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Business Interruption Coverage in a COVID-19 World

by Kelly E. Petter

Whether you believe 2020 was the end of a decade, or the beginning of the next, one thing is certain — 2020 sparked social and economic concerns that were unsettled in the United States. What some were calling a once-in-a-lifetime pandemic, others characterized as an anticipated risk and a sign of things to come. The pandemic raised myriad legal issues one of which resulted in a flurry of litigation throughout the country in 2020. Businesses filed business interruption claims against their insurance carriers in hopes that their policies would relieve economic stress resulting from measures put in place by various levels of government to prevent the spread of the SARS-CoV-2 virus more commonly known as COVID-19. Countless legal and news articles, opinion pieces, podcasts and advertisements published in March and April 2020 forecasted the legal issues presented by such claims.[1] Lawsuits were filed almost immediately, and over one hundred decisions related to the viability of the business interruption claims related to COVID-19 were issued across the country throughout 2020. This article analyzes the manner in which various jurisdictions dealt with the arguments presented by the parties and their applicability to jurisdictional precedent.

Motions to Dismiss Granted in Favor of Carrier

While the language of the various policies analyzed by the Courts differed, the language of the Business Income coverage generally stated that such coverage extends to actual loss of income sustained by the Named Insured due to the necessary suspension of the Named Insured's operations when the suspension was caused by a specific triggering event. Several versions of the triggering language were considered by the Courts, including "accidental direct physical loss to" property, "direct physical damage to" property, and "direct physical loss of or damage to" property.

The majority of Courts across the United States granted dismissal of insureds' business interruption claims related to COVID-19. The primary grounds for dismissal fall into these categories: 1) "direct physical loss of or damage to," or similar phrasing in the insuring agreement of the Property, Business Income, Extra Expense, and Civil Authority coverages, requires tangible alteration of property, which is not satisfied by the purely economic losses claimed by the insureds related to COVID-19; 2) "direct physical loss of or damage to," or similar phrasing in the insuring agreements, may include circumstances where there was no tangible alteration to property, such as a dispossession of or loss of use of property, but the insureds nonetheless failed to satisfy the threshold necessary to demonstrate such loss; 3) the essential elements for Civil Authority coverage were not alleged; 4) the insured's losses are excluded pursuant to the Virus Exclusion; and 5) other policy exclusions apply to bar coverage.

Granting Dismissal in Favor of the Carrier because the Insured Failed to Allege Physical Alteration to Property

The majority of Courts that dismissed COVID-19 business interruption claims on the grounds that there was no tangible alteration to property did so based upon applicable jurisdictional precedent that dictated that the triggering language in the insuring agreement, such as "direct physical loss of or damage to property," required physical alteration to property, or some external physical force affecting the property in order to trigger coverage.[2] The courts following such precedent reasoned that, absent allegations of some tangible alteration to property, litigants suffered no direct physical loss of property as a consequence of COVID-19 closure orders. The reasoning employed by many of those Courts demonstrated the fallacy in the insureds' argument that a tangible alteration occurred merely by virtue of such orders**.** Florida Courts, for example, relied on a recent business interruption decision unrelated to COVID-19 to distinguish

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THE PRESIDENT'S COLUMN

by Eric Niederer

I am proud to be the in-coming President of this extraordinary organization serving our members and civil defense attorneys of the Connecticut Bar. Through the leadership of our out-going President, Erika Amarante, and the efforts of our Managing Director, Officers, Directors, Committee Chairs, Members and volunteers, the CDLA has been vibrant and effective in the delivery of services and the acting voice for our mutual concerns during the trying times of this pandemic.

Despite the limitations created by the pandemic, the CDLA has conducted a variety of meetings, CLE programs, networking and social events including programs focusing on the development of young lawyers, and will continue this trajectory and increasing opportunities in the coming year. While meetings were virtual this past year, there were robust offerings with record and near-record attendance and participation. These activities ranged from social events like the Comedy Night to ethics and practice area CLE programs to professional networking opportunities at which young lawyers were encouraged to ask questions, network and learn from others in a stress-free and collaborative environment. The defense legal community has responded to our great offerings, services, and benefits with significant increases in membership, networking opportunities, and continued involvement and support from our Sponsors.

The CDLA's productive committees, with learned and passionate Chairs and Members, continue to engage our membership, legal community, and government organs supportive of our practices and interests. CDLA has contributed to discussions in the Judicial Rules Committee and provided testimony to legislative committees in an effort to provide equitable creation and application of laws which affect our practice, and obtain redress for inequities, like the *Marciano* debate in the Joint Judicial Committee conducted just a few months ago. Jim Pickett, Chair of the Legislative Committee continues to monitor, report and work on legislative issues to assist the CDLA on identifying and responding to hot-button issues, like *Marciano*. Jeff Babbin, Chair of the Amicus Committee, spearheads and submits *amicus* briefs on behalf of the CDLA, like in the Connecticut Supreme Court case of *Carpenter v. Daar*. Ed Mayer and Glenn Coffin, Chairs of the CLE Committee, and Members like Jen Booker, develop many CLE offerings, including our recent practicum on Worker's Compensation and the medical billing analysis presentation from AccuMed at our June meeting. Kelly Petter, Chair of the Young Lawyers Committee, has introduced another benefit of membership by helping to develop the Next Generation CLE series and future programs scheduled on the third

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The Defense welcomes contributions and comments from members of the Connecticut Defense Lawyers Association. If you would like to submit an article, case review, verdict report, or news of interest to the defense bar, contact the newsletter chair Stephen Murphy, Jr. at smurphy@mwllc.us.

NEWS FROM THE EXECUTIVE DIRECTOR

by Jackie Walker

It's hard to believe it's been over a year since the world shut down back in March 2020 due to the COVID-19 pandemic. CDLA, like many other industries, had to overcome hurdles and adjust quickly to a new virtual reality. Although the forecast isn't completely clear, and the future depends on a lot of unknowns, CDLA is hopeful that it will soon be safe enough for all of us to gather in-person once again.

Meetings & Events

We hope you can join us for CDLA's Annual Spring Meeting on June 9, 2021. The meeting will be held virtually and at 4 p.m. AccuMed will kick off the meeting with an interesting CLE seminar about "Analyzing Inflated Charges from Providers." Medical Coding Expert, Toni Elhoms, will identify various ways in which providers use fraudulent billing and coding tactics to increase their charges. Not only will she describe what goes into her analysis at AccuMed, she will also teach you simple ways to spot fraudulent coding in your case. After the CLE, a brief business meeting will take place to vote on CDLA's new slate of officers and board of directors for the 2021-2022 election cycle. We are excited about Josh Geballe, Chief Operating Officer to Governor Ned Lamont taking center stage as this year's keynote speaker. The evening will conclude with the presentation of The President's Award for Excellence to Chief Justice Chase T. Rogers (Ret.).

A special thanks to our annual spring meeting sponsors; (Platinum) MLM Insurance Company and CED Technologies, Inc., (Gold) Exponent, Geomatrix Productions, Pullman & Comley, and Robson Forensic, (Silver) Lemieux & Associates and MDD Forensic Accountants.

We hope to see you there! Click here; REGISTER NOW.

Charity Event

CDLA proudly supports The Hole in the Wall Gang. The Hole in the Wall Gang Camp is dedicated to providing "a different kind of healing" to seriously ill children and their families throughout the Northeast, free of charge. It's a community that celebrates the fun, friendship and spirit of childhood, where every kid can "raise a little hell." Their goal is to ensure that children with serious medical conditions have the chance to experience the world of possibilities that camp has to offer. Through the generosity of others, The Hole in the Wall Gang Camp community provides this unique healing experience to kids in need and their families, including those who may not be able to come to Camp.

Please consider donating. Your donation will help bring joy, laughter and the spirit of camp to seriously ill children and their families, free of charge. We hope you can help us enrich the lives of these children with serious illness and contribute to restorative and compassionate programming for their families.

The Hole in the Wall Gang

Donations can be mailed to: CDLA, PO Box 991, Glastonbury, CT 06033 or when registering for CDLA's Annual Spring Meeting.

Continuing Legal Education (CLE Programs)

The CDLA and its Young Lawyers Committee are proud to present an exciting learning opportunity to its young/newer lawyer community throughout 2021 and 2022. The program is called CDLA Next Generation and it is a program designed for young defense attorneys interested in learning useful tips and insight from more experienced members of the defense bar.

The program will be a series of monthly events covering many aspects of defense practice. Each event will be approximately one hour, with the first 15-20 minutes a teaching session by an experienced, senior attorney of the defense bar, who will then take questions and exit the event, allowing the young attorneys an opportunity to discuss and ask questions among themselves without the pressure or concern presented by the presence of a potential employer or hiring partner.

To register for the next CDLA Next Generation session, click here: CDLA NEXT GEN CLE.

If you are interested in presenting a CLE for CDLA, please email me at ctdefenselawyers@gmail.com.

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Executive Director

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Awards & Recognition

The CDLA Rising Star award recognizes a civil defense attorney who is truly "one to watch" because of his or her contributions to the profession, the civil defense bar, and the community, and who shows promise of leadership in the future. The Rising Star recipient must be a civil defense attorney who graduated from law school less than ten years ago.

Michael J. Carreira

CDLA was pleased to present the 2020 Rising Star Award to Michael J. Carreira at our annual Fall Meeting on November 11, 2020.

Michael Carreira currently handles the defense of complex civil cases involving personal injury, sexual abuse, malpractice, and general liability at David G. Hill & Associates. Michael was nominated for CDLA's Rising Star award by his former colleague, Christopher Russo who states, "Mike is fearless in the courtroom and relishes the opportunity to take on the biggest cases against the best that the plaintiff's bar has to offer."

Mike is also an active part of his local community. He is an assistant coach on his daughter's youth soccer team, makes annual donations to Gaylord Hospital, and is a member of the UConn Law Mentoring Program.

Congratulations to Mike on being CDLA's 2020 Rising Star!

Membership / Benefits

I am please pleased to report CDLA membership has increased 9% from last year. Currently, CDLA has 235 members and has welcomed 20 new members. CDLA is always exploring new ways to grow and get stronger and we ask you to encourage your colleagues to get involved. In addition to the seminars and networking events, there are a number of other benefits CDLA has to offer. To explore all of these benefits, click here: MEMBER BENEFITS.

Joining CDLA is easy — just click here: JOIN and complete the member application. Don't forget, anyone who refers a new member receives a $20 gift card!

Committee Developments & Involvement

In order to make the CDLA stronger and more active, we need your input and participation. What do you find most useful about the CDLA? What programs, information, or support would you like us to offer? Which topics are of greatest interest to you?

Please consider becoming more involved by joining one of several CDLA committees (CLE, Newsletter, Technology, Legislative, Amicus or Young Lawyers). Please email me at ctdefenselawyers@gmail.com with any ideas or suggestions, or to let me know if you are interested in becoming a committee member.

President's Column

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Tuesday of each month through early 2022. The CDLA continues its partnership with DRI, where Jim Craven represents Connecticut and Chris Harrington spearheads networking opportunities and strategic meetings. These Officers, Directors, Chairs and Members are just a few who have and continue to contribute to the strength and vibrancy of the CDLA. I encourage everyone to engage and take advantage of all the CDLA has to offer.

Whatever has or may occur, including a future transition back to in-person and virtual events, the CDLA is well positioned and capable of representing our mutual interests, voicing our concerns and positions, and providing excellent educational, networking and professional development to our membership. I look forward to serving you and continuing our path of excellence as we promote equitable laws, professional opportunities and development, professionalism in the practice of law, and our representation of the civil defense bar in Connecticut. Let's do this together!

Case Summary

by Edward Storck of Freeman Mathis & Gary, LLP

In *Kyle McCall v. Gina Sopneski, et al*, 202 Conn. App. 616 (2021), the appellant, Kyle McCall, sought review of the trial court's decision granting the Motion for Summary Judgment filed by appellee, Reynold's Garage & Marine, Inc. on the grounds that Reynold's Garage was immune from suit pursuant to the dealer plate statute, Connecticut General Statutes §14-60.

The underlying lawsuit involved a claim by McCall against Reynold's Garage and Gina Sopneski, a customer who was loaned a motor vehicle by Reynold's Garage while her vehicle was in for repairs. Sopneski struck plaintiff while he was riding his motorcycle, causing significant injuries with damages well in excess of the Sopneski's personal auto policy. McCall brought suit against Reynold's Garage pursuant to Connecticut General Statutes § 14-154a, which creates vicarious liability for motor vehicle lessors. In the trial court, we successfully obtained summary judgment on behalf of the dealership pursuant to Connecticut General Statutes § 14-60, which grants immunity for dealers who loan motor vehicles or dealer plates to customers while the customer's vehicle is being repaired and the dealership obtains proof of insurance from the customer.

On appeal, the plaintiff argued the trial court got it wrong by concluding that there was no question of fact that the transaction was a loan and not a rental. He argued that the agreement between the dealer and its customer was titled "Rental Agreement" and used the word "rental" approximately 27 times throughout the document, the document itself was titled "Rental Agreement." McCall argued that a jury should have been allowed to decide what type of transaction was involved. Reynold's Garage argued that Connecticut General Statutes §14-60, as interpreted by the Connecticut Supreme Court in *Cook v. Collins Chevrolet, Inc.,* 199 Conn. 245 (1986), provided immunity from such suits under the facts of the case.

In affirming the trial court's decision, Judge Nina Elgo, held that the trial court properly concluded there was no genuine issue of material fact as to whether the dealership was entitled to the immunity provided by § 14-60. Judge Elgo held that the plaintiff's position that § 14-60 applies only to the lending of motor vehicles that have dealer plates affixed was untenable in light of the plain language of the statute encompassing situations in which a dealer lends either a dealer vehicle, a dealer plate, or a dealer vehicle containing a dealer plate. Thus, the fact that the motor vehicle operated by the tortfeasor had a vanity plate rather than a dealer plate did not operate to preclude the application of § 14-60. Moreover, the court held that regardless of the label on the agreement between the dealership and the tortfeasor, the essence of the transaction was a loan, as the motor vehicle was given to the tortfeasor for temporary use and the tortfeasor was not charged a fee for the use of the motor vehicle. In the decision, Judge Elgo found that the decision in *Cook v. Collins Chevrolet, Inc.,* to be instructive in resolving the claim. The underlying facts in *Cook* involved the lending of a dealer plate and not a vehicle. Judge Elgo's decision expands on the decision in *Cook*, by finding that §14-60 did not only apply when a dealer plate was loaned to a customer, but also when a vehicle is loaned to the customer. The court further found that despite the agreement being labeled a rental agreement, the essence of the transaction made it clear that the transaction involved a loan and not a rental. The court found that the title of the document was not what determined the type of transaction involved.

Since *Cook,* there have been a number of superior court decisions interpreting Cook and either granting immunity to dealerships under the facts of the case or finding differences in the facts such that they denied similar Motions for Summary Judgment. The decision of the Court of Appeals in *McCall*, has essentially consolidated many of those superior court cases which found there was immunity into one succinct decision. Moreover, in preparing the Motion for Summary Judgment and the Appellee brief, I was unable to find any cases involving the situation where the dealer loaned a vehicle to a customer which had vanity plates on it. This decision now extends immunity to dealerships in those cases. Further, the decision also makes it clear that the title of the document was not necessarily determinative of the transaction. While this was raised in a superior court case, there was no appellate level decisions on this point. This is significant where many dealerships are required to use form documents created by the automobile companies and do not have a say on the language. In this case, there would have probably been little issue had the agreement used not have been called a "Rental Agreement."

Edward Storck is an associate at Freeman Mathis & Gary, LLP in Hartford.

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facts establishing a tangible alteration to property in the prior case from the absence of such allegations in the COVID-19 claims. In *Malaube, LLC*, the Southern District of Florida noted that "[a]lthough the plaintiff in *Mama Jo's* failed to put forth any evidence that his cleaning claim constituted a direct physical loss, he at least alleged that there was a physical intrusion (i.e. dust and debris) into his restaurant. Plaintiff has done nothing similar in this case. Plaintiff merely claims that two Florida Emergency Orders closed his indoor dining. But, for the reasons already stated, this cannot state a claim because the loss must arise to actual damage." *Malaube, LLC,* 2020 U.S. Dist. LEXIS 156027, at *8; *see also Infinity Exhibits,* 2020 U.S. Dist. LEXIS 182497, at *4 (citing *Malaube*, 2020 WL 5051581, at *8) ("[T]he action should be dismissed because the policy required direct physical loss or property damage and plaintiff had alleged 'merely [ ] economic losses — not anything tangible, actual, or physical.'"). Similarly, the Northern District of Georgia and the New Jersey Superior Court reasoned that "the Order merely recognized an existing threat. It did not represent an external event that changed the insured property. Every physical element of the dining rooms- the floors, the ceilings, the plumbing, the HVAC, the tables, the chairs- underwent no physical change as a result of the Order. The only possible change was an increased public and private perception of the existing threat, which cannot be deemed a physical change that rendered the property unsatisfactory. . ." *Henry's La. Grill,* 2020 U.S. Dist. LEXIS 188353, at *11; *FAFB LLC,* MER L 000892-20, at *7 ("The Government orders to prevent COVID-19, quote, do not represent an external event that changed the insured property. Every physical element of the dining rooms, the floors, the ceilings, the plumbing, the HVAC, the tables, the chairs underwent no physical damage as a result of the order, closed quote. And that's a quote from the Henry's case, 2020 WL 5938755 in which the Court interpreted Government orders as physical loss would exceed any reasonable bounds of possible construction. And that same analysis clearly applies to this case."). The Central District of California similarly explained that the insured law firm argued it was "'deprived of the typical foot traffic, visibility, and ability to interface with clients that it ordinarily depends on, and is entitled to coverage for the business losses that resulted from this deprivation,'" yet the court found the insured failed "to allege that there was physical damage to the property and [the insured] concede[d] that Coronavirus 'has never been detected at [its] property.'" *Geragos,* 2020 U.S. Dist. LEXIS 196932, at *6. The Southern District of New York similarly reasoned:

> The idea that "loss of use" does not constitute a "direct physical loss of or damage to" property resonates in ordinary experience outside the context of insurance coverage. Say, for example, a teenager broke curfew, and his parents punished him by taking away the keys to his car. The teen undoubtedly lost the ability to use the car. However, we would not say that there had been a "direct physical loss of or damage to" the car. The teenager was precluded from driving it. But the car's physical condition remained unchanged, and its presence likely remained at the residence. Similarly, imagine a fisherman visits a public pond each day to cast his line. One morning he arrived and found that the pond was closed for fishing because a nearby town was hosting its annual swim race. Did the fisherman lose the use of the pond for the day? Yes. He could not enjoy the premises for his intended use (*i.e.*, to fish). But could anyone reasonably conclude there was a "direct physical loss of or damage to" the pond because he could not fish? No. The condition of the pond was not altered physically.

Michael Cetta, 2020 U.S. Dist. LEXIS 233419, at *12-13. Most notably, the Southern District of Alabama went so far as to conclude that "a reasonable insured would not understand a 'direct physical loss of property' to have occurred as a consequence of the State's Order." *Hillcrest Optical*, 1:20-cv-00275-JB-N, at *15; *see Drama Camp Prods.,* 2020 U.S. Dist. LEXIS 246969, at *10-12.

