



20 Stanwix Street, 11<sup>th</sup> Floor  
Pittsburgh, PA 15222

Robert Horst  
Robert Runyon, III  
Matthew Malamud  
400 Maryland Drive  
Fort Washington, PA 19304

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA**

MACMILES, LLC D/B/A	:	
GRANT STREET TAVERN	:	
310 Grant Street, Ste. 106	:	
Pittsburgh, PA 15219-2213,	:	
	:	
Plaintiff,	:	No.: GD-20-7753
	:	
vs.	:	
	:	
ERIE INSURANCE EXCHANGE	:	
100 Erie Insurance Place	:	
Erie, PA 16530,	:	
	:	
Defendant.	:	

**MEMORANDUM AND ORDER OF COURT**

**I. The Parties**

MacMiles, LLC d/b/a Grant Street Tavern (hereinafter “Plaintiff”) is a restaurant and bar located in the Downtown neighborhood of Pittsburgh, Allegheny County, Pennsylvania.

Erie Insurance Exchange (hereinafter “Defendant”) is a reciprocal insurance exchange organized under the laws of Pennsylvania with its principal place of business in Erie, Pennsylvania.

**II. Introduction**

Defendant issued Plaintiff an Ultra Plus Commercial General Liability Policy for the policy period between September 12, 2019 to September 12, 2020 (hereinafter “the insurance contract”). The insurance contract is an all-risk policy, which provides coverage for any direct physical loss or direct physical damage unless the loss or damage is specifically excluded or limited by the insurance contract.

In March and April of 2020, in order to prevent and mitigate the spread of the coronavirus disease “COVID-19,” Governor Tom Wolf (“Governor Wolf”) issued a series of mandates restricting the operations of certain types of businesses throughout the Commonwealth of Pennsylvania (the “Governor’s orders”). On March 6, 2020, Governor Wolf issued an order declaring a Proclamation of Disaster Emergency. On March 19, 2020, Governor Wolf issued an order requiring all non-life sustaining businesses in Pennsylvania to cease operations and close physical locations. On March 23, 2020, Governor Wolf issued an order directing Pennsylvania citizens in particular counties to stay at home except as needed to access life sustaining services. Then, on April 1, 2020, Governor Wolf extended the March 23, 2020 order, and directed all of Pennsylvania’s citizens to stay at home. As of April 1, 2020, at least 5,805 citizens of Pennsylvania contracted COVID-19 in sixty counties across the Commonwealth, and seventy-four (74) citizens died.<sup>1</sup> Unfortunately, since April 1, 2020, the number of positive cases and deaths from COVID-19 has increased dramatically.<sup>2</sup>

As a result of the spread of COVID-19 and the Governor’s orders, Plaintiff suspended its business operations. Plaintiff thereafter submitted a claim for coverage under its insurance contract with Defendant. Defendant denied Plaintiff’s claim.

On September 29, 2020, Plaintiff filed a complaint in the Court of Common Pleas of Allegheny County. In its complaint, Plaintiff asserted the following counts: [a] count one is for declaratory judgment in regards to the business income protection provision of the insurance contract; [b] count two is for breach of contract in relation to the business income protection

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<sup>1</sup> See Governor Tom Wolf, *Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home*, (April 1, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/04/20200401-GOV-Statewide-Stay-at-Home-Order.pdf>.

<sup>2</sup> As of May 14, 2021, 993,915 citizens of Pennsylvania have contracted COVID-19 and 26,724 citizens have died. See Pennsylvania Department of Health, COVID-19 Data for Pennsylvania, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>.

provision of the insurance contract; [c] count three is for declaratory judgment with regard the civil authority provision of the insurance contract; [d] count four is for breach of contract in regards to the civil authority provision of the insurance contract; [e] count five is for declaratory judgment with regard to the extra expense provision of the insurance contract; and [f] count six is for breach of contract in regards to the extra expense provision of the insurance contract. All of Plaintiff's claims require this Court's determination as to whether Plaintiff is entitled to coverage under various provisions of the insurance contract with Defendant for losses Plaintiff sustained in relation to the spread of COVID-19 and the Governor's orders.

