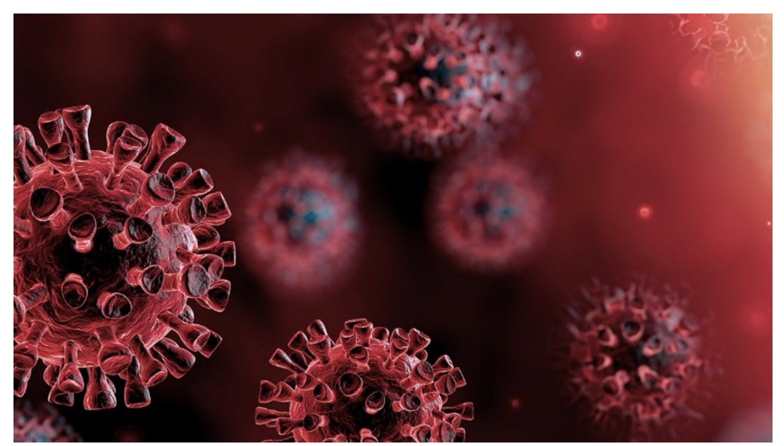
COVID-19 and Business Loss Interruption Litigation



Hay-Sell Chapter of the American Inns of Court

January 21, 2021

<u>Program outline</u>

Welcome and introduction – 5 minutes

Explanation of coverage concepts and policy provisions – 10 minutes

Summary of recent PA/Federal cases – 10 minutes

Federal PA judicial and regulatory trends – 5 minutes

Discovery issues – 5 minutes

Future possible modifications to policies to address future virus scenarios – 5 minutes

Guest speaker: Chris Jacobs, Houston Harbaugh

<u>Pupilage Group Leader*</u>
John Joyce, Grenen & Birsic, P.C.

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Kevin Barley, Esq., unrestricted free agent
The Honorable Patricia Dodge, U.S. District Court Magistrate Judge
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*Member bios and contact information are included in the 2020-2021 Handbook

The COVID-19 pandemic and associated government actions and orders have created numerous economic losses for American businesses. Many businesses have turned to their existing business interruption and other insurance policies to seek coverage for such losses. Our zoom program will join the COVID-19 Pandemic team of the Pasteur & Salk law firm, led by practice group chair Patricia Dodge, on their weekly Zoom meeting. The team will discuss coverage concepts and policy provisions, recent litigation and judicial and regulatory trends, discovery issues, and potential future insurance policy modifications to address future virus scenarios.

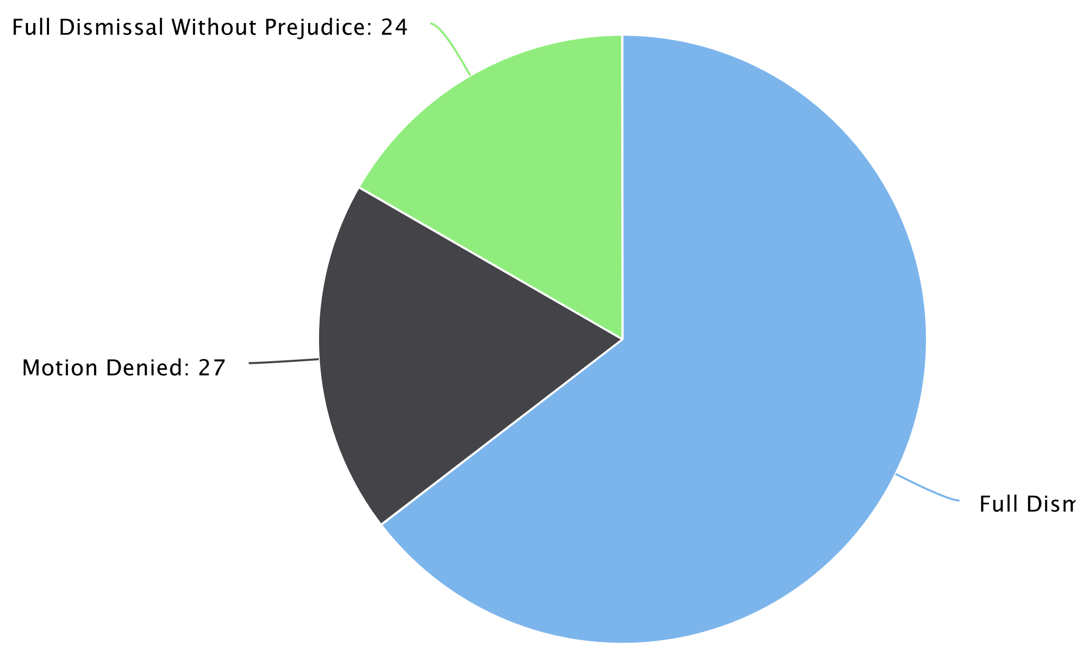
Attached are various materials that further explore insurance coverage concepts and policy provisions. These include available coverage case trackers, copies of some of the most relevant cases addressing these coverage issues, and discovery protocols for business interruption insurance litigation.

Links to additional materials of interest:

https://schulwolfmediation.com/a-mediators-take-on-covid-19-part-2/
https://www.insurancelawsection.org/a-mediators-take-on-covid-19/
https://www.insurancelawsection.org/a-mediators-take-on-covid-19-part-ii/

UPenn Law COVID Coverage litigation tracker:
https://cclt.law.upenn.edu/judicial-rulings/

Judicial Rulings on the Merits in Business Interruption Cases



	Virus exclusion in policy	No virus exclusion in policy
MTD granted	87	30
MTD denied	13	14
Insurer MSJ granted	5	1
Policyholder MSJ granted	1	2

Previous **1** **2** **Next** Search:

Showing 101 to 162 of 162 entries

Case Name	Court	State	Docket Number	Date	Outcome	Virus
Water Sports Kauai, Inc. v. Fireman's Fund Insurance Company et al	NDCA	CA	3:20-cv-03750	11/09/2020	Full Dismissal Without Prejudice	No
Brian Handel DMD PC v Allstate Insurance Company	EDPA	PA	2:20-cv-03198-TJS	11/06/2020	Full Dismissal With Prejudice	Yes
Mac Property Group LLC v. Selective Fire And Casualty Insurance Company	Camden County	NJ	CAM-L-002629-20	11/05/2020	Full Dismissal With Prejudice	Yes
N and S Restaurant LLC v Cumberland Mutual Fire Insurance	DNJ	NJ	1:20-cv-05289-RBK-KMW	11/05/2020	Full Dismissal With Prejudice	Yes
Cajun Conti LLC v Certain Underwriters at Lloyds	Orleans Parish	LA	2020-02558	11/04/2020	Insurer MSJ denied	No
Independence Barbershop, LLC v. Twin City Fire Insurance Co.	WDTX	TX	1:20-cv-00555	11/04/2020	Motion Denied	Yes

Case Name	Court	State	Docket Number	Date	Outcome	Virus
Real Hospitality, LLC v. Travelers Casualty Insurance Company of America	SDMS	MS	2:20-cv-00087-KS-MTP	11/04/2020	Full Dismissal With Prejudice	Yes
Uncork and Create LLC v. Cincinnati Insurance Company et al	SDWV	WV	2:20-cv-00401	11/02/2020	Full Dismissal With Prejudice	No
Raymond H Nahmad DDS PA RH Nahmad Equities LLC v. Hartford Casualty Insurance Company	SDFL	FL	1:20-cv-22833-BB	11/02/2020	Full Dismissal With Prejudice	Yes
FAFB LLC v. Blackboard Insurance Company	Mercer County	NJ	L-000892-20	10/30/2020	Full Dismissal With Prejudice	Yes
West Coast Hotel Management v Berkshire Hathaway Guard Insurance Companies	CDCA	CA	2:20-cv-05663-VAP-DFM	10/27/2020	Full Dismissal With Prejudice	Yes

Case Name	Court	State	Docket Number	Date	Outcome	Virus
Taps & Bourbon on Terrace LLC v Underwriters at Lloyd's London	Philadelphia County	PA	200700375	10/26/2020	Motion Denied	Yes
Vizza Wash LP v Nationwide Mutual Insurance	WDTX	TX	5:20-cv-00680-OLG	10/26/2020	Full Dismissal With Prejudice	Yes
Boxed Foods Company, LLC et al v. California Capital Insurance Company et al	NDCA	CA	3:20-cv-04571-CRB	10/26/2020	Full Dismissal Without Prejudice	Yes
Founder Institute Inc. v. Hartford Fire Insurance Company	NDCA	CA	5:20-cv-04466-NC	10/22/2020	Full Dismissal Without Prejudice	Yes
Hillcrest Optical v. Continental Casualty Co.	SDAL	AL	1:20-cv-00275	10/21/2020	Full Dismissal With Prejudice	No
Chapparells Inc. v. Cincinnati Insurance Company	Summit County	OH	CV-2020-06-1704	10/21/2020	Motion Denied	No

Case Name	Court	State	Docket Number	Date	Outcome	Virus
Travelers Casualty Insurance Company of America v. Geragos and Geragos	CDCA	CA	2:20-cv-03619	10/19/2020	Full Dismissal With Prejudice	Yes
Seifert et al v. IMT Insurance Company	DMN	MN	0:20-cv-01102-JRT-DTS	10/16/2020	Full Dismissal Without Prejudice	Yes
Lombardi's, Inc. et al v. Indemnity Insurance Company of North America,	Dallas County	TX	DC-20-05751	10/15/2020	Motion Denied	Yes
O'Brien Sales and Marketing, Inc. v. Transportation Insurance Company	NDCA	CA	3:20-cv-02951	10/09/2020	Full Dismissal Without Prejudice	No
North State Deli et al. v. Cincinnati Insurance Company	Durham County	NC	20-CVS-02569	10/09/2020	Policyholder MSJ granted	No
North State Deli et al. v. Cincinnati Insurance Company	Durham County	NC	20-CVS-02569	10/09/2020	Motion Denied	No

Case Name	Court	State	Docket Number	Date	Outcome	Virus
Harvest Moon Distributors LLC v. Southern Owners Insurance Company	MDFL	FL	6:20-cv-01026-PGB-DCI	10/09/2020	Full Dismissal Without Prejudice	No
Mace Marine, Inc. v. Tokio Marine Specialty Insurance Company	Monroe County	FL	20-CA-000120-P	10/08/2020	Full Dismissal Without Prejudice	Yes
Horizon Dive Adventures v Tokio Marine Specialty Insurance Co	Monroe County	FL	20-CA-000159-P	10/08/2020	Full Dismissal Without Prejudice	Yes
Vandelay Hospitality Group LP v The Cincinnati Insurance Co.	NDTX	TX	3:20-cv-01348-D	10/07/2020	Full Dismissal Without Prejudice	No
Henry's Louisiana Grill, Inc. et al v. Allied Insurance Company of America	NDGA	GA	1:20-cv-02939-TWT	10/06/2020	Full Dismissal With Prejudice	Yes

Case Name	Court	State	Docket Number	Date	Outcome	Virus
Mark's Engine Company No. 28 Restaurant, LLC v. Travelers Indemnity Company of Connecticut et al	CDCA	CA	2:20-cv-04423-AB-SK	10/02/2020	Full Dismissal With Prejudice	Yes
Pappy's Barber Shops, Inc. v. Farmers Group, Inc.	SDCA	CA	3:20-cv-00907-CAB-BLM	10/01/2020	Full Dismissal With Prejudice	Yes
Wilson et al v. Hartford Fire Insurance Co. et al	EDPA	PA	2:20-cv-03384-ER	09/30/2020	Full Dismissal With Prejudice	Yes
Best Rest Motel Inc v. Sequoia Insurance Company	San Diego County	CA	37-2020-00015679-CU-IC-CTL	09/30/2020	Motion Denied	No
Francois Inc. v. Cincinnati Insurance Company	Lorain County	OH	20CV201416	09/29/2020	Motion Denied	No
Oral Surgeons PC v Cincinnati Insurance Company	SDIA	IA	4:20-cv-00222-CRW-SBJ	09/29/2020	Full Dismissal With Prejudice	No

Case Name	Court	State	Docket Number	Date	Outcome	Virus
It's Nice Inc v State Farm Fire and Casualty Co	DuPage County	IL	2020L 000547	09/29/2020	Full Dismissal With Prejudice	Yes
Infinity Exhibits Inc v Certain Underwriters at Lloyds London	MDFL	FL	8:20-cv-01605-JSM-AEP	09/28/2020	Full Dismissal With Prejudice	Yes
Urogynecology Specialist of Florida LLC v Sentinel Insurance Company, Ltd.	MDFL	FL	6:20-cv-01174-ACC-EJK	09/24/2020	Motion Denied	Yes
Franklin EWC, Inc. et al v. Hartford Financial Services Group, Inc. et al	NDCA	CA	3:20-cv-04434-JSC	09/22/2020	Full Dismissal Without Prejudice	Yes
Johnston Jewelers Inc. v. Jewelers Mutual Insurance Company SI	Pinellas County	FL	20002221CI	09/22/2020	Motion Denied	Yes
Sandy Point Dental PC v. Cincinnati Insurance Company et al	NDIL	IL	1:20-cv-02160	09/21/2020	Full Dismissal With Prejudice	No

Case Name	Court	State	Docket Number	Date	Outcome	Virus
Blue Springs Dental Care LLC v. Owners Insurance Company	WDMO	MO	4:20-cv-00383-SRB	09/21/2020	Motion Denied	No
Plan Check Downtown III, LLC v. Amguard Insurance Company	CDCA	CA	2:20-cv-06954	09/16/2020	Full Dismissal With Prejudice	Yes
Mudpie, Inc. v. Travelers Casualty Insurance Company of America	NDCA	CA	4:20-cv-03213-JST	09/14/2020	Full Dismissal With Prejudice	Yes
Mortar and Pestle Corp. v. Atain Specialty Insurance Company	NDCA	CA	3:20-cv-03461	09/11/2020	Full Dismissal Without Prejudice	Yes
Pappy's Barber Shops, Inc. v. Farmers Group, Inc.	SDCA	CA	3:20-cv-00907-CAB-BLM	09/11/2020	Full Dismissal Without Prejudice	Yes
780 Short North LLC v. Cincinnati Insurance Company	Franklin County	OH	20CV003836	09/08/2020	Motion Denied	No

Case Name	Court	State	Docket Number	Date	Outcome	Virus
SSF II, Inc. v. Cincinnati Insurance Company	Franklin County	OH	20CV002644	09/08/2020	Motion Denied	No
Turek Enterprises v. State Farm Mutual Automobile Insurance Company et al	EDMI	MI	1:20-cv-11655	09/03/2020	Full Dismissal With Prejudice	Yes
Mauricio Martinez, DMD, P.A. v. Allied Insurance Company of America 06-04-2020	MDFL	FL	2:20-cv-00401	09/02/2020	Full Dismissal With Prejudice	Yes
Ridley Park Fitness LLC v. Philadelphia Insurance Companies et al	Philadelphia County	PA	200501093	08/31/2020	Motion Denied	Yes
10E, LLC v. Travelers Indemnity Company of Connecticut	CDCA	CA	2:20-cv-04418-SVW-AS	08/29/2020	Full Dismissal Without Prejudice	Yes
Malaube LLC v. Greenwich Insurance Co.**	SDFL	FL	1:20-cv-22615-KMW	08/27/2020	Full Dismissal Without Prejudice	Yes

Case Name	Court	State	Docket Number	Date	Outcome	Virus
Diesel Barbershop v. State Farm Lloyds	WDTX	TX	5:20-cv-00461-DAE	08/13/2020	Full Dismissal With Prejudice	Yes
K.C. Hopps, Ltd. v. Cincinnati Insurance Company, Inc.	WDMO	MO	4:20-cv-00437	08/13/2020	Motion Denied	No
Optical Services USA/JC1 et al v Franklin Mutual Insurance Company	Bergen County	NJ	BER-L-3681-20	08/13/2020	Motion Denied	Yes
Travelers Casualty Insurance Company of America v. Geragos and Geragos	CDCA	CA	2:20-cv-03619	08/12/2020	Motion Denied	Yes
Studio 417, Inc. v. Cincinnati Insurance Company (consolidated with Rieger)	WDMO	MO	6:20-cv-03127-SRB	08/12/2020	Motion Denied	No

Case Name	Court	State	Docket Number	Date	Outcome	Virus
Somco, LLC v. Lightning Rod Mutual Insurance Company	Cuyahoga County	OH	CV-20-931763	08/12/2020	Motion Denied	No
Rose's 1, LLC v. Erie Insurance Exchange	District of Columbia	DC	2020-CA-002424	08/06/2020	Insurer MSJ granted	No
Inns by the Sea v. California Mutual Insurance Company	Monterey County	CA	20CV001274	08/06/2020	Full Dismissal With Prejudice	No
Gavrilides Management Company LLC et al v. Michigan Insurance Company	Ingham County	MI	20-000258-CB	07/21/2020	Full Dismissal With Prejudice	Yes
Windber Hospital v Travelers Property Casualty Co	WDPA	PA	3:20-cv-00080-KRG	07/15/2020	Policyholder MSJ denied	Yes

Show 100 entries

Previous 1 2 Next

** This is a magistrate's recommendation, not a final order.

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Up ↑

List of COVID-19 Business Interruption Cases with Insurer MSJs Denied

Cajun Conti LLC v Certain Underwriters at Lloyds	Orleans Parish	LA	2020-02558	11/04/2020	Insurer MSJ denied
Independence Barbershop, LLC v. Twin City Fire Insurance Co.	WDTX	TX	1:20-cv-00555	11/04/2020	Motion Denied
Humans & Resources LLC v. Firstline National Insurance Company	EDPA	PA	2:20-cv-02152	01/08/2021	Motion Denied
Johansing Family Enterprises LLC v Cincinnati Specialty Underwriters Insurance Company	Hamilton County	OH	A2002349	01/08/2021	Motion Denied
Queen's Tower Restaurant Inc. v. Cincinnati Financial Corporation	Hamilton County	OH	A2001747	01/08/2021	Motion Denied
Sylvester & Sylvester Inc. v. State Automobile Mutual Insurance Company	Stark County	OH	2020CV00817	01/07/2021	Motion Denied
Baldwin Academy, Inc. v. Markel Insurance Company	SDCA	CA	3:20-cv-02004	12/21/2020	Motion Denied
Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company	EDVA	VA	2:20-cv-00265-RAJ-LRL	12/09/2020	Motion Denied
Wagner Shoes LLC v. Auto-Owners Insurance Company	NDAL	AL	7:20-cv-00465	12/08/2020	Motion Denied
JGB Vegas Retail Lessee LLC v Starr Surplus	Clark	NV	A-20-	12/01/2020	Motion

List of COVID-19 Business Interruption Cases with Insurer MSJs Denied

Lines Insurance Company	County		816628-B		Denied
Dino Palmieri Salons, Inc. v. State Automobile Mutual Insurance Company	Cuyahoga County	OH	CV-20-932117	11/17/2020	Motion Denied
Hill and Stout PLLC v. Mutual of Enumclaw Insurance Co.	King County	WA	20-2-07925-1	11/13/2020	Motion Denied
Taps & Bourbon on Terrace LLC v Underwriters at Lloyd's London	Philadelphia County	PA	200700375	10/26/2020	Motion Denied
Chapparells Inc. v. Cincinnati Insurance Company	Summit County	OH	CV-2020-06-1704	10/21/2020	Motion Denied
Lombardi's, Inc. et al v. Indemnity Insurance Company of North America,	Dallas County	TX	DC-20-05751	10/15/2020	Motion Denied
North State Deli et al. v. Cincinnati Insurance Company	Durham County	NC	20-CVS-02569	10/09/2020	Motion Denied
Best Rest Motel Inc v. Sequoia Insurance Company	San Diego County	CA	37-2020-00015679-CU-IC-CTL	09/30/2020	Motion Denied
Francois Inc. v. Cincinnati Insurance Company	Lorain County	OH	20CV201416	09/29/2020	Motion Denied
Urogynecology Specialist of Florida LLC v Sentinel Insurance Company, Ltd.	MDFL	FL	6:20-cv-01174-ACC-EJK	09/24/2020	Motion Denied

List of COVID-19 Business Interruption Cases with Insurer MSJs Denied

Case	Court	State	Case No.	Date	Result
Johnston Jewelers Inc. v. Jewelers Mutual Insurance Company SI	Pinellas County	FL	20002221CI	09/22/2020	Motion Denied
Blue Springs Dental Care LLC v. Owners Insurance Company	WDMO	MO	4:20-cv-00383-SRB	09/21/2020	Motion Denied
780 Short North LLC v. Cincinnati Insurance Company	Franklin County	OH	20CV003836	09/08/2020	Motion Denied
SSF II, Inc. v. Cincinnati Insurance Company	Franklin County	OH	20CV002644	09/08/2020	Motion Denied
Ridley Park Fitness LLC v. Philadelphia Insurance Companies et al	Philadelphia County	PA	200501093	08/31/2020	Motion Denied
K.C. Hopps, Ltd. v. Cincinnati Insurance Company, Inc.	WDMO	MO	4:20-cv-00437	08/13/2020	Motion Denied
Optical Services USA/JC1 et al v Franklin Mutual Insurance Company	Bergen County	NJ	BER-L-3681-20	08/13/2020	Motion Denied
Travelers Casualty Insurance Company of America v. Geragos and Geragos	CDCA	CA	2:20-cv-03619	08/12/2020	Motion Denied
Studio 417, Inc. v. Cincinnati Insurance Company [consolidated with Rieger]	WDMO	MO	6:20-cv-03127-SRB	08/12/2020	Motion Denied
Somco, LLC v. Lightning Rod Mutual Insurance Company	Cuyahoga County	OH	CV-20-931763	08/12/2020	Motion Denied

2021 WL 147139
Only the Westlaw citation is currently available.
United States District Court, W.D. Pennsylvania.

1 S.A.N.T., INC., Plaintiff,
v.
BERKSHIRE HATHAWAY, INC. and NATIONAL FIRE & MARINE **INSURANCE** COMPANY, Defendants.

Civil Action No. 2:20-cv-862
|
Filed 01/15/2021

MEMORANDUM OPINION

WILLIAM S. STICKMAN IV UNITED STATES DISTRICT JUDGE

***1** Defendant National Fire & Marine **Insurance** Co. ("National Fire")[1] filed its Federal Rule of Civil Procedure ("Rule") 12(b)(6) Motion to Dismiss (ECF No. 17). Briefing is complete, and oral argument occurred on October 28, 2020. The matter is ripe for resolution. For the reasons set forth here, Defendant's Motion to Dismiss is granted.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff 1 S.A.N.T., Inc., d/b/a Town & Country and d/b/a Gatherings Banquet and Event Center ("1 S.A.N.T."), the operator of a restaurant and tavern business, bought commercial property **insurance** for lost **business income** for a policy term of June 1, 2019 to June 1, 2020 ("Policy"). (ECF No. 15, ¶¶ 3, 13). In response to the **COVID-19** pandemic, on March 6, 2020, Governor Tom Wolf declared a "Disaster Emergency" throughout the Commonwealth of Pennsylvania. (*Id.* ¶ 29). On March 19, 2020, Governor Wolf signed an Executive Order ("Governor Wolf's order") closing all non-life sustaining businesses, which included 1 S.A.N.T. (*Id.* ¶ 29). 1 S.A.N.T. incurred, and continues to incur, a substantial loss of **business income** and other expenses. (*Id.* ¶ 45). 1 S.A.N.T. provided notice to National Fire of its claim for interruption to its business. (*Id.* ¶ 46). On June 4, 2020, National Fire denied 1 S.A.N.T.'s claim. (*Id.* ¶ 47).

1 S.A.N.T. filed a putative class action lawsuit against National Fire, seeking coverage for lost **business income** resulting from the suspension or reduction of its operations because of the **COVID-19** pandemic. (ECF No. 18, p. 6).

National Fire submits that 1 S.A.N.T.'s claim for coverage under the Policy was properly denied because (1) 1 S.A.N.T. did not sustain "**direct physical loss** of or damage to Covered Property" necessary to trigger coverage under the Policy; (2) 1 S.A.N.T.'s Policy excludes the alleged loss or damage because it was caused by **COVID-19**, which is barred by the Virus Exclusion provision; and (3) the orders issued by state and local governments in response to **COVID-19** did not prohibit

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access to 1 S.A.N.T.'s property, which is required to trigger **Civil Authority** coverage. (*Id.*). National Fire submits its Rule 12(b)(6) Motion to Dismiss to the Court asserting that 1 S.A.N.T. does not have a claim under 1 S.A.N.T.'s Policy. (ECF No. 18).

1 S.A.N.T. opposes the Motion to Dismiss and contends the Policy should cover its claim. 1 S.A.N.T. argues that triggering coverage for physical loss or damage does not require physical alteration, that it was triggered because 1 S.A.N.T. could not use the property for its intended purpose. (ECF No. 26, p. 6). Further, it argues that the Virus Exclusion does not bar coverage because Governor Wolf's orders were the efficient, proximate cause of 1 S.A.N.T.'s loss and not the virus. (*Id.* at 6–7). Alternatively, the ubiquitous presence of the virus is enough to constitute a covered cause of loss. (*Id.* at 7). Finally, 1 S.A.N.T. argues that National Fire should be estopped from applying the Virus Exclusion provision under the theory of Regulatory Estoppel. (*Id.*).

STANDARD OF REVIEW

***2** A motion to dismiss filed under Rule 12(b)(6) tests the legal sufficiency of the complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). A plaintiff must allege enough facts that, if accepted as true, state a claim for relief plausible on its face. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court must accept all well-pleaded factual allegations as true and view them in the light most favorable to a plaintiff. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009); *see also DiCarlo v. St. Marcy Hosp.*, 530 F.3d 255, 262–63 (3d Cir. 2008). Although the Court must accept the allegations as true, it is "not compelled to accept unsupported conclusions and unwarranted inferences, or a legal conclusion couched as a factual allegation." *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007) (citations omitted).

The "plausibility" standard required for a complaint to survive a motion to dismiss is not akin to a "probability" requirement but asks for more than sheer "possibility." *Iqbal*, 556 U.S. at 678 (*citing Twombly*, 550 U.S. at 556). In other words, the complaint's factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations are true even if doubtful in fact. *Twombly*, 550 U.S. at 555. Facial plausibility is present when a plaintiff pleads factual content that allows the Court to draw the reasonable inference that a defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678. Even if the complaint's well-pleaded facts lead to a plausible inference, that inference alone will not entitle a plaintiff to relief *Id.* at 682. The complaint must support the inference with facts to plausibly justify that inferential leap. *Id.*

ANALYSIS

National Fire seeks to dismiss 1 S.A.N.T.'s amended complaint for two reasons. National Fire argues that the Policy does not provide coverage because 1 S.A.N.T. failed to allege that it suffered any **direct physical loss** or damage as a result of the involuntary business closure, which is necessary to implicate any coverage. National Fire contends that, even if a **direct physical loss** had been alleged, the Policy contains a broad exclusion for viruses that applies to the **COVID-19** pandemic. Before turning to the merits, the Court must consider the general principles governing **insurance** contract interpretation under Pennsylvania law.

A. Principles of Pennsylvania insurance contracts

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Courts generally enforce the plain language of an **insurance** policy. *Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 901 (3d Cir. 1997) ("If ... the terms of the policy are clear and unambiguous, the general rule in Pennsylvania is to give effect to the plain language of the agreement.") (citations omitted). Policy exclusions, similarly, are enforced under their plain meaning. *Pac. Indem. Co. v. Linn*, 766 F.2d 754, 760–61 (3d Cir. 1985) ("Exclusions from coverage contained in an **insurance** policy will be effective against an insured if they are clearly worded and conspicuously displayed ...."). Any ambiguity in policy language should be interpreted against the insurer. *McMillan v. State Mut. Life Ins. Co.*, 922 F.2d 1073, 1075 (3d Cir. 1990).

When parties dispute coverage and exclusions under an **insurance** policy, courts will apply a burden-shifting framework. *See Burgunder v. United Specialty Ins. Co.*, No. CV 17-1295, 2018 WL 2184479, at *4 (W.D. Pa. May 11, 2018). "[I]n an action based upon an 'all risks' **insurance** policy, the burden is upon the insured to show that a loss has occurred; thereafter, the burden is on the insurer to defend by showing that the loss falls within a specific policy exclusion." *Betz v. Erie Ins. Exch.*, 957 A.2d 1244, 1256 (Pa. Super. 2008).

B. The Court must interpret the plain meaning of 1 S.A.N.T.'s Policy.

***3** "All risks" policies differ from policies that cover specified risks, such as flooding or earthquakes. National Fire's Policy provides general coverage with specific exclusions. If an exclusion does not apply, then the risk is covered. If an exclusion applies, then the risk is not covered. **COVID**-**19**, National Fire claims, is an excluded peril under the Virus Exclusion of 1 S.A.N.T.'s Policy. (ECF No. 18, p. 12). But before the Court can even consider the applicability of an exclusion, it must first determine whether there is an insurable loss.

Litigation involving **insurance** claims arising out of business shutdowns and restrictions imposed by **COVID**-**19** mitigation orders have proliferated in recent months, and courts have had a chance to specifically examine the relevant policy language to determine whether coverage was warranted. Some courts have focused on virus exclusions within policies, many dismissing the cases given their policies' virus exclusion provisions.[2] Other courts have focused on the threshold question of whether the claimants could establish physical loss or damage tied to the novel **coronavirus** or state and local orders in response to the virus.[3]

***4** The Court will first determine whether, in this case, there was a loss that would trigger coverage under the language of the policy. If so, it will look at whether the virus exclusion applies.

C. Coverage under the policy requires **direct**, **physical** **loss**.

The policy that 1 S.A.N.T. bought from National Fire has the following threshold provision for coverage:

> 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.

(ECF No. 1-1, p. 16). National Fire asserts that **COVID**-**19** is excluded as a potential Covered Cause of Loss under the Virus Exclusion and that 1 S.A.N.T. has not shown a "**direct** **physical** **loss** of or damage" to the property. (ECF No. 18, p. 13). Indeed, National Fire argues that 1 S.A.N.T. has sustained no "**direct** **physical** **loss** of or damage to" any covered property. It contends that 1 S.A.N.T. has not claimed that the virus is present at its facilities or that any of its employees have contracted the virus. (*Id.*). National Fire points out that access to the building was never impeded and that the building was used for alternate operations, such as takeout. The gist of its argument is, simply, that the interruption of 1 S.A.N.T.'s usual and intended business operations resulting from Governor Wolf's mitigation efforts cannot be considered a **direct**, **physical** **loss** of or damage to the Covered Properly, which ends the coverage analysis.

1 S.A.N.T. objects to National Fire's contention that a policyholder must show actual physical damage to invoke policy

protections. 1 S.A.N.T. emphasizes that the Policy does not define "**direct** **physical** **loss** of or damage to" properly (EFC No. 26, p. 11) and cites a recent **COVID**-**19** case in the Western District of Missouri that interpreted "**direct** **physical** **loss**" broadly to include business closures dictated by government **COVID**-**19** mitigation orders. *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-cv-03127-SRB, 2020 WL 4692385, at *4–8 (W.D. Mo. Aug. 12, 2020). There, the court denied a motion to dismiss recognizing that the insurer "conflate[d] 'loss' and 'damage' in support of its argument that the Policies require[d] a tangible, physical alteration." *Id.* at *5. The court elaborated, "[E]ven absent a physical alteration, a physical loss may occur when the properly is uninhabitable or unusable for its intended purpose." *Id.* Consulting a dictionary definition, the court found loss included either "the act of losing possession" or "deprivation" of the plaintiff's properly. *Id.* (quoting Merriam-Webster, www.merriam-webster.com/dictionary/loss).

1 S.A.N.T. argues that events rendering the property unusable for its intended purpose cause "physical loss of or damage to" properly, even if the structure remains intact. *See, e.g.*, *Port Auth. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (finding physical loss or damage results only "if an actual release of asbestos fibers ... has resulted in contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable ..."). It points to a decision of the United States District Court for the Middle District of Pennsylvania, which found that a policyholder was covered for loss of the use of a property despite no physical damage to a home where the home became unusable because of flooding surrounding the home. *Gibson v. Sec'y of U.S. Dep't of Hous. & Urb. Dev.*, 479 F. Supp. 3, 10 (M.D. Pa. 1978).[4] 1 S.A.N.T. also cites a New Jersey Superior Court's recent denial of an insurer's motion to dismiss a **COVID**-**19**-related **business** **interruption** claim asserted by a group of optometry practices. Transcript of Oral Hearing 29:1 in *Optical Servs. USA v. Franklin Mut. Ins. Co.*, No. 1:20-cv-080690-JHR-KMW (N.J. Super. Ct. Aug. 13, 2020). There, the court recognized the policyholder had stated a valid claim whether "physical damage occurs where a policyholder loses functionality of their property and by operation of **civil** **authority** such as the entry of an executive order results in a change to the property." *Id.* at 29:15–20.[5]

***5** 1 S.A.N.T. argues that being present at the restaurant created an unsafe situation because of the ongoing pandemic. It points to a case involving forest fires where the policyholder cancelled several performances at its outdoor theater because of dangerous levels of smoke and ash from nearby fires. *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No 1:15-cv-01932-CKM, 2016 WL 3267247, at *4 (D. Ore. June 7, 2016), *vacated by stipulation of the parties.* The policyholder made a claim for "**direct** **physical** **loss** of or damage to covered properly," but the **insurance** company denied coverage. *Id.* at *5. The policyholder argued that wildfire smoke caused the injury and harm to the theater including the air within the theater space. *Id.* The court found that "[t]he policy itself [did] not give any indication that the air within a covered building" could not suffer contamination or infiltration. *Id.* at *6. The smoke and ash, although they did not cause structural damage, were enough to constitute physical damage to trigger coverage. *Id.* at *11. 1 S.A.N.T. also points to the holding in *Murray v. State Farm Fire & Casualty Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) where the court recognized that "[l]osses covered by the policy[ ] includ[e] those rendering the insured property unusable or uninhabitable," even "in the absence of structural damage to the insured property." There, the court held that the properties suffered "real damage" when they became "unsafe for habitation." *Id.* Physical loss "may exist in the absence of structural damage" to the insured property in a circumstance where there is a significant risk of catastrophic loss. *Id.*

The Court's review of the language of the Policy reveals that National Fire has not defined "**direct** **physical** **loss** of" or "direct physical damage to." But failing to define a coverage term does not mean that it is ambiguous. *Capital Flip, LLC v. Am. Modern Select Ins. Co.*, 416 F. Supp. 3d 435, 439 (W.D. Pa. 2019) (citing *Heebner v. Nationwide Ins. Enterprise*, 818 F. Supp. 2d 853, 857 (E.D. Pa. 2011)). When a policy, or any document, neglects to define a term, the Court will read it in the plain and generally accepted meaning of the term. *Id.* Four words are critical to the determination of this issue: "**direct**," "**physical**," "**loss**" and "damage." "Direct"[6] is defined as

> 1a: proceeding from one point to another in time or space without deviation or interruption ...
>
> b: proceeding by the shortest way ...
>
> 2a: stemming immediately from a source ...
>
> b: being or passing in a straight line of descent from parent to offspring ...
>
> c: having no compromising or impairing element ....

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The definition of “physical”[7] is

> 1a: of or relating to natural science
>
> b(1): of or relating to physics
>
> (2): characterized or produced by the forces and operations of physics
>
> 2a: having material existence: perceptible especially through the senses and subject to the laws of nature[,] ... motion, and resistance ...
>
> b: of or relating to material things
>
> 3a: of or relating to the body ....

“Loss”[8] is

> 1: DESTRUCTION, RUIN ...
>
> 2a: the act of losing possession ...
>
> b: the harm or privation resulting from loss or separation ...
>
> c: an instance of losing ...
>
> 3: a person or thing or an amount that is lost ...
>
> 4a: failure to gain, win, obtain, or utilize ...
>
> b: an amount by which the cost of something exceeds its selling price
>
> ...
>
> 5: decrease in amount, magnitude, or degree ...
>
> 6: the amount of an insured’s financial detriment by death or damage that the insurer is liable for ....

Finally, “damage”[9] is defined as “loss or harm resulting from injury to person, property, or reputation.”

The Court examined these ordinary, dictionary definitions of the relevant terms in the context of their usage in the Policy language. For example, “loss” and “damage” do not stand alone but are modified by the terms “direct physical.” The Court must give effect to *all* the terms in the context of the Policy language. The starting point of the analysis is “direct.” The ordinary usage recounted presupposes a level of immediacy that is simply not present in 1 S.A.N.T.’s theory of coverage. Moreover, when combined with “physical”, there is no reasonable question that the Policy language presupposes that the request for coverage stems from an *actual impact* to the property’s structure, rather than the diminution of its economic value because of governmental actions that do not affect the structure. This understanding is highlighted, confirmed and consummated by the terms “loss of” or “damage to.” The ordinary usage of these terms, individually and in the context of the other terms in the sentence, can only be reasonably construed as extending to events that impact the physical premises completely (loss) or partially (damage). On the other hand, a determination that “**direct physical loss** of or damage to” the property can refer to mere economic losses caused by governmental orders limiting the use of property (while not impacting the physical structure itself) would stretch the language beyond the plain meaning of its terms and beyond the interpretive authority of the Court.