A split of authority developed in the Western District of Missouri when the *BBMS* Court reasoned that "[a] survey of cases, both from Missouri and elsewhere, confirms that the phrase requires some physical event or force on, in or affecting the property in question and not mere 'loss of use.' Ruling otherwise would render the word 'physical' a nullity." *BBMS,* 2020 U.S. Dist. LEXIS 233982, at *6. The *Zwillo V* decision followed shortly thereafter where the Court stated: "[i]n short, the Court agrees with Defendant that 'direct physical loss of or damage to property' requires physical alteration of property, or, put another way, a tangible impact that physically alters property." *Zwillo V,* 2020 U.S. Dist. LEXIS 230672, at *6. Three earlier decisions out of the same Court denied carriers' motions to dismiss finding that "physical loss" was adequately pleaded because the plain and ordinary meaning of the phrase "physical loss" encompasses dispossession or deprivation of property. *See Blue Springs Dental Care v. Owners Ins. Co.,* 4:20-cv-00383-SRB, 488 F. Supp. 3d 867, 2020 U.S. Dist. LEXIS 172639, at *8 (W.D. Mo. Sep. 21, 2020) (adopting the definition of "physical loss" established in *Studio 417); K.C. Hopps v. Cincinnati Ins. Co.,* 4:20-cv-00437-SRB, 2020 U.S. Dist. LEXIS 144285, at *1 (W.D. Mo. Aug. 12, 2020) (adopting the reasoning set forth in *Studio 417*); *Studio 417 v. Cincinnati Ins. Co.,* 6:20-cv-03127-SRB, 478 F. Supp. 3d 794, 2020 U.S. Dist. LEXIS 147600, at *8 (W.D. Mo. Aug. 12, 2020). Notably, the decisions denying the motions to dismiss relied upon specific allegations in the complaints

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purportedly demonstrating an external force upon the property — actual contamination — unlike the insured in *BBMS* where the Court found that the insured had failed to allege that the virus was present in and on the insured premises, instead, relying on the mere existence of COVID-19 generally, and the executive orders, which the Court found were insufficient to survive dismissal. *BBMS,* 2020 U.S. Dist. LEXIS 233982, at *10-11. The *Zwillo V* Court similarly reasoned that the insured's "allegations concerning the impact of the COVID-19 virus and stay-at-home orders do not plausibly allege 'direct physical loss of or damage to' property." *Zwillo V,* 2020 U.S. Dist. LEXIS 230672, at *6.

In contrast to the aforementioned cases, one Court found that the insured alleged facts to substantiate a physical alteration to covered property sufficient to move past the pleading stage when a beer distributor alleged that it ordered beer that spoiled after its customer closed and did not accept the stock before it expired. *Harvest Moon Distribs., LLC v. Southern-Owners Ins. Co.,* 6:20-cv-01026-PGB-DCI, 2020 U.S. Dist. LEXIS 189390, at *6 (M.D. Fl. Oct. 9, 2020). The *Harvest Moon Distributors* Court nonetheless found that the insured failed to allege a covered Business Income loss because the insured failed to allege that the insured suspended "operations" or underwent a "period of restoration". *Id. at* *8. Rather, the insured alleged that the beer spoiled as a result of the customer suspending operations, which was insufficient to satisfy all of the triggering events for Business Income coverage under the policy. *Id. at* *8-9.

Like the *Harvest Moon Distributors* Court, several Courts found that the use of the phrase "period of restoration" in the Business Income and Civil Authority coverages, as well as the associated definitions in the policies, were further evidence that the policy contemplated tangible alteration to property in order to trigger coverage. Those Courts reasoned that the use of the phrase "period of restoration" inferred that the "suspension" of "operations" occurred by virtue of the time necessary to repair, rebuild, or replace the physical alteration of or to the covered property. *See Drama Camp Prods.,* 2020 U.S. Dist. LEXIS 246969, at *12-13; *VSTYLES Inc.,* RIC2003415, at *3; *Santo's Italian Café LLC,* 2020 U.S. Dist. LEXIS 239382, at *19-20; *Verveine Corp.,* 2020 Mass. Super. LEXIS 187, at *8-9; *Newchops Rest. Comcast LLC*, 2020 U.S. Dist. LEXIS 238254, at *10; *Michael Cetta,* 2020 U.S. Dist. LEXIS 233419, at *13-14; *T&E Chi. LLC,* 2020 U.S. Dist. LEXIS 217090, at *11; *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.,* 3:20-cv-03750-WHO, 2020 U.S. Dist. LEXIS 209547, at *9 (N.D. Cal. Nov. 9, 2020); *Musso & Frank Grill Co.,* 2020 Cal. Super. LEXIS 4510, at *6; *FAFB LLC,* MER L 000892-20, at *7; *W. Coast Hotel Mgmt.,* 2020 U.S. Dist. LEXIS 201161, at *8; *Hillcrest Optical*, 1:20-cv-00275-JB-N, at *16; *Henry's La. Grill,* 2020 U.S. Dist. LEXIS 188353, at *13; *Malaube, LLC,* 2020 U.S. Dist. LEXIS 156027, at *21.

In an effort to combat jurisdictional precedent and policy language considerations leading Courts to the conclusion that tangible alteration to property was required to trigger coverage, some insureds argued that use of the phrases "loss of" and "damage to" in the policies must be interpreted to include something other than just physical alteration to property; otherwise, the phrases would be redundant. The Courts requiring physical alteration of property to trigger coverage rejected such arguments. *See Steiner Steakhouse, LLC,* 2020 U.S. Dist. LEXIS 252012, at *5; *Santo's Italian Café LLC,* 2020 U.S. Dist. LEXIS 239382, at *22-23;*10012 Holdings,* 2020 U.S. Dist. LEXIS 235565, at *5; *Michael Cetta,* 2020 U.S. Dist. LEXIS 233419, at *18 ("A close analysis of the text of the provision here confirms that the terms "loss" and "damage" are not superfluous."); *Henry's La. Grill,* 2020 U.S. Dist. LEXIS 188353, at *11-12 ("These definitions can support two different meanings—that loss is the "disappearance of value" or "the act of losing possession" by complete destruction, while damage is any other injury requiring repair. As an illustrative example, a tornado that destroys the entirety of the restaurant results in a 'loss of' the restaurant, while a tree falling on part of the kitchen would represent 'damage to' the restaurant."); *Plan Check Downtown III,* 2020 U.S. Dist. LEXIS 178059, at *5 ("While Plan Check's argument is not inconceivable, the Court finds that it places too much weight on the need to avoid surplusage, and asks a handful of words — "loss," "of," and "to" — to do too much work."); *10E, LLC,* 2020 U.S. Dist. LEXIS 156827, at *7-8.

Several insureds also attempted to establish that "direct physical loss of or damage to property" was sufficiently alleged in the complaint through conclusory allegations regarding the physical attributes of COVID-19, which arguments were rejected by the Courts as unsupported by facts and, thus, insufficient to overcome a motion to dismiss pursuant to *Iqbal*. *See Ashcroft v. Iqbal,* 556 U.S. 662 (2009); *see also Selane Prods. v. Cont'l Cas. Co.,* 2:20-cv-07834-MCS-AFM, 2020 U.S. Dist. LEXIS 233753, at *8 (C.D. Cal. Nov. 24, 2020) (pointing to the "physical attributes of COVID-19, which 'can adhere to surfaces of property for several days and can linger in the air in building for several hours,' and alleges they constitute 'physical loss of or damage to the property.' Compl. ¶¶ 4, 30-31, 49, 51."); *W. Coast Hotel Mgmt.,* 2020 U.S. Dist. LEXIS 201161, at *3-4; *10E, LLC,* 2020 U.S. Dist. LEXIS 156827, at *6. The *Water Sports Kauai* Court rejected claims that "the explosive spread of coronavirus and the imminence of the threat it presented is sufficient to show a 'direct physical loss' because the closure is alleged to have resulted from a

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physical event 'the spread of the virus' and potential exposure to a disease." *Water Sports Kauai,* 2020 U.S. Dist. LEXIS 209547, at *5. The *Promotional Headwear* Court found that the insureds' allegations "that the virus likely contaminated its property fails to raise 'a right of relief above the speculative level'" despite the complaint citing to studies finding the virus spread through air droplets, was able to travel across distances, and could settle on physical surfaces later infecting another person. *Promotional Headwear,* 2020 U.S. Dist. LEXIS 228093, at *16-17 ("The health data and studies described in the Complaint do not support the conclusory assertion that the virus was present on the surfaces of Plaintiff's property, causing its losses. The fact that the virus travels through the air and was present in the United States sooner than first suspected, does not support the assertion that it "likely" exists on the surfaces of Plaintiff's property. "There is a similar risk of exposure to the virus in any public setting, regardless of artful pleading as to the likelihood of the presence of the virus." The Complaint alleges that at the time of filing, there were 403 known infections in Johnson County; there is no allegation that any of these infected individuals were ever present on Plaintiff's property, or that employees or customers came into contact with someone who was infected before entering the property. To accept Plaintiff's conclusory assertion would be to accept the proposition that any business located in a community with COVID-19 infections was likely contaminated with the virus. The Court declines to accept this speculative assertion, even at the motion to dismiss stage."). The *Uncork and Create* Court found that allegations of the presence of the virus on the premises were not determinative of whether coverage was triggered. *Uncork & Create,* 2020 U.S. Dist. LEXIS 204152, at *9-10 ("Firstly, while factual allegations drive the analysis of a motion to dismiss, courts are not required to set aside common sense, and neither *Studio 417*, which relied in part on the allegation of presence of the virus, nor the instant case, involve actual allegations of employees or patrons with infections traced to the business. There is a similar risk of exposure to the virus in any public setting, regardless of artful pleading as to the likelihood of the presence of the virus. Secondly, even when present, COVID-19 does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property. Because routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover, and a covered 'loss' is required to invoke the additional coverage for loss of business income under the Policy.").

Granting Dismissal in Favor of the Carrier, Even if Loss of Use was Sufficient to Trigger Coverage, because the Insured Nonetheless Failed to Meet the Threshold Requirements to Sufficiently Allege Same

In contrast to the aforementioned decisions that held that physical alteration to property was required to establish "direct physical loss or damage," some Courts rejected carriers' contention that physical alteration to property was required under the policy. The Northern District of California held that there was a distinction between "loss to" and "loss of" property. *See Water Sports Kauai,* 2020 U.S. Dist. LEXIS 209547, at *5; *Mudpie, Inc. v. Travelers Cas. Ins. Co.,* 487 F. Supp. 3d 834, 4:20-cv-03213-JST, 2020 U.S. Dist. LEXIS 168385, at *5-6 (N.D. Cal. Sept. 14, 2020). Relying on recent precedent, the *Mudpie, Inc.* Court held that "'loss of' property contemplates that the property is misplaced and unrecoverable, without regard to whether it was damaged," and to require "loss of" to require "damage to" property would render the "damage to" portion of the policy meaningless thereby violating black-letter cannon of contract interpretation. *Mudpie, Inc.,* 2020 U.S. Dist. LEXIS 168385, at *6. Accordingly, the Court concluded that "loss of" could include "the permanent disposition of something." *Id.*

Nonetheless, the overwhelming majority of Courts recognized that, even if "loss of" was intended to include circumstances where there was no tangible alteration to property, insureds asserting business interruption claims related to COVID-19 did not suffer complete "direct physical loss of" covered property because they always had complete access to the premises even after the various orders were issued. The Courts reasoned that, instead, the insureds sought coverage for a temporary inability to use the property for its intended purpose, which Courts found insufficient to trigger coverage.[3] Those Courts also rejected the precedent relied upon by insureds to support the contention that they sufficiently alleged "loss of" property, because the precedent upon which the insureds relied involved permanent dispossession of property, which the Courts found constituted direct "physical loss," and the insureds did not allege complete and permanent disposition of property.[4] Accordingly, the Courts found the precedent clearly distinguishable.

The *Seifert* Court held that Minnesota law did not require a showing of structural damage to qualify for coverage, citing to cases where asbestos and smoke contamination was sufficient to trigger coverage. *Seifert,* 2020 U.S. Dist. LEXIS 192121, at *7 ("In short, '[i]t is sufficient to show that the 'insured property is injured in some way,' which may be something less than structural damage or some other tangible injury. *See Archer Daniels Midland Co. v. Aon Risk Servs., Inc. of Minnesota*, No. 97-2185, 2002 WL 31185884, at *3 (D. Minn.

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Sept. 27, 2002), *aff'd*, 356 F.3d 850 (8th Cir. 2004)."). However, the Court clarified that "[s]imply claiming 'mere loss of use or function' is not enough." *Id.* Actual injury, such as contamination, must have occurred and merely alleging economic loss unrelated to an actual infiltration and contamination of the property was insufficient to trigger coverage. *Id.* at *8. The Court held that government action prohibiting the use of the property, absent allegation of actual injury to the property, cannot trigger business interruption coverage. *Id.* at *9.

The Eastern District of Pennsylvania similarly held that caselaw out of the Third Circuit recognized that allegations of physical damage to a building from "sources unnoticeable to the naked eye," such as the presence of asbestos in a building or e-coli bacteria in a well, may be sufficient, but those cases must meet a higher threshold. *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.,* 2:20-cv-03198-HB, 2020 U.S. Dist. LEXIS 207892, at *7-8 (E.D. Pa. Nov. 6, 2020); *see Kessler Dental Assocs.,* 2020 U.S. Dist. LEXIS 228859, at *9-10; *4431, Inc. v. Cincinnati Ins. Cos.,* 5:20-cv-04396-JFL, 2020 U.S. Dist. LEXIS 226984, at *19 (E.D. Pa. Dec. 3, 2020) ("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."). The *Brian Handel D.M.D.* Court noted that, if the building continues to function and remain usable, then the building owner has not suffered a covered loss. *Brian Handel D.M.D.,* 2020 U.S. Dist. LEXIS 207892, at *7-8 ("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.' [*Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.,* 311 F.3d 226, 235 (3d Cir. 2002).]"). The Court held that, in order to meet the heightened threshold applicable in such circumstances, the insured must demonstrate that the functionality of the property "was nearly eliminated or destroyed" or the "property was made useless or uninhabitable" to establish "direct physical loss of or damage to" the property. *Brian Handel D.M.D.,* 2020 U.S. Dist. LEXIS 207892, at *8. Applying the test to the facts involved in that case, the *Brian Handel D.M.D.* Court found the insured dental office failed to allege a "direct physical loss of or damage to" the dental property, because no order ever required the dental office to completely close and, instead, it was permitted to remain open for emergency procedures. *Id.* at 8-9. The *4431, Inc.* Court similarly reasoned:

> To frame point 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.

4431, Inc., 2020 U.S. Dist. LEXIS 226984, at *n. 15. The Court concluded that the insured failed to allege the requisite physical condition of the premises to trigger coverage, because its loss of Business Income as a result of COVID-19 was due to the threat of illness and the Governor's orders rather than the physical condition of the property, and the insured maintained the ability to operate at their premises on a limited basis. *Id.* at *22-23. Relying on the same principles, the *Kessler Dental Associates* Court held that "direct physical loss of or damage to" property was not alleged when the insured contended that "[b]ecause business is conducted in an enclosed building, [it] is more susceptible to being or becoming contaminated," because the allegations were "indirect 'general threat[s] of future damage' [that] do not demonstrate 'physical damage.' *Port Auth. of New York & New Jersey*, 311 F.3d at 235." *Kessler Dental Assocs.,* 2020 U.S. Dist. LEXIS 228859, at *10.

Several Courts illustrated why plaintiffs' position — that temporary restrictions of use constituted "direct physical loss of or damage to property" — was untenable. The Southern District of Alabama concluded that, in order to apply the insured's theory of coverage, one must apply the same meaning to possession and usability, but "not every instance of possession leads to use." *Hillcrest Optical*, 1:20-cv-00275-JB-N, at *13. For example, a gas rationing order would not result in a finding that a vehicle suffered direct physical loss. *Id.* at *14. The Central District of California considered the following examples, which would not be appropriately covered under the policy:

> (1) a city changes its maximum occupancy codes to lower the caps, meaning that a particular restaurant can no longer seat as many customers as it used to; (2) a city amends an ordinance requiring restaurants located in residential zones to cease operations between 1:00 a.m. and 5:30 a.m. to expand the window to 12:00 a.m. to 6:00 a.m.; (3) a city issues a mandatory evacuation order to all of its residents due to nearby wildfires (a consequence of this is that all businesses must suspend operations), but lifts the order three weeks later

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> when the wildfires are extinguished without, fortunately, any destruction of property.

Plan Check Downtown III, 2020 U.S. Dist. LEXIS 178059, at *8-9. The *Plan Check Downtown III* Court also noted that "[t]he manageability issue is not limited to government action, but with anything that interferes with the permitted physical activities on a property. If a building's elevator system had a software bug that temporarily shut down all the elevators, that would clearly interfere with permitted physical activities. Similarly, a snowstorm would interfere with a restaurant's outdoor dining service." *Id.* at *9. The Court found that none of the aforementioned circumstances should be covered under the carrier's all-risk policy as they would not fit within the parties' expectations of what property insurance should cover, and requiring an exclusion to contract away liability for each would be unworkable. *Id.*; *see also Mark's Engine Co.,* 2020 U.S. Dist. LEXIS 188463, at *5-8 (citing *Plan Check Downtown III, LLC* for the same proposition); *see also Henry's La. Grill,* 2020 U.S. Dist. LEXIS 188353, at *11 ("Insureds' theory of coverage is untenable, because it would "potentially make an insurer liable for the negative effects of operations changes resulting from any regulation or executive decree, such as a reduction in a space's maximum occupancy."); *Hillcrest Optical*, 1:20-cv-00275-JB-N, at *14 (citing *Henry's La. Grill* for the same proposition).

The Southern District of Mississippi aptly observed: "this is a commercial property policy, not a stand-alone business interruption policy—Plaintiff's *operations* are not what is insured—the building and the personal property in or on the building are. Accordingly, Plaintiff is incorrect when it states, 'Plaintiff's property lost its usability due to the imposition of civil orders which suspended operations and for which there is coverage.' [16] at p. 15." *Real Hosp., LLC,* 2020 U.S. Dist. LEXIS 208599, at *13.

Granting Dismissal in Favor of the Carrier with Respect to Civil Authority Coverage Claims because the Essential Elements of Coverage were Not Alleged

While Business Income coverage typically applies to lost business income as a result of direct loss to the insured's covered property, Civil Authority coverage typically applies when there is a covered cause of loss that causes damage to property other than the insured's property resulting in action of a civil authority rendering the insured property unreachable. Civil Authority coverage typically only applies when the insured demonstrates that: 1) a covered cause of loss caused damage to adjacent property; 2) access to the area immediately surrounding the damaged property was prohibited by civil authority as a result of the damage or dangerous condition; and 3) the action of the civil authority is taken in response to the condition of the adjacent property.

Several insureds' suits specifically alleged that coverage was afforded for COVID-19 losses pursuant to the Civil Authority coverage afforded by the policy, while others simply argued they were entitled to all coverage under the policy. Claims for Civil Authority coverage were met with repudiation similar to that received in response to Business Income coverage, as the insureds could not allege facts sufficient to establish each element to trigger coverage. The analysis employed by Courts analyzing Civil Authority coverage claims was substantially similar to the analysis applied to the Business Income coverage claims with respect to the triggering event. Moreover, Courts found that claims for Civil Authority coverage failed due to additional deficiencies such as the insureds' failure to identify any specific property in the immediate area of the insured property that suffered damage necessitating the civil authority order.[5] In the same vein, Courts reasoned that insureds could not allege facts necessary to satisfy the causal connection between the damage to adjacent property and the orders, because the government closure orders were intended to prevent the spread of COVID-19 and, since they were preventative and in the absence of allegations of damage to adjacent property, the allegations failed to trigger the Civil Authority coverage afforded by the policies.[6] Civil Authority coverage claims were also dismissed because allegations did not establish that the covered property was not accessible due to the Orders.[7] This basis for dismissal was prevalent in cases involving insureds whose businesses were deemed essential and, thus, were permitted to operate. Courts also dismissed claims for Civil Authority coverage by non-essential businesses on the same grounds noting that nothing in the stay-at-home orders prohibited access to the premises in that the owners and employees could physically go to the premises. Many of the orders relied upon by insureds specifically noted that essential business functions for non-essential businesses, such as mail, could continue.

