STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

SEA LAND AIR TRAVEL SERVICE, INC., d/b/a SEA LAND AIR TRAVEL, Individually and on behalf of all others similarly situated,

Plaintiff,

-vs-

AUTO-OWNERS INSURANCE COMPANY, a Michigan corporation and HOME-OWNERS INSURANCE COMPANY, a Michigan Corporation, an Illinois corporation,

Defendants.

Case No: 20-005872-CB
Hon. Brian R. Sullivan

AMENDED AS TO CASE CODE ONLY
ORDER GRANTING DEFENDANT, AUTO-OWNER'S AND HOME-OWNERS, MOTION FOR SUMMARY DISPOSITION

At a session of said Court, held in the City County Building, City of Detroit, County of Wayne, State of Michigan, on 4/1/2021

PRESENT: HONORABLE BRIAN R. SULLIVAN

Plaintiff Sea Land Air Travel Service, Inc. (Sea Land) filed suit against Auto-Owners Insurance Company and Home-Owners Insurance (Home-Owners) Company alleging it was entitled to business loss insurance benefits under an Auto-Owners and Home-Owners commercial property insurance policy. Sea Land contends the COVID-19 virus forced it to close its business and that loss of income was insured under the insurance policy.

Defendants moved for summary disposition on the complaint alone and asserted:

1. "Loss of business income" is payable only during the time the business lost income because the property was being restored due to physical damage or loss to it. Plaintiff did not allege the building was being restored due to physical damage or loss to the property in its complaint and none occurred. COVID does not qualify as physical damage or loss.

2. The policy excludes:
a. loss due to governmental action. Sea Land's loss of business occurred when it closed its office to live customers. The business or office closure was the result of an Executive order of the Governor, which is a governmental act. That order did not preclude Sea Land from conducting remote business.
b. loss due to "pollutants" and the COVID virus is a "contaminant" or "pollution";
c. loss of market and consequential damages, and Sea Land's claim of loss from closing its office to live customers was loss of market or consequential damages; and

3. Auto-Owners has no contract with Sea Land and is not a proper party to the suit.

Sea Land opposed the motion and contends the virus, and threat of the virus, rendered its workplace property "unsafe and uninhabitable." That is tangible (physical) damage to the property. Moreover, defendant issued an "all risk" policy and "physical damage" is not, and need not, be a condition to the point of uninhabitably or an unsafe workplace. There are numerous cases holding there can be direct physical loss without physical damage, structural damage to property or from a source unseen. The COVID danger satisfies the "physical damage" component as COVID is physical, and its presence, actual or potential, is material and real. The threat of COVID was also real as it rendered the property unsafe and uninhabitable. People were unwilling and were not allowed to interact with each other whether it was actually present or if it were only potentially present. Moreover, the observation of the governor that the pending, spreading danger of increased cases of COVID was justified and real. The safety of the

people as articulated in the action of the government satisfies the contractual requirements.

The policy exclusions do not require "physical damage" as a condition precedent to recovery under the policy language or case law. It requires "physical loss *or* damage" to property. Sea Land alleged it suffered a loss. Legally speaking the term "property" is not limited to a definition of a material item or thing in the world. It identifies the legal relations of persons as to those things.

Finally, there is no "virus" exclusion under the policy, even though such specific exclusions were known in the insurance industry and available on the market. It is not in this policy of insurance and cannot be read into it.

The court sympathizes with plaintiff's situation and the sacrifices plaintiff, and those in the same situation. They have been required to endure the shouldering of the burden of inhibiting the spread of the virus by a great sacrifice without a demonstration that the peril was at their doorstep. The hardship, work and sacrifice that accompany such burdens is unarticulated in the complaint and news but is commendable and honorable.

The court concludes:

1. The Home-Owners insurance policy provides Sea Land with business income coverage (p4 or policy). It further states that loss is compensable only for the inability of a business to function due to repair of the physical premises caused by direct physical damage or loss due to an insured cause. No repair was alleged. A loss from "suspension of operations caused by direct physical loss" was not factually alleged by the order to prevent the spread of the virus. The closing of Sea Land's office to live

customers to prevent or inhibit the spread of the virus does not constitute "direct physical loss of or damage to the property". That act does not meet the criteria of the contract for loss of business income. Summary disposition is granted on this ground.

