Visconti Bus Serv., LLC v Utica Natl. Ins. Group

Supreme Court of New York, Orange County

February 12, 2021, Decided

EF005750-2020

Reporter
2021 N.Y. Misc. LEXIS 546 *; 2021 NY Slip Op 21027 **

[1]** Visconti Bus Service, LLC, VISCONTI FAMILY LLC, ROBIN ALLY LLC, 145-147 MILLS STR., LLC, Plaintiffs, against Utica National ***Insurance*** Group and UTICA NATIONAL ***INSURANCE*** OF TEXAS, Defendants.

Core Terms

coverage, premises, physical loss, civil authority, loss of use, cause of ***loss***, virus, business ***income***, physical damage, property damage, extra expense, Orders, losses, trigger, closure, ***insured*** premises, ***insured***, cases, ***insured*** property, contamination, interruption, provisions, alleges, buses, government action, provide coverage, closure order, restaurant, pandemic, ***insurance*** policy

Case Summary

Overview
HOLDINGS: [1]-In a breach of contract action, the ***insured***'s motion to dismiss the complaint was granted because the all risk policy did not cover the significant ***business interruption*** losses and extra expenses suffered as a direct result of the nationwide and statewide government shutdown orders designed to mitigate the ***Covid***-19 pandemic which restricted all or part of the ***insured***'s busing business; [2]-The court noted that labeling the policy as all-risk does not relieve the ***insured*** of its initial burden of demonstrating a covered loss under the terms of the policy.

Outcome
Insured's motion granted; complaint dismissed.

LexisNexis® Headnotes

Evidence > Burdens of Proof > Allocation

Insurance Law > ... > Property
Insurance > Coverage > All Risks

Insurance Law > ... > Procedure > Evidence & Trial > Burdens of Proof

Insurance Law > ... > Property
Insurance > Obligations > Covered Losses

HN1[] **Burdens of Proof, Allocation**

The policyholder bears the initial burden of showing that the ***insurance*** contract covers the loss. Labeling the policy as all-risk does not relieve the ***insured*** of its initial

burden of demonstrating a covered loss under the terms of the policy.

Insurance Law > ... > Business
Insurance > Commercial General Liability
Insurance > Property Claims

Insurance Law > ... > Property
Insurance > Coverage > Property Damage

HN2[] Commercial General Liability Insurance, Property Claims

Construing policy language substantially identical, New York courts pre-***Covid*** held that (1) business income/ extra expense coverage is triggered only by direct physical loss or damage to the covered property itself, and (2) a mere loss of use or functionality does not constitute a direct physical loss within the meaning of a policy providing coverage for direct physical loss or damage to covered property.

Insurance Law > ... > Property
Insurance > Coverage > Property Damage

HN3[] Coverage, Property Damage

The words direct and physical, which modify the phrase loss or damage, ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure. Direct physical loss or damage language in an ***insurance*** policy clearly and unambiguously provides coverage only where the ***insured***'s property suffers direct physical damage.

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > Ordinary & Usual Meanings

Insurance Law > ... > Property
Insurance > Coverage > Property Damage

Insurance Law > ... > Business
Insurance > Commercial General Liability
Insurance > Property Claims

HN4[] Policy Interpretation, Ordinary & Usual Meanings

Putting these definitions together demonstrates that the requirement that the loss be physical, given the ordinary definition of that term, is widely held to exclude from property ***insurance*** alleged losses that are intangible or incorporeal. The plain meaning of the phrase direct physical loss of or damage to therefore connotes a negative alteration in the tangible condition of property. The phrase direct physical loss or damage unambiguously requires some form of actual, physical damage to the ***insured*** premises. The phrase physical loss or damage requires that the interruption in business must be caused by some physical problem with the covered property. An interpretation of the phrase direct physical loss of to include deprivation of property without physical change in the condition of the property would lack manageable bounds. Losing the ability to use otherwise unaltered or existing property simply does not change the physical condition or presence of that property and therefore cannot be classified as a form of direct physical loss or damage. Property ***insurance*** claims are precluded when the ***insured*** merely suffers a detrimental economic impact unaccompanied by a distinct, demonstration physical alteration of the property).

Governments > Local Governments > Employees & Officials

Insurance Law > Types of ***Insurance*** > Property ***Insurance***

HN5[] Local Governments, Employees & Officials

The gist of Civil Authority coverage is that physical harm to someone else's premises has caused the civil authorities to prohibit access to the ***insured***'s premises.

Evidence > Burdens of Proof > Allocation

Insurance Law > ... > Property
Insurance > Coverage > All Risks

HN6[] Burdens of Proof, Allocation

Labeling the policy as all-risk does not relieve the ***insured*** of its initial burden of demonstrating a covered loss under the terms of the policy.

Counsel: **[*1]** For Plaintiff: Allan Kanner, Esq., Kanner & Whiteley, LLC, New Orleans, LA, and Alexandra Awad, Esq., Finkelstein & Partners, LLC, Newburgh, NY.

For Defendant: Bryce L Friedman, Esq. and Michael J. Garvey, Esq., Simpson Thacher & Bartlett LLP, New York, NY.

Judges: Catherine M. Bartlett, J.

Opinion by: Catherine M. Bartlett

Opinion

Catherine M. Bartlett, J.

I FACTUAL AND PROCEDURAL BACKGROUND

This is an action for breach of contract arising out of the denial by the defendant ***insurers*** ("Utica") of a claim by Plaintiffs ("Visconti") for ***insurance*** coverage for losses sustained in connection with the ***Covid***-19 pandemic. Utica moves for dismissal on the ground that the commercial property ***insurance*** policy in question provides no coverage for the claimed losses.

