In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1336

STANT USA CORP., *et al.*,

Plaintiffs-Appellants,

v.

FACTORY MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 1:21-cv-00253-SEB-TAB — **Sarah Evans Barker**, *Judge*.

ARGUED NOVEMBER 1, 2022 — DECIDED MARCH 2, 2023

Before ROVNER, BRENNAN, and SCUDDER, *Circuit Judges*.

ROVNER, *Circuit Judge*. The plaintiffs, Stant USA Corporation, Stant Foreign Holding Corporation, and Vapor US Holding Corporation (collectively "Stant"), filed suit seeking a declaratory judgment that they were entitled to recover under a commercial insurance policy issued by the defendant Factory Mutual Insurance Company ("FM"). The district court granted a motion to dismiss by FM, and Stant now appeals that dismissal.

Stant is a manufacturer of products for automobile suppliers and for automobile manufacturers such as Fiat Chrysler, Ford Motor Company, and General Motors. The products manufactured by Stant for those customers included vapor management systems, fuel delivery systems, and thermal management systems. The spread of COVID-19 in early 2020 and the ensuing government orders curtailing the operation of non-essential businesses resulted in the suspension or reduction in operations by Stant's customers, and Stant alleged that it suffered over $5.3 million in derivative financial losses.

Stant sought to recover under an "all-risk" insurance policy sold by FM to Stant's ultimate parent company, insuring Stant for the period from May 1, 2019 to May 1, 2020. Under the Contingent Time Element coverage in that policy, Stant argues it was entitled to coverage for lost income as a result of "physical loss or damage" at its customers' properties. Stant contends that the COVID-19 virus caused such "physical loss or damage" to its customers' properties, and that its resulting business interruption losses were covered under the policy.

We review *de novo* the district court's grant of the motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Circle Block Partners, LLC v. Fireman's Fund Insurance Company*, 44 F.4th 1014, 1018 (7th Cir. 2022). This case arises under our diversity jurisdiction, and all parties agree that Indiana law applies. The interpretation of an insurance policy under Indiana law is a legal question determined under traditional principles of contract interpretation. *Id.*

We turn first to the language of the policy at issue. The policy, in relevant part, covers property against "all risks of physical loss or damage, except as hereinafter excluded."

Stant does not argue that its own property sustained any physical loss or damage. Instead, it argues that other policy provisions cover the loss of business income that has been caused by physical loss or damage at its *customers'* properties. Specifically, on appeal, Stant points to a portion of the policy titled "Supply Chain Time Element Coverage Extensions" and its subsection termed "Contingent Time Element Extended" which covers losses "directly resulting from physical loss or damage of the type insured to property of the type insured at contingent time element locations within the territory of this policy." That provision provides coverage for lost income resulting from "physical loss or damage" at certain properties, including its customers' properties.

The critical question for coverage, then, was whether the loss at issue here resulted from "physical loss or damage" at those properties. We have repeatedly interpreted similar language in insurance cases seeking compensation for losses related to COVID-19 restrictions, and have consistently held that temporary loss of use or restrictions on use do not constitute "physical" damage or loss.

For instance, in *Sandy Point Dental P.C. v. Cincinnati Insurance Co.*, 20 F.4th 327, 332 (7th Cir. 2021), we addressed an Illinois insurance policy which provided coverage for "direct physical loss or damage." We held that the word "physical" modifies both damage and loss, and therefore the policy requires that there be some physicality to either that loss or damage in order to fall within the policy coverage. A mere partial loss of use was insufficient to meet that physicality requirement, at least where such loss was not so pervasive as to render a property completely uninhabitable, amounting to a complete physical dispossession. *Id*. at 334. We concluded

that in order to state a claim, the businesses needed to allege a physical alteration to their property. *Id*. at 332–33. As support for that interpretation, we noted that the policy covered losses during a period of restoration, which is defined by reference to the date by which the property should be repaired, rebuilt or replaced. *Id*. at 333. We noted that "[w]ithout a physical alteration to property, there would be nothing to repair, rebuild, or replace." *Id*. The provisions as a whole made clear, then, that the term "direct physical damage or loss" involved physical alteration to property. We have reiterated that holding repeatedly in subsequent cases involving contracts from other states. *See, e.g.*, *Paradigm Care & Enrichment Center, LLC v. West Bend Mutual Insurance Co.*, 33 F.4th 417 (7th Cir. 2022); *Crescent Plaza Hotel Owner, L.P. v. Zurich American Insurance Co.*, 20 F.4th 303 (7th Cir. 2021); *Bradley Hotel Corp. v. Aspen Specialty Insurance Co.*, 19 F.4th 1002 (7th Cir. 2021); *Circle Block*, 44 F.4th 1014.

Applying that standard to a claim based on pandemic-related restrictions, we held that the circumstances failed to allege direct physical damage or loss. Sandy Point Dental had alleged that the continuous presence of the virus on and around the premises rendered the premises unsafe and unfit for the intended use, and therefore caused physical property damage or loss. We held those allegations insufficient to allege direct physical loss, because they constituted only allegations of a loss of the property's intended or preferred use and did not describe how the presence of the virus or the resulting closure order physically altered its property. *Sandy Point*, 20 F.4th at 335.