2.a. Sea Land alleges the office closing was the result of an executive order of the Governor and the Van Buren County Health Department to inhibit the spread of this highly contagious virus. That order was not alleged to have precluded Sea Land from working remotely. Those orders are governmental acts, which are specifically excluded in the policy of insurance. Summary disposition is granted on this ground.

b. The court does not agree that the COVID virus is a "pollutant" as that term is defined in the policy. Defendant's motion on this ground is denied.

c. Loss of market and consequential damages are not available under the contract. Sea Land's claim is excluded under this exclusion of the policy.

3. There is not contract between Sea Land and Auto-Owners attached to the First Amended Complaint or Complaint. The complaint alleges Auto-Owners responded to Sea Land's claim and denied it (by letterhead). There is no assertion by plaintiff there is more than one policy of insurance. The policy provided to the court and identified in the complaint is one issued by Home-Owners to Sea Land. If Sea Land has a contract with Auto-Owners, it should have been attached or referenced in its complaint or submitted to the court in response to this motion. No Auto-Owners contract was provided. Defendant's motion for summary disposition as to Auto-Owners is granted for the reason there is no contract provided with the complaint as to Auto-Owners.

I STANDARD OF REVIEW

2. MCR 2.116 (C)(8).

A motion under 2.116(C)(8) tests the legal sufficiency of the complaint (pleadings alone). *Maiden v Rozwood,* 461 Mich 109, 119 (1999). All well pled allegations, as well as any reasonable inferences that may be drawn from those allegations, are accepted as true and are construed in a light most favorable to the non-moving party. See *Maiden,* 461 Mich at 119; *Wade v Department of Corrections,* 439 Mich 158 (1992); *Spiek v Dept of Transportation*, 456 Mich 331, 337 (1998); *Singerman v Municipal Services Bureau*, 455 Mich 135, 139 (1997).

A motion under (C)(8) should be granted only where the claims alleged are so "clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden,* 461 Mich at 119; *Wade,* 439 Mich at 163. A court considers only the pleadings when considering a (C)(8) motion. MCR 2.116(G)(5). The court can examine a contract in an action under contract. *Woody v Tamer*, 158 Mich App 764, 770 (1987). Conclusory allegations without supporting allegations of fact are insufficient to state a cause of action. *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272 (2003).

II CONTRACT LAW

The rules of construction for contracts are well developed. An insurance policy is a contract. The principles of construction that apply to contracts in general apply to insurance policies. *Rory v Continental Insurance Company*, 473 Mich 457, 461 (2005); *Meemic Ins, Co. v Fortson*, 506 Mich App 287, 296-297 (2020). The general rule of contracts is, "[a]ny clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy." *Fortson*, 506 Mich App at

297, quoting *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 568; (1999). .

The court determines what that agreement is and gives effect to the intent of the parties. The court is to enforce an unambiguous contract as it is written, unless a provision of the contact violates the law or public policy. *Rory*, 473 Mich at 491.

The interpretation of an insurance contract is a question of law. *Wilkie v Auto Owners Insurance Company*, 469 Mich 41 (2003); *Rory v Continental Insurance Company*, 473 Mich 457 (2005). The question of whether a contract (or a provision) is ambiguous, is a question of law for the court. See *Mayer v Auto Owners Insurance Company,* 127 Mich App 23 (1983). (Construction of a contract is a question of law for the court). *Fragner v American Community Mutual Insurance Company*, 199 Mich App 537 (1993); *Rory* v *Continental Insurance Company*, 473 Mich 457 (2005).

The primary function of the court is to give effect to the intent of the contract as discerned from the language of the contract. To accomplish this function, the contract is examined as a whole. *Auto Owners Insurance Company v Churchman*, 440 Mich 560 (1992). The court must look at the contract "as a whole and give meaning (consider) all the terms of the contract." *Fresard v Michigan Millers Mut Ins Co*., 414 Mich 686, 694 (1982); *Royal Prop Group, LLC v Prime Ins Syndacite, Inc*, 267 Mich App 708, 714 (2005).