***6** While 1 S.A.N.T. has cited cases in which courts have accepted the interpretation of the same or similar policy language that it proffers here, the Court is not persuaded by the reasoning of those cases. Rather, the growing body of case law rejects the contrived definition of “**direct physical loss** of or damage to” that would provide coverage for economic losses unrelated to physical impact to the covered structure. The Court believes that these cases represent the more reasonable interpretation of the policy language.

In a case with similar facts and similar insurance coverage, the Middle District of Florida recently analyzed and defined "direct physical loss of or damage to" in *Prime Time Sports Grill, Inc. v. DTW 1991 Underwriting Ltd.*, No. 8:20-cv-771-T-36JSS (M.D. Fla. Dec. 17, 2020). There, the court examined Florida jurisprudence and concluded that "there must be tangible damage to property for a 'direct physical loss' to exist." *Id.* at *6. The court cited *Homeowners Choice Property & Casualty v. Miguel Maspons*, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017), where the state court recognized that "direct" and "physical" must "modify loss and impose the requirement that the damage be actual." *Id.* at *5.

The Eastern District of Pennsylvania took a similar approach. In *Newchops Restaurant Comcast LLC v. Admiral Indemnity Co.*, No. 20-1949 (E.D. Pa. Dec. 17, 2020), the court found property damage must be "a distinct, demonstrable, physical alteration of the property." (quoting 10A *Couch on Insurance* § 148.46 (3d ed. 1995)). The court continued that "[p]ure economic losses are intangible and do not constitute property damage." *Id.* at 9 (quoting 9A *Couch on Insurance* § 129.7). The court held that "damage must be physical" and that orders prohibiting access do not constitute physical damage. *Id.* at 10.

The Court holds that after reading the ordinary usage of the terms in the Policy, the language can be construed only as extending to events that physically impact the covered property.

1) Virus's ubiquity

Another argument that 1 S.A.N.T. asserts is that there was "direct physical loss of or damage to" the property because COVID-19 is a physical substance that is readily transmissible and ubiquitous. (ECF No. 26, p. 19). The virus attaches to, and damages, property by making premises unsafe and unusable. (*Id.*). In other words, because virus particles are, as 1 S.A.N.T. contends, ubiquitous physical objects, the presence of those physical particles can be said to render the property unsafe to inhabit and thus can constitute physical loss or damage.

Courts have found physical loss or damage to property that was too unsafe to inhabit. *See Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (allowing a claim for business income coverage where the risk of collapse required abandonment of grocery store); *Manpower Inc. v. Ins. Co. of Pa.*, No. 08C0085, 2009 WL 3738099, at *3 (E.D. Wis. Nov. 3, 2009) (finding inability to use building, which was unstable but had suffered no visible damage, would support the business income claim); *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650 (Cal. Ct. App. 1962) (finding a house was unsafe and allowing coverage after a landslide caused a portion of the ground surrounding property to collapse).

National Fire rejects this theory. It argues that 1 S.A.N.T.'s ubiquity theory conflicts with the facts pled because 1 S.A.N.T. has not alleged that someone has been infected, that COVID-19 was present in the building, or that the building even closed because of the ubiquitous presence of the virus (it remained open for takeout operations). (ECF No. 18, p. 19). National Fire highlights that no employee or customer has been alleged to have been infected by COVID-19. (*Id.*). But even had 1 S.A.N.T. alleged an infection on its property, it contends that it would still not constitute physical damage.[10]

***7** The cases cited by 1 S.A.N.T. all involve an actual impeding physical danger already impacting the site. The ubiquity theory cannot broaden the policy definition of "direct physical loss of or damage to" discussed above. There is no question that the novel coronavirus is a physical substance. But even if it were, as argued, so ubiquitous as to be considered present at the insured property, it still does not fall within the policy definition for a covered loss. The theory also is inconsistent with the pleading, which shows that the virus was not so physically ubiquitous as to prevent access to or operations at the property.

D. Governor Wolf's orders do not trigger coverage under the Civil Authority provision.

The Civil Authority coverage requires an "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." (ECF No. 1-1, p. 32). The coverage definition requires access to the covered properly to be limited because of "**direct physical loss** of or damage to [other] property." As explained above, 1 S.A.N.T. has failed to plead any such loss or damage, either to the covered property or any other property. This alone would foreclose coverage under the **Civil Authority** provisions. Coverage can also be denied because reduction to partial access does not suffice to trigger **business income** coverage under the **Civil Authority** provisions. *See, e.g.*, *By Development, Inc. v. United Fire & Cas. Co.*, No. Civ. 04-5116, 2006 WL 694991, at *6 (D. S.D. Mar. 14, 2006) (holding that a civil order making access to insured's property harder, but not prohibiting access, did not trigger **business**-**interruption** coverage); *S. Hosp., Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1140 (10th Cir. 2004) (finding no coverage under hotel's **civil authority** provision because FAA order prohibiting airplanes from flying did not prohibit all access to hotel operations); *Kean, Miller, Hawthorne, D'Armond McCowan & Jarman, LLP v. Nat'l Fire Ins. Co. of Hartford*, 2007 WL 2489711, *4 (M.D. La. Aug. 28, 2007) (finding no coverage under insured office's **civil authority** coverage because the direction of Baton Rouge officials to stay off streets did not deny access to business's premises).

Here, the restaurant remained open for takeout and delivery services, and employees had access to the business to service customers. Governor Wolf's orders do not constitute **direct physical loss** of or damage to any property and, as such, cannot implicate **Civil Authority** coverage. 1 S.A.N.T. was not denied access to its facilities. The Court holds that the **Civil Authority** coverage is not implicated under these facts.

CONCLUSION

1 S.A.N.T and similarly situated businesses unquestionably present as sympathetic parties. They endured interruptions to their business operations in a way that was truly unexpected and unprecedented. Yet, the Court's coverage analysis must be based only on the terms of the **insurance** contract. An examination of the plain language of the Policy language requires the Court to find in National Fire's favor. There is not coverage because there was no **direct physical loss** of or damage to the covered property. Without coverage under the Policy, the Court is compelled to grant National Fire's motion to dismiss.

For the reasoning set forth here, Defendants' 12(b)(6) Motion to Dismiss (ECF No. 17) will be granted. An Order of Court will follow.

All Citations

Slip Copy, 2021 WL 147139

Footnotes

[1] Plaintiff initially filed its complaint against both Berkshire Hathaway, Inc. and National Fire & Marine **Insurance** Company. 1 S.A.N.T. voluntarily dismissed without prejudice all claims against Berkshire Hathaway (ECF No. 24), and the Court terminated Berkshire Hathaway as a party (ECF No. 25).

[2] *See* *Franklin EWC, Inc. v. Hartford Fin. Servs. Group, Inc.*, No. 20-cv-04434 JSC, 2020 WL 5642483, at *2 (N.D. Cal. Sept. 22, 2020) (granting Rule 12(b)(6) motion with prejudice because "the loss was caused directly or indirectly by the virus, the Virus Exclusion applies under its plain and unambiguous language"); *Mauricio Martinez DMD, P.A. v. Allied Ins. Co.*, No. 2:20-cv-00401-FtM-66NPM 2020 WL 5240218, at *3 (M.D. Fla. Sept. 2, 2020) (granting Rule 12(b)(6) motion with prejudice applying the policy's virus exclusion); *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020) (same); *Turek Enters. Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *8 (E.D. Mich. Sept. 3, 2020) (same); *Wilson v. Hartford Cas. Co.*, No. 20-3384, 2020 WL 5820800, at *15 (E.D. Pa. Sept. 30, 2020) (same); *Mark's Engine Co. No. 28 Rest. v. Travelers Indem. Co. of Conn.*, No. 2:20-cv-04423-AB-SK, 2020 WL 5938689, at *9 (C.D. Cal. Oct. 2, 2020) (same). *But see* *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, No. 6:20-cv-1174-Orl-22EJK, 2020 WL 5939172, at *6 (M.D. Fla. Sept. 24, 2020) (reserving judgment on the applicability of the virus exclusion pending receipt of the entire policy); *Venezie Sporting Goods, LLC v. Allied Ins. Co. of Am.*, 2:20-cv-1066, 2020 WL 565198 (W.D. Pa. Sept. 23, 2020) (declining jurisdiction and remanding to state court because of a novel state law issue); *Seifert v.*

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IMT Ins. Co., No. CV 20-1102 (JRT/DTS), 2020 WL 6120002, at *1 (D. Minn. Oct. 16, 2020) (same).

3 *See T & E Chicago LLC v. Cincinnati Ins. Co.*, No. 20-4001, 2020 WL 6801845, at *5 (N.D. Ill. Nov. 19, 2020) (denying plaintiff's claim for coverage because plaintiff did not suffer physical loss); *Graspa Consulting, Inc. v. United Nat'l Ins. Co.*, No. 20-23245, 2020 WL 7062449, at *10 (S.D. Fla. Nov. 17, 2020) (granting an **insurance** company's Rule 12(b)(6) motion because a "loss must arise to actual damage"). *But see Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, No. CV-20-932117 (Ohio Ct. Com. Pl. Cuyahoga Cnty. Nov. 17, 2020) (finding defendant's "physical loss or damage" argument premature at the motion to dismiss stage because plaintiffs alleged the presence of **COVID**-**19** on its premises); *Cajun Conti LLC v. Certain Underwriters at Lloyd's London*, No. 2020-02558 (Civ. Dist. Ct. Parish of Orleans Nov. 4, 2020) (denying defendant's motion for summary judgment because "**direct** **physical** **loss** or damage" constituted a matter of first impression); *Hill & Stout PLLC v. Mut. Of Enumclaw Ins. Co.*, No. 20-2-07925-1 (Wash. Super. Ct. King Cnty. Nov. 3, 2020) (denying motion to dismiss **COVID**-**19**-related claims for coverage under "all-risk" policy that covered "physical loss or damage to" property).

4 1 S.A.N.T. also cites *Travco Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010) (noting that most cases nationwide find that physical damage to property is unnecessary where, at least, the property has been rendered unusable by a covered cause of loss); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) ("**Direct** **physical** **loss** also may exist in the absence of structural damage to the insured property."); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600, 601–02 (Fla. Dist. Ct. App. 1995) (finding coverage where, as a result of an unknown substance released into a sewage treatment plant causing a shutdown and the city's order relating to same, the plant could not be used for its intended purpose).

5 The court cited *Wakefern Food Corp. v. Liberty Mutual Fire* ***Insurance*** *Co.*, 406 N.J. Super. 524 (App. Div. 2019), where the New Jersey appellate court found that a grocery store's loss of power, despite no physical damage, constituted physical loss.

6 *Direct*, Merriam-Webster, https://www.merriam-webster.com/dictionary/direct (last visited Jan. 15, 2021).

7 *Physical*, Merriam-Webster, https://www.merriam-webster.com/dictionary/physical (last visited Jan. 15, 2021).

8 *Loss*, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss (last visited Jan. 15, 2021).

9 *Damage*, Merriam-Webster, https://www.merriam-webster.com/dictionary/damage (last visited Jan. 15, 2021).

10 In *Social Life Magazine Inc. v. Sentinel* ***Insurance*** *Co.*, 20-cv-3311 (S.D.N.Y.), a recent **COVID**-**19** **insurance** case, the court ruled that "Social Life's properly has not suffered any damage." The judge replied to Social Life's contention that the "virus exists everywhere" by saying, "It damages lungs. It doesn't damage printing presses." Jeff Sistrunk, *Magazine Turns to 2d Cir. in* ***Coronavirus*** *Coverage Fight*, Law360 (May 18, 2020, 4:07 PM), https://www.law360.com/articles/1274622.

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Declined to Extend by V&S Elmwood Lanes, Inc. v. Everest National Insurance Company, E.D.Pa., January 11, 2021

2020 WL 5820800
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

Rhonda Hill WILSON, et al., Plaintiffs,
v.
HARTFORD CASUALTY CO., et al., Defendants.

CIVIL ACTION NO. 20-3384
|
Filed 09/30/2020

Synopsis
Background: Insureds brought action in state court against insurer and their broker-agent, alleging breach of insurance contract and obligations to them by denying their claim for coverage arising from interruption of their business caused by coronavirus and resulting governmental COVID-19 closure orders. Insurer removed action, and moved to dismiss.

Holdings: The District Court, Eduardo C. Robreno, Senior District Judge, held that:

[1] complaint could not be amended after removal so as to defeat federal diversity jurisdiction by requesting damages not in excess of $70,000;

[2] Pennsylvania law applied to insureds' action;

[3] virus exclusion applied, barring coverage for business interruption losses;

[4] exemption to virus exclusion did not apply to insureds' business interruption losses;

[5] anti-concurrent causation clause in virus exclusion barred coverage even assuming governmental closure orders were separate cause of loss;

[6] broker-agent that was involved in procurement of insurance policy could not be liable for breach of insurance policy; and

[7] leave to amend complaint against insurer alleging breach of insurance policy would have been futile.

Motion granted.

West Headnotes (23)

[1] **Federal Civil Procedure** Insufficiency in general

On a motion to dismiss for failure to state a claim upon which relief can be granted, 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. Fed. R. Civ. P. 12(b)(6).

1 Cases that cite this headnote

[2] **Federal Civil Procedure** Matters considered in general

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, a court limits its inquiry to the facts alleged in the complaint and its attachments, matters of public record, and undisputedly authentic documents if the complainant's claims are based upon these documents.

[3] **Removal of Cases** Constitutional and statutory provisions

Because federal courts are courts of limited jurisdiction, the removal statute is to be strictly construed against removal. 28 U.S.C.A. § 1441.

[4] **Removal of Cases**Hearing and scope of inquiry

A motion to remand is evaluated under the same analytical approach as a motion challenging subject matter jurisdiction. 28 U.S.C.A. §§ 1441, 1447(c); Fed. R. Civ. P. 12(b)(1).

[5] **Removal of Cases**Increase or reduction by amendment

Complaint could not be amended after removal so as to defeat federal diversity jurisdiction by requesting damages not in excess of $70,000, since amount in controversy was determined as of date of removal, and initial complaint sought damages in excess of $100,000. 28 U.S.C.A. §§ 1332(a), 1441.

[6] **Removal of Cases**Evidence

The removing defendant does not have the burden to prove to a legal certainty that the plaintiff is entitled to recover more than $75,000 when the plaintiff has not specifically averred in the complaint that he or she is entitled to an amount below the jurisdictional threshold; in seeking remand, the challenger to subject matter jurisdiction must prove to a legal certainty that the amount in controversy could not exceed the statutory threshold. 28 U.S.C.A. §§ 1441, 1447(c).

[7] **Removal of Cases**Allegations and prayers in pleadings

Amount in controversy for diversity jurisdiction after insurer's removal was met by aggregating insureds' unjust enrichment claim under Pennsylvania law requesting damages in excess of $50,000 for all money insureds paid for business interruption insurance policy and breach of contract claim requesting damages in excess of $50,000 for lost business income due to coronavirus and resulting governmental COVID-19 closure orders. 28 U.S.C.A. §§ 1332(a), 1441.

[8] **Federal Courts**Right to Decline Jurisdiction; Abstention
Federal Courts Declaratory judgment

When a complaint includes claims for both declaratory and legal relief, a court may apply the "independent claim" test to determine whether a district court has discretion to decline jurisdiction. 28 U.S.C.A. § 2201.

1 Cases that cite this headnote

[9] **Federal Courts**Colorado River abstention
Federal Courts Declaratory judgment

Under the independent claim test, a court first determines whether the legal claims are independent of the declaratory claims, meaning that the legal claims alone are sufficient to invoke the court's subject matter jurisdiction and can be adjudicated without the requested declaratory relief; if the legal claims are independent, the court has a virtually unflagging obligation to hear those claims, provided that the "exceptional circumstances" laid out in *Colorado River* do not apply. 28 U.S.C.A. § 2201.

2 Cases that cite this headnote

[10] **Federal Courts**Withholding Decision;

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Certifying Questions

District courts in the Third Circuit do not have authority to certify cases to the Pennsylvania Supreme Court, even if the legal issues in the case are unsettled under Pennsylvania law. Pa. R. App. P. 3341.

[11] **Contracts**Questions for Jury

Under Pennsylvania law, contract interpretation is a question of law that requires the court to ascertain and give effect to the intent of the contracting parties as embodied in the written agreement.

1 Cases that cite this headnote

[12] **Federal Courts**Conflict of Laws; Choice of Law

In a diversity case, the forum state's choice of law rules govern.

[13] **Contracts**What law governs

Under Pennsylvania's choice of law rules, a contract is construed according to the law of the state with the most significant contacts or relationship with the contract.

1 Cases that cite this headnote

[14] **Insurance**Property insurance

Pennsylvania law applied to insureds' action in Pennsylvania federal district court against insurer and their broker-agent alleging breach of insurance contract and obligations to them by denying their claim for coverage arising from interruption of their business caused by coronavirus and resulting governmental COVID-19 closure orders, since policy was issued to insured in Pennsylvania and provided coverage per terms of policy for insured property located in Pennsylvania.

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

When the language of an insurance policy is clear and unambiguous, a court applying Pennsylvania law is required to give effect to that language.

2 Cases that cite this headnote

[16] **Insurance**Ambiguity in general
InsuranceConstruction to be unstrained

Under Pennsylvania law, a court may not distort the meaning of the language of an insurance policy or resort to a strained contrivance in order to find an ambiguity.

[17] **Insurance**Acts of government or governmental actors
InsuranceBusiness Interruption; Lost Profits
InsuranceCombined or concurrent causes

Insureds were not entitled under insurance policy under Pennsylvania law to recover for business interruption losses caused by coronavirus and resulting governmental COVID-19 closure orders, since insurance policy had virus exclusion stating that insurer would not pay for loss or damage caused directly or indirectly by presence, growth, proliferation, spread or any activity of fungi, wet

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rot, dry rot, bacteria or virus and it applied regardless of any other cause or event that contributed concurrently or in any sequence to loss and whether or not loss event resulted in widespread damage or affected substantial area.

5 Cases that cite this headnote

[18] **Federal Courts**State constitutions, statutes, regulations, and ordinances
Federal Courts Anticipating or predicting state decision

Federal courts have an obligation to interpret state law even if the law is unsettled; if the state law is unsettled, the federal court must predict how the highest court of the state would resolve the issue.

[19] **Insurance**Acts of government or governmental actors
InsuranceBusiness Interruption; Lost Profits

Exemption to virus exclusion in insurance policy did not apply to insureds' business interruption losses that resulted from coronavirus and resulting governmental COVID-19 closure orders, since exemption applied only when virus was result of specified cause of loss other than fire or lightning or equipment breakdown accident.

3 Cases that cite this headnote

[20] **Insurance**Business Interruption; Lost Profits
InsuranceCombined or concurrent causes

Virus exclusion barred coverage for business interruption losses under insurance policy under Pennsylvania law; even assuming that governmental closure orders were separate cause of loss, anti-concurrent causation clause in virus exclusion provided that such loss or damage was excluded regardless of any other cause or event that contributed concurrently or in any sequence to loss.

4 Cases that cite this headnote

[21] **Insurance**Duties and Liabilities to Insureds or Others

Broker-agent that was involved in procurement of insurance policy could not be liable under Pennsylvania law for breach of insurance policy, since it was not party to insurance contract.

[22] **Federal Civil Procedure**Liberality in allowing amendment

Leave to amend a pleading should be freely granted. Fed. R. Civ. P. 15.

[23] **Federal Civil Procedure**Pleading over

Leave to amend complaint against insurer alleging breach of insurance policy would have been futile, and therefore all of insureds' claims had to be dismissed with prejudice, since exclusion and its exemptions were clear and unambiguous and none of specified causes of loss in exemption could plausibly apply.

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MEMORANDUM

EDUARDO C. ROBRENO, District Judge

I. INTRODUCTION

***1** Plaintiffs Rhonda Hill Wilson and The Law Office of Rhonda Hill Wilson ("Plaintiffs") allege that Hartford Casualty Company ("Hartford") and their broker-agent, USI Insurance Services, LLC ("USI") (together, "Defendants") breached their insurance contract and obligations to Plaintiffs by denying their claim for insurance coverage arising from the interruption of their business caused by the Coronavirus and resulting governmental COVID-19 closure orders.

Plaintiffs' Amended Complaints are identical and contain three Counts against both Defendants: I) A request for declaratory relief under the Declaratory Judgment Act regarding whether Plaintiffs are entitled to coverage under the insurance policy for their past and future losses; II) Breach of Contract; and III) Injunctive Relief enjoining denials of coverage.

Hartford removed this case to federal court on July 10, 2020. Plaintiffs filed a Motion to Remand to state court and a Motion to Dismiss for lack of subject matter jurisdiction (which also contains a request to remand). Both Defendants filed Motions to Dismiss for failure to state a claim with respect to all Counts.

Plaintiffs' Motion to Remand will be denied because the correct amount in controversy to consider is the one in the initial Complaint, which was in effect at the time of removal. Plaintiffs' Motion to Dismiss for lack of subject matter jurisdiction and request to remand will also be denied for the same reason and because the legal claims are independent of the declaratory claim. Hartford's Motion to Dismiss for failure to state a claim will be granted with respect to all Counts because a virus exclusion applies and the exemptions to it are inapplicable here. USI's Motion to Dismiss for failure to state a claim will be granted with respect to all Counts for the same reason and also because they were not a party to the contract. Leave to amend will not be granted with respect to any of Plaintiffs' claims because it would be futile.

II. BACKGROUND

Plaintiff Rhonda Hill Wilson is an attorney who is the sole owner of the Law Office of Rhonda Hill Wilson, P.C. (the second Plaintiff), which is located and does business in Philadelphia, Pennsylvania. Defendant Hartford is an insurance company incorporated in Delaware with its principal place of business in Indiana. Defendant USI Insurance Services is incorporated in North Carolina with its headquarters in New York, and is authorized to do business in Pennsylvania as a licensed property/casualty insurance broker-agent of Hartford.

Prior to 2019, Plaintiffs obtained and maintained an insurance policy ("Policy") from Hartford through their broker-agent, USI. As relevant here, the Policy specifically includes Civil Authority coverage for business interruptions caused by order of a civil authority, Lost Business Income & Extra Expense coverage, Extended Business Income coverage, and Business Income Extension for Essential Personnel coverage, as well as Limited Fungi, Bacteria, or Virus coverage, which is limited to $50,000.

***2** The Civil Authority provision of the Policy at issue applies to the actual loss of business income sustained when access to the policyholder's scheduled premises is prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of the scheduled premises. The Policy also provides coverage to pay for lost business income due to the necessary suspension of a policyholder's operations, regardless of whether the loss was the result of a civil authority order. However, the suspension must be caused by direct physical loss of or physical damage to property at the scheduled premises, caused by or resulting from a Covered Cause of Loss.

On March 19, 2020, the Law Office of Rhonda Hill Wilson was required to close because of various COVID-19 governmental closure orders prohibiting

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non-life sustaining business.[1] Plaintiffs allege that as a result, they suffered direct and actual losses due to COVID-19. Plaintiffs claim they suffered a Covered Cause of Loss to property because the Coronavirus caused direct physical damage and loss of property at their scheduled premises. Plaintiffs allege that the Coronavirus causes physical harm to property so as to impair its value, usefulness and/or normal function, and renders property physically unsafe and unusable, resulting in the physical loss of the property.

Plaintiffs allege that "[i]t is probable that COVID-19 particles have been present at Plaintiffs' building and premises described in the Policy during the Policy period," Pls.' Am. Compl. ¶ 34, and that the Limited Fungi, Bacteria, or Virus Coverage therefore applies to them as well. They further allege that due to the closure orders, Plaintiffs have suffered and continue to suffer substantial lost business income and other financial losses.

Plaintiffs submitted timely insurance claims to Defendants on April 12, 2020, and Hartford responded via letter the next day (April 13) stating that their investigation was complete and Plaintiffs were not entitled to coverage under the Policy.

Based on these facts and allegations, Plaintiffs filed identical Amended Complaints containing three Counts against both Defendants: I) A request for declaratory relief under the Declaratory Judgment Act; II) Breach of Contract; and III) Injunctive Relief enjoining denials of coverage. Hartford timely removed this case to federal court. In response, Plaintiffs filed a Motion to Remand to state court and a Motion to Dismiss for lack of subject matter jurisdiction. Both Defendants have filed Motions to Dismiss for failure to state a claim with respect to all Counts. These motions are now before the Court.

III. LEGAL STANDARD

A. Motion to Dismiss for Failure to State a Claim

***3** A party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). When considering such a motion, the Court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the non-moving party." DeBenedictis v. Merrill Lynch & Co., Inc., 492 F.3d 209, 215 (3d Cir. 2007).

To withstand a motion to dismiss, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). This "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. Although a plaintiff is entitled to all reasonable inferences from the facts alleged, a plaintiff's legal conclusions are not entitled to deference, and the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986).

[1][2]The pleadings must contain sufficient factual allegations so as to state a facially plausible claim for relief. See, e.g., Gelman v. State Farm Mut. Auto. Ins. Co., 583 F.3d 187, 190 (3d Cir. 2009). "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. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)). In deciding a Rule 12(b)(6) motion, the Court limits its inquiry to the facts alleged in the complaint and its attachments, matters of public record, and undisputedly authentic documents if the complainant's claims are based upon these documents. SeeJordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994); Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993).

B. Motion to Remand/Dismiss for Lack of Jurisdiction

The Court may exercise diversity jurisdiction over cases "where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between ... citizens of different States." 28 U.S.C. § 1332(a). A civil action brought in a state court may be removed to the district court in the district where the state action is pending if the district court had original jurisdiction over the case. Id. § 1441(a).

[3][4]Because federal courts are courts of limited jurisdiction, 28 U.S.C. § 1441 is to be strictly construed against removal. La Chemise Lacoste v. Alligator Co., Inc., 506 F.2d 339, 344 (3d Cir. 1974). And "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be

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remanded." 28 U.S.C. § 1447(c). A motion to remand is evaluated under the "same analytical approach" as a Rule 12(b)(1) motion challenging subject matter jurisdiction. SeePapp v. Fore-Kast Sales Co., Inc., 842 F.3d 805, 811 (3d Cir. 2016).

IV. DISCUSSION

A. Motion to Remand

Plaintiffs allege that this case should be remanded to state court because the amount in controversy in their Amended Complaint requests damages not in excess of $70,000 and therefore does not exceed $75,000. Diversity of citizenship is not contested.

[5]This Court and the Third Circuit have held that "[t]he amount in controversy is determined as of the date of removal; that is, a plaintiff may not subsequently amend a complaint so as to defeat federal jurisdiction." Kobaissi v. Am. Country Ins. Co., 80 F. Supp. 2d 488, 489 (E.D. Pa. 2000) (citations omitted); see alsoWerwinski v. Ford Motor Co., 286 F.3d 661, 666 (3d Cir. 2002) (stating that a district court's evaluation of the amount in controversy shall be based on the "plaintiff's complaint at the time the petition for removal was filed"); Lieb v. Allstate Prop. & Cas. Ins. Co., 640 F. App'x 194, 196 (3d Cir. 2016) ("When assessing whether allegations in a state-court complaint are sufficient to support removal to federal court, we look to the complaint that was in effect when removal occurred."). As a result, Plaintiffs' invitation to consider the amount in controversy stated in the Amended Complaint as the relevant amount will be declined.

***4**[6]It is not the removing defendant's burden to prove to a legal certainty that the plaintiff is entitled to recover more than $75,000 when the plaintiff has not specifically averred in the Complaint that he or she is entitled to an amount below the jurisdictional threshold. In seeking remand, "the *challenger* to subject matter jurisdiction" must prove to a legal certainty that "the amount in controversy *could not exceed* the statutory threshold." Frederico v. Home Depot, 507 F.3d 188, 195 (3d Cir. 2007). In the final analysis, the rule "does not require the removing defendant to prove to a legal certainty the plaintiff can recover [the amount in controversy] - a substantially different standard." Judon v. Travelers Prop. Cas. Co. of Am., 773 F.3d 495, 501 (3d Cir. 2014) (quoting Frederico, 507 F.3d at 195).

[7]Plaintiffs' initial Complaint sought declaratory relief for the first claim, and in the ad damnum clause for each of six more claims, damages in excess of $50,000. Specifically, the initial Complaint sought recovery for: Count II) breach of the insurance contract for failing to cover Plaintiffs' alleged COVID-19 losses; Count III) statutory bad faith for denying coverage for Plaintiffs' COVID-19 claim; Count IV) breach of the covenant of good faith and fair dealing; Count V) fraudulent misrepresentation with respect to the scope of coverage; Count VI) unjust enrichment; and Count VII) injunctive relief.[2]See Pls.' Initial Compl. 15, 17-19, 21-22. Plaintiffs also sought, among other things, punitive damages and attorneys' fees.

Plaintiffs' statement in their Motion to Remand that "the ad damnum clause in Plaintiffs' initial Complaint requested an amount not in excess of Fifty Thousand ($50,000.00) Dollars," Pls.' Mot. to Remand 5, is therefore inaccurate. However, Plaintiffs continue to inexplicably assert that their initial Complaint contained the appropriate ad damnum clause necessary for submission to an arbitration panel. It is true that judicial districts in Pennsylvania can set local rules requiring civil cases with amounts in controversy less than $50,000 to be submitted to an arbitration panel. 42 PA. Stat. and Cons. Stat. § 7361 (West 2020). Philadelphia's Court of Common Pleas has adopted this arbitration requirement, but it states that "[e]xcept as provided hereunder, all cases having an amount in controversy, exclusive of interest and costs, of $50,000 or less shall be assigned to the Compulsory Arbitration Program of the Court of Common Pleas of Philadelphia County." Phila. Civ. R. 1301 (emphasis added). Since Plaintiffs sought damages in their initial Complaint in excess of $50,000 for each of six claims (at least two of which can be aggregated) in addition to punitive damages and attorneys' fees, they cannot plausibly claim that they are entitled to an arbitration panel under local law.

Since the amount in controversy is determined as of the date of removal, the relevant amount according to the initial Complaint is damages well in excess of $75,000. The Plaintiffs are therefore incorrect that the burden falls on the Defendants. Since Plaintiffs do not attempt to show that the relevant amount in controversy could not exceed the statutory threshold, Plaintiffs' Motion for Remand will be denied.

B. Motion to Dismiss for Lack of Jurisdiction

***5** Plaintiffs seek to dismiss this case for lack of subject

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matter jurisdiction and remand to state court on two separate grounds. First, Plaintiffs allege that the Court lacks subject matter jurisdiction because the amount in controversy under the Amended Complaint is now less than $75,000. However, as discussed previously, jurisdiction is assessed based on the claims asserted in the complaint at the time of removal, and the removed Complaint sought damages well in excess of $75,000.

[8]Next, Plaintiffs argue that the Court lacks jurisdiction because they assert a claim for declaratory relief alongside their legal claims. However, Third Circuit precedent forecloses this argument. When a complaint includes claims for both declaratory and legal relief, courts in the Third Circuit apply the "independent claim" test to determine whether a district court has discretion to decline jurisdiction. The Third Circuit adopted the independent claim test over competing approaches in 2017 to "prevent[ ] plaintiffs from evading federal jurisdiction through artful pleading." Rarick v. Federated Serv. Ins. Co., 852 F.3d 223, 229 (3d Cir. 2017).

[9]Under the independent claim test, the Court first determines whether the legal claims are independent of the declaratory claims, meaning that the legal claims "are alone sufficient to invoke the court's subject matter jurisdiction and can be adjudicated without the requested declaratory relief." Id. at 228 (quoting R.R. St. & Co., Inc. v. Vulcan Materials Co., 569 F.3d 711, 715 (7th Cir. 2009)). "If the legal claims are independent, the court has a 'virtually unflagging obligation' to hear those claims," provided that the "exceptional circumstances" laid out in Colorado River do not apply. Seeid. (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)). Exceptional circumstances do not apply here since there are no parallel pending state court proceedings, which Plaintiffs concede.

This Court has held multiple times that legal claims are independent of claims for declaratory relief when applying Rarickto insurance coverage disputes. See, e.g., Cont'l Cas. Co. v. Westfield Ins. Co., No. 16-cv-5299, 2017 WL 1477136, at *4–5 (E.D. Pa. Apr. 24, 2017) (in an insurance coverage dispute with similar claims, the Court held that it was required to maintain jurisdiction over the suit -- the breach of contract claims were both "jurisdictionally independent," in that they satisfied the requirements for diversity jurisdiction under 28 U.S.C. § 1332; and "substantively independent," because the claims involving money would not cease to exist if "the request for a declaration simply dropped from the case"; and "[c]laims can be substantively independent even though they are based on the same underlying legal obligation"); Schodle v. State Farm Mut. Auto. Ins. Co., No. 17-cv-407, 2017 WL 1177133, at *2 (E.D. Pa. Mar. 30, 2017) (denying policyholder plaintiff's motion to remand in auto insurance coverage dispute, holding that the policyholder's legal and declaratory claims were independent) ("The breach of contract claim is the essence of this lawsuit. The insured surely wants monetary relief, not simply a declaration of his rights.").

Plaintiffs argue that the Court should nevertheless decline to hear the case because of the factors set forth in Kelly v. Maxum Specialty Insurance Group that a district court should consider when determining jurisdiction of a case involving a claim for declaratory judgment. 868 F.3d 274, 283 (3d Cir. 2017). However, Kellyis inapplicable here since it addressed factors that courts should consider in determining whether to abstain from hearing a case "in actions seeking only declaratory relief." Id. at 282 (emphasis added). The correct test to apply here is the one laid out in Rarick (as previously discussed). See852 F.3d 223.

***6**[10]Additionally, to the extent that Plaintiffs' motion can be construed as a request for certification to the Pennsylvania Supreme Court, given that, according to Plaintiffs, the legal issues in the case are unsettled under Pennsylvania law, their request will be denied. District courts in the Third Circuit do not have authority to refer cases to the Pennsylvania Supreme Court; only the United States Supreme Court and United States Courts of Appeals have that authority. SeePa.R.A.P. Rule 3341.

The legal claims found in the Plaintiffs' initial Complaint appear to be both jurisdictionally and substantively independent (and Plaintiffs do not argue otherwise) of the requested declaratory relief since they satisfy the requirements for diversity jurisdiction under 28 U.S.C. § 1332 (as discussed previously) and would not cease to exist if the request for a declaration simply dropped from the case. As a result, they are alone sufficient to invoke the Court's subject matter jurisdiction. The Court therefore will retain jurisdiction and deny Plaintiffs' Motion to Dismiss for lack of subject matter jurisdiction.

C. Hartford's 12(b)(6) Motion to Dismiss

In insurance contract disputes such as this one, where the Plaintiffs allege a wrongful denial of coverage, it is necessary to analyze the claim in three steps: 1) Whether the Plaintiff's claim falls within the scope of coverage; 2) Whether the Defendant has asserted any affirmative defenses, such as a policy exclusion; and 3) Whether there

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are any applicable exemptions from the exclusion. See 17 Steven Plitt et al., Couch on Insurance ch. 245(3d ed. 2020). As explained below, even assuming that Plaintiffs' claim falls within the scope of coverage, a virus exclusion applies here and the Plaintiffs do not fall within any exemption to the exclusion.

[11][12][13][14]The issue in this case is fundamentally an issue of contract interpretation. Under Pennsylvania law,[3] "[c]ontract interpretation is a question of law that requires the court to ascertain and give effect to the intent of the contracting parties as embodied in the written agreement." In re Old Summit Mfg., LLC, 523 F.3d 134, 137 (3d Cir. 2008) (quoting Dep't of Transp. v. Pa. Indus. for the Blind & Handicapped, 886 A.2d 706, 711 (Pa. Commw. Ct. 2005)); United States v. Sunoco Inc., 637 F. Supp. 2d 282, 287 (E.D. Pa. 2009); Gene & Harvey Builders, Inc. v. Pa. Mfrs.' Ass'n Ins. Co., 512 Pa. 420, 517 A.2d 910, 913 (1986).

[15][16]When the language of an insurance policy is clear and unambiguous, a court applying Pennsylvania law is required to give effect to that language. 401 Fourth St., Inc. v. Inv'rs Ins. Grp., 583 Pa. 445, 879 A.2d 166, 171 (2005); see alsoSentinel Ins. Co., Ltd. v. Monarch Med Spa, Inc., 105 F. Supp. 3d 464, 471 (E.D. Pa. 2015). Courts may not "distort the meaning of the language or resort to a strained contrivance in order to find an ambiguity." Madison Const. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 735 A.2d 100, 106 (1999) (citing Steuart v. McChesney, 498 Pa. 45, 444 A.2d 659, 663 (1982)).

