BROWN'S GYM, INC.,

Plaintiff

vs.

THE CINCINNATI INSURANCE COMPANY and C.C. YOUNG and HENKELMAN INSURANCE,

Defendants

IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY

CIVIL ACTION - LAW

NO. 20 CV 3113

MAURI B. KELLY
LACKAWANNA COUNTY
2021 JUL 13 P 2: 34
CLERK OF
JUDICIAL RECORDS
CIVIL DIVISION

MEMORANDUM AND ORDER

NEALON, J.

A gym and fitness center, which was required to close its premises and cease all business operations in compliance with state government closure orders issued in response to the COVID-19 pandemic, has commenced this action against its insurer seeking to recover damages under the business income, extra expense, and civil authority coverages contained in its commercial policy for the revenues lost and additional costs incurred due to the coronavirus public health crisis and resulting closure orders. Unlike The Scranton Club v. Tuscarora Wayne Mut. Group, Inc., 2021 WL 454498 (Lacka. Co. 2021), *app. pending*, No. 238 MDA 2021 (Pa. Super.), the insurance policy in this case does not contain an exclusion in its business interruption insurance coverages for losses caused by a virus or pandemic, and the gym has specifically alleged that the COVID-19 virus was actually present on its covered premises and the neighboring properties, and that all public

access to the insured property was prohibited as a result. The insurer has filed preliminary objections seeking to dismiss the gym's claims for a declaratory judgment that its coronavirus-related losses are covered by the policy, compensatory damages for breach of the insurance agreement, and extra-contractual damages for insurer bad faith under 42 Pa.C.S. § 8371, and asserts that the gym's declaratory judgment and breach of contract claims are insufficient as a matter of law due to the gym's failure to allege any "direct physical loss or damage" to its property, which is a condition to business income, extra expense, and civil authority coverages. In addition, the insurer seeks to dismiss the gym's bad faith liability claim on the ground that the insurer's denial of coverages was proper as a matter of law.

Prior to the COVID-19 pandemic, appellate and state courts in this Commonwealth established a "reasonable and realistic standard for identifying physical loss or damage" to property in cases "where sources unnoticeable to the naked eye" substantially reduced the use of the property, and held that an insured may satisfy the "direct physical loss or damage" requirement for insurance coverage if the infectious pathogen, disease-causing agent, or contaminant renders the property "useless or uninhabitable," or the property's functionality is "nearly eliminated or destroyed" by that invisible source. Under this "physical contamination" theory, courts concluded that ammonia fumes, e-coli bacteria, carbon-monoxide, gas vapors, lead intrusion, and odor from cat urine or methamphetamine cooking, which made covered premises unusable, unsafe, or unfit for their intended use, constituted "physical loss or damage" for purposes of insurance coverage. In the wake of the coronavirus pandemic and the accompanying government closure orders, better reasoned decisions across the country have applied the "physical

contamination" theory in recognizing the applicability of business interruption insurance coverage only if the insured asserts that (a) the COVID-19 virus was actually present on or attached to surfaces on the covered property, and (b) its presence caused the insured premises to become uninhabitable, unusable, inaccessible, or unduly dangerous to use.

Based upon the gym's specific averments regarding the "continuous presence" of the COVID-19 virus on its property that rendered it unusable, unsafe, inaccessible, and unfit for its intended use, the gym has sufficiently alleged "direct physical loss or damage" to its property under the "physical contamination" theory as a necessary condition to business interruption insurance coverage. Although the policy drafted by the insurer does not include a virus exclusion among the 26 stated exclusions from business interruption insurance coverage, it does contain a comprehensive "communicable disease or virus" exclusion for other "crisis event response communication expense" coverage in the policy, thereby creating a reasonable expectation on the part of the gym that coronavirus-related damages would be covered by the policy's business interruption insurance coverage, but excluded from crisis event response communication expense coverage. Furthermore, inasmuch as the gym has averred that the COVID-19 virus was also present on nearby properties and that public access to the covered premises was completely prohibited as a result, it has stated an alternate claim for "business income" and "extra expense" recovery under its "civil authority" coverage. Finally, in light of the gym's assertions that the insurer misrepresented the policy terms and monetary limits to the gym and denied the gym's coverage request based upon the insurer's own economic considerations, rather than the merits of the claim, the insurer's demurrer to the gym's declaratory judgment, breach of contract, and bad faith claims will be overruled.

I. FACTUAL BACKGROUND

Plaintiff, Brown's Gym, Inc. ("Brown's"), owns and operates a gym and fitness center for which it "sought commercial property insurance" coverage through an insurance broker, defendant, C.C. Young and Henkelman Insurance ("C.C. Young"). (Docket Entry No. 1 at ¶¶ 1, 3-4, 6, 10, 14). It is alleged that in exchange for Brown's payment of "substantial premiums," it purchased an "all risk" commercial property insurance policy from defendant, Cincinnati Insurance Company ("Cincinnati"), that was procured by C.C. Young. (Id. at ¶¶ 2, 5-8, 15, 32). Brown's maintains that "unlike many commercial property policies available in the market, the policy sold by [Cincinnati and C.C. Young] does not include an exclusion for any loss caused by a virus," as a result of which Brown's "reasonably expected that the insurance it purchased . . . included coverage for property damage and business interruption losses caused by viruses like the COVID-19 coronavirus." (Id. at ¶ 26).

According to Brown's policy no. ETD 053 56 56 that is attached to the complaint, Brown's purchased commercial property insurance coverage from Cincinnati for the period from May 5, 2019, to May 5, 2020. (Id. at p. 33). The "Building and Personal Property Coverage" states that Cincinnati "will pay for direct 'loss' to Covered Property at the 'premises' caused by or resulting from any Covered Cause of Loss." (Id. at p. 52). A "Covered Cause of Loss" is defined as "mean[ing] direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." (Id. at p. 54). Per the policy's general definitions, the term "'[l]oss' means accidental physical loss or accidental physical damage." (Id. at p. 87). The policy does not define the words "direct," "physical," or "damage." (Id. at pp. 87-89).

Cincinnati's policy contains 26 exclusions from its building and property coverage for any loss, "regardless of any other cause or event that contributes concurrently or in any sequence," that is caused directly or indirectly by ordinance, earth movement, government seizure or destruction, nuclear hazard, utility services, war and military action, water, fungi, wet rot, dry rot, and bacteria, electrical current, delay, smoke, vapor, gas, wear and tear, rust or corrosion, smog, settling or cracking, nesting or infestation by insects, birds, rodents, or other animals, mechanical breakdown, marring or scratching, explosion of steam apparatus, water seepage, freezing of plumbing, dishonest or criminal acts, voluntary parting under false pretense, exposure to weather, collapse, pollutants, damage to product, neglect, weather conditions, acts or decisions by any organization, defects in design, errors in zoning, or omissions in maintenance, or any additional "special exclusions." (Id. at pp. 54-60). However, the policy does not exclude or otherwise limit building and personal property coverage for any loss caused by a virus "regardless of any other cause or event that contributes concurrently or in any sequence to the 'loss.'" (Id. at p. 54).

Cincinnati's policy does provide coverage for "Business Income and Extra Expense" and "Extended Business Income." Under the business income coverage, Cincinnati is obligated to pay Brown's "for the actual loss of 'Business Income' and 'Rental Value' [Brown's] sustain[ed] due to the necessary 'suspension' of your 'operations' during the 'period of restoration'" if the suspension was "caused by direct 'loss' to property at a 'premises' caused by or resulting from any Covered Cause of Loss." (Id. at p. 67). The "Extra Expense" coverage requires Cincinnati to pay Brown's for "necessary expenses" it incurred "during the 'period of restoration' that [Brown's] would

not have sustained if there had been no direct 'loss' to property caused by or resulting from a Covered Cause of Loss." (Id. at p. 68). Those "necessary expenses" include costs incurred by Brown's to "[a]void or minimize the 'suspension' of business and to continue 'operations'" and to "repair or replace" the insured property. (Id.).

Cincinnati's policy also affords an alternate basis for the payment of "Business Income" and "Extra Expense" losses under its "Civil Authority" coverage. The civil authority provisions state that "[w]hen a Covered Cause of Loss causes damage to property other than Covered Property at a 'premises,' [Cincinnati] will pay for the actual loss of 'Business Income' and necessary Extra Expense [Brown's] sustain[s] caused by action of civil authority that prohibits access to the 'premises.'" (Id.). The civil authority coverage is applicable if "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage," and "[t]he 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 . . . ." (Id.).

Brown's policy with Cincinnati contains supplemental endorsements for "Fitness and Recreation Property," "Equipment Breakdown," and "Crisis Event Expense" coverages. (Id. at pp. 90-102, 263). The "Crisis Event Expense" coverage requires Cincinnati to "pay [Brown's] 'crisis event response communication expense' resulting from a 'covered crisis event' at "[Brown's] 'covered location' for sixty (60) consecutive days after a 'covered crisis event' occurs." (Id. at p. 95). A "covered crisis event" on Brown's premises is defined as including a fire or explosion, construction accident, equipment failure, or workplace accident "causing significant regional or national news medial coverage" of Brown's or its operations, the criminal "use of a firearm or device

designed to cause harm," a felonious sexual assault or "attempt or threat of sexual assault," a felonious stalking or "attempt or threat by a person directed at one or more of [Brown's] employees or customers," a child abduction or kidnap or "attempt or threat to unlawfully seize and detain a person under the age of sixteen (16)," the "necessary closure" of Brown's property "by a Board of Health or any other governmental authority as a result of the discovery or belief that contaminated food or drink has been served to patrons," or a "malicious act, attempt or threat committed on [Brown's] 'premises' against any person that results in physical injury or death to such person or an innocent bystander." (Id. at pp. 100-101). In contrast to the business income, extra expense, and civil authority coverage provisions of the policy, the "Crisis Event Expense Coverage" contains a specific virus exclusion which states that the "Crisis Event Expense Coverage" endorsement "does not apply to any loss directly or indirectly caused by or resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease." (Id. at p. 97). That "Communicable Disease or Virus" exclusion further provides:

> This Exclusion applies to, but is not limited to, any loss directly or indirectly attributable to Anthrax, Avian Influenza, Crimean-Congo Hemorrhagic Fever, Dengue Hemorrhagic Fever, Ebola Hemorrhagic Fever, Francisella Tularensis, Influenza, Lassa Fever, Marburg Hemorrhagic Fever, Meningococcal Disease, Plague, Rift Valley Fever, Severe Acute Respiratory Syndrome, Smallpox, Tularemia, Yellow Fever ***or any pandemic or similar influenza which is defined by the United States Center for Disease Control as virulent human influenza that may cause global outbreak, or pandemic, or serious illness***.

(Id.)(emphasis added).

Brown's avers that "there was a business arrangement between [Cincinnati] and [C.C. Young] to their mutual pecuniary benefit," that C.C. Young "was authorized by [Cincinnati] to bind coverage and did bind coverage behalf of [Cincinnati]," that C.C.

Young "was an agent, servant and/or employee" of Cincinnati, that Brown's "sought commercial property insurance" through C.C. Young, and that Cincinnati and C.C. Young "directed and controlled the activities" relative to Brown's insurance coverages. (Docket Entry No. 1 at ¶¶ 7-11). It claims that it specifically requested "as broad as possible Business Income, Contingent Business Income, Extra Expense and Civil Authority coverages," and that C.C. Young "undertook to secure" that coverage on its behalf. (Id. at ¶ 117). Brown's maintains that it purchased the foregoing insurance coverages based upon C.C. Young's representations "regarding the amounts and applicability of the Business Income, Contingent Business Income, Extra Expense, and Civil Authority coverages under the policy," which representations C.C. Young made as the authorized agent of Cincinnati. (Id. at ¶ 123).

Brown's states that in response to the COVID-19 public health crisis, Governor Tom Wolf issued a "Proclamation of Disaster Emergency" on March 6, 2020, and together with the Secretary of the Pennsylvania Department of Health, issued orders on March 19, 2020, mandating the closure to the public of all businesses, such as Brown's gym and fitness center, that were not "life sustaining" businesses. (Id. at ¶¶ 18-23, 43, 45-47). It avers that "[e]merging research on the virus and recent reports from the Centers for Disease Control and Prevention ('CDC') indicate that the COVID-19 strains physically infect and can stay alive on surfaces for at least 17 days, a characteristic that renders property exposed to the contagion potentially unsafe and dangerous." (Id. at ¶ 44). Brown's further asserts that "[o]ther research indicates that the virus may linger on surfaces for up to four weeks in low temperatures." (Id.). On March 19, 2020, the Secretary of the Department of Health allegedly "issued an Order highlighting how

exposure to COVID-19 is possible by touching a surface or object that has the virus on it." (Id. at ¶ 48).

Brown's has specifically represented that the COVID-19 virus was physically present on its insured property, as well as the neighboring properties. It expressly states that "[t]he continuous presence of the coronavirus on or around [Brown's] premises has rendered the premises unsafe and unfit for its intended use and therefore caused property damage or loss under [Cincinnati's] policy." (Id. at ¶ 50). Brown's maintains that the COVID-19 virus "causes damages to property, particularly in places of business such as that of [Brown's], . . . where the operation of the business requires interaction, gatherings, and contact in areas where there exists a heightened risk of the COVID-19 virus." (Id. at ¶ 54). It also claims that the coronavirus was present on neighboring properties immediately surrounding its insured premises, and asserts that the closure orders were "made in direct response to the continued and increasing presence of the coronavirus on property, including property around [Brown's] premises." (Id. at ¶ 52).