The language used in an insurance contract is to be given its ordinary meaning, unless it is apparent from a reading of the entire instrument, that a different or special meaning is intended. *Sump v St. Paul Fire and Marine Insurance Company*, 21 Mich App 160 (1970). The court must determine what the agreement is and effectuate the intent of the parties. *Eghotz v Creech*, 365 Mich 527, 520 (1962); *Auto-Owners*

Insurance Co. v Churchman, 440 Mich 560, 567 (1992); *Wozniak v John Hancock Mutual Life Ins Co.,* 288 Mich 612, 615 (1939) states:

> An insurance policy is a contract and should be interpreted according to its plain meaning. The court is mindful of the rule of law that where the provisions of an insurance policy are uncertain or ambiguous, or the meaning is not clear, that those terms should be given such interpretation or construction as is most favorable to the insured. This rule does not mean, however, that the plain meaning of plain words should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefiting the insured.

Smith v Lumberman's Mutual Ins Co, 101 Mich App 78, 83 (1980) held, "[a] patently unreasonable interpretation of a contractual ambiguity will not be employed merely to allow the insured to recover his losses."

It is also a rule of law that "[a]ny clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy." Raska v Farm Bureau Mut Ins Co of Michigan, 412 Mich 355, 361-362, 314 NW2d 440 (1982). A contract is ambiguous if it's capable of two or more constructions both of which are reasonable. *Petovello v Murray*, 139 Mich 639 (1984).

The Court is not at liberty to rewrite the contract nor can it create an ambiguity where none exists. *Edgar's Warehouse, Inc. v United States Fidelity Guarantor Co.*, 375 Mich 598, 602, 134 NW2d 746 (1965). If the contract is not ambiguous the court must enforce it as written according to its plain meaning. *Clevenger v Allstate Insurance Company*, 443 Mich 646 (1993). In an instance where the contract is not ambiguous the court does not resort to extrinsic evidence to determine meaning. *Upjohn Company v New Hampshire Insurance Company*, 438 Mich 197 (1991).

If an insurance contract is deemed ambiguous and susceptible to two different

interpretations the one most favorable to the insured is to be adopted. *Woaniak, Id*. If a policy is found to be ambiguous, the court can determine the intent of the parties by resorting an examination of the extrinsic evidence such as custom and usage. *Michigan Millers Mutual Insurance Company v Bronze and Plating Company*, 197 Mich App 482 (1992). The most common of extrinsic aids to the construction of an insurance policy is custom and usage. *Allstate Insurance Company v Freeman*, 432 Mich 565 (1989).

An insurance company is free to limit and define the scope of coverage as long as the language is not ambiguous and such provisions do not contravene public policy. *Heniser v Frankenmuth Mutual Insurance Company*, 449 Mich 155 (1995). Definitions of an insurance policy control the contract. *Century Surety Company v Charron*, 230 Mich App 79 (1998). If a term is not defined in the policy of insurance the courts supply the commonly understood meaning of the word. *Citizens Insurance Company v Pro Seal Service Group, Inc.*, 477 Mich 75 (2007). The use of undefined terms in an insurance policy does not render the contract ambiguous.

Exclusionary clauses in insurance policies are strictly construed in favor of the insured. *Shelby Mut Ins Co v United States Fire Ins Co.*, 12 Mich App 145, 149 (1968). However, coverage under a policy is lost if any exclusion within the policy applies to an insured's particular claims. *Fresard*, 414 Mich. at 695. Clear and specific exclusions in a policy must be given legal effect. An insurance company is not to be held legally liable for a risk it did not assume. *Kaczmarck v La Perriere*, 337 Mich 500, 506 (1953); *Hunt v Drielick*, 496 Mich 366 (2014); *Henderson v State Farm Fire & Casualty Company*, 460 Mich 348 (1999).

