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# COVID-19 Business Interruption Update: 5 Things We Know From Recent Judicial Decisions

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As COVID-19 cases have continued to surge into the Fall, so have the number of lawsuits filed by corporate policyholders seeking to recover part of the billions of dollars in lost income sustained since the pandemic began earlier this Spring. There are now hundreds of lawsuits pending in state and federal courts in different venues around the country. From these filings, courts have now issued dozens of decisions providing some guidance to parties both in and out of litigation.

While the facts and circumstances of each case are unique, here are five observations about potential trends as business interruption claims continue to work their way through the courts:

1. **Allegations Matter.** The overwhelming number of decisions issued so far have been written by federal judges responding to motions to dismiss filed by insurers arguing that the insured's complaint fails to state a claim upon which relief can be granted under Federal Rule 12(b)(6). In analyzing such motions, courts are generally limited to considering the allegations as pleaded, which will inevitably vary from one case to another. Although there will always be some similarities in complaints, and individual motions to dismiss may share common issues, including the existence of "physical loss," a decision to dismiss one complaint based on allegations unique to that pleading is not necessarily going to dictate the result in a motion to dismiss based on different allegations. In other words, the case law matters, and the policy terms matter. But allegations matter, too. Corporate policyholders should carefully consider how the factual allegations in a complaint can be developed to maximize the potential for recovery, particularly with the benefit of the dismissal opinions issued to date.

2. **Alleging the Presence of COVID-19 on Insured Premises.** One important distinction in factual allegations borne out by recent decisions is whether COVID-19 has been identified on the insured property. Some decisions have treated this fact as determinative in deciding whether the "direct physical loss" triggering coverage has been alleged. Other decisions suggest that allegations confirming the presence of the coronavirus on insured premises could trigger a virus exclusion. Depending on individual policy terms, corporate policyholders should consider how allegations about the existence of COVID-19, including the presence of infected employees, patrons or vendors, at an insured property will impact coverage and a potential dismissal motion. Given the developing science around the airborne transmission of COVID-19 and potential asymptomatic carriers, policyholders should consider not only documented cases but also the probability that COVID-19 has been present in or around insured property since the pandemic began in early 2020.

3. **State Court v. Federal Court.** While data on state court decisions may be incomplete, from a strictly numeric basis, policyholders have obtained a higher proportion of favorable decisions from state court judges than federal district courts. Any number of factors could be influencing this outcome, which is itself subject to change as decisions continue to be handed down. In the meantime, however, policyholders should be cognizant of differences in procedural rules and pleading requirements, as between state and federal courts, in making strategic decisions about venue. Although joinder and remand decisions are not reported in the summary below, naming the right defendants is also a key part of these deliberations, which should not be overlooked.

4. **Virus Exclusions.** The judicial decisions reported so far confirm that the existence of policy exclusions addressing viral contamination and pollutants are not an automatic bar to recovery or a plaintiff's complaint. Although, differences in policy terms remain significant. Those policies containing broad virus exclusions with anti-concurrent causation language have been the subject of more than one unfavorable dismissal opinion. Other decisions, however, have not found more narrowly worded virus or related exclusions to justify dismissal of a policyholder's complaint.

5. **Civil Authority Coverage.** Most reported decisions have focused on allegations invoking both (1) state and local lockdown/shelter-in-place orders issued at the height of the pandemic; and (2) the civil authority and ingress-egress provisions in individual commercial property forms. Many civil authority provisions, however, require not only the existence of a government order precluding access to insured property; such provisions also require the existence of covered physical loss or damage to neighboring property as the impetus for the government's action. Policyholders invoking civil authority (or related) coverage in a complaint should be sure to include factual allegations supporting each element of the relevant coverage and also confirm that the terms of the government orders cited are consistent with the insured's claim for recovery.

In addition to the observations above, here is a brief breakdown of the COVID-19 business interruption coverage decisions issued to date.

