Reinfection: Examining Judicial Traits and Estimating Outcomes as COVID-19 Coverage Cases Gain Appellate Review

American College of Coverage Counsel
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Program Description

This panel will review the range of trial court decisions (more particularly, case dismissals for which appeal has been taken).[1] We endeavor to predict the fate of insurer victories on appeal in light of not only the policies and facts at issue and but also the relevant bench (often federal) and applicable law (state), which may not have received close scrutiny by trial courts deciding Rule 12 motions.

The "first wave" of COVID-19 coverage cases, largely involving property insurance business interruption/business income claims broke for insurers in substantial part. Most of the more than 400 trial court rulings to date have been made by federal trial courts. As reflected in the following materials, the date to date suggest that state courts may be more hospitable to policyholder claims. In state courts, policyholders and insurers are winning at a roughly equal rate while federal trial courts have ruled for insurers at almost a 90 percent rate.

The insurer winning streak may be jeopardized or vindicated on appeal as cases receive the attention of more experienced counsel, argument from consumer and business amici, and more extensive review by appellate courts. In addition, evolving medical and economic developments may alter the climate in which decisions are made in ways that could advantage either insurers or policyholders. If policyholders continue to do comparatively well in state court, this may create pressure for federal courts to be more receptive to their claims pursuant to the *Erie v. Tompkins* principle that federal courts must generally follow state law regarding insurance and contract disputes, a requirement that may prompt certification of more state law questions to state supreme courts.

Appellate court composition – both overall composition and that of particular panels – will also play a role. Thus far, no one has compared the characteristics of trial judges and Covid coverage decisions. We are in the process of collecting and analyzing empirical information that we expect to shed light on judicial orientation toward these coverage disputes that in turn will illuminate the prospects of coverage cases on appeal in various appellate courts. This project is ongoing and will be reported on at the September 2021 Annual Meeting.

Also significant, as lawyers know, is the manner in which cases are presented and argued. We are reviewing cases outcomes according to the manner of pleading to determine if outcomes differ significantly according to the manner in which physicality, loss, or damage is outlined in the pleadings as well as whether claims for loss due to civil authority action or sue-and-labor claims do proportionately better or worse than others. Also relevant, of course, is the language of the insurance policy in dispute, particularly the presence of and language of virus or contamination exclusions.

As of mid-July 2021, there has been one federal appellate court decision on the merits in a COVID-19 coverage claim. *See Oral Surgeons, P.C. v. Cincinnati Ins. Co*, No. 20-3211(8th

[1] In cases where the policyholders defeated dismissal motions, the cases presumably remain alive at the trial level with no appealable final order and little likelihood of interlocutory appellate review.

Cir. July 2, 2021)(applying Iowa law)(included in these materials)(affirming Rule 12 dismissal of policyholder claim for coverage). As one might expect, insurers have hailed the decision while policyholders have been critical and contend that the ultimate outcome of COVID-19 coverage litigation remains in flux.

Pending appeals present variant factual scenarios and policy language but tend to converge around a set of arguments for and against coverage. Representative appellate briefs in *Oral Surgeons* as well as pending appeals are included with these materials.

Also included are is a recent state trial court opinion favoring policyholders (*Brown's Gym, Inc. v. Cincinnati Ins. Co.*, No. 20 CV 3113 (Common Pleas, Lackawanna Co., PA, July 13, 2021), a contrary state court decision (*Rose's No. 1, LLC v. Erie Ins. Exchange* (D.C. Super. Ct. Aug. 6, 2020) and notable federal trial court opinions canvasing the issues: *In re Society Insurance Co. COVID-19 Business Interruption Litigation* (N.D. Ill. Feb. 22, 2021); *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp.3d 353 (W.D. Tex. Aug. 13, 2020); *Studio 417, Inc. v. Cincinnati Ins. Co.* (W.D. Mo. Aug. 12, 2020).

Although COVID-19 coverage is a moving target, we hope to identify important factors affecting outcomes and provide relatively good predictions about the fate of Covid cases pending on appeal. We will look at the outcome of cases according to facts pleaded and court characteristics, building on the work of the Covid Coverage Litigation Tracker (CCLT) developed by Professor Tom Baker at the University of Pennsylvania with the assistance of the Stanford Securities Litigation Analytics Project and its data collection software.

Our opinions may diverge in spite of looking at the same data and will almost certainly diverge regarding the merits of various arguments for and against coverage. The panel hopes to stimulate useful additional discussion of Covid coverage issues as well as bringing to bear additional information, analysis, and argument regarding the merits of these disputes.

Covid Coverage Litigation Tracker

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Latest developments

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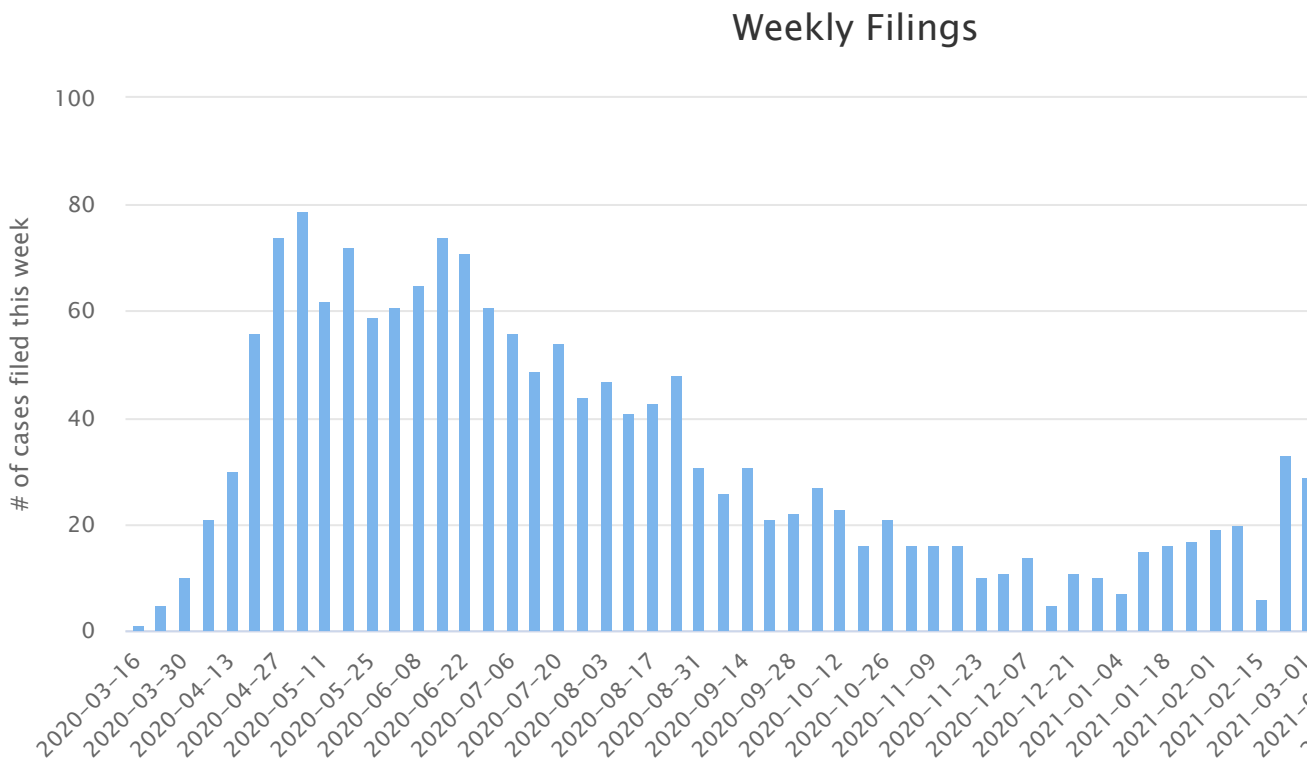