If the contract of insurance is unambiguous it must be enforced as written. If an

exclusion in a policy applies, then coverage. *Vanguard Insurance Company v Clark*, 438 Mich 463 (1991), overruled in part othr grds, *Wilkie v Auto Insurance*, 469 Mich 41 (2013). Insurance exclusions are construed strictly and narrowly. *Auto Owners Insurance Company v Churchman*, 440 Mich 560 (1992).

. The insurer has the burden of proving an exclusion applies. *Roddis Lumber & Veneer Company v American Alliance Insurance Company*, 330 Mich 81 (1951).

When the dispute in the case concerns whether or not the alleged occurrence is within the scope of the insurance contract, that is one of coverage, that question is one of law for the court to decide. *Dembinski v Aetna Casualty & Insurance Company*, 76 Mich App 181 (1977).

The term "arising out of" is a broad term. It encompasses concurrent causation. See *United States Fidelity and Guaranty Company v Citizens Insurance Company of America*, 201 Mich App 491 (1993); *Allstate Insurance Company v Freeman*, 432 Mich 656 (1989).

III FACTS

The essential facts are not in dispute. They are derived from the complaint and contract, viewed in a light most favorable to plaintiff Sea Land:

1. Sea Land is a family owned business in Paw Paw, MI.

2. Sea Land purchased an all risk policy (No 45-153-225-00) from Home-Owners Insurance Co.

3. The policy includes business interruption insurance.

4. Sea Land purchased business interruption insurance to protect its business in "unexpected situations". First Amended Complaint (filed 22 June 2020) paragraph 2.

5. Sea Land asserts the COVID virus is a physical substance transmitted via droplets. (Paragraph 4).

6. In March, 2020 the Governor issued an Executive Order prohibiting the operation of a business to suppress the spread of COVID-19. Remote work was encouraged. Van Buren County (where Paw Paw is located) is in region 3 of the order.

7. A state of emergency was declared in Michigan by the Governor and on March 17, 2020. Van Buren County followed suit in implementing that order.

8. On March 23, 2020 the Governor issued a stay at home order and precluded the operation "of a business".

9. Sea Land complied with that order and closed its business doors to live customer business at its location. It suffered a loss of business revenue as a result of that business closure.

10. Sea Land submitted a claim to its insurer, Auto-Owners. Auto-Owners denied the claim on April 3, 2020.

11. Sea Land claims an "actual loss of Business Interruption" as the business was necessarily suspended by "risks of direct physical loss". (Paragraph 17).

12. Sea Land filed a complaint, then a First Amended Complaint, as a class action.

13. Defendants filed this motion for summary disposition in response to the first amended complaint, the final supplement brief filed in March 2021.

IV Suit and Motion

The class action suit Sea Land filed alleged defendants Home-Owners and/or Auto-Owners issued a commercial, all-risk, general liability property policy which provided business interruption insurance. Sea Land's business was interrupted when it, like other non-essential businesses, was ordered to close its business operation. The order was issued to impair the spread of COVID.

Sea Land alleges the policy it bought from defendant covers this loss. It is not excluded by the policy exclusions. Sea Land alleges it is entitled to benefits, loss of business income under business interruption in the policy due to the COVID closure.

Sea Land alleged three counts in its First Amended Complaint: 1. Declaratory Relief; 2. Breach of Contract; and 3. Violation of the Trade Protection Act.

V Pertinent Policy Language

Sea Land had a contract with Home-Owners under policy No 45-153-2225-00, BUSINESSOWNERS SPECIAL PROPERTY COVERAGE FORM (BP 00 02 01 87) (Policy). It states:

> **A. COVERAGE**
>
> 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 any Covered Cause of Loss. (Policy p1).
>
> **3. Covered Causes of Loss**
>
> RISKS OF DIRECT PHYSICAL LOSS unless the loss is**:**
>
> a. Excluded in Section B., Exclusions; or
> b. Limited in Paragraph A.4., Limitations;
> that follow. (Policy p2)

The risk is stated as a risk of *physica*l loss.(Emphasis supplied). It is directed to property, but that is not only a reference to a material item. The contract specifies what is not included.

