

Courts Across The Country Continue To Rule On Covid-Related Coverage Claims, With Substantial Majority Finding No Coverage

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Case	Jurisdictional Law	Key Holdings and Notable Findings
<i>Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London</i> , No. 00375 (Pa. Ct. Comm. Pl. Oct. 26, 2020)	Pennsylvania	<ul style="list-style-type: none">Restaurant's coverage suit survives motion to dismiss. Accepting allegations as true, court concludes that dismissal would be premature given the "rapidly evolving" law relating to Covid-related insurance coverage.
<i>Founder Inst. Inc. v. Hartford Fire Ins. Co.</i> , 2020 WL 6268539 (N.D. Cal. Oct. 22, 2020)	California	<ul style="list-style-type: none">Startup company's coverage suit dismissed because even "[a]ssuming—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."Court rejects policyholder's attempt to "wriggle out of the exclusion by attaching a different label to its loss" in characterizing it as a loss due to respiratory droplets rather than a loss due to a virus.In an "abundance of caution," court allows policyholder to re-plead, but deems it "unlikely that Founder will ever be able to state a claim," noting that "its theory of coverage appears frivolous."
<i>Boxed Foods Co., LLC v. California Capital Ins. Co.</i> , 2020 WL 6271021 (N.D. Cal. Oct. 26, 2020)	California	<ul style="list-style-type: none">Restaurants' business income and civil authority claims dismissed because "Pathogenic Organisms Exclusion" bars coverage. Exclusion applies to "loss or damage caused by, resulting from, contributing to or made worse by the actual, alleged or threatened presence of any pathogenic organism, whether direct or indirect, proximate or remote, in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy."

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		<ul style="list-style-type: none"> • Court rejects policyholders' assertion that exclusion is ambiguous or does not apply to civil authority coverage, noting that exclusion expressly applies to any loss directly or indirectly caused by a virus. • Court rules that discovery is unnecessary to determine the scope and validity of the exclusion because policyholders' proffered interpretations are unreasonable.
<i>West Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.</i> , 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020).	California	<ul style="list-style-type: none"> • Hotels' coverage suit dismissed based on virus exclusion, which precludes coverage for loss or damage "caused directly or indirectly by . . . [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Exclusion is unambiguous and was conspicuously displayed in policy. • Court rejects application of "reasonable expectations" doctrine, noting that it "does not give courts a license to refuse to enforce contract terms based on one party's expectations." • "Direct physical loss of or damage to property," even if undefined in the policy, "plainly requires, at minimum, that the loss or damage be physical in nature." Therefore, "temporary loss of economically valuable use" of hotels due to government orders does not trigger coverage under policy. • Civil authority coverage unavailable for additional reason that policyholders failed to provide "sufficient non-conclusory allegations" regarding damage to nearby properties, and instead merely recited the policy language without specifying facts that could support recovery. • Court declines to grant leave to amend complaint, noting that amendment would be "futile."
<i>Vizza Wash, LP v. Nationwide Mut. Ins. Co.</i> , 2020 WL 6578417 (W.D. Tex. Oct. 26, 2020)	Texas	<ul style="list-style-type: none"> • Car wash company's coverage suit fails to state a claim because even assuming that claims are encompassed by business income or civil authority provisions, coverage is barred by virus exclusion. Exclusion applies to "loss or damage caused directly or indirectly by . . . [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease," "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." • Court rejects policyholder's assertion that exclusion does not apply because virus was not actually present at insured properties; policy language excludes loss even "indirectly" caused by a virus. • Court rejects policyholder's contention that exclusion is ambiguous, stating that "the fact that [Nationwide] could have used even more specific language does not automatically render ambiguous the language that [it] actually used." (Emphasis in original). • Court dismisses extra-contractual bad faith and statutory claim, explaining that such claims fail where, as here, the insurer has properly denied coverage. • Court also dismisses claims against insurance agent as a matter of law, citing absence of allegations that agent made any misrepresentations or omissions in order to induce purchase of the policy. • Leave to amend is denied because future attempts to cure defects would be "futile."
<i>Uncork & Create LLC v. Cincinnati Ins. Co.</i> , 2020 WL 6436948 (S.D. W.	West Virginia	<ul style="list-style-type: none"> • Event planning company's coverage suit dismissed based on failure to allege "accidental physical loss or accidental physical damage."