Brown's submits that its commercial insurance policy with Cincinnati provides business interruption coverage which obligates Cincinnati to "pay for the actual loss of business income sustained by [Brown's] due to the necessary suspension of [its] operations during the period of business interruption caused by direct loss to property at the insured's premises." (Id. at ¶ 35). The policy reportedly defines the term "suspension" as meaning the "slowdown or cessation of your business activities" or "that a part or all of the premises is untenantable." (Id. at ¶ 36). It likewise affords extra expense coverage for "necessary expenses [Brown's] sustains during the 'period of restoration' that [Brown's] would not have sustained if there had been no direct 'loss' to

property caused by or resulting from a Covered Cause of Loss." (Id. at ¶¶ 34, 40). Brown's avers that Cincinnati's policy separately "includes 'Civil Authority' coverage, pursuant to which [Cincinnati] promised to pay for the loss of Business Income and Necessary Extra Expense sustained by [Brown's] 'caused by action of civil authority that prohibits access' to [Brown's] insured premises" if "access to the area immediately surrounding the damaged property is prohibited by Civil Authority as a result of the damage" and the action "is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage." (Id. at ¶¶ 41-42). Based upon the lack of a virus exclusion for the business income, extra expense, and civil authority coverages under the policy, and in light of the policy language employed by Cincinnati in connection with those coverages, Brown's states that it "reasonably expected that the insurance it purchased from [Cincinnati] and [C.C. Young] included coverage for property damage and business interruption losses caused by viruses like the COVID-19 virus." (Id. at ¶ 26).

After Brown's allegedly "suffered substantial business income losses and incurred extra expense" due to the presence of the coronavirus on its insured premises and the neighboring properties, and the resulting closure orders, it submitted a claim to Cincinnati on March 16, 2020, "requesting coverage for its business interruption losses" pursuant to the business income, extra expense, and civil authority coverages "promised under the policy." (Id. at ¶¶ 55-56). According to Brown's, Cincinnati replied via a letter dated March 23, 2020, which "misrepresented the law applicable to [Brown's] claims, mislead [Brown's] regarding the coverage limits that were available to it, and misrepresented the terms of the policy." (Id. at ¶ 58). For instance, Cincinnati allegedly stated that the limits

of insurance for business income, extra expense, and civil authority coverages were $25,000.00, even though the policy declarations page identifies those limits as $200,000.00. (Id. at ¶¶ 64-74 and p. 263). In addition, Cincinnati reportedly "sought to shift its statutory obligations" to promptly investigate and evaluate claims to Brown's by demanding that Brown's "provide an analysis as to the reasons [it] believes there is coverage for [its] claim." (Id. at ¶¶ 75-76).

On April 16, 2020, Cincinnati formally denied Brown's coverage claims on the grounds that Brown's did not suffer "direct physical loss or direct physical damage" to its property, and that Brown's claims were barred by "the pollutant exclusion." (Id. at ¶¶ 78-79, 83). Brown's contends that "any reasonable investigation" of its claim would have revealed that Brown's "sustained direct physical loss or direct physical damage to the insured premises," and "that the pollutant exclusion is inapplicable to the claim." (Id. at ¶¶ 80, 84). It asserts that Cincinnati's denial of the claim was motivated by "Cincinnati's desire to preempt its own financial exposure to the economic fallout resulting from the COVID-19 crisis, rather than to initiate, as Cincinnati is obligated to do, a full and fair investigation of the claim and a careful review of the policy it sold to [Brown's] in exchange for valuable premiums." (Id. at ¶ 28). In paragraph 89 of the complaint, Brown's itemizes 57 instances in which Cincinnati allegedly breached its statutory, regulatory, and common law duties that it owed to Brown's as its insured. (Id. at ¶ 89(a)-(eee)).

Brown's advances three causes of action against Cincinnati. Count I of the complaint seeks a declaratory judgment that Brown's business interruption losses "are insured losses under the policy," and that "Cincinnati is obligated to pay [Brown's] for the

full amount of the losses incurred and to be incurred" as a result of the presence of the coronavirus on its premises and the government closure orders. (Id. at ¶¶ 95-99). Count II asserts a claim against Cincinnati for breach of the insurance contract and "the policy's implied covenant of good faith and fair dealing," and demands the recovery of "actual and consequential damages." (Id. at ¶¶ 101-107). Brown's also alleges bad faith liability on the part of Cincinnati under 42 Pa.C.S. § 8371, for which it seeks to recover statutory interest, counsel fees, and punitive damages.[1] (Id. at ¶¶ 109-113).

Cincinnati has filed preliminary objections in the nature of a demurrer seeking to dismiss Brown's declaratory judgment, breach of contract, and bad faith liability claims. (Docket Entry No. 17 at ¶¶ 7, 49). It contends that the business income, extra expense, and civil authority coverages require direct physical loss or damage to the insured premises, and argues that Brown's "has not alleged a direct physical loss to property in the complaint in order to trigger coverage under the policy." (Id. at ¶¶ 17-26). Specifically, Cincinnati represents that "[t]here is no allegation that the virus was in fact ever found to be physically present at the premises, let alone that it caused a loss of property." (Id. at ¶ 28).

Cincinnati alleges in its demurrer that Brown's "is not entitled to coverage for business interruption because there was no physical loss to property," and claims that the "Complaint fails to identify any damage to property, much less physical damage, including outside of the insured premises." (Id. at ¶¶ 32, 36). It posits that "[i]n the

[1]In Counts IV, V, and VI, Brown's asserts claims against C.C. Young for negligence and negligent misrepresentation. (Id. at ¶¶ 115-120, 122-126, 128-132). C.C. Young filed preliminary objections to those claims, but its demurrers were overruled by Memorandum and Order dated December 18, 2020. *See* Brown's Gym, Inc. v. the Cincinnati Ins. Co., 2020 WL 7646364 (Lacka. Co. 2020).

absence of direct physical loss, there can be no coverage and exclusions do not come into play." (Id. at ¶ 43). In addition to seeking the dismissal of Brown's declaratory judgment and breach of contract claims on that basis, Cincinnati argues that Brown's bad faith claim must also be dismissed since its "denial of coverage was proper" as a matter of law. (Id. at ¶¶ 47-49).

On June 1, 2021, Cincinnati filed a "Praecipe to Amend and Attach" in which it seeks to supplement its preliminary objections. (Docket Entry No. 30). Through that filing, it attempts to submit 227 pages of additional exhibits in support of its demurrer. (Id. at pp. 3-229). Those exhibits include CDC publications on cleaning and disinfecting public spaces, workplaces, businesses, schools, and homes, (Id. at pp. 209-223), as well as the government closure orders that were previously attached to Brown's complaint. (Id. at pp. 225-226, 228-229).

In its supporting brief, Cincinnati cites a legion of federal district court rulings throughout the country, as well as our holding in The Scranton Club, for the proposition that "there cannot be coverage under the policy when there was no physical loss or damage to the insured property." (Docket Entry No. 27 at pp. 9-20, 33-34). It states that "courts have uniformly held that the mere presence of the coronavirus on property is insufficient to establish the requisite for first party coverage: physical damage or loss to property." (Id. at p. 21). Cincinnati asserts that "[r]eading the policy as a whole, including the 'period of restoration' requirement, confirms that physical alteration of property must take place" in order for there to be a "demonstrable alteration of the property" triggering coverage. (Id. at pp. 28, 31).

Cincinnati further contends that the civil authority coverage is likewise inapplicable since "no direct physical loss to other property is alleged" and "access to [Brown's] premises was not prohibited." (Id. at pp. 34-37). On that basis, it demurs to Brown's declaratory judgment and breach of contract claims premised upon the business income, extra expense, and civil authority coverages. (Id. at p. 38). It also seeks to dismiss Brown's bad faith claim on the grounds that "Cincinnati's position is legally correct" and Brown's "does not even allege facts to show the virus was present at the premises." (Id. at p. 39).

Although Brown's acknowledges that the policy's "business income, extra expense, and civil authority coverages requires physical loss or damage to the subject premises," it asserts that "the policy does not define the phrase 'physical loss or physical damage,'" and relying upon Ungarean v. CNA, 2021 WL 1164836 (Alleg. Co. 2021), *app. pending*, No. 490 WDA 2021 (Pa. Super.), argues that "[t]he phrase 'accidental physical loss or accidental physical damage' is not limited to physical alter[]ation of or damage to [Brown's] property but includes the loss of use of [Brown's] property." (Docket Entry No. 28 at pp. 12-13). Referencing pre-coronavirus decisions from other jurisdictions which concluded that the release of ammonia, emission of toxic gases, release of carbon monoxide, and presence of mold, arsenic, or lead established the necessary "physical loss or damage to property" for insurance coverage, Brown's alternatively submits "that contamination and suspected contamination making property dangerous to use can constitute 'physical loss or damage.'" (Id. at pp. 17-20). It argues in that regard that the physical existence of COVID-19 on its premises, coupled with the resulting closure orders that "prohibited the public from accessing [Brown's] gym and fitness center" and caused

"substantial business income losses and incurred extra expenses," adequately demonstrates physical loss or damage to its property "triggering business interruption, extra expense, and civil authority coverages under the policy." (Id. at pp. 13-14).

Citing the reasoning in Ungarean, Brown's maintains that "[t]he 'period of restoration' merely imposes a time limit upon available coverage," which ceases once the indicated remedial measures have been completed and the "business is once again operating at normal capacity, or reasonably could be operating at normal capacity." (Id. at p. 16). It identifies those measures as including "the installation of partitions, additional handwashing/sanitization stations, and the installation or renovation of ventilation systems." (Id. at p. 17). Brown's asserts that Cincinnati has not established that it is clear and free from doubt that its business income, extra expense, or civil authority coverage claims are insufficient as a matter of law. (Id. at pp. 22-23). As for its bad faith claim, Brown's maintains that Cincinnati improperly denied coverage on faulty grounds, including "the pollutant exclusion," and posits "that any reasonable evaluation of [Brown's] claim would reveal that coverage exists." (Id. at p. 25). Following the completion of oral argument on June 9, 2021, Cincinnati's preliminary objections became ripe for resolution. (Docket Entry No. 25).

II. DISCUSSION

(A) STANDARD AND SCOPE OF REVIEW

"'Standard of review' and 'scope of review,' although distinct, are not concepts that are considered in isolation from one another." Bowling v. Office of Open Records, 621 Pa. 133, 170, 75 A.3d 453, 475 (2013); KMC Shamrock, Inc. v. LNR Transportation, Inc., 50 Pa. D. & C. 5th 259, 268 (Lacka. Co. 2015). "Scope of review" refers to the

confines within which a reviewing court must conduct its examination, "or to the matters (or 'what') the [reviewing] court is permitted to examine." Samuel-Bassett v. Kia Motors America, Inc., 613 Pa. 371, 407, 34 A.3d 1, 21 (2011), *cert. denied*, 567 U.S. 935 (2012); Mid Valley School District v. Warshawer, 33 Pa. D. & C. 5th 272, 281 (Lacka. Co. 2013). "Standard of review" concerns the manner in which (or "how") that examination is to be conducted. Holt v. 2011 Legislative Reapportionment Commission, 614 Pa. 364, 392, 38 A.3d 711, 728 (2012); Brian T. Kelly & Associates v. Northeastern Educational Intermediate Unit, 36 Pa. D. & C. 5th 300, 310 (Lacka. Co. 2014).

"Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint." Sayers v. Heritage Valley Medical Group, Inc., 247 A.3d 1155, 1161 (Pa. Super. 2021). When considering preliminary objections under Pa.R.C.P. 1028(a)(4), the standard of review dictates that all well-pleaded, material, and relevant facts must be accepted as true, as well as every inference that is fairly deducible from those facts. Raynor v. D'Annunzio, 243 A.3d 41, 52 (Pa. 2020). But a court need not accept as true the pleader's conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. Mercer v. Newell, 2021 WL 1916957, at *3 (Pa. Super. 2021). Nevertheless "[p]reliminary objections should be sustained only in cases that are clear and free from doubt," Pennsylvania Independent Oil & Gas Association v. Pennsylvania One Call System, 245 A.3d 362, 365 (Pa. Cmwlth. 2021), and to be clear and free from doubt, the law must state "with certainty that no recovery is possible" based upon the facts averred. Vacula v. Chapman, 230 A.3d 431, 436 (Pa. Super. 2020). "Where a doubt exists as to whether a demurrer should be sustained, this doubt should be

resolved in favor of overruling it." Com. by Shapiro v. UPMC, 652 Pa. 322, 340, 208 A.3d 898, 909 (2019).