The *Pappy's Barber Shop* Court raised an important distinction between the manner in which Civil Authority coverage was intended to apply and the arguments made by insureds for coverage thereunder:

> Plaintiffs fail to make any distinction between their place of business (i.e., the physical premises where they operate their business), and the business itself, but this distinction is relevant to coverage under the Policy. The Policy insures property, in this case Plaintiffs' property and physical places of business, and not Plaintiff's business itself. To that end, the civil authority coverage provision only provides coverage to the extent that access to Plaintiff's physical premises is prohibited, and not if Plaintiffs are simply prohibited from

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> operating their business. The government orders alleged in the complaint prohibit the operation of Plaintiff's business; they do not prohibit access to Plaintiffs' place of business.

Pappy's Barber Shops, 2020 U.S. Dist. LEXIS 166808, at *9. The Court also clarified that, even if plaintiff could establish the requisite prohibited access, "the orders were not issued due to direct physical loss of or damage to property *other than at Plaintiffs' premises*." *Id.*

Granting Dismissal in Favor of the Carrier by Virtue of the Virus Exclusion

Although not all policies contained the same exclusion, most contained the following, or substantially similar language: "[w]e will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism." At least one Court enforced an exclusion titled "Fungi, Wet Rot, Dry Rot, Bacteria And Virus," which excluded loss or damage caused by "presence, growth, proliferation, spread or any activity of "fungi", wet rot, dry rot, bacteria or virus." *Franklin EWC, Inc.,* 2020 U.S. Dist. LEXIS 174010 at *3; *Franklin EWC, Inc., v. Hartford Fin. Servs. Grp.,* 3:20-cv-04434-JSC, 2020 U.S. Dist. LEXIS 234651, at *3 (N.D. Cal. Dec. 14, 2020) ("*Franklin EWC, Inc. II*"). Another Court enforced a "Pathogenic Organisms Exclusion," which excluded damage caused by the "actual, alleged or threatened presence of any pathogenic organism, all whether direct or indirect, proximate or remote, or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy…" *Boxed Foods Co., LLC v. Cal. Capital Ins. Co.,* 3:20-cv-04571-CRB, 2020 U.S. Dist. LEXIS 198859, at *5 (N.D. Cal. Oct. 26, 2020). A "Pollution and Contamination Exclusion" that stated the policy did not cover "loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this Policy. . ." was also enforced and held to bar coverage for the insureds claims. *Zwillo V,* 2020 U.S. Dist. LEXIS 230672, at *7-10.

Insureds primarily argued that their claims should not be dismissed based on the Virus Exclusion because: 1) the cause of loss was the closure order and not the virus, or the cause of loss was a question of fact that should not be decided by way of a motion to dismiss; 2) the carriers should be estopped from applying the exclusion; and 3) insureds had reasonable expectations that the policy would afford coverage for losses suffered if their businesses were forced to shut down.

The overwhelming majority of Courts rejected insureds' contention that a factual dispute as to the cause of the insureds' losses was a question of fact not properly decided by way of a motion to dismiss. Those Courts further rejected attempts to distinguish between losses caused by orders issued in response to the virus, or the virus itself, which arguments were submitted in an attempt to circumvent the applicability of the Virus Exclusion.[8] Courts similarly rejected attempts to distinguish between the "virus particles" and the "role of human droplets," which at least one insured attempted to argue were larger in size than virus particles, thus, establishing their own physical presence that altered or damaged surfaces and, thereby, creating a factual dispute as to the applicability of the Virus Exclusion. *Healthnow Med. Ctr. v. State Farm Gen. Ins. Co.,* 4:20-cv-04340-HSG, 2020 U.S. Dist. LEXIS 232626, at *3 (N.D. Cal. Dec. 10, 2020). The *Healthnow Medical Center* Court rejected the argument and focused on the purpose of the stay-at-home orders that "plainly sought to prevent COVID-19- a virus- from spreading." *Id.* Notably, the Court stated: "Plaintiff's suggestion that there is a meaningful distinction under the ordinances, and thus under the Policy, between 'droplets' that may or may not contain the virus and the virus itself defies common sense and Plaintiff's own allegations." *Id.*

Courts also rejected insureds' assertion of estoppel theories holding that the elements necessary to enforce the various estoppel theories were not present under the circumstances. *See 1210 McGavock St. Hospitality,* 2020 U.S. Dist. LEXIS 241668, at *8; *Newchops Rest. Comcast LLC*, 2020 U.S. Dist. LEXIS 238254, at *17-18; *Franklin EWC, Inc. II,* 2020 U.S. Dist. LEXIS 234651, at *6; *Kessler Dental Assocs.,* 2020 U.S. Dist. LEXIS 228859, at *8-9; *Border Chicken AZ,* 2020 U.S. Dist. LEXIS 217649, at *10; *Mattdogg, Inc.,* 2020 N.J. Super. LEXIS 250, at *9; *Chattanooga Prof'l Baseball,* 2020 U.S. Dist. LEXIS 212349, at *5-6; *Brian Handel D.M.D.,* 2020 U.S. Dist. LEXIS 207892, at *11-12; *Indep. Barbershop, LLC,* 2020 U.S. Dist. LEXIS 211152, at *6; *FAFB LLC,* MER L 000892-20, at *11; *Boxed Foods Co.,* 2020 U.S. Dist. LEXIS 198859, at *8-9. The Superior Court of New Jersey and the Eastern District of Pennsylvania found that the carrier's position was consistent with the representations made to regulators — that coverage was not afforded for virus related losses. *Newchops Rest. Comcast LLC*, 2020 U.S. Dist. LEXIS 238254, at *17-18; *Kessler Dental Assocs.,* 2020 U.S. Dist. LEXIS 228859, at *8-9; *Brian Handel D.M.D.,* 2020 U.S. Dist. LEXIS 207892, at *11-12; *FAFB LLC,* MER L 000892-20, at *11. Moreover, the New Jersey and Tennessee Courts found that "what's most important on this theory is that regulatory estoppel does not void clear and unambiguous language provisions or provide a basis for recision." *FAFB LLC,* MER L 000892-20, at *11-12; *see also 1210 McGavock St. Hospitality,* 2020 U.S. Dist. LEXIS 241668, at *8 ("The plaintiff acknowledges that no Tennessee court has adopted the doctrine of

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regulatory estoppel. Tennessee courts have long held, however, that extrinsic evidence may not be introduced to modify the terms of an unambiguous contract."); *Mattdogg, Inc.,* 2020 N.J. Super. LEXIS 250, at *9 ("Additionally, regulatory estoppel does not void clear and unambiguous provisions or provide a basis for recission."). The *Chattanooga Professional Baseball* Court found that regulatory estoppel was a New Jersey state law defense that was rejected by Texas and Indiana that was inapplicable to the suit governed by Arizona law. *Chattanooga Prof'l Baseball,* 2020 U.S. Dist. LEXIS 212349, at *5. The Court also found that general equitable estoppel could not be used to create insurance coverage where it otherwise did not exist, and any alleged misrepresentations about the unambiguous Virus Exclusion were not made to the insured, but to state commissions, which the Court deemed insufficient to support the application of equitable principles to bar enforcement of the exclusion relative to the insured's claim. *Id.* at *6. The Court also held that federal common law did not apply. *Id.* The *Border Chicken AZ* Court similarly held that Arizona courts have not recognized regulatory estoppel. *Border Chicken AZ,* 2020 U.S. Dist. LEXIS 217649, at *10. The Court also noted that the insured failed to plead sufficient facts in the Complaint to overcome a motion to dismiss, and the facts alleged in the insured's reply to the motion to dismiss were insufficient, because 'naked assertion devoid of further factual enhancement' will not survive motion to dismiss." *Id.* The Western District of Texas found that the doctrine of regulatory estoppel had, in fact, been rejected by courts applying Texas law. *Indep. Barbershop, LLC,* 2020 U.S. Dist. LEXIS 211152, at *6.

Courts similarly rejected insureds' attempts to apply the reasonable expectations doctrine to avoid the application of the Virus Exclusion to COVID-19 claims. Those insureds argued that they reasonably expected their losses to be covered if the business was forced to shut down. *See Gerleman Mgmt.,* 2020 U.S. Dist. LEXIS 247547, at *10-11; *Palmer Holdings,* 2020 U.S. Dist. LEXIS 233827, at *21-23; *Border Chicken AZ,* 2020 U.S. Dist. LEXIS 217649, at *7-8; *Mac Prop. Grp.,* 2020 N.J. Super. Unpub. LEXIS 2244, at *16; *W. Coast Hotel Mgmt.,* 2020 U.S. Dist. LEXIS 201161, at *14; *Boxed Foods Co.,* 2020 U.S. Dist. LEXIS 198859, at *8-9. The *Boxed Foods Company, LLC* Court rejected the argument on the grounds that "courts do not evaluate the reasonable expectations doctrine when a policy's language is clear and unambiguous." *Boxed Foods Co.,* 2020 U.S. Dist. LEXIS 198859, at *8-9. The *Mac Property Group* Court noted that the insured pointed to "no language in the insurance policy or declarations which created any reasonable expectation of coverage for the claimed loss. Reasonable expectations must be based upon the insurance contract itself, and not on an insured's subjective belief about what insurance should cover." *Mac Prop. Grp.,* 2020 N.J. Super. Unpub. LEXIS 2244, at *16. The Court, in *Boarder Chicken AZ, LLC*, rejected the insured's assertion of the reasonable expectations doctrine noting that the insured failed to substantiate its argument with any extraneous reason why the expectations of the insured were reasonable despite the clear language of the policy, such as prior negotiations or publications of which the insured was aware and relied upon in obtaining the policy. *Border Chicken AZ,* 2020 U.S. Dist. LEXIS 217649, at *9. Similarly, the *West Coast Hotel Management, LLC* Court noted that "the doctrine does not give courts a license to refuse to enforce contract terms based on one party's expectations" and the Court found the insured's argument that the breadth and scope of the pandemic in some way rendered the Virus Exclusion unenforceable to be unsubstantiated. *W. Coast Hotel Mgmt.,* 2020 U.S. Dist. LEXIS 201161, at *14.

Granting Dismissal in Favor of the Carrier by Virtue of the Various Other Exclusions Applicable to Insureds' Claims Related to COVID-19

A number of Courts also noted that, even if "direct physical loss of or damage to property" was alleged, and the Virus Exclusion did not apply, other exclusions in the policy barred the claims related to COVID-19 such that dismissal was appropriate. *See Mortar & Pestle Corp.,* 2020 U.S. Dist. LEXIS 240060, at *6 (noting that the policy excludes from coverage "loss of use"); *Newchops Rest. Comcast LLC*, 2020 U.S. Dist. LEXIS 238254, at *12-13 (applying the "government orders" exclusion that excluded coverage for loss or damage caused by or resulting from "[t]he enforcement of an ordinance or law. . . [r]egulating the construction, *use* or repair of any property."); *Elegant Massage,* 2020 U.S. Dist. LEXIS 231935, at *28 (dismissing so much of the insured's claim arising out of a brief time period in which the insured elected not to operate, before mandatory closure orders were issued, under the Consequential Loss exclusion barring coverage for loss caused by "[d]elay, loss of use or loss of market."); *Selane Prods.,* 2020 U.S. Dist. LEXIS 233753, at *10 ("[The insured's] Policy, in contrast, excludes 'loss of use.'"); *Chattanooga Prof'l Baseball,* 2020 U.S. Dist. LEXIS 212349, at *4-5 (D. Ariz. Nov. 13, 2020) ("Turning to MLB's failure to provide players, even if [the insureds'] losses were caused by such failure- and the virus did not cause such failure- the Policies include an exclusion for losses stemming from the '[s]uspension, lapse or cancelation' of a contract."); *Musso & Frank Grill Co.,* 2020 Cal. Super. LEXIS 4510, at *5-6 ("[Carrier] also cites to the Policy provision excluding coverage for 'loss or damage caused by or resulting from… loss of use' as suggesting the 'direct physical loss of property' clause was not intended to include a loss where property was rendered unusable without any intervening physical force… As such, [the insured] has not alleged facts suggesting [Carrier] breached its Policy with [the insured] in denying [the insured's] claim given the terms of the Policy included in the [insured's] pleading."); *Harvest*

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Moon Distribs., 2020 U.S. Dist. LEXIS 189390, at *11-12 (finding no coverage because the insured's loss - the spoiled beer - was not caused by a "Covered Cause of Loss" since the policy excluded loss caused by "[d]elay, loss of use or loss of market" and "[a]cts or decisions…of any person, group, organization or governmental body"); *Mudpie, Inc.,* 2020 U.S. Dist. LEXIS 168385, at *10-11 (finding that the policy language suggested that it was not intended to cover a loss where the property was rendered unusable without an intervening physical force, because it included an exclusion for loss or damage caused by or resulting from "loss of use or loss of market");

Upon Granting Dismissal in Favor of the Carrier, Many Courts Denied Leave to Amend Finding that no Amendment of the Complaint would Cure the Fact that the Claimed Losses were Not Covered

Many of the Courts granting carriers' motions to dismiss specifically outlined in their decisions that leave to amend would not be granted because amendment would not cure the defects.[9] A handful of decisions held that, after being given the opportunity to amend, the insureds' attempt to amend the Complaint was insufficient to overcome the inadequacies and further amendment would not be permitted.[10]

Carriers' Motions to Dismiss Denied

Denying Carriers' Motions to Dismiss Finding that "Physical Loss" Encompasses Dispossession or Deprivation of Property, which was Adequately Alleged in the Complaint

A line of cases out of the Washington Superior Court, District of Nevada, Eastern District of Virginia, and the Western District of Missouri also found that dismissal was inappropriate, because "physical loss" was adequately pleaded because the plain and ordinary meaning of the phrase "physical loss" encompasses dispossession or deprivation of property. *See Elegant Massage,* 2020 U.S. Dist. LEXIS 231935, at *18-19; *Hill and Stout v. Mut. of Enumclaw Ins. Co.,* 20-2-07925-1, at *4 (Wash. Sup. Ct. Nov. 13, 2020) ("The dictionary definition for 'loss' includes 'destruction", 'ruin', 'deprivation'. In applying the ordinary meaning of 'deprivation', the Court finds that the Plaintiff's position that the dental practice had a "direct physical deprivation" of its property when they were unable to see patients and practice dentistry is a reasonable interpretation by the average lay person."); *Blue Springs Dental Care v. Owners Ins. Co.,* 4:20-cv-00383-SRB, 488 F. Supp. 3d 867, 2020 U.S. Dist. LEXIS 172639, at *8 (W.D. Mo. Sep. 21, 2020) (adopting the definition of "physical loss" established in *Studio 417); K.C. Hopps v. Cincinnati Ins. Co.,* 4:20-cv-00437-SRB, 2020 U.S. Dist. LEXIS 144285, at *1 (W.D. Mo. Aug. 12, 2020) (adopting the reasoning set forth in *Studio 417*); *Studio 417 v. Cincinnati Ins. Co.,* 6:20-cv-03127-SRB, 478 F. Supp. 3d 794, 2020 U.S. Dist. LEXIS 147600, at *8 (W.D. Mo. Aug. 12, 2020) ("The Merriam-Webster dictionary defines 'direct' in part as 'characterized by close logical, causal, or consequential relationship.' Merriam-Webster, www.merriamwebster.com/dictionary/direct (last visited August 12, 2020). 'Physical' is defined as 'having material existence: perceptible especially through the senses and subject to the laws of nature.' Merriam-Webster, www.merriam-webster.com/dictionary/physical (last visited August 12, 2020). 'Loss' is 'the act of losing possession' and 'deprivation.' Merriam-Webster, www.merriam-webster.com/dictionary/loss (last visited August 12, 2020)."). A handful of cases denying carriers' motions to dismiss relying on that reasoning also found that requiring tangible alteration of property to demonstrate "physical loss" improperly conflated "loss" and "damage" rather than giving meaning to both terms. *Hill and Stout,* 20-2-07925-1, at *5; *K.C. Hopps v. Cincinnati Ins. Co.,* 4:20-cv-00437-SRB, 2020 U.S. Dist. LEXIS 144285, at *1 (W.D. Mo. Aug. 12, 2020) (adopting the reasoning set forth in *Studio 417*); *Studio 417,* 2020 U.S. Dist. LEXIS 147600, at *9. The *Blue Springs Dental* Court specifically noted; however, that the decision to deny the motion to dismiss was only a statement with respect to the adequacy of the allegations at the pleadings stage, and not an opinion with respect to the merits of the coverage claims. *Blue Springs Dental,* 2020 U.S. Dist. LEXIS 172639, at *12 ("Discovery will ultimately show whether Plaintiffs' alleged closure date was the actual date when the alleged physical loss occurred, the duration of that alleged physical loss, at what point in time the insured properties could or should have been repaired, rebuilt, or replaced, and whether Plaintiffs took those restoration measures. For now, Plaintiffs have done enough to survive dismissal on this point.").

A notable split of authority developed in the Western District of Missouri regarding whether "physical loss" was satisfied by dispossession or deprivation of property. C*ompare with Zwillo V,* 2020 U.S. Dist. LEXIS 230672, at *5 ("The term 'direct physical loss of or damage to property' plainly requires physical loss of or some form of physical damage to the insured property to effect coverage. Put another way, the words 'direct' and 'physical,' which modify the words 'loss' and 'damage' relay actual, demonstrable loss of or harm to some portion of the premises itself."); *BBMS,* 2020 U.S. Dist. LEXIS 233982, at *6 ("A survey of cases, both from Missouri and elsewhere, confirms that the phrase requires some physical event or force on, in or affecting the property in question and not mere 'loss of use.' Ruling otherwise would render the word 'physical' a nullity.").

The *Studio 417* Court found that the insureds adequately alleged physical loss in the complaint because they alleged that there was a causal relationship between COVID-19 and the alleged losses; that

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COVID-19 is a physical substance that lives on and is active on inert physical surfaces, and is emitted into the air; and that COVID-19 allegedly attached to and deprived the insureds of their properties, making the properties unsafe and unusable, resulting in direct physical loss to the premises and property. *Studio 417,* 2020 U.S. Dist. LEXIS 147600, at *8. The Court emphasized that, unlike precedent finding that the insured failed to allege physical loss, the insureds in *Studio 417* specifically alleged physical contamination. *Id.* at *11-12. The Court pointed to nationwide precedent extending coverage to various circumstances in which there was no actual physical damage to the property, but the property was uninhabitable and unusable, such as brown recluse spiders and asbestos in the air. *Id.* at *9-10. Relying on Minnesota Appellate precedent, the *Studio 417* Court also refused to dismiss the claim for Civil Authority coverage holding that the policies did not state that "all" or "any" access to the property needed to be prohibited and, thus, prohibition of access to some degree may be sufficient. *Id.* at *14.

