UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 20-3211

ORAL SURGEONS, PC,

Plaintiff-Appellant,

v.

THE CINCINNATI INSURANCE COMPANY,

Defendant-Appellee.

BRIEF OF APPELLEE THE CINCINNATI INSURANCE COMPANY

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CORPORATE DISCLOSURE STATEMENT

CINCINNATI FINANCIAL CORPORATION is the parent corporation of THE CINCINNATI INSURANCE COMPANY and is the only publicly held company owning ten percent (10%) or more of the stock of THE CINCINNATI INSURANCE COMPANY.

L.R. 34B NOTICE OF PENDING CASES

Whiskey River on Vintage, Inc. v. Ill. Cas. Co., No. 4:20-cv-185-JAJ, 2020 WL 7258575 (S.D. Iowa Nov. 30, 2020) (Appeal No. 20-3707, filed Dec. 29, 2020)

Zwillo V, Corp. v. Lexington Ins. Co., No. 20-cv-00339-RK, 2020 WL 7137110 (W.D. MO. Dec. 2, 2020) (Appeal No. 21-1015, filed Jan. 5, 2021)

Whiskey River and *Zwillo* also involve claims for business income, extra expense, and civil authority coverage for financial losses allegedly sustained as a result of the Coronavirus and related government orders. The property insurance policies at issue in those cases contain substantially similar language to that in the policy here, requiring direct physical loss or damage to property for each of the coverages plaintiffs seek. *Whiskey River* and *Zwillo* grant judgment in favor of the defendant insurers pursuant to Fed.R.Civ.P. 12(c) and Fed.R.Civ.P. 12(b)(6), respectively.

The district courts' analyses in these cases is persuasive. Nonetheless, Cincinnati opposes consolidation of the oral arguments in these cases because each involves different plaintiffs and defendants, and the facts surrounding the insurance claims are distinct. In the alternative, if this Court orders the cases be heard together under Eighth Circuit Local Rule 34B, it should increase the argument time proportionately in order to avoid prejudice to Defendant-Appellee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other

STATEMENT OF THE CASE

INTRODUCTION

This case involves a claim for lost income under a commercial property insurance policy without any accompanying physical loss or damage to Oral Surgeons' property. It arises from temporary restrictions on the scope of Oral Surgeons' medical practice that were ordered by the Governor of Iowa to prevent the spread of COVID-19. The Policy at issue supplies property insurance coverage. It is designed to indemnify for physical loss or damage to property, such as in the case of a fire or storm. In that context, it can cover loss of business income caused by physical loss or damage to property. The virus, and the disease it causes, hurts people but does not damage property.

Oral Surgeons seeks the Policy's Business Income, Extra Expense and Civil Authority coverages. But, because these coverages are part of a property insurance policy, they only protect Plaintiff for income losses tied to physical loss or damage to property. They do not cover purely economic losses caused by governmental or other efforts to protect people from disease. The allegations of Oral Surgeons' Petition establish that it has not sustained any losses of income attributable to direct physical loss or damage to property. Oral Surgeons asks for a vast extension of Iowa insurance law

that would create coverage from whole cloth. This request is unmerited under the Policy's plain meaning, existing Iowa law, and over 70 directly applicable state and federal cases decided across the nation since May 2020. For all these reasons, and for the other reasons discussed below, Oral Surgeons' action was properly dismissed, and the District Court's dismissal should be affirmed.

A. Allegations of the Complaint

The Petition includes the following relevant factual allegations:

> Oral Surgeons performs oral and maxillofacial surgery services across the greater Des Moines metropolitan area. (Petition, JA015 at ¶ 6).
>
> In an effort to slow the spread of the novel coronavirus COVID-19, the State of Iowa issued a Proclamation of Disaster Emergency on or about March 26, 2020 (the "Order"), which in part, restricted dentists, including practitioners of OSPC, from performing any dental procedures other than in emergency cases. The Order remained in effect through May 8, 2020, which thereafter the State of Iowa allowed for the re-opening of dental facilities and practices upon adherence to the *Guidelines for the Safe Transition Back to Practice* as adopted by the Iowa Dental Board. (Petition, JA016 at ¶ 8).
>
> As a result of the Order, Oral Surgeons ceased performing non-emergency dental procedures during March 26-May 8, 2020. (Petition, JA016 ¶¶ 8, 16).

Appellant's Statement of the Case does not assert that any physical loss or damage to Oral Surgeons' property was alleged in the Petition. Also, no physical alteration to the property is claimed. Rather, Oral Surgeons

asserts that it "was unable to access its Property" (Entry ID: 4984447, App. Br., p. 12).[1] But, this is not alleged in its Petition and is contrary to the terms of the Order on which it relies. The Order temporarily restricted some of Oral Surgeons' dental procedures, but it allowed other procedures. It did not preclude access to or use of Oral Surgeons' premises.

B. Oral Surgeons' Commercial Property Insurance Policy

Cincinnati issued Policy No. ECP 036 57 36 to Oral Surgeons, PC and Ingersoll Real Estate, LC for the policy period January 1, 2019 to January 1, 2022. The pertinent forms in the Policy for purposes of Oral Surgeons' claim are forms FM 101 05 16 and FA 213 05 16. These are the main property and Business Income coverage forms, respectively.

The Policy's main insuring agreement provides that Cincinnati "will pay for direct 'loss'[2] to Covered Property at the 'premises' caused by or resulting from any Covered Cause of Loss." (JA052). "Loss" is defined as "accidental physical loss or accidental physical damage." (JA087). Covered Cause of Loss means direct "loss" that is neither excluded nor limited. (JA054).

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[1] Citations to page numbers of Oral Surgeons' brief refer to the page numbers supplied by Oral Surgeons in the lower margin of its brief. For example, "(App. Br., p. __)."

[2] In these policy forms, terms that are defined in the policy form are placed in quotes.

The Policy further provides certain Business Income and Extra Expense coverage. These are found in the main form FM 101 05 16 as coverage extensions, and in the Business Income form, FA 213 05 16. The same language is used in each form. The main form's Business Income coverage is limited to $25,000. The Business Income form's coverage is limited to the amount of coverage stated on the Policy's declarations page. Business Income coverage pays for income losses caused by "the necessary 'suspension' of your [Oral Surgeons'] 'operations' during the 'period of restoration'. (JA067; JA133). "The 'suspension' must be caused by direct 'loss' to property at a 'premises' caused by or resulting from any Covered Cause of Loss." (JA067; JA133). The Policy defines "period of restoration" to mean the period of time that begins at the time of "loss" and ends the earlier of:

> **(1)** The date when the property at the "premises" should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
>
> **(2)** The date when business is resumed at a new permanent location.

(JA087-JA088; JA141).

Nowhere does the Policy provide coverage for loss of business income or loss of use of property at the premises in the absence of physical harm to the property.

The Extra Expense coverage provides in pertinent part:

> **(2) Extra Expense**
>
> > **(a)** We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain (as described in Paragraphs **(2)(b), (c)** and **(d))** during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss. . . .

(JA068; JA133-JA134).

The Civil Authority coverage provides:

> **(3) Civil Authority**
>
> When a Covered Cause of Loss causes damage to property other than Covered Property at a "premises", we will pay for the actual loss of "Business Income" and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the "premises", provided that both of the following apply:
>
> > **(a)** Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
> >
> > **(b)** The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.
> >
> > This Civil Authority coverage for "Business Income" will begin immediately after the time of that action and will apply for a period of up to 30 days from the date of that action.

> This Civil Authority coverage for Extra Expense will begin immediately after the time of that action and will end:
>
> **1)** 30 consecutive days after the time of that action; or
>
> **2)** When your "Business Income" coverage ends; whichever is later.

(JA068; JA134).

Thus, fundamentally, the Business Income, Extra Expense and Civil Authority coverages only apply if there is direct physical loss or damage to property, such as would happen from fire or windstorm.

THE APPLICABLE LAW

The requirements for stating a claim are governed by federal law. Oral Surgeons' Petition was required to provide enough facts to state a claim for relief that was plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Legal conclusions and other conclusions not supported by facts may not be considered in determining a motion to dismiss. *Zutz v. Nelson*, 601 F.3d 842, 848 (8th Cir. 2010). Documentary materials not attached to but "necessarily embraced by" the allegations in the complaint are properly considered. *Hughes v. City of Cedar Rapids, Iowa,* 840 F.3d 987, 998 (8th Cir. 2016). Here, those documents include the insurance Policy and the government Order that is alleged in and underlies the Petition.

The substantive law applicable to the interpretation of the Policy is Iowa law. In *National Sur. Corp. v. Westlake Inv., LLC*, 880 N.W.2d 724, 733-34 (Iowa 2016) (internal citations omitted), the Iowa Supreme Court summarized the core legal principles applying to insurance policies:

> When we interpret an insurance policy, we determine the meaning of the words that govern its legal effect. The cardinal principle guiding our interpretation is that the intent of the parties at the time the policy was sold controls. To determine the parties' intent, we look to the language of the policy unless the meaning of that language is ambiguous. When the language of the policy is ambiguous, we adopt the construction most favorable to the insured. Because insurance policies are contracts of adhesion, an insurer assumes a duty to define in clear and explicit terms any limitations or exclusions to the scope of coverage a policy affords. Nevertheless, where no ambiguity exists, we will not write a new policy to impose liability on the insurer.
>
> The mere fact that parties disagree as to the meaning of terms in an insurance policy does not establish the policy is ambiguous. Rather, we determine whether an insurance policy is ambiguous by applying an objective test. Policy language is ambiguous when, considered in the context of the policy as a whole, it is susceptible to two plausible interpretations. Thus, we determine whether an ambiguity exists not by examining clauses seriatim, but by interpreting the policy in its entirety, including all endorsements, declarations, or riders attached.
>
> When interpreting an insurance policy, we give each policy term not defined in the policy its ordinary meaning. We determine the ordinary meaning of the words in an insurance policy from the standpoint of a reasonable ordinary person, not from the standpoint of a specialist or an expert. We strive to interpret every term in an insurance policy in a manner that will not render it superfluous unless it is evident that adopting an

interpretation giving meaning to a term would be unreasonable when we consider the term in context.