On December 22, 2020, Plaintiff filed a Motion for Partial Summary Judgment as to Plaintiff's claims for declaratory judgment with regard to the business income protection and civil authority provisions of the insurance contract. On March 10, 2021, Defendant filed a Cross Motion for Judgment on the Pleadings. On March 31, 2021, this Court heard oral argument on Plaintiff's Motion for Partial Summary Judgment and Defendant's Cross Motion for Judgment on the Pleadings. For the reasons set forth herein, this Court grants Plaintiff's Motion for Partial Summary Judgment, in part, and denies Defendant's Cross Motion for Judgment on the Pleadings.

### **III. The Contract Provisions**

Plaintiff's and Defendant's dispute involves the following provisions regarding coverage under the insurance contract.

#### **Section 1 - Coverages**

##### **Insuring Agreement**

We will pay for direct physical "loss" of or damage to Covered Property at the premises described in the "Declarations" caused by or resulting from a peril insured against.

Omnibus Memorandum in Support of Erie’s Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff’s Motion for Summary Judgment, at 61, Exhibit A.

## **Section II – Perils Insured Against**

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### **Income Protection – Coverage 3**

#### **Covered Cause of Loss**

This policy insures against direct physical “loss”, except “loss” as excluded or limited in this policy.<sup>3</sup>

*Id.* at 64.

### **Income Protection – Coverage 3**

#### **A. Income Protection**

Income Protection means loss of “income” and/or “rental income” you sustain due to partial or total “interruption of business” resulting directly from “loss” or damage to property on the premises described in the “Declarations” or to your food truck or trailer when anywhere in the coverage territory from a peril insured against.<sup>4</sup>

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<sup>3</sup> “Loss” means direct and accidental loss of or damage to covered property. Omnibus Memorandum in Support of Erie’s Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff’s Motion for Summary Judgment, at 96, Exhibit A.

<sup>4</sup> The insurance contract defines “interruption of business” as “the period of time that your business is partially or totally suspended and it: 1. Begins with the date of direct “loss” to covered property caused by a peril insured against; and 2. Ends on the date when the covered property should be repaired, rebuilt, or replaced with reasonable speed and similar quality.” Omnibus Memorandum in Support of Erie’s Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff’s Motion for Summary Judgment, at 96, Exhibit A. The insurance contract defines “income” as “the sum of net income (net profit or loss before income taxes) that would have been earned or incurred and necessary continuing operating expenses incurred by the business such as payroll expenses, taxes, interest, and rents.” *Id.* The insurance contract defines “rental income” as the following:

1. The rents from the tenant occupancy of the premises described in the “Declarations”;
2. Continuing operating expenses incurred by the business such as:
  - a. Payroll; and
  - b. All expenses for which the tenant is legally responsible and for which you would otherwise be responsible;
3. Rental value of the property described in the “Declarations” and occupied by you; or

*Id.* at 63.

## **C. Additional Coverages**

### **1. Civil Authority**

When a peril insured against causes damage to property other than property at the premises described in the “Declarations”, we will pay for the actual loss of “income” and/or “rental income” you sustain and necessary “extra expense” caused by action of civil authority that prohibits access to the premises described in the “Declarations” or access to your food truck or trailer anywhere in the coverage territory provided that both of the following apply:

- a. Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the premises described in the “Declarations” or your food truck or trailer are within that area but are not more than one mile from the damaged property; and
- b. The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the peril insured against that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

*Id.* at 64.

## **Section III. Exclusions**

### **A. Coverages 1, 2, and 3**

We do not cover under Building(s) – Coverage 1; Business Personal Property and Personal Property of others – Coverage 2; and Income Protection – Coverage 3 “loss” or damage caused directly or indirectly by any of the following. Such a “loss” or damage is excluded regardless of any cause or event that contributes concurrently or in any sequence to the “loss”:

\* \* \* \* \*

10. By the enforcement of or compliance with any law or ordinance regulating the construction, use, or repair of any property, or requiring the tearing down of any

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4. Incidental income received from coin-operated laundries, hall rentals, or other facilities on the premises described in the “Declarations”.

