SJC-13172

VERVEINE CORP.[1] & others[2] vs. STRATHMORE INSURANCE COMPANY & another.[3]

Suffolk. January 7, 2022. - April 21, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, & Wendlandt, JJ.

Insurance, Business owner's policy, Property damage, "All risk" policy, Agent's negligence, Construction of policy, Coverage. Contract, Insurance, Performance and breach. Negligence, Insurance agent. Practice, Civil, Motion to dismiss, Judgment on the pleadings. Words, "Direct physical loss of or damage to."

Civil action commenced in the Superior Court Department on June 30, 2020.

Motions to dismiss and for judgment on the pleadings were heard by Janet L. Sanders, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

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[1] Doing business as Coppa.

[2] 1704 Washington LLC, doing business as Toro; and JKFOODGROUP LLC, doing business as Little Donkey.

[3] Commercial Insurance Agency, Inc.

Benjamin R. Zimmermann for the plaintiffs.
Stephen E. Goldman for Strathmore Insurance Company.
Andrew R. Ferguson for Commercial Insurance Agency, Inc.
The following submitted briefs for amici curiae:
John G. O'Neill & Jessica H. Park for Massachusetts Insurance and Reinsurance Bar Association.
Kristin A. Heres & Katharina Kraatz-Dunkel for American Property Casualty Insurance Association & others.
Robert J. Gilbert, Timothy J. McLaughlin, & Nathan A. Sandals for Amphenol Corporation & another.
Rhonda D. Orin, of New York, & Marshall Gilinsky for United Policyholders.
Jonathan T. Merrigan for American Food Systems, Inc.

KAFKER, J. This appeal requires us to determine whether various losses stemming from the COVID-19 pandemic constitute "direct physical loss of or damage to" properties owned by the plaintiffs and insured by the defendants. The plaintiffs own three restaurants, which, like many brick-and-mortar businesses, suffered severe reductions in revenues during the pandemic and the resulting government restrictions on public gatherings. And like many other businesses, they looked to their property insurers to offset these losses, and had their claims denied. The plaintiffs sued their insurer for breach of contract and their insurance broker for negligently failing to procure policies that would have covered damages resulting from the COVID-19 virus. Holding that the insurance policies in question unambiguously did not cover the plaintiffs' losses, a Superior Court judge granted the motion to dismiss filed by the defendant Strathmore Insurance Company (Strathmore) and the motion for

judgment on the pleadings filed by the defendant Commercial Insurance Agency, Inc. (Commercial).

We agree that the plaintiffs' losses were not "direct physical loss of or damage to" their property within the meaning of the insurance policies, and we therefore affirm.[4]

1. Background. The following facts are drawn from the plaintiffs' complaint and from sources of which this court can take judicial notice. See Jarosz v. Palmer, 436 Mass. 526, 530 (2002) (motions under Mass. R. Civ. P. 12 [c], 365 Mass. 754 [1974]); Jackson v. Longcope, 394 Mass. 577, 580 n.2 (1985) (motions under Mass. R. Civ. P. 12 [b] [6], 365 Mass. 754 [1974]).[5]

The plaintiffs are three Massachusetts companies that operate restaurants in Boston and Cambridge (restaurants). They are Verveine Corporation, which operates Coppa in Boston

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[4] We acknowledge the amicus briefs submitted by the Massachusetts Insurance and Reinsurance Bar Association; by the American Property Casualty Insurance Association, the National Association of Mutual Insurance Companies, and the Massachusetts Insurance Federation; by Amphenol Corporation and Lawrence General Hospital; by United Policyholders; and by American Food Systems, Inc.

[5] We take judicial notice of content of the Governor's COVID-19 orders, referenced in the complaint, because they are "a subject of generalized knowledge readily ascertainable from authoritative sources." Commonwealth v. Green, 408 Mass. 48, 50 n.2 (1990). We do so only for clarity as to the exact requirements of the orders, and note that neither the orders themselves nor their summary description in the complaint would establish that the plaintiffs are entitled to relief.