SUMMARY OF ARGUMENT

The physical, emotional, and economic devastation wreaked by the Coronavirus and government orders intended to slow its human-to-human transmission is unprecedented. But, the fundamental issue before the Court is not. The insurance Policy is a contract and, under well-established Iowa law, it must be treated as such. This means that the unambiguous language of the Policy must be enforced as written. Nationwide, courts have recognized that sympathy is not a substitute for the rules of contract interpretation. Nor is it a basis to hold insurers liable for risks they did not underwrite and for which they did not receive a premium.

The Policy does not entitle Plaintiff to any coverage absent direct physical loss or damage to property. This requirement is not ambiguous. A temporary restriction on the use of the Premises for some purposes does not constitute direct physical loss or damage to it. Read in the context of the Policy as a whole, there is only one reasonable interpretation: Plaintiff must allege actual, tangible alteration of property. It has not and cannot do so. The virus harms people, not property. Even if present at the Premises, which is not alleged, it can be removed by ordinary cleaning.

Because Plaintiff's claim for purely financial losses in the absence of physical loss or damage to property does not satisfy the Policy's insuring agreement, the presence or absence of a virus exclusion is irrelevant. Further, Plaintiff admits the Orders permitted it to continue performing onsite, non-elective dental procedures. As such, the Orders never prohibited access to its Premises and they were never uninhabitable. Simply put, there are no factual allegations to show that *any* of the requirements for the Policy's Business Income, Extra Expense, or Civil Authority coverages are met. And, because there is no coverage, there is no bad faith.

ARGUMENT

I. BUSINESS INCOME COVERAGE UNDER THE POLICY REQUIRES DIRECT PHYSICAL LOSS OR DAMAGE TO PROPERTY

A. Iowa Law, Including Other Iowa Coronavirus Coverage Decisions, Supports The Trial Court's Dismissal Decision.

Since the onset of the Coronavirus pandemic, numerous courts nationally have considered the meaning of the phrase direct physical loss or damage, or similar phrases, in insurance cases involving the broad presence of the virus in society and government Orders that adversely affected businesses. This includes three Iowa decisions, including this case. *See Palmer Holdings & Investments, Inc. v. Integrity Ins. Co.,* 2020 WL 7258857 (S.D. Iowa); and *Whiskey River on Vintage, Inc. v. Ill. Cas. Co.,*

2020 WL 7258575 (S.D. Iowa). These cases hold that when the insured only incurs adverse economic effect without distinct, demonstrable, physical alteration of the property, there is no coverage.

Palmer and *Whiskey River* involve the same government order and the same Business Income and Extra Expense coverage language as here. Both *Palmer* and *Whiskey River* made a detailed analysis of the physical element of the operative language. This included consideration of this Court's decisions in *Source Food* and *Pentair,* and the decisions in *Milligan v. Grinnell Reinsurance Co.,* 2001 WL 427642 (Iowa App.) (unpublished) and *Phoenix Ins. Co. v. Infogroup, Inc.,* 147 F.Supp 3d 815 (S.D.Iowa 2015). *Palmer* observed the conclusion in *Milligan* that "'[direct] loss or damage' . . . unambiguously referred to injury to or destruction of the realty owned by the insureds. . . . ***the loss or destruction must be physical in nature***." *Milligan*, 2001 WL 427642 at *2, cited at *Palmer*, 2020 WL 7258857 at *8 (emphasis supplied); and *see Whiskey River*, 2020 WL 7258575 at *16, citing *Milligan*, 2001 WL 427642 at *2.

Palmer and *Whiskey River* also rely on *Infogroup*'s detailed analysis of why loss of use alone, without physical alteration of property, does not constitute direct physical loss or damage to property. To do so would not give effect to the plain language of the policy. *See Palmer,* 2020 WL

7258857 at *9-*10; *Whiskey River*, 2020 WL 7258575 at *9, *citing Infogroup*, 147 F.Supp.3d at 825. Also, to do so "stretches 'physical' beyond its ordinary meaning and may, in some cases, render the word 'physical' meaningless." *Infogroup*, 147 F.Supp.3d at 825 (internal citations omitted). *Palmer* concludes that "it is a settled matter in Iowa law that direct physical loss or damage requires tangible alteration of property and that loss of use alone is insufficient." *Palmer*, 2020 WL 7258857 at *11; and *see Whiskey River*, 2020 WL 7258575 at *11 (same). At bottom, Iowa law is well stated in *Palmer*, where it is recognized that "loss of use is insufficient to trigger coverage without physical damage to the insured properties." *Palmer*, 2020 WL 7258857 at *9. As shown below and in Table 1 of this brief, the trend is overwhelmingly the same throughout the country.

Oral Surgeons' Petition does not allege that there has been any tangible, physical harm to its building or contents, the relevant Covered Property specified in the Policy. (JA052-JA053). Yet, that is required for Business Income coverage. Instead, Oral Surgeons argues that the range of services it customarily provided was truncated by the Order and by directives from the Iowa Dental Board. It says that this lessened range of services is "physical loss." (*See, e.g.*, App. Br., pp. 12-13, 41-44). This

"loss of use" theory has been widely rejected both before the pandemic and in numerous pandemic-related coverage cases. It should be rejected here.

B. Well-Established, Well-Reasoned Cases Preceding The Pandemic Support The Trial Court's Decision.

Prior to the pandemic, numerous courts, including this Court, held that actual, tangible, permanent, physical alteration to property is required to have coverage under property policies. Oral Surgeons concedes that this is so. (App. Br., pp. 37-38). These decisions include *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.,* 465 F.3d 834, 838 (8th Cir. 2006) (Minnesota Law)[3]; *Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co*., 400 F.3d 613, 616 (8th Cir. 2005) (Minnesota Law); *City of Burlington v. Indem. Ins. Co. of N. Am.*, 332 F.3d 38, 44 (2d Cir. 2003) (direct physical loss "strongly implies that there was an initial satisfactory state that was changed . . . into an unsatisfactory state"); *Trinity Indus., Inc. v. Ins. Co. of N. Am.*, 916 F.2d 267, 270-71 (5th Cir. 1990); *Infogroup*, 147 F.Supp 3d at 815 (no direct physical loss from a threat of physical loss); *NE Ga. Heart Ctr., P.C. v. Phoenix Ins. Co.*, 2014 WL 12480022 at *5 (N.D. Ga.) (same); *Phila. Parking Auth. v. Fed. Ins. Co.,* 385 F. Supp. 2d 280, 289 (S.D.N.Y.2005);

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[3] As will be discussed further below, this outcome is confirmed for Coronavirus-related property claims by the Minnesota District Court. *See Seifert v. IMT Insurance Co.*, 2020 WL 6120002 (D. Minn.).

MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co., 187 Cal. App. 4th 766, 777-78 (2010) (lost income caused by MRI malfunction due to shut off for roof repairs following storm not covered when no "accidental direct physical loss"); *Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 556-57 (2003), *as modified on denial of reh'g* (Jan. 7, 2004) (loss of electronically stored data, "with its consequent economic loss, but with no loss of or damage to tangible property" did not constitute direct physical loss); *Wolstein v. Yorkshire Ins. Co.*, 97 Wash. App. 201, 212-13 (1999) (same); *N. Am. Shipbuilding, Inc. v. S. Marine & Aviation Underwriting, Inc.*, 930 S.W.2d 829, 833-34 (Tex. App. 1996) (same). Additionally, the leading treatise on insurance law has long concluded: "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." 10A *Couch on Insurance*, § 148:46 (Generally; "Physical" Loss or Damage).

Source Food rejected the loss of use theory. There, the insured claimed loss of use of its beef because it was not permitted to be transported

into the United States from Canada due to an embargo. The embargo was based on a general concern about incidents of mad cow disease. *Id*. at 835. There was no evidence that the insured's cattle were tainted. *Id*. The insured's insurance policy provided coverage for "direct physical loss to property". *Id*. This Court rejected the loss of use claim because it would render the term "physical" meaningless. *Id*.

Similarly, *Pentair* considered a claim for business income arising from the shutdown of a factory caused by a loss of electrical power to the factory from the local electric utility. *Id*. at 614. This Court affirmed the district court's conclusion that the factory's inability to operate without power did not constitute direct physical loss or damage to it. As here, this was required for business income coverage. *Id*. at 616-617.

> Accordingly, for some time now, the phrase direct physical loss or damage to property, or substantially similar language, has unambiguously not applied to economic loss claims. Therefore, the Trial Court's decision was correct.

C. A Rapidly Growing Number of Decisions Nationally Hold to the Same Effect as the Trial Court Held Here.

As established, recent Iowa coronavirus coverage cases and pre-pandemic cases alike hold that loss of use without actual physical injury to property is insufficient to establish coverage. This same principle has

already been widely applied in over seventy virus-related coverage decisions from state and federal courts throughout the country. *See* Table 1.