The scope of review governing demurrers requires the reviewing court to address the preliminary objections based solely upon the averments set forth in the complaint and any exhibits attached to that contested pleading. Buchan v. Milton Hershey School, 208 A.3d 1081, 1086 (Pa. Super. 2019), *app. denied*, 223 A.3d 238 (Pa. 2020); Foster v. UPMC South Side Hospital, 2 A.3d 655, 662 (Pa. Super. 2010), *app. denied*, 608 Pa. 647, 12 A.3d 371 (2010). No evidence "outside the complaint" may be adduced or considered when disposing of legal issues presented by a demurrer. Catanzaro v. Pennel, 238 A.3d 504, 508 (Pa. Super. 2020); Estate of Rothberg, 166 A.3d 378, 381 (Pa. Super. 2017), *app. denied*, 644 Pa. 342, 176 A.3d 840 (2017); Hill v. Ofalt, 85 A.3d 540, 547 (Pa. Super. 2014). Therefore, the supplemental exhibits that Cincinnati filed on June 1, 2021, may not be considered when determining the legal sufficiency of the allegations of Brown's complaint.

(B) INSURANCE POLICY INTERPRETATION

Cincinnati contends that Brown's declaratory judgment and breach of contract claims are insufficient as a matter of law since its business income, extra expense, and civil authority coverages clearly are not applicable based upon the plain language of the policy and the allegations of the complaint. "The interpretation of an insurance contract regarding the existence or nonexistence of coverage is generally performed by the court." Donegal Mut. Ins. Co. v. Baumhammers, 595 Pa. 147, 154-155, 938 A.2d 286, 290 (2007); Brogan v. Rosenn, Jenkins & Greenwald, LLP., 35 Pa. D. & C. 5th 500, 520 (Lacka. Co. 2014). When construing insurance policies, courts "are guided by the

polestar principle that insurance policies are contracts between an insurer and a policyholder" and must "apply traditional principles of contract interpretation in ascertaining the meaning of the terms used therein." Kurach v. Truck Insurance Exchange, 235 A.3d 1106, 1116 (Pa. 2020). "In so doing, we must 'ascertain the intent of the parties as manifested by the terms used in the written insurance policy.'" Gallagher v. GEICO Indemnity Co., 650 Pa. 600, 622, 201 A.3d 131, 137 (2010) (quoting 401 Fourth Street, Inc. v. Investors Ins. Group, 583 Pa. 445, 879 A.2d 166, 171 (2005)); Evans v. Travelers Ins. Co., 226 A.3d 96, 100 (Pa. Super. 2020) (same).

"The proper focus regarding issues of coverage under insurance contracts is the reasonable expectations of the insured," and "[i]n determining the reasonable expectations of the insured, courts must examine the totality of the insurance transaction involved." Consolidated Rail Corporation v. ACE Property & Casualty Ins. Co., 182 A.3d 1011, 1026 (Pa. Super. 2018), *app. denied*, 648 Pa. 165, 191 A.3d 1288 (2018). But, if the policy terms are clear and unambiguous, courts are required to give effect to the language of the contract and the plain and ordinary meaning of those terms. Kurach, supra; Penn Psychiatric Center v. United States Liability Ins. Co., 2021 WL 2460789, at * 4 (Pa. Super. 2021); Tuscarora Wayne Ins. Co. v. Hebron, Inc., 197 A.3d 267, 272 (Pa. Super. 2018), *app. denied*, 651 Pa. 358, 205 A.3d 273 (2019). "[W]hile reasonable expectations of the insured are focal points in interpreting the contract language of insurance policies, an insured may not complain that its reasonable expectations were

frustrated by policy limitations which are clear and unambiguous."[2] Consolidated Rail Corporation, supra. However, when a provision of a policy is ambiguous, it must be construed in favor of the insured and against the insurer as the drafter of the policy which selected the language used. Kurach, supra; Penn Psychiatric Center, supra; Gemini Ins. Co. v. Meyer Jabara Hotels, LLC, 231 A.3d 839, 847-848 (Pa. Super. 2020).

Insurance policy terms "are ambiguous 'if they are subject to more than one reasonable interpretation when applied to a particular set of facts.'" Erie Insurance Exchange v. Moore, 228 A.3d 258, 267 (Pa. 2020) (quoting Madison Construction Co. v. Harleysville Mut. Ins. , 557 Pa. 595, 606, 735 A.2d 100, 106 (1999)); Pass v. Palmiero Automotive of Butler, Inc., 229 A.3d 1, 5 (Pa. Super. 2020) (quoting Murphy v. Duquesne University of the Holy Ghost, 565 Pa. 571, 591, 777 A.2d 418, 430 (2001)). "However, the lack of a definition for an operative term in an insurance policy does not necessarily render the policy ambiguous." Gemini Ins. Co., 231 A.3d at 848. Moreover, a particular policy provision will not be deemed ambiguous "simply because the parties

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[2]The Supreme Court of Pennsylvania has applied the "reasonable expectations" approach in insurance coverage disputes involving non-commercial insureds. *See, e.g.*, Tonkovic v. State Farm Mutual Automobile Ins. Co., 513 Pa. 445, 455, 521 A.2d 920, 925 (1987); Collister v. Nationwide Life Ins. Co., 479 Pa. 579, 594, 388 A.2d 1346, 1353 (1978). The United States Court of Appeals for the Third Circuit has "predicted that Pennsylvania courts would apply that doctrine even where the insured is a sophisticated purchaser of insurance - - i.e., 'a large commercial enterprise that has substantial economic strength, desirability as a customer, and an understanding of insurance matters, or readily available assistance in understanding and procuring insurance.'" UPMC Health System v. Metropolitan Life Ins. Co., 391 F.3d 497, 503 (3d Cir. 2004) (quoting Reliance Ins. Co. v. Moessner, 121 F.3d 895, 904-905 n.8 (3d Cir. 1997)). The federal district courts in Pennsylvania have likewise concluded that the reasonable expectations doctrine may apply to commercial entities and sophisticated purchasers of insurance. *See* Downey v. First Indemnity Insurance, 214 F.Supp.3d 414, 424 (E.D. Pa. 2016); Austin James Associates, Inc. v. American International Specialty Lines Ins. Co., 2012 WL 4755394, at * 5 (M.D. Pa. 2012); Whole Enchilada, Inc. v. Travelers Property Casualty Company of America, 581 F.Supp.2d 677, 690 (W.D. Pa. 2008). Although the Superior Court of Pennsylvania originally left "for another day" the issue of "whether the 'reasonable expectations' doctrine can be invoked by a 'sophisticated' commercial enterprise," Millers Capital Ins. Co. v. Gambone Brothers Development Co., 941 A.2d 706, 717, n. 10 (Pa. Super. 2007), *app. denied*, 600 Pa. 734, 963 A.2d 471 (2008), it has more recently applied the doctrine in insurance coverage litigation involving the interpretation of commercial insurance policies issued to business enterprises. *See* Consolidated Rail Corporation, supra (commercial policy insuring railroad company); Good v. Frankie & Eddie's Hanover Inn, LLP, 171 A.3d 792, 797 (Pa. Super. 2017) (commercial policy issued to a hotel).

disagree" on the meaning or proper construction of certain words. Van Divner v. Sweger, 2021 WL 2584114, at * 3 (Pa. Super. 2021); State Farm Automobile Ins. Co. v. Dooner, 189 A. 3d 479, 482-483 (Pa. Super. 2018). "While courts are responsible for deciding whether, as a matter of law, written contract terms are either clear or ambiguous; it is for the fact-finder to resolve ambiguities and find the parties' intent." Windows v. Erie Insurance Exchange, 161 A.3d 953, 957 (Pa. Super. 2017).

(C) COVID-19 BUSINESS INTERRUPTION INSURANCE LITIGATION IN PENNSYLVANIA

As we noted in The Scranton Club, "[t]he onset of the novel coronavirus pandemic and the resulting government orders closing businesses predictably generated claims by those businesses against their commercial property insurers based upon the business income, extra expense, and civil authority provisions of their policies." The Scranton Club, supra, at *9. According to the "COVID Coverage Litigation Tracker" maintained by the University of Pennsylvania Law School, 1,937 lawsuits challenging insurers' denials of such claims have been filed in federal and state courts as of June 28, 2021. *See* https://cclt.law.upenn.edu. Rulings made in those lawsuits involve the interpretation and application of the virus exclusion, the "physical loss or damage" requirement for business income and extra expense coverages, and the availability of civil authority coverage, and are based upon the language of the applicable insurance policies, the laws of the forum states, and the allegations set forth in the complaints. *See* John K. DiMugno, "Implications of COVID-19 for the Insurance Industry and its Customers: An Update," *Insurance Litigation Reporter*, Vol. 42, No. 18 at pp. 514-531 (Nov. 6, 2020). Although several common pleas courts in this Commonwealth have issued decisions in business

interruption coverage disputes arising from the coronavirus pandemic and government closure orders, and even more federal district courts in Pennsylvania have had occasion to consider similar insurance coverage issues, no appellate court in Pennsylvania has yet had an opportunity to address these insurance coverage questions. *See* The Scranton Club, supra, at *9-10; Samuel W. Braver & Deborah A. Little, "Insurance Coverage for Businesses' Economic Losses Due to COVID-19," *The Pennsylvania Lawyer*, Vol. 43, No. 4 at p. 41 (July/August 2021).

(1) Federal Court Rulings

To date, the federal holdings regarding business interruption insurance claims resulting from coronavirus-related closure orders are based, in part, upon the "physical loss or damage" standard established by the United States Court of Appeals for the Third Circuit in two decisions that predated the COVID-19 pandemic. In Port Authority of New York and New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226 (3d Cir. 2002), the owners of "numerous facilities in New York and New Jersey that incorporated asbestos products in their construction" brought an action against their commercial insurers to recover the cost of asbestos abatement, and "contend[ed] that physical damage ha[d] occurred in these structures as a result of the 'presence of asbestos,' 'threat of release and reintrainment of asbestos fibers,' and the 'actual release and reintrainment of asbestos fibers.'" Id. at 230. The trial court granted the insurers' motion for summary judgment, finding "that unless asbestos in a building was of such quantity and condition as to make the structure unusable, the expense of correcting the situation was not within the scope of a first party insurance policy covering 'physical loss or damage.'" Id.

On appeal, the Third Circuit examined the insurance laws of New York and New Jersey where the insured facilities were located, and remarked that it was confronted "with a diversity case in which applicable state law provides no guidance and the parties rely upon appellate decisions from jurisdictions having no relationship with the entities involved in this dispute." Id. at 235. It stated that in common parlance, "physical damage to property" ordinarily means "a distinct, demonstrable, and physical alteration of a structure," and reasoned that "[p]hysical damage to a building as an entity by sources unnoticeable to the naked eye must meet a higher threshold." Id. at 235. In support of that test, it cited the seminal contamination decision in Western Fire Ins. Co. v. First Presbyterian Church, 165 Colo. 34, 437 P.2d 52 (1968), which is discussed in Section II(D) below, where the Colorado Supreme Court "concluded that coverage was triggered when authorities ordered a building closed after gasoline fumes seeped into a building's structure and made its use unsafe," even though "neither the building nor its elements were demonstrably altered," but "its function was eliminated." Id.

Applying that standard, Port Authority held that "[w]hen the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner." Id. at 236. It posited that "[t]he requirement that the contamination reach such a level in order to come within coverage limitation establishes a reasonable and realistic standard for identifying physical loss or damage," and that "[a] less demanding standard would require compensation for repairs caused by the inevitable deterioration of materials used in the construction of the building." Id. In affirming the lower court ruling, it observed that "[a]lthough the

plaintiffs demonstrated that many of its structures used asbestos-containing substances, those buildings had continuous and uninterrupted usage for many years." Id.

Three years later, the Third Circuit considered the application of the Port Authority standard in an insurance coverage dispute involving property whose "well was contaminated with e-coli bacteria" and a policy that required "direct physical loss" as a condition to coverage. In Motorists Mutual Ins. Co. v. Hardinger, 131 Fed.Appx. 823 (3d Cir. 2005), the district court granted the insurer's "motion for summary judgment on the basis that the Hardingers failed to establish a physical loss, a prerequisite for coverage under the policy." Id. at 825. "While the bacteria allegedly made the house uninhabitable, the [trial] court deemed this a 'constructive loss,' and held it insufficient to satisfy the policy's requirement of 'physical loss.'" Id.

The federal appellate court noted on appeal that "[n]o Pennsylvania Supreme Court case . . . directly addresses whether loss of use may constitute a physical loss." Id. at 826. Nevertheless, it deemed "[i]nstructive" the ruling by Cumberland County Judge Kevin Hess in Hetrick v. Valley Mutual Ins. Co., 15 Pa. D. & C. 4th 271 (Cumb. Co. 1992), which is also discussed in greater detail in Section II(D) below, where "the court gave substantial attention and approval to Western Fire Insurance Co. v. First Presbyterian Church, 165 Colo. 34, 38-39, 437 P.2d 52 (1968)." Id. at n.4. With regard to the district court's conclusion that "Port Authority is inapplicable," the Third Circuit declared "[w]e find nothing, however, in New York, New Jersey, or Pennsylvania law that would cause us to disregard Port Authority under Pennsylvania law," and that it did not "appear that there is any substantive law in Pennsylvania at odds with Port Authority." Id. at 826.

Based upon that reasoning, Hardinger determined that Port Authority is "instructive in a case where sources unnoticeable to the naked eye have allegedly reduced the use of the property to a substantial degree." Id. Thus, it held:

> We predict that the Pennsylvania Supreme Court would adopt a similar principle as we did in Port Authority. Applying Port Authority's standard here, we believe there is a genuine issue of fact whether the functionality of the Hardinger's property was nearly eliminated or destroyed, or whether their property was made useless or uninhabitable.

