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COURT OF APPEALS
STATE OF NEW YORK

CONSOLIDATED RESTAURANT OPS,

Appellant,

-against-

WESTPORT INSURANCE,

Respondent.

NO. 7

20 Eagle Street
Albany, New York
January 10, 2024

Before:

ACTING CHIEF JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN
PRESIDING JUSTICE FRANCESCA CONNOLLY

Appearances:

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Official Court Transcriber

1 ACTING CHIEF ACTING CHIEF JUDGE RIVERA: Good
2 afternoon. We are now on the last case on the calendar,
3 Consolidated Restaurant Operations v. West Port Insurance
4 Corporation.

5 Counsel?

6 And we want to welcome, of course, our colleague,
7 Judge Connolly. Thank you so much - - -

8 JUDGE CONNOLLY: Thank you.

9 ACTING CHIEF JUDGE RIVERA: - - - for joining us
10 today.

11 And Judge Halligan, as you see, is on the screen.
12 We will try to be cautious to be able to hear when she has
13 questions and - - - and give her an opportunity to ask
14 whatever she needs to ask.

15 Go ahead, counsel.

16 MS. COHEN: Thank you, Your Honor.

17 ACTING CHIEF JUDGE RIVERA: Thank you.

18 MS. COHEN: Good afternoon. Robin Cohen on
19 behalf of Consolidated Re - - - Restaurants Operations
20 Inc., better known as CRO. We would like three minutes for
21 rebuttal.

22 ACTING CHIEF JUDGE RIVERA: You have it.

23 MS. COHEN: Okay. This appeal poses two issues.
24 One is, did the first department err when it rewrote the
25 policy, finding that the words direct physical loss or

1 damage can only mean tangible, demonstrable, damage to its
2 property?

3 Second, even if that were the appropriate
4 standard, did the first department err when it violated New
5 York's Liberal pleading standards by rejecting CRO's
6 allegations that COVID-19 physically and tangibly altered
7 its property without any evidentiary record?

8 JUDGE HALLIGAN: Counsel, can I ask, are you - -
9 - over here. Thank you. Are you arguing that loss of use
10 from some completely exogenous external event constitutes
11 direct physical loss? Or is your position that as long as
12 there's some physical substance on the property that
13 renders it uninhabitable, that that's what constitutes
14 direct physical loss or damage?

15 MS. COHEN: We are arguing both, Your Honor. We
16 are arguing that if you have a physical substance like
17 COVID and it goes onto your property and it physically
18 causes your property to be unsafe so that you physically
19 cannot use that property in whole or part, that - - -

20 JUDGE CONNOLLY: But counsel, how does that
21 constitute physical damage or physical loss?

22 MS. COHEN: So physical loss is different than
23 physical damage. Physical damage is physical harm. What
24 we say physical loss is, is deprivation of property as a
25 result of a physical event.

1 JUDGE CANNATARO: So is this loss or - - -

2 JUDGE TROUTMAN: And how does the government - -

3 -

4 JUDGE CANNATARO: - - - loss or damage? What are
5 we talking about here?

6 MS. COHEN: Well, that is physical loss, Your
7 Honor. So if you have deprivation of your property in part
8 or in full as a result of a physical - - -

9 JUDGE TROUTMAN: What about the government's
10 orders with respect to the property, how does that impact
11 your definition?

12 MS. COHEN: If we only had government orders,
13 that would be a pure loss case and we would not be able to
14 get part - - -

15 ACTING CHIEF JUDGE RIVERA: Wel, it might - - -
16 it might be loss of profits. How is it physical loss?

17 MS. COHEN: Okay. So - - - so that - - - it's a
18 - - - it's - - - so loss, without the physical to modify
19 it, would be economic loss or reputational loss. So for
20 example, if the restaurant got a bad review - - -

21 ACTING CHIEF JUDGE RIVERA: Uh-huh.

22 MS. COHEN: - - - and we suffered economic loss
23 because of that, that's not covered.

24 ACTING CHIEF JUDGE RIVERA: Uh-huh.

25 MS. COHEN: If a competitor comes into the



1 neighborhood and we, CRO, suffer loss - - - economic loss
2 because of that competitor, that is not recoverable.
3 However - - -

4 JUDGE HALLIGAN: But that - - - that's - - -
5 that's Roundabout, isn't it? I mean, that's a completely
6 external event. So - - - so I thought I heard you say that
7 you were taking the position that a completely external
8 event was also covered.

9 MS. COHEN: Your Honor, Roundabout dealt with a
10 pure loss of use case. It did not - - -

11 JUDGE HALLIGAN: But due to some external event
12 that - - - that caused that loss of use, right?

13 MS. COHEN: It doesn't matter if the physical
14 event is outside the property or on the property, but once
15 you have a physical substance that causes some physical
16 event on the property, that constitutes physical loss. So
17 it has to - - -

18 JUDGE HALLIGAN: Okay. So you agree then - - - I
19 just want to make sure I'm clear - - - that something has
20 to basically break the plane. In other words, it - - - it
21 has to come on to your property in order to constitute - -
22 - in order to constitute physical loss and something that
23 is - - - so for example, if you had not alleged that there
24 was COVID-19 present on your property, that would not be an
25 allegation sufficient to be physical loss; is that right?

1 MS. COHEN: That is exactly right.

2 JUDGE HALLIGAN: Okay. Thank you.

3 MS. COHEN: And that is why we are not Roundabout
4 because Roundabout was a situation where there was an
5 accident outside of the covered property and the street
6 closed and as a result the theaters closed. There was no
7 physical event on the property. We agree - - -

8 ACTING CHIEF JUDGE RIVERA: But let's get back to
9 this. It says physical loss.

10 MS. COHEN: Yes.

11 ACTING CHIEF JUDGE RIVERA: Explain that to me.

12 MS. COHEN: Sure.

13 ACTING CHIEF JUDGE RIVERA: If you've already
14 said what it's - - - or partially said what it's not, let's
15 get to what it is.

