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Transcript of Hearing on Motions

Date: July 2, 2021

Case: Crescent Hotels & Resorts, LLC, et al. -v- Zurich American Insurance Co., et al.

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V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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CRESCENT HOTELS & RESORTS, LLC,

et al.,

Plaintiff,

v.

CASE NO. 2021 02974

ZURICH AMERICAN INSURANCE CO.,

and INTERSTATE FIRE &

CASUALTY, CO.,

Defendants.

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Hearing on Motions

BEFORE THE HONORABLE MICHAEL F. DEVINE, Judge

Conducted Virtually

Friday, July 2, 2021

12:20 p.m.

Job No.: 384291

Pages: 1 - 91

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A P P E A R A N C E S

ON BEHALF OF THE PLAINTIFFS:

ARDEN B. LEVY, ESQ.

ARDEN LEVY LAW, PLLC

2121 Eisenhower Avenue, Suite 200

Alexandria, Virginia 22314

(703) 519-6800

MICHAEL S. GEHRT, ESQ. (Pro Hac Vice)

PASICH LLP

1230 Rosecrans Avenue, Suite 690

Manhattan Beach, California 90266

(424) 313-7860

PETER HALPRIN (Pro Hac Vice)

PASICH LLP

757 Third Avenue, 20th Floor

New York, New York 10017

(212) 686-5000

1 A P P E A R A N C E S (Continued)

2 ON BEHALF OF THE PLAINTIFFS:

3 NATHAN M. DAVIS, ESQ. (Pro Hac Vice)

4 PASICH LLP

5 10880 Wilshire Boulevard, Suite 2000

6 Los Angeles, California 90024

7 (424) 313-7860

8

9 ON BEHALF OF THE DEFENDANTS:

10 DAVID J. GOGAL, ESQ.

11 TIMOTHY C. BENJAMIN, ESQ.

12 BLANKINGSHIP & KEITH, P.C.

13 4020 University Drive, Suite 300

14 Fairfax, Virginia 22030

15 (703) 691-1235

16

17 PHILIP SILVERBERG, ESQ. (Pro Hac Vice)

18 HILARY HENKIND, ESQ. (Pro Hac Vice)

19 MOUND COTTON WOLLAN & GREENGRASS, LLP

20 One New York Plaza

21 New York, New York 10004

22 (212) 804-4257

1 A P P E A R A N C E S (Continued)

2 ON BEHALF OF THE DEFENDANTS:

3 BRIAN J. YOUNG, ESQ.

4 DLA PIPER, LLP

5 500 8th Street, Northwest

6 Washington, D.C. 20004

7 (202) 799-4523

8

9 BRETT INGERMAN, ESQ.

10 DLA PIPER, LLP

11 6225 Smith Avenue

12 Baltimore, Maryland 21209

13 (410) 580-3000

14

15 ALSO PRESENT:

16 William Flinter (intern/observer)

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E X H I B I T S

(None.)

1 P R O C E E D I N G S

2 THE COURT: Let me start by swearing our
3 court reporter.

4 (The court reporter was duly sworn.)

5 THE COURT: All right. I have got a note
6 here. Mr. Levy, can't not hear. Let's see. Oh,
7 Ms. Levy. Well, Ms. Levy, we want you to hear
8 everything that's going on.

9 Ms. Levy, can you hear us now? Doesn't
10 look like it.

11 MS. LEVY: I can hear now.

12 THE COURT: Okay. Excellent. All right.
13 Very good.

14 MS. LEVY: I really --

15 THE COURT: All right. We are here in
16 the case of Crescent Hotels and Resorts, LLC,
17 et al., against Zurich American Insurance, et al.
18 It is Civil Case No. 2021-2974.

19 Who is going to be arguing this morning
20 for plaintiffs?

21 MR. GEHRT: That's me, Your Honor.

22 Michael Gehrt on behalf of Plaintiffs.

1 THE COURT: All right. And I have got
2 Ms. Levy is here for Plaintiffs. Mr. Davis is
3 here. I have got Mr. Schunk as Plaintiff's
4 representative.

5 And who is arguing for our defense today?

6 MR. SILVERBERG: Your Honor, this is
7 Phillip Silverberg, and there are two, I guess,
8 motions on. One is to crave oyer and the other is
9 the demurrer. I will be arguing on the demurrer
10 motion except for, you know, one issue that relates
11 to co-defendant, Interstate.

12 THE COURT: All right. And who else is
13 arguing today?

14 MR. INGERMAN: Your Honor, it's Brett
15 Ingerman from DLA Piper. I'll be arguing the
16 motion to crave oyer and the pollution
17 contamination exclusion, which is the specific
18 exclusion for Interstate.

19 THE COURT: Okay. And I have got
20 Ms. Henkind is here, Mr. Gogal is here, Mr. Young
21 is here, all on the defendant's side. And
22 Mr. Flinter is here as an observer.

1 Mr. Flinter, this may make you decide you
2 don't want to practice law, but, with that warning,
3 let's go ahead and proceed.

4 We are -- we should probably start on the
5 motion craving oyer. Counsel, go ahead, please.

6 MOTION CRAVING OYER

7 MR. INGERMAN: Thank you, Your Honor,
8 Brett Ingerman on behalf of the defendants.

9 The purpose of this motion, Your Honor,
10 really was to aid the Court in its choice of law
11 analysis. We do not believe that the plaintiffs
12 have adequately pled facts in the complaint to
13 allow the Court to make a choice of law
14 determination which, as we mentioned in our
15 demurrer motion, is actually an independent grounds
16 to dismiss the complaint.

17 But all we're asking the Court to do is
18 really to consider two groups of documents. One
19 are the ten cover letters that went along with the
20 policy that came from Interstate and then the nine
21 endorsements that followed, including the
22 endorsements that include the contamination and

1 pollution contamination exclusions, as well as an
2 email that transmitted Zurich's policy, all going
3 to the broker for the insured, Marsh, in New York.
4 And we believe that these documents are an
5 important part of the transaction and necessary for
6 this Court to make a choice of law determination.

7 As Your Honor knows, under the Burn case,
8 the standard for craving over is when there's a
9 missing document that is essential to the claim,
10 and that standard has been expanded over the years.
11 We believe the cover letters that transmitted the
12 policy to the insured's broker in New York are
13 essential here because this Court is required to
14 make a choice of law determination at the outset.
15 And I know we have inundated Your Honor with many,
16 many, many, many COVID-19 decisions that have come
17 out as recently as today and --

18 THE COURT: I'm going to confess: I
19 haven't looked at that one.

20 MR. INGERMAN: Okay. We barely looked at
21 it, Your Honor, as well. But, you know, I have had
22 the -- I'm not sure I'll call it the honor, but I

1 have read nearly all of the 400-plus opinions that
2 have complete out. They all start with a choice of
3 law analysis because that can be important to the
4 decision. And so, here, you know, you have got
5 four of the five of the plaintiff's claims are
6 contract based or breach of covenant of this
7 agent's fair dealing, and what law applies will be
8 important to the Court's analysis of that.

9 Now, with respect to that, why is that
10 important? I want to be clear: We actually don't
11 think there's a conflict between the rules of
12 contract interpretation under New York law and the
13 rules of interpretation under Virginia law, but if
14 Your Honor determines, as we allege, that New York
15 law applies, you have about 20 decisions out of the
16 New York federal state courts that have granted
17 motions to dismiss or motions for judgment on the
18 pleading on these very issues, and so, you know, we
19 thought it would be important for the Court to
20 understand.

21 Now, with respect to -- Your Honor, so
22 that's the argument on the motion to craveoyer. I

1 don't know if you want to hear from me on which law
2 applies or not --

3 THE COURT: No, I really don't, not at
4 this point.

5 MR. INGERMAN: Okay.

6 THE COURT: What I'm having difficulty
7 with is I want to intercept the idea that we can do
8 a motion craving oyer to affect the choice-of-law
9 issue. My difficulty is whether or not these
10 documents actually inform -- potentially the
11 transmittal documents -- inform that question. And
12 that's where I'm having difficulty understanding
13 how it matters if an email, attaching a policy, is
14 sent from someone in Boston to someone in New York
15 about a policyholder in Virginia, and that somehow
16 controls my choice of law.

17 Could you hit on that issue?

18 MR. INGERMAN: Yes, thank you, Your
19 Honor. So the Essex case, I think, where Judge
20 Ellis, in 2016, dealt with this issue is probably
21 the best indicator of why it matters. And Judge
22 Ellis cited both to Willis on contracts and Couch

1 on insurance in Footnote 11 to that opinion where
2 he said, Look, the deciding factor in determining
3 which choice of law applies when interpreting an
4 insurance contract is when does the insured take a
5 visible step to put the policy beyond the insurer's
6 control.

7 THE COURT: But you said an important
8 word there, and the word you said was "when" not
9 "where." So I think we have to be careful in
10 making a distinction between a timing question,
11 which is a "when," versus a "where" question, which
12 I think affects the choice of law.

13 MR. INGERMAN: I agree with that, Your
14 Honor. I think what Judge Ellis was saying was
15 where -- it could be -- your point's exactly right.
16 It's where do you deliver it -- where is the last
17 step the insured takes to deliver the policy to the
18 insured where the insurer can no longer make any
19 changes to it --

20 THE COURT: I don't think that's quite
21 it, to be quite honest. I think the issue is
22 delivery occurs when you drop it in the mail or

1 when the insurer releases control over it. Where
2 it occurs has no bearing on that person's location.

3 MR. INGERMAN: Well, I think the way the
4 cases have come down is you have to make a "where"
5 determination because that's going to drive what
6 the -- which choice of law applies. Right?

7 THE COURT: But didn't Judge Ellis cite a
8 statute that said that the -- that, in Virginia --
9 under Virginia law -- and I don't have the statute
10 number in my head -- but there's a footnote in
11 Judge Ellis's opinion about a statute in Virginia
12 that says that a broker or an agent is always an
13 agent for the insurer and not for the insured.

14 MR. INGERMAN: Well, a broker here --

15 THE COURT: That's in one of his
16 footnotes; right?

17 MR. INGERMAN: Well, the --

18 THE COURT: Go ahead.

19 MR. INGERMAN: I apologize, Your Honor.
20 The video is sometimes difficult. Go ahead.

21 THE COURT: No, you go.

22 MR. INGERMAN: I think that -- I don't

1 think there's a dispute here that Marsh was the
2 insured's broker here, so...

