MEMORANDUM

TO: Prof. Tom Baker
FROM: William McCarter
DATE: 10/23/2022
RE: Current Status of Covid-Related Insurance Litigation in State and Federal Appellate Courts

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I. Question Presented

How have federal and state appellate courts addressed whether Covid can cause physical loss or damage to insured property, and to what extent is any difference between outcomes in state and federal appellate courts explained by different pleading standards?

II. Brief Answer

Policyholders in Covid-related business interruption insurance litigation have had limited success in the appellate courts, but the door is still not entirely closed to them in many state courts and some federal courts, depending on what state law is to be applied. The most notable examples of this are Louisiana and Vermont, but the vast majority of state courts of last resort have not issued a ruling one way or the other, leaving the possibility open that even intermediate appellate decisions adverse to policyholders might be overturned on further appeal. In fact, it is easier to list the states where the court of last resort *has* issued a definitive answer: Massachusetts,[1] South Carolina,[2] Indiana,[3] and Wisconsin.[4] In Washington,[5] Iowa,[6] Oklahoma,[7] and North Carolina,[8] courts of last resort

[1] Verveine Corp. v. Strathmore Ins. Co., 489 Mass. 534 (2022) (holding that Covid cannot cause physical loss or damage).
[2] Sullivan Mgmt., LLC v. Fireman's Fund Ins., No. 2021-001209, 2022 S.C. LEXIS 90 (August 10, 2022).
[3] Indiana Repertory Theatre v. Cincinnati Cas. Co., 180 N.E.3d 403 (Ind. Ct. App. 2022), transfer denied, 2022 Ind. LEXIS 426 (Ind. July 19, 2022) (holding that Covid cannot cause physical loss or damage)
[4] Colectivo Coffee Roasters, Inc. v. Soc'y Ins., 2022 WI 36.
[5] Hill & Stout, PLLC v. Mut. Of Enumclaw Ins. Co., No, 100211-4, at *14-15 (Wash. Aug. 25, 2022).
[6] Wakonda Club v. Selective Ins. of Am., 973 N.W.2d 545, 553 (Iowa 2022).
[7] Cherokee Nation v. Lexington Ins. Co., 2022 OK 71, ¶ 7.
[8] N. State Deli v. Cincinnati Ins. Co., 378 N.C. 367 (2022) (refusing the appeal).

have suggested that Covid could, under different facts, cause physical loss or damage. In Louisiana, as noted above, a state intermediate appellate court has held that Covid can, and did, cause physical loss or damage, [9] whereas intermediate appellate courts in several other states have suggested it cannot cause physical loss or damage. Vermont's Supreme Court held that Covid did, under certain facts, cause physical loss or damage. [10] Still other states have conflicting state intermediate appellate decisions, specifically California, [11] New Jersey, [12] and Michigan. [13] These examples, combined with numerous ongoing cases described in this memorandum, demonstrate that the game is far from up in the state appellate courts.

The federal appeals courts are a different matter. Each circuit except the Third has issued a decision on whether Covid can cause physical loss or damage, and none of the decisions examined in this memorandum have been favorable to policyholders. While it is the case that many federal appellate courts have not issued decisions applying the law from each of the states therein, the obvious trend is towards applying the same reasoning used in prior decisions to cases applying the insurance law of a previously unsettled state. [14] This, combined with "rules of orderliness," such as in the Fifth Circuit (discussed below), and a reluctance among federal courts to employ the logic of state appellate courts bucking the

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[9] Cajun Conti L.L.C. v. Certain Underwriters at Lloyd's, 2021-0343, p. 14-15 (La. App. 4 Cir. 06/15/22).
[10] Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co., No. 2021-173, 2022 WL 4396475 (Vt. Sept. 23, 2022).
[11] *Compare* Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co., 81 Cal. App. 5th 96 (2022) (holding Covid can and did cause physical loss or damage), *with* Musso & Frank Grill Co., v. Mitsui Sumitomo Ins. USA Inc., 77 Cal. App. 5th 753, 759 (2022) ("[A] policy requiring physical loss or damage does not cover losses incurred by reason of the pandemic.").
[12] *Compare* AC Ocean Walk, LLC v. Am. Guar. & Liab. Co., No. A-1824-21, 2022 N.J. Super. Unpub. LEXIS 1119 (N.J. Super. Ct. App. Div. June 23, 2022), *with* MAC Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., 278 A.3d 272 (N.J. Super. Ct. App. Div. 2022).
[13] *Compare* Gavrilides Mgmt. Co. v. Mich. Ins. Co., No. 354418, 2022 Mich. App. LEXIS 632 (Feb. 1, 2022), *with* Gourmet Deli Ren Cen Inc. v. Farm Bureau Gen. Ins. Co. of Mich., No. 357386, 2022 Mich. App. LEXIS 1863 (Apr. 4, 2022).
[14] *See, e.g.,* Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co., 22 F.4th 450, 456-57 (5th Cir. 2022) (collecting cases).

trend[15] make it unlikely for the trends towards finding no coverage to reverse, absent a decision from a state court of last resort. Tables at the end of this memorandum summarize the findings by state and by circuit. This memorandum also analyzes examples of the pleading standards, state and federal, in action, and discusses the role of those standards in explaining differential outcomes in the state, as opposed to federal, appellate courts.

III. Introduction

Since 2020, state and federal courts have been faced with the same novel question of law: can the Covid-19 virus cause physical loss or damage, as required by most property and business interruption insurance policies? There is not yet a concrete answer to this question, not least because the question is governed by state law and therefore, to be truly accurate, requires fifty different answers. Nonetheless, this memorandum seeks to demonstrate that the ability of Covid to cause physical loss or damage in the eyes of the courts is an open question in many states and in some federal circuits as well, depending on which state's substantive law is to be applied. Moreover, differences in litigation outcomes between state and federal courts are only partially explained by disparate pleading standards, suggesting in some cases a different substantive view of the legal question presented.

[15] *See, e.g.*, Creative Artists Agency, LLC v. Affiliated FM Ins. Co., No. 2:21-CV-08314, 2022 U.S. Dist. LEXIS 142347 (C.D. Cal. July 27, 2022) ("The Court is aware of the recent decision by the Court of Appeal for the Second District of California, *Marina Pac. Hotel & Suites, LLC v. Fireman's Fund Ins.* . . . which reaches a conclusion that is 'at odds with almost all (but not all) decisions' considering these issues, including *Inns-by-the-Sea, United Talent Agency*, and *Musso* . . . . However, the Court finds the allegations raised in *Marina Pacific Hotel & Suites* are factually distinguishable from the allegations raised here, and is also at odds with the majority of decisions within this district."); *see also* Coleman E. Adler & Sons, LLC v. Axis Surplus Lines Insurance Co., 49 F.4th 894, 898 (5th Cir. 2022) ("No exception to the rule of orderliness applies here. Since *Q Clothier*, there has been 'neither a clearly contrary subsequent holding of the highest court of [Louisiana] nor a subsequent statutory authority, squarely on point.'").

IV. State-of-Play in the Appeals Courts

i. The First Circuit

In the First Circuit, CCLT has identified no ongoing appellate cases since the resolution of *Legal Sea Foods, LLC v. Strathmore Insurance Co.*[16] and related cases. In that case, the First Circuit, applying Massachusetts law, followed the Massachusetts Supreme Judicial Court's decision in *Verveine Corp. v. Strathmore Insurance Co.*[17] in finding no "physical loss or damage" because "nothing in the allegations in Legal's complaint . . . would provide a basis for concluding that *Verveine* can be distinguished from the case before us . . . ." In so holding, the First Circuit was the first and only Federal appeals court to await a decision from a state high court before issuing a decision applying that state's law, as opposed to making an *Erie* guess. The only First Circuit cases on pointhave applied Massachusetts law,[18] leaving the door open to different outcomes in cases applying law from other states, though no such cases are currently active in the First Circuit Court of Appeals.

As discussed above, Massachusetts itself has held that Covid virus particles cannot cause physical loss or damage because those particles do not cause "some 'distinct, demonstrable, physical alteration of the property.'"[19] There are no ongoing appellate cases in Massachusetts.

Elsewhere in the First Circuit, the only live appellate case identified by the CCLT is in New Hampshire, where the state's high court has yet to rule on *Schleicher and Stebbins Hotels, LLC v. Starr Surplus Lines Insurance Cos*.[20] In this case, the trial court granted the policyholders' motion for summary judgment that "the terms 'loss or damage' and 'direct

[16] 36 F.4th 29 (1st Cir. 2022).
[17] 489 Mass. 534 (2022).
[18] In addition to *Legal Sea Foods*, the First Circuit has rendered opinions in *SAS International, Ltd. v. General Star Indemnity Co.*, 36 F.4th 23 (1st Cir. 2022) and *American Food Systems, Inc. v. Fireman's Fund Insurance Co.*, 530 F. Supp. 3d 74 (1st Cir. 2022).
[19] Verveine Corp. v. Strathmore Ins. Co., 489 Mass. 534, 542 (2022) (citing 10A S. PLITT, D. MALDONADO, J.D. ROGERS, & J.R. PLITT, COUCH ON INSURANCE 3d § 148:46 (rev. ed. 2016)).
[20] No. 2022-0155 (N.H. filed Jan. 6, 2022).

physical loss of or damage to property,' as used in the parties' contract, encompass the impact of SARS-CoV-2 on the Plaintiffs' properties."[21] The trial court also denied the defendants' motions for summary judgment "that the impacts to the Plaintiffs' operations from COVID-19 do not trigger any provision of the policy without a showing of direct physical loss of or damage to property, or in the alternative, that the Microorganism Exclusion applies."[22] The trial court granted an interlocutory appeal to the New Hampshire Supreme Court to settle these novel questions of law. In its order granting partial summary judgment, the trial court noted that, under New Hampshire law, "'physical loss,' when used in an insurance agreement, includes 'not only tangible changes to [an] insured property, but also changes ... that exist in the absence of structural damage,' provided only that such changes be both 'distinct and demonstrable.'"[23] The trial court also held that the Microorganism Exclusion does not unambiguously apply because "a virus is not unambiguously understood to be a 'microorganism.'"

The CCLT has not identified any appellate cases in Rhode Island.

i. *The Second Circuit*

The leading Second Circuit cases applying New York law are *10012 Holdings, Inc. v. Sentinel Insurance Co.*[24] and *Kim-Chee LLC v. Philadelphia Indemnity Insurance Co.*[25]

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[21] Schleicher and Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Cos., No. 217-2020-CV-00309, 2021 WL 4029204, at *10 (N.H. Super. Ct. June 15, 2021).
[22] *Id.*
[23] *Id.* (citing Mellin v. N. Sec. Ins. Co., Inc., 115 A.3d 799 (N.H. 2015)).
[24] 21 F.4th 216 (2d Cir. 2022) (holding that loss of use does not fall within the boundaries of "direct physical loss" under New York law).
[25] Kim-Chee LLC v. Philadelphia Indemnity Insurance Co., No. 21-1082-cv, 2022 WL 258569, at *1-2 (2d Cir. Jan. 28, 2022) ("Kim-Chee's complaint must plausibly allege that the virus itself inflicted 'actual physical loss of or damage to' property . . . . [But it] offers only conclusory assertions in support of this contention."). Most other decisions applying New York law in the Second Circuit concern allegations of "loss of use" and are therefore resolved on the basis of *10012 Holdings*. *See* BR Restaurant Corp v. Nationwide Mut. Ins. Co., No. 21-2100-cv, 2022 WL 1052061 (2d Cir. Apr. 8, 2022); Deer Mountain Inn LLC v. Union Ins. Co., No. 21-1513, 2022 WL 598976 (2d Cir. Mar. 1, 2022); SA Hospitality Grp., LLC v. Hartford Fire Ins. Co., No. 21-1523, 2022 WL 815683 (2d Cir. Mar. 18, 2022); Rye Ridge Corp. v. Cincinnati Ins. Co., 21-1323-cv, 2022 WL 120782 (Jan. 13, 2022). *But see* Buffalo Xerographix, Inc. v. Sentinel Ins. Co., No. 21-1502, 2022 WL 4241191 (2d Cir. Sept. 15, 2022) (applying *Kim-Chee* to conclude that Covid cannot cause physical loss or damage).

Farmington Village Dental Associates, LLC v. Cincinnati Insurance Co.[26] applied Connecticut law, specifically citing *Capstone Building Corp. v. American Motorists Insurance Co.*[27] *Farmington Village* held that Connecticut law required the insured to demonstrate "physical, tangible alteration to any property"[28] and that "Farmington Village's allegations that SARS-CoV-2 causes physical loss or physical damage to its property by way of its transmissibility through physical particles in the air and on surfaces fail to allege how the presence of those virus-transmitting particles *tangibly* alter or impact the property").[29] Finally, *Abbey Hotel Acquisition, LLC v. National Surety Corp.*[30] held that, under Florida law as articulated in *Commodore, Inc. v. Certain Underwriters at Lloyd's London*,[31] Covid particles cannot cause physical loss or damage because "a structure that merely needs to be cleaned has not suffered direct physical loss" (citations and internal quotations omitted).[32]

Despite the limited success of policyholders in the Second Circuit Court of Appeals, several cases are pending. With the exception of *Robbins*, which is dissimilar to the others in that the dispute is over travel insurance as opposed to property or commercial insurance, these cases are all governed by either New York or Connecticut law. As discussed above, the Second Circuit has held that, under the laws of both states, Covid cannot cause physical loss or damage. These holdings have been bolstered by state appellate court decisions in New York that have held the same, whereas the Connecticut appellate courts have yet to speak on the issue.

[26] No. 21-2080, 2022 U.S. App. LEXIS 15853 (2d Cir. June 8, 2022).
[27] 67 A.3d 961 (Conn. 2013).
[28] Farmington Village Dental Assocs., LLC v. Cincinnati Ins. Co., No. 21-2080, 2022 U.S. App. LEXIS 15853, at *1 (2d Cir. June 8, 2022)
[29] *Id.*
[30] No. 21-2609, 2022 U.S. App. LEXIS 14646 (2d Cir. May 27, 2022).
[31] No. 3D21-0671, 2022 WL 1481776, at *6 (Fla. Dist. Ct. App. May 11, 2022).
[32] *Abbey Hotel*, 2022 U.S. App. LEXIS 14646, at *1.

