

A. Mattison Bogan
T 803.255.9589 F 803.255.5916
matt.bogan@nelsonmullins.com

1320 Main Street | 17th Floor
Columbia, SC 29201
T 803.799.2000 F 803.256.7500
nelsonmullins.com

June 6, 2022

RECEIVED

Jun 06 2022

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 May 27, 2022.

As before, given the volume of decisions, Defendants have limited the list below to those decided by appellate courts only. Appellate courts nationwide remain unanimous without a single dissent that COVID-19 and related government orders do not cause direct physical loss or damage to property.

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

Federal Circuit Courts of Appeal

- *American Food Sys., Inc. v. Fireman's Fund Ins. Co.*, No. 21-1307, slip op. at *2 (1st Cir. June 3, 2022) (Plaintiff's "complaint does not allege either that the virus has more than mere 'evanescent presence,' or that, insofar as it results in surface level contamination, such contamination is not susceptible of being redressed through 'simple cleaning.'")
- *Legal Sea Foods v. Strathmore Ins. Co.*, ___ F.4th ___, No. 21-1202, 2022 WL 1818317, at *5 (1st Cir. June 3, 2022) ("[T]he factual allegations in Legal's

operative complaint allege no more than a presence of the virus that is evanescent or that results in contamination of surfaces that may be addressed through simple cleaning.”)

- *SAS Int’l, Ltd. v. General Star Indem. Co.*, ___ F.4th ___, No. 21-1219, 2022 WL 1818115, at *4 (1st Cir. June 3, 2022) (“SAS does argue that its complaint alleges that the virus is ‘ubiquitous,’ ‘omnipresent and . . . constantly reintroduced.’ It then goes on to contend, in that same vein, that it has alleged that the virus ‘cannot simply be removed with disinfectant because it is continually spread and reintroduced.’ But, even assuming that SAS has fairly characterized its complaint, those allegations about the way that the virus can be spread by individuals entering the premises who are infected does not constitute an allegation that the virus, when present, will not ‘quickly dissipate on its own’ within the meaning of *Verveine* or cannot be removed from surfaces ‘by simple cleaning.’”)
- *Green Beginnings, LLC v. W. Bend Mut. Ins. Co.*, No. 21-2186, 2022 WL 1700139, at *1 (7th Cir. May 27, 2022) (for communicable disease coverage: “Because the shutdown orders would have been issued verbatim even if the insured premises in that case did not exist, we reasoned that the shutdown orders were not ‘due to’ conditions present at the insured premises.”)
- *Frontier Development, LLC v. Endurance Am. Ins. Co.*, No. 21-13449, 2022 WL 1763402, at *3 (11th Cir. June 1, 2022) (“Frontier did not allege that COVID-19 caused ‘a tangible alteration of [its] properties,’ and Frontier’s specific factual allegations—that COVID-19 virus particles attached to physical surfaces and prevented the properties from being used—do not plausibly suggest any tangible alterations to the properties.”)
- *PF Sunset View, LLC v. Atlantic Specialty Ins. Co.*, No. 21-11580, 2022 WL 1788920, at *2 (11th Cir. June 2, 2022) (“[B]inding precedent mandates the franchisees show a ‘tangible alteration to the insured propert[y]’ and that losses stemming from suspension of operations and extra expenses incurred in response to COVID-19 closure orders do not count.”)
- *Henry’s Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, No. 20-14156, slip op., at *6 (11th Cir. June 3, 2022) (“Even if we assume that the governor’s Covid-19 order caused loss because it deprived the restaurant of the use of its property, that does not result in a win for Henry’s. Allied agreed to provide for only one manner of loss—the *physical* loss of Henry’s property. To be physical, the loss itself must be ‘of or relating to things perceived through the senses as opposed to the mind’; it must be ‘tangible or concrete.’ New Oxford American Dictionary 1321 (3d ed. 2010).”)

Wisconsin Supreme Court

- *Colectivo Coffee Roasters, Inc. v. Society Mut. Ins. Co.*, ___ N.W.2d ___, No. 2021AP463, 2022 WL 1758674, at *3 (Wis. June 1, 2022) (“An insured suffers a

physical ‘loss’ of its property when the property is ‘destroyed’ or affected to such an extent that it cannot be repaired. Such a loss occurs, for example, when a building burns down and must be rebuilt. Physical ‘damage’ is harm to the tangible characteristics of the insured property that does not rise to the level of a physical loss. . . . Colectivo argues that it suffered a physical loss of or damage to its property in two ways: (1) because of the ‘presence of COVID-19 particles’ on its premises; and (2) it lost the use of at least some of its property because of [government] orders closing restaurants. We reject both arguments because neither alleges a tangible harm to Colectivo’s physical property necessary to trigger coverage.”)

Michigan Court of Appeals

- *Gourmet Deli Ren Cen., Inc. v. Farm Bureau Gen. Ins. Co. of Michigan*, No. 357386, 2022 WL 1714202, at *5 (Mich. Ct. App. May 26, 2022) (The period of restoration, “in limiting coverage to the time required to ‘rebuild, repair, or replace’ the property, indicates the need for physical, structural damage. Gourmet’s loss of use of its property for its intended purpose did not render the property in need of rebuilding, repair, or replacement.”).

Very truly yours,

/s/ A. Mattison Bogan

A. Mattison Bogan

cc: Justin O’Toole Lucey, Esquire
Sohayla Roudsari Townes, Esquire
Anna Scarborough McCann, Esquire
Amanda Nicole Funai, Esquire
Brett David Solberg, Esquire
Brett Ingerman, Esquire
Mark Matthew Billion, Sr., Esquire
Rhonda D. Orin, Esquire
Jason E. Kosek, Esquire
Marshall Gilinsky, Esquire
Shanon N. Peake, Esquire
Jonathan M. Robinson, Esquire
G. Murrell Smith, Jr., Esquire
Kaitlin J. Beach, Esquire
Amy Mason Saharia, Esquire
The Honorable Mary Geiger Lewis