agencies; immediate.").

Plaintiff attempts to circumvent the plain language of the Policy by emphasizing its disjunctive phrasing – "direct physical loss of *or* damage to property," Dkt. 27-2, Ex. 1, at 121 – and insisting that "loss," unlike "damage," encompasses impaired use. To support this argument, Plaintiff relies on *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767 (C.D. Cal. 2018). In

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Total Intermodal, the court concluded that giving separate effect to "loss" and "damage" in the phrase, "direct physical loss or damage," required recognizing coverage for "the permanent dispossession of something." *Id.* at *4.

Even if the Policy covers "permanent dispossession" in addition to physical alteration, that does not benefit Plaintiff here. Plaintiff's FAC does not allege that it was permanently dispossessed of any insured property. *See generally* Dkt. 22. As far as the FAC reveals, while public health restrictions kept the restaurant's "large groups" and "happy-hour goers" at home instead of in the dining room or at the bar, Plaintiff remained in possession of its dining room, bar, flatware, and all of the accoutrements of its "elegantly sophisticated surrounding." *Id.* at 3.

The Court therefore concludes that Plaintiff has not alleged facts plausibly supporting an inference that it is entitled to coverage under the Policy.

Because it is not entitled to coverage under the Policy, Plaintiff cannot state a claim for breach of contract, *see 1231 Euclid Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 135 Cal. App. 4th 1008, 1020-21 (2006) ("The failure of [a policy's] conditions precedent is a complete defense to [an insured's] breach of contract claim."), or bad faith, *see Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151 (1990) ("Where benefits are withheld for proper cause, there is no breach of the implied covenant.").

Likewise, Plaintiff's UCL claim is based on an allegation that the Policy represents that Plaintiff would be covered under these circumstances. Dkt. 22, at 10-11. The Court has concluded that Plaintiff was not entitled to recover under the Policy on the facts alleged in the FAC. That determination is based on an interpretation of the "ordinary and popular sense" of the Policy language. *Palmer*, 21 Cal. 4th at 1115. If the ordinary and popular sense of the Policy language does not support recovery on these facts, Plaintiff cannot plausibly allege that the Policy constitutes fraudulent, unfair, or unlawful conduct giving rise to UCL liability. *See Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1203 (9th Cir. 2001) (citing *Cel-Tech Comms., Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 182 (1999)) ("[T]he breadth of [the UCL] does not give a plaintiff license to 'plead around' the absolute bars to relief contained in other possible causes of action by recasting those causes of action as one for unfair competition."). Therefore, the Court also dismisses Plaintiff's UCL claim.

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V. Conclusion

For the reasons articulated above, the Court DENIES Plaintiff's motion to remand the case to state court and GRANTS Defendant's motion to dismiss the FAC. The Court will allow Plaintiff leave to amend its complaint within 14 days of the issuance of this Order.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-22615-Civ-WILLIAMS/TORRES

MALAUBE, LLC,

Plaintiff,

v.

GREENWICH INSURANCE COMPANY,

Defendant.

_____/

REPORT AND RECOMMENDATION
ON DEFENDANT'S MOTION TO DISMISS

This matter is before the Court on Greenwich Insurance Company's ("Defendant" or "Greenwich") motion to dismiss against Malaube, LLC's ("Plaintiff") amended complaint. [D.E. 10]. Plaintiff responded to Defendant's motion on July 30, 2020 [D.E. 14] to which Defendant replied on August 6, 2020. [D.E. 15]. Therefore, Defendant's motion is now ripe for disposition. After careful consideration of the motion, response, reply, relevant authority, and for the reasons discussed below, Defendant's motion to dismiss should be **GRANTED**.[1]

[1] On August 7, 2020, the Honorable Kathleen Williams referred Defendant's motion to dismiss to the undersigned Magistrate Judge for disposition. [D.E. 16].

I. BACKGROUND

Plaintiff filed this action on April 23, 2020 [D.E.1] in Florida state court, seeking to recover insurance benefits for the loss of business income as a result of government shutdowns in response to the COVID-19 pandemic.[2] On September 25, 2019, Greenwich entered into an insurance contract with Plaintiff with the latter agreeing to make payments in exchange for Greenwich's promise to indemnify for losses including business income at Plaintiff's restaurant.[3] Plaintiff alleges that the insurance policy is in full effect, providing business income and personal property insurance from September 25, 2019 to September 25, 2020.

On March 17, 2020, Miami-Dade Mayor Carlos Gimenez signed an order to close all restaurants for indoor dining and only permitted takeout and delivery as a result of the COVID-19 pandemic. Florida Governor, Ron DeSantis, then issued an executive order on March 20, 2020 that closed all onsite dining at restaurants.[4] Plaintiff claims that these orders resulted in significant business losses for Plaintiff's restaurant and that Greenwich was obligated to pay because of government orders that prohibited access to indoor dining. When Plaintiff demanded payment for these losses, Greenwich denied Plaintiff's claim because Plaintiff did not experience any physical loss or damage to the insured property. Plaintiff now fears that, with Greenwich's improper denial of its insurance benefits,

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[2] Defendant removed this case to federal court on June 24, 2020 based on the Court's diversity jurisdiction. Plaintiff is a citizen of Florida and Greenwich is a citizen of Delaware and Connecticut.

[3] The restaurant serves Italian food at 5748 Sunset Drive, Miami, FL 33143.

[4] We refer to these collectively as the Florida Emergency Orders.

its restaurant may be forced to close permanently. Therefore, Plaintiff seeks a declaratory judgment that that the insurance policy provides coverage for the losses stemming from the government shutdowns including costs, prejudgment interest, and attorney's fees.

II. APPLICABLE PRINCIPLES AND LAW

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a claim for failure to state a claim upon which relief can be granted. "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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Conclusory statements, assertions or labels will not survive a 12(b)(6) motion to dismiss. *Id.* "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.*; *see also Edwards v. Prime, Inc.*, 602 F.3d 1276, 1291 (11th Cir. 2010) (setting forth the plausibility standard). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Twombly*, 550 U.S. at 555 (citation omitted). Additionally:

> Although it must accept well-pled facts as true, the court is not required to accept a plaintiff's legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (noting "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). In evaluating the sufficiency of a plaintiff's pleadings, we make reasonable inferences in Plaintiff's favor, "but we are not required to draw plaintiff's inference." *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005). Similarly, "unwarranted deductions of fact" in a complaint are not admitted as true for the purpose of testing the sufficiency of plaintiff's allegations.

> *Id.*; *see also Iqbal*, 556 U.S. at 681 (stating conclusory allegations are "not entitled to be assumed true").

Sinaltrainal v. Coca-Cola, 578 F.3d 1252, 1260 (11th Cir. 2009), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, 566 U.S. 449, 453 n.2, (2012). The Eleventh Circuit has endorsed "a 'two-pronged approach' in applying these principles: 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, 'assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.'" *American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 679).

III. ANALYSIS

Defendant seeks to dismiss Plaintiff's amended complaint for three independent reasons.[5] First, Defendant argues that the insurance policy was never triggered because it excludes any coverage for viruses, bacteria, or other microorganisms that induce physical distress, illness, or disease. Second, Defendant claims that there is no insurance coverage because Plaintiff failed to allege that it suffered any direct physical loss or damage to property. And third,

[5] In determining whether Plaintiff's amended complaint fails to state a claim, we may consider the language of the policy itself because exhibits are part of a pleading "for all purposes." Fed. R. Civ. P. 10(c); *see also Solis–Ramirez v. U.S. Dep't of Justice,* 758 F.2d 1426, 1430 (11th Cir. 1985) ("Under Rule 10(c) Federal Rules of Civil Procedure, such attachments are considered part of the pleadings for all purposes, including a Rule 12(b)(6) motion."). To the extent the complaint's allegations conflict with the exhibit, the exhibit must control. *See Hoefling v. City of Miami*, 811 F.3d 1271, 1277 (11th Cir. 2016) ("A district court can generally consider exhibits attached to a complaint in ruling on a motion to dismiss, and if the allegations of the complaint about a particular exhibit conflict with the contents of the exhibit itself, the exhibit controls.") (citing *Crenshaw v. Lister,* 556 F.3d 1283, 1292 (11th Cir. 2009)).

Defendant reasons that the two Florida Emergency Orders never prohibited Plaintiff from accessing the insured property – a prerequisite that must be satisfied before insurance coverage can apply. Before we consider the merits, we must consider the general principles governing the interpretation of insurance contracts under Florida law. These principles are necessary, as they will inform the analysis that follows.

A. General Principles of Insurance Contracts

"Under Florida law, an insurance policy is treated like a contract, and therefore ordinary contract principles govern the interpretation and construction of such a policy." *Pac. Emp'rs Ins. Co. v. Wausau Bus. Ins. Co.*, 2007 WL 2900452, at *4 (M.D. Fla. Oct. 2, 2007) (citing *Graber v. Clarendon Nat'l Ins. Co.*, 819 So. 2d 840, 842 (Fla. 4th DCA 2002)). The interpretation of an insurance contract – including the question of whether an insurance provision is ambiguous – is a question of law. *See id.*; *Travelers Indem. Co. of Illinois v. Hutson*, 847 So. 2d 1113 (Fla. 1st DCA 2003) (stating that whether an ambiguity exists in a contract is a matter of law).

In addition, "[u]nder Florida law, insurance contracts are construed according to their plain meaning." *Garcia v. Fed. Ins. Co.*, 473 F.3d 1131, 1135 (11th Cir. 2006) (quoting *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005)). The "terms of an insurance policy should be taken and understood in their ordinary sense and the policy should receive a reasonable, practical and sensible interpretation consistent with the intent of the parties-not a strained,

forced or unrealistic construction." *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 736 (Fla. 2002) (quoting *Gen. Accident Fire & Life Assurance Corp. v. Liberty Mut. Ins. Co.*, 260 So. 2d 249 (Fla. 4th DCA 1972)); *see also Gilmore v. St. Paul Fire & Marine Ins.*, 708 So. 2d 679, 680 (Fla. 1st DCA 1998) ("The language of a policy should be read in common with other policy provisions to accomplish the intent of the parties.").

However, if there is more than one reasonable interpretation of an insurance policy, an ambiguity exists and it "should be construed against the insurer." *Pac. Emp'rs Ins.*, 2007 WL 2900452, at *4 (citing *Purrelli v. State Farm Fire & Cas. Co.,* 698 So. 2d 618, 620 (Fla. 2d DCA 1997)). Where an interpretation "involve[s] exclusions to insurance contracts, the rule is even clearer in favor of strict construction against the insurer: exclusionary provisions which are ambiguous or otherwise susceptible to more than one meaning must be construed in favor of the insured." *Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 412 F.3d 1224, 1228 (11th Cir. 2005) (quoting *State Farm Mut. Auto. Ins. Co. v. Pridgen,* 498 So. 2d 1245, 1248 (Fla. 1986)). An insurance policy must, of course, be ambiguous before it is subject to these rules. *See Taurus Holdings, Inc.*, 913 So. 2d at 532 ("Although ambiguous provisions are construed in favor of coverage, to allow for such a construction the provision must actually be ambiguous."). An ambiguous policy must, for example, have a genuine inconsistency, uncertainty, or ambiguity in meaning after the court has applied the ordinary rules of construction. *See Deni Assocs. of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.,*711 So. 2d 1135 (Fla.

1998). "Just because an operative term is not defined, it does not necessarily mean that the term is ambiguous." *Amerisure Mut. Ins. Co. v. Am. Cutting & Drilling Co.*, 2009 WL 700246, at *4 (S.D. Fla. Mar. 17, 2009) (citing *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.,* 845 So. 2d 161, 166 (Fla. 2003)).

On the other hand, "if a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision." *Hagen v. Aetna Cas. & Sur. Co.,* 675 So. 2d 963, 965 (Fla. 5th DCA 1996). Ultimately "in the absence of some ambiguity, the intent of the parties to a written contract must be ascertained from the words used in the contract, without resort to extrinsic evidence." *Fireman's Fund Ins. Co. v. Tropical Shipping & Const. Co.*, 254 F.3d 987, 1003 (11th Cir. 2001) (quoting *Lee v. Montgomery*, 624 So. 2d 850, 851 (Fla. 1st DCA 1993)).

When the parties dispute coverage and exclusions under a policy, a burden-shifting framework applies. "A person seeking to recover on an insurance policy has the burden of proving a loss from causes within the terms of the policy[,] and if such proof of loss is made within the contract of insurance, the burden is on the insurer to establish that the loss arose from a cause that is excepted from the policy." *U.S. Liab. Ins. Co. v. Bove,* 347 So. 2d 678, 680 (Fla. 3d DCA 1977) (alteration added; citations omitted). If the insurer is able to establish that an exclusion applies, the then burden shifts back to the insured to prove an exception to the exclusion. *See id.*; *see also IDC Const., LLC. v. Admiral Ins. Co.*, 339 F. Supp. 2d 1342, 1348 (S.D. Fla. 2004) ("When an insurer relies on an exclusion to deny coverage, it has the

burden of demonstrating that the allegations in the complaint are cast solely and entirely within the policy exclusions and are subject to no other reasonable interpretation."). That is, "if there is an exception to the exclusion, the burden once again is placed on the insured to demonstrate the exception to the exclusion." *East Fla. Hauling, Inc. v. Lexington Ins. Co.*, 913 So. 2d 673, 678 (Fla. 3d DCA 2005) (citing *LaFarge Corp. v. Travelers Indem. Co.,* 118 F.3d 1511, 1516 (11th Cir. 1997)).

B. The Business Income Exclusion

Having set forth the relevant legal principles, Defendant's strongest argument is that Plaintiff's amended complaint fails to state a claim because the insurance policy only provides coverage for the actual loss of business income if a *direct physical loss or damage* to the property causes a suspension to Plaintiff's operations:

> 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 premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations.

[D.E. 5-1 at 53]. The policy further provides coverage for extra expenses during a period of restoration, but that also only applies if the insured property suffers direct physical loss or damage:

> Extra Expense Coverage is provided at the premises described in the Declarations only if the Declarations show that Business Income Coverage applies at that premises.
>
> Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been on

> direct physical loss or damage to property caused by or resulting from a Coverage Cause of Loss.

Id. at 53.

Defendant argues that Plaintiff has failed to state a claim because there are no allegations that the insured property has ever suffered a direct physical loss or damage. Instead, Plaintiff alleges that two Florida Emergency Orders limited the full use of its restaurant and that, as a result, Plaintiff suffered significant businesses losses. [D.E. 5 at ¶¶ 13-14 ("On March 17, 2020, Miami-Dade Mayor, Carlos Gimenez, signed an order to close all restaurants for dining in and only permitting takeout and delivery. On March 20, 2020, the Florida Governor, Ron DeSantis, issued an executive order closing all onsite dining at restaurants")]. Defendant also states that the amended complaint concedes that the Florida Emergency Orders were issued in response to the COVID-19 pandemic and entirely unrelated to any physical loss or damage to Plaintiff's property. *See id*. at 18 ("The Government Shutdowns that interfered with [Plaintiff'] access to its business came as a result of the COVID-19 pandemic."). Because Plaintiff's allegations seek coverage for pure economic losses stemming with no connection to any physical loss or damage, Defendant reasons that Plaintiff's amended complaint must be dismissed.

Plaintiff's response is that there is an ongoing debate in both state and federal courts on the meaning of "direct physical loss" and "direct physical damage." Plaintiff contends, for example, that the use of the "or" in the phrase "direct physical loss or damage" suggests that the two terms are not the same, and that

they must be distinct. If the terms were the same, Plaintiff believes that it would render some component of the insurance policy meaningless and undermine a fundamental rule of Florida contract law. *See, e.g.*, *Westport Ins. Corp. v. Tuskegee Newspapers, Inc.*, 402 F.3d 1161, 1166 (11th Cir. 2005) ("[A] court will attempt to give meaning and effect, if possible, to every word and phrase in the contract, . . . and a construction which neutralizes any provision of a contract should never be adopted if the contract can be so construed as to give effect to all the provisions.") (quoting *J. Appleman, Insurance Law and Practice* § 7383 (1981)).

Plaintiff also states that the Florida Emergency Orders caused a direct physical loss because they forced Plaintiff to close its indoor dining to mitigate the spread of COVID-19. As support, Plaintiff references several state and federal court opinions – some of which date back to the 1970s – with a contention that these are the "better reasoned cases" in the ongoing debate and that they are consistent with Florida law. Plaintiff then asserts, with a reference to several other cases, that the inability to use the intended purpose of a business constitutes a direct physical loss because Plaintiff had no option other than to close the indoor dining section of its restaurant. Thus, Plaintiff equates the closure of its indoor dining to a physical loss because the business could no longer operate for its intended purpose.

To begin, Plaintiff's response is, in many respects, unhelpful because it is conclusory and fails to put forth any substantive reasons in support of its position. Plaintiff makes assertions, for example, that physical damage is different from physical loss and then follows that statement with a string cite of parentheticals

with no explanation as to how any of the cases are relevant. Plaintiff complicates matters further when it references cases, some of which are decades old, across the country (including Michigan, Minnesota, and California) but then fails to offer any analysis whatsoever. Plaintiff just leaves it for the Court to examine these cases, and to do the work that Plaintiff should have done in the first place. That is, Plaintiff invites the Court to develop its own argument and determine which of these cases (1) are relevant to Florida law, (2) are applicable to the insurance policy in this case, (3) offers a persuasive distinction between physical loss and damage, and (4) are analogous to the partial closure of a business. Hence, Plaintiff's response is largely unpersuasive. *See United States Liab. Ins. Co. v. Bove*, 347 So. 2d 678, 680 (Fla. 3rd DCA 1977) (stating that a party claiming coverage has the burden of proof to establish that coverage exists).

Putting aside this problem, Plaintiff argues that physical loss does not require structural alteration and that a property's inability to operate with its intended purpose (i.e. the operation of both its indoor and outdoor dining sections) falls within the insurance policy's coverage. The policy does not define "physical loss" or "physical damage." However, "[t]he mere failure to provide a definition of a term involving coverage does not render the term ambiguous." *Those Certain Underwriters at Lloyd's London v. Karma Korner, LLC*, 2011 WL 1150466, at *2 (M.D. Fla. 2011) (citation omitted). When a policy does not define a term, the plain and generally accepted meaning should be applied. *See Evanston Ins. Co. v. S & Q Prop. Inv.*, LLC, 2012 WL 4855537, at *2 (S.D. Fla. 2012).

Defendant argues that, under the plain meaning of the word "physical", Plaintiff has not alleged coverage for any loss because, by definition, the policy excludes losses that are intangible. *See, e.g.*, 10A *Couch On Insurance* § 148.46 (3d Ed. 2019) ("[T]he requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude 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."). This is persuasive, in some respects, because courts in our district have found that "[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.'" *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) (quoting *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010)), *aff'd*, 2020 WL 4782369 (11th Cir. Aug. 18, 2020).

