June 15, 2021

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Michael E. Gans
Clerk of Court
United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
St. Louis, MO 63102

Re: *Whiskey River on Vintage, Inc., d/b/a Whiskey River on Vintage et al. v. Illinois Casualty Company.*, No 20-3707
Fed. R. App. P. 28(j) Supplemental Authority Letter
No oral argument date set

Dear Mr. Gans:

Pursuant to Rule 28(j), *amici* Restaurant Law Center and Iowa Restaurant Association submit two recent decisions relevant to this appeal. These cases support the Law Center's positions that: (1) whether a plaintiff has stated a business-interruption claim turns on the specific allegations of "loss or damage" in each case, *see* RLC Br. 2, 14-16; and (2) to determine a complaint's sufficiency, this Court's *de novo* review must be guided by controlling state substantive law and policy-interpretation principles—not tallying district court decisions insurers favor, *see id.* 14-17.

- *Kenneth Seifert d/b/a The Hair Place v. IMT Ins. Co.*, 2021 WL 2228158 (D. Minn. June 2, 2021): Chief Judge Tunheim denied a motion to dismiss and "conclude[d] that a plaintiff would plausibly demonstrate a direct physical loss of property by alleging that executive orders forced a business to close because the property was deemed dangerous to use and its owner was thereby deprived of lawfully occupying and controlling the premises to provide services within it." *Id.* *5. The court reasoned that under governing state law "a qualifying loss may arise from 'an impairment of function and value' to property, as when legal regulations stymie a business's ability to lawfully provide its products" or when "a building's function is seriously impaired and the property is rendered useless." *Id.* *4-5 & nn.12, 16. The court reached that conclusion—despite having dismissed plaintiff's initial complaint—based on the amended complaint's

"more nuanced theory concerning the key policy language in dispute." *Id.* *3.

- *Legacy Sports Barbershop LLC v. Continental Cas. Co.*, 2021 WL 2206161 (N.D. Ill. June 1, 2021): Judge Kocoras denied a motion to dismiss and concluded that, although "loss of or damage to" property required "physical damage or alteration" under applicable state law, policyholders satisfied that standard by alleging they were required to "build a new outdoor patio, install social distancing barriers and germ sanitation stations, and remove work stations in order to promote proper social distancing." *Id.* at *2-3 & n.1. In so holding, the court distinguished its own prior decisions finding other plaintiffs had not adequately alleged "loss or damage." *Id.*

Sincerely,

/s/ *Gabriel K. Gillett*
Gabriel K. Gillett

cc: Counsel of record (via ECF)

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CERTIFICATE OF SERVICE

I, Gabriel K. Gillett, an attorney, hereby certify that on June 15, 2021, I caused the foregoing **Rule 28(j) Letter** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Gabriel K. Gillett*
Gabriel K. Gillett

2021 WL 2228158
Only the Westlaw citation is currently available.
United States District Court, D. Minnesota.

KENNETH SEIFERT d/b/a THE HAIR PLACE and HARMAR BARBERS, INC., individually and on behalf of all others similarly situated, Plaintiffs,
v.
IMT INSURANCE COMPANY, Defendant.

Civil No. 20-1102 (JRT/DTS)
|
Filed 06/02/2021

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION TO DISMISS

JOHN R. TUNHEIM Chief Judge United States District Court

***1** Plaintiff Kenneth Seifert filed this action to collect lost business income after executive orders mandated the closure of his hair salon and barbershop due to the rising number of COVID-19 cases in Minnesota, lost income alleged to be covered under the insurance policies he purchased from Defendant IMT Insurance Co. ("IMT"). IMT has filed a Motion to Dismiss, claiming that the policies do not cover Seifert's losses and that, even if they did, the virus exclusion contained in the policies would preclude recovery.

Because the business income provision of the policies insures against a direct physical loss of property, as when government mandates deprive a business owner of legally occupying or using the premises and property as intended, Seifert plausibly alleges that he is entitled to coverage. Additionally, because the virus exclusion is only triggered by a direct or indirect contamination of the covered premises, the exclusion has no effect with respect to Seifert's alleged losses. However, coverage under the civil authority provision of the policies is unavailable and the doctrine of regulatory estoppel is inapplicable. Thus, the Court will grant in part and deny in part IMT's Motion to Dismiss.