Relying on *Studio 417*, the District of Nevada similarly refused to dismiss an insured's cause of action finding that the insured sufficiently alleged losses stemming from the direct physical loss and/or damage to property from COVID-19. *JGB Vegas Retail,* 2:20-cv-01366-KJD-BNW, at *4. Notably, the Court was analyzing coverage under the Time Element coverage provisions that included coverage for general business interruption and interruption by civil or military authority. *Id.* The Western District of Texas similarly refused to dismiss the insured's claims under the Time Element coverage finding that it specifically allowed for up to 30 days of coverage for business interruption of "loss or damage to property caused by. . . virus." *Indep. Barbershop, LLC,* 2020 U.S. Dist. LEXIS 211152, at *7. The Cuyahoga Court of Common Pleas in Ohio similarly relied upon *Studio 417* and *Blue Springs Dental* and found that the insureds in that case not only alleged "that Covid-19- a physical substance-was *likely* on their premises (as do the Plaintiffs in *Studio 417* and *Blue Springs Dental* Care), but that it *was* physically present and that it caused physical loss and damage." *Dino Palmieri Salons,* CV-20-932117, at *9. Accordingly, the Court found that the insureds sufficiently alleged that COVID-19 existed on their premises, and that it caused direct physical loss and damage in order to withstand the motion to dismiss. The Court also relied on *Studio 417* to refuse to dismiss the Civil Authority coverage claim holding that the policy did not specify access to the premises had to be absolutely prohibited in order for coverage to be afforded under that section of the policy. *Id.* at 12.

Denying Carriers' Motions to Dismiss Finding that Determination of the Coverage Issues Presented by the Claims was Premature

Several Courts denied carriers' motions to dismiss finding that the matters raised by the motions were inappropriate for determination at the dismissal stage of the case. The New Jersey Superior Court denied the carrier's motion to dismiss finding that the determination of coverage was a fact-sensitive analysis, and the parties failed to present an adequate record for a determination of their respective legal positions. *Optical Servs.,* 2020 N.J. Super. Unpub. LEXIS 1782, at *22. The *Optical Services* Court also noted the lack of controlling legal precedent supporting either version of interpretation of the terms of the policy. *Id.* at 24-25 ("The defendant argues that there is a plain meaning of 'direct physical loss' and the closure of the plaintiffs' business does not qualify for. . . purposes of coverage. This is a blanket statement unsupported by any common law in the State of New Jersey or by a blanket review of the policy language."). Accordingly, the Court found that dismissal was premature, and the insured was entitled to engage in issue-oriented discovery. *Id.* at *25. The Court emphasized the early stage of litigation, and the inadequate evidence in the record from which it could decide the coverage issues presented in the case throughout the decision. However, a split of authority has developed in New Jersey Superior Courts in that regard. *See FAFB LLC,* MER L 000892-20, at *6 ("The Court should dismiss the complaint even when the facts construed in its favor fail to articulate a legal basis for relief and that's the case here and that's the Rieder v. State Department of Transportation case, 221 N.J. Super. 547. And as that case said, as well, and it's applicable to this case, too, there is no need for discovery to resolve these issues. Even assuming discovery bears out all of plaintiff's allegations, there would be no coverage.").

A California Superior Court relied upon judicial notice of exhibits, such as Executive Orders, Department of Insurance bulletins, and health agency notices to find that the case involved questions outside of the Complaint that could not be resolved on a motion to dismiss. *Best Rest Motel Inc. v. Sequoia Ins. Co.,* 37-2020-00015679-CU-IC-CTL (Cal. Sup. Ct. Sept. 30, 2020). The Lorain County Court of Common Pleas, and the Cuyahoga County Court of Commons Pleas in Ohio found that discovery on liability and coverage was necessary before the matter could be decided. *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.,* CV-20-932117, at *8 (Ohio Ct. Comm. Pleas Nov. 17, 2020) ("As noted by Defendant in its Motion, The Eighth District Court of Appeals has previously interpreted the requirement in an insurance policy that the insured property in question must have sustained physical loss, damage, or injury. . . The Eighth District's holding in Mastellone, however, interpreted the policy in question - as well as whether plaintiffs had satisfied the terms of that

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policy - with the benefit of evidence, including expert opinions. At the Motion to Dismiss stage, this Court does not have the benefit of similar evidence."); *Francois, Inc. v. Cincinnati Ins. Co.,* 20CV201416, at *1 (Ohio Ct. Comm. Pleas Sep. 29, 2020) ("The complaint states claims which arguably fit the terms and conditions of the insurance policy and therefore the claims and defenses need to be developed with a record. The parties should proceed with discovery on liability/coverage while the damages issues are bifurcated. Discovery on damages is held in abeyance until a decision has been made on coverage as the court anticipates Summary Judgment motions will be filed at the conclusion of discovery on the liability/coverage issues."). The Pennsylvania Court of Common Pleas similarly held that "[a]t this very early stage, it would be premature for this court resolve [sic] the factual determinations put forth by defendants to dismiss plaintiff's claims." *Taps & Bourbon on Terrace, LLC v. Lloyds London,* 00375, at *n. 1 (Pa. Ct. Comm. Pleas Oct. 26, 2020); *Ridley Park Fitness, LLC v. Philadelphia Indem. Ins. Co.,* 01093, at *n. 1 (Pa. Ct. Comm. Pleas Aug. 31, 2020).

Denying Carriers' Motions to Dismiss Finding that Dismissal was Inappropriate Due to Ambiguous Policy Language

A handful of Courts denied carriers' motions to dismiss finding the policy language, or more specifically the Virus Exclusion, relied upon in support of the motions was ambiguous. At least one Court denied the carrier's motion to dismiss finding that the policy, which excluded loss caused by the "presence, growth, proliferation, spread or any activity of "fungi," wet rot, dry rot, bacteria or virus," was ambiguous thus rendering the determination of coverage inappropriate at the dismissal stage. *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.,* 489 F. Supp. 3d 1297, 6:20-cv-01174-ACC-EJK, 2020 U.S. Dist. LEXIS 184774, at *6 (M.D. Fl. Sept. 24, 2020). Most notably, the *Urogynecology Specialist of Fla*. Court noted that several important policy forms were not provided to the Court to be relied upon in rendering the decision. *Id.* The Court also found that the Virus Exclusion at issue was ambiguous because losses stemming from COVID-19 do not "logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses." *Id.* at 7. The Court also noted the lack of binding precedent on which the Court could rely to determine that no plausible action was pleaded by plaintiff. *Id. at* *7-8. The District of Nevada also refused to dismiss an insured's claim under a Pollutant and Contaminants exclusion finding that it was not unreasonable to interpret the exclusion to apply to instances of traditional environmental and industrial pollution and contamination, despite the inclusion of the word virus in the exclusion, and traditional environmental and industrial pollution was not at issue in the COVID-19 claims.[11] *JGB Vegas Retail v. Starr Surplus Lines Ins. Co.,* 2:20-cv-01366-KJD-BNW, at *5 (D. Nev. Nov. 30, 2020).

Denying Carriers' Motions to Dismiss Pursuant to Policy Exclusions Finding that the Anti-Concurrent Causation Language Preceding the Exclusions was Unenforceable

The Eastern District of Virginia also held that the anti-concurrent causation language preceding the Virus Exclusion was not established as enforceable in the jurisdiction, and, accordingly, the Virus Exclusion did not bar coverage where the insured did not allege the presence of the virus as a direct cause of the loss, and the Executive Orders were not issued due to the "growth, proliferation, spread or presence" of virus contamination on the insured property. *Elegant Massage,* 2020 U.S. Dist. LEXIS 231935, at *24-25. The Court also refused to enforce the Ordinance or Law, or Acts or Decisions exclusions. *Id.* at 26-28.

Motions For Judgment on The Pleadings/ Motions For Summary Judgment

Motions for Judgment on the Pleadings Granted in Favor of Carriers

Several carriers prevailed on motions for judgment on the pleadings with respect to which the Courts found that there was no coverage for the insureds' losses under the carriers' policies. *See Barbecue v. State Auto. Mut. Ins. Co.,* 1:20-cv-00665-RP, 2020 U.S. Dist. LEXIS 234939 (W.D. Tex. Dec. 14, 2020); *Robert W. Fountain, Inc.,* 2020 U.S. Dist. LEXIS 231629; *Whiskey River on Vintage v. Ill. Cas. Co.,* 4:20-cv-00185-JAJ-HCA, 2020 U.S. Dist. LEXIS 233826 (S.D. Iowa Nov. 30, 2020); *Natty Greene's Brewing Co., LLC v. Travelers Cas. Ins. Co. of Am.,* 1:20-cv-00437-CCE-JEP, 2020 U.S. Dist. LEXIS 222712, at *6-7 (M.D.N.C. Nov. 30, 2020); *Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.,* 2:20-cv-03342-JDW, 2020 U.S. Dist. LEXIS 223356 (E.D. Pa. Nov. 30, 2020). Although the Courts reached the same outcome - judgment was entered on the pleadings - different principles were applied to reach the end result in each case.

The *Barbeque* Court held that "physical loss" is not ambiguous and the insured's interpretation of the word "loss" while ignoring the "unambiguous requirement that there must be a 'direct physical loss of or damage *to property*' in order to trigger coverage" was unreasonable. *Barbecue,* 2020 U.S. Dist. LEXIS 234939, at *9. The Court observed that "[i]n order to trigger coverage under a commercial property policy, "physical loss" requires there to be some "distinct, demonstrable, physical alteration of the property," as opposed to merely economic losses. *Ross v. Hartford Lloyd Ins. Co.*, No. 4:18-CV-00541-O, 2019 WL 2929761, at *6 (N.D. Tex. July 4, 2019) (quoting

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10A COUCH ON INS. § 148:46 (3d ed. 2010)); *see also Trinity Indus., Inc. v. Ins. Co. of N. Am.*, 916 F.2d 267, 270-71 (5th Cir. 1990) (noting that "[t]he language 'physical loss or damage' strongly implies that there was an initial satisfactory state that was changed by some external event into an unsatisfactory state—for example, the car was undamaged before the collision dented the bumper")." *Id.* at *9-10. Accordingly, the Court held that the insured failed to allege facts sufficient to trigger coverage under the Business Income or Civil Authority coverages. *Id.* The Court also held that the insured failed to establish the essential elements of Civil Authority coverage, because it did not allege damage to property within one mile of the insured property, or that the civil authority prohibited access to the insured property after the damage to the neighboring property. *Id.* at *14-15. Leave to amend the complaint was denied "[b]ecause the Court has determined that there is no coverage for Plaintiff's losses in this case under the clear terms of the Policy, any attempt to amend the Petition would be futile." *Id.* at *18.

The *Whiskey River* Court observed that Iowa precedent defined "loss" and "damage" to require "destruction or injury of the insured property, meaning the alleged loss or destruction must be physical." *Whiskey River,* 2020 U.S. Dist. LEXIS 233826, at *13 (citing, *Milligan v. Grinnell Mut. Reinsurance Co.,* No. 00-1452, 2001 Iowa App. LEXIS 267, at *2 (Iowa Ct. App. Apr. 27, 2001)). The Court found that precedent also dictated that "physical loss or damage generally requires some sort of physical invasion," or "material loss, which calls for something more than a threat of loss." *Whiskey River,* 2020 U.S. Dist. LEXIS 233826, at *13-14 (citing, *Phoenix Ins. Co. v. Infogroup, Inc.,* 147 F. Supp. 3d 815, 823-24, 825 (S.D. Iowa 2015)). The Court concluded that it was a "settled matter in Iowa that direct physical loss or damage requires tangible alteration of property and that loss of use alone is insufficient." *Whiskey River,* 2020 U.S. Dist. LEXIS 233826, at *17. Accordingly, the Court held that the insureds' allegations that "the proclamation caused them direct physical loss or damage by precluding customers from patronizing their business, precluding them from conducting business, and frustrating the intended purpose of their businesses," simply alleged loss of use that was insufficient to trigger the Business Income or Extra Expense coverage afforded by the policy. *Id.,* at *15.

The *Whiskey River* Court also concluded that the insureds failed to plead facts sufficient to trigger the Civil Authority coverage:

> Plaintiffs have failed to plead facts sufficient to qualify for coverage under the Civil Authority provision. They point generally to the physical form COVID-19 may take; however, Plaintiffs have not alleged damage to another property. Further, Reynolds's proclamation was not issued in response to a dangerous physical condition that resulted from a Covered Cause of Loss. Rather, the proclamation was issued to limit the spread of COVID-19.

Id. at *18. The Court rejected the insureds' argument that the losses were caused by the Proclamation and not the virus, a distinction, which the Court held was meaningless since the Proclamation was issued by the Governor in response to COVID-19 and the Virus Exclusion applied to losses directly or indirectly caused by or resulting from COVID-19. *Id.* at *20. The Court also rejected the insureds' arguments based on the reasonable expectations doctrine, and estoppel relative to the application of the Virus Exclusion for substantially similar reasons to those more fully set forth in the preceding sections of this article. *Id.* at *21-22. The Court also held that the Consequential Loss Exclusion, which excluded from coverage loss of use, loss of market, or loss of access, and the Acts or Decisions Exclusion, which excluded from coverage loss or damage caused by or resulting from the acts of decisions of a governmental body, barred coverage for the insureds' claims. *Id.* at *27-28.

In contrast, the *Robert W. Fountain, Inc.* Court held that permanent dispossession of something can constitute "loss of" property. *Robert W. Fountain, Inc.,* 2020 U.S. Dist. LEXIS 231629 at *6. Yet, the Court concluded that the insured, nonetheless, could not trigger coverage because it merely alleged it was "physically unable to utilize their business premises and thus lost the physical use thereof," not that it was permanently dispossessed of the property. *Id.* In so holding, the Court reasoned that "[b]usiness losses resulting from the temporary inability to access an unharmed property are not 'direct physical loss of or damage to' property. They are quite obviously not 'damage to property' given the plain meaning of those words. But neither are they 'direct physical loss of' property." *Id.* at *5. The Court also held that the Virus Exclusion barred coverage because the exclusion applied to "loss or damage caused directly or indirectly by…Any virus," and the insured could not "convincingly argue that its losses were caused by the March 2020 governmental orders while ignoring that those governmental orders were themselves caused by a virus." *Id.* at *8.

The Middle District of North Carolina granted the carriers' motions for judgment on the pleadings in *Natty Greene's Brewing*, a suit in which a number of businesses sued their various insurance companies for Business Income and Civil Authority coverage, holding that the policy expressly excluded from coverage loss or damage caused directly or indirectly by, or resulting from, any virus, and the insureds specifically alleged that COVID-19 is a "highly contagious airborne virus" that resulted in the government actions and closures that caused the alleged losses and damages. *Natty Greene's Brewing*

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Co., LLC v. Travelers Cas. Ins. Co. of Am., 1:20-cv-00437-CCE-JEP, 2020 U.S. Dist. LEXIS 222712, at *6-7 (M.D.N.C. Nov. 30, 2020). The Court rejected estoppel arguments finding the evidence was only relevant insofar as the policy language was ambiguous and the Court found that it was not. *Id.* at 7. The *Toppers Salon & Health Spa* Court also granted the carrier's motion for judgment on the pleadings holding that the language of the Virus Exclusion excluding from coverage "loss or damage caused by or resulting from any virus. . . that induces or is capable of inducing physical distress, illness or disease" was not ambiguous, and applied to COVID-19, "which is caused by a coronavirus that causes physical illness and distress." *Toppers Salon & Health Spa,* 2020 U.S. Dist. LEXIS 223356, at *5. The Court also held that the insured could not demonstrate that it suffered "direct physical loss of or damage to" the insured property, because the insured must demonstrate "some sort of physical damage to the property that can be the subject of a repair, rebuilding, or replacement," and the COVID-19 pandemic does not fall within that definition. *Id.* at 7. The Court also held that the insured could not trigger coverage under the Civil Authority coverage in the policy because the insured premises did not close because of damage or a dangerous physical condition at a nearby premises. *Id.* at *8.

Motions for Summary Judgment Granted in Favor of Carrier

A carrier prevailed at the summary judgment stage when the Superior Court of the District of Columbia found that there was no genuine issue of material fact that the carrier's policy did not afford coverage for the insured's losses because the insured did not sustain "direct physical loss." *Rose's 1, LLC v. Erie Ins. Exch.,* 2020 CA 002424 B, 2020 D.C. Super. LEXIS 10 (D.C. Sup. Ct. Aug. 6, 2020). The Court rejected the insured's argument that the loss of use of the restaurant property was "direct" because the closures were the direct result of the Mayor's orders without intervening action finding that "[s]tanding alone and absent intervening actions by individuals and business, the orders did not effect any direct changes to the properties." *Id. at* *5. The Court further rejected the argument that the losses were "physical" because the COVID-19 virus is "material" and "tangible" and the harm the insured suffered was the result of the Mayor's orders and not "some abstract mental phenomenon such as irrational fear causing diners to refrain from eating out." *Id.* The Court found that the insured failed to offer any evidence the virus was actually present on the insured property at the time they were forced to close, and the Mayor's orders "did not have any effect on the material or tangible structure of the insured properties." *Id.* The Court also rejected the insured's argument that the use of "loss" and "damage" in the policy must mean the terms are distinct and, accordingly, "loss" incorporates "loss of use." *Id.* The Court found that, pursuant to the dictionary definitions adopted by the insured, any "loss of use" "must be caused, without the intervention of other persons or conditions, by something pertaining to matter- in other words, a direct physical intrusion on to the insured property." *Id.* The Court, again, reasoned that the Mayor's orders were not a direct physical intrusion. *Id.* The Court also distinguished the authority cited by plaintiff noting that the release of ammonia, gasoline fumes, asbestos, bacterium, toxic gases released by defective drywall, cat urine odor, and landslide all resulted in a material change to the property and the insured's damages were the result of government orders standing alone. *Id.* at 5-7. The Court also cited to jurisdictional precedent that analyzed whether a restaurant could recover for its lost business due to a curfew imposed in response to riots following the assassination of Dr. Martin Luther King, Jr. and noted that the court of appeals interpreted "direct loss" to mean "a loss proximately resulting from physical damage to the property or contents caused by a riot or civil commotion." *Id.* at *8-9 (citing *Bros., Inc. v. Liberty Mutual Fire Insurance Co.,* 268 A.2d 611, 613 (D.C. 1970)).

Motions for Summary Judgment Granted in Favor of Insureds

A Trial Court in North Carolina granted summary judgment for the insureds in *North State Deli* holding that the dictionary definitions of the terms in the insuring agreement revealed that the ordinary meaning of the phrase "direct physical loss" "included the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions." *North State Deli LLC v. Cincinnati Ins. Co.,* 20 CVS 02569, at *6 (N.C. Super. Ct, Oct. 9, 2020). Applying those definitions to the businessowners policy at issue in the case, the Court reasoned that "direct physical loss" "described the scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property," which the Court found was the precise injury to the insureds caused by the executive orders related to COVID-19. *Id.* The Court rejected the carrier's argument that physical alteration to property was required noting that it was required to give effect to every word in the policy, and the use of the conjunctive "or" means physical loss must have a meaning distinct from the physical alteration anticipated in relation to "physical damage." *Id.* at 7. Without explanation, the Court concluded that the "Ordinance or Law", "Acts or Decisions", and "Delay or Loss of Use" exclusions did not apply to bar coverage, and the Court noted the policies did not contain a virus exclusion. *Id.*

Applying the same law used by the Washington Superior Court in *Hill and Stout* in which the carrier's motion to dismissed was denied, another Washington Superior Court entered partial summary judg-

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ment for the insured holding that the insured's claimed loss fell within the grant of coverage, because, as a result of the proclamations and orders issued by Governor Inslee, the insured suffered direct physical loss of its property at the insured premises. *Perry Street Brewing Co. v. Mut. of Enumclaw Ins. Co.,* 20-2-02212-32, at *4 (Wash. Sup. Ct. Nov. 23, 2020). The Court reasoned that "[d]ictionary definitions of 'loss,' include 'destruction' 'ruin' or 'deprivation.' Loss, Merriam-Webster, https:/ /www .merriam-webster.com/dictionary/loss." *Id.* at 5. Moreover, the "undefined phrases 'loss of' property and 'damage to' property also are distinct from one another. *Nautilus Group, Inc. v. Allianz Global Risks US,* No. Cl 1-528 lBHS, 2012 WL 760940 (W.D. Wash. Mar. 8, 2012)." *Id.* Accordingly, the Court concluded that the interruption of the insured's business operations due to the proclamations was a direct physical loss of the insured's property because the property could not be used for its intended purposes. *Id.* at 6. Notably, the Court did not decide, and the insured did not seek judgment regarding whether any exclusions applied to bar coverage. Thus, the judgment was not final.

