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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Blue Ox LLC d/b/a Ox Cart Ale House,

Plaintiff,

v.

Midwest Family Mutual Insurance Co.,

Defendant.

Case Type: Contract

Case File No. 62-CV-20-3771
Judge John H. Guthmann

Fitzgeralds LLC, d/b/a The Fitz,

Plaintiff,

v.

Midwest Family Mutual Insurance Co.,

Defendant.

Lowertown Café LLC d/b/a Handsome Hog,

Plaintiff,

v.

Midwest Family Mutual Insurance Co.,

Defendant.

Public Kitchen and Bar LLC d/b/a Green Lantern and Public Kitchen and Bar,

Plaintiff,

v.

Midwest Family Mutual Insurance Co.
Defendant.

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Madison Eagle Street Grille,

Plaintiff,

v.

Midwest Family Mutual Insurance Co.,

Defendant.

Lowry Kitchen,

Plaintiff,

v.

Midwest Family Mutual Insurance Co.,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

The above-entitled matter came before the Honorable John H. Guthmann, Judge of District Court, on November 12, 2020 via Zoom. At issue in these consolidated cases were cross motions for judgment on the pleadings. Alex L. Rubenstein, Esq., argued on behalf of the plaintiffs. Mark D. Covin, Esq., argued on behalf of defendant Midwest Family Mutual Insurance Co. Based upon all the files, records, affidavits and arguments, the court issues the following:

ORDER

1. The motion for judgment on the pleadings brought by each of the plaintiffs is **DENIED**.

2. The motion for judgment on the pleadings brought by Midwest Family Mutual Insurance Co. in each of the above-captioned cases is **GRANTED**.

3. The court declares that defendant Midwest Family Mutual Insurance Company's Businessowners' Policies do not cover plaintiffs' coronavirus-related losses. Therefore, a

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judgment of dismissal plus costs and disbursements shall be entered in favor of defendant Midwest Family Mutual Insurance Company in each of the above-captioned cases.

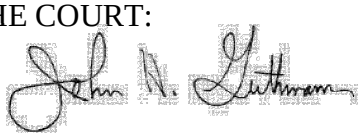
4. A copy of this Order shall be filed in each of the above-captioned case files.

5. The following Memorandum is made part of this Order.

THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 29, 2020

BY THE COURT:



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John H. Guthmann
Judge of District Court

M E M O R A N D U M

I. STATEMENT OF THE CASE

On various dates from and after March 13, 2020, the above-named plaintiffs filed declaratory judgment actions against defendant Midwest Family Insurance Co. seeking a determination of coverage for losses triggered by the COVID-19 pandemic. By order dated August 12, 2020, Chief Judge Leonardo Castro granted defendant's motion to consolidate the above-captioned cases. The cases were assigned to the undersigned. Thereafter, cross motions for judgment on the pleadings were filed by the parties and the court approved a briefing schedule. The motions were taken under advisement following the November 12, 2020 hearing.

II. STATEMENT OF FACTS

A. Facts Underlying the Present Insurance Dispute.

Based on the allegations in the various Complaints, the court accepts the following facts as true. On March 5, 2020, Minnesota's first case of COVID-19, a disease caused by a novel

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coronavirus, was reported. (Blue Ox, LLC Compl. ¶ 5.[1]) On March 13, 2020, Minnesota Governor Tim Walz issued Executive Order 20-01, which declared a COVID-19 State of Emergency. (*Id.* ¶ 6.) Thereafter, on March 16, 2020, the Governor followed up with Executive Order 20-04. (*Id.* ¶ 7.) Executive Order 20-04 prohibited bars and restaurants from offering dine-in service and limited their business to delivery and carryout service. (*Id.*) The order took effect on March 17, 2020 and, per various extensions, continued unchanged until June 1, 2020. (*Id.* ¶¶ 7-8.)