Id. at 826-827. In reversing the trial court's finding that bacteria contamination did not satisfy the "direct physical loss" requirement for coverage, the Third Circuit stated that "[s]ummary judgment was not proper because there is a genuine issue of material fact whether there was a physical loss." Id. at 828.

Relying upon the "physical loss or damage" analysis articulated in Port Authority and Hardinger, those federal district courts in Pennsylvania which have addressed the merits of COVID-19 business interruption insurance claims under Pennsylvania law have uniformally denied coverage on the ground that the insureds were unable to satisfy the "physical loss or damage" requirement in their insurance policies.[3] The only four federal courts in the Middle District and Western District which have considered coronavirus-

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[3]Because of the uncertainty surrounding COVID-19 business interruption insurance claims under Pennsylvania law, and the public policy interest in having those state law claims decided by Pennsylvania courts, at least seven federal judges in this state have declined to exercise jurisdiction pursuant to Reifer v. Westport Ins. Co., 751 F.3d 129, 146 (3d Cir. 2014), and have either dismissed insurance coverage disputes without prejudice to the right to refile the actions in state court, or have remanded to state court any proceedings that were removed to federal court. *See, e.g.*, Commercial Office Furniture Co., Inc. v. Charter Oak Fire Ins. Co., 2021 WL 1837412, at *5 (E.D. Pa. 2021) (Padova, J.); Amos Inc. v. Firstline Nat'l Ins. Co., 2021 WL 1375472, at *1 (W.D. Pa. 2021) (Wiegand, J); Schwartz Law Firm, LLC v. Selective Ins. Co. of South Carolina, 2021 WL 698189, at *3 (E.D. Pa. 2021) (Pappert, J.); V & S Elmwood Lanes, Inc. v. Everest National Ins. Co., 2021 WL 84066, at *4 (E.D. Pa. 2021) (DuBois, J.); Venezie Sporting Goods, Inc. LLC v. Allied Ins. Co. of America, 2020 WL 5651598, at *5 (W.D. Pa. 2020) (Hornak, C.J.); Dianoia's Eatery, LLC v. Motorist Mut. Ins. Co., 2020 WL 5051459, at *4 (W.D. Pa. 2020) (Fischer, J.); Greg Prosmushkin, P.C. v. Hanover Ins. Group, 2020 WL 4735498, at *5 (E.D. Pa. 2020) (Jones, J.).

related business income loss claims have found that the "physical loss or damage" provisions in the policies were unambiguous and barred coverage based upon the facts alleged. *See* 44 Hummelstown Associates, LLC v. American Select Ins. Co., 2021 WL 2312778, at *7-8 (M.D. Pa. 2021) (Kane, J.); 1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc., 2021 WL 147139, at * 5 (W.D. Pa. 2021) (Stickman, J.); Windber Hospital v. Travelers Property Cas. Co., 2021 WL 1061849, at *4-5 (W.D. Pa. 2021) (Gibson, J.); Kahn v. Pennsylvania Nat. Mut. Ins. Co., 2021 WL 422607, at *5-8 (M.D. Pa 2021) (Jones, C.J.). Fifteen of the sixteen federal judges in the Eastern District have also determined that business losses caused by government closure orders stemming from the COVID-19 pandemic cannot satisfy the "physical loss or damage" requirement for coverage. *See* Boscov's Department Store, Inc. v. American Guarantee and Liability Ins. Co., 2021 WL 2681591, at *5-6 (E.D. Pa. 2021) (Gallagher, J.); RDS Vending, LLC v. Union Ins. Co., 2021 WL 1923024, at *4 (E.D. Pa. 2021) (Rufe, J.); Mareik Inc. v. State Farm Fire & Casualty Co., 2021 WL 1940647, at * 4-5 (E.D. Pa. 2021) (Alejandro, J.); Lansdale 329 Prop LLC v. Hartford Underwriters Ins. Co., 2021 WL 1667424, at *5-10 (E.D. Pa. 2021) (Goldberg, J.); SSN Hotel Management, LLC v. Hartford Mut. Ins. Co., 2021 WL 1339993, at *4-5 (E.D. Pa. 2021) (Kenney, J.); Eric R. Shantzer, D.D.S. v. Travelers Cas. Ins. Co., 2021 WL 1209845, at *4-5 (E.D. Pa. 2021) (Sanchez, C.J.); Chester County Sports Arena v. Cincinnati Specialties Underwriters Ins. Co., 2021 WL 1200444, at * 6-7 (E.D. Pa. 2021) (Baylson, J.); Tria WS, LLC v. Allianz Global Risks U.S. Ins. Co., 2021 WL 1193370, at *4-5 (E.D. Pa. 2021) (Beetlestone, J.); Fuel Recharge Yourself, Inc. v. AMCO Ins. Co., 2021 WL 510170, at *5 (E.D. Pa. 2021) (McHugh, J.); Frank Van's Auto Tag, LLC v. Selective Ins. Co., 2021 WL 289547, at *4-7 (E.D. Pa.

2021) (Pratter, J.); Humans & Resources, LLC v. First Line National Ins. Co., 2021 WL 75775, at *7 (E.D. Pa. 2021) (Joyner, J.); Newchops Restaurant Comcast v. Admiral Indemnity Co., 2020 WL 7395153, at *5 (E.D. Pa. 2020) (Savage, J.); Kessler Dental Associates, P.C. v. Dentist Ins. Co., 2020 WL 7181057, at *4 (E.D. Pa. 2020) (Wolson, J.) 4431, Inc. v. Cincinnati Ins. Companies, 2020 WL 7075318, at *10 (E.D. Pa.2020) (Leeson, J.); Brian Handel, D.M.D., P.C. v. Allstate Ins. Co., 2020 WL6545893, at *3 (E.D. Pa. 2020) (Bartle, J.). In Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Ins. Co., 2021 WL 1837479 (E.D. Pa. 2021) (Schiller, J.), the court "conclude[d] that the phrase 'direct physical loss of or damage to property at the described premises' in the context of Business Income and Extra Expense insurance is ambiguous," and found that "[t]he allegations in Plaintiff's Complaint regarding its suspension of operations could plausibly constitute a 'direct physical loss of . . . property at the described premises,' in that Plaintiff lost the ability to physically operate its business at the described premises." Id. at *9. However, Susan Spath Hegedus denied the insurer's motion to dismiss based upon its interpretation and application of California law, not Pennsylvania law. Id. at *3, 8-10.

(2) State Court Rulings

The first reported reference to a business interruption insurance ruling by a state court judge is found in an order that was issued by Philadelphia County Judge Gary Glazer on August 31, 2020, in Ridley Park Fitness, LLC v. Philadelphia Indemnity Ins. Co., 2020 WL 8613467 (Phila. Co. 2020), *reconsideration denied*, 2020 WL 8613466 (Phila. Co. 2020). In addressing the insurer's preliminary objections asserting "that

certain clauses including a virus exclusion and 'direct physical loss' bar coverage," he stated in a footnote.

> At this very early stage, it would be premature for this court [to] resolve the factual determinations put forth by defendants to dismiss plaintiff's claims. Taking the factual allegations made in plaintiff's complaint as true, as this court must at this time, plaintiff has successfully pled to survive this stage of the proceedings. As such, the preliminary objections are overruled.

Id. at *1 n.1. On October 26, 2020, Judge Glazier entered an essentially identical one-sentence order in a separate case, which included the same footnote as Ridley Part Fitness, but added the sentence "[m]oreover, the law and facts are rapidly evolving in the area of COVID-19 business losses." Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London, 2020 WL 6380449, at *1 n.1 (Phila. Co. 2020). Neither order identifies the specific policy language at issue in those cases or the legal authority relied upon by the court.

On January 25, 2021, we issued a Memorandum and Order in The Scranton Club sustaining the insurer's demurrer based upon the failure of a private social club to allege "any facts which may arguably satisfy the 'direct physical loss or damage' requirement for business income and extra expense coverage under the policy." The Scranton Club, supra, at *16. In contradistinction to Brown's averments in this case, the insured in The Scranton Club affirmatively alleged that "'[t]here is no evidence that the COVID-19 virus was present within The Scranton Club's premises at the time that it closed its business,'" and even asserted that "its 'loss of business income was not caused by a virus within its premises' but was 'due to the Governor's and Pennsylvania Department of Health Secretary's orders that were issued in response to the pandemic.'" Id. at *4. Hence, after

reviewing the "physical loss or damage" test formulated in Port Authority and Hardinger, we stated:

> Per the Scranton Club's binding judicial admissions, the coronavirus was never present on its premises, nor did any occupant of its property ever test positive for COVID-19. In short, there has never been an allegation by the Scranton Club that the presence of the novel coronavirus on its property caused some form of physical damage to its premises that rendered it uninhabitable or unusable.

Id. at *15. For that reason, we sustained the insurer's demurrer after concluding that "[t]he Scranton Club is mistaken that Studio 417 [Inc. v. Cincinnati Insurance Company, 478 F.Supp.3d 794 (W.D. Mo. 2020)] warrants a contrary conclusion since, unlike the instant case, the business in Studio 417 specifically alleged that the 'physical substance' of COVID-19 'lived on,' was 'active on,' and 'attached to' the 'physical surfaces' on its property, 'making it unsafe and unusable,' and 'causing it to cease or suspend operations.'"[4] Id. at *16 (quoting Studio 417, 478 F.Supp.3d at 798, 802).

Lancaster County Judge Thomas Sponaugle filed an order on March 2, 2021, granting the insurer's motion for judgment on the pleadings in a business interruption insurance action that was commenced by a restaurant, and citing Hardinger, he found that "Plaintiff suffered no direct physical loss or damage to its premises." Isaac's at Spring Ridge, LLP v. MMG Ins. Co., 2021 WL 1650789, at *1 n.1 (Lanc. Co. 2021), *app. pending*, No. 455 MDA 2021 (Pa. Super.) After the insured filed an appeal, Judge

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[4]It is presumed that the Scranton Club asserted that COVID-19 was never present on its premises in order to avoid the application of the policy's virus exclusion, which it succeeded in doing so. Id. at *11-13. One commentator has described such a strategy as a "pleading Catch-22" in which an insured's allegation that the virus did not exist on its covered premises forestalls the application of the virus exclusion, while simultaneously operating to prevent satisfaction of the "physical damage" requirement for business income and extra expense coverage. *See* John K. DiMugno, "The Implications of COVID-19 for the Insurance Industry and Its Customers: 2021 Developments," *Insurance Litigation Reporter*, Vol. 43, No. 3 at pp. 63-65 (Mar. 12, 2021) (discussing The Scranton Club, supra).

Sponaugle issued an opinion pursuant to Pa.R.A.P. 1925(a). Issacs's at Spring Ridge, LLP v. MMG Ins. Co., No. CI-20-03613, Sponaugle, J. (Lanc. Co. June 11, 2021). In that Opinion, he stated that "[t]he losses were the result of the virus which is specifically excluded as a covered loss under the policy," and that "Plaintiff sustained no distinct, demonstrable, and physical alteration of its property, and therefore has no physical loss and no coverage." Id. at p. 6. As further support for the dismissal, he noted that "at no point was Plaintiff prohibited from access to its premises" since it "continued to employ individuals to take orders, make and package food, receive payment, and deliver food" and "patrons were permitted to enter upon the property for delivery of their ordered food." Id. at p. 7.

The Ungarean decision on March 25, 2021, represents the first instance in which a Pennsylvania court determined, as a matter of law, that an insured was entitled to business income, extra expense, and civil authority coverage, and granted the insured's motion for summary judgment seeking declaratory judgment relief on that basis. Allegheny County Judge Christine Ward reasoned that "[w]hile some courts have interpreted 'direct physical loss of or damage to property' as requiring some form of physical alteration and/or harm to property in order for the insured to be entitled to coverage, this Court reasonably determines that any such interpretation improperly conflates 'direct physical loss of' with 'direct physical . . . damage to' and ignores the fact that these two phrases are separated in the contract by the disjunctive 'or.'" Ungarean, supra, at *6. After she "looked to the ordinary, dictionary definitions of the terms 'direct,' 'physical,' 'loss,' and 'damage,'" she concluded:

> Accordingly, in this instance, the most reasonable definition of 'loss' is one that focuses on the act of losing possession and/or deprivation of property instead of one that encompasses various forms of damage to property, i.e., destruction and ruin. Applying this definition gives the term 'loss' meaning that is different from the term 'damage.' Specifically, whereas the meaning of the term 'damage' encompasses all forms of harm to Plaintiff's property (complete or partial), this Court concludes that the meaning of the term 'loss' reasonably encompasses the act of losing possession and/or deprivation, which includes the loss of use of property absent any harm to property.

Id. To that end, she remarked that "the spread of COVID-19 and social distancing measures (with or without the Governor's orders) caused plaintiff, and many other businesses, to *physically* limit the use of property and the number of people that could inhabit *physical* buildings at any given time," such that "the spread of COVID-19 did not, as [the insurers] contend, merely impose economic limitations" in that the "economic losses were secondary to the businesses' *physical* losses." Id. at *7 (emphasis in original).