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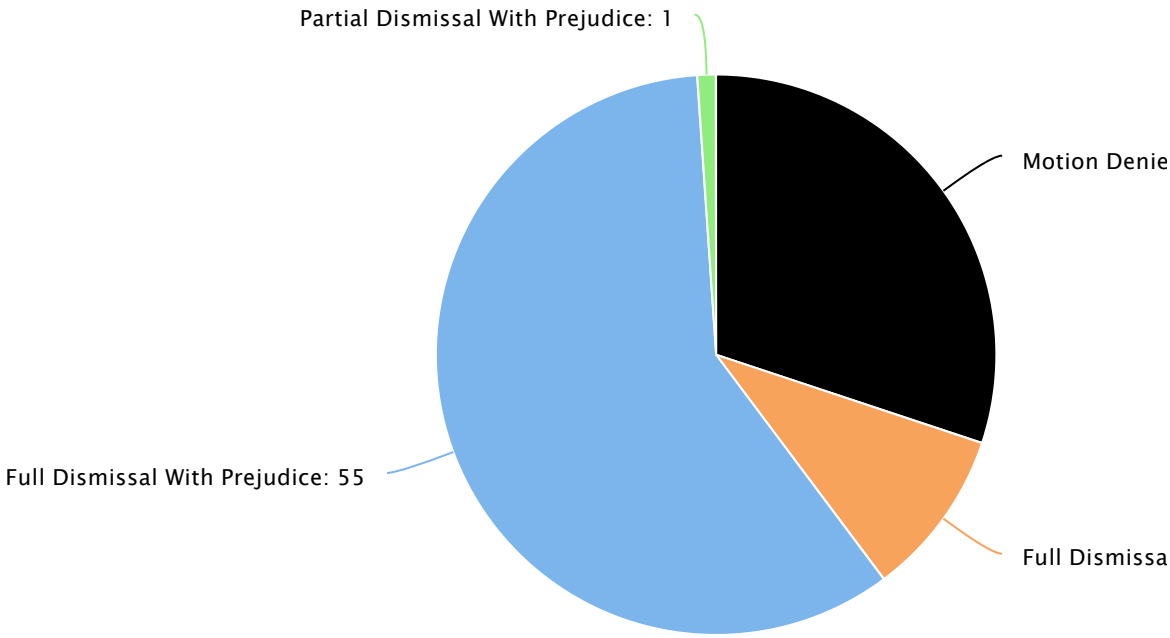

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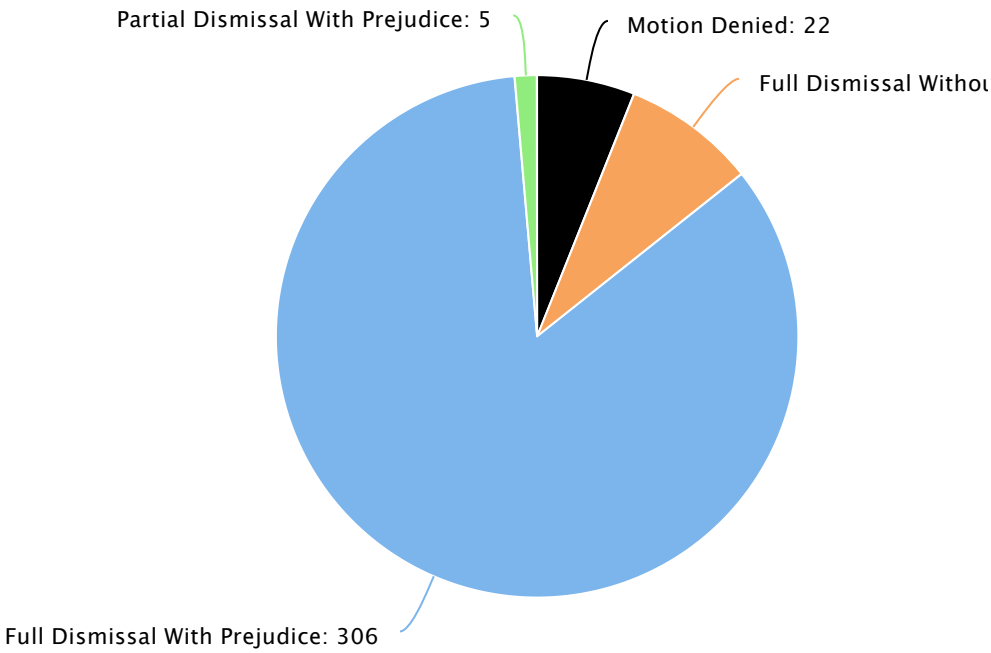

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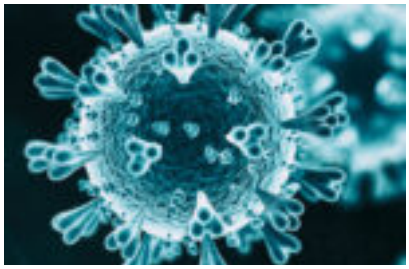

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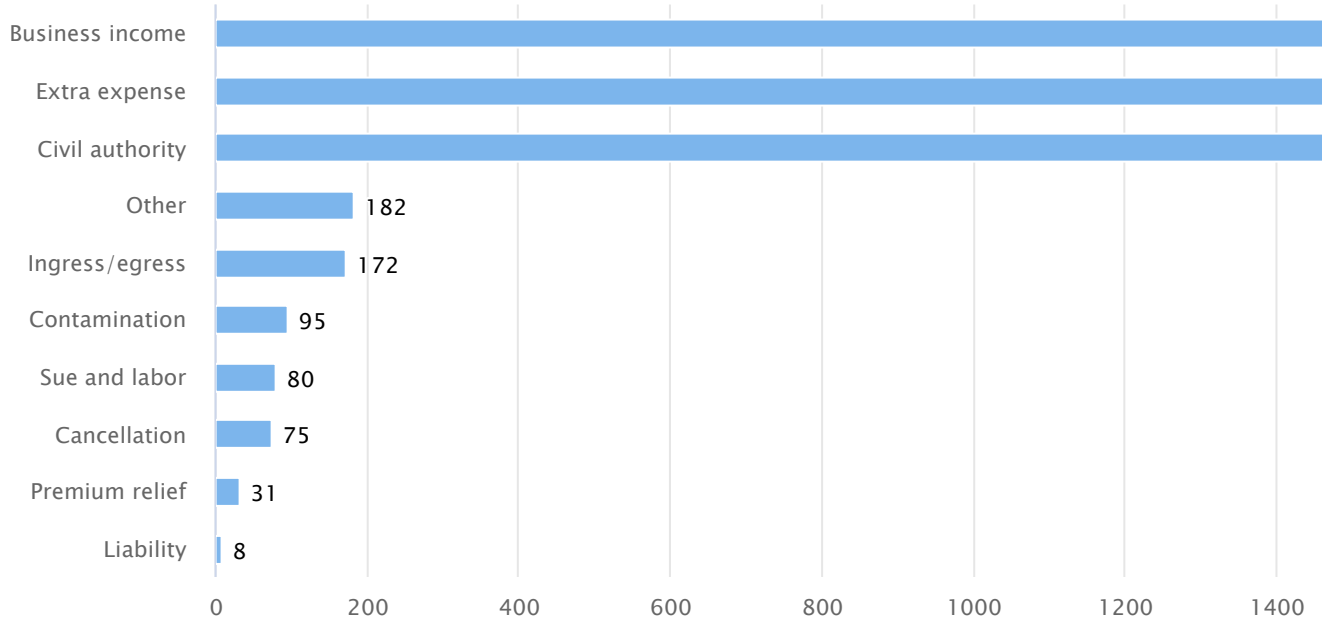
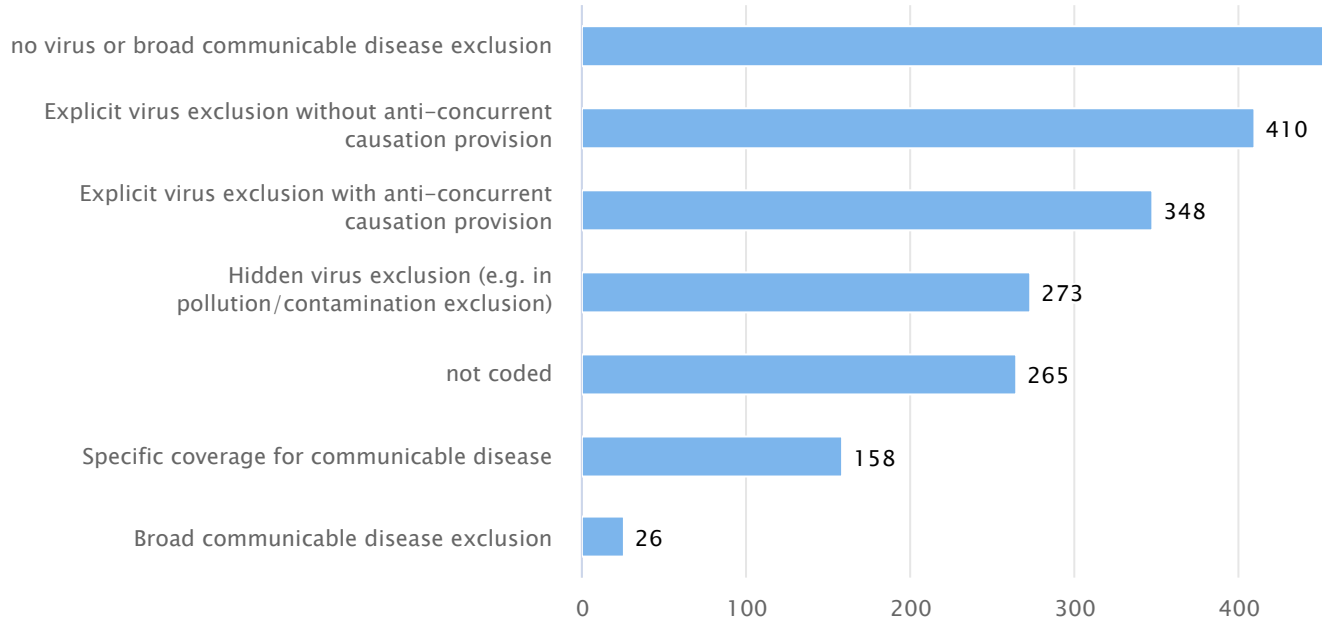
Allegations

