



**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

SULLIVAN MANAGEMENT, LLC,	§	
Plaintiff,	§	
	§	
vs.	§	Civil Action No. 3:20-cv-2275-MGL
	§	
FIREMAN’S FUND INSURANCE COMPANY	§	
and ALLIANZ GLOBAL RISKS US	§	
INSURANCE COMPANY,	§	
Defendants.	§	

ORDER CERTIFYING QUESTIONS TO THE SUPREME COURT

I. INTRODUCTION

This is an insurance coverage case. Plaintiff Sullivan Management, LLC (Sullivan) seeks coverage under a commercial property insurance policy (the Policy) issued by Defendant Fireman’s Fund Insurance Company (Fireman’s Fund) for what Sullivan claims are losses related to the SARS-CoV-19 pandemic. This includes all variants and evolved lineage mutations of SARS-CoV-19.

A judicial interpretation of the Policy under South Carolina law is necessary to decide this issue. The Policy requires that Sullivan has suffered “direct physical loss or damage to property” as a prerequisite to coverage.

II. LEGAL STANDARD

Rule 244(a) of the South Carolina Appellate Court Rules states:

[t]he [South Carolina] Supreme Court in its discretion may answer questions of law certified to it by any federal court of the United States or the highest appellate court or an intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

S.C. App. Ct. R. 244(a). The certification order must set forth: (1) “a statement showing fully the nature of the controversy in which the questions arose,” (2) “all findings of fact relevant to the questions certified,” and (3) “the questions of law to be answered[.]” S.C. App. Ct. R. 244(b).

III. NATURE OF THE CONTROVERSY

Sullivan filed a Complaint against Fireman’s Fund and Allianz Global Risks US Insurance Company (AGR US) in the South Carolina Court of Common Pleas, Richland County, as the first-named insured on the Policy. AGR US denies that it issued an insurance Policy to Sullivan. This dispute is irrelevant to the Certified Questions.

Sullivan seeks to recover business interruption benefits under the Policy, including under the Policy’s Business Income and Extra Expense Coverage part. Fireman’s Fund and AGR US (collectively, Defendants) removed the lawsuit to this Court in accordance with 28 U.S.C. §§ 1332 and 1441.

Defendants moved to dismiss Sullivan’s Complaint per Federal Rule 12(b)(6). Defendants argued, *inter alia*, that Sullivan failed to state a claim on which relief could be granted because, among other things, SARS-CoV-19 does not cause “direct physical loss or damage to property.” Sullivan

opposed the motion, arguing, among other things, that “direct physical loss” does not require structural damage or alteration to property, and dangerous particles can cause “physical loss.”

The Court issued an Order on June 16, 2021 (the “Order”) dismissing without prejudice Defendants’ Motion to Dismiss. The Court indicated in the Order it would certify questions to the South Carolina Supreme Court concerning interpretation of the Policy language.

IV. RELEVANT ALLEGATIONS AND POLICY PROVISIONS

The question presented to this Court is whether, assuming Sullivan’s allegations to be true, there is coverage for Sullivan’s claims under the subject Policy. Defendants, however, retain and do not waive their ability to challenge whether Sullivan’s allegations are “well-pleaded” and “non-conclusory.” Therefore, the Complaint and Policy are being transmitted herewith; and the allegations of the Complaint are accepted as true for purposes of this inquiry. Nonetheless, some of the allegations of the Complaint and some of the terms of the Policy, in addition to other undisputed facts, are called out or summarized below to provide better context for the Certified Questions.

1. Sullivan was insured by the Policy at the time it suffered damage from the SARS-CoV-19 pandemic.
2. Sullivan filed a claim under the Policy.
3. Fireman’s Fund denied Sullivan’s claim.
4. Sullivan’s Complaint alleges the following:
 - a. Sullivan owns, manages, and oversees the operation of nine (9) Carolina Ale House restaurant-bars where patrons gather to eat, drink, and view live-streamed sporting events.
 - b. Sullivan entered into a contract of insurance with the Defendants, which the Policy covered Sullivan’s entities, properties, and scheduled locations. The Policy has been continuously in full-force and effect since inception, providing first-party business income, extra expense, and additional coverages.
 - c. The spread of a severe acute respiratory syndrome of an unknown origin, SARS-CoV-19, sparked a series of international, national, state-wide, and local government orders in the January-March 2020 timeframe.