D. Covered Loss Or Damage Must Be Direct.

Oral Surgeons repeatedly argues that the phrase "direct physical loss" does not appear in the Policy and that the numerous court decisions involving that phrase should be disregarded for that reason. (*See, e.g.*, App. Br., pp. 16, 21-23, 26-28). It essentially argues that the only relevant language in the Policy is the definition of "loss," which is defined as "accidental physical loss or accidental physical damage." (App. Br., pp. 21, 26; JA087; JA141). Oral Surgeons says that because this definition does not include the word "direct," covered loss or damage need not be direct loss or damage. (App. Br., pp. 15-17, 21-28). This, in turn, is spun into the assertion that the cases Cincinnati cites are inapplicable because the policy language in those cases included the word "direct." This argument misses wide because the word "direct" is indeed part of the operative language here. (App. Br., p. 26).[4] And, because this argument is wrong, the cases that the Trial Court relied on are indeed applicable.

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[4] As established, the definition of loss applies wherever the word "loss" appears in quotes. In the policy, the quotations signify that it is a defined term. The Business Income coverage's insuring agreement states:

Thus, the phrase "direct physical loss or damage" accurately portrays the coverage and is a fair description of the relevant language here. Cases discussing "direct physical loss" or closely similar terms, are relevant to the analysis of the language in the present case. But, to allay any doubt, Cincinnati's arguments are based on the text of its Policy as written and apply to that text as it is literally stated. Accordingly, direct physical loss to property is a prerequisite for Business Income coverage.

II. THE CASES ORAL SURGEONS RELIES ON ARE POORLY REASONED, INAPPLICABLE OR DISTINGUISHABLE

A. The *Studio 417* Suite Of Cases Are Poorly Reasoned, Contrary To A National Trend Of Better Reasoned Decisions And Have Been Broadly Rejected By Courts Nationally.

Oral Surgeons relies heavily on a triad of orders by Judge Stephen R. Bough in the Western District of Missouri. These decisions deny motions to dismiss claims like Plaintiff's claim here. *Studio 417*, 2020 WL 4692385 (W.D. Mo.); *K.C. Hopps v. Cincinnati Ins. Co.*, 2020 WL 6483108 (W.D.

> We will pay for the actual loss of "Business Income" . . . you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by ***direct "loss" to property*** at a "premises" caused by or resulting from any Covered Cause of Loss.

(JA067; JA133) (emphasis supplied). As established, the term "loss" is defined to mean "accidental physical loss or accidental physical damage." (JA087; JA141).

Mo.); and *Blue Springs Dental v. Owners Ins. Co.*, 2020 WL 5637963 at *4 (W.D. Mo.) (collectively, "*Studio 417*").[5] But, those decisions are poorly-reasoned, and contrary to Iowa law, as well as an overwhelming body of directly on-point authority nationally.

Studio 417, for all of its flaws, expressly left open a key door: that its determination that allegations of the presence of the Coronavirus and/or the Orders sufficiently establish direct physical loss may change as additional authorities develop. *Studio 417*, 2020 WL 4692385 at *8. And they have certainly developed over the last several months. As established throughout this brief and in Table 1, courts nationally rapidly, and with near unanimity, have rejected *Studio 417*'s holding.

Zwillo V., Corp. v. Lexington Insurance Co., 2020 WL 7137110 (W.D. MO.) (Ketchmark, J., presiding), and *Promotional Headwear International, Inc. v. The Cincinnati Insurance Co.*, 2020 WL 7078735 at *4 (D. Kan.) (Robinson, C.J., presiding) are among the cases rejecting *Studio*

[5] *Blue Springs* did not involve Cincinnati but was decided by the same district court judge as *Studio 417* and *K.C. Hopps*. It relies heavily on the same faulty reasoning as the earlier cases. Additionally, Plaintiff relies on a state court decision in *North State Deli v. The Cincinnati Ins. Co.*, No. 20-CVS-02569 (Durham Co., NC). There, the trial court granted summary judgment prior to Cincinnati answering the complaint and asserting affirmative defenses. And, *North State* ignores controlling precedent from the North Carolina Court of Appeals, *Harry's Cadillac v. Motors Ins. Co.,* 486 S.E.2d 249 (N.C. App. 1997).

417. After a detailed examination of the relevant law and unambiguous policy language, both courts reject the same arguments Plaintiff makes here. Namely, they concluded that plaintiffs' "loss of use" theory did not satisfy their policies' direct physical loss or damage requirement. And, both cases expressly reject *Studio 417*'s errant holding.

Zwillo also decisively "*consider[s]*" <u>*and rejects*</u> the argument that it should deny the motion to dismiss "to be in harmony with other rulings in [the Western District of Missouri]." *Id*. at 10. And, it dispenses with any pretextual effort to distinguish those cases: "To the extent this Court's ruling – finding the language in the policy plainly and unambiguously does not cover the claims – conflicts with *Studio 417*, *K.C. Hopps*, and *Blue Springs Dental Care, this Court respectfully disagrees with those cases.*" (*Id*. at p. 7) (emphasis added).

Promotional Headwear rejects a claim of loss of use of premises resulting from emergency orders issued by the Governor of Kansas and Johnson County, Kansas. *Id*. at *1. It holds that the same Cincinnati policy form involved in the present case did not provide coverage. *Id*. at *2. There was no physical loss or physical damage to property because there was no claim that the property had been physically altered:

> The Court finds that coverage for "direct loss to Covered Property" under the Policy unambiguously requires more than

> mere diminution in value or impairment of use of the property. Under Kansas law, "[t]he failure of an insurance policy to specifically define a word does not necessarily create ambiguity." 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. The Court follows the majority of courts to consider identical policy language in the context of COVID-19 and holds that direct physical loss or damage to the property requires a tangible, actual change to or intrusion on the covered property. Like the restaurant in *Mama Jo's*, Plaintiff alleges no loss or damage to the property that required repair or replacement based on an actual or tangible problem with the premises. ***And like the plaintiffs in Pentair and Source Food, Plaintiff suffers purely economic damages due to temporary loss of use, not a direct, physical change or intrusion onto the property***.

Id. at *7 (internal footnotes omitted) (emphasis supplied). *Promotional Headwear* further rejects *Studio 417*'s determination that a mere allegation that the virus was present on the premises is sufficient to survive a motion to dismiss. *Id*. at *8, *infra*.

Promotional Headwear relies heavily on this Court's decisions in *Source Food* and *Pentair*. And, unlike *Studio 417*, *Promotional Headwear*'s holding is consistent with this Court's well-reasoned analysis in these cases. It applies the same basic insurance law principles that apply in Iowa: the policy must be read as a whole and terms in the policy must be read in context. *Id*. at *4-*5; *Westlake*, 880 N.W.2d at 733-34, *supra*. Thus, to find coverage based solely on dictionary definitions of the word loss, in isolation

from the phrase containing that word, would read the modifying elements "direct" and "physical" out of the policy. *Promotional Headwear*, 2020 WL 7078735 at *7. *Promotional Headwear* also rejects the argument that direct physical loss or damage could mean dispossession under the cases Plaintiff relies on here. *Id*. at *6. (See App. Br., pp. 41-44). Specifically, Promotional Headwear did not allege facts to show the virus or the orders caused permanent dispossession of the property. *Promotional Headwear*, 2020 WL 7078735 at *7. And, neither the virus nor the orders rendered the premises unusable. *Id.*

There are numerous other well-reasoned decisions that reject *Studio 417*. *See, e.g.*, *Uncork & Create LLC v. The Cincinnati Ins. Co.*, 2020 WL 643698 at *4 (S.D. W.Va.); *Malaube, LLC v. Greenwich Ins. Co.*, 2020 WL 5051581 at *8 (S.D. Fla.)*; Diesel Barbershop LLC v. State Farm Lloyds*, 2020 WL 4724305 at *5 (S.D. Tex.)*; Hillcrest Optical v. Continental Cas. Co.*, 2020 WL 6163142 at *3 (S.D. Ala.)*; Real Hospitality, LLC v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 6503405 at *6-*8 (S.D. Miss.).

Studio 417 is not just broadly rejected. It is also poorly reasoned. *Studio 417* violates a controlling maxim of law by repeatedly and erroneously accepting the plaintiffs' summary allegations and legal conclusions in addressing a F.R.C.P. Rule 12(b)(6) motion. In particular, it

treats the allegation that the virus was likely on the premises of each of the numerous plaintiffs there as an allegation that the virus caused physical loss or damage to those properties. Those legal conclusions and other unsupported conclusions should not have been considered in determining the motion to dismiss. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

Moreover, *Studio 417* erroneously concluded that the plaintiffs there had alleged direct physical loss because there was a connection between plaintiffs' purely financial losses and the virus, which is "a physical substance". *Studio 417*, 2020 WL 4692385 at *4. But, under the plain language of the policies, it is the alleged loss or damage to property, *not* the damage-causing *agent* that must be physical. Indeed, under *Studio 417*'s reasoning a bullet fired at a building that misses would physically damage the building because the bullet is a physical object. Here, there are no factual allegations to show that the virus caused a physical injury or alteration to Plaintiff's property.

Additionally, *Studio 417* purported to follow two Missouri law cases, but those cases do not support the decision. *See Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349 (8th Cir. 1986); *Mehl v. The Travelers*

Home & Marine Ins. Co., Case No. 16-CV-1325-CDP (E.D. Mo.). In *Hampton* there *was* physical alteration to property because of a collapse. *Hampton*, 787 F.2d at 349. And, *Mehl* states that the policy language at issue expressly covered *loss of use* of property. *Mehl*, Case No. 16-CV-1325-CDP. The property coverage here has no such provision. For this reason as well, *Studio 417* is poorly reasoned, has been cemented as an outlier in the national landscape, and should not be followed.