3 THE COURT: But Virginia law treats them
4 as working for the insurer under that code section
5 that Judge Ellis had mentioned that I can't recall.

6 MR. INGERMAN: I apologize, Your Honor.
7 I don't have that code section in front of me, but
8 I don't think there's a meaningful -- I don't think
9 there's a meaningful dispute that, once we deliver
10 it to the broker here, Marsh in New York, we have
11 taken that step that puts it beyond our control.
12 And if you read that --

13 THE COURT: I -- I agree. So that
14 answers the "when" question, but it doesn't answer
15 the "where" question. The "where" question, I
16 think, has to be bound by where your insured is,
17 and that's in Virginia.

18 So I'll give you an example that I'm more
19 familiar with as a litigator, and maybe you are
20 too. Most courts -- our courts in Virginia have a
21 mail rule. If you're going to file a brief with
22 the appellate courts, it is deemed filed, the

1 timing of it -- so you don't blow your time
2 limit -- occurs when you drop it off at the post
3 office with the right postage and a return receipt
4 requested. That takes care of the "when." But the
5 "where" is down in Richmond.

6 So as soon as I drop it off at the post
7 office in Fairfax, like I used to do, that's the
8 when it's the filed, but it's deemed where it's
9 filed is down in Richmond. And so I think we have
10 got a similar situation here where the "when" is
11 when you release it and the "where" is where your
12 insured is. I think the code section -- my clerk
13 is helping me out here -- is 38.2-1801(a), Virginia
14 Code 38.2-1801(a).

15 MR. GEHRT: And it's Footnote 9 in the
16 decision, Your Honor.

17 THE COURT: Thank you.

18 MR. INGERMAN: Your Honor, I think -- and
19 by the way, as a young associate, I was running to
20 the FedEx at BWI Airport dropping filings off, so I
21 know exactly what you mean by the "when."

22 THE COURT: Well, let me caution you in

1 this case: If you do that in Virginia, you'll be
2 untimely because we only accept U.S. Mail.

3 MR. INGERMAN: I do know that too.

4 THE COURT: You learn that one the hard
5 way.

6 MR. INGERMAN: Yes, you do. Yes, you do,
7 Your Honor. Thank you.

8 There are a number of cases that we cited
9 in our brief, Your Honor, where the Virginia courts
10 are looking to where -- where it is delivered, and
11 it's not always the location of the insured. So,
12 for instance, there's a case we cite in our brief
13 that mentions the fact that the insured was in
14 Norfolk at the time but applies a different state's
15 law there because it's actually where it was
16 delivered and put beyond the insured's control.

17 And it's not always the location of the
18 insured because, in that case, you wouldn't need
19 the rule necessarily. It would always be -- the
20 rule would be, if the insured's in Virginia, then
21 Virginia law applies. And that's not the analysis
22 that the Courts have undertaken in the several

1 cases that we put into our brief, Your Honor.

2 THE COURT: All right.

3 MR. INGERMAN: So that's -- I mean, you
4 know, again, I want to reiterate the fact that we
5 don't think there was a material difference
6 necessarily in deciding the demurrer. We think the
7 rules of contract interpretation in both in
8 Virginia and in New York are the same, but you have
9 got considerably more cases on the New York side to
10 draw from, if New York law applies, and we
11 recognize that there's Elegant Massage on the
12 Virginia side and Mr. Silverberg will be prepared
13 to address that.

14 THE COURT: All right. Okay. Thank you.
15 (Indiscernible) today on the motion craving oyer.

16 MR. GEHRT: I'm sorry, Your Honor, I
17 didn't catch the first part of that.

18 THE COURT: Plaintiff's on motion craving
19 oyer?

20 MR. GEHRT: Thank you. Your Honor, I
21 don't have a whole lot to add to that. I mean, I
22 think, as the insured has pointed out, the test is

1 whether or not it's essential to the claim, and
2 it's not whether or not it's essential to an
3 argument they'd like to make.

4 THE COURT: Well, it does raise a
5 threshold question. Can choice-of-law issues be
6 addressed on a motion craving oyer? You know,
7 because it does seem -- it does seem you have got
8 to resolve the choice-of-law issue, and that would
9 seem to make it essential to the decision, wouldn't
10 it? Not even applying this case but in general.
11 Isn't it some -- couldn't -- it seems to make
12 sense, doesn't it?

13 MR. GEHRT: I don't think so, Your Honor,
14 because, again, we're on a demurrer here, and so if
15 there needs to be evidentiary development for
16 choice of law, that's a matter for evidence, not a
17 matter to be handled here. But ultimately, you
18 know, I think, as counsel acknowledged, if there is
19 no conflict, which is what the insured have said,
20 then I struggle with seeing how it's essential to
21 the claim to a choice-of-law analysis if the
22 choice-of-law analysis need not be done.

1 So it is hard to say it is essential for
2 an analysis that is irrelevant to --

3 THE COURT: Well, I'm not convinced the
4 analysis would be irrelevant. I tend to agree that
5 the choice-of-law rules -- I'm sorry -- the
6 contract interpretation rules don't vary in any
7 significant way I think in any of the U.S. states.
8 I think everybody's gotten on the same board for
9 that for the most part.

10 But there is the issue of, once we start
11 trying to construe the language within these
12 insurance contracts, New York has, I think, a much
13 more developed body of law, for example;
14 Massachusetts has a developed body of law.
15 Everybody seems to have a developed body of law
16 other than Virginia. Virginia seems to have no
17 body of law on this out of our state courts. Not
18 an unusual circumstance.

19 So I think it is relevant to determine
20 whether or not we're dealing with something that
21 this Court might have to look at as binding versus
22 something that is merely persuasive authority.

1 All right. My view of it is this: I do
2 think that the Court can reach a choice-of-law
3 question on a motion craving oyer. That is, if the
4 Court is faced with a choice-of-law issue, a motion
5 craving oyer makes that -- that can be helpful to
6 that, that issue is essential, and under our recent
7 Supreme Court decision, which tends to clarify the
8 use of motions craving oyer to things that are
9 essential or necessary to resolution of that
10 dispute, I think it's cognizable on a motion
11 craving oyer.

12 I disagree with defense counsel. I don't
13 think that these -- I don't think these letters --
14 the transmittal letters control or answer the
15 question as to where -- where these things were
16 delivered. I think that there's, you know, the
17 insurance contracts themselves identify the insured
18 as being in Virginia with a mailing address here in
19 Fairfax. We have got that code section that we
20 talked about, which provides that the -- let me
21 take another look at it -- that the licensed agent
22 shall be an agent of the insurer, and I think that

1 that applies even if it tends -- if the insurer --
2 if the agents working for the insured, they're
3 still deemed under this code section to be an agent
4 for the insurer. Merely sending a document to your
5 own agent, as they are considered to be under this
6 code section, isn't releasing the document
7 unconditionally. I think that unconditional
8 release doesn't occur until it's received by the
9 insured in Virginia.

10 So I don't think these documents answer
11 that question at all. Whether you look at that as,
12 you know, I think I can grant the motion craving
13 oyer, but it doesn't answer the question. And so
14 it's my considerate opinion at this point that
15 Virginia law applies. I'm going -- and since the
16 documents don't answer the question, I think the
17 motion craving oyer should be denied. So that's
18 the holding of the Court under the motion craving
19 oyer.

20 But I do make it an opinion that Virginia
21 law is the applicable law here, and I appreciate
22 all the work the other states have done. We can

1 argue about those and whether Virginia would adopt
2 those same -- the same reasoning. But with that in
3 mind, let's move on to the demurrer.

4 All right. Go ahead.

5 MOTION FOR DEMURRER

6 MR. SILVERBERG: All right. Thank you,
7 Your Honor. Phil Silverberg from the law firm of
8 Mound Cotton. I am arguing the motion for
9 demurrer. We represent Zurich. There is another
10 defendant, Interstate, and as noted earlier,
11 counsel for Interstate will be speaking, at least
12 in part, with respect to this motion.

13 And we understand Your Honor's ruling
14 that Virginia law applies, and we trust Your Honor
15 appreciates that, in our demurrer motion, we did
16 argue law from all jurisdictions, including
17 Virginia, and, in fact, we do, as co-counsel noted,
18 we do agree with the rules of construction, and we
19 believe the rules of construction get us to the
20 place where over 300 other court decisions have
21 gotten with respect to COVID-19 first-party
22 property claims.

1 Now, let me start by saying there's
2 absolutely zero question here that this plaintiff
3 has suffered financial loss, and, in fact, much of
4 the world businesses, enterprises, have suffered
5 financial loss as a result of the pandemic,
6 particularly businesses that deal with the public.
7 And, here, we certainly have an operation that
8 deals with the public. It's a hotel. It has a
9 restaurant. It has gymnasium, spas, conference
10 centers and all of that, all require, in order to
11 do business, allowing in the general public.

12 The reason COVID is particularly harsh on
13 those businesses is because COVID is a mortal
14 danger to human beings. It does not cause direct
15 physical loss of or damage to property. And,
16 indeed, that is the reason why there have been and
17 continue, including today, decisions being handed
18 down all over the country -- state courts, federal
19 courts, and now we have an Eighth Circuit
20 decision -- essentially holding that COVID does not
21 cause physical loss or damage to property.

22 What is at issue here is, in fact, a

1 first-party property policy of insurance that
2 insures against direct physical loss of or damage
3 to property. Tangible physical loss or damage.

4 What I just read in that is, you know,
5 the grant of coverage, "Direct physical loss of or
6 damage to property" is, in our view -- and in the
7 opinion of over 300 courts -- clear and
8 unambiguous. The rules of contract construction --
9 and I have in my notes, in New York and Virginia --
10 I'm dropping the New York part now, because Your
11 Honor has ruled -- the rules of construction in
12 Virginia are clear: A policy should be construed
13 in accordance with its plain and ordinary meaning.

14 Courts across -- as I said, courts across
15 the country -- and if Your Honor noted, the rules
16 of construction essentially are the same across the
17 country in terms of clear and unambiguous. There's
18 nothing unambiguous about physical loss or damage.

19 THE COURT: I mean, nothing ambiguous.
20 There's nothing ambiguous.

21 MR. SILVERBERG: Did I say -- thank you,
22 Your Honor.

1 Elegant Massage doesn't bind this Court.
2 It is a federal court decision of Judge Jackson.
3 We do disagree with the decision. It stands really
4 as a stark outlier, and, in fact, it's been
5 characterized as an outlier by more than one other
6 court in the country. I think a New Jersey court,
7 I think a West Virginia court, and maybe one other
8 court has specifically singled it out as an
9 outlier.

