

**THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION - CIVIL**

LEHIGH VALLEY BASEBALL, LP, et al.	:	DECEMBER TERM, 2020
	:	
Plaintiffs,	:	NO. 00958
	:	
v.	:	COMMERCE PROGRAM
	:	
PHILADELPHIA INDEMNITY	:	1413 EDA 2021
INSURANCE CO.,	:	
	:	
Defendant.	:	

2021 JUL 23 PM 3:22

**APPEAL OPINION**

Plaintiffs, Lehigh Valley Baseball, LP, J&E Concessions LLC, Garden State Baseball, LP, and At Bat Group, LLC (collectively, the “MiLB Insureds”), appeal from this court’s Order entered on June 17, 2021, in which the court sustained defendant Philadelphia Indemnity Insurance Co.’s (“PIIC”) Preliminary Objections and dismissed the MiLB Insureds’ claims against PIIC for coverage for business income lost during the COVID-19 pandemic. For the reasons contained in the attached Opinion, as well as for the following reasons, the court respectfully requests that its decision be affirmed on appeal.

In their Motion for Reconsideration, the MiLB Insureds highlighted several legal doctrines that they believe support their claims. However, this court does not agree that any of them change the outcome of the court’s decision. First, they argue that “[u]nder the efficient proximate cause doctrine, when covered and uncovered risks together cause a loss, the loss is covered if, at minimum, the covered risk was the efficient or predominant cause of loss, even if



there is an excluded cause of the loss in the causal chain.”<sup>1</sup> In this case, the efficient or predominant cause of loss was the COVID-19 virus, coverage for which is clearly excluded under the express terms of the Virus Exclusion in the Policy.

Second, the MiLB Insureds claim that “the Court overlooked Pennsylvania’s robust reasonable expectations doctrine . . . under which enforcement of the [Virus] Exclusion here would defeat a reasonable person’s expectation of coverage [because n]o one would expect a Virus Exclusion to apply to a global, once-in-a-lifetime pandemic, especially given the availability of various Pandemic Exclusions.” The “expectations” of a commercial insured cannot directly contradict and invalidate the clear, express, language of the Policy, including the Virus Exclusion.<sup>2</sup>

Third, the MiLB Insureds argue that “regulatory estoppel barred PIIC’s reliance on the [Virus] Exclusion” because “by 2006 [when the insurance industry sought approval for the Virus Exclusion from state regulators], insurers were well aware their property insurance policies had been found to cover a variety of claims involving disease-causing agents. The cases putting the industry ‘on notice’ are legion, span decades, and involve E. coli bacteria; radioactive dust; noxious air particles; asbestos; mold; mildew; ‘health-threatening organisms’; vaporized agricultural chemicals; pesticides; and other harmful conditions that impact property or make it

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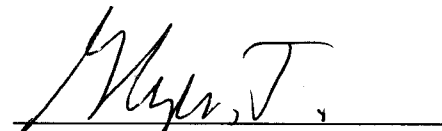
<sup>1</sup> *Citing Raybestos-Manhattan, Inc. v. Industrial Risk Insurers*, 433 A.2d 906, 908-09 (Pa. Super. 1981). In that case, a covered cause of loss was the first and primary link in the causal chain, which the court found was not eclipsed by a secondary, uncovered, cause of loss. Here the primary cause of loss is the existence of the COVID-19 virus near, and possibly in, the business premises owned by plaintiffs, which virus led to the governmental action and inaction, the MLB’s refusal to supply players, and all the other alleged causes of plaintiffs’ loss.

<sup>2</sup> *See Guttman Oil Co. v. Pennsylvania Ins. Guar. Ass’n*, 429 Pa. Super. 523, 528, 632 A.2d 1345, 1347-48 (1993) (“while reasonable expectations of the insured are the focal points in interpreting the contract language of insurance policies, an insured may not complain that his or her reasonable expectations were frustrated by policy limitations which are clear and unambiguous.”)

unfit for use.”<sup>3</sup> In support of this mixed statement of law and fact, the MiLB Insureds did not offer any pre-2006 controlling cases in which a court found coverage for losses caused by a virus such as COVID-19.<sup>4</sup> Without relevant supporting Pennsylvania or New Jersey case law showing that, before 2006, standard Pennsylvania and New Jersey policies covered losses caused by viruses, the statements of “fact” the MiLB Insureds made with respect to their regulatory estoppel claim are, at best, vague and conclusory, and, at worst, false. Either way, they are not sufficient to withstand Preliminary Objection.