B. *North State Deli* Is Poorly Reasoned And Inapplicable.

North State Deli, LLC v. The Cincinnati Ins. Co., No. 20-CVS-02569 (Super. Ct., Durham Co., NC) is not persuasive. In *North State*, the trial court's ruling ignores controlling North Carolina precedent. *Harry's Cadillac-Pontiac-GMC Truck Co., Inc. v. Motors Insurance Corp. and MIC Prop. and Casualty Ins. Corp.*, 486 S.E.2d 249 (N.C. App. 1997). In *Harry's Cadillac*, the sole issue was whether plaintiff's alleged lost profits as a result of a snowstorm causing plaintiff's dealership to be inaccessible to patrons for a week were covered under the policy's business interruption coverage. In concluding there was no business income coverage the appellate court stated:

> [W]e hold that the business interruption clause is not applicable to the facts in this case. Plaintiff neither alleged nor offered proof that its lost business income was due to damage to or the destruction of the property, rather all the evidence shows that the loss was proximately

> caused by plaintiff's inability to access the dealership due to the snowstorm. There was no suspension of business due to the roof damage or the repairs thereto. We hold that, under the language of the business interruption clause of the policy, coverage is provided only when loss results from suspension of operations due to damage to, or destruction of, the business property by reason of a peril insured against.

Id., 486 S.E.2d at 251-52 (emphasis added).

North State Deli makes no mention of *Harry's Cadillac*, despite it being binding authority from its appellate court. Cincinnati is appealing the trial court's decision in *North State Deli*. Additionally, *North State Deli* granted summary judgment prior to Cincinnati answering the complaint and asserting affirmative defenses.

C. Oral Surgeons' Cases Involving Contamination Are Either Distinguishable Or Inapplicable.

Oral Surgeons cites a number of cases where contamination was found to cause physical loss to properties. The properties were contaminated by deleterious substances, such as sulfide gas, e-coli bacteria, gasoline fumes, and methamphetamine odors. (See App. Br., pp. 41-44).[6] In each

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[6] *Citing TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699 (E.D. Va. 2010; *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399 (1st Cir. 2009); *Motorists Mutual Ins. Co. v. Hardinger*, 131 Fed. Appx. 823 (3d Cir. 2005); *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332 (Or. 1993). Appellant's amicus adds *Sentinel Management Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296 (Minn. App.1997) (released asbestos fibers), to this

case, the contamination was so pervasive that it rendered the premises uninhabitable. As a result, the courts found that there was actual physical injury to the premises. These cases have no bearing here. Oral Surgeons does not allege that its premises were uninhabitable. To the contrary, it admits that the Order and Dental Board directions expressly permitted the premises to be used for non-elective services, meaning that the premises were habitable. (JA002 at ¶¶ 7-8). Courts throughout the country hold there is no coverage under policies like Plaintiff's because the virus, *even if present*, does not render plaintiffs' property or premises unusable or uninhabitable. *See, e.g.*, *Promotional Headwear*, 2020 WL 7078735 at *9; *Uncork & Create*, 2020 WL 6436948 at *5; *Hillcrest*, 2020 WL 6163142 at *5-*7.

The common thread of Plaintiff's contamination cases is that the physical substances were not readily remediated and caused permanent dispossession. In likely recognition of this fact, Oral Surgeons now argues that it is "plausible" that its premises were contaminated by the Coronavirus. (App. Br., p. 48). However, that is not alleged in its Petition. In any event,

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list. As shown in this brief and many of the cases cited in Table 1, Plaintiff's reliance on these cases is not novel. Courts throughout the country have considered and rejected arguments citing the same cases. With near unanimity, such cases have rejected virus-related coverage claims.

the mere presence of the virus on a premises is insufficient to secure coverage.

One reason for this is that there is no direct physical loss or damage to property in situations where the allegedly damaging element can readily be cleaned away: "[E]ven assuming that the virus physically attached to covered property, it did not constitute the direct, physical loss or damage required to trigger coverage because its presence can be eliminated. Much like the dust and debris at issue in *Mama Jo's*, routine cleaning and disinfecting can eliminate the virus on surfaces." *Promotional Headwear*, 2020 WL 7078735 at *8. *See also Malaube,* 2020 WL 5051581 at *8-*9.

In *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974 at *9 (S.D. Fla.), *affd*, 823 F.Appx. 868 (11th Cir. 2020), the plaintiff complained that dirt and dust from nearby road construction had entered the restaurant requiring frequent cleaning. *Mama Jo's* correctly holds that "an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'" *Mama Jo's*, 823 F. App'x at 879. Similarly, *Universal Image Prods., Inc. v. Chubb Corp*., 703 F. Supp. 2d 705, 710 (E.D. Mich. 2010), *affd,* 475 F. App'x. 569 (6th Cir. 2012), held that the cost of a complete cleaning of a ventilation system did not address a direct physical loss.

The CDC has instructed that the Coronavirus can be readily removed via commonly available cleaning agents: "The virus that causes COVID-19 can be killed if you use the right products. EPA has compiled a list of disinfectant products that can be used against COVID-19, including ready-to-use sprays, concentrates, and wipes." *See* CDC Reopening Guidance for Cleaning and Disinfecting (4/28/2020), (JA187-JA195); *see also* CDC, *Cleaning and Disinfecting Your Home*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/disinfecting-your-home.html (accessed December 28, 2020).[7] Thus, even if there were an actual presence of the Coronavirus at Oral Surgeons' premises, there is no direct physical loss because the virus can be wiped away.

Indeed, while the district court in *Uncork* acknowledged the existence of outlier decisions like *Studio 417*, it found "those decisions concluding that

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[7] Federal courts may take judicial notice of information published on the CDC's website or websites of other government agencies. *See Gent v. CUNA Mut. Ins. Soc'y*, 611 F.3d 79 at *84 n.5 (1st Cir. 2010) (taking judicial notice of CDC website); *Meredith v. Medtronic, Inc.*, 2019 WL 6330677 at *1 n.1 (S.D. Iowa) (taking judicial notice of information on the FDA's website); *Loucka v. Lincoln Nat'l Life Ins. Co.*, 334 F. Supp. 3d 1 at *8 (D.D.C. 2018) (taking judicial notice of CDC testing criteria published on website and collecting cases). This judicial notice does not convert a motion to dismiss into one for summary judgment. *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007).

COVID-19 does not cause a direct physical damage or loss to property to be more persuasive." *Uncork*, 2020 WL 6436948 at *5. And, it continued:

> Although some courts have drawn a distinction based on whether a complaint alleged presence of the virus on the premises, the Court does not find such an allegation determinative. . . . 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.

Id. (emphasis added). Another recent decision involving dental offices held:

> By all accounts, the structural integrity of the dental offices' "walls, doors, windows, and other external and internal physical barriers" remain entirely unscathed despite the proliferation and persistence of COVID-19. Any "actual change" is instead premised on the omnipresent specter of COVID-19, a generalized "alteration" experienced by every home, office, or business that welcomes individuals into an indoor setting across the globe

Johnson v. The Hartford Financial Services Group, Inc., 2020 WL 37573 at *5 (N.D. Ga.). *See also Santo's Italian Cafe LLC v. Acuity Ins. Co.*, 2020

WL 7490095 at *8-*9 (N.D. Ohio) (no direct physical loss or damage as a result of the Coronavirus or related orders), *citing Mastellone v. Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130, 1144-1145 (Ohio App. 2008) (mold on insured's wood siding did not cause physical loss or damage because it could be removed by cleaning without causing any harm to the wood: "Absent any specific alteration of the siding, the [insured's] failed to show that their house suffered any direct physical injury as required by the homeowners' policy.")

III. DECONSTRUCTING THE OPERATIVE PHRASE TO FIND COVERAGE FOR LOSS OF USE IN THE ABSENCE OF PHYSICAL INJURY IS CONTRARY TO IOWA INSURANCE LAW

Oral Surgeons speaks admiringly of the few courts that have declined to dismiss virus-related coverage claims. Those courts have "deconstructed" the policy language to find coverage for any restriction on the use of a business' premises, even in the absence of any physical injury to the building or its contents.[8] Those analyses are contrary to Iowa insurance law, and the prevailing law nationally.

"Deconstruction" of written language asserts that the meaning of a word or phrase never means exactly what the author intended. *See* Merriam-

[8] These cases include the consolidated decisions in *Studio 417* and *K.C. Hopps*, and *North State Deli*.

Webster.com/dictionary/deconstruction. The deconstruction method involves extracting words from the context in which they were written and reconstructing the writing to suit the narrative of the deconstructor without regard to the original intention of the writing. The point is to knowingly ignore the author's intended meaning and impose a reader's alternative meaning. Deconstruction may have its devotees in academic circles, but the Iowa law of insurance policy interpretation requires that words in insurance policies be read in context and rejects the notion that individual words can be read out of context to create an ambiguity or alternate meaning. *National Sur. Corp.,* 880 N.W.2d at 733-34.

Recently, *Zwillo,* made an extensive analysis of this technique and correctly rejected the deconstruction approach:

> An Insured cannot create an ambiguity by reading only a part of the policy and claiming that, read in isolation, that portion of the policy suggests a level of coverage greater than the policy actually provides when read as a whole.