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Va. Nov. 2, 2020)		<ul style="list-style-type: none"> • Court distinguishes West Virginia case in which physical damage or loss was found notwithstanding absence of physical alteration to insured property, explaining that in that case, nearby rock fall made insured property uninhabitable due to physical threat, whereas here, Covid “has no effect on the physical premises of a business.” • Court notes that “majority of courts to address the issue . . . have found that COVID-19 and governmental orders closing businesses to slow the spread of the virus do not cause physical damage or physical loss to insured property,” and deems the reasoning of those cases to be persuasive. • Court rejects distinction based on whether a complaint alleges presence of virus on the premises in order to determine “physical loss or damage.” See <i>Studio 417, Inc. v. Cincinnati Ins. Co.</i>, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020) (discussed in July/August 2020 Alert) and <i>Seifer v. IMT Ins. Co.</i>, 2020 WL 6120002 (D. Minn. Oct. 16, 2020) (discussed in October 2020 Alert). Court notes that even if complaint includes “artful pleading as to the likelihood of the presence of the virus” on insured property, the virus “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.”
<i>Raymond H. Nahmad DDS PA v. Hartford Cas. Ins. Co.</i> , 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020)	Florida	<ul style="list-style-type: none"> • Dentist’s coverage suit dismissed for failure to allege “direct physical loss of or physical damage to Covered property.” • Court observes that “[n]umerous other courts across the country have dismissed substantially similar COVID-19-related lawsuits at this stage for failing to plead actionable claims under the insurance policy.” (Citing cases discussed in our September and October 2020 Alerts). • “Federal courts in Florida that have examined whether economic losses caused by COVID-19 business closures or suspensions constitute a ‘direct physical loss’ or ‘physical harm’ have rejected Plaintiffs’ arguments.” • Civil authority coverage unavailable for the additional reason that the complaint fails to allege that access to the insured premises was prohibited by order of civil authority. “Rather, Plaintiffs allege that they suspended or reduced their practice because two government orders required ‘that non-emergent or elective dental care be postponed indefinitely.’” • Even if policyholder alleged facts to support coverage, a virus exclusion applies. Exclusion applies notwithstanding policyholder’s assertion that loss was caused by government orders rather than virus itself.
<i>Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.</i> , 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020)	Mississippi	<ul style="list-style-type: none"> • Restaurant’s coverage claims dismissed based on failure to allege “direct physical loss of or damage to property.” Policyholder’s “contention that loss of property reasonably includes a loss of usability is not sustainable.” • Non-Covid cases from other jurisdictions that deem loss of use sufficient to trigger coverage are distinguishable because they involved a “pervasive, physical impact on the insured property for which each court concluded was tantamount to physical loss or damage.” • Coverage is barred, in any event, by a virus exclusion because complaint expressly states that business was closed as a result of the Covid pandemic.