Effective June 1, 2020, the original bar and restaurant business limitations were replaced by Executive Order 20-63. (*Id.* ¶ 9.) The new limitations permitted bars and restaurants to offer outdoor on-site dining service subject to the development and implementation of a COVID-19 Preparedness Plan, placement of tables at least six feet apart, and a capacity limit of fifty customers at any given time. (*Id.*)

Executive Order 20-63 was replaced by Executive Order 20-74 effective June 10, 2020. (*Id.* ¶ 10.) The revised limitations permitted bars and restaurants to offer both indoor and outdoor on-site dining service subject to development and implementation of a COVID-19 Preparedness Plan, a 50% of capacity limit for indoor dining not to exceed 250 people, placement of outdoor tables at least six feet apart, and a 250 person limit on outdoor seating, space permitting. (*Id.*)

Due to the requirements of the Governor's initial Executive Order, most of the plaintiffs suspended their restaurant operations because it was not economical to do business only as a take-out operation.[2] (*Id.* ¶ 11.) Consequently, certain food inventory with expiration dates could no longer be used safely. (*Id.* ¶ 12.) Both during the suspension of all operations and after partial

[1] The Complaints in these consolidated matters are virtually identical. For purposes of convenience, the court only cites to the Blue Ox, LLC Complaint.

[2] The plaintiffs did not make identical business decisions. Two plaintiffs reopened carry-out only operations while the others did not operate at all while the dine-in prohibition was in effect. (Mem. of Law in Supp. of Pl.s' Joint Mot. for J. on the Pleadings and in Opp. to Def.'s Mot. for J. on the Pleadings at 4-5.)

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operations resumed, the plaintiff businesses lost income due to lost business caused by the limitations imposed by the Governor's Executive Orders. (*Id*. ¶ 13.)

B. The Midwest Family Mutual Insurance Co. Policy.

Due to their losses, the plaintiffs turned to the insurance policies they each carried with Midwest Family Mutual Insurance Co. The policies are identical for purposes of the instant litigation.[3] Both the covering language and the language of several policy exclusions are at issue.[4]

Each of the policies contain a schedule that list the numerous forms included in the policy. Not all of the forms are at issue in the instant litigation. For purposes of this case, the key forms are: the Businessowners Coverage Form (Form BP 00 03 01 10); the Ultimate Property Advantage Endorsement (Form MFMBP035 09-18); and the Minnesota Changes endorsement (Form BP 01 25 07 13). As with most insurance policies, a determination of coverage begins with the definition of what is covered. Defendant's policies use the terms "Covered Property" and "Covered Causes of Loss." The covering language in the Businessowners Coverage Form states:

> **SECTION I— PROPERTY**
>
> **A. Coverage**
>
> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.
>
> **1. Covered Property**
>
> Covered Property includes Buildings as described under Paragraph a. below, Business Personal Property as described under Paragraph b. below, or both, depending on whether a Limit of Insurance is shown in the Declarations for that type of property. Regardless of whether coverage is

[3] The applicable policy is attached as Exhibit 1 to each Complaint. The forms are also attached as Exhibit 7 to the Declaration of Mark Covin. Accordingly, citations are to the policy itself rather than to one of the Complaint exhibits or to an affidavit.

[4] The subject policies are of a genre called "all-risk" property insurance. *See generally Johnson, What Constitutes Physical Loss or Damage in a Property Insurance Policy*, 54 TORT TRIAL AND INSURANCE LAW PRACTICE JOURNAL 96, 96-99 (2019).

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shown in the Declarations for Buildings, Business Personal Property, or both, there is no coverage for property described under Paragraph 2. Property Not Covered.

a. Buildings, meaning the buildings and structures at the premises described in the Declarations . . ..

. . . .

b. Business Personal Property located in or on the buildings at the described premises or in the open (or in a vehicle) within 100 feet of the described premises, including:

(1) Property you own that is used in your business;

. . . .

3. Covered Causes of Loss

Risks of direct physical loss unless the loss is:

a. Excluded in Paragraph **B**. Exclusions in Section I; or

b. Limited in Paragraph **4**. Limitations in Section I.

(Businessowners Coverage Form (Form BP 00 03 01 10) at 1 of 49 to 2 of 49 (emphasis in original).)

In addition to the primary policy language defining the scope of policy coverage, the applicable policies contain a number of additional and extended coverages. Here, the parties agree that two of these coverages are potentially implicated in the present dispute. The first is additional coverage for the loss of business income:

5. Additional Coverages

. . . .

f. Business Income

(1) Business Income

(a) We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by direct physical loss of or damage to property at the described premises.