Id. at *2 (internal citations and quotations omitted).[9] *Zwillo* further held that the word loss could not be read in isolation from the words "direct" and "physical," which modify the words loss and damage, and convey actual,

[9] Appellant's amicus cites *Studio 417* and criticizes the page count of the district court's order in the present case, but ignores the extensive analyses by the courts in *Zwillo* and *Promotional Headwear.*

demonstrable loss or harm to some portion of the premises itself. *Id*. at *4-*5. Fundamentally, physical alteration of property is required by the modifying word physical. Thus, there must be a tangible impact that physically alters property. *Id*. at *4. Indeed, it is *Studio 417*'s use of a deconstruction analysis that led the district court in *Zwillo* to ***expressly reject*** *Studio 417*, an earlier decision in the same district. *Id*. at *8; *see also Kessler Dental Assocs., P.C. v. The Dentists Ins. Co.*, 2020 WL 7181057 at *2 (E.D. Pa.) ("A court should not consider individual items in isolation. It must consider the entire insurance provision to ascertain the intent of the parties.").

Similarly, in *Mama Jo's*, the Eleventh Circuit Court of Appeals rejected arguments based solely on definitions of the word loss applied out of the context of the whole phrase. It holds that "'direct' and 'physical' modify loss and impose the requirement that the damage be actual." *Mama Jo's*, 823 F.Appx. at 879.

The Third Circuit Court of Appeals has likewise rejected the deconstruction of insurance policy language. *Royal Insurance Co. of America v. KSI Trading Co.*, 563 F.3d 68, 73-74 (3d Cir. 2009), stated, quoting from *A&S Fuel Co., Inc. v. Royal Indemnity Co., Inc.*, 652 A.2d 1236 (N.J. App. 1995):

> Our case law, however, does not require us to credit every conceivable deconstruction of contractual language. As Justice Clifford stated in *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 23, 405 A.2d 788 (1979), the "doctrine of ambiguity" should be invoked only to resolve "genuine ambiguities", not "artificial" ambiguities created by "semantical ingenuity."

See also Henderson v. State Farm Ins. Co., 596 N.W.2d 190, 195 (Mich. 1999) ("The proper approach is to read the phrase as a whole, giving the phrase its common meaning" rather than attempting to define each word in the phrase separately.).

As established, one of the earmarks of the deconstruction theory is the selection of certain words in a phrase that fit the deconstructor's narrative while ignoring other words that do not fit. Contrary to the deconstruction approach, in insurance law loss cannot be defined independently from the words that surround it in the operative phrase: direct, accidental, ***physical*** loss or damage to property. Oral Surgeons seeks to impose a definition of loss as merely a deprivation of use. But, this ignores the context in which loss is used in the Policy. Coverage based on restrictions on the use of property, without more, reads the word "physical" out of the phrase, broadening the scope of coverage beyond the ordinary meaning of the language.

IV. THE USE OF THE WORD "OR" IN THE DEFINITION OF "LOSS" DOES NOT MEAN THAT PHYSICAL LOSS MUST MEAN SOMETHING ENTIRELY DIFFERENT FROM PHYSICAL DAMAGE

Oral Surgeons argues that because the term "physical loss" is separated from the term "physical damage" by the word "or", physical loss and physical damage must be "mutually exclusive." (App. Br., p. 35). In support of this proposition it cites *Denison Municipal Utilities v. Iowa Workers' Compensation Commissioner*, 857 N.W.2d 230 (Iowa 2014), and *Monroe County v. International Insurance Co.*, 609 N.W.2d 522 (Iowa 2000). Neither case applies here.

In *Denison* the issue was whether the employer was obligated to file a first report of an injury under a statute that referred to reporting "as required by section 86.11 or 86.13 or by agency rule." *Denison,* 857 N.W.2d at 235. *Denison* held that the "disjunctive" word "or" meant that the reporting requirement could come under any of the alternatives, but it did not suggest that the alternatives were wholly different from each other. *Denison*. 857 N.W.2d at 236. *Monroe County* considered an insurance policy exclusion for (1) prior and pending litigation *or* (2) facts, circumstances or situations underlying or alleged in such litigation. *Monroe County,* 609 N.W.2d 522 at 524. The fact that two subparts were separated by the word "or", which the court referred to as being in the disjunctive, did not mean that the two parts

of the exclusion were mutually exclusive as opposed to being closely related. *Monroe County*, 609 N.W.2d at 525.

Bethel Village Condominium Association v. Republic-Franklin Insurance Co., 2007 WL 416693 (Ohio Ct. App.), involved the same insurance policy language as is at issue here. Bethel made the same argument as does Oral Surgeons. It urged that the word "or" separated two distinct and mutually exclusive, non-synonymous terms, physical loss and physical damage. *Bethel*, 2007 WL 416693 at *4. In essence, Bethel argued that any non-physical effect necessarily fell into the direct physical loss category. *Bethel* rejected this argument. It explained that "the conjunction 'or' may introduce any number of alternatives or may introduce a synonym or explanation of a previous word." *Bethel*, 2007 WL 416693 at *4. *Bethel* added that "Insurance contracts regularly insure against both total loss and damage to a portion of property." *Bethel*, 2007 WL 416693 at *4.

Synonyms are sometimes identical in meaning. They can be terms that have nearly the same meaning in some or all senses. (Merriam-Webster.com/Dictionary/synonym). Synonyms include words that have a common core meaning but can also differ in shades of meaning or connotation. *See, e.g., Grammar Notes for Synonym* at Dictionary.com/browse/synonym. *See also Indiana Mut. Ins. Co. v. North*

Vermillion County School Corp., 665 N.E.2d 630, 635 (Ind.Ct.App. 1996) (the use of "or" can suggest similarity between the connected terms).

Again, Plaintiff's argument on this issue is far from novel and it has been soundly rejected by courts in Iowa and throughout the country. This argument was rejected in *Palmer* and *Whiskey River*. *Palmer*, 2020 WL 7258857*8-*9; *Whiskey River*, 2020 WL 7258575 at *8-*10. *Henry's* explained that when read in the context of a phrase like that here, "or" is a coordinating conjunction used to link complementary terms. *Henry's Louisiana Grill v. Allied Ins. Co. of Am.*, 2020 WL 5938755 at *5. Loss connotes complete destruction and damage connotes lesser harm. Thus, physical damage to property means an alteration to property that can be repaired, while physical loss to property means an alteration to property that is beyond practical or economical repair. *Id*. As the court in *Henry's* put it, "loss is . . . 'the act of losing possession' by complete destruction, while damage is any other injury requiring repair." *Id.* at *6. In either case, however, a physical alteration of the property is necessary to have coverage. *Id.* at *5-*6.

Malaube is to the same effect. It explained that the word "or" did not require an interpretation of loss to be wholly distinct from damage because both required an actual, direct and physical effect upon property. *Malaube*,

2020 WL 5051581 at *7-*8. *See also Kirsch v. Aspen Am. Ins. Co.*, 2020 WL 7338570 at *6 & fn. 3 (E.D. Mich.); *Zwillo*, 2020 WL 7137110 at *4; *Promotional Headwear*, 2020 WL 7078735; *Pappy's Barber Shops, Inc. v. Farmers Grp. Inc.*, 2020 WL 5500221 at *5-*6 (S.D. Cal.). Also, see additional cases in Table 1.

As all of these cases show, the use of "or" cannot be read to eliminate the physical element for loss or damage to property. There simply is no basis in law or grammar for concluding that the presence of the word "or" in the phrase "accidental physical loss or accidental physical damage" requires that the term "physical loss" be construed to mean loss of use of property that has not suffered some physical alteration. Nor is there any basis to conclude that the presence of the word "or" means it is reasonable to ignore the modifier "physical" in the phrase direct physical loss. As *Malaube* stated, "the terms of an insurance policy should be taken and understood in their ordinary sense and the policy should receive a reasonable, practical and sensible interpretation consistent with the intent of the parties—not a strained, forced or unrealistic construction." *Malaube*, 2020 WL 5051581 at *3. Although *Malaube* was referring to Florida law, Iowa insurance law is the same. *See, e.g.*, *Westlake*, 880 N.W.2d at 733-34; *Palmer*, 2020 WL 7258857 at *9-*10 ("the 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" and, "[e]ven if loss and damage are distinct, the physicality requirement of the loss or damage remains, and Plaintiffs have failed to allege a tangible loss or alteration to property that is sufficient to trigger coverage"); *Whiskey River*, 2020 WL 7258575 at *8-*10 (S.D. Iowa) (same).

The prevailing law nationally is the same. *See, e.g.*, *Santo's*, 2020 WL 7490095 at *7, *11; *SA Palm Beach LLC v. Certain Underwriters at Lloyd's London*, 2020 WL 7251643 at *3-*5 (S.D. Fla.) (collecting cases); *Promotional Headwear*, 2020 WL 7078735 at *4; *Zwillo*, 2020 WL 7137110 at *4; *Selane Prods., Inc. v. Continental Cas. Co*., 2020 WL 7253378 at *5 (C.D. Cal.); *10E, LLC v. Travelers Indem. Co. of Connecticut*, 2020 WL 5359653 at *5 (C.D. Cal.).

No amount of clever word play can escape the Iowa law imperative that the operative language here be read in context. Accordingly, the use of the word "or" in the phrase direct physical loss or damage to property does not suggest that Oral Surgeons' Petition is sufficient. No physical alteration to property is alleged.