Judge Ward also addressed the insurers' contention "that the insurance contract's definition for 'period of restoration' suggests that the contract expressly contemplates and necessitates the existence of actual tangible damage in order for Plaintiff to be entitled to business income and extra expense coverage" Id. She observed that "the threat of COVID-19 has necessitated many physical changes to business properties across the Commonwealth," including "the installation of partitions, additional handwashing /sanitizations stations, and the installation or renovation of ventilation systems," and stated that "[t]hese changes would undoubtedly constitute 'repairs' or 'rebuilding' of property." Id. at *8 (citing In re Society Insurance Co. COVID-19 Business Interruption Protection Insurance Litigation, 2021 WL 679109, at *9 (N.D. Ill. 2021) (finding that "the 'Period of Restoration' describes a *time* period during which loss of business income will

be covered, rather than an explicit definition of coverage," noting the policy's use of the words "repaired" and "replaced" and stating that if "the coronavirus risk could be minimized by the installation of partitions and a particular ventilation system, then the restaurants would be expected to 'repair' the space by installing those safety features," and holding that "the definition of the Period of Restoration is consistent with interpreting direct physical loss of property to include the loss of physical use of the covered property imposed by the shutdown orders."). Ergo, she held:

> Whether or not Plaintiff in the instant matter actually undertook such changes, or resumed its business at a new location, is of no moment. The "period of restoration" does not require repairs, rebuilding, replacement, or relocation of Plaintiff's property in order for Plaintiff to be entitled to coverage. The "period of restoration" merely imposes a time limit on available coverage, which ends when such measures, if undertaken, would have been completed with reasonable speed and similar quality. To put this another way, the "period of restoration" ends when Plaintiff's business is once again operating at normal capacity, or reasonably could be operating at normal capacity. The "period of restoration" does not somehow redefine or place substantive limits on types of available coverage. Defendants cannot avoid providing coverage that is otherwise available simply because the end point with regard to the "period of restoration" may be, at times, slightly more difficult to pinpoint in the context of the COVID-19 pandemic.

Id. Judge Ward later issued a comparable ruling in granting an insured's motion for partial summary judgment seeking declaratory judgment relief with regard to business income loss coverage. *See*, MacMiles, LLC v. Erie Insurance Exchange, No. GD-20-7753, Ward, J., at pp. 11-15 (Alleg. Co. May 25, 2021), *app. pending*, No. 740 WDA 2021 (Pa. Super.).

On May 20, 2021, Lawrence County Judge J. Craig Cox reached a contrary result in Venezie Sporting Goods, LLC v. Allied Ins. Co. of America, No. 10397 of 2020, Cox, J. (Lawrence Co. 2021), and sustained the insurer's preliminary objections based upon the

"direct physical loss of or damage to property" provision and virus exclusion in the policy. After reviewing the foregoing decisions in The Scranton Club and Ungarean, Id. at pp. 9-17, he stated that "the Court finds the approach adopted by The Scranton Club Court and the United States District Courts for the Eastern, Middle and Western Districts of Pennsylvania to be persuasive and consistent with the language contained within the subject insurance policy." Id. at p. 19. Judge Cox determined that "the analysis provided in Ungarean is not consistent with the language contained within the current insurance policy as closure of the facility to a majority portion of the public does not render the premises uninhabitable or rendered useless." Id. He affirmed the denial of coverage on the basis that "[i]t is apparent the COVID-19 pandemic did not demonstrably alter the components of Plaintiff's building nor did it cause any other form of physical damage to the property." Id. Moreover, he also rejected the availability of civil authority coverage since "Plaintiff's employees and staff were still permitted to access the property despite the orders, much in the same way as the dental practice in Brian Handel D.M.D. and the private social club in The Scranton Club." Id. at p. 20.

Within the past month, two members of the Court of Common Pleas of Philadelphia County issued decisions in business interruption insurance coverage cases on June 17, 2021. In Lehigh Valley Baseball, L.P. v. Philadelphia Indemnity Ins. Co., No. 0958, December Term 2020, Glazer, J. (Phila. Co. 2021), Judge Gary Glazer, who authored the 2020 orders in the Ridley Park Fitness and Taps & Bourbon overruling the insurers' preliminary objections, sustained the insurer's demurrer and dismissed the insurance coverage action filed by the owner of Minor League Baseball teams. Referencing the "direct physical loss" requirement in the policy and the holdings in Port

Authority and Hardinger, he stated that "[n]either the fact that the Major League Baseball teams failed to supply players for the 2020 season, nor the governmental stay-at-home-orders and other governmental responses to the pandemic, caused any physical alteration or impact to the [Minor League Baseball] insureds' real or personal property, nor to nearby real or personal property, nor did those events render real or personal property completely uninhabitable or unusable." Id. at p. 8. After emphasizing that the insureds had merely alleged that "the virus likely was physically present at their stadiums," Judge Glazer held that "[e]ven if such contamination constituted physical loss or damage, coverage for such loss or damage, and the resulting loss of business income, is clearly barred by the policies' virus exclusion because such 'loss or damage was caused by or resulted from a virus, bacterium, or other micro-organism that induces or is capable of inducing physical distress, illness, or disease.'"[5] Id. at p. 9.

On the same day, Philadelphia County Judge Nina Wright Padilla filed an Opinion in Spector Gadon Rosen Vinci P. C. v. Valley Forge Insurance Company, No. 1636, May Term 2020, Padilla, J. (Phila. Co. 2021) granting the insurer's motion for summary judgment and dismissing a law firm's claim for business income, extra expense, and civil authority coverage. The law firm "argue[d] that 'physical loss of . . . property does not require physical alteration to property, but instead solely requires a 'loss of use' of property," but she rejected that argument and "found that 'loss of use' of the property alone . . . is not enough to trigger coverage." Id. at p. 5 & n.10. Judge Padilla

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[5]In a footnote, Judge Glazer also stated that "[t]o the extent that this ruling appears inconsistent with any prior ruling of this court in any similar coverage case, the court welcomes further motion practice in that case." Id. at p. 10 n.1.

underscored that "there is no allegation or evidence that the virus was actually present at the [law firm's] building or that the threat of the virus spreading made the property 'uninhabitable and unusable,'" and held that "the absence of direct physical loss of or damage to the property as described by Port Authority fails to trigger coverage under the business income and extra expense coverage of Valley Forge's policy." Id. at p. 7. She likewise found the civil authority coverage inapplicable since "[t]here [wa]s no evidence that the virus was present at the property necessitating the issuance of the government shutdown orders or that the virus was present at a property locating within five miles of [the insured's] law office." Id. at p. 8.

What may be gleaned from the foregoing state courts' application of Port Authority and Hardinger is that, in cases claiming "physical damage" to property caused by "sources unnoticeable to the naked eye," the contaminant, pathogen, or other offending microorganism must render the insured structure uninhabitable or unusable, or nearly destroy its functionality, in order to constitute "physical damage" for purposes of business interruption insurance coverage. An insured's failure to allege that the coronavirus was present on the covered premises is fatal to a claim for business income or extra expense coverage. Furthermore, the fact that the insured still enjoys limited or modified use of the property, notwithstanding a government closure order, generally makes civil authority coverage inapplicable. Additionally, Ungarean stands for the minority proposition that the phrase "direct physical loss" encompasses "the act of losing possession and/or deprivation" of property, "which includes the loss of use of property absent any harm to property." With the benefit of that decisional guidance, the merits of the parties' insurance coverage arguments will be considered.

(D) PHYSICAL DAMAGE FROM CORONAVIRUS CONTAMINATION OF PROPERTY

Cincinnati seeks to dismiss Brown's claims for business income, extra expense, and civil authority coverage on the ground that Brown's has not alleged direct "physical damage" or "physical loss" to its property. As a general rule, "it is a necessary prerequisite to recovery upon a policy for the insured to show a claim within the coverage provided by the policy." McEwing v. Lititz Mut. Ins. Co., 77 A.3d 639, 646 (Pa. Super. 2013); Brogan, 35 Pa. D. & C. 5th at 525. It is noteworthy that Brown's purchased an "all risk," as opposed to a "named perils" or "specific perils," policy from Cincinnati. "Named perils" or "specific perils" policies provide coverage only for those specific risks that are enumerated in the policy, and exclude all other risks that are not expressly identified in the policies. Western Metal Bed Co., Inc. v. Lexington Ins. Co., 2007 WL 5479851, at *4 n.19 (Phila. Co. 2007), *aff'd*, 963 A.2d 581 (Pa. Super. 2008); 7 *Couch On Insurance* § 101: 7 (3d ed.). In contrast, "the policy in this case is an 'all risk' policy, meaning that all losses to the [building] and its contents are covered except for those specifically excluded." Spece v. Erie Ins. Group, 850 A.2d 679, 683 (Pa. Super. 2004).

Brown's advances two arguments in support of its claim that it has averred the requisite physical damage or loss. First, referencing its specific averments that COVID-19 virus droplets or particles were present on its covered property, Browns maintains that contamination caused by invisible sources such as ammonia, toxic gases, and the like can constitute "physical damage" to property. (Docket Entry No. 28, at pp. 13-14, 17-20). In that regard, it punctuates its factual allegations that the highly contagious "COVID-19 strains physically infect and can stay alive on surfaces" for days or weeks. (Docket Entry

No. 1 at ¶¶ 44, 48). *See also*, Friends of Danny DeVito v. Wolf, 227 A.3d 872, 880 n. 3 (Pa. 2020) (noting that "the virus has an incubation period of up to fourteen days" and "can remain on surfaces for days and can spread through the air within confined areas and structures."), *cert. denied*, 141 S. Ct. 239 (U.S. 2020). Second, Browns advocates the interpretation of "physical loss" adopted in Ungarean, which construed that requirement as including the mere loss of use or possession of property absent any physical harm to it. (Docket Entry No. 28 at pp. 12-13).

Under the physical contamination theory proposed by Brown's in its first argument, "[t]he presence of bacteria, odor, smoke or noxious gases may constitute physical loss or damage where insured property has been rendered uninhabitable or unusable for its intended purpose." Scott G. Johnson, "What Constitutes Physical Loss or Damage in a Property Insurance Policy?," 54 Tort Trial & Ins. Prac. L. J. 95, 114 (Winter 2019). Prior to the decision by the Supreme Court of Colorado in Western Fire Ins. Co., other courts had "suggest[ed] that physical loss or damage requires a demonstrable physical change to insured property." Id. at 100. In Western Fire Ins. Co., gasoline had infiltrated "the soil under and around the [church] building" that was insured, and gasoline vapors throughout the "hall and rooms of the church building" made "the same uninhabitable" and rendered "the use of the building dangerous." Western Fire Ins. Co., 165 Colo. at 36-37, 437 P.2d at 54. Rejecting the property insurer's contention "that the insured sustained no 'direct physical loss,'" the court reasoned that gasoline infiltration on other property and the resulting vapors caused the building to become "uninhabitable" and made "further use of the building highly dangerous," as a result of which "the insured

established that there was a direct physical loss occasioned to the church building within the policy period of the insurance contract." Id. at 39-40, 437 P.2d at 55.

As mentioned above, the Cumberland County court later adopted the reasoning in Western Fire Ins. Co. in deciding whether property damage coverage was applicable after a "fuel oil tank ruptured, spilling approximately 250 gallons of oil into the ground causing the pollution of ground water." Hetrick, 15 Pa. D. & C. 4th at 271. Relying upon the rationale in Western Fire Ins. Co., that "direct physical loss" can be established where contamination makes "the building uninhabitable and highly dangerous to use," Hetrick "conclude[d] that an oil spill which pollutes the ground water may make a building uninhabitable," and that "if the building is uninhabitable, then there is a direct loss to that building." Id. at 273-274 (citing Gibson v. Secretary of U. S. Dept. of Housing, 479 F.Supp.3 (M.D. Pa. 1978)).