The language in the policy before us today contains similar language and mandates the same result. As with *Sandy*

Point, the policy in this case is limited to "physical" loss or damage. Moreover, the policy in this case also references the timeline of repairs and restoration in assessing the period of coverage. The period of liability applicable to the contingent time element extended coverage runs from the time of the physical loss or damage until the time when the "building and equipment could be (i) repaired or replaced; and (ii) made ready for operations, under the same or equivalent physical and operating conditions that existed prior to the damage." That language mirrors that in *Sandy Point* and supports the same interpretation which requires a physical alteration for coverage.

Stant argues that, in contrast to *Sandy Point* and the other cases we have decided, in this case the policy covers "physical damage or loss" to property, not "*direct* physical damage or loss" to property. Stant asserts that the absence of the modifier "direct" signifies more expansive coverage than the language in *Sandy Point* and supports coverage for circumstances that render property unfit or unsuitable for its intended purpose or unsafe for normal human occupancy or continued use.

Even if the "direct" qualifier were absent in the language here, that term was not the language that was critical to the limitation of coverage recognized in *Sandy Point*. The requirement that the property loss or damage must be "physical" was the limitation that mandated a physical alteration to the property. The requirement of a physical alteration was not based on the language that the property loss or damage must be "direct." And Stant has failed to explain why the modifier "direct" should alter the conclusion that a physical alteration was required.

In the end, however, we need not decide the impact that the word "direct" has on the interpretation of the policy language, because the policy in this case contains language that imposes the same essential requirement. Stant's policy "covers property … against all risks of physical loss or damage, *except as hereinafter excluded*," and in the first provision in the Exclusions section, the "Policy excludes … indirect or remote loss or damage." (emphasis added) Therefore, the policy covers only physical loss or damage that is not indirect or remote, which is not materially different in language from the policies we considered that covered only direct physical loss or damage. Accordingly, that technical difference in language does not portend a different result.

Stant next argues that *Sandy Point* is inapplicable because it involved Illinois law, whereas Indiana law is applicable here. During the pendency of this appeal, however, we decided *Circle Block*, 44 F.4th at 1016, which addressed the same claim under Indiana law. In *Circle Block*, we again addressed an all-risk insurance policy covering direct physical loss or damage to property, and again held that businesses forced to shut down or reduce operations during the pandemic failed to allege direct physical loss or damage. *Id*. at 1016–17. As in *Sandy Point*, we held that "a temporary denial of a plaintiff's preferred use of its property, absent some physical alteration, does not fall within the plain meaning of 'direct physical loss or damage.'" *Id*. at 1019; *see also Wilson v. USI Ins. Serv. LLC*, 57 F.4th 131, 143 n.6 (3d Cir. 2023) (noting that "every other Court of Appeals and all but one state supreme court to have considered this issue also has held that loss of use caused by closure orders issued in response to the COVID-19 pandemic does not constitute physical loss or damage sufficient to trigger property insurance coverage.")

Stant nevertheless argues that the spread of the COVID-19 virus during the pandemic resulted in a physical alteration, which constituted physical loss or damage to property. It argues that the SARS-CoV-2 virions were present at the facilities of its customers, on the surfaces and in the air inside those locations, resulting in the shutdown or restrictions on operations. Stant claims that when people entered those facilities the virions expelled into the air physically altered the surfaces of Stant's customers' properties as well as the air, rendering them dangerous and potentially lethal to breathe. Stant maintains that the danger posed by the virus resulted in the imposition of government shutdowns and restrictions, which resulted in the significant financial losses by Stant.

Once again, our opinion in *Circle Block* has addressed and rejected that argument. In that case, the plaintiff alleged that virus particles physically attached to surfaces at a hotel, and an amicus brief submitted by Purdue University asserted that the virus "adsorbs" onto surfaces, materially altering them. *Circle Block*, 44 F.4th at 1020. We held that neither *Sandy Point* nor Indiana caselaw hold that any imaginable physical alteration is sufficient. "We distinguished conditions that 'generally involve persistent physical contamination that requires repair or replacement, rather than cleaning and disinfecting, to remediate.'" *Id*. at 1020. We held that the mere presence of the virus on surfaces did not constitute the type of physical alteration required to trigger coverage under the language of the policy. *Id*. at 1020–22; *see also Sandy Point*, 20 F.4th at 335. Stant's arguments are indistinguishable from the ones presented in *Circle Block*, and therefore fail under the reasoning of that case. *See also Indiana Repertory Theatre, Inc. v. Cincinnati Cas. Co.*, 2023 WL 1950974, at *1 (Ind. Ct. App. Feb. 13, 2023).

Stant's other arguments fare no better. It argues that we should certify the question to the Indiana Supreme Court, but we refused such a certification request in *Circle Block*, holding that we had no serious doubt as to how the Indiana Supreme Court would resolve these questions. *Circle Block*, 44 F.4th at 1024. Stant has raised no argument that would cause us to question that determination now.

Because we hold that Stant's claim does not fall within the coverage of the policy for physical property loss or damage, we need not address FM's alternative arguments that the claim would fall within other exclusions in the policy, including the Loss of Use exclusion and the Contamination exclusion. We have addressed similar exclusions in numerous cases and determined that such COVID-based claims fell within those exclusions but express no opinion as to the applicability in this case. *See, e.g.*, *Bradley Hotel Corp.*, 19 F.4th at 1007–08 (loss of use exclusion); *Mashallah Inc. v. West Bend Mutual Ins. Co.*, 20 F.4th 311 (7th Cir. 2021) (virus exclusion); *Crescent Plaza Hotel*, 20 F.4th 303 (microorganism exclusion).

The decision of the district court is AFFIRMED.