(Coppa); 1704 Washington LLC, which operates Toro in Boston (Toro); and JKFOODGROUP LLC, which operates Little Donkey in Cambridge (Little Donkey). All three have common ownership and management.

The restaurants engaged Commercial to advise them on their insurance needs and to procure the necessary insurance policies for their businesses. For many years, Commercial arranged for the plaintiffs to purchase coverage from Strathmore, a wholly owned subsidiary of Greater New York Mutual Insurance Company.

When the pandemic began, the restaurants were covered by two Strathmore property and liability policies -- one covering both Toro and Coppa and the other covering Little Donkey. Commercial represented to the plaintiffs that the coverage under the policies was the same, but Little Donkey's policy contained an exclusion 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," which was not contained in the policy covering Coppa and Toro.[6] The addition of the virus exclusion to the Little Donkey policy did not result in a premium reduction.

[6] The policy covering Coppa and Toro contained an exclusion that was limited to "loss or damage caused directly or indirectly by 'fungus', wet rot, dry rot and bacteria" and did not mention viruses.

In spring 2020, the novel coronavirus that causes the COVID-19 respiratory illness (virus or COVID-19 virus) spread around the globe, eventually arriving in Massachusetts.[7] In order to slow the spread of the virus, State and local authorities began issuing "stay-at-home" orders and other restrictions on businesses and public activities. On March 15, 2020, four days after the World Health Organization announced that the COVID-19 outbreak had become a "pandemic," Governor Charles D. Baker issued an emergency order prohibiting in-person dining at all restaurants and bars. However, as "COVID-19 Essential Services," restaurants were exempt from the order shutting down all nonessential businesses, and were allowed, and even encouraged, to remain open to offer takeout and delivery services, provided they complied with social distancing requirements. Toro and Coppa complied with the order, resulting in a steep decline in their revenues from the loss of in-person dining services. Because of its location, Little Donkey's

[7] In ruling on the motion to dismiss, the judge noted that the complaint did not allege that the virus was physically present at the restaurants. The question whether the complaint contained such allegations would not affect the outcome of this appeal, but based on the other allegations of the complaint, it is reasonable to infer that the virus was present at some point in the air and on surfaces at the restaurants, or would have been had the restaurants not been closed to the public for in-person dining. As suggested at oral argument, an interpretation rejecting such an inference would simply result in an amendment of the complaint and a return of the issue to the court for resolution.

management determined that it was not feasible to remain open only for takeout and delivery, and therefore the restaurant suspended operations completely, although its kitchen was used to prepare meals for frontline workers. In June 2020, the stay-at-home orders were amended to allow limited in-person dining at reduced capacities. The restaurants were able to resume these operations, but continued to lose revenue from the restrictions.

Given these losses and expected continued losses, the restaurants filed a claim for lost business income with Strathmore. Strathmore denied the claims under both policies, citing the lack of any "physical loss of or damage to" the properties and the virus exclusion to Little Donkey's policy.

In June 2020, the restaurants brought a declaratory judgment action to determine the scope of their policies, asserting claims for breach of contract and under G. L. c. 93A and G. L. c. 176D for unfair and deceptive practices against Strathmore.[8] Little Donkey also brought a commercial negligence claim against Commercial for failing to procure a policy without a virus exclusion. Commercial answered the complaint and filed a motion for judgment on the pleadings under Mass. R. Civ. P. 12 (c). Strathmore filed a motion to dismiss for failure to state a claim under Mass. R. Civ. P. 12 (b) (6). Finding that

[8] The restaurants do not separately dispute the dismissal of their statutory claims on appeal.

there was no "direct physical loss or damage" resulting from the COVID-19 virus, a judge in the Superior Court granted Strathmore's motion. Because coverage would be denied with or without the virus exclusion, she also granted Commercial's motion dismissing the negligence claim related to Little Donkey's policy. The restaurants appealed, and this court transferred the case from the Appeals Court sua sponte.