> **B. EXCLUSIONS**
>
> **1.** We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss (p5-6).
>
> **2.** We will not pay for loss or damage caused by or resulting from any of the following:
>
> **b. Consequential Losses**: Delay, loss of use or loss of market. (p 7).

k. Pollution: We will not pay for loss or damage caused by or resulting from the release, discharge or dispersal of "pollutants" unless the release, discharge or dispersal is itself caused by any of the "specified causes of loss." But if loss or damage by the "specified causes of loss" results, we will pay for the resulting damage caused by the "specified causes of loss."

3. We will not pay for loss or damage caused by or resulting from any of the following. But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage.

b. Acts or Decisions: Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body. (Policy p8).

4. Business Income and Extra Expense Exclusions. We will not pay for:

b. Any other consequential loss. (Policy p 8).

8. Resumption of Operations

We will reduce the amount of your:
(a) Business Income loss, other than Extra Expense, to the extent you can resume your "operations", in whole or in part, by using damaged or undamaged property (including merchandise or stock) at the described premises or elsewhere.

H. PROPERTY DEFINITIONS

1. **"Operations"** means your business activities occurring at the described premises.

"Period of Restoration" means the period of time that:
a. Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and
b. Ends on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality.

"Period of restoration" does not include any increased period required due to the enforcement of any law that:

(1) Regulates the construction, use or repair, or requires the tearing down of any property; or
(2) Regulates the prevention, control, repair, clean-up or restoration of environmental damage.

The expiration date of this policy will not cut short the "period of restoration." (Policy p 17,18).

3. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed. (Policy p18).

An endorsement to the Special Property Coverage Form, called "BUSINESS INCOME AND EXTRA EXPENSE" (No. 54277), states:

1. Under A. COVERAGE, 5. Additional Coverages, f. Business Income and g. Extra Expenses are deleted and replaced by the following:

f. Business Income

Subject to the Limit of Insurance provisions of this endorsement, 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 of or damage to property at the described premises, including personal property in the open (or in a vehicle) within the business shown in the Declarations under BUSINESS PERSONAL PROPERY – EXPANDED COVERAGE, caused by or resulting from any Covered Cause of Loss.

Business Income means the:

(1) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and

(2) Continuing normal operating expenses incurred, including payroll.

g. Extra Expense. Subject to the limit of Insurance provisions of this endorsement, we will pay necessary Extra 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 at the described premises, including personal property in the open (or in a vehicle) within the distance shown in the Declarations under BUSINESS PERSONAL PROOPERTY-EXPANDED CONVERAGE, caused by or resulting from a Covered Cause of Loss. (Endorsement, p 1).

E. Property Loss Conditions

8. Resumption of Operations

We will reduce the amount of your:
(a)Business Income loss, other than Extra Expense, to the extent you can resume your "operations", in whole or in part, by using damaged or undamaged property (including merchandise or stock) at the described premises or elsewhere.

(b)Extra Expense loss to the extent you can return "operations" to normal and discontinue such Extra Expense. (Policy p 12).

f. contains Business Income defined as:
We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations: during the "period of operations." The suspension must be caused by direct physical loss of or damage to property at the described premises…caused by or resulting from any Covered Cause of Loss."

4. "Period of Restoration" is defined as that from the date of direct physical loss or damage resulting from any "Covered Cause of Loss…" and ends on the date the premises are "repaired, rebuilt or replaced…"

VI DISCUSSION

Plaintiff seeks to invoke the policy to compensate it for its loss of business income due to the closure of its business office by the Governor to inhibit the spread of COVID. Plaintiff filed suit to recover for that insured benefit after its claim to the defendant for payment was denied.

Defendant asserts that First Amended Complaint fails to state a cause of action for the reason the policy does not provide for loss of income as such; that the complaint does not allege physical damage or loss to property, a condition precedent to the recovery of business income under the policy, and neither COVID nor the government order shutting down Sea Land's location of business is a risk assumed or insured under the policy.

Business interruption or income applies only to a loss of business incurred while the premises are being repaired or remedied from an insured loss the policy covered. Neither COVID nor government action is such an insured loss as both are excluded under the insurance policy, a property coverage policy. The policy pays for damage or physical loss to buildings, personal property etc., of the business, as specified as a loss in the contract. "Business Income" is a defined concept in the policy.