16 MS. COHEN: So it's not economic or reputational
17 loss.

18 ACTING CHIEF JUDGE RIVERA: Okay. Uh-huh.

19 MS. COHEN: But it is if there's a physical event
20 - - -

21 ACTING CHIEF JUDGE RIVERA: Yes.

22 MS. COHEN: - - - on your property - - -

23 ACTING CHIEF JUDGE RIVERA: Yeah.

24 MS. COHEN: - - - that causes the air or the
25 surfaces to physically make it unsafe on your property,

1 that means - - - and you lose money, or you are
2 dispossessed from your property - - - that constitutes
3 physical loss.

4 JUDGE CANNATARO: So you - - -

5 ACTING CHIEF JUDGE RIVERA: And how - - - excuse
6 me for one second.

7 JUDGE CANNATARO: Go ahead.

8 ACTING CHIEF JUDGE RIVERA: And is there some
9 temporal aspect to this?

10 MS. COHEN: Well, for - - -

11 ACTING CHIEF JUDGE RIVERA: Right. Because part
12 of the argument is you clean off everything and you can use
13 it again.

14 MS. COHEN: Right. So first you have to
15 establish that you have physical loss or physical damage.

16 ACTING CHIEF JUDGE RIVERA: Uh-huh.

17 MS. COHEN: Once you do that, then the - - - then
18 the question is, what's the measure of damages? Then you
19 go to the temporal limitation. They want to put the period
20 of liability into the insuring agreement and really use it
21 as an exclusion or a limitation on physical loss or
22 physical damage. That is not how the policies work.

23 If you go to the first page of the policy, that's
24 record cite 84, it expressly says - - - this is an all-risk
25 policy. It's in bold letters. And it says it's triggered

1 either by physical loss or physical damage.

2 JUDGE TROUTMAN: So how does the period of
3 liability then come into play here?

4 MS. COHEN: So - - - so let's assume for the sake
5 of argument that we agree that there's physical loss or
6 physical damage on our property. Then the question
7 becomes, how much are you entitled to? And then the
8 temporal limitation comes in. You're entitled to economic
9 damages from the physical loss or physical damage up until
10 the point, if you could - - - and the word could is in the
11 policy language - - - you could repair or replace the
12 property.

13 JUDGE SINGAS: What - - - what factual - - -
14 specific factual allegations did you make concerning the
15 virus on your property?

16 MS. COHEN: So paragraphs 12 through 22 in our
17 original complaint expressly discuss in detail what the
18 process was. at that point, we filed pretty early, we were
19 focused on the surfaces of the restaurants. And what we
20 said is there were fomites that would come as a result of
21 the spread of the virus. Those fomites would change the
22 physical integrity of the surfaces. As a result, they
23 would change, and we were entitled to damages as a result
24 of that. Now - - -

25 JUDGE SINGAS: And did science contradict that at

1 all?

2 MS. COHEN: In fact, Your Honor, just the
3 reverse. We attached son - - - we put footnotes of
4 scientific studies that supported our view, and then we
5 amended the complaint - - - because this is a science
6 that's growing - - - we amended the complaint and
7 paragraphs 12 all the way to paragraphs 38, talking in
8 excruciating detail what the physical process is, both the
9 change in the air, how the air alters and causes physical
10 loss or physical damage. We also talked more about how
11 those fomites get absorbed into the surface where it's very
12 difficult to clean - - -

13 ACTING CHIEF JUDGE RIVERA: So are you saying
14 it's physical loss or damage to the air?

15 MS. COHEN: Well, the - - - it's the - - - the -
16 - - there's a physical alteration to the air - - -

17 ACTING CHIEF JUDGE RIVERA: Okay.

18 MS. COHEN: - - - that causes CRO to be
19 dispossessed from his property. So because the air makes
20 the place unsafe, we had a business interruption claim
21 because no one was coming to the restaurant - - -

22 ACTING CHIEF JUDGE RIVERA: That again sounds
23 like economic loss. I can't run my business - - -

24 MS. COHEN: It's not - - -

25 ACTING CHIEF JUDGE RIVERA: - - - because of the



1 quality - - - the air quality.

2 MS. COHEN: It's not just the air quality, Your
3 Honor. It is that the air - - -

4 ACTING CHIEF JUDGE RIVERA: Uh-huh.

5 MS. COHEN: - - - microscopically - - -

6 ACTING CHIEF JUDGE RIVERA: Yes.

7 MS. COHEN: - - - has changed to make the - - -
8 the property from being safe - - -

9 ACTING CHIEF JUDGE RIVERA: Yes. Uh-huh.

10 MS. COHEN: - - - to unsafe.

11 ACTING CHIEF JUDGE RIVERA: Uh-huh.

12 MS. COHEN: And the surface is the same thing.
13 The fomite process is being absorbed into the surfaces to
14 make the - - -

15 ACTING CHIEF JUDGE RIVERA: So let - - - let me -
16 - - let me take this example. Let's forget COVID for one
17 moment. Whatever it was, a couple of months ago when we
18 had - - - or actually, I guess, during the summer - - -
19 when we had all that smoke because of the fires in Canada
20 come in. Couldn't even see the front of your hand.

21 MS. COHEN: Yeah.

22 ACTING CHIEF JUDGE RIVERA: I assume there were
23 businesses that had to close. People - - - or people
24 wouldn't go in, or coughing was affecting their eyes, their
25 lungs, and so forth. But once the smoke lifts, nothing

1 inside is damaged. Every - - - every piece of furniture
2 still is available. Is that physical loss or damage?