BACKGROUND

I. FACTUAL BACKGROUND

In an earlier decision, the Court laid out the relevant facts in detail. *See Seifert v. IMT Ins.*

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Co., 495 F. Supp. 3d 747, 749–50 (D. Minn. 2020). As Seifert has not alleged any new facts in the Amended Complaint, the Court will briefly summarize them here.

Seifert's businesses, The Hair Place and Harmar Barbers, Inc., were ordered to close by two executive orders issued in response to the growing number of COVID-19 cases in Minnesota.[1] (Am. Compl. ¶¶ 1–2, 4, 27–28, Nov. 10, 2020, Docket No. 36.) As a result, Seifert contacted an authorized IMT agent to file a claim for lost business income. (*Id.* ¶ 35.) Seifert was advised that his losses were not covered. (*Id.* ¶¶ 5, 35.)

1 Minn. Emergency Exec. Order No. 20-08 (Mar. 18, 2020), https://mn.gov/governor/assets/Filed%20EO-20-08_Clarifying%20Public%20Accommodations_tcm1055-423784.pdf; *see also* Minn. Emergency Exec. Order No. 20-04 (Mar. 16, 2020), https://mn.gov/governor/assets/2020_03_16_EO_20_04_Bars_Restaurants_tcm1055-423380.pdf.

The policies at issue contain a business income provision, which protects against the actual loss of business income sustained due to a "suspension of your 'operations' during the 'period of restoration' ... caused by direct physical loss of or damage to property ... caused by or result[ing] from a Covered Cause of Loss." (Aff. of Shayne M. Hamman ¶ 3, Ex. A ("Policy") at 82, May 29, 2020, Docket No. 13-1.[2]) "Covered Cause[ ] of Loss" is defined as a "[d]irect physical loss unless the loss is excluded." (Policy at 78.) "Operations" is defined as "business activities occurring at the described premises." (*Id.* at 109.) And "period of restoration" is the period of time beginning "after the time of direct physical loss or damage" and ending on the date when "the property at the described premises should be repaired, rebuilt or replaced" or when "business is resumed at a new permanent location." (*Id.* at 109–10.)

2 The four policies issued to Seifert are identical. As such, the Court will simply cite to Exhibit A instead of all four exhibits.

***2** The policies also contain a civil authority provision, which protects against the actual loss of business income when "a Covered Cause of Loss causes damage to property" other than the insured property and, as a consequence, "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage" and the civil authority has acted either in response to dangerous physical conditions from the damage or to have unimpeded access to the damaged property. (*Id.* at 85.)

Finally, the policies contain a virus exclusion, which precludes coverage for loss or damage caused by a "virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (*Id.* at 96.) Such loss or damage, whether caused directly or indirectly, is excluded "regardless of any other cause or event that contributes concurrently or in any sequence to the loss ... whether or not the loss event results in widespread damage or affects a substantial area." (*Id.* at 93.)

II. PROCEDURAL BACKGROUND

On May 6, 2020, Seifert filed a Complaint, alleging breach of contract and seeking declaratory and monetary relief. (Compl. ¶¶ 37–48, May 6, 2020, Docket No. 1.) In response, IMT filed a Motion to Dismiss pursuant to Rule of Civil Procedure 12(b)(6).

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(Mot. Dismiss, May 29, 2020, Docket No. 9.) The Court granted IMT's Motion without prejudice to allow Seifert an opportunity to amend the pleadings, especially as the law concerning business interruption coverage with respect to the COVID-19 pandemic was very much in development. *Seifert*, 495 F. Supp. 3d at 753; *id.* at 753 n.7.

On November 4, 2020, Seifert filed a Motion for Extension of Time,[3] (Mot. Extension, Nov. 4, 2020, Docket No. 29), and then an Amended Complaint on November 10, 2020, alleging three Counts: (1) Breach of Contract; (2) Declaration of Rights; and (3) Regulatory Estoppel, (Am. Compl. ¶¶ 57–76.) IMT has filed a second Motion to Dismiss pursuant to Rule 12(b)(6). (Mot. Dismiss, Nov. 24, 2020, Docket No. 37.)