**Policyholder Victories**

*Florida*

- *Urogynecology Specialist of Florida, LLC v. Sentinel Ins. Co.*, 2020 U.S. Dist. LEXIS 184774 (M.D. Fla. Sept. 24, 2020) (denying insurer's motion to dismiss a complaint filed by a gynecology practice alleging damages from the closure of its business operations following the issuance of a COVID-19 executive order in March 2020 because (1) several ambiguities relating to the subject policy, including the absence of a complete copy in the record, made determination of the insured's coverage inappropriate; (2) the terms of the policy's virus exclusion also referenced fungi, dry rot and bacteria, and there was no indication that the elimination of pollutants as a covered cause of loss was intended to reach the losses caused by the pandemic; and (3) the cases cited by the insurer regarding the scope of the virus exclusion were factually distinguishable from the circumstances implicated by the current pandemic).

*Missouri*

- *Studio 417, Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020) (denying insurer's motion to dismiss a complaint filed by hair salon and restaurant owners in Missouri and Kansas alleging that (1) customers, employees or other visitors to the insured premises were infected with COVID-19 and carried the virus onto the insured properties, rendering the premises infected, unsafe and unusable and causing the suspension and interruption of business; and (2) related Closure Orders have caused physical loss or damage to insured premises by denying the use of property, based on the court's reasoning that (a) the policy terms relating to physical "loss" must be construed separately from "damage"; (b) prior decisions acknowledge that "even absent a physical alteration, a physical loss may occur when the property is uninhabitable and unusable"; and (c) the insureds have adequately alleged that the Closure Orders restricted access to property for purposes of the policy's Civil Authority, Ingress and Egress, Dependent Property and Sue & Labor coverages).

- *K.C. Hopps v. Cincinnati Ins. Co.*, 2020 U.S. Dist. LEXIS 144285 (W.D. Mo. Aug. 12, 2020) (denying insurer's motion to dismiss, following *Studio 417*).

- *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020) (denying insurer's motion to dismiss a complaint filed by dental offices alleging that (1) customers, employees or other visitors to insured properties were infected with COVID-19; (2) insureds suspended operations to prevent physical damage to insured property and injury to people; and (3) customers cannot access insured property due to Stay-at-Home Orders or fear of infection, based on (a) the Court's reasoning in *Studio 417*, including as it relates to civil authority, extra expense, and sue & labor provisions; (b) the conclusion that the subject policies did not require a complete or total suspension of operations; and (c) a finding that discovery will determine the "period of restoration" needed for the insured premises).

*New Jersey*

- *Optical Services USA/JCI v. Franklin Mut. Ins. Co.*, 2020 N.J. Super. Unpub. LEXIS 1782 (N.J. Super. Ct. Aug. 13, 2020) (denying insurer's motion to dismiss because (1) under New Jersey law, "[s]ince the term 'physical' can mean more than material alteration or damage, it is incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided"; (2) there is no controlling legal authority to guide the court; and (3) "the plaintiff should be afforded the opportunity to develop their case and prove before this Court that the event of the Covid-19 closure may be a covered event under the Coverage C, Loss of Income, when occupancy of the described premises is prohibited by civil authorities"—despite the underlying allegation that "[t]here is no known instance of COVID-19 transmission or contamination within the premises of plaintiffs' businesses").

*North Carolina*

- *North State Deli, LLC v. The Cincinnati Insurance Co.*, No. 20-CVS-02569, in the General Court of Justice, Durham County, North Carolina (Oct. 9, 2020) (granting summary judgment in favor of insured restaurant owners on their COVID-19 business interruption claim on the grounds that (1) "physical loss" includes the inability to utilize or possess something tangible, including insured buildings, even where the structures are not altered; and (2) the insureds sustained such loss as a result of government civil authority orders).

*Ohio*

- *Francois Inc. v. The Cincinnati Insurance Co.*, No. 20CV201416, in the Court of Common Pleas, Lorain County, Ohio (Sept. 29, 2020) (denying insurer's motion to dismiss because "[t]he complaint states claims which arguably fit the terms and conditions of the insurance policy and therefore the claims and defenses need to be developed with a record").

*Pennsylvania*

- *Ridley Park Fitness, LLC v. Philadelphia Indem. Ins. Co.*, No. 20080358, in the 1st Judicial District Court, Civil Trial Division, of Pennsylvania (Aug. 31, 2020) (overruling preliminary objections to the insured's amended complaint).

