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RECEIVED

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S.C. SUPREME COURT

Via Email

The Honorable Patricia A. Howard
Clerk of Court
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RE: Sullivan Management, LLC v. Fireman's Fund Insurance Company, et al.
Appellate Case No. 2021-001209
District Court Case No. 3:30-cv-02275
Our File No. 001101.01640

Dear Ms. Howard:

Pursuant to Rule 208(b)(7), Defendants Fireman's Fund Insurance Co. and Allianz Global Risk US Insurance Co. present the following notice of additional pertinent authorities decided after their last letter was filed on June 6, 2022.

As before, given the volume of decisions, Defendants have limited the list below to those decided by appellate courts only.

The authorities below are pertinent to the issues discussed in Section V(A) (pages 11-35) of Defendants' brief.

Defendants also note that Plaintiff's counsel, on rebuttal during oral argument, responded to a question from the Court by stating that he was unaware of any opinions addressing a communicable disease provision. But numerous courts of appeals have addressed the same or similar coverage provisions, addressing many of the same questions this Court raised. A sample of relevant decisions, all but one of which were handed down after this matter was fully briefed, is provided immediately below.

Communicable Disease Coverage Cases

- *Abbey Hotel Acquisition, LLC v. Nat'l Sur. Corp.*, No. 21-2609, 2022 WL 1697198, at *2 (2d Cir. May 27, 2022) ("Abbey Hotel contends that the county mayor's Emergency Order qualified as a 'communicable disease event,' triggering

coverage under this provision. But even if it were true that a communicable disease event happened here, Abbey Hotel would still be entitled to reimbursement only for ‘direct physical loss or damage’ ‘caused by or resulting from’ such an event. As noted above, ‘physical loss or damage’ does not extend to the mere presence of COVID-19 particles in the air or on surfaces.”);

- *Paradigm Care & Enrichment Ctr., LLC v. W. Bend Mut. Ins. Co.*, 33 F.4th 417, 423 (7th Cir. 2022) (“The Centers next invoke the Communicable Disease provision. . . . The policies do not define ‘due to,’ and the parties dispute how strict of a causal nexus the phrase imposes. But the question of precise degree is irrelevant because ‘due to’ clearly requires some degree of causation between a shutdown order and a communicable disease outbreak ‘at the insured premises.’ And in no sense were the executive orders at issue here caused by a COVID-19 outbreak at the Centers (or, for that matter, at any other specific location). Rather, the orders were general prophylactic measures taken to slow, suppress, and stop the spread of COVID-19. These same executive orders would have been promulgated verbatim even if the Centers had not existed. Thus, the orders were not issued ‘due to’ conditions at the Centers’ premises.”)
- *Dakota Girls, LLC v. Philadelphia Indem. Ins. Co.*, 17 F.4th 645, 651-52 (6th Cir. 2021) (The communicable disease “provision reflects that the illness must be both from a communicable disease and at the premises to have triggered the coverage. Reading the communicable-disease coverage to not require an actual illness at the premises, therefore, would engender serious inconsistency within the policy. . . . Dakota Girls also never alleged that Ohio’s statewide shutdown order arose ‘directly’ (or even indirectly) from an illness *at the premises*. Nor could it have. The Director of Health’s order was framed in general terms and applied to all ‘Facilities Providing Child Care Services.’ It was also couched as a prophylactic measure ‘to avoid an imminent threat with a high probability of widespread exposure to COVID-19,’ not as a response to a specific illness discovered at appellants’ preschools or anywhere else.” (emphasis original));
- *Green Beginnings, LLC v. W. Bend Mut. Ins. Co.*, No. 21-2186, 2022 WL 1700139, at *1 (7th Cir. May 27, 2022) (“Because the shutdown orders would have been issued verbatim even if the insured premises in [*Paradigm*] did not exist, we reasoned that the shutdown orders were not ‘due to’ conditions present at the insured premises. This reasoning applies with equal force here. The Illinois shutdown orders were not promulgated because of conditions at Green Beginnings’ insured premises—they applied to the entire State of Illinois as a prophylactic measure.”);
- *Planet Sub Holdings, Inc. v. State Auto Prop. & Cas. Ins. Co., Inc.*, No. 21-2199, 2022 WL 1951615, at *3 (8th Cir. June 6, 2022) (“The restaurants argue there is no direct causal language in the Food-Borne Illness extension tying the civil authority orders to the restaurants. But the plain, ordinary meaning of this extension does not support that view: ‘resulting from’ requires a causal connection.

The actual or alleged exposure must have been on the covered premises, which the restaurants do not plausibly allege.”);

- *Terry Black’s Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, 22 F.4th 450, 458 (5th Cir. 2022) (“Because the civil authority orders did not “result from” TBB’s exposure to COVID-19, the [restaurant extension endorsement] provision does not provide coverage either. The REE provision provides coverage for the suspension of business operations due to a civil authority order ‘resulting from the actual or alleged exposure of the described premises to a contagious or infectious disease.’ The key here is the requirement that the civil authority orders ‘result from’ TBB’s actual or alleged exposure to a contagious disease. The plain meaning of ‘resulting from’ is causation. . . . And from a common sense understanding of the onset of the pandemic, the civil authority orders were not caused, even tangentially, by TBB’s alleged or actual exposure to a contagious disease. The civil authority orders ‘resulted from’ the global pandemic and the need to take measures to contain and prevent the spread of COVID-19.”).