The Third Circuit Court of Appeals has likewise cited Western Fire Ins. Co. with approval, *see* Port Authority, 311 F.3d at 235, and subsequently described Hetrick as "instructive." Hardinger, 131 Fed. Appx. at 826 n.4. Prior to the onset of the COVID-19 pandemic, courts throughout the country adopted the contamination theory in recognizing that the existence of odors, bacteria, and other imperceptible agents such as ammonia, salmonella, lead, e-coli bacteria, and carbon-monoxide, may constitute physical damage or loss to a property if its presence renders the structure uninhabitable or unusable, or essentially destroys its functionality. *See* Mellin v. Northern Security Ins. Co., Inc., 167 N.H. 544, 548, 550, 115 A.3d 799, 803, 805 (2015) (finding that the pervasive odor of cat urine was "physical loss to the property," "conclud[ing] that 'physical loss' need not be read to include only tangible changes to the property that can be seen or touched, but can

also encompass changes that are perceived by the sense of smell," and "hold[ing] that physical loss may include not only tangible changes to the insured property, but also changes that are perceived by the sense of smell and that exist in the absence of structural damage."); Netherlands Ins. Co. v. Main Street Ingredients, LLC, 745 F.3d 909, 916-917 (8th Cir. 2014) (insured sustained physical damage under its commercial insurance policy when its dried milk and instant oatmeal became contaminated with salmonella); Widder v. Louisiana Citizens Prop. Ins. Corp., 82 So. 3d 294, 296 (La. App. 4 Cir. 2011) (reversing trial court ruling that lead contamination in a home was not a "direct physical loss" for which there was coverage, and "find[ing] that the intrusion of the lead to be a direct physical loss that has rendered the home unusable and uninhabitable."), *cert. denied*, 76 So. 3d 1179 (La. 2011); Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 399, 406 (1st Cir. 2009) ("[W]e are persuaded both that odor can constitute physical injury to property under Massachusetts law, and also that allegations that an unwanted odor permeated the building and resulted in a loss of use of the building are reasonably susceptible to an interpretation that physical injury to property has been claimed."); General Mills, Inc. v. Gold Medal Ins. Co., 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (concluding that a food manufacturer sustained direct physical damage to its cereal product after the oats were treated with an unapproved pesticide, and reasoning "that direct physical loss can exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way."); Azalea, Ltd. v. American States Ins. Co., 656 So.2d 600, 602 (Fla. Ct. App. 1995) (reversing trial court and finding that a direct physical loss had been established after an unseen contaminant entered the insured's sewage treatment system and destroyed the

bacteria colony that was integral to its operation); Farmers Ins. Co. of Oregon v. Trutanich, 123 Or. App. 6, 10-11, 858 P.2d 1332, 1335-36 (1993) (rejecting insurer's contention that the trial "court erred in ruling that [the insured's] losses caused by odor from the methamphetamine 'cooking' constituted 'direct physical loss,'" and holding that damages caused by odor from methamphetamine cooking represented direct physical loss covered by the policy); Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of America, 2014 WL 6675 934, at *6 (D.N.J. 2014) (stating that "non-structural property damage claims have found that buildings rendered uninhabitable by dangerous gases or bacteria suffered direct physical loss or damage," and finding "that the ammonia release physically transformed the air within Gregory Packaging's facility so that it contained an unsafe amount of ammonia or that the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated," such "that the ammonia discharge inflicted 'direct physical loss of or damage to' Gregory Packaging's facility."); Association of Apartment Owners of Imperial Plaza v. Fireman's Fund Insurance Company, 939 F.Supp.2d 1059, 1068-69 (D. Haw. 2013) (concluding that the invisible release of arsenic and resulting contamination of the building's carpet, concrete, and interior objects established "direct physical damage" to the building); TRAVCO Ins. Co. v. Ward, 715 F.Supp.2d 699, 709 (E.D. Va. 2010) (toxic gas released by defective drywall, which rendered the home uninhabitable, satisfied the "direct physical loss or damage" requirement), *aff'd*, 504 Fed. Appx. 251 (4th Cir. 2013); Stack Metallurgical Services, Inc. v. Travelers Indemnity Co. of Connecticut, 2007 WL 464715, at *8 (D. Or. 2007) (finding that the release of lead, which prevented the use of a furnace for its expected purpose, was "fairly characterized as 'direct physical damage'" to the furnace);

Cooper v. Travelers Indemnity Co. of Illinois, 2002 WL 32775680, at *5 (N.D. Cal. 2002) (concluding that the suspension of a tavern's operations "resulted from direct physical damage to the property" since it was caused by e-coli bacteria in well water); Yale University v. Cigna Ins.Co., 224 F.Supp.2d 402, 413-414 (D. Conn. 2002) (presence of lead contamination constituted physical loss or damage to property); Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts, 2002 WL 31495830, at *8-9 (D. Or. 2002) (stating "that physical damage can occur at the molecular level and can be undetectable in a cursory inspection," and finding that "[b]ecause mold may be a 'direct' and 'physical' loss covered by the policy in this case, Prudential is not entitled to summary judgment."); Matzner v. Seaco Ins. Co., 1998 WL 566658, at *4 (Mass. Super. 1998) (concluding "that carbon-monoxide contamination constitutes 'direct physical loss of or damage to' property, namely the insured building, 'caused by or resulting from any covered cause of loss,' namely the *risk* of carbon monoxide contamination.")(emphasis in original); Arbeiter v. Cambridge Mut. Fire Ins. Co., 1996 WL 1250616, at *2 (Mass. Super. 1996) ("The existence of fumes may be a physical loss. The plaintiffs argue persuasively that fumes are a physical loss which attaches to the property.").

At the outset of the novel coronavirus public health crisis, and in anticipation of insurers' arguments that insureds could not satisfy the "physical damage" requirement for business interruption insurance coverage, insurance law commentators opined:

> Business owners should argue that the mere presence of the coronavirus constitutes "physical damage" to business premises because the coronavirus attaches to surfaces and is capable of causing potentially fatal infection upon contact and prevents business owners from using and enjoying their property.

Charles S. LiMandri, Milan L. Brandon and Noel J. Meza, "Business Interruption Coverage for the COVID-19 Pandemic: Insurance Industry Fights Biggest Battle Ever Against Difficult Odds," *Insurance Litigation Reporter*, Vol. 42, No. 10 at p. 285 (June 19, 2020). They indicated that "scientific research confirms that the coronavirus can linger on surfaces for days and that it can be transmitted through 'fomites' (objects or materials likely to carry infection, such as furniture)." Id. (citing Neetjle van Dormalen et al., "Aerosol and Surface Stability of SARS-CoV-2 as compared with SARS-CoV-1," 382 New Eng. J. Med. 1564 (2020)). As for any resulting repairs to restore the property in the wake of COVID-19, those commentators stated that "a strong argument can be advanced that 'there was a physical deposit of hazardous biological material (coronavirus particles) upon property, such that disinfection was reasonably required before the property could be used again." Id. at 286 (quoting Nick Bond and Mark Maclean, "Is Coronavirus Contamination Considered Property Damage in the Context of Business Interruption Insurance?," *Kennedys Law* (Mar. 26, 2020)).

Studio 417, Inc. v. Cincinnati Ins. Co., 478 F.Supp.3d 794 (W.D. Mo. 2020) is the first reported case that employed such a rationale in addressing Cincinnati's denial of a coronavirus-related business interruption insurance claim on the basis that "direct physical loss requires actual, tangible, permanent, physical alteration of property." Id. at 800. The hair salons in that case had alleged "that COVID-19 'is a physical substance,' that it 'lives on' and is "active on inert physical surfaces," and "attached to and deprived [them] of their property, making it 'unsafe and unusable, resulting in a direct physical loss to the premises and property.'" Not unlike Brown's policy, Cincinnati's policy in Studio 417 did not define the words "direct," "physical," "loss," or "damage." Id. Citing Port

Authority, the federal district court stated that "[o]ther courts have similarly recognized that even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose." Id. at 801. In finding that the salons had adequately alleged that they suffered direct physical loss or damage, Studio 417 stressed that they had averred "that COVID-19 particles attached to and damaged their property, which made their premises unsafe and useable." Id. at 802. *Accord* NeCo, Inc. v. Owners Ins. Co., 2021 WL 601501, at *4 (W.D. Mo. 2021) (holding that "Plaintiff has adequately alleged a claim for direct physical loss" by asserting "that COVID-19 was present on Plaintiff's premises" and that "the presence of COVID-19 on property impairs its value, usefulness, and/or normal function."); Blue Springs Dental Care, LLC v. Owners Ins. Co., 488 F.Supp.3d 867, 874 (W.D. Mo. 2020) (denying motion to dismiss for failure to allege physical damage in light of dental clinics' allegations that it "suspended operations due to COVID-19 to prevent physical damages to the premises by the presence or proliferation of the virus" and "that COVID-19 physically attached itself to their dental clinics, thereby depriving them of the possession and use of those insured properties.").

Elegant Massage, LLC v. State Farm Mutual Auto. Ins. Co., 506 F.Supp.3d 360 (E.D. Va. 2020) utilized similar reasoning in treating COVID-19 contamination of insured premises like contamination by ammonia, toxic gas, or noxious odors when determining whether the direct physical loss or damage threshold for coverage was met. The trial court in that action deemed it "plausible that a fortuitous 'direct physical loss' could mean that the property is uninhabitable, inaccessible, or dangerous to use because of intangible,

or non-structural, sources." Id. at 376. In denying the insurer's motion to dismiss, Elegant Massage stated:

> Here, while the Light Stream Spa was not structurally damaged, it is plausible that Plaintiff experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, or dangerous to use by the Executive Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus. That is, the facts of this case are similar to those where courts found that asbestos, ammonia, odor from methamphetamine lab, or toxic gasses from drywall, which caused properties to become uninhabitable, inaccessible, and dangerous to use, constituted a direct physical loss.

Id. *See also* Cibus, LLC v. Eagle West Ins. Co., 2021 WL 1566306, at *5 (D. Ariz. 2021) (following Studio 417 and holding that plaintiff "sufficiently alleged that [it] suffered a direct physical loss of or damage to its property when COVID-19 contaminated the property and that this physical loss caused the business disruption and extra expenses.").

Earlier this month, the United States Court of Appeals for the Eighth Circuit considered an appeal involving the "physical loss" or "physical damage" requirement under Iowa law. The oral and maxillofacial surgery group in Oral Surgeons, P.C. v. Cincinnati Ins. Co., 491 F.Supp.3d 455 (S.D. Iowa 2020) did not allege that the coronavirus was present in its offices, and "instead contend[ed] its loss was caused by the COVID-19 coronavirus and the government actions to suspend temporarily non-emergency dental procedures." Id. at 456. On appeal, the Eighth Circuit considered "only the question whether the COVID-19 pandemic and the related-government imposed restrictions constitute direct 'accidental physical loss or accidental physical damage' under the policy" and Iowa law. Oral Surgeons, P.C. v. Cincinnati Ins. Co., 2021 WL 2753874, at *3 n. 2 (8th Cir. 2021). Although the appellate court affirmed the lower court dismissal and rejected the "conten[tion] that 'physical loss' occurs whenever the insured is

physically deprived of the insured property," Id. at *1, it reasoned that "there must be some physicality to the loss or damage of property – *e.g.*, a physical alteration, ***physical contamination***, or physical destruction." Id. at *2 (emphasis added).

In order for an insured to sustain a claim of physical loss or damage based upon the contamination theory recognized in Studio 417, the insured must expressly aver that the coronavirus was present on its covered property. *See* Hair Studio 1208, LLC v. Hartford Underwriters Ins. Co., 2021 WL 1945712, at *8 (E.D. Pa. 2021) ("Unlike in [Hardinger] where there were specific allegations of bacteria in the insured property, Plaintiff does not assert the presence of COVID-19 on its property."); Muriel's New Orleans, LLC v. State Farm Fire and Cas. Co., 2021 WL 1614812, at *8 (E.D. La. 2021) ("find[ing] the reasoning in Studio 417 inapplicable here" because "Muriel's does not allege that COVID-19 physically infiltrated the premises; rather, Muriel's alleges that 'the shutdown orders issued by the City of New Orleans and the State of Louisiana, and their effects on Muriel's business, property, and operations, constitute a direct physical loss to covered property.'"); Goodwill Industries of Central Oklahoma, Inc. v. Philadelphia Indemnity Ins. Co., 499 F.Supp.3d 1098, 1104 (W.D. Ok. 2020) ("Here, however, Goodwill only states that the government's mandated closures rendered it unusable, not that COVID-19 attached to or deprived it of its property."). In fact, we found Studio 417 to be inapplicable in The Scranton Club because there had "never been an allegation by the Scranton Club that the presence of the novel coronavirus on its property" rendered "it uninhabitable or unusable," and to the contrary, the Scranton Club had distinctly alleged that "its 'loss of business income was not caused by a virus within its premises.'" The Scranton Club, supra, at *4, 15. The federal district court in Mudpie, Inc. v. Travelers

Casualty Ins. Co. of America, 487 F.Supp.3d 834 (N.D. Cal. 2020) also found "that Mudpie has failed to establish a 'direct physical loss of property' under its insurance policy," but further explained:

> Had Mudpie alleged the presence of COVID-19 in its store, the Court's conclusion about an intervening physical force would be different. SARS-CoV-2 - - the coronavirus responsible for the COVID-19 pandemic, which is transmitted either through respiratory droplets or through aerosols which can remain suspended in the air for prolonged periods of time - - is no less a "physical force" than the "accumulation of gasoline" in Western Fire Insurance or the "ammonia release which physically transformed the air" in Gregory Packaging.

Id. at 841 & n.7. *Accord* Cinemark Holdings, Inc. v. Factory Mutual Ins. Co., 500 F.Supp.3d 565, 569 (E.D. Tex. 2021) ("Unlike Selery [Fullfillment, Inc. v. Colony Ins. Co., 2021 WL 963742 (E.D.Tex. 2021)], Cinemark alleges that COVID-19 was actually present and actually damaged the property by changing the content of the air."); Derek Scott Williams PLLC v. Cincinnati Ins. Co., 2021 WL 767617, at *2, 4 (N.D. Ill. 2021) (addressing Cincinnati's contentions "that physical *alteration* to the property is required" and that coronavirus contamination "does not constitute damage to an insured's property because it can be removed by cleaning," and concluding "that a reasonable factfinder could find that the term 'physical loss' is broad enough to cover, as Williams argues, a deprivation of the use of its business premises.")(emphasis in original); Henderson Road Restaurant Systems, Inc. v. Zurich American Ins. Co., 2021 WL 168422, at *13 (N.D. Oh. 2021) ("After considering the ordinary definitions of the undefined words in the policy, the Court finds that the Plaintiffs have shown that their business operations were suspended by direct physical loss of or damage to property at the premises" due to the presence of the coronavirus there.).