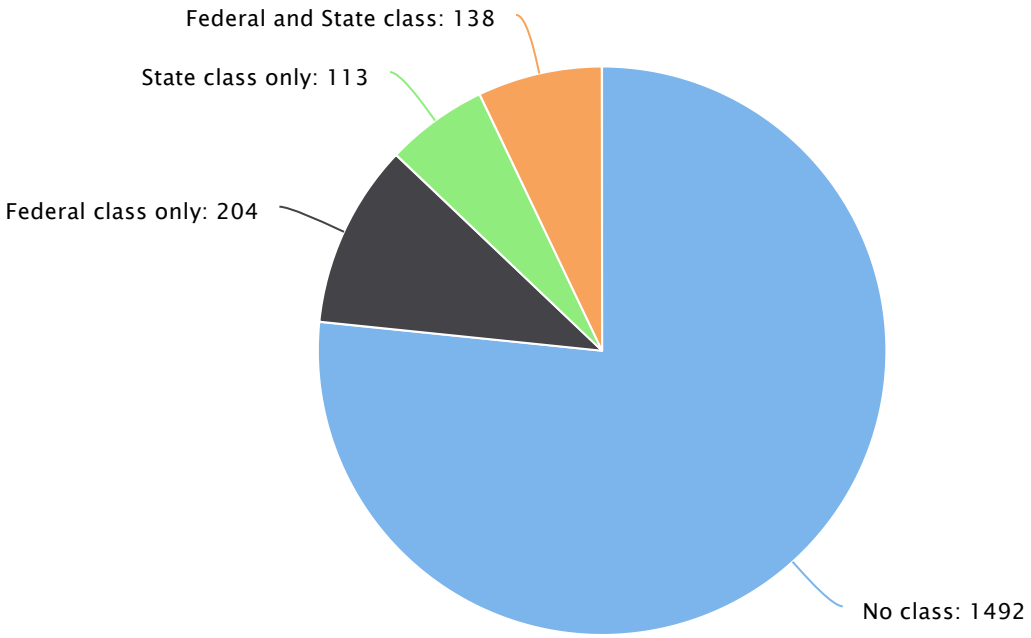
Coverage Sought



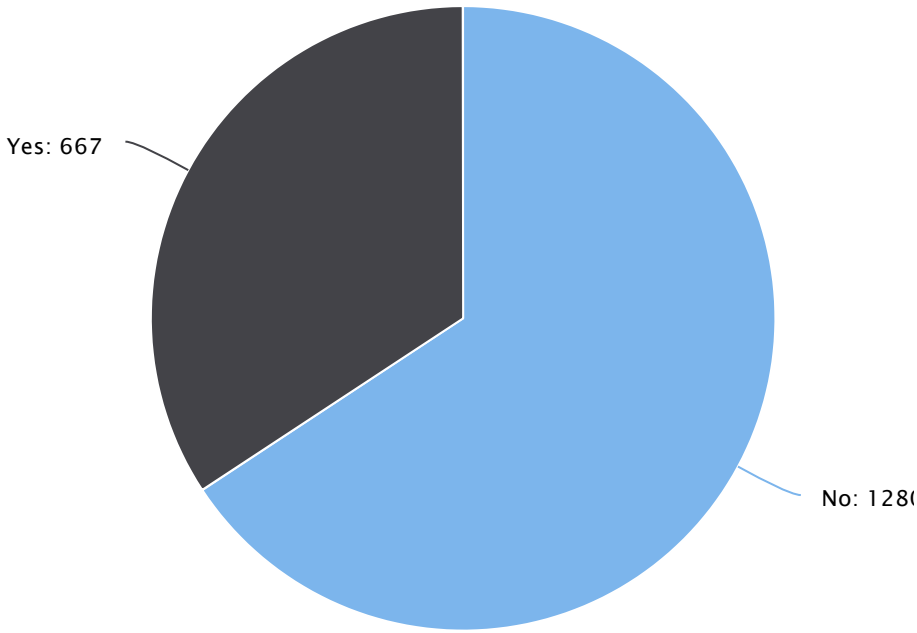
Policy provisions for communicable disease (beta test ver



Class Allegations



Bad faith allegations



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Parties and law firms

Most Frequent Insurance Groups

Insurance Group	# of Cases
Hartford Financial Services Group, Inc.	247
Zurich Insurance Group Ltd	177
Cincinnati Financial Corporation	168
Certain Underwriters at Lloyd's London	122
Chubb Limited	101
Liberty Mutual Holding Company, Inc.	85
Nationwide Mutual Insurance Company	83
CNA Financial Corporation	79
Travelers Companies, Inc.	77
Erie Insurance Exchange	76
Society Insurance, a mutual company	67
Allianz SE	66
American International Group, Inc.	62
Tokio Marine Holdings, Inc.	58
Fairfax Financial Holdings Limited	54

Most Frequent Industries

Industry	# of Cases
722 - Food Services and Drinking Places	654
621 - Ambulatory Health Care Services	239
721 - Accommodation	130
812 - Personal and Laundry Services	113
713 - Amusement, Gambling, and Recreation Industries	96
531 - Real Estate	85
541 - Professional, Scientific, and Technical Services	73
448 - Clothing and Clothing Accessories Stores	68
711 - Performing Arts, Spectator Sports, and Related Industries	58
622 - Hospitals	36
561 - Administrative and Support Services	30
611 - Educational Services	30
624 - Social Assistance	24
453 - Miscellaneous Store Retailers	23
424 - Merchant Wholesalers, Nondurable Goods	21
423 - Merchant Wholesalers, Durable Goods	16
441 - Motor Vehicle and Parts Dealers	16
512 - Motion Picture and Sound Recording Industries	15
551 - Management of Companies and Enterprises	15
442 - Furniture and Home Furnishings Stores	12
813 - Religious, Grantmaking, Civic, Professional, and Similar Organizations	12
311 - Food Manufacturing	11
446 - Health and Personal Care Stores	11

Industry	# of Cases
921 - Executive, Legislative, and Other General Government Support	11

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United States Court of Appeals
For the Eighth Circuit

No. 20-3211

Oral Surgeons, P.C.

Plaintiff - Appellant

v.

The Cincinnati Insurance Company

Defendant - Appellee

The Restaurant Law Center

Amicus on Behalf of Appellant(s)

American Property Casualty Insurance Association; National Association of Mutual Insurance Companies

Amici on Behalf of Appellee(s)

Appeal from United States District Court
for the Southern District of Iowa - Central

Submitted: April 14, 2021
Filed: July 2, 2021

Before LOKEN, WOLLMAN, and STRAS, Circuit Judges.

WOLLMAN, Circuit Judge.

Oral Surgeons, P.C., offers oral and maxillofacial surgery services at its four offices in the Des Moines, Iowa, area. Oral Surgeons stopped performing non-emergency procedures in late March 2020, after the governor of Iowa declared a state of emergency and imposed restrictions on dental practices because of the COVID-19 pandemic. Oral Surgeons resumed procedures in May 2020 as the restrictions were lifted, adhering to guidance from the Iowa Dental Board.

Oral Surgeons submitted a claim to The Cincinnati Insurance Company (Cincinnati) for losses it suffered as a result of the suspension of non-emergency procedures. The policy insured Oral Surgeons against lost business income and certain extra expense sustained due to the suspension of operations "caused by direct 'loss' to property." The policy defines "loss" as "accidental physical loss or accidental physical damage." Cincinnati responded that the policy did not afford coverage because there was no direct physical loss or physical damage to Oral Surgeons's property. This lawsuit followed. The district court[1] granted Cincinnati's motion to dismiss, concluding that Oral Surgeons was not entitled to declaratory judgment and that it had failed to state claims for breach of contract and bad faith. Reviewing *de novo* and applying Iowa law in this diversity action, we affirm. See Sletten & Brettin Orthodontics, LLC v. Cont'l Cas. Co., 782 F.3d 931, 934 (8th Cir. 2015) (standard of review).