10 Now, further sort of evidence or proof
11 from a contextual nature of the fact that you need
12 physical loss or damage is if you look at the time
13 element provision of this policy, and for that, I
14 would refer you to Section 4.03.01.01. And it
15 really proves the point. Because much of what, if
16 not entirely Plaintiff's claim here is business
17 income loss, time element loss, incumbent loss,
18 profits loss for a period of time. But how do you
19 measure that under the policy? With due diligence
20 and dispatch to effectuate repairs. There's no
21 repairs to be done here. The hotels were no more
22 damaged than your or my home was damaged.

1 Now, there were certain civil authority
2 law was handed down in various states to limit the
3 activity in those facilities because it was to keep
4 the public apart to prevent the transfer of the
5 COVID virus from human to human. But we're not a
6 personal -- we're not a first-party personal injury
7 policy. What we are is a first-party property
8 policy.

9 There's nothing changed about those
10 hotels. What has changed is civil authority orders
11 have lifted and people have gotten injects, people
12 have gotten vaccines. That's what's changed.
13 Nothing's changed. And, in fact, I know counsel
14 will point to and has pointed to in the brief that
15 its restaurant was closed or its spa or its gym
16 facility was closed. There was nothing wrong with
17 the gym facility. There was nothing wrong with
18 that restaurant. They didn't need to be repaired.
19 There wasn't Chinese drywall in the restaurant that
20 was causing a toxic condition that had yellow tape
21 and said, "This facility is uninhabitable." It was
22 to keep people apart. You don't have restaurants

1 open because you want people to wear their masks.
2 You don't have gyms because you don't want people
3 closely congregating and breathing heavily. Those
4 were the reasons behind it. There's no question
5 about that. It has nothing --

6 THE COURT: Let me ask you this question:
7 Wouldn't that implicate the communicable disease
8 coverage?

9 MR. SILVERBERG: Well, Your Honor, it
10 zeros in on the one provision in the policy, and
11 I'm happy to speak to that. Your Honor, it zeros
12 in on the one provision in the policy that does not
13 require physical loss or damage. There's no
14 question. Every other provision in the policy
15 requires physical loss or damage to property, which
16 we contend, along with 300-plus other courts, did
17 not occur. There is no physical loss or damage.

18 THE COURT: So holding a communicable
19 disease coverage to one side, if your side prevails
20 on physical loss or damage, that takes care of 99
21 percent of the case.

22 MR. SILVERBERG: Well, holding that

1 endorsement aside, you are correct, Your Honor.

2 THE COURT: All right. Go ahead.

3 MR. SILVERBERG: Would you like me to
4 address the communicable disease endorsement?

5 THE COURT: If you wish to do it now.
6 I'm sure you'll get to it at some point. And I
7 don't mean to derail your argument.

8 MR. SILVERBERG: No, I'm happy to deal
9 with it now and then go back to my argument or
10 answer --

11 THE COURT: Very good. Let's do it. So
12 why should the demurrer be sustained on -- given
13 the communicable disease coverage?

14 MR. SILVERBERG: Sure. So while it
15 doesn't require direct physical loss or damage, it
16 requires a necessary suspension of business
17 activities at the insured's location if the
18 suspension is caused by a governmental order
19 declaring uninhabitable where access is prohibited.
20 Access wasn't prohibited. People could go -- I'm
21 not saying customers necessarily, because I
22 understand -- and it's the lack of customers that

1 resulted in a loss of business, but, you know,
2 there was no yellow tape across the restaurant,
3 there was no prohibition to enter those facilities,
4 and there was no declaration of uninhabitability.

5 Furthermore, Your Honor --

6 THE COURT: So let me clarify. So when
7 the government agency says you can't run your gym,
8 you can't run your pool, and you can't run your
9 indoor restaurant because of the threat of
10 spreading communicable diseases in that
11 environment, because you're only limiting customers
12 and not employees, for example, or the cleaning
13 crew or the maintenance crew, this coverage is not
14 implicated? Is that your argument?

15 MR. SILVERBERG: In part, Your Honor.

16 THE COURT: In part.

17 MR. SILVERBERG: There was also no order
18 directed specifically to the hotels that said
19 there's an outbreak of COVID in your facility.

20 THE COURT: But this language, there
21 doesn't have to be an outbreak. This language
22 speaks specifically about being declared

1 uninhabitable due to a threat. A threat means I
2 think the harm has not occurred yet necessarily.
3 It's the risk of the harm.

4 So I'm not sure -- and is your position
5 that this declaration of uninhabitability can't
6 apply to everybody's pool and everybody's gym; it
7 has to be individual?

8 MR. SILVERBERG: That is the way we read
9 it, as something required with respect to the
10 insured location, Your Honor. And, also, the
11 prohibition -- and I understand what Your Honor is
12 saying, but there was no inability or
13 inaccessibility of persons to those areas. I
14 understand that the operations -- the activities,
15 whether it's a restaurant or whether it's a gym --
16 the activities ceased because of the civil
17 authority orders -- these general state and local
18 civil authority orders, but, in fact, there was no
19 uninhabitability and there was nothing specific for
20 those particular locations.

21 THE COURT: So I want to focus, then,
22 again on this uninhabitability question. So, in

1 your view, uninhabitability means not just
2 customers but it would have to be anyone else
3 presumably who is not wearing some kind of a HAZMAT
4 type of precaution? I mean, I'm thinking, you
5 know, the containment building at Chernobyl, we all
6 understand that's uninhabitable. Well, there was
7 no containment building, but that's another issue.

8 But in this context, is that what's
9 required to be uninhabitable? That even the hotel
10 employees can't go in there? It's not enough that
11 just the public and their customers can't go in
12 there, to be uninhabitable?

13 MR. SILVERBERG: Well, I think the focus,
14 I think more, Your Honor, is on the prohibition,
15 that there was no prohibition that no one could go
16 in to those particular areas, and that, in fact,
17 you know, the doors were open. I understand
18 customers were not going in there, and I understand
19 it resulted in financial -- potentially financial
20 loss, so I'm not sure --

21 THE COURT: Well, we can assume our way
22 through that for right now. So if the prohibition

1 is only on customers and not on employees, that
2 means it has not been declared uninhabitable. Is
3 that your position?

4 MR. SILVERBERG: Yes, Your Honor.

5 THE COURT: Okay. All right. I
6 understand that.

7 MR. SILVERBERG: So going back, Your
8 Honor, to my argument -- and it does pretty much --
9 you know, and I would -- going back to the
10 argument, I think we have sort of covered on the
11 physical loss or damage, and we did -- and, you
12 know, we did find out about a couple of decisions.
13 In fact, I just found out about another decision
14 while I was in the waiting room of this Webex where
15 another court yet again, involving a sports
16 facility, found no physical loss or damage.

17 So I realize that there's no shortage of
18 case law on that point, but the point with the
19 physical loss or damage is all the other coverages,
20 putting aside, again, the contagious disease
21 endorsement.

22 And I would note, with respect to the

1 contagious disease endorsement, it's subject to a
2 \$1 million sub-limit. It's not per location. And
3 that's clear from the declaration page of the
4 policy. It's a very limited policy.

5 But all the other coverages under
6 which -- counts under which Plaintiffs are seeking
7 coverage, putting aside the endorsement we just
8 discussed, all require direct physical loss of or
9 damage to, whether it's civil authority, whether
10 it's ingress/egress --

11 THE COURT: Well, they didn't make a
12 claim on ingress and egress. I think we're all
13 agreed on that.

14 MR. SILVERBERG: Okay. They all require
15 some -- they all require physical loss or damage
16 but by a covered cause of loss. So, again, it all
17 goes back to sort of the threshold requirement here
18 that there be physical loss or damage, and it's our
19 position that -- even if there were the presence of
20 COVID -- and by the way, while they alleged they
21 believed COVID exists, there's no evidence of
22 COVID. But even, you know, assuming for purposes

1 of the demurrer that's not physical loss or damage,
2 at least according to the great weight of authority
3 nationwide.

4 Now, in addition, even if one were to get
5 past that argument, there is a virus exclusion in
6 the policy.

7 THE COURT: Okay.

8 MR. SILVERBERG: And that exclusion has
9 been upheld by various courts around the company
10 [verbatim]. The policy, it's a contamination
11 exclusion, and I understand my co-counsel has a
12 separate exclusion which he also wants to speak to
13 whenever Your Honor would like.

14 But the contamination exclusion, it
15 defines -- the policy defines contamination has to
16 include virus and it's clear that it would apply
17 here.

18 Now, you know, the other thing that I
19 think is notable is that, you know, when I keep
20 saying there's 300-plus cases, that's a fact.
21 Many, many, many of those cases where the party --
22 where the insurers move to dismiss the complaint or

1 to dismiss the pleadings, you know, they argued in
2 the first instance no physical loss or damage, and
3 in the alternate -- and in the second instance,
4 even if it is, the virus exclusion applies.

5 The overwhelming majority or many of
6 those cases don't even get to the virus exclusion,
7 and we submit, Your Honor, the same results should
8 happen here. With respect to -- but if Your Honor
9 does consider it, the virus exclusion, there's no
10 question that COVID is a virus.

11 Now, you know, we understand Plaintiff
12 has argued why you need a virus exclusion, a virus
13 doesn't constitute physical loss or damage. You
14 know, a couple of responses to that. First of
15 all -- and certain decisions have even made this
16 remark in dealing with this very same argument.

17 A belt-and-suspenders approach by an
18 insurance company to make sure it doesn't have to
19 deal with the issue doesn't -- isn't -- doesn't
20 serve as an acknowledgment that virus is physical
21 loss or damage.

22 Another point which we think is worth

1 making is there are numerous policies that insure,
2 among other things, livestock. Livestock is
3 property and virus can kill livestock. So it's not
4 necessarily inconsistency. And, frankly, when you
5 get to the rules of construction in Virginia and
6 elsewhere, the policy should be read to make sense
7 and not to be -- and not to not make sense. And
8 we, again -- so we would submit for certain that
9 the virus exclusion does apply here, if you even
10 get to it. And as I noted, we don't think you get
11 to it.