3 MS. COHEN: For sixty years - - -

4 ACTING CHIEF JUDGE RIVERA: Yeah.

5 MS. COHEN: - - - the courts throughout the
6 country have used that example - - -

7 ACTING CHIEF JUDGE RIVERA: Yes.

8 MS. COHEN: - - - specifically as causing
9 physical loss or physical damage. It - - -

10 ACTING CHIEF JUDGE RIVERA: Because of the
11 environmental impact?

12 MS. COHEN: Yeah, because, it - - -

13 JUDGE HALLIGAN: Are there - - -

14 MS. COHEN: - - - just - - - oh, I'm sorry.

15 ACTING CHIEF JUDGE RIVERA: Judge Halligan.

16 JUDGE HALLIGAN: Sorry. I was just going to say,
17 are there New York cases you can point us to that that hold
18 that?

19 MS. COHEN: So there's not a New York case on
20 point. But what I can point you to is the PepsiCo case,
21 because that case - - -

22 JUDGE HALLIGAN: But there, the product itself
23 was altered, right? But the - - - the soda, I thought
24 there became at least unmerchantable. It - - - it sounded
25 like it was pretty bad whatever happened to it. And so I

1 think that's the - - - the property - - - the physical
2 property itself could not be - - - could not be used ever.
3 That was a permanent, I thought, effective destruction.

4 MS. COHEN: You are absolutely right, Your Honor.
5 But under the first department's decision, that would not
6 constitute physical damage. The first and fore - - -

7 JUDGE CONNOLLY: But the counsel in that - - -
8 I'm sorry - - - in that case, they had to actually destroy
9 - - - they actually did destroy the Pepsi product.

10 MS. COHEN: Absolutely. But that did not come
11 into play in analyzing the case. Meaning the second
12 department looked at the case and they said because the
13 function and value of that product was severely impaired,
14 not because it was destroyed - - -

15 JUDGE CONNOLLY: But there was a diminution in
16 value, which is a loss. It was a diminution in the value
17 of the product - - -

18 MS. COHEN: Well - - -

19 JUDGE CONNOLLY: - - - as a result of this
20 substance that was - - -

21 MS. COHEN: Well, the court specifically said
22 that in order to prove property damage, you don't need - -
23 - and I'm quoting - - - a distinct demonstrable alteration
24 of the physical structure. And the court went on to say in
25 that decision that if you lose - - - if there's a physical

1 event and you lose the function and value of your product,
2 that constitutes physical damage.

3 JUDGE CANNATARO: Is that - - - why is that not a
4 loss? That sounds to me like a loss. The chemistry - - -
5 the recipe for the Coke - - - Pepsi - - - excuse me - - -
6 rendered - - - got messed up and it rendered the product
7 unusable as a - - - or at least unsaleable.

8 MS. COHEN: Yeah.

9 JUDGE CANNATARO: That to me reads total loss.
10 So what am I misunderstanding due to my total lack of
11 sophistication about the distinction between damage and
12 loss in this type of situation?

13 MS. COHEN: Because what happened in that case -
14 - - and I agree it's not completely on par with the smoke.
15 And I want to get back to the smoke analogy. But in that
16 case, you had a physical event, meaning that the - - -
17 there was a physical event, it was invisible, that occurred
18 to the product. And as a result, that product became
19 unsellable. Now, if - - -

20 JUDGE CANNATARO: And that was damage to the
21 product?

22 MS. COHEN: Absolutely - - - absolutely. It was
23 invisible damage to the product. The product was altered
24 in a way that the product - - -

25 ACTING CHIEF JUDGE RIVERA: And that's - - -



1 that's the problem here, no - - - nothing physical on the
2 premises of the restaurant is damaged as a result of COVID.
3 You simply didn't make profit. You don't have customers.
4 You had to close. What - - - whatever was that part of the
5 argument. It sounds to me like your reading requires us to
6 read loss of use into this phrase, and we cannot add terms.

7 MS. COHEN: You cannot add terms, but it says
8 direct physical loss or physical damage. But I want to go
9 back to Your Honor's point, because I want to push back a
10 little bit on - - - on that. Just because damage - - -

11 ACTING CHIEF JUDGE RIVERA: Uh-huh.

12 MS. COHEN: - - - is temporary - - -

13 ACTING CHIEF JUDGE RIVERA: Uh-huh.

14 MS. COHEN: - - - doesn't mean there's no damage.
15 So to get back to your example - - -

16 ACTING CHIEF JUDGE RIVERA: But again, it's not
17 really damage. Damage suggests repair, and there's no
18 damage to any of the property.

19 MS. COHEN: We would disagree with that - - -

20 ACTING CHIEF JUDGE RIVERA: Okay.

21 MS. COHEN: - - - because repair really deals
22 with measure of damages. You're putting repair into the
23 insuring agreement and it's not. So you can have temporary
24 damage.

25 ACTING CHIEF JUDGE RIVERA: Uh-huh.

1 MS. COHEN: Good examples. The ammonia
2 contamination in the District Court of New Jersey case.

3 ACTING CHIEF JUDGE RIVERA: Uh-huh.

4 MS. COHEN: There was ammonia spill.

5 JUDGE CONNOLLY: But didn't that require
6 remediation? People could not go there unless this - - -
7 this - - - the ammonia was remediated - - - removed.