A. Pertinent Allegations of Visconti's Complaint

Visconti's Complaint alleges in pertinent part as follows:

> 1. This action for breach of contract arises out of Utica's denial of Visconti's claim for ***insurance*** coverage under their "all risk" policy for its significant ***business interruption*** losses and extra expenses suffered as a direct result of the nationwide and statewide government shutdown orders designed to mitigate the ***Covid***-19 pandemic by, in part, restricting all **[*2]** or part of the ***insured***'s business at the ***insured*** premises in order to save lives and protect property.
>
> 2. The losses, including the loss of use of the ***insured*** premises and ***loss*** of business ***income*** therefrom, were caused by these Executive Orders designed to mitigate the imminent threat to person and property posed by ***Covid***-19, which is an unexcluded covered cause of loss under the subject "all risk" policy, which defines "covered cause of loss" as risk of direct physical loss unless the loss is excluded or otherwise limited.
> .....
> 5. Visconti is a bus contractor that owns a fleet of transportation vehicles, including buses. Visconti's headquarters are located in Newburgh, New York. Their mechanics services their vehicles, including buses, at headquarters. Buses must be scheduled and dispatched at headquarters. Buses cannot be dispatched remotely due to internal safety protocols.
> .....
>
> 47. Actions, such as those taken by Visconti and the incidental ***loss*** of business ***income***, including compliance with a reasonable and necessary Executive Order to limit the use of their premises in order to prevent or mitigate an imminent risk of direct physical loss or damage to people and property, in the face **[*3]** of a widespread pandemic, are the cause of Plaintiff's loss of utility of its property and attendant business ***income loss***.
> .....
>
> 68. According to a study published in The New England Journal of Medicine, ***Covid***-19 is widely accepted as a cause of real physical loss and damage. It remains stable and transmittable in aerosols for at least three hours, up to four hours on copper, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel....
> .....
> 73. [Executive Orders required reduction of "in-person workforce" for non-essential businesses and severely impact essential businesses.]
> 74. [Executive Orders closed schools.] As a result, the operation of Visconti's bus fleet ceased, with the exception of two buses that operated to deliver meals to students of a closed local school district.

B. Pertinent Provisions of the Utica *Insurance* Policy

By reason of the foregoing, Visconti seeks coverage for ***loss*** of business ***income*** under its commercial property "all risk" Utica ***insurance*** policy, which covered the Visconti headquarters referenced in the Complaint (but *not* the Visconti buses). The policy provisions pertinent to the issues before the Court are as follows:

> **COVERAGE**
>
> We **[*4]** will pay for *direct physical loss of or damage to Covered Property* at the premises described in the Declarations *caused by or resulting from any Covered Cause of Loss*.

COVERED CAUSES OF LOSS

Covered Causes of Loss means *Risks of Direct Physical Loss unless the loss is Excluded in Section B, Exclusions*....

BUSINESS INCOME (and Extra Expense) COVERAGE

We will pay for the actual ***loss*** of Business ***Income*** you sustain due to the necessary "suspension" of your "operations" during the "period of restoration."[1]

The "*suspension" must be caused by direct physical loss of or damage to property at premises* which are described in the Declarations....*The loss or damage must be caused by or result from a Covered Cause of Loss...*.

> Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.
>
> **CIVIL AUTHORITY COVERAGE**
>
> We will pay for the actual ***loss*** of Business ***Income*** you sustain and necessary Extra Expense *caused by action of civil authority that* ***[*5]*** *prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss*.

EXCLUSIONS

Exclusion of Loss Due to Virus or Bacteria

A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part, including but not limited to forms or **[**2]** endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

B. We will not pay for *loss or damage caused by or resulting from any virus*, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

Other Exclusions

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

a. Ordinance or Law The enforcement of any ordinance or law (1) regulating the construction, use or repair of any property...

2. We will not pay for loss or damage caused by or resulting from **[*6]** any of the following: ...

b. Delay, *loss of use* or *loss of market*.

3. We will not pay for loss or damage caused by or resulting from...[3.b. *Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body*.] But if an excluded cause of loss that is listed in [3.b.] results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

C. Utica's Disclaimer

Utica disclaimed coverage on the grounds that "the premises described in the Declarations did not sustain any direct physical loss or damage from a Covered Cause of Loss." Utica also cited exclusions from coverage, including (1) the "virus" exclusion, and (2) the exclusion for "delay, loss of use or loss of market."

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[1] F.3. "**Period of Restoration**" means the period of time that: a. Begins: (1) 72 hours after the time of direct physical loss or damage for Business Income coverage; or (2) Immediately after the time of direct physical loss or damage for Extra Expense coverage; caused by or resulting from any Covered Cause of Loss at the described premises; and b. Ends on the earlier of: (1) The date when the property at the described premises should be *repaired, rebuilt or replaced* with reasonable speed and similar quality; or (2) The date when *business is resumed at a new permanent location*.

II LEGAL ANALYSIS

A. Burden of Proof

HN1[⬆] The policyholder bears the initial burden of showing that the ***insurance*** contract covers the loss. *Roundabout Theatre Co., Inc. v. Continental Cas. Co., 302 AD2d 1, 6, 751 N.Y.S.2d 4 (1st Dept. 2002)*; *Morgan Stanley Group, Inc. v. New England Ins. Co., 225 F.3d 270, 276 (2d Cir. 2000)*. "Labeling the policy as 'all-risk' does not relieve the ***insured*** of its initial burden of demon- strating a covered loss under the terms of the policy." *Roundabout Theatre Co., Inc., supra.*

B. Visconti's Argument Re Business Income / Extra Expense Coverage

While the Complaint does not specifically so state, Visconti has affirmatively maintained **[*7]** both in its motion papers (Memo., p. 2) and at oral argument that **its premises have not been infected with the *Covid* virus**. The substance of Visconti's argument regarding business income / extra expense coverage is succinctly stated in its Memorandum as follows:

The Business Income (and Extra Expense) Coverage Form...provides for payment:

> for the actual ***loss*** of Business ***Income*** [sustained] due to the necessary "suspension" of **[**3]** your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to property at premises....The loss or damage must be caused by or result from a Covered Cause of Loss.
> Because the Policy does not contain any exclusion or limitation for Government Orders, such as those that caused Plaintiffs' loss, the Policy provides coverage on a showing of
>
> (1) direct physical loss of property, (2) caused by or resulting from a covered cause of loss. Here, the **direct physical loss is the loss of use or functionality of the property** and the **covered cause of loss is Government Action** to mitigate the proliferation of a pandemic.

