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COURT OF APPEALS

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
APPEAL NO. 2021AP463**

COLECTIVO COFFEE ROASTERS, INC., TANDEM
RESTAURANT, LLC d/b/a THE TANDEM, WRECKING
CREW, INC., IRON GRATE BBQ COMPANY, INC.,
EAST TROY BREWERY COMPANY, LOGAN &
POTTER, INC., BUCKLEY'S KISKEAM INN, LLC,
OTHER ONES MKE, LLC, BCT 5, LLC, COMPANY
BREWING, LLC, BRYHOPPER'S BAR & GRILL, LLC,
THE RIVER'S BAR, LLC, ETCETERA BY
BLH, LLC, REMBS, LLC, KRO BAR, INC.,
RIVERMILL, INC. and PORK'S PLACE OF KAUKANA, LLC,

Plaintiff-Respondent,

v.

SOCIETY INSURANCE, A MUTUAL
COMPANY,

Defendant-Appellant.

Appeal from the Milwaukee County Circuit Court
Case No. 20-CV-2597
The Honorable Laura Gramling Perez, Presiding

**REPLY BRIEF OF DEFENDANT-APPELLANT
SOCIETY INSURANCE,
A MUTUAL COMPANY**

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I. The Label “All Risk” Policy Does Not Mean Colectivo Need Not Show Direct Physical Loss Of Or Damage To Covered Property.

Although the Policy does not say “all risk,” Colectivo repeatedly calls the Society Policy “all-risk,” as though coverage applies to any event unless excluded. However, “the burden of proof rests with the party seeking to establish coverage.” *Oaks v. Am. Fam. Mut. Ins. Co.*, 195 Wis. 2d 42, 51, 535 N.W.2d 120, 124 (Ct. App. 1995). “Labeling the policy as ‘all-risk’ does not relieve the insured of its initial burden of demonstrating a covered loss....” *Roundabout Theatre Co. v. Cont’l Cas. Co.*, 302 A.D.2d 1, 6, 751 N.Y.S.2d 4, 7 (2002); *Whitaker v. Nationwide Mut. Fire Ins. Co.*, 115 F.Supp.2d 612, 617 (E.D.Va.1999).

II. “Direct Physical Loss Of Or Damage To” Covered Property Requires Colectivo To Show Injury, Destruction, Or Dispossession.

Because “direct physical loss of or damage to” Covered Property is required for Business Income or Extra Expense coverage, Colectivo must show COVID-19 or the Social Distancing Orders caused (1) tangible injury or (2) destruction or dispossession.

The weight of authority is that neither the presence of COVID-19 nor governmental orders limiting operations cause physical damage or physical loss. *Infra* at 13-15. The loss of use of property for in-person dining is not

loss or damage of covered property. *Visconti Bus Serv., LLC v. Utica Nat'l Ins. Grp.*, 71 Misc. 3d 516, 528, 142 N.Y.S.3d 903 (N.Y. Sup. Ct. 2021) (“The plain meaning of the phrase ‘direct physical loss of or damage to’ therefore connotes a negative alteration in the tangible condition of property.”).

A. There Was No Direct Physical Damage.

Colectivo objects to Society’s reference to CDC guidance (R. 56:134-142). Judicial notice is proper at any stage of a proceeding. Wis. Stat. § 902.01(6). The CDC guidance is a public record from a federal agency, the veracity of which cannot be reasonably disputed. Wis. Stat. § 902.01; *Perkins v. State*, 61 Wis. 2d 341, 346, 212 N.W.2d 141 (1973); *Wis. Power & Light Co. v. City of Beloit*, 215 Wis. 439, 444, 254 N.W. 119 (1934) (public service commission files).