8 MS. COHEN: Their - - - they didn't have any more
9 remediation than we've had here. Meaning - - - they - - -

10 JUDGE HALLIGAN: But - - - but you - - - you had
11 - - - you didn't allege - - - I don't think. Correct me if
12 I'm wrong - - - complete unusability, right? And - - - and
13 I think, actually, the complaint indicates that there was
14 some utility that remained at the - - - at the property.
15 So it seems to me we would have to accept your argument
16 that partial loss of use or diminution in use is - - - is
17 sufficient. Am I - - - am I right in the way I read your
18 complaint?

19 MS. COHEN: No, Your Honor. Two points. First
20 of all, paragraph 35 of the original complaint and
21 paragraph 50 of the amended complaint alleged that 30 of
22 our 55 restaurants were completely closed. So we have
23 complete disposition if that is the standard. But that is
24 directly contrary to the policy language.

25 ACTING CHIEF JUDGE RIVERA: But that's not

1 because of loss of the property. That's because you didn't
2 have people returning to the restaurant. That, again,
3 sounds to me like economic loss. But Counsel, your red
4 light is on. I'll give you an opportunity to address that
5 when you come back. Do you have a re - - -

6 MS. COHEN: Sure. Sure.

7 JUDGE HALLIGAN: Could I - - - sorry, Judge - - -
8 could I just ask one very quick question?

9 ACTING CHIEF JUDGE RIVERA: Go ahead. Yes. Yes.
10 Yes. Go ahead.

11 JUDGE HALLIGAN: I think at paragraph 63 of your
12 complaint, you also allege that the virus might not
13 actually be present on the property. What - - - what
14 should we make of that - - -

15 MS. COHEN: That - - -

16 JUDGE HALLIGAN: - - - in assessing your
17 allegations?

18 MS. COHEN: Sure. That was dealing with the
19 communicable disease coverage, and that is inconsistent
20 with paragraph 36 and 61, where we made crystal clear that
21 the virus was present and caused physical - - - physical
22 loss or damage. And we corrected that, Your Honor, in the
23 amended complaint to make it crystal clear that there are
24 many causes to our - - - our loss, which is both physical
25 loss and damage caused by the virus and the orders. It was

1 a combination.

2 And the question becomes, if this gets past a
3 motion to dismiss, is what is the efficient proximate
4 cause? Meaning what was the predominant cause? And the
5 New York courts have weighed in on this so far and they say
6 it's the virus. So if the virus - - - between the virus
7 and the - - - the governmental orders - - - if the virus is
8 the efficient, proximate cause, then that is sufficient to
9 get us past the motion to dismiss.

10 ACTING CHIEF JUDGE RIVERA: Okay. Okay. Thank
11 you.

12 MS. COHEN: Okay.

13 CHIEF JUDGE WILSON: You have your rebuttal.
14 Go ahead, sir.

15 MR. MCCORMACK: Good afternoon, Your Honors.
16 Excuse me. Sorry about that. Aidan McCormack. May it
17 please the court. Counsel for Westport Insurance
18 Corporation.

19 I think it's really fundamental that we need to
20 look at the contract language and - - - and really look at
21 that and look at the plain meaning of it. I think that's
22 critical because there was a lot of use of the word
23 physical event, and I've, unfortunately, read this policy
24 too many times, more than I can imagine, and it does not
25 appear - - - that phrase does not appear in this insurance

1 contract.

2 JUDGE HALLIGAN: Counsel, to the - - - to the
3 plain language, can I just ask you briefly, what meaning
4 does the phrase physical loss have as applied to real
5 property, which I don't think theft or displacement - - -
6 you know, misplacement readily applies to?

7 MR. MCCORMACK: Right. So Your Honor, there are
8 many courts that have interpreted that particular phrase.
9 It's not limited to physical loss or damage. It's direct
10 physical loss or damage to insured property - - -

11 JUDGE HALLIGAN: Right. But what - - - what
12 meaning does the word loss distinctly have as applied to
13 real property then?

14 MR. MCCORMACK: Yes. In insurance parlance, and
15 certainly the way these insurance contracts have been
16 interpreted, a physical loss is a total loss. Your
17 warehouse burns to the ground. A physical damage is, you
18 know, God forbid your warehouse is partially damaged by
19 fire. And so in insurance parlance, and certainly the way
20 the plain meaning of this language is, those words do have
21 different meanings, but they're both require - - - and
22 absolutely require physical damage to insured property. In
23 the case of the former, it's a total loss.

24 JUDGE CANNATARO: So the distinction is - - -

25 JUDGE HALLIGAN: And - - -



1 JUDGE CANNATARO: - - - if it's damaged, you can
2 repair it. If it's lost, you have to replace it.

3 MR. MCCORMACK: Exactly, Your Honor. It fits
4 right in, then, with the period of liability clause - - -

5 JUDGE HALLIGAN: And - - -

6 MR. MCCORMACK: - - - which we know from record
7 on page 115, which uses those two same precise words, they
8 match up and they mirror themselves. I'm sorry - - -

9 JUDGE HALLIGAN: And what can you - - - no, I
10 appreciate that - - - what can you point us to as support
11 for that understanding of physical loss as distinct from
12 physical damage?

13 MR. MCCORMACK: So it - - -

14 JUDGE HALLIGAN: You said that's common parlance
15 in the insurance industry - - -

16 MR. MCCORMACK: Yeah.

17 JUDGE HALLIGAN: - - - but where can we look to
18 see that?

19 MR. MCCORMACK: Well, there's - - - there's many
20 - - - there's many cases on this phrase, and we've cited
21 them in our brief. But I would say to you, you need go no
22 further than the over 120 New York cases that have decided
23 the issue before you.

24 Now, I know they're persuasive and not binding on
25 this court and you make your own decisions, but those cases

1 repeatedly talk in terms of, you have to have a physical
2 loss to the insured property, meaning - - -

3 JUDGE HALLIGAN: I understand that. But - - -
4 but specifically, to the extent you're arguing that
5 physical loss means complete destruction as opposed to
6 damage, which means partial or repairable, where do we see
7 support for - - - for that reading of the word physical
8 loss?