1. Scope of Coverage Under the Policy

***7** As relevant here, and as discussed in more detail above in Section II, the Policy at issue specifically includes Civil Authority coverage for business interruptions caused by order of a civil authority, Lost Business Income & Extra Expense Coverage, Extended Business Income coverage, and Business Income Extension for Essential Personnel coverage, as well as Limited Fungi, Bacteria, or Virus Coverage (one of the exemptions to the virus exclusion), which is limited to $50,000 and will be discussed in greater detail below. It is not necessary for the Court to decide whether Plaintiffs' claim falls within the scope of coverage, because even assuming that it does, a virus exclusion applies here and the Plaintiffs do not fall within any exemption to the exclusion.

2. A Virus Exclusion Bars Coverage in This Case

This Court and the Third Circuit have regularly granted motions to dismiss in insurance cases when the plaintiff's allegations fall squarely within the policy's exclusions to coverage. See Brewer v. U.S. Fire Ins. Co., 446 F. App'x 506, 510 (3d Cir. 2011) (affirming dismissal of complaint because the unambiguous policy exclusion applied as a matter of law); Nautilus Ins. Co. v. Shawn Owens Inc., 316 F. Supp. 3d 873, 878 (E.D. Pa. 2018) (finding exclusion barred insurance coverage under policy and granting insurer's Rule 12(c) motion); Nautilus Ins. Co. v. Motel Mgmt. Servs., Inc., 320 F. Supp. 3d 636, 643 (E.D. Pa. 2018), aff'd, 781 F. App'x 57 (3d Cir. 2019) (granting insurer's Rule 12(c) motion because the assault and battery exclusion comprehensively barred all conduct alleged).

[17]Plaintiffs' Amended Complaint is misleading when it references the Limited Fungi, Bacteria, or Virus Coverage. The Policy actually includes a virus exclusion which states that Hartford "will not pay for loss or damage caused directly or indirectly by ... [p]resence, growth, proliferation, spread or any activity of 'fungi', wet rot, dry rot, bacteria or virus."See Hartford's Mot. to Dismiss Ex. A 119. The exclusion applies "regardless of any other cause or event that contributes concurrently or in any sequence to the loss" and "whether or not the loss event results in widespread damage or affects a substantial area." Id. Plaintiffs explicitly allege that their losses are caused by the Coronavirus, and yet do not reference this exclusion or dispute that Coronavirus is a virus.

The Third Circuit and this Court have upheld similarly unambiguous exclusions barring coverage for losses caused by hazardous substances or microorganisms. See, e.g., Certain Underwriters at Lloyds of London Subscribing to Policy No. SMP3791 v. Creagh, 563 F. App'x 209, 211 (3d Cir. 2014) (applying microorganism exclusion to bacteria); Sentinel Ins. Co., Ltd. v. Monarch Med Spa, Inc., 105 F. Supp. 3d 464, 467, 471–72 (E.D. Pa. 2015) (enforcing exclusion of coverage for "[i]njury or damage arising out of or related to the presence of, suspected presence of, or exposure to" fungi, bacteria and viruses based on showing that Group A Streptococcus is a bacterium); see alsoAlea London Ltd. v. Rudley, No. 03-CV-1575, 2004 WL 1563002, at *3 (E.D. Pa. July 13, 2004) (mold exclusion bars coverage for suit alleging mold contamination).

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[18]Pennsylvania courts have also enforced similar exclusions as unambiguous. See, e.g., Mount Pocono Motel Inc. v. Tuscarora Wayne Ins. Co., No. 9534 CIVIL 2013, 2014 WL 11351696, at *4 (Pa. Com. Pl. July 8, 2014) (ruling that the "Fungi or Bacteria exclusion" was clear and unambiguous and barred claims arising from mold).[4] Furthermore, exclusions are "effective against an insured if they are clearly worded and conspicuously displayed, irrespective of whether the insured read the limitations or understood their import." Frederick Mut. Ins. Co. v. Ahatov, 274 F. Supp. 3d 273, 283 (E.D. Pa. 2017). The Policy language here—including the defined term "specified cause of loss"—is conspicuously displayed, clear, and unambiguous.

3. Plaintiffs Do Not Fall Under Any Exemptions

***8**[19]Plaintiffs' reference to the Limited Fungi, Bacteria, or Virus Coverage demonstrates that they believe their claim falls into the second exemption of the virus exclusion. There are two unambiguous exemptions from the virus exclusion: "(1) When 'fungi', wet or dry rot, bacteria or virus results from fire or lightning; or (2) To the extent that coverage is provided in the Additional Coverage – Limited Coverage for 'Fungi', Wet Rot, Dry Rot, Bacteria and Virus with respect to loss or damage by a cause of loss other than fire or lightning." Hartford's Mot. to Dismiss Ex. A 119. The Policy makes clear that the latter exemption "only applies when the 'fungi', wet or dry rot, bacteria or virus is the result of": "(1) A 'specified cause of loss' other than fire or lightning" or "(2) Equipment Breakdown Accident." Id. at 120.

"Specified Cause of Loss" is defined to mean "[f]ire; lightning; explosion, windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage." Id. at 51. Plaintiffs do not attempt to plead any factual allegations that would allow the Court to reasonably infer that the virus is a result of a "specified cause of loss" or equipment breakdown.[5]

4. Separate Causes of Loss

To the extent that Plaintiffs allege that the governmental closure orders are a separate cause of loss, Plaintiffs provide no explanation as to why the Civil Authority coverage would not be precluded by the virus exclusion. Nor could they. The virus exclusion is "added to Paragraph B.1. Exclusions of ... the Special Property Coverage Form." Seeid. at 119. The Civil Authority coverage is part of the Special Property Coverage Form. Id. at 37.

[20]Even assuming that the governmental closure orders are a separate cause of loss, the virus exclusion would still bar coverage because of the anti-concurrent causation clause in the virus exclusion which states "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Id. at 119; see, e.g., Colella v. State Farm Fire & Cas. Co., 407 F. App'x 616, 622 (3d Cir. 2011) (anti-concurrent causation clause in insurance policy "negates the application" of the state's causation law) (applying Pennsylvania law); Brodzinski v. State Farm Fire & Cas. Co., No. CV 16-6125, 2017 WL 3675399, at *5 (E.D. Pa. Aug. 25, 2017) (coverage for claims for mold and rot prohibited by anti-concurrent clause preceding surface water exclusion).

As a result of the foregoing, Hartford's Motion to Dismiss will be granted with respect to all Counts. Plaintiffs' Breach of Contract claim (Count II) will be dismissed since an unambiguous virus exclusion in the Contract applies and none of the specified causes of loss in the second exemption could plausibly apply to Plaintiffs' case. Plaintiffs' claim for Declaratory Relief (Count I) will also be dismissed since it is predicated on the assumption that the Policy provides coverage, but an unambiguous virus exclusion bars coverage here. Lastly, Plaintiffs' claim for Injunctive Relief (Count III) will be dismissed since Plaintiffs do not explain how they fit into the second exemption of the virus exclusion (nor could they), so the Court cannot reasonably infer that Hartford wrongfully denied their claim or would continue to do so in the future.

D. USI's 12(b)(6) Motion to Dismiss

***9**[21]Plaintiffs' claims will be dismissed against USI with respect to all three Counts for the same reasons enumerated above and for one additional reason, which is that Plaintiffs do not attempt to plead any independent wrongdoing by USI. Plaintiffs concede that the Policy was between themselves and Hartford and that Hartford was the one to deny coverage. While USI may have been

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involved in the procurement of the Policy, it is not a party to the Policy. SeeConquest v. WMC Mortg. Corp., 247 F. Supp. 3d 618, 640 (E.D. Pa. 2017) (holding that two insurance brokers could not be liable for a breach of contract since they were not parties to the insurance contract).

Consequently, all three of Plaintiffs' claims, which relate to the Policy itself, will be dismissed with respect to USI since Plaintiffs have not pled any facts that would allow the Court to reasonably infer that USI had co-responsibility with Hartford in making coverage determinations. Even if Plaintiffs could somehow demonstrate that USI is liable under an agency theory,[6] their claim would fail on the merits for the reasons discussed above.

E. Leave to Amend

[22][23]Leave to amend should be freely granted. Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). In this case, however, all of Plaintiffs' claims will be dismissed with prejudice since the virus exclusion and its exemptions are clear and unambiguous and none of the specified causes of loss in the second exemption could plausibly apply to Plaintiffs' case. Leave to amend would therefore be futile.

V. Conclusion

For all of the aforementioned reasons, Plaintiffs' Motions to Remand and Dismiss for lack of subject matter jurisdiction will be denied and Defendants' Motions to Dismiss for failure to state a claim will be granted with respect to all Counts. An appropriate Order follows.

ORDER

AND NOW, this **30th** day of **September, 2020,** after considering Plaintiffs' Motion to Remand (ECF No. 8), Plaintiffs' Motion to Dismiss for lack of subject matter jurisdiction (ECF No. 14), Defendant Hartford's Motion to Dismiss for failure to state a claim (ECF No. 12), Defendant USI's Motion to Dismiss for failure to state a claim (ECF No. 9), and the Parties' responses, and after oral argument on the record, and for the reasons stated in the accompanying Memorandum, it is hereby **ORDERED** as follows:

1. Plaintiffs' Motion to Remand (ECF No. 8) is **DENIED;**

2. Plaintiffs' Motion to Dismiss for lack of subject matter jurisdiction (ECF No. 14) is **DENIED;**

3. Defendant Hartford's Motion to Dismiss for failure to state a claim (ECF No. 12) is **GRANTED;**

4. Defendant USI's Motion to Dismiss for failure to state a claim (ECF No. 9) is **GRANTED;** and, accordingly, Counts I-III in the Amended Complaints (ECF Nos. 3-4) are **DISMISSED with prejudice** and the case shall be **MARKED CLOSED.**

AND IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 5820800

Footnotes

1 Plaintiffs are presumably referring to the following orders: 1) All Non-Life-Sustaining Businesses in Pennsylvania to Close Physical Locations as of 8 PM Today to Slow Spread of COVID-19, Governor Tom Wolf (Mar. 19, 2020), https://www.governor.pa.gov/newsroom/all-non-life-sustaining-businesses-in-pennsylvania-to-close-physical-locations-as-of-8-pm-today-to-slow-spread-of-covid-19/#:~:text=Governor% 20Tom% 20Wolf% 20today% 20ordered,01% 20a.m.% 20Saturday% 2C% 20March% 2021.; 2) Emergency Order Temporarily Prohibiting Operation of Non-Essential Businesses and Congregation of Persons to Prevent the Spread of 2019 Novel Coronavirus (COVID-19), Office of the Mayor (Mar. 22, 2020), https://www.phila.gov/media/20200322130746/Order-2-Business-And-Congregation-Prohibition-Stay-At-Home.pdf; 3) Order re: General Statewide Judicial Emergency, Supreme Court of Pennsylvania (Mar. 18, 2020), http://www.pacourts.us/assets/files/page-1305/file-8634.pdf; and 4) Emergency Judicial Order, Idee C. Fox, President Judge, Philadelphia Court of Common Pleas (Mar. 17, 2020), https://www.courts.phila.gov/pdf/regs/2020/10-of-2020-PJ-ORDER.pdf.

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2 Defendants argue that all six of these claims for damages can be aggregated, resulting in an amount in controversy in excess of $300,000. This is not necessary for the Court to determine, however, because at least two of the claims can certainly be aggregated: Count VI (unjust enrichment) requests damages in excess of $50,000 for all of the money that Plaintiffs paid for the insurance policy, while Count II (breach of contract) requests damages in excess of $50,000 for lost business income due to the Coronavirus. These two claims alone would result in damages in excess of $100,000, and this is before consideration of Plaintiffs' requests for punitive damages and attorneys' fees.

3 In a diversity case, the forum state's choice of law rules govern. Gen. Star Nat. Ins. Co. v. Liberty Mut. Ins. Co., 960 F.2d 377, 379 (3d Cir. 1992). Under Pennsylvania's choice of law rules, a contract is construed according to the law of the state with the "most significant contacts or relationship with the contract." Hammersmith v. TIG Ins. Co., 480 F.3d 220, 228 (3d Cir. 2007). The Policy was issued to Wilson in Pennsylvania and provides coverage per the terms of the Policy for insured property located in Pennsylvania. Accordingly, we can assume for purposes of this motion that Pennsylvania law applies.

4 While not binding on this Court, it is worthwhile to note that state and federal courts in other jurisdictions have concluded recently that virus exclusions like the one at issue here preclude insurance coverage for COVID-19 business income losses. See, e.g., Diesel Barbershop, LLC et al. v. State Farm Lloyds, No. 5:20-cv-461-DAE, ––– F.Supp.3d ––––, ––––, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020); Gavrilides Mgmt. Co. et al. v. Mich. Ins. Co., Case No. 20-258-CB-C30, 2020 WL 4719102 (Mich. Cir. Ct., Ingham Cnty. June 30, 2020). Plaintiffs argue that since the Pennsylvania Supreme Court has not spoken on the issue, the issue should be considered unsettled law. Even if the law is unsettled, federal courts have an obligation to interpret state law. If the state law is unsettled, the federal court must predict how the highest court of the state would resolve the issue. And, as explained before, the district courts in the Third Circuit do not have the authority to certify questions of unsettled law to the Pennsylvania Supreme Court.

5 Plaintiffs argue that since the Pennsylvania Supreme Court recently determined in Friends of Danny Devito v. Tom Wolf, 227 A.3d 872 (Pa. 2020) that COVID-19 should be considered a natural disaster, "[i]t follows that the language 'specified cause of loss' and 'direct physical loss' under COVID 19 and Pennsylvania law has to be determined by the Pennsylvania courts." See Pls.' Resp. in Opp'n to Hartford's Mot. to Dismiss 9-10. It is unclear how one follows from the other. Natural disaster is not listed as one of the specified causes of loss, and since Plaintiffs concede that the Coronavirus is, in fact, a virus, there is no ambiguity created by the court's ruling. Furthermore, the case concerned executive authority and did not deal with an agreed-upon insurance contract that contains a virus exclusion which limits recovery. That is the central issue that we must focus on in this case.

6 Plaintiffs allege that they can maintain a cause of action against USI under an "agency theory." This would stand agency theory on its head. USI, the agent, would be the one responsible for the actions of the Principal, Hartford.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by V&S Elmwood Lanes, Inc. v. Everest National Insurance Company, E.D.Pa., January 11, 2021

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United States District Court, E.D. Pennsylvania.

BRIAN HANDEL D.M.D., P.C.
v.
ALLSTATE INSURANCE CO.

CIVIL ACTION NO. 20-3198
|
Filed 11/06/2020

Synopsis

Background: Insured healthcare provider brought action against insurer, seeking declaratory judgment and alleging breach of contract, arising from insurer's denial of coverage for claims for business income loss and extra expenses due to the interruption of insured's dental practice during the COVID-19 pandemic. Insurer moved to dismiss for failure to state a claim.

Holdings: The District Court, Bartle, J., held that:

[1] under Pennsylvania law, state Governor's orders in response to COVID-19 pandemic, requiring suspension or reduction of business operations in state, did not cause physical damage to property of insured;

[2] under Pennsylvania law, even if insured pled sufficient facts for physical damage or loss, such damage or loss fell within virus exclusion to coverage; and

[3] under Pennsylvania law, doctrine of regulatory estoppel did not prevent insurer from taking position that virus exclusion applied.

Motion granted.

West Headnotes (13)

[1] Federal Civil Procedure

On a motion to dismiss for failure to state a claim, court may consider matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, and items appearing in the record of the case. Fed. R. Civ. P. 12(b)(6).

[2] Insurance

Under Pennsylvania law, the initial burden in insurance coverage disputes is on the insured to show that the claim falls within the policy, but if the insured is able to make this showing the insurer has the burden to demonstrate that there is an applicable policy exclusion which denies coverage.

[3] Insurance

Under Pennsylvania law, if the language of an insurance policy is ambiguous in that it is open to more than one interpretation, the court must construe the language in favor of the insured.

[4] Insurance

Under Pennsylvania law,, an insurance contract provision is not ambiguous simply because the parties do not agree on the construction of the provision.

[5] Insurance

Under Pennsylvania law, state Governor's orders in response to COVID-19 pandemic, requiring suspension or reduction of business operations in state, did not cause physical damage to property of insured, a dental care provider, as could fall under insured's all-risk business coverage; insured's property remained inhabitable and usable, and insured was allowed to remain open for emergency procedures.

[6] Insurance

Under Pennsylvania law, when insured seeks coverage for physical damage to property, burden is on insured to establish that its structure was physically damaged.

[7] Insurance

Under Pennsylvania law, civil authority provision of insured dental care provider's all-risk policy, providing coverage for loss of business income and necessary extra expenses when "[a]ccess to the area immediately surrounding the damaged property [was] prohibited by civil authority as a result of the damage" and "[t]he 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," required evidence of direct physical loss or prohibited access to the property.

[8] Insurance

Under Pennsylvania law, even if insured provider of dental care pled sufficient facts for physical damage or loss as result of COVID-19 pandemic caused by spread of SARS-CoV-2 virus, such damage or loss fell within all-risk policy's exclusion for damage or loss caused, directly or indirectly, by "[a]ny virus…capable of inducing physical distress, illness, or disease"; there was no other way to characterize pandemic than as the spread of a virus which caused physical illness and distress.

[9] Estoppel

Under Pennsylvania law, regulatory estoppel prohibits parties from switching legal positions to suit their own ends.

[10] Insurance

Under Pennsylvania law, pursuant to doctrine of regulatory estoppel, if an insurer represents to a regulatory agency that new language in a policy will not result in decreased coverage, the insurer cannot assert the opposite position when insureds raise the issue in litigation.

[11] Insurance

By asserting in instant litigation that virus exclusion to insured dental care provider's all-risk coverage precluded insured's claims for business loss arising from COVID-19 pandemic, insurer did not take position contrary to statements made before regulatory agencies on behalf of insurer, and thus, under Pennsylvania law, doctrine of regulatory estoppel did not prevent insurer from taking such position, where statements made to agencies asserted that property policies had not been and were not intended to be a source of recovery for damage from disease-causing agents such as a virus.

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[12] Estoppel

Under Pennsylvania law, to support a claim for regulatory estoppel, a plaintiff must plead two elements: (1) a party made a statement to a regulatory agency; and (2) afterward, the party took a position opposite to the one presented to the regulatory agency.

[13] Insurance

Under Pennsylvania law, the representations that an insurer made to a regulatory agency must be contrary to the insurer's position in the current litigation for regulatory estoppel to apply.

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MEMORANDUM

Bartle, District Judge

***1** Plaintiff Brian Handel D.M.D., P.C. has sued defendant Allstate Insurance Co. in this diversity action for a declaratory judgment and for breach of contract. These counts arise from defendant's denial of coverage for claims of plaintiff for business income loss and extra expenses due to the interruption of plaintiff's dental practice during the COVID-19 pandemic.

Before the court is the motion of defendant to dismiss plaintiff's first amended complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I.

When considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court must accept as true all well-pleaded factual allegations in the complaint and draw all reasonable inferences in the light most favorable to the plaintiff. See Phillips v. Cty. of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008); Umland v. PLANCO Fin. Servs., Inc., 542 F.3d 59, 64 (3d Cir. 2008). We must then determine whether the pleading at issue "contain[s] 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, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

[1]On a motion to dismiss under Rule 12(b)(6), the court may consider "allegations contained in the complaint, exhibits attached to the complaint and matters of public record." Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993) (citing 5A Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (2d ed. 1990)). The court may also consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case." Buck v. Hampton Twp. Sch. Dist., 452 F.3d 256, 260 (3d Cir. 2006) (citing 5B Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed. 2004)).

II.

For present purposes, the court accepts as true the following well-pleaded facts set forth in the amended complaint. Plaintiff, a professional corporation, is a dental practice in Wayne, Pennsylvania. Plaintiff has an "all-risk" insurance policy with defendant, dated September 9, 2019, for non-excluded business losses.

On March 19, 2020, the Governor of Pennsylvania prohibited business operations that are not life sustaining so as to prevent the spread of COVID-19, a highly contagious respiratory virus that has infected more than 8 million people in the United States and killed more than 225,000. According to the complaint, COVID-19 is known to be transmitted by aerosols which can linger in the air for up to three hours and on surfaces for up to three days.

On March 23, 2020, the Governor issued a stay-at-home order for residents of various counties in Pennsylvania, including Chester County, where plaintiff is located. This order required residents in seven counties to stay at home "except as needed to access, support, or provide life sustaining business, emergency, or government services." On April 1, 2020, the Governor extended the stay-at-home order to all counties in the Commonwealth.

***2** Pursuant to the Governor's orders and a March 26, 2020 guidance from the state Department of Health, plaintiff was forced to close its office for all non-emergency dental services. Plaintiff subsequently made a claim for business income loss and/or extra expense coverage with defendant under the terms of the policy.

The policy at issue provides that defendant will pay for "direct physical loss of or damage to Covered Property ... caused by or resulting from any Covered Cause of Loss." A Covered Cause of Loss is defined as "[d]irect physical loss unless the loss is excluded or limited under Section I – Property."

This coverage includes business income loss sustained "due to the necessary suspension of your 'operations' during the 'period of restoration' " if the suspension was "caused by direct physical loss of or damage to property at the described premises" and was caused by a Covered Cause of Loss. "Operations" refers to "business activities occurring at the described premises." The "period of restoration" begins either immediately after the direct physical loss or damage or seventy-two hours after the loss or damage and ends when the property is repaired or replaced or when business resumes at a new location.

The policy also covers "necessary Extra Expense" incurred during the " 'period of restoration' that [the insured] would not have incurred if there had been no direct physical loss or damage to property at the described premises" if the loss or damage are "caused by or result from a Covered Cause of Loss."

The policy includes a provision to cover the loss of business income and necessary extra expenses when a Covered Cause of Loss damages property other than the described premises and actions of a civil authority prohibit access to the described premises. This "Civil Authority" provision requires that "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage," and "[t]he 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."

Encompassed within the property coverage section of the policy are exclusions from coverage. One such exclusion is for "loss or damage caused directly or indirectly" by "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."

On May 28, 2020, defendant denied plaintiff's claim for coverage because it claimed that "there is no damage to the premises by a covered cause of loss that caused your business to lose income."

III.

[2] [3] [4] [5]The initial burden in insurance coverage disputes is on the insured to show that the claim falls within the policy, but if the insured is able to make this showing the insurer has the burden to demonstrate that there is an applicable policy exclusion which denies coverage. State Farm Fire & Cas. Co. v. Estate of Mehlman, 589 F.3d 105, 111 (3d Cir. 2009). If the language is ambiguous in that it is open to more than one interpretation, the court must construe the language in favor of the insured. Med. Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999). A contract provision is not ambiguous simply because the parties do not agree on the construction of the provision. Weisman v. Green Tree Ins. Co., 447 Pa.Super. 549, 670 A.2d 160, 161 (Pa. Super. 1996).

***3** Plaintiff avers in its amended complaint that COVID-19: caused "direct physical damage, as well as indirect non-physical damage;" rendered the property "unsafe, uninhabitable, or otherwise unfit for its intended use;" and restricted the use of the property resulting in "direct physical loss." Plaintiff also claims that the "Covid-19 Effect," or the public's social anxiety about

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public health and the safety of indoor spaces, "is the functional equivalent of damage of a material nature or an alteration in physical composition."

Defendant counters that plaintiff fails to plead any facts describing any property alteration or damage that would constitute physical loss or damage and that the mere risk of contamination is not enough to constitute property damage. Defendant also argues that at most the property would need sanitizing.

[6]Our Court of Appeals has ruled that "[i]n ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure," such as from fire, water, or smoke, that "may demonstrably alter the components of a building and trigger coverage." Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co., 311 F.3d 226, 235 (3d Cir. 2002). The burden is on the plaintiff to establish that its structure was physically damaged. Id. at 232.

Allegations of physical damage to a building from "sources unnoticeable to the naked eye must meet a higher threshold." Id. at 235. In Port Authority of New York and New Jersey v. Affiliated FM Insurance Co., the Court determined that asbestos causes physical damage if it is present in such large quantities that it makes the structure "uninhabitable and unusable," but if the building continues to function and remain usable then the building owner has not suffered a loss. Id. at 236. The court concluded that the "mere presence of asbestos, or the general threat of future damage from that presence, lacks the distinct and demonstrable character necessary for first-party insurance coverage." Id.

In a subsequent insurance coverage case involving contamination of a homeowner's well from e-coli bacteria, the Court of Appeals found its reasoning in Port Authority to be applicable under Pennsylvania law and "instructive in a case where sources unnoticeable to the naked eye have allegedly reduced the use of the property to a substantial degree." Motorists Mut. Ins. Co. v. Hardinger, 131 F. App'x 823, 826 (3d Cir. 2005). In those circumstances "direct physical loss of or damage to" the property means that the functionality of the property "was nearly eliminated or destroyed" or the "property was made useless or uninhabitable." Id. at 826-27. This definition applies equally to the situation here involving the COVID-19 virus.

Plaintiff alleges generally in the amended complaint that it was "forced to suspend or reduce business operations following an order from Pennsylvania Governor Wolf." (emphasis added). In its brief in opposition to defendant's motion to dismiss, plaintiff clarifies that the effect of the orders of the Governor and Department of Health only "denied access to Plaintiff's premises for all non-emergent procedures" and that its business "has suffered reduced operations and loss of income." In fact, no order by either the Governor or the Department of Health ever required dental offices such as plaintiff to close completely. Instead, plaintiff was able to remain open for emergency procedures.

Thus, plaintiff's property remained inhabitable and usable, albeit in limited ways. Plaintiff has failed to plead plausible facts that COVID-19 caused damage or loss in any physical way to the property so as to trigger coverage as set forth in Hardinger. See 131 F. App'x at 826-27.

IV.

***4** [7]Plaintiff's claim for coverage pursuant to the civil authority provision of the policy also fails. That provision obliges defendant to cover the loss of business income and necessary extra expenses when a Covered Cause of Loss damages property in the immediate area and a civil authority prohibits access to the covered property. The policy requires that "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage" and that "[t]he 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."

As previously stated, to constitute a Covered Cause of Loss there must be direct physical loss. In addition, the Governor's orders limit, rather than prohibit, access to the property. Absent facts of direct physical loss or prohibited access to the property, plaintiff cannot sustain a claim for coverage under the civil authority provision of this policy.

V.

[8]Even if plaintiff had pleaded sufficient facts for physical damage or loss as a result of COVID-19, plaintiff's claims are still excluded by the virus exclusion provision. Courts have routinely granted motions to dismiss when an exclusion provision in an insurance policy applies to the

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action. See Brewer v. U.S. Fire Ins. Co., 446 F. App'x 506, 510 (3d Cir. 2011); Wilson v. Hartford Cas. Co., Civil Action No. 20-3384, ––– F.Supp.3d ––––, ––––, 2020 WL 5820800, at *7 (E.D. Pa. Sept. 30, 2020).

The policy at issue unambiguously states that defendant will not cover loss or damage if caused, either directly or indirectly, by "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." There is no other way to characterize COVID-19 than as a virus which causes physical illness and distress. Therefore, the virus exclusion unambiguously bars coverage for plaintiff's claims due to COVID-19.

Plaintiff argues that the exclusion only states that defendant will not pay for "loss or damage" but does not say anything about paying for expenses and that plaintiff can still recover for extra expenses. In order to recover extra expenses, however, plaintiff would still need to plead sufficient facts of direct physical loss or damage caused by a Covered Cause of Loss. As stated above, plaintiff has not done so.

VI.

[9] [10] [11]Plaintiff asserts that the doctrine of regulatory estoppel prevents defendant from raising the virus exclusion to deny coverage. Regulatory estoppel "prohibits parties from switching legal positions to suit their own ends." Sunbeam Corp. v. Liberty Mut. Ins. Co., 566 Pa. 494, 781 A.2d 1189, 1192 (2001). If an insurer represents to a regulatory agency that new language in a policy will not result in decreased coverage, the insurer cannot assert the opposite position when insureds raise the issue in litigation. Id. at 1192-93.

[12] [13]To support a claim for regulatory estoppel, a plaintiff must plead two elements: "(1) A party made a statement to a regulatory agency; and (2) Afterward, the party took a position opposite to the one presented to the regulatory agency." Simon Wrecking Co. v. AIU Ins. Co., 541 F. Supp. 2d 714, 717 (E.D. Pa. 2008). The representations the insurer made to the regulatory agency must be contrary to the insurer's position in the current litigation for regulatory estoppel to apply. Hussey Copper, LTD v. Arrowood Indem. Co., 391 F. App'x 207, 211 (3d Cir. 2010).

Plaintiff satisfies the first element of regulatory estoppel since it avers that the Insurance Services Office, Inc. ("ISO") and the American Association of Insurance Services ("AAIS") presented to state regulatory agencies in 2006 on behalf of multiple insurers, including defendant, to include a virus exclusion in insurance policies. However, plaintiff fails to plead any facts to satisfy the second element that defendant currently takes a position contrary to the statements made before the regulatory agencies on behalf of the insurers.

***5** Plaintiff cites to the statements of the ISO and the AAIS in which both organizations made clear that property policies have not been and were not intended to be a source of recovery for damage from disease-causing agents such as a virus. The statement of AAIS to which plaintiff cites explicitly states that "[t]his endorsement clarifies that loss, cost, or expense caused by, resulting from, or relating to any virus ... is excluded."

Defendant takes the same position here as the ISO and AAIS did by arguing that the virus exclusion eliminates coverage for any damage or loss as a result of the causes enumerated therein. Since defendant does not take a contradictory position to the one made to regulatory agencies, the doctrine of regulatory estoppel does not apply to this action.

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United States District Court, E.D. Pennsylvania.

TOPPERS SALON & HEALTH SPA, INC., Plaintiff
v.
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Defendant.

Case No. 2:20-cv-03342-JDW
|
Signed 11/30/2020

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MEMORANDUM

JOSHUA D. WOLSON, United States District Judge

***1** There was a time not so long ago when someone seeking an escape from day-to-day pressures could count on a trip to a spa, like Marge Simpson at Rancho Relaxo.[1] But like so many other things, the Covid-19 pandemic has upended that norm. Like so many other businesses, state and local governments have at times issued orders closing spas to prevent the virus's spread. Those businesses have, in turn, looked to recoup their losses from insurers. This is one such case.

Plaintiff Toppers Salon & Health Spa, Inc. seeks coverage for the government-mandated suspension of its businesses in Pennsylvania, New Jersey, and Delaware. The commercial property policy that Toppers purchased from Travelers Property Casual Company of America offers coverage for many interruptions to Toppers' business. But it does not cover Covid-19, both because it includes an exclusion that applies to virus-related losses and because the various governmental orders do not trigger coverage under Toppers' policy. The Court will therefore grant Travelers' motion for judgment on the pleadings and deny Toppers' motion for partial summary judgment.

I. BACKGROUND

A. The Policy

Toppers operates a chain of day spas in Pennsylvania, New Jersey, and Delaware. It receives commercial property insurance coverage from Travelers under a policy from October 2019 for its locations in Philadelphia, Wayne, and Newtown, Pennsylvania; Marlton, New Jersey; and Dover, Delaware. Among other things, the Policy includes a Business Income Coverage Form that offers Toppers coverage in the event of certain interruptions to its business. Relevant here, that Form includes both Business Income coverage and Civil Authority coverage.

The Policy covers Business Income loss that Toppers sustains "due to the necessary suspension of your 'operations' during the 'period of restoration,' " if the suspension was "caused by direct physical loss of or damage to property at [the insured's] premises." (ECF No. 5-2 at 41.) The Policy defines the period of restoration as the "period of time after direct physical loss or damage" and "when the premises should be repaired, rebuilt, or replaced with reasonable speed and similar quality." (*Id.* at 50.) Business Income includes "net income ... *plus* continuing normal operating expenses incurred, including payroll." (*Id.* at 41) (emphasis added).

The "Civil Authority" provision covers loss of Business Income and extra expenses incurred due to damage to property other than property at the insured's premises, when as a result of "dangerous physical conditions," a civil authority's actions prohibit access to both the insured's premises and the area immediately surrounding the damaged property. (*Id.* at 42.) The damaged property must be within one mile of the insured's premises to enable a civil authority to have unimpeded access to the damaged property.

The Policy excludes coverage for any "loss or damage caused by or resulting from any virus, bacterium or other

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microorganism that induces or is capable of inducing physical distress, illness or disease." (*Id.* at 82 (the "Virus Exclusion").) The Exclusion applies to "all coverage under all forms and endorsements" including Business Income and Civil Authority coverage. (*Id.*)

B. The Shutdown Orders

***2** In March 2020, Pennsylvania, New Jersey, and Delaware, issued sweeping stay-at-home orders to mitigate the further spread of the Covid-19 virus. Those Shutdown Orders referenced that the virus can be transmitted through contact with surfaces and through exposure to airborne particles. As a result of these Orders, **Toppers** had to suspend operations at all of its locations. In June 2020, **Toppers** filed a coverage claim for its operating expenses during the suspension period. **Travelers** denied **Toppers**' claim later that month. It explained that **Toppers**' loss did not satisfy the Policy's Business Income or Civil Authority coverage provisions and was also subject to the Policy's Virus Exclusion, as well as several other exclusions.

C. Procedural History

On July 8, 2020, **Toppers** filed this action against **Travelers** for breach of contract for failure to provide coverage under the Policy. Both parties requested pre-trial judgment: **Toppers** moved for partial summary judgment, while **Travelers** moved for judgment on the pleadings. Both Motions are ripe for decision.

II. LEGAL STANDARD

A. Summary Judgment

Federal Rule of Civil Procedure 56(a) permits a party to seek, and a court to enter, summary judgment "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." Fed. R. Civ. P. 56(a). "[T]he plain language of Rule 56[(a)] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quotations omitted). In ruling on a summary judgment motion, a court must "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.' " *Scott v. Harris*, 550 U.S. 372, 378 (2007) (quotation omitted).

B. Judgment on the Pleadings

"After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). A court can grant a Rule 12(c) motion "if, on the basis of the pleadings, the movant is entitled to judgment as a matter of law." *Fed Cetera, LLC v. Nat'l Credit Servs., Inc.*, 938 F.3d 466, 470 n.7 (3d Cir. 2019) (quotation omitted). A Rule 12(c) motion "is analyzed under the same standards that apply to a Rule 12(b)(6) motion[,]" construing all allegations and inferences in the light most favorable to the nonmoving party. *Wolfington v. Reconstructive Orthopaedic Assocs. II PC*, 935 F.3d 187, 195 (3d Cir. 2019) (quotation omitted).

III. DISCUSSION

The parties agree that Pennsylvania insurance law applies. Under Pennsylvania law, the goal in interpreting an insurance policy, "as with interpreting any contract, is to ascertain the parties' intentions, as manifested by the policy's terms." *Kvaerner Metals Div. of Kvaerner, U.S. v. Commercial Union Ins. Co.*, 908 A.2d 888, 897 (Pa. 2006). A court should not consider individual items in isolation. It must consider the entire insurance provision to ascertain the intent of the parties. *See 401 Fourth St., Inc. v. Inv'rs Ins. Grp.*, 879 A.2d 166, 171 (Pa. 2005). When policy language is clear and unambiguous, a court applying Pennsylvania law must give effect to that language. *See Kvaerner Metals*, 908 A.2d at 897. When a provision in the policy is ambiguous, a court must construe the policy "in favor of the insured to further the contract's prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage." *401 Fourth St.*, 879 A.2d at 171. "Contractual language is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." *Id.* (quote omitted).

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A. The Virus Exclusion

***3** The Virus Exclusion applies to "loss or damage caused by or resulting from any virus ... that induces or is capable of inducing physical distress, illness or disease." The language is not ambiguous, and it applies to Covid-19, which is caused by a coronavirus that causes physical illness and distress. *See Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, Civ. No. 20-3198, 2020 WL 6545893, at *4 (E.D. Pa. Nov. 6, 2020) (similar virus exclusion barred coverage). Other courts considering **Travelers**' policies under other states' laws have reached the same conclusion.[2] That means that the Virus Exclusion applies to **Toppers**' insurance claim.

Toppers concedes that the Virus Exclusion applies. It argues that the exclusion does not extend to claims for continuing expenses because those expenses are not a "loss" or a "damage." **Toppers**' argument ignores both the Policy's language and structure. First, the Policy uses the word "loss," but it does not define it. The Court must therefore give it its plain and ordinary meaning. *See Pa. Manufacturers' Ass'n Ins. Co. v. Aetna Cas. & Sur. Ins. Co.*, 233 A.2d 548, 551 (Pa. 1967). In the insurance context, a "loss" is the "amount of financial detriment caused by ... an insured property's damage." Black's Law Dictionary 1087 (10th ed. 2009). More generally, the word refers to an "undesirable outcome of a risk" (*id.*) or an "amount of money lost by a business or organization" (New Oxford American Dictionary 1033 (3d ed. 2010).