COVID-19 can be removed with disinfectant. (R. 56:134-142). Thus, its presence does not cause physical damage. *O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co.*, No. 20-CV-02951-MMC, __ F.Supp.3d __, 2021 WL 105772, at *4 (N.D. Cal. Jan. 12, 2021); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 498 F.Supp.3d 878 (S.D. W.Va. Nov. 2, 2020); *see also Mama Jo's, Inc. v. Sparta Ins. Co.*, No. 17-CV-23362-KMM, 2018 WL 3412974, at *9

(S.D. Fla. June 11, 2018), *aff'd*, 823 F. App'x 868 (11th Cir. 2020). Even if present in restaurant air (Response at n.8), COVID-19 would eventually land on a surface where disinfectant would eliminate it.

Colectivo did not allege facts supporting the proposition that the suspected presence of COVID-19 damaged *its* property, but only speculated it was “likely” COVID-19 “infected” its premises because people infected with COVID-19 were “likely” present. (R. 18:¶¶96, 101; App.267-68). These allegations do not establish that the virus actually damaged property. *Cafe Int'l Holding Co. LLC v. Westchester Surplus Lines Ins. Co.*, No. 20-21641-CIV, 2021 WL 1803805, at *1, 4 (S.D. Fla. May 4, 2021), *appeal filed* (11th Cir. 2021) (rejecting similar allegations because the complaint lacked “any fact-specific allegations of physical damage”). But even if they were sufficient, COVID-19 particles do not cause physical damage. (Opening Br. 43-45, 49-53).

B. Colectivo’s Loss of Use Was Not a Direct Physical Loss.

Direct physical loss means “the state or fact of being destroyed or placed beyond recovery.” *RTE Corp. v. Maryland Casualty Co.*, 74 Wis. 2d 614, 624, 247 N.W.2d 171 (1976). Colectivo’s Covered Property was not “destroyed” or “placed beyond recovery.”

Colectivo contends that because of Social Distancing Orders, it could not physically use part of the Covered Property for in-person dining. Colectivo's property was unharmed and in Colectivo's possession. Social Distancing Orders allowed restaurants to continue serving customers through takeout service. (R.18:¶38; App.257).¹ Colectivo did not allege facts that could establish direct physical loss.

Colectivo dismisses *RTE Corp.*'s definition of "direct physical loss," but it is binding precedent. *See Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 58, 324 Wis. 2d 325, 782 N.W.2d 682 ("the court of appeals may not dismiss a statement from an opinion by [the Wisconsin Supreme Court] by concluding that it is dictum"). In fact, the meaning of "direct physical loss of or damage to" covered property was central to *RTE Corp.*—the issue was whether the insured had a duty to give notice of loss. 74 Wis. 2d 623-24. To determine the insured's duty, the court considered the meaning of "loss" within the phrase "direct physical loss of or damage to" covered property. *Id.*

¹ Colectivo disputes the relevance of serving takeout because, it says, Society agreed to insure Colectivo's "business activities." (Response at 19). The Society Policy relates to *covered property*. Colectivo may be entitled to business income coverage when covered property is physically lost or damaged, but is not entitled to coverage for business activities without accompanying physical alteration. Colectivo's citations to the Policy provisions detailing what types of losses are covered, such as a "partial slowdown," are descriptions of the types of business income Society will cover *when there is a direct physical loss of or damage to covered property*. (See Response at 23).

Colectivo ignores that “physical” modifies loss. Physical means “pertaining to real, tangible objects,” (Opening Br. at 32), so the “loss” covered by the Society Policy must be physical. *See Oral Surgeons v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021)²; *Melcorp v. West. Amer. Ins. Co.*, No. 20 C 4839, 2021 WL 2853371, at * (N.D. Ill. July 8, 2021). The Policy requires destruction or dispossession of a physical thing, not mere loss of use. *Brunswick Panini's, LLC v. Zurich Am. Ins. Co.*, No. 1:20CV1895, 2021 WL 663675, at *8 (N.D. Ohio Feb. 19, 2021), *appeal filed* (8th Cir. Mar. 9, 2021; *see also Oral Surgeons* at 1144 (reaffirming rule from *Pentair v. American Guarantee and Liability Insurance*, 400 F.3d 613 (8th Cir. 2005), that loss of use and function without a physical change was not direct physical loss). Colectivo’s alternate definitions of “loss” render “physical” superfluous.