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<i>MAC Prop. Grp. LLC v. Selective Fire and Cas. Ins. Co.</i> , No. L-2629-20 (N.J. Super. Ct. Nov. 5, 2020)	New Jersey	<ul style="list-style-type: none"> Bakery's business loss and civil authority coverage claims dismissed because virus exclusion bars coverage. Exclusion contains anti-concurrent causation provision, which excludes coverage "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." In addition to virus exclusion, "Plaintiff points to no direct physical loss or damage to property which resulted in the order of civil authority."
<i>Indep. Barbershop, LLC v. Twin City Fire Ins. Co.</i> , 2020 WL 6572428 (W.D. Tex. Nov. 4, 2020)	Texas	<ul style="list-style-type: none"> Barbershop's Covid coverage suit survives motion to dismiss only with respect to one claim: potential coverage under a "Virus Endorsement" that allows for thirty days of coverage for business interruption if "loss or damage to property caused by . . . virus" causes a suspension of operations and if "Time Element Coverage applies." Policyholder's argument that pandemic and government orders (rather than virus) caused the loss fails because exclusionary provision includes the following language: "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Court also rejected regulatory estoppel argument (i.e., assertion that insurance industry misled state regulators by representing that Virus Endorsement was not an exclusion but rather a clarification of existing coverage), finding "no basis in Texas law for applying the doctrine of regulatory estoppel." Court will determine class certification issue at a later time.
<i>Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.</i> , 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020)	Hawaii	<ul style="list-style-type: none"> Retail store's business interruption and civil authority coverage claims fail as a matter of law based on lack of "direct physical loss of or damage to" property. Court cites "overwhelming majority of courts" that have reached the same conclusion. An "imminent threat" of contamination is insufficient to trigger coverage; "[t]here are no facts plausibly alleging an actual exposure at one or more Sand People stores, much less that an actual physical exposure caused them to close a particular store or set of stores." Court rejects policyholder's assertion that loss of use of property or temporary "deprivation of the functionality of property" triggers coverage. Civil authority coverage unavailable for additional reason that "preventative closure orders cannot support a causal link of direct physical loss of or damage to property."
<i>DAB Dental PLLC v. Main St. Am. Prot. Ins. Co.</i> , No. 20-CA-5504 (Fla. Cir. Ct. Nov. 10, 2020)	Florida	<ul style="list-style-type: none"> Dental practice's coverage suit dismissed. Allegations that presence of Covid particles at insured property rendered it uninhabitable or unusable do not constitute allegations of direct physical loss or damage; actual tangible or structural damage is required. Even if allegations were sufficient to give rise to possibility of coverage, virus exclusion applies. Court rejects assertion that exclusion is inapplicable because loss was caused by executive order, rather than virus. "This is a narrow application of the Exclusion to the alleged facts which is not supported by a plain and reasonable reading of the language. . . . [T]he Executive Order would not have been issued had COVID-19 not created a public health concern necessitating the Order." "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. As such, it is also not a Covered Cause of Loss and cannot serve as the basis for Civil Authority coverage."

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<i>Dime Fitness, LLC v. Markel Ins. Co.</i> , 2020 WL 6691467 (Fla. Cir. Ct. Nov. 10, 2020)	Florida	<ul style="list-style-type: none"> • Fitness company’s coverage claims dismissed based on failure to allege direct physical loss. Business income loss and restricted access are not direct physical loss. • “[T]he Court must evaluate whether the admittedly pure economic loss alleged here meets the Policy definition of a ‘covered cause of loss.’ It does not. A ‘covered cause of loss’ is a ‘risk of direct physical loss.’ ‘Direct physical loss’ has been defined by other courts—the consensus of which is that ‘direct physical loss’ requires a ‘physical alteration of the property.’” • Civil authority coverage fails for the additional reason that “the Executive Order was issued to address a public health crisis. There was no damage to other property which caused the issuance of the Executive Order. Nor was the Executive Order issued in response to a dangerous physical condition that caused property damage.” • Court rules that in any event, coverage is barred by the virus exclusion. Policyholder’s assertions that exclusion is inapplicable or limited by concurrent causation doctrine are without merit.
<i>N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co.</i> , 2020 WL 6501722 (D.N.J. Nov. 5, 2020)	New Jersey	<ul style="list-style-type: none"> • Restaurant’s coverage suit dismissed based on virus exclusion. Anti-concurrent preamble to exclusion, which states that loss is excluded “regardless of any other cause or event that contributes concurrently or in any sequence to the loss,” negates policyholder’s assertion that loss was caused by executive order rather than virus. • Court rejects policyholder’s argument that New Jersey law requires proximate causation for application of exclusionary language, holding that contractual language designed to avoid the efficient proximate causation doctrine is enforceable.
<i>Mace Marine, Inc. v. Tokio Marine Specialty Ins. Co.</i> , No. 20-CA-120 (Fla. Cir. Ct. Oct. 9, 2020) <i>Horizon Dive Adventure, Inc. v. Tokio Marine Specialty Ins. Co.</i> , No. 20-CA-159 (Fla. Cir. Ct. Oct. 20, 2020)	Florida	<ul style="list-style-type: none"> • Two scuba and snorkeling companies’ coverage suits dismissed in summary orders. Court states that “direct” and “physical” modify the term “loss” in the policy, and impose a requirement that “the damage be actual.”
<i>Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.</i> , No. 20 STCV16681 (Cal. Super. Ct. Nov. 9, 2020)	California	<ul style="list-style-type: none"> • Restaurant’s coverage suit dismissed for failure to allege “direct physical loss of or damage to property.” “Plaintiff has alleged no facts suggesting Plaintiff’s operations were suspended due to a physical alteration of insured property. . . . In addition, Plaintiff did not allege facts suggesting the Orders prohibited access to Plaintiff’s premises as a result of damage to property within one mile as required for Civil Authority Coverage and Plaintiff did not allege facts suggesting its premises were not accessible due to the Orders.” • Court rejects policyholder’s contention that policy “can be reasonably construed to provide coverage for a loss resulting from Plaintiff’s inability to use or access its property.” Court distinguishes cases involving loss of use because those cases involved physical damage to adjacent property or dispossession of property, neither of which exist here. • “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.” • Coverage is also barred by virus exclusion. Court rejects policyholder’s assertion that “predominating cause” of loss were the government orders (rather than the virus).