V. INTERPRETING BOTH PHYSICAL LOSS AND PHYSICAL DAMAGE TO REQUIRE ACTUAL PHYSICAL INJURY TO PROPERTY HARMONIZES WITH OTHER PROVISIONS IN THE BUSINESS INCOME COVERAGE

As established, Oral Surgeons does not claim any damages based on physical injury to its premises or contents. Rather, it only claims loss of business income under the Business Income, Extra Expense and Civil Authority coverages. In particular, it does not allege that any of its property needs to be repaired, rebuilt or replaced. The Business Income and Extra Expense coverages apply to "the necessary 'suspension' of your 'operations' during the 'period of restoration'. The 'suspension' must be caused by direct 'loss'[10] to property at a 'premises' caused by or resulting from any Covered Cause of Loss." (JA029; JA133). The Policy defines "period of restoration" to mean "the period of time that begins at the time of loss and ends the earlier of:

> **(1)** The date when the property at the "premises" should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
>
> **(2)** The date when business is resumed at a new permanent location.

(JA088, JA141).

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[10] As earlier shown, the defined term "loss" means "accidental physical loss or accidental physical damage."

Thus, the period of restoration consists of the time needed to repair, rebuild or replace the property that is the subject of direct "loss"—the defined term that means physical loss to or physical damage to property. "Repair" is what one does to a building or contents that are damaged, but repairable. If the building is beyond repair—a total loss—it can be rebuilt. The provision of the Policy that ties Business Income coverage to a defined period of restoration ending with repair, rebuilding or replacement squarely harmonizes with the necessity for ***physical*** loss or ***physical*** damage to property.

In contrast, interpreting physical loss to mean "loss of use" without physical harm to the property does not harmonize with the period of restoration provision. There is nothing to repair, rebuild or replace. Nor can the lifting of the restrictions on Oral Surgeons' practice substitute as an end-point to the period of restoration because there is no sense in which the terms "repair, rebuild or replace" can be understood to mean the abatement or termination of governmental regulation of the business's operations.

Topper Salon and Health Spa, Inc. v. Travelers Property Casualty Co. of America, 2020 WL 7024287 at *4 (E.D.Pa.), exemplifies this point. *Topper* addressed the identical period of restoration provision applicable here and held:

> [T]hese provisions make clear that there must be some sort of physical damage to the property that can be the subject of a repair, rebuilding or replacement.

Topper concluded that the plaintiff's loss of use claim could not be harmonized with the period of restoration that governs the business income coverage. *See, e.g.*, *Palmer*, 2020 WL 7258857 at *8; *Santo's*, 2020 WL 7490095 at *10; *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, 2020 WL 7395153 at *5 (E.D. Pa.); *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405 at *6-*7 (S.D. NY); *SA Palm Beach*, 2020 WL 7251643 at *4-*5 (collecting cases); *Malaube*, 2020 WL 5051581 at *9; *Henry's*, 2020 WL 593875 at *5; *Hillcrest*, 2020 WL 6163142 at *8 ("It is apparent . . . that a 'direct physical loss of property' contemplates the tangible alteration of property which would necessitate a party's absence to fix it or require the party to begin operations elsewhere. The 'period of restoration' expressly assumes repair, rebuild or replacement of property."); *Real Hospitality*, 2020 WL 6503405 at *6; *Uncork*, 2020 WL6436948 at *4; *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 2020 WL 5630465 at *2 (N.D. Ill.); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 5525171 at *4 (N.D. Cal.); *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, 2020 WL 6562332 at *6 (N.D. Cal.).

Therefore, here as in *Topper* and the other cases cited above, there must be some physical alteration to property in order to have direct physical loss or damage to property. The definition of the period of restoration resonates with this core requirement. If there is nothing to repair, rebuild or replace then there must not have been any direct physical loss or damage to property in the first place. Oral Surgeons' financial loss allegations fail to grasp this important point. Therefore, the Trial Court's decision should be affirmed.

VI. GOVERNMENT REGULATION OF BUSINESSES IS NOT A PHYSICAL LOSS TO THOSE BUSINESSES' PROPERTY

Oral Surgeons' case is essentially about its loss of revenue due to government regulation. For a time, this regulation limited the procedures Oral Surgeons was allowed to perform. Thus, if Oral Surgeons' Petition was deemed to establish coverage, that result would mean that any loss of revenue caused by government regulation would be direct physical loss or damage to property. Businesses are subject to a host of federal, state and local government regulations that affect the bottom line. Thus, the transfiguration of government regulation into direct physical loss or damage to property could eventually make property insurers into guarantors of businesses' economic success in a regulated economy. Nothing could be further from the mission of property insurance coverage.

PlanCheck III Downtown LLC v. Amguard Ins. Co., 2020 WL 5742712 (C.D.Cal.), exemplifies this concern. It rejects an insured's claim that physical loss encompassed a reduction in the permitted use of its restaurants, even though there was no physical alteration of property. It held that PlanCheck's interpretation was not reasonable because it would result in a "sweeping expansion of coverage without any manageable bounds." *PlanCheck*, 2020 WL 5742712 at *6 & n. 6. Further, *PlanCheck* finds:

> [H]olding that the Governor's Executive Order led to a "physical loss of" the dining rooms ***would massively expand the scope of the insurance coverage at issue here.*** . . . ***The Plaintiffs' construction would potentially make an insurer liable for the negative effects of operational changes resulting from any regulation or executive decree, such as a reduction in a space's maximum occupancy.***

PlanCheck, 2020 WL 5742712 at *5 (emphasis added). *And see*, *Hillcrest*, 2020 WL 6163142 at *7 (same); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut*, 2020 WL 5938689 at *4 (C.D. Cal.).

But, that is precisely what Oral Surgeons seeks here, lost revenue caused by a government order limiting its business, but not harming its property. The problem is that all American businesses are subject to governmental regulation. That regulation often cuts into profits. If the government's temporary restriction of dental procedures is twisted into a physical loss to property, then a fire department's restriction of a restaurant's

occupancy numbers could be as well. There is no end to where Oral Surgeons' position would go.

VII. THE ABSENCE OF A VIRUS EXCLUSION IS IRRELEVANT

Oral Surgeons argues that because the Policy does not contain a virus exclusion it must cover any claim arising from or involving a virus. That argument is contrary to how insurance coverage is applied in Iowa, and nationally. An exclusion can become relevant only if it is first determined that there is a loss within the scope of the insuring agreement apart from any exclusions. As shown above, the Business Income insuring agreement requires several important things:

- A necessary suspension of Oral Surgeons' operations during a period of restoration;
- The suspension must be caused by direct "loss," meaning accidental physical loss or accidental physical damage to property;
- The "loss" must be caused by or result from a Covered Cause of Loss. A Covered Cause of Loss means a direct "loss" that is not excluded or limited.

Similarly, the Extra Expense coverage is defined to provide coverage for necessary expenses that would not have been sustained in the absence of direct physical loss or damage to property. And, the Civil Authority

coverage requires the Order to have been issued in response to direct physical loss or damage to property other than Oral Surgeons' property.

Accordingly, in the absence of a direct physical loss or damage to property, there is no need to explore whether Plaintiff's alleged losses resulted from an excluded cause. Here, as established, the Trial Court correctly found that Oral Surgeons made no factual allegations of direct physical loss or damage to property.

These principles have frequently been applied under Iowa law. *See Unkrich Ag, Inc. v. Farm Bureau Prop. & Cas. Ins. Co.*, 2020 WL 2060302 at *4 (Iowa App.) ("An insured who has experienced loss and seeks coverage under an insurance policy initially bears the burden 'to prove both the property and the peril were covered by the terms of the policy.'") (citation omitted). If an insured demonstrates direct physical loss is present, then exclusions may nevertheless apply. *City of W. Liberty v. Employers Mut. Cas. Co.*, 913 N.W.2d 627, 2018 WL 1182764 at *3 (Iowa App. 2018), *aff'd*, 922 N.W.2d 876 (Iowa 2019) ("If the insured meets the initial burden, it is then that the burden shifts to the insurer to prove any claimed exclusion or exception to the coverage."). "Until a *prima facie* case of coverage is shown, the insurer has no burden to prove a policy exclusion." *Salem United Methodist Church of Cedar Rapids, Iowa v. Church Mut. Ins. Co.*, 898

N.W.2d 202, 205 (Iowa App. 2017) (unpublished) (quoting 17A Couch on Insurance § 254:12). Thus, if there is no direct physical loss in the first place, the absence of a virus exclusion is irrelevant.

Iowa is not alone. This insurance law principle is recited in Couch and is recognized by cases from across the nation. For example, in *Ward General Insurance*, 114 Cal. App. 4th at 555, a computer database crashed. Because there was no direct physical loss, it was "unnecessary to analyze the various exclusions and their application to this case." Similarly, in *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 333 (S.D.N.Y. 2014), a law firm temporarily closed because of a power outage. The loss of power was not a direct physical loss to the law firm's property. Accordingly, it was unnecessary to decide whether a flood exclusion applied.

Moreover, the scope of the insuring agreement cannot be inferred in the first instance from the absence of an exclusion. *See, e.g.*, *4431, Inc.*:

> It is undisputed that there is no virus exclusion. However, Plaintiffs have failed to provide any support for the notion that the absence of an exclusion means that whatever could have been excluded but wasn't is necessarily covered. Even more fundamentally, the issue of exclusions is irrelevant as Plaintiffs' claims do not fall within the scope of the Policies' coverage.