Federal Circuit Courts of Appeal

- *Summit Hosp. Group, Ltd. v. Cincinnati Ins. Co.*, No. 21-1362, 2022 WL 2072759, at *1 (4th Cir. June 9, 2022) (affirming dismissal under North Carolina law for the reasons expressed in *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926, 933-34 (4th Cir. 2022)).
- *Ferrer & Poirot, GP v. Cincinnati Ins. Co.*, No. 21-11046, 2022 WL 2070875, at *2 (5th Cir. June 9, 2022) (“While COVID-19 has wrought great physical harm to people, it does not physically damage property within the plain meaning of ‘physical.’ Ferrer was not deprived of its property nor was there a tangible alteration to its property, so there was no underlying ‘direct “loss”’ to trigger coverage.”);
- *Farmington Vill. Dental Associates, LLC v. Cincinnati Ins. Co.*, No. 21-2080-CV, 2022 WL 2062280, at *1 (2d Cir. June 8, 2022) (“In *Capstone*, the Connecticut Supreme Court concluded that under the plain language of the applicable general liability policy, the escape of carbon monoxide did not, without more, constitute a ‘physical injury to tangible property’ because it caused no ‘physical, tangible alteration to any property.’ Here, as in *Capstone*, the policy language unambiguously requires that loss or damage be physical; accordingly, Farmington Village’s deprivation of the use and benefits of its property is not enough to trigger coverage.”);
- *Troy Stacy Enterprises Inc. v. Cincinnati Ins. Co.*, No. 21-4008, 2022 WL 2062001, at *4 (6th Cir. June 8, 2022) (“The COVID-19 pandemic has caused hardship for many businesses across the country, and we are sympathetic to the challenges they have been forced to confront. Nevertheless, we may not reconstruct the insurance policy’s terms or grant Troy Stacy a contractual benefit it did not bargain for.”);

- *Melcorp, Inc. v. W. Am. Ins. Co.*, No. 21-2448, 2022 WL 2068256, at *2 (7th Cir. June 8, 2022) (“The language in Melcorp’s policy is indistinguishable from that of the policies in those cases. As with those cases, the coverage is limited to ‘physical’ loss of or damage to covered property and provides coverage during the period of restoration which ends when the property should be ‘repaired, rebuilt or replaced’ or when business resumes at a new permanent place. . . . Melcorp presented no evidence of any physical impact to the property, and it alleged only a temporary restriction on the use of the property but maintained access to the property. Melcorp did not argue in its briefs that the restrictions constituted a total physical dispossession of the property, alleging only a loss of property for its intended use.”);
- *Nat’l Coatings & Supplies, Inc. v. Valley Forge Ins. Co.*, No. 21-1421, 2022 WL 2045334, at *1 (4th Cir. June 7, 2022) (affirming dismissal under North Carolina law for the reasons expressed in *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926, 933-34 (4th Cir. 2022));
- *Windy City Limousine Co., LLC v. Cincinnati Fin. Corp.*, No. 21-3296, 2022 WL 1965903, at *1 (7th Cir. June 6, 2022) (“First, Windy City argues that, unlike the plaintiffs in *Sandy Point*, it pleaded the known, actual presence of the virus on its premises. But we have already held that this is insufficient. . . . Second, Windy City notes that under *Sandy Point* a party may plead ‘direct physical loss’ by alleging either a ‘physical alteration’ or, in rare cases, ‘an access-or use-deprivation so substantial as to constitute a physical dispossession.’ By alleging that the presence of the virus rendered its business ‘effectively inoperable,’ Windy City claims it has pleaded physical dispossession. But we explained in the earlier cases why that is not so. Windy City’s intended operations may have been rendered untenable for a time, but its premises were not rendered uninhabitable or unsuitable for all other conceivable uses.”);
- *Planet Sub Holdings, Inc. v. State Auto Prop. & Cas. Ins. Co., Inc.*, No. 21-2199, 2022 WL 1951615, at *2 (8th Cir. June 6, 2022) (holding under Kansas, Missouri, and Oklahoma law that loss of use and virus on the premises does not constitute “direct physical loss of damage to property”).
- *Dukes Clothing, LLC v. Cincinnati Ins. Co.*, 35 F.4th 1322 (11th Cir. 2022) (“We further conclude that if a property or surface can be cleaned and quickly restored to its previous condition, then the property has not suffered direct ‘accidental physical loss or accidental physical damage’ such that it has been tangibly altered. A temporary loss of use, without more, cannot satisfy the physical loss or damage requirement in an insurance policy like the one here.”);
- *Rest. Group Mgmt., LLC v. Zurich Am. Ins. Co.*, No. 21-12107, 2022 WL 1931094, at *2 (11th Cir. June 6, 2022) (“Here, the restaurants identify two alleged ‘direct physical los[se]s’ caused by the COVID-19 pandemic: reduced seating capacity

and ‘property contamination due to the virus.’ But neither reduced capacity nor the presence of the virus on surfaces within the restaurants constitutes tangible harm to the insured properties.”).

Very truly yours,

/s/ A. Mattison Bogan

A. Mattison Bogan

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