Both the failure to collect income and the payment of continued expenses fall within these definitions of "loss." In addition, the Policy's structure indicates that the parties intended the word "loss" to cover both lost income and continuing expenses. Under the Policy, "Business Income" includes both net income and continuing expenses, and the Policy provides coverage for any "loss of Business Income." (ECF No. 5-2 at 41.) Under the heading "Loss Determination," it describes the way that the parties anticipated determining the "amount of Business Income loss." (*Id.* at 46.) And the Policy includes a provision that imposed on **Toppers** certain duties in the event of a "loss." (*Id.*) These provisions, read as a whole, demonstrate that the parties intended the term "loss" to extend to all types of Business Income, including covered expenses. **Toppers**' argument to the contrary does not analyze the Policy's text; it does not point to a different definition of "loss;" and it does not account for the Policy's overall structure. As a result, it does not carry the day.

B. Coverage

Even if the Virus Exclusion did not bar coverage, **Toppers** would not be able to show that the Policy covers its claim, either under the Business Income or the Civil Authority coverage.

1. Business Income coverage

Under the Policy, **Toppers** can obtain Business Income coverage if it must suspend its operations during a period of restoration as a result of "direct physical loss of or damage to" its premises. (ECF No. 5-2 at 41.) No one disputes that **Toppers** suspended its operations at each of its premises as a result of the Shutdown Orders. So the only question is whether physical loss or damage caused that suspension. It did not.

***4** The Policy only pays Business Income coverage during a period of restoration. The Policy measures that period from the start of the physical loss until the "date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality" or when "business is resumed at a new permanent location." (*Id.* at 50.) In addition, the Policy includes special exclusions for the Business Income coverage that apply to an "increase of loss caused by or resulting from [a d]elay in resulting, repairing, or replacing the property due to interference at the location by strikers or other persons." (*Id.* at 56.) These provisions make clear that there must be some sort of physical damage to the property that can be the subject of a repair, rebuilding, or replacement. The Covid-19 pandemic does not fall within that definition.

Toppers admits that it will never trigger the end point for the period of restoration. (ECF No. 19 at 7.) It claims that fact demonstrates only that **Travelers** cannot prematurely end its coverage. But **Toppers**' argument misses the point. The parties' agreement to measure the period of restoration against the time it takes to repair the premises indicates that they intended the Policy to cover losses for physical damage, and that intent controls the Court's interpretation of the Policy.

Toppers also argues that Policy's use of the phrase "loss of" the premises means the loss of use of the premises.

The Court agrees. But that does not save Toppers because it ignores the question of why Toppers lost use of the premises. It did not lose use because the premises suffered physical damage. Business Income coverage does not apply.

2. Civil Authority coverage

The Policy's Civil Authority coverage applies only if there is "damage to property other than property at the described premises" and if a civil authority prohibits access to the area immediately around the covered premises in response to dangerous physical conditions in the area. (ECF No. 5-2 at 42.) But Toppers did not close because of damage to a nearby premise or because there was some dangerous physical condition at another nearby premise. It closed because the Shutdown Orders applied to its own operations. Its shutdown and resulting losses fall outside the scope of the Civil Authority coverage.

IV. CONCLUSION

Businesses nationwide have struggled to stay afloat during the pandemic. While the pandemic has affected Toppers' salons, the Policy's Virus Exclusion is unambiguous and bars Toppers' coverage claim. Toppers also cannot show that Covid-19 or the Shutdown Orders caused it physical damage or reparable loss under the Policy. Therefore, Toppers is not entitled to summary judgment. On the contrary, Travelers has demonstrated that it is entitled to judgment on the pleadings. An appropriate Order follows.

All Citations

Slip Copy, 2020 WL 7024287

Footnotes

1 *See* The Simpsons: Homer Alone (Fox TV Broadcast February 6, 1992).

2 *See Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 6503405, at *8 (S.D. Miss. Nov. 4, 2020); *Travelers Cas. Ins. Co. of Am. v. Geragos and Gergaos*, No. CV 20-3619 PSG (Ex), 2020 WL 6156584, at *4 (C.D. Cal. Oct. 19, 2020); *Mark's Engine Co. No. 28 Rest., LLC v. The Travelers Indem. Co. of Conn.*, No. 20-04423, Order (C.D. Cal. Oct. 2, 2020); *10E, LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-CV-04418-SVW-AS, 2020 WL 5359653, at *6 (C.D. Cal. Sept. 2, 2020).

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Declined to Extend by V&S Elmwood Lanes, Inc. v. Everest National Insurance Company, E.D.Pa., January 11, 2021

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United States District Court, E.D. Pennsylvania.

4431, INC., 4431 Assoc., LP, 3354 Walbert Assoc., LP, 3354 Walbert Avenue Associates, LLC, Blue Grille House and Wine Bar, 4131 Associates, Candlelight Inn, 2960 Center Valley Parkway, LLC, 3739 West Chester Pike, LLC, Melt Restaurant Group, LLC, Paxos Restaurants, Inc., Melt Real Estate Group, LP., and Top Cut Steakhouse, Plaintiffs,
v.
CINCINNATI INSURANCE COMPANIES, the Cincinnati Insurance Company, the Cincinnati Casualty Company, and the Cincinnati Indemnity Company, Defendants.

No. 5:20-cv-04396
|
Filed 12/03/2020

Attorneys and Law Firms

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OPINION

Defendants' Motion to Dismiss for Failure to State a Claim, ECF No. 5—GRANTED

Joseph F. Leeson, Jr., United States District Judge

I. INTRODUCTION

***1** This insurance coverage dispute stems from the ongoing COVID-19 pandemic and its impact on the ability of several restaurants to operate. Plaintiffs are twelve commercial entities that own and operate restaurants in Pennsylvania (collectively, "Plaintiffs"). They purchased four identical "All Risk" property insurance policies ("the Policies") from Defendants Cincinnati Insurance Company and related entities (collectively, "Cincinnati"). As with so many other businesses, Plaintiffs have been forced to limit their operations as a result of the COVID-19 pandemic, closing their restaurants for in-dining and bar service. After Cincinnati refused to pay Plaintiffs' claims for pandemic-related loss of income under the Policies, Plaintiffs commenced this action in the Court of Common Pleas of Northampton County. Cincinnati removed the action to this Court on diversity grounds and now moves to dismiss the Complaint for failure to state a claim, arguing Plaintiffs' losses are not covered by the terms of the Policies. Plaintiffs oppose the motion.

Upon consideration of Cincinnati's motion to dismiss and Plaintiffs' opposition thereto, and for the reasons set forth below, the motion is granted, and Plaintiffs' Complaint is dismissed.

II. BACKGROUND

A. Facts Alleged in Plaintiffs' Complaint[1]

Plaintiffs operated bar and dine-in services on the premises of and as part of several restaurants in Pennsylvania. Plaintiffs' Complaint ("Compl."), ECF No. 1, ¶¶ 2, 22. Due to Orders issued by the Governor of Pennsylvania in response to the COVID-19 pandemic, Plaintiffs were forced to close on-premises dining and bar service at their restaurants beginning on March 19, 2020, and continuing to the present. *Id.* ¶¶ 3, 27-31. Their

restaurants remain open only for takeout service. *Id.* ¶ 32. These closures have resulted in losses in excess of $100,000.00 per month since March 19, 2020, for each of Plaintiffs' restaurants. *Id.*

Prior to March 2020, Plaintiffs purchased four "All Risk" insurance policies from **Cincinnati**.[2] *See* Compl. ¶ 4. The terms of the Policies are identical. *Id.* ¶ 14. The Policies provide as follows:

> We will pay for the actual loss of "Business Income" and "Rental Value" 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.

***2** Policy at 47. The Policies further state:

> 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 "loss" to property at "premises" which are described in the Declarations and for which a "Business Income" Limit of Insurance is shown in the Declarations. The "loss" must be caused by or result from a Covered Cause of Loss.

Id. at 102. And further:

> We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain ... during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.

Id. at 48. The Policies also provide that **Cincinnati** "will pay for direct 'loss' to Covered Property at the 'premises' caused by or resulting from any Covered Cause of Loss." *Id.* at 32.

Relevant to Plaintiffs' suit, the Policies also contain a provision regarding covered losses stemming from actions of "civil authority":

> When a Covered Cause of Loss causes damage to property other than Covered Property at a "premises", we will pay for the actual loss of "Business Income" and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the "premises", provided that both of the following apply:
>
> > (a) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
> >
> > (b) 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.

Policy at 48.

The Policies define "Covered Causes of Loss" as used in the above provisions as "direct 'loss' unless the 'loss' is excluded or limited in this coverage part." Compl. ¶ 16. "Loss" is in turn defined as "[a]ccidental physical loss or accidental physical damage." *Id.*; *see, e.g.*, Policy at 67. There are no exclusions or limitations for viruses under the Policies. *See* Compl. ¶¶ 17, 41-42.

The Policies were fully paid and in effect as of March 2020, and have remained fully paid and in effect at all times since March 2020. Compl. ¶¶ 23-24. At some point during or after March 2020, Plaintiffs submitted claims for loss of income under the Policies. *Id.* ¶ 34. Plaintiffs state that their loss of income is the result of mandatory physical closures due to the spread of COVID-19, and is covered under the terms of the Policies. *Id.* ¶ 45. Specifically, Plaintiffs claim the closures were the result of "a covered cause of loss which inflicted a direct physical loss and/or caused direct physical damage to their covered premises. Plaintiffs also have had to pay for disinfecting and cleaning the premises to prevent COVID-19 contamination." *Id.* Plaintiffs also state that they are entitled to "Civil Authority Coverage" under the Policies as a result of what they identify as Pennsylvania's "Civil Authority Orders"—*i.e.*, mandatory closure and stay at home orders issued by the Governor of Pennsylvania.[3] *Id.* ¶¶ 57-62. **Cincinnati** denied all of Plaintiffs' claims for lost business income. *Id.* ¶ 35.

***3** Based upon the above averments, Plaintiffs assert a claim for declaratory judgment under 42 Pa. Cons. Stat. § 7532,[4] *see* Compl. ¶¶ 36-63, as well as a claim for breach of contract, *see id.* ¶¶ 64-69.

B. Procedural Background

On July 24, 2020, Plaintiffs commenced this action in the Court of Common Pleas of Northampton County. *See* ECF No. 1. **Cincinnati** filed a Notice of Removal on September 8, 2020, removing the case to this Court on the basis of diversity jurisdiction. *See id.* Shortly thereafter on September 15, 2020, **Cincinnati** filed the instant motion to dismiss the Complaint for failure to state a claim. *See* ECF No. 5. On September 23, 2020, Plaintiffs filed a motion to remand the action back to state court. *See* ECF

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No. 6. On October 14, 2020, after receiving correspondence from the parties indicating Plaintiffs' wish to withdraw their motion to remand, the Court granted that request and extended the deadline for Plaintiffs' response to the pending motion to dismiss. *See* ECF No. 10. Plaintiffs' opposition to the motion to dismiss was filed on October 26, 2020, *see* ECF No. 11, and **Cincinnati's** reply in further support of its motion was filed on November 3, 2020, *see* ECF No. 13.

III. DISCUSSION

A. Whether Exercising Jurisdiction is Appropriate

1. Applicable Legal Principles

Although Plaintiffs' motion to remand has technically been withdrawn, the question of whether this Court should exercise jurisdiction over the action and rule on **Cincinnati's** motion to dismiss is still one that the Court must address. This is due to the declaratory relief Plaintiffs seek. *See Rarick v. Federated Serv. Ins. Co.*, 852 F.3d 223, 227 (3d Cir. 2017) ("When an action seeks legal relief, federal courts have a virtually unflagging obligation to exercise jurisdiction.... When an action seeks declaratory relief, however, federal courts may decline jurisdiction under the [federal] Declaratory Judgment Act.") (internal quotation marks omitted).

The federal Declaratory Judgment Act ("DJA")[5] provides in relevant part as follows:

> In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a) (emphasis added).[6] "[T]he DJA grants discretion to federal district courts, who have 'no compulsion' to exercise their jurisdiction over cases seeking declaratory judgment." *Greg Prosmushkin, P.C. v. Hanover Ins. Grp.*, No. CV 20-2561, 2020 WL 4735498, at *2 (E.D. Pa. Aug. 14, 2020) (quoting *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 494 (1942)).

***4** In *Rarick v. Federated Service Insurance Company*, 852 F.3d 223 (3d Cir. 2017), the Third Circuit established the "independent claim test" as the appropriate test for determining whether a district court should exercise jurisdiction over an action seeking *both* declaratory *and* legal relief based on issues of state law. The *Rarick* Court stated as follows with regard to the independent claim test:

> When a complaint contains claims for both legal and declaratory relief, a district court must determine whether the legal claims are independent of the declaratory claims. If the legal claims are independent, the court has a "virtually unflagging obligation" to hear those claims, subject of course to [*Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)'s] exceptional circumstances. If the legal claims are dependent on the declaratory claims, however, the court retains discretion to decline jurisdiction of the entire action, consistent with our decision in [*Reifer v. Westport Ins. Corp.*, 751 F.3d 129 (3d Cir. 2014)].[7]

Rarick, 852 F.3d at 229. The Court went on to explain why the independent claim test is superior to other tests it had examined:

> The independent claim test is superior to the others principally because it prevents plaintiffs from evading federal jurisdiction through artful pleading. Although [Plaintiffs] Rarick and Easterday included declaratory claims in their complaints, they requested a legal remedy—damages—for breach of contract. Because both cases satisfied the requirements for diversity jurisdiction, Rarick and Easterday could have obtained their desired relief in federal courts without requesting a declaratory judgment. By including a declaratory claim in their pleadings, however, Rarick and Easterday invited the District Court to avoid *Colorado River*'s "virtually unflagging obligation" in favor of the more expansive discretion afforded under *Reifer*.
>
> This outcome is inconsistent with the purpose of the Declaratory Judgment Act, which is to "clarify legal relationships" in order to help putative litigants "make responsible decisions about the future." The Declaratory Judgment Act was intended to "*enlarge*[ ] the range of remedies available in the federal courts" by authorizing them to adjudicate rights and obligations even though no immediate remedy is requested.

Id. (citation omitted).

***5** With respect to the first step of the independent claim test—determining the dependency or independency of claims—the Court observes that "[n]on-declaratory

claims are 'independent' of a declaratory claim when they are alone sufficient to invoke the court's subject matter jurisdiction and can be adjudicated without the requested declaratory relief." *Rarick*, 852 F.3d at 228 (quoting *R.R. St. & Co., Inc. v. Vulcan Materials Co.*, 569 F.3d 711, 715 (7th Cir. 2009)).

Assuming that Plaintiffs' claim for breach of contract is independent of their claim for declaratory relief, the second step of the independent claim test requires application of *Colorado River.* "The *Colorado River* doctrine allows a federal court to abstain, either by staying or dismissing a pending federal action, when there is a parallel ongoing state court proceeding." *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 307 (3d Cir. 2009). "The initial question is whether there is a parallel state proceeding that raises 'substantially identical claims [and] nearly identical allegations and issues.' If the proceedings are parallel, courts then look to a multi-factor test to determine whether 'extraordinary circumstances' meriting abstention are present." *Id.* at 307-08 (quoting *Yang v. Tsui,* 416 F.3d 199, 204 n.5 (3d Cir. 2005) and *Spring City Corp. v. American Bldgs. Co.,* 193 F.3d 165, 171 (3d Cir. 1999)). The six factors courts examine to determine whether "exceptional circumstances" exist pursuant to *Colorado River* are the following: "(1) which court [state or federal] first assumed jurisdiction over property [in an *in rem* case]; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) whether federal or state law controls; and (6) whether the state court will adequately protect the interests of the parties."[8] *Spring City Corp.*, 193 F.3d at 171.

2. Application to Plaintiffs' Complaint

Applying the "independent claim test" to Plaintiffs' Complaint, the Court first observes that Plaintiffs' claim for breach of contract is indeed independent of their claim for declaratory relief, as it is "alone sufficient to invoke the court's subject matter jurisdiction and can be adjudicated without the requested declaratory relief." *Rarick*, 852 F.3d at 228; *see Wilson v. Hartford Cas. Co.*, No. CV 20-3384, 2020 WL 5820800, at *5 (E.D. Pa. Sept. 30, 2020) ("This Court has held multiple times that legal claims are independent of claims for declaratory relief when applying *Rarick* to insurance coverage disputes.") (collecting cases).

The Court therefore turns to the second step of the independent claim test—whether the considerations set forth in *Colorado River* and its progeny indicate the existence of "exceptional circumstances" sufficient to negate this Court's "virtually unflagging obligation" to exercise jurisdiction over legal claims.

First, because there is no parallel state court action here, it is doubtful whether *Colorado River* is even applicable. *See Wilson*, 2020 WL 5820800, at *5 ("Exceptional circumstances do not apply here since there are no parallel pending state court proceedings, which Plaintiffs concede."); *Nat'l City Mortg. Co. v. Stephen*, 647 F.3d 78, 84 (3d Cir. 2011) ("[W]e note that the controversy has taken place almost exclusively in federal court, the state proceeding began after NCM appealed to us and has been stayed pending the outcome of this appeal, and there are none of the complicating factors present in *Colorado River.* Thus, *Colorado River* abstention does not apply either."), *as amended* (Sept. 29, 2011); *Nationwide Mut. Fire Ins. Co.*, 571 F.3d at 307 ("The *Colorado River* doctrine allows a federal court to abstain, either by staying or dismissing a pending federal action, *when there is a parallel ongoing state court proceeding.*") (emphasis added).

***6** However, even if the Court were to consider the *Colorado River* factors, five of the six factors weigh against declining to exercise jurisdiction based on the existence of extraordinary circumstances. These factors indicate that such extraordinary circumstances do not exist here.

Factor one—which court first assumed jurisdiction over property—is inapplicable here because this is not an *in rem* proceeding.[9] Factor two—the inconvenience of the federal forum—does not weigh in favor of abstention. There are no arguments raised that the federal forum is inconvenient for Plaintiffs. Factor three—the desirability of avoiding piecemeal litigation—is met "only when there is evidence of a strong federal policy that all claims should be tried in the state courts." *Ryan v. Johnson*, 115 F.3d 193, 197-98 (3d Cir. 1997) (citing *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Comm'n,* 791 F.2d 1111, 1118 (3d Cir. 1986)). There is no evidence of any such strong federal policy here. Factor four—the order in which jurisdiction was obtained—is inapplicable here because there is no competing state court proceeding, and therefore no "order" of obtaining jurisdiction. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 (1983) (explaining that "priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions"). Factor six—whether the state

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court will adequately protect the interests of the parties—is similarly inapplicable. *See* *Ryan*, 115 F.3d at 200 ("[T]he mere fact that the state forum is adequate does not counsel in favor of abstention, given the heavy presumption the Supreme Court has enunciated in favor of exercising federal jurisdiction. Instead, this factor is normally relevant only when the state forum is *inadequate*.") (emphasis in original).

The only factor that weighs in favor of abstention under *Colorado River* is factor five—whether federal or state law controls. This action is controlled exclusively by Pennsylvania law. The Court also acknowledges that the questions of state law that Plaintiffs' action presents are novel, having yet to be addressed by any Pennsylvania court.[10] Indeed, as one court in this District recently observed in a similar COVID-related insurance coverage dispute, "[t]he issues of state law presented in Plaintiffs' action are novel, complex, and exceedingly important, creating a compelling public policy interest for these claims to be allowed to be decided by Pennsylvania courts." *Greg Prosmushkin, P.C. v. Hanover Ins. Grp.*, No. CV 20-2561, 2020 WL 4735498, at *5 (E.D. Pa. Aug. 14, 2020).

However, in the Court's view, the novel nature of the state law question cannot, without more, permit this Court to circumvent its "virtually unflagging obligation" to exercise jurisdiction where the prerequisites for that exercise have otherwise been met, as they have been here. *See* 28 U.S.C. § 1332. Nor is this conclusion inconsistent with very recent precedent. At least two courts in this District have recently chosen to exercise jurisdiction over COVID-related insurance converge disputes where declaratory relief was sought. In *Wilson v. Hartford Cas. Co.*, No. CV 20-3384, 2020 WL 5820800 (E.D. Pa. Sept. 30, 2020), the court exercised jurisdiction based on the dependency of plaintiffs' claims for legal and declaratory relief, as well as on the absence of a parallel state court proceeding, and granted defendants' motion to dismiss the complaint. *See id.* at *6 (explaining that "[t]he legal claims found in the Plaintiffs' initial Complaint appear to be both jurisdictionally and substantively independent (and Plaintiffs do not argue otherwise) of the requested declaratory relief.... As a result, they are alone sufficient to invoke the Court's subject matter jurisdiction"). Another court in this District recently exercised jurisdiction in a COVID-related insurance coverage dispute in the absence of a motion to remand without even engaging in a discussion as to abstention. *See* *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. CV 20-3198, 2020 WL 6545893, at *3 (E.D. Pa. Nov. 6, 2020) (granting defendant's motion to dismiss and dismissing plaintiff's claims for breach of contract and declaratory relief where "plaintiff's property remained inhabitable and usable, albeit in limited ways" and finding that "[p]laintiff has failed to plead plausible facts that COVID-19 caused damage or loss in any physical way to the property so as to trigger coverage").

***7** It is moreover significant that in several recent COVID-based insurance disputes in which federal courts in this Circuit have *declined* to exercise jurisdiction, unlike Plaintiffs' Complaint here the complaints at issue presented *only* a request for declaratory judgment and no claims for legal relief. *See, e.g.*, *Greg Prosmushkin, P.C.*, No. CV 20-2561, 2020 WL 4735498, at *5 (E.D. Pa. Aug. 14, 2020) ("In sum, Plaintiffs present no independent claim for legal relief in their Complaint."); *Dianoia's Eatery, LLC v. Motorists Mut. Ins. Co.*, No. CV 20-787, 2020 WL 5051459, at *2 (W.D. Pa. Aug. 27, 2020) ("Plaintiff's single-count declaratory judgment action simply does not state a breach of contract action against Defendant seeking damages."); *Venezie Sporting Goods, LLC v. Allied Ins. Co. of Am.*, No. 2:20-CV-1066, 2020 WL 5651598, at *3 (W.D. Pa. Sept. 23, 2020) ("The long and the very short of it is that there are no independent money damage or equitable claims asserted, only a request that this Court implement a declaration of coverage by either requiring Defendants to act in accord with such a declaration, or to refrain from taking actions contrary to such a declaration."). The absence of independent legal claims allowed these courts to retain "the more expansive discretion afforded under *Reifer*" to decline the exercise of jurisdiction. *Rarick v. Federated Serv. Ins. Co.*, 852 F.3d 223, 229 (3d Cir. 2017).

In summary, the circumstances capable of constituting "exceptional circumstances" as set forth in *Colorado River* and its progeny are "extraordinary and narrow exception[s]" to a federal court's "virtually unflagging obligation" to exercise jurisdiction where legal relief is sought. *Colo. River*, 424 U.S. at 813, 817. The Court acknowledges that Plaintiffs' Complaint presents novel questions of Pennsylvania law. However, in light of (1) the independence of Plaintiffs' legal claim from their request for declaratory relief, and (2) the absence of any parallel state court proceedings, the Court finds that there are insufficient other considerations to permit the Court to circumvent this obligation. The Court will therefore exercise its jurisdiction, and proceeds to an analysis of **Cincinnati's** motion to dismiss Plaintiffs' Complaint.

B. Cincinnati's Motion to Dismiss the Complaint

1. Legal Standard: Motions to Dismiss under Rule 12(b)(6)

In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court clarified the appropriate pleading standard in civil cases and set forth the approach to be used when deciding motions to dismiss brought under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

After identifying a pleaded claim's necessary elements,[11] district courts are to "identify [ ] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679; *see id.* at 678 ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' " (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))); *Thourot v. Monroe Career & Tech. Inst.*, No. CV 3:14-1779, 2016 WL 6082238, at *2 (M.D. Pa. Oct. 17, 2016) (explaining that "[a] formulaic recitation of the elements of a cause of action" alone will not survive a motion to dismiss). Though "legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679.

Next, if a complaint contains "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. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. This standard, commonly referred to as the "plausibility standard," "is not comparable to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556-57). It is only where the "[f]actual allegations ... raise a right to relief above the speculative level" that the plaintiff has stated a plausible claim.[12] *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 555).

***8** Putting these steps together, the Court's task in deciding a motion to dismiss for failure to state a claim is to determine the following: whether, based upon the facts as alleged, which are taken as true, and disregarding legal contentions and conclusory assertions, the complaint states a claim for relief that is plausible on its face in light of the claim's necessary elements. *Iqbal*, 556 U.S. at 679; *Ashford v. Francisco*, No. 1:19-CV-1365, 2019 WL 4318818, at *2 (M.D. Pa. Sept. 12, 2019) ("To avoid dismissal under Rule 12(b)(6), a civil complaint must set out sufficient factual matter to show that its claims are facially plausible."); *see* Connelly, 809 F.3d at 787.

In adjudicating a Rule 12(b)(6) motion, the scope of what a court may consider is necessarily constrained: a court may "consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *United States v. Gertsman*, No. 15 8215, 2016 WL 4154916, at *3 (D.N.J. Aug. 4, 2016) (quoting *Guidotti v. Legal Helpers Debt Resolution*, L.L.C., 716 F.3d 764, 772 (3d Cir. 2013)). A court adjudicating a Rule 12(b)(6) motion may also take judicial notice of certain undisputed facts. *See Devon Drive Lionville, LP v. Parke Bancorp, Inc.*, No. CV 15-3435, 2017 WL 5668053, at *9 (E.D. Pa. Nov. 27, 2017).

2. Applicable Legal Principles: Insurance Policies as Contracts

A dispute over coverage arising under an insurance policy "is fundamentally an issue of contract interpretation." *Wilson*, 2020 WL 5820800, at *6. As both sides here appear to assume, Pennsylvania's law of contracts and rules of contract interpretation govern the instant dispute.[13] Under Pennsylvania law,

> [c]ontract interpretation is a question of law that requires the court to ascertain and give effect to the intent of the contracting parties as embodied in the written agreement. Courts assume that a contract's language is chosen carefully and that the parties are mindful of the meaning of the language used. When a writing is clear and unequivocal, its meaning must be determined by its contents alone.

In re Old Summit Mfg., LLC, 523 F.3d 134, 137 (3d Cir. 2008) (quoting *Dep't of Transp. v. Pa. Indus. for the Blind & Handicapped,* 886 A.2d 706, 711 (Pa Cmwlth. Ct. 2005)).

In construing an insurance policy to determine whether coverage was improperly denied, the Court must first determine whether a policy's language is unambiguous, or whether it is reasonably susceptible to different readings. "When policy language is clear and unambiguous, a court applying Pennsylvania law must give effect to that language." *Toppers Salon & Health Spa, Inc. v. Travelers Property Casualty Co. of America*, No. 2:20-CV-03342, 2020 WL 7024287, at *2 (E.D. Pa. Nov. 30, 2020) (citing *Kvaerner Metals Div. of Kvaerner, U.S. v. Commercial Union Ins. Co.*, 908 A.2d 888, 897 (Pa. 2006)). "When a provision in a policy is ambiguous, however, the policy is

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to be construed in favor of the insured to further the contract's prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage." *401 Fourth St., Inc. v. Inv'rs Ins. Grp.*, 879 A.2d 166, 171 (Pa. 2005). A policy's language is ambiguous "if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." *Id.* (quoting *Madison Construction Co. v. Harleysville Mutual Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999)).

***9** Under Pennsylvania law, "[t]he initial burden in insurance coverage disputes is on the insured to show that the claim falls within the policy." *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. CV 20-3198, 2020 WL 6545893, at *2 (E.D. Pa. Nov. 6, 2020). "[I]f the insured meets that burden, the insurer then bears the burden of demonstrating that a policy exclusion excuses the insurer from providing coverage if the insurer contends that it does." *State Farm Fire & Cas. Co. v. Estate of Mehlman*, 589 F.3d 105, 111 (3d Cir. 2009) (citing *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996)).

3. The Contentions of the Parties

According to **Cincinnati**, "[t]he requirement of direct physical loss is a core element in property insurance policies like Plaintiffs', and appears in multiple places in the [P]olicies." Defs.' Mem. at 6. Pointing to the Policies' definition of "loss" as "physical loss or damage to property," **Cincinnati** contends that "there is no Covered Cause of Loss, and therefore no Business Income coverage, unless the insured first establishes, among other things, that there is direct physical loss to covered property." *Id.* According to **Cincinnati**, because "Plaintiffs not only *admit*, but *affirmatively allege*, that there was no direct physical loss or damage to any property as a result of the virus, or the [Governor's] Orders," there can be no coverage under the Policies. *Id.* at 12 (emphasis in original) (citing Compl. ¶ 52 ("A virus, unlike a fire, flood, or weather event, cannot damage walls, floors, roofs or equipment.")). In support of this contention, **Cincinnati** points to *Philadelphia Parking Authority v. Fed. Ins. Co.*, 385 F. Supp. 2d 280 (S.D.N.Y. 2005), a case applying Pennsylvania law, and argues that *Philadelphia Parking Authority* is consistent with a growing body of case law holding that virus-related losses do not constitute physical damage or loss. *See* Defs.' Mem. at 13-20. **Cincinnati** also argues that the absence of a virus exclusion in the Policies is irrelevant, because "[e]xclusions do not come into play unless there is first direct physical loss," which there is not. *Id.* at 20. Finally, **Cincinnati** asserts that there is no Civil Authority coverage, because the "Plaintiffs do not allege the [Governor's] Orders prohibited access to their premises," as the Policies require. *Id.* at 23.

In opposition, Plaintiffs first contend that they are entitled to business interruption coverage under the Policies because "loss" is defined as *either* "physical loss" *or* "physical damage," and while their properties have not been damaged, they have sustained "physical loss."[14] Pls.' Opp'n. at 3-4. In particular, Plaintiffs claim "physical loss" is synonymous with "loss of use of the property," which they have suffered as a result of the pandemic and the Governor's Orders. *Id.* at 7 (emphasis in original). Accordingly, they need not have sustained "physical damage" to their premises. *See id.* at 7-8. *See id.* at 4-7.

According to Plaintiffs, they are also entitled to coverage under the "Civil Authority" provision of the Policies. *See* Pls.' Opp'n. at 8-11. The heart of their argument on this point is as follows:

> ***10** As a result of the Civil Authority Orders, access to Plaintiffs' properties was strictly prohibited. The principal use of the properties was for upscale on-site dining. These were not drive-through pickup fast food places. Defendants' contention that because Plaintiffs could continue take out and home delivery service, there was no denial of access misses the point that there has been physical loss or damage when the use of the property has been "nearly eliminated."

Id. at 10.

4. Application to Plaintiffs' Complaint

The Court finds that Plaintiffs are not entitled to coverage under the Policies, because their premises have not suffered a direct "loss" as that term is unambiguously defined in the Policies: "[a]ccidental *physical* loss or accidental *physical* damage." Policy at 67 (emphasis added). As an initial matter, it appears that Plaintiffs concede that their premises have not suffered any direct "physical damage" as a result of COVID-19 and the Governor's Orders. *See* Pls.' Opp'n. at 7 ("For there to be coverage for business interruption lost income there must be direct physical loss to the insured properties. Direct physical damage is not required."). The Court will

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therefore focus its analysis on the construction of the term direct "physical loss."

In light of the plain language of the Policies—in particular, the modifier "physical" preceding the word "loss"—and after surveying the legal authority presented by the parties and revealed through the Court's own independent research, the Court reaches the following conclusion: To constitute direct "physical loss" under the Policies as that term is construed under Pennsylvania law, economic loss resulting from an inability to utilize a premises as intended must (1) bear some causal connection to the *physical* conditions of that premises, which conditions (2) operate to completely or near completely preclude operation of the premises as intended.[15] The Court finds support for these conclusions in relevant case law.

In *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002), the Third Circuit, applying New York and New Jersey state law, addressed the question of to what extent the presence of asbestos in a building constitutes "physical loss or damage" so as to warrant coverage under an "All Risk" property insurance policy similar to the Policies at issue here. Affirming a grant of summary judgment in favor of the insurer, the Court stated as follows with regard to the term "physical loss":

> 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. However, if asbestos is present in components of a structure, but is not in such form or quantity as to make the building unusable, the owner has not suffered a loss. The structure continues to function—it has not lost its utility. The fact that the owner may choose to seal the asbestos or replace it with some other substance as part of routine maintenance does not bring the expense within first-party coverage. ... The effect of asbestos fibers in such quantity is comparable to that of fire, water or smoke on a structure's use and function.

***11** *Id.* at 236. *Port Authority*'s central holding—that a release of asbestos fibers, or an imminent threat of such a release, must have "resulted in contamination of [ ] property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable," *id.*—was upheld under Pennsylvania law by the Third Circuit in *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823 (3d Cir. 2005), an unpublished opinion.[16] *See id.* at 826 ("We predict that the Pennsylvania Supreme Court would adopt a similar principle as we did in *Port Authority*.").

In *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280 (S.D.N.Y. 2005), the Southern District of New York, applying Pennsylvania law, addressed whether economic loss on its own could warrant coverage under a policy's "direct physical loss" provision. There, the operator of a parking garage at the Philadelphia International Airport sustained significant economic loss as the result of a downturn in air travel stemming from the terrorist attacks of September 11, 2001. The court held that economic loss stemming from an inability to utilize property as intended was alone not sufficient to invoke coverage:

> The Court finds that the phrase "physical loss or damage" is not ambiguous since "reasonably intelligent [people] on considering it in the context of the entire policy would [not] honestly differ as to its meaning." As stated above, the phrase "direct physical loss or damage," when considered in the context of the Insurance Policy at issue in the present case, requires *that claimed loss or damage must be physical in nature.*

Id. at 289 (emphasis added) (quoting *United Servs. Auto Ass'n v. Elitzky*, 517 A.2d 982, 985 (Pa. Super. Ct. 1986)). The Southern District of New York also held that the at-issue policy's "civil authority" provision did not cover plaintiff's economic losses, as the relevant civil authority "did not 'prohibit[ ] access to' Plaintiff's garages as the policy requires." *Philadelphia Parking Auth.*, 385 F. Supp. 2d at 289.

These cases support the conclusion that under Pennsylvania law, for Plaintiffs to assert an economic loss resulting from their inability to operate their premises as intended within the coverage of the Policy's "physical loss" provision, the loss and the bar to operation from which it results must bear a causal relationship to some *physical condition* of or on the premises. The cases also indicate the existence of an element correlating to extent of operational utility—*i.e.*, a premises must be uninhabitable and unusable, or nearly as such; the ability to operate in almost any capacity, even on a limited basis, precludes coverage.

***12** At least two recent cases from within the Eastern District of Pennsylvania have reached the same conclusions when construing similar contracts in light of COVID-19.

In a November 6, 2020 decision *in Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. CV 20-3198, 2020 WL 6545893 (E.D. Pa. Nov. 6, 2020), the court held that economic losses resulting from COVID-19 and the Governor's Orders suffered by a dentist's office did not constitute "direct physical loss" under a property insurance policy. Because "no order by either the

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Governor or the Department of Health ever required dental offices such as plaintiff to close completely" and because "plaintiff was able to remain open for emergency procedures," the court concluded that "plaintiff's property remained inhabitable and usable, albeit in limited ways. Plaintiff has failed to plead plausible facts that COVID-19 caused damage or loss in any physical way to the property so as to trigger coverage." *Id.* at *3.

The court reached a similar conclusion in a November 30, 2020 decision in *Toppers Salon & Health Spa, Inc. v. Travelers Property Casualty Co. of America*, No. 2:20-CV-03342, 2020 WL 7024287 (E.D. Pa. Nov. 30, 2020). In that case, the owner of a spa brought suit under an insurance policy for lost revenue resulting from COVID-19 and the Governor's shut-down Orders, claiming coverage under a "direct physical loss of or damage to" provision. Unlike the dentist office in *Handel*, plaintiff in *Toppers* was required to suspend its operations. So the only question before the court was "whether physical loss or damage caused that suspension." *Id.* at *3. The court found that "[i]t did not," because the policy's other provisions—in particular, reference to a "period of restoration," and the premises being "repaired, rebuilt or replaced"— made "clear that there must be some sort of physical damage to the property that can be the subject of a repair, rebuilding, or replacement. The Covid-19 pandemic does not fall within that definition." *Id.* at *4.

Here, Plaintiffs' loss of business income as a result of COVID-19 and the Governor's Orders does not constitute direct "physical loss" under the Policies for the same reasons coverage was precluded in *Handel* and *Toppers.* First, there is no physical component to Plaintiffs' loss; there are no allegations that any physical conditions of or on the covered premises have been altered in a way that has resulted in or affected Plaintiffs' loss.[17] Second, Plaintiffs maintain the ability to operate at their premises, albeit on a limited basis. For these related reasons, Plaintiffs have suffered no direct "physical loss." Without a direct "physical loss" or direct "physical damage," there is no "Covered Cause of Loss." Under these circumstances, Plaintiffs cannot claim coverage under the "Business Income" provision of the Policies.