3 Under Rule 6(b), "[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time ... if a request is made, before the original time or its extension expires." Fed. R. Civ. P. 6(b)(1). "[M]otions to extend are to be liberally permitted ... to secure the just, speedy, and inexpensive determination of every action." *Baden v. Craig-Hallum, Inc.*, 115 F.R.D. 582, 585 (D. Minn. 1987) (citation omitted); *see also* 4B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1165 (4th ed.) (stating that a request will normally be granted absent bad faith or prejudice). Here, Seifert proceeded to file the Amended Complaint late without having received permission first. However, the Court finds that there was good cause for the six-day enlargement and that IMT was not prejudiced by it. Further, the Court held a hearing and has fully considered the pleadings and briefs, and deciding a case on the merits is always preferable to dismissing an action based on a procedural technicality. As such, the Court will grant Seifert's Motion for Extension of Time.

DISCUSSION

I. STANDARD OF REVIEW

In reviewing a motion to dismiss under Rule 12(b)(6), the Court considers all facts alleged in the complaint as true to determine if the complaint states a "claim to relief that is plausible on its face." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)). The Court construes the complaint in the light most favorable to the plaintiff, drawing all inferences in plaintiff's favor. *Ashley Cnty. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009).

***3** Although the Court accepts the complaint's factual allegations as true, it is not bound to accept as true a legal conclusion couched as a factual allegation. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Instead, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

II. STATE LAW

Under Minnesota law, the interpretation of an insurance contract is a question of law. *Horizon III Real Estate v. Hartford Fire Ins. Co.*, 186 F. Supp. 2d 1000, 1004 (D. Minn. 2002). "[A] court will compare the allegations in the complaint in the underlying action with the relevant language in the insurance policy." *Midwest Family Mut. Ins. Co. v. Justkyle, Inc.*, No. 17-1632, 2018 WL 3475486, at *5 (D. Minn. July 19, 2018) (quoting *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 415 (Minn. 1997)). "While the insured bears the initial burden of demonstrating coverage, the insurer carries the burden of establishing the applicability of exclusions." *Id.* at *6 (quoting

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Travelers Indem. Co. v. Bloomington Steel & Supply Co., 718 N.W.2d 888, 894 (Minn. 2006)).

III. ANALYSIS

A. Coverage

The Amended Complaint presents a more nuanced theory concerning the key policy language in dispute, "direct physical loss of or damage to property." Because Seifert does not allege any damage to his properties, only the terms "direct physical loss of" are relevant.[4]

4 Seifert does not plead any facts demonstrating that any nearby properties were damaged either. Because only damage triggers civil authority coverage, the Court will grant IMT's Motion to Dismiss with respect to Counts I and II as they relate to the civil authority provision.

The Court interpreted this language before when granting IMT's motion to dismiss the Complaint; but, when doing so, the Court relied on Minnesota and Eighth Circuit cases that grappled with slightly different language: "direct physical loss **to** property." *See Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 835–36 (8th Cir. 2006); *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 151 (Minn. Ct. App. 2001); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 297 (Minn. Ct. App. 1997); *see also Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.,* 400 F.3d 613, 614, 616 (8th Cir. 2005) (reading a policy as if it said "direct physical loss to" instead of "direct physical loss of"). As Seifert correctly notes, because of the disjunctive separating "of" and "to," these words must mean different things. Thus, the more precise question considered now is whether "of" makes a difference when assessing the plausibility of Seifert's claims.

As the policies do not define what "direct physical loss of" means, the Court will give the words their plain and ordinary meanings. *See, e.g.*, *Farm Bureau Mut. Ins. Co. v. Earthsoils, Inc.*, 812 N.W.2d 873, 876 (Minn. Ct. App. 2012). "Direct" means "stemming immediately from a source."[5] "Physical" is "having material existence[;] perceptible especially through the senses and subject to the laws of nature."[6] These two words modify "loss," which means "destruction" or "deprivation."[7] As such, the policies insure against an immediate and materially perceptible destruction or deprivation of property. However, to give the full phrase meaning, there is also the word "of" to consider.