Looking Forward

The decisions released in 2020 related to COVID-19 coverage lawsuits spanned additional issues, including jurisdictional arguments, fraudulent joinder, multi-district litigation, and whether certain individuals and entities were appropriately named as parties to the action, such as adjusters, politicians, and government entities. Business interruption litigation has continued in 2021 with new lawsuits filed despite what appeared to be an overwhelming majority of courts finding that coverage was not applicable to the insureds' claims. Trial courts continue to address the coverage issues presented by the business interruption claims in the context of dispositive motions and over one hundred appeals have been filed to date. No one can forecast how long these issues will remain hot button topics throughout the United States Courts, but it appears they will remain at the forefront of coverage litigation for the foreseeable future.

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Endnotes

1 Those searching for a sense of levity while discussing such a difficult topic may enjoy the references to ***Marathon Man***, ***The Simpsons*** and ***Seinfeld*** presented by the Hon. Joshua D. Wolson out of the Eastern District of Pennsylvania. ***See Kessler Dental Assocs., P.C. v. Dentists Ins. Co.,*** 2:20-cv-03376-JDW, 2020 U.S. Dist. LEXIS 228859, at *1, n.1, 2, n. 2 (E.D. Pa. Dec. 7, 2020); ***Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.,*** 2:20-cv-03342-JDW, 2020 U.S. Dist. LEXIS 223356, at *1, n.1 (E.D. Pa. Nov. 30, 2020).

2 ***See*** COUCH ON INSURANCE 10A § 148:46 ("The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property"); ***see also*** **Applying Alabama Law:** *Drama Camp Prods. v. Mt. Hawley Ins. Co.,* 1:20-cv-00266-JB-B, 2020 U.S. Dist. LEXIS 246969, at *10 (S.D. Ala. Dec. 30, 2020); ***Hillcrest Optical, Inc. v. Continental Cas. Co.***, 1:20-cv-00275-JB-N, at *13 (S.D. Ala. Oct. 21, 2020) (citing to Couch as a treatise upon which Alabama courts frequently rely and noting that Alabama precedent required some tangible alteration or disturbance to the property to demonstrate a "physical" loss); **Applying California Law:** ***VSTYLES Inc. v. Continental Cas. Co.,*** RIC2003415, at * (Cal. Sup. Ct. Dec. 23, 2020) ("Under California law, losses from inability to use property do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase. Physical loss or damage occurs only when property undergoes a 'distinct, demonstrable, physical alteration.' (MRI Healthcare Center of Glendale, Inc. v. State Farm Gen. Ins. Co., 187 Cal. App. 4th 766, 779 [citation and internal quotation marks omitted].) 'Detrimental economic impact' does not suffice. (Ibid. [citation and internal quotation marks omitted].) An insured cannot recover by artfully pleading temporary impairment to economically valuable use of property as physical loss or damage. (Id. at 780)."); ***Mortar & Pestle Corp. v. Atain Specialty Ins. Co.,*** 3:20-cv-03461-MMC, 2020 U.S. Dist. LEXIS 240060, at *5 (N.D. Cal. Dec. 21, 2020); ***Geragos & Geragos Engine Co. No. 28, LLC v. Hartford Fire Ins. Co.,*** 2:20-cv-04647-GW-MAA, 2020 U.S. Dist. LEXIS 237547, at *4 (N.D. Cal. Dec. 3, 2020) ("G&G has not offered a persuasive argument for why all those courts decided the issue incorrectly. It repeats the same arguments those courts all considered in their rulings. For example, G&G's argument that a physical alteration is not required is based primarily on a district court's reasoning in ***Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.***, No. 17-cv-04908, 2018 WL 3829767 (C.D. Cal. July 11, 2018). ***See*** Opp. at 7-8. However, that very same district court judge also presided over the ***Mark's Engine Co. No. 28 Rest.*** case. The judge considered the exact same argument that G&G raises here and did not find it persuasive. ***See Mark's Engine Co. No. 28 Rest.***, 2020 WL 5938689, at *4 (observing that 'to the extent Plaintiff relies on this Court's order in ***Total Intermodal*** for the proposition that 'direct physical loss of' encompasses deprivation of property without physical change in the condition of the property, the Court notes that such an interpretation of an insurance policy would be without any manageable bounds')."); ***Long Affair Carpet and Rug, Inc. v. Liberty Mut. Ins. Co.,*** 8:20-cv-01713-CJC-JDE, 2020 U.S. Dist. LEXIS 220757, at *4-5 (C.D. Cal. Nov. 12, 2020); ***Musso & Frank Grill Co., Inc., v. Mitsui Sumitomo Ins. USA Inc.,*** 20STCV16681, 2020 Cal. Super. LEXIS 4510, at *5-6 (Cal. Sup. Ct. Nov. 9, 2020) ("To the extent Plaintiff argues the term 'direct physical loss' must be read broadly to extend to coverage for when property is seized or rendered unusable for its intended purpose, regardless of whether the property itself is damaged, this argument is belied by the terms of the Policy itself, which directly reference physical damage."); ***W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Co.,*** 2:20-cv-05663-VAP-DFM, 2020 U.S. Dist. LEXIS 201161, at *8-9 (C.D. Cal. Oct. 27, 2020) ("While 'direct physical loss of or damage to property' is not defined in the Policy, it plainly requires, at minimum, that the loss or damage be physical in nature," and "[u]nder California law, however, a "detrimental economic impact" alone—as Plaintiffs have alleged—is not compensable under a property insurance contract (citations omitted)."); ***Travelers Cas. Ins. Co. of Amer. v. Geragos and Geragos,*** 2:20-cv-03619-PSG-E, 2020 U.S. Dist. LEXIS 196932, at *7 (C. D. Cal. Oct. 19, 2020); ***Mark's Engine Co. No. 28 Rest. v. Travelers Indem. Co.,*** 2:20-cv-04423-AB-SD, 2020 U.S. Dist. LEXIS 188463, at *5-8 (C.D. Cal. Oct. 2, 2020); ***Plan Check Downtown III, LLC v. AmGuard Ins. Co.,*** 485 F. Supp. 3d 1225, 2:20-cv-06954-GW-SK, 2020 U.S. Dist. LEXIS 178059, at *6-7 (C.D. Cal. Sept. 10, 2020); ***10E, LLC,*** 2020 U.S. Dist. LEXIS 156827, at *6 ("Under California law, losses from inability to use property do not amount to "direct physical loss of or damage to property" within the ordinary and popular meaning of that phrase. Physical loss or damage occurs only when property undergoes a "distinct, demonstrable, physical alteration." ***MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.,*** 187 Cal. App. 4th 766, 779 (2010) (citation and quotation marks omitted). "Detrimental economic impact" does not suffice. ***Id.*** (cita-

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tion and quotation marks omitted); ***see also Doyle v. Fireman's Fund Ins. Co.,*** 21 Cal. App. 5th 33, 39 (2018) ("[D]iminution in value is not a covered peril, it is a measure of loss" in property insurance)."); **Applying Florida Law:** *Sun Cuisine, LLC v. Certain Underwriters at Lloyd's London,* 1:20-cv-21827-DPG, 2020 U.S. Dist. LEXIS 242587, at *5-6 (S.D. Fl. Dec. 28, 2020) ("Stated differently, Plaintiff's Complaint fails to clearly articulate its actual physical loss. While Plaintiff argues that a loss of functionality or intended use constitutes physical loss or damage, it is not supported by the plain language of the Policy or Florida law."); ***Prime Time Sports Grill, Inc. v. DTW 1991 Underwriting Ltd.,*** 8:20-cv-00771-CEH-JSS, 2020 U.S. Dist. LEXIS 237338, at *15 (M.D. Fl. Dec. 17, 2020); ***SA Palm Beach LLC v. Certain Underwriters at Lloyd's,*** 9:20-cv-80677-UU, 2020 U.S. Dist. LEXIS 251178, at *7-8 (S.D. Fl. Dec. 9, 2020) ; ***El Novillo Rest. v. Certain Underwriters at Lloyd's,*** 1:20-cv-21525-UU, 2020 U.S. Dist. LEXIS 233994, at *8-9 (S.D. Fl. Dec. 7, 2020); ***Graspa Consulting v. United Nat'l Ins. Co.,*** 1:20-cv-23245-KMW, 2020 U.S. Dist. LEXIS 215976, at *11 (S.D. Fl. Nov. 17, 2020); ***S. Fla. ENT Assocs. v. Hartford Fire Ins. Co.,*** 1:20-cv-23677-KMW, 2020 U.S. Dist. LEXIS 213319, at *12-13 (S.D. Fl. Nov. 13, 2020); ***Dime Fitness, LLC v. Markel Ins. Co.,*** 20-CA-5467, at *4 (Fla. 13th Cir. Ct. Nov. 10, 2020); ***DAB Dental PLLC v. Main Street Am. Prot. Ins. Co.,*** 20-CA-5504, at *5-6 (Fla. 13th Cir. Ct. Nov. 10, 2020) ("A plain reading of the Policy language and a consideration of Florida law lead to the only reasonable interpretation that the mere presence of COVID-19 on business premises does not constitute a direct physical loss of or damage to property," and holding that "Florida law 'reflect[s] that actual, concrete damage is necessary'" and that the failure to allege that COVID-19 physically altered or physically damaged any property was fatal to the insured's case.); ***Infinity Exhibits v. Certain Underwriters at Lloyd's London,*** 489 F. Supp. 3d 1303, 8:20-cv-01605-JSM-AEP, 2020 U.S. Dist. LEXIS 182497, at *7 (M.D. Fl. Sept. 28, 2020); ***Malaube, LLC v. Greenwich Ins. Co.,*** 1:20-cv-22615-KMW, 2020 U.S. Dist. LEXIS 156027, at *12, 16-17 (S.D. Fla., Aug. 26, 2020); **Applying Georgia Law:** *Henry's La. Grill, Inc. v. Allied Ins. Co. of Am.,* 1:20-cv-02939-TWT, 2020 U.S. Dist. LEXIS 188353, at *8 (N.D. Ga. Oct. 6, 2020) ("[T]he words 'loss of'. . . and the words 'damage to' . . . make it clear that coverage is predicated upon a change in the insured property resulting from an external event rendering the insured property, initially in a satisfactory condition, unsatisfactory." ***AFLAC, Inc. v. Chubb & Sons, Inc.,*** 260 Ga. App. 306 (2003).); **Applying Illinois Law:** *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.,* __ F. Supp. 3d __, 1:20-cv-04249, 2020 U.S. Dist. LEXIS 245686, at *6-7 (N.D. Ill. Dec. 22, 2020); ***T&E Chi. LLC v. Cincinnati Ins. Co.,*** 1:20-cv-04001, 2020 U.S. Dist. LEXIS 217090, at *11 (N.D. Ill. Nov. 19, 2020); ***It's Nice, Inc. v. State Farm Fire and Cas. Co.,*** 2020L000547, at *28 (Ill. Sup. Ct. 18th Cir. Sep. 29, 2020) ("The words ***direct*** and ***physical***, which modify the word loss, ordinarily connote actual demonstrable harm of some form to the premises itself rather than force the closure of the premises for reasons extraneous to the premises itself or adverse business consequences that flow from such closure."); ***Sandy Point Dental, PC v. Cincinnati Ins. Co.,*** 488 F. Supp. 3d 690, 1:20-cv-02160, 2020 U.S. Dist. LEXIS 171979, at *4 (N.D. Ill. Sep. 21, 2020) ("The critical policy language here—"direct physical loss"—unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage. The words "direct" and "physical," which modify the word "loss," ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure. See ***Newman Myers Kreines Gross, P.C. v. Great Northern Ins. Co.,*** 17 F.Supp.3d 323 (S.D.N.Y. 2014) (law firm did not suffer "direct physical loss" when electric utility preemptively shut off power in advance of Hurricane Sandy)."); **Applying Iowa Law:** *Gerleman Mgmt. v. Atl. States Ins. Co.,* 4:20-cv-00183-JAJ-HCA, 2020 U.S. Dist. LEXIS 247547, at *7 (S.D. Iowa Dec. 11, 2020) ("Further, the Court concludes the phrase "direct physical loss of or damage" requires tangible alteration of property to trigger coverage."); ***Palmer Holdings & Invs. v. Integrity Ins. Co.,*** 4:20-cv-00154-JAJ-HCA, 2020 U.S. Dist. LEXIS 233827, at *13 (S.D. Iowa Dec. 7, 2020) ("[T]he Court concludes the phrase 'direct physical loss of or damage to property' requires a physical invasion and loss of use is insufficient to trigger coverage without physical damage to the insured properties."); **Applying Kansas Law:** *Promotional Headwear Int'l v. Cincinnati Ins. Co.,* 2:20-cv-02211-JAR-GEB, 2020 U.S. Dist. LEXIS 228093, at *15-16 (D. Kan. Dec. 3, 2020) ("The presence of the words "direct" and "physical" limit the words "loss" and "damage" and unambiguously require that the loss be directly tied to a material alteration to the property itself, or an intrusion onto the insured property."); **Applying Massachusetts Law:** *Verveine Corp. v. Strathmore Ins. Co.,* SUCV2020-1378-BLS2, 2020 Mass. Super. LEXIS 187, at *5-6 (Mass. Sup. Ct. Dec. 21, 2020); **Applying Michigan Law:** *Kirsch v. Aspen Am. Ins. Co.,* 3:20-cv-11930-RHC-DRG, 2020 U.S. Dist. LEXIS 234220, at *7-8 (E.D. Mich. Dec. 14, 2020) ("As a leading treatise on property insurance—cited by the Sixth Circuit—explains, usually a property insurance 'policy specifically ties the insurer's liability to the covered peril having some specific effect on the property.' ***Physical' loss or damage***, 10A Couch on Ins. § 148:46. And, '[i]n modern policies. . . this trigger is frequently 'physical loss or damage' but may be any of several variants focusing on 'injury,' 'damage,' and the like.' ***Id.*** A policy requirement that a loss be ***physical*** 'is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.' ***Id.***"); ***Turek Enters. v. State Farm Mut. Auto. Ins. Co.,*** 1:20-cv-11655-TLL-PTM, 484 F. Supp. 3d 492, 2020 U.S. Dist. LEXIS 161198, at *14 (E.D. Mich. Sep. 3, 2020); **Applying Missouri Law:** *Zwillo V v. Lexington Ins. Co.,* 4:20-cv-00339-RK, 2020 U.S. Dist. LEXIS 230672, at *5-6 (W.D. Mo. Dec. 2, 2020) ("The term 'direct physical loss of or damage to property' plainly requires physical loss of or some form of physical damage to the insured property to effect coverage. Put another way, the words 'direct' and 'physical,' which modify the words 'loss' and 'damage' relay actual, demonstrable loss of or harm to some portion of the premises itself. . . In short, the Court agrees with Defendant that 'direct physical loss of or damage to property' requires physical alteration of property, or, put another way, a tangible impact that physically alters property."); ***BBMS v. Cont'l Cas. Co.,*** 4:20-cv-00353-BP, 2020 U.S. Dist. LEXIS 233982, at *6 (W.D. Mo. Nov. 30, 2020) ("A survey of cases, both from Missouri and elsewhere, confirms that the phrase requires some physical event or force on, in or affecting the property in question and not mere 'loss of use.' Ruling otherwise would render the word 'physical' a nullity."); **Applying New Jersey Law:** *FAFB LLC v. Blackboard Ins. Co.,* MER L 000892-20, at *6 (N.J. Super. Ct. Oct. 30, 2020) ("[E]ven assuming that discovery could prove all of plaintiff's allegations true, this would only establish a loss of use of property and there's no coverage under New Jersey Law for loss of use, quote, unquote, standing alone without some physical impact on the property and that's a quote from one of the cases cited by both parties here from Wakefern at Page 540."); **Applying New York Law:** *10012 Holdings, Inc. v. Sentinel Ins. Co.,* 1:20-cv-04471-LGS, 2020 U.S. Dist. LEXIS 235565, at *4 (S.D.N.Y. Dec. 15, 2020); ***Michael Cetta, Inc. v. Admiral Indem. Co.,*** 1:20-cv-04612-JPC, __ F. Supp. 3d __, 2020 U.S. Dist. LEXIS 233419, at *11 (S.D.N.Y. Dec. 11, 2020) ("'Physical' means '[o]f, relating to, or involving material things; pertaining to real, tangible objects.' Physical, Black's Law Dictionary (11th ed. 2019). While Black's Law Dictionary provides several definitions for the word 'loss,' only one could apply to physical objects: '[t]he failure to maintain possession of a thing.' Loss, Black's Law Dictionary (11th ed. 2019). Putting these definitions together demonstrates that the 'requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude [from property insurance] alleged losses that are intangible or incorporeal.' 10A Couch on Ins. § 148:46 (3d ed. 2005)."); ***Social Life Magazine, Inc. v. Sentinel Ins. Co.,*** 1:20-cv-03311-VEC (S.D.N.Y. May 14, 2020), Tr. 15:12-16, ECF No. 32 ("But New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going. You get an A for effort, you get a gold star for creativity, but this is just not what's covered under these insurance policies."); **Applying Ohio Law:** *Santo's Italian Café LLC v. Acuity Ins. Co.,* __ F. Supp. 3d __, 1:20-cv-01192-PAB, 2020 U.S. Dist. LEXIS 239382, at *16-19, 24 (N.D. Ohio Dec. 21, 2020) ("Ohio law construes "direct physical loss of or damage to"