2. Discussion. a. Standard of review. "We review the allowance of a motion to dismiss de novo." Meehan v. Medical Info. Tech., Inc., 488 Mass. 730, 732 (2021), quoting Magliacane v. Gardner, 483 Mass. 842, 848 (2020). A motion to dismiss will be granted unless the factual allegations in the complaint are "enough to raise a right to relief above the speculative level based on the assumption that all the allegations in the complaint are true (even if doubtful in fact)" (alterations omitted). Sudbury v. Massachusetts Bay Trans. Auth., 485 Mass. 774, 779 (2020), quoting Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). However, "[w]e do not regard as 'true' legal conclusions cast in the form of factual allegations." Sudbury, supra at 778-779, quoting Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 39 n.6 (2009). "A [defendant's] motion for judgment on the pleadings under Mass. R. Civ. P. 12 (c) is actually a motion to dismiss that argues that the complaint fails to state a claim upon which relief can be granted"

(quotation and alterations omitted). Mullins v. Corcoran, 488 Mass. 275, 281 (2021), quoting Jarosz, 436 Mass. at 529. Therefore, we review Commercial's motion under the same standard as Strathmore's.

b. The restaurants' insurance policies. The question whether the Strathmore policies covered the restaurants' claimed losses is a question of contractual interpretation. "Interpretation of language in an insurance contract is no different from the interpretation of any other contract" (quotation and alteration omitted). Metropolitan Life Ins. Co. v. Cotter, 464 Mass. 623, 634-635 (2013), quoting Metropolitan Prop. & Cas. Ins. Co. v. Morrison, 460 Mass. 352, 362 (2011). This requires the court to determine "the fair meaning of the language used, as applied to the subject matter." Gordon v. Safety Ins. Co., 417 Mass. 687, 689 (1994), quoting Manning v. Fireman's Fund Am. Ins. Cos., 397 Mass. 38, 40 (1986). The court must also "assume that every word in an insurance contract serves a purpose, and must be given meaning and effect whenever practicable" (citation and quotation omitted). Dorchester Mut. Ins. Co. v. Krussell, 485 Mass. 431, 437 (2020).

When a policy term is unambiguous, we "construe the words of the policy in their usual and ordinary sense." Citation Ins. Co. v. Gomez, 426 Mass. 379, 381 (1998), quoting Hakim v. Massachusetts Insurers' Insolvency Fund, 424 Mass. 275, 280

(1997). See Given v. Commerce Ins. Co., 440 Mass. 207, 209 (2003) (insurance contracts to be interpreted "in light of their plain meaning, giving full effect to the document as a whole" [citation omitted]). If at all unclear or in doubt, we inquire into "what an objectively reasonable insured, reading the relevant policy language, would expect to be covered." Dorchester Mut. Ins. Co., 485 Mass. at 437, quoting Metropolitan Prop. & Cas. Ins. Co., 460 Mass. at 362. "Any ambiguities in the language of an insurance contract . . . are interpreted against the insurer who used them and in favor of the insured" (citation omitted). Dorchester Mut. Ins. Co., supra.

"[A] term is ambiguous where it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one" (quotation omitted).[9] Dorchester Mut. Ins. Co., 485 Mass. at 437, quoting Citation

[9] The plaintiffs and amicus American Food Systems, Inc., contend that terms are strictly construed against the insurer if they are not defined, relying on Interstate Gourmet Coffee Roasters, Inc. v. Seaco Ins. Co., 59 Mass. App. Ct. 78, 84-85 (2003), citing Preferred Mut. Ins. Co. v. Gamache, 426 Mass. 93, 94 (1997). In that case, the Appeals Court had to construe a term that was both undefined and ambiguous, and therefore the distinction between the two was not relevant. See Interstate Gourmet Coffee Roasters, Inc., supra at 83-84. See also Preferred Mut. Ins. Co., supra ("ambiguities in a policy are to be strictly construed against an insurer" [emphasis added]). We clarify that a term is not ambiguous or construed against the insurer merely because it is not explicitly defined in an insurance policy. Undefined terms may still be unambiguous, just as a term may remain ambiguous despite the insurer's attempt to define it.