Oral Surgeons maintains that the COVID-19 pandemic and the related government-imposed restrictions on performing non-emergency dental procedures

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[1]The Honorable Charles H. Wolle, United States District Judge for the Southern District of Iowa.

constituted a "direct 'loss' to property" because Oral Surgeons was unable to fully use its offices. Oral Surgeons argues that the policy's disjunctive definition of "loss" as "physical loss" or "physical damage" creates an ambiguity that must be construed against Cincinnati. To give the terms separate meanings, Oral Surgeons suggests defining physical loss to include "lost operations or inability to use the business" and defining physical damage as a physical alteration to property. Appellant's Br. 41. Amicus Restaurant Law Center contends that "physical loss" occurs whenever the insured is physically deprived of the insured property.

We must construe the policy to give effect to the intent of the parties. Boelman v. Grinnell Mut. Reinsurance Co., 826 N.W.2d 494, 501 (Iowa 2013). Intent is determined by the language of the policy itself, unless there is ambiguity. Id. Ambiguity exists "[o]nly when policy language is subject to two reasonable interpretations." T.H.E. Ins. Co. v. Est. of Booher, 944 N.W.2d 655, 662 (Iowa 2020); see Cairns v. Grinnell Mut. Reinsurance Co., 398 N.W.2d 821, 824 (Iowa 1987) ("Ambiguity exists if, after the application of pertinent rules of interpretation to the face of the instrument, a genuine uncertainty results as to which one of two or more meanings is the proper one." (cleaned up)). "Generally speaking, the plain meaning of the insurance contract prevails." Est. of Booher, 944 N.W.2d at 662.

The policy here clearly requires direct "physical loss" or "physical damage" to trigger business interruption and extra expense coverage. Accordingly, there must be some physicality to the loss or damage of property—*e.g.*, a physical alteration, physical contamination, or physical destruction. See Milligan v. Grinnell Mut. Reinsurance Co., No. 00-1452, 2001 WL 427642, at *2 (Iowa Ct. App. Apr. 27, 2001) (concluding that "direct physical loss or damage" "unambiguously referred to injury to or destruction of" insureds' property and finding support for the conclusion "in the fact that the loss or destruction must be physical in nature"); see also The Phx. Ins. Co. v. Infogroup, Inc., 147 F. Supp. 3d 815, 823 (S.D. Iowa 2015) ("The common usage of physical in the context of a loss therefore means the loss of something

material or perceptible on some level."); 10A Steven Plitt et al., Couch on Insurance § 148:46 (3d ed. 2021) ("The requirement that the loss be 'physical' . . . is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." (footnotes omitted)). The policy cannot reasonably be interpreted to cover mere loss of use when the insured's property has suffered no physical loss or damage. See Pentair, Inc. v. Am. Guar. & Liab. Ins. Co., 400 F.3d 613, 616 (8th Cir. 2005) ("Once physical loss or damage is established, loss of use or function is certainly relevant in determining the amount of loss, particularly a business interruption loss."); Infogroup, 147 F. Supp. 3d at 825 ("While a loss of use may, in some cases, entail a physical loss, the Court does not find 'loss of use' and 'physical loss or damage' synonymous.").

The unambiguous requirement that the loss or damage be physical in nature accords with the policy's coverage of lost business income and incurred extra expense during the "period of restoration." The "period of restoration" begins at the time of "loss" and ends on the earlier of:

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

Property that has suffered physical loss or physical damage requires restoration. That the policy provides coverage until property "should be repaired, rebuilt or replaced" or until business resumes elsewhere assumes physical alteration of the property, not mere loss of use.

Our precedent interpreting "direct physical loss" under Minnesota law is instructive here. See Source Food Tech., Inc. v. U.S. Fid. & Guar. Co., 465 F.3d 834

(8th Cir. 2006); Pentair, 400 F.3d 613. The policy in Pentair covered "all risk of direct physical loss of or damage to property described herein." 400 F.3d at 614. Pentair filed an insurance claim after an earthquake caused a two-week loss of power to Taiwanese factories that supplied products to a Pentair subsidiary. Pentair shipped the delayed products via airfreight, at great expense. We upheld the district court's determination that the power outages merely shut down manufacturing operations, which did not cause direct physical loss of or damage to Pentair's supplier's property. Id. at 616. We rejected the argument that loss of use or function necessarily constitutes "direct physical loss or damage," explaining that such an interpretation would allow coverage to be "established *whenever* property cannot be used for its intended purpose." Id.

The policy in Source Food Technology similarly covered certain losses caused by "direct physical loss to Property." 465 F.3d at 835. Source Food filed an insurance claim after beef product manufactured in Canada could not be imported into the United States because of an embargo. Source Food was unable to fulfill orders, was forced to find a new supplier, and lost its best customer as a result of its inability to deliver beef product. The beef product was not "physically contaminated or damaged in any manner," however. Id. at 838. We rejected the argument that "impairment of function and value of a food product caused by government regulation is a direct physical loss to insured property," because to hold otherwise "would render the word 'physical' meaningless." Id. at 836, 838. Minnesota law is not materially distinguishable from Iowa law, and we conclude that the reasoning set forth in Pentair and Source Food Technology applies here.

Oral Surgeons did not allege any physical alteration of property. The complaint pleaded generally that Oral Surgeons suspended non-emergency procedures due to the COVID-19 pandemic and the related government-imposed restrictions. The complaint thus alleged no facts to show that it had suspended activities due to direct "accidental *physical* loss or accidental *physical* damage,"

regardless of the precise definitions of the terms "loss" or "damage." We reject Oral Surgeons's argument that the lost business income and the extra expense it sustained as a result of the suspension of non-emergency procedures were "caused by direct 'loss' to property."[2]

The policy clearly does not provide coverage for Oral Surgeons's partial loss of use of its offices, absent a showing of direct physical loss or physical damage.[3] "[W]here no ambiguity exists, we will not write a new policy to impose liability on the insurer." Nat'l Sur. Corp. v. Westlake Invs., LLC, 880 N.W.2d 724, 734 (Iowa 2016); see Boelman, 826 N.W.2d at 501 ("We will not strain the words or phrases of

[2]This appeal presents 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.

[3]Iowa state and federal courts have uniformly determined that the COVID-19 pandemic and the related government-imposed restrictions do not constitute direct physical loss. Lisette Enters., Ltd. v. Regent Ins. Co., No. 4:20-cv-00299, 2021 WL 1804618, at *1–2 (S.D. Iowa May 6, 2021) (Iowa Court of Appeals's decision in Milligan "is consistent with the principle that coverage for 'loss' or 'damage' under Iowa law at least requires the presence of a physical condition on or affecting the property located at the insured premises."), *appeal docketed*, No. 21-2238 (8th Cir. June 4, 2021); Gerleman Mgmt., Inc. v. Atl. States Ins. Co., No. 4:20-cv-183, 2020 WL 8093577, at *5 (S.D. Iowa Dec. 11, 2020) ("It is a settled matter in Iowa law that direct physical loss or damage requires tangible alteration of property and that loss of use alone is insufficient."), *appeal docketed*, No. 21-1082 (8th Cir. Jan. 12, 2021); Palmer Holdings & Invs., Inc. v. Integrity Ins. Co., 505 F. Supp. 3d 842, 856 (S.D. Iowa 2020) (same), *appeal docketed*, No. 21-1040 (8th Cir. Jan. 7, 2021); Whiskey River on Vintage, Inc. v. Ill. Cas. Co., 503 F. Supp. 3d 884, 899 (S.D. Iowa 2020) (same), *appeal docketed*, No. 20-3707 (8th Cir. Dec. 29, 2020); Wakonda Club v. Selective Ins. Co. of Am., No. LACL148208, slip op. at 6 (Iowa Dist. Ct. Polk Cnty. March 3, 2021) ("Wakonda claims no injury to or destruction to realty or other loss physical in nature and therefore [its claim is] not covered under the policy."), *appeal docketed*, No. 21-0374 (Iowa Ct. App. Mar. 16, 2021).

the policy in order to find liability that the policy did not intend and the insured did not purchase.").

The judgment is affirmed.

Case No. 20-3211

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ORAL SURGEONS, P.C.,

Plaintiff-Appellant,

v.