*Id.* at 97. Finally, “Declarations” is defined as “the form which shows your coverages, limits of protection, premium charges, and other information.” *Id.* at 96.

property, including the cost of removing its debris, except as provided in Extensions of Coverage – B.3., B.7., and B.8.

*Id.* at 66.

#### **IV. Standard of Review**

It is well-settled that, after the relevant pleadings are closed, a party may move for summary judgment, in whole or in part, as a matter of law. Pa. R.C.P. 1035.2. Summary judgment “may be entered only where the record demonstrates that there are no genuine issues of material fact, and it is apparent that the moving party is entitled to judgment as a matter of law.” *City of Philadelphia v. Cumberland County Bd. of Assessment Appeals*, 81 A.3d 24, 44 (Pa. 2013). Furthermore, appellate courts will only reverse a trial court’s order granting summary judgment where it is “established that the court committed an error of law or abused its discretion.” *Siciliano v. Mueller*, 149 A.3d 863, 864 (Pa. Super. 2016).

The interpretation of an insurance contract is a matter of law, which may be decided by this Court on summary judgment. *Wagner v. Erie Insurance Company*, 801 A.2d 1226, 1231 (Pa. Super. 2002). When interpreting an insurance contract, this Court aims to effectuate the intent of the parties as manifested by the language of the written instrument. *American and Foreign Insurance Company v. Jerry’s Sport Center*, 2 A.3d 526, 540 (Pa. 2010). When reviewing the language of the contract, words of common usage are read with their ordinary meaning, and this Court may utilize dictionary definitions to inform its understanding. *Wagner*, 801 A.2d at 1231; *see also AAA Mid-Atlantic Insurance Company v. Ryan*, 84 A.3d 626, 633-34 (Pa. 2014). If the terms of the contract are clear, this Court must give effect to the language. *Madison Construction Company v. Harleysville Mutual Insurance Company*, 735 A.2d 100, 106 (Pa. 1999). However, if the contractual terms are subject to more than one reasonable interpretation, this Court must find that the contract is ambiguous. *Id.* “[W]hen a provision of

a[n insurance contract] is ambiguous, the [contract] provision is to be construed in favor of the [the insured] and against the insurer, as the insurer drafted the policy and selected the language which was used therein.” *Kurach v. Truck Insurance Exchange*, 235 A.3d 1106, 1116 (Pa. 2020).

## **V. Discussion**

### **a. Coverage Provisions**

Plaintiff bears the initial burden to reasonably demonstrate that a claim falls within the policy’s coverage provisions. *State Farm Cas. Co. v. Estates of Mehlman*, 589 F.3d 105, 111 (3d Cir. 2009) (applying Pennsylvania law). Then, provided that Plaintiff satisfies its initial burden, Defendant bears “the burden of proving the applicability of any exclusions or limitations on coverage.” *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996) (applying Pennsylvania law). In order to prevail, Defendant must demonstrate that the language of the insurance contract regarding exclusions is “clear and unambiguous: otherwise, the provision will be construed in favor of the insured.” *Fayette County Housing Authority v. Housing and Redevelopment Ins. Exchange*, 771 A.2d 11, 13 (Pa. Super. 2001).

First, this Court will address whether Plaintiff is entitled to coverage under the Income Protection provision of the insurance contract for losses Plaintiff sustained in relation to the public health crises and the spread of the COVID-19 virus. With regard to Income Protection coverage, the insurance contract provides that:

#### **Section 1 - Coverages**

##### **Insuring Agreement**

We will pay for *direct physical “loss” of or damage to* Covered Property at the premises described in the “Declarations” caused by or resulting from a peril insured against.

Omnibus Memorandum in Support of Erie’s Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff’s Motion for Summary Judgment, at 61, Exhibit A (emphasis added).