*Texas*

- *Lombardi's Inc. v. Indemnity Insurance Company of North America*, Cause No. DC-20-05751-A, in the 14th Judicial District Court of Dallas County, Texas (Oct. 15, 2020) (denying insurer's motion to dismiss pursuant to Texas Rule of Civil Procedure 91a, addressing "baseless" causes of action).

**Dismissal Decisions**

*Alabama*

- *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, 2020 U.S. Dist. LEXIS 195273 (S.D. Ala. Oct. 21, 2020) (dismissing complaint by optometrist alleging the loss of use of property resulting from a state order limiting certain medical procedures, on the basis that (1) the insured's loss of use was temporary, not permanent; (2) authorities construing loss of use of property as "physical loss" were factually distinguishable; (3) "physical loss" requires some tangible alteration or disturbance to property; (4) the insured did not allege tangible alteration of property from the statewide order temporarily precluding some medical procedures; and (5) the insured's property was not repaired for purposes of the policy's period of restoration).

*California*

- *10E, LLC v. Travelers Indemnity Co. of Conn.*, 2020 U.S. Dist. LEXIS 165252 (C.D. Cal. Sept. 2, 2020) (dismissing an LA-restaurant owner's complaint seeking damages for an insurer's refusal to pay for loss of income caused by civil authority orders prohibiting in-person dining, because (1) the policy's coverage requires the insured's suspension of operations to be caused by direct physical loss of or damage to property, which requires "physical alteration" of property as opposed to an inability to use property; (2) the insured did not allege physical alteration or permanent dispossession of property; (3) the policy's civil authority coverage also requires physical loss or damage to nearby property, which is not alleged; and (4) efforts to circumvent the policy's virus exclusion through conclusory references to policy terms are insufficient to avoid dismissal).

- *Plan Check Downtown III, LLC v. AmGuard Ins. Co.*, 2020 U.S. Dist. LEXIS 178059 (C.D. Cal. Sept. 10, 2020) (dismissing an LA-restaurant owner's putative class action complaint after reasoning that the subject policy's trigger of coverage for "physical loss or damage" requires a "tangible alteration" under California law, including recent authority from *10E, LLC*).

- *Pappy's Barber Shops, Inc. v. Farmers Grp,. Inc.*, 2020 U.S. Dist. LEXIS 166808 (S.D. Cal. Sept. 11, 2020) (dismissing a complaint filed by San Diego business owners alleging business income losses resulting from COVID-19 Civil Authority Orders, based on (1) the Court's decision in *10E, LLC*; and (2) reasoning that the subject policies' Civil Authority coverage was not triggered because (a) there is no allegation that any civil authority order prohibited access to business premises; and (b) the orders were not issued because of direct physical loss to property other than the insured's premises).

- *Mudpie, Inc. v. Travelers Cas. Ins. Co.*, 2020 WL 5525171 (N.D. Cal. Sept. 14, 2020) (dismissing, with leave to amend, a retail owner's class action claim for business interruption loss resulting from California's Stay at Home Order because (1) "physical loss" contemplates either damage or the "permanent dispossession of something"; (2) the retail owner has not been permanently dispossessed of its storefront; (3) the policy terms governing the "period of restoration" suggest that a "physical loss" requires a change requiring the repair or replacement of property, which was not part of the retail owner's claim; (4) cases involving an insured's loss of functionality have also involved an "intervening physical force"; (5) the insured here does not allege that COVID-19 entered the property through any employee or customer; and (6) California's Stay at Home order was issued to prevent the spread of COVID-19, not due to direct physical loss or damage to property).

- *Franklin EWC, Inc. v. Hartford Fin. Services Group*, 2020 U.S. Dist. LEXIS 174010 (N.D. Cal. Sept. 22, 2020) (dismissing a complaint filed by a salon owner seeking compensation for business interruption loss resulting from California's COVID-19 executive orders because (1) the subject policy includes a virus exclusion, with anti-concurrent causation language, which also applies to the policy's civil authority coverage; and (2) the policy's limited coverage for fungi, bacteria and virus required that such losses be the result of named perils, which were not mentioned in the plaintiff's complaint).