Ins. Co., 426 Mass. at 381. Ambiguity is not created by "the fact that the parties disagree as to its meaning," Dorchester Mut. Ins. Co., supra, or "the mere existence of multiple dictionary definitions of a word, . . . for most words have multiple definitions," Citation Ins. Co. supra.

With these principles in mind, we turn to the language of the policies themselves. The restaurants' insurance policies consist of a selection of standardized forms. The policies define "Covered Causes of Loss" as "Risks of Direct Physical Loss," subject to certain exclusions and limitations not relevant here. Although Strathmore's policies do not include the term,[10] this type of policy is somewhat inaccurately referred to as an "all-risk" property insurance policy, meaning the insured does not need to demonstrate the losses or damage stemmed from a particular risk, such as fire or flood. See Intermetal Mexicana, S.A. v. Insurance Co. of N. Am., 866 F.2d 71, 74 (3d Cir. 1989); Aetna Cas. & Sur. Co. v. Yates, 344 F.2d 939, 940 (5th Cir. 1965) (Friendly, J.) ("The description of the policy as 'All Risk' is rather a misnomer . . ."). However, the

[10] The plaintiffs allege that the policies were "marketed and sold" as all-risk policies. But the relevant question is what the terms of the policies themselves say. Even if we were to inquire into the expectations of the insured, the focus is on what an insured "reading the relevant policy language, would expect to be covered," not the insured's more general perceptions of the policy. Dorchester Mut. Ins. Co., 485 Mass. at 437.

burden remains on the insured to demonstrate that such loss or damage, within the meaning of the policy, actually occurred. Boazova v. Safe Ins. Co., 462 Mass. 346, 351 (2012).

The "Building and Personal Property Coverage Form" in both policies provides: "[Strathmore] will pay for direct physical loss of or damage to Covered Property at the [insured] premises . . . caused by or resulting from any Covered Cause of Loss" (emphasis added). "Covered Property" includes the "building or structure" identified in each policy and personal property "[l]ocated in or on the building described in the Declarations or in the open (or in a vehicle) within [one hundred] feet of the described premises," subject to certain exclusions.

Importantly, in the context of the restaurants' property coverage forms, "direct physical loss of or damage to Covered Property" characterizes what effects the covered causes must have on the property to trigger coverage, not the causes themselves.

The "Business Income (and Extra Expense) Coverage Form" in both policies states, "[Strathmore] 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 of or damage to property at [the insured premises]. . . . The loss or damage must be caused by or result from a Covered Cause of Loss"

(emphasis added). Likewise, the extra expense provision covers "necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss" (emphasis added).

Here, "direct physical loss of or damage to property" moves from effect to cause, but does not change in meaning. The covered losses are the actual loss of income and certain extra expenses incurred during a defined suspension period, provided the suspension was caused by the kind of loss or damage covered by the property coverage forms, which must in turn be caused by a nonexcluded risk.[11] These losses would normally not be recoverable under the property coverage forms because they are neither "direct" nor "physical," hence the need for separate coverage forms specifically addressing them. What is recoverable changes, but not the trigger for coverage.

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[11] While the term "direct physical loss of or damage to" should be construed consistently between the two forms, that does not mean that the business interruption coverage forms are subsidiary to or dependent upon the property coverage forms. An insured need not file a claim or be entitled to recover under a property policy to recover for business interruption. 5 J.E. Thomas, New Appleman on Insurance Law Library Edition § 46.03[5] (2021). In particular, we note that the restaurants' property coverage forms are limited to loss of or damage to "Covered Property," which is expressly defined by a detailed list of inclusions and exclusions, whereas the business interruption coverage forms only require loss of or damage to "property" at the insured premises.