2020 WL 7075318 at *13; *Newchops* 2020 WL 7395153 at *3; *see also Doe Run Res. Corp. v. Lexington Ins. Co.*, 719 F.3d 868, 876 (8th Cir. 2013)

(Missouri law) ("[T]he absence of an exclusion, standing alone, does not imply coverage; coverage must be provided in the remaining policy terms."); *Advance Watch Co. v. Kemper Nat. Ins. Co.*, 99 F.3d 795, 805 (6th Cir. 1996) ("the absence of an exclusion cannot create coverage"); *Bluegrass v. State Auto. Ins. Co.*, 2021 WL 42050 (S.D.W. Va.) ("Having found that coverage has not been triggered by a direct physical loss or damage, I need not analyze whether State Auto property invoked coverage exclusions for damage caused by viral infections or government ordered loss of use when denying coverage to Bluegrass").

Accordingly, the absence of a specific virus exclusion does not bear on the interpretation of the insuring agreement or the meaning of direct physical loss or damage.

VIII. FEAR OF COVID-19 DOES NOT CONSTITUTE PHYSICAL LOSS OR PHYSICAL DAMAGE TO PROPERTY

The Petition does not allege that fear of the Coronavirus is physical loss or damage to property. Nevertheless, citing *Murray v. State Farm Fire & Cas. Co.*, 509 S.E. 2d 1, 17 (W.Va.1998), and *Total Intermodal Services, Inc. v. Travelers Property Casualty Co. of America*, 2018 WL 3829767 (C.D. Cal.), Oral Surgeons raises this argument for the first time on appeal. (App. Br., p. 42) (asserting that fear of loss was in fact a physical loss). Accordingly, Oral Surgeons should be deemed to have waived it. *Dormani*

v. Target Corp., 970 F.3d 910, 916 (8th Cir. 2020). The following discussion applies only if Oral Surgeons is not deemed to have waived this argument.

In *Murray* there was an ongoing rock fall that had already damaged property and would inevitably physically damage the insured's home. *Uncork*, a leading coronavirus coverage decision, finds *Murray* is not relevant to a plaintiff's virus based claim: "[T]he houses [in *Murray*] were rendered uninhabitable by a physical threat [because] experts anticipated further rock falls likely to physically damage the home. The novel coronavirus has no effect on the physical premises of a business." *Uncork*, 2020 WL 6436948 at *4.

Total Intermodal says nothing about fear of loss or damage. Rather, it involved a misdirected shipment of goods. They mistakenly went to China, and the plaintiff was unable to recover them. They were destroyed in China. *Total Intermodal*, 2018 WL 3829767 at *1. The holding that this situation was a "physical loss" has no parallel in the present case. Oral Surgeons has neither lost possession of its property nor has its property been destroyed.

And, unlike *Milligan*, *Palmer* and *Whiskey River*, neither *Murray* nor *Total Intermodal* addresses Iowa law.[11]

Oral Surgeons' amicus cites two additional cases similar to *Murray.* In *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349 (8th Cir. 1986), the building Hampton occupied. It was collapsing. Hampton had insurance for its personal property. *Hampton,* 787 F.2d at 351. The local building official found the collapsing building to be unsafe, required Hampton to move out, and refused access to the building. This Court found that Hampton had coverage because there was physical alteration to property. *Id.* at 352.

The second case, *Hughes v. Potomac Insurance Co. of the District of Columbia*, 199 Cal.App.2d 239 (1962), involved a homeowners policy that was differently worded than the Policy here. Heavy rains for a number of days resulted in hydrostatic forces that caused land under the house to fall away, leaving the house dangling over a cliff. *Hughes*, 199 Cal.App.2d

[11] Again, Plaintiff's reliance on *Total Intermodal* is misplaced and has been rejected by courts nationwide considering virus-related coverage claims. *See, e.g.*, *Water Sports*, 2020 WL 6562332 at *5-*6 (collecting cases); *Mudpie*, 2020 WL 5525171 at *3-*4; *Hillcrest*, 2020 WL 6163142 at *4; *Mark's Engine*, 2020 WL 5938689 at *3-*4; *Pappy's*, 2020 WL 5500221 at *5. Additional cases in Table 1. The district courts in all of these cases recognized that neither the Coronavirus nor the Orders result in a complete dispossession of plaintiffs' property, as was deemed sufficient in *Total Intermodal* to constitute physical loss of property.

at 249. There was indisputably actual physical damage to the ground under the house; the issue was whether that ground was part of the insured dwelling. *Hughes*, 199 Cal.App.2d at 248-49. The court found that the word "dwelling", which concededly included the foundation as well as the structure upon it, was ambiguous as to whether it also included the ground below and thus concluded that the ground was insured property. *Hughes*, 199 Cal.App.2d. at 245. There was no dispute that the ground was in fact physically lost or damaged. As a result, the court found that there was actual physical loss or damage to the dwelling. *Hughes*, 199 Cal.App.2d at 246.

Hughes is thus inapplicable here and in no way supports Oral Surgeons' case. In contrast to *Hughes*, Oral Surgeons wants coverage not for physical loss or damage to property, but for the regulation of its business conducted on the property. Moreover, Oral Surgeons was expressly permitted to continue to use the premises for some services. Indeed, the Order was not based on any physical loss or damage to anybody's premises. Rather, it was designed to reduce the potential for person-to-person transmission. *See e.g.*, *Kessler*, 2020 WL 7181057 at *4 (holding that a "general threat of future damage" does not demonstrate physical damage).

IX. THERE IS NO COVERAGE FOR ORAL SURGEONS' CLAIM UNDER THE POLICY'S CIVIL AUTHORITY COVERAGE

Oral Surgeons asserts that it was denied access to its premises (App. Br., p. 11). This assertion is made without any record citation. There is no such allegation in its Petition. Oral Surgeons also quotes the Civil Authority coverage language in its statement of facts. Apart from these two references, Oral Surgeons does not discuss the Civil Authority coverage at all. Accordingly, Oral Surgeons should be deemed to have waived any appeal from the dismissal of its claim for that coverage. *Dormani,* 970 F.3d at 916. The following discussion applies only if Oral Surgeons is not deemed to have waived its Civil Authority claim.

The Policy's Civil Authority coverage only applies if there is a Covered Cause of Loss, meaning direct physical loss or direct physical damage, to property other than the Insured's property. Even then, there is only coverage if the civil authority orders: "(1) ***prohibit*** access to the Insured's "premises" due to (2) ***direct physical "loss"*** to property, other than at the "premises" caused by or resulting from any Covered Cause of Loss." (JA068, JA134) (emphasis supplied).

A. There Is No Direct Physical Loss To Other Property.

The plain language of the Policy states that direct physical loss or damage to property other than the Plaintiff's property is required for there to

be Civil Authority coverage. *See e.g., United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 131 (2d Cir. 2006); *Palmer*, 2020 WL 2020 WL 7258857 at *12. The Petition does not identify any actual, tangible, permanent, physical alteration of property, anywhere. As Oral Surgeons' complaint admits, the State's Orders were issued to keep people separated and thus to lessen the spread of the virus. (JA002, ¶ 8.) No facts are alleged that demonstrate that these things happened because of direct physical loss or damage to anybody's property.

B. The Requisite Prohibition of Access Is Lacking.

The Civil Authority coverage also requires that access to Plaintiff's premises be completely prohibited by an order of Civil Authority, "not just made more difficult or less desirable." 11A *Couch on Ins.* § 167:15. No government order issued in Iowa prohibited access to Plaintiff's premises. At most, a partial restriction of the business was ordered as emergency dental procedures were expressly allowed. (JA002, ¶¶ 7-8.) This is not the same thing as a prohibition of access to the property. Accordingly, the Civil Authority coverage does not apply.

X. AT THE VERY LEAST, THERE IS A BONA FIDE DISPUTE, SO ORAL SURGEONS' "BAD FAITH" CLAIM FAILS

Oral Surgeons' brief does not address in any way the dismissal of its "bad faith" claim. Thus, this claim is waived and abandoned. *Dormani*, 970

F.3d at 916. The following discussion only applies if, for some reason, the bad faith claim is not deemed to have been abandoned.

The bad faith claim fails as a matter of law. "To establish a first-party bad faith claim, a plaintiff must prove that (1) the insurer had no reasonable basis for denying the plaintiff's claim or for refusing to consent to settlement; and (2) the insurer knew or had reason to know that its denial or refusal lacked a reasonable basis." *Penford Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 662 F.3d 497, 504 (8th Cir. 2011). A "fairly debatable" claim cannot give rise to a cause of action for bad faith. *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005). "Whether a claim is fairly debatable can generally be decided as a matter of law by the court." *Id*. Cincinnati has demonstrated that its position here is correct. But, at a minimum, there is a fairly debatable question regarding Oral Surgeons' coverage claims that renders the claim for first-party bad faith without merit. *Palmer*, 2020 WL 7258857 *15; *Whiskey River*, 2020 WL 7258575 at *16.

CONCLUSION

Oral Surgeons' Policy is a commercial property insurance policy and not a stand-alone business interruption policy. Indeed, "One does not buy simply 'business interruption insurance.' Policyholders are not insuring against 'all risks' to their income—they are insuring against 'all risks' to

their property—that is, the building and its contents." *Real Hospitality*, 2020 WL 6503405 at *5 n.9. Cincinnati agreed to provide coverage for business income losses while insured property is being repaired, rebuilt or replaced as a result of tangible, physical alteration of property. But, stripped of its factually unsupported, conclusory allegations, legal conclusions, and allegations that directly conflict with the Policy and the Orders, the Petition shows nothing of the sort happened here. As such, Oral Surgeons fails to state a plausible claim for relief under the plain and unambiguous language of the Policy and Iowa law.