(Memo., p. 6 [emphasis added])

C. Under New York Law, There Is No "Business Income / Extra Expense" [*8] Coverage in the Absence of "Direct Physical Loss Or Damage" to the *Insured* Premises; Mere Loss of Use / Functionality Is Insufficient to Trigger Coverage

HN2[⬆] Construing policy language substantially identical to that contained in the Utica policy at issue here, New York courts pre-***Covid*** held that (1) business income / extra expense coverage is triggered only by direct physical loss or damage to the covered property itself, and (2) contrary to Visconti's argument, a mere loss of use or functionality does not constitute a "direct physical loss" within the meaning of a policy providing coverage for "direct physical loss or damage" to covered property. *See,* *Roundabout Theatre Co., Inc. v. Continental Cas. Co., supra*; *Newman Myers Kreines Gross Harris, PC v. Great Northern Ins. Co., 17 F.Supp.3d 323 (S.D.NY 2014)*. In the face of the ***Covid*** pandemic, federal courts in New York have uniformly followed this authority in rejecting claims akin to those raised by Visconti here. *See,* *Michael Cetta, Inc. v. Admiral Indem. Co., 2020 U.S. Dist. LEXIS 233419, 2020 WL 7321405 (S.D.NY Dec. 11, 2020)*; *10012 Holdings, Inc. v. Sentinel Ins. Co., 2020 U.S. Dist. LEXIS 235565, 2020 WL 7360252 (S.D.NY Dec. 15, 2020)*; *Tappo of Buffalo, LLC v. Erie Ins. Co., 2020 U.S. Dist. LEXIS 245436, 2020 WL 7867553 (W.D.NY Dec. 29, 2020)*.

1. Roundabout Theatre Co., Inc. v. Continental Cas. Co.

In *Roundabout*, the seminal New York state authority, a theater company sought ***business interruption*** coverage for losses occasioned by order of the City of New York closing the street and denying access to the theater due to a construction accident in the area. The First Department wrote:

> [T]he language in the instant **[*9]** policy clearly and unambiguously provides coverage only where the ***insured***'s property suffers direct physical damage. The ***Insuring*** Agreement provides coverage for "loss of, damage to, or destruction of property or facilities... contracted by the ***insured*** for use in connection with such Production, caused by the perils ***insured*** against." The Perils ***Insured*** clause covers "all risks of direct physical loss or damage to the [***insured***'s] property," not otherwise excluded. Reading these provisions together, the only

> conclusion that can be drawn is that the business inter-ruption coverage is limited to losses involving physical damage to the ***insured***'s property [cit.om.].
>
> The IAS court's interpretation that the phrase "loss of" must include "loss of use of." **[**4]** because otherwise "loss of" would be redundant to "destruction of," is flawed....
>
> ...[T]he court's interpretation completely ignores the fact that the above-quoted ***Insuring*** Agreement is limited by the phrase "caused by the perils ***insured*** against," which, as noted, requires "direct physical loss or damage to the [***insured***'s] property." The plain meaning of the words "direct" and "physical" narrow the scope of coverage and mandate the conclusion **[*10]** that losses resulting from off-site property damage do not constitute covered perils under the policy [cit.om.].
>
> Other provisions in the policy support the conclusion that coverage is limited to instances where the ***insured***'s property suffered direct physical damage. In the "Definition of Loss" section of the policy, the measure of recovery is limited to "such length of time as would be required with exercise of due diligence and dispatch to *rebuild, repair or replace such part of the property herein described as has been lost, damaged or destroyed...*" If, as Roundabout argues, the policy covers losses resulting from off-site property damage, this provision would be meaningless since the ***insured*** obviously has no duty to repair a third party's property.
>
> ....An ***insurance*** policy should not be read so that some provisions are rendered meaningless (*see County of Columbia v. Continental Ins. Co., 83 NY2d 618, 628, 634 N.E.2d 946, 612 N.Y.S.2d 345*...), and such would be the result if Roundabout's position were upheld here.

Roundabout, supra, 302 AD2d at 6-8.

The reasoning of the *Roundabout* Court is fully applicable to the case at bar:

> (1) Here, much as in *Roundabout*, the ***insured*** sought ***business interruption*** coverage for a loss resulting not from damage to its property, but from a loss of use resulting from a governmental **[*11]** order.
>
> (2) The Utica policy, like the policy in *Roundabout*, explicitly limits coverage to direct physical loss or damage to the ***insured***'s covered property.
>
> (3) The words "direct" and "physical" narrow the scope of coverage to physical damage to the property itself and foreclose Visconti's argument that the phrase "loss of" includes mere "loss of use of" the property.
>
> (4) As in *Roundabout*, this is confirmed by other provisions of the Utica policy.
>
> The measure of recovery in the Utica policy is limited, much as in *Roundabout*, to the period within which the property should be "repaired, rebuilt or replaced" or the business is "resumed at a new permanent location." (*See*, Definition of "Period of Restoration") To recognize coverage for a mere "loss of use" when it is affirmatively maintained that Visconti's premises is not even infected with the ***Covid*** virus, would render this provision meaningless.

2. Newman Myers Kreines Gross Harris, PC v. Great Northern Ins. Co.

In *Newman Myers*, a law firm sought ***business interruption*** coverage for losses occasioned by a power outage that occurred when Con Edison preemptively shut off power as Hurricane **[**5]** Sandy approached to preserve the integrity of the electrical **[*12]** system in the event of flooding. The law firm's policy provided coverage for ***loss*** of business ***income*** and extra expenses in the event of "direct physical loss or damage by a covered peril to property." The firm argued that "the preemptive closure of its building in preparation for a coming storm" involved "direct physical loss or damage," citing, in support of this proposition, a number of out-of-state decisions wherein premises affected by noxious fumes or gases, unpleasant odors, contamination of well water, or threat of rockfall were rendered unusable. *Newman Myers, supra, 17 F.Supp.3d at 325, 328-329*.