## **Section II – Perils Insured Against**

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### **Income Protection – Coverage 3**

#### **Covered Cause of Loss**

This policy insures against direct physical “loss”, except “loss” as excluded or limited in this policy.<sup>5</sup>

*Id.* at 64.

### **Income Protection – Coverage 3**

#### **A. Income Protection**

Income Protection means loss of “income” and/or “rental income” you sustain due to partial or total “interruption of business” resulting *directly from “loss” or damage to property* on the premises described in the “Declarations” or to your food truck or trailer when anywhere in the coverage territory from a peril insured against.<sup>6</sup>

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<sup>5</sup> “Loss” means direct and accidental loss of or damage to covered property. Omnibus Memorandum in Support of Erie’s Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff’s Motion for Summary Judgment, at 96, Exhibit A.

<sup>6</sup> The insurance contract defines “interruption of business” as “the period of time that your business is partially or totally suspended and it: 1. Begins with the date of direct “loss” to covered property caused by a peril insured against; and 2. Ends on the date when the covered property should be repaired, rebuilt, or replaced with reasonable speed and similar quality.” Omnibus Memorandum in Support of Erie’s Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff’s Motion for Summary Judgment, at 96, Exhibit A. The insurance contract defines “income” as “the sum of net income (net profit or loss before income taxes) that would have been earned or incurred and necessary continuing operating expenses incurred by the business such as payroll expenses, taxes, interest, and rents.” *Id.* The insurance contract defines “rental income” as the following:

1. The rents from the tenant occupancy of the premises described in the “Declarations”;
2. Continuing operating expenses incurred by the business such as:
  - a. Payroll; and
  - b. All expenses for which the tenant is legally responsible and for which you would otherwise be responsible;
3. Rental value of the property described in the “Declarations” and occupied by you; or

*Id.* at 63 (emphasis added).

In order to state a reasonable claim for coverage under the Income Protection provision of the insurance contract, Plaintiff must show that it suffered “direct physical loss of or damage to” its property. The interpretation of the phrase “direct physical loss of or damage to” property is the key point of the parties’ dispute. Defendant contends that “direct physical loss of or damage to” property requires some physical altercation of or demonstrable harm to Plaintiff’s property. Plaintiff contends that the “direct physical loss of . . . property” is not limited to physical altercation of or damage to Plaintiff’s property but includes the loss of use of Plaintiff’s property. Plaintiff further asserts that, because its interpretation is reasonable, this Court must find in Plaintiff’s favor.

The insurance contract does not define every term in the phrase “direct physical loss of or damage to” property.<sup>7</sup> As previously noted, Pennsylvania courts construe words of common usage in their “natural, plain, and ordinary sense . . . and [Pennsylvania courts] may inform [their] understanding of these terms by considering their dictionary definitions.” *Madison Construction Company*, 735 A.2d at 108. Four words in particular are germane to the determination of this threshold issue: “direct,” “physical,” “loss,” and “damage.” “Direct” is

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4. Incidental income received from coin-operated laundries, hall rentals, or other facilities on the premises described in the “Declarations”.

*Id.* at 97. Finally, “Declarations” is defined as “the form which shows your coverages, limits of protection, premium charges, and other information.” *Id.* at 96.

<sup>7</sup> Although the insurance contract does define the term “loss” as meaning “direct and accidental loss of or damage to covered property,” this definition is essentially meaningless because it is repetitive of the phrase “direct physical loss of or damage to.” Omnibus Memorandum in Support of Erie’s Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff’s Motion for Summary Judgment, at 96, Exhibit A. Accordingly, when interpreting the term “loss,” this Court relies upon the term’s the ordinary dictionary definition as it does with the other terms in this phrase, which the insurance contract did not define.

defined as “proceeding from one point to another in time or space without deviation or interruption . . . [and/or] characterized by close logical, causal, or consequential relationship . . . .”<sup>8</sup> “Physical” is defined as “of or relating to natural science . . . having a material existence . . . [and/or] perceptible especially through the senses and subject to the laws of nature . . . .”<sup>9</sup> “Loss” is defined as “DESTRUCTION, RUIN . . . [and/or] the act of losing possession [and/or] DEPRIVATION . . . .”<sup>10</sup> “Damage” is defined as “loss or harm resulting from injury to person, property, or reputation . . . .”<sup>11</sup>

