United States Court of Appeals
For the First Circuit

No. 21-1307

AMERICAN FOOD SYSTEMS, INC.; OLD ANDOVER RESTAURANT, INC., d/b/a Grassfield's Food & Spirit; OLD WALTHAM RESTAURANT, INC., d/b/a Grassfield's Food & Spirit; OLD ARLINGTON RESTAURANT, INC., d/b/a Jimmy's Steer House; OLD SAUGUS RESTAURANT, INC., d/b/a Jimmy's Steer House; OLD SHREWSBURY RESTAURANT, INC., d/b/a Jimmy's Tavern & Grill; OLD LEXINGTON RESTAURANT, INC., d/b/a Mario's Italian Restaurant,

Plaintiffs, Appellants,

v.

FIREMAN'S FUND INSURANCE COMPANY; ALLIANZ GLOBAL RISKS UNITED STATES INSURANCE COMPANY,

Defendants, Appellees.

Before

Barron, Chief Judge,
Lynch and Thompson, Circuit Judges.

JUDGMENT

Entered: June 3, 2022

The plaintiffs, who own and operate seven restaurants in eastern and central Massachusetts, appeal from the dismissal by the United States District Court for the District of Massachusetts, pursuant to Federal Rule of Civil Procedure 12(b)(6), of their complaint against their property insurer and its parent company. The plaintiffs' complaint seeks, under Massachusetts law, coverage based on their insurance policy for losses that they claim to have suffered during the COVID-19 pandemic. We affirm based on the reasoning in the recent decision of the Supreme Judicial Court of Massachusetts ("SJC") in Verveine Corp. v. Strathmore Insurance Co., 184 N.E.3d 1266 (Mass. 2022).

There, the SJC held that, as a matter of Massachusetts law, a complaint did not allege that SARS-CoV-2, the virus that causes COVID-19, caused "direct physical loss of or damage to property" within the meaning of the coverage provisions of the insurance policies there at issue because "[e]vanescent presence of a harmful airborne substance that will quickly dissipate on its

own, or surface-level contamination [from that substance] that can be removed by simple cleaning, does not physically alter or affect property," id. at 1276. For the reasons stated in Legal Sea Foods v. Strathmore Insurance Co., No. 21-1202 (1st Cir. June 3, 2022) and SAS International v. General Star Indemnity Co., No. 21-1307 (1st Cir. June 3, 2022), Verveine controls this case, as here, too, the plaintiffs do not dispute that they seek coverage based on a policy that requires them to show "direct physical loss of or damage to property" for the types of coverage that they contend apply.[1] We also note that the plaintiffs have not submitted any Rule 28(j) letter following Verveine addressing its bearing on their case.

True, the plaintiffs argue in their briefing to us -- which preceded the SJC's decision in Verveine -- that they have plausibly alleged the actual presence of the virus "during all 'relevant times,'" and that the virus "permeates the insured property and premises." But, their complaint does not allege either that the virus has more than mere "evanescent presence," or that, insofar as it results in surface level contamination, such contamination is not susceptible of being redressed through "simple cleaning." Verveine, 184 N.E.3d at 1276. The plaintiffs do argue that their complaint alleges that such "simple cleaning" will not prevent the virus from permeating their facilities insofar as it is populated, given that the virus is transmissible from person to person. But, we do not understand Verveine to permit that quality of the virus to provide a basis for concluding that it causes "direct physical loss of or damage to property," absent some independent allegation that the nature of the virus is such that, when present, it has more than "evanescent presence" or that it contaminates surfaces in a manner that precludes that contamination from being removed by "simple cleaning."[2]

The plaintiffs also claim that the District Court erred by dismissing their claim under Massachusetts General Laws chapter 93A. But, "[w]hen coverage has been correctly denied, as

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[1] The plaintiffs seek compensation under the following types of coverage in the Policy:

- "Business Income and Extra Expense Coverage," under which the insurer "will pay for the actual loss of business income and necessary extra expense you sustain due to the necessary suspension of your operations . . . arising from direct physical loss or damage to property at a location, or within 1,000 feet of such location, caused by or resulting from a covered cause of loss," where a "covered cause of loss" is "risks of direct physical loss or damage" not otherwise "excluded or limited";
- "Delayed Occupancy Coverage," under which the insurer will provide compensation in similar circumstances that likewise require a "delay in starting operations . . . arising from direct physical loss of or damage to property at a location caused by or resulting from a covered cause of loss";
- "Dependent Property Coverage," which applies to "suspension[s]" that are "due to direct physical loss or damage at the location of a dependent property"; and
- "Civil Authority Coverage," which applies when "action of civil authority . . . prohibits access to a location," and that "prohibition of access . . . [a]rise[s] from direct physical loss or damage to property other than at such location; and [is] caused by or result[s] from a covered cause of loss."

[2] We also note that the plaintiffs have not pointed to any allegations that would lead us to conclude that the plaintiffs, unlike the plaintiffs in Verveine, have suffered more than a "partial loss of use" of their property, see id. at 1276-77.

in this case, no violation of the Massachusetts statutes proscribing unfair or deceptive trade practices may be found." Transamerica Ins. Co. v. KMS Patriots, L.P., 752 N.E.2d 777, 783 (Mass. App. Ct. 2001); see also Aquino v. United Prop. & Cas. Co., 143 N.E.3d 379, 393 (Mass. 2020) ("[A]n insurer which in good faith denies a claim of coverage on the basis of a plausible interpretation of its insurance policy cannot ordinarily be said to have committed a violation of G.L. c. 93A." (cleaned up) (quoting Lumbermens Mut. Cas. Co. v. Offices Unlimited, Inc., 645 N.E.2d 1165, 1169 (Mass. 1995))).

Accordingly, the judgment of the District Court is **affirmed**. The parties shall bear their own costs.

By the Court:

Maria R. Hamilton, Clerk

cc:
Allan Kanner
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Angelo I. Amador
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