Therefore, the question is whether there was any "direct physical loss of or damage to property" at the restaurants. We conclude that no reasonable interpretation of direct physical loss of or damage to property supports the plaintiffs' claims.

c. Direct physical loss of or damage to property. Such language, or similar language, is commonly used to define the scope of coverage under all-risk property policies, and therefore courts in both Massachusetts and other jurisdictions have frequently been called upon to resolve disputes over its meaning, both before and after the COVID-19 pandemic. See 10A S. Plitt, D. Maldonado, J.D. Rogers, & J.R. Plitt, Couch on Insurance 3d § 148:46 (rev. ed. 2016) (Couch on Insurance). In particular, the lower court relied on HRG Dev. Corp. v. Graphic Arts Mut. Ins. Co., 26 Mass. App. Ct. 374, 376 (1988), and cases following it. In that case, the Appeals Court concluded for a variety of reasons that an all-risk insurance policy did not cover the "loss" of certain equipment owned by the insured due to a title defect after the rightful owner reclaimed it. Id. at 375-376. In defining the scope of "physical loss or damage," the Appeals Court reasoned that the term could not "fairly . . . be construed to mean physical loss in the absence of physical damage." Id. at 377. See Pirie v. Federal Ins. Co., 45 Mass. App. Ct. 907, 908 (1998) (government order to abate existing lead in apartment not "physical loss"). Although we note that

the phrasing requires clarification, the principle is correctly identified.[12]

The plaintiffs argue that HRG Dev. Corp. cannot apply to their claims because the cause of the loss in that case was purely legal, as opposed to the virus, which is physical and has physical effects. Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/physical [https://perma.cc/4GUL-KCFT] (defining "physical" as "having material existence: perceptible especially through the senses and subject to the laws of nature" and "of or relating to material things"). See Matzner vs. Seaco Ins. Co., Mass. Super. Ct., No. CIV A. 96-0498B (Suffolk County Aug. 12, 1998) (holding blocked chimney filling apartment building with carbon monoxide was "direct physical loss of or damage to" property). However, as explained above, the question is not whether the virus is physical, but rather if it has direct physical effect on property that can be fairly characterized as "loss or damage." Therefore, the proper interpretation of the rule from HRG Dev. Corp. is that coverage was excluded not because the cause was purely legal, but rather because the effect -- loss of legal

[12] There can of course be "physical loss of" property without damage, especially personal property such as the equipment in HRG Dev. Corp., if it is stolen or otherwise disappears. Indeed, at a number of points, the Strathmore policy expressly includes "theft" and "disappearance" within "physical loss of or damage to" property.

ownership -- was not direct physical loss or damage, even if it indirectly resulted in loss of possession to the rival claimant or interruption to the insured's business.

We conclude that "direct physical loss of or damage to" property requires some "distinct, demonstrable, physical alteration of the property."[13] Couch on Insurance, supra at § 148.46. Every appellate court that has been asked to review COVID-19 insurance claims has agreed with this definition for this language or its equivalent. See Uncork & Create LLC v. Cincinnati Ins. Co., 27 F.4th 926, 930-932 (4th Cir. 2022); Terry Black's Barbecue Dallas, L.L.C. v. State Auto. Mut. Ins. Co., 22 F.4th 450, 456-458 (5th Cir. 2022); 10012 Holdings, Inc. v. Sentinel Ins. Co., 21 F.4th 216, 221-222 (2d Cir. 2021); Goodwill Indus. of Cent. Okla., Inc. v. Philadelphia Indem. Ins. Co., 21 F.4th 704, 710-712 (10th Cir. 2021); Sandy Point Dental, P.C. v. Cincinnati Ins. Co., 20 F.4th 327, 331-334 (7th Cir. 2021); Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am., 15 F.4th 885, 890-893 (9th Cir. 2021); Santo's Italian Café LLC v. Acuity Ins. Co., 15 F.4th 398, 401-406 (6th Cir. 2021); Gilreath Family & Cosmetic Dentistry, Inc. vs. Cincinnati Ins. Co., U.S. Ct. App., No. 21-11046 (11th Cir. Aug. 31, 2021); Oral Surgeons, P.C. v. Cincinnati Ins. Co., 2 F.4th 1141, 1143-1144 (8th Cir.