Table 1. Ongoing Appellate Cases in the Second Circuit Court of Appeals.

Case Name	State Law Applied	Status	Alleged Covid on Premises
Connecticut Children's Medical Center v. Continental Casualty Co.	Connecticut	Appellee's Brief Filed Aug. 15, 2022	Yes
Robbins v. Generali Global Assistance, Inc. [MDL 2968]	Various[33]	Reply Brief Filed July 12, 2022	N/A [Travel Insurance]
Mario Badescu Skin Care, Inc. v. Sentinel Insurance Co.	New York	Appellant's Brief Filed June 10, 2022	Yes
ENT and Allergy Associates, LLC v. Continental Casualty Co.	Connecticut	Reply Brief filed Sept. 27, 2022	Yes
Chefs' Warehouse Inc. v. Liberty Mutual Insurance Co.	New York	Appellant's Brief filed Oct. 6, 2022.	Yes
ITT Inc. v. Factory Mutual Insurance Co.	Connecticut	Reply Brief filed Sept. 13, 2022	Yes
Pacific Indemnity Co. v. Kiton Corporation	New York	Appellant's Brief Due Nov. 4, 2022	Yes

The First District of New York's Supreme Court, Appellate Division, has held that Covid cannot cause physical loss or damage. In *Consolidated Restaurant Operations, Inc. v. Westport Insurance Corp.*,[34] the First District held although the complaint "vaguely refers to 'fomites' in the surfaces of its restaurants, and states the virus infiltrated the premises," the complaint nonetheless "fails to identify in either its pleading or the proposed amended complaint a single item that it had to replace, anything that changed, or that was actually damaged at any of its properties."[35] The appellants, however, have filed a motion, which is currently pending, for leave to appeal to the New York Court of Appeals.

[33] The cases in this MDL are governed by Georgia, Oregon, Missouri, Utah, Pennsylvania, and Florida law.
[34] 205 A.D.3d 76 (N.Y. App. Div. 2022).
[35] *Id.* at 86.

Table 2. Ongoing Cases in the New York Appellate Courts.

Case	Court	Notes
Visconti Bus Service, LLC v. Utica National Insurance Group	Appellate Division, Second District	No docket activity since Jan. 2022
6593 Weightlock Drive, LLC v. SpringHill SMC Corporation	Appellate Division, Fourth District	No docket activity since Jan. 2022
Sportime Clubs, LLC v. American Home Assurance	Appellate Division, Second District	No docket activity since Jan. 2022
Consolidated Restaurant Operations, Inc. v. Westport Insurance Corp.	Court of Appeals	
Harry E. Bassett III v. Wesco Insurance Co.	Appellate Division, Second District	
Wellpath Holdings, Inc. v. XL Insurance America, Inc.	Appellate Division, Second District	
Raymours Furniture Co., Inc. v. Lexington Insurance Co.	Appellate Division, First District	No docket activity since Nov. 2021
VMSB, LLC v. Zurich American Insurance Co.	Appellate Division, First District	No docket activity since Dec. 2021
Buffalo Bills, LLC v. American Guarantee and Liability Insurance Co.	Appellate Division, Fourth District	No docket activity since Dec. 2021
Rainbow USA, Inc. v. Zurich American Insurance Co.	Appellate Division, Second District	
Madison Square Garden Sports Corp. v. Factory Mutual Insurance Co.	Appellate Division, First District	
Century 21 Department Stores LLC v. Starr Surplus Lines Insurance Co.	Appellate Division, First District	
Topgun 21 Astor LLC v. Certain Underwriters at Lloyd's, London	Appellate Division, First District	
Abruzzo Docg Inc. v. Acceptance Indemnity Insurance Co.	Appellate Division, Second District	
616 First Avenue LLC v. Employers Insurance Co. of Wausau	Appellate Division, First District	
North American Elite Insurance Co. v. Mac Parent LLC	Appellate Division, First District	
Meritage Hospitality Group Inc. v. North American Elite Insurance Co.	Appellate Division, First District	
Tina Turner Musical LLC v. Chubb Insurance Co. of Europe	Appellate Division, First District	

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Genting Americas Inc. v. American International Group UK Limited	Appellate Division, Second District	
Arch Insurance Co. v. DocNetwork, Inc.	Appellate Division, First District	
Peet's Coffee & Tea HoldCo, Inc. v. North American Elite Insurance Co.	Appellate Division, Second District	
Triumph Hospitality LLC v. Hartford Fire Insurance Co.	Appellate Division, First District	

In New York, the CCLT has only identified one merits-based appellate decision, this being *Consolidated Restaurant.* In New York, a decision of one Appellate Division is not binding on other Appellate Divisions, though it is binding on a lower court in another Appellate Division "until its home department or the Court of Appeals pronounces a contrary rule."[36] As such, it would appear that the First District's *Consolidated Restaurant* holding is binding on New York trial courts until either the Court of Appeals issues a decision in the *Consolidated Restaurant* appeal or another division issues a contrary ruling.

In Connecticut, on the other hand, no appellate court has issued a ruling on whether Covid can cause physical loss or damage. Two cases in that state are ongoing before the Connecticut Supreme Court, having been transferred out of the Connecticut Appellate Court prior to a decision,[37] and the rest are stayed pending the outcome of those two cases.

Perhaps the most significant case in the Second Circuit is one decided recently by the Vermont Supreme Court.[38] In *Huntington Ingalls*, Vermont's high court reversed the trial court's order granting judgment on the pleadings to the insurers. The Court held that the policy in

[36] *See* Maple Med., LLP v. Scott, 191 A.D.3d 81, 90 (N.Y. App. Div. 2020) (discussing the binding effect of Appellate Division decisions).
[37] These are *Hartford Fire Insurance Company v. Moda LLC*, No. SC 20678 (Conn. transferred Feb. 8, 2022), and *Connecticut Dermatology Group, PC v. Twin City Fire Insurance Company*, No. SC 20695 (Conn. transferred Mar. 29, 2022).
[38] Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co., No. 2021-173, 2022 WL 4396475 (Vt. Sept. 23, 2022).

question covered both physical loss and physical damage, which are not the same: "direct physical damage requires a distinct, demonstrable, physical change to property,"[39] while "direct physical loss to property requires persistent destruction or deprivation, in whole or in part, with a causal nexus to a physical event or condition."[40] For physical loss, the Court noted that "although loss of use is required, it alone is insufficient to establish a direct physical loss to property."[41] Rather, the loss of use must be the "'consequential result' of [a] physical event,"[42] or there must be an "explicit nexus between the purported loss and the physical condition of the insured property,"[43] and the "destruction or deprivation of property must be persistent"[44] because the "policy anticipates that a direct physical loss may require the property to be rebuilt, repaired, or replaced."[45] After noting Vermont's "extremely liberal notice-pleading standards,"[46] the Court found that the allegations "adequately allege that the virus physically altered property in insured's shipyards when it adhered to surfaces"[47] and support finding that the policyholder "took steps beyond mere cleaning,"[48] thereby satisfying the "distinct, demonstrable physical alteration"[49] requirement. (The Court referenced *Cajun Conti* in its discussion of this finding.)[50] Finding direct physical damage in the first instance, the Court did not reach "whether the complaint alleges facts that would entitle insured to relief under a theory of 'direct physical loss,'"[51] nor did it reach the insured's "mitigation" coverage claims. Two justices dissented, concluding that "loss and damage are not always easily differentiated where they occur in [the]

[39] *Id.* at ¶ 26.
[40] *Id.* at ¶ 28.
[41] *Id.* at ¶ 30.
[42] *Id.* at ¶ 33.
[43] *Id.*
[44] *Id.* at ¶ 35.
[45] *Id.*
[46] *Id.* at ¶ 40 (citation and internal quotations omitted).
[47] *Id.* at ¶ 42.
[48] *Id.* at ¶ 43.
[49] *Id.*
[50] *Id.*
[51] *Id.* at ¶ 47.

policy."[52] Regarding physical damage, the dissent cited *Sandy Point Dental* for the proposition that "SARS-CoV-2 does not 'alter the appearance, shape, color, structure, or other material dimension of the property.'"[53] The dissent also criticized the majority's failure to apply the period-of-recovery provision, finding that the "rebuild, repair, replace" language created a separate requirement that the definition of "direct physical loss or damage" must be of such a sort that could give rise to a period to "rebuild, repair, or replace" the insured property, lest other policy provisions be rendered nonsensical.[54]

ii. The Third Circuit

The Third Circuit Court of Appeals consolidated its Covid insurance litigation cases and has not yet issued a decision.

The CCLT has identified two New Jersey appellate court decisions discussing whether Covid can cause physical loss or damage.[55] In one of the cases, *MAC Properties*, the court noted that the plaintiff failed to allege Covid on the premises, suggesting a potentially different result if the plaintiff had so alleged.[56] However, the Court also favorably cites extra-jurisdictional cases holding that Covid cannot cause physical loss or damage, such as *Verveine* and *Sandy Point Dental*.[57] Nonetheless, there are seven cases still active in the New Jersey appellate courts.[58] The CCLT has not identified any appellate cases in Pennsylvania addressing the issue, though

[52] *Id.* at ¶ 65 n.19 (Carroll, J., dissenting).
[53] *Id.* at ¶ 61.
[54] *See id.* ¶¶ 65- 67.
[55] These are *AC Ocean Walk, LLC v. American Guarantee & Liability Co.*, No. A-1824-21, 2022 N.J. Super. Unpub. LEXIS 1119 (N.J. Super. Ct. App. Div. June 23, 2022) and *MAC Property Group LLC v. Selective Fire & Casualty Insurance Co.*, 278 A.3d 272 (N.J. Super. Ct. App. Div. 2022).
[56] MAC Property Grp. LLC v. Selective Fire & Cas. Ins. Co., 278 A.3d 272, 284-85 (N.J. Super. Ct. App. Div. 2022).
[57] *Id*. at 288.
[58] Any Garment Cleaners Somerdale, LLC v. Selective Ins. Co. of New England; Capri Holdings Ltd. v. Zurich Am. Ins. Co.; Jenkinson's South Inc. v. Westchester Surplus Lines Ins. Co.; Plastic Surgerycenter, P. v. Hanover Ins. Grp.; 1401 Ocean LLC v. Zurich Am. Ins. Co.; NJMHMC LLC v. Am. Guarantee and Liability Ins. Co.; Tory Burch LLC v. Zurich Am. Ins. Co. The New Jersey docket is somewhat opaque with regard to public access, so this might not be current.

many cases are still pending.[59] Finally, the Delaware Supreme Court recently decided *APX Operating Co. v. HDI Global Insurance Co.*,[60] in which the policyholder appealed the trial court's order dismissing the complaint. It is noteworthy that the trial court resolved this case on the basis of an exclusion and did not rule on whether or not Covid can cause physical loss or damage.[61] The Delaware Supreme Court summarily affirmed the trial court's ruling,[62] so the Delaware courts have not determined whether Covid can cause physical loss or damage. Nonetheless, it seems likely that the Third Circuit will follow all other federal appeals courts in deciding that Covid cannot cause physical loss or damage, especially since the appellate court of a state within the circuit has so held.

iii. The Fourth Circuit

The Fourth Circuit has held several times that Covid cannot cause physical loss or damage.[63] The CCLT has identified two ongoing cases in the Fourth Circuit Court of Appeals: *Central Laundry, LLC v. Illinois Union Insurance Co.*[64] and *Death and Taxes, LLC v. Cincinnati Ins. Co*.[65] The leading case in Virginia is *Crescent Hotels & Resorts v. Zurich American Insurance Co*.[66] In North Carolina, there are two appellate decisions holding that Covid cannot

[59] Isaac's at Spring Ridge, LLP v. MMG Ins. Co., No. 455 MDA 2021 (Pa. Super. Ct. filed Apr. 16, 2021); Ungarean v. CAN (Pa. Super. Ct. filed June 21, 2021); Lehigh Valley Baseball LP v. Phila. Indem. Ins. Co., No. 1413 EDA 2021 (Pa. Super. Ct. filed July 21, 2021); Spector Gadon Rosen Vinci P.C. v. Valley Forge Ins. Co., No. 1314 EDA 2021 (Pa. Super. Ct. filed July 9, 2021); MacMiles LLC v. Erie Ins. Exch., No., 1100 WDA 2021 (Pa. Super. Ct. July 19, 2021); Ridley Park Fitness LLC v. Phila. Ins. Cos., No. 1810 EDA 2021 (Pa. Super. Ct. filed Aug. 29, 2021).
[60] No. 393, 2021, 2022 WL 5056431 (Del. Oct. 5, 2022).
[61] *See* APX Operating Co., LLC v. HDI Glob. Ins. Co., No. CVN21C03058, 2021 WL 5370062, at *6 (Del. Super. Ct. Nov. 18, 2021).
[62] APX Operating Co. v. HDI Global Ins. Co., No. 393, 2021, 2022 WL 5056431 (Del. Oct. 5, 2022).
[63] *See* Uncork and Create LLC v. Cincinnati Ins. Co., 27 F.4th 926 (4th Cir. 2022) (applying West Virginia law); Nat'l Coatings & Supplies, Inc. v. Valley Forge Ins. Co., No. 21-1421, 2022 U.S. App. LEXIS 15629 (4th Cir. June 7, 2022) (applying North Carolina law).
[64] No. 22-1075 (4th Cir. filed Jan. 19, 2022) (applying Virginia law).
[65] No. 22-1237 (4th Cir. filed Mar. 4, 2022) (applying North Carolina law).
[66] No. 211074 (Va. April 14, 2022).

cause physical loss or damage,[67] one of which was unsuccessfully appealed to the state's supreme court.[68] However, both *North State Deli* and *Four Roses* did note that the plaintiff failed to allege Covid on the premises, and hence failed to allege any physical alternation to the insured premises, suggesting that a plaintiff that so alleged might survive a motion to dismiss.[69]

Maryland's Court of Special Appeals has held that Covid cannot cause physical loss or damage.[70] However, this decision is currently on appeal to the Maryland Court of Appeals.[71] In addition, there are two cases ongoing in the Maryland appellate courts.[72] While the CCLT has not identified a Fourth Circuit case applying South Carolina law, the South Carolina Supreme Court has held that Covid cannot cause physical loss or damage.[73] The CCLT has not identified any appellate cases in West Virginia.