The federal district court, first, distinguished these cases from the closure of the plaintiff's building in anticipation of the storm:

> Newman Myers's cases are, however, distinguishable. In each there was some compromise to the physical integrity of the workplace. To be sure, the cases involving odors, noxious fumes, and water contamination did not involve tangible, structural damage to the

> architecture of the premises. But the critical policy term at issue, requiring "physical loss or damage," does not require that the physical loss or damage be tangible, structural or even visible. The invasions of noxious or toxic gases in *TRAVCO* ***[*13]*** and *Essex*, rendering the premises unusable or uninhabitable, were held to suffice, because even invisible fumes can represent a form of physical damage. The contamination of well water in *Hardinger*, similarly involved physical damage, just not structural — there, to the building's water supply.[2]

Finally, the rockfall in *Murray*, although itself not having struck the premises, revealed a palpable future risk of physical damage, from another rockfall. Whether or not these cases were correctly decided, each involved the closure of a building due to either a physical change for the worse in the premises [*TRAVCO, Essex*, or *Hardinger*] or a newly discovered risk to its physical integrity [*Murray*]. Those characteristics are not presented by Con Ed's preemptive decision to shut off power to several utility service networks in order to safeguard its own system and equipment.

Newman Myers, supra, 17 F.Supp.3d at 330.

The Court, in any event, held that the meaning of "direct physical loss or damage" had to be determined under New York law:

> More apposite is New York case authority, and it favors the ***insurer*** here. Most germane is *Roundabout Theatre Co., supra.* [reciting facts and holding of the First Department in *Roundabout*].

The critical policy ***[*14]*** language here — "direct physical loss or damage" — similarly, and unambiguously, requires some form of actual, physical damage to the ***insured*** premises to trigger ***loss*** of business ***income*** and extra expense coverage. Newman Myers simply cannot show any such loss or damage to the 40 Wall Street Building as a result of either (1) its inability to access its office from October 29 to November 3, 2012, or (2) Con Ed's decision to shut off the power to te Bowling Green network. ***HN3***[⬆] *The words "direct" and "physical," which modify the phrase "loss or damage," ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure. See Roundabout Theatre Co., 302 AD2d at 6...("direct physical loss or damage" language in* ***insurance*** *policy "clearly and unambiguously provides coverage only where the* ***insured****'s property suffers direct physical damage");...[cit.om.]. This authority undermines, and the Court is unaware of authority supporting, Newman Myers's argument that "direct physical loss or damage" should be read to include to extend to mere loss of use of a premises, where* ***[*15]*** *there has been no physical damage to such premises. See United Airlines, Inc. v. Ins. Co. of State of Pa., 385 F.Supp.2d 343, 349 (S.D.NY 2005), aff'd 439 F.3d 128 (2d Cir. 2006)* ("The inclusion of the modifier 'physical' before 'damages' ... supports [defendant's] position that physical damage is required before business inter-ruption ***insurance*** coverage is paid."); *Philadelphia Parking Auth.,385 F.Supp.2d at 287-88* (noting that "'direct physical' modifies both loss and damage," and therefore "the interruption in business must be caused by some physical problem with the covered property...which must be caused by a 'covered cause of loss'").

Newman Myers, supra, 17 F.Supp.3d at 330-332 (emphasis added).[3]

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[2] To the same effect is *Pepsico, Inc. v. Winterthur Int'l America Ins. Co., 24 AD3d 743, 806 N.Y.S.2d 709 (2d Dept. 2005)*. In that case the plaintiff sought ***insurance*** coverage for "off-tasting" soft drink products rendered so by faulty raw ingredients. The question was whether the soft drinks were "physically damaged" within the meaning of an all-risk property ***insurance*** policy. The Second Department, much like the federal district court in *Newman Myers*, observed that the ***insured*** need not show a "distinct demonstrable alteration of the physical structure" of the soft drinks to prove "physical damage," but that "a physical event...[from] which injury or damage resulted" was nonetheless required. *Id., 24 AD3d at 743-744*. Hence, *Pepsico* does not support Visconti's argument (Memo., p. 8) that mere loss of use or functionality in the absence of any *physical* loss or damage to property is sufficient to trigger coverage.

[3] *Newman Myers*, like *Roundabout*, went on to demonstrate that its interpretation was supported by other policy provisions, specifically the "period of restoration" provision limiting coverage to the time necessary to "rebuild, repair, or replace": "The words 'repair' and 'replace' contemplate physical damage to the ***insured*** premises as opposed to loss of use of it." *See id.*, *17 F.Supp.3d at 332*.

Thus, *Newman Myers* squarely holds that the very policy language at issue in the Utica policy here requires "actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises," and squarely rejects the very claim made by Visconti here, i.e., that "'direct physical loss or damage' should be read to include...mere loss of use of a premises, where there has been no physical damage to such premises." *Id., 17 F.Supp.3d at 331*.

Moreover, *Newman Myers* undermines the primary ground on which Visconti seeks to **[**6]** evade the force of *Roundabout*, i.e., that the mere risk of "imminent harm" from ***Covid*** leading to a loss of use **[*16]** of its premises constitutes "direct physical loss" and therefore triggers coverage under the Utica policy. (*See*, Memo., pp. 12, 14-17) As the *Newman Myers* Court observed, (1) all (save one) of the out-of-state cases on which Visconti relies involved a"*physical* change for the worse" in the ***insured*** premises; (2) the only exception (*Murray v. State Farm Fire & Cas. Co., 203 W.Va. 477, 509 S.E.2d 1 [1998]*), involved a palpable risk to the physical integrity of the premises, rendering them untenantable; and (3) regardless, New York authority requires actual, demonstrable harm to the premises itself. *Newman Myers, supra, 17 F.Supp.3d at 330-332*.