Courts from coast to coast have recognized the unfortunate plight of businesses that were either shut down or have experienced declines in patronage as a result of efforts to keep people separated. *See*, *e.g.*, *Zwillo*, 2020 WL 7137110 at *8 ("Although the Court is sympathetic to the plight of businessowners affected by COVID-19 and related aftermath, including the economic effect of the stay-at-home orders, Plaintiff and the class it seeks to represent are not entitled to relief under the Policy."); *Bluegrass*, 2021 WL 42050 at *5 ("While I am sympathetic to the plight of small businesses affected by the COVID-19 pandemic, I am unable to find that a regulatory shutdown order is a 'physical loss or damage' as contemplated by the plain language of the parties' contract."); *T & E Chicago*, 2020 WL 6801845 at *5

("The Court sympathizes with Plaintiff. Nevertheless, the policy's phrasing requires the Court to find in Defendant's favor."); *Henry's,* 2020 WL 593875 at *7 ("This Court's decision here is not a judgment on the Plaintiff's business sense or the wisdom of shuttering dining rooms in the face of a global pandemic. This decision merely reflects the plain language of the parties' insurance contract."); *Infinity Exs., Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000*, 2020 WL 5791583 at *5 (M.D. Fla.) ("[A]lthough the Court is sympathetic to Plaintiff and all insureds that experienced economic losses associated with COVID-19, there is simply no coverage under the policies if they require "direct physical loss of or damage" to property."); *Diesel, supra* ("[A]s the Court sympathizes with Plaintiffs' situation, the Court determines that the motion to dismiss must be granted … ."); *Rose's 1, LLC v. Erie Ins. Exch.*, 2020 WL 4589206 at *1 (D.C. Super.) ("While the Court is sympathetic to the plight of Plaintiffs, it must grant summary judgment to Defendants as a matter of law").

Cincinnati respectfully requests that this Honorable Court similarly enforce the clear terms of this property policy of insurance and affirm the decision of the District Court.

Respectfully submitted,

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DATED: January 14, 2021

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I hereby certify that on January 11, 2021, I electronically filed the foregoing 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 the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Robert V.P. Waterman

EXHIBIT A

TABLE 1: CASES REJECTING CLAIMS FOR PROPERTY INSURANCE COVERAGE BASED ON CORONAVIRUS ORDERS*

Case (Federal 2021)	2021 WL Cite	Court
Island Hotel Properties, Inc. v. Fireman's Fund Ins. Co.	4:20-cv-10056	S.D.Fla.
Mena Catering, Inc. v. Scottsdale Ins. Co.	1:20-cv-23661	S.D.Fla.
K D Unlimited v. Owners Ins.	1:20-CV-02163	N.D.Ga
Blue Grass v. State Auto. Mut. Ins.	42050	S.D.W.Va.
Ballas Nails & Spa v. Travelers Cas. Ins.	37984	E.D.Mo.
Edison Kennedy v. Scottsdale Ins.	22314	M.D.Fla.
Roy H. Johnson, DDS v. The Hartford Fin. Serv.	37573	N.D.Ga
Baker v. Oregon Mut. Ins.	24841	C.D.Cal.

Case (Federal 2020)	2020 WL Cite	Court
Atma Beauty v. HDI Global Spec.	7770398	S.D.Fla.
Drama Camp Productions. v. Mt. Hawley Ins.	8018579	S.D.Ala.
Jonathan Oheb MD. v. Travelers Cas. Ins.	7769880	C.D.Cal.
Sun Cuisine v. Certain Underwriters at Lloyd's	7699672	S.D.Fla.
Karen Trinh, DDS v. State Farm Gen. Ins.	7696080	N.D.Cal.
1210 McGavock St. Hosp. Part. v. Admiral Indem.	7641184	M.D.Tenn.
Bradley Hotel v. Aspen Spec. Ins.	7889047	N.D.Ill.
Santo's Italian Cafe v. Acuity Ins.	7490095	N.D.Ohio
Mortar And Pestle v. Atain Spec. Ins.	7495180	N.D.Cal.
Emerald Coast Restaurants v. Aspen Spec. Ins.	7889061	N.D.Fla.

*This Table does not include authorities that dismissed plaintiff's complaint based solely on the existence of a virus exclusion. Nor does it include state court dismissals that are not available on Westlaw.

Newchops Rest. Comcast v. Admiral Indem.	7395153	E.D.Pa.
Prime Time Sports Grill v. DTW 1991 Underwriting	7398646	M.D.Fla.
10012 Holdings v. Sentinel Ins.	7360252	S.D.NY
Kirsch v. Aspen Am. Ins.	7338570	E.D.Mich.
Re: Boulevard Carroll Entm't v. Fireman's Fund Ins.	7338081	D.N.J.
Terry Black's Barbecue v. State Auto. Mut. Ins.	7351246	W.D.Tex.
Gerleman Mgmt. v. Atlantic States Ins.	No. 4:20-cv-00183	S.D.Iowa
Michael Cetta. v. Admiral Indem.	7321405	S.D.N.Y.
Robert W. Fountain v. Citizens Ins.	7247207	N.D.Cal.
SA Palm Beach v. Certain Underwriters at Lloyd's	7251643	S.D.Cal.
Palmer Holdings & Investments v. Integrity Ins.	7258857	S.D.Iowa
Kessler Dental Assocs.. v. Dentists Ins.	7181057	E.D.Pa.
El Novillo Rest. v. Certain Underwriters at Lloyd's	7251362	S.D.Fla.
Hajer v. Ohio Sec. Ins.	7211636	E.D.Tex.
Geragos & Geragos Eng. Co. No. 28 v. Hartford Ins.	7350413	C.D.Cal.
4431, Inc. v. Cincinnati Ins.	7075318	E.D.Pa.
Promotional Headwear v. Cincinnati Ins.	7078735	D.Kan.
Zwillo V, v. Lexington Ins.	7137110	W.D.Mo.
Toppers Salon & Health Spa v. Travelers Prop. Cas.	7024287	E.D.Pa.
Whiskey River on Vintage. v. Ill. Cas.	7258575	S.D.Iowa
BBMS v. Cont'l Cas.	7260035	W.D.Mo.
Selane Prods. v. Continental Cas.	7253378	C.D.Cal.
T & E Chicago v. Cincinnati Ins.	6801845	N.D.Ill.
Chattanooga Prof'l Baseball v. Nat'l Cas.	6699480	D.Ariz.

Long Affair Carpet & Rugv. Liberty Mut. Ins.	6865774	C.D.Cal.
Goodwill Ind. of Centr. Okla. v. Philadelphia Ind. Ins.	8004271	W.D.Okla.
Water Sports Kauai v. Fireman's Fund Ins.	6562332	N.D.Cal.
Brian Handel D.M.D. v. Allstate Ins.	6545893	E.D.Pa.
Real Hospitality v. Travelers Cas. Ins.	6503405	E.D.Miss.
Raymond H Nahmad DDS v. Hartford Cas. Ins..	6392841	S.D.Fla.
Uncork & Create v. Cincinnati Ins.	6436948	S.D.W.Va.
W. Coast Hotel Mgmt. v. Berkshire Hathaway	6440037	C.D.Cal.
Hillcrest Optical v. Cont'l Cas.	6163142	S.D.Ala.
Travelers Cas. Ins. v. Geragos & Geragos	6156584	C.D.Cal.
Seifert v. IMT Ins. Co.	6120002	D.Minn.
Vandelay Hosp. Grp. v. Cincinnati Ins.	5946863	N.D.Tex.
Henry's Louisiana Grill v. Allied Ins. Co.	5938755	N.D.Ga.
Mark's Engine Co. No. 28 Rest. v. Travelers Indem.	5938689	C.D.Cal.
Oral Surgeons. v. Cincinnati Ins.	5820552	S.D.Iowa
Infinity Exhibits v. Certain Underwriters At Lloyd's	5791583	M.D.Fla.
Sandy Point Dental v. Cincinnati Ins.	5630465	N.D.Ill.
Plan Check Downtown III v. Amguard Ins.	5742712; 5742713	S.D.Cal.
Mudpie, Inc. v. Travelers Cas. Ins.	5525171	N.D.Cal.
Pappy's Barber Shopsv. Farmers Group	5500221	S.D.Cal.
Turek Enterprises v. State Farm Mut. Auto. Ins.	5258484	E.D.Mich.
10E, LLC v. Travelers Indem.	5359653	C.D.Cal.
Malaube, LLC v. Greenwich Ins.	5051581	S.D.Fl.
Diesel Barbershop v. State Farm	4724305	W.D.Tex.
Social Life Magazine v. Sentinel Ins.	2904834	S.D.N.Y.

Palmdale Estates. v. Blackboard Ins.	25048	N.D.Cal.

Case (State)	**2020 WL Cite**	**Court**
Musso & Frank Grill. v. Mitsui Sumitomo Ins.	7346569	Cal.Super.
The Inns By the Sea v. California Mut. Ins.	5868738	Cal.Super.
Rose's 1 v. Erie Ins.	4589206	DC Super.
Dime Fitness v. Markel Ins.	6691467	Fla.Cir.Ct.
DAB Dental v. Main Street Am. Protection Ins.	7137138	Fla.Cir.Ct.
Gavrilides Mgm't v. Michigan Ins.	4561979	Mich.Cir.Ct.
MAC Property Group v. Selective Fire and Cas. Ins.	7422374	N.J.Super.