iv. The Fifth Circuit

The Fifth Circuit has held that Covid cannot cause physical loss or damage under Texas law.[74] Furthermore, while the Fifth Circuit has not explicitly held that Covid cannot cause physical loss or damage under Louisiana law, its favorable citation of *Terry Black's Barbecue* in

[67] *See* North State Deli v. Cincinnati Ins. Co., No. 2022-NCCOA-455 (N.C. Ct. App. July 5, 2022); Four Roses, LLC v. First Protective Ins. Co., No. 2022-NCCOA-501 (N.C. Ct. App. July 19, 2022).
[68] North State Deli v. Cincinnati Ins. Co., 378 N.C. 367 (2022) (refusing the appeal).
[69] North State Deli v. Cincinnati Ins. Co., No. 2022-NCCOA-455, ⁋ 14 (N.C. Ct. App. July 5, 2022); Four Roses, LLC v. First Protective Ins. Co., No. 2022-NCCOA-501, ⁋ 12 (N.C. Ct. App. July 19, 2022).
[70] GPL Enter., LLC v. Certain Underwriters at Lloyd's, 276 A.3d 75, 79 (Md. Ct. Spec. App. 2022) ("Although the Virus can harm humans, it does not physically alter structures and therefore does not result in coverable property loss or damage." (citing Cordish Cos. v. Affiliated FM Ins. Co., 573 F. Supp. 977, 1000 (D. Md. 2021)), *petition for cert. filed*, No. COA-PET-0160-2022 (Md. filed July 6, 2022).
[71] GPL Enter., LLC v. Certain Underwriters at Lloyd's, No. COA-PET-0160-2022 (Md. filed July 6, 2022).
[72] Goucher Coll. v. Continental Cas. Co., No. CSA-REG-0538-2022 (Md. Ct. Spec. App. filed May 31, 2022); Tapestry Inc. v. Factory Mutual Insurance Co., No. COA-MISC-0001-2022 (Md. filed May 2, 2022) (certified question).
[73] Sullivan Mgmt., LLC v. Fireman's Fund Ins., No. 2021-001209, 2022 S.C. LEXIS 90 (August 10, 2022).
[74] *See* Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co., 22 F.4th 450 (5th Cir. 2022) (applying Texas law).

cases applying Louisiana law suggests that this would very likely be the outcome.[75] Nonetheless, several cases are ongoing.

Table 3. Ongoing Appellate Cases in the Fifth Circuit Court of Appeals.

Case Name	State Law Applied	Status	Alleged Covid on Premises
New Orleans Equity LLC v. U.S. Specialty Insurance Co.	Louisiana	Uncertain – PACER Not Updated Since Dec. 2021	Yes
PHI Group, Inc. v. Zurich American Insurance Co.	Louisiana	Reply Brief filed July 13, 2022	Yes
Southern Orthopaedic Specialists, LLC v. State Farm Fire & Casualty Co.	Louisiana	Appellant's Brief filed Sept. 1, 2022	Yes
Hotel Management of New Orleans, LLC v. General Star Indemnity Co.	Louisiana	Appellee's Brief filed Sept. 28, 2022	Yes

A recent appellate case from Louisiana may have changed the landscape in the Fifth Circuit. Louisiana's Fourth Circuit Court of Appeal held that an insurance policy covering "direct physical loss of or damage to" the insured property was ambiguous in so far as the term "loss" could mean either a partial or total loss of use of the insured property.[76] Since this decision was issued, the Fifth Circuit has at least three times reaffirmed its position from *Q Clothier*.[77] In fact, Fifth Circuit procedure would have barred any other decision – the Fifth

[75] Q Clothier New Orleans v. Twin City Fire Ins. Co., 29 F.4th 252, 258 (5th Cir. 2022) (applying Louisiana law) ("[W]e note that . . . we are unaware of[ ] any pertinent difference between Texas law and Louisiana law with respect to interpreting insurance policies.").
[76] Cajun Conti L.L.C. v. Certain Underwriters at Lloyd's, 2021-0343, p. 14-15 (La. App. 4 Cir. 06/15/22).
[77] *See* PS Bus. Mgmt., LLC v. Fireman's Fund Ins. Co., No. 21-30723, 2022 U.S. App. LEXIS 18688 (5th Cir. July 6, 2022) (not mentioning *Cajun Conti*); Dickie Brennan & Co., L.L.C. v. Zurich Am. Ins. Co., No. 21-30776, 2022 U.S. App. LEXIS 21185 at *5 (5th Cir. August 1, 2022) (discussing *Cajun Conti* in a footnote); Coleman E. Adler & Sons, LLC v. Axis Surplus Lines Insurance Co, 49 F.4th 894, 898 (5th Cir. 2022) (Since *Q Clothier*, there has been 'neither a clearly contrary subsequent holding of the highest court of [Louisiana] nor a subsequent statutory authority, squarely on point).

Circuit is not bound by the decisions of intermediate appellate state courts, and because of the "rule of orderliness,"[78] was bound by its prior holding in *Q Clothier*. It is worth noting that *Cajun Conti* is the only appellate decision identified by the CCLT in Louisiana addressing whether Covid can cause physical loss or damage. Nonetheless, absent input from the Louisiana Supreme Court, the aforementioned ongoing cases applying Louisiana law in the Fifth Circuit will very likely be bound by *Q Clothier*, not *Cajun Conti*.[79] This is precisely what occurred in *Coleman E. Adler & Sons, LLC v. Axis Surplus Lines Insurance Co*.[80]

Meanwhile, CCLT has identified two pending cases in the Texas appeals courts, both in Texas's Fourteenth District Court of Appeals.[81] While no Texas appeals court has ruled on whether Covid can cause physical loss or damage, regardless of the outcome of these cases, the Fifth Circuit will be bound in future litigation by its prior holding in *Terry Black's Barbecue* because of the Fifth Circuit's rule of orderliness, explained above. The CCLT has identified no cases in Mississippi.

v. The Sixth Circuit

The leading case in the Sixth Circuit applying Ohio law is *Santo's Italian Cafe LLC v. Acuity Insurance Co.*,[82] which held that the policy does not cover "a pandemic-triggered government order, barring in-person dining at a restaurant" because that is not "direct physical

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[78] *See* Jacobs v. Nat'l Drug Intel. Ctr., 548 F.3d 375 (5th Cir. 2008) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court . . . . Indeed, even if a panel's interpretation of the law appears flawed, the rule of orderliness prevents a subsequent panel from declaring it void.").

[79] Cases applying Louisiana law brought in other circuits, however, would not be bound as the Fifth Circuit is. The CCLT has not identified any ongoing cases applying Louisiana law outside of the Fifth Circuit.

[80] 49 F.4th 894, 898 (5th Cir. 2022) ("No exception to the rule of orderliness applies here. Since *Q Clothier*, there has been 'neither a clearly contrary subsequent holding of the highest court of [Louisiana] nor a subsequent statutory authority, squarely on point.'").

[81] Baylor Coll. of Med. v. XL Ins. Am. Inc., No. 14-22-00145-CV (Tex. App. filed Mar. 4, 2022); Masterworks Dev. Co. v. Zurich Am. Ins. Co., No. 14-21-00649-CV (Tex. App. filed Nov. 8, 2022).

[82] 15 F.4th 398 (6th Cir. 2022) (applying Ohio law).

loss of or damage to the property."[83] The court also noted that the plaintiff did not allege Covid on the premises.[84] In *Estes v. Cincinnati Ins. Co.*,[85] the Sixth Circuit, making an *Erie* guess under Kentucky law, rejected the "loss of use" theory advanced in *Santo's*, but unlike in *Santo's*, here the plaintiff did allege Covid on the premises and subsequent physical loss of property.[86] In its first on-point case applying Michigan law, *Brown Jug, Inc. v. Cincinnati Ins. Co.*,[87] the Sixth Circuit followed the Michigan Court of Appeals[88] in holding that loss of use does not amount to physical loss, while also noting that the plaintiffs had not alleged Covid on the premises and that such an allegation would be relevant to future coverage disputes.[89]

One Sixth Circuit case dealt with a different type of policy provision. *Wild Eggs* is also distinguishable from *Santo's* because the policy at issue contains a "Restaurant Endorsement" that provides coverage for, inter alia, "alleged exposure of the described premises to a contagious or infectious disease."[90]

The CCLT has identified seven cases pending in the Sixth Circuit Court of Appeals.

Table 4. Ongoing Appellate Cases in the Sixth Circuit Court of Appeals.

Case Name	State Law Applied	Status	Alleged Covid

[83] Santo's Italian Cafe LLC v. Acuity Ins. Co., 15 F.4th 398, 401 (6th Cir. 2022).
[84] *Id*. at 403 ("[Plaintiff] has not alleged any problem with the building."). However, the court cast doubt on the merits of such an argument in dicta, noting that "coronavirus did not physically affect the property in the way, say, fire or water damage would. No one argues that the virus physically and directly altered the property. The restaurant indeed makes no such argument." *Id*. at 402.
[85] 23 F.4th 695 (6th Cir. 2022).
[86] Plaintiff-Appellant's Brief on Appeal at 3, Estes v. Cincinnati Ins. Co., 23 F.4th 695 (6th Cir. 2022) (No. 21-5587) ("The presence of COVID-19 constituted a direct physical loss to property because the property was infested by a harmful agent that rendered it unusable or impaired their function."). Notably, the plaintiff did not allege that Covid caused an alteration to the insured premises, only that the infestation rendered the property unusable, which sounds like "loss of use" more than physical loss or damage.
[87] 27 F.4th 398 (6th Cir. 2022)
[88] Gavrilides Mgmt. Co. v. Mich. Ins. Co., No. 354418, 2022 Mich. App. LEXIS 632 (Mich. Ct. App. Feb. 1, 2022).
[89] The *Brown Jug* court noted in dicta that "a sufficient complaint alleging that the COVID-19 virus itself damaged an insured property would likely, at a minimum: (1) include allegations that COVID-19 was present at the covered property; (2) include allegations that COVID-19 materially altered all or part of the property; and (3) seek specific damages "for replacing that property and only for the time that property was damaged or lost" (citations omitted). This favorable dicta could set the stage for a later case to distinguish *Brown Jug*.
[90] Brief for Plaintiffs/Appellants at 16, Wild Eggs Holdings, Inc. v. State Auto Property & Casualty Insurance Company, No. 21-5962 (6th Cir. Dec. 23, 2021).

			Damaged Premises
Mikmar, Inc. v. Westfield Insurance Co.	Ohio	Reply Brief Filed Aug. 17, 2021. Oral Argument Not Yet Scheduled.	No [91]
Equity Planning Corporation v. Westfield Insurance Co.	Ohio	Appellee's Brief Filed Aug. 23, 2021.	No
Brunswick Panini's, LLC v. Zurich American Insurance Co.	Ohio	Reply Brief Filed Sept. 22, 2021.	No
Ceres Enterprises, LLC v. Travelers Insurance Co.	Ohio	Appellee's Brief Filed Aug. 19, 2021.	No
Family Tacos, LLC v. Auto Owners Insurance Co.	Ohio	Appellee's Brief filed Aug. 27, 2021.	No
Eye Centers of America, LLC v. Series Protected Cell 1, A Series of Oxford Insurance Co. TN, LLC	Tennessee	Submission on Briefs Set for Oct. 20, 2022.	N/A (Not Property Insurance)

As it stands, the Ohio cases seem unlikely to succeed because the appellants fail to allege Covid on and causing damage to the premises as seemingly required by binding Sixth Circuit precedent.[92] *Eye Centers of America* seems more promising for the appellants, as the CCLT has not identified any on-point Sixth Circuit case applying Tennessee law and because the case is distinguishable on the basis that it does not concern property insurance, moving it outside the shadow of *Santo's* and similar Sixth Circuit cases.

[91] The appellants in *Mikmar, Inc. v. Westfield Insurance Company, Equity Planning Corporation v. Westfield Insurance Company, Brunswick Panini's, LLC v. Zurich American Insurance Company*, and *Ceres Enterprises, LLC v. Travelers Insurance Company* all advance the same "loss of use" theory. *See, e.g.,* Opening Brief of Plaintiffs-Appellants at 16, Mikmar, Inc. v. Westfield Ins. Co., No. 21-3230 (6th Cir. June 25, 2021) ("the kind of 'loss of use' Mikmar suffered . . . ."); Opening Brief of Plaintiffs-Appellants at 19, Equity Planning Corporation v. Westfield Ins. Co.. No. 21-3229 (6th Cir. July 20, 2021) ("the kind of 'loss of use' Equity Planning suffered . . . .").
[92] Santo's Italian Cafe LLC v. Acuity Ins. Co., 15 F.4th 398, 401 (6th Cir. 2022).

In the appellate courts of the states that compose the Sixth Circuit, there are several decisions and numerous cases pending. In Ohio, the CCLT has identified two on-merits appellate court decisions, both coming from Ohio's intermediate appellate court.[93] In *Sanzo*, the appellants alleged only loss of use, not that Covid on the premises physically damaged the insured property.[94] In *Nail Nook*, on the other hand, the appellants alleged "that its physical property was damaged,"[95] but the court found the policy's virus exclusion dispositive in siding with the insurer.[96] In an alternate holding, however, the *Nail Nook* court also noted that "aside from the virus exclusion, and assuming all of the allegations in Nail Hook's complaint were true, Nail Nook did not have a valid claim for coverage because it could not prove 'direct physical loss of or damage to Covered Property.'"[97] This alternate holding might foreclose later policyholders' arguments, even absent a virus exclusion.