3. Michael Cetta, Inc. v. Admiral Indemnity Company

Michael Cetta, Inc. parallels the case at bar: (1) it involved a claim for breach of contract arising out of the defendant ***insurance*** company's declining to provide business income / extra expense coverage for losses resulting from governmental orders to close restaurants due to the ***Covid***-19 outbreak; (2) the policy at issue provided coverage in the event of a suspension of business operations "caused by direct physical loss of or damage to property" at the ***insured*** premises; (3) the plaintiff made it clear that ***Covid***-19 was never found at its premises, and did not allege that its property was physically lost or damaged; **[*17]** (4) instead, like Visconti, it claimed that it "suffered a direct physical loss of and damage to its property because it has been unable to use its property for its intended purpose due to the closure orders." *Michael Cetta, Inc., supra, 2020 U.S. Dist. LEXIS 233419, 2020 WL 7321405 at *1, 5*.

Rejecting the plaintiff's argument that the alleged "loss of use" was sufficient to trigger coverage under a policy requiring "direct physical loss of or damage to property", the Court first analyzed the language of the ***insurance*** contract, writing:

> Because Sparks's "loss of use" theory centers on the word "loss," the Court must hone in on that word's meaning in the Policy. In the relevant portion of the Policy, the term "loss" is modified by the word "physical".[4]

... "Physical" means "of, relating to, or involving material things; pertaining to real, tangible objects." *Physical*, Black's Law Dictionary (11th ed. 2019). While Black's Law Dictionary provides several definitions of the word "loss," only one could apply to physical objects: "the failure to maintain possession of a thing." *Loss*, Black's Law Dictionary (11th ed. 2019). ***HN4***[⬆] Putting these definitions together demonstrates that the "requirement that the loss be 'physical,' given the ordinary definition of that term, is widely **[*18]** held to exclude [from property ***insurance***] **[**7]** alleged losses that are intangible or incorporeal." 10A Couch on Ins. §148:46 (3d ed. 2005).

> The plain meaning of the phrase "direct physical loss of or damage to " therefore connotes a negative alteration in the tangible condition of property. *See, e.g., Newman Myers Kreines Gross Harris, PC v. Great N. Ins. Co., 17 F.Supp.3d 323, 331 (S.D.NY 2014)* (holding that the phrase "direct physical loss or damage" "unambiguously[] requires some form of actual, physical damage to the ***insured*** premises"); *Phila. Parking Auth. v. Fed. Ins. Co., 385 F.Supp.2d 280, 288 (S.D.NY 2005)* (holding that the phrase "physical loss or damage" requires that "the interruption in business must be caused by some physical problem with the covered property"); *see also Mark's Engine Co. No. 28 Rest. v. Travelers Indem. Co., ... 2020 U.S. Dist. LEXIS 188463, 2020 WL 5938689, at *4 (C.D. Cal. Oct. 2, 2020)* (noting that an interpretation of the phrase

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[4] The Court declined to interpret the term "physical loss" as used in the context of commercial *property* coverage in light of the policy definition of "property damage" — "loss of use of tangible property that is not physically injured" — for purposes of *general liability* coverage. (Visconti, Memo., p. 8, has advanced a similar argument here.) The Court did so because (1) a word or phrase may mean different things in different sections of the policy, (2) the drafters of the policy included different "definition" sections for different sections of the policy, and (3) business income coverage and commercial general liability coverage protect "wholly different interests." *Michael Cetta, Inc., supra, 2020 U.S. Dist. LEXIS 233419, [WL] at *9*. The reasoning is sound, and counsels rejection of Visconti's parallel argument here.

> "direct physical loss of" to include "deprivation of property without physical change in the condition of the property" would lack "manageable bounds")...Losing the ability to use otherwise unaltered or existing property simply does not change the physical condition or presence of that property and therefore cannot be classified as a form of "direct physical loss" or "damage." *See* 10A Couch on Ins. §148:46 (3d ed. 2005) (explaining that property ***insurance*** claims are precluded "when the ***insured*** merely suffers a detrimental **[*19]** economic impact unaccompanied by a distinct, demonstration physical alteration of the property").

*Michael Cetta, Inc., supra, 2020 U.S. Dist. LEXIS 233419, [WL] at *6*.

The *Michael Cetta* Court proceeded to cite the analysis and holdings of both *Roundabout* and *Newman Myers* in support of its own conclusion (*2020 U.S. Dist. LEXIS 233419, [WL] at *6-7*), and then observed:

> As a result of ***Covid***-19 closure orders throughout the country, many businesses have brought lawsuits claiming entitlement to coverage under provisions materially similar to those at issue in *Roundabout Theater, Newman Myers*, and here. And nearly every court to address this issue has concluded that loss of use of a premises due to a govern-mental closure order does not trigger business income coverage premised on physical loss to property.

*2020 U.S. Dist. LEXIS 233419, [WL] at *8* (citing fourteen cases). Addressing a claim, much like Visconti's here, that all of this authority should be disregarded because the use of the disjunctive ("or") in the phrase "direct loss of or damage to property" indicates that "one can have a 'loss' without 'damage'" (Memo., pp. 6-7), the Court wrote:

> ...[T]he Appellate Division rejected a similar argument in *Roundabout Theatre*:
>
> The [lower] court's interpretation that the phrase "loss of" must include "loss of use of," **[*20]** because otherwise "loss of" would be redundant to "destruction of," is flawed. Initially, as [defendant] points out, "loss of" could refer to the theft or misplacement of theatre property that is neither damaged nor destroyed, yet still requires the cancellation of performances. *751 NYS2d at 8*.
>
> A close analysis of the text of the provision here confirms that the terms "loss" and "damage" are not superfluous. First, as noted in *Roundabout Theatre*, the term "loss" would seem to include "theft or misplacement," which would not constitute damage to the property. *Id.* Further, "loss" would extend to the *complete* destruction of property, whereas "damage" contemplates a lesser injury. [cit.om.] Thus, Sparks's argument that "direct physical loss of" then "*must* encompass loss of use,"...is an untenable leap in logic.