[13] It can also cover cases of theft, as explained in note 12, supra.

2021); Inns by the Sea v. California Mut. Ins. Co., 71 Cal. App. 5th 688, 698-699 (2021); Sweet Berry Café, Inc. v. Society Ins., Inc. 2022 IL App (2d) 210088, ¶ 39; Indiana Repertory Theatre v. Cincinnati Cas. Co., 180 N.E.3d 403, 408-409 (Ind. Ct. App. 2022); Gavrilides Mgt. Co. vs. Michigan Ins. Co., Mich. Ct. App., No. 354418 (Mich. Ct. App. Feb. 1, 2022); Sanzo Enters. LLC v. Erie Ins. Exch., 2021-Ohio-4268, ¶¶ 40-43 (Ct. App.).

In the case of the business interruption coverage forms, this interpretation is bolstered by the definition of "period of restoration." Rather than refer simply to the resumption of operations on the premises, the coverage forms expressly provide that coverage ends on "(1) [t]he date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) [t]he date when business is resumed at a new permanent location" (emphasis added). This clearly implies that the property has not experienced physical loss or damage in the first place unless there needs to be active repair or remediation measures to correct the claimed damage or the business must move to a new location.[14] See Sandy Point Dental, P.C., 20 F.4th at 333.

[14] The plaintiffs point out that coverage also ceases when a year has passed. However, this third alternative is better understood as an over-all cap on recoverable losses, where, for whatever reason, repairing or remediating the premises or finding replacement premises takes more than a year.

The allegations in the complaint do not support recovery under this definition. Although caused, in some sense, by the physical properties of the virus, the suspension of business at the restaurants was not in any way attributable to a direct physical effect on the plaintiffs' property that can be described as loss or damage. As demonstrated by the restaurants' continuing ability to provide takeout and other services, there were not physical effects on the property itself. It is only these effects that would trigger coverage under either the property or the business interruption coverage forms.

As the plaintiffs seem to accept, the COVID-19 orders standing alone cannot possibly constitute "direct physical loss of or damage to" property, for the same reason that loss of legal title or other government restrictions cannot themselves physically alter property. See HRG Dev. Corp., 26 Mass. App. Ct. at 377; Oral Surgeons, P.C., 2 F.4th at 1145, quoting Source Food Tech., Inc. v. United States Fid. & Guar. Co., 465 F.3d 834, 836 (8th Cir. 2006) (rejecting argument that "impairment of function and value of [property] caused by government regulation is a direct physical loss to insured property, because to hold otherwise would render the word physical meaningless" [quotations omitted]).

Even accepting the plaintiffs' premise that the suspension of their business was caused by the "presence" of the virus on surfaces and in the air at the restaurants (as opposed to the danger that the virus would be introduced to the restaurants or spread directly from person to person if indoor dining were allowed), mere "presence" does not amount to loss or damage to the property. Kim-Chee LLC v. Philadelphia Indem. Ins. Co., 535 F. Supp. 3d 152, 159 (W.D.N.Y. 2021), aff'd, U.S. Ct. App., No. 21-1082-cv (2d Cir. Jan. 28, 2022) (summarizing cases explaining that "[t]he presence of the COVID-19 virus in the air or on surfaces of a covered property does not qualify as damage to the property itself"). Evanescent presence of a harmful airborne substance that will quickly dissipate on its own, or surface-level contamination that can be removed by simple cleaning, does not physically alter or affect property. See Santo's Italian Café LLC, 15 F.4th at 403-404, citing Mastellone v. Lightning Rod Mut. Ins. Co., 175 Ohio App. 3d 23 (2008). While saturation, ingraining, or infiltration of a substance into the materials of a building or persistent pollution of a premises requiring active remediation efforts is sufficient to constitute "direct physical loss of or damage to property," evanescent presence is not. See Kim-Chee LLC, supra at 160-161. Cf. Gregory Packaging, Inc. vs. Travelers Prop. Cas. Co. of Am., U.S. Dist. Ct., No. 2:12-cv-04418 (D.N.J. Nov. 25, 2014)