The CCLT has identified two ongoing cases in the Ohio appellate courts. The Ohio Supreme Court is currently deciding a certified question from the Northern District of Ohio in *Neuro-Communication Services, Inc. v. Cincinnati Insurance Co.*[98] The plaintiffs, in their complaint at the district court, alleged that Covid both "den[ied] use of and damag[ed] the property."[99] Cincinnati has sought a declaration from the Ohio Supreme Court that, inter alia, "in order to have direct physical loss or damage to property, there must be some tangible, physical

[93] Nail Nook, Inc. v. Hiscox Ins. Co., 2021-Ohio-4211, 182 N.E.3d 356; Sanzo Enters., LLC v. Erie Ins. Exch., 2021-Ohio-4268, 182 N.E.3d 393.
[94] Sanzo Enters., LLC v. Erie Ins. Exch., 2021-Ohio-4268, 182 N.E.3d 393, at ⁋ 52;
[95] Nail Nook, Inc. v. Hiscox Ins. Co., 2021-Ohio-4211, 182 N.E.3d 356, at ⁋ 4.
[96] Id. at ⁋ 18 ("After reviewing the record, we agree with the trial court that, '[u]nder the policy's clear and unambiguous virus exclusion, Nail Nook's alleged losses are excluded from coverage.'").
[97] Id. at ⁋ 30.
[98] No. 2021-0130 (Ohio filed June 14, 2021).
[99] Class Action Complaint at ⁋ 63, Neuro-Communication Servs., Inc. v. Cincinnati Ins. Co., No. 4:20-cv-01275 (N.D. Ohio June 10, 2020).

alteration to the property or structural damage to it."[100] The other ongoing case in Ohio's appellate court system is *Eye Specialists of Delaware v. Harleysville Worcester Insurance Co*.[101]

In Michigan, there are three ongoing appellate cases, all before the Michigan Supreme Court. The plaintiffs in *Gavrilides Management Co. LLC v. Michigan Insurance Co*.[102] are appealing to the Michigan Supreme Court, as are the plaintiffs from *Three Won Three Corporation v. Property-Owners Insurance Co.*,[103] and the plaintiffs from *Gourmet Deli Ren Cen Inc. v. Farm Bureau General Insurance Co. of Michigan*.[104]

The CCLT has not identified any appellate cases in Kentucky or Tennessee.

vi. The Seventh Circuit

The Seventh Circuit held in *Sandy Point Dental, P.C. v. Cincinnati Insurance Co.*,[105] that under Illinois law, "direct physical loss" requires physical alteration to the property that Covid cannot cause.[106] The Seventh Circuit, following a case from the Court of Appeals of Indiana, also held that Covid cannot cause physical loss or damage under Indiana law.[107] Nonetheless, one case is ongoing in the circuit: *Stant USA Corp. v. Factory Mutual Insurance Co*.[108] The appellants in this case are, expectedly, attempting to distinguish their case from *Sandy Point Dental*. The appellants in a recently decided case*, Jump Buffalo Grove, LLC v. Cincinnati Casualty Co.*,[109] also attempted to argue that their case was distinguishable from *Sandy Point* on

[100] Merit Brief of the Defendants/Petitioners at 2, Neuro-Communication Servs., Inc. v. Cincinnati Ins. Co., No. 2021-0130 (Ohio filed June 14, 2021).
[101] No. 21AP000090 (Ohio Ct. App. filed Mar. 1, 2021).
[102] No. 354418, 2022 Mich. App. LEXIS 632 (Feb. 1, 2022).
[103] No. 356791, 2022 Mich. App. LEXIS 2851 (May 19, 2022).
[104] No. 357386, 2022 Mich. App. LEXIS 1863 (Apr. 4, 2022).
[105] 20 F.4th 327 (7th Cir. 2021).
[106] *Id.* at 335; *see also* Bradley Hotel Corp. v. Aspen Specialty Ins. Co., 19 F.4th 1002 (7th Cir. 2021) (reaffirming *Sandy Point Dental*).
[107] Circle Block Partners, LLC v. Fireman's Fund Ins. Co., No. 21-2459, 2022 U.S. App. LEXIS 22800 (7th Cir. August 17, 2022) (following Ind. Repertory Theatre v. Cincinnati Cas. Co., 180 N.E.3d 403 (Ind. Ct. App. 2022), *transfer denied*, 2022 Ind. LEXIS 426 (Ind. July 19, 2022)).
[108] No. 22-1336 (7th Cir. docketed Mar. 2, 2022) (applying Indiana law).
[109] No. 22-1006 (7th Cir. Sept. 15, 2022) (applying Illinois law).

the facts, latching onto what they argued was limiting dicta in *Sandy Point*,[110] but to no avail. The *Stant* appellants, taking a different approach, are distinguishing on the difference in policy language at issue in *Sandy Point* versus in *Stant*, arguing that the omission of the term "direct" in its own policy creates broader coverage than in *Sandy Point*.[111]

The appellate courts of the states that compose the Seventh Circuit are still fielding numerous cases, despite emphatic decisions already having been issued. In Illinois, there are ten appellate decisions identified by the CCLT,[112] and the Illinois Supreme Court has refused two petitions for leave to appeal intermediate appellate decisions.[113] Despite that none have favored policyholders and the cases, taken together, confirm the correctness of the Seventh Circuit's *Erie* guess in *Sandy Point Dental*, there are fifteen ongoing appellate cases in Illinois.

Table 5. Ongoing Appellate Cases in Illinois.

Case	Court	Notes
Stats LLC v. Continental Insurance Co.	Illinois Appellate Court, First District	
Masa Uno, Inc. v. Society Insurance	Illinois Appellate Court, First District	
Parson's Chicken & Fish v. Society Insurance	Illinois Appellate Court, First District	

[110] Brief and Short Appendix of Plaintiff-Appellant at 7, Jump Buffalo Grove, LLC v. Cincinnati Cas. Co., No. 22-1006 (7th Cir. Mar. 7, 2022) ("[T]his Court acknowledged that if the contamination was so severe that it led to complete dispossession or made the premises uninhabitable, "direct physical loss" would occur (citing *Sandy Point Dental*)).

[111] Brief of Plaintiffs-Appellants at 14, Stant USA Corp. v. Factory Mut. Ins. Co., No. 22-1336 (7th Cir. Apr. 11, 2022) ("However, the policy language at issue in this current appeal has an important distinction: it omits the modifier 'direct' from its coverage trigger.").

[112] Lee v. State Farm Fire & Cas. Co., 2022 IL App (1st) 210105; Sweet Berry Cafe, Inc. v. Soc'y Ins., Inc., 2022 IL App (2d) 210088, *petition for leave to appeal denied*, No. 128399 (Sept. 28, 2022); Firebirds Int'l, LLC v. Zurich Am. Ins. Co., 2022 IL App (1st) 210558; ABW Dev., LLC v. Cont'l Cas. Co., 2022 IL App (1st) 210930; Ark Rests. Corp. v. Zurich Am. Ins. Co., 2022 IL App (1st) 211147-U; State & 9 St. Corp. v. Soc'y Ins., 2022 IL App (1st) 211222-U; GPIF Crescent Court Hotel LLC v. Zurich Am. Ins. Co., 2022 IL App (1st) 211335-U; Ortiz Eye Assocs., P.C. v. Cincinnati Ins., Inc., 2022 IL App (1st) 211312-U; Bottleneck Mgmt. v. Zurich Am. Ins. Co., 2022 IL App (1st) 211462-U; Alley 64, Inc. v. Society Ins., 2022 IL App (2d) 210401, *petition for leave to appeal denied*, No. 128576 (Sept. 28, 2022).

[113] Sweet Berry Cafe, Inc. v. Soc'y Ins., Inc., 2022 IL App (2d) 210088, *petition for leave to appeal denied*, No. 128399 (Sept. 28, 2022); Alley 64, Inc. v. Society Ins., 2022 IL App (2d) 210401, *petition for leave to appeal denied*, No. 128576 (Sept. 28, 2022).

Pussytails, Inc. v. Society Insurance	Illinois Appellate Court, First District	
Maillard Tavern, LLC v. Society Insurance	Illinois Appellate Court, First District	
Kpokos, Inc. v. Society Insurance	Illinois Appellate Court, First District	
Spartan Education Group, LLC v. New Hampshire Insurance Co.	Illinois Appellate Court, First District	
Corelle Brands LLC v. Zurich American Insurance Co.	Illinois Appellate Court, First District	
Wild Holdings LP v. Zurich American Insurance Co.	Illinois Appellate Court, First District	
Oak Park Prosthodontics v. Twin City Fire Insurance Co.	Illinois Appellate Court, First District	
Graduate Hotels Real Estate Fund III LP v. Hartford Fire Insurance Co.	Illinois Appellate Court, First District	
Steve Foley Cadillac, Inc. v. New York Marine and General Insurance Co.	Illinois Appellate Court, First District	
Napleton River Oaks Cadillac Inc. v. Erie Insurance Property & Casualty Co.	Illinois Appellate Court, First District	
Stefani Management Services Inc. v. Society Insurance	Illinois Appellate Court, First District	
MTDB Corp. v. American Automobile Insurance Co.	Illinois Appellate Court, First District	

The CCLT has identified one on-merits appellate decision from Indiana*: Indiana Repertory Theatre v. Cincinnati Casualty Co*.[114]

While the CCLT has not identified any Seventh Circuit cases applying Wisconsin law, there is one appellate decision from Wisconsin: *Colectivo Coffee Roasters, Inc. v. Soc'y Ins.*[115] *Colectivo* held that Covid cannot satisfy the physical loss or damage requirement because "it

[114] 180 N.E.3d 403 (Ind. Ct. App. 2022), *transfer denied*, 2022 Ind. LEXIS 426 (Ind. July 19, 2022) (holding that Covid cannot cause physical loss or damage).
[115] 2022 WI 36.

does not 'alter the appearance, shape, color, structure, or other material dimension of the property.'"[116]

vii. The Eighth Circuit

The Eight Circuit has addressed Covid-related business interruption claims under Iowa, Missouri, and Arkansas law.[117] In *Oral Surgeons*, the Court rejected the appellant's "loss of use" theory, holding that a policyholder must demonstrate "a physical alteration, physical contamination, or physical destruction"[118] to initiate coverage, and Oral Surgeons alleged "no facts to show that it had suspended activities due to direct 'accidental physical loss or accidental physical damage.'"[119] Therefore, the door remains open to a policyholder who alleges Covid caused a physical alteration to the insured premises. The Eighth Circuit applied the same reasoning in *Monday Restaurants v. Intrepid Insurance Co*.[120] In a case applying Arkansas law, however, the Eighth Circuit held that allegations of Covid on the premises and damage to the premises caused by Covid were insufficient to demonstrate physical loss or damage.[121] *Monday Restaurants* suggests that even if a policyholder alleged Covid on the premises in a case under Iowa or Missouri law, the Eighth Circuit would reject that argument absent specific allegations about the damage caused by Covid. It is not clear what such specific allegations would have to be.

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[116] *Id.* at ⁋ 9, 2022 WI 36 (quoting Sandy Point Dental, P.C. v. Cincinnati Ins. Co., 488 F. Supp. 3d, 690, 693-94 (N.D. Ill. 2020), *aff'd*, 20 F.4th 327 (7th Cir. 2021)).
[117] *See* Oral Surgeons, P.C. v. Cincinnati Ins. Co., 2 F.4th 1141 (8th Cir. 2021) (applying Iowa law); Monday Restaurants v. Intrepid Ins. Co., 32 F.4th 656 (8th Cir. 2022) (applying Missouri law); Rock Dental Ark. PLLC v. Cincinnati Ins. Co., No. 21-2919, 2022 U.S. App. LEXIS 20079, at *4 (8th Cir. July 21, 2022).
[118] Oral Surgeons, P.C. v. Cincinnati Ins. Co., 2 F.4th 1141, 1144 (8th Cir. 2021).
[119] *Id.* at 1145.
[120] Monday Rests. v. Intrepid Ins. Co., 32 F.4th 656, 658 (8th Cir. 2022) ("Neither business alleges COVID-19 was physically present on its premises or that anything physical happened to its properties. The businesses allege the distinction between 'loss of' and 'damage to' property distinguishes this case from *Oral Surgeons, P.C. v. Cincinnati Ins. Co.,* 2 F.4th 1141, 1145 (8th Cir. 2021). It does not.").
[121] Rock Dental Ark. PLLC v. Cincinnati Ins. Co., No. 21-2919, 2022 U.S. App. LEXIS 20079, at *4 (8th Cir. July 21, 2022) ("However, these allegations are just a '[t]hreadbare recital of' the policy's language, combined with 'conclusory statements' that the coronavirus impaired Rock Dental's property in some unidentified way.'" (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009))).

The CCLT has not identified any Eighth Circuit appellate decisions applying law from Minnesota, Nebraska, North Dakota, or South Dakota. The CCLT has identified five ongoing cases in the Eighth Circuit.

Table 6. Ongoing Appellate Eighth Circuit Court of Appeals.

Case Name	State Law Applied	Status	Alleged Covid Damaged Premises
Great River Entertainment, LLC. v. Zurich American Insurance Co.	Iowa	Oral Argument Scheduled Sept. 21, 2022	Yes
Mark Rossi v. Arch Insurance Co., (MDL No. 2955)	Missouri	Oral Argument Scheduled Sept. 21, 2022	N/A [122]
Lindenwood Female College v. Zurich American Insurance Co.	Missouri	Oral Argument Scheduled Sept. 21, 2022	Yes
Olmsted Medical Center v. Continental Casualty Co.	Minnesota	Reply Brief filed May 19, 2022	Yes
K.C. Hopps, Ltd. v. Cincinnati Insurance Co., Inc. (MDL No. 2962)	Missouri and Kansas	Reply Brief Filed July 29, 2022	Yes

The CCLT has identified several on-point decisions from the appellate courts of the states in the Eighth Circuit. In Iowa, the state's Supreme Court has issued decisions in two Covid cases: *Wakonda Club v. Selective Insurance of America* [123] and *Jesse's Embers LLC v. Western Agricultural Insurance Co*. [124] In both cases, the court held that the insured did not incur physical loss or damage to the insured premises because the appellants failed to allege Covid on the

[122] Ski pass insurance, not property insurance, is at issue.
[123] 973 N.W.2d 545 (Iowa 2022).
[124] 973 N.W.2d 507 (Iowa 2022).

premises.[125] Given that the appellants' failure to allege Covid on the premises seems dispositive in these two cases, it is possible that a policyholder alleging Covid on the premises might succeed where these appellants failed. The CCLT has not identified any ongoing cases in the Iowa appellate courts.