C. “Loss” and “Damage” Provide Coverage For Different Types of Harm.

Physical loss means that the Covered Property is destroyed or placed beyond recovery (*i.e.*, by theft), while damage represents a “lesser injury.” *Michael Cetta, Inc. v. Admiral Indem. Co.*, 506 F.Supp.3d 168, 180 (S.D.N.Y. 2020), *appeal withdrawn* (2d Cir. Mar. 23, 2021; *see also Henry's*

² Although the insurance policy at issue in *Oral Surgeons* is worded differently from the Society policy, the operative language—“physical loss” or “physical damage”—is the same.

Louisiana Grill, Inc. v. Allied Ins. Co. of Am., 495 F.Supp.3d 1289, 1295 (N.D. Ga. 2020) (“[a] tornado that destroys the entirety of the restaurant results in a ‘loss of’ the restaurant, while a tree falling on part of the kitchen would represent ‘damage to’ the restaurant.”); *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 499 F.Supp.3d 288, 294–95 (S.D. Miss. 2020) (“[i]n a restaurant with ten tables, there could be a fire, which completely burns up five of the tables—thus, there is a ‘direct physical loss of property.’ The fire also could melt the tabletops or cause smoke damage to the remaining five tables—thus, there is ‘damage to property.’”).

Colectivo’s allegation that Society’s interpretation renders policy terms superfluous is wrong: “if the mere loss of use were covered, what would be the difference between ‘direct loss’ and ‘direct physical loss’?” *Melcorp*, 2021 WL 2853371, at *5.

D. The Society Policy as a Whole Supports Dismissal.

1. The Society Policy Does Not Use “Direct Physical Loss” and “Loss of Use” Interchangeably.

The terms “direct physical loss” and “loss of use” refer to different things. (Opening Br. at 41). For instance, a section of the Policy related to personal property of invitees refers to “direct physical loss or damage,

including loss of use.”³ (R.50:119; App.144). The distinct usage of these two phrases confirms Society’s interpretation. *See United Am. Ins. Co. v. Wilbracht*, 825 F.2d 1196, 1203 (7th Cir. 1987) (presuming that differently worded provisions in an insurance policy carry different meanings).

2. The Period of Restoration Confirms Society’s Interpretation.

The Period of Restoration clause limits Business Income or Extra Expense coverage to the time needed to repair or replace Covered Property following direct physical loss or damage. (R.50:170; App.195). Colectivo says that some businesses may have implemented mitigation measures in response to COVID-19 (such as plexiglass partitions), so COVID-19’s presence required repair or restoration.

Colectivo asserts that measures to prevent the transmission of COVID-19 would “restore” property. The Period of Restoration clause requires repair or replacement. The clause implies that, during the repair or replacement period, the property is unusable or uninhabitable. COVID-19 and Social Distancing Orders did not make property uninhabitable or unusable, restaurants could offer takeout service. Mitigation strategies are

³ In this brief, emphasis is added and citations are omitted unless otherwise noted.

not the type of repair or replacement resulting from physical loss or damage contemplated by the Period of Restoration clause, “for if there has been no physical alteration to the property’s condition or location, there would be nothing to “repair[], rebuild[d] or replace[].” *Melcorp*, 2021 WL 2853371, *3; *Zagafen Bala, LLC v. Twin City Fire Ins. Co.*, No. CV 20-3033, 2021 WL 131657, at *6 (E.D. Pa. Jan. 14, 2021), *appeal filed* (3d Cir. Mar. 19, 2021) (concluding that “changes made to the properties to ameliorate the threat of the virus” cannot reasonably be interpreted as “rebuild[ing] or replac[ing]”).