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insured property to require that the plaintiff-insured plead distinct, demonstrable, physical alteration of the insured property. ***See, e.g., Mastellone***, 175 Ohio App. 3d at 40."); **Applying Oklahoma Law:** ***Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.,*** 5:20-cv-00511-R, 2020 U.S. Dist. LEXIS 210404, at *5-6 (W.D. Okla. Nov. 9, 2020) ("The Oklahoma Supreme Court has relied on dictionary definitions to provide the common usage of terms; ***see, e.g., U. S. Fid. & Guar. Co. v. Brisco***, 239 P.2d 754, 757 (Okla. 1951), and Merriam-Webster defines 'direct' as 'proceeding from one point to another … without deviation or interruption' or as 'stemming immediately from a source,' implying that a causal connection must exist. Merriam Webster, https://www.merriam-webster.com/dictionary/direct (last visited Oct. 29, 2020). 'Physical' is defined as 'having material existence' or as 'relating to material things,' and a 'loss' is defined as a 'deprivation.' Merriam Webster, https://www.merriamwebster.com/dictionary/physical (last visited Oct. 29, 2020); Merriam Webster, https://www.merriam-webster.com/dictionary/loss (last visited Oct. 29, 2020). Thus, a direct physical loss results from an actual, or material, deprivation of Plaintiff's property, which closely aligns with PIIC's proffered definition explaining that the Policy only covers a 'demonstrable, physical ***alteration*** of the property … [which] exclude[s] alleged losses that are intangible.' Doc. No. 8, p. 15."); **Applying Pennsylvania Law:** *Newchops Rest. Comcast LLC v. Admiral Indem. Co.,* __ F. Supp. 3d __, 2:20-cv-01949-TJS, 2020 U.S. Dist. LEXIS 238254, at *9-10 (E.D. Pa. Dec. 18, 2020); **Applying Tennessee Law:** *1210 McGavock St. Hospitality, LLC v. Admiral Indem. Co.,* 3:20-cv-00694, 2020 U.S. Dist. LEXIS 241668, at *9-10 (M.D. Tenn. Dec. 23, 2020); **Applying Texas Law:** *Steiner Steakhouse, LLC v. Amco Ins. Co.,* 1:20-cv-00858-LY, 2020 U.S. Dist. LEXIS 252012, at *6 (W.D. Tex. Dec. 30, 2020) ("However, the court holds that the phrase 'direct physical loss of or damage to property' is not ambiguous. Amco's interpretation is the only reasonable interpretation under Texas law. ***In re Deepwater Horizon,*** 728 F.3d at 499. Although the insurance policy does not define 'physical loss or damage,' the term has a legally established meaning a 'distinct, demonstrable, physical alteration of the property.' STEVEN PUTT ET AL., COUCH ON INS. § 148:46 (3d ed. 2005) (cited in ***Hartford Ins. Co. of Midwest v. Miss. Valley Gas Co.,*** No. 05-60299, 181 Fed. App'x 465, 470 (5th Cir. May 25, 2006) (unpublished)); ***see also Trinity Indus. Inc. v. Ins. Co. of North Am.,*** 916 F.2d 267, 270-27 1 (5th Cir. 1990); ***Sultan Hajer v. Ohio Sec. Ins. Co.,*** 2020 WL 7211636, at *2 (E.D. Tex. Dec. 7, 2020). 'The language 'physical loss or damage' strongly implies that there was an initial satisfactory state that was changed by some external event into an unsatisfactory state.' ***See Hartford Ins.,*** 2006 WL 1489249, at *5 (holding policy did not cover monetary losses under Texas law absent some physical manifestation of loss or damage) (citing ***Trinity Indus.,*** 916 F.2d at 270-27 1 (holding arbitration award did not qualify as physical loss or damage))."); ***Hajer v. Ohio Sec. Ins. Co.,*** 6:20-cv-00283-JCB, 2020 U.S. Dist. LEXIS 229317, at *4 (E.D. Tex. Dec. 7, 2020) ("The scope of the term 'physical loss' is far narrower than plaintiff contends and is only reasonably read in context as meaning 'a distinct, demonstrable, physical al-teration of the property.' ***Hartford Ins. Co. v. Miss. Valley Gas Co.***, 181 F. App'x 465, 470 (5th Cir. 2006) (quoting 10A Couch on Ins. § 148:46 (3d ed. 2005))."); ***Diesel Barbershop, LLC v. State Farm Lloyds,*** 5:20-cv-00461-DAE, 479 F. Supp. 3d 353, 2020 U.S. Dist. LEXIS 147276, at *13 (W.D. Tex. Aug. 13, 2010); **Applying West Virginia Law:** *Uncork & Create LLC v. Cincinnati Ins. Co.,* 2:20-cv-00401, 2020 U.S. Dist. LEXIS 204152, at *7 (S.D.W. Va. Nov. 2, 2020) ("The novel coronavirus has no effect on the physical premises of a business. Non-essential businesses were ordered to shut down to prevent people from exposing one another. In a recent case not involving COVID-19, Judge Johnston explained that "economic losses, such as loss of income and benefits" do not constitute property damage or physical injury to property. ***Cooper v. Westfield Ins. Co.***, No. 2:19-CV-00324, 2020 WL 5647015, at *5 (S.D.W. Va. Sept. 22, 2020) (Johnston, C.J.). Recovery for the Plaintiff here would be purely economic, solely for lost business without any accompanying repairs to the premises.").

3 *See* **Applying Alabama Law:** *Drama Camp Prods.,* 2020 U.S. Dist. LEXIS 246969, at *8-9; ***Hillcrest Optical***, 1:20-cv-00275-JB-N, at *13 ("Plaintiff's loss of usability did not result from an immediate occurrence which tangibly altered its property – the Order did not immediately cause some sort of tangible alteration to Plaintiff's office. Rather, Plaintiff was only temporarily precluded from performing routine medical procedures while the Order was in effect."); **Applying California Law:** *Long Affair Carpet,* 2020 U.S. Dist. LEXIS 220757, at *5 ("Plaintiff has been dispossessed of its storefronts, but it is not a 'permanent dispossession.''When the [COVID-19] orders are lifted, [Plaintiff] can regain possession of its storefront[s]."'); ***Geragos,*** 2020 U.S. Dist. LEXIS 196932, at *8 ("This Court agrees that 'labeling' is not 'physical damage,' particularly when, as here, the business was not even labeled 'non-essential.'"); ***Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co., et al.,*** 3:20-cv-03750-WHO, at *10 (N.D. Cal. Nov. 9, 2020) (noting that the insured had not been dispossessed or deprived of any specific property and, instead, it complained "of loss of use, meaning its inability to operate its stores."); ***Mark's Engine Co.,*** 2020 U.S. Dist. LEXIS 188463, at *8 ("The only individuals who could potentially claim 'direct physical loss of' access to the premises would be patrons who were no longer allowed to dine in. And even then, the Policy is between Plaintiff and Defendant, not restaurant goers and Defendant."); ***Mudpie, Inc.,*** 2020 U.S. Dist. LEXIS 168385, at *5-6, 7 (("Although [insured] has been dispossessed of its storefront, it will not be a 'permanent dispossession' as with the lost cargo in ***Total Intermodal***… When the Stay at Home orders are lifted, [insured] can regain possession of its storefront. [Insured's] physical storefront has not been 'misplaced' or become 'unrecoverable,' and neither has its inventory"…"But here, there is nothing to fix, replace, or even disinfect for [insured] to regain occupancy of its property, which [insured] admits in its opposition brief: [insured's] loss is caused by state closure orders and thus will last for however long those restrictions remain."); ***10E, LLC,*** 2020 U.S. Dist. LEXIS 156827, at *8 ("[W] hile public health restrictions kept the restaurant's 'large groups' and 'happy-hour goers' at home instead of in the dining room or at the bar, Plaintiff remained in possession of its dining room, bar, flatware, and all of the accoutrements of its 'elegantly sophisticated surrounding.'"; **Applying Florida Law:** *Malaube, LLC,* 2020 U.S. Dist. LEXIS 156027, at *21 (finding that the insured failed to sate a claim, even if the Court adopted the expansive definition of "direct physical loss or damage" supported by plaintiff, because the insured "only alleges that the government forced it to close its indoor dining to contain the spread of COVID-19. The government permitted [the insured] to continue its takeout and delivery services. While [the insured] never makes clear whether it undertook either of these options, the government never made the restaurant uninhabitable or substantially unusable."); **Applying Minnesota Law:** *Seifert v. IMT Ins. Co.,* 0:20-cv-01102-JRT-DTS, 2020 U.S. Dist. LEXIS 192121, at *7 (D. Minn. Oct. 16, 2020); **Applying Mississippi Law:** *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.,* 2:20-cv-00087-KS-MTP, __ F. Supp. 3d __, 2020 U.S. Dist. LEXIS 208599, at *9 (S.D. Miss. Nov. 4, 2020) ("Based on the foregoing, reading the Policy as a whole, the Court finds that Plaintiff's Complaint fails to state a claim because it does not allege that any insured property was damaged or that Plaintiff was permanently dispossessed of any insured property. Consequently, Plaintiff's contention that 'loss of property' reasonably includes loss of usability is not sustainable.").

4 *See Drama Camp Prods.,* 2020 U.S. Dist. LEXIS 246969, at *9; ***Long Affair Carpet,*** 2020 U.S. Dist. LEXIS 220757, at *5 ("Plaintiff argues that the Court should apply 'a more liberal interpretation' and find "'direct physical loss or damage' where there is a direct loss of use, utility, access, or function of the covered property, even though there is no structural damage.' (Dkt. 20 [Opposition] at 5 8.) However, the cases Plaintiff cites in support of this argument, involve a structure being rendered 'uninhabitable' or 'useless.'"); ***Musso & Frank Grill Co.,*** 2020 Cal. Super. LEXIS 4510, at *5 ("Plaintiff's remaining cited authorities are inapposite since they involve lost physical possession of insured property, which is distinguishable from the instant action in which Plaintiff has not alleged it has been dispossessed of its restaurant… Here, Plaintiff has not alleged facts suggesting actual or potential physical damage or loss or that Plaintiff has been deprived of its possession of its physical property. Rather, the

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Public Health Orders cited in the complaint restricted restaurants from operating in-person dining, not from operating entirely."); ***Mudpie, Inc.,*** 2020 U.S. Dist. LEXIS 168385, at *7-8 (finding that the cases relied upon by the insured involved an intervening physical force which "made the premises uninhabitable or entirely unusable" and which was not present in the COVID-19 litigation).

5 ***See Steiner Steakhouse, LLC,*** 2020 U.S. Dist. LEXIS 252012, at *9; ***1210 McGavock St. Hospitality,*** 2020 U.S. Dist. LEXIS 241668, at *11; ***Bradley Hotel Corp.,*** 2020 U.S. Dist. LEXIS 245686, at *8; ***Verveine Corp.,*** 2020 Mass. Super. LEXIS 187, at *9; ***Santo's Italian Café LLC,*** 2020 U.S. Dist. LEXIS 239382, at *26; ***Newchops Rest. Comcast LLC***, 2020 U.S. Dist. LEXIS 238254, at *11; ***10012 Holdings,*** 2020 U.S. Dist. LEXIS 235565, at *8 ("But the Complaint does not allege that these closures of neighboring properties 'direct[ly] result[ed]' in closure of Plaintiff's own premises, as the Civil Authority provisions require. Instead, the Complaint alleges that Plaintiff was forced to close for the same reason as its neighbors -- the risk of harm to individuals on its own premises due to the pandemic. Put differently, the Complaint does not plausibly allege that the potential presence of COVID-19 in neighboring properties directly resulted in the closure of Plaintiff's properties; rather, it alleges that closure was the direct result of the risk of COVID-19 at Plaintiff's property. ***See United Air Lines,*** 439 F.3d 128, 134–35 (2d Cir. 2006) (denying recovery because nationwide shutdown of airport facilities due to risk of terrorism did not directly result from physical damage to neighboring properties)."); ***Kirsch,*** 2020 U.S. Dist. LEXIS 234220, at *12; ***Michael Cetta,*** 2020 U.S. Dist. LEXIS 233419, at *23; ***Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.,*** 2:20-cv-00265-RAJ-LRL, __ F. Supp. 3d __, 2020 U.S. Dist. LEXIS 231935, at *21 (E.D. Va. Dec. 9, 2020); ***Kessler Dental Assocs.,*** 2020 U.S. Dist. LEXIS 228859, at *11 ("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."); ***Hajer,*** 2020 U.S. Dist. LEXIS 229317, at *7; ***Palmer Holdings,*** 2020 U.S. Dist. LEXIS 233827, at *18 ("They point generally to the physical form COVID-19 may take; however, Plaintiffs have not alleged damage to another property. Further, Reynolds's proclamation was not issued in response to a dangerous physical condition that resulted from a Covered Cause of Loss. Rather, the proclamation was issued to limit the spread of COVID-19. Because Plaintiffs have failed to allege facts sufficient to trigger the Civil Authority provision, the Court need not address whether a civil authority order must completely prohibit access. However, the Court is skeptical that the prohibits access prong would be satisfied when the Plaintiffs were able to—and did—conduct delivery and take-out services at the insured properties."); ***SA Palm Beach, LLC,*** 2020 U.S. Dist. LEXIS 251178, at *11-12; ***El Novillo Rest.,*** 2020 U.S. Dist. LEXIS 233994, at *12; ***Promotional Headwear,*** 2020 U.S. Dist. LEXIS 228093, at *19 ("Plaintiff points to no allegation in the Complaint that sufficiently alleges damage to surrounding property for the same reasons discussed above. Instead, Plaintiff makes the circular argument that because state and local governments issued Stay at Home Orders in response to the COVID-19 pandemic, this 'includes the area surrounding Plaintiff's property.' The allegations in the Complaint are insufficient to demonstrate direct loss, or damage to property surrounding Plaintiff's property."); ***BBMS,*** 2020 U.S. Dist. LEXIS 233982, at *11; ***Musso & Frank Grill Co.,*** 2020 Cal. Super. LEXIS 4510, at *5-6 (Plaintiff did not allege facts suggesting the Orders prohibited access to the insured premises as a result of damage to property within one mile as required for civil authority coverage); ***Mattdogg, Inc. v. Phila. Indem. Ins. Co.,*** MER L 000820-20, 2020 N.J. Super. LEXIS 250, at *8-9 (N.J. Super. Ct. Nov. 17, 2020) ("The civil authority provision, by its plain terms, does not apply here. The provision applies only in specifically defined circumstances regarding damage to a nearby property and a denial of access to the surrounding area. Plaintiff alleges no facts establishing any nexus between damage to nearby property and Governor Murphy's orders."); ***Nahmad v. Hartford Cas. Ins. Co.,*** 1:20-cv-22833-BB, 2020 U.S. Dist. LEXIS 203838, at *15 (S.D. Fl. Nov. 2, 2020) ("The Complaint alleges no physical harm to any properties in the immediate area, only suspensions and closures in general due to government orders."); ***Seifert,*** 2020 U.S. Dist. LEXIS 192121, at *9 ("Here, [insured] does not plead any facts demonstrating that the coronavirus contaminated properties neighboring his businesses, or that a civil authority then prohibited him from entering his insured properties because of any such contamination."); ***Henry's La. Grill,*** 2020 U.S. Dist. LEXIS 188353, at *15 ("In fact, the Plaintiffs do not identify any particular property around their premises which was damaged by COVID-19 or had its access restricted by a civil authority."); ***Franklin EWC, Inc., v. Hartford Fin. Servs. Grp.,*** 488 F. Supp. 3d 904, 3:20-cv-04434-JSC, 2020 U.S. Dist. LEXIS 174010 at *5 (N.D. Cal. Sept. 22, 2020); ***It's Nice, Inc.,*** 2020L000547, at *37 ("Just as the coronavirus did not cause direct physical loss to plaintiff's property here, the complaint has not and likely could not allege that the coronavirus caused direct physical loss to other property. By the policy's own terms, the civil authority coverage then does not apply."); ***Sandy Point Dental,*** 2020 U.S. Dist. LEXIS 171979, at *6.

6 ***See Steiner Steakhouse, LLC,*** 2020 U.S. Dist. LEXIS 252012, at *9; ***1210 McGavock St. Hospitality,*** 2020 U.S. Dist. LEXIS 241668, at *11; ***Mortar & Pestle Corp.,*** 2020 U.S. Dist. LEXIS 240060, at *8 ("Further, it is apparent from the plain language of the cited civil authority orders that such directives were issued to stop the spread of COVID-19 and not as a result of any physical loss of or damage to property."); ***Newchops Rest. Comcast LLC***, 2020 U.S. Dist. LEXIS 238254, at *11-12; ***Kirsch,*** 2020 U.S. Dist. LEXIS 234220, at *12-13 ("Plaintiff has failed to establish that the COVID-19 executive order was a direct result of damage to existing property as opposed to an attempt to curtail the virus's spread and future damage."); ***Elegant Massage,*** 2020 U.S. Dist. LEXIS 231935, at *21 ("That is, the Executive Orders were issued because 'COVID-19 presents an ongoing threat to [Virginia] communities', and not because of prior actual 'physical damage' to its own property or surrounding properties. See Exec. Or. 53 at 1."); ***Hajer,*** 2020 U.S. Dist. LEXIS 229317, at *6-7; ***Dime Fitness, LLC,*** 20-CA-5467, at *5 ("The Executive Order was issued in an effort to address public health concerns surrounding the COVID-19 pandemic. Therefore, there is no damaged property to which access was denied, nor was the civil authority issued as a result of the alleged damage here."); ***Water Sports Kauai,*** 2020 U.S. Dist. LEXIS 209547, at *5; ***Mudpie, Inc.,*** 2020 U.S. Dist. LEXIS 168385, at *12.

7 ***See 1210 McGavock St. Hospitality,*** 2 . Dist. LEXIS 241668, at *11 ("The most natural reading of "access," in this context, is physical access, not simply being closed to the public. The plaintiff does not allege that it was ever physically unable to access the restaurant."); ***Bradley Hotel Corp.,*** 2020 U.S. Dist. LEXIS 245686, at *8; ***Santo's Italian Café LLC,*** 2020 U.S. Dist. LEXIS 239382, at *27; ***Verveine Corp.,*** 2020 Mass. Super. LEXIS 187, at *9; ***Michael Cetta,*** 2020 U.S. Dist. LEXIS 233419, at *24-26; ***SA Palm Beach, LLC,*** 2020 U.S. Dist. LEXIS 251178, at *11-12; ***Kessler Dental Assocs.,*** 2020 U.S. Dist. LEXIS 228859, at *11 ("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."); ***El Novillo Rest.,*** 2020 U.S. Dist. LEXIS 233994, at *12-13; ***Promotional Headwear,*** 2020 U.S. Dist. LEXIS 228093, at *20-21 ("As the Tenth Circuit has explained, 'prohibited' means 'to 'formally forbid, esp. by authority' or 'prevent.' The Policy language 'requires a direct nexus between the civil authority order and the suspension of the insured's business.' The civil authority action must either prohibit access to the business, or require the premises to close. Having the indirect effect of restricting or hampering access to the business is insufficient."); ***4431, Inc.,*** 2020 U.S. Dist. LEXIS 226984, at *23; ***Musso & Frank Grill Co.,*** 2020 Cal. Super. LEXIS 4510, at *5-6; ***Brian Handel D.M.D.,*** 2020 U.S. Dist. LEXIS 207892, at *9; ***Nahmad,*** 1:20-cv-22833-BB, 2020 U.S. Dist. LEXIS 203838, at *15 ("Plaintiffs do not allege that they were prohibited from accessing the premises nor do they allege that they could not perform medically necessary non-elective medical procedures."); ***FAFB LLC,*** MER L 000892-20, at *9 ("So while the civil authority orders here precluded plaintiff from operating its in-person dining facility, they did not prohibit access to the premises for other purposes such as takeout and delivery."); ***Henry's***

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La. Grill, 2020 U.S. Dist. LEXIS 188353, at *15 ("The Governor's Executive Order had no substantive provisions limiting access to private businesses or their operations. While the Order could be read as "advising" residents to stay home, the Order itself does not represent an action to prohibit access to the described premises."); ***Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.,*** 487 F. Supp. 3d 937, 3:20-cv-00907-CAB-BLM, 2020 U.S. Dist. LEXIS 166808 (S.D. Cal. Sept. 11, 2020) ("Rather, it only alleges that Plaintiffs were prohibited from operating their business at their premises."); ***Sandy Point Dental,*** 2020 U.S. Dist. LEXIS 171979, at *6 ("As to the next prong, while coronavirus orders have limited plaintiff's operations, no order issued in Illinois prohibits access to plaintiff's premises. . . Indeed, plaintiff concedes that dental offices were deemed essential businesses for emergency and non-elective work.").