While neither party cited a binding decision on the meaning of "direct physical loss" or "direct physical damage" under Florida law, a case that addresses many of the arguments presented is a district court's recent decision in *Studio 417, Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385, at *4 (W.D. Mo. Aug. 12, 2020). There, the plaintiffs purchased insurance policies for their hair salons and restaurants. The policies provided coverage for physical losses or physical damages,

and the plaintiffs argued that they should recover the insurance proceeds as a result of the Covid-19 pandemic. The defendants moved to dismiss because – with the policies requiring either a direct physical loss or damage – the plaintiffs could not recover unless there was an actual, tangible, permanent, or physical alteration to the insured properties. The district court rejected that argument, however, because "loss" and "damage" could not be conflated with the "or" separated between them. Instead, the court had to "give meaning to both terms," to avoid the other from being superfluous. *Studio 417, Inc.*, 2020 WL 4692385, at *5 (citing *Nautilus Grp., Inc. v. Allianz Global Risks US*, 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 district court then referenced several decisions where courts have recognized that, absent a physical alteration, a physical loss may occur when a property is uninhabitable or substantially unusable for its intended purpose. *Studio 417, Inc.*, 2020 WL 4692385, at *5 (citing *Port Auth. of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (affirming the 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*, 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.")); *see also Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 509 (1998) (holding policyholders to suffer a "direct physical loss" when their homes were rendered uninhabitable due to threat of rockfall); *W. Fire Ins. Co. v. First Presbyterian Church,* 165 Colo. 34, 437 P.2d 52, 55 (1968) (holding that the policyholder suffered "direct physical loss" when "the accumulation of gasoline around and under the [building caused] the premises to become so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous").

The court also acknowledged that there were cases where an actual alteration was required to show a "physical loss," but distinguished those on the basis that they were, for the most part, decided on a motion for summary judgment, factually dissimilar, or non-binding. *Id.* (citing *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006) (affirming the denial of insurance coverage on a motion for summary judgment and under Minnesota law)); *Mama Jo's, Inc.*, 2018 WL 3412974, at *8 (granting summary judgment in favor of the insurance company because the plaintiff could not "show that there was any suspension of operations caused by 'physical damage.'") (citing *Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co. of Am.*, 835 F.2d 812, 814 (11th Cir.

1988) ("[R]ecovery is intended when the loss is due to inability to use the premises where the damage occurs.").[6]

In light of these decisions, the district court denied the defendant's motion to dismiss because the plaintiffs alleged that COVID-19 was a highly contagious virus that was *physically present* in viral fluid particles and deposited on surfaces and objects. The plaintiffs further alleged that the physical substance was on the premises and caused them to cease or suspend operations. That is, "[r]egardless of the allegations in . . . other cases, Plaintiffs . . . plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable." *Studio 417, Inc.*, 2020 WL 4692385, at *6. And that was "enough to survive a motion to dismiss." *Id*.

This case is materially different because Plaintiff has not alleged any physical harm. There is no allegation, for example, that COVID-19 was physically present on the premises. Instead, Plaintiff only alleges that two Florida Emergency

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[6] In *Source Food*, the insured's beef was not allowed to cross from Canada into the United States because of an embargo related to mad cow disease. The insured was therefore unable to fill orders and had to find a new supplier. The insured sought coverage based on a provision requiring "direct physical loss to property," but the district court denied coverage and the Eighth Circuit affirmed, explaining that:

> Although 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.

Source Food Tech., Inc., 465 F.3d at 838.

Orders forced the closure of its restaurant. And, as stated earlier, courts have found this to be insufficient to state a claim because there must be some allegation of actual harm:

> The critical policy language here—"direct physical loss or damage"—similarly, and unambiguously, requires some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage. [Plaintiff] simply cannot show any such loss or damage to the 40 Wall Street Building as a result of either (1) its inability to access its office from October 29 to November 3, 2012, or (2) Con Ed's decision to shut off the power to the Bowling Green network. The words "direct" and "physical," which modify the phrase "loss or damage," ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure.

Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co., 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014).

Plaintiff's allegations are insufficient to state a claim for an entirely separate reason because, when we examine the language of the insurance policy, "direct physical" modifies both "loss" and "damage." That means that any "interruption in business must be caused by some *physical problem* with the covered property . . . which must be caused by a 'covered cause of loss.'" *Philadelphia Parking Authority v. Federal Ins. Co.*, 385 F. Supp. 2d 280, 288 (S.D.N.Y. 2005); *see also United Airlines, Inc. v. Ins. Co. of State of Pa.*, 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005), *aff'd* 439 F.3d 128 (2d Cir. 2006) ("The inclusion of the modifier 'physical' before 'damages' . . . supports [defendant's] position that physical damage is required before business interruption coverage is paid.").

Florida's appellate courts are in agreement with this interpretation. The Third District has found, for instance, that a "loss" constitutes a diminution of value and that, with the modifiers "direct" and "physical," the alleged damage *must be actual*:

> A "loss" is the diminution of value of something, and in this case, the 'something' is the insureds' house or personal property. Loss, *Black's Law Dictionary* (10th ed. 2014). "Direct" and "physical" modify loss and impose the requirement that the damage be actual. Examining the plain language of the insurance policy in this case, it is clear that the failure of the drain pipe to perform its function constituted a "direct" and "physical" loss to the property within the meaning of the policy.

Homeowners Choice Prop. & Cas. v. Miguel Maspons, 211 So. 3d 1067, 1069 (Fla. 3rd DCA 2017); *see also Vazquez v. Citizens Prop. Ins. Corp.*, 2020 WL 1950831, at *3 (Fla. 3rd DCA Mar. 18, 2020) ("Consistent with this plain meaning, the trial court determined that the 'insured loss' is the property that was actually damaged."); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.,* 1999 WL 619100, at *7 (D. Or. Aug. 4, 1999) (holding that a policyholder could not recover under a policy requiring "physical loss" unless the claimed mold physically and demonstrably damaged the insured property); *MRI Healthcare Ctr. of Glendale, Inc.*, 187 Cal. App. 4th at 779 ("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.") (internal quotation marks and citation omitted); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App. 3d 23, 42 (Ohio Ct. App. 2008).

The Eleventh Circuit's decision in *Mama Jo's Inc. v. Sparta Ins. Co.*, 2020 WL 4782369, at *1 (11th Cir. Aug. 18, 2020), is also consistent with our interpretation of Florida law. There, the plaintiff owned and operated a restaurant and, from December 2013 until June 2015, there was roadway construction in its general vicinity. The construction generated dust and debris, requiring the plaintiff to perform daily cleanings. Although the restaurant was open every day during the roadwork, customer traffic decreased and the business suffered an economic loss. The plaintiff was insured under a policy, which included coverage for loss of business. This policy covered "direct physical loss of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss." *Id.* at *1 (citation and quotation marks omitted). The plaintiff submitted a claim to the insurer on the basis that dust and debris caused a loss in business. The insurer denied that claim because the proof of loss form failed to reflect the existence of any physical damage (and it was questionable whether a direct physical loss occurred). Thus, the insurer concluded that plaintiff's claim was not covered under the policy.

After finding no error in the district court's decision to exclude several of the plaintiff's experts, the Eleventh Circuit found that the plaintiff failed to show any evidence of direct physical loss or damage. The plaintiff alleged that his insurance claim had two components: one for cleaning the restaurant and another for the loss of business income. In determining whether coverage existed, the Court looked to the same Florida decisions we referenced above and found that "direct physical loss" is defined as a diminution in value and that the modifiers "direct" and "physical"

"imposed the requirement that the damage be actual." *Id.* (citing *Homeowners Choice Prop. & Cas.*, 211 So. 3d at 1069; *Vazquez*, 2020 WL 1950831, at *3).

The Court then examined whether coverage existed for the cleaning claim because the plaintiff's public adjuster testified that cleaning and painting was all that was required. In fact, there was no need for the removal or replacement of any items during the construction. The Eleventh Circuit found that, based on the evidence that the district court considered, the cleaning claim did not constitute a direct physical loss because these expenses are merely economic losses. *Id.* at *8 ("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.'") (citing *Maspons*, 211 So. 3d at 1069 (recognizing that "damage [must] be actual"); *Vazquez*, 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."); *MRI Healthcare Ctr. of Glendale, Inc.*, 187 Cal. App. 4th at 779 ("A direct physical loss 'contemplates an actual change in insured property."); *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 307 (2003) (same).

The Eleventh Circuit also agreed with the district court, with respect to the business loss claim, because that too required that a suspension of operations be caused by direct physical loss or damage to the property. Yet, the plaintiff failed to put forward any evidence that it suffered a direct physical loss or damage during

the policy period. And in the absence of any evidence of actual damage, the Eleventh Circuit concluded that the district court was correct in granting the insurer's motion for summary judgment.

When comparing *Mama Jo's* to the allegations in this case, Plaintiff's allegations are far weaker. Although the plaintiff in *Mama Jo's* failed to put forth any evidence that his cleaning claim constituted a direct physical loss, he at least alleged that there was a physical intrusion (i.e. dust and debris) into his restaurant. Plaintiff has done nothing similar in this case. Plaintiff merely claims that two Florida Emergency Orders closed his indoor dining. But, for the reasons already stated, this cannot state a claim because the loss must arise to actual damage. And it is not plausible how two government orders meet that threshold when the restaurant merely suffered economic losses – not anything tangible, actual, or physical.

As a last ditch effort, Plaintiff suggests that we should adopt a more expansive definition of "direct physical loss or damage," so that coverage could apply if the property is either uninhabitable or substantially unusable. *See, e.g.*, *Port Auth. of New York & New Jersey*, 311 F.3d at 236 ("When 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 loss to its owner."). Assuming we were inclined to ignore both Eleventh Circuit and Florida precedent, Plaintiff still fails to state a claim because – even under an expanded definition – there are no allegations that the restaurant was uninhabitable or substantially

unusable. Plaintiff only alleges that the government forced it to close its indoor dining to contain the spread of COVID-19. The government permitted Plaintiff to continue its takeout and delivery services. While Plaintiff never makes clear whether it undertook either of these options, the government never made the restaurant uninhabitable or substantially unusable. Therefore, under no definition of "direct physical loss or damage" has Plaintiff stated a claim where coverage exists under this insurance policy.

Although unnecessary to the disposition of the motion to dismiss, other provisions of the insurance policy support the same interpretation. Take, for instance, the "Business Income" and "Extra Expense" provisions where it provides coverage for Plaintiff's operations during a "period of restoration." [D.E. 5-1 at 53]. A "period of restoration" is defined in the policy as beginning "(1) 72 hours after the time of direct physical loss or damage for Business Income Coverage; or (2) [i]mmediately after the time of direct physical loss or damage for Extra Expenses Coverage[.]" *Id.* at 61. The policy then states that this "period of restoration" "[e]nds on the earlier of (1) [t]he date when the property at the described premises should be *repaired, rebuilt or replaced* with reasonable speed and similar quality; or (2) [t]he date when business is resumed at a new permanent location." *Id.* (emphasis added).

"The words 'repair' and 'replace' contemplate physical damage to the insured premises as opposed to loss of use of it." *Newman Myers Kreines Gross Harris, P.C.*, 17 F. Supp. 3d at 332 (*United Airlines,* 385 F. Supp. 2d at 349 (policy language

limiting coverage "for only such length of time [needed] to rebuild, repair or replace such part of the Insured Location(s) as has been damaged or destroyed" supports the notion that "physical damage is required before business interruption coverage is paid"); *Philadelphia Parking Auth.,* 385 F. Supp. 2d at 287 ("'Rebuild,' 'repair' and 'replace' all strongly suggest that the damage contemplated by the Policy is physical in nature.")). This means that, if we construe "direct physical loss or damage" to require actual harm, it gives effect to the other provisions in the policy. And that is exactly what Florida law requires us to do so that no section of the insurance policy is left meaningless. *See Aucilla Area Solid Waste Admin. v. Madison Cty.*, 890 So. 2d 415, 416–17 (Fla. 1st DCA 2004) ("Pursuant to the principles of contract construction, we must construe the provisions of a contract in conjunction with one another so as to give reasonable meaning and effect to all of the provisions.") (citing *Hardwick Properties, Inc. v. Newbern,* 711 So. 2d 35, 40–41 (Fla. 1st DCA 1998)). And making matters worse, the policy further provides that the period of restoration "does not include any increased period required due to the enforcement of any ordinance or law that . . . [r]egulates the construction, *use* or repair . . . of any property[.]" [D.E. 5-1 at 61]. Thus, if there was any lingering doubt on whether a loss of use for pure economic reasons could be recoverable under the policy, the other provisions of the policy put that uncertainty to bed. Accordingly, Defendant's motion to dismiss should be **GRANTED**.

IV. CONCLUSION

For the foregoing reasons, the Court **RECOMMENDS** that Defendant's motion to dismiss be **GRANTED**. If viable under Rule 11, any amended complaint should be filed within (14) fourteen days from the date the District Judge adopts this Report and Recommendation.[7]

Pursuant to Local Magistrate Rule 4(b) and Fed. R. Civ. P. 73, the parties have fourteen (14) days from service of this Report and Recommendation within which to file written objections, if any, with the District Judge. Failure to timely file objections shall bar the parties from *de novo* determination by the District Judge of any factual or legal issue covered in the Report *and* shall bar the parties from challenging on appeal the District Judge's Order based on any unobjected-to factual or legal conclusions included in the Report. 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *see, e.g., Patton v. Rowell,* 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security,* 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

DONE AND SUBMITTED in Chambers at Miami, Florida, this 26th day of August, 2020.

/s/ *Edwin G. Torres*
EDWIN G. TORRES
United States Magistrate Judge

[7] Because Plaintiff's complaint fails for the reasons stated above, we offer no opinion on Defendant's remaining arguments. To the extent Plaintiff files an amended complaint, it should ensure that it can survive any other exclusion that may exist under the policy.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION—CIVIL ACTIONS BRANCH

ROSE'S 1, LLC, et al.,	*	
	*	
Plaintiffs,	*	Civil Case No. 2020 CA 002424 B
	*	Civil II, Calendar I
v.	*	Judge Kelly A. Higashi
	*	
ERIE INSURANCE EXCHANGE,	*	
	*	
Defendant.	*	

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Motion") and Defendant's Cross-Motion for Summary Judgment ("Defendant's Motion"). While the Court is sympathetic to the plight of Plaintiffs, it must grant summary judgment to Defendant as a matter of law.

I. FACTS

Plaintiffs own and operate a number of prominent restaurants in the District of Columbia. They all purchased "Ultrapack Plus Commercial Property Coverage" from Defendant Erie Insurance Exchange. Included in this policy is coverage for "loss of 'income' and/or 'rental income'" sustained "due to partial or total 'interruption of business' resulting directly from 'loss' or damage" to the property insured. Rose's 1 Ultrapack Plus Commercial Property Coverage ("Coverage") at 3. The coverage document further states that the "policy insures against direct physical 'loss'" with the exception of several exclusions that are not relevant to this matter. *Id.* at 4.

This case comes in the context of the COVID-19 pandemic. COVID-19 is "a novel severe acute respiratory illness that has killed … more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be

infected but asymptomatic, they may unwittingly infect others." *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring). On March 11, 2020, D.C. Mayor Muriel Bowser declared a state of emergency and a public health emergency due to the "imminent hazard of or actual occurrence of widespread exposure" to COVID-19. Plaintiffs' Statement of Material Facts ("SMF") ¶3. On March 16, Mayor Bowser issued an order prohibiting table seating at restaurants and bars in D.C. SMF ¶4. On March 20, Mayor Bowser extended this ban to "standing customers at restaurants, bars, taverns, and multi-purpose facilities." SMF ¶5. On March 24, Mayor Bowser ordered the closure of all non-essential businesses. SMF ¶6. On March 30, she ordered all D.C. residents to stay in their residences except for limited "essential" reasons, a restriction that continued for several months. SMF ¶¶7-8.

As a result of Mayor Bowser's orders, the restaurant Plaintiffs were forced to close their businesses and suffered serious revenue losses. SMF ¶¶21-22. To cover those losses, they filed insurance claims with Defendant pursuant to insurance policies that "are substantively identical in all ways relevant to this action." SMF ¶78. When Defendant denied their claims, Plaintiffs filed this lawsuit seeking a declaratory judgment that their claims were covered by the express language of their insurance contracts with Defendant. Both sides subsequently moved for summary judgment.

II. SUMMARY JUDGMENT STANDARD

D.C. Superior Court Rule of Civil Procedure 56 allows a court to grant summary judgment to a party when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. D.C. Super. Ct. Civ. R. 56(a); *Perkins v. District of Columbia*, 146 A.3d 80, 84 (D.C. 2016). In considering a motion for summary judgment, the

court must view the evidence "in the light most favorable to the nonmoving party, who is entitled to all favorable inferences which may reasonably be drawn from the evidentiary materials." *Phelan v. City of Mt. Rainier*, 805 A.2d 930, 936 (D.C. 2002) (internal quotation marks omitted). The Court "may not resolve issues of fact or weigh evidence at the summary judgment stage." *Fry v. Diamond Construction, Inc.*, 659 A.2d 241, 245 (D.C. 1995) (internal quotation marks omitted). Even if no material dispute of fact exists, the moving party must still establish that it is entitled to judgment as a matter of law. D.C. Super. Ct. Civ. R. 56(a).

III. ANALYSIS

Under District of Columbia law, "[c]ontract principles are applicable to the interpretation of an insurance policy." *Carlyle Inv. Mgmt. LLC v. Ace Am. Ins. Co.*, 131 A.3d 886, 894 (D.C. 2016). "The proper interpretation" of an insurance contract, "including whether [the] contract is ambiguous, is a legal question." *Id.* (internal quotation mark omitted) (quoting *Tillery v. D.C. Contract Appeals Bd.*, 912 A.2d 1169, 1176 (D.C. 2006)). "[A]n insurance policy is to be . . . enforced in accordance with the real intent of the parties as expressed in the language employed in the policy." *Redmond v. State Farm Ins. Co.*, 728 A.2d 1202, 1205 (D.C. 1999) (internal quotation marks omitted) (quoting *Peerless Ins. Co. v. Gonzalez*, 697 A.2d 680, 682 (Conn. 1997)). A court must "give the words used in an insurance contract their common, ordinary, and . . . popular meaning," *Id.* (omission in original) (internal quotation marks omitted) (quoting *Quadrangle Dev. Corp. v. Hartford Ins. Co.*, 645 A.2d 1074, 1075 (D.C. 1994)), and must interpret the contract "as a whole, giving reasonable, lawful, and effective meaning to all its terms, and ascertaining the meaning in light of all the circumstances surrounding the parties at the time the contract was made," *Carlyle Inv. Mgmt.*, 131 A.3d at 895 (internal quotation mark omitted) (quoting *Debnam v. Crane Co.*, 976 A.2d 193, 197 (D.C. 2009)).

"[I]f the provisions of the contract are ambiguous, the correct interpretation becomes a question for a factfinder." *Carlyle Inv. Mgmt.*, 131 A.3d 886 at 895 (internal quotation marks omitted) (quoting *Debnam*, 976 A.2d at 197-98). "Where," however, "insurance contract language is not ambiguous, summary judgment is appropriate because a written contract duly signed and executed speaks for itself and binds the parties without the necessity of extrinsic evidence." *Fogg v. Fidelity Nat. Title Ins. Co.*, 89 A.3d 510, 514 (D.C. 2014) (internal quotation marks omitted) (quoting *Stevens v. United Gen. Title Ins. Co.*, 801 A.2d 61, 66 (D.C. 2002)). Indeed, the Court "should not seek out ambiguity where none exists." *Athridge v. Aetna Cas. & Sur. Co.*, 351 F.3d 1166, 1172 (D.C. Cir. 2003) (citing *Medical Serv. of Dist. of Columbia v. Llewellyn*, 208 A.2d 734, 736 (D.C. 1965)).