9 MR. MCCORMACK: Well - - - well, I would suggest
10 to you it's plainly in the words, Your Honor. The word
11 damage, right, I think we can all accept means something is
12 damaged, not totally lost. And the word loss completes the
13 circle. When you have physical loss, you have a total loss
14 of the property. And when you - - -

15 JUDGE CONNOLLY: But can't loss also mean
16 diminution in value?

17 MR. MCCORMACK: Not with the word physical in
18 front of it, Your Honor. And also, just to be very clear,
19 the definition of insured property does not include air.
20 Okay. It only includes the real estate and the furniture
21 and the chairs and the table. And you can study this
22 complaint all day long - - - all day long - - - and
23 including the amended complaint. And there is not a single
24 factual allegation of a table or a chair or a knife or a
25 fork or a refrigerator or an oven that was damaged and

1 needed to be discarded, needed to be repaired or replaced.

2 JUDGE CANNATARO: So in all risk - - -

3 ACTING CHIEF JUDGE RIVERA: Is there any coverage
4 - - - I'm sorry. Go ahead.

5 JUDGE CANNATARO: Right. If you have an all-risk
6 policy and it - - - they - - - they don't typically cover
7 the release of noxious gases or something like that? Would
8 - - - that would require some special rider?

9 MR. MCCORMACK: So it depends upon what the
10 noxious gases - - -

11 JUDGE CANNATARO: Because you said you can't - -
12 - you know, air is not property, and I just want to explore
13 that - - -

14 MR. MCCORMACK: Oh, okay. Yes. Okay.
15 Certainly. If the - - - if the air is just in the air,
16 right, you are correct.

17 JUDGE CANNATARO: But the air is always in the
18 air, Counsel.

19 MR. MCCORMACK: It's - - - but if in the case of
20 the - - - of the Oregon wildfires - - - wildfire case,
21 right, where it permeates property such that the property -
22 - - the insured property - - -

23 JUDGE CANNATARO: Yeah.

24 MR. MCCORMACK: - - - has to be discarded or
25 repaired - - - cleaned, it's heavily built in - - - then

1 you have an insured loss resulting from a gas.

2 JUDGE CANNATARO: But if you had a dangerous gas
3 leak and you had to evacuate the premises and you couldn't
4 reopen for three weeks, that's not going to cut it under
5 this kind of policy?

6 MR. MCCORMACK: That would not cut it under this
7 policy. That's right, Your Honor. Now, let's look - - -
8 let's look at Gregory Packing, right. They - - - they love
9 to cite Gregory Packing, which is a New Jersey case, so
10 it's not New York law. It's an unreported decision from
11 the Federal District Court. That case involved pneumonia -
12 - - ammonia, not pneumonia - - - ammonia entering the
13 premises and permeating the premises. So much so, when I -
14 - - one of the - - - one of the judges mentioned it - - -
15 so much that they had to go in haz - - - hazmat suits and
16 remediate the whole property. And the court in that case
17 said that is a physical loss or damage and therefore it's
18 covered.

19 But what they don't want to mention to you,
20 because they don't, is that since Gregory Packing, ten New
21 Jersey cases have ruled on COVID, and they've all affirmed
22 dismissal of the complaint because they don't allege threat
23 of physical loss.

24 JUDGE TROUTMAN: So in the case that you just
25 described, do you agree that that is - - - that was lost?

1 MR. MCCORMACK: I really - - - I will say this
 2 about Gregory Packing. There's not a lot in the decision,
 3 but I really don't have any quarrel with it, nor do I have
 4 any quarrel with PepsiCo. I mean, PepsiCo, the product was
 5 the soda. The product was infiltrated by another product.
 6 I think it was damaged sugar. It destroyed the product.
 7 The product had to be thrown out. That's destroyed.
 8 That's repair or replace. That's replaced - - -

9 JUDGE TROUTMAN: So is it focused more on - - -

10 JUDGE HALLIGAN: So why is - - -

11 JUDGE TROUTMAN: - - - some action that you then
 12 have to take?

13 MR. MCCORMACK: That's right. And Roundabout
 14 weeds that out. Roundabout doesn't say - - - and just for
 15 the record - - - I want to be clear on this - - - the
 16 period of liability clause is an insurance clause. If you
 17 look at page - - - record 113, the time element cover,
 18 where they're seeking coverage, Section A, period of
 19 liability is built into the insurance clause. So these
 20 repeated references to it not being the insurance clause
 21 are frankly inaccurate.

22 But the - - - the way it's built out is you have
 23 that period of liability clause, which Roundabout looked to
 24 and said, when you look at that, that informs us, reading
 25 the contract as a whole, that in order to have physical



1 loss damage, something must need to be repaired or
2 replaced. And we're all sitting in this courtroom today,
3 same furniture, same walls, same ceiling. Nothing's
4 happened. Was COVID - - -

5 JUDGE HALLIGAN: Counsel, you - - -

6 MR. MCCORMACK: Certainly.

7 JUDGE HALLIGAN: - - - you - - - you say you have
8 no problem with - - - no quarrel with Gregory Packing.

9 MR. MCCORMACK: It's - - -

10 JUDGE HALLIGAN: So tell me if you would, why is
11 ammonia different from COVID? I take your point about the
12 subsequent New Jersey cases, but why is COVID
13 distinguishable from ammonia?