**Dated: July 23, 2021**

**BY THE COURT,**

  
\_\_\_\_\_  
**GLAZER/J.**

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<sup>3</sup> Complaint, ¶ 89. The word “virus” is conspicuously absent from this list.

<sup>4</sup> In their Complaint, the MiLB Insurers allude to cases from other jurisdictions that provided property damage and business loss coverage caused by the following ills: rocks, landslides, radioactive dust, radon gas, carbon monoxide, pollutants, asbestos, lead, vibrations, chemicals, bacteria, soot, smoke, fumigants, methamphetamine odors, ammonia, pesticides, spiders, and “off-tasting soda.” *See* Complaint, ¶¶ 75-76. Not one of these is a virus.

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Plaintiffs,	:	NO. 00958
	:	
v.	:	COMMERCE PROGRAM
	:	
PHILADELPHIA INDEMNITY	:	Control No. 21020014
INSURANCE CO.,	:	
	:	
Defendant.	:	

**OPINION**

Plaintiffs, Lehigh Valley Baseball, LP, J&E Concessions LLC, Garden State Baseball, LP, and At Bat Group, LLC (collectively, the “MiLB Insureds”) are insured under several separate Commercial Lines insurance policies (the “Policies”) issued by defendant Philadelphia Indemnity Insurance Co. (“PIIC”). Lehigh Valley Baseball, LP, Garden State Baseball, LP d/b/a Trenton Thunder, and At Bat Group, LLC d/b/a Erie Sea Wolves, own and operate Minor League Baseball (“MiLB”) teams. J&E Concessions LLC provides services for Lehigh Valley Baseball, LP and the Iron Pigs MiLB team.

The MiLB Insureds filed this action seeking insurance coverage under the Policies for the business-income losses they suffered during the COVID-19 pandemic in 2020 and beyond. PIIC filed Preliminary Objections to the Complaint arguing that the MiLB Insureds’ coverage claims are barred by the plain language of the Policies.

Beginning in mid-March, 2020, in response to the COVID-19 pandemic, the Governors of Pennsylvania and New Jersey issued state-wide stay-at-home orders that closed the stadiums

where MiLB Insureds host Minor League Baseball games.<sup>1</sup> In addition, the Major League Baseball Teams refused to provide players for the 2020 season, so the MiLB 2020 season was effectively cancelled.<sup>2</sup>

“As a result of the [COVID-19] virus, attendant disease, resulting pandemic, governmental responses, and MLB not supplying players, the [MiLB Insureds] have been deprived of their primary source of revenue – fans coming to the ballpark and paying for game tickets, merchandise, and food and beverage and partaking in other amenities – and other revenue sources.”<sup>3</sup>

“Yet the fixed costs of operating a baseball stadium remain, such as fixed lease payments and payroll for permanent employees needed to operate the team[s] over an annual business cycle.”<sup>4</sup>

“The [MiLB Insureds] have therefore suffered, and will continue to suffer, significant business-income losses, expenses, and damages in a number of forms.”<sup>5</sup>

There is no dispute that many businesses, including the MiLB Insureds, have suffered significant business losses during the COVID-19 pandemic. The question is whether standard commercial insurance policies, such as the ones PIIC issued to the MiLB Insureds, provide coverage for such losses.

The PIIC Policies provide coverage for “direct physical loss” to the MiLB Insureds’ real and personal property as follows:

We will pay for direct physical “loss” to Covered Property caused by or resulting from any of the Covered Causes of Loss.

1. Covered Property

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<sup>1</sup> Complaint, ¶ 26-27.

<sup>2</sup> *Id.*, ¶ 41.

<sup>3</sup> *Id.*, ¶ 43.

<sup>4</sup> *Id.*, ¶ 45.

<sup>5</sup> *Id.*, ¶ 46.