At the most basic level, the parties dispute whether the closure of the restaurants due to Mayor Bowser's orders constituted a "direct physical loss" under the policy. Plaintiffs start with dictionary definitions to support their case. For example, they cite the American Heritage Dictionary definition of "direct" as "[w]ithout intervening persons, conditions, or agencies; immediate." Plaintiffs' Motion at 9-10. They also cite the Oxford English Dictionary definition of "physical" as pertaining to things "[o]f or pertaining to matter, or the world as perceived by the senses; material as [opposed] to mental or spiritual." *Id*. at 10. As for "loss," it is defined by the coverage document as "direct and accidental loss of or damage to covered property." Coverage at 36.

Plaintiffs use these definitions to make three primary arguments. *First*, Plaintiffs argue that the loss of use of their restaurant properties was "direct" because the closures were the direct result of the mayor's orders without intervening action. Plaintiffs' Motion at 9-10. But those orders were governmental edicts that commanded individuals and businesses to take certain

actions. Standing alone and absent intervening actions by individuals and businesses, the orders did not effect any direct changes to the properties.

Second, Plaintiffs argue that their losses were "physical" because the COVID-19 virus is "material" and "tangible," and because the harm they experienced was caused by the mayor's orders rather than "some abstract mental phenomenon such as irrational fear causing diners to refrain from eating out." Plaintiffs' Motion at 11. But Plaintiffs offer no evidence that COVID-19 was actually present on their insured properties at the time they were forced to close. And the mayor's orders did not have any effect on the material or tangible structure of the insured properties.

Third, Plaintiffs argue that by defining "loss" in the policy as encompassing either "loss" or "damage," Defendant must treat the term "loss" as distinct from "damage," which connotes physical damage to the property. Plaintiffs' Motion at 11-12. In contrast, Plaintiffs argue, "loss" incorporates "loss of use," which only requires that Plaintiffs be deprived of the use of their properties, not that the properties suffer physical damage. *Id*. at 12-13. But under a natural reading of the term "direct physical loss," the words "direct" and "physical" modify the word "loss." As such, pursuant to Plaintiffs' dictionary definitions, any "loss of use" must be caused, without the intervention of other persons or conditions, by something pertaining to matter—in other words, a direct physical intrusion on to the insured property. Mayor Bowser's orders were not such a direct physical intrusion.

Further, none of the cases cited by Plaintiffs stand for the proposition that a governmental edict, standing alone, constitutes a direct physical loss under an insurance policy. In *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, the court found that the release of ammonia into a juice cup packaging factory was a "direct physical loss" because it constituted

"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." 2014 U.S. Dist. LEXIS 165232 at *13-19 (D.N.J. Nov. 25, 2014) (quoting *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 319-20 (Ga. Ct. App. 2003)) (internal quotation marks omitted) (emphasis added). Similarly, in *Western Fire Insurance Co. v. First Presbyterian Church*, the Colorado Supreme Court found a "direct physical loss" when gasoline fumes from an unknown source entered an insured church and the fire department ordered the church's closure. 437 P.2d 52, 55 (Colo. 1968). The court based its reasoning on the fact that the church "became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous." *Id.* At the same time, the Court noted that "[i]t is perhaps quite true" that the fire department's closure order, "*standing alone*, does not in and of itself constitute a 'direct physical loss.'" *Id*. (emphasis added). All of the other cases cited by Defendant involved some compromise to the physical integrity of the insured property. *See Port Authority v. Affiliated FM Insurance Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (presence of asbestos in building was not "physical loss" because building owner could not show real or imminent "contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable"); *Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823, 826-27 (3d Cir. 2005) (presence of bacterium on property could constitute "direct physical loss" if it "reduced the use of the property to a substantial degree"); *TRAVCO Insurance Co. v. Ward*, 715 F. Supp. 2d 699, 709-10 (E.D. Va. 2010), *aff'd* 504 F. Appx. 251 (4th Cir. 2013) (home rendered uninhabitable by toxic gases released by defective drywall constituted "direct physical loss"); *Mellin v. Northern Security Insurance Company, Inc.*, 115 A.3d 799, 805 (N.H. 2015) (cat urine odor from neighboring apartment may constitute "direct

physical loss" if plaintiff could show "distinct and demonstrable alteration to the unit"); *Murray v. State Farm Fire & Casualty Co.*, 509 S.E.2d 1, 16-17 (W.Va. 1998) (landslide rendering homes uninhabitable, due to either actual physical damage or palpable future risk of physical damage from a follow-on landslide, was a "direct physical loss"); *Sentinel Management Co. v. New Hampshire Insurance Co.*, 563 N.W.2d 296, 300-01 (Minn. Ct. App. 1997) (asbestos contamination in building was "direct physical loss" when "property rendered useless").

In contrast, courts have rejected coverage when a business's closure was not due to direct physical harm to the insured premises. In *Roundabout Theatre Co. v. Continental Casualty Co.*, the City of New York ordered the closure of a theater after a portion of a neighboring building under construction collapsed onto the street and adjacent buildings. 302 A.D.2d 1, 2-3 (N.Y. App. Div. 2002). The theater itself sustained minor damage that was repaired in one day. *Id.* at 3. Nonetheless, the court found that the theater did not suffer a "direct physical loss" as a result of the city-mandated closure. *Id.* at 7. It found that "[t]he plain meaning of the words 'direct' and 'physical'" narrowed the scope of coverage and mandated "the conclusion that losses resulting from off-site property damage do not constitute covered perils under the policy." *Id.* Similarly, in *Newman Myers Kreines Gross, P.C. v. Great Northern Insurance Co.*, a federal district court found that a law firm did not suffer a "direct physical loss" when an electric utility preemptively shut off power in advance of Hurricane Sandy. 17 F. Supp. 3d 323 (S.D.N.Y. 2014). The court distinguished the cases cited by the law firm (several of which were also cited by Plaintiffs in this case) as either "involv[ing] the closure of a building due to either a physical change for the worse in the premises … or a newly discovered risk to its physical integrity." *Id.* at 330. Citing *Roundabout*, the Court reasoned:

> The critical policy language here—"direct physical loss or damage"—similarly, and unambiguously, requires some form of actual, physical damage to the insured premises to

> trigger loss of business income and extra expense coverage. Newman Myers simply cannot show any such loss or damage to the 40 Wall Street Building as a result of either (1) its inability to access its office from October 29 to November 3, 2012, or (2) Con Ed's decision to shut off the power to the Bowling Green network. The words "direct" and "physical," which modify the phrase "loss or damage," ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure.

Id. at 331; *see also United Airlines, Inc. v. Insurance Co. of State of Pa*., 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005), *aff'd* 439 F.3d 128 (2d Cir. 2006) ("The inclusion of the modifier 'physical' before 'damages' . . . supports [defendant's] position that physical damage is required before business interruption coverage is paid."); *Philadelphia Parking Auth. v. Federal Insurance Co.,* 385 F. Supp. 2d 280, 287-88 (S.D.N.Y. 2005) (noting that "'direct physical' modifies both loss and damage," and therefore "the interruption in business must be caused by some physical problem with the covered property . . . which must be caused by a 'covered cause of loss'").

While the Court can find no published cases in this jurisdiction analyzing the exact term "direct physical loss," cases addressing similar issues do not help Plaintiffs. Most relevantly, in *Bros., Inc. v. Liberty Mutual Fire Insurance Co.*, the District of Columbia Court of Appeals considered whether a restaurant could recover on its claim after it lost business due to a curfew imposed by the D.C. government as a result of the riots following the assassination of Dr. Martin Luther King, Jr. in 1968. 268 A.2d 611 (D.C. 1970). The insurance contract included this relevant language:

> In consideration of the premium for this coverage shown on the first page of this policy [Building and Contents] . . . the coverage of this policy is extended to include direct loss by . . . Riot . . . [and] Civil Commotion . . . .
>
> When this Endorsement is attached to a policy covering Business Interruption, . . . the term "direct," as applied to loss, means loss, as limited and conditioned in such policy, *resulting from direct loss to described property from perils insured against*; . . . .

Id. at 613 (emphasis in original).[1] The Court of Appeals interpreted the term "direct loss" in the contract to mean "a loss proximately resulting from physical damage to the property or contents caused by a riot or civil commotion." *Id*. Under that definition, the Court found that the restaurant was unable to recover, since, "at the most," the restaurant's lost business due to the curfew "was an indirect, if not remote, loss resulting from riots" and there was no "physical damage to the property." *Id.* Accordingly, while the Court agrees with Plaintiffs that *Bros., Inc.* is not directly on point, the case does support the proposition that, in the context of property insurance, the term "direct loss" implies some form of direct physical change to the insured property.

With both dictionary definitions and the weight of case law supporting Defendant's interpretation of the term "direct physical loss," Plaintiffs' additional arguments are unconvincing. First, Plaintiffs argue that because the insurance contract has specific exclusions for "loss of use" under some coverage lines but not for Income Protection coverage, the Court should infer that the Income Protection coverage covers losses such as Plaintiffs'. Plaintiffs' Motion at 13-14. But as already discussed, even if "loss of use" was covered, Plaintiffs would still have to show that the loss of use was a "direct physical loss" similar to those in the cases discussed *supra* at 5-7. And for the reasons explained in this order, there was no "direct physical loss" to Plaintiffs. Second, Plaintiffs argue that, unlike some similar insurance policies, their policies do not include a specific exclusion for pandemic-related losses. *Id.* at 19-20. But again,

[1] This Court notes that the phrase at issue in the *Bros., Inc.* contract was "direct loss," as opposed to "direct physical loss," at issue in the present case, and that in the *Bros., Inc.* case, there was an issue as to whether the "Building and Contents" Form, which was mistakenly attached to the policy at the time of signing, or the "Business Interruption" Form, which the insurance company later substituted, was construed by the trial court. However, the Court of Appeals found it "unnecessary to ascertain which of the two forms was construed by the trial court," 268 A.2d at 612, as the Court found that the insurance company prevailed under both forms.

even in the absence of such an exclusion, Plaintiffs would still be required to show a "direct physical loss." Because they cannot do so, the Court grants summary judgment to Defendant.

Accordingly, it is this **6th** day of **August, 2020**, hereby

ORDERED that Plaintiffs' Motion for Summary Judgment is **DENIED**; and it is further

ORDERED that Defendant's Cross-Motion for Summary Judgment is **GRANTED**; and it is further

ORDERED that judgment is **ENTERED** in favor of Defendant Erie Insurance Exchange and against Plaintiffs, the initial scheduling conference is **VACATED**, and the case is **CLOSED**.

Kelly A. Higashi
Associate Judge
(Signed in Chambers)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DIESEL BARBERSHOP, LLC; WILDERNESS OAKS CUTTERS, LLC; DIESEL BARBERSHOP BANDERA OAKS, LLC; DIESEL BARBERSHOP DOMINION, LLC; DIESEL BARBERSHOP ALAMO RANCH, LLC; AND HENLEY'S GENTLEMEN'S GROOMING, LLC,	§	No. 5:20–CV–461–DAE
Plaintiffs,	§	
vs.	§	
STATE FARM LLOYDS,	§	
Defendant.	§	

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Before the Court is a Motion to Dismiss filed by State Farm Lloyds ("Defendant" or "State Farm") on May 8, 2020. (Dkt. # 9.) Plaintiffs Diesel Barbershop, LLC; Wilderness Oak Cutters, LLC; Diesel Barbershop Bandera Oaks, LLC; Diesel Barbershop Dominion, LLC; Diesel Barbershop Alamo Ranch, LLC; and Henley's Gentlemen's Grooming, LLC (collectively "Plaintiffs") responded on May 22, 2020 (Dkt. # 14), and Defendant filed a reply on May 29, 2020 (Dkt. # 17). The Court presided over a virtual hearing on July 29, 2020, during which Shannon Loyd, Esq., represented Plaintiffs and Neil Rambin, Esq. and Susan Egeland, Esq. represented Defendant. After careful consideration of the

memorandum filed in support of and against the motion and after hearing arguments from counsel, the Court—for the reasons that follow—**GRANTS** Defendant's Motion to Dismiss.

FACTUAL BACKGROUND

On February 11, 2020, the World Health Organization identified the 2019 Coronavirus ("COVID-19") as a disease. Since then, COVID-19 has spread across the world, and health organizations, including the Center for Disease Control ("CDC"), characterize COVID-19 as a global pandemic. (See Dkt. # 8.) The outbreak in the United States is a rapidly evolving situation, and the state of Texas saw an exponential increase in COVID-19 cases. To stop "community spread" of COVID-19, state and local governments have issued executive orders that limit the opening of certain businesses and require social distancing. Bexar County Judge Nelson Wolff and Texas Governor Greg Abbott have issued executive orders throughout this crisis, and below are the relevant orders (the "Orders") for the purposes of this case.

a. The Bexar County Orders

County Judge Wolff issued multiple executive orders pertaining to the "state of local disaster . . . due to imminent threat arising from COVID-19." (Dkt. # 8, Exh. B.) On March 23, 2020, County Judge Wolff issued an order requiring "all businesses operating within Bexar County" save for those "exempted" to

"cease all activities" at any business located in Bexar County from March 24, 2020 until April 9, 2020. (Id.) The order defines exempted businesses as those pertaining to: (a) healthcare services, (b) government functions, (c) education and research, (d) infrastructure, development, operation and construction, (e) transportation, (f) IT services, (g) food, household staples, and retail, (h) services to economically disadvantaged populations, (i) services necessary to maintain residences or support exempt businesses, (j) news media, (k) financial institutions and insurance services, (l) childcare services, (m) worship services, (n) funeral services, and (o) CISA sectors. (Id.) County Judge Wolff notes that he is authorized "to take such actions as are necessary in order to protect the health, safety, and welfare of the citizens of Bexar County" and "has determined that extraordinary emergency measures must be taken to mitigate the effects of this public health emergency and to facilitate a cooperative response" in line with Governor Abbott's "declaration of public health disaster." (Id.)

In a supplemental executive order dated April 17, 2020, County Judge Wolff emphasizes that "the continued spread of COVID-19 by pre- and asymptomatic individuals is a significant concern in Bexar County and on April 3, 2020, the [CDC] recommended cloth face coverings be worn by the general public to slow the spread of COVID-19 and implementing this measure would assist in reducing the transmission of COVID-19 in San Antonio and Bexar County." (Id.)

The goal of the supplemental order was to "reduce the spread of COVID-19 in and around Bexar County" and to "continue to protect the health and safety of the community and address developing and the rapidly changing circumstances when presented by the current public health emergency." (Id.)

b. The State of Texas Order

On March 31, 2020, Texas Governor Greg Abbott signed an executive order closing all "non-essential" businesses from April 2, 2020 until April 30, 2020. (Dkt. # 8, Exh. C.) Governor Abbott's order provides the following:

> NOW, THEREFORE, I, Greg Abbott, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order the following on a statewide basis effective 12:01 a.m. on April 2, 2020, and continuing through April 30, 2020, subject to extension based on the status of COVID-19 in Texas and the recommendations of the CDC and the White House Coronavirus Task Force:
>
> > In accordance with guidance from DSHS Commissioner Dr. Hellerstedt, and to achieve the goals established by the President to reduce the spread of COVID-19, every person in Texas shall, except where necessary to provide or obtain essential services, minimize social gatherings and minimize in-person contact with people who are not in the same household.
> >
> > "Essential services" shall consist of everything listed by the U.S. Department of Homeland Security in its Guidance on the Essential Critical Infrastructure Workforce, Version 2.0, plus religious services. . . .
> >
> > In accordance with the Guidelines from the President and the CDC, people shall avoid eating or drinking at bars, restaurants, and food courts, or visiting gyms, massage

> establishments, tattoo studios, piercing studios, or cosmetology salons; provided, however, that the use of drive-thru, pickup, or delivery options for food and drinks is allowed and highly encouraged throughout the limited duration of this executive order.

(Dkt. # 8, Exh. C.)

c. Plaintiffs' Insurance Policies

Plaintiffs run barbershop businesses; a type of business deemed non-exempt and non-essential under the Orders. (Dkt. # 8.) State Farm issued insurance policies (the "Policies")[1] to Plaintiffs regarding the insured properties (the "Properties") that are subject of this dispute. (See Dkt. # 9, Exhs. A-1–A-6.)

The Policies state, in relevant part, the following:

> When a Limit Of Insurance is shown in the Declarations for that type of property as described under Coverage A – Buildings, Coverage B – Business Personal Property, or both, we will pay for accidental direct physical loss to that Covered Property at the premises described in the Declarations caused by any loss as described under SECTION I — COVERED CAUSES OF LOSS.

(Id.) The Policies note in Section I–Covered Causes of Loss that State Farm will "insure for accidental direct physical loss to Covered Property" unless the loss is excluded under Section I–Exclusions or limited in the Property Subject to Limitations provision. (Id.) The Policies further contain a "Fungi, Virus, or

[1] Defendant attaches each Plaintiff's policy and endorsement to the policy to the motion to dismiss. (See Dkt. # 9, Exhs. A-1–A-6.) Defendant asserts that "the relevant provisions of the policies are identical" (Dkt. # 9), and thus this Court shall cite the policies together without analyzing each Plaintiff's policy separately.

Bacteria" exclusion (the "Virus Exclusion"), which contains lead-in language and states the following:

> 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:
>
> . . .
>
> **j. Fungi, Virus Or Bacteria**
>
> . . .
>
> (2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease.

(Id.) The Policies also contain an endorsement modifying the businessowners coverage form, including a Civil Authority provision which states in relevant part:

> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual "Loss of Income" you sustain and necessary "Extra Expense" 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 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 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, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

(Id.) There are various other exclusions within the Policies including for example, the "Ordinance or Law," the "Acts or Decisions" and the "Consequential Loss" exclusions. (Dkt. # 9.)

PROCEDURAL HISTORY

Plaintiffs assert that due to the COVID-19 outbreak and the Orders, Plaintiffs "have sustained and will sustain covered losses" under the terms of the Policies. (Dkt. # 8.) Plaintiffs filed a claim with State Farm seeking coverage for business interruption to the Properties pursuant to the Policies in March 2020. (Id.) Without seeking additional documentation or information, and without further investigation, State Farm denied Plaintiffs' claims. (Dkt. # 8, Exh. D.) In the denial letter, State Farm asserted that Plaintiffs' claims are not covered as the "policy specifically excludes loss caused by enforcement of ordinance or law, virus, and consequential losses." (Id.) State Farm argued that there is a requirement "that there be physical damage, within one mile of the described property" and "that the damage be the result of a Covered Cause of Loss" which, State Farm asserted, a "virus is not." (Id.)

Plaintiffs sued State Farm in state court on April 8, 2020, after State Farm denied Plaintiffs coverage. (Dkt. # 1, Exh. C.) Defendant timely removed the action to this Court on April 13, 2020. (Dkt. # 1.) In their second amended complaint, Plaintiffs bring claims of breach of contract, noncompliance with the

Texas Insurance Code, and breach of the duty of good faith and fair dealing. (Dkt. # 8.) Attached to Plaintiffs' second amended complaint are the Policies, Orders, and State Farm's letter denying coverage.

On May 8, 2020, State Farm filed a motion to dismiss for failure to state a claim. (Dkt. # 9.) The Court granted the parties' joint motion to stay discovery pending a ruling on the motion to dismiss on May 18, 2020. (Dkt. # 12.) Plaintiffs responded to the motion to dismiss on May 22, 2020 (Dkt. # 14), and a week later, Defendant filed its reply (Dkt. # 17). Defendant filed a notice of supplemental authority on July 14, 2020 (Dkt. # 21), and Plaintiffs filed a notice of supplemental authority on July 28, 2020 (Dkt. # 22). The Court held a virtual hearing on this matter on July 29, 2020. Defendant filed an additional notice of supplemental authority on August 7, 2020 (Dkt. # 25), and Plaintiffs filed another notice of supplemental authority on August 12, 2020 (Dkt. # 27). Defendant filed its third notice of supplemental authority on August 13, 2020 (Dkt. # 28), notifying the Court of the United States Judicial Panel on Multidistrict Litigation's decision to deny the creation of an industry-wide multidistrict litigation. (Id., Exh. A.)