THE CINCINNATI INSURANCE COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Iowa, Central Division (Hon. Charles R. Wolle)
No. 4:20-cv-00222-CRW-SBJ

BRIEF OF THE RESTAURANT LAW CENTER, AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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Amicus curiae certifies that it has no outstanding shares or debt securities in the hands of the public, and it does not have a parent company. No public held company has a 10% or greater ownership interest in *amicus curiae.*

/s/ Gabriel K. Gillett
Gabriel K. Gillett

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STATEMENT REGARDING CONSENT

All parties consent to the filing of this *amicus* brief.[1]

STATEMENT OF INTEREST

The Restaurant Law Center (the "Law Center") is a public policy organization affiliated with the National Restaurant Association, the world's largest foodservice trade association. The industry is comprised of over one million restaurants and other foodservice outlets that represent a broad and diverse group of owners and operators—from large national outfits with hundreds of locations and billions in revenue, to small single-location, family-run neighborhood restaurants and bars, and everything in between. The industry employs over 15 million people, and is the nation's second-largest private-sector employer.

Through regular participation in *amicus* briefs on behalf of the industry, the Law Center provides courts with the industry's perspective on legal issues in pending cases that may have industry-wide implications.

The Law Center and its members have a significant interest in the important issues raised by this case. Many businesses in the restaurant industry have sought business interruption coverage under "all risk" commercial insurance policies for the

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

physical loss or damage they suffered as a direct result of unprecedented executive shutdown orders. Many of those restaurants have been unreasonably and categorically denied coverage on the basis that they supposedly have not incurred physical loss or damage even though their properties have been rendered non-functional, detrimentally altered, and physically impaired as a result of the orders. Therefore, although Plaintiff-Appellant Oral Surgeons P.C. ("OSPC") operates dental practices—and whether it has stated a claim for coverage depends on the specific factual allegations in its pleadings—the Law Center and its members have a strong interest in highlighting for the Court why certain issues raised in this appeal have potential importance to the restaurant industry as well.

SUMMARY OF ARGUMENT

To complement OSPC's arguments, *amicus* writes to provide this Court—which is among the first appellate courts in the country to address these issues—with additional context about this case as well as to address why reversal is appropriate.

I. The restaurant industry is a significant sector of the Iowa economy and a substantial driver of economic activity across the country. The industry creates employment and entrepreneurship opportunities—including for women, minorities, and immigrants. It supports local farmers, draws tourists, produces significant tax revenue, and is an integral part of the cultural fabric in Iowa and beyond.

For years, restaurants in Iowa and elsewhere paid substantial premiums for business interruption coverage under "all risk" commercial property insurance policies. Those policies cover any and all risks, even unforeseen and unprecedented ones, unless specifically excluded. Restaurants bought that coverage with the reasonable understanding that the policies covered income lost as a result of physical loss or damage to their property.

Yet when the Governor of Iowa and others issued executive orders that caused such loss or damage—by detrimentally altering and materially impairing restaurants' physical spaces, rendering them nonfunctional for their intended purposes—insurers uniformly denied coverage without legitimate justification. Those improper denials come at a particularly challenging time for the industry, as it faces catastrophic financial losses. Hundreds of Iowa restaurants have already closed, and countless more will be forced to close—*permanently*. So restaurants have turned to the courts to obtain the coverage they are entitled to receive.

II. This is an issue of first impression arising in an unprecedented context. This Court applies *de novo* review, considering the issues independently and without according the decision below any deference. That is especially appropriate here. Unlike the court below, many trial courts—including courts in this Circuit and elsewhere interpreting the same Cincinnati policy at issue here—have found a plaintiff stated a claim for business interruption coverage and sufficiently alleged

that they suffered physical loss or damage as a result of executive shutdown orders. As courts have done in other hotly contested insurance coverage cases, this Court should thus review the allegations of the complaint as well as the policy language, apply longstanding principles of policy interpretation, and resolve this case based on the unprecedented factual circumstances under which it arises.

III. On the merits, this Court should reverse the district court's decision. Bedrock insurance policy interpretation principles hold that undefined terms should be given their plain and ordinary meaning and that a court should not inject additional terms or conditions into the policy. Moreover, if a provision is susceptible to more than one reasonable interpretation, it should be construed in accordance with a policyholder's reasonable expectations of coverage.

Applying these principles here, and taking OSPC's allegations as true, the district court erred in finding OSPC had not sufficiently alleged that it suffered "physical loss" or "physical damage" to its property as a result of the executive shutdown orders. (Dkt. 23 at 2.)[2] OSPC alleged that the orders "caus[ed] physical damage" to OSPC's insured property and that OSPC "suffered a physical loss of the covered property" because it "was forced to cease all 'non-emergency' patient services" and was "unable to operate and use its facilities" as intended. (Dkt. 1-1 ¶¶ 7, 21-22.) OSPC's pleading is thus sufficient to state a claim. Indeed, other courts in

[2] Citations to "Dkt." refer to the district court record.

the Eighth Circuit have found similar pleadings sufficient to state a claim in cases involving the same or similar policies. And courts across the country have long held that physical loss or damage may exist when property is rendered nonfunctional for its intended purpose, even without structural damage to property. This Court should reach the same conclusion here and reverse the decision below.

ARGUMENT

I. Restaurants Are Critical To Iowa's Economy And Culture, And Sought Insurance Coverage To Help Survive Unprecedented Hardship.

A. The Restaurant Industry, Which Drives Billions Of Dollars In Revenue And Employs Millions Of Workers, Is In Crisis.

The restaurant and foodservice industry plays a major role in Iowa's economy. In 2019, the industry accounted for an estimated $4.9 billion dollars of sales across nearly 6,400 locations in Iowa.[3] The restaurant industry is also a considerable source of employment in the state, providing jobs to more than 150,000 people,[4] which amounted to 6.6 percent of Iowa's total employment in 2019.[5] Over the next decade, that number is expected to grow by more than ten percent.[6]

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[3] Nat'l Restaurant Ass'n, *Factbook*: *2020 State of the Restaurant Industry* 7 (Feb. 2020), https://www.restaurant.org/downloads/pdfs/research/soi/2020-state-of-the-industry-factbook.pdf ("*Factbook*").
[4] *Id.* at 77.
[5] U.S. Bureau of Labor Statistics Quarterly Census of Employment and Wages, 2019-Q3.
[6] *Factbook* at 77.

Consumer spending at restaurants has a multiplier effect too. Every dollar spent at table-service restaurants—the businesses most threatened by the state's shutdown orders—returns $1.71 to the state's economy, not to mention the positive impact on the state's tax revenue.[7]

A single restaurant contributes to the livelihood of dozens of employees, suppliers, purveyors, and related businesses like hotels.[8] That is particularly true in Iowa, where the success of independent farmers and ranchers is tied to the continued vitality of the restaurant industry. As one Iowa farmer recently put it: "the demand for our meat from restaurants across the country allows Niman Ranch farmers to make a living and, in turn, keeps rural farming communities alive."[9]

Restaurants are also cultural centers, creating unique neighborhood identities and driving commercial revitalization.[10] That is particularly true of the many small restaurants—often family-owned—that make up the vast majority of the industry. Indeed, the restaurant industry remains a shining example of upward mobility. Eight

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[7] Nat'l Restaurant Ass'n, Iowa Restaurant Industry at a Glance (2019), https://www.restaurant.org/downloads/pdfs/state-statistics/iowa.pdf.
[8] Eric Amel, et al., *Independent Restaurants Are a Nexus of Small Businesses in the United States and Drive Billions of Dollars of Economic Activity That Is at Risk of Being Lost Due to the COVID-19 Pandemic* (June 10, 2020).
[9] Paul Willis, *Farmers have support from Congress, and independent restaurants need help now*, Des Moines Register (Nov. 15, 2020).
[10] Amel, et al., *supra* note 8 at 13.

in ten restaurant owners say their first job in the industry was an entry-level position. Even more restaurant managers say the same.[11]

Restaurants also provide opportunities for historically disadvantaged communities. There are more women and minority managers in the restaurant industry than in any other industry,[12] and restaurants provide opportunity for immigrants to the United States—not only for employment, but also business ownership.[13]

The successes of the restaurant industry are neither self-sustaining nor guaranteed. Today, the industry is more at risk than ever before as restaurants have suffered catastrophic financial losses and continue to face unprecedented challenges.[14] As of April, over eight million restaurant employees nationally—nearly two-thirds of the restaurant workforce—had been laid off or furloughed. By May, almost 40 percent of all restaurants across the country were shuttered, and the industry lost over $80 billion in sales. Economists predict those numbers will only

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[11] *Factbook*, *supra* note 2.
[12] *Id.*
[13] Americas Soc'y et al., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015).
[14] Nat'l Restaurant Ass'n, *COVID-19 Update: The Restaurant Industry Impact Survey* (Apr. 20, 2020), https://www.restaurant.org/downloads/pdfs/business/covid19-infographic-impact-survey.pdf.

continue to rise, and the industry will have sustained almost $250 billion in lost revenues by year-end.[15]

Iowa restaurants are in a moment of crisis. Conservatively, researchers estimate 15 to 20 percent of restaurants will permanently close nationwide.[16] According to the Iowa Restaurant Association, the industry is on track to lose roughly a billion dollars.[17] The state is expected to lose more than 1,000 restaurants by March of next year, along with thousands and thousands of local jobs.[18] The numbers for independent restaurants are even more dire, with up to 85 percent at risk for closure.[19] As the National Restaurant Association put it, "[v]irtually every kind of restaurant is suffering: the corner diner, the independents, the individual owners of full-service restaurant chains."[20]

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[15] *Id.*
[16] Danny Klein, *It Will Take Years for the Restaurant Industry to Recover*, FSR Magazine (June 2020).
[17] The Gazette, *Iowa regulators step up enforcement of COVID-19 rules at bars and restaurants* (Nov. 29, 2020).
[18] *Id.*
[19] Heather Lalley, *Report: Up To 85% of Independent Restaurants Could Close Due To Pandemic*, Rest. Bus. (June 11, 2020).
[20] Nat'l Restaurant Ass'n, *National Restaurant Association Statement on Congressional Recess Without Recovery Deal* (Oct. 27, 2020), https://restaurant.org/news/pressroom/press-releases/association-statement-on-congressional-recess-with.