In Minnesota, *Shakopee Mdewakanton Sioux Community v. Factory Mutual Insurance Co.*[126] is on appeal to the Minnesota Court of Appeals.[127] The CCLT has not identified any on-merits cases, ongoing or completed, in Missouri, Arkansas, Nebraska, North Dakota, or South Dakota.

viii. The Ninth Circuit

The Ninth Circuit has decided Covid-related business interruption cases on the basis of the meaning of "physical loss or damage"[128] under California, Nevada, and Washington law.[129]

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[125] *See* Wakonda Club v. Selective Ins. of Am., 973 N.W.2d 545, 553 (Iowa 2022) ("Wakonda Club affirmatively disavowed any knowledge that the COVID-19 virus was ever on its premises or carried by any of its employees or members . . . . [I]ts concession removes even any potential physical element to the loss of the use of its property, distinguishing its claim from those in the cases it relies on."); Jesse's Embers LLC v. W. Agric. Ins. Co., 973 N.W.2d 507 (Iowa 2022) ("We addressed whether 'direct physical loss of or damage to' property language in an identical insurance policy's Business Income and Extra Expense provisions cover mere loss of use of property in a companion case, *Wakonda Club*, also filed today. . . . Jesse's Embers took the same position as Wakonda, affirmatively asserting there was no contamination to its property, either by the existence of the COVID-19 virus on its property or by the presence of any infected employees or patrons. Given this affirmative assertion, the district court here properly granted summary judgment to Farm Bureau with respect to the Business Income and Extra Expense provisions of the policy.").

[126] No. 70-CV-21-6480 (Minn. Dist. Ct. Dec. 29, 2021) (granting defendant's motion for summary judgment and holding that Covid-19 does not cause physical loss or damage to property).

[127] Shakopee Mdewakanton Sioux Cmty. v. Factory Mut. Ins. Co., No. A22-06865 (Minn. Ct. App. filed May 16, 2022).

[128] *See also* Chattanooga Pro. Baseball LLC v. Nat'l Cas. Co., No. 20-17422, 2022 U.S. App. LEXIS 1426 (9th Cir. Jan. 19, 2022) (applying law from ten states but not discussing the meaning of "physical loss or damage").

[129] Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am., 15 F.4th 885 (9th Cir. 2021) (holding that loss of use does not meet the physical loss or damage requirement under California law); Chattanooga Pro. Baseball LLC v. Nat'l Cas. Co., No. 20-17422, 2022 U.S. App. LEXIS 1426 (9th Cir. Jan. 19, 2022) (not discussing the meaning of "physical loss or damage"); Palmdale Ests., Inc. v. Blackboard Ins. Co., 510 F. Supp. 3d 874 (9th Cir. 2021) (holding that, under California law, a virus exclusion precluded coverage and not discussing "physical loss or damage"); Selane Prods. v. Cont'l Cas. Co., No. 21-55123, 2021 U.S. App. LEXIS 29633 (9th Cir. Oct. 1, 2021) (applying California law and holding that loss of use was not physical loss or damage); Rialto Pockets, Inc. v. Beazley Underwriting Ltd., No. 21-55196, 2022 U.S. App. LEXIS 10699 (9th Cir. Apr. 20, 2022) (holding that loss of use is not physical loss or damage under California law); Circus Circus LV, LP v. AIG Specialty Ins. Co., No. 21-15367, 2022 U.S. App. LEXIS 10298, at *4 (9th Cir. Apr. 15, 2022) (applying Nevada law and holding that "[d]espite Circus Circus's allegation that the COVID-19 virus was present on its premises, it has not identified any direct physical damage to

The Ninth Circuit has held that Covid cannot cause physical loss or damage under Nevada law.[130] The Ninth Circuit has not, however, so held under California law. As the cases enumerated above demonstrate, the Ninth Circuit has only decided two cases involving an allegation of physical loss or damage caused by Covid on the premises, which the court resolved on the basis of policy exclusions.[131] Therefore, a policyholder not restricted by virus or contamination exclusions might still succeed under California law before the Ninth Circuit. Similarly, the Ninth Circuit has held that loss of use is not physical loss or damage under Washington law,[132] the Ninth Circuit has not addressed whether allegations of physical damage to the premises caused by Covid-19 would be sufficient for physical loss or damage under Washington law. Currently, there are twenty-nine Covid-related cases pending before the Ninth Circuit.

Table 7. Ongoing Appellate Ninth Circuit Court of Appeals.

Case Name	State Law	Status	Alleged Covid

its property caused by the virus which led to the casino's closure."); Levy Ad Grp., Inc. v. Chubb Corp., No. 21-15413, 2022 U.S. App. LEXIS 6954 (9th Cir. Mar. 17, 2022) (holding that loss of use is not physical loss or damage); Egg and I, LLC v. U.S. Specialty Ins. Co., No. 21-15545, 2022 U.S. App. LEXIS 18738 (9th Cir. July 7, 2022) (not discussing "physical loss or damage"); Baker v. Or. Mut. Ins. Co., No. 21-15716, 2022 U.S. App. LEXIS 6769 (9th Cir. Mar. 16, 2022) (reaffirming *Mudpie*); Palomar Health v. Am. Guar. & Liab. Ins. Co., No. 21-56073, 2022 U.S. App. LEXIS 20916, at *2 (9th Cir. July 28, 2022) (holding that, under California law, the plaintiff's claims based on the presence of Covid on the insured premises "are barred by the policies' contamination exclusions" and the claims based on government shutdown orders "are barred by the policies' government-order exclusions."); Hot Yoga Inc v. Philadelphia Indemnity Insurance Co., No. 21-35806, 2022 WL 9732180 (9th Cir. Oct. 17, 2022) (applying Washington law as interpreted by *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co*., 515 P.3d 525, 532 (Wash. 2022)); *see also* Appellant's Opening Brief at 20, Hot Yoga Inc v. Phila. Indem. Ins. Co., No. 21-35806 (9th Cir. Dec. 21, 2021) ("Here, 'physical loss of' property can reasonably be understood to include the loss of the ability to use property or suffering the "deprivation" of such property.").

[130] Circus Circus LV, LP v. AIG Specialty Ins. Co., No. 21-15367, 2022 U.S. App. LEXIS 10298, at *4 (9th Cir. Apr. 15, 2022).

[131] Palmdale Ests., Inc. v. Blackboard Ins. Co., 510 F. Supp. 3d 874 (9th Cir. 2021) (holding that, under California law, a virus exclusion precluded coverage and not discussing "physical loss or damage"); Palomar Health v. Am. Guar. & Liab. Ins. Co., No. 21-56073, 2022 U.S. App. LEXIS 20916, at *2 (9th Cir. July 28, 2022).

[132] Hot Yoga Inc v. Philadelphia Indemnity Insurance Co., No. 21-35806, 2022 WL 9732180 (9th Cir. Oct. 17, 2022) (applying Washington law as interpreted by *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co*., 515 P.3d 525, 532 (Wash. 2022)); *see also* Appellant's Opening Brief at 20, Hot Yoga Inc v. Phila. Indem. Ins. Co., No. 21-35806 (9th Cir. Dec. 21, 2021) ("Here, 'physical loss of' property can reasonably be understood to include the loss of the ability to use property or suffering the "deprivation" of such property."); *see also* Caballero v. Massachusetts Bay Insurance Co., No. 21-35510 (9th Cir. Oct. 17, 2022); Kara McCulloch DMD MSD PLLC v. Valley Forge Insurance, No. 21-35520 (9th Cir. Oct. 17, 2022).

	Applied		Damaged Premises
Kevin Barry Fine Art Associates v. Sentinel Insurance Co., Ltd.	California	Reply Brief Filed Feb. 25, 2022	Yes
Caribe Restaurant and Nightclub v. Topa Insurance Co.	California	Answering Brief filed Sep. 22, 2021	Yes
French Laundry Partners LP v. Hartford Fire Insurance Co.	California	Answering Brief filed Sep. 12, 2022	Yes
Vita Coffee LLC v. Fireman's Fund Insurance Co.	Washington	Stayed pending the Supreme Court of the State of Washington's decision in *Hill and Stout PLLC v. Mutual of Enumclaw Insurance Co.*	Yes
Germack v. Dentists Insurance Co.	Washington	Stayed	No [133]
Pacific Endodontics PS v. Ohio Casualty Insurance Co.	Washington	Stayed	No [134]
Another Planet Entertainment, LLC v. Vigilant Insurance Co.	California	Oral Argument Scheduled Dec. 9, 2022	Yes
First and Stewart Hotel Owner LLC v. Fireman's Fund Insurance Co.	Washington	Stay lifted Oct. 18, 2022	Yes
Nari Suda LLC v. Oregon Mutual Insurance Co.	Oregon	Reply Brief Filed Apr. 6, 2022.	Yes
Protege Restaurant Partners LLC v. Sentinel Insurance Co., Ltd.	California	Oral Argument Scheduled for Oct. 21, 2022.	Yes [135]
HT-Seattle Owner LLC v. American Guarantee and Liability	Washington	Answering Brief Filed Aug. 22, 2022.	No [136]

[133] Opening Brief of Plaintiffs-Appellants at 18, Germack v. Dentists Ins. Co., No. 21-35491, (9th Cir. Nov. 11, 2021) ("Here, 'physical loss' of property can reasonably be interpreted to include the loss of the ability to use property or suffering the 'deprivation' of such property.").

[134] Opening Brief of Plaintiffs-Appellants at 11, Pacific Endodontics PS v. Ohio Cas. Ins. Co., No. 21-35500 (9th Cir. Nov. 21, 2021) ("[O]rders . . . required Plaintiffs to refrain from all routine business and thus deprived them of the use of their insured properties. This deprival constitutes "direct physical loss" that entitles Plaintiffs to coverage.").

[135] The appellant in this case is seizing on the language from *Inns-by-the-Sea* that could allow for finding physical loss or damage in a case where the insured alleged Covid on the premises. *See* Appellant's Opening Brief at 43-44, Protégé Rest. Partners, LLC v. Sentinel Ins. Co., Ltd., No. 21-16814 (9th Cir. Feb. 7, 2022).

[136] Brief of Plaintiff-Appellant at 28, HT-Seattle Owner LLC v. American Guarantee and Liability Insurance Company, No. 21-35916 (9th Cir. June 22, 2022) ("'[D]amage' requires physical alteration, but 'direct physical loss' occurs when the presence of a physical substance renders a property so unsafe as to be impaired and unfit for its intended use.").

Insurance Co.			
TP Racing LLLP v. American Home Assurance Co.	Arizona	Oral Argument Scheduled Nov. 18, 2022	Yes
HP Tower Investments, LLC v. Nationwide Mutual Insurance Co.	California	Oral Argument Scheduled Dec. 5, 2022	No [137]
Federal Insurance Co. v. Simon Wiesenthal Center, Inc.	California	Reply Brief Filed July 11, 2022.	Yes
AECOM v. Zurich American Insurance Co.	California	Reply Brief Filed July 21, 2022.	N/A [138]
Discount Electronics, Inc. v. Wesco Insurance Co.	California	Answering Brief Submitted Oct. 6, 2022.	Yes
Madison International v. Valley Forge Insurance Co.	California	Answering Brief Due Nov. 2, 2022.	Yes
Mostre Exhibits, LLC v. Sentinel Insurance Co., Limited	California	Argument Scheduled Dec. 5, 2022.	Yes
JC SC LLC v. Travelers Indemnity Co. of Connecticut	California	Answering Brief due Nov. 7, 2022.	Yes
In-N-Out Burgers v. Zurich American Insurance Co.	California	Answering Brief Filed Oct. 21, 2022.	Yes
Team 44 Restaurants LLC v. American Insurance Co.	Arizona	Answering Brief Filed Sep. 9, 2022.	No [139]
Hovagimian v. Maxum Casualty Insurance Co.	California	Answering Brief Due Nov. 14, 2022.	Yes [140]
Khatchik Hairabedian v. Security National Insurance Co.	California	Opening Brief Filed Oct. 11, 2022.	Yes
Tao Group Holdings, LLC v. Employers Insurance Co. of Wausau	New York	Reply Brief Filed July 22, 2022.	Yes
Lulu's Fashion Lounge LLC v. Hartford Fire Ins. Co.	California	Opening Brief Filed Sep. 6, 2022.	No [141]

[137] Appellants HP Tower Investments, LLC's and Irvine Family Spa, Inc.'s Opening Brief at 16, HP Tower Invs., LLC v. Nationwide Mut. Ins. Co., No. 21-56240 (9th Cir. Apr. 11, 2022).
[138] Exclusions at issue on appeal. *See* Appellant's Opening Brief, AECOM v. Zurich Am. Ins. Co., No. 22-55092 (9th Cir. Apr. 28, 2022).
[139] Plaintiffs-Appellants' Opening Brief at 26, Team 44 Rests. LLC v. Am. Ins. Co., No. 22-15403 (9th Cir. July 11, 2022) ("Here, Plaintiffs were expressly deprived of access to and the ability to use their property for the income-generating purposes for which it was insured by way of government decree.").
[140] In fact, the appellant is arguing that "COVID-19 physically altered its properties." *See* Appellant's Opening Brief at 2, Hovagimian v. Maxum Cas. Ins. Co., No. 22-55358 (9th Cir. Aug. 15, 2022).
[141] Lulu's Fashion Lounge LLC v. Hartford Fire Ins. Co., No. 2:20-cv-01836, 2022 U.S. Dist. LEXIS 63677 (E.D. Cal. Apr. 5, 2022) ("Plaintiff all but concedes that it is making just the kind of loss of use claim rejected by *Mudpie*.").