TEXAS CONTRACT-INTERPRETATION STANDARDS

"Insurance policies are contracts and are governed by the principles of interpretation applicable to contracts." Amica Mut. Ins. Co. v. Moak, 55 F.3d 1093, 1095 (5th Cir. 1995). Under Texas contract-interpretation standards, the

"paramount rule is that courts enforce unambiguous policies as written" such that court must "honor plain language, reviewing policies as drafted, not revising them as desired." Pan Am Equities, Inc. v. Lexington Ins. Co., 959 F.3d 671, 674 (5th Cir. 2020). Importantly, an "ambiguity" is "more than lack of clarity"; a court should find an insurance contract ambiguous only if "giving effect to all provisions, its language is subject to two or more reasonable interpretations." Id. (internal quotation marks and citation omitted). To determine ambiguity, which is a question of law, a court must "examine the entire contract in order to harmonize and give effect to all provisions so that none will be meaningless." Id. (internal quotation marks and citation omitted); see also Provident Life & Acc. Ins. Co. v. Knott, 128 S.W.3d 211, 216 (Tex. 2003) ("In interpreting these insurance policies as any other contract, we must read all parts of each policy together and exercise caution not to isolate particular sections or provisions from the contract as a whole."); State Farm Lloyds v. Page, 315 S.W.3d 525, 527 (Tex. 2010) ("The fact that the parties may disagree about the policy's meaning does not create an ambiguity." (citations and internal quotation marks omitted)). "The goal in interpreting . . . [language within the contract] is to ascertain the true intentions of the parties as expressed in the writing itself." Richards v. State Farm Lloyds, No. 19-0802, 2020 WL 1313782, at *5 (Tex. Mar. 20, 2020) (citation and internal quotation marks omitted).

RULE 12(b)(6) LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "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." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In analyzing whether to grant a Rule 12(b)(6) motion, a court accepts as true "all well-pleaded facts" and views those facts "in the light most favorable to the plaintiff." United States ex rel. Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 346 (5th Cir. 2013) (citation omitted). A court need not "accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678. Furthermore, in assessing a motion to dismiss under Rule 12(b)(6), a court's review is generally limited to the complaint, documents attached to the complaint, and any documents attached to the motion to dismiss that are referred to in the complaint and are central to the plaintiff's claims. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007); see also Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC, 594 F.3d 383, 387 (5th Cir. 2010).

DISCUSSION

State Farm argues that for business income coverage to apply, the Policies explicitly require (1) an accidental direct physical loss to the insured property and (2) that the loss is not excluded. (Dkt. # 9.) Defendant asserts that Plaintiffs fail to properly plead direct physical loss to the Properties as Plaintiffs argue that the Orders are the reason for the business interruption claim and fail to show that the Properties have been tangibly "damaged" per se. (Dkts. ## 9, 17.) Defendant also argues that regardless, Plaintiffs fail to overcome the Virus Exclusion hurdle that is unambiguously within the Policies and was added to these Policies in response to the SARS pandemic in the early 2000s. (Id.)

In response, Plaintiffs assert that the language in the Policies does not require a tangible and complete physical loss to the Properties, but rather allows for a partial loss to the Properties, which includes the loss of use of the Properties due to the Orders restricting usage of the Properties. (Dkt. # 14.) Plaintiffs also argue that it is not COVID-19 within Plaintiffs' Properties that caused the loss directly, but rather that it was the Orders that caused the direct physical loss and thus the Virus Exclusion should not apply. (Id.) Plaintiffs also argue that the Orders were issued to protect public health and welfare, and that Plaintiffs claims thus fall under the Civil Authority provision within the Policies. (Id.)

Based on the parties' filings, plain language of the Policies in question, and argument at the hearing, as much as the Court sympathizes with Plaintiffs' situation, the Court determines that the motion to dismiss must be granted for the following reasons.

a. Accidental Direct Physical Loss

This Court is mandated to "honor plain language, reviewing policies as drafted, not revising them as desired." Pan Am Equities, 959 F.3d at 674. The Court looks at the coverage provided by the Policies as a whole in order to determine the plain language. Id. Here, the Policies are explicit that there has to be an accidental, direct physical loss to the property in question. The Court agrees with Plaintiffs that some courts have found physical loss even without tangible destruction to the covered 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 (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)). The Court also agrees that a virus like COVID-19 is not like a hurricane or a hailstorm, but rather more like ammonia, E. coli, and/or carbon

monoxide (i.e. cases in which the loss is caused by something invisible to the naked eye), and in such cases, some courts have found direct physical loss despite the lack of physical damage. See e.g., Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226, 236 (3d Cir. 2002) (holding that while mere installation of asbestos was not loss or damage, the presence or imminent threat of a release of asbestos would "eliminate[] or destroy[]" the function of the structure, thereby making the building "useless or uninhabitable"); Lambrecht & Assocs., Inc. v. State Farm Lloyds, 119 S.W.3d 16, 24–26 (Tex. App. 2003) (noting that while State Farm argued that the losses were not "physical" as they were not "tangible," the court found that under the "direct language" of the policy allowed for coverage to "electronic media and records" and the "data stored on such media" as "such property is capable of sustaining a 'physical' loss"); Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 399, 406 (1st Cir. 2009) ("We are persuaded both that odor can constitute physical injury to property . . . and also that allegations that an unwanted odor permeated the building and resulted in a loss of use of the building are reasonably susceptible to an interpretation that physical injury to property has been claimed.").

Even so, the Court finds that the line of cases requiring tangible injury to property are more persuasive here and that the other cases are distinguishable. See Dickie Brennan & Co. v. Lexington Ins. Co., 636 F.3d 683, 686 (5th Cir.

2011) (affirming summary judgment and holding that there was no coverage under the civil authority provision of the policy as plaintiffs "failed to demonstrate a nexus between any prior property damage and the evacuation order" when the city issued a mandatory evacuation order prior to the arrival of a hurricane and plaintiffs allegedly suffered business interruption losses); United Air Lines, Inc. v. Ins. Co. of State of PA, 439 F.3d 128, 134 (2d Cir. 2006) (determining that United could not show that its lost earnings resulted from physical damage to its property or from physical damage to an adjacent property when the government shut down the airport after the 9/11 terrorist attacks). For instance, unlike Essex Ins. Co., COVID-19 does not produce a noxious odor that makes a business uninhabitable. It appears that within our Circuit, the loss needs to have been a "distinct, demonstrable physical alteration of the property." Hartford Ins. Co. of Midwest v. Mississippi Valley Gas Co., 181 F. App'x 465, 470 (5th Cir. 2006) ("The requirement that the loss be "physical," given the ordinary definition of that term 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." (citation omitted)); see also Ross v. Hartford Lloyd Ins. Co., 2019 WL 2929761, at *6–7 (N.D. Tex. July 4, 2019) ("direct physical loss" requires "a distinct, demonstrable, physical alteration

of the property" (citing 10A Couch on Ins. § 148:46 (3d ed. 2010)).) Thus, the Court finds that Plaintiffs fail to plead a direct physical loss.

b. The Virus Exclusion

Even if the Court had found that the language within the Policies was ambiguous and/or that Plaintiffs properly plead direct physical loss to the Properties, the Court finds that the Virus Exclusion bars Plaintiffs' claims. The language in the lead-in of the Virus Exclusion (also called the anti-concurrent causation ("ACC") clause) expressly states that State Farm does not insure for a loss regardless of "whether other causes acted concurrently or in any sequence within the excluded event to produce the loss." (See Dkt. # 9, Exhs. A-1–A-6.) Here, Plaintiffs allege that the loss of business occurred as a result of the Orders that mandated non-essential businesses to discontinue operations for a set period of time to help staunch community spread of COVID-19. (Dkts. ## 8, 14.) Plaintiffs also assert that the Court should find that the Virus Exclusion does not apply because COVID-19 was not present at the Properties. (Id.)

The Court notes that the parties vehemently dispute how to read the lead-in language to the Virus Exclusion. Defendant cites Tuepker v. State Farm Fire & Cas. Co., 507 F.3d 346 (5th Cir. 2007) in support of the argument that the lead-in language to the Virus Exclusion bars Plaintiffs' claims and that the lead-in language is unambiguous and enforceable. Meanwhile, Plaintiffs cite Stewart

Enterprises, Inc. v. RSUI Indem. Co., 614 F.3d 117 (5th Cir. 2010) in support of their assertion that the lead-in language does not exclude coverage here.

The Court finds the facts in Stewart Enterprises distinguishable from the facts here. There, the ACC clause was within a policy provided by Lexington Insurance Company and contained different language than the ACC clause in State Farm's Policies here. See Stewart Enterprises, 614 F.3d at 125 (noting in the ACC clause that "this policy does not insure against loss or damage caused directly or indirectly by any of the excluded perils" as "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss"). In addition, the issue in Stewart Enterprises was that the insurer was seeking "to use the ACC clause to bar recovery for damage caused by two included perils." Id. at 126 (emphasis added). The Fifth Circuit rightly decided there that it would be absurd to "read the policy to force Stewart to prove a windless flood." Id. at 127.

But here, the Court can read the Policies objectively and without "creating difficult causation determination where none otherwise exist." Id. Like the Fifth Circuit in Tuepker, the Court finds that here, the State Farm ACC clause within the Policies is unambiguous and enforceable. See Tuepker, 507 F.3d at 356. The Policies expressly state that State Farm does 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[.]" (See Dkt. # 9, Exhs. A-1–A-6.) Guided by the plain language of the Policies, the Court finds that Plaintiffs have pleaded that COVID-19 is in fact the reason for the Orders being issued and the underlying cause of Plaintiffs' alleged losses. While the Orders technically forced the Properties to close to protect public health, the Orders only came about sequentially as a result of the COVID-19 virus spreading rapidly throughout the community. Thus, it was the presence of COVID-19 in Bexar County and in Texas that was the primary root cause of Plaintiffs' businesses temporarily closing. Furthermore, while the Virus Exclusion could have been even more specifically worded, that alone does not make the exclusion "ambiguous." See In re Katrina Canal Breaches Litig., 495 F.3d 191, 210 (5th Cir. 2007) ("The fact that an exclusion could have been worded more explicitly does not necessarily make it ambiguous.").

Thus, the Court finds that the Policies' ACC clause excluded coverage for the losses Plaintiffs incurred in complying with the Orders. See, e.g., JAW The Pointe, L.L.C. v. Lexington Ins. Co., 460 S.W.3d 597, 610 (Tex. 2015) ("Because the covered wind losses and excluded flood losses combined to cause the

enforcement of the ordinances concurrently or in a sequence, we agree with the court of appeals that the policy's anti-concurrent-causation clause excluded coverage for JAW's losses."). Thus, even if the Court found direct, physical loss to the Properties, the Virus Exclusion applies and bars Plaintiffs' claims.

c. The Civil Authority Provision

In light of the foregoing, the Court also finds that the Civil Authority provision within the Policies is not triggered. Plaintiffs' recovery remains barred due to the unambiguous nature of the events that occurred, causing the Virus Exclusion to apply such that Plaintiffs fail to allege a legally cognizable "Covered Cause of Loss." See Dickie Brennan, 636 F.3d at 686–87 ("[C]ivil authority coverage is intended to apply to situations where access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property.").

CONCLUSION

The Court finds merit in Defendant's arguments and determines that Plaintiffs' breach of contract, Texas Insurance Code,[2] and breach of duty of good faith and fair dealing claims all fail. While there is no doubt that the COVID-19 crisis severely affected Plaintiffs' businesses, State Farm cannot be held liable to

[2] Plaintiffs expressly seek to drop their allegation of misrepresentation pending further discovery in light of this Court's ruling in Brasher v. State Farm Lloyds, 2017 WL 9342367, at *7 (W.D. Tex. Feb. 2, 2017). (Dkt. # 14.)

pay business interruption insurance on these claims as there was no direct physical loss, and even if there were direct physical loss, the Virus Exclusion applies to bar Plaintiffs' claims. Given the plain language of the insurance contract between the parties, the Court cannot deviate from this finding without in effect re-writing the Policies in question. That this Court may not do.

For the reasons stated above, the Motion to Dismiss (Dkt. # 9) is **GRANTED**. Because allowing Plaintiffs leave to amend their claims would be futile, the Court **DISMISSES** Plaintiffs' claims. The Clerk's office is instructed to **ENTER JUDGMENT** and **CLOSE THIS CASE**.

IT IS SO ORDERED.

DATE: San Antonio, Texas, August 13, 2020.

David Alan Ezra
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

STUDIO 417, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 20-cv-03127-SRB
	)	
THE CINCINNATI INSURANCE COMPANY,	)	
	)	
Defendant.	)	

ORDER

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 (2009) (internal citations and quotation marks omitted) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Zink v. Lombardi*, 783 F.3d 1089, 1098 (8th Cir. 2015).[1]

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.

[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.

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, pp. 24, 57.)[2] 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

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

> 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 . . . [and] [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.)

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

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 (quoting *Twombly*, 550 U.S. at 570). "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). 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).

Because this case is based on diversity jurisdiction, "state law controls the construction of [the] insurance policies[.]" *J.E. Jones Const. Co. v. Chubb & Sons, Inc.*, 486 F.3d 337, 340 (8th Cir. 2007). Under Missouri law, "[t]he interpretation of an insurance policy is a question of law to be determined by the Court." *Lafollette v. Liberty Mut. Fire Ins. Co.*, 139 F. Supp. 3d 1017, 1021 (W.D. Mo. 2015) (quoting *Mendota Ins. Co. v. Lawson*, 456 S.W.3d 898, 903 (Mo. App. W.D. 2015)).[3] "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.'" *Id.* (citing *Thiemann v. Columbia Pub. Sch. Dist.*, 338 S.W.3d 835, 840 (Mo. App. W.D. 2011)). "Insurance policies are to be given a reasonable construction and interpreted so as to afford coverage rather than to defeat coverage." *Cincinnati Ins. Co. v. German St. Vincent Orphan Ass'n, Inc.*, 54 S.W.3d 661, 667 (Mo. App. E.D. 2001).

"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

[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.

written absent a statute or public policy requiring coverage. If the language is ambiguous, it will be construed against the insurer." *Id.* (quotations omitted).

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.)

Upon review of the record, the Court finds that Plaintiffs have adequately stated a claim for direct physical loss. First, because the Policies do not define a direct "physical loss" the Court must "rely on the plain and ordinary meaning of the phrase." *Vogt*, 963 F.3d at 763; *Mansion Hills Condo. Ass'n v. Am. Family Mut. Ins. Co.*, 62 S.W.3d 633, 638 (Mo. App. E.D. 2001) (recognizing that standard dictionaries should be consulted for determining ordinary meaning). The Merriam-Webster dictionary defines "direct" in part as "characterized by close logical, causal, or consequential relationship." Merriam-Webster, www.merriam-webster.com/dictionary/direct (last visited August 12, 2020). "Physical" is defined as "having material existence: perceptible especially through the senses and subject to the laws of nature." Merriam-Webster, www.merriam-webster.com/dictionary/physical (last visited August 12, 2020). "Loss" is "the act of losing possession" and "deprivation." Merriam-Webster, www.merriam-webster.com/dictionary/loss (last visited August 12, 2020).

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 963.

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.)[4] However, Plaintiffs correctly respond that these cases were decided at the summary judgment stage, are factually dissimilar, 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.

[4] *See also* Scott G. Johnson, "*What Constitutes Physical Loss or Damage in a Property Insurance Policy?*" 54 Tort Trial & Ins. Prac. 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[.]")

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. *Id.*

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 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.

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

[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 a[t] no 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.)

to, the premises.")[6] For all these reasons, the Court finds that Plaintiffs have adequately alleged a direct physical loss under the Policies.[7]

B. Plaintiffs Have Plausibly Stated a Claim for Civil Authority Coverage.

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

[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 6675934, 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.

[7] Although it appears to be persuasive, the Court need not address Defendant's additional argument that the Amended Complaint fails to allege "physical damage."

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," 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.

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.

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 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.

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 "incurred 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.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: August 12, 2020

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2942

ORDER DENYING TRANSFER AND DIRECTING ISSUANCE OF SHOW CAUSE ORDERS

Before the Panel:[*] There are two motions under 28 U.S.C. § 1407 to centralize pretrial proceedings in this litigation. The first motion is brought by plaintiffs in the two Eastern District of Pennsylvania actions listed on Schedule A (the Pennsylvania movants). The Pennsylvania movants seek centralization of eleven actions in the Eastern District of Pennsylvania. The second motion is brought by plaintiffs in seven actions pending in various districts (the Illinois movants).[1] The Illinois movants request centralization of fifteen actions (the eleven on the first motion and five others) in the Northern District of Illinois.[2] All fifteen actions, which are listed on Schedule A, assert declaratory judgment and/or breach of contract claims against plaintiffs' respective providers of commercial property insurance. Plaintiffs allege that these policies provide coverage for business interruption losses caused by the COVID-19 pandemic and the related government orders suspending, or severely curtailing, operations of non-essential businesses. In addition to the fifteen actions on the motions, the Panel has received notice of 263 related actions. Collectively, these actions are pending in 48 districts and name more than a hundred insurers.

Plaintiffs in more than 175 actions or related actions responded to the motions. Many of these plaintiffs support centralization in one of the two districts proposed by movants. Other plaintiffs suggest the Northern District of California, Southern District of Florida, the Western District of Missouri, the District of New Jersey, and the Western District of Washington as potential transferee districts for this litigation. Still other plaintiffs oppose centralization or ask to be excluded from any MDL.

Plaintiffs in more than thirty actions (some of which either support or oppose centralization

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[*] Judges Karen K. Caldwell and David C. Norton took no part in the decision of this matter.

[1] These movants include plaintiffs in: Central District of California *Caribe Restaurant & Nightclub, Inc.*; Southern District of New York *Gio Pizzeria & Bar Hospitality, LLC*; Northern District of Ohio *Bridal Expressions LLC*; Southern District of Ohio *Troy Stacy Enterprises Inc.*; District of Oregon *Dakota Ventures, LLC*; Northern District of Texas *Berkseth-Rojas*; and Eastern District of Wisconsin *Rising Dough Inc.*

[2] A sixteenth action on the second motion was voluntarily dismissed.

in the first instance) propose that, instead of creating the "industry-wide" MDL requested by the movants, the Panel should centralize these insurance coverage actions on a state-by state, regional, or insurer-by-insurer basis. These proposals, which were raised for the first time in the parties' responses to the motions, encompass claims against Certain Underwriters at Lloyd's, London; Cincinnati Insurance Company; The Hartford; State Farm; and Westchester Surplus Lines/Chubb. These plaintiffs variously suggest ten districts for these narrower MDLs.

In total, thirty-two insurers or insurer-groups named as defendants in the related actions responded to the motions.[3] Unlike plaintiffs, the defendants uniformly oppose centralization. Several defendants, in their Notices of Presentation or Waiver of Oral Argument, indicated alternative support for one or more potential transferee districts. In addition to these defendants, one non-party insurer group and several *amici curiae* filed responses in opposition to centralization.