B. Insurers Have Wrongfully Denied Restaurants Business Interruption Coverage Under "All Risk" Insurance Policies.

Faced with unprecedented losses as a result of executive orders forcing restaurants to severely alter and restrict their physical premises, restaurants throughout Iowa and across the country turned to their insurers for coverage under "all risk" commercial property insurance policies that included protection for business interruption.

"All risk" property policies insure against losses from unexpected and unprecedented circumstances, and provide coverage for "all risks" of any kind or description, unless specifically excluded. "Business interruption" insurance provides coverage—often up to a year or more—to replace business income lost as a result of a covered cause of loss. Under industry-standard "all risk" policies procured by many in the restaurant industry, business interruption coverage is triggered when a restaurant suffers direct "physical loss of or damage to" its premises. These policies therefore provide consumers with comfort knowing they have coverage for even unforeseeable or unlikely risks that may physically impair their businesses.

Due to the breadth of coverage, restaurants paid substantial premiums for "all risk" property insurance policies that included business interruption coverage. In doing so, restaurants reasonably understood, expected, and believed that their policies would cover business income losses from any and all non-excluded risks,

including executive shutdown orders, causing direct physical loss or damage to their restaurants.

The physical design of a restaurant is an essential element of its success. In a business known for tight margins, restaurant owners and operators thoughtfully utilize their physical space to maintain the level of revenue necessary to support their staff and other operational costs. Table service restaurants, for example, were not designed to operate as a hub for take-out or delivery. They have far larger dining areas than a take-out only operation, and most have proportionally smaller kitchens than a restaurant designed only to produce food. Those dining areas are built out, often at significant expense, to create the kind of warm, inviting ambience that draws guests in. Restaurant dining is an experience, not just a financial transaction. The physical space and layout plays a crucial role in that experience.

Insurers know this. They price and charge premiums based on the policyholder's properties operating in a fully functional manner—whether as restaurants, bars, venues, or another type of food service business—and based on the available square footage at the outset of the policy period. Insurers also account for the prospect of having to pay claims for lost business at levels commensurate with the policyholder being a fully operational business. Business interruption coverage thus insures against the risk that a business-owner's property will not be able to function as intended.

That kind of interruption is precisely what happened when executive orders required restaurants to make physical, detrimental alterations that materially impaired the functionality of their premises. In barring on-premises dining, the executive orders caused millions of square feet of vibrant physical space that used to serve guests to be lost. The orders caused both property loss and property damage by dispossessing restaurants of their tangible spaces and forcing very real, material detrimental physical changes and alterations to their premises. Dining rooms closed or limited. Areas blocked off. Barriers erected. Physical layout altered. Fixtures and furniture removed. Self-service stations eliminated. Spaces shuttered. Floors marked. Plexiglass mounted. These are but a few of the physical manifestations of the direct physical loss and damage that restaurants have suffered.

Yet insurance carriers have refused coverage and issued blanket denials without just cause. Those denials are frequently rapid, featuring boilerplate language asserting that coverage is excluded because the restaurant supposedly has not satisfied the industry-standard "physical loss of or damage" requirement. Those denials follow the telegraphed statements by insurance industry executives and trade groups.[21] Those denials are also frequently issued without meaningful (if any) investigation, regardless of the information provided by the policyholder.

[21] For example, Rick Parks, CEO of Society Insurance, Inc., prospectively concluded in an ostensibly private memo to "agency partners" on March 16, 2020—before most businesses had even submitted claims but after many states had "taken steps to limit

Many restaurants in Iowa, and thousands of restaurants across the country, have challenged these wrongful denials and sought relief in the courts. Without such relief, the restaurant industry is in serious danger. Many restaurants will be out of business entirely, many restaurant-industry employees will be out of work, and many residents will be robbed of the neighborhood places and spaces they treasure.

II. This Is An Important Case Of First Impression Where The Court Applies *De Novo* Review.

This Court should closely scrutinize the policy language, apply longstanding principles of policy interpretation, and resolve this case of first impression based on the unprecedented circumstances under which it arises. That is particularly so here, for three reasons.

First, this Court reviews "a district court's interpretation of the contractual provisions of an insurance policy de novo as a question of law." *Edgley v. Lappe*, 342 F.3d 884, 888 (8th Cir. 2003). That means this Court "look[s] anew at the record which was before the district court when it made its decision," as if the issue had not

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operations of certain businesses"—that Society's policies would likely not cover losses caused by a "widespread governmental imposed shutdown." Compl. at Ex. A, *Big Onion Tavern Grp., LLC v. Society Ins., Inc.*, No. 20-cv-02005 (N.D. Ill. Mar. 27, 2020), ECF No. 1-1 https:// propertycasualtyfocus.com/wp-content/uploads/ 2020/04/Big-Onion-v-Society-Insurance.pdf. In early April, the American Property Casualty Insurance Association similarly opined, without reference to any policy language, that "[p]andemic outbreaks are uninsured because they are uninsurable." Press Release, Am. Prop. Cas. Ins. Ass'n, *APCIA Releases New Business Interruption Analysis* (Apr. 6, 2020), https://www.apci.org/media/news-releases/ release/60052/.

been previously decided. *Colvin v. Taylor*, 324 F.3d 583, 586 (8th Cir. 2003). "When de novo review is compelled, no form of appellate deference is acceptable." *Feibelman v. Worthen Nat'l Bank, N.A.*, 20 F.3d 835, 836 (8th Cir. 1994). However, in reviewing "the district court's grant of motions to dismiss de novo," this Court "tak[es] all allegations in the complaint as true and draw[s] all reasonable inferences in favor of the non moving party"—here, OSPC. *Palmer v. Ill. Farmers Ins. Co.*, 666 F.3d 1081, 1083 (8th Cir. 2012).

Second, this Court is set to be among the first appellate courts to address the important issues presented by this case. This Court's review comes at a time when shutdown-related business interruption insurance litigation is in its early stages. More than 1,400 separate business interruption lawsuits have been filed against insurance companies, but less than one-half of one-percent have been decided so far.[22]

Among the trial-level decisions to date, a substantial number have found a plaintiff stated a claim for business interruption coverage and sufficiently pleaded physical loss or damage from executive shutdown orders.[23] Indeed, courts in the

[22] *See* Penn Law, *Covid Coverage Litigation Tracker*, https://cclt.law.upenn.edu/cclt-case-list/.

[23] *See, e.g.*, Order, *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, 2020 WL 5939172, at *4 (M.D. Fla. Sept. 24, 2020); Order, *Optical Servs. USA JC1 v. Franklin Mut. Ins. Co.*, 2020 WL 5806576 (N.J. Super. Ct. L. Aug. 13, 2020); Order, *Ridley Park Fitness, LLC v. Philadelphia Indem. Ins. Co.*, No. 01093 (Pa. D. Aug.

Eighth Circuit have reached that conclusion, including in cases involving the same Cincinnati policy at issue here.[24] And while other decisions have favored insurers, often they are not well reasoned, overlook important differences in factual allegations, or are effectively the result of a self-fulfilling feedback loop. As one example, a case decided just months ago in the Central District of California has already been cited by ten other courts—even though the unreported decision does not delve deeply into these weighty issues, dismissed without prejudice, and has not yet been subject to appellate review. *See 10E, LLC v. Travelers Indem. Co.*, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020), *appeal pending* No. 20-56206 (9th Cir.).