Vida Skin Care, Inc. v. Sentinel Insurance Co. Ltd.	California	Opening Brief Filed Sep. 6, 2022.	N/A [142]
Goergio Cosani Menswear Inc v. AmGUARD Insurance Co.	California	Oral Argument Scheduled Dec. 5, 2022.	Yes
Madera Group, LLC v. Mitsui Sumitomo Insurance USA, Inc.	California	Opening Brief Due Nov. 2, 2022.	Yes
Crown Intermediate HoldCo Inc v. Allianz Global Risks US Insurance Co.	California and New York	Answering Brief Due Jan. 21, 2023.	Yes

In the state courts within the Ninth Circuit, California and Washington have addressed the ability of Covid to cause physical loss or damage. Two of California's appellate districts have decided Covid cases, namely the Fourth and Second Districts. In *Inns-by-the-Sea v. California Mutual Insurance Co.*, [143] the Fourth District rejected the plaintiff's argument that loss of use amounts to physical loss or damage, though it stopped short of holding that Covid cannot cause physical loss or damage. Rather, the court noted,

> [I]t could be possible, in a hypothetical scenario, that an invisible airborne agent would cause a policyholder to suspend operations because of direct physical damage to property. However, the complaint here simply does not describe such a circumstance because it bases its allegations on the situation created by the Orders, which were not directed at a particular business establishment due to the presence of COVID-19 on that specific business's premises. [144]

On the other hand, the Second District not only affirmed *Inns-by-the-Sea* but also held that "*Inns-by-the-Sea* holds, without equivocation, that a policy requiring physical loss or damage does not cover losses incurred by reason of the pandemic." [145] Nonetheless, the

[142] This case was decided on the basis of the policy's virus exclusion. *See* Vida Skin Care, Inc. v. Sentinel Ins. Co. Ltd., No. 2:21-cv-07997, 2022 U.S. Dist. LEXIS 82670, at *8-10 (C.D. Cal. May 6, 2022).
[143] 71 Cal. App. 5th 688 (2021), *petition for review denied*, No. S272450, 2022 Cal. LEXIS 1412 (Cal. Mar. 9, 2022).
[144] Inns-by-the-Sea v. Cal. Mut. Ins. Co., 71 Cal. App. 5th 688, 704 (2021)
[145] Musso & Frank Grill Co. v. Mitsui Sumitomo Ins. USA Inc., 77 Cal. App. 5th 753, 759 (2022); *see also* United Talent Agency v. Vigilant Ins. Co., 77 Cal.App.5th 821 (2022) (following *Inns-by-the-Sea*).

Second District later held that Covid can, and did, cause physical loss or damage when viewing facts in the light most favorable to the nonmovant on a motion to dismiss.[146]

The First District recently seemed to endorse the reasoning of *Marina Pacific* and support the possibility that Covid can cause physical loss or damage. In *Tarrar Enterprises v. Associated Indemnity Corp.*,[147] California's Court of Appeal, First Appellate District, affirmed the trial court's decision that the policyholder did not adequately allege physical loss or damage as required by California decisions involving Covid-related insurance claims, such as *Apple Annie*. However, the Court reversed the trial court's denial of leave for the policyholder to amend its complaint in accordance with both its opening brief and reply briefs, which discuss, for example, "alleg[ing] further details about the physical harm that the COVID-19 virus causes to air and surface of property, and the inability to remediate that harm and make properties usable."[148] Granting leave to amend suggests that the Court agrees with *Marina Pacific*, which was explicitly cited by this Court and held that Covid can cause physical loss or damage. In the context of coverage for communicable disease events, the First Appellate District has also found that an insured adequately pled physical loss or damage caused by Covid-19.[149]

The CCLT has identified sixteen ongoing cases in the California appellate courts.

Table 8. Ongoing Appellate Cases in California.

Cases	Court	Notes
Saddle Ranch Sunset,	California Court of	

[146] Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co., 81 Cal. App. 5th 96 (2022) ("The trial court . . . rul[ed] the COVID-19 virus cannot cause direct physical loss or damage to property for purposes of insurance coverage. That might be the correct outcome following a trial or even a motion for summary judgment. It was error at this nascent phase of the case.").
[147] 83 Cal. App. 5th 685 (2022).
[148] Appellant's Reply Brief at 54, Tarrar Enterprises v. Associated Indemnity Corp., 83 Cal.App.5th 685 (2022).
[149] Amy's Kitchen, Inc. v. Fireman's Fund Ins. Co., No. A163767, 2022 WL 4875656, at *5-6 (Cal. Ct. App. Oct. 4, 2022). The court ultimately denied coverage, however, because "Amy's has not pled a 'communicable disease event,'" but also held that Amy's "should be given leave to amend to do so." *Id.* at *6.

LLC v. Fireman's Fund Insurance Co.	Appeals, Second District	
John's Grill Inc. v. Hartford Financial Services Group Inc.	California Court of Appeals, First District	
Starlight Cinemas, Inc. v. Massachusetts Bay Insurance Co.	California Court of Appeals, Second District	
Shusha Inc v. Century-National Insurance Co.	California Court of Appeals, Second District	
Peanut Wagon Inc. v. Allianz Global Corporate & Specialty	California Court of Appeals, First District	
George Gordon Enterprises, Inc. v. AGCS Marine Insurance Co.	California Court of Appeals, Second District	
Boffo Cinemas LLC v. Fireman's Fund Insurance Co.	California Court of Appeals, Fourth District	
Anchors and Whales LLC v. Crusader Insurance Co.	California Court of Appeals, First District	
Best Rest Motel Inc v. Sequoia Insurance Co.	California Court of Appeals, Fourth District	
Coast Restaurant Group v. AmGuard Insurance Co.	California Court of Appeals, Fourth District	
Showa Hospitality LLC v. Sentinel Insurance Co. Ltd.	California Court of Appeals, Fourth District	
Benyaminy & Kashani Dental Corp., v. Dentists Insurance Co.	California Court of Appeals, Second District	

In Washington, meanwhile, the Washington Supreme Court has held that an insured's loss of use theory, which did not include allegations of Covid on the premises, did not satisfy the physical loss or damage requirement, but the court noted that "there are likely cases in which there is no physical alteration to the property but there is a direct

physical loss under a theory of loss of functionality."[150] However, the court also favorably cited *Verveine*, observing "the national consensus . . . that COVID-19 and related governmental orders do not cause physical loss of or damage to a property and do not trigger coverage under similar policy language."[151] It is not clear how a complaint arising under Washington law and alleging Covid physically damaged the premises would be resolved under *Hill & Stout*. A similar case is still pending before the Washington Court of Appeals.[152]

Elsewhere in the Ninth Circuit, *BA Ventures LLC v. Farmers Insurance Exchange*[153] is still pending in Oregon. The Nevada Supreme Court has taken up *JGB Vegas Retail Lessee LLC v. Starr Surplus Lines Insurance Co.*, No. 84986 (Nev. July 29, 2022). The CCLT has not identified any appellate cases in Montana, Idaho, Arizona, Alaska, or Hawaii.

ix. The Tenth Circuit

The only Covid-related appellate case identified by the CCLT in the Tenth Circuit is *Goodwill Industries of Central Oklahoma Inc. v. Philadelphia Indemnity Insurance Co.* The Tenth Circuit in this case held that loss of use does not amount to physical loss or damage under Oklahoma law.[154] There are two cases pending in the Tenth Circuit Court of Appeals.[155]

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[150] Hill & Stout, PLLC v. Mut. Of Enumclaw Ins. Co., No, 100211-4, at *14-15 (Wash. Aug. 25, 2022).
[151] *Id*. at *18.
[152] Fitness Int'l v. Zurich Am. Ins. Co., No. 565684 (Wash. Ct. App. Oct. 21, 2021).
[153] No. A17690 (Or. Ct. App. Sep. 20, 2021).
[154] Goodwill Industries of Central Oklahoma Inc v. Philadelphia Indemnity Insurance Co., 21 F.4th 704 (10th Cir. 2021).
[155] Sagome, Inc. v. Cincinnati Ins. Co., No. 21-1359 (10th Cir. filed Oct. 15, 2021); Monarch Casino & Resort, Inc. v. Affiliated FM Ins. Co., No. 22-1096 (10th Cir. filed Apr. 1, 2022).

Meanwhile, in Oklahoma state court, three Covid-related business interruption cases were consolidated by the Oklahoma Supreme Court, and one has been decided.[156] The court reversed the trial court's order granting plaintiffs' motion for summary judgment, citing several federal cases applying Oklahoma law, and held that "physical loss or damage" "requires immediate and actual, material, or tangible deprivation or destruction of property."[157] The Court specifically noted that Nation "was not forced to close due to contamination of the virus or by any emergency order regarding COVID-19."[158] Three justices dissented, citing *Western Fire Ins. Co. v. First Presbyterian Church* and arguing that the majority's interpretation of "physical loss or damage" "render[s] one term or the other redundant."[159] Finding the policy ambiguous, the dissenters would have given Nation the opportunity "to show its expectation of coverage is reasonable."[160]

The CCLT has not identified any appellate decisions or ongoing cases in the state appellate courts of New Mexico, Colorado, Utah, or Kansas.

x. The Eleventh Circuit

The Eleventh Circuit has held that Covid cannot cause physical loss or damage under Georgia and Florida law.[161] The CCLT has not identified any ongoing Covid cases in the Eleventh Circuit Court of Appeals. Florida's Court of Appeals has affirmed the

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[156] Cherokee Nation v. Lexington Ins. Co., 2022 OK 71, ¶ 2; *see also* Choctaw Nation of Oklahoma v. Lexington Ins. Co., No. SD-119413 (Ok. filed Mar. 19, 2021); Muscogee Creek Nation v. Lexington Ins. Co., No. SD-119701 (Ok. filed July 8, 2021). An opinion has not been rendered on the latter two cases, as of writing. *See Choctaw Nation of Oklahoma*, OKLAHOMA STATE COURTS NETWORK, https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=SD-119413 (last visited Oct. 23, 2022); *Muscogee (Creek) Nation d/b/a, Muscogee (Creek) Nation Casinos et al.*, OKLAHOMA STATE COURTS NETWORK, https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=SD-119701 (last visited Oct. 23, 2022).

[157] Cherokee Nation v. Lexington Ins. Co., 2022 OK 71, ¶ 7.

[158] *Id.* at ¶ 19.

[159] *Id.* at ¶ 3 (Edmondson, J., dissenting).

[160] *Id.* at ¶ 6.

[161] Henry's Louisiana Grill v. Allied Ins. Co. of Am., 35 F.4th 1318, 1321 (11th Cir. 2022) (applying Georgia law); SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London, 32 F.4th 1347, 1358 (11th Cir. 2022) (applying Florida law).

outcome in *SA Palm Beach*, holding that Covid cannot cause physical loss or damage.[162] One case is still pending in that state's appeals courts.[163] The CCLT has not identified any decisions or ongoing cases in the state courts of Georgia or Alabama.

xi. Conclusions

In summary, the door remains open to policyholders in many state courts and some federal courts, depending on what state law is to be applied. The most notable examples of this are Louisiana, where *Cajun Conti* held that Covid can, and did, cause physical loss or damage, and Vermont under *Huntington Ingalls*. But the vast majority of state courts of last resort have not issued a ruling one way or the other, leaving the possibility open that even intermediate appellate decisions adverse to policyholders might be overturned on further appeal. In fact, it is easier to list the states where the court of last resort *has* issued a definitive answer: Massachusetts,[164] South Carolina,[165] Indiana,[166] and Wisconsin.[167] In Washington,[168] Iowa,[169] Oklahoma,[170] and North Carolina,[171] courts of last resort have suggested that Covid could, under different facts, cause physical loss or damage. In Louisiana,[172] a state intermediate appellate court has held that Covid can, and did, cause physical loss or damage, whereas intermediate appellate courts in other states have suggested it cannot cause physical loss or damage. Vermont's Supreme Court held that

[162] Commodore, Inc. v. Certain Underwriters at Lloyd's London, No. 3D21-0671, 2022 Fla. App. LEXIS 3262, at *17-18 (Fla. Dist. Ct. App. May 11, 2022).
[163] Sukkah Miami Beach Acquisitions, LLC v. Zurich Am. Ins. Co., No. 3D21-2443 (Fla. Ct. App. filed Dec. 22, 2021).
[164]Verveine Corp. v. Strathmore Ins. Co., 489 Mass. 534 (2022) (holding that Covid cannot cause physical loss or damage).
[165] Sullivan Mgmt., LLC v. Fireman's Fund Ins., No. 2021-001209, 2022 S.C. LEXIS 90 (August 10, 2022).
[166]Indiana Repertory Theatre v. Cincinnati Cas. Co., 180 N.E.3d 403 (Ind. Ct. App. 2022), transfer denied, 2022 Ind. LEXIS 426 (Ind. July 19, 2022) (holding that Covid cannot cause physical loss or damage)
[167] Colectivo Coffee Roasters, Inc. v. Soc'y Ins., 2022 WI 36.
[168] Hill & Stout, PLLC v. Mut. Of Enumclaw Ins. Co., No, 100211-4, at *14-15 (Wash. Aug. 25, 2022).
[169] Wakonda Club v. Selective Ins. of Am., 973 N.W.2d 545, 553 (Iowa 2022).
[170] Cherokee Nation v. Lexington Ins. Co., 2022 OK 71, ¶ 7.
[171] N. State Deli v. Cincinnati Ins. Co., 378 N.C. 367 (2022) (refusing the appeal).
[172] Cajun Conti L.L.C. v. Certain Underwriters at Lloyd's, 2021-0343, p. 14-15 (La. App. 4 Cir. 06/15/22).

Covid did, under certain facts, cause physical loss or damage.[173] Still other states have conflicting state intermediate appellate decisions, specifically California,[174] New Jersey,[175] and Michigan.[176] These, combined with numerous ongoing cases described above, demonstrate that the game is far from up in the state appellate courts.

The federal appeals courts are a different matter. Each circuit except the Third has issued a decision on whether Covid can cause physical loss or damage, and none of the decisions examined here have been favorable to policyholders. While it is the case that many federal appellate courts have not issued decisions applying the law from each of the states therein, the obvious trend is towards applying the same reasoning used in prior decisions to cases applying the insurance law of a previously unsettled state.[177] This, combined with the "rule of orderliness" in the Fifth Circuit, discussed above, and a reluctance among federal courts to employ the logic of state appellate courts bucking the trend[178] make it unlikely for the trends towards finding no coverage to reverse, absent a decision from a state court of last resort.