After considering the arguments of counsel,[4] we conclude that the industry-wide centralization requested by movants will not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation. The proponents of centralization identify three core common questions: (1) do the various government closure orders trigger coverage under the policies; (2) what constitutes "physical loss or damage" to the property; and (3) do any exclusions (particularly those related to viruses) apply. These questions, though, share only a superficial commonality. There is no common defendant in these actions—indeed, there are no true multi-defendant cases, as the actions involve either a single insurer or insurer-group (*i.e.*, related insurers operating under the same umbrella or sharing ownership interests). Thus, there is little potential for common discovery across the litigation. Furthermore, these cases involve different insurance policies with different coverages, conditions, exclusions, and policy language, purchased by different businesses in different industries located in different states. These differences will overwhelm any common factual questions.[5]

The proponents of centralization argue that the insurers use standardized forms. Even so,

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[3] Two responses by defendant insurers were submitted after the close of briefing and were not considered by the Panel. *See* Notices of Major Deficiency, MDL No. 2942 (J.P.M.L. July 24, 2020), ECF Nos. 755 & 756.

[4] In light of the concerns about the spread of COVID-19 virus (coronavirus), the Panel heard oral argument by videoconference at its hearing session of July 30, 2020. *See* Suppl. Notice of Hearing Session, MDL No. 2942 (J.P.M.L. July 14, 2020), ECF No. 692.

[5] *Cf. In re Hotel Industry Sex Trafficking Litig.*, 433 F. Supp. 3d 1353, 1356 (J.P.M.L. 2020) ("[E]ach action involves different alleged sex trafficking ventures, different hotel brands, different owners and employees, different geographic locales, different witnesses, different indicia of sex trafficking, and different time periods. Thus, unique issues concerning each plaintiff's sex trafficking allegations predominate in these actions. Indeed, there is no common or predominant defendant across all actions, further indicating a lack of common questions of fact.").

there are many such "standardized" forms in circulation, and any form used by a given insurer will have been modified in a unique way. While the policy language for business income and civil authority coverages may be very similar among the policies, seemingly minor differences in policy language could have significant impact on the scope of coverage.[6]

Moreover, the proposed MDL raises significant managerial and efficiency concerns. A transferee court would have to establish a pretrial structure to manage the hundreds of plaintiffs—many with disparate views of the litigation—and more than one hundred insurers. The court also would have to identify common policies with identical or sufficiently similar policy language and oversee discovery that likely will differ insurer-to-insurer. To say this litigation would result in a complicated MDL seems an understatement. Managing such a litigation would be an ambitious undertaking for any jurist, and implementing a pretrial structure that yields efficiencies will take time. As counsel emphasized during oral argument, however, time is of the essence in this litigation. Many plaintiffs are on the brink of bankruptcy as a result of business lost due to the COVID-19 pandemic and the government closure orders. An industry-wide MDL in this instance will not promote a quick resolution of these matters.

Put simply, the MDL that movants request entails very few common questions of fact, which are outweighed by the substantial convenience and efficiency challenges posed by managing a litigation involving the entire insurance industry. The proponents' arguments that these problems can be overcome are not persuasive. We therefore deny the motions for centralization.

The proposals for regional and state-based MDLs raised by some of the responding plaintiffs suffer from many of the same problems as the industry-wide motions. Although these MDLs would be smaller, they still would involve multiple defendants with different policies, coverages, exclusions, and endorsements. Any efficiencies with respect to common discovery and motion practice would be outweighed by the unique discovery and motion practice as to each insurer. We likewise deny these regional and state-based MDLs proposals.

In contrast, the arguments for insurer-specific MDLs are more persuasive. Such an MDL would be limited to a single insurer or group of related insurers and thus would not entail the managerial problems of an industry-wide MDL involving more than a hundred insurers. The actions are more likely to involve insurance policies utilizing the same language, endorsements, and exclusions. Thus, there is a significant possibility that the actions will share common discovery and

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[6] The Illinois movants' citation to the experience of the United Kingdom's Financial Conduct Authority (FCA) in reviewing property insurance policies is illustrative. The FCA, which operates under a unitary legal system, reviewed property insurance policies from eight different insurers and concluded that the policies issued in that one jurisdiction fell within seventeen different policy categories. *See* Baker Decl. ¶ 7, Ex. A to the Illinois Movants' Reply Br., MDL No. 2942 (J.P.M.L. Jun. 15, 2020), ECF No. 544-1. An industry-wide MDL, encompassing more than a hundred insurers and the laws of the fifty states, would entail far more differences. The example of the FCA—which is operating using stipulated facts—thus weighs *against* centralization.

pretrial motion practice. Moreover, centralization of these actions could eliminate inconsistent pretrial rulings with respect to the overlapping nationwide class claims that most of the insurers face. An insurer-specific MDL therefore could achieve the convenience and efficiency benefits envisioned by Section 1407.

That said, we will not attempt to create an insurer-specific MDL on the present record. The proposals for insurer-specific MDLs were made midway through the briefing on the industry-wide motions, and no motion for an insurer-specific MDL was filed. As a result, only a few insurers, and few plaintiffs other than the movants, responded to the insurer-specific MDL proposals, which themselves were often vague as to which actions would be included in a given MDL.[7] The Panel requires a better understanding of the factual commonalities and differences among these actions, as well as the efficiencies that may or may not be gained through centralization, before creating an insurer-specific MDL.

Instead, we will direct the Clerk of the Panel to issue orders with respect to actions naming four insurers or groups of related insurers—Certain Underwriters at Lloyd's, London; Cincinnati Insurance Company; the Hartford insurers;[8] and Society Insurance—directing the parties to show cause why those actions should not be centralized. *See* Panel Rule 8.1. With respect to these four insurers or insurer groups, centralization may be warranted to eliminate duplicative discovery and pretrial practice. Cognizant that delay should be avoided in this litigation to the extent possible, the due date for responses to the show cause orders will be expedited by one week to ensure that the Panel will be able to consider the matters at its next hearing session on September 24, 2020.

With respect to the actions in this litigation involving other insurers, centralization does not appear appropriate. There are alternatives to centralization available to minimize any duplication in pretrial proceedings, including informal cooperation and coordination of the actions. The parties also may seek to relate actions against a common insurer in a given district before one judge. Such alternatives appear practicable as to these insurers, given the limited number of actions and districts involved as to each.

IT IS THEREFORE ORDERED that the motions for centralization of the actions listed on Schedule A are denied.

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[7] In addition, many of the insurers are not named in any of the actions on the motions, but only in actions noticed as related to those motions. This potentially presents a procedural obstacle to any immediate centralization as to those insurers. *See* 28 U.S.C. § 1407(c) (requiring notice to the parties that centralization of the actions is contemplated).

[8] The Hartford insurers include: Hartford Financial Services Group, Inc.; Hartford Fire Insurance Company; Hartford Casualty Insurance Company; Hartford Underwriters Insurance Company; Sentinel Insurance Company Limited; and Twin City Fire Insurance Company. These six insurers filed a joint response to the motions. *See* Hartford's Interested Party Response at 1 & n.1, MDL No. 2942 (J.P.M.L. Jun. 5, 2020), ECF No. 425.

IT IS FURTHER ORDERED that the Clerk of the Panel shall issue a show cause order as to the actions listed on Schedule B. The show cause order shall be captioned "*In re: Certain Underwriters at Lloyd's, London, COVID-19 Business Interruption Protection Insurance Litigation*."

IT IS FURTHER ORDERED that the Clerk of the Panel shall issue a show cause order as to the actions listed on Schedule C. The show cause order shall be captioned "*In re: Cincinnati Insurance Company COVID-19 Business Interruption Protection Insurance Litigation*."

IT IS FURTHER ORDERED that the Clerk of the Panel shall issue a show cause order as to the actions listed on Schedule D. The show cause order shall be captioned "*In re: Hartford COVID-19 Business Interruption Protection Insurance Litigation*."

IT IS FURTHER ORDERED that the Clerk of the Panel shall issue a show cause order as to the actions listed on Schedule E. The show cause order shall be captioned "*In re: Society Insurance Company COVID-19 Business Interruption Protection Insurance Litigation*."

IT IS FURTHER ORDERED that responses to the above show cause orders shall be due on August 26, 2020, and replies on September 2, 2020.

PANEL ON MULTIDISTRICT LITIGATION

Ellen Segal Huvelle
Acting Chair

R. David Proctor
Nathaniel M. Gorton
Catherine D. Perry
Matthew F. Kennelly

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2942

SCHEDULE A

Northern District of Alabama

WAGNER SHOES LLC v. AUTO-OWNERS INSURANCE COMPANY, C.A. No. 7:20-00465

Central District of California

CARIBE RESTAURANT AND NIGHTCLUB, INC. v. TOPA INSURANCE COMPANY, C.A. No. 2:20-03570

Middle District of Florida

PRIME TIME SPORTS GRILL, INC. v. DTW 1991 UNDERWRITING LIMITED, C.A. No. 8:20-00771

Southern District of Florida

EL NOVILLO RESTAURANT, ET AL. v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL., C.A. No. 1:20-21525

Northern District of Illinois

BIG ONION TAVERN GROUP, LLC, ET AL. v. SOCIETY INSURANCE, INC., C.A. No. 1:20-02005
BILLY GOAT TAVERN I, INC., ET AL. v. SOCIETY INSURANCE, C.A. 1:20-02068
SANDY POINT DENTAL PC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 1:20-02160

Southern District of New York

GIO PIZZERIA & BAR HOSPITALITY, LLC, ET AL. v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NUMBERS ARP-74910-20 AND ARP-75209-20, C.A. No. 1:20-03107

Northern District of Ohio

BRIDAL EXPRESSIONS LLC v. OWNERS INSURANCE COMPANY, C.A. No. 1:20-00833

Southern District of Ohio

TROY STACY ENTERPRISES INC. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 1:20−00312

District of Oregon

DAKOTA VENTURES, LLC, ET AL. v. OREGON MUTUAL INSURANCE CO., C.A. No. 3:20−00630

Eastern District of Pennsylvania

LH DINING LLC v. ADMIRAL INDEMNITY COMPANY, C.A. No. 2:20−01869
NEWCHOPS RESTAURANT COMCAST LLC v. ADMIRAL INDEMNITY COMPANY, C.A. No. 2:20−01949

Northern District of Texas

BERKSETH−ROJAS DDS v. ASPEN AMERICAN INSURANCE COMPANY, C.A. No. 3:20−00948

Eastern District of Wisconsin

RISING DOUGH, INC., ET AL. v. SOCIETY INSURANCE, C.A. No. 2:20−00623

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2942

SCHEDULE B

Middle District of Florida

PRIME TIME SPORTS GRILL, INC. v. DTW 1991 UNDERWRITING LIMITED, C.A. No. 8:20−00771

Southern District of Florida

RUNWAY 84, INC. & RUNWAY 84 REALTY, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO CERTIFICATE NUMBER ARP–75203–20, C.A. No. 0:20–61161

EL NOVILLO RESTAURANT, ET AL. v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL., C.A. No. 1:20−21525

ATMA BEAUTY, INC. v. HDI GLOBAL SPECIALTY SE, ET AL., C.A. No. 1:20–21745

SUN CUISINE, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO CONTRACT NUMBER B0429BA1900350 UNDER COLLECTIVE CERTIFICATE ENDORSEMENT 350OR100802, C.A. No. 1:20-21827

SA PALM BEACH LLC v. CERTAIN UNDERWRITERS AT LLOYDS LONDON, ET AL., C.A. No. 9:20-80677

Central District of Illinois

RJH MANAGEMENT CORP. v. CERTAIN UNDERWRITERS AT LLOYDS, LONDON SUBSCRIBING TO POLICY CERTIFICATE NO. TNR 198538, C.A. No. 3:20-03143

Eastern District of Louisiana

STATION 6, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, C.A. No. 2:20–01371

District of New Jersey

PALM AND PINE VENTURES, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL., C.A. No. 3:20–08212

MDH GLOBAL, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL., C.A. No. 3:20–08214

Southern District of New York

GIO PIZZERIA & BAR HOSPITALITY, LLC, ET AL. v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NUMBERS ARP-74910-20 AND ARP-75209-20, C.A. No. 1:20-03107

632 METACOM, INC. v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. XSZ146282, C.A. No. 1:20–03905

Eastern District of Pennsylvania

FIRE ISLAND RETREAT v. CERTAIN UNDERWRITERS AT LLOYDS, LONDON SUBSCRIBING TO POLICY NO. B050719MKSFL000081-00, C.A. No. 2:20–02312

INDEPENDENCE RESTAURANT GROUP, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, C.A. No. 2:20–02365

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2942

SCHEDULE C

Middle District of Alabama

EAGLE EYE OUTFITTERS, INC. v. THE CINCINNATI CASUALTY COMPANY, C.A. No. 1:20–00335
PEAR TREE GROUP, LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 3:20–00382
SNEAK & DAWDLE, LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 3:20–00383
AUBURN DEPOT LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 3:20–00384

Northern District of Alabama

HOMESTATE SEAFOOD LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 2:20–00649
SOUTHERN DENTAL BIRMINGHAM LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 2:20–00681

Northern District of Illinois

SANDY POINT DENTAL PC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 1:20–02160
3 SQUARES, LLC, ET AL. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 1:20–02690
DEREK SCOTT WILLIAMS PLLC, ET AL. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 1:20–02806

District of Kansas

PROMOTIONAL HEADWEAR INT'L v. THE CINCINNATI INSURANCE COMPANY, INC., C.A. No. 2:20–02211

Western District of Missouri

STUDIO 417, INC. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 6:20–03127

Southern District of Ohio

TROY STACY ENTERPRISES INC. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 1:20–00312
TASTE OF BELGIUM LLC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 1:20–00357
SWEARINGEN SMILES LLC, ET AL. v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 1:20–00517

Eastern District of Pennsylvania

MILKBOY CENTER CITY LLC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 2:20–02036
STONE SOUP, INC. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 2:20–02614

Western District of Pennsylvania

HIRSCHFIELD-LOUIK v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 2:20–00816

Southern District of West Virginia

UNCORK AND CREATE LLC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 2:20–00401

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2942

SCHEDULE D

Northern District of Alabama

PURE FITNESS LLC v. THE HARTFORD FINANCIAL SERVICES GROUP INC., ET AL., C.A. No. 2:20–00775

District of Arizona

FORFEX LLC v. HARTFORD UNDERWRITERS INSURANCE COMPANY, ET AL., C.A. No. 2:20–01068
JDR ENTERPRISES LLC v. SENTINEL INSURANCE COMPANY LIMITED, ET AL., C.A. No. 4:20–00270

Central District of California

GERAGOS & GERAGOS ENGINE COMPANY NO. 28, LLC v. HARTFORD FIRE INSURANCE COMPANY, ET AL., C.A. No. 2:20–04647
PATRICK AND GEOFF INVESTMENTS INC. v. THE HARTFORD, ET AL., C.A. No. 2:20–05140
ROUNDIN3RD SPORTS BAR LLC v. THE HARTFORD, ET AL., C.A. No. 2:20–05159
R3 HOSPITALITY GROUP, LLC v. THE HARTFORD, ET AL., C.A. No. 5:20–01182

Northern District of California

PROTEGE RESTAURANT PARTNERS LLC v. SENTINEL INSURANCE COMPANY, LIMITED, C.A. No. 5:20–03674

Southern District of California

PIGMENT INC. v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00794

District of Connecticut

LITTLE STARS CORPORATION v. HARTFORD UNDERWRITERS INS. CO., ET AL., C.A. No. 3:20–00609
CONSULTING ADVANTAGE INC. v. HARTFORD FIRE INSURANCE COMPANY, ET AL., C.A. No. 3:20–00610

-D2-

RENCANA LLC, ET AL. v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00611
COSMETIC LASER, INC. v. TWIN CITY FIRE INSURANCE COMPANY, C.A. No. 3:20–00638
DR. JEFFREY MILTON, DDS, INC. v. HARTFORD CASUALTY INSURANCE COMPANY, C.A. No. 3:20–00640
ONE40 BEAUTY LOUNGE, LLC v. SENTINEL INS. CO., LTD., C.A. No. 3:20–00643
PATS v. HARTFORD FIRE INSURANCE COMPANY, ET AL., C.A. No. 3:20–00697
DOTEXAMDR PLLC v. HARTFORD FIRE INS. CO., ET AL., C.A. No. 3:20–00698
KENNEDY HODGES & ASSOCIATES LTD., LLP, ET AL. v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00852
LEAL, INC. v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00917
SA HOSPITALITY GROUP, LLC, ET AL. v. HARTFORD FIRE INSURANCE COMPANY, C.A. No. 3:20–01033

District of District of Columbia

GCDC LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–01094

Northern District of Florida

FLORIDA WELLNESS CENTER OF TALLAHASSEE v. HARTFORD CASUALTY INSURANCE COMPANY, C.A. No. 4:20–00279

Southern District of Florida

REINOL A. GONZALEZ, DMD, P.A. v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–22151

Northern District of Georgia

KARMEL DAVIS AND ASSOCIATES, ATTORNEY–AT–LAW, LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–02181

Southern District of Illinois

TAUBE v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00565

-D3-

Eastern District of Louisiana

Q CLOTHIER NEW ORLEANS, LLC, ET AL. v. TWIN CITY FIRE INSURANCE COMPANY, ET AL., C.A. No. 2:20–01470

District of Massachusetts

RINNIGADE ART WORKS v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–10867

Southern District of Mississippi

THE KIRKLAND GROUP, INC. v. SENTINEL INSURANCE GROUP LTD., C.A. No. 3:20–00496

Eastern District of Missouri

ROBERT LEVY, D.M.D., LLC v. HARTFORD CASUALTY INSURANCE COMPANY, C.A. No. 4:20–00643

District of New Jersey

AMBULATORY CARE CENTER, PA v. SENTINEL INSURANCE COMPANY, LIMITED, C.A. No. 1:20–05837
THE EYE CARE CENTER OF NEW JERSEY, PA v. THE HARTFORD FINANCIAL SERVICES GROUP INC., ET AL., C.A. No. 2:20–05743
LD GELATO LLC v. HARTFORD UNDERWRITERS INSURANCE CORPORATION, C.A. No. 2:20–06215
BACK2HEALTH CHIROPRACTIC CENTER, LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 2:20–06717
MARRAS 46 LLC v. TWIN CITY FIRE INSURANCE COMPANY, C.A. No. 2:20–08886
ADDIEGO FAMILY DENTAL, LLC v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–05847
ADDIEGO ORTHODONTICS, LLC v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–05882
SWEETBERRY HOLDINGS LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–08200
BLUSHARK DIGITAL, LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–08210

-D4-

Eastern District of New York

METROPOLITAN DENTAL ARTS P.C. v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–02443
BRAIN FREEZE BEVERAGE, LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 2:20–02157

Southern District of New York

SHARDE HARVEY DDS PLLC v. THE HARTFORD FINANCIAL SERVICES GROUP INC., ET AL., C.A. No. 1:20–03350
FOOD FOR THOUGHT CATERERS, CORP. v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–03418
RED APPLE DENTAL PC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 7:20–03549

Western District of New York

BUFFALO XEROGRAPHIX INC. v. SENTINEL INSURANCE COMPANY, LIMITED, ET AL., C.A. No. 1:20–00520
SALVATORE'S ITALIAN GARDENS, INC., ET AL. v. HARTFORD FIRE INSURANCE COMPANY, C.A. No. 1:20–00659