5 Merriam-Webster, https://www.merriam-webster.com/dictionary/direct (last visited May 21, 2021).

6 Merriam-Webster, https://www.merriam-webster.com/dictionary/physical (last visited May 21, 2021).

7 Merriam-Webster, https://www.merriam-webster.com/dictionary/loss (last visited May 21, 2021).

***4** As courts have stated when considering similar business interruption claims, "to" and "of" are not interchangeable; that is, they mean distinctly different things. *See, e.g.*, *Seoul Taco Holdings, LLC v. Cincinnati Ins. Co.*, No. 20-1249, 2021 WL 1889866, at *6 (E.D. Mo. May 11, 2021); *T & E Chicago LLC v. Cincinnati Ins. Co.*, 20-4001, 2020 WL 6801845, at *5 (N.D. Ill. Nov. 19, 2020); *see also Source Food*, 465 F.3d at 838 ("[T]he policy's use of the word 'to' in the policy language 'direct physical loss *to* property' is significant. [Plaintiff's] argument might be

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stronger if the policy's language included the word ‘of’ rather than ‘to,’ as in ‘direct physical loss *of* property[.]’ ”).

“To” is a preposition indicating an action toward a thing reached, or contact.[8] “Of,” on the other hand, is a preposition indicating “belonging or a possessive relationship,”[9] with “possessive” meaning “manifesting possession,” or occupying and controlling property.[10] Thus, “direct physical loss to” involves a force acting toward and reaching property, a contact that leads to an immediate and materially perceptible destruction or deprivation of the property itself. *See, e.g.*, *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, No. 20-2211, 2020 WL 7078735, at *7 (D. Kan. Dec. 3, 2020). “Direct physical loss of,” however, is a severing of an owner's possession of property, one which causes an immediate and materially perceptible inability to occupy and control property as intended.

8 Merriam-Webster, https://www.merriam-webster.com/dictionary/to (last visited May 21, 2021).

9 Merriam-Webster, https://www.merriam-webster.com/dictionary/of (last visited May 21, 2021).

10 Merriam-Webster, https://www.merriam-webster.com/dictionary/possession (last visited May 21, 2021); Merriam-Webster, https://www.merriam-webster.com/dictionary/possessive (last visited May 21, 2021).

It is undisputed that the executive orders had the effect of depriving business owners of the ability to occupy and control business properties as intended. But a question remains: What type of deprivation is required to trigger coverage? Neither the Eighth Circuit nor Minnesota courts have answered this directly, as they have not interpreted the exact phrase, “direct physical loss of.”[11] However, when interpreting “direct physical loss to” property, Minnesota courts have concluded that “direct physical loss” can exist without structural damage or tangible injury to property; “it is sufficient to show that the insured property is injured in some way.” *General Mills*, 622 N.W.2d at 152 (citing *Sentinel*, 563 N.W.2d at 300 (intangible contamination of property)). As such, a qualifying loss may arise from “an impairment of function and value” to property, as when legal regulations stymie a business's ability to lawfully provide its products. *Id.* (citing *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 98 N.W.2d 280, 293 (Minn. 1959)). Additionally, a qualifying loss may arise if a building's function is seriously impaired and the property is rendered useless. *Sentinel*, 563 N.W.2d at 300.

11 As mentioned above, the *Pentair* court read the “loss of” policy language as if it actually read “loss to.” 400 F.3d at 614, 616. Because the significance of “of” was not questioned or established in *Pentair*, and because the *Source Food* court then explicitly stated that the analysis would likely be different if a policy uses “of” rather than “to,” 465 F.3d at 838, the Court finds that the Eighth Circuit has not yet established binding precedent with respect to the precise question considered here.

***5** Here, with “of” instead of “to” in play, the situation is not completely analogous. However, the Court concludes that Minnesota courts would extend the same reasoning when interpreting “direct physical loss of” and only require some injury to an owner's ability to occupy and control property as intended, not an absolute or permanent dispossession.[12] The Court further concludes that if a government deems a property dangerous to use and an owner is thus unable to lawfully realize the business property's physical space to provide services, Minnesota courts would find this to be a cognizable impairment of function and value.