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> The loss or damage must be caused by or result from a Covered Cause of Loss. . . .
>
> **(b)** We will only pay for loss of Business Income that you sustain during the "period of restoration".[5] We will only pay for loss of Business Income that occurs within 12 consecutive months after the date of direct physical loss or damage. . . .

(*Id.* at 5 of 49 to 6 of 49 (emphasis in original).)

The second potentially applicable additional coverage is an endorsed extension of $10,000 in "spoilage coverage" for the loss of perishable stock. The term "perishable stock" is defined to mean property "[m]aintained under controlled conditions for its preservation; and [s]usceptible to loss or damage if the controlled conditions change." (Ultimate Property Advantage Endorsement (Form MFMBP035 09-18) at 4 of 7.) The spoliation coverage language states:

> **u. Spoilage Coverage**
>
> **a.** We will pay of the loss of "perishable stock" as described below caused by:
>
> **(1)** A change in temperature or humidity resulting from mechanical breakdown or failure of refrigeration, cooling or humidity control apparatus or equipment is at the described premises;
>
> **(2)** Contamination by a refrigerant; and
>
> **(3)** Power Outage, meaning change in temperature or humidity resulting from complete or partial interruption of electrical power, either on or off the described premises, due to conditions beyond your control.

(*Id.* at 3 of 7 (emphasis in original).)

Once it is determined that an accidental direct physical loss to Covered Property falls within defendant's policy and its extensions or additions, the loss is covered unless a coverage

[5] The policy defines the term "period of restoration" to mean the "period of time that [b]egins [i]mmediately after the time of the direct physical loss or damage caused by or resulting from any Covered Loss [and] [e]nds on the earlier of [t]he date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality or [t]he date when business is resumed at a new permanent location." (Businessowners Coverage Form (Form BP 00 03 01 10) at 30 of 49.)

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exclusion or limitation applies. Defendant's motion for judgment on the pleadings relies upon the following policy exclusions:

> **B. Exclusions**
>
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.[6] These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.
>
> . . . .
>
> **j. Virus Or Bacteria**
>
> **(1)** Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.
>
> . . . .
>
> **2.** We will not pay for any loss or damage caused by or resulting from any of the following:
>
> . . . .
>
> **b. Consequential Losses**
>
> Delay, loss of use or loss of market.
>
> . . . .
>
> **l. Other Types of Loss**
>
> . . . .
>
> **(2)** Rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself.
>
> . . . .
>
> **3.** We will not pay for loss or damage caused by or resulting from any of the following Paragraphs **a.** through **c.** But if an excluded cause of loss that is listed in Paragraphs **a.** through **c.** results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

[6] The second sentence of paragraph 1 is an anti-concurrent cause clause. An anti-concurrent cause provision is a term in a first-party policy indicating that a loss caused by a combination of covered and excluded causes of losses is not covered. For an example of anti-concurrent cause clause quoted in a Minnesota appellate case, *see Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152-53 (Minn. Ct. App.) (the policy exclusions apply "regardless of any other cause or event contributing concurrently or in any other sequence to the loss"), *rev. denied* (Minn. 2001).

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. . . .

b. Acts or Decisions

Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

(Businessowners Coverage Form (Form BP 00 03 01 10) at 15 of 49, 17 of 49 to 19 of 49 (emphasis in original).)

The final exclusion relied upon by defendant is found Minnesota Changes endorsement. The endorsement deletes, replaces, or adds a variety of provisions found in the main policy (Minnesota Changes (Form BP 01 25 07 13).) The Minnesota Endorsement replaces the Ordinance or Law exclusion in the main policy with the following language:

B. Section I – Property is amended as follows:

. . . .

4. Paragraph B.1.a. Ordinance Or Law Exclusions is replaced by the following:

a. Ordinance Or Law

(1) The enforcement or compliance with any ordinance or law:

(a) Regulating the construction, use or repair of any property; or

(b) Requiring the tearing down of any property, including the cost of removing its debris.