State trial courts throughout the nation have agreed with the foregoing rationale articulated in the federal case law in denying insurers' attempts to dismiss business interruption insurance claims filed by insureds who assert that COVID-19 was present on their covered property.[6] *See*, *e.g.*, McKinley Development Leasing Co. Ltd. v. Westfield Ins. Co., 2021 WL 506266, at *4 (Stark Co. Oh. 2021) (following Henderson Road Restaurant and holding that "McKinley has adequately stated a claim for direct physical loss" from the presence of the coronavirus); Goodwill Industries of Orange Co. v. Philadelphia Indemnity Ins. Co., 2021 WL 476268, at *3 (Orange Co. Calif. 2021) (citing Studio 417, noting that the insured alleged "that coronavirus and COVID-19 were present at its properties at the time of the State and County closure orders," and declining to hold "as a matter of law that the coronavirus and COVID-19 have not, in some manner, caused physical damage to property."); Cherokee Nation v. Lexington Ins. Co., 2021 WL 506271, at *4-5, 9 (Cherokee Co. Okl. 2021) (finding that an averment that the existence of the coronavirus on its covered property "rendered it unusable for its intended purpose" established "direct physical loss or damage."); North State Deli, LLC v. The Cincinnati Ins. Co., 2020 WL 6281507, at *3 (N.C. Super. 2020) (stating "that the ordinary meaning of the phrase 'direct physical loss' includes the inability to utilize or possess something in the real, material, or bodily world," finding that "Plaintiffs were expressly forbidden by government decree from accessing or putting their property to use for the income-generating purposes for which the property was insured," and concluding that "this loss is

[6]Cincinnati's assertion, that "courts have uniformally held that the mere presence of the coronavirus on property is insufficient to establish the requisite for first party coverage: physical damage or loss to property," is incorrect. (Docket Entry No. 27 at p. 21).

unambiguously a 'direct physical loss,' and the policies afford coverage."). In addition, the federal district court in Legacy Sports Barbershop, LLC v. Continental Casualty Co., 2021 WL 2206161 (N.D. Ill. 2021) fashioned an alternative test for determining whether the COVID-19 virus caused a "distinct, demonstrable, physical alteration" of the covered premises. Id. at *2. It noted that the insureds not only alleged "that COVID-19 was present on their properties," but further averred that they were required to "install social distancing barriers" and other measures "to promote proper social distancing." Id. at *3. In denying the insurer's motion to dismiss, Legacy Sports Barbershop reasoned that the insured "sufficiently alleged that the properties underwent a 'distinct, demonstrable, physical alteration' and therefore suffered 'physical loss of or damage to' the properties" as a result of the presence of the coronavirus and the resulting installation of social distancing protections. Id.

The policy that Cincinnati issued to Brown's does not define the words "direct," "physical," "loss," or "damage." "Words of 'common usage' in an insurance policy are to be construed in their natural, plain, and ordinary sense, and a court may inform its understanding of these terms by considering their dictionary definitions." Allstate Fire and Cas. Ins. Co. v. Hymes, 29 A.3d 1169, 1172 (Pa. Super. 2011), *app. denied*, 616 Pa. 625, 46 A.3d 715 (2012). Dictionaries define "the adjective 'direct' as 'stemming immediately from a source' and 'characterized by close logical, causal, or consequential relationship.'" DiFabio v. Centaur Ins. Co., 366 Pa. Super. 590, 595, 531 A.2d 1141, 1143 (1987). "'Physical' is defined as 'having material existence: perceptible especially through the senses and subject to the laws of nature.'" Tria WS LLC, supra, at *4. Damage means "loss or harm resulting from injury to person, property, or reputation."

Com v. White, 2017 WL 5187751, at *4 (Pa. Super. 2017); 44 Hummelstown Associates, supra, at *7. "Loss" refers to "destruction, ruin" and "the act of losing possession" or "deprivation." 44 Hummelstown Associates, supra; Ungarean, supra, at *6.

Under the "reasonable and realistic standard for identifying physical loss or damage" established in Port Authority and Hardinger for cases "where sources unnoticeable to the naked eye" substantially reduce the use of property, an insured may satisfy the "direct physical loss or damage" prerequisite for coverage if the invisible agent renders the property "useless or uninhabitable," or the property's functionality is "nearly eliminated or destroyed" by that source. In pre-COVID-19 case law, including the Western Fire Insurance decision cited by Port Authority and Hardinger, the requisite "physical loss or damage" was established when vapors, odors, fumes, and other contaminants from ammonia, carbon-monoxide, arsenic, salmonella, lead, and other non-visual sources made property uninhabitable or unusable, or nearly destroyed or eliminated its functionality. Thus, in instances where the insured avers that the COVID-19 virus was present on the insured premises and caused the covered property to become uninhabitable or unusable, or nearly eliminated or destroyed its functionality, the conclusion in Studio 417 and its progeny that "physical loss or damage" is sufficiently alleged is consistent with the physical contamination theory formulated in Port Authority and Hardinger. Such "loss or harm" to property "stem[s] immediately from a [coronavirus] source," and is perceptible "through the senses and subject to the laws of nature."[7] Based upon Brown's

[7]Our Supreme Court has stated "[w]e have no hesitation in concluding that the ongoing COVID-19 pandemic equates to a natural disaster." Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 370 (Pa. 2020), *cert. denied sub nom.*, Republican Party of Pennsylvania v. Degraffenreid, 141 S.Ct. 732 (U.S. 2021). In support of their argument that the coronavirus causes physical damage to property, some insureds have quoted the

averments regarding the "continuous presence" of the coronavirus on its covered premises that rendered its property unusable, unsafe, and "unfit for its intended use," Brown's has adequately alleged "physical loss or damage" to its property under the contamination theory for purposes of business income, extra expense, and civil authority coverage.

Such a conclusion is supported by well-established principles of insurance contract construction and the specific language of Cincinnati's policy. "An insurance policy must be read as whole, and not 'in discrete units.'" Clarke v. MMG Ins. Co., 100 A.3d 271, 276 (Pa. Super. 2014) (quoting Luko v. Lloyd's London, 393 Pa. Super. 165, 573 A.2d 1139, 1142 (1990)), *app. denied*, 632 Pa. 666, 117 A.3d 294 (2015). It is axiomatic that in interpreting an insurance contract, the court must give effect to all of the policy's language and not treat any of its provisions "as mere surplusage." Penn Psychiatric Center, supra, at *5; Indalex, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, 83 A.3d 418, 421 (Pa. Super. 2013), *app. denied*, 627 Pa. 759, 99 A.3d 926 (2014); Millers Capital Ins. Co. v. Gambone Bros. Development Co, Inc., 941 A.2d 706, 715 (Pa. Super. 2007), *app. denied*, 600 Pa. 734, 963 A.2d 471 (2008). "Indeed, if the court is 'forced to choose between two competing interpretations of an insurance policy, we are bound, as a matter of law, to choose the interpretation which allows us to give effect to all of the

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following language used by the Supreme Court in first holding that the COVID-19 pandemic qualified as a "natural disaster" under the Emergency Management Services Code, 35 Pa.C.S. §§ 7101-79a31:

> First, the specific disasters in the definition of "natural disaster" themselves lack commonality, as while some are weather related (*e.g.*, hurricane, tornado, storm), several others are not (tidal wave, earthquake, fire, explosion). To the contrary, the only commonality among the disparate types of specific disasters referenced is that ***they all involve "substantial damage to property***, hardship, suffering or possible loss of life." In this respect, ***the COVID-19 pandemic is of the "same general nature or class as those specifically enumerated***," and thus is included, rather than excluded, as a type of "natural disaster."

Friends of Danny DeVito, 227 A.3d at 888-889(emphasis added).

policy's language.'" Clarke, 100 A.3d at 276 (quoting Millers Capital Ins. Co., 941 A.2d at 716).

The terms contained in Brown's policy with Cincinnati appear to manifest an intent to provide business interpretation insurance coverage based upon a finding that the presence of the COVID-19 virus on Brown's premises constitutes "physical damage" to that covered property. As mentioned above, the business income and extra expense provisions of the "all-risk" policy contain 26 exclusions from coverage, including exclusions for damage caused by "bacteria," "vapor," "gas," and "pollutants." By virtue of those detailed exclusions, coverage under Cincinnati's policy would not be applicable for the e-coli "bacteria" in Hardinger, the ammonia "vapor" in Gregory Packaging, the "gas" seepage and fumes in Western Fire Insurance and TRAVCO Ins., or the "pollutants" in General Mills and Azalea Limited Ltd. However, no virus exclusion is included among the multitude of stated exclusions for business income and extra expense coverage. As the sole drafter of the policy, Cincinnati had the power to bar business income and extra expense coverage for losses caused by viruses by simply including a virus exclusion among its many exclusions, but it failed to do so. *See* Housing and Redevelopment Ins. Exchange v. Lycoming County Housing County, 58 Pa. D. & C. 4th 321, 346-347 (Lacka. Co. 2001) ("We are mindful that [the insurer], as the drafter of the insurance policy, had the ability to control its exposure and indemnity obligations by inserting language that expressly excluded liability for constitutional torts, or by defining the phrase 'wrongful act' more narrowly so as to eliminate coverage for claims involving violations of the First Amendment, Due Process Clause, or Whistleblower Law."), *aff'd*, 809 A.2d 1096 (Pa. Cmwlth. 2002).

"The maxim *expressio unius est exclusio alterius* is applicable to insurance policy exclusions." Slate Construction Co. v. Bituminous Cas. Corp., 228 Pa. Super. 1, 8 n.9, 323 A.2d 141, 145 n.9 (1974) (*en banc*). Under that interpretive rule, the expression of one thing in an insurance contract implies the exclusion of another matter. TIG Specialty Ins. Co. v. Koken, 855 A.2d 900, 914 (Pa. Cmwlth. 2004), *aff'd*, 586 Pa. 84, 890 A.2d 1045 (2005). Hence, the fact that Cincinnati's business income and extra expense provisions identify 26 exclusions from coverage, but not a virus exclusion, implies that virus-related damages are not intended to be similarly excluded from that same coverage. *See* Mutual of Omaha Ins. Co. v. Bosses, 428 Pa. 250, 252, 237 A.2d 218, 219 (1968) ("When . . . the insurer declared that undisclosed sickness would not be covered by the policy, it excluded rescission. *Expressio unius est exclusio alterius*.").

Furthermore, the "all-risk" policy's divergent treatment of virus-related damages in the business income/extra expense/civil authority provisions and the "Crisis Event Expense Coverage" also supports the applicability of business income and extra expense coverage for Brown's. Cincinnati's "Crisis Event Expense Coverage" contains a comprehensive virus exclusion which bars coverage for "any loss directly or indirectly caused by or resulting from any virus, . . . or any pandemic or similar influenza which is defined by the [CDC] as virulent human influenza that may cause global outbreak or pandemic, or serious illness." (Docket Entry No. 1 at p. 97). But, as noted above, its business income, extra expense, and civil authority coverages do not include any such virus exclusion in their coverage provisions, and "[a] principle frequently applied as an aid in arriving at the policy's intention is that the mention of one thing implies the exclusion of another thing." Clarke, 100 A.3d at 276. When "read as a whole, and not in

discrete units," the foregoing policy language reflects an intent to exclude "Crisis Event Expense Coverage" for losses resulting from any virus, while not likewise excluding business income, extra expense, and civil authority protection for damage caused by a virus. Id. at 278 ("Further, under the contractual interpretation maxim that the 'mention of one thing implies the exclusion of another,' a court may not add language to a provision, particularly where the language was contained in a separate provision but excluded from the provision at hand.").

Finally, the applicability of Brown's business interruption coverage for physical contamination caused by the coronavirus is consonant with "the reasonable expectations of the insured" based upon "the totality of the insurance transaction involved." Consolidated Rail Corp., 182 A.3d at 1026. Brown's avers that Cincinnati and C.C. Young "directed and controlled" its purchase of the commercial insurance policy, and submits that since the policy "does not include an exclusion for loss caused by a virus" in its business interruption coverage, Brown's "reasonably expected that the insurance it purchased . . . included coverage for property damage and business interruption losses caused by viruses like the COVID-19 virus." (Docket Entry No. at ¶¶ 11, 26). It further asserts that it "had a reasonable expectation in purchasing" its civil authority coverage, "that such coverage would apply in the event that a civil authority issued an order effectively closing [its] business because of a public health emergency, such as the COVID-19 pandemic." (Id. at ¶ 118). Based upon the totality of the circumstances alleged, Brown's had a reasonable expectation that business interruption coverage would be provided for losses caused by the presence of the COVID-19 virus on its insured premises.