Before analyzing the definitions of each of the above terms to determine whether Plaintiff’s interpretation is reasonable, it is important to note that the terms, in addition to their ordinary, dictionary definitions, must be considered in the context of the insurance contract and the specific facts of this case. *See Madison Construction Company*, 735 A.2d at 106 (clarifying that issues of contract interpretation are not resolved in a vacuum). While 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 determined 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.”<sup>12</sup> It is axiomatic that courts must “not treat the words in the

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<sup>8</sup> Direct, Merriam-Webster, <https://www.merriam-webster.com/dictionary/direct>.

<sup>9</sup> Physical, Merriam-Webster, <https://www.merriam-webster.com/dictionary/physical>.

<sup>10</sup> Loss, Merriam-Webster, <https://www.merriam-webster.com/dictionary/loss>.

<sup>11</sup> Damage, Merriam Webster, <https://www.merriam-webster.com/dictionary/damage>.

<sup>12</sup> *See Fayette County Housing Authority v. Housing and Redevelopment Ins. Exchange*, 771 A.2d 11, 15 (Pa. Super. 2001) (explaining that merely accepting the non-binding decisions of other courts “by the purely mechanical process of searching the nations courts for conflicting decisions” amounts to an abdication of this Court’s judicial role).

[contract] as mere surplusage . . . [and] if at all possible, [this Court must] construe the [contract] in a manner that gives effect to all of the [contract's] language.” *Indalex Inc. v. Nation Union Fire Ins. Co. Pittsburgh, PA*, 83 A.3d 418, 420-21 (Pa. Super. 2013). Based upon this vital principle of contract interpretation, this Court concluded that, due to the presence of the disjunctive “or,” whatever “direct physical ‘loss’ of” means, it must mean something different than “direct physical . . . damage to.”

In order to determine what the phrase “direct physical loss of . . . property” reasonably means, this Court looked to the ordinary, dictionary definitions of the terms “direct,” “physical,” “loss,” and “damage.” This Court began its analysis with the terms “damage” and “loss,” as these terms are the crux of the disputed language. As noted above, “damage” is defined as “loss or harm resulting from injury to person, property, or reputation . . . ,”<sup>13</sup> and “loss” is defined as “DESTRUCTION, RUIN . . . [and/or] the act of losing possession [and/or] DEPRIVATION . . . .”<sup>14</sup>

Based upon the above-provided definitions, it is clear that “damage” and “loss,” in certain contexts, tend to overlap. This is evident because the definition of “damage” includes the term “loss,” and at least one definition of “loss” includes the terms “destruction” and “ruin,” both of which indicate some form of damage. However, as noted above, in the context of this insurance contract, the concepts of “loss” and “damage” are separated by the disjunctive “or,” and, therefore, the terms must mean something different from each other. 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

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<sup>13</sup> Damage, Merriam Webster, <https://www.merriam-webster.com/dictionary/damage>.

<sup>14</sup> Loss, Merriam-Webster, <https://www.merriam-webster.com/dictionary/loss>.

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 concluded 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.

In reaching its conclusion, this Court also considered the meaning and impact of the terms “direct” and “physical.” Ultimately, this Court determined that the ordinary, dictionary definitions of the terms “direct” and “physical” are consistent with the above interpretation of the term “loss.” As noted previously, “direct” is defined as “proceeding from one point to another in time or space without deviation or interruption . . . [and/or] characterized by close logical, causal, or consequential relationship . . . ,”<sup>15</sup> and “physical” is defined as “of or relating to natural science . . . having a material existence . . . [and/or] perceptible especially through the senses and subject to the laws of nature . . . .”<sup>16</sup> Based upon these definitions it is certainly reasonable to conclude that Plaintiff could suffer “direct” and “physical” loss of use of its property absent any harm to property.