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In sum, the Court concludes that a plaintiff would plausibly demonstrate a direct physical loss of property by alleging that executive orders forced a business to close because the property was deemed dangerous to use and its owner was thereby deprived of lawfully occupying and controlling the premises to provide services within it. *Accord In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, No. 20-2005, 2021 WL 679109, at *8–10 (N.D. Ill. Feb. 22, 2021) ("Plaintiffs did suffer a direct 'physical' loss of property on their premises ... the pandemic-caused shutdown orders do impose a *physical* limit ... Plaintiffs cannot use (or cannot fully use) the physical space.").[13]

12 When the Minnesota Supreme Court has not decided an issue, federal courts must predict how it would resolve the issue, and while intermediate appeals court decisions are not binding, they are not to be disregarded unless the Court is convinced that the Minnesota Supreme Court would decide otherwise. *Harleysville Ins. Co. v. Physical Distribution Servs., Inc.*, 716 F.3d 451, 457 (8th Cir. 2013). The Court is not convinced of such here.

13 Courts have come to the same conclusion when interpreting policy language that involves "direct physical loss to." *See Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 20-265, 2020 WL 7249624, at *10 (E.D. Va. Dec. 9, 2020) ("[I]t is plausible that Plaintiff's experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders[.]"); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 800–01 (W.D. Mo. 2020) ("[A] physical loss may occur when the property is uninhabitable or unusable for its intended purpose.").

Seifert alleges just this, for he asserts that his businesses were forced to close by executive orders issued in response to the pandemic and, as a result, the businesses suffered an impairment of function and value, as he was deprived of occupying and controlling them to provide hair salon and barbershop services.

Thus, the Court finds that Seifert plausibly alleges direct physical losses of his property. Additionally, the business activities that were suspended while the executive orders were in effect certainly qualify as "operations" under the policies.[14] As IMT has allegedly refused to cover these losses, the Court will deny IMT's Motion to Dismiss with respect to Counts I and II as they relate to the business income provision.

14 With respect to the "period of restoration," the Court notes that this period ends when "the property at the described premises should [have been] repaired, rebuilt or replaced." (Policy at 110). "Replace" means, as relevant here, "to restore to a former place or position," which would include restoring an owner's full manifestation of possession over property to occupy and control it as intended. Merriam-Webster, https://www.merriam-webster.com/dictionary/replace (last visited May 21, 2021),

B. Exclusions

The virus exclusion precludes coverage for any loss or damage caused indirectly or directly by any virus that induces or is capable of inducing physical distress, illness or disease.[15] Furthermore, the virus exclusion is an anti-concurrent loss provision, which "exclude[s] coverage where any portion of the loss was caused or contributed to by an excluded loss." *Ken Johnson Props., LLC v. Harleysville Worcester Summary Ins. Co.*, No. 12-1582, 2013 WL 5487444, at *12 (D. Minn. Sept. 30, 2013).

15 In addition to the virus exclusion, IMT argues that the ordinance or law exclusion applies. However, IMT offers nothing to demonstrate that the executive orders specifically closing barbershops and hair salons had the force of law. Moreover, this exclusion likely only applies to ordinances or laws regulating the construction or repair of a property, or land use. *See, e.g.*, *Frank Van's Auto Tag, LLC v. Selective Ins. Co. of the Southeast.*,

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No. 20-2740, 2021 WL 289547, at *8–9 (E.D. Pa. Jan. 28, 2021). As such, IMT has not meet its burden to demonstrate that the ordinance or law exclusion applies. IMT also argues that the consequential losses exclusion would preclude coverage resulting from any loss of use. However, as the policies specifically insure against lost business income, interpreting "loss of use" to sweep in such income would undermine the central purpose of the policy provisions in dispute. As such, the Court finds this argument to be unavailing.

***6** Seifert alleges that his businesses would be open, "if not for the Governmental Closure Orders." (Am. Compl. ¶ 33.) Thus, he alleges a single cause of loss: the executive orders. Of course, the orders were issued in response to the growing cases of COVID-19 in Minnesota, which in turn were a result of the coronavirus spreading within the community. Yet, as the Amended Complaint demonstrates, when the insurance industry proposed this exclusion to state regulators, they were intent on excluding coverage "involving contamination by disease-causing agents" at the property.[16] (Am. Compl. ¶ 51).