- *Mark's Engine Co. No. 28 Restaurant, LLC v. Travelers Indemnity Co.*, 2020 U.S. Dist. LEXIS 188463 (C.D. Cal. Oct. 2, 2020) (dismissing with prejudice a restaurant owner's complaint urging that government-mandated shutdown orders caused "physical loss" to and impeded access to insured property triggering the Civil Authority coverage in Travelers' policy, because (1) losses from the inability to use property, as opposed to "physical alteration," do not qualify as "direct physical loss or damage" under California law; (2) the plaintiff restaurant owner did not allege the presence of the coronavirus on insured property; (3) while patrons may have lost access to the insured premises, the insureds did not; and (4) the subject policy's virus exclusion precludes coverage regardless of how "physical loss or damage" is construed).

- *Travelers Cas. Ins. Co. of America v. Geragos & Geragos*, 2020 U.S. Dist. LEXIS 196932 (C.D. Cal. Oct. 19, 2020) (dismissing with prejudice a law firm's complaint for business income loss sustained as a result of local civil authority orders directing the closure of non-essential businesses because (1) the civil authority order at issue was issued because of the risk of exposure to COVID-19; (2) the policy excludes coverage for loss or damage resulting from a virus; (3) other courts have dismissed similar claims based on similar exclusions; and (4) relying on prior authority, loss of use of property does not qualify as direct physical loss under California law).

- *Boxed Foods Co., LLC v. Cal. Capital Ins. Co.*, 2020 U.S. Dist. LEXIS 198859 (N.D. Cal. Oct. 26, 2020) (dismissing restaurant owners' putative class action complaint seeking to recover lost income as a consequence of COVID-19 and related civil authority orders because the subject policy contained a pathogenic organisms/virus exclusion, which barred coverage for the insureds' claim).

- *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, 2020 U.S. Dist. LEXIS 201161 (C.D. Cal. Oct. 27, 2020) (dismissing with prejudice a hotel owner's allegations that executive orders limited public access to insured properties, because (1) the subject policy requires "direct physical loss or damage" to insured property, which means something more than detrimental economic impact; (2) the complaint alleges only temporary loss of economically valuable use of insured hotels; (3) beyond conclusory allegations of "physical loss" and generic statements about the physical nature of COVID-19, the complaint does not allege physical damage from COVID-19; (4) the complaint does not allege facts supporting a claim under the policy's civil authority coverage; and (5) the policy's virus exclusion precludes coverage in any event).

*District of Columbia*

- *Rose's 1, LLC v. Erie Ins. Exch.*, 2020 D.C. Super. LEXIS 10 (D.C. Super. Ct. Aug. 6, 2020) (granting summary judgment against D.C. restaurant owners, who lost income when they were forced to close their businesses in response to the D.C. Mayor's civil authority orders, on the grounds that (1) the Mayor's orders did not effect any direct change to the insured properties; (2) the insureds did not present evidence that COVID-19 was actually present on any insured property; (3) prior case law does not support the claim that a government order along qualifies as direct physical loss).

*Florida*

- *Malaube, LLC v. Greenwich Ins. Co.*, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020) (magistrate report recommending dismissal of restaurant owner's pleading alleging that state and city Emergency Orders caused business losses after (1) finding that under Florida law, a "physical loss" requires "that the damage be actual"; (2) analogizing to an Eleventh Circuit decision, where business losses sustained by a restaurant from nearby roadway construction were found not to constitute direct physical loss or damage; (3) distinguishing *Studio 417* because the restaurant owner did not allege that COVID-19 was physically present on the premises; (4) observing that the restaurant was not substantially unusable where there was no prohibition on takeout business).

- *Martinez v. Allied Ins. Co. of America*, 2020 U.S. Dist. LEXIS 165140 (M.D. Fla. Sept. 2, 2020) (dismissing a dentist's complaint seeking damages for pandemic-related business interruption and the cost of decontaminating office space, because the loss and damage alleged was not caused by a "Covered Cause of Loss" but was excluded under the subject policy's virus exclusion, which applies to loss or damage caused directly or indirectly by a virus).