31, 2020); *Francois Inc. v. The Cincinnati Ins. Co.*, No. 20CV201416 (Ohio C.P. Sept. 29, 2020); Minute order, *Best Rest Motel, Inc. v. Sequoia Ins. Co.*, No. 37-2020-00015679 (Cal. Super. Ct. Sept. 30, 2020); Order denying mot. to dismiss, *Lombardi's, Inc. v. Indem. Ins. Co. of N. Am.*, No. DC-20-05751-A (Tex. Dist. Ct. Oct. 15, 2020); Order, *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, No. 00375 (Pa. Dist. Ct. Oct. 26, 2020); Order granting mot. partial summ. j., *Perry St. Brewing Co. LLC v. Mut. of Enumclaw Ins.*, No. 2020221232 (Wash., Spokane Cnty. Nov. 23, 2020); Order, *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, No. A-20-816628-B (Nev., Clark Cnty. Dec 1, 2020); Journal entry, *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, No. CV-20-932117 (Ohio C.P. Nov. 17, 2020); Order denying mot. to dismiss, *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*, No. 20-2-07925-1 (Wash., King Cnty. Nov. 13, 2020); Order, *Chapparells Inc. v. Cincinnati Ins. Co.*, No. CV-2020-06-1704 (Ohio C.P. Oct. 21, 2020); *Johnston Jewelers, Inc. v. Jewelers Mut. Ins. Co., S.I.*, No. 20-002221-CI (Fla., Pinellas Cnty. Sept. 22, 2020); *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, No. 2020-02558 (La. Civ. Dist. Ct. Nov. 4, 2020).

[24] *Studio 417, Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385, at *4 (W.D. Mo. Aug. 12, 2020); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 2020 WL 5637963, at *4 (W.D. Mo. Sept. 21, 2020); *K.C. Hopps, Ltd. v. Cincinnati Ins. Co.*, 2020 WL 6483108, at *1 (W.D. Mo. Aug. 12, 2020).

The decision below offers a good example. It is less than two full pages in total, more than half of which is dedicated to the case's caption and procedural posture. (Dkt. 23.) The district court failed to meaningfully evaluate the policy interpretation issues this case presents or grapple with the substantive coverage issues implicated by OSPC's claim. The decision contains no reasoning. It merely offers two conclusory sentences that obliquely refer to cases cited by both sides, without identifying those cases much less applying them to the allegations in OSPC's complaint or distinguishing this case from the others where the plaintiff stated a claim for coverage. It is therefore all the more important for this Court to carefully and seriously consider the issues here, take Plaintiff's allegations as true, and apply core principles of policy interpretation in evaluating whether OSPC has sufficiently stated a claim.

Third, history shows that early decisions on issues of first impression are often viewed differently after appellate courts have the opportunity to weigh in. That has been true in insurance coverage cases involving the interpretation of industry-standard policy language. For example, "the meaning of the standard pollution exclusion clause's exception for discharges that are 'sudden and accidental' …. precipitated 'a legal war ... in state and federal courts from Maine to California.'" *N. Ins. Co. of N.Y. v. Aardvark Assocs., Inc.*, 942 F.2d 189, 191 (3d Cir. 1991). Eventually, courts viewed the split in authority as "at least suggesting that the term

'sudden' is susceptible of more than one reasonable definition." *New Castle Cnty. v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1196 (3d Cir. 1991). And many courts eventually coalesced around a meaning that permitted policyholders to recover in many situations. *See* 9 Couch on Ins. § 127:11 (2020).

This Court faces a similar task in interpreting the meaning of the industry-standard "physical loss of or damage" requirement. To date, some courts have concluded that the impact of executive shutdown orders satisfied that requirement, while others have disagreed. This disagreement merely reinforces that this Court is on solid ground in concluding that the plain meaning of the undefined, disjunctive term covers the executive shutdown orders which have detrimentally altered, physically impaired, rendered nonfunctional OSPC's property.

III. Policy Language, Interpretation Principles, And Precedent Support Reversal.

On March 17, 2020, Governor Kim Reynolds issued an emergency order forcing restaurants to close for on-premises dining. On March 26, Governor Reynolds extended the closure of on-premises dining and, at the same time, prohibited dentists from performing any non-emergency procedures. OSPC alleged in its complaint that the executive orders "caus[ed] physical damage or loss of property to OSPC" because it was "unable to operate and use its facilities for patient services." (Dkt. 1-1 ¶¶ 7, 22.) OSPC further alleged that it had "suffered a physical loss of the covered property" and that "[d]irect physical loss may exist without actual

structural damage to property." (*Id.* ¶ 21.) Cincinnati, like other insurers, has insisted that the shutdown orders that impaired policyholders' property have not caused "direct physical loss of or damage to property." Cincinnati, like other insurers, further contends that alleging physical loss or damage is insufficient to state a claim for coverage under the policy because only events like hurricanes and fires can cause the type of loss required to trigger business interruption coverage.

Cincinnati, like other insurers, is wrong. Cincinnati's position is inconsistent with the policy's language and foundational principles for interpreting it. Cincinnati's position is also contrary to both historical and recent precedent—including in the insurance coverage context. The district court was therefore wrong to agree with Cincinnati and to dismiss the complaint. The decision below should be reversed.

A. The Policy Language And Policy-Interpretation Principles Support Finding The Orders Caused Physical Loss Or Damage.

The words of an insurance policy are to be given their plain and ordinary meaning as understood by the reasonable policyholder. *See Bituminous Cas. Corp. v. Sand Livestock Sys., Inc.*, 728 N.W.2d 216, 220-21 (Iowa 2007) (holding that undefined terms must be given "their ordinary meaning, one that a reasonable person would understand them to mean"). Courts must "strive to give effect to all the language of a contract" and in doing so, avoid an interpretation that renders part of an agreement "superfluous." *Fashion Fabrics of Iowa, Inc. v. Retail Invs. Corp.*, 266

N.W.2d 22, 26, 29 (Iowa 1978) (reversing decision finding contractual language was "surplusage at best").

An insurance policy's terms are "ambiguous" if they are "susceptible to more than one reasonable interpretation." *A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 619 (Iowa 1991). According to first principles of insurance policy interpretation, "[i]f an insurance policy provision is ambiguous" this court must "construe it in the light most favorable to the insured." *Kalell v. Mut. Fire & Auto. Ins. Co.*, 471 N.W.2d 865, 866 (Iowa 1991). This construction is intended to "honor[]" the "reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts." *Grinnell Mut. Reins. Co. v. Voeltz*, 431 N.W.2d 783, 786 (Iowa 1988). In addition, courts "construe ambiguous insurance policy provisions in a light favorable to the insured because insurance policies constitute adhesion contracts." *Cairns v. Grinnell Mut. Reins. Co.*, 398 N.W.2d 821, 824 (Iowa 1987).

Here, the plain language of the policy supports finding coverage for physical loss or damage caused by the executive orders. Cincinnati agreed to pay for "direct 'loss' to property at a 'premises' caused by or resulting from any Covered Cause of Loss." Although Cincinnati circularly defined "[l]oss" to mean "accidental physical loss or accidental physical damage," it did not in turn define those terms nor specify what constitutes "physical loss" or "physical damage." (Dkt. 3-2 at 18, 38.) In other

words, the policy provides coverage if the policyholder shows physical loss **or** physical damage to property. Black letter contract interpretation requires that the terms—separated by the disjunctive "or"—be given distinct meanings. *See Fashion Fabrics of Iowa*, 266 N.W.2d at 26. As many courts have held, to read the policy otherwise would improperly collapse the meaning of "loss" with the meaning of "damage."[25]

Had Cincinnati wished for "loss" and "damage" to mean the same thing, or to narrow the meaning of "physical loss" or "physical damage," it was obligated to do so by defining or limiting those terms. *See Cairns*, 398 N.W.2d at 824 ("It is therefore incumbent upon an insurer to define clearly and explicitly any limitations or exclusions to coverage expressed by broad promises."). But Cincinnati chose not to define those terms, even as it defined "loss" (albeit in a circular fashion). Cincinnati instead intentionally left each of these terms undefined, even though it knew, or should have known, that these terms can reasonably be construed, and indeed have been construed by courts, more broadly than the narrow self-serving definition that Cincinnati contends should provide the terms' only meaning. As a

[25] *See, e.g.*, Slip op. at 5-6, *North State Deli, LLC v. The Cincinnati Ins. Co.*, No. 20-CVS-02569 (N.C. Sup. Ct. Oct. 9, 2020); *Studio 417, Inc.*, 2020 WL 4692385, at *4; *Blue Springs Dental Care*, 2020 WL 5637963, at *4; *Urogynecology Specialist of Fla.*, 2020 WL 5939172, at *4; *K.C. Hopps, Ltd.*, 2020 WL 6483108, at *1; *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767, at *3 (C.D. Cal. July 11, 2018).

result, each of those terms must be given its plain and ordinary meaning consistent with the knowledge and expectations of an ordinary, reasonable consumer. *Bituminous Cas. Corp.*, 728 N.W.2d at 220-21; *accord Prudential Ins. Co. of Am. v. Martinson*, 589 N.W.2d 64, 65 (Iowa 1999) ("When coverage is granted in broad terms, an insurer must define exclusions in clear and explicit terms and also bear the burden of proving the applicability of an exclusion.").