Northern District of Ohio

SYSTEM OPTICS, INC. v. TWIN CITY FIRE INSURANCE COMPANY, ET AL., C.A. No. 5:20–01072

Eastern District of Pennsylvania

LANSDALE 329 PROP, LLC, ET AL. v. HARTFORD UNDERWRITERS INSURANCE COMPANY, ET AL., C.A. No. 2:20–02034
SIDKOFF, PINCUS & GREEN PC v. SENTINEL INSURANCE COMPANY, LIMITED, C.A. No. 2:20–02083
HAIR STUDIO 1208, LLC v. HARTFORD UNDERWRITERS INSURANCE CO., C.A. No. 2:20–02171
ULTIMATE HEARING SOLUTIONS II, LLC, ET AL. v. HARTFORD UNDERWRITERS INSURANCE COMPANY, ET AL., C.A. No. 2:20–02401
ATCM OPTICAL, INC., ET AL. v. HARTFORD FIRE INSURANCE COMPANY, C.A. No. 2:20–02828
MOODY, ET AL. v. THE HARTFORD FINANCIAL SERVICES GROUP INC., ET AL., C.A. No. 2:20–02856

-D5-

SEYMON BOKMAN v. SENTINEL INSURANCE COMPANY, LIMITED, C.A. No. 2:20–02887

District of South Carolina

COFFEY & MCKENZIE LLC v. TWIN CITY FIRE INSURANCE COMPANY, C.A. No. 2:20–01671
BLACK MAGIC LLC v. THE HARTFORD FINANCIAL SERVICES GROUP INC., ET AL., C.A. No. 2:20–01743
FANCY THAT! BISTRO & CATERING LLC v. SENTINEL INSURANCE COMPANY LIMITED, ET AL., C.A. No. 3:20–02382

Eastern District of Texas

RISINGER HOLDINGS, LLC, ET AL. v. SENTINEL INSURANCE COMPANY, LTD., ET AL., C.A. No. 1:20–00176
BOOZER-LINDSEY, PA, LLC v. SENTINEL INSURANCE COMPANY, LTD., C.A. No. 6:20–00235

Northern District of Texas

GRAILEYS INC. v. SENTINEL INSURANCE COMPANY LTD.,C.A. No. 3:20–01181

Western District of Texas

INDEPENDENCE BARBERSHOP, LLC v. TWIN CITY FIRE INSURANCE CO., C.A. No. 1:20–00555

District of Utah

WILLIAM W. SIMPSON ENTERPRISES v. THE HARTFORD FINANCIAL SERVICES GROUP, C.A. No. 4:20–00075

Eastern District of Virginia

ADORN BARBER & BEAUTY LLC v. TWIN CITY FIRE INSURANCE COMPANY, C.A. No. 3:20–00418

Western District of Washington

CHORAK v. HARTFORD CASUALTY INSURANCE COMPANY, C.A. No. 2:20–00627
KIM v. SENTINEL INSURANCE COMPANY LIMITED, C.A. No. 2:20–00657

GLOW MEDISPA LLC v. SENTINEL INSURANCE COMPANY LIMITED,
C.A. No. 2:20–00712
STRELOW v. HARTFORD CASUALTY INSURANCE COMPANY,
C.A. No. 2:20–00797
PRATO v. SENTINEL INSURANCE COMPANY LIMITED, C.A. No. 3:20–05402
LEE v. SENTINEL INSURANCE COMPANY LIMITED, C.A. No. 3:20–05422

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2942

SCHEDULE E

Northern District of Illinois

BIG ONION TAVERN GROUP, LLC, ET AL. v. SOCIETY INSURANCE, INC., C.A. No. 1:20−02005
BILLY GOAT TAVERN I, INC., ET AL. v. SOCIETY INSURANCE, C.A. 1:20−02068
BISCUIT CAFE INC., ET AL. v. SOCIETY INSURANCE, INC., C.A. No. 1:20–02514
DUNLAYS MANAGEMENT SERVICES, LLC, ET AL. v. SOCIETY INSURANCE, C.A. No. 1:20–02524
JDS 1455, INC. v. SOCIETY INSURANCE, C.A. No. 1:20–02546
351 KINGSBURY CORNER, LLC v. SOCIETY INSURANCE, C.A. No. 1:20–02589
ROSCOE SAME LLC, ET AL. v. SOCIETY INSURANCE, C.A. No. 1:20–02641
KEDZIE BOULEVARD CAFE INC. v. SOCIETY INSURANCE INC., C.A. No. 1:20–02692
VALLEY LODGE CORP. v. SOCIETY INSURANCE, C.A. No. 1:20–02813
THE BARN INVESTMENT LLC, ET AL. v. SOCIETY INSURANCE, C.A. No. 1:20–03142
PURPLE PIG CHEESE BAR & PORK STORE, LLC v. SOCIETY INSURANCE, C.A. No. 1:20–03164
CIAO BABY ON MAIN LLC v. SOCIETY INSURANCE INC., C.A. No. 1:20–03251
CARDELLI ENTERPRISE, LLC v. SOCIETY INSURANCE, C.A. No. 1:20–03263
726 WEST GRAND LLC, ET AL. v. SOCIETY INSURANCE, C.A. No. 1:20–03432
DEERFIELD ITALIAN KITCHEN, INC. v. SOCIETY INSURANCE, INC., C.A. No. 1:20–03896
THE WHISTLER LLC, ET AL. v. SOCIETY MUTUAL INSURANCE COMPANY, C.A. No. 1:20–03959
RIVERSIDE ENTERPRISES, LLC v. SOCIETY INSURANCE, C.A. No. 1:20–04178

District of Minnesota

LUCY'S BURGERS, LLC v. SOCIETY INSURANCE, INC., C.A. No. 0:20–01029

Middle District of Tennessee

PEG LEG PORKER RESTAURANT, LLC v. SOCIETY INSURANCE, C.A. No. 3:20–00337

-E2-

Eastern District of Wisconsin

RISING DOUGH, INC., ET AL. v. SOCIETY INSURANCE, C.A. No. 2:20−00623
AMBROSIA INDY LLC v. SOCIETY INSURANCE, C.A. No. 2:20–00771

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2942

ORDER DENYING TRANSFER AND DIRECTING ISSUANCE OF SHOW CAUSE ORDERS

Before the Panel:[*] There are two motions under 28 U.S.C. § 1407 to centralize pretrial proceedings in this litigation. The first motion is brought by plaintiffs in the two Eastern District of Pennsylvania actions listed on Schedule A (the Pennsylvania movants). The Pennsylvania movants seek centralization of eleven actions in the Eastern District of Pennsylvania. The second motion is brought by plaintiffs in seven actions pending in various districts (the Illinois movants).[1] The Illinois movants request centralization of fifteen actions (the eleven on the first motion and five others) in the Northern District of Illinois.[2] All fifteen actions, which are listed on Schedule A, assert declaratory judgment and/or breach of contract claims against plaintiffs' respective providers of commercial property insurance. Plaintiffs allege that these policies provide coverage for business interruption losses caused by the COVID-19 pandemic and the related government orders suspending, or severely curtailing, operations of non-essential businesses. In addition to the fifteen actions on the motions, the Panel has received notice of 263 related actions. Collectively, these actions are pending in 48 districts and name more than a hundred insurers.

Plaintiffs in more than 175 actions or related actions responded to the motions. Many of these plaintiffs support centralization in one of the two districts proposed by movants. Other plaintiffs suggest the Northern District of California, Southern District of Florida, the Western District of Missouri, the District of New Jersey, and the Western District of Washington as potential transferee districts for this litigation. Still other plaintiffs oppose centralization or ask to be excluded from any MDL.

Plaintiffs in more than thirty actions (some of which either support or oppose centralization

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[*] Judges Karen K. Caldwell and David C. Norton took no part in the decision of this matter.

[1] These movants include plaintiffs in: Central District of California *Caribe Restaurant & Nightclub, Inc.*; Southern District of New York *Gio Pizzeria & Bar Hospitality, LLC*; Northern District of Ohio *Bridal Expressions LLC*; Southern District of Ohio *Troy Stacy Enterprises Inc.*; District of Oregon *Dakota Ventures, LLC*; Northern District of Texas *Berkseth-Rojas*; and Eastern District of Wisconsin *Rising Dough Inc.*

[2] A sixteenth action on the second motion was voluntarily dismissed.

in the first instance) propose that, instead of creating the "industry-wide" MDL requested by the movants, the Panel should centralize these insurance coverage actions on a state-by state, regional, or insurer-by-insurer basis. These proposals, which were raised for the first time in the parties' responses to the motions, encompass claims against Certain Underwriters at Lloyd's, London; Cincinnati Insurance Company; The Hartford; State Farm; and Westchester Surplus Lines/Chubb. These plaintiffs variously suggest ten districts for these narrower MDLs.

In total, thirty-two insurers or insurer-groups named as defendants in the related actions responded to the motions.[3] Unlike plaintiffs, the defendants uniformly oppose centralization. Several defendants, in their Notices of Presentation or Waiver of Oral Argument, indicated alternative support for one or more potential transferee districts. In addition to these defendants, one non-party insurer group and several *amici curiae* filed responses in opposition to centralization.

After considering the arguments of counsel,[4] we conclude that the industry-wide centralization requested by movants will not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation. The proponents of centralization identify three core common questions: (1) do the various government closure orders trigger coverage under the policies; (2) what constitutes "physical loss or damage" to the property; and (3) do any exclusions (particularly those related to viruses) apply. These questions, though, share only a superficial commonality. There is no common defendant in these actions—indeed, there are no true multi-defendant cases, as the actions involve either a single insurer or insurer-group (*i.e.*, related insurers operating under the same umbrella or sharing ownership interests). Thus, there is little potential for common discovery across the litigation. Furthermore, these cases involve different insurance policies with different coverages, conditions, exclusions, and policy language, purchased by different businesses in different industries located in different states. These differences will overwhelm any common factual questions.[5]

The proponents of centralization argue that the insurers use standardized forms. Even so,

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[3] Two responses by defendant insurers were submitted after the close of briefing and were not considered by the Panel. *See* Notices of Major Deficiency, MDL No. 2942 (J.P.M.L. July 24, 2020), ECF Nos. 755 & 756.

[4] In light of the concerns about the spread of COVID-19 virus (coronavirus), the Panel heard oral argument by videoconference at its hearing session of July 30, 2020. *See* Suppl. Notice of Hearing Session, MDL No. 2942 (J.P.M.L. July 14, 2020), ECF No. 692.

[5] *Cf. In re Hotel Industry Sex Trafficking Litig.*, 433 F. Supp. 3d 1353, 1356 (J.P.M.L. 2020) ("[E]ach action involves different alleged sex trafficking ventures, different hotel brands, different owners and employees, different geographic locales, different witnesses, different indicia of sex trafficking, and different time periods. Thus, unique issues concerning each plaintiff's sex trafficking allegations predominate in these actions. Indeed, there is no common or predominant defendant across all actions, further indicating a lack of common questions of fact.").

there are many such "standardized" forms in circulation, and any form used by a given insurer will have been modified in a unique way. While the policy language for business income and civil authority coverages may be very similar among the policies, seemingly minor differences in policy language could have significant impact on the scope of coverage.[6]

Moreover, the proposed MDL raises significant managerial and efficiency concerns. A transferee court would have to establish a pretrial structure to manage the hundreds of plaintiffs—many with disparate views of the litigation—and more than one hundred insurers. The court also would have to identify common policies with identical or sufficiently similar policy language and oversee discovery that likely will differ insurer-to-insurer. To say this litigation would result in a complicated MDL seems an understatement. Managing such a litigation would be an ambitious undertaking for any jurist, and implementing a pretrial structure that yields efficiencies will take time. As counsel emphasized during oral argument, however, time is of the essence in this litigation. Many plaintiffs are on the brink of bankruptcy as a result of business lost due to the COVID-19 pandemic and the government closure orders. An industry-wide MDL in this instance will not promote a quick resolution of these matters.

Put simply, the MDL that movants request entails very few common questions of fact, which are outweighed by the substantial convenience and efficiency challenges posed by managing a litigation involving the entire insurance industry. The proponents' arguments that these problems can be overcome are not persuasive. We therefore deny the motions for centralization.

The proposals for regional and state-based MDLs raised by some of the responding plaintiffs suffer from many of the same problems as the industry-wide motions. Although these MDLs would be smaller, they still would involve multiple defendants with different policies, coverages, exclusions, and endorsements. Any efficiencies with respect to common discovery and motion practice would be outweighed by the unique discovery and motion practice as to each insurer. We likewise deny these regional and state-based MDLs proposals.

In contrast, the arguments for insurer-specific MDLs are more persuasive. Such an MDL would be limited to a single insurer or group of related insurers and thus would not entail the managerial problems of an industry-wide MDL involving more than a hundred insurers. The actions are more likely to involve insurance policies utilizing the same language, endorsements, and exclusions. Thus, there is a significant possibility that the actions will share common discovery and

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[6] The Illinois movants' citation to the experience of the United Kingdom's Financial Conduct Authority (FCA) in reviewing property insurance policies is illustrative. The FCA, which operates under a unitary legal system, reviewed property insurance policies from eight different insurers and concluded that the policies issued in that one jurisdiction fell within seventeen different policy categories. *See* Baker Decl. ¶ 7, Ex. A to the Illinois Movants' Reply Br., MDL No. 2942 (J.P.M.L. Jun. 15, 2020), ECF No. 544-1. An industry-wide MDL, encompassing more than a hundred insurers and the laws of the fifty states, would entail far more differences. The example of the FCA—which is operating using stipulated facts—thus weighs *against* centralization.

pretrial motion practice. Moreover, centralization of these actions could eliminate inconsistent pretrial rulings with respect to the overlapping nationwide class claims that most of the insurers face. An insurer-specific MDL therefore could achieve the convenience and efficiency benefits envisioned by Section 1407.

That said, we will not attempt to create an insurer-specific MDL on the present record. The proposals for insurer-specific MDLs were made midway through the briefing on the industry-wide motions, and no motion for an insurer-specific MDL was filed. As a result, only a few insurers, and few plaintiffs other than the movants, responded to the insurer-specific MDL proposals, which themselves were often vague as to which actions would be included in a given MDL.[7] The Panel requires a better understanding of the factual commonalities and differences among these actions, as well as the efficiencies that may or may not be gained through centralization, before creating an insurer-specific MDL.

Instead, we will direct the Clerk of the Panel to issue orders with respect to actions naming four insurers or groups of related insurers—Certain Underwriters at Lloyd's, London; Cincinnati Insurance Company; the Hartford insurers;[8] and Society Insurance—directing the parties to show cause why those actions should not be centralized. *See* Panel Rule 8.1. With respect to these four insurers or insurer groups, centralization may be warranted to eliminate duplicative discovery and pretrial practice. Cognizant that delay should be avoided in this litigation to the extent possible, the due date for responses to the show cause orders will be expedited by one week to ensure that the Panel will be able to consider the matters at its next hearing session on September 24, 2020.

With respect to the actions in this litigation involving other insurers, centralization does not appear appropriate. There are alternatives to centralization available to minimize any duplication in pretrial proceedings, including informal cooperation and coordination of the actions. The parties also may seek to relate actions against a common insurer in a given district before one judge. Such alternatives appear practicable as to these insurers, given the limited number of actions and districts involved as to each.

IT IS THEREFORE ORDERED that the motions for centralization of the actions listed on Schedule A are denied.

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[7] In addition, many of the insurers are not named in any of the actions on the motions, but only in actions noticed as related to those motions. This potentially presents a procedural obstacle to any immediate centralization as to those insurers. *See* 28 U.S.C. § 1407(c) (requiring notice to the parties that centralization of the actions is contemplated).

[8] The Hartford insurers include: Hartford Financial Services Group, Inc.; Hartford Fire Insurance Company; Hartford Casualty Insurance Company; Hartford Underwriters Insurance Company; Sentinel Insurance Company Limited; and Twin City Fire Insurance Company. These six insurers filed a joint response to the motions. *See* Hartford's Interested Party Response at 1 & n.1, MDL No. 2942 (J.P.M.L. Jun. 5, 2020), ECF No. 425.

IT IS FURTHER ORDERED that the Clerk of the Panel shall issue a show cause order as to the actions listed on Schedule B. The show cause order shall be captioned "*In re: Certain Underwriters at Lloyd's, London, COVID-19 Business Interruption Protection Insurance Litigation*."

IT IS FURTHER ORDERED that the Clerk of the Panel shall issue a show cause order as to the actions listed on Schedule C. The show cause order shall be captioned "*In re: Cincinnati Insurance Company COVID-19 Business Interruption Protection Insurance Litigation*."

IT IS FURTHER ORDERED that the Clerk of the Panel shall issue a show cause order as to the actions listed on Schedule D. The show cause order shall be captioned "*In re: Hartford COVID-19 Business Interruption Protection Insurance Litigation*."

IT IS FURTHER ORDERED that the Clerk of the Panel shall issue a show cause order as to the actions listed on Schedule E. The show cause order shall be captioned "*In re: Society Insurance Company COVID-19 Business Interruption Protection Insurance Litigation*."

IT IS FURTHER ORDERED that responses to the above show cause orders shall be due on August 26, 2020, and replies on September 2, 2020.