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[173] Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co., No. 2021-173, 2022 WL 4396475 (Vt. Sept. 23, 2022).
[174] *Compare* Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co., 81 Cal. App. 5th 96 (2022) (holding Covid can and did cause physical loss or damage), *with* Musso & Frank Grill Co., v. Mitsui Sumitomo Ins. USA Inc., 77 Cal. App. 5th 753, 759 (2022) ("[A] policy requiring physical loss or damage does not cover losses incurred by reason of the pandemic.").
[175] *Compare* AC Ocean Walk, LLC v. Am. Guar. & Liab. Co., No. A-1824-21, 2022 N.J. Super. Unpub. LEXIS 1119 (N.J. Super. Ct. App. Div. June 23, 2022), *with* MAC Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., 278 A.3d 272 (N.J. Super. Ct. App. Div. 2022).
[176] *Compare* Gavrilides Mgmt. Co. v. Mich. Ins. Co., No. 354418, 2022 Mich. App. LEXIS 632 (Feb. 1, 2022), *with* Gourmet Deli Ren Cen Inc. v. Farm Bureau Gen. Ins. Co. of Mich., No. 357386, 2022 Mich. App. LEXIS 1863 (Apr. 4, 2022).
[177] *See, e.g.,* Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co., 22 F.4th 450, 456-57 (5th Cir. 2022) (collecting cases).
[178] *See, e.g.*, Creative Artists Agency, LLC v. Affiliated FM Ins. Co., No. 2:21-CV-08314, 2022 U.S. Dist. LEXIS 142347 (C.D. Cal. July 27, 2022) ("The Court is aware of the recent decision by the Court of Appeal for the Second District of California, *Marina Pac. Hotel & Suites, LLC v. Fireman's Fund Ins.* . . . which reaches a conclusion that is 'at odds with almost all (but not all) decisions' considering these issues, including *Inns-by-the-Sea, United Talent Agency*, and *Musso* . . . . However, the Court finds the allegations raised in *Marina Pacific Hotel & Suites* are factually distinguishable from the allegations raised here, and is also at odds with the majority of decisions within this district."); *see also* Coleman E. Adler & Sons, LLC v. Axis Surplus Lines Insurance Co., 49 F.4th 894, 898 (5th Cir. 2022) ("No exception to the rule of orderliness applies here. Since *Q Clothier*, there has been 'neither a clearly

V. The Role of Pleading Standards in Explaining Differences Between State and Federal Appeals Courts Outcomes

i. Background

Because the ability of Covid to cause physical loss or damage was a novel question before state courts, those federal courts addressing the question in diversity cases made *Erie* guesses to resolve the question, predicting how the state court would rule given the precedent of that state and other persuasive authorities.[179] The purpose of *Erie* doctrine is to ensure "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."[180] However, the Covid litigation cases demonstrate that a significant factor in the outcome of the federal appellate cases is the pleading standards set out in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). This is because none of the federal cases identified by the CCLT involved trial verdicts – all involved motions to dismiss, motions for summary judgment, or motions for judgment on pleadings. This begs the question: to what extent did the federal pleading standards affect the outcome of Covid-related business insurance litigation viz-a-vis similar cases brought and decided in the state courts?

Where the outcomes in state and federal court are the same, it would seem that the pleading standards did not affect the outcome. For example, the First Circuit's application of *Verveine* left no room for the pleading standards to influence the outcome. Thus, the focus of this analysis is on states whose decisions depart from the federal courts applying that state's substantive law, such as Louisiana, whose *Cajun Conti* is at odds with *Q Clothier*.

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contrary subsequent holding of the highest court of [Louisiana] nor a subsequent statutory authority, squarely on point.'").

[179] *See, e.g.,* Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co., 22 F.4th 450, 454 (5th Cir. 2022).

[180] Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 109 (1945).

To answer this question, a distinction must be made between questions of fact and questions of law. The interpretation of an insurance policy, at least in so far as determining whether an insurance policy is ambiguous, is a question of law.[181] Because the interpretation of insurance policies is a question of law, in ruling on a motion to dismiss, judges need not accept either litigant's interpretation of their insurance policy – the meaning of policy language, unlike factual allegations, is not viewed in the light most favorable to nonmovants.

In the context of Covid-related insurance litigation, the central question, as the above analysis demonstrated, is often whether the loss alleged by the policyholder meets the threshold of physical loss or damage, an undefined term in many insurance policies. It is helpful to categorize the Covid cases into two broad categories: 1) cases where the policyholder has alleged "loss of use" as the basis of the claim, and 2) cases where the policyholder has alleged Covid on the premises as the basis of the claim. For the former kind, the question has been treated as a question purely of law by federal judges. The latter case type involves both questions of fact (e.g., whether or not there was Covid on the premises) and questions that are not clearly questions of law or questions of fact, specifically the application of historical facts, such as the presence of Covid on the premises and damage to the premises cause thereby, to a legal standard: is this physical loss or damage?

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[181] Green v. Merrill, 308 So. 2d 702, 705 (Ala. 1975); Dugan v. Atlanta Cas. Cos., 113 P.3d 652, 654 (Alaska 2005); Emps. Mut. Cas. Co. v. DGG & CAR, Inc., 183 P.3d 513, 515 (Ariz. 2008); Norris v. State Farm Fire & Cas. Co., 16 S.W.3d 242, 246 (Ark. 2000); Ameron Int'l Corp. v. Ins. Co. of State of Penn., 242 P.3d 1020, 1024 (Cal. 2010); Am. Fam. Mut. Ins. Co. v. Allen, 102 P.3d 333, 340 (Colo. 2004); Capstone Bldg. Corp. v. Am. Motorists Ins. Co., 67 A.3d 961, 974 (Conn. 2013); RSUI Indem. Co. v. Murdock, 248 A.3d 887, 905 (Del. 2021); United Servs. Life Ins. Co. v. Ringsdorf, 91 A.2d 717, 719 (D.C. 1952); Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co., 232 So. 3d 273, 276 (Fla. 2017); State Farm Mut. Auto. Ins. Co. v. Staton, 685 S.E.2d 263, 265 (Ga. 2009); Corban v. United Servs. Auto. Ass'n, 20 So. 3d 601, 609 (Miss. 2009); Colfax ex rel. Colfax v. Johnson, 11 P.3d 1171, 1174 (Kan. 2000); Blasing v. Zurich Am. Ins. Co., 2014 WI 73, ¶ 20, 356 Wis. 2d 63, 72, 850 N.W.2d 138, 143 (Wis. 2014); Foster v. Johnstone, 685 P.2d 802, 806 (Idaho 1984); Equinox on Battenkill Mgmt. Ass'n, Inc. v. Phila. Indem. Ins. Co., 2015 VT 98, ¶ 16, 200 Vt. 33, 37, 125 A.3d 893, 896 (2015); Henderson v. State Farm Fire & Cas. Co., 596 N.W.2d 190, 195 (Mich. 1999); King's Cove Marina, LLC v. Lambert Com. Constr. LLC, 958 N.W.2d 310, 316 (Minn. 2021).

ii. Case Study: The Second Circuit

Most second circuit cases applying New York law concern only loss of use.[182] A glaring exception to that is *Kim-Chee LLC v. Philadelphia Indemnity Insurance Co*,[183] in which the policyholder alleged that the virus was present at the insured property and that the virus caused "actual physical loss of or damage to" the property.[184] Nonetheless, the court held that the policyholder "offer[ed] only conclusory assertions in support of this contention,"[185] suggesting that the court found the policyholder's allegations were not substantiated enough "to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true."[186]

However, the court went on to assert a somewhat different argument, noting that "the complaint does not allege that any part of its building or anything within it was damaged,"[187] nor did the policyholder explain how the virus caused the insured property to be unable to serve "its intended function."[188] This line of argument suggests not that the court found the policyholder's allegations to be implausible but rather that, even assuming the truth of the allegations, that the policyholder missed the mark because the assumed-to-be-true allegations do meet the legal standard for the cause of action asserted. This is unlike *Twombly* and *Iqbal*, where the Supreme Court took issue with "threadbare recitals of the elements of a cause of action, supported by mere

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[182] *See* BR Restaurant Corp v. Nationwide Mut. Ins. Co., No. 21-2100-cv, 2022 WL 1052061 (2d Cir. Apr. 8, 2022); Deer Mountain Inn LLC v. Union Ins. Co., No. 21-1513, 2022 WL 598976 (2d Cir. Mar. 1, 2022); SA Hospitality Grp., LLC v. Hartford Fire Ins. Co., No. 21-1523, 2022 WL 815683 (2d Cir. Mar. 18, 2022); Rye Ridge Corp. v. Cincinnati Ins. Co., 21-1323-cv, 2022 WL 120782 (Jan. 13, 2022).
[183] Kim-Chee LLC v. Philadelphia Indemnity Insurance Co., No. 21-1082-cv, 2022 WL 258569, at *1-2 (2d Cir. Jan. 28, 2022) ("Kim-Chee's complaint must plausibly allege that the virus itself inflicted 'actual physical loss of or damage to' property . . . . [But it] offers only conclusory assertions in support of this contention.").
[184] *Id*. at 1.
[185] *Id.* at 2.
[186] *Id.* (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
[187] *Id.* In fact, the appellants' brief states very clearly that it is *not* alleging physical damage to the premises but rather "physical loss of" the insured property. Brief & Special Appendix for Plaintiffs-Appellants at 32, Kim-Chee LLC v. Philadelphia Indemnity Insurance Co., No. 21-1082-cv, 2022 WL 258569 (2d Cir. June 23, 2021).
[188] *Id.*

conclusory statements"[189] and complaints in which "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct."[190] To the contrary, the Second Circuit's focus in *Kim-Chee* on the plaintiffs' failure to allege that any part of its building or anything within it was damaged"[191] or how the virus caused the insured property to be unable to serve "its intended function"[192] suggests that the complaint did not even "recit[e] . . . the elements of a cause of action."[193] Thus, the court's focus on how the virus damaged the property or rendered it unusable makes the degree to which the pleading standard affected the outcome in *Kim-Chee* to be unclear.

iii. Case Study: Louisiana and The Fifth Circuit

The Fifth Circuit's discussion in *Terry Black's Barbecue* is elucidating. The court, in affirming the trial court's dismissal of the policyholder's complaint based on a "loss of use" theory, did not find that the allegations in the complaint were not "well-pleaded." Rather, the court concluded that "TBB has failed to allege any tangible alteration or deprivation of its property."[194] To paraphrase, the allegations in the complaint, assumed to be true, were insufficient to meet the legal standard for physical loss or damage. *Twombly* and *Iqbal* were not necessary for this part of the holding, as the court did not question the plausibility of the allegations, as in *Twombly* and *Iqbal*, but rather assumed the allegations to be true.

Later, in refusing the appellant's plea for leave to amend its complaint to allege the presence of Covid on the premises, the court employed a different argument. After noting that

[189] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).
[190] *Id.* at 679.
[191] Kim-Chee LLC v. Philadelphia Indemnity Insurance Co., No. 21-1082-cv, 2022 WL 258569, at 2 (2d Cir. Jan. 28, 2022).
[192] *Id.*
[193] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).
[194] Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co., 22 F.4th 450, 456 (5th Cir. 2022).

the pleading standard in Texas is different than the federal pleading standard,[195] the court nonetheless held that "TBB's restaurants have not been tangibly altered in any way such that it would be entitled to coverage under the policy."[196] This is perplexing. At first glance, it would seem that this contradicts the pleading standard: if the policyholder plausibly alleged "tangible alterations to property"[197] as required for coverage, one would expect that to be sufficient to survive a motion to dismiss. But the Fifth Circuit disagreed.[198] Even though the Fifth Circuit did not explicitly say this, dismissal here without leave to amend the complaint would only be consistent with the federal pleading standard if hypothetical allegations of "tangible alteration to property" under the circumstances were "mere conclusory statements,"[199] unsupported by the particular facts of the situation. For otherwise the complaint should have been sufficient to survive a motion for summary judgment or motion to dismiss.

Similarly, in *Q Clothier*, the court held that the policyholder failed to allege facts, even if true, sufficient to trigger coverage.[200] This is analogous to the first holding in *Terry Black's Barbecue*. The pleading standard was not relevant to this part of the holding because the court accepted the veracity of the allegations. It is difficult to directly analogize *Q Clothier* to *Cajun Conti* because *Q Clothier* did not involve allegations of Covid on the premises. But taking *Terry Black's Barbecue* as an indicator of how the Fifth Circuit might rule on similar allegations under Louisiana law, it would seem, upon this cursory review, that the different outcome in the federal courts than in Louisiana court can be explained by a difference in pleading standards.

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[195] *Id*. at 459.
[196] *Id*. at 460.
[197] *Id*. at 456.
[198] *Id*. at 460 ("We perceive no set of facts in which TBB states a covered claim for its losses due to the suspension of dine-in services during the pandemic.").
[199] Ashcroft v. Iqbal, 556 U.S. 662, 663, (2009).
[200] Q Clothier New Orleans, L.L.C. v. Twin City Fire Ins. Co., 29 F.4th 252, 258 (5th Cir. 2022).

But this is not the case. *Cajun Conti* was not a decision on a motion to dismiss or for summary judgment – it was a bench trial decision on the merits.[201] Thus, the Louisiana Court of Appeal held that Covid not only can but in fact *did cause physical loss or damage*, pleading standards aside. Because of this critical difference in procedure, the disparate outcomes in state versus federal court can only be explained by a difference in substantive interpretation of the law.

iv. Case Study: The Sixth Circuit

A Sixth Circuit case exemplifies the role of the federal pleading standards in the federal appeals courts. In *Santo's*, the Court noted, "One paragraph of the complaint, it is true, alleges that the orders closing the restaurant 'prohibit [Santo's Café] and the public from having access to' the building . . . . But the theory is implausible, as it is inconsistent with the remainder of the complaint and above all with the text of the shut-down order itself."[202] The Sixth Circuit's explicit citation to the *Twombly* pleading standard suggests that the pleading standard was a determining factor in the outcome of the case.