Here, Plaintiff’s loss of use of its property was both “direct” and “physical.” The spread of COVID-19, and a desired limitation of the same, had a close logical, causal, and/or consequential relationship to the ways in which Plaintiff materially utilized its property and physical space. *See* February 22, 2021 Court Order of the United States District Court, N.D. Illinois, Eastern Division case *In re: Society Insurance Co. COVID-19 Business Interruption*

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<sup>15</sup> Direct, Merriam-Webster, <https://www.merriam-webster.com/dictionary/direct>.

<sup>16</sup> Physical, Merriam-Webster, <https://www.merriam-webster.com/dictionary/physical>.

*Protection Insurance Litigation*, Civil Case No. 1:20-CV-05965 at 21 (stating that government shutdown orders and COVID-19 *directly* impacted the way businesses used *physical* space) (emphasis added). Indeed, 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, if at all. Thus, the spread of COVID-19 did not, as Defendant contends, merely impose economic limitations. Any economic losses were secondary to the businesses’ *physical* losses.

While the terms “direct” and “physical” modify the terms “loss” and “damage,” this does not somehow necessarily mean that the entire phrase “direct physical loss of or damage to” property requires actual harm to Plaintiff’s property in every instance. Any argument that the terms “direct” and “physical,” when combined, presuppose that any request for coverage must stem from some actual impact and harm to Plaintiff’s property suffers from the same flaw noted in this Court’s above discussion regarding the difference between the terms “loss” and “damage:” such interpretations fail to give effect to all of the insurance contract’s terms and, again, render the phrase “direct physical loss of” duplicative of the phrase “direct physical . . . damage to.”

Defendant also contends that the insurance contract’s Amount of Insurance provision supports the conclusion that the contract necessitates the existence of tangible damage in order for Plaintiff to be entitled to Income Protection coverage. According to Defendant, because the Amount of Insurance provision contemplates the existence of damaged or destroyed property, and the need to rebuild, repair, or replace property, Plaintiff’s argument regarding loss of use in the absence of any tangible damage or destruction to property is untenable.

Although this Court agrees with Defendant on the general principle that the insurance contract's provisions must be read as a whole so that all of its parts fit together, this Court is not persuaded that the Amount of Insurance provision is inherently inconsistent with an interpretation of "direct physical loss of . . . property" that encompasses Plaintiff's loss of use of its property in the absence of tangible damage. The insurance contract provides that:

We will pay the actual income protection loss for only such length of time as would be required to resume normal business operations. We will limit the time period to the shorter of the following periods:

1. The time period required to rebuild, repair, or replace such part of the Building or Building Personal Property that has been damaged or destroyed as a direct result of an insured peril; or
2. Twelve (12) consecutive months from the date of loss.

Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 64, Exhibit A. Upon review of the above language, this Court determined that the Amount of Insurance provision does not limit coverage only to instances where Plaintiff needed to rebuild, repair, or replace damaged or destroyed property. Indeed, the relevant part of the Amount of Insurance provision starts by generally stating that the insurer will pay for income protection loss for only such length of time as would be required to resume normal business operations. Thereafter, the Amount of Insurance provision further explains that this time period for coverage will be limited to either (a) the length of time needed to rebuild, repair, or replace damaged or destroyed property; or (b) twelve (12) months from the initial date of loss.

Although Defendant is correct to point out that the Amount of Insurance provision expressly contemplates some circumstances in which Plaintiff's property is actually damaged or destroyed, this provision does not necessitate the existence of damaged or destroyed property,

and does not require repairs, rebuilding, or replacement of damaged or destroyed property in order for Plaintiff to be entitled to coverage. The Amount of Insurance provision merely imposes a time limit on available coverage, which ends whenever any required rebuilding, repairs, or replacements are completed to any damaged or destroyed property that might exist, *or* twelve (12) months after the initial date of the loss. To put this another way, the Amount of Insurance provision provides that coverage ends when Plaintiff's business is once again operating at normal capacity after damaged or destroyed property is fixed or replaced, *or* within twelve (12) months from the initial date of loss in circumstances where it is not necessary to fix or replace damaged or destroyed property, or it is not feasible to do so within a twelve (12) month time frame. The Amount of Insurance provision does not somehow redefine or place further substantive limits on types of available coverage.