8 *See* **Applying Arizona Law:** ***Border Chicken AZ, LLC v. Nationwide Mut. Ins. Co.,*** 2:20-cv-00785-JJT, 2020 U.S. Dist. LEXIS 217649, at *6-7 (D. Ariz. Nov. 20, 2020) ("At the least, COVID-19 was an indirect cause of Plaintiff's loss. In fact, the FAC states that Plaintiff suffered losses due to the civil actions taken by governmental authorities in order to 'address the current coronavirus pandemic' (FAC ¶1), and Governor Ducey's Executive Order 2020-09 was titled 'LIMITING THE OPERATIONS OF CERTAIN BUSINESS TO SLOW THE SPREAD OF COVID-19.'"); ***Chattanooga Prof'l Baseball, LLC v. Nat'l Cas. Co.***, 2:20-cv-01312-DLR, 2020 U.S. Dist. LEXIS 212349, at *4 (D. Ariz. Nov. 13, 2020) ("There is no allegation in the complaint that absent the pandemic, the government would have been prompted to issue stay-at-home orders or otherwise inhibit access to the ballparks."); **Applying California Law:** *Franklin EWC, Inc. II,* 2020 U.S. Dist. LEXIS 234651, at *3-4; ***10E, LLC v. Travelers Indem. Co.,*** 2:20-cv-04418-SVW-AS, 2020 U.S. Dist. LEXIS 217482, at *4-5 (C.D. Cal. Nov. 13, 2020) ("***10E, LLC II***"); ***Long Affair Carpet,*** 2020 U.S. Dist. LEXIS 220757, at *6-7; ***Musso & Frank Grill Co.,*** 2020 Cal. Super. LEXIS 4510, at *4 ("Finally, Plaintiff failed to allege facts suggesting its claim would not fall within the Virus Exclusion, which bars claims resulting from a virus, given Plaintiff's allegations demonstrate the Public Health Orders that caused Plaintiff's closure were in response to the spread of the virus COVID-19."); ***W. Coast Hotel Mgmt.,*** 2020 U.S. Dist. LEXIS 201161, at *14 ("Even if Plaintiffs were to argue that their losses were caused solely by the Executive Orders and not "directly or indirectly" by the virus, Plaintiffs have already admitted that the Orders were issued "to halt the physical spread of COVID-19." (Id. ¶ 34). Indeed, the text of the Orders, of which the Court takes judicial notice, allows no other conclusion. (See Dkt. 14-1 (State Order providing that "[o]ur goal is simple, we want to bend the curve, and disrupt the spread of the virus"); Dkt. 14-2 (Fresno Order issued in response to "conditions of extreme peril . . . with respect to the international COVID-19 pandemic")).."); ***Boxed Foods Co.,*** 2020 U.S. Dist. LEXIS 198859, at *7 ("The Civil Authority Orders would not exist absent the presence of COVID-19; COVID-19 is therefore the efficient proximate of Plaintiffs' losses."); ***Founder Inst. Inc. v. Hartford Fire Ins. Co.,*** 3:20-cv-04466-VC, 2020 U.S. Dist. LEXIS 196732, at *1 (N.D. Cal. Oct. 22, 2020) ("Assuming-for argument's sake only- that the claim for loss of business income due to the shelter-in-place orders would otherwise be covered by Founder's insurance policy, the claim clearly falls within the virus exclusion for the reasons explained by Judge Corley in ***Franklin EWC, Inc.…***" and rejecting the insured's attempt to characterize the cause of loss as respiratory droplets on the surfaces at its building as distinguishable from the focus of the order being on preventing transmission of COVID-19); ***Geragos,*** 2020 U.S. Dist. LEXIS 196932, at *6; ***Mark's Engine Co.,*** 2020 U.S. Dist. LEXIS 188463, at *9 ("Plaintiff's FAC clearly demonstrates that all alleged loss or damage was both caused by and resulted from the novel coronavirus. The FAC alleges that Mayor Garcetti issued the order because of 'the dire risks of exposure with the contraction of COVID-19 and evidence of physical damage to property.' (FAC 18.) Plaintiff also states that it shut down its business because employees had 'refused to work out of fear of contracting the novel Coronavirus.' (Id. at 22.) And most tellingly, Plaintiff seeks declaratory relief 'due to physical loss or damage from the Coronavirus.' (Id. at 28.) The virus exemption applies here and precludes all coverage."); ***Franklin EWC, Inc.,*** 2020 U.S. Dist. LEXIS 174010 at *2 ("[U]nder Plaintiffs' theory, the loss is created by the Closure Orders rather than the virus, and therefore the Virus Exclusion does not apply. Nonsense."); ***10E, LLC v. Travelers Indemnity Co. of Connecticut, et al.,*** 2:20-cv-04418-SVW-AS, 2020 WL 5359653 at *4 (C.D. Cal. Nov. 13, 2020) ("Plaintiff's SAC seeks to recover under the Policy for losses incurred as a result of in-person dining restrictions during the COVID-19 pandemic. Plaintiff admits in the SAC that these restrictions were enacted in response to the pandemic. The SAC alleges that statewide restrictions as of September 16, 2020 were imposed 'in counties where positive COVID-19 test results are greater than 7 per 100,000 people,' SAC ¶ 16, and that City restrictions were 'issued based on the dire risks of exposure with the contraction of COVID-19,' id. ¶ 22. Likewise, the SAC concedes that at least one goal of business restrictions was to mitigate effects of the virus such as 'concern for the availability of hospital beds.' Id. ¶ 21. These admissions reveal that Plaintiff cannot even describe the relevant public health measures without falling back on the virus to which those measures seek to respond. Because in-person dining restrictions result from a virus, the virus exclusion bars coverage for their consequences.'"); **Applying Connecticut Law:** *LJ New Haven LLC v. AmGuard Ins. Co.,* 3:20-cv-00751-MPS, 2020 U.S. Dist. LEXIS 239513, at *16 (D. Conn. Dec. 21, 2020); **Applying Florida Law:** *Dime Fitness, LLC,* 20-CA-5467, at *7 ("While the economic losses at issue here were suffered as a result of business closures required by the Executive Order, the Executive Order would not have been issued had COVID-19 not created a public health concern. The Executive Order was in direct response to the threat of COVID-19 and aimed at slowing its spread."); ***DAB Dental PLLC,*** 20-CA-5504, at *8 ("While the economic losses at issue here were purportedly suffered as a result of business closures required by the Executive Order, the Executive Order would not have been issued had COVID-19 not created a public health concern necessitating the Order."); ***Nahmad,*** 1:20-cv-22833-BB, 2020 U.S. Dist. LEXIS 203838, at *17 ("Upon consideration, the Court does not agree that Plaintiffs' distinction between the government orders versus the virus as the immediate cause of their losses avoids the plain language of the virus exclusion. Even if COVID-19 is not a direct cause of their losses, the Complaint's allegations demonstrate that the government's civil orders were specifically enacted to address COVID-19 activity in Florida."); ***Martinez v. Allied Ins. Co. of Am.,*** 483 F. Supp. 3d 1189, 2:20-cv-00401-JLB-NPM, 2020 U.S. Dist. LEXIS 165140, at *5 (M.D. Fl. Sept. 2, 2020) ("Because [the insured's] damages resulted from COVID-19, which is clearly a virus, neither the Governor's executive order narrowing dental services to only emergency procedures nor the disinfection of the dental office of the virus is a "Covered Cause of Loss" under the plain language of the policy's exclusion. Because, as a matter of law, the plain language of the insurance policy excludes coverage of the dental practice's purported damages…"); **Applying Iowa Law:** *Gerleman Mgmt.,* 2020 U.S. Dist. LEXIS 247547, at *9-10 ("Plaintiffs' alleged losses were caused by or resulted from a virus, specifically, COVID-19. Plaintiffs' Second Amended Complaint states their losses were 'caused by COVID-19 and/or the Governor Reynolds' proclamation . . . .' Pls.' Second Am. Compl. [Dkt. No. 24], ¶ 45. Plaintiffs thereby recognize their alleged losses were caused by COVID-19, which triggers the Virus Exclusion. Plaintiffs' contention that it was the proclamation that caused their losses rather than the virus because they would have remained open does not save their claims from the Virus Exclusion. Plaintiffs' losses were caused by or resulted from COVID- 19. The proclamation was issued in response to the COVID-19 pandemic as referenced in the proclamation itself. Office of the Governor of Iowa Kim Reynolds, supra. The Virus Exclusion is therefore triggered, and coverage is excluded even if Plaintiffs could establish coverage under the Business Income, Extra Expense, or Civil Authority provisions of the insurance policy."); ***Palmer Holdings,*** 2020 U.S. Dist. LEXIS 233827, at *20 ("Plaintiffs' contention that it was the proclamation that caused their losses rather than the virus because they would have remained open does not save their claims from the Virus Exclusion. Plaintiffs' losses were directly or indirectly caused by or resulted from COVID-19, rather than strictly the proclamation. The proclamation was issued in response to the COVID-19 pandemic as

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referenced in the proclamation itself. Office of the Governor of Iowa Kim Reynolds, supra. The Virus Exclusion is therefore triggered, and coverage is excluded even if Plaintiffs could establish coverage under the Business Income, Extra Expense, or Civil Authority provisions of the insurance policy."); **Applying Illinois Law:** ***AFM Mattress Co., LLC v. Motorists Commer. Mut. Ins. Co.,*** 1:20-cv-03556, 2020 U.S. Dist. LEXIS 221121, at *7-8 (N.D. Ill. Nov. 25, 2020) ("In this case, the governments issued shutdown orders in response to the virus, an excluded cause of loss. Without a covered cause of loss, there is no civil authority coverage, and plaintiffs do not plead that some other event triggered the shutdown orders. That other governments reacted differently or imposed looser restrictions doesn't change the fact that the governments at issue here restricted public access to plaintiff's stores in response to the virus."); ***It's Nice, Inc.,*** 2020L000547, at *34; **Applying Michigan Law:** *Turek Enters.*, 2020 U.S. Dist. LEXIS 161198, at *15-16 ("Plaintiff's contention that the Order was the "sole, direct, and only proximate cause" of Plaintiff's losses is refuted by the Order itself. ECF No. 1 at PageID.3. The Order expressly states that it was issued to "suppress the spread of COVID-19" and accompanying public health risks. ECF No. 16-4 at PageID.424. The only reasonable conclusion is that the Order—and, by extension, Plaintiff's business interruption losses—would not have occurred but for COVID-19."); **Applying Mississippi Law:** *Real Hosp., LLC,* 2020 U.S. Dist. LEXIS 208599, at *13-14; **Applying New Jersey Law:** *Mattdogg, Inc.,* 2020 N.J. Super. LEXIS 250, at *8 ("The Governor issued his executive orders affecting Plaintiff's business as a direct result of COVID-19 – indeed, Plaintiff alleges as much, Compl. at ¶¶ 11-14 – and any losses incurred therefrom are squarely within the exclusion."); ***Mac Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co.,*** CAM L 002629-20, 2020 N.J. Super. Unpub. LEXIS 2244, at *16 (N.J. Super. Ct. Nov. 5, 2020) ("Since the virus is alleged to be the cause of the governmental action, and the governmental action is asserted to be the cause of the loss, plaintiff cannot avoid the clear and unmistakable conclusion that the coronavirus was the cause of the alleged damage or loss."); ***N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co.,*** 1:20-cv-05289-RBK-KMW; 2020 U.S. Dist. LEXIS 206972, at *6-7 (D.N.J. Nov. 5, 2020) ("There is no doubt that COVID-19, a virus, caused Governor Murphy to issue the Executive Order mandating closure of Plaintiff's restaurant. Therefore, COVID-19 is still a cause of the closure because the Virus Exclusion specifically provides for such indirect causation."); ***FAFB LLC,*** MER L 000892-20, at *10 ("There really is no differing or other interpretation of the policy that would support the plaintiff's position because there's no legitimate dispute that the COVID-19 virus is capable of inducing physical distress, illness or disease."); **Applying Ohio Law:** *Santo's Italian Café LLC,* 2020 U.S. Dist. LEXIS 239382, at *30; **Applying Pennsylvania Law:** *Newchops Rest. Comcast LLC*, 2020 U.S. Dist. LEXIS 238254, at *15; ***Wilson v. Hartford Cas. Co.,*** 2:20-cv-03384-ER, 492 F. Supp. 3d 417, 2020 U.S. Dist. LEXIS 179896, at *18, 21-22 (E.D. Pa. Sep. 30, 2020) ("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.'"); **Applying Tennessee Law:** ***1210 McGavock St. Hospitality,*** 2020 U.S. Dist. LEXIS 241668, at *7-8 ("The court finds that the clear and unambiguous language of the Virus Exclusion Clause precludes coverage of the plaintiff's claims. The language of the closure orders establishes that the orders would not have been issued were it not for the threat posed by the coronavirus, which is indisputably a virus. The plaintiff's loss thus 'result[ed] from' the coronavirus, and the Virus Exclusion Clause applies."); **Applying Texas Law:** ***Hajer,*** 2020 U.S. Dist. LEXIS 229317, at *8; ***Indep. Barbershop, LLC v. Twin City Fire Ins. Co.,*** 1:20-cv-00555-JRN, ___ F. Supp. 3d ___, 2020 U.S. Dist. LEXIS 211152, at *6 (W.D. Tex. Nov. 4, 2020) ("But the Court cannot in good faith hold that the SARS-CoV-2 virus is not even a ***contributing cause*** to these other terms."); ***Vizza Wash, LP v. Nationwide Mut. Ins. Co.,*** 5:20-cv-00680-OLG, 2020 U.S. Dist. LEXIS 211737, at *14 (W.D. Tex. Oct. 26, 2020); ***Diesel Barbershop,*** 2020 U.S. Dist. LEXIS 147276, at *17 (W.D. Tex. Aug. 13, 2010) ("While the Orders technically forced the Properties to close to protect public health, the Orders only came about sequentially as a result of the COVID-19 virus spreading rapidly throughout the community. Thus, it was the presence of COVID-19 . . . that was the primary root cause of Plaintiffs' business temporarily closing.").

9 ***Steiner Steakhouse, LLC,*** 2020 U.S. Dist. LEXIS 252012, at *11 ("Because the court has determined that there is no coverage for Steiner Steakhouse's alleged losses as a matter of Texas law, any attempt to amend the complaint would be futile."); ***Tralom, Inc. v. Beazley USA Servs.,*** 2:20-cv-08344-JFW-RAO, 2020 U.S. Dist. LEXIS 249203, at *2 (C.D. Cal. Dec. 29, 2020); ***1210 McGavock St. Hospitality,*** 2020 U.S. Dist. LEXIS 241668, at *12; ***Prime Time Sports Grill,*** 2020 U.S. Dist. LEXIS 237338, at *17 ("Moreover, it appears to the Court that any amendment would be futile based on the facts and circumstances of this case. As such, the Court will dismiss this case with prejudice."); ***10012 Holdings,*** 2020 U.S. Dist. LEXIS 235565, at *9 ("Leave to amend is denied because the Policy does not provide coverage for the loss Plaintiff suffered.") ; ***Michael Cetta,*** 2020 U.S. Dist. LEXIS 233419, at *27 ("Sparks did not move this Court for leave to amend the Complaint, and, in all events, the Court finds that allowing leave to amend would be futile."); ***Robert W. Fountain, Inc. v. Citizens Ins. Co. of Am.,*** 3:20-cv-05441-CRB, 2020 U.S. Dist. LEXIS 231629 (N.D. Cal. Dec. 9, 2020) (granting motion for judgment on the pleadings "with prejudice as it concludes that amendment would be futile."); ***4431, Inc.,*** 2020 U.S. Dist. LEXIS 226984, at *24 ("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."); ***Border Chicken AZ,*** 2020 U.S. Dist. LEXIS 217649, at *12; ***Mattdogg, Inc.,*** 2020 N.J. Super. LEXIS 250, at *9 ("The Court dismisses Plaintiff's complaint with prejudice as no further discovery or amended pleadings would allow Plaintiff to avoid the virus exclusion provision that is a part of its contract with Defendant."); ***Long Affair Carpet,*** 2020 U.S. Dist. LEXIS 220757, at *7 ("Because amendment is futile, the FAC is **DISMISED WITH** PREJUDICE."); ***Mac Prop. Grp.,*** 2020 N.J. Super. Unpub. LEXIS 2244, at *17 ("Amendment of the Complaint will not change the conclusion that plaintiff's claims based upon actions taken to slow or stop the spread of the coronavirus fall within the virus or bacteria exclusion. For that reason, the Court will not grant leave to amend, and the dismissal will be with prejudice."); ***W. Coast Hotel Mgmt.,*** 2020 U.S. Dist. LEXIS 201161, at *15 ("Here, as the Virus Exclusion precludes coverage under the Civil Authority and Business Income provisions of the Policy, the Court determines that granting Plaintiffs leave to amend would be futile."); ***Geragos,*** 2020 U.S. Dist. LEXIS 196932, at *8 (denying leave to amend because "amendment would be futile."); ***Wilson,*** 2020 U.S. Dist. LEXIS 179896, at *23-24; ***Infinity Exhibits,*** 2020 U.S. Dist. LEXIS 182497, at *10 ("It is also apparent that any amendment would be futile under these circumstances"); ***Turek Enters.***, 2020 U.S. Dist. LEXIS 161198, at *17; ***Martinez,*** 2020 U.S. Dist. LEXIS 165140, at *6 ("Given the deficiencies of this complaint, any amendment would be futile."); ***10E, LLC,*** 2020 U.S. Dist. LEXIS 156827, at *4; ***Diesel Barbershop,*** 2020 U.S. Dist. LEXIS 147276, at *19 ("Because allowing Plaintiffs leave to amend their claims would be futile, the Court **DISMISSES** Plaintiffs' claims.").

10 ***Franklin EWC, Inc. II,*** 2020 U.S. Dist. LEXIS 234651, at *12; ***SA Palm Beach LLC v. Certain Underwriters at Lloyd's London, et al.,*** 9:20-cv-80677-UU, at *12 (S.D. Fl. Dec. 9, 2020); ***El Novillo Restaurant, et al. v. Certain Underwriters at Lloyd's London, et al.,*** 1:20-cv-21525-UU, at *13 (S.D. Fl. Dec. 7, 2020) ("Given that Plaintiffs have already had an opportunity to amend their initial complaint, and because the Court finds that any further amendment would be futile, the dismissal is with prejudice."); ***10E, LLC II,*** 2020 U.S. Dist. LEXIS 217482, at *5 ("The Court already gave Plaintiff one opportunity to amend its complaint. As explained above, Plaintiff failed to cure the deficiencies in its pleading of 'direct physical loss or damage.' Moreover, Plaintiff's suggestion that in-person dining restrictions during the pandemic did not result from the COVID-19 virus is implausible and contradicted in the SAC itself. In line with other courts that denied leave to amend complaints asserting similar theories, the Court concludes that

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to allow Plaintiff to initiate a third round of briefing on the same flawed legal theories would be futile and prejudicial to Defendant."); ***Vizza Wash, LP,*** 2020 U.S. Dist. LEXIS 211737, at *19 ("In this case, Plaintiff has already amended its complaint twice, once prior to removal and once in response to Nationwide's first motion to dismiss. And neither of Plaintiff's prior amendments nor Plaintiff's briefing indicate that Plaintiff could fix the fundamental deficiencies with its claims in this case. Indeed, the various theories of relief asserted by Plaintiff are all premised on the existence of insurance coverage that is not provided by the Policy. Accordingly, it appears evident that providing Plaintiff another attempt to amend its claims would be futile, and for that reason, Plaintiff's claims against Nationwide will be dismissed with prejudice."); ***Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.,*** 491 F. Supp. 3d 738, 3:20-cv-00907-CAB-BLM, 2020 U.S. Dist. LEXIS 182406, at *2 (S.D. Cal. Oct. 1, 2020) ("No amount of artful pleading by Plaintiffs can state a plausible claim that they suffered any business income losses due to direct physical loss of or damage to property at their premises, or due to civil authority orders prohibiting access to Plaintiffs' premises due to direct physical loss or damage to property elsewhere, as required for coverage under the Policy.").