(ammonia release requiring outside remediation company to reduce levels in building low enough for safe occupancy inflicted direct physical loss or damage); Western Fire Ins. Co. v. First Presbyterian Church, 165 Colo. 34, 36-40 (1968) (gasoline-infiltrated soil and vapors contaminated foundation, halls, and rooms); Farmers Ins. Co. of Ore. v. Trutanich, 123 Or. App. 6, 10-11 (1993) (persistent odor in residence from methamphetamine production constituted physical damage, and therefore cost of remediation was recoverable).

The plaintiffs object that this reading ignores the difference between "loss" and "damage." Because the coverage forms provide for "loss or damage," the plaintiffs claim that loss must have a different scope that does not rely on physical alteration of the property and can include broader concepts, such as loss of use or loss of function. However, any distinction between these two terms is not relevant in the context of their claims. As noted above, there may be a "loss of" property without damage if it is stolen. Santo's Italian Café LLC, 15 F.4th at 404 ("There is no need to read 'physical loss' to include a deprivation of some particular use of a property in order to give the phrase independent meaning. That possibility could occur whenever a policy holder is deprived of property without any damage to it, say a portable grill or a delivery truck stolen without a scratch") The plaintiffs'

interpretation ignores that the loss itself must be a "direct physical" loss, clearly requiring a direct, physical deprivation of possession. The plaintiffs were not deprived of possession of their property, and indeed continued to inhabit and use it for other purposes. Although they could not use it for in-person or indoor dining but rather for takeout services, "[w]ithout any physical alteration to accompany it, this partial loss of use does not amount to a 'direct physical loss.'" Sandy Point Dental P.C., 20 F.4th at 334.[15]

d. Virus exclusion. Given our determination that coverage did not attach in the first place, we need not reach the defendants' alternative arguments that other terms in the policies would exclude coverage. Santo's Italian Café LLC, 15 F.4th at 406 ("For now, the absence of initial coverage for this claim suffices to reject it"). However, we will briefly address

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[15] One case that the plaintiffs urge us to apply by analogy is Murray v. State Farm Fire & Cas. Co., 203 W. Va. 477 (1998). In that case, a man-made rock wall above the plaintiffs' house (but not on their property) began to crumble, dropping rocks onto nearby houses. Id. at 481. Although the plaintiffs' property itself was not damaged, the fire department ordered them to evacuate because further rockfall was likely. Id. Noting that no "rational persons would be content to reside" in the plaintiffs' home, the court held there was a "direct physical loss" of the property. Id. at 493. Even if we were to adopt this reasoning, it would not support the plaintiffs' claim. See Uncork & Create LLC, 27 F.4th at 932-933 (applying West Virginia law and rejecting application of Murray to similar claims). The risk to the home in Murray made it "unusable and uninhabitable," which, as already noted, was not true of the restaurants, according to the complaint. Murray, supra.

the virus exclusion to Little Donkey's policy, not for whether it would exclude coverage, but whether, as the plaintiffs claim, it creates a clear negative implication that policies that do not contain the exclusion should cover claims arising from the COVID-19 virus. We conclude that no such negative implication can or should be drawn. Indeed, we have emphasized the importance of not drawing negative implications. Cf. Halebian v. Berv, 457 Mass. 620, 628 (2010), quoting 2A N.J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 47.25, at 429 (7th ed. 2007) ("the maxim of negative implication -- that the express inclusion of one thing implies the exclusion of another -- 'requires great caution in its application'").