As this Court determined that it is, at the very least, reasonable to interpret the phrase "direct physical loss of . . . property" to encompass the loss of use of Plaintiff's property due to the spread of COVID-19 absent any actual damage to property, and because Plaintiff established that there are no genuine issues of material fact regarding its right to coverage under the Income Protection provision of the insurance contract, this Court grants Plaintiff's Motion for Partial Summary Judgment in relation to Plaintiff's claim for declaratory judgment and the income protection provision of the insurance contract.

Second, this Court will address whether Plaintiff is entitled to coverage under the Civil Authority provision of the insurance contract for losses Plaintiff sustained in relation to the Governor's orders, which were issued to help mitigate the spread of the COVID-19 virus. With regard to Civil Authority coverage, the insurance contract provides that:

When a peril insured against causes damage to property other than property at the premises described in the : Declarations", we will pay for the actual loss of

“income” and/or “rental income” you sustain and necessary “extra expense” caused by action of civil authority that prohibits access to the premises described in the “Declarations” or access to your food truck or trailer anywhere in the coverage territory provided that both of the following apply:

- a. Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the premises described in the “Declarations” or your food truck or trailer are within that area but are not more than one mile from the damaged property; and
- b. The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the peril insured against that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

*Id.* at 64.

With regard to Civil Authority coverage, Plaintiff must, as a threshold matter, demonstrate that COVID-19 caused damage to property other than Plaintiff’s property. Unlike the Income Protection provision, under the Civil Authority provision there is no coverage for the loss of use of property other than Plaintiff’s property. Accordingly, this Court’s above analysis with regard to Income Protection coverage and loss of use is inapplicable, as it does not address whether COVID-19 separately caused damage to property.

Again, as noted above, “damage” is defined as “loss or harm resulting from injury to person, property, or reputation . . . .”<sup>17</sup> Based upon this definition, this Court determined that, at the very least, in order for COVID-19 to damage property, COVID-19 must come into contact with property and cause harm. Presently, it is contested whether COVID-19 can live on the surfaces of property for some period of time. Additionally, while this might be one way by which individuals contract COVID-19, it is not the primary means by which COVID-19 spreads. *See Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 892 (Pa. 2020) (holding that COVID-19

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<sup>17</sup> Damage, Merriam Webster, <https://www.merriam-webster.com/dictionary/damage>.

does not spread because the virus is present on any particular surface or at any particular location, rather COVID-19 spreads because of person-to-person contact). Indeed, person-to-person transmission of COVID-19, as opposed to property damage, was the primary reason for the Governor's orders, social distancing measures, and resultant changes in the ways business utilized property. With or without COVID-19 contacting the surface of any given property in the Commonwealth, businesses throughout the Commonwealth shutdown, at least partially, and suffered the loss of use of property due to the risk of person-to-person COVID-19 transmission. Thus, in the above discussion regarding the Income Protection provision, this Court determined that there are no genuine issues of material fact as to whether Plaintiff suffered the loss use of property due to COVID-19. The same is, however, not as clear with regard to the question of whether COVID-19 caused damaged to property throughout the Commonwealth.

Even if this Court were to accept that COVID-19 could and did cause damage to property under the theory presented by Plaintiff, whether Plaintiff is entitled to coverage under the Civil Authority provision depends upon whether Plaintiff can demonstrate that COVID-19 was actually present on property other than Plaintiff's property. Additionally, Plaintiff must show that any such damaged property was within one mile of Plaintiff's property, and that the actions of civil authority (in this case the Governor's orders) were "taken in response to dangerous physical conditions resulting from the *damage* or continuation of the peril insured against that caused the *damage*, or the action is taken to enable a civil authority to have unimpeded access to the *damaged* property." Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 64, Exhibit A (emphasis added). At this time, genuine issues of material fact remain in dispute as to the following: [a] whether COVID-19 caused damage to property; [b] whether COVID-19

was actually present at any particular property; and [c] the extent to which the Governor's orders were issued in response to property damaged by COVID-19. Accordingly, this Court denies Plaintiff's Motion for Partial Summary Judgment in relation to its claim for declaratory judgment and the Civil Authority provision of the insurance contract without prejudice.<sup>18</sup>