12 Now, another issue that Plaintiff has
13 raised that I'd like to address is something called
14 a Louisiana endorsement. With respect to
15 Louisiana, that took out the word "virus" from the
16 contamination exclusion. Again, we don't think you
17 get to the contamination exclusion here, but the
18 argument that the Louisiana endorsement wipes out
19 "virus" for all locations simply has been rejected
20 by numerous courts already, including most recently
21 the federal district court in Pennsylvania. It's
22 one of the cases we just sent you, Babcock (ph),

1 which I note --

2 THE COURT: What does it do in Louisiana?

3 MR. SILVERBERG: What is it doing --

4 THE COURT: And we have a property in
5 Louisiana here; right?

6 MR. SILVERBERG: Yeah.

7 THE COURT: So what does it do in
8 Louisiana for that property?

9 MR. SILVERBERG: With respect to this
10 case, nothing because it's not physical loss or
11 damage in the first instance. And there are
12 Louisiana cases that say that.

13 Now, I would acknowledge, Your Honor,
14 that if this were a -- you know, if this were a
15 sole Louisiana location and if there were physical
16 loss or damage, you know, or a finding of physical
17 loss or damage, then we would not have the virus
18 exclusion in that particular -- we would not have
19 virus as part of the definition of "contamination."

20 THE COURT: Right. But the Louisiana --
21 the Louisiana endorsement talks about basically any
22 irritant. That's the language that it uses.

1 MR. SILVERBERG: Yeah, yeah. And with --

2 THE COURT: I'm trying to think what
3 falls outside of an irritant. Why would -- I mean,
4 it almost seems like, by limiting the language, you
5 have substituted something that is arguably
6 broader, an irritant. I mean, is a COVID-19, you
7 know, virus -- the COVID 2 virus an irritant?
8 Irritant seems very broad. It would seem to cover
9 a lot of ground.

10 MR. SILVERBERG: You know, I am not --
11 you know, I'm not prepared to say if a virus is an
12 irritant, but what I would say, it's limited to
13 Louisiana. There are some 31 state-specific
14 endorsements, and, again, this argument has been
15 raised several times that the Louisiana endorsement
16 suddenly wipes out virus for all locations under
17 the policy. That's been rejected. I think we
18 cited at least two cases where that specific
19 argument has been rejected.

20 Just recently, the Eastern District of
21 Pennsylvania -- and it's one of the cases we sent,
22 Babcock. And I would note, Your Honor, that it's

1 the exact same policy wording. The Court went to
2 great length in rejecting all of the insured's
3 argument, including that the Louisiana endorsement
4 should apply across the border. That involved
5 department stores with locations -- various
6 locations around the country, and we essentially --
7 it's our position here, and that's the same exact
8 argument we have made here. With the exception of
9 Louisiana, it does not (inaudible).

10 And, again, at the risk of repeating
11 myself, like the 300 other courts around the
12 country, we don't think you get to the exclusion
13 anyway because it's not physical loss or damage.

14 THE COURT: I understand. I understand.
15 Okay. Go ahead. Anything else on your argument?

16 MR. SILVERBERG: You know, the only other
17 thing I would say at this point, Your Honor, other
18 than to answer whatever questions, Your Honor may
19 have, is when you look at the case, this is really
20 a loss of use case, and that's excluded, and we
21 noted that in our policy. There is a loss of use
22 exclusion.

1 Yes, to some extent, they lost the
2 ability to use property, but there's no tangible
3 physical loss or damage to the property. And the
4 policy -- the threshold touched onto this policy is
5 direct physical loss of or damage to property.
6 That's an issue that's been answered in favor of
7 the insurers time and time again in states all over
8 the country.

9 THE COURT: But the insurers have also
10 lost that argument in other courts, haven't they?

11 MR. SILVERBERG: Oh, I'm not saying we're
12 batting a thousand, Your Honor, and I'm not -- I'm
13 for sure not saying that but --

14 THE COURT: If all 50 states are close
15 enough, you know, follow the same rules of
16 construction, what would you say accounts for these
17 differences in construing what is essentially the
18 same language?

19 MR. SILVERBERG: You know, I have to be
20 careful here because I'm on the record.

21 THE COURT: Well, let's just pretend
22 that's not true.

1 MR. SILVERBERG: Listen, there are --
2 there are -- listen, there are judges in courts --
3 you know, let me back up a minute. What is most
4 remarkable to me, because I have been --
5 notwithstanding my youthful looks, I have been
6 doing this for quite a while, and, you know, there
7 are jurisdictions and there are courts who are not
8 necessarily known for going out of their way for
9 insurance companies in coverage disputes. And
10 here -- and, yes, there are exceptions and there
11 are, as other courts have described Elegant Massage
12 outliers. And I'm talking about state courts,
13 federal courts. It's really been across the board.
14 States like Florida, you know, that can -- from
15 time to time, have been known to be tough on
16 insurance companies.

17 This has really been across the board.
18 Are we batting a thousand? No, we're not batting a
19 thousand. And I can't justify or know the reasons
20 why courts here and there have come down the other
21 way. You know, I can say that Elegant Massage was
22 wrongly decided. I do believe it was wrongly

1 decided. I believe Judge Jackson was wrong. I
2 don't believe he followed the rules of
3 construction. I mean, it is clear and unambiguous,
4 "direct physical loss or damage."

5 So, you know, do I have to bat a thousand
6 to win? I hope not. I think the facts, I think
7 the policy wording, I think the logic is on our
8 side, and it's for those reasons, Your Honor, that
9 we respectfully submit that our demurrer be
10 granted.

11 THE COURT: All right. Thank you.

12 There's further argument on the demurrer
13 for the defense?

14 MR. INGERMAN: Yes. Thank you, Your
15 Honor. Brett Ingerman on behalf of Interstate. We
16 have a pollution contamination exclusion that is
17 limited only to Interstate. It also does not have
18 the Louisiana endorsement issue associated with it.
19 We think that the plain language of that exclusion
20 bars coverage here and warrants grant of the
21 demurrer.

22 Let me just address just a couple --

1 quickly, a couple of the arguments that the
2 plaintiff makes just to our exclusion. The first
3 is they suggest that there's been no release or
4 migration or discharge, escape, or dispersal of the
5 virus on the insured premises, and, therefore, this
6 exclusion wouldn't apply.

7 Just the plain -- Virginia follows the
8 rules of contract interpretation of interpreting
9 the words as to their plain meaning. "Dispersal"
10 clearly means to spread widely under the Webster's
11 Dictionary definition, and all you need to do is
12 look at their complaint, Your Honor. You can start
13 at paragraph 130, and you can go for 10 or 15 or 20
14 paragraphs forward, but just looking at 130, they
15 allege one way SARS-CoV-2 spreads is in the air.
16 When an infected person breathes, speaks, coughs or
17 sneezes, thousands of droplets carrying SARS-CoV-2
18 physically permeated the air around the person.
19 And it goes on from there.

20 It's clearly a dispersal of the virus on
21 the premises that they allege triggers coverage.
22 And to be sure, just three days ago, in the Teal

1 (ph) Metro Entertainment case out of the Northern
2 District of Oklahoma, one of the cases we provided
3 to Your Honor this morning, the plaintiff made the
4 exact same argument there as to a nearly identical
5 exclusion, and what the Court said there was -- and
6 I'm quoting from the opinion now at page 20 -- they
7 say, "COVID-19 travels by discharge, dispersal, or
8 release. As COVID-19 spreads when an infected
9 person breathes out droplets in very small
10 particles that contain the virus, these droplets
11 and particles can be breathed in by other people or
12 land on their eyes, noses, or mouth. Accordingly,
13 the plain language of the policy's pathogenic
14 materials exclusion excludes losses and damage
15 caused by COVID-19."

16 It was a nearly identical exclusion. It
17 didn't even use the word "virus"; it used the word
18 "pathogen" but the Court still found that it
19 applied.

20 The same was true in the Circus Circus
21 versus AIG case out of Nevada. They said the
22 plaintiff's own pleading support a finding that the

1 virus has been released, dispersed, and discharged
2 into the atmosphere.

3 And this Willow versus Lexington case out
4 of the Western District of Missouri finds the same
5 thing.

6 Just one other argument I wanted to
7 address, Your Honor, and then I'm happy to take any
8 questions on this exclusion. There is a reference
9 in the plaintiff's brief to Elegant Massage
10 rejecting a virus exclusion, so let me just address
11 that quickly.

12 In that case, it was very clear that the
13 plaintiff actually was not alleging that if losses
14 were caused by the virus. In that case, as Judge
15 Gaffin (ph) said, he said, quote, "Here, Plaintiff
16 is neither alleging that there is a presence of the
17 virus at the covered property nor that a virus is
18 the direct cause of the property's physical loss."

19 He goes on to explain that what the
20 plaintiffs there are alleging was that their losses
21 were caused by the civil authority orders. There's
22 a suggestion that Judge Jackson determined that --

1 and the anti-concurrent causation language in the
2 policy here also had not been recognized in
3 Virginia. And I think that either the parties did
4 not bring to his attention or he was not aware of
5 the Lower Chesapeake versus Valley Forge case,
6 which is cited in our brief, Virginia Supreme Court
7 case from 2000, that expressly enforced a similar
8 anti-concurrent causation provision in an insurance
9 policy.

10 So, Your Honor, we believe that, in
11 addition to all of the reasons that Mr. Silverberg
12 laid out that we adopt on behalf of Interstate,
13 that there's a further basis to grant the demurrer
14 as to Interstate with respect to its pollution and
15 contamination exclusion.

16 THE COURT: All right. Thank you.

17 All right. Then arguing for plaintiffs.

18 MR. GEHRT: Yes, Your Honor. Thank you.

19 So lots to unpack, and I'll try to do that in an
20 orderly fashion.

21 THE COURT: I appreciate it. I agree
22 with you. It's a lot to unpack.

1 MR. GEHRT: So I think, analytically,
2 where I start on these cases, as my co-counsel, I
3 have read, you know, hundreds of these. So,
4 analytically, where I start is that we're on a
5 demurrer here, and, on a demurrer, you accept as
6 true all facts that are properly pled as well as
7 all reasonable inferences from those facts. And,
8 here, we have a complaint -- specifically
9 paragraphs 129 through 149 -- that detail the
10 physical loss or damage caused by SARS-CoV-2. We
11 have paragraph 133 which details how the presence
12 of SARS-CoV-2 on surfaces turns them into fomites,
13 which is an object that's likely to spread
14 infection. At 134, details how SARS-CoV-2 causes
15 threat of physical damage by attaching to property
16 and rendering it unusable.