***13** Finally, for the reasons that have already been presented, there is also no coverage under either the Policies' "Extra Expenses" or "Civil Authority" provisions. *See* Policy at 48. Coverage under both provisions requires an insured to have suffered a Covered Cause of Loss, and thus a direct physical loss. *See id.* With no direct physical loss, there can be no coverage. Additionally, it is clear that Plaintiffs' ability to continue limited takeout and delivery operations at the premises precludes coverage under the Civil Authority provision: a prohibition on access to the premises, which is a prerequisite to coverage, is not present.[18] *See Handel*, 2020 WL 6545893, at *3 ("[P]laintiff's property remained inhabitable and usable, albeit in limited ways. Plaintiff has failed to plead plausible facts that COVID-19 caused damage or loss in any physical way to the property so as to trigger coverage.").

C. Leave to Amend

The Court must consider whether Plaintiffs are entitled to amend the Complaint and re-plead their claims. *See Kanter v. Barella*, 489 F.3d 170, 181 (3d Cir. 2007) ("Generally, a plaintiff will be given the opportunity to amend her complaint when there is an asserted defense of failure to state a claim."). Although leave to amend pleadings, when not as of right, should be "freely give[n] when justice so requires," Fed. R. Civ. P 15(a)(2), the denial of leave to amend is appropriate where there exists undue delay, bad faith, dilatory motive, or futility. *See Holst v. Oxman*, 290 F. App'x 508, 510 (3d Cir. 2008).

Here, it is clear that any amendment to the Complaint would be futile. The terms of the Policies are not in dispute, and there is nothing else Plaintiffs could allege that would bring their claimed losses within the Policies' coverage. Leave to amend is therefore denied.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs are not entitled to coverage under the terms of the Policies for their COVID-related business income losses. As such, their Complaint fails to state a viable claim for relief, and it is dismissed, with prejudice.

A separate Order follows this Opinion.

All Citations

Slip Copy, 2020 WL 7075318

Footnotes

1 These allegations are accepted as true, with all reasonable inferences drawn in Plaintiffs' favor. *See Lundy v. Monroe Cty. Dist. Attorney's Office*, No. 3:17-CV-2255, 2017 WL 9362911, at *1 (M.D. Pa. Dec. 11, 2017), *report and recommendation adopted*, 2018 WL 2219033 (M.D. Pa. May 15, 2018). Neither conclusory assertions nor legal contentions need be considered by the Court in determining the viability of Plaintiffs' claims. *See Brown v. Kaiser Found. Health Plan of Mid-Atl. States, Inc.*, No. 1:19-CV-1190, 2019 WL 7281928, at *2 (M.D. Pa. Dec. 27, 2019). Much of the Complaint is legal argument regarding construction of insurance policies and Plaintiffs' Policies in particular. The majority of these legal assertions are not included in the Court's recital here, except where necessary for context and continuity.

2 Although a copy of the Policies may have been attached to the original Complaint when filed in state court, there are no copies attached to the Complaint as filed with **Cincinnati's** Notice of Removal. The Policies are however attached in full as exhibits to **Cincinnati's** motion papers. Policy No. EPP 017 41 30 was issued to the Blue Grillhouse Plaintiffs for the policy period October 1, 2019 to October 1, 2022; Policy No. ECP 028 55 02 was issued to the Torre Restaurant Plaintiff for the policy period October 1, 2019 to October 1, 2022; Policy No. EPP 040 99 71 was issued to the Firepoint Grille Plaintiff for the policy period October 1, 2019 to October 1, 2020; and Policy No. EPP 017 41 28 was issued to the Melt Restaurant Plaintiffs for the policy period October 1, 2019 to October 1, 2020. *See* **Cincinnati's** Memorandum in Support of their Motion to Dismiss ("Defs.' Mem."), ECF No. 5, Exhibits A-D. The Court directly references the language of the Policies rather than the Complaint where doing so enhances clarity. Where the Court directly references the language of the Policies, the Court's citation is to the Policy attached as Exhibit A to **Cincinnati's** Memorandum in Support of its Motion, ECF No. 5-5. The Court cites to the Bates numbers applied by **Cincinnati** to the bottom of each page of the document.

3 Plaintiffs additionally state that the Policies' "Pollutants Exclusion" does not apply to a virus. *See* Compl. ¶ 63.

4 Notwithstanding its label as the Complaint's "First Cause of Action," "[d]eclaratory judgment is a form of relief, not an independent legal claim." *Jones v. ABN AMRO Mortg. Grp., Inc.*, 551 F. Supp. 2d 400, 406 (E.D. Pa. 2008), *aff'd*, 606 F.3d 119 (3d Cir. 2010).

5 At the outset, the Court observes that its authority to issue declaratory relief stems from the federal Declaratory Judgment Act, 28 U.S.C. § 2201, rather than from Pennsylvania's declaratory judgment statute, 42 Pa. Cons. Stat. § 7532. This is because "[o]nly the courts of the Commonwealth [of Pennsylvania] have 'the power to grant declarations and injunctive relief pursuant to [Pennsylvania's] Declaratory Judgments Act.' " *Keystone ReLeaf LLC v. PA Dep't of Health*, 186 A.3d 505, 517 (Pa. Commw. Ct. 2018) (quoting *Empire Sanitary Landfill, Inc. v. Com., Dep't of Envtl. Res.*, 546 Pa. 315, 332 (1996)); *see SWB Yankees, LLC v. CNA Fin. Corp.*, No. 3:20-CV-01303, 2020 WL 5848375, at *2 (M.D. Pa. Oct. 1, 2020) ("[A] Pennsylvania state court in a declaratory action may 'declare rights, status, and other legal relations whether or not further relief is or could be claimed.' " (quoting 42 Pa. Cons. Stat. § 7532)).

6 "Although courts often refer to a court's 'jurisdiction' under the DJA, the statute is not a jurisdictional grant. Rather, the Supreme Court has characterized the DJA as procedural, affording a remedial option in a case over which a court must have an independent basis for exercising jurisdiction." *Kelly v. Maxum Specialty Ins. Grp.*, 868 F.3d 274, 281 n.4 (3d Cir. 2017).

7 In *Colorado River*, the Supreme Court "reminded federal courts that they have a 'virtually unflagging obligation' to exercise jurisdiction over actions seeking legal relief." *Rarick*, 852 F.3d at 225 (quoting *Colo. River*, 424 U.S. 800, 817 (1976)). However, the Court also explained that abstaining from exercising federal jurisdiction can be justified—and indeed, *only* justified—"in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Colo. River*, 424 U.S. at 813.
In *Reifer*, the Third Circuit held that "it is not a *per se* abuse of discretion for a court to decline to exercise jurisdiction when pending parallel state proceedings do not exist. Nor is it a *per se* abuse of discretion for a court to exercise jurisdiction when pending parallel state proceedings do exist." *Reifer*, 751 F.3d at 144. Rather, "the existence or non-existence of pending parallel state proceedings is but one factor for a district court to consider." *Id.*

8 "Only the first four of these factors were delineated in *Colorado River*, the other two are drawn from *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23, 26 (1983)." *Nationwide Mut. Fire Ins. Co.*, 571 F.3d at 308 n.10.

9 The Court considers this and the other "inapplicable" factors to be "neutral." "[T]he presence of a neutral factor necessarily weighs against abstention." *Hartford Life Ins. Co. v. Rosenfeld*, No. CIV.A. 05-5542, 2007 WL 2226014, at *7 (D.N.J. Aug. 1, 2007).

10 The Court's own independent research was unable to unearth any state court decisions addressing the questions at issue in Plaintiffs' suit.

11 The Third Circuit has identified this approach as a three-step process, with the identification of a claim's necessary elements as the first step. *See Connelly v. Lane Const. Corp.*, 809 F.3d 780, 787 n.4 (3d Cir. 2016) ("Although *Ashcroft v. Iqbal* described the process as a 'two-pronged approach,' 556 U.S. 662, 679 (2009), the Supreme Court noted the elements of the pertinent claim before proceeding with that approach, *id.* at 675-79. Thus, we have described the process as a three-step approach.") (citation omitted).

12 As the Supreme Court has observed, "[d]etermining whether a complaint states a plausible claim for relief ... [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679

13 "In a diversity case, the forum state's choice of law rules govern. Under Pennsylvania's choice of law rules, a contract is construed according to the law of the state with the 'most significant contacts or relationship with the contract.' " *Wilson*, 2020 WL 5820800, at *6 n.3 (citing *Gen. Star Nat. Ins. Co. v. Liberty Mut. Ins. Co.*, 960 F.2d 377, 379 (3d Cir. 1992) and quoting *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 228 (3d Cir. 2007)). Because the Policies here were issued to insure businesses and property located in Pennsylvania, the Court can safely assume the law of Pennsylvania governs interpretation of the Policies. The parties appear to assume the same. *See* Defs.' Mem. at 13; Plaintiffs' Memorandum in Opposition ("Pls.' Opp'n."), ECF No. 11, at 4, 6.

14 In further support of this argument, Plaintiffs make a single, conclusory contention as to the absence of a virus exclusion: "At the outset, we note that there is no contention by Defendants that there is a virus exclusion in the policy, so COVID-19 is a covered cause of loss." Pls.' Opp'n. at 3.

15 To frame point (1) slightly differently, although the Court agrees with Plaintiffs that the disjunctive nature of "physical loss" *or* "physical damage" as used in the Policies indicates that the two terms are not synonymous, *see* Pls.' Opp'n. at 4, the Court disagrees that "physical loss" is synonymous with "loss of use of [ ] property," *id.* at 7, alone—that is, loss having not arisen as a result of a tangible physical condition of or on the premises.

16 *Hardinger* involved contamination of a homeowner's well from e-coli bacteria. In *Hardinger*, the Third Circuit found instructive a 1992 Pennsylvania trial court decision in *Hetrick v. Valley Mut. Ins. Co.*, 15 Pa. D. & C 4th 271 (Pa. Com. Pl. 1992). The Court noted that "[i]n *Hetrick,* the court gave substantial attention and approval to *Western Fire Insurance Co. v. First Presbyterian Church*, 165 Colo. 34, 38-39, 437 P.2d 52(1968). In that case, the Colorado Supreme Court held the term 'direct physical loss' extended to cover the loss of use of the insured property where the accumulation of gasoline around and under the property rendered it uninhabitable." *Hardinger*, 131 F. App'x at 826 n.4. The court in *Hetrick* (the 1992 trial court decision) concluded as follows: "an oil spill which pollutes the ground water may make a building uninhabitable. And if the building is uninhabitable, then there is direct loss to that building." *Hetrick*, 15 Pa. D. & C.4th at 274 (internal citation omitted).

17 Construing "physical loss" under the Policies to require a causal connection to some physical condition of a covered premises is, similar to the policy in *Toppers*, further supported by the structure of the Policies. As **Cincinnati** points out, here "there can be no 'Period of Restoration' " for pandemic-related losses as that term is used in the Policies, *see* Policy at 47-48, "because the Coronavirus does not constitute direct physical loss to property requiring any physical repair, rebuilding or replacement. The inapplicability of the 'Period of Restoration' element to Plaintiffs' alleged loss further demonstrates that ... pure economic losses are not covered under the Policy," **Cincinnati's** Reply Memorandum ("Defs.' Mem."), ECF No. 13, at 5.

18 Additionally, Plaintiffs' conclusory assertion that, because "there is no contention by Defendants that there is a virus exclusion in the policy," it follows that "COVID-19 is a covered cause of loss," Pls.' Opp'n. at 3, is without merit. It is undisputed that there is no virus exclusion. However, Plaintiffs have failed to provide any support for the notion that the absence of an exclusion means that whatever could have been excluded but wasn't is necessarily covered. Even more fundamentally, the issue of exclusions is irrelevant as Plaintiffs' claims do not fall within the scope of the Policies' coverage.

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NEWCHOPS RESTAURANT COMCAST LLC d/b/a Chops
v.
ADMIRAL INDEMNITY COMPANY
LH Dining L.L.C. d/b/a River Twice Restaurant
v.
Admiral Indemnity Company

CIVIL ACTION NO. 20-1949, CIVIL ACTION NO. 20-1869
|
Filed December 17, 2020

Synopsis

Background: Insured brought action against insurer, alleging violation of civil authority and business income provisions of all risks commercial lines insurance policy. Insurer moved to dismiss.

Holdings: The District Court, Timothy J. Savage, J., held that:

[1] loss or damage had to be physical or structural, not merely economic, to be covered under civil authority provision or business income provision;

[2] governmental shutdown orders in response to COVID-19 pandemic, regulating use of property and having force of law, did not constitute covered cause of loss under civil authority or business income provisions;

[3] exclusion for viruses and other pathogens applied to preclude coverage for losses and damages from governmental shutdown orders that were issued as result of COVID-19 virus;

[4] lack of specific reference to pandemic in exclusion for viruses and other pathogens did not render that provision ambiguous; and

[5] insureds were not entitled to seek additional discovery under theory of regulatory estoppel.

Motion granted.

West Headnotes (21)

[1] Insurance

In Pennsylvania, the interpretation of an insurance contract is a question of law.

[2] Insurance

Under Pennsylvania law, a court must interpret the plain language of the insurance contract read in its entirety, giving effect to all its provisions.

[3] Insurance

Under Pennsylvania law, the words in an insurance policy are construed by their natural, plain and ordinary sense meaning.

[4] Insurance

When an insurance policy language is ambiguous under Pennsylvania law, the provision is construed in favor of the insured.

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[5] Insurance

Under Pennsylvania law, insurance policy language may not be stretched beyond its plain meaning to create an ambiguity.

[6] Insurance

Under Pennsylvania law, an insurance policy is not ambiguous merely because the parties disagree about its meaning.

[7] Insurance

Under Pennsylvania law, the guiding principle in interpreting an insurance contract is to effectuate the reasonable expectations of the insured.

[8] Insurance

Under Pennsylvania law, even if the terms of the insurance contract are clear and unambiguous, the insured's reasonable expectations may prevail over the express terms of the contract.

[9] Insurance

Under Pennsylvania law, the language of the insurance contract itself serves as the best evidence of the parties' reasonable expectations.

[10] Insurance

Under Pennsylvania law, the insured has the initial burden of establishing coverage under the insurance policy; where the insured meets that burden and the insurer relies on a policy exclusion as the basis for denying coverage, the insurer then has the burden of proving that the exclusion applies.

[11] Insurance

Under Pennsylvania law, insurance policy exclusions are strictly construed against the insurer.

[12] Insurance

Any restriction of access, total or partial, to insured properties satisfied prohibited access element of civil authority provision in commercial lines insurance policy under Pennsylvania law.

[13] Insurance

Loss or damage had to be physical or structural, not merely economic, to be covered under civil authority provision or business income provision of all risks commercial lines insurance policy under Pennsylvania law, and therefore loss that occurred as result of shutdown orders in response to COVID-19 pandemic was not covered because loss of utility or mere possibility of presence of virus in nearby properties was not structural or physical.

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[14] Insurance

Governmental shutdown orders in response to COVID-19 pandemic, regulating use of property and having force of law, did not constitute covered cause of loss under civil authority or business income provisions of all risks commercial lines insurance policy under Pennsylvania law, since policy language unequivocally stated that insurer would not pay for any loss or damage caused by law that regulated use of any property.

[15] Insurance

Exclusion for viruses and other pathogens applied to civil authority or business income provisions of all risks commercial lines insurance policy under Pennsylvania law to preclude coverage for losses and damages from governmental shutdown orders that were issued as result of COVID-19 virus, since virus exclusion explicitly stated that it applied to all coverage under all forms and endorsements, including business income or action of civil authority.

[16] Insurance

Lack of specific reference to pandemic in exclusion for viruses and other pathogens did not render that provision ambiguous, and therefore it applied to preclude coverage under civil authority or business income provisions of all risks commercial lines insurance policy for losses and damages from governmental shutdown orders that were issued as result of COVID-19 virus; in any event, there was no real distinction between "virus" and "coronavirus pandemic."

[17] Contracts

Under Pennsylvania law, extrinsic evidence cannot be considered if contract terms are unambiguous.

[18] Insurance

Insureds were not entitled to seek additional discovery under theory of regulatory estoppel on issue of whether virus exclusion was first permitted by state insurance departments due to misleading and fraudulent statements by insurance advisory organization that property insurance policies did not cover, and were not intended to cover, losses caused by viruses, since insurer's position was consistent with organization's contemplation that pandemic was potential source of loss and created virus exclusion language to foreclose that avenue of recovery.

[19] Insurance

Under Pennsylvania's doctrine of regulatory estoppel, an industry that makes representations to a regulatory agency to win agency approval will not be heard to assert the opposite position when claims are made by litigants such as insured policyholders.

[20] Insurance

To establish regulatory estoppel under Pennsylvania law, the party seeking to invoke it

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must establish that the opposing party made a statement to a regulatory agency and later adopted a position contrary to the one presented to the regulatory agency.

[21] **Federal Civil Procedure**

Insured could not be granted leave to amend, after dismissal of breach of contract claim against insurer, since language of civil authority or business income provisions of all risks commercial lines insurance policy was clear, insured already had amended its complaint, and further amendment would have been futile. Fed. R. Civ. P. 12(b)(6), 15.

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MEMORANDUM OPINION

Savage, District Judge

***1** Like many restaurants in Philadelphia and Pennsylvania, plaintiffs **Newchops** Restaurant Comcast LLC and LH Dining L.L.C. were forced to close or severely limit operations in March 2020 due to the shutdown orders issued by the Governor of Pennsylvania and the Mayor of Philadelphia in response to the COVID-19 pandemic. As a result, they suffered business losses and sought indemnity from their insurance carrier, **Admiral** Indemnity Company, under their commercial lines policies. **Admiral** denied the claims.

Newchops and LH Dining ("insureds") then brought these actions seeking a declaration that **Admiral** must cover the business losses resulting from the mandatory closing of their restaurants pursuant to the shutdown orders.[1] The insureds claim that their business losses are covered under the civil authority and business income provisions of their policies. **Admiral** argues that the insureds have not alleged facts establishing coverage under either provision. If they did, their claims are barred by the virus exclusion.

We conclude that the alleged facts establish that their losses are not covered. Even if they were, the virus exclusion bars coverage. Therefore, we shall grant **Admiral's** motions to dismiss.

Factual Background

Newchops owns and operates Chops, a steakhouse located in Center City Philadelphia,[2] and LH Dining operates River Twice Restaurant in South Philadelphia.[3] The insureds each served hundreds of customers weekly in outdoor and indoor dining spaces.[4]

In September 2019, **Admiral** issued commercial lines policies to the insureds, providing property, business personal property, business income, extra expenses and other coverage through September 2020.[5] They are "all risks" policies.

On March 16, 2020, in response to the rapidly worsening COVID-19 pandemic, the City of Philadelphia ordered the closure of all non-essential businesses (the "Philadelphia Order").[6] The Philadelphia Order mandated that "[f]ood establishments may only accommodate online and phone orders for delivery and pick-up, and cannot allow dine-in service, for the duration of these restrictions."[7] Three days later, Pennsylvania Governor Tom Wolf issued an order requiring all "non-life-sustaining businesses" across the Commonwealth to cease operations and close all physical locations (the "Pennsylvania Order").[8] The Pennsylvania Order noted that "[a]ll restaurants and bars previously

have been ordered to close their dine-in facilities" and ordered that "[b]usinesses that offer carry-out, delivery, and drive-through and beverage service may continue, so long as social distancing and other mitigation measures are employed to protect workers and patrons."[9]

***2** Complying with the shutdown orders, the insureds closed their restaurants on March 16, 2020.[10] **Newchops** laid off twenty-five employees.[11] LH Dining furloughed eight.[12]

The insureds each filed an action seeking a declaration that its business losses were covered.[13] **Admiral** answered the complaints and filed a motion for judgment on the pleadings in each.[14] In response to the motions, the insureds filed amended complaints on June 29, 2020.[15] **Admiral** responded with motions to dismiss.[16]

Interpreting Insurance Contracts

[1] [2] [3]The interpretation of an insurance contract is a question of law. *Am. Auto. Ins. Co. v. Murray*, 658 F.3d 311, 320 (3d Cir. 2011). A court must interpret the plain language of the insurance contract read in its entirety, giving effect to all its provisions. *Id.* (citation omitted); *Sapa Extrusions, Inc. v. Liberty Mut. Ins. Co.*, 939 F.3d 243, 258 (3d Cir. 2019) (quoting *Mut. of Omaha Ins. Co. v. Bosses*, 428 Pa. 250, 237 A.2d 218, 220 (1968)); *Contrans, Inc. v. Ryder Truck Rental, Inc.*, 836 F.2d 163, 169 (3d Cir. 1987) (quoting 13 Appleman, *Insurance Law and Practice*, § 7383 at 34-37 (1976)). The words in the policy are construed by their "natural, plain and ordinary sense" meaning. *Riccio v. Am. Republic Ins. Co.*, 550 Pa. 254, 705 A.2d 422, 426 (1997) (citing *Easton v. Wash. Cty. Ins. Co.*, 391 Pa. 28, 137 A.2d 332, 335 (1958)).

[4] [5] [6]When the policy language is ambiguous, the provision is construed in favor of the insured. *Ramara, Inc. v. Westfield Ins. Co.*, 814 F.3d 660, 677 (3d Cir. 2016) (quoting *Med. Protective Co. v. Watkins*, 198 F.3d 100, 104 (3d Cir. 1999)); *Pa. Nat'l Mut. Cas. Ins. Co. v. St. John*, 630 Pa. 1, 106 A.3d 1, 14 (2014) (quoting *401 Fourth St., Inc. v. Investors Ins. Grp.*, 583 Pa. 445, 879 A.2d 166, 171 (2005)). The policy is ambiguous where it is reasonably susceptible of more than one construction and meaning. *Pa. Nat'l*, 106 A.3d at 14 (citing *Lititz Mut. Ins. Co. v. Steely*, 567 Pa. 98, 785 A.2d 975, 978 (2001)). However, policy language may not be stretched beyond its plain meaning to create an ambiguity. *Meyer v. CUNA Mut. Ins. Soc.*, 648 F.3d 154, 164 (3d Cir. 2011) (citing *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 557 Pa. 595, 735 A.2d 100, 106 (1999)); *Trizechahn Gateway LLC v. Titus*, 601 Pa. 637, 976 A.2d 474, 483 (2009) (citation omitted). It is not ambiguous merely because the parties disagree about its meaning. *Meyer*, 648 F.3d at 164 (citing *Williams v. Nationwide Mut. Ins. Co.*, 750 A.2d 881, 885 (Pa. Super. 2000)).

[7] [8] [9]The guiding principle in interpreting an insurance contract is to effectuate the reasonable expectations of the insured. *Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 903 (3d Cir. 1997) (citations omitted); *Safe Auto Ins. Co. v. Berlin*, 991 A.2d 327, 331 (Pa. Super. 2010) (citation omitted). Under Pennsylvania law, even if the terms of the insurance contract are clear and unambiguous, the insured's reasonable expectations may prevail over the express terms of the contract. *Bensalem Twp. v. Int'l Surplus Lines Ins. Co.*, 38 F.3d 1303, 1309 (3d Cir. 1994); *see also Safe Auto Ins. Co.*, 991 A.2d at 332 ("[A] court's decision to look beyond the policy language is not erroneous under all circumstances.") (citation omitted). Nonetheless, the language of the insurance contract itself serves as the best evidence of the parties' reasonable expectations. *Safe Auto Ins. Co.*, 991 A.2d at 332 (quoting *Allstate Ins. Co. v. McGovern*, No. 07-2486, 2008 WL 2120722, at *2 (E.D. Pa. May 20, 2008)). At times, the Pennsylvania Superior Court has ruled out reasonable expectations when the insurance contract is clear and unambiguous. *See Regis Ins. Co. v. All Am. Rathskeller, Inc.*, 976 A.2d 1157, 1166 n.11 (Pa. Super. 2009) ("However, an insured may not complain that his or her reasonable expectations were frustrated by policy limitations which are clear and unambiguous.") (citations and quotations omitted); *Millers Capital Ins. Co. v. Gambone Bros. Dev. Co.*, 941 A.2d 706, 717 (Pa. Super. 2007).

***3 [10] [11]**The insured has the initial burden of establishing coverage under the policy. *State Farm Fire & Cas. Co. v. Estate of Mehlman*, 589 F.3d 105, 111 (3d Cir. 2009) (citing *Koppers Co. v. Aetna Cas. and Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996)). Where the insured meets that burden and the insurer relies on a policy exclusion as the basis for denying coverage, the insurer then has the burden of proving that the exclusion applies. *Id.*; *Wolfe v. Ross*, 115 A.3d 880, 884 (Pa. Super. 2015) (citing *Donegal Mut. Ins. Co. v. Baumhammers*, 595 Pa. 147, 938 A.2d 286, 290 (2007)). Policy exclusions are strictly construed against the insurer. *Nationwide Mut. Ins. Co. v. Cosenza*, 258 F.3d 197, 206-7 (3d Cir. 2001) (citing *Selko v. Home Ins. Co.*, 139 F.3d 146, 152 n.3 (3d Cir. 1998)); *Peters v. Nat'l Interstate Ins. Co.*, 108 A.3d 38, 43 (Pa. Super. 2014) (quoting *Swarner v. Mut. Benefit Grp.*, 72 A.3d 641, 644-45 (Pa. Super. 2013)).

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Analysis

The insureds assert coverage under the civil authority and the business income provisions of the policy.[17] **Admiral** contends that there is no covered loss under either provision.[18] It also relies on the virus exclusion as a basis for denying coverage.[19] Pointing out that the virus exclusion expressly applies to both the civil authority and business income provisions, **Admiral** asserts that the exclusion bars coverage.[20]

Under Pennsylvania law, we first determine whether the insureds have met their burden of establishing coverage under either the civil authority or the business income provision before considering whether the virus exclusion applies. *See State Farm*, 589 F.3d at 111 (citations omitted); *Wolfe*, 115 A.3d at 884 (citations omitted).

The civil authority provision 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 Business 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.[21]

The business income coverage provides in relevant part:

> 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. The loss or damage must be caused by or result from a Covered Cause of Loss.[22]

***4** [12]The civil authority provision applies when a civil authority issues an order prohibiting access[23] to the insured's property in response to a dangerous physical condition caused by damage to another's property. The business income provision is triggered when there is a suspension of the insureds' operations caused by direct physical loss of or damage to the insured's property.

Both coverages share two essential elements. Each is predicated on damage to property. The civil authority coverage requires "damage to property" of another, and the business income provision covers "direct physical loss of or damage to property" of the insured.

Each also depends on the existence of a "covered cause of loss" as defined in the policy. The civil authority coverage applies only when the damage to another's property that instigated the governmental response was caused by a "covered cause of loss." Similarly, the business income coverage applies when operations are suspended as a result of loss or damage caused by a "covered cause of loss."

The parties do not disagree that the facts state that the shutdown orders were "civil authority actions" within the meaning of the policy. Nor do they dispute that the allegations show there was a "suspension of operations" as a result of these actions. The dispute is whether the insureds have alleged loss of or damage to property caused by a covered cause of loss. Thus, we start with what constitutes loss of or damage to property and then examine the policy definition of a covered cause of loss.

Loss of or Damage to Property

The civil authority provision applies when damage to another's property created a dangerous condition resulting in the government restricting access to the insured property. The business income coverage applies when business losses are caused by "direct physical loss of or damage to" the insured property.

[13]The issue here is whether the loss or damage must be physical or structural, not merely economic. **Admiral** contends that the insureds must allege some distinct, demonstrable, physical alteration of the insured properties or nearby properties to satisfy the "damage to property" requirement.[24] It argues that the policy covers only tangible, physical damage, such as a structural change,

not economic damage.[25] Citing the "physical loss of or damage to property" language appearing only in the business income provision, the insureds counter that a loss of functionality, usability or habitability is sufficient.[26]

***5** Property damage is "a distinct, demonstrable, physical alteration of the property." 10A *Couch on Ins.* § 148.46 (3d ed. 1995) (citations omitted). Pure economic losses are intangible and do not constitute property damage. 9A *Couch on Ins.* § 129.7.

Reading the civil authority and business income provisions in the context of the entire policy, we conclude that the damage must be physical.[27] The civil authority provision specifically refers to "dangerous physical conditions resulting from the damage or a continuation of the Covered Cause of Loss that caused the damage." The instigation of the orders prohibiting access must be a physical condition in a nearby property. Loss of utility is not structural or physical. Nor is the mere possibility of the presence of the virus in the nearby properties.

The business income provision covers losses sustained by the suspension of operations during the "period of restoration." This term is given special meaning in the policy. It is defined as ending "when the property ... should be repaired, rebuilt or replaced."[28] This definition informs that the loss or damage to the property must be physical, affecting the structure of the property. It speaks to the time to "repair, rebuild or replace" the property, terms connoting structure. *See Phila. Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 287 (S.D.N.Y. 2005) (finding the restoration language "strongly suggest[s] that the damage contemplated by the Policy is physical in nature" under Pennsylvania law).

There was no physical damage to the insureds or others' properties alleged in the amended complaints. Thus, because they have not alleged facts showing damage to others' properties or "a direct physical loss of or damage to" their own properties, the insureds have not established coverage under the civil authority or the business income provisions.

Covered Cause of Loss

***6** [14]As in typical "all risks" policies, the policy here defines a covered cause of loss as a risk of "direct physical loss" unless the loss is excluded or limited.[29] The insureds argue that the shutdown orders are the covered cause of loss that caused their business losses.[30] However, the shutdown orders cannot constitute a covered cause of loss under either the civil authority or business income provision.

To trigger coverage under the civil authority provision, a covered cause of loss must cause damage to another's property, prompting a civil authority action to respond to that damage. The insureds do not allege damage to nearby properties or to their own properties that was the result of a covered loss. The shutdown orders and accompanying proclamations were in response to the COVID-19 health crisis, not damage to any property – the insureds' or another's. *See, e.g.*, "Proclamation of Disaster Emergency," Governor Wolf, Commonwealth of Pennsylvania (March 6, 2020) (stating that it is critical "to implement measures to mitigate the spread of COVID-19");[31] "Emergency Order Temporarily Prohibiting Operation of Non-Essential Businesses and Congregation of Persons to Prevent the Spread of 2019 Novel Coronavirus (COVID-19): Order No. 2," Office of the Mayor: Department of Public Health, City of Philadelphia (March 22, 2020) ("[I]n order to limit the spread of COVID-19, it is immediately necessary to forbid the operations of businesses that do not provide essential services to the public and activities that endanger public health");[32] Philadelphia Order (stating that certain business closures were required "to reduce the spread of the COVID-19 novel coronavirus in Philadelphia"); Pennsylvania Order ("All restaurants and bars previously have been ordered to close their dine-in facilities to help stop the spread of COVID-19"). The insureds assert as much in their amended complaints.[33] The civil authority action cannot be both the cause of that damage and the response to it.

Governmental Order Exclusion

***7** The policy's definition of "covered cause of loss" as it applies to both the civil authority and business income provisions contains an exclusion for governmental orders. The "Causes of Loss – Special Form" specifically states that a government order, like the shutdown orders, is not a "covered cause of loss." The form reads, "[w]e will not pay for loss or damage caused directly or indirectly by ... [t]he enforcement of any ordinance or law ... [r]egulating the construction, *use* or repair of any property."[34] As that unequivocal language states, **Admiral** will not pay for any loss or damage caused by a law that regulated the use

of any property. That is what happened here. The shutdown orders were governmental orders regulating the use of property and having the force of law.

According to the Pennsylvania State Police, the shutdown orders "can be enforced by local law enforcement as well as state police. While voluntary compliance is preferred, law enforcement maintains discretion to warn or cite individuals who fail to abide by the orders, and each decision is based on the unique circumstances of an encounter." *See* "Business Closure, Stay at Home Order, Worker Safety Measures, and Liquor Control Enforcement," Pennsylvania State Police (2020), https://www.psp.pa.gov/COVID-19/Pages/Enforcement.aspx. According to the enforcement guidance, "[t]he closures are enforceable through criminal penalties, under the Disease Control and Prevention Law of 1955 and the Administrative Code of 1929." The Administrative Code, 71 P.S. § 1409, proscribes criminal penalties of a fine or 30 days in county jail. *See* "Business Closure Order Enforcement Guidance," Pennsylvania State Police (2020), https://www.psp.pa.gov/Documents/Public% 20Documents/Letter% 20LEO% 20Community.pdf. Certain provisions under the Crimes Code, including 18 Pa. C.S. § 5101, may be applicable for more serious violations. *Id.*

In his guidance to the restaurant industry, Governor Wolf warned that "[f]ailure to strictly adhere to the requirements of this guidance may result in disciplinary actions up to and including suspension of licensure, including liquor licenses." "Guidance for Businesses in the Restaurant Industry Permitted to Operate During the COVID-19 Disaster Emergency to Ensure the Safety and Health of Employees and the Public," Governor Tom Wolf (May 27, 2020), https://www.governor.pa.gov/covid-19/restaurant-industry-guidance/. According to the guidance, restaurants that do not complete the self-certification process must operate at no greater than 25% indoor capacity. *Id.* It warned that if a restaurant did not self-certify and exceeded 25% indoor capacity by October 5, 2020, the state enforcement agencies may impose penalties. *Id.*

The Mayor similarly imposed restrictions on indoor and outdoor dining, including that "[b]usinesses must obtain any permits or other authorization, as required, to serve food and beverages outside of physical indoor service areas." "Reopening Guidance: Restaurants and Mobile Food Vendors," Office of the Mayor: Department of Public Health, City of Philadelphia at 1 (October 20, 2020), https://www.phila.gov/media/20200529130422/Guidelines-for-Restaurants-Mobile-Food-Vendors.pdf. The Mayor's guidance specifically provided that restaurants must follow the requirements outlined in Governor Wolf's guidance to the restaurant industry. *Id.*

***8** As a result of the shutdown orders, the insureds were unable to use their restaurants as intended without violating the law. Thus, the shutdown orders regulating the use of the insureds' properties are not a covered cause of loss under either the civil authority or business income provision.

Virus Exclusion

[15]Even if the insureds had suffered covered losses under either or both the civil authority and business income provisions, the virus exclusion precludes coverage. The policy contains an exclusion for viruses and other pathogens. The virus exclusion provides "[w]e will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease."[35]

Lest there be any ambiguity, the virus exclusion explicitly states that it "applies to all coverage under all forms and endorsements ... including ... business income ... or action of civil authority."[36] This reference to civil authority coverage contemplates a civil authority action taken in response to a virus and excludes it from coverage. Similarly, the specific application of the virus exclusion to business income coverage shows that the parties had agreed that a suspension of an insured's operations caused by a virus was not covered.

In an attempt to circumvent this exclusion, the insureds argue that the cause of their losses and damages is the shutdown orders, not the COVID-19 virus.[37] This effort fails.

The civil authority provision applies only when another's property is damaged by a covered cause of loss. As alleged in the amended complaints, the virus contaminated other properties which caused the civil authorities to issue the orders. If so, the cause of the insureds' losses was the virus, which is specifically excluded as a covered cause of loss. Even if the shutdown orders were the cause, they are similarly excluded from the definition of covered cause of loss. Thus, whether the cause of the losses was the shutdown orders or the virus, it was not covered.

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The business income provision requires loss of or damage to the insured's property caused by a covered cause of loss. The insureds do not claim that the virus contaminated their properties. Nor do they allege any damage to their properties that caused them to suspend operations. If they did, the virus exclusion would bar coverage.

[16] [17]The insureds argue that the virus exclusion is ambiguous because it does not include a specific reference to a pandemic. The 2006 Insurance Services Office ("ISO") filing cited in the amended complaints reveals why insurers sought the virus exclusion.[38] The ISO filing clearly contemplated a pandemic as a potential source of loss and created the virus exclusion language to foreclose that avenue of recovery. The filing reads:

> 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.[39]

***9** The lack of a specific reference to a pandemic in the policy does not render the provision ambiguous. *See Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. 20-3198, ––– F.Supp.3d ––––, ––––, 2020 WL 6545893, at *4 (E.D. Pa. Nov. 6, 2020) ("the virus exclusion unambiguously bars coverage for plaintiff's claims due to COVID-19"). *See also Diesel Barbershop, LLC v. State Farm Lloyds*, No. 20-461, ––– F.Supp.3d ––––, ––––, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020) (citing *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 210 (5th Cir. 2007)) ("[W]hile the Virus Exclusion could have been even more specifically worded, that alone does not make the exclusion 'ambiguous.' "). In any event, there is no real distinction between "virus" and "coronavirus pandemic."

[18]The insureds argue that the virus exclusion was first permitted by state insurance departments "due to misleading and fraudulent statements by the ISO that property insurance policies do not and were not intended to cover losses caused by viruses."[40] The insureds maintain that "before the ISO made such baseless assertions, courts considered contamination by a virus to be physical damage."[41] Without relying on any facts, the insureds seek additional discovery on this issue under a theory of regulatory estoppel.