We rely instead on basic insurance law principles. "[A]bsence of an express exclusion does not operate to create coverage." Given, 440 Mass. at 212. Rather, "when an occurrence is clearly not included within the coverage afforded by the insuring clause, it need not also be specifically excluded." Inns by the Sea, 71 Cal. App. 5th at 709, quoting Glavinich v. Commonwealth Land Title Ins. Co. 163 Cal. App. 3d 263, 270 (1984).

With these principles in mind, we consider the policy requirements, the virus exclusion, and COVID-19. As explained supra, the language creating coverage, which requires "direct physical loss of or damage to property," plainly does not

encompass the COVID-19-related losses for which the plaintiffs seek coverage. That the Little Donkey policy contains an exclusion 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" cannot create coverage in Coppa and Toro's policy that does not otherwise exist under that policy's plain language. See Given, 440 Mass. at 212. Accordingly, the scope of that exclusion is irrelevant to coverage under Coppa and Toro's policy.

This interpretation of "direct physical loss of or damage to property" does not render the virus exclusion meaningless or surplusage in the Little Donkey policy. Most obviously, the exclusion would have independent significance where, for example, personal property, such as food, becomes physically contaminated or infected with a virus, requiring its destruction or some form of remediation. See Source Food Tech., Inc., 465 F.3d at 836-837 (discussing "mad cow" disease infection of insured beef); HoneyBaked Foods, Inc. v. Affiliated FM Ins. Co., 757 F. Supp. 2d 738, 741-745 (N.D. Ohio 2010) (listeria contamination of insured turkey and ham). As discussed above, the COVID-19 virus is different: the contamination is readily removeable, returning the property to its uncontaminated state and allowing its continued use. The other appellate courts that have considered the same exclusion in the context of COVID-19

claims agree, rejecting its applicability. See Kim-Chee LLC, U.S. Ct. App., No. 21-1082-cv (2d Cir.), supra; Inns by the Sea, 71 Cal. App. 5th at 709.[16]

In short, the exclusion in no way implies that we should broaden the scope of coverage.

e. Civil authority coverage. The restaurants' policies also provide additional "civil authority" coverage. This provides income and expense coverage "[w]hen a Covered Cause of Loss causes damage to property other than property at the described premises" and an "action of civil authority . . .

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[16] The statement from the Insurance Services Office (ISO) explaining the rationale behind the exclusion and relied on by the plaintiffs is not to the contrary. It states:

> "Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage" (emphasis added).

Indeed, the statement further explains:

> "While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent" (emphasis added).

In other words, the ISO accurately predicted that, if there were a pandemic, insureds would bring virus-related claims in cases where no property damage had occurred, resulting in litigation and the risk that at least some courts would improperly consider extending coverage to such claims.

prohibits access to the described premises" (emphasis added). However, coverage only applies where

> "(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
>
> "(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property."

The plaintiffs claim that this language covers their losses because the COVID-19 orders prohibited public access to their restaurants and were the result of damage to properties within one mile. Strathmore contests both of these points, but we only need to address the latter. For the same reasons that the presence of the COVID-19 virus at the restaurants themselves did not cause damage to property under the business interruption coverage forms, the virus did not cause "damage" to the properties within one mile of the restaurants. Sanzo Enters. LLC, 2021-Ohio-4268, ¶¶ 59-61. Furthermore, the term "loss" is absent, precluding any argument that coverage can be based on the loss of possession or use of the surrounding buildings. Therefore, the plaintiffs' claim based on the civil authority coverage was also correctly dismissed.

f. Claims against Commercial. We also affirm the dismissal of the claims against Commercial. Little Donkey

failed to recover from Strathmore because coverage did not attach in the first place, not because of the virus exclusion. Therefore, its negligence claim must be dismissed. Leavitt, 454 Mass. at 44-45.

3. Conclusion. We affirm the order granting Strathmore's motion to dismiss and Commercial's motion for judgment on the pleadings.

So ordered.