17 THE COURT: Let me stop you right there.
18 It sounds to me that that's -- I'm not sure that's
19 a fact so much as a conclusion that you're making.
20 You're saying that it causes physical damage by --
21 you know, I'm looking at 134 right now. Causes
22 physical damage and physical loss by, among other

1 things, physically permeating, attaching to,
2 binding to, and corrupting.

3 You know, I think your assertion of fact
4 there is it permeates, it attaches, it binds, it
5 corrupts, it destroys, distorting. But I think
6 that whether that amounts to physical damage,
7 that's a legal -- isn't that -- that's the ultimate
8 issue here on this construction of the contract.

9 And so I'll accept -- I think I would be
10 required to accept all your other verbs there, but
11 to accept that this equals that, which is stated
12 and meant by the contract, I'm not sure that falls
13 into a fact that, therefore, answers the question.

14 MR. GEHRT: Yeah, I don't disagree with
15 that, Your Honor. The facts as alleged, the way in
16 which the virus behaves, the way in which it
17 attaches to property, the way in which it alters
18 air space as alleged in paragraph 135, those must
19 be accepted as true. Whether or not that
20 constitutes threat of physical loss or damage,
21 that's for this Court.

22 But given those factual allegations, I

1 think it's hard -- you'd be hard-pressed to say
2 that that is not direct physical loss or damage as
3 those -- as that phrase has been interpreted.

4 So we have alleged, for example, a
5 physical alteration. That's what the insurers have
6 argued that we need to allege. We have alleged
7 that. That's a factual allegation. A physical
8 alteration is a factual allegation which satisfies
9 the direct physical loss or damage, you know,
10 operative phrase.

11 And so, you know, ultimately, these are
12 questions of proof, and Plaintiff will be put to
13 that proof, but that's not an issue here today.
14 Plaintiffs have, you know, factual allegations on
15 these issues are specific and they adequately
16 provide the insurers with notice as to what we
17 intend to prove, and that's, in and of itself, is
18 enough to defeat the motion.

19 But turning to the critical language, the
20 direct physical loss or damage, counsel
21 acknowledged one of the arguments we made, which is
22 that this is -- there's a logical flaw in the

1 insured position which is that, if a virus cannot
2 cause loss, then why do you attempt to exclude
3 virus-related losses?

4 We cited the Atwells Realty Corporation
5 case out of Rhode Island from last month which said
6 that the virus exclusion would be superfluous and
7 rendered meaningless if viruses cannot cause
8 covered losses in the first place.

9 Now, to be clear, Plaintiffs are --

10 THE COURT: Let me just slow down for a
11 second and process what you just said so I make
12 sure I get it.

13 MR. GEHRT: Sure.

14 THE COURT: Give it to me one more time
15 because it sounded good.

16 MR. GEHRT: Maybe I stop there. The
17 point is that the insurer's theory -- and, indeed,
18 the insurance industry's theory -- is that losses
19 caused by viruses and the presence of virus in
20 property cannot cause direct physical loss or
21 damage, and, therefore, do not trigger the coverage
22 agreements, while, at the same time, they adopt

1 virus exclusions attempting to exclude losses
2 caused by viruses.

3 If you need an exclusion, then, by
4 definition -- in an all-risk policy, then, by
5 definition, the coverage grants is satisfied. And
6 it's notable here -- and the insurers here used a
7 much more broad validity exclusion --

8 THE COURT: Can you -- can you respond to
9 the belts-and-suspenders argument that isn't it
10 just as reasonable to determine that it's a
11 belts-and-suspenders approach that it's not
12 included but just to make sure that some clever
13 lawyer somewhere doesn't argue that it is, we're
14 going to put it in there also as an exclusion?

15 MR. GEHRT: Well, Your Honor, I don't
16 think the belts and suspenders is consistent with
17 the rules of contract interpretation. There's, you
18 know, clear case law suggesting that words in a
19 contract must be given meaning and there can't be
20 any surplusage and you can't interpret a contract
21 to render a certain provision meaningless.

22 And so if the direct physical loss or

1 damage was interpreted as a matter of law to not
2 apply to losses caused by viruses, then the virus
3 exclusion, as interpreted by the insurers -- not
4 our interpretation but as interpreted by the
5 insurers -- would be rendered meaningless. It
6 would just be surplusage, and, again, would be belt
7 and suspenders and that's not how the contracts are
8 meant to be interpreted.

9 THE COURT: Oh, okay. Go ahead.

10 MR. GEHRT: So setting aside the logical
11 issues there, I think, you know, we have indicated
12 in our briefing that we believe that Elegant
13 Massage provides the appropriate structure for
14 analyzing a direct physical loss of or damage to
15 property and the insureds haven't really identified
16 a flaw in it other than to characterize it as an
17 outlier, but the question is, is whether or not it
18 applied the contractual interpretation rules in
19 Virginia appropriately, and we believe it did.

20 And the starting point for that analysis
21 is whether the disputed policy language is
22 susceptible to more than one meaning. If it is,

1 then the Court must construe that language in
2 Plaintiff's favor.

3 And I think it's important to note
4 here -- and I make this point as much as I can --
5 is that it's not a contest between the
6 reasonableness of the parties' respective
7 interpretations, even if Plaintiffs believe that
8 theirs is controlling.

9 In order for the insurer to prevail here,
10 they must show their interpretation of the only
11 reasonable interpretation, and we would submit that
12 they have not done that and, indeed, cannot do
13 that. And the insurer in Elegant made the same
14 argument as the insureds do here, that direct
15 physical loss or damage requires some physical or
16 structural alteration.

17 And although we allege that -- in our
18 view, allege that physical and structural
19 alteration, the Court in Elegant went through a
20 very thorough analysis and walked through dozens of
21 cases that have interpreted this phrase, and they
22 found the phrase has been subject to, quote, "a

1 spectrum of interpretations" in Virginia.

2 Now, in order for the insurer to prevail,
3 they must establish that those interpretations, all
4 of them are unreasonable; that only one is
5 reasonable. And they haven't done that. Some
6 courts have said that direct physical loss or
7 damage is structural damage. Some courts have said
8 that direct physical loss or damage is a distinct
9 and demonstrable physical alteration, although that
10 language isn't in the policy but that's the
11 interpretation. And yet others have said, if the
12 property is rendered uninhabitable or dangerous to
13 use, the so-called functional impairment argument,
14 that satisfies the direct physical loss or damage.

15 And so, in light of those varied
16 interpretations, similar to varied interpretations
17 that have been presented here, the Court held it
18 was plausible that Plaintiffs experienced direct
19 physical loss when the property was deemed
20 uninhabitable, inaccessible, and dangerous to use
21 by the executive orders and because of the risk of
22 spreading COVID-19, an invisible but highly lethal

1 virus.

2 And so the Court likened the presence of
3 the virus to other cases that are cited in the
4 decision. For example, asbestos, ammonia, odor,
5 toxic gases, all of those, although not resulting
6 in a physical alteration or structural damage to
7 the property, all of those have been held to be
8 direct physical loss or damage to property.

9 THE COURT: Yeah, but isn't the issue on
10 a lot of those cases that the remediation of that
11 requires rather invasive and physical destruction
12 of the property to remove, you know, a
13 chemical-laden carpeting or the Chinese drywall or
14 to remove the asbestos? That requires quite an
15 invasive process to rid the building of that
16 condition as opposed to simply wiping down exposed
17 surfaces. Is that a distinction that makes any
18 difference?

19 MR. GEHRT: No, you know, Your Honor, I
20 would submit that it doesn't. Those cases are not
21 necessarily premised on the remediation efforts,
22 although, you know, the remediation efforts for

1 various things might be significant. They're based
2 on the fact that humans can't use them. It's not
3 that they can't use them while they're being
4 remediated; it's that humans can't be present while
5 the asbestos is there, while the noxious odor is
6 there, while --

7 THE COURT: And how is that any different
8 than just a loss of use, which is excluded from the
9 policies?

10 MR. GEHRT: It's not, Your Honor, and I
11 would say -- let me address the loss of use
12 exclusion because that's one of the arguments that
13 the insurers have raised as a basis to disagreement
14 with Elegant. The loss of use exclusion only
15 applies to property -- it's in the property damage
16 section of the policy, Section 3 of the policy. It
17 doesn't apply to time element or business
18 interruption losses.

19 THE COURT: There's nothing in the
20 exclusions that limit them to that. The exclusions
21 are very broad, and it doesn't say -- it's not so
22 limited. In fact, there's another section of the

1 policy that states that, in addition to the other
2 exclusions, these other -- you know, these later
3 exclusions apply. I think the policy itself knocks
4 that argument out. And if you give me a minute, I
5 can tell you where it existed, but I remember
6 seeing that in there. I think the plain language
7 of the policy knocks that argument down.

8 MR. GEHRT: Yes, Your Honor, I'll address
9 that. It's 4.02.05, which is the lead-in to the
10 Section 4 exclusions. So Section 3 of the policy
11 applies to property damage. Section 4 of the
12 policy applies to time element or business
13 interruption, as it's commonly referred to.

14 And the lead-in to those -- it's a
15 separate set of exclusions for time element losses.
16 It says, "In addition to exclusions elsewhere in
17 the policy, the following exclusions apply to time
18 element coverage."

19 Now, I don't -- I would submit that that
20 lead-in does not clearly and ambiguously
21 incorporate in all of the Section 3 exclusions into
22 the section -- to the Section 4 exclusion. But I

1 think it's helpful -- and we pointed this out in
2 our briefing -- that there is some redundancy which
3 supports the reasonableness of our interpretation.
4 There is some redundancy between the two sets of
5 exclusions, which would render an interpretation
6 that Section 4 only applies to the time element,
7 reasonable. And that is that the Section 4
8 exclusions include an exclusion for strikes or
9 other work stoppage, and the Section 3 exclusions
10 also include an exclusion for loss or damage
11 arising from the interference by strikers.

12 If, indeed, the Section 3 exclusions were
13 incorporated into the Section 4 exclusions -- and
14 we would submit that's not clearly and ambiguously
15 done, but if that were the case, then why would
16 there be a need for redundant exclusions for
17 strikes and strikers?