[19] [20]"[U]nder Pennsylvania's doctrine of regulatory estoppel, an industry that makes representations to a regulatory agency to win agency approval 'will not be heard to assert the opposite position when claims are made by [litigants such as] insured policyholders.' " *Hussey Copper, Ltd. v. Arrowood Indem. Co.*, 391 F. App'x 207, 211 (3d Cir. 2010) (quoting *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 566 Pa. 494, 781 A.2d 1189, 1192-93 (2001)). To establish regulatory estoppel under Pennsylvania law, the party seeking to invoke it must establish that the opposing party made a statement to a regulatory agency and later adopted a position contrary to the one presented to the regulatory agency. *Simon Wrecking Co. v. AIU Ins. Co.*, 541 F. Supp. 2d 714, 717 (E.D. Pa. 2008).

Even assuming that ISO's statements can be imputed to **Admiral**,[42] the insureds have not alleged that **Admiral** is now contradicting those statements. On the contrary, **Admiral's** position here is consistent with the ISO's statement. The ISO's filing asserted in relevant part:

> **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.... 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.[43]

***10** The ISO recognized that not every case alleging loss due to virus or bacteria involves property damage and that a virus exclusion can be helpful in clarifying that a policy does not cover losses stemming from a virus or other disease-causing agent. Even if ISO's statement was fraudulent or misleading, the insureds have not identified how **Admiral's** position contradicts ISO's earlier statements. *See Handel*, ––– F.Supp.3d at ––––, 2020 WL 6545893, at *5 ("Defendant takes the same position here as the ISO and AAIS did by arguing that the virus exclusion eliminates coverage for any damage or loss as a result of the causes enumerated therein. Since defendant does not take a contradictory position to the one made to regulatory agencies, the doctrine of regulatory estoppel does not apply to this action."); *Kessler v. Dentists' Ins. Co.*, No. 20-3376, 2020 WL 7181057, at *3 (E.D. Pa.

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Dec. 7, 2020). Therefore, the insureds have not stated a claim for regulatory estoppel.

Conclusion

[21]The insureds have not stated a claim for coverage under the civil authority or the business income provisions. They have not alleged losses caused by a "covered cause of loss." Even if the insureds had met their burden of establishing coverage under either or both of these provisions, the virus exclusion precludes coverage. Therefore, we shall grant the motions to dismiss with prejudice.[44]

All Citations

--- F.Supp.3d ----, 2020 WL 7395153

Footnotes

1 The insureds bring two separate actions, but the defendant, the insurance policies, the factual allegations and the arguments are identical. We shall refer to the policies in the singular.

2 Pl.'s Am. Compl. at ¶ 12 (Case No. 20-1949, ECF No. 27) ("**Newchops** Am. Compl.").

3 Pl.'s Am. Compl. at ¶ 12 (Case No. 20-1869, ECF No. 27) ("LH Dining Am. Compl.").

4 **Newchops** Am. Compl. at ¶¶ 12, 62; LH Dining Am. Compl. at ¶¶ 12, 63.

5 **Newchops** Am. Compl. at ¶¶ 11, 13-14, 17; LH Dining Am. Compl. at ¶¶ 11, 13-14, 17.

6 **Newchops** Am. Compl. at ¶ 47; LH Dining Am. Compl. at ¶ 47.

7 "City Announces New Restrictions on Business Activity in Philadelphia," City of Philadelphia (March 16, 2020), https://www.phila.gov/2020-03-16-city-announces-new-restrictions-on-business-activity-in-philadelphia/ (the "Philadelphia Order"); **Newchops** Am. Compl. at ¶ 47 (citing the Philadelphia Order); LH Dining Am. Compl. at ¶ 47 (citing the Philadelphia Order).

8 **Newchops** Am. Compl. at ¶ 48; LH Dining Am. Compl. at ¶ 48.

9 *Id.*; Def.'s Mot. to Dism. Ex. 2 (Case No. 20-1949, ECF No. 29) ("**Newchops** Mot. to Dism."); Def.'s Mot. to Dism. Ex. 2 (Case No. 20-1869, ECF No. 29) ("LH Dining Mot. to Dism.").

10 **Newchops** Am. Compl. at ¶ 57; LH Dining Am. Compl. at ¶ 58.

11 **Newchops** Am. Compl. at ¶ 58.

12 LH Dining Am. Compl. at ¶ 59.

13 Pl.'s Compl. (Case No. 20-1869, ECF No. 1); Pl.'s Compl. (Case No. 20-1949, ECF No. 1).

14 Def.'s Answer (Case No. 20-1949, ECF No. 13); Def's Mot. for J. on the Plead. (Case No. 20-1949, ECF No. 17); Def.'s Answer (Case No. 20-1869, ECF No. 14); Def.'s Mot. for J. on Plead. (Case No. 20-1869, ECF No. 18).

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15 **Newchops** Am. Compl.; LH Dining Am. Compl.

16 **Newchops** Mot. to Dism.; LH Dining Mot. to Dism.

17 **Newchops** Am. Compl. at ¶ 73, Section VI(10); LH Dining Am. Compl. at ¶ 74, Section VI(10); Pl.'s Resp. at 20, 36-37 (Case No. 20-1949, ECF No. 30) ("**Newchops** Resp."); Pl.'s Resp. at 20, 36-37 (Case No. 20-1869, ECF No. 30) ("LH Dining Resp.").

18 **Newchops** Mot. to Dism. at 23-32; LH Dining Mot. to Dism. at 23-32.

19 **Newchops** Mot. to Dism. at 18; LH Dining Mot. to Dism. at 18.

20 **Newchops** Mot. to Dism. at 18, 21; LH Dining Mot. to Dism. at 18, 21.

21 **Newchops** Policy at BI-2 § A.5.a ("**Newchops** Policy"); LH Dining Policy at BI-2 § A.5.a ("LH Dining Policy").

22 **Newchops** Policy at BI-1 § A.1; LH Dining Policy at BI-1 § A.1.

23 **Admiral** argues that because the orders permitted partial use of the properties, access was not prohibited. The shutdown orders prohibited access to the insured properties. It does not matter whether the prohibition was total or partial. Nothing in the policy requires total inaccessibility. The restaurants were essentially closed to the public, prohibiting the insureds from conducting their usual business. Because it is unclear whether access need be total or substantially prohibited, the policy language is ambiguous. Accordingly, because we must construe the ambiguity in favor of the insureds, we conclude that any restriction of access, total or partial, to the properties satisfies the prohibited access element of the civil authority provision.

24 **Newchops** Mot. to Dism. at 28-30; LH Dining Mot. to Dism. at 28-30.

25 **Newchops** Mot. to Dism. at 29; LH Dining Mot. to Dism. at 29.

26 The insureds do not address the "damage to property" language from the civil authority provision.

27 This conclusion is consistent with the opinions of numerous other courts presented with the same issue in the COVID-19 business interruption insurance context. *See, e.g., Kessler v. Dentists' Ins. Co.*, No. 20-3376, 2020 WL 7181057, at *5 (E.D. Pa. Dec. 7, 2020); *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. 20-3198, ––– F.Supp.3d ––––, ––––, 2020 WL 6545893, at *3 (E.D. Pa. Nov. 6, 2020); *Real Hosp. LLC v. Travelers Cas. Ins. Co.*, No. 20-87, ––– F.Supp.3d ––––, –––– – ––––, 2020 WL 6503405, at *5-6 (S.D. Miss. Nov. 4, 2020); *Uncork and Create LLC. v. Cincinnati Ins. Co.*, No. 20-00401, ––– F.Supp.3d ––––, –––– – ––––, 2020 WL 6436948, at *4-5 (S.D. W. Va. Nov. 2, 2020); *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, No. 20-275, ––– F.Supp.3d ––––, –––– – ––––, 2020 WL 6163142, at *6-7 (S.D. Ala. Oct. 21, 2020); *Seifert v. IMT Ins. Co.*, No. 20-1102, ––– F.Supp.3d ––––, –––– – ––––, 2020 WL 6120002, *3-4 (D. Minn. Oct. 16, 2020); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, No. 20-2160, ––– F.Supp.3d ––––, ––––, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020); *Turek Enters v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, ––– F.Supp.3d ––––, –––– – ––––, 2020 WL 5258484, *6-7 (E.D. Mich. Sept. 3, 2020); *10E, LLC v. Travelers Indem. Co. of Conn.*, No. 20-4418, ––– F.Supp.3d ––––, ––––, 2020 WL 5359653, at *4 (C.D. Cal. Sept. 2, 2020); *Malaube, LLC v. Greenwich Insurance Co.*, No. 20-22615, 2020 WL 5051581, at *7 (S.D. Fla. Aug. 26, 2020); *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 20-461, ––– F.Supp.3d ––––, ––––, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020).

28 **Newchops** Policy at BI-11 § F.3.b(1); LH Dining Policy at BI-11 § F.3.b(1).

29 **Newchops** Mot. to Dism. Ex. 3 at COL-1 § A ("Covered Causes of Loss means Risks Of Direct Physical Loss unless the loss is: (1) Excluded in Section B., Exclusions; or (2) Limited in Section C., Limitations; that follow"); LH Dining Mot. to Dism. Ex. 3 at COL-1 § A (same).

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30 **Newchops** Am. Compl. at ¶ 33; **Newchops** Resp. at 13-14; LH Dining Am. Compl. at ¶ 33; LH Dining Resp. at 13-14.
The insureds offer contradictory causes of the closing of their restaurants. In the amended complaints, the insureds admit they shut their doors "*[i]n light of the Coronavirus global pandemic* and state and local orders mandating that restaurants not permit in-store dining[.]" **Newchops** Am. Compl. at ¶ 2 (emphasis added); LH Dining Am. Compl. at ¶ 2 (emphasis added). The insureds claim in their briefing that "the losses *caused by COVID-19* and the risk of injury constitute a covered cause of loss under the terms of the Policy" and "Plaintiff experienced physical loss *as a result of the pandemic* and the resulting Civil Authority Orders." **Newchops** Resp. at 20, 34 (emphasis added); LH Dining Resp. at 20, 34 (emphasis added). They also claim that COVID-19 caused damage to property through virus contamination when rebutting **Admiral's** arguments about the third element of civil authority coverage. **Newchops** Resp. at 34; LH Dining Resp. at 34. On one hand, they argue that COVID-19 is not the cause of the damage or their losses when considering whether the virus exclusion applies. On the other hand, it is the cause when trying to establish coverage under the civil authority provision. As we shall see, neither cause is covered. *See infra* at ——.

31 *See* **Newchops** Am. Compl. Ex. 2 at 1.

32 *See* **Newchops** Am. Compl. Ex. 3.

33 *See* **Newchops** Am. Compl. at ¶¶ 33 ("Plaintiff's losses were caused by the entry of Civil Authority Orders, particularly those by Governor Wolf and by the Pennsylvania Department of Health, *to mitigate the spread of COVID-19*"), 46 (Governor Wolf's March 6 Order was "the first formal recognition of an emergency situation in the Commonwealth *as a result of COVID-19*"); LH Dining Am. Compl. at ¶¶ 33, 46 (same).

34 **Newchops** Policy COL-1 § B.1.a(1) (emphasis added); LH Dining Policy COL-1 § B.1.a(1) (emphasis added).

35 **Newchops** Policy at CP 01 40 07 06 § B; LH Dining Policy at CP 01 40 07 06 § B.

36 **Newchops** Policy at CP 01 40 07 06 § A; LH Dining Policy at CP 01 40 07 06 § A.

37 *See supra* note 30.

38 Although extrinsic evidence cannot be considered if the contract terms are unambiguous, *see Wert v. Manorcare of Carlisle PA, LLC*, 633 Pa. 260, 124 A.3d 1248, 1259 (2015), the ISO filing is relevant to the insureds' regulatory estoppel argument and further underscores **Admiral's** point that the virus exclusion applies here.

39 **Newchops** Mot. to Dism. Ex. 6 at 6 (emphasis added); LH Dining Mot. to Dism. Ex. 6 at 6 (emphasis added).

40 **Newchops** Am. Compl. at 34; LH Dining Am. Compl. at 34.

41 *Id.*

42 **Admiral** suggests in passing that the ISO's statements to regulators do not bind it, but it does not directly argue this point. *See* Def.'s Reply in Supp. of Mot. to Dism. at 7 (Case No. 20-1949, ECF No. 31) ("**Newchops** Reply") ("Even assuming that ISO's actions in 2006 could bind **Admiral**...."); Def.'s Reply in Supp. of Mot. to Dism. at 7 (Case No. 20-1869, ECF No. 31) ("LH Dining Reply") (same). The insureds do not explain how the ISO's statements to Pennsylvania insurance regulators bind **Admiral**.
In *Hussey*, the plaintiff claimed that the defendant was asserting a position contrary to statements made to the Pennsylvania Insurance Department by the ISO on behalf of insurance companies like the defendant. 391 F. App'x at 211. The Court rejected the plaintiff's regulatory estoppel argument, but not because of an issue with the ability of the ISO's statements to bind the defendant. Rather, the Court held that regulatory estoppel did not apply because the statements were not relevant to the contract language at issue in the case, and the context of the statements showed the defendant's position was consistent with the ISO's representations. *Id.*

43 **Newchops** Reply Ex. 6 at 2 (emphasis added); LH Dining Reply Ex. 6 at 2 (emphasis added).

44 We shall not grant leave to amend because the insureds have already amended their complaints, the language of the policy is clear and further amendment would be futile.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by V&S Elmwood Lanes, Inc. v. Everest National Insurance Company, E.D.Pa., January 11, 2021

2020 WL 7181057
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

KESSLER DENTAL ASSOCIATES, P.C., Plaintiff, v. The DENTISTS INSURANCE COMPANY, Defendant.

Case No. 2:20-cv-03376-JDW
|
Signed 12/07/2020

Attorneys and Law Firms

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MEMORANDUM

JOSHUA D. WOLSON, United States District Judge

***1** Even before Covid-19, the question on everyone's mind when going to the dentist was the same, "Is it safe?"[1] The Covid-19 pandemic heightened those safety concerns, not just for dentists but for all types of business in Pennsylvania and around the country. In an effort to mitigate these risks and ensure that things are, in fact, safe, governments have restricted business operations, including dental offices. Stuck between a rock and a hard place, many of those businesses have turned to their insurers for relief.

Kessler Dental Associates is one such business. It has sued its insurer, The Dentists Insurance Company, for declining a claim for coverage for losses it has incurred. The Court sympathizes with Kessler Dental. But it cannot ignore that Kessler Dental purchased an insurance policy that does not cover the losses that it suffered. At the risk of being labeled an anti-Dentite,[2] the Court will grant Dentists Insurance's motion to dismiss.

I. BACKGROUND

A. The Policy's Coverages

Kessler Dental operates a dental practice in Phoenixville, Pennsylvania. It receives commercial property insurance coverage from Dentists Insurance under a policy from January 2020. Among other things, the Policy includes Loss of Income coverage that provides coverage in the event of certain interruptions to Kessler Dental's business. It includes both Dental Practice Income loss coverage and Civil Authority loss coverage.

The Policy provides that Dentists Insurance will pay for "direct physical loss of or physical damage to covered property, subject to all limitations and exclusions...." (*Id.* at 19.) The coverage includes Dental Practice Income loss that Kessler Dental sustains "during the period of restoration caused directly by a necessary suspicion of [the] dental practice," if the suspension was "the direct result of a covered loss or damage to the insured property...." (ECF No. 11-1 at 14.) The "period of restoration" begins "on the date of covered loss or damage to insured property...." and ends when the property is repaired, the practice starts to earn income, or two years following the date of loss. (ECF No. 11-2 at 35.) The Policy also covers "extra expense[s]" incurred "during the period of restoration that the [business] would not have sustained but for the loss or damage to [the] real property or business personal property...." (ECF No. 11-1 at 15).

The "Civil Authority" provision covers loss of Dental Practice Income and extra expenses incurred when a civil authority prohibits access to the business "because of direct physical loss or physical damage to other property, not more than one mile from the premises...." (ECF No. 11-1 at 16.)

B. The Virus Exclusion

The Policy includes a Virus Exclusion that excludes coverage for any "loss or damage, including economic loss, cause by" any "virus, bacteria or other

microorganism that cause or could cause physical illness, disease or disability....” (ECF No. 11-1 at 19, 22.) Kessler Dental alleges that the Insurance Services Office (“ISO”) and the American Association of Insurance Services (“AAIS”) made false statements to various state regulators seeking approval of this Virus Exclusion. In particular, it claims that they represented that the Virus Exclusion only clarified that commercial property policies did not cover disease-causing agents, even though some courts had concluded otherwise. The Amended Complaint claims that the trade groups “represented hundreds of insurers,” but it does not say whether they represented Dentists Insurance. (ECF No. 11 at ¶¶ 83-84.)

C. The Shutdown Orders

***2** On March 19, 2020, Pennsylvania Governor Tom Wolf required all non-life sustaining businesses to close to prevent the spread of Covid-19, a highly contagious respiratory virus that, to date, has infected over 14 million of people in the United States and has claimed the lives of over 270,000 Americans. Covid-19 is transmittable through contact with surfaces and through exposure to airborne particles. On March 23, 2020 Governor Wolf issued a stay-at-home order for residents of various counties in Pennsylvania, including Chester County, where Kessler Dental is located. This order required residents to say at home “except as needed to access, support, or provide life sustaining business, emergency, or government service.” (ECF No. 11-6.) Subsequently, the Pennsylvania Department of Health prohibited all non-emergency dental procedures. (*See* ECF No. 11-7.) And on April 1, 2020, the Governor extended the stay-at-home order to the entire Commonwealth. (See ECF No. 11-8.)

As a result of these orders and based on the Department of Health guidance, Kessler Dental had to close its office for all non-emergency dental services. Kessler Dental submitted a claim for its lost income during the suspension period. On May 20, 2020, The Dentist Insurance Company denied Kessler Dental’s claim because it did not satisfy the Policy’s Dental Income or Civil Authority coverage provisions and was also subject to the Policy’s Virus Exclusion.

D. Procedural History

On October 23, 2020, Kessler Dental filed an Amended Complaint against The Dentist Insurance Company for declaratory judgment and breach of contract for failure to provide coverage under the Policy. Before the Court is Dentists Insurance’s motion to dismiss for failure to state a claim.

II. LEGAL STANDARD

A district court may dismiss a plaintiff’s complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Rather than require detailed pleadings, the “Rules demand only a short and plain statement of the claim showing that the pleader is entitled to relief[.]” *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016) (quotation omitted). “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.” *Id.*

A claim has facial plausibility when the complaint contains factual allegations that permit the court “to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* In doing so, the court must “draw on its judicial experience and common sense.” *Id.* (same). Under the governing “pleading regime[,]” a court confronted with a 12(b)(6) motion must take three steps. First, it must identify the elements needed to set forth a particular claim. *Id.* at 878. Second, the court should identify conclusory allegations, such as legal conclusions, that are not entitled to the presumption of truth. *Id.* Third, with respect to well-pleaded factual allegations, the court should accept those allegations as true and “determine whether they plausibly give rise to an entitlement to relief.” *Id.* The court must “construe those truths in the light most favorable to the plaintiff, and then draw all reasonable inferences from them.” *Id.* at 790 (citations omitted).

III. DISCUSSION

The parties agree that Pennsylvania insurance law applies. Under Pennsylvania law, the goal in interpreting an insurance policy, “as with interpreting any contract, is to ascertain the parties’ intentions, as manifested by the policy’s terms.” *Kvaerner Metals Div. of Kvaerner, U.S. v. Commercial Union Ins. Co.*, 908 A.2d 888, 897 (Pa. 2006). A court should not consider individual items in isolation. It must consider the entire insurance provision to ascertain the intent of the parties. *See*

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Inc. v. Inv'rs Ins. Grp., 879 A.2d 166, 171 (Pa. 2005). When policy language is clear and unambiguous, a court applying Pennsylvania law must give effect to that language. *See Kvaerner Metals*, 908 A.2d at 897. When a provision in the policy is ambiguous, a court must construe the policy "in favor of the insured to further the contract's prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage." *401 Fourth St.*, 879 A.2d at 171. "Contractual language is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." *Id.* (quote omitted).

A. The Virus Exclusion

***3** The Virus Exclusion applies to any "loss or damage, including economic loss, caused by" any "virus, bacteria or other microorganism that cause or could cause physical illness, disease or disability...." (ECF No. 11-1 at 19 and 22.) The language is not ambiguous. It applies to Covid-19, which is caused by a coronavirus that causes physical illness and distress. *See Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, Civ. No. 20-3198, 2020 WL 6545893, at *4 (E.D. Pa. Nov. 6, 2020) (similar virus exclusion barred coverage).

Kessler Dental argues that the exclusion does not apply to expenses it seeks to recover because those expenses are not a "loss" or a "damage." (See ECF No. 11 at ¶¶ 80-81.) Kessler Dental's argument ignores both the Policy's language and structure. First, the exclusion specifies that it includes economic loss. Next, the Policy uses the word "loss," but it does not define it. The Court must therefore give it its plain and ordinary meaning. *See Pa. Manufacturers' Ass'n Ins. Co. v. Aetna Cas. & Sur. Ins. Co.*, 233 A.2d 548, 551 (Pa. 1967). In the insurance context, a "loss" is the "amount of financial detriment caused by ... an insured property's damage." Black's Law Dictionary 1087 (10th ed. 2009). More generally, the word refers to an "undesirable outcome of a risk" (*id.*) or an "amount of money lost by a business or organization" (New Oxford American Dictionary 1033 (3d ed. 2010)). Both the failure to collect income and the payment of continued expenses fall within these definitions of "loss."

Additionally, the Policy's structure indicates that the parties intended the word "loss" to cover both lost income and continuing expenses. Under the Policy, "Loss of Income" includes "Dental Practice Income" and "Action of Civil Authority," both of which include extra expenses. (*See e.g.,* ECF No. 11-1 at 15)(the Policy described that extra expenses are included in determining the amount of "Dental Practice Income.") Extra expenses are, therefore, included in loss Income. These provisions, read as a whole, demonstrate that the parties intended the term "loss" to extend to all types of income, including covered expenses. *See Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:20-CV-03342-JDW, 2020 WL 7024287, at *3 (E.D. Pa. Nov. 30, 2020). Moreover, the Virus Exclusion applies to all income that the section of the Policy covers, including expenses.

Kessler Dental asserts that the doctrine of regulatory estoppel prevents Dentists Insurance from raising the virus exclusion to deny coverage. Regulatory estoppel "prohibits parties from switching legal positions to suit their own ends." *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189, 1192 (Pa. 2001). "A plaintiff must set forth two elements to prove regulatory estoppel: (1) a party made a statement to a regulatory agency; and (2) afterward, the party took a position opposite to the one presented to the regulatory agency." *Simon Wrecking Co. v. AIU Ins. Co.*, 541 F. Supp. 2d 714, 717 (E.D. Pa. 2008). The representations the defendant made in the current litigation must be opposite from the one presented to the regulatory agency, "playing 'fast and loose' with the judicial system." *Id.* at 714.

Kessler Dental has not satisfied either element. Although it alleges that ISO and AAIS made false statements to Pennsylvania state regulators seeking the adoption of the Virus Exclusion, it does not allege that Dentists Insurance was a member of either group or that either group represented Dentists Insurance. But even if the Court were to attribute those trade groups' statements to Dentists Insurance, Kessler Dental does not plead any inconsistency. it alleges that ISO and AAIS made statements in 2006 representing that property policies were not intended to cover virus-related losses. Dentists Insurance takes the same position here today as the ISO and AAIS did in 2006; it argues that the Virus Exclusion bars coverage. Thus, regulatory estoppel does not apply, even if, as Kessler Dental claims, the insurance trade groups made statements to regulators in 2006 that were at odds with the then-current state of the law.

B. Coverage

***4** Even if the Virus Exclusion did not bar coverage, Kessler Dental has not pled facts sufficient to establish that the Policy covers its claim, either under the Dental Income or the Civil Authority coverage.

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1. **Dental Practice Income**

The Parties clash over whether **Kessler** Dental sustained physical loss or damage. It did not. The text of the Policy is clear; it is meant to cover "direct physical loss of or physical damage to covered property...." (*Id.*) Moreover, the Policy pays for "loss of Dental Practice Income during the period of restoration cause directly by a necessary suspension" where the suspension is "the direct result of a covered loss or damage to insured property." (*Id.*) These provisions make clear that there must be some sort of physical damage to the property.

"[P]hysical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure." *Port Auth. of New York & New Jersey v. Affiliated FM **Ins**. Co.*, 311 F.3d 226, 235 (3d Cir. 2002). Allegations of physical damage to a building from "sources unnoticeable to the naked eye must meet a highest threshold." *Id.* at 235. In *Port Authority of New York and New Jersey*, the Third Circuit held that that "asbestos causes physical damage if it is present in such large quantities that it makes the structure "uninhabitable and unusable," but "the mere presence of asbestos, or the general threat of future damage from that presence," is not enough to trigger coverage." *Id.* at 236. There is no reason to think that this would not apply to Covid-19. *See, e.g., Motorists Mut. **Ins**. Co. v. Hardinger,* 131 F. App'x 823, 826 (3d Cir. 2005); *Brian Handel D.M.D.*, 2020 WL 6545893, at *3.

Although **Kessler** Dental asserts in its complaint that "Covid-19 virus caused direct physical loss of or damage" to its business (ECF No.11 at ¶ 49), such legal conclusions are not entitled to the presumption of truth. **Kessler** Dental does not allege that Covid-19 was present on its premises or that it made the structure unusable. Instead, **Kessler** Dental complains that "[b]ecause business is conducted in an enclosed building, [it] is more susceptible to being or becoming contaminated ..."(ECF No. 11 at ¶ 103.) But these are indirect "general threat[s] of future damage" and do not demonstrate "physical damage." *Port Auth. of New York & New Jersey*, 311 F.3d at 235.

Kessler Dental's allegation that it was "forced to close the doors of its non-life sustaining business" fails for similar reasons. (ECF No. 11 at 90.) **Kessler** Dental did not close its dental practice. In fact, no order ever required dental practices to close. Rather, **Kessler** Dental was able to stay open for emergency procedures. **Kessler** Dental's business structure was inhabitable and usable, though on a limited basis. Thus, **Kessler** Dental has not pled facts that Covid-19 caused physical damage to its business to trigger Dental Practice Income coverage under the Policy.

2. **Civil Authority coverage**

The Policy's Civil Authority coverage applies only if there is "direct physical loss or physical damage to other property, not more than one mile from the premises ...," and if a civil authority prohibits access to the covered property. (ECF No. 11-1 at 16.) But no civil authority prohibited access to **Kessler** Dental's practice. The orders prohibited operation of non-life sustaining business and permitted **dentists** to perform emergency procedures. (ECF No. 11-5.) Additionally, the limits on **Kessler** Dental's business did not come from damage to a nearby premise or because there was some dangerous physical condition at another nearby premise. They came when state and local authorities ordered the closure of all non-life sustaining business in Pennsylvania and to help stop the spread of Covid-19.

IV. **CONCLUSION**

***5** The Covid-19 pandemic might be unprecedented, particularly in its impact on businesses large and small. But it is not a writ for the Court to rewrite the Policy to which **Kessler** Dental and **Dentists** Insurance agreed. That Policy does not provide coverage for the losses that **Kessler** Dental has suffered. The Court will grant **Dentists** Insurance motion to dismiss this case. An appropriate Order follows.

All Citations

Slip Copy, 2020 WL 7181057

Footnotes

1 Marathon Man (Paramount Pictures 1975).

2 *Seinfeld: The Yada Yada* (NBC Broadcast April 24, 1997).

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2020 WL 7685913 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania.
Allegheny County

JOSEPH TAMBELLINI, INC. d/b/a Joseph Tambellini Restaurant, Plaintiff,
v.
ERIE INSURANCE EXCHANGE, Defendant.
HTR RESTAURANTS, INC. d/b/a Siebs Pub, Individually and on Behalf of a Class of Similarly Situated Persons, Plaintiff,
v.
ERIE INSURANCE EXCHANGE, Defendant.

Nos. G.D. 20-005137, GD 20-006901.
November 19, 2020.

*1 CIVIL DIVISION

Opinion

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Christine Ward, Judge.

OPINION

I. Factual and Procedural Background

Plaintiffs, Joseph Tambellini, Inc. d/b/a Joseph Tambellini Restaurant and HTR Restaurants, Inc. d/b/a Siebs Pub, individually, and on behalf of a class of similarly situated persons (hereinafter the "Allegheny County Plaintiffs"), together with Capriccio Parkway, LLC d/b/a Capriccio Cafe and Bar at Cret Park, and Capriccio, Inc. d/b/a Capriccio Cafe at Wills Eye Hospital, on behalf of themselves and others similarly situated (the "Philadelphia County Plaintiffs"), and Perfect Pots, LLC (the "Lancaster County Plaintiff), commenced separate actions in their respective counties when Erie Insurance Exchange ("Erie") denied Plaintiffs' and the class members' claims for business interruption coverage in the wake of the COVID-19 pandemic.

The Allegheny County Plaintiffs', the Philadelphia Plaintiffs', and the Lancaster County Plaintiff's Complaints and/or Amended Complaints are nearly identical. Each names Erie as the sole Defendant, and asserts claims for breach of contract and declaratory

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judgment. The gravamen of all Plaintiffs' Complaints is that Erie wrongfully denied Plaintiffs' claims for coverage under the business interruption, civil authority, and extra expense provisions in Plaintiffs' standard business insurance policies with Erie.

On June 24, 2020, Plaintiffs filed a Joint Motion to Coordinate the above-referenced cases in the Court of Common Pleas in Allegheny County, Pennsylvania. Plaintiffs' Motion to Coordinate also requested the coordination of all similar actions filed against Erie in Pennsylvania courts. On July 23, 2020, this Court issued an order granting Plaintiffs' Joint Motion to Coordinate. On August 21, 2020, Erie appealed this Court's July 23, 2020 order.

II. Errors Complained of on Appeal

Erie Insurance Exchange's Pa. R.A.P. 1925(b) statement complained of the following purported errors:

1. The Trial Court abused its discretion in granting Joseph Tambellini, Inc. d/b/a Joseph Tambellini Restaurants and HTR Restaurants, Inc. d/b/a Siebs Pub's Motion to Coordinate where coordination of unfiled cases is beyond the scope of Rule 213.1. Future filed cases were not "pending" at the time the Motion to Coordinate was filed and were, therefore, beyond the scope of Pa. R.C.P. 213.L which, by its clear terms, applies only to actions pending in different counties;

2. The Trial Court abused its discretion in granting Joseph Tambellini, Inc. d/b/a Joseph Tambellini Restaurants and HTR Restaurants, Inc. d/b/a Siebs Pub's Motion to Coordinate by purporting to coordinate both present and future lawsuits in the Court of Common Pleas of Allegheny County without a sufficient factual record related to the cost, expense, and/or burden on the other litigants from across the Commonwealth, including multiple Plaintiffs who selected other venues in which to file suit;

***2** 3. The Trial Court abused its discretion in granting Joseph Tambellini, Inc. d/b/a Joseph Tambellini Restaurants and HTR Restaurants, Inc. d/b/a Siebs Pub's Motion to Coordinate by purporting to coordinate multiple present and future-filed lawsuits in the absence of a record detailing any alleged benefits associated with coordination and whether those benefits are outweighed by the delay, expense, and prejudice to Appellant, and any absent, future-Plaintiffs, including:

a. **There is no predominating common question of fact or law.** A common question of fact or law does not predominate regarding the matters coordinated pursuant to the July 23, 2020 Order. To the contrary, plaintiffs make claims that will necessarily require individualized, fact-intensive consideration of each individual claimant's circumstances, varying alleged causes of loss, widely-varying alleged damages, substantive law of different jurisdictions, and the terms, conditions, endorsements, and exclusions of each individual claimant's specific policy;

b. **Coordination does not serve the convenience of the parties, witnesses, and counsel.** Coordination in Allegheny County of all actions filed across the Commonwealth of Pennsylvania against Erie Insurance Exchange relating to business income claims arising from COVID-19 is not convenient for the parties, witnesses, and counsel;

c. **Coordination will result in unreasonable delay, expense, and prejudice.** Coordination in Allegheny County of all actions filed across the Commonwealth of Pennsylvania against Erie Insurance Exchange relating to business income claims arising from COVID-19 will result in unreasonable delay or expense or otherwise prejudice parties to Erie Insurance Exchange and other litigants, including absent plaintiffs;

d. **Coordination will not promote the efficient use of judicial facilities and personnel or the efficient conduct of the coordinated actions.** Coordination in Allegheny County of all actions filed across the Commonwealth of Pennsylvania against Erie Insurance Exchange relating to business income claims arising from COVID-19 will not promote efficient use of judicial facilities and personnel or the just and efficient conduct of the actions; and

e. **Coordination is not a fair and efficient method of adjudicating these controversies.** Coordination in Allegheny County of all actions filed across the Commonwealth of Pennsylvania against Erie Insurance Exchange relating to business

income claims arising from COVID-19 is not a fair and efficient method of adjudicating these controversies. Among other things, the Order has allowed Moving Plaintiffs' Counsel to use the coordination process to establish a quasi-class action without affording Erie or other litigants the procedural protections required under the Pennsylvania Rules of Civil Procedure governing Class Actions.

4. The Trial Court abused its discretion in granting Joseph Tambellini, Inc. d/b/a Joseph Tambellini Restaurants and HTR Restaurants, Inc. d/b/a Siebs Pub's Motion to Coordinate by including an "opt out" provision in paragraph 4 which results in delay, expense, confusion, unfairness, and inefficiency; and

5. The Trial Court abused its discretion in granting Joseph Tambellini, Inc. d/b/a Joseph Tambellini Restaurants and HTR Restaurants, Inc. d/b/a Siebs Pub's Motion to Coordinate where Plaintiffs failed to give all affected parties notice of the Motion to Coordinate, as required by Pa. R.C.P. 213.1(a).

III. Standard of Review

Appellate courts review a trial court order coordinating actions for an abuse of discretion. *Washington v. FedEx Ground Package System, Inc.*, 995 A.2d 1271, 1277 (Pa. Super. 2010). In exercising its discretion, the trial court considers the criteria enumerated in Pa. R.C.P. 213.1. Additionally, the trial court recognizes the explanatory comment to Pa. R.C.P. 213.1(c), explaining that "the ultimate determination that the court must make is whether coordination is a fair and efficient method of adjudicating the controversy." *Id.* (citations and internal quotations omitted). Whether the appellate court would have reached the same conclusion is immaterial. *Id.* If the "record provides a sufficient basis to justify the order of coordination, no abuse of discretion exists." *Id.*

IV. Discussion

***3** In its first matter complained of on appeal, Erie asserts that this Court abused its discretion in granting coordination because the coordination of unfiled actions is beyond the scope of Pa. R.C.P. 213.1. However, Pa. R.C.P. 213.1(d)(3) provides that "[i]f the court orders that actions shall be coordinated, it may … make any other appropriate order." The comments to Pa. R.C.P. 213.1(d)(3) further explain that this subdivision is meant to provide courts with an opportunity for creative judicial management, and that any "order is limited only by its function of providing a fair and efficient method of adjudicating the controversy." This Court recognized that, following its' granting of the Plaintiff's Joint Motion to Coordinate, similar claims for business interruption coverage relating to COVID-19 were forthcoming. Accordingly, in the above-described spirit of judicial efficiency, this Court ordered Erie to provide notification of any similar actions filed against Erie so that they may be transferred to this Court and be made part of the coordinated proceeding. This Court determined that, with regard to future filed actions, the most fair and orderly method for adjudicating the controversy was to have similar future actions automatically coordinated, unless any party files an objection, and the Court finds that the action should not be part of the coordinated proceeding. Therefore, pursuant to Pa. R.C.P. 213.1(d)(3), this Court did not abuse its discretion in deciding to grant the coordination with regard to future filed actions.

In its fifth matter complained of on appeal, Erie asserts that this Court abused its discretion in granting Plaintiffs' Joint Motion to Coordinate because Plaintiffs' failed to give all affected parties notice of the Motion to Coordinate. Erie did not cite any case law in support of its argument. However, in *Wohlson/Crow v. Pettinato Associated Contractors & Engineers, Inc.*, 666 A.2d 701, 704 n. 4 (Pa. Super. 1995), the Pennsylvania Superior Court vacated an order granting coordination as to certain actions because those actions were not mentioned in the motion to coordinate, and the parties to those actions were given neither notice nor opportunity to respond to the motion to coordinate.

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While, at first glance, *Wohlson/Crow* might seem to support Erie's argument, the instant matter is distinguishable for two reasons: [1] Plaintiffs' motion to coordinate specifically requested that this Court coordinate *all* other business interruption actions filed against Erie in Pennsylvania courts; and [2] this Court's order granting coordination provides the parties in all other business interruption actions with both notice and an opportunity to object to coordination. Specifically, paragraph 2 of this Court's order directs Erie to notify all other similarly situated Plaintiffs that these actions are being coordinated in Allegheny County, and paragraph 4 provides all parties with the opportunity to object to coordination *before* the coordination and transfer of any other action actually occurs. Thus, this Court did not abuse its discretion in granting coordination because this Court's order provided all parties with the same notice and opportunity to object as the parties would have had in the first instance.