Covered Property, as used in this Coverage Form, means the following types of property for which a Limit of Insurance is shown in the Declarations.

a. Your Business Personal Property, and similar property of others in your care, custody or control[.]<sup>6</sup>

\* \* \*

b. "Buildings" described in the Declarations including:

- (1) Building glass;
- (2) Completed additions;
- (3) Permanently installed;
  - (a) Fixtures;
  - (b) Machinery; and
  - (c) Equipment[.]<sup>7</sup>

\* \* \*

"Loss" means accidental loss or damage.<sup>8</sup>

\* \* \*

"Covered Causes of Loss" means Risks of Direct Physical Loss unless the "loss" is:

1. Excluded in Section B., Exclusions; or
  2. Limited in Section C., Limitations;
- that follow.<sup>9</sup>

The Policies also contain a "Business Income with Extra Expense Coverage Form," upon which the MiLB Insureds rely heavily for their claim of coverage for their economic losses during the COVID-19 pandemic. The business income form provides as follows:

We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by direct physical "loss" to property at the premises

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<sup>6</sup> PROPERTY COVERAGE FORM, PI-ULT-007 11.98, Page 1 of 24.

<sup>7</sup> *Id.*, Page 2 of 24.

<sup>8</sup> *Id.*, Page 24 of 24.

<sup>9</sup> CAUSES OF LOSS FORM PI-ULT-008 11.98, Page 1 of 11.

described in the Declarations, or within 1000 feet of the premises, caused by or resulting from any of the Covered Causes of Loss.<sup>10</sup>

\* \* \*

**b. Civil Authority**

We will pay for the actual loss of Business Income you sustain and necessary Extra Expenses you incur caused by action of Civil Authority that prohibits access to the described premises due to direct physical "loss" to property other than at the described premises caused by or resulting from any of the Covered Causes of Loss.

The coverage for Business Income will begin 72 hours after the time of that action and will apply for a period of up to three consecutive weeks after coverage begins.

The coverage for Extra Expense will begin immediately after the time of that action and will end:

- (1) Three consecutive weeks after the time of that action; or
  - (2) When your Business Income coverage ends;
- Whichever is later.<sup>11</sup>

\* \* \*

4. "Loss" means accidental loss or damage.

5. "Operations" means:

- a. Business activities you perform at the described premises; and
- b. The tenantability of the described premises, if coverage for Business Income including "Rental Value" or "Rental Value" applies.

6. "Period of Restoration" means the period of time that:

a. Begins:

- (1) 72 hours after the time of direct physical "loss" for Business Income coverage; or
- (2) Immediately after the time of direct physical "loss" for Extra Expense coverage; and

b. Ends on the earlier of:

- (1) The date when the property at the described 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.

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<sup>10</sup> BUSINESS INCOME WITH EXTRA EXPENSE COVERAGE FORM, PI-ULT-010 11.98,  
Page 1 of 13.

<sup>11</sup> *Id.*, Page 3 of 13

c. "Period of Restoration" does not include any increased period required due to the enforcement of any ordinance or law that:

- (1) Regulates the construction, use or repair, or requires the tearing down of any property; or
- (2) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants."

The expiration date of this policy will not cut short the "period of restoration."<sup>12</sup>

Finally, the Policies also contain an "Exclusion of Loss Due to Virus or Bacteria," upon which PIIC relies heavily for its argument that there is no coverage for the MiLB Insureds' business income losses sustained during the COVID-19 pandemic. The exclusion provides:

- A. The exclusion set forth in Paragraph B. [below] applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.<sup>13</sup>

At the Preliminary Objection stage, this court must accept as true the facts pled by the MiLB Insureds regarding their losses<sup>14</sup> and apply the language of the Policies to those facts to determine if there is coverage for the claimed losses.

The proper construction of an insurance policy is resolved as a matter of law to be decided by the court . . . . When an insured and the insurer disagree on coverage in a policy, we must determine what the parties intended by their

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<sup>12</sup> BUSINESS INCOME WITH EXTRA EXPENSE COVERAGE FORM, PI-ULT-010 11.98, Pages 12-13 of 13

<sup>13</sup> EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA, CP 01 40 07 06, Page 1 of 1.