- d. SARS-CoV-19 is a highly transmissible, tangible particle. Following its arrival, the novel SARS-CoV-19 was identified, within the scientific community and by government agencies and authorities, as both a virus-containing airborne vapor and surface-adhering particle.
- e. On March 17, 2020, the Governor of the state of South Carolina issued Executive Order No. 2020-10, barring on-premises or dine-in consumption services at South Carolina restaurants. Local municipalities, like Charleston, Columbia, Greenville, etc., issued similar orders.
- f. Similarly, on March 21, 2020, the Mayor of Augusta, Georgia, prohibited gatherings of more than ten (10) people and ordered restaurants and business with on-premises consumption of alcoholic beverages to close their on-premises operations.
- g. Executive orders at all levels of government continued and are more thoroughly detailed in Sullivan's Complaint.
- h. SARS-CoV-19 allegedly contaminated the areas and property within and immediately surrounding Sullivan's properties, including the re-circulated air in the properties and surfaces, rendering them unsafe and unfit for their principal purpose.
- i. Sullivan and all named insureds listed within the Policy claim damages related to the arrival and contamination of SARS-CoV-19 and closure orders; specifically: business interruption, extra expense, employee training losses, goodwill losses, consumables and inventory damage and loss, costs for chemical cleanings, increased cleaning and sanitation costs, event cancellation costs, and other damages.
- j. Sullivan's insured restaurant locations were subject to government orders. The orders prohibited on-premises dining, gathering, and patronage at Sullivan's restaurants. It permitted Sullivan's kitchen areas to remain open only for take-out orders.

Sullivan has suffered damages including, but not limited to, business interruption, extra expense, employee training loss, goodwill losses from inability to operate its restaurants, consumables and inventory damage and loss, costs for cleanings of production lines and equipment to remove contaminants, increased cleaning and sanitation costs, and event cancellation costs including marketing and planning losses.

- 5. The Policy's Property Coverage part provides coverage for "direct physical loss or damage to property" caused by, or resulting from, a "**covered cause of loss.**" The Policy defines a "[c]**covered cause of loss**" as "risks of direct physical loss or damage not excluded or limited in this Coverage Form."
 - a. The Policy does not define "direct physical loss or damage."

6. The Business Income and Extra Expense Coverage part of the Policy states:

we will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension** of your **operations** during the **period of restoration** arising from direct physical loss or damage to property at a location, or within 1,000 feet of such location, caused by or resulting from a **covered cause of loss**.

a. The Policy defines **suspension** as “the slowdown or cessation of your operations, or that a part or all of the described premises is rendered untenable.”

(1) The Policy does not define “untenable.”

b. The Policy defines “**operations**” as “the usual and customary business activities in the conduct of your business occurring at the **location**, including the tenability of the **premises**.”

c. The Policy defines “**period of restoration**” as:

the period of time that begins immediately after the time of direct physical loss or damage caused by or resulting from a **covered cause of loss** to property at the **location** and ends on the earlier of:

(1) The date when such property at the **location** should be repaired, rebuilt, or replaced with reasonable speed and like kind and quality; or

(2) The date when the business is resumed at a new permanent **location**.

d. The Policy defines “**extra expense**” as:

the necessary expenses you incur during the **period of restoration**, over and above the expenses you would have normally incurred had there been no covered loss, in order to:

a. Avoid or minimize the **suspension** of business and to continue **operations** at the location or at replacement or temporary locations, including relocation expenses and costs to equip and operate such replacement or temporary locations;

b. Minimize the **suspension** of business if you cannot continue operations; or

c. Repair or replace covered property, but only to the extent it reduces the amount of loss that otherwise would have been payable under Business Income and Extra Expense Coverage.

7. The Policy and Coverage Form contain extensions of coverage including, *inter alia*:
- a. Loss Avoidance or Mitigation expenses for “the necessary expense that you incur to protect, avoid, or significantly mitigate potential covered loss or damage that is actually and imminently threatening **Property Insured**”;
 - b. Business Access Coverage:
 - a. We will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension** of **operations** at a **location** if access to such **location** is impaired or obstructed. Such impairment or obstruction must:
 - (1) Arise from direct physical loss or damage to property other than at such **location**; and
 - (2) Be caused by or result from a **covered cause of loss**; and
 - (3) Occur within the number of miles stated in the Declarations from such **location**.
 - b. We will not pay under Business Access Coverage for **business income** loss or **extra expense** incurred caused by or resulting from action of civil authority or military authority.
 - c. [Limits of Coverage]
 - c. Civil Authority Coverage:
 - a. We will pay for the actual loss of **business** income and necessary **extra expense** you sustain due to the necessary **suspension** of your **operations** caused by action of civil authority that prohibits access to a **location**. Such prohibition of access to such **location** by a civil authority must:
 - (1) Arise from direct physical loss or damage to property other than at such **location**; and
 - (2) Be caused by or result from a **covered cause of loss**; and
 - (3) Occur within the number of miles stated in the Declarations from such **location**.
 - b. [Limits of Coverage]
 - c. Actions of civil authority do not include actions of military authority; and