In its second, third, and fourth matters complained of on appeal, Erie asserts that this Court abused its discretion in granting Plaintiffs' Joint Motion to Coordinate because the coordination of these cases is inappropriate considering various factors set forth in Pa. R.C.P. 213.1(c). Accordingly, for ease of disposition, this Court will address these remaining matters together, and explain why granting Plaintiffs' Joint Motion to Coordinate was appropriate with regard to each factor enumerated in Pa. R.C.P. 213.1(c).

Pa. R.C.P. 213.1 permits any party to file a motion to coordinate actions that involve a common question of law or fact. Specifically, Pa. R.C.P. 213.1(a) provides the following:

> In actions pending in different counties which involve a common question of law or fact or which arise from the same transaction or occurrence, any party, with notice to all other parties, may file a motion requesting the court in which a complaint was first filed to order coordination of the actions. Any party may file an answer to the motion and the court may hold a hearing.

Id.

Pa. R.C.P. 213.1(c) further provides that the court shall consider the following factors in determining whether to coordinate certain cases and whether a particular location is appropriate for coordination:

***4** 1. Whether the common question of law or fact is predominating and significant to the litigation;

2. The convenience of the parties, witnesses and counsel;

3. Whether coordination will result in unreasonable delay or expense to a party or otherwise prejudice a party in an action which would be subject to coordination;

4. The efficient utilization of judicial facilities and personnel and the just and efficient conduct of the actions;

5. The disadvantages of duplicative and inconsistent rulings, orders or judgments; and

6. The likelihood of settlement of the actions without further litigation should coordination be denied.

First, these actions involve common questions of law or fact that are predominate and significant to the litigation. Specifically, these actions all require the Court to determine whether Erie breached its standard contracts of insurance through its uniform denial of all claims for business losses related to COVID-19, and/or the related actions of civil authorities taken in response to COVID-19. While Erie is correct to point out that the individual claims for business interruption coverage relating to COVID-19 are, to a certain extent, factually unique, all of them nonetheless require this Court to resolve common issues regarding the same causes of action, which involve the same insurance policy contracts, the same insurance policy language, and the same insurance company.

The initial determinations of whether Erie's standard business insurance contracts cover business losses suffered as a result of COVID-19 can and should be determined by one court. Any issues regarding the extent to which the shutdown orders impacted each Plaintiff differently, and resulted in various Plaintiffs suffering different damages, can be addressed at a later time, and possibly by different courts. Should any Plaintiffs desire to try their individual cases in another county *after* this Court resolves the common issues in the coordinated proceeding, this Court can, pursuant to Pa. R.C.P. 213.1(d)(3), "make any other appropriate order;" including one permitting certain Plaintiffs to try their cases in separate counties.

Second, the coordination of these cases in Allegheny County is convenient for all parties. Erie contends that distance and expedience are inversely proportional and that coordination is therefore inconvenient for Plaintiffs whom are located in other counties throughout the Commonwealth. While travel might have been a more determinative consideration prior to the COVID-19 pandemic, this Court is now proceeding with all matters remotely via videoconferencing on Microsoft Teams. Accordingly, the relationship between distance and expedience has changed as travel is no longer required. Thus, all parties involved in the coordinated action are capable of participating in any proceeding from whatever locations the parties find most convenient.

Third, coordination will not result in unreasonable delay, expense, nor otherwise prejudice any party subject to coordination. Paragraph 4 of this Court's order (i.e., the "opt out" provision) provides that "[a]ny party in an action identified in a notice filed with this Court as raising common questions of fact or law can within thirty (30) days of this Order or within fourteen (14) days after the notice is filed (whichever is later), file an objection to being part of the coordinated proceeding with this Court [and] … [i]f the Court finds that the action should not be part of the coordinated proceedings, the action will not be transferred." Although the "opt out" provision might result in some delay and expense, any such delay or expense will likely be minimal given the ease with which arguments can be scheduled and conducted remotely. Overall, the "opt out" provision makes the adjudication of business interruption insurance claims against Erie more efficient and fair, and it does not otherwise prejudice any parties, because it helps the Court and the parties limit coordination to only those actions that truly involve common questions of law or fact. All other actions will not be transferred, and the parties in those actions may proceed with their claims in the county of their choosing.

***5** Fourth, coordination promotes the efficient utilization of judicial facilities and personnel, as well as the just and efficient adjudication of the actions. As part of the Allegheny County Court of Common Pleas' Commerce and Complex Litigation Center ("the Center"), this Court frequently deals with insurance coverages disputes. Indeed, insurance coverage disputes arising from policies insuring business enterprises are among the types of actions presumptively assigned to the Center. Thus, this Court is especially positioned to handle this matter in a just and efficient manner. Given this Court's familiarity with insurance disputes, and its ability to conduct proceedings remotely, this Court correctly determined that coordination in Allegheny County would promote the efficient utilization of judicial facilities and personnel, and the just and efficient conduct of the actions.

Fifth, coordination of these actions in one court ensures that there will not be duplicative and inconsistent rulings, orders or judgments throughout the Commonwealth. As mentioned already, these actions all involve the same causes of action, the same insurance policy contracts, the same insurance policy language, and the same insurance company. Accordingly, the most fair and efficient way to adjudicate these actions is to have one judge determine, at the very least, the initial questions regarding whether Erie's insurance policies cover business losses related to COVID-19. If these cases are not coordinated, and if different Judges throughout the Commonwealth are forced to adjudicate the exact same questions regarding the same insurance policy contracts and the same insurance company, duplicative or inconsistent rulings will be unavoidable.

Sixth, Pa. R.C.P. 213.1(c) directs courts to consider the likelihood of settlement of the actions without further litigation should coordination be denied. Here, it seems unlikely that any of these actions would reach a settlement should coordination be denied because Erie has consistently denied all claims for business losses related to COVID-19 and/or the related actions of civil authorities taken in response to COVID-19. Moreover, even assuming that there would be some potential for the settlement of the actions if this Court denied coordination, because five of the six factors enumerated in Pa. R.C.P. 213.1(c) weigh in favor of coordination as demonstrated above, this Court's decision to coordinate does not amount to an abuse of discretion. *See Lincoln*

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General Ins. Co. v. Donahue, 616 A.2d 1076, 1081 (Pa. Cmwlth. 1992) (holding that there is no abuse of discretion where five of the six factors weigh in favor of a trial court's decision to coordinate actions pursuant to Pa. R.C.P 213.1).

V. Conclusion

As all of the requirements for coordination of actions have been satisfied pursuant to Pa. R.C.P. 213.1, this Court did not abuse its discretion in granting the Allegheny County Plaintiffs', the Philadelphia County Plaintiffs', and the Lancaster County Plaintiff's Joint Motion to Coordinate. Accordingly, this Court's July 23, 2020 order should be affirmed.

By the Court:

Christine Ward, J.

Christine Ward, J.

Dated: 11/19/20

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New Pandemic Discovery Protocols for Business Interruption Insurance Litigation

BY BRITTANY K.T. KAUFFMAN AND BROOKE H. MEYER

This article builds on two previous Colorado Lawyer *articles surveying COVID-19 insurance issues. It highlights recently developed initial discovery protocols for business interruption insurance disputes that are intended to make discovery in these cases more efficient.*

Ten months into the pandemic, COVID-19 continues to impact large and small businesses. Many businesses have permanently closed, while others have adapted by transitioning employees to teleworking, developing a virtual retail presence, or seeking federal loan assistance. The aggregate losses for US companies with fewer than 100 workers has been estimated at as much as $431 billion a month.[1] In the wake of these losses, businesses continue to file insurance claims for business interruption (BI) and similar insurance coverage. On the insurance side, insurers could face as much as $100 billion in losses from the pandemic.[2] There has already been a rapid increase in court cases involving commercial property damage BI insurance claims, as explored in a recent two-part *Colorado Lawyer* series.[3]

Recognizing the need to efficiently process this influx of cases in both state and federal courts, IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, launched a project to create discovery protocols for BI insurance disputes (BI Insurance Protocols).[4] The BI Insurance Protocols provide a new pretrial procedure for cases involving BI insurance for commercial property damage claims arising from the COVID-19 pandemic, with the goal of reducing conflict and cost for the parties and the court. The protocols are designed to be implemented by trial judges, lawyers, and litigants in state and federal courts.

> “The BI Insurance Protocols provide a new pretrial procedure for cases involving BI insurance for commercial property damage claims arising from the COVID-19 pandemic, with the goal of reducing conflict and cost for the parties and the court. The protocols are designed to be implemented by trial judges, lawyers, and litigants in state and federal courts.”

The Current State of Business Interruption Litigation

BI coverage, also known as business income coverage, covers lost income and operating expenses when a business cannot continue normal business operations. The business interruption must result from direct physical loss or damage to the insured’s property. Coverage depends on the policy language, insurers’ forms, and any exclusions that would preclude coverage for BI losses. The threshold question when determining coverage is whether the business suffered a direct physical loss of or damage to its property according to the policy terms at issue.[5] Jurisdictions disagree about what constitutes physical loss of or damage to the property. For example, some courts have held that property must suffer physical structural damage.[6] Colorado courts have held that physical loss means the property is unfit for physical occupancy or is unusable.[7] During COVID-19, litigation has focused on whether viral or similar exclusions exclude such coverage, and whether specialty coverage applies, such as coverage for business losses due to “civil authority clauses.”

Covid Coverage Litigation Tracker

Professor Tom Baker at the University of Pennsylvania Carey Law School developed the online Covid Coverage Litigation Tracker to report data on BI insurance coverage cases related to the COVID-19 pandemic.[8] The data collected includes policyholder name and industry code, insurer name and AM Best number, policyholder and insurer law firms, jurisdictions where the case is litigated, the coverage sought, the type of insurance policy and state of issue, insurance policy forms, and information regarding key litigation events.[9] The site approximates a two-week delay from case filing to tracking on the website.[10] As of November 25, 2020, the site lists 1,414 lawsuits filed for BI coverage.[11] The site also keeps track of outcomes on merit-based motions to dismiss and will eventually track and compare specific policy language.[12]

Spectrum of Recent Court Rulings

BI lawsuits across federal and state courts are in early litigation stages. Courts are beginning

to rule on defendants' motions to dismiss for failure to state a claim, plaintiffs are seeking to amend complaints, and parties are exchanging initial disclosures. Court rulings on defendants' motions to dismiss for failure to state a claim run the gamut, including dismissing plaintiffs' cases with or without prejudice, denying the motions and proceeding with scheduling orders and setting trial dates, or granting dispositive motions in plaintiffs' favor.

In *Studio 417, Inc. v. Cincinnati Insurance Co.*, the Western District of Missouri denied an insurer's motion to dismiss, rejecting arguments that plaintiffs, a proposed class of restaurants and hair salons, did not state plausible claims for "direct physical loss," "civil authority," "ingress/egress," "dependent property," and "sue and labor" coverage under their "all risk" policies.[13] The court acknowledged that "'physical loss' is not synonymous with physical damage" because "loss" includes "the act of losing possession" and "deprivation," and a physical loss may occur when the property is "uninhabitable or unusable for its intended purpose."[14] The court then issued a scheduling order and set trial for May 2022.

In *North State Deli, LLC, v. Cincinnati Insurance Co.*, a superior court in North Carolina granted plaintiffs' partial motion for summary judgment against defendants "jointly and severally" for declaratory judgment, where the policies did not contain viral exclusions and the court concluded that the policy language, "'accidental physical loss *or* accidental physical damage,'" has "two distinct and separate meanings," and "the phrase 'direct physical loss' included the loss of use or access to covered property even where that property has not been structurally altered."[15] Further, the court told parties that the order represented "a final judgment" with "no just reason for delay of any appeal."[16]

Courts have also dismissed insureds' lawsuits—both with and without prejudice—for failure to adequately allege direct physical loss. In *Henry's Louisiana Grill, Inc. v. Allied Insurance Co.*, the Northern District of Georgia granted the insurer's motion to dismiss with prejudice the insureds' lawsuit seeking coverage for BI and civil authority clause coverage.[17] The court examined the key phrase "'direct physical loss of or damage to' the covered property" and determined that plaintiffs could not state probable claims because they admitted that COVID-19 had never been identified on the premises.[18] The court also rejected plaintiffs' argument, based on the civil authority clause, that the Georgia Governor's Executive Order generated a physical change to the property that rendered the once satisfactory dining rooms "unsatisfactory."[19] The court also denied, in its discretion, plaintiffs' request to certify questions of law to the Supreme Court of Georgia for an answer on determinative state law issues based on "substantial doubt regarding the status of state law."[20] The court noted that while jurisprudence regarding COVID-19 is understandably in its early stages, at least one other district court within the Eleventh Circuit appeared to align with its decision.[21]

A JUDGE'S PERSPECTIVE

Judge Lee Rosenthal, chief judge of the US District Court for the Southern District of Texas, Houston Division, offers her view: "IAALS' prior discovery protocols have proven incredibly valuable to efficient, fair, cost-effective progress in each of these categories of cases. Because lawyers on both sides of the 'v.' were involved in developing each protocol, the obligations are balanced and fair. The lawyers and parties get critical information they need in every case early, and fast. Often this is the only information needed for meaningful case evaluation and early resolution."

The US Judicial Panel on Multidistrict Litigation

Two motions were brought under 28 USC § 1407 to centralize BI litigation before the US Judicial Panel on Multidistrict Litigation (JPML). The first sought centralization in the Eastern District of Pennsylvania, and the second in the Northern District of Illinois.[22] Plaintiffs in more than 175 actions filed varying responses to the motions, including proposals for centralization to another district, or creation of an industry-wide multidistrict litigation (MDL) based on "a state-by-state, regional, or insurer-by-insurer basis."[23] The panel received "notice of 263 related actions . . . pending in 48 districts and nam[ing] more than a hundred insurers."[24] On August 12, 2020, the JPML concluded that centralization would not further the just and efficient conduct of this litigation or convenience the parties and witnesses where there is only a shared "superficial commonality" because "there is no common defendant" and the "cases involve different insurance policies with different coverages, conditions, exclusions, and policy language, purchased by different businesses in different industries located in different states."[25]

While the JPML rejected the insureds' motions to transfer and centralize all federally filed COVID-19-related BI cases, it agreed to consider creating an MDL specific to five insurers that accounted for about one-third of the cases.[26] On October 2, 2020, in *In re: Society Insurance Co. COVID-19 Business Interruption Protection Insurance Litigation*, the JPML agreed to transfer and centralize over 30 federal cases against Society Insurance Co. to the US District Court for the Northern District of Illinois.[27] With respect to *Society Insurance Co.*, the JPML found that a consolidated action would be manageable because it implicated the law of only six states and would "serve the convenience of the parties and witnesses and further the just and efficient conduct of this litigation."[28] The JPML declined insurer-specific MDLs for the other insurers—Cincinnati Insurance Co.; Hartford Financial Services Group Inc.; Certain Underwriters at Lloyd's, London; and Travelers Co.—finding that it would not be more efficient to consolidate the cases against those insurers because the lawsuits were pending in too many different jurisdictions that were geographically too far apart.

The Need for Efficiency

Like businesses, the justice system is being disrupted by the pandemic. Courts are rethinking and altering the way they do business, with the overarching goal of ensuring the efficient delivery of justice. These challenges will continue as filings increase, so litigants, attorneys, judges,

and the courts should work now toward ensuring that cases move through the process efficiently.

Courts can take meaningful steps to tailor processes for different case types and unique customer demands, from large companies to self-represented litigants. This will help address the anticipated increase in civil cases that is likely to persist for the foreseeable future as businesses deal with the economic fallout of COVID-19. As one member of the IAALS' BI Insurance Protocols working group stated, "Courts and litigants throughout the country will be grappling with COVID-19 insurance issues long after the disease has run its course."[29]

Discovery is often at the heart of cost and delay in litigation, so enhancing efficiency at this stage of litigation can make a significant difference.

Initial Discovery Protocols

Discovery can be expensive and time-consuming for parties, particularly when the information and documents sought in discovery are central to resolving the issues. Pattern discovery protocols provide a clearly defined set of information and documents to be exchanged that are tailored by case type. This approach has been used successfully in state and federal courts, and some states have adopted pattern discovery by rule for common case types such as personal injury actions.[30]

IAALS has facilitated the development of pattern discovery protocols for specific case types. The first set of protocols, the Initial Discovery Protocols for Employment Cases Alleging Adverse Action (Employment Protocols), was published as a nationwide pilot project by the Federal Judicial Center (FJC) in November 2011.[31] The Employment Protocols have since been adopted by over 75 federal judges and on a district-wide basis in multiple jurisdictions around the country, including the District of Connecticut and the District of Oregon. The FJC has issued multiple reports evaluating the pilot project, reflecting that discovery motions are less common in pilot cases than comparison cases.[32]

The Initial Discovery Protocols for Fair Labor Standards Act Cases Not Pleaded as Collective Actions (FLSA Protocols)[33] and Initial Discovery Protocols for First-Party Insurance Property Damage Cases Arising from Disasters (Disaster Protocols)[34] followed. For each of the protocols, IAALS brought together a balanced committee of attorneys from across the country who regularly represent plaintiffs or defendants in these matters, along with other key experts (e.g., a Federal Emergency Management Agency attorney in the case of the Disaster Protocols) and state and federal judges.

The IAALS protocols offer a pretrial procedure that makes it easier and faster for parties and their counsel to

- exchange important information and documents early in the case;
- frame the issues;
- evaluate claims for possible early resolution; and
- plan more efficient and targeted subsequent formal discovery, if needed.

In each instance, the protocols create a new category of information exchange, replacing initial disclosures with initial case-specific discovery. This discovery is provided automatically by both sides within a specific number of days from the responsive pleading or motion (30 days for Employment and FLSA Protocols, 45 days for Disaster Protocols). While the parties' subsequent right to discovery under the Federal Rules of Civil Procedure (FRCP) is not affected, the amount and type of information initially exchanged focuses on the disputed issues, which streamlines the discovery process and minimizes opportunities for gamesmanship. The protocols are accompanied by a Standing Order for their implementation by individual judges, as well as an Interim Protective Order that the court and parties can use as a template for discussion.

IAALS' BI Insurance Protocols Project

In May 2020, IAALS launched a project to develop a fourth set of Initial Discovery Protocols focused on the incoming wave of BI insurance cases expected to result from the pandemic. The BI Insurance Protocols provide a new pretrial procedure for cases involving first-party insurance BI and related coverage claims that arise from the COVID-19 pandemic, or similar public health threats from disease or other sources of infection or contamination. To create the BI Insurance Protocols, IAALS gathered a balanced working group comprising highly experienced attorneys from across the country who regularly represent plaintiffs or defendants in BI insurance and other commercial property damage disputes.[35] This working group was kept small to promote efficiency.

Through virtual meetings, the working group developed a draft of discovery protocols based on the Disaster Protocols. The draft was then reviewed by a second, broader committee of experts, which helped generate buy-in for the project. The final product is the result of rigorous debate and compromise on both sides, inspired by the goal of improving the pretrial process in BI cases nationwide. The BI Insurance Protocols aim to reduce conflict and cost and to help businesses and insurers reach quick resolution during the pandemic, whether it be in settlement, motions practice, or trial.

Interaction with Rules of Civil Procedure

The BI Insurance Protocols supersede the parties' obligations to make initial disclosures under FRCP 26(a)(1) or applicable state disclosure rules. They require both the insured and the insurer to disclose information within 30 days after the insurer has submitted a responsive pleading or motion, unless the court orders otherwise.

The BI Insurance Protocols focus on the basic documents and information required in BI insurance cases. They are not intended to preclude or modify any party's rights to formal discovery, and they do not waive or foreclose a party's right to seek additional discovery. The disclosures focus on the information and documents most likely to be important in facilitating early settlement discussions and resolving or narrowing the issues, and they are not subject to objection except for attorney-client privilege or work-product protection, including joint-defense agreements.

Documents withheld based on a privilege or work-product protection claim are subject to FRCP 26(b)(5) or applicable state rules. Rather than providing a detailed privilege log, the parties may briefly describe documents withheld as privileged, or work-product pro-

tected communications, by category or type. The BI Insurance Protocols also recognize that non-testifying consulting experts need not be disclosed under FRCP 26(b)(2)(B). The initial discovery is subject to supplementation under FRCP 26(e), to certification of responses under FRCP 26(g), and to the requirements of FRCP 34(b)(2)(E) or similar applicable state rules governing form of production.

Participating courts may implement the BI Insurance Protocols by local rule or by standing, general, or individual case orders. The protocols include a model Standing Order for the court and an Interim Protective Order that remains in place until and unless the parties agree on, or the court orders, a different protective order. Absent party agreement or court order, the Interim Protective Order does not apply to subsequent discovery.

Beyond these initial disclosures for BI cases, which is the project's first priority, IAALS may also develop a set of case management guidelines and other protocols to guide the litigation resulting from the pandemic.

Conclusion

The COVID-19 pandemic has created unique challenges for litigants and the court system. Unlike typical natural disaster cases, which generally affect a certain geographic area, BI insurance claims are being filed in all 50 states.

The BI Insurance Protocols are being released this month for use around the country by state and federal judges and attorneys. IAALS hopes these protocols will serve as an effective tool to streamline the critical early stage of COVID-19 insurance cases, positioning these disputes for a more efficient resolution. Read and download the protocols at iaals.du.edu/protocols. CL

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NOTES

1. Feeley and Chiglinsky, "Houston Rockets Becomes First NBA Team to Sue Insurer Over Denied COVID-19 Claims," *Houston J.* (July 16, 2020), https://www.insurancejournal.com/news/southcentral/2020/07/16/575820.htm (citing statistics from the American Property Casualty Insurance Association).

2. *Id.*

3. Henderson et al., "Survey of COVID-19 Insurance Issues, Coverage for Business Income Interruptions—Part 1," 49 *Colo. Law.* 56 (Aug./Sept. 2020); Henderson et al., "Survey of COVID-19 Insurance Issues—Part 2: Workers' Compensation," 49 *Colo. Law.* 50 (Oct. 2020), https://cl.cobar.org/features/survey-of-covid-19-insurance-issues.

4. Initial Discovery Protocols for Business Interruption Insurance Disputes Arising from the Covid-19 Pandemic and Similar Public Health Threats, iaals.du.edu/protocols.

5. *See W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968).

6. *See Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868 (11th Cir. 2020) (under Florida law, the insured restaurant failed to show that it suffered a direct physical loss of or damage to its property when its interior was exposed to dust and debris from a road construction project near the restaurant; cleaning the restaurant's interior and items within the interior was all that was required to maintain the property, and there was no actual change to the physical structure of the restaurant).

7. *See W. Fire Ins. Co.*, 437 P.2d 52.

8. Covid Coverage Litigation Tracker, an insurance law analytics tool, https://cclt.law.upenn.edu.

9. About the CCLT, https://cclt.law.upenn.edu/about.

10. *Id.*

11. The CCLT case list identifies the case name, court, state, NAICS code for the business, filing date, and plaintiff's firms, https://cclt.law.upenn.edu/cclt-case-list.

12. Outcomes on Merits-Based Motions to Dismiss, Covid Coverage Litigation Tracker, https://cclt.law.upenn.edu/judicial-rulings.

13. *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385 at *5 (W.D.Mo. Aug. 12, 2020).

14. *Id.*

15. *N. State Deli, LLC v. Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507 at *3 (N.C.Super.Ct. Oct. 09, 2020).

16. *Id.*

17. *Henry's Louisiana Grill, Inc. v. Allied Ins. Co.*, No. 1:20-CV-2939-TWT, 2020 WL 5938755 at *6 (N.D.Ga. Oct. 6, 2020).

18. *Id.*

19. *Id.*

20. *Id.*

21. *See Malaube, LLC v. Greenwich Ins. Co.*, No. 1:20-22615, 2020 WL 5051581 at *8 (S.D.Fla. Aug. 26, 2020) (holding that allegations of "direct physical loss or damage" without alleging that the virus has entered the premises does not state a claim for which relief can be granted).

22. *See In re COVID-19 Bus. Interruption Prot. Ins. Litig.*, No. MDL 2942, 2020 WL 4670700 (J.P.M.L. Aug. 12, 2020).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Orders Rejecting Transfer of Cases for Travelers Co., Hartford Financial Servs. Group Inc., Cincinnati Ins. Co., and Certain Underwriters at Lloyd's, London are located on the JPML's website, https://www.jpml.uscourts.gov/panel-orders.

28. *See In re: Society Ins. Co. COVID-19 Business Interruption Prot. Ins. Litig.*, No. MDL 2964 (Oct. 2, 2020).

29. IAALS Press Release, New Pandemic Protocols for Litigation Will Help Struggling Businesses and Their Insurers (May 27, 2020), https://iaals.du.edu/sites/default/files/documents/publications/pandemic_protocols_press_release.pdf (quoting Douglas J. Pepe, former member of the IAALS Disaster Protocols Committee and current member of the COVID-19 Protocols working group).

30. *See, e.g.*, Utah R. Civ. P. 26.1 (disclosure and discovery in domestic relation actions), 26.2 (disclosures in personal injury actions), and 26.3 (disclosure in unlawful detainer actions).

31. Fed. Judicial Ctr., Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action (Nov. 2011), https://www.fjc.gov/sites/default/files/2012/DiscEmpl.pdf.

32. Cantone and Lee III, Fed. Judicial Ctr., Initial Discovery Protocols for Employment Cases Alleging Adverse Action: Report on a Pilot Project to the Judicial Conference Advisory Committee on Rules of Civil Procedure (Oct. 2018); Lee III and Cantone, Fed. Judicial Ctr., Report on Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action (Oct. 2015). *See also* Memorandum from Lee III and Cantone to the Judicial Conference Advisory Committee on Civil Rules (Oct. 26, 2016).

33. Fed. Judicial Ctr., Initial Discovery Protocols for Fair Labor Standards Act Cases Not Pleaded as Collective Actions (Jan. 2018).

34. IAALS, Initial Discovery Protocols for First-Party Insurance Property Damage Cases Arising from Disasters (Feb. 20, 2019), https://iaals.du.edu/publications/initial-discovery-protocols.

35. Working group members are: Steven J. Badger, Zelle LLP; David H. Brown, Copeland & Rice LLP; Hon. Andrew M. Edison, US magistrate judge, S. Dist. of Texas, Houston Division; Hon. John Koeltl, US dist. judge, S. Dist. of New York; Jay Levin, Offit Kurman; Adam J. Levitt, DiCello Levitt Gutzler; Douglas J. Pepe, Joseph Hage Aaronson LLC; Hon. Lee H. Rosenthal, US dist. chief judge, S. Dist. of Texas, Houston Division; Ronald P. Schiller, Hangley Aronchick Segal Pudlin & Schiller; Rene M. Sigman, Merlin Law Group; and Joyce Wang, Carlson, Calladine & Peterson LLP.

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JPML Combines Erie Insurance Virus Coverage Cases In Pa.

By **Jeff Sistrunk**

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Law360 (December 15, 2020, 6:39 PM EST) -- A judicial panel on Tuesday centralized in Pennsylvania more than a dozen cases alleging Erie Insurance Group has wrongfully refused to cover businesses' lost income due to COVID-19 stay-at-home orders, making Erie the second insurer to face multidistrict litigation over its rejection of policyholders' claims for pandemic-related losses.

The seven-member Judicial Panel on Multidistrict Litigation granted a transfer petition filed in August by several groups of Erie policyholders and sent 13 COVID-19 coverage actions pending against the insurer across four states to Chief U.S. District Judge Mark R. Hornak in Pittsburgh, where Erie is headquartered.

The panel's order created the second MDL to manage COVID-19 business interruption insurance cases against a single insurer.

In early October, the JPML **centralized** more than 30 coverage suits against Society Insurance Co. before a federal judge in Chicago. At the same time, it refused to create MDLs for COVID-19 coverage actions pending against Travelers, The Hartford, Cincinnati Insurance Co. and underwriters at Lloyd's of London, all of which are facing many more cases than Society. The JPML **declined** in August to create a nationwide, industrywide MDL to centralize pandemic coverage cases against all insurance carriers.

The JPML followed largely the same rationale it applied to the Society matter in deciding to centralize the COVID-19 cases against Erie. Like Milwaukee, Wisconsin-based Society, Erie is a smaller regional insurer, although Erie does business in more jurisdictions — 12 states and the District of Columbia, versus six states for Society, according to the order.

Despite Erie's slightly broader geographic reach, the JPML found that centralization will promote efficiency because the Erie policyholders' cases — which include both individual suits and putative class action complaints — raise common factual allegations that the insurer wrongfully denied their claims for financial losses due to government orders that required them to close or reduce operations.

"The actions therefore will require an assessment of whether COVID-19 caused any 'loss' or 'damage' to property, and whether any of Erie's policy exclusions apply to preclude plaintiffs' claims," the JPML wrote. "If discovery of Erie regarding the drafting and interpretation of its policies is needed, it will be common to all actions. Thus, these actions present common factual and legal questions that support centralization."

The panel chose Pittsburgh as the forum for the MDL because it is the "clear center of gravity for this litigation," noting that Erie is based in the city and eight cases against the insurer are already pending there.

In addition to the 13 suits identified in the August transfer petition, the JPML has been notified of at least 14 additional federal court cases against Erie that could also potentially be transferred to the MDL, according to court records.

An Erie spokesman declined to comment. Counsel for the policyholders did not immediately respond to a request for comment.

The policyholders are represented by attorneys with Levin Sedran & Berman LLP, DiCello Levitt Gutzler LLC, The Lanier Law Firm, Golomb & Honik PC and Beasley Allen Crow Methvin Portis & Miles PC, among others.

Erie is represented by Adam J. Kaiser and Tiffany L. Powers of Alston & Bird LLP.

The case is In Re: Erie COVID-19 Business Interruption Protection Insurance Litigation, MDL No. 2969, before the Judicial Panel on Multidistrict Litigation.

--Editing by Michael Watanabe.

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Case Information

Case Title

IN RE: Erie COVID-19 Business Interruption Protection Insurance Litigation

Case Number

2969

Court

Judicial Panel on Multidistrict Litigation

Nature of Suit

Judge

Mark R. Hornak

Date Filed

August 21, 2020

Law Firms

- Alston & Bird
- Beasley Allen
- DiCello Levitt
- Golomb & Honik
- Lanier Law Firm
- Levin Sedran

Companies

- Cincinnati Financial Corp.
- Erie Insurance Inc.

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on
MULTIDISTRICT LITIGATION

IN RE: ERIE COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION

MDL No. 2969

TRANSFER ORDER

Before the Panel: Plaintiffs in five actions[1] listed on Schedule A move under 28 U.S.C. § 1407 to centralize pretrial proceedings in this litigation in the Eastern District of Pennsylvania. This litigation consists of thirteen actions pending in five districts, as listed on Schedule A. The parties have notified the Panel of twelve related actions pending in eight districts.[2] Plaintiffs in six actions and potential tag-along actions support centralization in either the Eastern District of Pennsylvania, the Western District of Pennsylvania, or both. Plaintiffs in three actions and potential tag-along actions oppose centralization or, alternatively, ask that their actions be excluded from any MDL. Plaintiffs in two of these actions alternatively suggest either the Western District of New York or the Southern District of West Virginia as potential transferee districts. The Erie defendants[3] likewise oppose centralization. Alternatively, Erie suggests the Western District of Pennsylvania should serve as the transferee district.

This is the latest motion seeking centralization of litigation involving insurance claims for coverage of business interruption losses caused by the COVID-19 pandemic and the related government orders suspending, or severely curtailing, operations of non-essential businesses. At our July 2020 hearing session, we denied two motions seeking centralization on an industry-wide basis as to all insurers, concluding that the differences among the many insurers would overwhelm any common factual questions and hinder the transferee court's ability to efficiently manage the litigation. *See In re COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2942, __ F. Supp. 3d __, 2020 WL 4670700 (J.P.M.L. Aug. 12, 2020). We found the arguments of several parties for insurer-based MDLs more persuasive and issued orders directing the parties to show cause why

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[1] These five actions are the *LA Campagna Inc.*, *High Tech Hair*, and *Sulimay's Hair Design* actions in the Eastern District of Pennsylvania; the *Laser Spa of Rochester* action in the Western District of New York; and the *Close Enterprises* action in the Western District of Pennsylvania.

[2] These and any other related actions are potential tag-along actions. *See* Panel Rules 1.1(h), 7.1, and 7.2.

[3] The Erie defendants include: Erie Insurance Company; Erie Insurance Exchange; Erie Indemnity Company; and Erie Insurance Property & Casualty Company.

actions against certain insurers should not be centralized.[4] *Id.* at *3.

At our September 2020 hearing session, we considered show cause orders with respect to five insurers. With respect to Lloyd's of London, we denied centralization because the structure of the London market would complicate pretrial management and likely would lead to the MDL expanding to encompass other insurers who participated in this market. *See In re Certain Underwriters at Lloyd's, London, COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2961, __ F. Supp. 3d __, 2020 WL 5887416, at *2 (J.P.M.L. Oct. 2, 2020). We also denied centralization with respect to Cincinnati Insurance Company, The Hartford, and Travelers, though those litigations presented "a close question." *In re Cincinnati Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2962, __ F. Supp. 3d __, 2020 WL 5884791, at *1 (J.P.M.L. Oct. 2, 2020). We found that the actions presented "common legal and factual questions that could, in other circumstances, support centralization." *Id.* We concluded, though, that the actions could more timely be resolved in the transferor courts because centralization would require the time-consuming establishment of a pretrial structure to account for the many different state insurance laws, closure orders, and policy variations presented by the actions. *Id.* at *2; *In re Hartford COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2963, __ F. Supp. 3d __, 2020 WL 5884782, at *2–3 (J.P.M.L. Oct. 2, 2020); *In re Travelers COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2965, __ F. Supp. 3d __, 2020 WL 5884785, at *1–2 (J.P.M.L. Oct. 2, 2020).

In contrast, centralization of the fifth show cause litigation—involving Society Insurance Company—was warranted. *See In re Society Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2964, __ F. Supp. 3d __, 2020 WL 5887444 (J.P.M.L. Oct. 2, 2020). Society's status as a regional insurer operating in only six states was a critical factor, as it meant the transferee judge would be tasked with a more manageable litigation than an MDL with a potentially nationwide scope. *Id.* at *2. Whether the Erie litigation is sufficiently similar to the Society litigation to merit centralization is the focus of much of the parties' arguments on the present motion.

After considering the arguments of counsel,[5] we conclude that centralization of the Erie actions listed on Schedule A will serve the convenience of the parties and witnesses and further the just and efficient conduct of this litigation. Erie is a regional carrier that operates in a somewhat

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[4] Movants here sought reconsideration of our order denying industry-wide centralization in MDL No. 2942, seeking a show cause order as to actions involving the Erie defendants. We denied this motion because the window for briefing an additional docket before the September 2020 hearing session had closed. *See In re COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2942 (J.P.M.L. Aug. 21, 2020), ECF No. 779. The present motion was filed shortly thereafter.

[5] 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 December 3, 2020. *See* Suppl. Notice of Hearing Session, MDL No. 2969 (J.P.M.L. Nov. 16, 2020), ECF No. 87.

larger geographic area than Society, encompassing thirteen jurisdictions.[6] Policyholders bring individual and putative nationwide and statewide class actions against Erie. These actions share common factual allegations that Erie wrongfully denied policyholders' claims for business interruption protection insurance. Plaintiffs contend that Erie preemptively decided to deny their claims, which are brought under various property insurance policies that, depending on the provisions plaintiff has purchased, provide: (1) business income coverage, (2) civil authority coverage, and (3) extra expense coverage. The actions therefore will require an assessment of whether COVID-19 caused any "loss" or "damage" to property, and whether any of Erie's policy exclusions apply to preclude plaintiffs' claims. If discovery of Erie regarding the drafting and interpretation of it policies is needed, it will be common to all actions. Thus, these actions present common factual and legal questions that support centralization.

In addition to requiring common factual questions, Section 1407 also requires that centralization promote the just and efficient conduct of the actions. As we noted in the prior business interruption protection insurance dockets, this litigation demands efficiency. 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. The most pressing question before us in these business interruption protection insurance cases, then, is whether centralization presents the most efficient means of advancing these actions towards resolution. As with the Society litigation, we find that centralization offers the most efficient route to resolution. There are 25 total actions pending in six states and the District of Columbia. At most, this litigation will expand to encompass six additional states. Furthermore, it appears that Erie employs a small number of substantially similar policies—the only difference among the policies that Erie identified in its briefing and oral argument is that some policies include a virus exclusion, while others do not. This suggests to us that this litigation presents a manageable controversy that can be best streamlined by proceeding before a single judge.