(Minnesota Endorsement (Form BP 01 25 07 13) at 1 of 7 (emphasis in original).)

C. Plaintiffs' Claims Against Midwest Family Mutual Insurance Co.

Contending that they incurred a direct physical loss to covered property within the meaning of the applicable policies, plaintiffs submitted claims for their lost business income and expired food inventory to defendant. (Blue Ox, LLC Compl. ¶¶ 20-23.) Defendant, in turn, responded with a written denial of coverage to each plaintiff. (*Id.* ¶ 24; *see id.*, Ex. 2 (denial letter).) The instant

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litigation followed. Each Complaint alleges a breach of contract by defendant and seeks a declaration that plaintiffs' losses are covered.

III. STANDARD OF REVIEW APPLICABLE TO MOTIONS FOR JUDGMENT ON THE PLEADINGS

Under Rule 12.03 of the Minnesota Rules of Procedure, a party may move to dismiss a claim after the pleadings are closed to determine if the claim, as pled, has any merit as a matter of law. Thus, "[j]udgment on the pleadings is proper where the defendant relies on an affirmative defense or counterclaim which does not raise material issues of fact." *Zutz v. Nelson*, 788 N.W.2d 58, 61 (Minn. 2010) (quoting *Jacobson v. Rauenhorst Corp.*, 301 Minn. 202, 206, 221 N.W.2d 703, 706 (1974), *overruled on other grounds, Farmington Plumbing & Heating Co. v. Fischer Sand & Aggregate, Inc.*, 281 N.W.2d 838 (Minn. 1979)). In addition, when considering a motion for judgment on the pleadings, the court must accept as true the factual allegations contained in the pleading, construing all reasonable inferences in favor of the non-moving party. *Hoffman v. N. States Power Co.*, 764 N.W.2d 34, 42 (Minn. 2009).

When considering a motion for judgment on the pleadings, the court's inquiry is to determine whether "the complaint sets forth a legally sufficient claim for relief." *Zutz*, 788 N.W.2d at 61 (quoting *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003)). Consequently, only documents embraced by the pleadings, such as in a complaint or counterclaim, may be considered. *Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 739 n.7 (Minn. 2000); *In re Hennepin Cty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995) ("The court may consider the entire written contract when the complaint refers to the contract and the contract is central to the claims alleged.").

A Rule 12.03 motion should be treated as a motion for summary judgment once matters outside the pleadings are presented to and not excluded by the court. Minn. R. Civ. P. 12.03; *see*

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Moreno v. Crookston Times Printing Co., 610 N.W.2d 321, 326 (Minn. 2000). Here, the insurance policies and coverage denial letters are attached to the Complaints. In addition, Governor Walz' Executive Orders are referenced in the Complaints and the court takes judicial notice of the orders. Minn. R. Evid. 201. While there are extra-complaint documents in the record, they may be considered without converting the motion into a motion for summary judgment. Accordingly, as do the parties, the court treats the motion as a motion for judgment on the pleadings.

IV. INSURANCE POLICY INTERPRETATION STANDARDS

As contracts, insurance policies are interpreted in accordance with general contract principles. *Progressive Specialty Ins. Co. v. Widness ex rel. Widness*, 635 N.W.2d 516, 518 (Minn. 2001). Accordingly, when interpreting insurance contracts, the court must ascertain and give effect to the intent of the parties as expressed in the policy language. *Nathe Bros. v. Am. Nat. Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000); *Minnesota Min. & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 179 (Minn. 1990). The terms of the insurance policy "determine the extent of the insurer's liability." *Am. Nat. Fire Ins. Co., v. Cordie*, 478 N.W.2d 531, 534 (Minn. Ct. App. 1991).

If possible, every term within an insurance policy must be given effect. *Bobich v. Oja*, 258 Minn. 287, 294-95, 104 N.W.2d 19, 24 (1960). Moreover, when examining policy language, the "insurance contract must be construed as a whole, with unambiguous language given its plain and ordinary meaning." *Indep. Sch. Dist. No. 697, Eveleth v. St. Paul Fire and Marine Ins. Co,* 515 N.W.2d 576, 579 (Minn. 1994) (quotation omitted); *see Widness*, 635 N.W.2d at 518 (if the policy language is clear, it must be given its "usual and accepted meaning"); *cf. Jenoff, Inc. v. New Hampshire Ins. Co.*, 558 N.W.2d 260, 262 (Minn. 1997) (undefined terms "must be given their plain, ordinary, or popular meaning").