18 So that, I think, supports the reasonable
19 interpretation that loss of use is not incorporated
20 in a time element. But the argument does not hinge
21 necessarily on that. The purpose of the loss of
22 use exclusion -- and we reference this -- the

1 Henderson Restaurant Systems, Incorporated, versus
2 Zurich out of the Northern District of Ohio earlier
3 this year acknowledge this as well, which is that
4 the loss of use exclusion is really meant to bar
5 compensatory damages for property damage. And if
6 it were to apply to business interruption losses,
7 it would have essentially vitiate that entire
8 coverage.

9 And so it can't be interpreted as
10 precluding business interruption losses arising
11 from the loss of use. It only applies to the
12 compensatory damages arising out of property
13 damage. So I would submit that the Court's
14 discussion there should also be considered.

15 And I'll also -- I also want to make a
16 point -- and it's related -- which is -- it's a
17 point that the Elegant Massage court made. And the
18 Court said, quote, "Defendants were fully aware of
19 cases that interpreted intangible damage as a
20 direct physical loss promulgated before the
21 issuance of the plaintiff's policy. Since
22 Defendants did not explicitly include structural

1 damage in the language, the policy may be construed
2 in favor of more coverage based on plausible
3 interpretations."

4 I would submit, Your Honor, that the same
5 is true here. As Plaintiffs allege in paragraph 94
6 of their complaint, the insurers were aware of
7 numerous cases -- and we have detailed them in the
8 complaint -- holding that the presence of a
9 hazardous substance in the air and on property
10 causes direct physical loss or damage. Indeed,
11 those cases include TravCo Insurance versus Ward,
12 which is another Eastern District of Virginia case.

13 And in light of the knowledge of these
14 cases -- in light of the insured's knowledge of
15 these cases, I would submit that the phrase "direct
16 physical loss or damage" should be construed in
17 favor of coverage under Virginia law. They are
18 aware of these cases. They did not make any
19 clarification in their policy that they interpreted
20 "direct physical loss or damage" to be limited to a
21 physical altercation of property or structural
22 damage of property. And in light of these cases

1 holding otherwise, if they wanted to so limit
2 coverage, they should have, and they didn't do it.

3 So -- and I believe the insurers --
4 excuse me, the plaintiffs, therefore, get the
5 benefit of the doubt under the contractual
6 interpretation rules.

7 The insurers also reference the period of
8 liability as a basis to support their
9 interpretation of direct physical loss or damage,
10 essentially that it limits it, it constrains that
11 phrase. And the period of liability for building
12 equipment -- and I'll be quick -- just simply
13 states -- defines it as the period starting from
14 the time the physical loss or damage and ending
15 when -- with due diligence and dispatch, the
16 building and equipment could be repaired or placed
17 and made ready for operations in the same or
18 equivalent physical and operating conditions that
19 existed prior to the damage.

20 So the period of liability makes it clear
21 that it doesn't determine whether there's been an
22 insured loss, it determines how long there's been

1 an insured loss. And the insured's focused on
2 repair or replace and suggests that that implies
3 some sort of limitation on direct physical loss or
4 damage, but the policy is clear that the property
5 must be made ready for operations under the same or
6 equivalent physical and operating conditions. In
7 this case, that would be when the virus is no
8 longer present or when the orders are lifted, the
9 orders that are limiting the functional impairment
10 of their property.

11 But even if repair or replace were the
12 focus and the Court wanted to dig in on those
13 words, "repair" has been defined to mean to restore
14 to a sound or healthy state. Applying that
15 definition to this policy language, the property is
16 restored to a sound or healthy state when the virus
17 is no longer present or when the civil authority
18 orders are issues -- are lifted so that they can
19 continue with the full operations that existed
20 prior to the pandemic.

21 So the period of liability, in our view,
22 is neither here nor there with respect to the

1 interpretation of direct physical loss or damage.
2 The question is whether or not that phrase is
3 susceptible to different interpretations, and we
4 would submit that, under the rules of Virginia --
5 of policy interpretation in Virginia, it is and,
6 therefore, must be interpreted in our favor.

7 I wanted to focus on the exclusions,
8 unless Your Honor has any questions on any of the
9 points raised with respect to direct physical loss
10 or damage.

11 THE COURT: No. I think I got your -- I
12 understand your positions on those. So go ahead to
13 the exclusions.

14 MR. GEHRT: Sure. So the first focus is
15 the contamination exclusion, and I'll focus -- I'll
16 start on Zurich because there is some unique
17 characteristics to that policy as opposed to the
18 Interstate policy.

19 The Zurich policy has an amendatory
20 endorsement, as counsel noted, that deletes "virus"
21 from the definition of "contaminant." And the
22 amendatory endorsement is very clear. It states in

1 bold letters, as other endorsements do, that this
2 endorsement changes the policy; please read
3 carefully.

4 And so we do. Viruses are not
5 contaminants, and, therefore, the policy does not
6 clearly and unambiguously exclude coverage from all
7 viruses.

8 THE COURT: Let me ask you a question
9 about that. It seems to me that you're asking me
10 to engage in a little bit of drafting history. I
11 realize it's there in the endorsement. The
12 endorsement is made part of the contract, but the
13 operative language -- you're asking me to consider
14 what they did to get to the operative language and
15 not just the operative language of the contract.
16 And I wonder if that doesn't lead me afoul of what
17 a judge should be doing when interpreting a
18 contract, which is you start with the four corners
19 of the document and what does the language that the
20 parties agree to say? And if that language is not
21 ambiguous, you don't go any further. We all agree
22 on that; right? You're nodding your head

1 affirmatively.

2 MR. GEHRT: I do agree.

3 THE COURT: So why do I consider what
4 they took out?

5 MR. GEHRT: Because we are -- I guess I'm
6 struggling a little bit with the question, but I
7 think what you're saying is that -- I don't think
8 we're injecting any history into the discussion.
9 We're limiting the interpretation to the four
10 corners of the document; namely, in this case now,
11 the amendatory endorsement, which clearly says
12 that, you know, it modifies the policy and removes
13 a definition --

14 THE COURT: It says what they did, but
15 you're not asking me to simply apply the language
16 that is the operative language. You're asking me
17 to look at what they did to get to the operative
18 language.

19 MR. GEHRT: I think the operative
20 language is that "contaminant does not include
21 viruses." The operative language -- the definition
22 of "contaminant" that is included in the amendatory

1 endorsement.

2 THE COURT: Let's -- let me get to that
3 endorsement because I wanted to review it with you.
4 And that's -- where am I going to find that
5 endorsement? Does it have a number on it?

6 MR. GEHRT: Unfortunately, no, Your
7 Honor. But it is in -- it's Exhibit A to the
8 complaint, and the best I can do is give you --
9 it's Edge 219(c), which, if you start flipping
10 through the policy, you'll see it's essentially
11 sequential -- not quite but largely sequential once
12 you get to the endorsements. And so at the bottom
13 is 219(c).

14 THE COURT: All right. Let me get there.
15 Just give me a moment.

16 MR. GEHRT: Sure.

17 THE COURT: So the -- let's see, 219(c).
18 Okay.

19 MR. GEHRT: Page 3 of 3, the last page.

20 THE COURT: Oh, that's the -- is it the
21 Louisiana endorsement that we're looking at?

22 MR. GEHRT: Yes, Your Honor.

1 THE COURT: Okay. So the Louisiana
2 endorsement, that's the one that uses the
3 "irritant" language.

4 MR. GEHRT: Correct.

5 THE COURT: Why -- it's -- why -- what is
6 an irritant and how is that narrowed? The irritant
7 seems pretty broad. I can think of lots of things
8 that irritate me. Nobody here, of course. And
9 the -- it seems -- irritant is so broad. Why
10 should I read this as somehow being narrowed?

11 MR. GEHRT: Well --

12 THE COURT: -- "solid liquid, gaseous,
13 thermal, or other irritant." And the "including
14 but not limited to", I don't think that really
15 helps me one way or another.

16 MR. GEHRT: It helps in that it helps
17 define -- again, give context for what's being
18 excluded, but I think -- the starting point would
19 be I think what are -- from a layperson's
20 perspective and from a reasonable insured's
21 perspective, you're looking at this policy and you
22 have originally -- and this is the plain language

1 of the policy; this is not reading in any intent of
2 any kind, this is the plain language -- originally,
3 you have contaminants defined to include viruses,
4 and you now remove it and limit it to the same
5 subset of contaminants but absent viruses. I think
6 the reasonable interpretation, at the very least,
7 is that viruses are no longer subject to the
8 contamination exclusion.

9 THE COURT: All right. And you realize
10 that whole argument rests on going beyond the
11 operative language to reach that conclusion.

12 MR. GEHRT: It's -- I wouldn't say --
13 it's not beyond the operative language in the sense
14 of the operative language of the contract says this
15 is deleted and this is added.

16 THE COURT: Okay. I see that argument.
17 I see that. Okay.

18 MR. GEHRT: But I would also note that,
19 even if we're assuming -- even if I were to go down
20 that road and say, Well, now, viruses are no longer
21 part of the operative language, the only operative
22 language where I put blinders on and the only

1 operative language I look at is simply the
2 definition that is now a part of the policy, that
3 language still has to be interpreted narrowly in
4 favor of coverage.

5 So if there's any ambiguity as to whether
6 or not an irritant is a virus -- and I would submit
7 that a virus that causes -- the virus itself is not
8 a solid liquid, gaseous, thermal irritant -- I know
9 it says "or other," which would be a catch-all but
10 it's not an irritant in the sense of, you know,
11 soot or chemicals or things of that nature. It
12 infects people and causes them to be sick. And I
13 guess it's irritating to be sick, but the virus
14 itself is not an irritant to people.

15 And that actually brings me to -- raises
16 another point that counsel made that I think I'd
17 like to speak on. It was a point raised that the
18 virus is a mortal danger to human beings. That's
19 true. It absolutely is a mortal danger to human
20 beings, and that's the basis for the property
21 damage. To use that as an argument suggests that,
22 oh, it doesn't harm property, it harms people, but

1 that's why things like asbestos and smoke and, you
2 know, in this case where they try to exclude
3 chemicals, it's not -- it's because they harm
4 people that renders the property dangerous. That's
5 the direct physical loss or damage.

6 So I would submit that the fact that it
7 is a mortal danger underscores why the policy
8 provides coverage for these types of losses.

9 THE COURT: All right. Anything else,
10 sir?

11 MR. GEHRT: Certainly. And just to make
12 clear, on the amendatory endorsement issue, counsel
13 argues that the fact of the matter that Louisiana
14 appears in the heading is dispositive here, I would
15 say that's contradicted by the policy in a number
16 of ways.