1. Business income loss and direct physical loss.

A. Policy covered loss. The insurance policy covers direct physical loss which is caused by or results from any covered loss under the policy. The loss plaintiff seeks is the loss of business income under Business Interruption due to the closing of the business and the virus. The policy states:

5. Additional Coverages.

f. Business Income

> We will pay for the actual loss of Business Income you sustained 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 described premises, including personal property in the open (or in a vehicle) within 100 feet, caused by or resulting from any Covered Cause of Loss.
>
> We will only pay for loss of Business Income that occurs within 12 consecutive months after the date of direct physical loss or damage. This Additional Coverage is not subject to the Limits of Insurance.
>
> Business Income means the:
>
> (1) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
>
> (2) Continuing normal operating expenses incurred, including payroll. (Policy p4).

The Home-Owners insurance policy provides Sea Land with business income coverage (p4, policy). The definition of Business Interruption in the policy is the loss sustained "due to the necessary suspension of your "operations" during the 'period of restorations.' The suspension [of operations] must be caused by direct physical loss or damage to property… caused by or resulting from any Covered Loss." (5f p4).

"Operations" means business activities occurring at the described premises. H.1. Property Definitions, p 17.

The language of the policy clearly states the criteria for payment:

a. such income is payable only for the actual loss sustained;

b. the loss is due to suspension of business operation during the time "of restoration", not just a loss of income;

c. the suspension of the operations "must be caused by direct physical loss of or damage to property";

d. which must be caused by, or resulting from, a covered loss.

Sea Land correctly asserts the first requirement, a "suspension of operations" was met when it closed its doors of business. The operations of the business were suspended.

The next contractual criteria, the suspension of business activities, must be caused by *direct physical loss of or damage* to property at the described premises. (Emphasis supplied). In this case, plaintiff asserts the presence of the virus meets that criteria that the suspension was due to "direct physical loss or damage to the property" by the potential presence of the virus. There is no allegation it was found on the premises. The complaint alleges suspension from "direct physical loss" resulting from a "covered loss", the government order.

The order by the governor to close the doors is not such a "direct, physical loss or damage to the property." In short, the court concludes there is no direct physical loss alleged in the Complaint or First Amended Complaint (Complaint) such as a fire, a flood, a truck hitting the building, or any other such act of *physical loss or damage* which would require repair that interrupted or loss of business income during a period of suspension while that damage or loss was being repaired, i.e. (but not only) damage to the structure or property.

What is essentially alleged is that a determination was made that the spread of the virus was to be addressed by "a stay at home order". That is not physical loss or damage as those terms are normally defined, used and understood. The contract insures and pays business interruption to the insured when the property needs repair, restoration or refurbishing to correct a loss or damage to it and business cannot function in such a setting. The need for the correction fulfills the condition precedent to pay for that interruption of the business activities that cannot be performed during that time of correction to the property.

The term "physical loss" is not a term of art and does not have a special, technical definition in the policy. Physical loss means just what it says, some physical damage or loss, i.e. a broken window, burned premises, water damage, etc. Plaintiff's contention that the requirement is fulfilled by the order to close its doors to prevent the potential introduction of the virus at its location is not physical damage or loss.

Plaintiff has not alleged any facts supporting a physical loss or damage has occurred to support the invocation of business interruption damages. The loss of business or lost profits or business interruption for any reason are not insured risks

under the policy. Loss of business income is payable only in connection with suspension of the operations due to the property being repaired due to direct physical damage or loss to the property insured. Moreover, there was no repair being made.

Plaintiff does not allege the actual presence of COVID at its location as the reason for the issuance of the government order and no such allegation was made as to Sea Land's place of business. Nor is there any allegation it was medically required by the County Health Department to close its doors for that reason.

Plaintiff states the potential presence of the virus and prevention or impairment of its being further spread was the reason for by the order. That is true. However, such an assertion does not trigger the policy and does not implicate business interruption or loss of business income benefits under the policy. They are implicated only in connection with physical loss or damage, and that component, necessary to activate that part of the policy, is missing.