III. Neither COVID-19’s Presence Nor Social Distancing Orders Are a Direct Physical Loss or Damage.

Courts have considered whether insurance policies like Society’s plausibly cover COVID-19-related claims, and the “*vast majority have found that [they do] not.*” *Brown Jug, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-13003, 2021 WL 2163604, at *5 (E.D. Mich. May 27, 2021), *appeal filed* (6th Cir. Jun. 23, 2021) (collecting cases). This is because COVID-19 and Social Distancing Orders do not cause physical damage, *Uncork*, 498 F.Supp.3d at 882, nor do they cause direct physical loss.” *Ryan P. Estes, D.M.D., P.S., P.S.C. v. Cincinnati Ins. Co.*, No. 220CV138WOBBCJS, 2021 WL 2292473, at *4, n.3 (E.D. Ky. June 4, 2021) *appeal filed* (6th Cir. Jun.

16, 2021). This Court should not conclude the Society Policy is ambiguous just because a minority of courts have taken a different approach.⁴ *Peace v. Nw. Nat'l Ins. Co.*, 228 Wis. 2d 106, ¶ 60, 596 N.W.2d 429 (1999).

The federal court decisions are instructive. The policies at issue in many of the cases require that the insured show direct physical loss or physical damage. While some cases address policies saying “direct physical loss *to*” rather than “*of*,” the “choice of preposition, while carrying some metaphysical distinction, [] makes no practical difference here because it does not alter the coverage trigger: that there be a “physical loss” affecting property.” *Melcorp*, 2021 WL 2853371, at *7. “When an insured suffers a “loss of property,” the insured had some property that is now lost. When an insured suffers a “loss to property,” it is the property that sustained the loss—but because that property belongs to the insured, the loss is the insured’s all the same.” *Id.*

Many federal courts have concluded that neither COVID-19 nor social distancing orders trigger coverage. *See, e.g., DZ Jewelry, LLC v. Certain Underwriters at Lloyds London*, No. CV H-20-3606, 2021 WL 1232778, at

⁴ While approximately fifty courts have denied insurer-filed motions to dismiss in COVID-19 coverage cases, *over 400 courts* have granted motions to dismiss filed by insurers. Covid Coverage Litigation Tracker, available at <https://cclt.law.upenn.edu/> (last visited August 5, 2021).

*4 (S.D. Tex. Mar. 12, 2021); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 487 F.Supp.3d 937, 943 (S.D. Cal. 2020). Most also reject complaints where the plaintiff suspects COVID-19 was present. *E.g.*, *Sandy Point Dental, PC, v. Cincinnati Ins. Co.*, 488 F.Supp.3d 690, 694 (N.D. Ill. 2020); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 491 F.Supp.3d 738, 740 (S.D. Cal. 2020). The existence of a virus exclusion in these cases is irrelevant because there was no coverage in the first instance. *See, e.g.*, *Zagafen*, 2021 WL 131657, at *7.

While Colectivo relies on federal decisions denying an insurer's motion to dismiss, these represent the minority view, which is inconsistent with Wisconsin law.⁵

IV. Civil Authority and Contamination Coverage Do Not Apply.

Access to Covered Property must be prohibited for Civil Authority or Contamination coverage to apply. (R.50:146-48; App. 171-173). Plainly, “prohibit” means to forbid or preclude. (Opening Br. at 52-53); *see also Mt. Hawley Ins. Co. v. Jamal & Kamal, Inc.*, No. CV H-20 2385, 2021 WL

⁵ *In re: Society Insurance Company COVID-19 Business Interruption Protection Insurance Litigation*, MDL No. 2964, 2021 WL 679109 (N.D. Ill. Feb. 22, 2021) is also inconsistent with Wisconsin law because the district court found an ambiguity where none existed and improperly delegated legal interpretation to a future jury. *Kraemer Bros. v. U.S. Fire Ins. Co.*, 89 Wis. 2d 555, 562, 278 N.W.2d 857, 860 (1979).