<sup>14</sup> See Ladd v. Real Estate Commission, 230 A.3d 1096, 1103 (Pa. 2020). ("We recognize a demurrer is a preliminary objection to the legal sufficiency of a pleading and raises questions of law; we must therefore accept as true all well-pleaded, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts. A preliminary objection in the nature of a demurrer should be sustained only in cases that clearly and without a doubt fail to state a claim for which relief may be granted.")



contract[.] [T]he law must look to what they clearly expressed. Courts, in interpreting a contract, do not assume that its language was chosen carelessly. Thus, we will not consider merely individual terms utilized in the insurance contract, but the entire insurance provision to ascertain the intent of the parties. In other words, “[g]enerally, courts must give plain meaning to a clear and unambiguous contract provision unless to do so would be contrary to a clearly expressed public policy. Where the language of the contract is clear and unambiguous, a court is required to give effect to that language.

\* \* \*

[The court’s] review should not result in an absurd construction of the policy. 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. Moreover, courts must construe the terms of an insurance policy as written and may not modify the plain meaning of the words under the guise of ‘interpreting’ the policy. If the terms of a policy are clear, [a court] cannot rewrite it or give it a construction in conflict with the accepted and plain meaning of the language used.<sup>15</sup>

In this case, the MiLB Insureds claim they incurred business income losses caused by “the [COVID-19] virus, attendant disease, resulting pandemic, governmental responses, and MLB not supplying players.”<sup>16</sup> Under the policy provisions cited previously, lost business income is covered under the Policies only if such economic loss was caused by or due to “direct physical loss to [real or personal] property,” either at the insureds’ premises or nearby.<sup>17</sup> The word “physical” is not defined in the Policies, but it is commonly defined as:

1. Of, relating to, or involving the material universe and its phenomena; relating to the physical sciences <a physical explanation of this phenomenon>. 2. Of, relating to, or involving material things; pertaining to real, tangible objects <the physical world around us>. 3. Of, relating to, or involving the properties, forces, and phenomena treated of in physics <the physical characters of a mineral>.<sup>18</sup>

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<sup>15</sup> *Allstate Fire & Cas. Ins. Co. v. Hymes*, 29 A.3d 1169, 1171–73 (Pa. Super. 2011).

<sup>16</sup> Complaint, ¶43.

<sup>17</sup> BUSINESS INCOME WITH EXTRA EXPENSE COVERAGE FORM, PI-ULT-010 11.98, Pages 1-3 of 13.

<sup>18</sup> Black’s Law Dictionary (11th ed. 2019).

Of or relating to material things: a wall that formed a physical barrier; the physical environment.<sup>19</sup>

a: having material existence : perceptible especially through the senses and subject to the laws of nature “everything physical is measurable by weight, motion, and resistance” - Thomas De Quincey.

b: of or relating to material things.<sup>20</sup>

“Loss” is rather unhelpfully defined in the Policies as “accidental loss or damage.”

Fortunately, the Third Circuit has previously explicated what “physical loss” and “physical damage” mean in the context of coverage for unseeable contaminants:

In ordinary parlance and widely accepted definition, physical damage to property means “a distinct, demonstrable, and physical alteration” of its structure. 10 Couch on Insurance § 148:46 (3d ed.1998). Fire, water, smoke and impact from another object are typical examples of physical damage from an outside source that may demonstrably alter the components of a building and trigger coverage. Physical damage to a building as an entity by sources unnoticeable to the naked eye must meet a higher threshold. The Colorado Supreme Court in Western Fire Ins. Co. v. First Presbyterian Church, 165 Colo. 34, 437 P.2d 52 (Co.1968), 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. Although neither the building nor its elements were demonstrably altered, its function was eliminated.

In the case before us, the policies cover “physical loss,” as well as damage. When 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. However, if asbestos is present in components of a structure, but is not in such form or quantity as to make the building unusable, the owner has not suffered a loss.<sup>21</sup>

Economic loss, such as the lost business income the MiLB Insureds suffered here, is not in itself “physical loss.”<sup>22</sup> In order for there to be coverage for such economic loss, there must

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<sup>19</sup> American Heritage Dictionary, 5<sup>th</sup> Ed (2020).

<sup>20</sup> Merriam-Webster.com Dictionary (2021).

<sup>21</sup> Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226, 235–36 (3d Cir. 2002).