*2020 U.S. Dist. LEXIS 233419, [WL] at *8-9*.

Finally, the *Michael Cetta* Court addressed out-of-state cases involving situations where structures were rendered uninhabitable or unusable in the absence of physical damage:

> But these cases involve situations in which a plaintiff claimed that some harmful or unwanted substance entered its premises and made it impossible to use. They are therefore distinguishable because Sparks makes clear that **[*21]** ***Covid***-19 was never found on its premises and that it has no reason to think the virus contaminated or damaged anything at the restaurant, let alone made it uninhabitable....
> ....
>
> Indeed, the main ***Covid***-19 related case that Sparks cites in its favor is distinguishable along these very lines as well. In *Studio 417 v. Cincinnati Ins. Co.,... 2020 U.S. Dist. LEXIS 147600, 2020 WL 4692385, at *9 (W.D. Mo. Aug. 12, 2020)*, the court denied an ***insurer***'s motion to dismiss because plaintiff beauty salons and restaurants alleged that ***Covid***-19 "attached to and deprived [p]laintiffs of their property, making it unsafe and unusable, resulting in direct physical loss to the premises and property." *2020 U.S. Dist. LEXIS 147600, [WL] at *4*....These plaintiffs thus "expressly allege[d] physical contamination." *2020 U.S. Dist. LEXIS 147600, [WL] at *6*. Sparks does not....

*2020 U.S. Dist. LEXIS 233419, [WL] at *10*. Here, similarly, Visconti has explicitly affirmed that its premises is not infected with the ***Covid*** virus.

4. 10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.

10012 Holdings reached the same conclusion, much more succinctly, in rejecting a claim analogous to Visconti's here:

> New York courts interpreting substantially identical language — "loss of, damage to, or destruction of property or facilities" — have found it "limited to losses involving *physical damage to the **insured**'s property*) [citing, among other cases, *Roundabout Theatre, Newman Myers, Philadelphia Parking Auth., and United Airlines, Inc., supra*]. In so holding, **[*22]** courts have declined to interpret such language to include "loss of use" of the property under New York law. *Roundabout Theatre, 751 NYS2d at 6*. Nothing in the Complaint plausibly supports an inference that ***Covid***-19 and the resulting Civil Orders physically damaged Plaintiff's property, regardless of how the public health response to the virus may have affected business conditions for Plaintiff. The Complaint does not state a claim for "loss" of the ***insured*** property.

[**8] *10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd., supra, 2020 U.S. Dist. LEXIS 235565, 2020 WL 7360252 at *2*.

5. Tappo of Buffalo, LLC v. Erie Ins. Co.

Tappo of Buffalo, LLC is much like *Michael Cetta, Inc., supra, 2020 U.S. Dist. LEXIS 233419*, except that the plaintiffs therein alleged that "their premises, as well as properties immediately surrounding their premises, were exposed to ***Covid***-19, had ***Covid***-19 or persons with ***Covid***-19 present at the premises..." *Tappo of Buffalo, LLC v. Erie Ins. Co., supra, 2020 U.S. Dist. LEXIS 245436, 2020 WL 7867553 at *2*. The Court held:

> In New York, as in the vast majority of jurisdictions to consider the issue, policy language providing coverage for "direct physical loss or damage" unambiguously requires some form of actual, physical damage to the ***insured*** premises to trigger ***loss*** of business ***income*** and extra expense coverage.... [citing *Roundabout Theatre* and *Newman Myers, supra*].
>
> Recent cases involving businesses seeking coverage for ***business interruption*** resulting from ***Covid***-19 and government closure orders have similarly **[*23]** construed the modifiers "direct" and "physical" as requiring that the loss involve a tangible change in ***insured*** property....[cit.om.].

The *Tappo* Court went on to address the question whether the presence of ***Covid*** on the ***insured***'s premises may result in a covered loss:

> ..."an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'" *Mama Jo's, Inc. [v. Sparta Ins.]*, 823 Fed. App'x [868] at 879 [11th Cir. 2020]. Therefore, "even assuming that the virus physically attached to covered property," as plaintiffs allege in the instant case, "it did not constitute the direct, physical loss or damage required to trigger coverage because its presence can be elimi-nated" by "routine cleaning and disinfecting." *Promotional Headwear [Int'l v. Cincinnati Ins. Co.], 2020 U.S. Dist. LEXIS 228093, 2020 WL 7078735, at *8*; *See Uncork & Create LLC v. Cincinnati Ins. Co.,... 2020 U.S. Dist. LEXIS 204152, 2020 WL 6436948, at *5 (S.D. W.Va. Nov. 2, 2020)* (no coverage because "***Covid***-19 does not threaten the inanimate structures covered by property ***insurance*** policies, and its presence on surfaces can be eliminated with disinfectant."); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc., ... 2020 U.S. Dist. LEXIS 182406, 2020 WL 5847570, at *1 (S.D. Ca. Oct. 1, 2020)* (even assuming presence of virus at plaintiffs' business premises, business ***income losses*** were caused by precautionary measures taken by the state to prevent the spread of ***Covid***-19 rather than by direct physical loss of or damage to property); *but see Studio 417 v. Cincinnati Ins. Co.,... 2020 U.S. Dist. LEXIS 147600, 2020 WL 4692385, at *6 (W.D. Mo. Aug. 12, 2020)* (allegations that ***Covid***-19 particles **[*24]** attached to and damaged plaintiff's property, making it unsafe and unusable, sufficient to plausibly allege direct physical loss).

*2020 U.S. Dist. LEXIS 245436, [WL] at *4*.