16 Seifert also alleges that IMT should be estopped from invoking the virus exclusion because the industry made misrepresentations when they proposed it. However, the Minnesota Supreme Court has rejected the regulatory estoppel doctrine when an exclusion is clear and unambiguous, as it is here. *Anderson v. Minnesota Ins. Guar. Ass'n*, 534 N.W.2d 706, 709 (Minn. 1995); *see also SnyderGeneral Corp. v. Great Am. Ins. Co.*, 928 F. Supp. 674, 682 (N.D. Tex. 1996), *aff'd sub nom. SnyderGeneral Corp. v. Cont'l Ins. Co.*, 133 F.3d 373 (5th Cir. 1998). As such, the Court will grant IMT's Motion to Dismiss with respect to Count III.

The Court concludes that the policies' virus exclusion is intended to preclude coverage only when there has been some direct or indirect contamination of the business premises, not whenever a virus is circulating in a community and a government acts to curb its spread by means of executive orders of general applicability. *Accord Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 20-1239, 2021 WL 168422, at *14–15 (N.D. Ohio Jan. 19, 2021); *see also Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd.*, 489 F. Supp. 3d 1297, 1302–03 (M.D. Fla. 2020) (noting that no prior cases considering virus exclusions considered "the unique circumstances of the effect COVID-19 has had on our society—a distinction this Court considers significant"). Extending the causal chain beyond situations involving a direct or indirect contamination of business premises would extend the chain too far; in this case, it would transform a virus exclusion into a government-order or pandemic exclusion, which is not what the parties intended. As such, the operative question is whether Seifert's losses involved a viral contamination at the covered premises.

No. Seifert's business income losses are all alleged to have been caused by executive orders, ones which shuttered every barbershop and hair salon irrespective of whether they had been contaminated. Moreover, Seifert does not allege that his businesses suffered any actual contamination or that staff or patrons either contracted or circulated the coronavirus. The Court therefore finds that Seifert's losses, as alleged, are not precluded by the virus exclusion and will deny IMT's Motion to Dismiss in this regard.

ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

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1. Seifert's Motion for Extension of Time [Docket No. 29] is **GRANTED**;

2. IMT's Motion to Dismiss [Docket No. 37] is **DENIED in part and GRANTED in part** as follows:

    a. The Motion is denied with respect to Counts I and II as they relate to coverage under the business income provision;

    b. The Motion is granted with respect to Counts I and II as they relate to coverage under the civil authority provision; and

    c. The Motion is granted with respect to Count III.

All Citations

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United States District Court,
N.D. Illinois, Eastern Division.

LEGACY SPORTS BARBERSHOP LLC, et al., Plaintiffs,
v.
CONTINENTAL CASUALTY COMPANY, Defendant.

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|
Signed 06/01/2021

Attorneys and Law Firms

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Brent R. Austin, Michael Lee McCluggage, Caroline Malone, Sarah Kinter, Eimer Stahl LLP, Chicago, IL, Robert Edward Dunn, Pro Hac Vice, Eimer Stahl LLP, San Jose, CA, for Defendant.

ORDER

Charles P. Kocoras, United States District Judge

***1** Before the Court is Defendant Continental Casualty Company's ("Continental") Motion to Dismiss Plaintiffs Legacy Sports Barbershop LLC ("Legacy Barbershop"), Legacy Barber Academy ("Legacy Academy"), and Panach Corp.'s ("Panach") (collectively, "Plaintiffs") First Amended Class Action Complaint ("FAC") under Federal Rule of Civil Procedure 12(b)(6). For the following reasons, the Court denies the motion.

STATEMENT

For the purposes of this motion, the Court accepts as true the following facts from the FAC. *Alam v. Miller Brewing Co.*, 709 F.3d 662, 665-66 (7th Cir. 2013). All reasonable inferences are drawn in Plaintiffs' favor. *League of Women Voters of Chicago v. City of Chicago*, 757 F.3d 722, 724 (7th Cir. 2014).

Plaintiffs are a barbershop, barbering school, and upscale hair salon that have similar insurance policies with Continental (the "Policies"). Legacy Barbershop and Legacy Academy are located in Virginia Beach, Virginia, while Panach is found in Santa Monica, California.