PANEL ON MULTIDISTRICT LITIGATION

Ellen Segal Huvelle
Acting Chair

R. David Proctor
Nathaniel M. Gorton
Catherine D. Perry
Matthew F. Kennelly

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2942

SCHEDULE A

Northern District of Alabama

WAGNER SHOES LLC v. AUTO-OWNERS INSURANCE COMPANY, C.A. No. 7:20-00465

Central District of California

CARIBE RESTAURANT AND NIGHTCLUB, INC. v. TOPA INSURANCE COMPANY, C.A. No. 2:20-03570

Middle District of Florida

PRIME TIME SPORTS GRILL, INC. v. DTW 1991 UNDERWRITING LIMITED, C.A. No. 8:20-00771

Southern District of Florida

EL NOVILLO RESTAURANT, ET AL. v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL., C.A. No. 1:20-21525

Northern District of Illinois

BIG ONION TAVERN GROUP, LLC, ET AL. v. SOCIETY INSURANCE, INC., C.A. No. 1:20-02005
BILLY GOAT TAVERN I, INC., ET AL. v. SOCIETY INSURANCE, C.A. 1:20-02068
SANDY POINT DENTAL PC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 1:20-02160

Southern District of New York

GIO PIZZERIA & BAR HOSPITALITY, LLC, ET AL. v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NUMBERS ARP-74910-20 AND ARP-75209-20, C.A. No. 1:20-03107

Northern District of Ohio

BRIDAL EXPRESSIONS LLC v. OWNERS INSURANCE COMPANY, C.A. No. 1:20-00833

Southern District of Ohio

TROY STACY ENTERPRISES INC. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 1:20−00312

District of Oregon

DAKOTA VENTURES, LLC, ET AL. v. OREGON MUTUAL INSURANCE CO., C.A. No. 3:20−00630

Eastern District of Pennsylvania

LH DINING LLC v. ADMIRAL INDEMNITY COMPANY, C.A. No. 2:20−01869
NEWCHOPS RESTAURANT COMCAST LLC v. ADMIRAL INDEMNITY COMPANY, C.A. No. 2:20−01949

Northern District of Texas

BERKSETH−ROJAS DDS v. ASPEN AMERICAN INSURANCE COMPANY, C.A. No. 3:20−00948

Eastern District of Wisconsin

RISING DOUGH, INC., ET AL. v. SOCIETY INSURANCE, C.A. No. 2:20−00623

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2942

SCHEDULE B

Middle District of Florida

PRIME TIME SPORTS GRILL, INC. v. DTW 1991 UNDERWRITING LIMITED, C.A. No. 8:20−00771

Southern District of Florida

RUNWAY 84, INC. & RUNWAY 84 REALTY, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO CERTIFICATE NUMBER ARP–75203–20, C.A. No. 0:20–61161

EL NOVILLO RESTAURANT, ET AL. v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL., C.A. No. 1:20−21525

ATMA BEAUTY, INC. v. HDI GLOBAL SPECIALTY SE, ET AL., C.A. No. 1:20–21745

SUN CUISINE, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO CONTRACT NUMBER B0429BA1900350 UNDER COLLECTIVE CERTIFICATE ENDORSEMENT 350OR100802, C.A. No. 1:20-21827

SA PALM BEACH LLC v. CERTAIN UNDERWRITERS AT LLOYDS LONDON, ET AL., C.A. No. 9:20-80677

Central District of Illinois

RJH MANAGEMENT CORP. v. CERTAIN UNDERWRITERS AT LLOYDS, LONDON SUBSCRIBING TO POLICY CERTIFICATE NO. TNR 198538, C.A. No. 3:20-03143

Eastern District of Louisiana

STATION 6, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, C.A. No. 2:20–01371

District of New Jersey

PALM AND PINE VENTURES, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL., C.A. No. 3:20–08212

MDH GLOBAL, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL., C.A. No. 3:20–08214

Southern District of New York

GIO PIZZERIA & BAR HOSPITALITY, LLC, ET AL. v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NUMBERS ARP-74910-20 AND ARP-75209-20, C.A. No. 1:20-03107

632 METACOM, INC. v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. XSZ146282, C.A. No. 1:20–03905

Eastern District of Pennsylvania

FIRE ISLAND RETREAT v. CERTAIN UNDERWRITERS AT LLOYDS, LONDON SUBSCRIBING TO POLICY NO. B050719MKSFL000081-00, C.A. No. 2:20–02312

INDEPENDENCE RESTAURANT GROUP, LLC v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, C.A. No. 2:20–02365

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2942

SCHEDULE C

Middle District of Alabama

EAGLE EYE OUTFITTERS, INC. v. THE CINCINNATI CASUALTY COMPANY, C.A. No. 1:20–00335
PEAR TREE GROUP, LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 3:20–00382
SNEAK & DAWDLE, LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 3:20–00383
AUBURN DEPOT LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 3:20–00384

Northern District of Alabama

HOMESTATE SEAFOOD LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 2:20–00649
SOUTHERN DENTAL BIRMINGHAM LLC v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 2:20–00681

Northern District of Illinois

SANDY POINT DENTAL PC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 1:20–02160
3 SQUARES, LLC, ET AL. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 1:20–02690
DEREK SCOTT WILLIAMS PLLC, ET AL. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 1:20–02806

District of Kansas

PROMOTIONAL HEADWEAR INT'L v. THE CINCINNATI INSURANCE COMPANY, INC., C.A. No. 2:20–02211

Western District of Missouri

STUDIO 417, INC. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 6:20–03127

Southern District of Ohio

TROY STACY ENTERPRISES INC. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 1:20–00312
TASTE OF BELGIUM LLC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 1:20–00357
SWEARINGEN SMILES LLC, ET AL. v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 1:20–00517

Eastern District of Pennsylvania

MILKBOY CENTER CITY LLC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 2:20–02036
STONE SOUP, INC. v. THE CINCINNATI INSURANCE COMPANY, C.A. No. 2:20–02614

Western District of Pennsylvania

HIRSCHFIELD-LOUIK v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 2:20–00816

Southern District of West Virginia

UNCORK AND CREATE LLC v. THE CINCINNATI INSURANCE COMPANY, ET AL., C.A. No. 2:20–00401

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2942

SCHEDULE D

Northern District of Alabama

PURE FITNESS LLC v. THE HARTFORD FINANCIAL SERVICES GROUP INC., ET AL., C.A. No. 2:20–00775

District of Arizona

FORFEX LLC v. HARTFORD UNDERWRITERS INSURANCE COMPANY, ET AL., C.A. No. 2:20–01068
JDR ENTERPRISES LLC v. SENTINEL INSURANCE COMPANY LIMITED, ET AL., C.A. No. 4:20–00270

Central District of California

GERAGOS & GERAGOS ENGINE COMPANY NO. 28, LLC v. HARTFORD FIRE INSURANCE COMPANY, ET AL., C.A. No. 2:20–04647
PATRICK AND GEOFF INVESTMENTS INC. v. THE HARTFORD, ET AL., C.A. No. 2:20–05140
ROUNDIN3RD SPORTS BAR LLC v. THE HARTFORD, ET AL., C.A. No. 2:20–05159
R3 HOSPITALITY GROUP, LLC v. THE HARTFORD, ET AL., C.A. No. 5:20–01182

Northern District of California

PROTEGE RESTAURANT PARTNERS LLC v. SENTINEL INSURANCE COMPANY, LIMITED, C.A. No. 5:20–03674

Southern District of California

PIGMENT INC. v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00794

District of Connecticut

LITTLE STARS CORPORATION v. HARTFORD UNDERWRITERS INS. CO., ET AL., C.A. No. 3:20–00609
CONSULTING ADVANTAGE INC. v. HARTFORD FIRE INSURANCE COMPANY, ET AL., C.A. No. 3:20–00610

-D2-

RENCANA LLC, ET AL. v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00611
COSMETIC LASER, INC. v. TWIN CITY FIRE INSURANCE COMPANY, C.A. No. 3:20–00638
DR. JEFFREY MILTON, DDS, INC. v. HARTFORD CASUALTY INSURANCE COMPANY, C.A. No. 3:20–00640
ONE40 BEAUTY LOUNGE, LLC v. SENTINEL INS. CO., LTD., C.A. No. 3:20–00643
PATS v. HARTFORD FIRE INSURANCE COMPANY, ET AL., C.A. No. 3:20–00697
DOTEXAMDR PLLC v. HARTFORD FIRE INS. CO., ET AL., C.A. No. 3:20–00698
KENNEDY HODGES & ASSOCIATES LTD., LLP, ET AL. v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00852
LEAL, INC. v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00917
SA HOSPITALITY GROUP, LLC, ET AL. v. HARTFORD FIRE INSURANCE COMPANY, C.A. No. 3:20–01033

District of District of Columbia

GCDC LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–01094

Northern District of Florida

FLORIDA WELLNESS CENTER OF TALLAHASSEE v. HARTFORD CASUALTY INSURANCE COMPANY, C.A. No. 4:20–00279

Southern District of Florida

REINOL A. GONZALEZ, DMD, P.A. v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–22151

Northern District of Georgia

KARMEL DAVIS AND ASSOCIATES, ATTORNEY–AT–LAW, LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–02181

Southern District of Illinois

TAUBE v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–00565

-D3-

Eastern District of Louisiana

Q CLOTHIER NEW ORLEANS, LLC, ET AL. v. TWIN CITY FIRE INSURANCE COMPANY, ET AL., C.A. No. 2:20–01470

District of Massachusetts

RINNIGADE ART WORKS v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–10867

Southern District of Mississippi

THE KIRKLAND GROUP, INC. v. SENTINEL INSURANCE GROUP LTD., C.A. No. 3:20–00496

Eastern District of Missouri

ROBERT LEVY, D.M.D., LLC v. HARTFORD CASUALTY INSURANCE COMPANY, C.A. No. 4:20–00643

District of New Jersey

AMBULATORY CARE CENTER, PA v. SENTINEL INSURANCE COMPANY, LIMITED, C.A. No. 1:20–05837
THE EYE CARE CENTER OF NEW JERSEY, PA v. THE HARTFORD FINANCIAL SERVICES GROUP INC., ET AL., C.A. No. 2:20–05743
LD GELATO LLC v. HARTFORD UNDERWRITERS INSURANCE CORPORATION, C.A. No. 2:20–06215
BACK2HEALTH CHIROPRACTIC CENTER, LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 2:20–06717
MARRAS 46 LLC v. TWIN CITY FIRE INSURANCE COMPANY, C.A. No. 2:20–08886
ADDIEGO FAMILY DENTAL, LLC v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–05847
ADDIEGO ORTHODONTICS, LLC v. HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–05882
SWEETBERRY HOLDINGS LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–08200
BLUSHARK DIGITAL, LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 3:20–08210

-D4-

Eastern District of New York

METROPOLITAN DENTAL ARTS P.C. v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–02443
BRAIN FREEZE BEVERAGE, LLC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 2:20–02157

Southern District of New York

SHARDE HARVEY DDS PLLC v. THE HARTFORD FINANCIAL SERVICES GROUP INC., ET AL., C.A. No. 1:20–03350
FOOD FOR THOUGHT CATERERS, CORP. v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 1:20–03418
RED APPLE DENTAL PC v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL., C.A. No. 7:20–03549

Western District of New York

BUFFALO XEROGRAPHIX INC. v. SENTINEL INSURANCE COMPANY, LIMITED, ET AL., C.A. No. 1:20–00520
SALVATORE'S ITALIAN GARDENS, INC., ET AL. v. HARTFORD FIRE INSURANCE COMPANY, C.A. No. 1:20–00659

Northern District of Ohio

SYSTEM OPTICS, INC. v. TWIN CITY FIRE INSURANCE COMPANY, ET AL., C.A. No. 5:20–01072

Eastern District of Pennsylvania

LANSDALE 329 PROP, LLC, ET AL. v. HARTFORD UNDERWRITERS INSURANCE COMPANY, ET AL., C.A. No. 2:20–02034
SIDKOFF, PINCUS & GREEN PC v. SENTINEL INSURANCE COMPANY, LIMITED, C.A. No. 2:20–02083
HAIR STUDIO 1208, LLC v. HARTFORD UNDERWRITERS INSURANCE CO., C.A. No. 2:20–02171
ULTIMATE HEARING SOLUTIONS II, LLC, ET AL. v. HARTFORD UNDERWRITERS INSURANCE COMPANY, ET AL., C.A. No. 2:20–02401
ATCM OPTICAL, INC., ET AL. v. HARTFORD FIRE INSURANCE COMPANY, C.A. No. 2:20–02828
MOODY, ET AL. v. THE HARTFORD FINANCIAL SERVICES GROUP INC., ET AL., C.A. No. 2:20–02856

-D5-

SEYMON BOKMAN v. SENTINEL INSURANCE COMPANY, LIMITED, C.A. No. 2:20–02887

District of South Carolina

COFFEY & MCKENZIE LLC v. TWIN CITY FIRE INSURANCE COMPANY, C.A. No. 2:20–01671
BLACK MAGIC LLC v. THE HARTFORD FINANCIAL SERVICES GROUP INC., ET AL., C.A. No. 2:20–01743
FANCY THAT! BISTRO & CATERING LLC v. SENTINEL INSURANCE COMPANY LIMITED, ET AL., C.A. No. 3:20–02382

Eastern District of Texas

RISINGER HOLDINGS, LLC, ET AL. v. SENTINEL INSURANCE COMPANY, LTD., ET AL., C.A. No. 1:20–00176
BOOZER-LINDSEY, PA, LLC v. SENTINEL INSURANCE COMPANY, LTD., C.A. No. 6:20–00235

Northern District of Texas

GRAILEYS INC. v. SENTINEL INSURANCE COMPANY LTD.,C.A. No. 3:20–01181

Western District of Texas

INDEPENDENCE BARBERSHOP, LLC v. TWIN CITY FIRE INSURANCE CO., C.A. No. 1:20–00555

District of Utah

WILLIAM W. SIMPSON ENTERPRISES v. THE HARTFORD FINANCIAL SERVICES GROUP, C.A. No. 4:20–00075

Eastern District of Virginia

ADORN BARBER & BEAUTY LLC v. TWIN CITY FIRE INSURANCE COMPANY, C.A. No. 3:20–00418

Western District of Washington

CHORAK v. HARTFORD CASUALTY INSURANCE COMPANY, C.A. No. 2:20–00627
KIM v. SENTINEL INSURANCE COMPANY LIMITED, C.A. No. 2:20–00657

GLOW MEDISPA LLC v. SENTINEL INSURANCE COMPANY LIMITED,
C.A. No. 2:20–00712
STRELOW v. HARTFORD CASUALTY INSURANCE COMPANY,
C.A. No. 2:20–00797
PRATO v. SENTINEL INSURANCE COMPANY LIMITED, C.A. No. 3:20–05402
LEE v. SENTINEL INSURANCE COMPANY LIMITED, C.A. No. 3:20–05422

IN RE: COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2942

SCHEDULE E

Northern District of Illinois

BIG ONION TAVERN GROUP, LLC, ET AL. v. SOCIETY INSURANCE, INC., C.A. No. 1:20−02005
BILLY GOAT TAVERN I, INC., ET AL. v. SOCIETY INSURANCE, C.A. 1:20−02068
BISCUIT CAFE INC., ET AL. v. SOCIETY INSURANCE, INC., C.A. No. 1:20–02514
DUNLAYS MANAGEMENT SERVICES, LLC, ET AL. v. SOCIETY INSURANCE, C.A. No. 1:20–02524
JDS 1455, INC. v. SOCIETY INSURANCE, C.A. No. 1:20–02546
351 KINGSBURY CORNER, LLC v. SOCIETY INSURANCE, C.A. No. 1:20–02589
ROSCOE SAME LLC, ET AL. v. SOCIETY INSURANCE, C.A. No. 1:20–02641
KEDZIE BOULEVARD CAFE INC. v. SOCIETY INSURANCE INC., C.A. No. 1:20–02692
VALLEY LODGE CORP. v. SOCIETY INSURANCE, C.A. No. 1:20–02813
THE BARN INVESTMENT LLC, ET AL. v. SOCIETY INSURANCE, C.A. No. 1:20–03142
PURPLE PIG CHEESE BAR & PORK STORE, LLC v. SOCIETY INSURANCE, C.A. No. 1:20–03164
CIAO BABY ON MAIN LLC v. SOCIETY INSURANCE INC., C.A. No. 1:20–03251
CARDELLI ENTERPRISE, LLC v. SOCIETY INSURANCE, C.A. No. 1:20–03263
726 WEST GRAND LLC, ET AL. v. SOCIETY INSURANCE, C.A. No. 1:20–03432
DEERFIELD ITALIAN KITCHEN, INC. v. SOCIETY INSURANCE, INC., C.A. No. 1:20–03896
THE WHISTLER LLC, ET AL. v. SOCIETY MUTUAL INSURANCE COMPANY, C.A. No. 1:20–03959
RIVERSIDE ENTERPRISES, LLC v. SOCIETY INSURANCE, C.A. No. 1:20–04178

District of Minnesota

LUCY'S BURGERS, LLC v. SOCIETY INSURANCE, INC., C.A. No. 0:20–01029

Middle District of Tennessee

PEG LEG PORKER RESTAURANT, LLC v. SOCIETY INSURANCE, C.A. No. 3:20–00337

-E2-

Eastern District of Wisconsin

RISING DOUGH, INC., ET AL. v. SOCIETY INSURANCE, C.A. No. 2:20−00623
AMBROSIA INDY LLC v. SOCIETY INSURANCE, C.A. No. 2:20–00771

SESSION NAME:

Is there Business Interruption/Loss of Income Coverage for COVID-19 Damages?

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Speakers

- Spencer Y. Kook, Esq., Hinshaw Culbertson, Los Angeles, CA
- Deborah Yue, Esq., Law Office of Deborah Yue LLC, Westlake, OH
- Grace Pyun, Esq., d'Arcambal Ousley & Cuyler Burk LLP, NY, NY
- Peter Roldan, Esq., Emergent LLP, San Francisco, CA
- Kristy Gonowon, Esq., Allstate Insurance, Chicago, IL

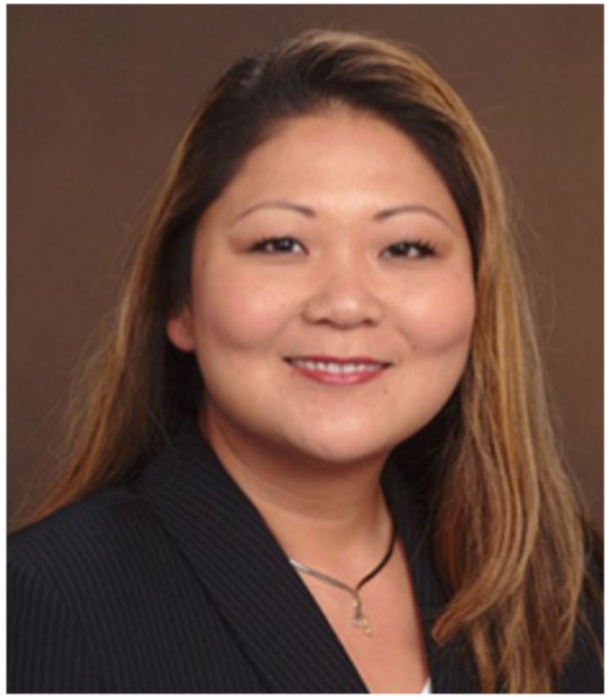
Moderator

- Debbie Sines Crockett, Esq., Cheffy Passidomo, P.A., Tampa, FL

Debbie Sines Crockett

Partner, Cheffy Passidomo, P.A.

- Concentrates in the areas of insurance coverage, construction litigation, and commercial disputes.
- Represents policyholders of all types of policies in litigation against carriers from the trial level through appeal, in both state and federal courts.
- Emphasis in complex insurance recovery issues such as additional insured status and contractual indemnity, and all aspects and types of insurance recovery, including insurance denials, claim representation, and both first and third-party bad faith/extra-contractual claims



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University of California, Los Angeles School of Law, J.D.
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- Partner-in-Charge of Hinshaw's downtown Los Angeles office and serves on Hinshaw's seven-member Management Committee, the firm's governing body
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- Represents policyholders in insurance coverage and insurance bad faith litigation arising out of claims under commercial and personal lines policies
- 17 years of experience as an insurance coverage litigator, including 9 years on the carrier side
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2020 NAPABA Virtual Experience

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1. What is Business Interruption Coverage?
2. "Physical Loss," Relevant Cases and Recent Decisions
3. Virus Exclusions
4. State, Federal and Industry Response?
5. Key Takeaways

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What Type of Insurance Policies are we talking about?

First Party: Your Own Insurance Company Pays You, the Policyholder

Businessowner's Coverage Part/Form	Commercial Inland Marine	Commercial Property Coverage
• BP 00 03 01 06	• CM 00 01 09 04 • Covers any property that is movable, transportable, or involved in transferring information (computer equipment and your "stuff")	• CP 00 10 06 07 • Building and Personal Property Coverage

What is Covered?
What is Business Interruption Coverage?

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Typical Coverage Grant

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
Section I – Property
5. Additional Coverages

- 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.**

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f. Business Income

(1) Business Income

(a) 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. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of the site at which the described premises are located.

With respect to the requirements set forth in the preceding paragraph, if you occupy only part of the site at which the described premises are located, your premises means:

(i) The portion of the building which you rent, lease or occupy; and

(ii) Any area within the building or on the site at which the described premises are located, if that area services, or is used to gain access to, the described premises.

(b) We will only pay for loss of Business Income that you sustain during the "period of restoration" and that occurs within 12 consecutive months after the date of direct physical loss or damage. We will only pay for ordinary payroll expenses for 60 days following the date of direct physical loss or damage, unless a greater number of days is shown in the Declarations.