14 MR. MCCORMACK: Yeah. I did caveat and say
15 there's not a lot of facts in Gregory Packing in the
16 decision.

17 JUDGE HALLIGAN: I understand.

18 MR. MCCORMACK: But - - - but what happened there
19 is that the ammonia got into the building. Hazmat suits
20 were needed to go in and environmental remediation needed
21 to be performed. That - - - I don't know the details of
22 what they did, but it sounds to me like they need to do
23 some serious remediation of the premises, meaning the
24 insured property. Obviously there's - - -

25 JUDGE HALLIGAN: So - - - so is the point that

1 the physical property and not the air was affected or that
2 the air was affected in a really bad way? I'm trying to
3 understand your distinction.

4 MR. MCCORMACK: Yes, it's the former, Your Honor,
5 that the ammonia damaged the property and it had to be
6 remediated. So it was the same just colloquy we just had,
7 which is if something is bad in the air, is that direct
8 physical loss to insured property? Answer, no. If that
9 air - - -

10 JUDGE HALLIGAN: So with the smoke - - - sorry.
11 Go ahead.

12 MR. MCCORMACK: - - - if that air penetrates the
13 surface in the Schlam and Stone case, for example, the
14 debris is from 9/11, if it permeates the surface and
15 requires repair or damage to the property, in that
16 eventuality, absolutely covered.

17 ACTING CHIEF JUDGE RIVERA: Can you address the -
18 - -

19 JUDGE HALLIGAN: So with just - - -

20 ACTING CHIEF JUDGE RIVERA: Oh, I'm sorry. Go
21 ahead. Go ahead.

22 JUDGE HALLIGAN: No, I'm just going to say, with
23 Judge Rivera's smoke hypothetical, it sounds to me then if
24 the smoke permeates all of the furniture, the carpets, et
25 cetera, and they have to be replaced, you would say that

1 counts. But if it's just in the air and no one can come in
2 for a week, that - - - that doesn't count because why?
3 That's just loss of use?

4 MR. MCCORMACK: That's right, Your Honor.
5 There's no direct physical loss or damage to insured
6 property in that instance. And I also wanted to - - - to
7 just remind or just if I may mention to the court that
8 remember that the loss - - - the financial loss, which
9 Consolidated certainly incurred, as many businesses did
10 during the pandemic, unless you were, you know, allowed to
11 stay open, unfortunately, like hospitals, it was a very bad
12 time for businesses. I don't - - - I don't - - - I don't
13 dispute that. But the financial loss that they incurred
14 was not because the tables and chairs were destroyed or
15 broken. Right. It was because there was no foot traffic.
16 And why was there no foot traffic? A, people were afraid,
17 rightly, and B, the government said, you're not allowed to
18 go in there, but you can, as paragraph 31 of the complaint
19 alleges, you - - - they could have takeout, they could
20 have, you know, delivery services and things like that,
21 which they did perform to - - -

22 JUDGE CANNATARO: But pre-mandate, didn't they
23 voluntarily close some of their dining spaces, like,
24 because of the risk inherent in using them?

25 MR. MCCORMACK: That's right, Your Honor. My - - -

1 - a member of our yacht club, we closed our dining space
2 long before the - - - the orders came - - -

3 JUDGE CANNATARO: That - - - that's got sort of
4 lost sound to it. They felt that the risk that was posed
5 by the virus, both in the air and on the surfaces - - -

6 MR. MCCORMACK: Uh-huh.

7 JUDGE CANNATARO: - - - because I was going to
8 ask you that question as well, because it's - - - you know,
9 part of their argument is that the viruses are in the air
10 then they become fomites and they fall to the surface where
11 they stay for some period of time. That sounds a lot like
12 the ammonia that damaged the property in Gregory Packing.

13 Be that as it may, they voluntarily, in a - - -
14 you know, out of caution, closed their space to account for
15 that hazard in their restaurants. How is that not a loss?

16 MR. MCCORMACK: If you use the word loss alone,
17 we'd, probably, we would agree, but that's not what the
18 policy requires. The policy requires that the financial
19 loss you incurred is resulting from direct physical loss or
20 damage, and there is no physical loss or damage that caused
21 their financial losses.

22 JUDGE CANNATARO: That brings me to my counter
23 question. Fomites on the counter. Not direct physical
24 damage or loss?

25 MR. MCCORMACK: It's a fancy word for a surface

1 that may transmit, sadly, a virus from one person to
2 another. It does not harm the surface, Your Honor. And
3 the plain meaning in any ordinary person on the street
4 would tell you if you said my chair - - - this chair right
5 here was damaged by a virus, wouldn't believe it.

6 ACTING CHIEF JUDGE RIVERA: Is that because you
7 can clean it?

8 MR. MCCORMACK: You can clean it? That's right,
9 Your Honor. And - - - and yes, may need to clean it many
10 times, but what's the difference - - - I mean, I know - - -
11 it's - - - I don't want to make light of the situation
12 because we all know it was very serious. We all lived
13 through it. But what - - - they're cleaning it with Lysol
14 instead of Pine-sol every night. Okay. That's what we're
15 talking about. And regular cleaning of a restaurant, we
16 all hope, is occurring anyway. I'm not suggesting that
17 they didn't have to do more, but it isn't physical loss or
18 damage to insured property where you can wipe it down.

19 JUDGE CONNOLLY: But counsel, aren't you asking
20 us to evaluate - - -

21 ACTING CHIEF JUDGE RIVERA: Over here.

22 JUDGE CONNOLLY: - - - over here.

23 MR. MCCORMACK: I'm sorry.

24 JUDGE CONNOLLY: Aren't you asking us to evaluate
25 scientific allegations prematurely at the pleading stage?

1 MR. MCCORMACK: Not at all, Your Honor. 3211 was
2 given by the legislator to the court system for a reason.
3 And there are jurisdictions, not this one, which say that
4 that should be very, very rarely used. But in New York,
5 it's a tool that eliminates cases early and for good
6 reason. This is a contract dispute. This is perfectly
7 suited - - - perfectly suited for 3211 dismissal. It - - -

8 ACTING CHIEF JUDGE RIVERA: Well, even if - - - I
9 - - - and perhaps I've misunderstand - - - stood the
10 science arguments, so you can, you know, correct me on
11 rebuttal. But again, this is my question about the
12 temporalness of this. It's not like you can never use the
13 chair if COVID got on it. You clean it.