17 THE COURT: But to read it the other way
18 is to say that, because it doesn't limit itself by
19 things like the Connecticut endorsement does, it
20 limits it to Connecticut, if I applied that
21 throughout all of these endorsements -- some of
22 which say they're state limited, some don't -- I

1 end up with all sorts of conflicting provisions,
2 which have nothing to do with the exclusions. A
3 lot of it has to do with how can you terminate one
4 of these contracts or, you know, whatever. And it
5 seems to become a hopeless mess jumbled of
6 conflicting provisions which then, by your
7 analysis, would apply -- and how does one make
8 sense of that, except to say, Well, this must only
9 apply to this particular state?

10 MR. GEHRT: Well, first, I would note, I
11 believe as you did, I think, that our
12 interpretation -- the conflicts that they're
13 referring to has nothing to do with what's at issue
14 here with respect to the contamination exclusion.
15 There's no conflicts created by our interpretation
16 with respect to that.

17 Zurich is really referring to other
18 potential conflicts that have really nothing to do
19 with these issues. But suffice it to say --

20 THE COURT: But we would like to be
21 consistent in interpreting the contract.

22 MR. GEHRT: Correct, correct. I don't

1 dispute that.

2 But I would say that it's Zurich that has
3 the burden of making its contract clear, and if the
4 endorsements are inconsistent -- we cited the
5 Minuteman case from the Northern District of
6 Illinois from 2004. If endorsements aren't
7 consistent, the rule is to resolve the ambiguity in
8 favor of the insured. It's not to find a way to
9 reconcile the endorsements in some way that limits
10 coverage, which is what we have to be doing here if
11 we were to interpret the amendatory endorsement as
12 only applying to Louisiana properties.

13 We would also have to violate the rules
14 of contract interpretation by rendering the
15 Connecticut language and the New York language
16 superfluous. It would be meaningless to have to
17 specify, you know, that all of that language be
18 rendered meaningless because all you have to do is
19 put the heading, which, by the way, the policy says
20 have no meaning. The policy explicitly says in
21 Section 6.20 that the titles of the various
22 paragraphs and endorsements are solely for

1 reference and shall not in any way affect the
2 provisions to which they relate.

3 So we have to take the policy on its
4 word. The headings have nothing to do --

5 THE COURT: Let me ask you this: How
6 does that argument affect your exclusion argument
7 that the exclusions only apply because they appear
8 under certain headings?

9 MR. GEHRT: I don't think the -- the
10 headings aren't being used to interpret it. It's
11 the structure of the policy itself.

12 THE COURT: What's the difference? I'm
13 not sure I see a difference there.

14 MR. GEHRT: I think if you look at -- if
15 you look at the -- we're looking at the plain
16 language of the policy. We're not using the
17 headings to interpret the Section 3 exclusion and
18 the Section 4 exclusions. We're talking about the
19 lead in to Section 4 and being separate and apart
20 from the exclusions in Section 3.

21 And, again, it's just a question of
22 whether or not it's clear and conspicuous -- again,

1 we're talking about exclusions here; we're not
2 talking about interpretation of coverage grants
3 either.

4 So in the context of exclusions, the
5 question is, is whether or not this clearly and
6 conspicuously incorporated into Section 4, and I
7 would submit that it's not.

8 But our argument doesn't rise and fall
9 with that; that is, of course, one argument with
10 respect to contamination exclusion. You can argue,
11 even if the Court were to take the logical leap
12 that the amendatory endorsement does not delete
13 viruses, notwithstanding the fact that there's
14 nothing in the policy language, you know, broadly
15 applying that amendatory endorsement, it's still in
16 the 501, the point we just raised, but also because
17 the contamination exclusion is limited to
18 contamination and any cost due to contamination.

19 And I'll refer -- and, therefore, it does
20 not exclude loss due to contamination. And I would
21 refer to the Court's holding in Thor Equities
22 versus Factory Mutual, which is the Southern

1 District of New York earlier this year. And the
2 Court there was faced with a nearly identical
3 exclusion, and the Court held that it cannot be
4 said that the exclusion unambiguously forecloses
5 recovery on the insured's losses due to
6 contamination, and thus, the Court cannot conclude
7 that there's no reasonable basis for a difference
8 of opinion. Essentially the Court ruled that,
9 quote, "The provision is susceptible to more than
10 one interpretation and potentially compatible with
11 either parties' interpretation," and those
12 interpretations would be those advanced here by
13 plaintiffs and also by the insurers.

14 But then, finally, we would also contend
15 that the contamination exclusion as drafted is not
16 clear and unambiguous. It doesn't -- it's not
17 labeled a virus exclusion notwithstanding the fact
18 that the insurance industry had a clear standard
19 form virus exclusion available to it. They didn't
20 avail themselves of it. Instead, they threw in an
21 exclusion for contamination that doesn't contain
22 the word "virus." Virus is, you know, buried 37

1 pages later, and it essentially operates as a
2 hidden virus exclusion, and we would submit that
3 it's not clear and unambiguous on that basis as
4 well.

5 THE COURT: All right. And did you want
6 to address the pollutions contamination question?

7 MR. GEHRT: Sure, Your Honor. And I
8 think we have stated our arguments generally in the
9 brief on that issue, and that's --

10 THE COURT: And that was the dispersal
11 that you're saying that basically comes out -- it
12 wasn't -- it doesn't fit within those verbs:
13 Release, migrate, discharge, escape, or dispersal.

14 MR. GEHRT: Correct, Your Honor. And as
15 well as the analysis -- that and the analysis
16 provided by the Court in Elegant which said that --
17 rejected an even broader exclusion than that in the
18 same context and because -- and counsel pointed
19 this out that, there, the Court was really relying
20 on the fact that the insured was not relying on the
21 presence of the virus.

22 I would direct the Court's attention to

1 paragraph 152 of the complaint, which we do argue
2 that the orders themselves result in the functional
3 impairment, which is the exact argument adopted by
4 the Court in Elegant. And so that argument would
5 be taken care of by those allegations. But,
6 otherwise, I would submit that the arguments are
7 the same.

8 THE COURT: Let me ask you sort of the
9 technical pleading question.

10 MR. GEHRT: Sure.

11 THE COURT: Are you making a claim for
12 the communicable disease coverage? I know you had
13 mentioned, you know, in your brief -- your
14 paragraph 106 and 152, interruption by communicable
15 disease. And that part of the complaint goes into
16 what your -- what the coverage is, but when you get
17 down to your actual claim of breach of contract,
18 I'm not sure you raise that explicitly as a grounds
19 for asserting that as a grounds for breach. Am I
20 reading this too technically?

21 MR. GEHRT: I would never accuse you of
22 reading it too technically but no, I -- to make

1 clear on the record, I would say that we are making
2 a claim under the communicable disease coverage,
3 but there are, in our view, multiple coverages that
4 apply here, which is why we focus primarily on the
5 time elements, civil authority, the dependent
6 properties. And I wouldn't -- I would caution the
7 Court not to lose sight of the dependent properties
8 or, excuse me, the attraction properties, which is
9 in the contingent time element coverage.

10 And the insureds have argued that, Well,
11 Elegant Massage is different because they were
12 required to shut down, and you guys didn't have to
13 shut down. And as Your Honor pointed out, well, we
14 did have to shut down portions of our property, and
15 the communicable disease coverage refers to
16 portions of property that it addressed.

17 THE COURT: And suspension provides
18 for --

19 MR. GEHRT: Slow down.

20 THE COURT: -- slow down. Right.

21 MR. GEHRT: Right, right. So I point
22 that out. But, also, the attraction properties,

1 for example, amusement parks, convention centers
2 that surround our hotels and, obviously, serve as a
3 major source of business and the reason why,
4 frankly, a lot of the hotels exist where they do is
5 because of these attraction properties, those have
6 been fully shut down.

7 So the arguments that we remained open
8 does not foreclose coverage under that piece
9 because those properties were shut down due to
10 direct physical loss or damage and that resulted in
11 the suspension of our business activities. So
12 that's a significant component of our claim, and I
13 just don't want it to be lost.

14 THE COURT: We have not lost that. All
15 right.

16 We have been at this a while but I'm
17 going to give Mr. Silverberg or Mr. Ingerman an
18 opportunity to respond briefly, if you wish.

19 MR. SILVERBERG: Thank you, Your Honor.
20 I'm going to try to be as brief as possible.

21 Restored to a sound and healthy state.
22 It was never not in a sound or healthy state, and

1 that's the point, because there was no physical
2 loss or damage. And I would just submit to the
3 Court, ask yourself, for instance, airlines,
4 hospitals, fire departments, police departments,
5 they weren't shut down because they needed to be
6 open because they were essential. Other
7 businesses, including stadiums, including hotels,
8 including bars and restaurants, they were either --
9 access was limited for a period of time because it
10 had do with the transmission of the virus person to
11 person. It had nothing to do with physical loss or
12 damage.

13 The TravCo case which Plaintiff cites in
14 its brief, it was Chinese drywall. The building
15 that -- the location was uninhabitable and it was
16 the property itself. Asbestos, same thing; it was
17 the property itself. That is not what we're
18 dealing with here.

19 As far as the Louisiana endorsement, the
20 very same argument has just been, two days ago,
21 rejected by the federal district court in New
22 Jersey in Boscoff (ph), also in the Firebird and

1 Manhattan Partners cases. These arguments are not
2 new. They have all been raised before.

3 The Thor case, that case has already been
4 criticized. First of all, it's New York and Your
5 Honor has said New York law is not controlling
6 here. It's been criticized by the Federal District
7 Court in New Jersey in Ralph Lauren. The Court, in
8 fact, said, As in Thor Properties, plaintiffs here
9 attempt to restrict the contamination exclusion to
10 expended costs only. This distinction is
11 superfluous. Indeed, the Court in Thor Equities
12 acknowledged that Plaintiffs reading the exclusion
13 could tend to render certain aspects of the
14 exclusions meaningless, arguing that the
15 conjunctive use of and specifically, quote,
16 "contamination" at any cost due to contamination,
17 including the ability to occupy property, destroys
18 Plaintiff's proffered interpretation of the
19 exclusion.