Plaintiffs bring this action seeking coverage under the Policies for losses suffered because of COVID-19. Plaintiffs seek coverage under the Policies' Business Income and Extra Expense coverage provisions, which supply coverage for losses as the result of "direct physical loss of or damage to the Covered Property." Plaintiffs also seek coverage under the Civil Authority coverage provision, which provides coverage for losses as the result of the government prohibiting access to the insured's premises due to "direct physical loss of or damage to" another property. Finally, Plaintiffs seek coverage under a "Sue and Labor" provision, which requires the insured to mitigate damages after a covered loss and keep a record of

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expenses "for consideration in the settlement of a claim."

Plaintiffs allege that the presence of COVID-19 on their premises required repairs and alterations to their properties. Specifically, Plaintiffs allege that they installed a new air filtration system, built a new outdoor patio to accommodate patrons outside, installed social distancing barriers and germ sanitation stations, and removed 60% of their workstations to allow for social distancing indoors. Additionally, Plaintiffs allege that the presence of COVID-19 at properties other than their own necessitated shutdown orders by the state governments, which prohibited access to their properties. Plaintiffs allege that they lost business income and incurred extra expenses because of the presence of COVID-19 in their businesses, the necessary alterations, and state mandated closure orders.

Based on these events, Plaintiffs filed the FAC seeking a declaratory judgment that their losses are covered under the Business Income, Extra Expense, Civil Authority, and Sue and Labor provisions of the Policies. Additionally, Plaintiffs allege that Continental breached the Policies by denying coverage under those provisions. Continental now moves to dismiss Plaintiffs' FAC.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the sufficiency of the complaint, not the merits of the case." *McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873, 878 (7th Cir. 2012). The allegations in the complaint must set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A plaintiff need not supply detailed factual allegations, but it must supply enough factual support to raise its right to relief above a speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

***2** A claim must be facially plausible, meaning that the pleadings must "allow ... the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The claim must be described "in sufficient detail to give the defendant 'fair notice of what the ... claim is and the grounds upon which it rests.' " *E.E.O.C. v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are insufficient to withstand a 12(b)(6) motion to dismiss. *Iqbal*, 556 U.S. at 678.

Continental argues that each of Plaintiffs' claims must be dismissed because there was no "physical loss of or damage to" the properties. Defendants also argue that any losses caused by a virus are excluded under the Policies. We address each issue in turn.

I. Loss of or Damage to the Properties

Under Illinois law,[1] the construction of an insurance policy is a question of law. *Country Mut. Ins. Co. v. Livorsi Marine, Inc.*, 222 Ill. 2d 303, 311 (2006). An insurance policy is to be construed as a whole and requires the court to find and give effect to the true intentions of the contracting parties. *First Ins. Funding Corp. v. Fed. Ins. Co.*, 284 F.3d 799, 804 (7th Cir. 2002) (applying Illinois law). "If the words

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used in the policy are clear and unambiguous, they must be given their plain, ordinary, and popular meaning." *Cent. Ill. Light Co. v. Home Ins. Co.*, 213 Ill.2d 141, 153 (2004). However, "[a] policy provision is not rendered ambiguous simply because the parties disagree as to its meaning." *Founders Ins. Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010).

1 The parties cite to Illinois, Virginia, and California law. As the legal standards appear to be similar in each state, we cite to only Illinois law for clarity and readability for purposes of this motion only. *See* *Copp v. Nationwide Mut. Ins. Co.*, 279 Va. 675, 681 (2010) (noting standard for insurance policy interpretation); *Hartford Cas. Ins. Co. v. Swift Dist., Inc.*, 59 Cal.4th 277, 288 (2014) (same).

Each of Plaintiffs' claims hinges upon the meaning of "direct physical loss of or damage to" the Properties. Continental argues that there is no "loss of or damage to" the properties because that phrase requires physical damage or alteration, and Continental says Plaintiffs do not allege physical damage or alteration to the properties. Plaintiffs respond that allegations of physical damage or alteration are not needed and, even if they are, Plaintiffs have alleged just that. While we agree with Continental that the Policies' language requires physical damage or alteration, we believe Plaintiffs have alleged the requisite physical damage and alteration.