- (1) “Access” is not a defined term in the Policy.
 - d. Other coverage extensions, such as Communicable Disease Coverage, Dependent Property Coverage, and Ordinance or Law Coverage.
8. The Policy’s Communicable Disease Coverage extension provides a non-exhaustive list of damage resulting from a **Communicable Disease Event** for which the extension would provide coverage:
- 1. Communicable Disease Coverage:
 - a. (1) We will pay for direct physical loss or damage to **Property Insured** caused by or resulting from a covered **communicable disease event** at a location including the following necessary costs incurred to:
 - (a) Tear out and replace any part of **Property Insured** in order to gain access to the **communicable disease**;
 - (b) Repair or rebuild **Property Insured** which has been damaged or destroyed by the **communicable disease**; and
 - (c) Mitigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor, and assess the effects the **communicable disease**.

The Policy defines **communicable disease** as “any disease, bacteria, or virus that may be transferred directly or indirectly from human or animal to a human.”

Communicable disease event means an event in which a **public health** authority has ordered that a location be evacuated, decontaminated, or disinfected due to the outbreak of a **communicable disease** at such location.

Public health authority means the governmental authority having jurisdiction over your **operations** relative to health and hygiene standards necessary for the protection of the public.

9. The Policy contains an Exclusion titled “Mortality and Disease” that excludes from all coverages “direct physical loss, damage, or expense caused by or resulting from . . . Mortality, death by natural causes, disease, sickness, any condition of health, bacteria, or virus.”
10. The Policy is subject to a Business Income (and Extra Expense) limit of \$12,715,000.
11. Defendants assert that neither SARS CoV-19 nor government orders cause physical loss or damage to property and that, even if there were coverage, the Policy’s virus exclusion bars any recovery.

V. CERTIFIED QUESTIONS OF LAW

This Court has concluded that neither this Court nor the Parties have found any controlling precedent in the decisions of the South Carolina Supreme Court on the proper legal definition of certain terms in the subject Policy and the questions presented by this case.

Accordingly, the Court respectfully requests the South Carolina Supreme Court address the following Certified Questions:

1. Does the presence of COVID-19 in or near Sullivan’s properties, and/or related governmental orders, which allegedly hinder or destroy the fitness, habitability, or functionality of property, constitute “direct physical loss or damage” or does “direct physical loss or damage” require some permanent dispossession of the property or physical alteration to the property?
 - a. Do other policy terms, *e.g.*, those in the Communicable Disease Coverage Extension, evidence that COVID-19 can constitute “direct physical loss or damage”?
 - b. Is the phrase “direct physical loss or damage to property” ambiguous?
2. Do the Policy’s Business Access and/or Civil Authority coverage require a complete prohibition of all access to Sullivan’s properties?
3. Has there been a “communicable disease event” as that term is used in the Communicable Disease Coverage Extension?
4. Does Sullivan’s alleged expenditures to mitigate COVID-19 qualify for Loss Avoidance or Mitigation Coverage?
5. Does the Mortality and Disease Exclusion bar all coverage or is it ambiguous and/or is it in conflict with the Communicable Disease Coverage Extension?

VI. CONCLUSION

In light of the lack of controlling precedent concerning the proper interpretation of the phrase “direct physical loss or damage to property” and other policy terms and coverage under South Carolina law in the context presented here, the Court **CERTIFIES** the questions above to the South Carolina Supreme Court.

The Clerk shall forward a copy of this order to the South Carolina Supreme Court under this Court’s official seal, together with the Complaint, the Policy, and copies of any portions of the record requested by the South Carolina Supreme Court.

IT IS SO ORDERED.

Signed this 19th day of October, 2021 in Columbia, South Carolina.

s/ Mary Geiger Lewis
MARY GEIGER LEWIS
UNITED STATES DISTRICT JUDGE