20 Finally, Elegant Message, which we have
21 made no bones about it, we think it was wrongly
22 decided and we think the federal court did not

1 follow the rules of construction in Virginia and it
2 has been cited time and again as an outlier and
3 courts have rejected it, but even there, the Court
4 said, "However, the Court does not go as far as to
5 interpret," quote, "direct physical loss," closed
6 quote, to mean whenever property cannot be used for
7 its intended purpose due to intangible sources,
8 citing the Pentair (ph) decision.

9 So even in that case where we disagree
10 with the Court, even the Court recognizes there
11 that any intangible loss means you have got direct
12 physical loss or damage. So, again, Your Honor, we
13 did send additional decisions today. In fact, I
14 have got another decision today, literally while I
15 was in the waiting room, where counsel for
16 plaintiffs were on the other side of it in New York
17 where a lot of same arguments were made and
18 rejected.

19 So I don't know if Your Honor is going to
20 want any further briefing or any supplementation on
21 those orders. The Boscoff case, which we sent, is
22 really the same policy wording as here. The

1 federal district court rejected Boscoff's argument
2 in Pennsylvania.

3 Unless Your Honor has questions -- we do
4 appreciate all the time and let me just say
5 personally, I also appreciate Your Honor doing this
6 by Zoom rather than in person, so thank you very
7 much.

8 THE COURT: You bet. All right. Thank
9 you.

10 And, Mr. Ingerman, do you have anything
11 you wish to add in rebuttal?

12 MR. INGERMAN: Thank you, Your Honor.
13 The only thing I'll add is that, if the Court looks
14 at the first paragraph of the pollution
15 contamination exclusion under the Clause 5
16 exclusions clause, it takes care of both of the
17 arguments that Plaintiff's counsel made with
18 respect to our pollution contamination clause
19 because it says we will not pay for loss/damage
20 cost or expense. So we don't have the issue that
21 was raised in the Thor Equities case.

22 And then it goes on to say, "Caused

1 directly or indirectly," which is the
2 anti-concurrent causation language. So whether
3 it's a civil authority order or not, if the virus
4 is indirectly causing the loss, this exclusion
5 would apply.

6 That's all I have, Your Honor. Thank you
7 very much for your time.

8 THE COURT: All right. Thank you.

9 I want to tell counsel that I thought the
10 briefing quality here was outstanding, and I think
11 both sides have done an excellent job of framing
12 the issues, explaining them in a careful way, and
13 you know, in doing it in such a way that was really
14 helpful to the Court to understand the issues from
15 your perspective, to analyze a broad range of cases
16 that have been out there, and it is, frankly, an
17 example of the highest and best work that anyone in
18 our profession could do.

19 This is not easy stuff. It may be easy
20 for you; it's not easy for us poor country lawyers
21 here in Fairfax. You know? And I appreciate the
22 quality of the briefing, and the arguments today

1 have been outstanding. I think you have done an
2 excellent job, again, of expressing your positions
3 on it in a very clear way.

4 In 1863, President Lincoln gave the
5 Gettysburg Address in which he said, "The world
6 will little note, nor long remember what we say
7 here." I believe that's true of anything I have to
8 say on this topic, and where President Lincoln was
9 wrong about the world remembering, I know that I'm
10 right.

11 If I were to take this case under
12 advisement, I'm afraid there'd be another 20
13 decisions made between now and the date that I make
14 the ruling, and I suspect that those would come out
15 in some fashion, you know, favorable to both sides,
16 at least some to some sides.

17 I don't really find that all these
18 different opinions -- I think Mr. Silverberg, you
19 expressed, I think, quite clearly, that some of
20 this has just to do with the nature of the Court's
21 philosophy of how they approach these types of
22 questions. It's interesting to me that, in

1 Virginia, we are operating on a relatively -- not
2 relative -- I think we're operating on a completely
3 blank slate on both the motion craving over issues
4 as to whether over can reach a choice of law
5 question, but even more so on the substantive
6 questions that you-all have presented, starting
7 with something as what appears to be as simple
8 initially as what does it mean to experience a
9 physical loss or damage. Perhaps where you stand
10 on this has a lot to do with where you sit.

11 I have read many -- I haven't read the
12 cases that have just come out in the last day or
13 two, and it's the last time I schedule a hearing
14 like this anywhere other than 9:00 in the morning,
15 but what I'm going to do is I'm going to sustain
16 the demurrer in its entirety because it is my view
17 that a plain reading of the statute -- of the
18 contract, that physical loss or damage is a phrase
19 that is not ambiguous, that it's clear on its face,
20 and it does not reach the circumstances that we
21 have here where there's a presence of a virus. I
22 simply disagree that that creates a physical loss

1 or damage. And so that takes care of many of the
2 issues.

3 In addition, I find that the
4 contamination exclusion excludes viruses. With
5 regard to the Louisiana exclusion, frankly, it's my
6 view -- this is one that Mr. Silverberg wasn't
7 willing to adopt, but I'm going to go there. I
8 think that the Louisiana exclusion is actually
9 broader than what was excised by saying "any
10 irritant." "Irritant" is -- I can't think of a
11 word broader than "irritant" and I think that it's
12 a distinction there that did not narrow that
13 exclusion, if anything had broadened it.

14 I simply just disagree that the argument
15 that having a belt-and-suspenders approach somehow
16 renders other portions of the contract not to have
17 meaning. I disagree with that. I don't see that.

18 I am -- with regard to the other
19 pollution exclusion, I think that, in the other
20 contract, that is also -- bars coverage here.

21 For all those reasons, I find that the
22 demurrer should be sustained with prejudice and the

1 complaint should be dismissed. I realize that --
2 and I encourage you, frankly, that this case ought
3 to be taken up and decided above my pay grade. I
4 think you have all done an excellent job in stating
5 those arguments, and I'm sure our Supreme Court
6 will grant you a petition in this case because it's
7 an important issue that I think minds greater than
8 mine, with your assistance, need to decide. But
9 that's how I come out on it. The demurrer is
10 sustained with prejudice.

11 Mr. Silverberg, I'm not sure if I have a
12 draft order to that effect. It's a pretty simple
13 order. But if you-all want to make sure that your
14 record is preserved, I'm more than willing to have
15 you-all draft an order and endorse it with your
16 objections and so forth to make sure that all of
17 the arguments that you have made, that are clearly
18 on the record here and well articulated today, are
19 preserved.

20 MR. SILVERBERG: Yes. Thank you, Your
21 Honor.

22 THE COURT: All right. Mr. Silverberg,

1 I'm going to put the burden on you to get that
2 order circulated and try to get it to me within,
3 say, two weeks.

4 MR. SILVERBERG: Yes, Your Honor.

5 THE COURT: All right. And that would
6 mean that any time period for running an appeal
7 wouldn't even begin until I get that order in hand
8 and I sign it, and then we would let you-all know
9 immediately when that happens so you can start
10 counting your time limits.

11 MR. SILVERBERG: Thank you, Your Honor.

12 THE COURT: All right. Thank you-all for
13 your great work. Very enjoyable argument. Thank
14 you.

15 MR. SILVERBERG: Thank you, Your Honor.

16 THE COURT: And happy 4th.

17 MR. GEHRT: Thank you, Your Honor.

18 MR. INGERMAN: Happy 4th, Your Honor.

19 Thank you.

20 (At 1:49 p.m., the above hearing
21 concluded.)

22

1 CERTIFICATE OF COURT REPORTER - NOTARY PUBLIC

2

3 I, Kevin Kiser, the officer before whom
4 the foregoing deposition was taken, do hereby
5 certify that said proceedings were electronically
6 recorded by me; and that I am neither counsel for,
7 related to, nor employed by any of the parties to
8 this case and have no interest, financial or
9 otherwise, in its outcome.

10 IN WITNESS WHEREOF, I have hereunto set my
11 hand and affixed my notarial seal this 2nd day of
12 July, 2021.

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16 KEVIN KISER, Notary Public

17 for the Commonwealth of Virginia

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19 Notary Registration Number: 7637508

20 My Commission Expires: 9/30/2024

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CERTIFICATE OF TRANSCRIBER

I, Bobbi J. Fisher, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.

Bobbi Fisher

Bobbi J. Fisher, RPR
NCRA Registered Professional Reporter (RPR)
Final Prepared: July 5, 2021

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<p>10017 2:18 106 77:14 10880 3:5 11 12:1 12 1:18 1230 2:11 1235 3:15 129 47:9 130 43:13, 43:14 133 47:11 134 47:14, 47:21 135 48:18 149 47:9 15 43:13 152 77:1, 77:14 17 5:5 1801 15:13, 15:14 1863 85:4 19 5:6, 9:16, 22:21, 38:6, 44:7, 44:8, 44:15, 54:22</p> <hr/> <p>2</p> <hr/> <p>20 1:18, 2:17, 10:15, 43:13, 44:6, 85:12 200 2:5</p>	<p>2000 3:5, 46:7 20004 4:6 2004 72:6 2016 11:20 202 4:7 2021 1:7, 1:17, 6:18, 90:12, 91:17 2024 90:20 212 2:19, 3:22 21209 4:12 2121 2:5 219 66:9, 66:13, 66:17 22 5:8 22030 3:14 22314 2:6 2974 6:18 2nd 90:11</p> <hr/> <p>3</p> <hr/> <p>30 90:20 300 3:13, 22:20, 24:7, 27:16, 34:20, 39:11 3000 4:13 31 38:13 313 2:13, 3:7</p>	<p>37 75:22 38.2 15:13, 15:14 384291 1:20</p> <hr/> <p>4</p> <hr/> <p>4.02 57:9 4.03 25:14 400 10:1 4020 3:13 410 4:13 42 5:9 424 2:13, 3:7 4257 3:22 4523 4:7 46 5:10 49 89:20 4th 89:16, 89:18</p> <hr/> <p>5</p> <hr/> <p>50 40:14 500 4:5 5000 2:19 501 74:16 519 2:7 580 4:13</p> <hr/> <p>6</p> <hr/> <p>6.20 72:21</p>	<p>6225 4:11 6800 2:7 686 2:19 690 2:11 691 3:15</p> <hr/> <p>7</p> <hr/> <p>703 2:7, 3:15 757 2:17 7637508 90:19 7860 2:13, 3:7 79 5:11 799 4:7</p> <hr/> <p>8</p> <hr/> <p>804 3:22 83 5:12 84 5:13 8th 4:5</p> <hr/> <p>9</p> <hr/> <p>9 86:14 90024 3:6 90266 2:12 91 1:21 94 60:5 99 27:20</p>
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