- *Infinity Exhibits v. Certain Underwriters at Lloyd's, London*, 2020 U.S. Dist. LEXIS 182497 (M.D. Fla. Sept. 28, 2020) (dismissing a complaint brought by a company that designs and manufactures trade show displays (1) by following prior authority, including *Malaube* and *Turek*, among others;[1] and (2) because the insured's complaint "fails to allege facts describing how the Property suffered any actual physical loss or damage").

- *Harvest Moon Distributors, LLC v. Southern-Owners Ins. Co.*, 2020 U.S. Dist. LEXIS 189390 (M.D. Fla. Oct. 9, 2020) (granting without prejudice an insurer's motion to dismiss a complaint filed by a wine and beer distributor, who lost money when Walt Disney Parks & Resorts closed due to the COVID-19 pandemic, on the basis that (1) while the alleged spoliation of the insured's product raised a plausible claim of "direct physical loss," the insured did not allege suspension of its own operations, as opposed to Disney's operations; (2) the subject policy excluded loss or damage caused by (a) delay, loss of use or loss of market; and (b) acts or decisions of a person, group or government body, including Disney's decision to suspend operations because of the pandemic).

- *Raymond H. Nahmad DDS PA v. Hartford Cas. Ins. Co.*, 2020 U.S. Dist. LEXIS 203838 (S.D. Fla. Nov. 2, 2020) (ordering dismissal of a complaint filed by a dental practice to recover business losses sustained because of state and local civil authority orders precluding non-emergency or elective dental care, because (1) other courts, within and outside Florida have dismissed similar COVID-19 business interruption claims; (2) the subject policy requires "direct physical loss" to covered property, which does not extend to economic damages alone without physical harm; (3) the policy's civil authority coverage also requires "physical loss," which is lacking; (4) there are also no allegations that the insureds lost access to insured property; (5) the policy contains a virus exclusion, with anti-concurrent causation language, which precludes coverage for any loss otherwise meeting the terms of the coverage grant).

[1] *The Inns by the Sea v. Cal. Mut. Ins. Co.*, No. 20-cv-001274 (Cal. Super. Ct. Aug. 6, 2020) (granting insurer's demurrer); *Rose's 1, LLC v. Erie Ins. Exch.*, No. 2020-CA-002424-B, 2020 WL 4589206 (D.C. Super. Ct. Aug. 6, 2020) (granting insurer's summary judgment motion); *Gavrilides Mgmt. Co. v. Mich. Ins. Co.*, No. 20-000258-CB (Mich. Cir. Ct. July 1, 2020) (granting insurer's motion for "summary disposition," which under Michigan law was on a motion to dismiss standard).

*Georgia*

- *Henry's Louisiana Grill Inc. v. Allied Ins. Co. of America*, 2020 U.S. Dist. LEXIS 188353 (N.D. Ga. Oct. 6, 2020) (granting dismissal and denying certification of questions to the Georgia Supreme Court in response to a restaurant owner's complaint alleging closure of dining areas in response to Georgia's executive order declaring a public health emergency because (1) the subject policy's terms insuring "direct physical loss" (and referring to a "period of restoration") require a change in the insured property resulting from an external event changing the insured property from a satisfactory to an unsatisfactory state; (2) the Executive Order did not cause a physical change in the insured property; and (3) the complaint does not allege facts demonstrating coverage under the Civil Authority provision, including loss of access to the insured or surrounding property).

*Illinois*

- *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 2020 U.S. Dist. LEXIS 171979 (N.D. Ill. Sept. 21, 2020) (dismissing a complaint brought by a dental office alleging loss of revenue from an Illinois order limiting dental practices to emergency and non-elective work because (1) "[t]he critical policy language here—'direct physical loss'—unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage"; (2) plaintiff has not pled facts showing physical alteration or structural degradation to the insured property; (3) other authorities, including *Diesel Barbershop*, *Gavrilides* and *Rose's 1*, have reached similar conclusions; and (4) the complaint does not allege physical loss to other property for purposes of the policy's civil authority coverage).