3079715, at *4 (S.D. Tex. July 21, 2021). Colectivo could access its premises under Social Distancing Orders. While Colectivo argues that Society's Policy should say "completely prohibit," the plain meaning of "prohibit" means that access is barred and additional verbiage is unnecessary.

Colectivo makes additional arguments why Civil Authority or Contamination coverage should apply. First, Colectivo says Civil Authority applies because Social Distancing Orders were in response to direct physical loss to other property, but never identifies that property, much less a direct physical loss to it. Next, Colectivo contends that contamination is a dangerous physical condition. This ignores that its property was safe for employees to prepare and customers to receive takeout orders. Finally, that other insurance policies do not contain contamination coverage cannot override the plain meaning of the Contamination coverage language.

V. Sue and Labor Does Not Provide Coverage

The Policy's Sue and Labor provision addresses the insured's duties in the event of a covered cause of loss, and whether the insurer must reimburse the insured's costs incurred fulfilling these duties. *Promotional Headwear Int'l v. Cincinatti Ins. Co.*, 504 F. Supp. 3d 1191, 1206 (D. Kan. 2020) (no coverage for COVID-19 claims under Sue and Labor). Colectivo

cites *Slay Warehousing Co. v. Reliance Ins. Co.*, 471 F.2d 1364, 1365 (7th Cir. 1973) in support of its argument that the “sue and labor” provision applies. That case, however, found reimbursement appropriate where the insured suffered clear physical damage—the collapse of a wall. In order to be a Covered Cause of Loss, there must be direct physical loss. As explained above, there was none. Therefore, this provision is not applicable.

VI. Exclusions Bar Colectivo’s Claims.

Even if Colectivo could allege facts that would trigger coverage, exclusions apply. The Consequential Losses exclusion bars claims for losses of use or market, like Colectivo’s. To the extent losses arose from Social Distancing Orders, the Acts or Decisions Exclusion applies because such a loss arises from acts of a governmental body. *See Paul Glat MD, P.C. v. Nationwide Mut. Ins. Co.*, No. CV 20-5271, ___F. Supp. 3d. ___, 2021 WL 1210000, at *6 (E.D. Pa. Mar. 31, 2021). Last, the causation issues Colectivo points to are inapt—whether the Social Distancing Orders or COVID-19 caused its loss, one of the exclusions applies.

VII. The Society Policy is Not Ambiguous.

Colectivo contends the Society Policy is ambiguous, so this Court should construe it in Colectivo’s favor rather than apply the plain meaning.

Wisconsin courts construe policies in favor of the insured only when there is an ambiguity—otherwise, the plain meaning applies. *Danbeck v. Am. Fam. Mut. Ins. Co.*, 2001 WI 91, ¶ 10, 245 Wis. 2d 186, 629 N.W.2d 150.

Neither “direct physical damage” nor “direct physical loss” are ambiguous, so the Policy’s plain meaning applies. *Id.* The existence of other court decisions interpreting the same or similar languages differently does not, by itself, render the Policy ambiguous. *Peace v. Nw. Nat’l Ins. Co.*, 228 Wis. 2d 106, ¶ 60, 596 N.W.2d 429 (1999) (“If the existence of differing court interpretations inevitably meant ambiguity, then only the first interpretation by a court would count.”); *Melcorp*, 2021 WL 2853371, at *7.

CONCLUSION

This Court should reverse the circuit court and remand with instructions to dismiss the Amended Complaint with prejudice.

Respectfully submitted and dated at Milwaukee, Wisconsin this 5th day of August, 2021.

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this Brief is 2,748 words.

Dated this 5th day of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2021, I personally caused copies of the Reply Brief of Defendant-Appellant Society Insurance, A Mutual Company to be served on counsel for Colectivo via the e-filing system.

Dated this 5th day of August, 2021.

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