<sup>22</sup> The distinction between purely economic loss and physical loss, damage, or injury has been highlighted frequently by Pennsylvania courts in the course of illuminating the Economic Loss Doctrine

also have been direct physical loss or damage to real or personal property that caused or resulted in the economic loss. Neither 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 MiLB 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.<sup>23</sup> Therefore, those alleged causes of the MiLB Insureds' lost business income do not trigger coverage under the Policies.<sup>24</sup>

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and similar rules of law. See Excavation Techs., Inc. v. Columbia Gas Co. of Pennsylvania, 936 A.2d 111, 115, n. 7 (Pa. Super. 2007), *aff'd*, 604 Pa. 50, 985 A.2d 840 (2009) ("The economic loss rule states that no cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage. . . . In other words, the basic non-liability of the economic loss rule . . . now reflected in Section 766C of the Restatement (Second) of Torts, instructs that without physical harm to either the person or the property of the plaintiff, *i.e.*, some physical impact, the plaintiff does not recover for a defendant's negligence."); Spivack v. Berks Ridge Corp. Inc., 402 Pa. Super. 73, 78, 586 A.2d 402, 405 (1990) ("The general rule of law is that economic losses may not be recovered in tort (negligence) absent physical injury or property damage. . . . The record herein offers no indication of either personal injury to the appellants or property damage to their condominium resulting from the builder/contractor's actions or lack thereof."). See also Excavation Techs., Inc. v. Columbia Gas Co. of Pennsylvania, 604 Pa. 50, 56–57, 985 A.2d 840, 844 (2009) ("Our review of the [One Call] Act reveals its purpose is not to protect against economic losses—the Act's purpose is to protect against physical harm to individuals working on construction sites and to avoid property damage to utility equipment and surrounding structures.").

<sup>23</sup> These alleged causes of loss also did not trigger any "period of restoration" as contemplated under the business income loss provisions of the Policies.

<sup>24</sup> See Tria WS LLC v. Am. Auto. Ins. Co., No. CV 20-4159, 2021 WL 1193370, at \*4 (E.D. Pa. Mar. 30, 2021) ("Given its ordinary meaning, the phrase 'direct physical loss of' property requires that the property be rendered unusable by some physical force. This in turn requires that the insured's 'loss of use' bear some causal connection to the condition of the premises, such as where a fire burns down an insured restaurant or a thief steals all of the restaurant's cooking equipment, thereby rendering the property unusable for its intended purpose. . . . While there is no dispute that Plaintiffs here have been precluded from fully using the insured premises by the government closure orders, the Complaint does not allege that any physical force has rendered the premises unusable or otherwise affected the condition of the property. Thus, Plaintiffs' Complaint fails to allege a 'direct physical loss of' the insured property, and fails to trigger coverage under the Policies' Business Income and Extra Expense provisions."); S.A.N.T., Inc. v. Berkshire Hathaway, Inc., No. 2:20-CV-862, 2021 WL 147139, at \*6 (W.D. Pa. Jan. 15, 2021) ("the growing body of [COVID -19 coverage] case law rejects the contrived definition of 'direct physical loss of or damage to' that would provide coverage for economic losses unrelated to physical impact to the covered structure.")

The MiLB Insureds argue that the COVID-19 “virus, attendant disease, and resulting pandemic” also caused their loss of business income because the virus likely was physically present at their stadiums and such contamination constituted direct physical loss or damage to their real and personal property. Even 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 result[ed] from [a] virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.”<sup>25</sup>

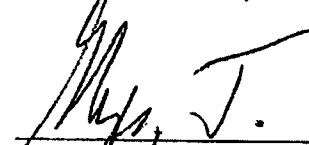
The MiLB Insureds attempt to invalidate the Virus Exclusion by claiming that the drafter of it misrepresented to the Pennsylvania and New Jersey insurance commissions in 2006 that such an exclusion did not reduce existing coverage, but simply clarified the extent of existing coverage. However, the MiLB Insureds did not plead any facts to support their claim that economic losses stemming from a viral pandemic like COVID-19 would have been covered in Pennsylvania and New Jersey under standard commercial insurance policies prior to 2006.

#### CONCLUSION

For all the foregoing reasons, defendant’s Preliminary Objections to plaintiffs’ Complaint seeking coverage under the Policies are sustained, and the Complaint is dismissed.

Dated: June 17, 2021

BY THE COURT,

  
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GLAZER, J.

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<sup>25</sup> EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA, CP 01 40 07 06, Page 1 of 1, Para. B.