Here, construing its allegations in the most favorable light, OSPC has met its burden to plead that it has suffered physical loss or physical damage consistent with the plain and ordinary meaning of those terms. *See Palmer*, 666 F.3d at 1083. In "searching for the ordinary meaning of undefined terms in a policy," like "loss" and "damage" here, Iowa courts "commonly refer to dictionaries." *A.Y. McDonald*, 475 N.W.2d at 619. Merriam-Webster defines physical as "of or relating to material things" that are "perceptible especially through the senses."[26] Loss is defined as "the act of losing possession," "deprivation," and the "failure to gain, win, obtain, or utilize."[27] Put together, the ordinary meaning of "physical loss" includes when a property can no longer function as intended in the real, material world. Indeed, OSPC has been "deprived" of its property in a way that is perceptible through the

[26] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical.

[27] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/loss.

senses because, during the effective period of the executive orders, OSPC no longer possessed the same rights to its property as it did before.[28]

Accordingly, the plain language of the policy—in conjunction with the settled rules that undefined terms are given their ordinary meaning and ambiguities are construed in favor of a reasonable policyholder's expectations—dictates that OSPC sufficiently alleged that the executive orders both dispossessed it of its property and rendered that property nonfunctional.

B. Precedent Supports Finding OSPC Sufficiently Alleged The Orders Caused Physical Loss Or Damage.

In finding OSPC sufficiently stated a claim—and reversing the district court's decision otherwise based on an erroneous construction of the policy—this Court will be well within the mainstream of coverage decisions, including well-reasoned case law on this very question.

For example, a district court in this circuit recently found that four dental practices—which for all intents and purposes appear to be materially identical to

[28] Had Cincinnati wished to narrow the meaning of "physical loss or physical damage," it could have done so by defining those terms. Cincinnati chose not to, intentionally leaving each of these terms undefined—even though it knew, or should have known, that these terms can reasonably be construed, and indeed have been construed by courts, more broadly than the narrow self-serving definition that Cincinnati contends should provide the terms' only meaning. As a result, each of those terms must be given its plain and ordinary meaning consistent with the knowledge and expectations of an ordinary, reasonable consumer. *Bituminous Cas. Corp.*, 728 N.W.2d at 220-21.

OSPC—stated a claim for business interruption coverage by pleading that the emergency executive orders in Missouri "forced them to suspend most of their business operations and deprived them of the use of their dental clinics, thus causing them to suffer a 'direct physical loss'" under their policies. *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 2020 WL 5637963, at *2 (W.D. Mo. Sep. 21, 2020). The Court first found the meaning of "physical loss" ambiguous and turned to dictionary definitions similar to those discussed above. *Id.* at *4. The Court then held that because plaintiffs alleged they had been "depriv[ed] … of the possession and use of those insured properties," they "adequately alleged a claim for a direct physical loss," which "may occur when the property is uninhabitable or unusable for its intended purposes." *Id.* at *4.

In another case in this circuit—involving a claim against Cincinnati and a policy with language that is identical to the language in OSPC's policy—the district court found that plaintiffs had stated a claim for business interruption coverage. In *Studio 417, Inc. v. Cincinnati Ins. Co.*, the Court focused on the disjunctive "or" in "accidental physical loss ***or*** accidental physical damage." 2020 WL 4692385, at *1, *5 (W.D. Mo. Aug. 12, 2020). Though Cincinnati "conflate[d] 'loss' and 'damage' in support of its argument that the Policies require a tangible, physical alteration," the Court found that it "must give meaning to both terms," with the effect that, "even absent a physical alteration, a physical loss may occur when the property is

uninhabitable or unusable for its intended purpose." *Id.* The Court accordingly found that the plaintiffs adequately alleged a direct physical loss under their policies by alleging that the pandemic and executive orders related thereto required plaintiffs to '"cease and/or significantly reduce operations at, and … have prohibited and continue to prohibit access to, the premises."' *Id*. at 6.

Also in a case against Cincinnati involving policy language that is identical to the language in OSPC's policy, a court in North Carolina granted summary judgment for plaintiffs. In *North State Deli, LLC v. The Cincinnati Insurance Co.*, the court, applying policy interpretation principles like Iowa's and turning to dictionary definitions, reasoned 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." No. 20-CVS-02569, Slip op. at 5-6 (N.C. Sup. Ct. Oct. 9, 2020). The Court concluded that "'direct physical loss' describes the scenario" where policyholders "lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government Orders. Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured." *Id.* at 6. In other words, Plaintiffs "unambiguously" suffered a "direct physical loss" as a result of the executive orders. *Id.*

The Court held that, even if it were reasonable for Cincinnati to argue that the policy required "some form of physical alteration to property," the Court's reading was equally reasonable, rendering the policy ambiguous. *Id.* Construing that ambiguity against the insurer, the Court found that "direct physical loss" includes "the loss of use or access to covered property even where that property has not been structurally altered." *Id*. The Court therefore granted summary judgment.

These cases, and the many other cases like them, are consistent with long-standing precedent in this circuit and elsewhere. For example, more than three decades ago, this Court held that a policyholder demonstrated a "direct physical loss" sufficient for business interruption coverage when the building in which the policyholder did business was at risk of collapse. *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 351 (8th Cir. 1986). The district court determined that the policy's language encompassed the "danger" of the ceiling collapsing, and this Court affirmed, reasoning that, because the language was ambiguous, it should be construed against the insurer. *Id.* at 351-52, 354.

Hampton Foods accords with precedent across the country. For example, more than 50 years ago, a California court considered the case of a couple whose home was left "standing on the edge of and partially overhanging a newly formed 30-foot cliff," the result of a landslide. *Hughes v. Potomac Ins. Co. of District of Columbia*, 199 Cal. App. 2d 239, 243 (1962). The insurer argued the policy only

insured the house itself—the "dwelling" or "dwelling building"—not the soil or land underneath it. *Id.* at 245-46. The court rejected that argument, reasoning that "to interpret the word 'dwelling' in such a manner as to exclude the underlying land would be to render the policy illusory." *Id.* at 248. To accept the insurer's argument, the court held, "would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been 'damaged' so long as its paint remains intact and its walls still adhere to one another. Despite the fact that a 'dwelling building' might be rendered completely useless to its owners, [the insurer] would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner." *Id.* at 248-49.

Similarly, the Supreme Court of West Virginia considered a case where large boulders had fallen from a man-made highwall onto two homes, though not the home of two of the other plaintiffs, whose homes were merely at risk of further rockfalls. *See Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 480-81 (1998). The insurer argued that, while the policies might cover the damage to those homes actually hit by rocks, they "do not cover any losses occasioned by the potential damage that could be caused by future rockfalls." *Id.* at 492. The Court reasoned that "'[d]irect physical loss' provisions require only that a covered properly be injured,

not destroyed." *Id.* at 493 (quoting *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997)).

The court continued: "[t]he properties insured by Allstate and State Farm in this case were homes, buildings normally thought of as a safe place in which to dwell or live …. The record suggests that until the highwall on defendant Harris' property is stabilized, the plaintiffs' houses could scarcely be considered 'homes' in the sense that rational persons would be content to reside there." *Id.* It therefore held that the "direct physical loss[es]" covered by the policy in question, "including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property." *Id.*[29]

OSPC has alleged that its insured property has been rendered materially non-functional. Focusing exclusively on structural damage ignores the well-reasoned analysis which suggests that even if a dental practice remains standing, it suffers

[29] *See also, e.g.*, *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014) ("property can sustain physical loss or damage without experiencing structural alteration"); *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) (holding coverage applied because the covered properties "no longer performed the function for which they were designed."); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *9 (D. Ore. June 7, 2016) (finding "direct property loss or damage" when property became "uninhabitable and unusable for its intended purpose."); *Sentinel Mgt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding "direct, physical loss to property under an all-risk insurance policy" when "a building's function may be seriously impaired or destroyed").

physical loss if it can no longer function as intended. Just like a home suffers physical loss when it is uninhabitable, a medical office suffers physical loss when it is rendered non-functional and can no longer treat patients as intended.

This Court should therefore conclude that OSPC has sufficiently stated a claim by alleging the executive orders caused physical loss or damage by dispossessing OSPC of its property and rendering the property non-functional for its intended purpose.

CONCLUSION

The district court's decision should be reversed.

December 7, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation because this brief contains 6,427 words.

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I hereby certify that on December 7, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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