Brown's purchased an "all-risk" policy from Cincinnati, which "by definition 'covers every kind of insurable loss except what is specifically excluded.'" Betz v. Erie Insurance Exchange, 957 A.2d 1244, 1255-56 (Pa. Super. 2008) (quoting Black's Law Dictionary 815 (8th ed. 2004)), *app. denied*, 606 Pa. 659, 995 A.2d 350 (2010). Giving effect to all the policy's language, including the listing and placement of its exclusions, Brown's has sufficiently alleged a claim for business interruption insurance coverage based upon "physical damage" from the COVID-19 virus under the physical contamination theory recognized in Port Authority/Hardinger. The "period of restoration" provision set forth in the "extra expense" coverage, (Docket Entry No. 1 at pp. 68, 87-88) was arguably satisfied by Brown's repairs and remedial measures in the form of "the installation of partitions" and "handwashing/sanitation stations" and other actions undertaken to renovate the premises in order to make the property safe for public use. *See* Legacy Sports Barbershop, supra, at *3. Accordingly, Cincinnati has not established that it is clear and free from doubt that, based upon the facts alleged in the complaint and all inferences fairly deducible from those facts, Brown's is unable to satisfy the "physical damage" requirement for business interruption coverage under the physical contamination theory.[8]

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[8]In light of the denial of Cincinnati's demurrer based upon the contamination theory, it is unnecessary to address Brown's alternate argument premised upon Ungarean, to wit, that physical loss or damage to property includes the mere "loss of use" of the covered property. *See* Seifert v. IMT Ins. Co., 2021 WL 2228158, at *5 (D. Minn. 2021) ("In sum, the Court concludes that a plaintiff would plausibly demonstrate a direct physical loss of property by alleging that executive orders forced a business to close because the property was deemed dangerous to use and its owner was thereby deprived of lawfully occupying and controlling the premises to provide services within it."); In re Society Insurance Co. COVID-19 Business Interruption Protection Insurance Litigation, supra, at *9 (holding "a reasonable jury can find that the Plaintiffs did suffer a direct 'physical' loss of property on their premises" since "the pandemic-caused shutdown orders do impose a *physical* limit: the restaurants are limited from using much of their physical space.")(emphasis in original). Nor is it necessary to consider Cincinnati's vicarious liability for the actions of C.C. Young based upon Brown's allegation that C.C. Young acted as the actual or ostensible agent of Cincinnati. (Docket Entry No. 1 at ¶ 9).

(E) CIVIL AUTHORITY COVERAGE

Cincinnati's policy provides an alternate ground for business interruption insurance under its "Civil Authority" coverage, (Docket Entry No. 1 at p. 67), and Cincinnati contends that the civil authority coverage cannot possibly apply since "no direct physical loss to other property is alleged" and access to Brown's property "was not prohibited" by any civil authority. (Docket Entry No. at pp. 34-37). Based upon the factual averments set forth in the complaint, Cincinnati's demurrer to Brown's civil authority coverage claim may be overruled summarily.

Cincinnati's policy affords "business income" and "extra expense" coverage as a result of "damage to property other than Covered Property" if access to Brown's premises was "prohibited by civil authority" due "to dangerous physical conditions" at another property. (Docket Entry No. 1 at p. 68). Brown's alleges that in addition to the COVID-19 virus existing on its own premises, the coronavirus was continuously present on other property "around [Brown's] premises," that it "rendered the premises unsafe and unfit for its intended use," and that it caused Brown's property to be closed as a "non-essential" business. (Docket Entry No. 1 at ¶¶ 50, 52). Unlike restaurants and other business that were allowed to remain open to offer limited services, public access to Brown's "gym and fitness center" was wholly prohibited (Id. at ¶¶ 51, 53). *See also*, Derek Scott Williams, supra, at *5 (dismissing civil authority coverage claim by insured "given their concession that access to their property by employees and others was permitted for limited ongoing operations.").

Therefore, Brown's has averred that it was denied access to its premises due to closure orders stemming from the coronavirus on nearby properties. Accepting those

allegations as true, Brown's has alleged a viable claim for civil authority coverage, and Brown's demurrer to that claim will be overruled.

(F) BAD FAITH CLAIM

Although Pennsylvania has recognized a cause of action for third party bad faith since Cowden v. Aetna Casualty and Surety Co., 389 Pa. 459, 134 A.2d 223 (1957), a claim for first party bad faith did not exist in this Commonwealth until 42 Pa.C.S. § 8371 was enacted in 1990.[9] Olsofsky v. Progressive Ins. Co., 52 Pa. D. & C. 4th 449, 457-458 (Lacka. Co. 2001). Section 8371 of the Judicial Code, 42 Pa.C.S., "authorizes courts, which find that an insurer has acted in bad faith towards its insured, to award punitive damages, attorneys' fees, interest and costs." Birth Center v. St. Paul Companies, Inc., 567 Pa. 386, 402-403, 787 A.2d 376, 386 (2001); Brogan, 35 Pa. D. & C. 5th at 526-527. That statute provides:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
>
> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorney fees against the insurer.

42 Pa.C.S. § 8371. Because Section 8371 states that "the court may" award punitive damages, counsel fees, interest, and costs, "the decision to award attorneys' fees and costs

[9] "First party insurance applies 'where the insured is seeking coverage against loss or damage sustained by the insured,' such as 'damage to his own property,' while third party insurance is applicable if 'the insured is seeking coverage against liability of the insured to another.'" Penn National Sec. Ins. Co. v. Kapinus, 2017 WL 2989245, at * 6 (Lacka. Co. 2017) (quoting Sean W. Gallagher, "The Public Policy Exclusion and Insurance for Intentional Employment Discrimination," 92 Mich. L. Rev. 1256, 1263 n.31 (March 1994)).

'upon a finding of bad faith is wholly within the discretion of the trial court.'" Clemens v. New York Central Mut. Fire Ins. Co., 903 F.3d 396, 399 (3d Cir. 2018) (quoting Polselli v. Nationwide Mut. Fire Ins. Co., 126 F.3d 524, 534 (3d Cir. 1997)).

"Section 8371 does not define 'bad faith,' set forth the manner in which plaintiffs must prove bad faith, or distinguish the manner of proof for punitive damages from other bad faith damages." Rancosky v. Washington National Ins. Co., 642 Pa. 153, 168, 170 A.3d 364, 372 (2017). Our "courts generally have defined the term as 'any frivolous or unfounded refusal to pay proceeds of a policy.'" Wenk v. State Farm Fire & Cas. Co., 228 A.3d 540, 547 (Pa. Super. 2020) (quoting Terletsky, 437 Pa. Super. at 125, 649 A.2d at 688), *app. denied*, 242 A.3d 309 (Pa. 2020). However, "mere negligence or bad judgment" is not bad faith. Grossi v. Travelers Personal Ins. Co., 79 A.3d 1141, 1149 (Pa. Super. 2013), *app. denied*, 627 Pa. 766, 101 A.3d 103 (2014); Rutkowski v. Allstate Ins. Co., 69 Pa. D. & C. 4th 10, 37 (Lacka. Co. 2004).

In light of "the insurer's status as fiduciary for its insured under the insurance contract, which gives the insurer the right, *inter alia*, to handle and process claims," every "insurer must act with the utmost good faith towards its insured." Berg v. Nationwide Mutual Insurance Company, Inc., 189 A.3d 1030, 1037 (Pa. Super. 2018), *app. dismissed*, 235 A.3d 1223 (Pa. 2020). "[T]o prevail in a bad faith insurance claim pursuant to Section 8371, a plaintiff must demonstrate, by clear and convincing evidence, (1) that the insurer did not have a reasonable basis for denying benefits under the policy and (2) that the insurer knew or recklessly disregarded its lack of a reasonable basis in denying the claim." Rancosky, 642 Pa. at 175-176, 170 A.3d at 377. Under the first prong of the Rancosky/Terletsky test, the question of "whether the insurer had a reasonable basis for denying benefits is an

objective inquiry into whether a reasonable insurer would have denied payment of the claim under the facts and circumstances presented." Id. at 170, 170 A.3d at 374. *Accord* Kunji Harrisburg, LLC v. Axis Surplus Ins. Co., 447 F.Supp.3d 303, 309 (E.D. Pa. 2020). "[P]roof of the insurer's knowledge or reckless disregard for its lack of reasonable basis in denying the claim is sufficient for demonstrating bad faith under the second prong" of the Rancosky/Terletsky framework, and evidence of "the insurer's subjective motive of self-interest or ill-will, while perhaps probative of the second prong of the above test, is not a necessary prerequisite to succeeding in a bad faith claim." Rancosky, 642 Pa. at 176, 170 A.3d at 377.

"Claims of bad faith are fact specific and depend on the conduct of the insurer toward its insured." Wenk, 228 A.3d at 547. Brown's generally claims that Cincinnati acted in bad faith by "[a]sserting defenses in coverage which [it] knew or should have known have no foundation in fact or law," "[i]gnored clear legal precedent," and "unreasonably and unfairly withheld policy benefits justly due and owed to [Brown's]." (Docket Entry No. 1 at ¶ 89(f), (o), (bb)). It asserts that Cincinnati misrepresented the terms and monetary limits of the business interruption insurance coverages, and misled Brown's regarding the coverages available and the true language of the policy. (Id. at ¶¶ 50, 64-74, 89(b), (i), (x), (ff), (pp), (uu)). Brown's also maintains that Cincinnati denied coverage based upon a "pollutant" exclusion that is clearly inapplicable. (Id. at ¶¶ 78-80, 83-84). Last, Brown's contends that Cincinnati's alleged violations of the Uniform Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. §§ 201-1 to 201-9.3, serve as grounds for bad faith liability. (Id. at ¶ 89(zz)-(ddd)).

Notwithstanding the contamination theory decisional precedent which predated the COVID-19 pandemic, the issue of what type of damage or loss related to the coronavirus and accompanying closure orders constitutes "physical loss or damage" was an open question as of March 23, 2020, when Cincinnati denied Brown's claim, in part, on that basis. However, its alleged misrepresentations as to the policy limits and coverage terms are far more problematic. An insurer's "investigation must be 'honest, intelligent and objective,'" and "misrepresentations constitute evidence that [its] investigation was neither honest nor objective." Mohney v. American General Life Ins. Co., 116 A.3d 1123, 1135-36 (Pa. Super. 2015), *app. denied*, 634 Pa. 749, 130 A.3d 1291 (2015). Based upon Brown's averments concerning Cincinnati's misrepresentations as to policy terms and limits, a cognizable claim for bad faith has been alleged under Section 8371. *See* Hayes v. Harleysville Mut. Ins. Co., 841 A.2d 121, 127 (Pa. Super. 2004), *app. denied*, 582 Pa. 686, 870 A.2d 322 (2005).

Moreover, Brown's assertion that Cincinnati invoked an irrelevant "pollutant exclusion," which Cincinnati has not even raised as a basis for dismissal in its pending demurrer, further supports a possible finding of bad faith. Equally troubling is Brown's contention that, instead of investigating and evaluating its claims based upon the facts and governing law, Cincinnati's denial of coverage was motivated by its "desire to preempt its own financial exposure to the economic fallout resulting from the COVID-19 crisis." (Docket Entry No. 1 at ¶ 28). It is well-settled that an insurance "claim must be evaluated on its merits alone, by examining the particular situation and the injury for which recovery is sought," and that "[a]n insurance company may not look to its own economic considerations, seek to limit its potential liability, and operate in a fashion designed to

'send a message.'" Bonenberger v. Nationwide Mut. Ins. Co., 791 A.2d 378, 382 (Pa. Super. 2002); Rutkowski, 69 Pa. D. & C. 4th at 37. Thus, Brown's has stated a claim for bad faith liability on that independent basis as well.[10]

Cincinnati seeks to dismiss Brown's bad faith claim on the grounds that Cincinnati's "denial of coverage was proper" and Brown's purported failure to "even allege facts to show the virus was present at the premises." Cincinnati has not demonstrated its entitlement to judgment in its favor on those bases, and for the reasons set forth above, Brown's has stated a claim for bad faith under Pennsylvania law. Accordingly, Cincinnati's demurrer will be overruled in its entirety. An appropriate Order follows.

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[10]Since the UTPCPL "applies to the sale of an insurance policy," rather than "to the handling of insurance claims," and 42 Pa.C.S. § 8371 "provides the exclusive statutory remedy applicable to claims handling," Brown's allegations of UTPCPL violations cannot serve as the basis for bad faith liability under Section 8371. Wenk, 228 A.3d at 550; Dunleavy v. Mid-Century Ins. Co., 460 F.Supp.3d 602, 612 (W.D. Pa. 2020), *aff'd*, 848 Fed. Appx. 528 (3d Cir. 2021).

BROWN'S GYM, INC.,	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiff	:	
vs.	:	CIVIL ACTION - LAW
THE CINCINNATI INSURANCE COMPANY and C.C. YOUNG and HENKELMAN INSURANCE,	:	
Defendants	:	NO. 20 CV 3113

ORDER

AND NOW, this 13th day of July, 2021, upon consideration of the "Preliminary Objections of Defendant The Cincinnati Insurance Company," the memoranda of law submitted by the parties, and the oral argument of counsel, and based upon the reasoning set forth in the foregoing Memorandum, it is hereby ORDERED and DECREED that:

1. The preliminary objections in the nature of a demurrer filed by defendant, The Cincinnati Insurance Company, are OVERRULED; and

2. Within the next twenty (20) days, defendant, The Cincinnati Insurance Company, shall file a responsive pleading to the complaint.

BY THE COURT:

J.

Terrence R. Nealon

cc: *Written notice of the entry of the foregoing Memorandum and Order has been provided to each party pursuant to Pa. R. C. P. 236 (a)(2) and (d) by transmitting time-stamped copies via electronic mail to:*

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