Accordingly, the *Tappo* Court held:

> While there is no doubt that ***Covid***-19 and the New York State Executive Orders relating **[**9]** to ***Covid***-19 have had a devastating impact upon the restaurant industry, this Court agrees with the overwhelming majority of courts to have considered this issue that plaintiffs cannot plausibly allege that this impact is the result of direct physical loss of or damage to covered property as required to establish coverage under their ***insurance*** policies.

Id.

6. Conclusion

In view of the foregoing, the Court finds that:

> (1) Business income / extra expense coverage under the Utica property ***insurance*** policy is triggered only where the suspension of business operations at the covered premises is "caused by direct physical loss or damage to property at [the covered] premises."
>
> (2) The words "direct" and "physical," which modify the phrase "loss or damage," require a showing of actual, demonstrable physical harm of some form to the ***insured*** premises — the forced closure of the premises for reasons exogenous to the premises themselves is insufficient **[*25]** to trigger coverage.
> (3) New York courts, state and federal, applying New York law have uniformly held that this policy language is not ambiguous, and that it unambiguously excludes coverage for the mere loss of use or functionality of the covered premises in the absence of actual, demonstrable physical harm thereto.
>
> (4) There is no allegation of any physical harm whatsoever to Visconti's premises — Visconti has unequivocally asserted that its premises are not infected with the ***Covid***-19 virus.
>
> (5) The purported risk of "imminent harm" to the premises by exposure to the ***Covid***-19 virus is insufficient to trigger coverage because (a) actual, demonstrable physical harm is required, and (b) even if ***Covid***-19 were found at Visconti's premises, it would not constitute the direct, physical loss or damage required to trigger coverage because its presence can be eliminated by routine cleaning and disinfecting.

Accordingly, Visconti's claims with respect to Utica's denial of business income / extra expense coverage are dismissed.

D. The Complaint Does Not Allege a Valid Basis for Civil Authority Coverage

Visconti has not made a serious effort to plead or otherwise demonstrate the existence of Civil **[*26]** Authority coverage under the Utica policy. The policy provides:

> We will pay for the actual ***loss*** of Business ***Income*** you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

Thus, to establish the existence of Civil Authority coverage under the language of the policy, Visconti must demonstrate that:

> (1) its loss was caused by action of civil authority
> (2) which prohibited access to its covered premises
> (3) due to direct physical loss of or damage to property elsewhere
> (4) caused by or resulting from a covered cause of loss.

While (1) Visconti's losses were unquestionably caused by "action of civil authority" (the Executive Orders), the Complaint does not sufficiently allege that (2) the Executive Orders "prohibited access" to Visconti's premises, or (3) the restrictions, such as they were, which those Orders imposed upon Visconti's business were due to "direct physical loss of or damage to" property other than its own premises.[5]

1. The Complaint Does Not Allege that the Action of Civil [*27] Authority Prohibited Access to Visconti's Premises

In *Michael Cetta, Inc. v. Admiral Indemnity Co., supra, 2020 U.S. Dist. LEXIS 233419*, the Court dismissed the plaintiff's claim for Civil Authority coverage on a number of grounds, including the fact that the plaintiff "has not alleged that access was ever denied completely to the restaurant..." *2020 U.S. Dist. LEXIS 233419, 2020 WL 7321405 at *12*. The Court wrote:

> The fact that Sparks could have continued to operate its business in some capacity is fatal to Sparks's claim for civil authority coverage.
>
> Sparks's response is that closure orders "make it illegal for Sparks to allow patrons into its restaurant."...However, Sparks fails to cite any authority to support the idea that this would trigger civil authority coverage. This novel theory is without merit because under the plain meaning of the Policy, if employees (but not patrons) were allowed access to the indoor portions of the restaurant, civil authority did not prohibit access. For example, a

[5] Moreover, if the "virus exclusion" applies, then (4) there was no covered cause of loss.

> court in the Southern District of California dismissed a claim for civil authority coverage because "the complaint does not allege that any ***Covid***-19 civil authority orders prohibited plaintiffs from access to their business premises." *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.,... 2020 U.S. Dist. LEXIS 166808, 2020 WL 5500221, at *6 (S.D. Cal. 2020)*; *see also Sandy Point Dental,... 2020 U.S. Dist. LEXIS 171979, 2020 WL 5630465, at *3* ("While ***coronavirus*** orders have limited plaintiff's operations, no order issued **[*28]** in Illinois prohibits access to plaintiff's premises.").

Id.

While the Complaint describes the Executive Orders issued in New York by Governor Cuomo, nowhere does Visconti allege that the Orders prohibited access to its premises. If and to the extent that Visconti is relying on the March 22, 2020 Executive Order whereby the Governor **[**10]** ordered the closure of all "non-essential" businesses, Visconti nowhere alleges that it was a "non-essential" business subject to this closure order. The Court notes that the Guidance issued by the NYS Department of Health in conjunction with this Executive Order included among the businesses defined as "essential" — and therefore not subject to the closure order — "transportation infrastructure" including "buses."

Therefore, Visconti has failed to plead an essential element of Civil Authority coverage, to wit, that action of civil authority "prohibited access" to its ***insured*** premises.

2. The Complaint Does Not Allege That Any Restriction Imposed by Civil Authority Upon Visconti's Premises Was Due to Direct Physical Loss of or Damage to Property Elsewhere

Visconti argues: "Clearly buildings throughout New York and nearby were contaminated by ***Covid***-19 and that **[*29]** contamination and its continuing, rapid spread led to Government Action to restrict access to other properties, like Plaintiff's, to slow the spread of the pandemic." (Memo., p. 18) For three distinct reasons, however, a claim of this nature is insufficient to trigger Civil Authority coverage.