However, it seems to be the court's interpretation of substantive Ohio insurance law, not the implausibility of alleged facts, that hamstrung the policyholder. As the court noted, the plaintiff did not allege Covid on the premises.[203] Because the policyholder pled loss of use as the crux of its complaint[204] and the court held that Ohio law requires a demonstration of how the virus "physically altered" the insured property,[205] even taking the pleaded facts as true, the

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[201] Cajun Conti L.L.C. v. Certain Underwriters at Lloyd's, 2021-0343, p. 14-15 (La. App. 4 Cir. 06/15/22).
[202] Santo's Italian Cafe LLC v. Acuity Ins. Co., 15 F.4th 398, 405 (6th Cir. 2021) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).
[203] *Id*. at 403 ("[Plaintiff] has not alleged any problem with the building."). However, the court cast doubt on the merits of such an argument in dicta, noting that "coronavirus did not physically affect the property in the way, say, fire or water damage would. No one argues that the virus physically and directly altered the property. The restaurant indeed makes no such argument." *Id*. at 402.
[204] *Id*. at 404.
[205] *Id.* at 403.

plaintiff must fail *in the application* of those facts from the complaint, accepted as true, to the relevant legal standard. Even without *Twombly*, the outcome, it seems, would have been the same. Further analysis will be warranted when the Ohio Supreme Court issues its opinion in *Neuro-Communication Services, Inc. v. Cincinnati Insurance Co.*[206]

v. Case Study: California and the Ninth Circuit

The difference in outcomes in California state court as compared to the Ninth Circuit in cases applying California law seem also, at first glance, to be the product of a difference in pleading standards. A California appellate court held that Covid could, hypothetically, cause physical loss or damage.[207] The Ninth Circuit cases applying California law, however, have not had occasion to so hold. The majority of such cases involved allegations based on a "loss of use" theory that has been rejected by both the Ninth Circuit and California appellate courts.[208] The two Ninth Circuit cases identified by the CCLT involving allegations of Covid damaging the premises were resolved on the basis of policy exclusions.[209] Thus, even if the Ninth Circuit wanted to follow *Inns-by-the-Sea*, they have not seen a case where it would be appropriate to follow it. This difference in the characteristics of cases between the state and federal appeals courts, whether by chance or some other factor, explains at least some of the difference in outcomes in state versus federal court.

vi. Case Study: Massachusetts, New Hampshire, and the First Circuit

Verveine and *Legal Sea Food* present likely the simplest interplay between state and federal courts, given that the First Circuit Court of Appeals did not use *Erie* guesses in deciding

[206] No. 2021-0130 (Ohio filed June 14, 2021).
[207] Inns-by-the-Sea v. California Mutual Insurance Co., 71 Cal. App. 5th 688 (2021), *petition for review denied*, No. S272450, 2022 Cal. LEXIS 1412 (Cal. Mar. 9, 2022)
[208] *See supra* note 65.
[209] Palmdale Estates, Inc. v. Blackboard Insurance Company, 510 F. Supp. 3d 874 (9th Cir. 2021) (holding that, under California law, a virus exclusion precluded coverage and not discussing "physical loss or damage"); Palomar Health v. Am. Guar. & Liab. Ins. Co., No. 21-56073, 2022 U.S. App. LEXIS 20916, at *2 (9th Cir. July 28, 2022).

the cases identified by the CCLT. However, a comparison of *Verveine* and *Schleicher and Stebbins Hotels* suggests that the pleading standards did not drastically affect the outcome of the cases. The Massachusetts summary judgment pleading standard is the same as the federal standard,[210] as is New Hampshire's.[211] Nonetheless, Massachusetts held that, under similar facts to *Schleicher and Stebbins Hotels*, Covid cannot cause physical loss or damage, whereas the New Hampshire trial court held the opposite. This reflects not a difference in pleading standards, as they are functionally the same, but a difference in substantive law.

vii. Case Study: The Seventh Circuit

The Seventh Circuit held in *Sandy Point Dental, P.C. v. Cincinnati Insurance Co*. that under Illinois law, "direct physical loss" requires physical alteration to the property that Covid cannot cause.[212] In so holding, the court explicitly cited the "legal sufficiency standard of Rule 12(b)(6)" as it rejected Sandy Point's request to file an amended complaint alleging that "COVID-19 physically attaches itself to the physical premises, and thereby deprive[s] plaintiff of the use of said premises."[213] However, the court did not hold that this allegation is implausible. Rather, the court held that "[e]ven if the virus was present and physically attached itself to Sandy Point's premises, Sandy Point does not allege that the virus altered the physical structures to which it attached."[214] The Seventh Circuit, like the Sixth Circuit in *Santo's* (discussed above), held that the plaintiff's argument would fail because of the application of facts, even accepted as true, to the relevant legal standard. As with *Santo's*, it seems the plaintiff would have failed even without the hurdle of the pleading standards.

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[210] CIVIL PROCEDURE RULE 12: DEFENSES AND OBJECTIONS - WHEN AND HOW PRESENTED - BY PLEADING OR MOTION - MOTION FOR JUDGMENT ON PLEADINGS, MASS.GOV, https://www.mass.gov/rules-of-civil-procedure/civil-procedure-rule-12-defenses-and-objections-when-and-how-presented-by-pleading-or-motion-motion-for-judgment-on-pleadings.
[211] Waterfield v. Meredith Corp., 20 A.3d 865, 868 (N.H. 2011).
[212] Sandy Point Dental, P.C. v. Cincinnati Ins. Co., 20 F.4th 327, 335 (7th Cir. 2021).
[213] *Id.*
[214] *Id.*

But the Seventh Circuit took its argument a step further. The court continued, "*Sandy Point* does not allege that the virus altered the physical structures to which it attached, *and there is no reason to think that it could have done so.*"[215] This last clause only makes sense in the context of the *Twombly* and *Iqbal* pleading standards. To rephrase the court's argument, even if the plaintiff alleged that the virus altered the physical structures to which it attached, that allegation would be implausible – so implausible, in fact, that it would not survive a motion to dismiss, and for that reason, leave to file an amended complaint would be futile. In this way, the pleading standards explain a part, though not all, of the Seventh Circuit's holding here.

viii. Case Study: Vermont

The Vermont Supreme Court in *Huntington Ingalls* did emphasize the liberality of that state's pleading standards in reaching its pro-policyholder decision. Only after noting Vermont's "extremely liberal notice-pleading standards"[216] did the Court find that the allegations "adequately allege that the virus physically altered property in insured's shipyards when it adhered to surfaces"[217] and support finding that the policyholder "took steps beyond mere cleaning,"[218] thereby satisfying the "distinct, demonstrable physical alteration"[219] requirement. The cases cited by the court in support of its "extremely liberal" proposition indicate that Vermont's standards are substantively different than the federal standards. There is no mention of "plausibility." The line of cases suggests that a complaint need only be "'a bare bones statement that merely provides the defendant with notice of the claims against it,' for its 'purpose is to initiate the cause of action, not prove the merits of the plaintiff's case.'"[220]

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[215] *Id.* (emphasis added).
[216] Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co., No. 2021-173, 2022 WL 4396475, ¶ 40 (Vt. Sept. 23, 2022).
[217] *Id.* at ¶ 42.
[218] *Id.* at ¶ 43.
[219] *Id.*
[220] *Id.* at ¶ 40 (citing Colby v. Umbrella, Inc., 2008 VT 20, ¶ 13, 184 Vt. 1, 955 A.2d 1082 (2008)).

Any comparison with the federal courts is impossible here because the Second Circuit has not encountered any cases applying Vermont law, and it is impossible to say how a hypothetical Vermont-law diversity case would have been resolved by the federal courts. Nonetheless, the application and explanation of the pleading standards here make a compelling case that there are substantive differences between Vermont and federal pleading standards and that these differences may well have been determinative in this case.

VI. Conclusion

The game is not up. While numerous state and federal courts have decided whether or not Covid can cause physical loss or damage, many have not. In the federal appeals courts, the door is still open to policyholders whose cases arise under the laws of certain states. Similarly, because of conflicting appellate decisions within states, ongoing appeals, and the thirty-two states that have yet to decide this important issue, it is certain that more developments are around the corner in the state appellate court systems.

Table 9. Synopsis of Federal Decisions.

Circuit	Loss of Use Is Not Physical Loss or Damage	Covid Cannot Cause Physical Loss or Damage	Covid Can Cause Physical Loss or Damage	No Decision on Whether Covid Can Cause Physical Loss or Damage
First Circuit	Massachusetts	Massachusetts	None	New Hampshire, Maine, Rhode Island
Second Circuit	New York, Connecticut	New York, Connecticut	None	Vermont
Third Circuit[221]	N/A	N/A	N/A	N/A
Fourth Circuit	West Virginia, North Carolina	West Virginia, North Carolina	None	Virginia, South Carolina
Fifth Circuit	Texas,	Texas, Louisiana	None	Mississippi

[221] The Third Circuit has not decided its consolidated action.

	Louisiana			
Sixth Circuit	Ohio, Kentucky, Michigan	Ohio, Kentucky	None	Tennessee
Seventh Circuit	Illinois, Indiana	Illinois, Indiana	None	Wisconsin
Eighth Circuit	Iowa, Missouri, Arkansas	Arkansas	None	Minnesota, Nebraska, North Dakota, South Dakota
Ninth Circuit	Washington, Nevada, California	Nevada	None	Oregon, Montana, Idaho, Arizona, Alaska, Hawaii
Tenth Circuit	Oklahoma	None	None	New Mexico, Colorado, Utah, Kansas
Eleventh Circuit	Georgia, Florida	Georgia, Florida	None	Alabama

Table 9. Synopsis of State Decisions.

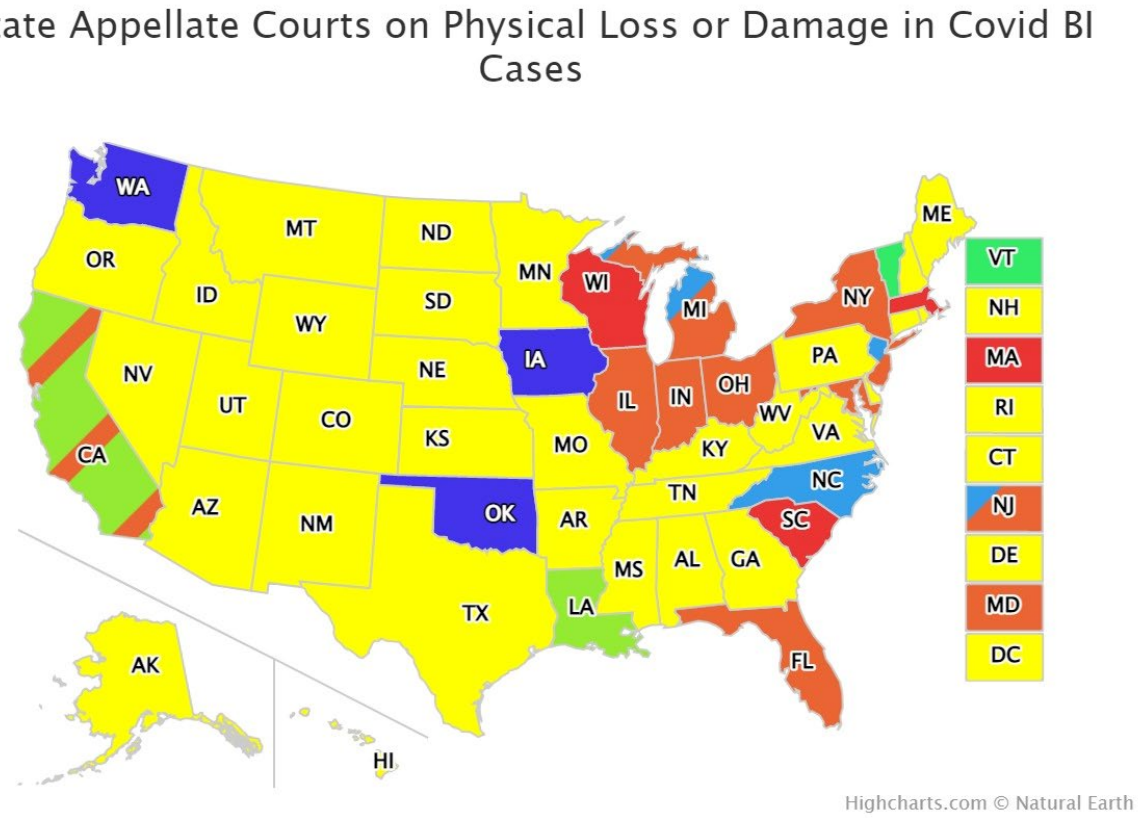
State	Loss of Use Is Not Physical Loss or Damage	Covid Cannot Cause Physical Loss or Damage	Covid Can Cause Physical Loss or Damage	No Decision on Whether Covid Can Cause Physical Loss or Damage[222]
Alabama				No Decision
Alaska				No Decision
Arizona				No Decision
Arkansas				No Decision
California	Yes	Yes	Yes	
Colorado				No Decision
Connecticut				No Decision
Delaware				No Decision
Florida	Yes	Yes	No	
Georgia				No Decision
Hawaii				No Decision
Idaho				No Decision
Illinois	Yes	Yes	No	
Indiana	Yes	Yes	No	
Iowa	Yes	No	Yes	
Kanas				No Decision

[222] "No Decision" means that the CCLT has failed to identify a decision issued from that state's appellate court system on the question of whether Covid can cause physical loss or damage.

Kentucky				No Decision
Louisiana	No	No	Yes	
Maine				No Decision
Maryland	Yes	Yes	No	
Massachusetts	Yes	Yes	No	
Michigan	Yes	No	Yes	
Minnesota				No Decision
Mississippi				No Decision
Missouri				No Decision
Montana				No Decision
Nebraska				No Decision
Nevada				No Decision
New Hampshire				No Decision
New Jersey	Yes	Yes	Yes	
New Mexico				No Decision
New York	Yes	Yes	No	
North Carolina	Yes	Yes	No	
North Dakota				No Decision
Ohio	Yes	Yes	No	
Oklahoma	Yes	No	No	
Oregon				No Decision
Pennsylvania				No Decision
Rhode Island				No Decision
South Carolina	Yes	Yes	No	
Tennessee				No Decision
Texas				No Decision
Utah				No Decision
Vermont	No	No	Yes	
Virginia	Yes	Yes	No	
Washington	Yes	No	Yes	
West Virginia				No Decision
Wisconsin	Yes	Yes	No	
Wyoming				No Decision

Figure 1. State Appellate Courts on Physical Loss or Damage in Covid BI Cases.[223]

[223] COVID COVERAGE LITIGATION TRACKER, PENN LAW, https://cclt.law.upenn.edu/ (last visited Oct. 23, 2022).



This memorandum's analysis of the effect of the pleading standards on litigation outcomes on this question in the state and federal appeals courts suggests that, while there seem to be discrepancies in the interpretation of substantive law between state and federal court, the pleading standards did play some role in the decisions of the federal courts and the difference between their decisions and those of the state appellate courts. This suggests that litigants in state courts might, ceteris paribus, fare better than their federal analogues, assuming their state's pleading standards are less stringent than the federal standards. Nonetheless, a more comprehensive study of the effect of the pleading standards would provide further insight into the magnitude of the pleading standards' effect on outcomes. A quantitative analysis of the federal appellate decisions, with a specific eye towards citations to *Twombly*, *Iqbal*, and related precedent, as well as to language suggesting the employment of those standards even in the

absence of any citation to those cases, would help to quantify and contextualize the findings from the case studies here.