Erie argues that centralization is not appropriate because the actions involve different claims and different types of business. The presence of additional or differing legal theories is not significant, however, when the actions arise from a common factual core. *See In re Oxycontin Antitrust Litig.*, 542 F. Supp. 2d 1359, 1360 (J.P.M.L. 2008). Likewise, Section 1407 does not require a complete identity or even majority of common factual and legal issues as a prerequisite to transfer. *See In re Satyam Computer Servs., Ltd., Sec. Litig.*, 712 F. Supp. 2d 1381, 1382 (J.P.M.L. 2010).

The opposing plaintiffs additionally argue that centralization is not appropriate because the actions likely will involve primarily legal questions. It is possible that plaintiffs' claims can be decided on motions to dismiss without need for discovery into, for example, the drafting of the policies at issue or epidemiological modeling of the spread of COVID-19. But centralization may be warranted even where common questions of law are prominent, as long as common factual issues

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[6] These jurisdictions include the District of Columbia, Illinois, Indiana, Kentucky, Maryland, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin.

are present. In such cases, "[t]he Panel must determine the extent of the common factual issues and the likelihood that centralized pretrial proceedings will create important efficiencies, avoid inconsistent rulings, and result in the overall fairer adjudication of the litigation for the benefit of all involved parties." *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 588 F. Supp. 2d 1376, 1377(J.P.M.L. 2008). Here, significant factual questions exist among the actions, and centralization will create substantial efficiencies for the parties and the courts.

All opponents of centralization argue that, should plaintiffs' claims survive dispositive rulings on policy interpretation questions, discovery will be plaintiff- and property-specific. There may be, by necessity, some unique aspects of each case. Were this litigation larger in geographic scope and if it involved more state laws, this might be a more persuasive argument because the transferee judge would be tasked with managing a much more complicated litigation. As with the Society litigation, what sets this litigation apart from others in which we have denied centralization is the defined geographical scope of these actions, which implicates only thirteen jurisdictions. The transferee judge can employ any number of pretrial techniques—including establishing state-specific tracks and selecting certain already-briefed motions in individual cases as bellwether motions—to manage any differences that the Erie actions present.

The opposing parties also assert that informal coordination among the parties and courts is preferable to formal centralization. We do not view alternatives to centralization to be an adequate substitute for an MDL here. There are more than two dozen cases brought by diverse counsel before twenty judges, which makes coordination difficult. While a few actions have been transferred to the Western District of Pennsylvania by stipulation of the parties, Section 1404 does not offer a reasonable prospect of eliminating the multidistrict nature of this litigation.

We are persuaded that the Western District of Pennsylvania is an appropriate transferee district. Both plaintiffs and defendants, either in the first instance or in the alternative, suggest this district to oversee this litigation. The Western District of Pennsylvania is the clear center of gravity for this litigation, as the Erie defendants are headquartered there and a sizeable number of actions are pending there. Additionally, Pittsburgh represents an accessible forum with the capacity to efficiently manage these cases. We are confident that the Honorable Mark R. Hornak, who has not yet had the opportunity to preside over an MDL, will steer this litigation on a prudent and expeditious course.

IT IS THEREFORE ORDERED that the actions listed on Schedule A and pending outside the Western District of Pennsylvania are transferred to the Western District of Pennsylvania and, with the consent of that court, assigned to the Honorable Mark R. Hornak for coordinated or consolidated pretrial proceedings with the actions pending there and listed on Schedule A.

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IN RE: ERIE COVID-19 BUSINESS INTERRUPTION PROTECTION INSURANCE LITIGATION MDL No. 2969

SCHEDULE A

Northern District of Illinois

PGB RESTAURANT, INC., ET AL. v. ERIE INSURANCE EXCHANGE, C.A. No. 1:20-02403
MENNS INC. v. ERIE INSURANCE EXCHANGE, ET AL., C.A. No. 1:20-02895
THE ITALIAN VILLAGE RESTAURANT, INC., ET AL. v. ERIE INSURANCE COMPANY, C.A. No. 1:20-03101
JERRY'S SANDWICHES AV, LLC, ET AL. v. ERIE INSURANCE COMPANY, C.A. No. 1:20-03249

Western District of New York

LASER SPA OF ROCHESTER, LLC v. ERIE INSURANCE COMPANY, C.A. No. 6:20-06308

Eastern District of Pennsylvania

LA CAMPAGNA INC. v. ERIE INSURANCE GROUP, C.A. No. 2:20-02689
SULIMAY'S HAIR DESIGN INC. v. ERIE INSURANCE EXCHANGE, C.A. No. 2:20-02731
HIGH TECH HAIR LLC, ET AL. v. ERIE INSURANCE EXCHANGE, C.A. No. 2:20-02895

Western District of Pennsylvania

THE LOCK LOFT, LLC v. ERIE INSURANCE EXCHANGE, C.A. No. 1:20-00122
CLOSE ENTERPRISES INC. v. ERIE INSURANCE GROUP, C.A. No. 1:20-00147
IZZY AND GAB LLC v. ERIE INSURANCE PROPERTY AND CASUALTY COMPANY, C.A. No. 1:20-00266
HELLO HOSPITALITY IV, LLC, ET AL. v. ERIE INSURANCE PROPERTY AND CASUALTY COMPANY, C.A. No. 1:20-00281

Middle District of Tennessee

PLEASANT FOOD, INC., ET AL. v. ERIE INSURANCE EXCHANGE, C.A. No. 3:20-00570

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Pa. Judge Defends Coordinating Erie Insurance Virus Suits

By **Matthew Santoni**

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Law360 (November 20, 2020, 6:36 PM EST) -- A Pennsylvania state court judge defended her order coordinating all current and future cases over Erie Insurance's coverage denials for pandemic-related business losses, writing in an opinion Friday that her court could easily weigh common issues via videoconference.

Erie is appealing Allegheny County Court of Common Pleas Judge Christine Ward's July order grouping together all current and future Pennsylvania lawsuits against the insurer in her Pittsburgh courtroom, so Judge Ward issued an opinion laying out her reasons for making and sticking to the order.

"While Erie is correct to point out that the individual claims are, to a certain extent, factually unique, all of them nonetheless require this court to resolve common issues regarding the same causes of action, which involve the same insurance policy contracts, the same insurance policy language, and the same insurance company," Judge Ward wrote.

Judge Ward's order **initially grouped a series of cases** from Allegheny, Philadelphia and Lancaster counties from businesses claiming the insurer wrongfully denied their claims for losses related to the COVID-19 pandemic and its associated shutdown orders. The order said that Erie would be responsible for notifying the court of any additional lawsuits filed against it in Pennsylvania so those cases could be transferred to Judge Ward.

Attorneys representing multiple businesses — including restaurants and a car dealership in Pittsburgh, a pair of Philadelphia restaurants and a group of Lancaster County floral shops — had requested the coordination order in June, after the Supreme Court of Pennsylvania **declined to exercise** its "King's Bench" jurisdiction and issue a statewide ruling on whether the pandemic and its subsequent closure orders were a "physical loss" that should be covered.

Numerous businesses **objected or took advantage** of an opt-out provision the judge wrote into the order, but Erie filed an appeal to the Superior Court of Pennsylvania, contending that coordination was improper for such disparate circumstances, inconvenient for plaintiffs in counties far from Pittsburgh and that the court was unable to rope in future cases without accounting for the parties' cost of coordination.

Judge Ward said the Rules of Civil Procedure for grouping together similar cases included a clause that said judges may "make any other appropriate order" for "creative judicial management," noting that her order bringing in yet-to-be-filed cases against Erie fell under that catch-all in the interest of streamlining future litigation.

She countered Erie's objection that not all parties were given notice of the coordination order or an opportunity to object by pointing to parts of her order directing the insurer to pass word of the coordination to all the businesses suing it and giving those businesses the chance to object before the transfer.

As for Erie's contention that every business's circumstances and insurance contracts were unique, Judge Ward wrote that there were still common issues the court could address.

"These actions all require the court to determine whether Erie breached its standard contracts of insurance through its uniform denial of all claims for business losses related to COVID-19, and/or the related actions of civil authorities taken in response to COVID-19," the opinion said. "The initial determination of whether Erie's standard business insurance contracts cover business losses suffered as a result of COVID-19 can and should be determined by one court."

Once the overarching questions were answered, damages or other issues unique to each business in the coordinated action could be split into separate cases or sent back to their home counties, the judge said.

"Should any plaintiff desire to try their individual cases in another county after this court resolves the common issues in the coordinated proceeding, this court can … 'make any other appropriate order,' including one permitting certain plaintiffs to try their cases in separate counties," the opinion said.

While Erie and some of the businesses that had initially objected said it would be difficult to advance their cases in Pittsburgh from across the state, Judge Ward noted that the pandemic had already forced her courtroom to do its work mainly by videoconference, so all the parties involved could participate remotely without travel.

Judge Ward also pointed to her court's experience with insurance issues, which are usually automatically assigned to her as one of two judges in Allegheny County's Commerce and Complex Litigation Center.

"This court is especially positioned to handle this matter in a just and efficient manner," the opinion said. "Given the court's familiarity with insurance disputes, and its ability to conduct proceedings remotely, this court correctly determined that coordination in Allegheny County would promote the efficient utilization of judicial facilities and personnel, and the just and efficient conduct of the actions."

"Judge Ward's opinion is precisely correct," said Scott Cooper of Schmidt Kramer, one of the firms representing the businesses. "She authored a thorough and well-reasoned opinion, and we hope the Superior Court will expedite the hearing of the appeal so we can press forward with the cases for these businesses who paid for this coverage and need it badly."

Counsel for Erie did not immediately respond to requests for comment Friday.

Erie Insurance is represented by Richard DiBella, Paul K. Geer and Tara Maczuzak of DiBella Geer McAllister Best PC, and Matthew B. Malamud of Timoney Knox LLP.

The businesses are represented by James Haggerty of Haggerty Goldberg Schleifer & Kupersmith PC; Scott Cooper of Schmidt Kramer PC; John Goodrich and Lauren Nichols of Jack Goodrich & Associates PC; Michael Boni, Joshua Snyder and John Sindoni of Boni Zack & Snyder LLC; and Jonathan Shub and Kevin Laukaitis of Shub Law Firm LLC.

The case is Joseph Tambellini Inc. v. Erie Insurance Exchange, case number GD-20-005137, in the Court of Common Pleas of Allegheny County, and case number 903 WDA 2020 in the Superior Court of Pennsylvania.

--Editing by Steven Edelstone.

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02 Jun 2020

Insurers' business interruption U-turn could lead to significant uptake in product, says GlobalData

Posted in Coronavirus

Following the announcement by the Financial Conduct Authority (FCA) that multiple insurers are to back down on the coronavirus policy dispute and pay company owners with business interruption policies;

Ben Carey-Evans, Insurance Analyst at GlobalData, a leading data and analytics company, offers his view:

"This is a significant turnaround for the industry, which had up to this point been stating that claims were not valid because of pandemic exclusions.

"In reality, there was no positive outlook for insurers in this dispute. Paying out will cost millions in claims as businesses around the country have been shut down or severely restricted during lockdown. However, not paying out would also have led to reduced consumer trust, with many business owners likely to avoid taking out any form of business interruption insurance in the future.

"GlobalData's 2019 UK Insurance Consumer Survey found that the uptake of business interruption has been increasing over the past few years. It has risen from a penetration rate among small and medium-sized enterprises (SMEs) of 11.1% in 2015 to 17.3% in 2019. This means that a significant number of existing policies will be up for renewal in 2020. The recent trend shows that it is a growing product and businesses are likely to be even more interested in it if it does cover pandemics going forward.

"The scale of disruption caused by COVID-19 will make pricing business interruption premiums with pandemic cover included extremely difficult. However, those insurers who are committed to paying out will surely see large increases in its penetration rate in the coming years."

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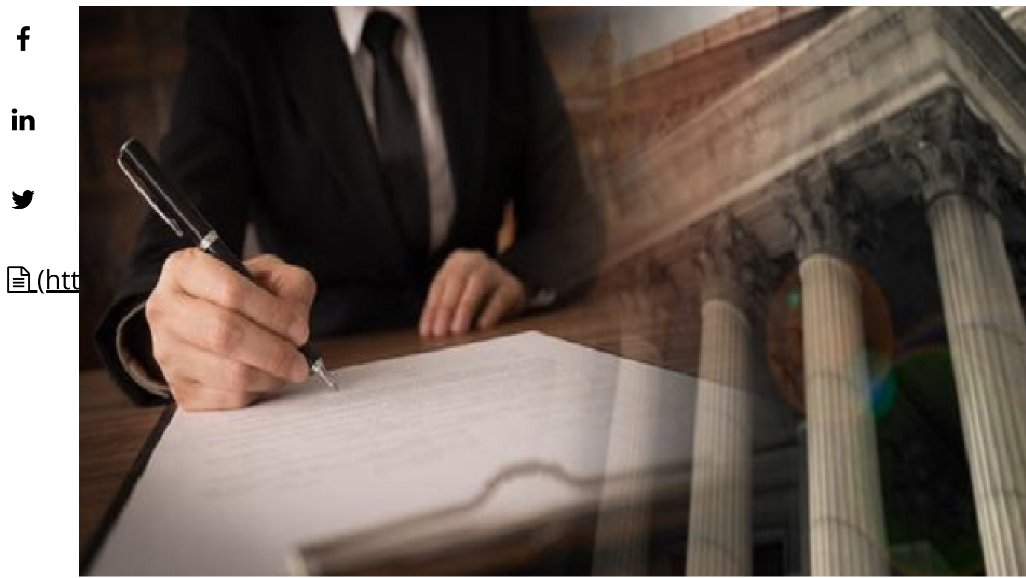
Instant Insights / **The coronavirus and its impa**

The coronavirus has upended lives and businesses around the globe. From business interruption and supply chain disruption to event and travel cancellations, we are only just seeing the beginning stages of COVID-19's impact. These articles provide valuable insights on insurance coverage, preparation tips and more to help individuals and businesses reduce exposures as the virus spreads.

Pandemic Risk Insurance Act and the future of business interruption insurance

What is PRIA, and how may it help mitigate the damages caused by the coronavirus pandemic?

By **Zachary Lerner** | April 21, 2020 at 12:00 AM



The Terrorism Risk Insurance Act (TRIA) model provides a proven framework to facilitate the implementation of the Pandemic Risk Insurance Act (PRIA) efficiently. (Photo: Shutterstock)

The impact of COVID-19 on the international community cannot be overstated, and as our lives have seemingly come to a halt, so have the operations of many of the world's businesses.

The insurance industry is no exception. It is perhaps ironic that while most insurance companies and agencies continue operating as "essential businesses" under applicable state mandates, the flood of claims under business interruption insurance policies could make the prospect of shuttering doors a real possibility.

In response to the tragedies of September 11th, 2001 (arguably the most appropriate comparison in magnitude to COVID-19 in a generation), the U.S. Congress passed the **Terrorism Risk Insurance Act, (https://www.propertycasualty360.com/2020/01/22/flood-and-terrorism-insurance-reauthorization-safe-for-now-414-170511/)** or "TRIA," which helped provide sufficient terrorism insurance to U.S. policyholders by mandating the offering of terrorism insurance coverage while providing a backstop for losses payable through funds provided by the U.S. Secretary of Treasury (the "Treasury"). It should come as no surprise that, in the wake of COVID-19, there is increasing momentum for the passage of a Pandemic Risk Insurance Act, or "PRIA," as well.

What is PRIA?

One of the realities of a post-9/11 world was that the pricing and **availability of terrorism insurance (https://www.propertycasualty360.com/2019/10/30/the-future-of-tria/)** coverage was thrown into flux. Reinsurance markets around the world faced the prospect of drying up, and underwriting large, metropolitan risks would quickly become a laborious and risky endeavor. TRIA's federal backstop provided the national and international insurance and reinsurance industries a financial cushion through the Secretary's backstop to weather another potentially catastrophic event. At the same time, it provides prospective insureds access to terrorism coverage by requiring insurers to "make available" on most forms of commercial property and casualty insurance terrorism coverage.

The U.S. now faces a similar threat that the market for business interruption insurance will be substantially interrupted as well (pun intended). Fortunately, the TRIA model — which has seen bipartisan support over the last two decades and general support among the insurance industry — provides an efficient framework around which PRIA may be structured.

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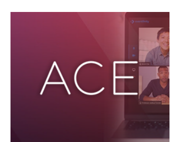

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On March 18, 2020, Maxine Waters formally called for the implementation of PRIA, which would "create a reinsurance program similar to [TRIA] for pandemics, by capping the total insurance losses that insurance companies would face." A number

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ANALYSIS

of initial structures have been suggested, including combining both TRIA and PRIA into one, singular piece of legislation that would provide insureds a second opportunity to purchase both TRIA and PRIA coverage at an enhanced premium.

Moreover, a model PRIA draft bill (the "PRIA Discussion Draft") has been circulating through Congress. The PRIA Discussion Draft very closely mirrors TRIA and requires participating insurers to "make available" insurance coverage for a "covered public health emergency," which includes "any outbreak of infectious disease or pandemic" on terms that do not differ materially from the terms applicable to losses arising from other events.

The PRIA Discussion Draft would apply to any insurance company licensed in any U.S. state, territory or possession, as well as any insurance company eligible to write insurance in the U.S. on a surplus lines basis, including non-U.S. insurance companies listed on the Quarterly Listing of Alien Insurers of the NAIC. Like TRIA, such participating insurers would be subject to individual and industry deductibles, and then such insurers would share with the Treasury in losses up to certain thresholds.

PRIA versus TRIA

While it certainly makes sense that PRIA would follow in the footsteps of TRIA, there are a number of practical and legislative differences that could impact PRIA's reach and success.

As an initial matter, terrorism risks and pandemic risks are inherently different. While both sets of risks present the prospect of catastrophic damage and immense insurance liabilities, terrorism risks are likely to be greatest in global city centers. While large metropolitan areas also are likely to be most impacted by pandemics, COVID-19 has clearly demonstrated that disease does not respect state lines or stay confined to discrete neighborhoods, with nearly every state imposing some level of business closures as a result of the pandemic.

As such, because PRIA will likely contemplate that pandemic insurance be provided on terms that "do not differ materially" from other components of business interruption insurance coverage, the insurance and reinsurance markets will need to collaborate closely to determine what the premium price points should be.

From a drafting standpoint, there are a number of important distinctions between TRIA and the PRIA Discussion Draft. First, the PRIA Discussion Draft is a voluntary program whereby participating insurers would be required to pay reinsurance premiums to the Treasury for participation; by contrast, TRIA is a mandatory program. Moreover, it also remains to be seen how broad PRIA's "make available" requirement will extend if passed. TRIA requires that each insurer "shall make available, in all of its property and casualty insurance policies, coverage for insured losses…" By contrast, the PRIA Discussion Draft is worded slightly differently and requires that each insurer shall "make available, in all of its business interruption insurance policies, coverage for insured losses…" (Emphasis added). Therefore, on its face, TRIA is significantly broader and mandates that terrorism coverage be provided in connection with any commercial property and casualty insurance policy. In

Public policy post-COVID-19: TRIA or NFIP for a pandemic? (//www.propertycasualty360.com/...policy-post-covid-tria-or-nfip-for-a-pandemic-414-184848/)

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contrast, PRIA may only require coverage for "covered public health emergencies" in connection with business interruption insurance policies, and only then for voluntarily participating insurers.

While certain components of PRIA have been met with general optimism, efforts to enforce retroactive coverage by insurance companies of COVID-19 claims (particularly when in-force insurance policies contain communicable disease exclusions) has been met with a significantly different tone from the insurance community.

A number of states have bills (https://www.propertycasualty360.com/2020/04/09/these-states-introduced-covid-19-business-interruption-coverage-bills/) in their respective legislative chambers that would augment current in-force business interruption insurance policies to compel coverage for COVID-19. In addition, the "Business Interruption Insurance Coverage Act of 2020" draft bill has been circulating through Congress, which, if passed into law, would force all insurers that offer business interruption insurance to offer coverage for a viral pandemic and "[a]ny exclusion in a contract for business interruption insurance that is in force on the date of the enactment of [the] Act shall be void to the extent it excludes" viral pandemics. Similarly, PRIA also may require that participating insurers void exclusions in current, in-force policies for pandemic-related losses. However, the PRIA Discussion Draft currently leaves open as a discussion point whether this mandate would go into effect as of the date of PRIA or at some later date, and PRIA's participation under the PRIA Discussion Draft would be voluntary. These "retroactive coverage" legislative efforts will quite likely be challenged in the courts should they become law.

While it may feel like we have endured a lengthy war against **COVID-19 (https://www.propertycasualty360.com/instant-insights/coronavirus-and-insurance/)**, we may yet be in our early days with respect to formulating a recovery strategy. Numerous frameworks exist to help align the interests of current and prospective insurance policyholders and their respective insurance carriers to help mitigate past, present and future pandemic-related losses.

The TRIA model provides a proven framework to facilitate the implementation of PRIA efficiently. While it remains to be seen where federal and state legislatures ultimately land, it is likely inevitable that before COVID-19 is truly in the past, legislation to help mitigate the damage it has caused will become the law of the land.

Zachary Lerner *is a partner at Locke Lord LLP and represents domestic and international insurance companies, insurance agents and brokers, reinsurance intermediaries, adjusters, third party administrators, captives, special purpose vehicles and other related entities in connection with their needs. Mr. Lerner also works with both insurance and non-insurance entities on an array of transactional matters, including mergers and acquisitions, corporate filings, annual reports and affiliate transactions.*

Related:

- **9/11, terrorism and insurance: How TRIA came to be, and what happens if it expires (https://www.propertycasualty360.com/2019/09/11/911-terrorism-and-insurance-how-tria-came-to-be-and-why-its-important/)**

- **Proposed business interruption bills could lead to disaster, says insurance leaders (https://www.propertycasualty360.com/2020/04/16/proposed-business-interruption-bills-could-lead-to-disaster-says-insurance-leaders/)**
- **Class actions filed against six insurers over COVID-19 coverage (https://www.propertycasualty360.com/2020/04/20/class-actions-filed-against-lloyds-of-london-5-other-insurers-over-covid-19-coverage-414-176943/)**

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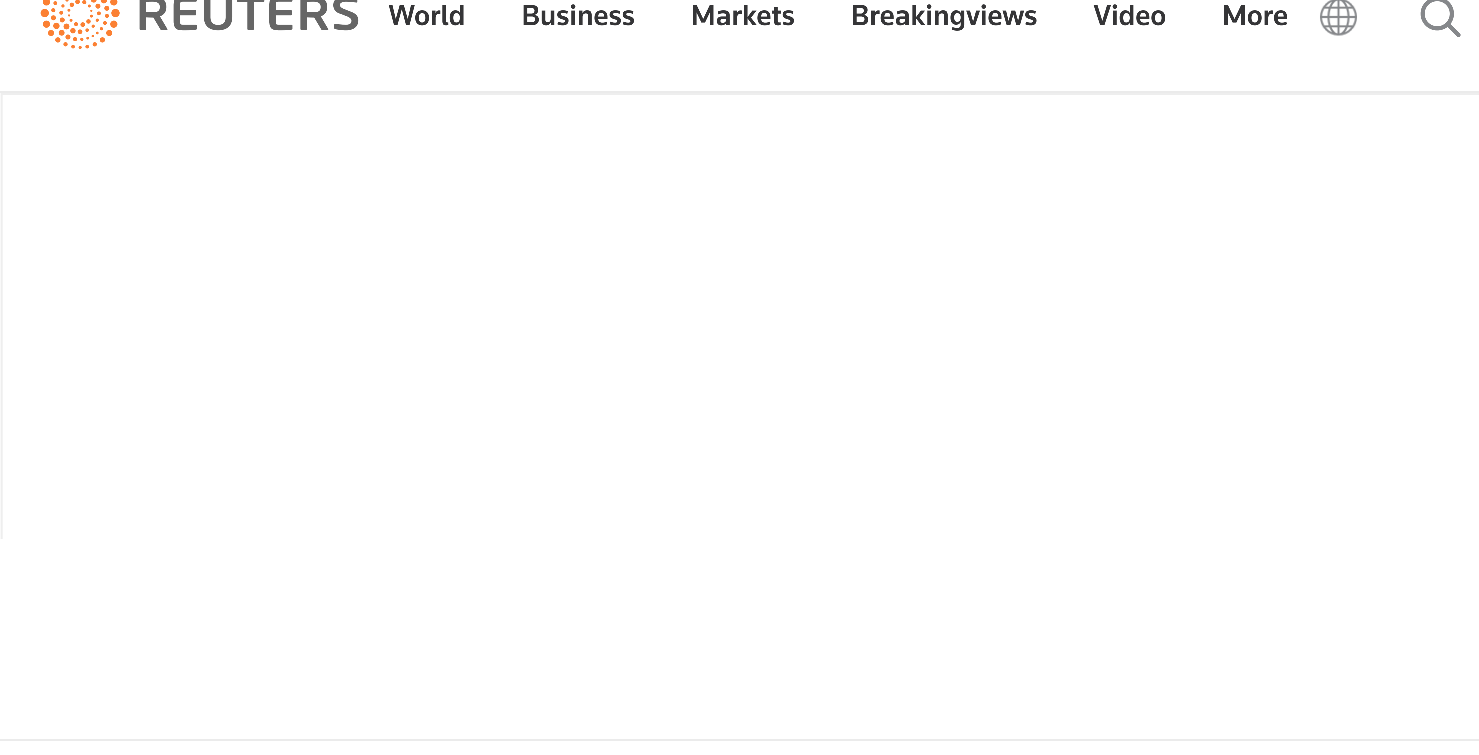
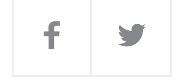


BUSINESS NEWS

JULY 10, 2020 / 3:31 AM / UPDATED 6 MONTHS AGO

Pandemic-proofing: Insurance may never be the same again

By Noor Zainab Hussain



(Reuters) - Insurers are creating products for a world where virus outbreaks could become the new normal after many businesses were left out in the cold during the COVID-19 crisis.

FILE PHOTO: Waiters at a restaurant adjust social distancing screens outside for outdoor seating seating that follows current health guidelines to slow the spread of Coronavirus (COVID-19) at a restaurant in New York City, New York, U.S., June 25, 2020. REUTERS/Lucas Jackson/File Photo

While new pandemic-proof policies might not be cheap, they offer businesses from restaurants to film production companies to e-commerce retailers ways of insuring against disruptions and losses if another virus strikes.

The providers include big insurers and brokers adding new products to existing coverage, as well as niche players that see an opportunity in filling the void left by mainstream firms that categorize virus outbreaks like wars or nuclear explosions.

Tech firm Machine Cover, for example, aims to offer policies next year that would give relief during lockdowns. Using apps and other data sources, the Boston-based company measures traffic levels around businesses such as restaurants, department stores, hairdressers and car dealers.

founder Inder-Jeet Gujral told Reuters.

"I believe this will be a major opportunity because post-COVID, it would be as irresponsible to not buy insurance against pandemics as it would be to not buy insurance against fire."

The company is backed by insurer Hiscox and individual investors, mostly from the insurance and private equity world.

Restaurants in Florida's Miami-Dade County, where Mayor Carlos Gimenez on Monday ordered dining to shut down soon after reopening, are now reeling, said Andrew Giambarba, a broker for Insurance Office of America in Doral, Florida.

"It's been like they made it to the ninth round of the fight and were holding on when this punch came out of nowhere," said Giambarba, whose clients include restaurants that did not get payouts under their business interruption coverage.

"Every niche that is dealing with insurance that is affected by business interruption needs every new product they can have."

FILLING THE VOID

Pandemic exemptions have helped some insurers emerge relatively unscathed and the sector has largely resisted pressure to provide more virus cover. Indeed, some insurers that paid out for event cancellations and other losses have removed pandemics from their coverage.

British risk managers association Airmic said last week that the pandemic had contributed to a lack of adequate insurance at an affordable price and most of its members were looking at other ways to reduce risk.

“These events are completely reliant on the technology working and a failure can be financially crippling,” said Mark Symons, contingency underwriter at Beazley.

Marsh, the world’s biggest insurance broker, has teamed up with AXA XL, part of France’s AXA AXAF.PA, and data firm Arity, which is part of Allstate, to help businesses such as U.S. supermarket chains, restaurants and e-commerce retailers cope with the challenges of social distancing.

With home deliveries surging, firms have hired individual drivers to meet demand, but commercial auto liability insurance for “gig” contractors with their own vehicles is hard to find.

"Even when the pandemic is over, we believe last-mile delivery will continue to grow," said Robert Bauer, head of Marsh's U.S. sharing economy and mobility practice.

A report by consultants Capgemini showed that demand for usage-based insurance has skyrocketed since COVID-19 first broke out and more than 50% of the customers it surveyed wanted it.

However, only half of the insurers interviewed by Capgemini for its World Insurance Report said they offered it.

BESPOKE COVER

Since businesses are only now learning how outbreaks can affect them, some new products are effectively custom-made.

Elite Risk Insurance in Newport Beach, California, has been offering "COVID outbreak relapse coverage" since May for businesses forced to shut down a second time, its founder Jeff Kleid said.

The policies are crafted around specific businesses and only pay out when certain conditions are met, Kleid said.

For film and television production companies that could be when a cast member contracts the virus, forcing them to stop shooting. Another client, which raises livestock for restaurants, is covered for a scenario in which it would be impossible to get animal feed.

Such policies do not come cheap. A $1 million policy could cost between about $80,000 to $100,000 depending on the terms.

And in March, when COVID-19 ravaged northern Italy, Generali's GASI.MI Europ Assistance offered medical help, financial support and teleconsultations for sufferers when discharged from hospital, on top of regular health insurance.

It sold 1.5 million policies in just two weeks and now has 3 million customers in Europe and United States.

Some insurers are also working on changes to employee compensation and health insurance schemes. With millions of workers not expected to return to offices anytime soon, some large insurers in Asia are preparing coverage to account for that, according to people familiar with those efforts.

At least one Japanese insurer has started work on a product to cover employees for injury while working at home, they said.

“Working from home will be the new normal for years to come. That would make the scope of the employee compensation scheme meaningless if a person suffers an injury while at home,” said a Hong Kong-based senior executive at a European insurer.

Reporting by Noor Zainab Hussain in Bengaluru, Suzanne Barlyn in Washington Crossing, Pennsylvania, Carolyn Cohn in London and Sumeet Chatterjee in Hong Kong; Additional reporting by Muvija M; Editing by Tomasz Janowski and David Clarke

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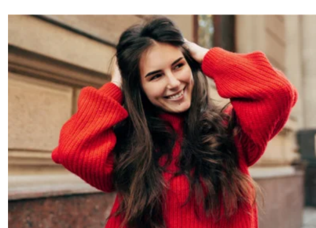

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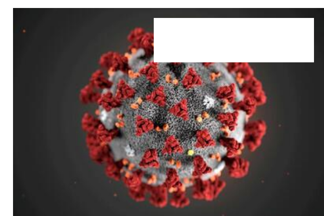

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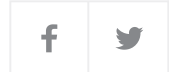

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Top UK Court Rules Insurers Must Cover Lockdown Losses

By Martin Croucher

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Law360, London (January 15, 2021, 9:53 AM GMT) -- The U.K. Supreme Court ruled Friday that insurers must pay out to hundreds of thousands of companies forced to close during the country's first pandemic lockdown, ruling in favor of the Financial Conduct Authority in a landmark case over business interruption cover.

The Supreme Court in London has upheld a ruling from the High Court in September that found largely in favor of insurance policyholders. (Peter Dazeley/Getty Images)

The country's top court upheld a High Court judgment in September that went largely in favor of policyholders, bringing to a close more than six months of litigation and delivering clarity for businesses battered by the pandemic.

The justices also went further and overturned a controversial precedent known as Orient Express that the insurers had relied on in their challenge. Delivering the judgment via video link on Friday morning, Justice Nicholas Hamblen said that the 2010 case decision should be overruled.

"For reasons given when addressing causation and the trends clauses, the Supreme Court concludes that the Orient Express case was wrongly decided and should be overruled," he said.

That ruling, in a case called Orient-Express Hotels Ltd. v. Assicurazioni Generali SpA , held that a company's claim for business interruption coverage can be limited if its turnover would have suffered regardless of the immediate event that forced it to close because of wider circumstances beyond the scope of the policy.

The FCA brought the first-ever test case using the Financial List at the High Court. The City regulator had sought by suing eight insurers with 21 policy wordings to reach an "authoritative declaratory judgment" that would have wide application.

The test case shone a light on so-called non-damage extensions to business interruption insurance. Policies for interrupted business often offer cover only if a company is forced to close as a result of physical damage to a property.

But many insurance policies are sold with add-ons, which provide cover if a business is forced to close because of the outbreak of an infectious disease within a specified radius of a company's premises, typically up to 25 miles.

Many insurers refused to pay out on claims after the country was first locked down in March and the coronavirus outbreak took hold, saying that such policies were not intended to cover global pandemics.

But the High Court largely found in favor of policyholders, ruling that such policies would pay out if it could be proven that there was a single case of COVID-19 within that radius.

The Supreme Court said it disagreed with the reasons behind the High Court judgment, but nevertheless said that insurers should pay out if the "occurrence" of COVID-19 within the vicinity was a cause of business interruption losses.

The justices also went further than the High Court did on the question of when insurance coverage could kick in.

The High Court's decision meant that businesses which closed when the lockdown started could claim on their policy. But those that pulled down the shutters when the prime minister warned that businesses should close — days before legislation for the lockdown was fully passed by Parliament — would have had their payouts significantly reduced.

The Supreme Court, however, concluded that it was "too narrow" for the High Court to say cover should start only when legislation was passed.

"An instruction given by a public authority may amount to a 'restriction imposed' if it carries the imminent threat of legal compulsion," the court ruled.

The FCA also appealed against the earlier ruling that businesses that were allowed to remain partially open — such as a restaurant offering takeaways — were denied insurance under "denial of access" clauses within their policies.

The regulator said that it was a denial of access under the policy wording because customers were unable to enter the dining area of a restaurant.

The Supreme Court agreed.

"This requirement may be satisfied where a policyholder is unable to use the premises for a discrete business activity or is unable to use a discrete part of the premises for its business activities," the justices ruled.

The FCA said that the insurance claims that would be paid out as a result of the judgment would be a lifeline to small businesses struggling to stay afloat.

"We will be working with insurers to ensure that they now move quickly to pay claims that the judgment says should be paid, making interim payments wherever possible," FCA Executive Director Sheldon Mills said. "Tens of thousands of small firms and potentially hundreds of thousands of jobs are relying on this."

Richard Leedham, partner at Mishcon de Reya LLP, which represented one group of claimants, the Hiscox Action Group, said his clients hoped that insurers would begin paying out on valid claims immediately.

Huw Evans, director general of the Association of British Insurers, said insurance companies would respect the judgment.

"Customers who have made claims that are affected by the test case will be contacted by their insurer to discuss what the judgment means for their claim," he said. "All valid claims will be settled as soon as possible."

Hiscox, one of the insurers in the case, said that it had begun processing claims.

The insurer also noted that the decision and the latest round of government lockdowns would add an extra $48 million to the amount it would pay out for business interruption claims. It did not give a figure for the full estimate.

The FCA was represented by Colin Edelman QC of Devereux Chambers, Peter Ratcliffe and Adam Kramer of 3 Verulam Buildings and Max Evans of Fountain Court Chambers, instructed by Herbert Smith Freehills LLP.

Arch Insurance UK was represented by John Lockey QC and Jeremy Brier of Essex Court Chambers, instructed by Clyde and Co LLP.

Argenta Syndicate Management Ltd. was represented by Simon Salzedo QC and Michael Bolding of Brick Court Chambers, instructed by Simmons & Simmons LLP.

Hiscox was represented by Jonathan Gaisman QC, Adam Fenton QC and Douglas Grant of 7 King's Bench Walk, and Miles Harris of 4 New Square, instructed by Allen & Overy LLP.

MS Amlin Underwriting Ltd. was represented by Gavin Kealey QC, Andrew Wales QC, Sushma Ananda and Henry Moore of 7 King's Bench Walk, instructed by DAC Beachcroft LLP.

QBE UK Ltd. was represented by Michael Crane QC of Fountain Court Chambers, Rachel Ansell QC and Martyn Naylor of 4 Pump Court, and Sarah Bousfield of Brick Court Chambers, instructed by Clyde and Co LLP.

RSA was represented by David Turner QC, Shail Patel, Anthony Jones and Clare Dixon of 4 New Square, instructed by DWF Law LLP.

Zurich Insurance PLC was represented by Andrew Rigney QC and Caroline McColgan of Crown Office Chambers and Craig Orr QC and Michelle Menashy of One Essex Court, instructed by Clyde and Co LLP.

The Hiscox Action Group was represented by Ben Lynch QC, Simon Paul and Nathalie Koh of Fountain Court Chambers, instructed by Mishcon de Reya LLP.

The lead case was Financial Conduct Authority (Appellant) v. Arch Insurance (UK) Ltd. and others (Respondents), case number UKSC 2020/0177, in the Supreme Court of the United Kingdom.

--Editing by Ed Harris.

Update: This story has been updated with additional detail about the decision.

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