B. Virus is not a physical loss. Defendant argues that "physical" loss must be more than the presence of a contaminant. There is nothing to suggest the presence or absence of the virus at any of the locations. Contaminants are dangerous and deadly. However, they are not a "physical loss". See *Universal Image Products v Chubb Ins Co.*, 703 F Supp 2d 705,709 (ED Mich, 2010).

Unlike the unpublished case of *Torres Hillsdale Country Cheese v Auto-Owners, Inc.* (unpublished no. 308824), where there was a tangible loss of product, cheese, there is no such tangible or physical loss in this case. The allegations that the ability to book trips was compromised or eliminated by the closing of the doors of the business and an ensuing concomitant loss of customers is true. However, that is not a physical

loss and the loss alleged is specifically excluded under the policy.

Sea Land purchased loss of business income for a reasonable time, due to, and during, the restoration or repair or refurbishing of the property or premises as a result of direct physical damage or loss. COVID precautions do not qualify as a direct, physical damage or loss as that phrase is normally defined and used in the contract. COVID was not asserted to be the direct cause of the business closure. The cause was an order of the governor and the county of Van Buren, acts which under the policy do qualify as a direct, physical cause. Moreover, there was no period of restoration or repair or refurbishing for which money for business interruption needs to be paid to compensate the business for the loss of income due to suspension of operations due to restoration or repair of the property. That is, defendant will pay plaintiff money for lost income while the premises are being repaired due to physical damage

The court concludes that the policy requires direct "physical loss or damage" be pled as a condition precedent to pay loss of business income. The plaintiff has not pleaded any physical loss or damage. The allegation of the presence of COVID, actual or potential, is not sufficient to qualify as a direct physical loss or damage as required under the policy. Summary disposition on this ground is granted.

2. Exclusions.

The general rule is that endorsements of a policy of insurance controls over the general policy and if there is a conflict between the two, the endorsement is given effect. *Basic v Citizens Ins. Co of the Midwest*, 290 Mich App 19, 26 (2010). Specific provisions of a contract (including an insurance contract) override general provisions. *Royal Property*, 267 Mich App at 719. Clear exclusionary clauses in a policy must be

given effect as an insurance company cannot be liable for risks it did not assume. *Hayley v Allstate Ins Co.*, 262 Mich App 571, 574 (1998). If an exclusion applies, coverage is lost. *Hayley, Id.*

The policy lists the following exclusions in the policy:

B. EXCLUSIONS

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss (p5-6).

2. We will not pay for loss or damage caused by or resulting from any of the following:

3. We will not pay for loss or damage caused by or resulting from any of the following. But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage.

b. Acts or Decisions: Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body. (Policy p8).

A. Government actions. The policy has a specific exclusion which states any loss which results from an "acts or decisions" of a "governmental body" is excluded from coverage under the policy. (See Special Property Coverage, Policy p8).

In the complaint Sea Land alleges the government, by the order of the governor, closed the doors to the business. Nothing in that, or any other order, prohibits remote work. There are no allegations in the complaint that the work could not be done elsewhere or under different conditions or remotely (as the contract notes). The governmental order inhibited the personal interactions, but not all interactions such as on the internet, telephone, computer etc. The order to close the business was the reason the plaintiff closed its office doors. That order was an act of a governmental body, the executive of the state of Michigan. Damages resulting from a decision of a

governmental body are specifically excluded under the policy. Defendant did not undertake to insure that risk. Plaintiff and defendant did not agree that risk would be insured and did agree it was excluded from coverage. Defendant's motion for summary disposition on this ground is granted.

B. Virus as "Pollutant." Defendant next asserts the pollution exclusion in the policy serves as a bar to plaintiff's recovery. Defendant asserts the virus is a "contaminant" and that the term "contaminant" is contained in the definition of the term "pollutant" in the policy:

> **B. EXCLUSIONS**
>
> **1.** We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss (p5-6).
>
> **2.** We will not pay for loss or damage caused by or resulting from any of the following:
>
> **k. Pollution:** We will not pay for loss or damage caused by or resulting from the release, discharge or dispersal of "pollutants" unless the release, discharge or dispersal is itself caused by any of the "specified causes of loss." But if loss or damage by the "specified causes of loss" results, we will pay for the resulting damage caused by the "specified causes of loss."
>
> **3.** We will not pay for loss or damage caused by or resulting from any of the following. But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage.
>
> **3."Pollutants"** means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

The term "contaminant" in the common usage means "to make unsuitable or unpure by contact or mixture". Random House Dictionary 2 Ed. Unabridged.