We previously held that "physical loss of or damage to" property requires "physical alteration or structural degradation of the property." *Bradley Hotel Corp. v. Aspen Specialty Insurance Co.*, 2020 WL 7889047, at *3 (N.D. Ill. 2020) (quoting *Sandy Point Dental, P.C. v. Cincinnati Insurance Co.*, 2020 WL 5630465, at *2 (N.D. Ill. 2020)). This conclusion is still in accordance with many courts in this District and around the country, and we reaffirm it today. *See id.* Thus, we believe a plaintiff needs to allege that their property underwent a "distinct, demonstrable, physical alteration" as the result of COVID-19. *See* *10E, LLC v. Travelers Indemnity Co. of Conn.*, 483 F. Supp. 3d 828, 836 (C.D. Cal. 2020).

***3** We granted the motion to dismiss in *Bradley Hotel* because the plaintiff only alleged the loss of use of their property, and not any physical damage or a tangible alteration. Plaintiffs here, however, allege more than just loss of use. Plaintiffs allege that COVID-19 was present on their properties and that their properties underwent physical alterations. For example, Plaintiffs allege that, as a result of the presence of COVID-19, they needed to build a new outdoor patio, install social distancing barriers and germ sanitation stations, and remove work stations in order to promote proper social distancing. Thus, we believe that Plaintiffs have sufficiently alleged that the Properties underwent a "distinct, demonstrable, physical alteration" and therefore suffered "physical loss of or damage to" the Properties. The Motion to Dismiss on this basis is thus denied.

II. Policy Exclusion

Defendants next argue that any losses due to COVID-19 are excluded from coverage. "The burden is on the insurer to establish that a policy exclusion applies, and its applicability must be definite and free from doubt." *Czapski v. Maher*, 2011 IL App (1st) 100948, ¶ 17. We previously dismissed claims under insurance policies in the COVID-19 context that involved unequivocal virus exclusions. *See* *Riverwalk Seafood Grill, Inc. v. Travelers Cas. Ins. Co.*

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of Amer., 2021 WL 81659 (N.D. Ill 2021), at *3; *Mashallah, Inc. v. West Bend Mut. Ins. Co.*, 2021 WL 679227, at **2–3 (N.D. Ill. 2021). The policies in those cases excluded from coverage "loss or damage caused by or resulting from any virus." *Mashallah*, 2021 WL 679227, at *2. We found that this language is "clear, sweeping, and all-encompassing" and therefore any losses suffered due to COVID-19 were excluded from coverage under the policies. *Id.* (quoting *Riverwalk Seafood*, 2021 WL 81659, at *3); *see also M&E Bakery Holdings, LLC v. Westfield Nat'l Ins. Co.*, 2021 WL 1837393, at *4 (N.D. Ill. 2021) (citing *Riverwalk Seafood* and *Mashallah* approvingly and granting motion to dismiss due to an unambiguous virus exclusion).

Here, however, we do not believe that the policy language is "clear, sweeping, and all-encompassing" or that its applicability is "definite and free from doubt." The Policies do not specifically exclude from coverage damage caused by viruses, but instead exclude from coverage damage caused by the "[p]resence, growth, proliferation, spread or any activity of 'fungi,' wet or dry rot, or 'microbes.' " Dkt. 19-1, pg. 96; Dkt. 19-2, pg. 104. "Microbes" are defined as "any non-fungal micro-organism or non-fungal, colony-form organism that causes infection or disease." Dkt. 19-1, pg. 96; Dkt. 19-2, pg. 104. The exclusion, though, says that " 'microbe' does not mean microbes that were transmitted directly from person to person." Dkt. 19-1, pg. 96; Dkt. 19-2, pg. 104.

Thus, it is not clear to us whether "microbe" as defined under the Policies includes a virus such as SARS-CoV-2 because that virus, of course, can spread from person to person. We therefore do not believe Continental has established that the claims are excluded from coverage at this stage.

In sum, we believe that Plaintiffs have alleged that they may be entitled to coverage under the Policies. "The Court emphasizes that Plaintiffs have merely pled enough facts to proceed with discovery. Discovery will shed light on the merits of Plaintiffs' allegations, including the nature and extent of COVID-19 on their premises." *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 805 (W.D. Mo. 2020).

Accordingly, Continental's Motion to Dismiss is denied.

CONCLUSION

For the reasons stated above, the Court denies Continental's motion to dismiss (Dkt. # 24). Continental must answer the FAC within 21 days of this Order. Telephonic status is set for July 13, 2021 at 10:40 a.m. It is so ordered.

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