14 MR. MCCORMACK: You clean it, and you sit back
15 down.

16 ACTING CHIEF JUDGE RIVERA: And - - - and that
17 was known even then.

18 MR. MCCORMACK: That's right. That's right, Your
19 Honor. But so to your point, in the first department, if
20 you read 2074 of the record, not only read the complaint,
21 they went the extra step and read the proposed amended
22 complaint. And my reading, their reading, same, said
23 there's no there there. It's just there is no direct
24 physical loss or damage to insured property that caused
25 their financial losses. It's not the warehouse was damaged



1 or the warehouse was burnt to the ground or something like
2 that.

3 ACTING CHIEF JUDGE RIVERA: You're also making
4 the argument that even if we didn't agree with you, there
5 are these particular exclusions that would apply. Is there
6 anything you want to add about what's already written in
7 the brief?

8 MR. MCCORMACK: That's correct, Your Honor. I
9 would just say this, that the contamination exclusion
10 that's in the contract can readily dispose of this case.
11 You know, I think there's quite a few Supreme Court
12 justices who wouldn't want you to stop there to be blunt
13 because there's a huge caseload below me. And so resolving
14 the primary issue is - - - for what it - - - it's your
15 discretion, but I think it's important.

16 But the contamination exclusion specifically says
17 there's no coverage for virus. And unlike some of the
18 arguments that have been made, it doesn't require physical
19 loss or damage. It's when you look at it, it doesn't alter
20 the meaning of the insuring clause. It's just an
21 exclusion. It's read seriatim under the Latin, meaning on
22 its own, can't create ambiguities, can't increase coverage.
23 And so I would say that that exclusion certainly bites in
24 and resolves the issue on its own. But I leave it to your
25 discretion as to whether to think of other things.

1 The - - - I think I would just close by saying
2 that, you know, obviously very important issue and thank
3 you for taking it up. I think a lot of the lower courts
4 are looking towards this decision. And you know, there was
5 one argument made that a lot of the cases that are out
6 there are only dealt with the exclusionary issue. And I
7 would respectfully say that's just not the case.

8 There's 172 federal appellate court decisions on
9 this issue, every single one of them unanimously dismissing
10 these kinds of allegations. There are a handful that dealt
11 with the exclusion, but by and large, they all said there's
12 no direct physical loss or damage.

13 ACTING CHIEF JUDGE RIVERA: Right. Because there
14 may not be these kinds of exclusions, but the language is
15 more commonplace in the policy.

16 MR. MCCORMACK: Yes. This is - - - this phrase,
17 direct physical loss or damage, and the requirement that
18 the losses result from that, I wouldn't say it's in every
19 policy. Schlam and Stone had slightly different wording.

20 ACTING CHIEF JUDGE RIVERA: Uh-huh.

21 MR. MCCORMACK: But it pretty much is standard.
22 If there's no further questions. Thank you, Your Honor.

23 ACTING CHIEF JUDGE RIVERA: Thank you.

24 Before you get to everything else you want to
25 say. And I certainly appreciate counsel's comments about

1 the necessary guidance. Why isn't he right that the
2 contaminants exclusion addresses this case? Perhaps not
3 others, but addresses this case?

4 MS. COHEN: Because Belt Painting - - - this
5 court in Belt Painting made it clear if you have prefatory
6 language that is in this exclusion - - -

7 ACTING CHIEF JUDGE RIVERA: Uh-huh. Uh-huh.

8 MS. COHEN: - - - that is only applies to
9 traditional environmental pollution. And so that's not
10 what we have here. So for example, this policy is almost
11 identical to the policy in Belt Painting. That's why it
12 doesn't apply.

13 JUDGE SINGAS: Ms. Cohen, did you find any SARS
14 or COVID virus in any of your restaurants?

15 MS. COHEN: Yes, Your Honor, we did. We did. In
16 fact, one of the facts that we have alleged in the amended
17 complaint is we started closing the - - - many of the
18 restaurants, not - - - not voluntarily, but - - - well, it
19 was voluntarily. But it was because the air and the
20 surfaces were dangerous; and therefore, we had to close
21 down a lot of the restaurants.

22 JUDGE GARCIA: Counsel, to go to these other
23 cases - - - you mentioned federal cases, and they're not
24 binding, of course, on us - - - but to the extent we might
25 find them persuasive, cases like Northwell, right, in the

1 Southern District, Judge Rakoff. Is there anything you
2 would say to distinguish your case from those decisions, or
3 would your argument be that they just were wrongly decided?

4 MS. COHEN: Three points, Your Honor. Ninety-
5 nine percent of the COVID cases that are cited in the first
6 department decision are all loss of use cases, are all
7 governmental order cases. And what I mean by that is they
8 did not allege that there was any COVID on the property.
9 In fact, the Michael Seda case, which is one of the
10 predominant cases, expressly distinguished its case,
11 meaning its facts from a case where you have a physical
12 event, where you have intrusion of COVID on its property.