In this context, pollution, the court concludes it is a stretch to consider a spreading

virus to be within the pollutant exclusion. Defendant's argument was issued as a response to the plaintiff's assertion that a direct physical loss is not required to trigger coverage for business interruption insurance. But that argument has been rejected by this court. A 'virus' is not a pollutant under 3. The court does not agree the virus is within the contractual term "pollutants". Defendants motion for summary disposition ion this ground is denied.

C. Loss of Market and Consequential Damages. The contract specifically excludes loss from:

B. EXCLUSIONS

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss (p5-6).

2. We will not pay for loss or damage caused by or resulting from any of the following:

b. Consequential Losses: Delay, loss of use or loss of market. (p 7).

4. Business Income and Extra Expense Exclusions. We will not pay for:

b. Any other consequential loss. (Policy p 8).

Plaintiff has not alleged it suffered any physical loss to the property which caused it to lose business, such as a fire to the premises. Plaintiff has alleged it had a demonstrable business loss from closing its doors. That loss, to the extent it is a market loss or consequential loss, is excluded from the policy.

The order of the government was to close business doors, to normal economic, walk in or appointment business customers at the physical location to inhibit the spread of COVID. That order permitted and encouraged the continuation of business by remote means, notably electronic mediums. The invocation of this procedure limited business

state wide to plaintiff and many other businesses and was devastating to many businesses That order is not an insured act, occurrence or event under the policy which amounts to a physical act which needed correction and for which defendant is obligated to compensate plaintiff for business loss while that property damage is being repaired.

The plaintiff did not buy, and the defendant did not sell, insurance for just business loss.

. The agreement does not require defendant to pay plaintiff because its business lost money, or because it lost money because an act of the government caused it to lose money by shutting its doors to walk in business customers. Summary disposition is granted to defendant on this ground.

3. Auto-Owners not a party to any contract with Sea Land. MCR 2.113(C)(1) requires a contract or be attached to the complaint or referenced by number, execution date, amount of the policy, premium paid, the interest of the insured, the loss and the property or risk insured. *Star Steel Supply CO. v United States Fidelity & Guar Co.*, 186 Mich App 475 (1990). That was not done. There is no prohibition against alternate pleading, especially where the facts are uncertain or unknown. However, the existence of a contract, especially an insurance contract is easily ascertainable. The plaintiff's footnote sufficiently explains the initial problem but does not serve as a sufficient basis to defiant summary disposition. Summary disposition is granted to Auto-Owners for the reason it has not contract with Sea Land.

CONCLUSION

Defendants motion for summary disposition is granted for the reason: 1. plaintiff is not entitled to loss of business income under the allegations made in its First Amended Complaint. Plaintiff has not sufficiently alleged it suffered a loss of business income due to the necessary suspension of its operations during a period of restoration to the property. Plaintiff has failed to allege its suspension of operations was caused by direct, physical loss or damage to the property at Sea Land's location.

2.a. Defendant is not required to pay business income to plaintiff under the contract for its business interruption or loss of business income because it ceased live business activities pursuant to a governmental order to close its business doors to live customers to inhibit the spread of the virus. That order to close operations, by a governmental body, is excluded from coverage under the plain language of the policy.

b. Market loss, even extreme conditions, and consequential damages are also specifically excluded in the policy.

3. Auto-Owners has not been properly identified as a party to the contract Sea Land has on its business. And,

IT IS SO ORDERED.

/s/ Brian R. Sullivan 4/1/2021
BRIAN R. SULLIVAN
Circuit Court Judge
Nunc pro tunc from 4-9 to 4-1, 2021 case code changed from CZ to CB only

ISSUED: 4/1/2021