*Iowa*

- *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2020 U.S. Dist. LEXIS 184772 (S.D. Iowa Sept. 29, 2020) (granting dismissal of surgical practice's claims relating to COVID-19 business interruption loss because (1) the subject policy requires "physical loss"; (2) plaintiff does not allege "physical loss," but instead contends that the loss was caused by COVID-19 and related government actions to suspend non-emergency dental procedures; and (3) the court relied upon the prior authorities cited by Cincinnati and distinguished those authorities cited by the insureds).

*Michigan*

- *Turek Enterprises, Inc. v. State Farm Auto Ins. Co.*, 2020 U.S. Dist. LEXIS 161198 (E.D. Mich. Sept. 3, 2020) (dismissing with prejudice a putative class complaint filed by a chiropractor alleging loss of income resulting from compliance with a Michigan civil authority order, because (1) the policy's grant of coverage for "direct physical loss" requires "tangible damage" under Michigan law, and the insured did not allege the presence of the virus on insured property or other damage; and (2) the subject policy's virus exclusion, including "but for" terms and anti-concurrent causation language, precludes coverage for the insured's claim, no matter how "physical loss" is construed).

*Minnesota*

- *Seifert v. IMT Ins. Co.*, 2020 U.S. Dist. LEXIS 192121 (D. Minn. Oct. 16, 2020) (dismissing a complaint brought by owners of a hair salon and barbershop, who suspended business operations because of emergency executive orders issued by the Minnesota governor, because (1) the subject policy terms addressing "physical loss or damage" require physical contamination of insured property, as opposed to loss of use or function; (2) the insured does not allege the presence of the coronavirus, but attributes the loss solely to the government's executive orders, whether for purposes of the general "physical loss" trigger or the policy's civil authority coverage; and (3) the policy's virus exclusion, with its anti-concurrent causation terms, precludes coverage for the insured's claim in any event).

*Pennsylvania*

- *Wilson v. Hartford Cas. Co.*, 2020 U.S. Dist. LEXIS 179896 (E.D. Pa. Sept. 30, 2020) (dismissing with prejudice a complaint filed by a Pennsylvania lawyer, who was required to close her office in response to COVID-19 governmental closure orders, because (1) regardless of whether the insured's claim fits within a grant of coverage, the subject policy contains a virus exclusion with anti-concurrent causation language; and (2) the complaint alleges that it is probable that COVID-19 particles have been present at the insured's premises).

*Texas*

- *Vandelay Hospitality Group, L.P. v. Cincinnati Ins. Co.*, 2020 U.S. Dist. LEXIS 185581 (N.D. Tex. Oct. 7, 2020) (dismissing with leave to replead a restaurant owner's petition for breach of contract against an insurer denying business interruption coverage, because (1) the allegations are "factually conclusory and/or legal conclusions and are therefore inadequate to plead a plausible claim for breach of contract" with respect to the existence of direct physical loss or damage to the insured properties).

- *Diesel Barbershop, LLC v. State Farm Lloyds*, 2020 U.S. Dist. LEXIS 147276 (W.D. Tex. Aug. 13, 2020) (granting insurer's motion to dismiss barbershop owners' complaints seeking to recover lost income resulting from state and local civil authority orders limiting the operation of non-essential businesses, because (1) the subject policies require direct physical loss to insured property; (2) while acknowledging authorities finding physical loss without tangible destruction of property, the court found more persuasive those authorities requiring tangible injury; (3) in any event, the subject policies include a virus exclusion with anti-concurrent causation language, which precludes coverage for the insured's claim even under the policies' civil authority coverage).

*West Virginia*

- *Uncork & Create, LLC v. Cincinnati Ins. Co.*, 2020 U.S. Dist. LEXIS 204152 (D.W.Va. Nov. 2, 2020) (dismissing a putative class action complaint against the insurer of a creative events company seeking business interruption coverage for losses sustained because of a civil authority order shutting down non-essential business operations, because (1) the subject policy requires physical loss to insured property; (2) the court factually distinguished West Virginia authorities finding "physical loss" in the absence of "physical damage"; (3) there are no allegations from plaintiff that any infections of employees or patrons are traceable to the insured premises; and (4) even the presence of the virus on insured premises would be insufficient to trigger the policy's "physical loss" coverage).