11 The policy in ***JGB Vegas Retail*** defined "Pollutant or contaminants" as: "any solid, liquid, gaseous or thermal irritant or CONTAMINANT including, but not limited to, smoke, vapor, soot, fumes, acids, alkalis, chemicals, virus, waste, (waste includes materials to be recycled, reconditioned or reclaimed) or hazardous substances as listed in the Federal WATER Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act, or as designated by the U.S. Environmental Protection Agency."

Amicus News

by Jeffrey Babbin, CDLA Amicus Committee Chair

The CDLA's Amicus Committee has approved the filing of an amicus brief in the Connecticut Supreme Court in the case of *Carpenter v. Daar*. The amicus brief will support the defendant, a dentist, who successfully obtained the dismissal of a malpractice complaint because of an inadequate opinion letter appended to the complaint under Connecticut General Statutes §52-190a. The Supreme Court granted the plaintiff's petition for certification after the Appellate Court affirmed and the Connecticut Trial Lawyers Association has filed an amicus brief in support of the plaintiff. The CDLA will file its amicus brief soon after the defendant files his appellee's brief. The case raises important issues about whether the defendant general practitioner can ever be considered a specialist under that statute based on statements on his website, and whether the specialist who authored the opinion letter can be regarded as a generalist because of his experience teaching at a dental school. The case also addresses how a plaintiff can properly amend or supplement the opinion of a similar health care provider appended to the complaint.

Please let us know if you are interested in participating on the CDLA Amicus Committee or if you are aware of any cases on appeal where committee can support the defense. Inquiries can be sent to ctdefenselawyers@gmail.com.

Legislative Initiative Update

For the past three years the CDLA has been successful in bringing our proposed legislative response to the Marciano decision to a public hearing before the Judiciary Committee of the Connecticut General Assembly. We offered written and verbal testimony in support of our proposed legislation. Our proposal would amend the collateral source statutes to allow for a post-verdict collateral source hearing in cases involving liens. For example, if the full price of the medical bills charged was $100,000, but the medical providers accepted $30,000 in Medicare payments as full compensation, the defendant would be entitled to a $70,000 collateral source reduction. In the 2019 legislative session, we made it as far as a public hearing. The same thing happened in 2020. In 2021, the legislation appeared on the Judiciary Committee's agenda for a vote, but it was not voted on. These are all steps forward. Getting legislation passed is a multiyear effort and it is much easier to kill legislation than to get it passed. We intend to keep trying and will keep the membership posted.

James Pickett, Legislative Committee Chair

The "Mode of Operation" Rule in Connecticut

by Renée W. Dwyer, Scott Kelleher, and Peter Sabellico

Slip and falls and falling merchandise are two endless sources of litigation for retailers. The standard rule is that business owners are required to maintain their property in a reasonably safe condition and protect visitors from dangerous conditions of which they have actual or constructive notice. However, as with all areas of law, theories of premises liability are ever changing.

Under the mode of operation rule, a business invitee who is injured as the result of a dangerous condition on a premises may recover without proof that the business had actual or constructive notice of that condition, so long as the business' chosen mode of operation creates a foreseeable risk that the condition regularly will occur and the business fails to take reasonable measures to discover and remove it. *Kelly* v. *Stop & Shop, Inc.*, 281 Conn. 768, 780–81 (2007). Originally, the mode of operation applied to slip and fall situations involving produce displays or unwrapped foods that customers were encouraged to handle. Plaintiffs' lawyers often seek to apply the mode of operation rule to other situations. For example, plaintiffs have argued that a merchant have arranged merchandise in such a way that a customer's self-service activities cause merchandise to fall, resulting in injury or defective conditions on the floor below.

The mode of operation rule has continued to evolve since it was adopted in Connecticut in 2007. This article will review the rule as adopted in *Kelly* and focus on its evolution by examining less familiar cases in which the court found the rule inapplicable. The fact patterns in these cases are instructive when defending mode operation cases.

Leading up to the Rule

Prior to *Kelly*, the Appellate Court addressed a case involving negligent stacking and the issue of notice. In *Meek* v. *Wal-Mart Stores, Inc.*, 72 Conn. App. 467, cert. denied, 262 Conn. 912 (2002), a customer brought an action after aluminum folding tables fell from a store shelf and struck him on the head and neck. The trial court entered judgment on a jury verdict for the customer with a 50 percent reduction in damages for contributory negligence, but then granted the plaintiff's motion to set aside the jury's finding that the customer was contributorily negligent. The store appealed, seeking to enforce the jury finding of contributory negligence. The Appellate Court affirmed the ruling and determined that the jury reasonably could have found that the defendants were negligent in stacking the tables and that it was foreseeable that placing them in the manner that they did could lead to a dangerous situation after minimal inspection or slight movement caused by a customer. More specifically, as to what we now know as the mode of operation, the court held that the trial court properly instructed the jury that it should find the defendants negligent if it determined that the manner in which they had stacked the tables was unreasonable in light of all of the surrounding circumstances, including the foreseeability that customers would handle and rearrange the merchandise. *Id*. at 484. Although the defendants must have had knowledge that the display was dangerous under the circumstances, it was not necessary that they have "knowledge of the actual condition of the display immediately before and at the time of the accident." *Id*.

Applying the Rule to Cases Pending Prior to Kelly

In *Humphrey v. Great Atl. & Pac. Tea Co., Inc.*, 295 Conn. 855 (2010), a customer brought an action against a supermarket to recover for injuries sustained in 2005 when he slipped and fell on grapes dropped to the floor next to a self-service counter. Following a bench trial, the court entered judgment in favor of the store owner. The customer appealed, claiming the court improperly failed to consider whether the defendant was liable for his injuries under the mode of operation rule subsequently adopted in *Kelly.* The Appellate Court affirmed the ruling, holding that the *Kelly* mode of operation rule did not apply retroactively. *Humphrey v. Great Atl. & Pac. Tea Co., Inc.*, 107 Conn. App. 796, 946 (2008). The customer filed petition for certification for appeal and the Supreme Court reversed, remanding the action for a new trial to consider the mode of operation rule as a defense.

Attempted Expansion of the Rule

One year after *Kelly*, the mode of operation was alleged in a case involving a fall on a creased rug in a retail store. In *Berry* v. *Staples Connecticut, Inc.*, Superior Court, Judicial District of Hartford, Docket No. CV 085018858 (October 9, 2008, *Aurigemma, J.),* the court determined the mode of operation rule did not apply and granted the defendant's motion to strike. In that case, the plaintiff alleged that the self-service mode of operation of the defendant's store, where customers select their own supplies, created a foreseeable risk of danger, including tripping and falling on the rug. The court held, however, that such a defect could occur anywhere and that the plaintiff failed to allege any specific facts to establish a crease in the runner was a foreseeable risk of the self-service operation.

Two years later in *Pereira* v. *Target Stores, Inc.*, United States District Court, Docket No. 3.09-CV-1537 (D. Conn., June 10, 2011), the court granted the defendant's motion for summary judgment after determining the mode of operation rule did not apply where a plaintiff

See ***"Mode of Operation" Rule*** *on Page 26*

"Mode of Operation" Rule

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fell in an aisle on an unclear defect. In that case, the plaintiff was shopping in the cosmetic section of the store, but did not know what caused her to fall. After the fall, she saw a brown object, which was possibly candy, on the floor nearby. The court determined the mode of operation rule did not apply because there was no specific mode of operation that made the plaintiff's accident more foreseeable.

Thereafter, the District Court once again found the rule inapplicable in a premises liability action claiming injuries sustained when the plaintiff slipped and fell on wet leaves on the steps outside a postal office in Norwich. *Gomes v. United States*, United States District Court, Docket No. 3:11-CV-01825 VLB (D. Conn., 2012). The court granted the defendant's motion for summary judgment, holding that the plaintiff presented no evidence as to how long the leaves on which he slipped were present on the exterior steps. After outlining the mode of operation rule and comparing it to the situation at issue, the court found the plaintiff failed to sufficiently allege that the defendant had actual or constructive notice, and that there was no specific "mode of operation," or self-service aspect of the post-office that made the exception applicable.

In *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107 (2012), a mother claimed her minor daughter injured her ankle while playing soccer on a carpeted surface and that the defendant was negligent in maintaining the surface. The Supreme Court outlined the Appellate Court's analysis in *Meek*, which was adopted in *Kelly*, and cited to three subsequent cases supporting the proposition that the affirmative act rule of standard premises liability actions does not apply to situations where patrons may have created the defect at issue and the alleged defect was related to the mode of operation of the business. *Id*., 124, n.10. The Court concluded that the affirmative act rule was not applicable in this action and that the plaintiffs needed to provide an evidentiary foundation from which a reasonable jury could have found the defendant or its employees had notice of the potential danger. *Id*. Because the plaintiff failed to do so, the Court reversed the appellate court, and affirmed the trial court's order of summary judgment.

Last fall, the Connecticut Appellate Court had an opportunity to consider a situation involving falling merchandise. *Hill* v. *OSJ of Bloomfield, LLC*, 200 Conn. App. 149, 235 A.3d 345 (2020). In doing so, the court further clarified the limitations of the rule. In *Hill*, the plaintiff brought an action against a retailer alleging injuries as a result of boxes falling on her head. After a bench trial where the court applied the mode of operation rule, and ruled in favor of the patron, the retailer appealed. In reversing the trial court, the Appellate Court reaffirmed the proposition that "self-service merchandising itself cannot be a negligent mode of operation." *Id*. at 160 (internal quotation marks omitted). The court concluded that there was no evidence of a specific method of operation different from the general operation of a business. *Id*. at 161-62. The Appellate Court reasoned that the rule requires a store's mode of operation to invite careless customer interference that creates an expected foreseeable hazard. A mere potential for hazard does not necessarily result in a regularly occurring or inherently foreseeable hazard. Id. at 160. Absent the required evidence, the court refused to invoke the mode of operation rule as it was not a device akin to *res ipsa loquitor* to fill the gaps in the plaintiff's case. Id. at 161-65.

Defending Cases where Mode of Operation is Alleged

When defending claims brought by plaintiffs under the mode of operation rule, counsel must first argue that the rule does not apply to the facts at issue, similar to what was done by the defense in the above cited cases. While the mode of operation rule represents a hurdle to defense counsel, the courts are not inclined to apply the rule on behalf of plaintiffs absent evidence that a specific, hazardous mode of operation involving customer interference is present, such that it creates the necessary zone of risk for the rule to apply. *See Natale* v. *Wal-Mart Stores East, LP*, Superior Court, Judicial District of New Britain, Docket No. CV176039435S (May 21, 2019, *Moore, J.*) (no liability against defendant where "mode of operation" claimed by plaintiff was furnishing customers with motorized carts as she was, essentially, attempting to hold the defendant liable for being a self-service store); *Phan* v. *Home Depot USA, Inc.*, Superior Court, Judicial District of Hartford, Docket No. CV136042539S (April 5, 2016, *Elgo, J.*) (mode of operation did not apply where there was no evidence that items placed on shelves in ways that were inherently hazardous or that manner in which other customers handled the times created readily foreseeable and hazardous condition).

Defenses are available even if a motion to strike or motion for summary judgment are not successful. Specifically, defense counsel must then attempt to establish that the retailer (1) had adequate policies and procedures in place to prevent this type of accident that occurred, and (2) the retailer's employees followed those policies and procedures. *Fisher* v. *Big Y Foods, Inc.*, at 298 Conn. 414, 420 n.10.

The Supreme Court in *Fisher* turned to several decisions from other jurisdictions it found helpful in determining whether the mode of operation rule applied to the specific fact pattern at issue. As such, it is important to remain apprised of new mode of operation cases as they are decided in Connecticut and in other states.

Renée W. Dwyer is a partner and Scott Kelleher and Peter Sabellico are associates at Conway Stoughton LLC in Hartford.

CDLA JURY VERDICT/ARBITRATION REPORT

Case Name: Kyle McCall v. Gina Sopneski, et al

Docket Number: AC 42498, KNL-CV18-6035906S

Jurisdiction: Court of Appeals, Judicial District of New London

Trial Judge: Judge Shari Ann Murphy

Return Date: July 10, 2018

Verdict Date: Decision Officially Released February 16, 2021

Arbitration Panel: N/A

Trial Counsel (Plaintiff): John F. Wynne, Jr.

Trial Counsel (Defendant): Edward N. Storck III on behalf of Reynolds Garage & Marine, Inc., Joseph James Andriola on behalf of Gina Sopneski

Expert Witness (Plaintiff): N/A

Submitted by: Edward N. Storck III

Description of Case: The underlying lawsuit involved a motor vehicle accident between the Plaintiff, Kyle McCall, who was operating a motorcycle, and Gina Sopneski, who was operating a vehicle loaned to her by Reynolds Garage & Marine, Inc. ("Reynolds") while her vehicle was being repaired. Plaintiff brought suit against Reynolds, who was doing business as Reynolds Subaru, pursuant to Conn. Gen. Stat. §14-154a which creates vicarious liability for lessors of motor vehicles. Plaintiff claims that the vehicle driven by Sopneski was rented to her by Reynolds. Plaintiff claimed significant injuries as a result of the accident.

Reynolds filed a Motion for Summary Judgment as to the claims asserted against in light of the immunity afforded to car dealerships pursuant to Conn. Gen. Stat. §14-60, otherwise known as the Dealer Plate Statute, as interpreted by the Connecticut Supreme Court in *Cook v. Collins Chevrolet, Inc.*, 199 Conn. 245 (1986). In this case, Reynolds argued that the Dealer Plate Statute grants immunity to automobile dealers who lend a motor vehicle and/or dealer plate to a customer while the customer's vehicle is being repaired and the dealer confirms that the customer has valid insurance.

On January 4, 2019, the court, Murphy, J., granted the Motion for Summary Judgment. In her decision, Judge Murphy found that the facts of the case come within the confines of §14-60. She further held the Defendant met its burden in clearly demonstrating that the subject vehicle was loaned to Sopneski by Reynolds while Sopneski's own vehicle was in for repairs at Reynolds and that Sopneski provided Reynolds with proof of insurance. Judge Murphy found that there was no genuine issue of material fact that the transaction in question fell within the purview of §14-60.

Damages Claimed: The plaintiff claimed severe injuries as a result of the accident including multiple fractures in both legs, several lacerations and abrasions requiring debridement surgery, a concussion, bilateral pulmonary contusion, and tachycardia.

Motions and Rulings of Interest: August 6, 2018 – Motion for Summary Judgment filed by Reynolds.
January 4, 2019 – Motion for Summary Judgment granted by Judge Murphy.
February 16, 2021 – Court of Appeals affirms trial court's granting of Summary Judgment to Reynolds. Judge Nina Elgo wrote the decision in which Judges Lavine and Prescott concurred. 202 Conn. App. 616 (2021)

Last Demand/ Settlement Offer: Not applicable

Outcome: Summary Judgment for Reynolds affirmed at Court of Appeals. In its decision, Judge Nina Elgo writing the opinion in which the other judges concurred, held that the trial court properly concluded that there was no genuine issue of material fact as to whether Reynolds was entitled to the immunity provided by § 14-60: the plaintiff's construction of § 14-60, that it applies only to the lending of motor vehicles that have dealer plates affixed, was untenable in light of the plain language of the statute encompassing situations in which a dealer lends either a dealer vehicle, a dealer plate, or a dealer vehicle containing a dealer plate and, thus, the fact that the motor vehicle operated by S had a vanity plate rather than a dealer plate did not operate to preclude the application of § 14-60; moreover, regardless of the label on the agreement between Reynolds and Sopneski, the essence of the transaction was a loan, as the motor vehicle was given to Sopneski for temporary use and Sopneski was not charged a fee for the use of the motor vehicle. 202 Conn. App. 616 (2021)

Issues on Appeal: Whether Conn. Gen. Stat. §14-154a rather than §14-60 applied to the transaction at issue;
Whether there was a factual issue remaining as to whether the transaction involved a rental rather than a loan; and
Whether the trial court was correct in concluding that there was no consideration for the transaction as no money exchanged hands.

CDLA JURY VERDICT / ARBITRATION REPORT

Case Name: Matthew Cook v. City of Milford, et al

Docket Number: AAN-CV-18-6030471-S

Jurisdiction: Judicial District of Ansonia/Milford

Trial Judge: N/A

Return Date: 10/16/2018

Verdict Date: 11/16/2020

Arbitration Panel: N/A

Trial Counsel (Plaintiff): Brian Altieri, Esq., Balzano & Tropiano PC

Trial Counsel (Defendant): Renee W. Dwyer, Esq. / Sarah F. D'Addabbo, Esq., Conway Stoughton LLC

Expert Witness (Plaintiff): N/A

Outcome: Summary Judgment Granted for Defendants, USA Softball, Jerry Schuette, Milford Umpires Association

Issues on Appeal: N/A

Submitted by: Renee W. Dwyer & Sarah F. D'Addabbo

Description of Case: Conway Stoughton represented USA Softball and the Milford Umpires Association in a lawsuit where the plaintiff alleged that he was injured by a dangerous and defective third base during an adult men's softball game in Milford in September, 2016. There was no dispute that the plaintiff was injured during the game while running from second base and sliding feet first into third base. The case turned, however, on whether the plaintiff could establish a specific defect. At his deposition, the plaintiff testified that the third base failed to breakaway as he slid into it, and he took the position that it should have broken away. He also testified, however, that he was not aware that the base was a breakaway base, and it would surprise him if the base was a breakaway base because he did not remember the base moving. The plaintiff specifically testified "I mean, I slid into the base, and the base didn't move, so it's possible the equipment was faulty." The plaintiff's position was, therefore, because the base did not breakaway, it must have been defective. That position, however, was missing a key component for which there was no evidence: the base was a breakaway base and it should have broken away.

Damages Claimed: Arthroscopic surgery about his left lower extremity at his left ankle with extensive debridement; medial dislocation and inversion about his left lower extremity at his left talus relative to the tibia with associated disruption of the lateral ligaments of his left ankle; a closed nondisplaced fracture about his left lower extremity at the left talus; bone bruising about his left lower extremity at his left tibia and left talus with associated impaction injury in the head of the talus; ligamentous tearing about his left lower extremity at his left anterior tablofibular, interior tablofibular, and calcaneofibular ligaments; a ligamentous tear with medial association of deep muscle fibers about his left lower extremity at his left deltoid; sprain/strain of his muscle fascia and tendons about his left lower extremity at his left ankle; and pain, stiffness, soreness, discomfort, tenderness, and spasms about his left lower extremity, left ankle, left foot, mid-lower back musculature, upper back musculature, and neck.

Motions and Rulings of Interest: Conway Stoughton filed a Motion for Summary Judgment citing to the plaintiff's testimony and inability to identify a specific defect, as required of him to prove his case. The court, Tyma, J., agreed with the defendants, granting summary judgment in their favor, finding that the defendants established that there was no genuine issue of material fact that there was no evidence of a specific defect causing injury to the plaintiff.

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