First, ill-defined assertions that other properties have been exposed to ***Covid***-19 are insufficient: "[w]ithout specific allegations that a neighboring property suffered 'damage to property,' the Complaint fails to state a claim that is plausible on its fact as to Sparks's entitlement to civil authority coverage." *Michael Cetta, Inc. v. Admiral Indemnity Co., supra, 2020 U.S. Dist. LEXIS 233419, 2020 WL 7321405 at *11*. Second, even if, as Visconti alleges, buildings throughout New York have been contaminated by ***Covid***-19, that would not constitute the "direct physical loss of or damage to" property that is required to trigger coverage. *See, Tappo of Buffalo, LLC v. Erie Ins. Co., supra, 2020 U.S. Dist. LEXIS 245436, 2020 WL 7867553 at *4*.

Finally, even if ***Covid***-19 contamination in other buildings were deemed to constitute direct physical loss of or damage to property, that was not the cause of any restriction imposed by civil authority upon the use of Visconti's own premises. As the Court in *10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd., supra, 2020 U.S. Dist. LEXIS 235565*, observed:

> It is plausible that the risk of ***Covid***-19 being physically present in neighboring properties caused **[*30]** state and local authorities to prohibit access to those properties. But the Complaint does not allege that these closures of *neighboring* properties "direct[ly] result[ed]" in closure of Plaintiff's *own* premises, as the Civil Authority provisions require. Instead, the Complaint alleges that Plaintiff was forced to close for the same reason as its neighbors — the risk of harm to individuals on its own premises due to the pandemic. Put differently, the Complaint does not plausibly allege that the potential presence of ***Covid***-19 in neighboring properties directly resulted in the closure of Plaintiff's properties; rather, it alleges that closure was the direct result of the risk of ***Covid***-19 at Plaintiff's property. *See United Air Lines, 439 F.3d 128, 134-35 (2d Cir. 2006)* (denying recovery because nationwide shutdown of airport facilities due to risk of terrorism did not directly result from physical damage to neighboring properties).

*2020 U.S. Dist. LEXIS 235565, 2020 WL 7360252 at *4*. ***HN5***[⬆] In other words, the gist of Civil Authority coverage is that physical **[**11]** harm to someone else's premises has caused the civil authorities to prohibit access to the ***insured***'s premises. Here, in contrast, *both* premises are restricted for the same reason: to limit the risk of spreading the ***Covid***-19 virus. This simply **[*31]** does not implicate Civil Authority coverage. *See, id.*

3. There Is No Free-Floating "Governmental Action" Coverage Under the Utica Policy

Visconti argues: "Because the Policy provides Civil Authority coverage under certain circumstances (Policy at A23, A73), then other Government Actions causing property loss are covered." (Memo., p. 18) The concluding phrase of that sentence is a *non sequitur*, and is demonstrably incorrect.

HN6[↑] As was noted at the outset, "[l]abeling the policy as 'all-risk' does not relieve the ***insured*** of its initial burden of demonstrating a covered loss under the terms of the policy." *Roundabout Theatre Co., Inc., supra, 302 AD2d at 6*. There is coverage under the Utica policy for the actions of government as set forth in the Civil Authority provision. For the rest, the policy provides:

> We will not pay for loss or damage caused by or resulting from...[3.b. *Acts or decisions, including the failure to act or decide, of any...governmental body*.] But if an excluded cause of loss that is listed in [3.b.] results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.
>
> Covered Causes of Loss means *Risks of Direct Physical Loss* unless the loss is Excluded in Section B, Exclusions....

[*32] Taken together, these provisions establish coverage (in addition to Civil Authority coverage) for government actions which cause "direct physical loss" to the ***insured***'s covered property. Here, of course, there is no allegation that the Executive Orders or any other governmental action caused "direct physical loss" as defined in Point "C" above to Visconti's property. There is no coverage for government actions which cause other losses — e.g., the loss of use or function- ality of property, restriction of business, etc. — which do not rise to the level of "direct physical loss," unless the claim falls within the scope of Civil Authority coverage.

4. Conclusion

Therefore, Visconti's claims with respect to Utica's denial of Civil Authority coverage are dismissed.

E. Other Issues

Visconti's Complaint is subject to dismissal because there is no coverage under the Utica policy for its claimed losses. Accordingly, the Court need not reach the issue whether coverage would be vitiated by any of the exclusions set forth in the policy. However, even if coverage were somehow found to exist, it appears that there are three policy exclusions which, singly or **[**12]** collectively, would potentially create an **[*33]** ***insurmountable*** barrier to Visconti's recovery.

First, the Utica policy explicitly excludes "loss or damage *caused by or resulting from... loss of use*." That exclusion undermines Visconti's primary argument in this case, i.e., that a loss of use or functionality of its property is a covered loss under the policy.

Second, the Utica policy explicitly excludes "loss or damage *caused by or resulting from...loss of market*." The Complaint (P74) alleges that upon the Governor's issuance of Executive Orders closing the schools of this State, "the operation of Visconti's bus fleet ceased, with the exception of two buses that operated to deliver meals to students of a closed local school district." Thus, Visconti's financial loss was caused by the loss of its *market* (the schools) independent of any loss or damage to its covered property — its headquarters, *not* its buses. Even if loss of use or functionality of its headquarters were a covered loss, Visconti cannot prove that that was the proximate cause of its financial loss.

Third, and finally, the Utica policy explicitly excludes "loss or damage *caused by or resulting from any virus*." The parties have argued at great length over the applicability **[*34]** *vel non* of the virus exclusion to the claims made by Visconti here. In an effort to circumvent this exclusion, Visconti argues, with some plausibility, that (1) its loss was caused not by the ***coronavirus*** but by the Executive Orders imposed in response to the virus, and (2) the virus exclusion must be construed narrowly relative to the other policy exclusions, which, unlike the virus exclusion, apply "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Since the Court has determined that there is no coverage under the Utica policy in the first instance, the interpretation of the virus exclusion may await another day.

It is therefore

ORDERED, that Defendants' motion is granted, and it is further

ORDERED, that Plaintiffs' request for leave to replead is denied, and it is further

ORDERED, ADJUDGED and DECREED, that the Complaint is dismissed.

The foregoing constitutes the decision, order and judgment of the Court.

ENTER

Dated: February 12, 2021

Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.