(c) Business Income means the:

(i) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred if no physical loss or damage had occurred, but not including any Net Income that would likely have been earned as a result of an increase in the volume of business due to favorable business conditions caused by the impact of the Covered Cause of Loss on customers or on other businesses; and

(ii) Continuing normal operating expenses incurred, including payroll.

(d) Ordinary payroll expenses:

(i) Mean payroll expenses for all your employees except:

i. Officers;

ii. Executives;

iii. Department Managers;

iv. Employees under contract; and

v. Additional Exemptions shown in the Declarations as:

- Job Classifications; or
- Employees.

(ii) Include:

i. Payroll;

ii. Employee benefits, if directly related to payroll;

iii. FICA payments you pay;

iv. Union dues you pay; and

v. Workers' compensation premiums.

(2) Extended Business Income

(a) If the necessary suspension of your "operations" produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period that:

(i) Begins on the date property except finished stock is actually repaired, rebuilt or replaced and "operations" are resumed; and

(ii) Ends on the earlier of:

i. The date you could restore your "operations", with reasonable speed, to the level which would generate the Business Income amount that would have existed if no direct physical loss or damage had occurred; or

ii. 30 consecutive days after the date determined in Paragraph **(a)(i)** above, unless a greater number of consecutive days is shown in the Declarations.

What constitutes '*direct physical loss of or damage* to property at the [insured] premises'?

Is viral contamination a 'Covered Cause of Loss'?

True or False?

The mere presence of a virus:

that attaches to property or physically affects property
renders that property
uninhabitable
or
unfit for its intended use?

Constitutes
“direct physical loss of or damage to property at the premises”?

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“DIRECT PHYSICAL LOSS”

- Asbestos
  - *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002)
  - *“Unhabitable and unusable.*.
  - BUT *Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass’n*, 793 F. Supp. 259 (D. Or. 1990) (opining that **asbestos contamination was not a physical loss**, as the building remained unchanged), *aff’d*, 953 F.2d 1387 (9th Cir. 1992).

- Ammonia
  - *Gregory Packaging, Inc. v. Travelers Prop. and Casualty Co. of Am.*, 2014 U.S. Dist. LEXIS 165232 (D.N.J. Nov. 25, 2014)
  - “a property can sustain physical loss or damage without experiencing structural alteration,

- Mold and Bacteria
  - *Universal Image Prods. v. Chubb Corp.*, 703 F. Supp. 2d 705 (E.D. Mich. 2010) (holding that intangible harms such as odors or the presence of mold and **bacteria in an HVAC system did not constitute physical damage to** property)

- Pollution/Environmental Contamination
  - *Morton Inter’l Inc. v. General Accident Ins. Co.,*629 A.2d 831 (N.J. 1993)
  - *St. Paul Fire Ins. Co. v. McCormick & Baxter Creosoting Co.* 923 P.2d 1200 (Or. 1996)

- *Remediation possible?*
  - *Mama Jo’s, Inc. v. Sparta Ins. Co.*, 17-CV-23362, 2020 WL 4782369 (11th Cir. Aug, 18, 2020) (holding that restaurant did not establish direct physical loss when dust and debris generated from nearby roadwork could be remediated by cleaning – “item or structure that merely needs to be cleaned has not suffered a ‘loss’ which is both ‘direct’ and ‘physical’”)

“DIRECT PHYSICAL LOSS”

- Asbestos
  - *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002)
  - *“Unhabitable and unusable.*.
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COVID-19 Rulings… that we know of so far…

Pro-Insurer

The Inns by the Sea v. Cal. Mut. Ins. Co., (Monterey County), Case no. 20 CV 001274 (Demurrer sustained without leave, 8/6/20)

Rose's 1, LLC v. Erie Ins. Exch., D.C., case no 2020 CA 002424 B (granting summary judgment in favor of insurer b/c not showing of "direct physical loss) (8/6/20)

Diesel Barbershop, LLC et al. v. State Farm Lloyds, W.D. Tx., case no. 5;20-cv-461 (granting motion to dismiss b/c no alleged tangible injury to property and, even if so, virus exclusion applied)

Malaube, LLC v . Greenwich Ins. Co., S.D. Fl., case no. 20-22615 (recommending grant of motion to dismiss on b/c no allegation of actual physical damage) (8/26/20)

10E, LLC v. Travelers Indem., C.D. Cal., case no. 2:20-cv-04418 (granting motion to dismiss b/c no allegation of "direct physical loss") (8/28/20)

Pro-Policyholder

Studio 417, Inc. v. Cincinnati Ins. Co., W.D. Mo., case no. 20-cv-03127 (denying motion to dismiss on ground that plaintiff adequately pled a "physical loss" (8/12/20)

But wait….!!!
My jurisdiction has
made declarations
and
issued orders.

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

EMERGENCY EXECUTIVE ORDER NO. 100

March 16, 2020

EMERGENCY EXECUTIVE ORDER

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

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County of Sonoma *California*

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.

Hillsborough County Florida

EST. 1834

EXECUTIVE ORDER OF THE HILLSBOROUGH COUNTY EMERGENCY POLICY GROUP SAFER-AT-HOME ORDER IN RESPONSE TO A COUNTY WIDE THREAT FROM THE COVID-19 VIRUS

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

1. Can Closure Orders Cause “physical loss”?
2. “…direct physical loss of *or* damage…”
   A. Is there a difference?
   B. What is the difference?
   C. Do “loss” and “damage” have different meanings?
3. Does loss of use of property as a direct result of a closure order constitute a “direct physical loss”?

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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.

Are there policy exclusions for Viruses?

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

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", 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.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

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.

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.

ISO Circular
7/6/2006

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.

ISO Circular
7/6/2006

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

BUSINESSOWNERS COVERAGE FORM

A. The exclusion set forth in Paragraph B. applies to all coverage under **Section I – Property** in all forms and endorsements that comprise this Businessowners Policy, except as provided in Paragraph C. This includes but is 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.

C. However, the exclusion in Paragraph B. does not apply to the following:

1. Loss or damage caused by or resulting from "fungi", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Businessowners Policy; or

2. Coverage otherwise provided under Food Contamination Endorsement BP 04 31 (if that endorsement is attached to this Businessowners Policy); or

3. Coverage otherwise provided under the Food Contamination Additional Coverage in Restaurants Endorsement BP 07 78 (if that endorsement is attached to this Businessowners Policy).

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

E. The following provisions in this Businessowners Policy are hereby amended to remove reference to bacteria:

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

2. Additional Coverage – Limited Coverage For "Fungi", Wet Rot, Dry Rot And Bacteria, including any endorsement increasing the scope or amount of coverage.

F. 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 Businessowners Policy.

This endorsement changes
the policy
-- PLEASE READ THIS CAREFULLY --

VIRUS OR BACTERIA EXCLUSION

DEFINITIONS

Definitions Amended --

When "fungus" is a defined "term", the definition of "fungus" is amended to delete reference to a bacterium.

When "fungus or related perils" is a defined "term", the definition of "fungus or related perils" is amended to delete reference to a bacterium.

PERILS EXCLUDED

The additional exclusion set forth below applies to all coverages, coverage extensions, supplemental coverages, optional 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.

1. The following exclusion is added under Perils Excluded, item 1.:

   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 of causing disease, illness, or physical distress.

   This exclusion applies to, but is not limited to, any loss, cost, or expense as a result of:

   a. any contamination by any virus, bacterium, or other microorganism; or

   b. any denial of access to property because of any virus, bacterium, or other microorganism.

2. **Superseded Exclusions** -- The Virus or Bacteria exclusion set forth by this endorsement supersedes the "terms" of any other exclusions referring to "pollutants" or to contamination with respect to any 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 of causing disease, illness, or physical distress.

OTHER CONDITIONS

Other Terms Remain in Effect --

The "terms" of this endorsement, whether or not applicable to any loss, cost, or expense, cannot be construed to provide coverage for a loss, cost, or expense that would otherwise be excluded under the policy to which this endorsement is attached.

MOLD EXCLUSION

It is understood and agreed that the insurance provided by Sections I and III of this policy, if any, does not apply to any remediation cost to, loss of, damage to, or devaluation of covered property or to property of others, caused directly or indirectly by "mold." It is also understood and agreed that the insurance provided by Section II of this policy, if any, does not apply to any loss, claim, suit, bodily injury, property damage, personal injury or advertising injury arising from or related to "mold."

Such remediation cost, loss, injury, damage or devaluation is not covered regardless of any other cause or event that contributes concurrently with or in any sequence to the loss, injury, damage or devaluation.

If any part of this exclusion is unenforceable by reason of statutory or judicial law, a sub-limit then replaces this exclusion, commencing from the inception date of the policy period, so that the total limit of the Company's liability for any and all "mold" related costs, losses, claims, injuries, damages or devaluation, shall not exceed $1,000 per occurrence and in the aggregate for each policy period.

This exclusion does not make inapplicable any other policy provision, including but not limited to any pollution exclusion, that may also exclude coverage for any "mold" related claim, injury, damage or devaluation, expense, cost, loss, or liability. This exclusion does not replace, in whole or in part, any other applicable exclusion.

"Mold" as used in this exclusion includes any and all forms of mold, including but not limited to all forms of Penicillium, Aspergillus, Fusarium, Stachybotrys, fungi, mildew, wet or dry rot, rust, smut, bacteria, virus, and including all forms of contamination by such organisms, either airborne or surface, indoor or outdoor, permanent or transient, and including all mycotoxins, spores, microbial volatile organic compounds, scents, or other by-products resulting therefrom. "Mold" does not include organisms that were grown or harvested for human ingestion or organisms that caused food poisoning if your business is food processing, sales or serving.

Fungus Exclusion

FUNGUS, WET ROT, DRY ROT, VIRUS AND BACTERIA EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the CAUSES OF LOSS – SPECIAL FORM.

1. Paragraph **B. Exclusions, 1, h., "Fungus", Wet Rot, Dry Rot and Bacteria**, and paragraph **E. Additional Coverage – Limited Coverage For "Fungus", Wet Rot, Dry Rot And Bacteria** are deleted in their entirety.
2. The following is added to paragraph **B. Exclusions, 1.**:

   "Fungus", Wet Rot, Dry Rot, Virus and Bacteria

   Presence, existence, growth, proliferation, release, transmission, migration, dispersal, exposure or spread or activity of "fungus", wet or dry rot, virus or bacterium or any other microorganism that induces or is capable of introducing physical distress, illness or disease.
3. We will not pay for any loss, damage or expense arising out of:
   1. The removal of "fungus", wet rot, dry rot, virus or bacteria from any building or structure, fixture item of personal property or product;
   2. Any demolition or increased cost of construction, repair, debris removal or loss of use necessitated by the enforcement of any law or ordinance regulating "fungus", wet rot, dry rot, virus or bacteria;
   3. Any governmental direction or request declaring that fungus", wet rot, dry rot, virus or bacteria present in or part of any undamaged portion of the insured's property can no longer be used for the purpose it was intended or installed and must be removed or modified.

We have no duty to defend or indemnify any insured against any loss, damage, claim, suit or other legal action or proceedings alleging damages to which this exclusion applies.

Class Actions? MDL?

- Class Actions
- Coordinated Multi-District Litigation
  - The consolidation of hundreds (or thousands) of cases involving one or more common questions of fact are pending in different districts before one court.

  - Plaintiff groups filed a motion with Judicial Panel of Multidistrict Litigation to consolidate various cases across the United States dealing with claims for breach of contract and declaratory relief involving claims for business interruption claims under commercial property policies for loss suffered due to COVID-19.

  - On August 12, the MDL Panel issued an order denying industry wide consolidation.

  - The Court found that while plaintiffs had identified 3 common questions, they "share only a superficial commonality."

  - JPML left the door open for the possibility of a limited centralization of cases against each of 4 of insurers as it was more likely that any given insurer would use the same wordings, (1) increasing the likelihood of common discovery, while (2) providing the opportunity for pre-trial rulings on common language and avoiding inconsistent rulings. Orders to show cause issued to show why the cases against insurer groups should not be centralized.

What are the States Doing?

- 10 states and the District of Columbia have introduced legislation regarding business interruption insurance coverage for COVID-19 claims:
  - California (Assembly Bill 1522)
  - Louisiana (SB477; HB 858)
  - Massachusetts (SB2655;SB2888)
  - Michigan (H5739)
  - New Jersey (Assembly Bill 3844)
  - New York (Assembly Bills A10226A and A10226B; S8178; S8211)
  - Ohio (HB589)
  - Pennsylvania ((HB2372; SB1114; SB1127)
  - Rhode Island (HB8064;HB8079)
  - South Carolina (S1188)
  - District of Columbia (B23-0751; B23-0751)

Many State Insurance Regulatory Agencies are Issuing 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

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What ELSE are the States Doing?

What are the Feds Doing?

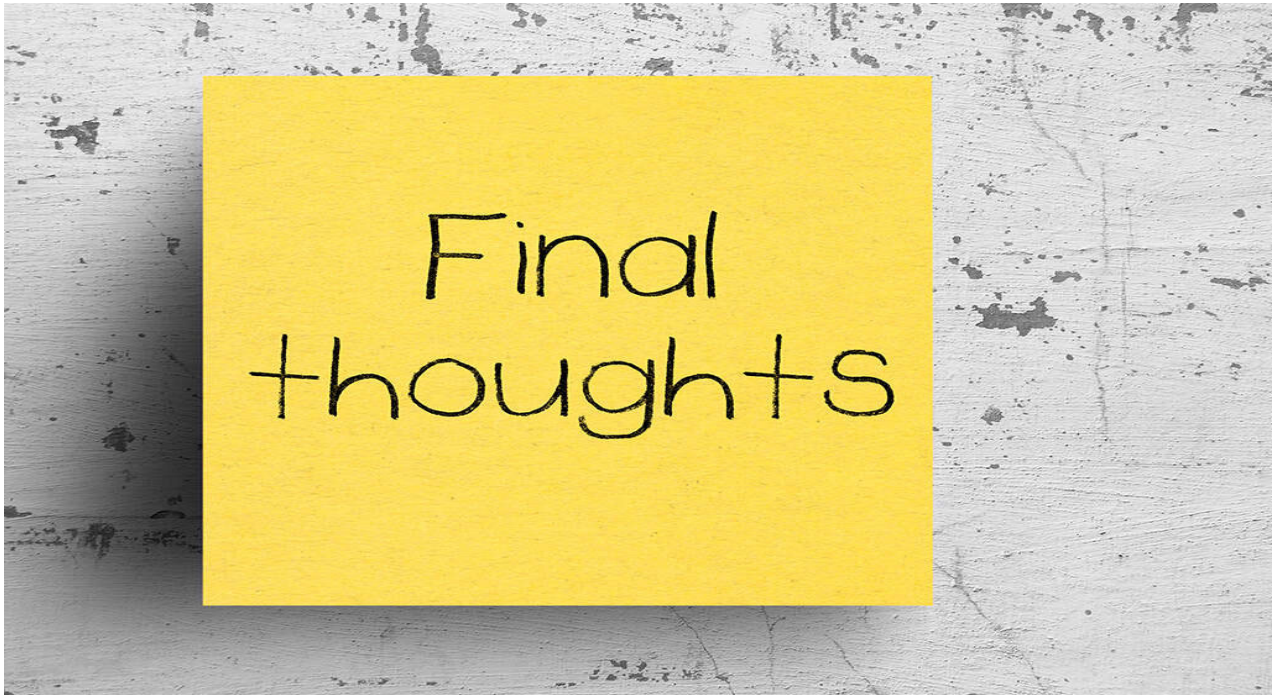
- A bipartisan group of U.S. House members has asked insurers to retroactively recognize financial losses relating to COVID-19 under commercial business interruption coverage for policyholders.
- Eighteen House members made their case in a **March 18 letter** addressed to the leaders of the American Property Casualty Insurance Association, the National Association of Mutual Insurance Companies, the Independent Insurance Agents & Brokers of America, and the Council of Insurance Agents and Brokers.
- "During times of crisis, we must all work together," the letter from the congressional representatives states. "We urge you to work with your member companies and brokers to recognize financial loss due to COVID-19 as part of policyholders' business interruption coverage."
- House Democrats who signed: Nydia Velazquez, N.Y.; Andy Kim, N.J. (who is self-quarantined due to contact with someone positive); Grace Napolitano, Calif.; Marc Veasey, Texas; Alcee Hastings, Fla.; Rashida Tlaib, Mich.; Gilbert Cisneros, Calif.; Scott Peters, Calif.; Max Rose, N.Y.; Kathleen Rice, N.Y.; Joe Cunningham, S.C.; and Andy Levin, Mich.
- House Republicans who signed: Brian Fitzpatrick, Pa.; Jim Hagedorn, Minn.; French Hill, Ark.; Rick Crawford, Ark.; Steve Womack, Ark; and Bruce Westerman, Ark.
- The letter argues that American businesses are "understandably concerned about the potential financial impact the continued global spread of COVID-19 may have on their operations" in the wake of more than 118,000 declared cases of the disease in 114 countries globally, with more than 4,000 people having lost their lives so far. As a result, they argue that including COVID-19 related losses in business interruption coverage is key.
- https://www.insurancejournal.com/news/national/2020/03/20/561810.htm

What's Industry Doing?

- The insurance industry leaders responded in no uncertain terms, saying: "**Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19**."
- "The U.S. insurance industry remains committed to our consumers and will ensure that prompt payments are made in instances where coverage exists," they added.
- In their response, the trade group leaders noted that member insurers have been active in **charitable efforts** in their communities and have begun working with customers to offer flexibility on premium payments.
- "We recognize the extraordinary challenges our country is facing—our member businesses, our employees, and our families are confronting the same trials," the trade group letter said, concluding, however, that **government action is needed to address growing problem**s.
- "The U.S. is in the midst of a national crisis that will require **federal assistance** that provides funding directly to those American individuals and businesses most in need. Our organizations stand ready to work with Congress on solutions that provide the necessary relief as soon as possible," the letter said.
- https://www.insurancejournal.com/news/national/2020/03/20/561810.htm

The Pandemic Risk Insurance Act of 2020

- Rep. Carolyn Maloney, D-N.Y. (House Financial Services Committee), **on March 26, 2020**
- **H.R. 7011, the Pandemic Risk Insurance Act of 2020**, would establish a federal backstop for business interruption, including event cancellation losses resulting from a future pandemic or public health emergency **from Jan. 1, 2021**. Related Bill **H.B. 6983**.
- 5/26/20- Referred to House Committee on Financial Services
- Insurer participation in the program would be voluntary.
- Insurers that sign up would be required to offer pandemic coverage in all their business interruption policies.
- Participating insurers would collectively be responsible for covering the first $250 million of business interruption losses incurred by their policyholders. Once that threshold is reached, a federal fund administered by the U.S. Treasury Department would cover 95% of additional losses up to $500 billion in a single year, with the remaining 5% spread among the insurers
- With a backstop the insurance industry will have “more certainty and will be able to safely underwrite this unique risk,” Rep. Maloney said.
- Introduction of the bill follows an alternative taxpayer-funded backstop proposal announced last week by three major insurance trade groups.
- “That’s not going to pass,” Rep. Maloney said during the news conference. “I welcome industry agreement that pandemic risk insurance is a viable, actuarially sound product. Let’s get to the table and start talking.”
- Like the Terrorism Risk Insurance Act that was enacted after the 9/11 terrorist attacks, under PRIA, the federal government would act as a backstop to maintain marketplace stability.
- https://www.businessinsurance.com/article/20200526/NEWS06/912334762?template=printart



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Questions?
Comments?
Thoughts?

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On behalf of the NAPABA Insurance Law Committee, Thank you for attending!

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