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<i>Chattanooga Profl Baseball LLC v. Nat'l Cas. Co.</i> , 2020 WL 6699480 (D. Ariz. Nov. 13, 2020)	California, Idaho, Indiana, Maryland, Oregon, South Carolina, Tennessee, Texas, Virginia, West Virginia (Court applies the law of the “state which the parties understood was to be the principal location of the insured risk”; here, the insured risk for each Plaintiff is the state where the team resides)	<ul style="list-style-type: none"> • Minor League Baseball (“MLB”) association’s Covid-related coverage claims dismissed based on virus exclusion. Court rejects policyholders’ assertions that losses were caused by factors other than the virus (e.g., by government orders or by the MLB’s failure to provide players for games). • Court also rejects regulatory estoppel argument, stating that the doctrine has been “rejected by virtually every other state and federal court to address the issue [other than New Jersey].” (Citations omitted).
<i>Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.</i> , No. CV-20-932117 (Ohio Ct. Comm. Pl. Nov. 17, 2020)	Ohio	<ul style="list-style-type: none"> • Salons and Furniture stores’ claims for business interruption, extra expense and civil authority coverage withstand motion to dismiss. • Court accepts as true for purposes of motion to dismiss policyholders’ allegations that virus was physically present at insured property and caused damage to that property.
<i>Hill & Stout PLLC v. Mut. of Enumclaw Ins. Co.</i> , No. 20-2-07925-1 (Wash. Super. Ct. Nov. 13, 2020)	Washington	<ul style="list-style-type: none"> • Dental office’s coverage suit withstands motion to dismiss. • Court deems “physical loss of” ambiguous.
<i>Brian Handel D.M.D., P.C. v. Allstate Ins. Co.</i> , 2020 WL 6545893 (E.D. Pa. Nov. 6, 2020)	Pennsylvania	<ul style="list-style-type: none"> • Dental office’s claims for business interruption and civil authority coverage dismissed based on failure to plead “direct physical loss of or damage to” property. • Court rejects policyholder’s “loss of use” argument, noting that it would need to allege that the functionality of the property “was nearly eliminated or destroyed” or “was made useless or uninhabitable.” Reduced operations or income do not meet this standard. • Civil authority coverage claim fails for additional reason that government orders limited (rather than prohibited) access to insured property. • Court rules that, in any event, coverage is barred by virus exclusion. • Court rejects policyholder’s regulatory estoppel argument.
<i>Graspa Consulting, Inc. v. United Nat'l Ins. Co.</i> , No. 20-23245 (S.D. Fla. Nov. 17, 2020)	Florida	<ul style="list-style-type: none"> • Restaurant entity’s coverage suit dismissed based on failure to plead “direct physical loss of or damage to” property. • Under Florida law, “direct physical” modified both “loss” and “damage,” which means that the “damage must be actual.” Court states that “it is not plausible how the allegations in this case meet that threshold when Plaintiff’s business merely suffered economic losses as opposed to anything tangible, actual, or physical.”

Authors and Contacts

[Bryce Friedman](#)

Partner

bfriedman@stblaw.com

[+1-212-455-2235](tel:+12124552235)