13 JUDGE GARCIA: But that doesn't seem to be the
14 Northwell analysis, right?

15 MS. COHEN: True. That's my second point. On
16 Northwell, the difference in the policy is this policy not
17 only expressly says that it's an all-risk policy, but this
18 policy expressly covers contamination from ammonia,
19 radiation, mold, a lot of different invisible contamination
20 - - - contaminants that can be temporary, that do not cause
21 structural damage or structural repair. So if you're a
22 reasonable policyholder and you see this policy that's in
23 all risk policy that expressly covers - - -

24 JUDGE GARCIA: Is that Kim-Chee?

25 MS. COHEN: Well, Kim-Chee is actually helpful to



1 us.

2 JUDGE GARCIA: But Kim-Chee says persistently, to
3 the contrary, we agree with the district court that the
4 virus's inability to physically alter or persistently
5 contaminate property differentiates us from radiation,
6 chemical dust, gas, asbestos and other contaminants whose
7 presence could trigger coverage.

8 MS. COHEN: So two points. Kim-Chee made it
9 clear if you have an invisible contaminant that causes
10 physical loss - - - it doesn't have to have be structural
11 damage - - - if it causes physical, invisible damage,
12 that's sufficient.

13 Where Kim-Chee went wrong is that Kim-Chee said
14 there is this spectrum and dust is on one side, that's
15 innocuous dust. And then you have these E coli in ammonia
16 on the other side. And then the question is, where does
17 COVID fit? Now, Your Honor suggested COVID should fit more
18 like innocuous dust because you can just clean it up. That
19 is directly contrary, not only to our allegations in the
20 complaint, not only to the scientific studies that we
21 attach to the complaint, but the Erie Medical Society
22 weighed in along with five other medical societies and said
23 those facts are junk science, that you cannot easily clean
24 it. Now that's a fight for - - -

25 ACTING CHIEF JUDGE RIVERA: For there's a

1 difference between easily clean and clean.

2 MS. COHEN: And they said you cannot clean it.

3 ACTING CHIEF JUDGE RIVERA: Even so. So if if I
4 don't know where you found the COVID, but let's say you
5 found it on a table where someone eats, are you saying
6 these studies now say you have to somehow properly discard
7 this table because you can never use it again?

8 MS. COHEN: No, Your Honor, what they're saying
9 is and this was a Northwell study actually that came out
10 very recently that the Erie Medical Society put forth.
11 They said even if you do very, very deep cleaning, you
12 can't clean it. It has to basically do. First by itself.
13 Now, the problem with that, obviously, is that new COVID is
14 being reintroduced as the restaurant is being opened. So
15 the bottom line is you really cannot clean it now. Counsel
16 suggested you can. And he's entitled to those facts, but
17 not on a motion to dismiss. We've alleged facts that make
18 it clear that the surfaces had been physically damaged
19 through the fomite process. He disagrees. We've made it
20 clear in our complaint that you cannot.

21 ACTING CHIEF JUDGE RIVERA: But even with the
22 science that you allege makes this point for you, you can
23 use the table. There will come a time when you can use
24 that table and you are using the table.

25 MS. COHEN: That is true, Your Honor. But this

1 policy expressly contemplates temporary damage.

2 ACTING CHIEF JUDGE RIVERA: What's temporary?
3 What's the point of the word physical? Okay.

4 MS. COHEN: Physical. It has to be a physical
5 event.

6 ACTING CHIEF JUDGE RIVERA: Like he says, there's
7 no such thing as physical event, as a phrase recognized in
8 the policy. Well, so why should we read in the extra word?

9 MS. COHEN: Because first you have to look at the
10 word loss, because physical modifies loss. Loss is not
11 defined in the policy. It's construed against the
12 carriers, their form. If you go to the dictionary, it says
13 dispossession. Okay. So then you have to figure out how
14 does physical modify dispossession? And a reasonable
15 policyholder would assume that if you have a physical,
16 dangerous substance that goes on to your property and
17 physically makes the property unsafe, that you are
18 dispossessed. But you're modifying.

19 ACTING CHIEF JUDGE RIVERA: Something else with
20 that.

21 MS. COHEN: I'm sorry, Your Honor.

22 ACTING CHIEF JUDGE RIVERA: You're modifying
23 something else now with this, what you're advocating should
24 be the proper analysis and reading.

25 MS. COHEN: I'm not. Because physical has to

1 mean something. And what I'm saying. Physical means
2 something. Physical happens on your property. And that if
3 we - - -

4 ACTING CHIEF JUDGE RIVERA: If we disagree, you
5 lose. Correct.

6 MS. COHEN: Disagree, we lose with that.

7 ACTING CHIEF JUDGE RIVERA: Particular view.

8 MS. COHEN: With respect to physical loss.

9 ACTING CHIEF JUDGE RIVERA: Yes, I know counsel
10 never likes to admit it's a yes or no answer, but it really
11 is.

12 MS. COHEN: But Your Honor, this is what I would
13 this is what I would really request is the entire argument
14 was based upon his view of what COVID can and cannot do.
15 This is on a motion to dismiss stage. And so we would ask
16 we've alleged the things that we need to ask.

17 Now, one other point I wanted to make. Judge
18 Garcia kept on asking, and I believe maybe others did too,
19 is what does physical loss mean that's different than
20 physical damage? And counsel said it means complete
21 dispossession. And the question was, what's the support
22 for that? There is no support.

23 In fact, the policy expressly says the otherwise.
24 If you go to record site 113 expressly states that economic
25 damages due to physical loss or damages can be as partial

1 or in whole. So the policy expressly contemplates that the
2 physical loss can be partial or in whole there is no
3 support. That physical loss means complete dispossession.
4 It doesn't say complete loss. It says physical loss.

5 ACTING CHIEF JUDGE RIVERA: Thank you.

6 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Consolidated Restaurant Ops v. Westport Insurance, No. 7 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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