**b. Exclusions**

Having determined that Plaintiff provided a reasonable interpretation demonstrating that Plaintiff is entitled to coverage under the Income Protection provision of the insurance contract, this Court turns to the question of whether Defendant demonstrated "the applicability of any exclusions or limitations on coverage." *Koppers Co.*, 98 F.3d at 1446 (applying Pennsylvania law). As discussed previously, in order to prevail, Defendant must show that the language of the insurance contract regarding an exclusion is "clear and unambiguous: otherwise, the provision will be construed in favor of the insured." *Fayette County Housing Authority*, 771 A.2d at 13.

Defendant argues that the insurance contract's exclusion regarding the enforcement of or compliance with laws and ordinances prevents coverage for income protection. The insurance contract states that the insurer will not pay for loss or damage caused "[b]y the enforcement of or compliance with any law or ordinance regulating the construction, use, or repair, of any property, or requiring the tearing down of any property, including the cost of removing its debris . . . ." Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 66, Exhibit A.

According to Defendant, coverage is precluded by the above exclusion because Plaintiff's alleged losses are due solely to the Governor's orders. This, however, is not the case. In its complaint, Plaintiff states that its claim for coverage is based upon losses and expenses Plaintiff

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<sup>18</sup> As this Court is not convinced that, as a matter of law, Plaintiff cannot prevail on its damage theory, this Court also denies Defendant's Cross Motion for Judgment on the Pleadings.

suffered in relation to both “*the COVID-19 pandemic . . . and the orders of civil authorities enacted in response to this natural disaster.*” Plaintiff’s Complaint at 13 (emphasis added). As this Court explained earlier in this memorandum, COVID-19 and the related social distancing measures (with and without government orders) directly forced businesses everywhere to physically limit the use of property and the number of people that could inhabit physical buildings at any given time. The Governor’s orders only came into consideration in the context of Plaintiff’s claim for coverage under the Civil Authority provision of the contract.<sup>19</sup> Accordingly, Defendant failed to demonstrate that the exclusion regarding the enforcement of or compliance with laws and ordinances clearly and unambiguously prevents coverage.

## **VI. Conclusion**

As this Court determined that [a] Plaintiff’s interpretation of the Income Protection provision of the insurance contract is, at the very least, reasonable, [b] that there are no genuine issues of material fact regarding Plaintiff’s loss of use, and [c] that none of the insurance contract’s exclusions clearly and unambiguously prevent coverage, Plaintiff’s Motion for Partial Summary Judgment as to Plaintiff’s claim for declaratory judgment with regard to Income Protection coverage is **GRANTED**. In contrast, because this Court determined that there are genuine issues of material fact remaining as to the Civil Authority provision and whether COVID-19 caused damage to property, Plaintiff’s Motion for Partial Summary Judgment as to Plaintiff’s claim for declaratory judgment with regard to Civil Authority coverage is **DENIED**

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<sup>19</sup> Certainly, the exclusion regarding the enforcement of or compliance with laws and ordinances could not have been intended to exclude coverage under the Civil Authority provision of the contract, as this would make any extended coverage for the actions of Civil Authority illusory. See *Heller v. Pennsylvania League of Cities and Municipalities*, 32 A.3d 1213, 1228 (Pa. 2011) (holding that where an exclusionary provision of an insurance contract operates to foreclose expected claims, such a provision is void as it renders coverage illusory).

without prejudice. Finally, Defendant's Cross Motion for Judgement on the Pleadings is DENIED.

By the Court:

*Christine Ward, J.*

Christine Ward, J.

Dated: 5/25/2021