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An insurance policy is construed against the insurer and in accordance with the insured's reasonable expectations only if its language is ambiguous. *Id*. (citing *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32, 36 (Minn. 1979)). A "court has no right to read an ambiguity into the plain language of a policy in order to provide coverage." *Farkas v. Hartford Acc. & Indem. Co.*, 285 Minn. 324, 327, 173 N.W.2d 21, 24 (Minn. 1969) (citations omitted).

Interpretation of unambiguous policy language presents a question of law for the court. *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001). But the burden of establishing entitlement to coverage falls upon the policyholder. *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 311 (Minn. 1995), *overruled on other grounds by Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910 (Minn. 2009) (citing *Boedigheimer v. Taylor*, 287 Minn. 323, 329, 178 N.W.2d 610, 614 (1970)). The insurer has the burden of proving that a policy exclusion is applicable. *Id.* at 313-14.

V. ANALYSIS OF COVERAGE ISSUES

A. There was no Physical Loss or Damage Within the Meaning of the Applicable Policies as Required by the Applicable Policies.

The court's analysis necessarily begins with the covering language of the applicable policies. Did plaintiffs satisfy their burden of proving that the claimed losses are within the covering language? The parties do not dispute that the business and inventory losses sustained by the various plaintiffs are Covered Property. In addition, the parties do not dispute that plaintiffs' losses were directly caused by Governor Walz's Executive Orders. However, in the context of the insurance coverage at issue, the latter sentence does not address the right question. The real question is whether plaintiffs satisfied their obligation to prove that the Governor's orders caused "direct physical loss of or damage to Covered Property." Plaintiffs argue that construing the covering language to require their property to be physically touched in some way reads the "direct

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physical loss of or damage to" requirement "too narrowly." (Mem. of Law in Supp. of Pl.s' Joint Mot. for J. on the Pleadings and in Opp'n to Def.'s Mot. for J. on the Pleadings at 13.) Defendant, in turn, essentially argues that "direct physical loss of or damage to" means what the phrase actually says.[7]

Plaintiffs' argument for coverage relies entirely on two Minnesota appellate cases. Yet, based on even a cursory examination, these cases actually compel a finding that plaintiffs cannot meet their burden of demonstrating coverage.

In the first case, *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, the plaintiff owned a number of residential rental properties that incorporated asbestos-containing products "in ceiling and floor tiles, surface treatments, and thermal and mechanical systems insulation." 563 N.W.2d 296, 298 (Minn. Ct. App. 1997). After experts determined that asbestos fibers, "a known carcinogen", had been released from these products into carpeting and other surfaces within the buildings, plaintiff filed a claim against its property insurer for the future cost of abating the contamination. *Id.* In denying coverage, one of the insurer's defenses was the lack of a "direct, physical loss" as required by the covering language of the policy. *Id.*

The trial court denied the insurer's motion for summary judgment but certified the coverage questions to the Minnesota Court of Appeals as important and doubtful. *Id.* The court treated the direct physical loss requirement as unambiguous and applied cases interpreting the phrase from around the country.[8] *Id.* at 299-301. The court began with the basic proposition that "'[d]irect

[7] There is no claim that COVID-19 was physically present at any of the plaintiff properties—the sole basis for asserting coverage is the Governor's issuance of Executive Orders. (Mem. of Law in Supp. of Pl.s' Joint Mot. for J. on the Pleadings and in Opp'n to Def.'s Mot. for J. on the Pleadings at 17.)

[8] Plaintiffs argue that the covering phrase is ambiguous because their interpretation of the cases is "reasonable". (Mem. of Law in Supp. of Pl.s' Joint Mot. for J. on the Pleadings and in Opp'n to Def.'s Mot. for J. on the Pleadings at 13, 16-17.) Yet, plaintiffs fail to cite a single published case finding the phrase ambiguous nor do they cite any cases adopting their "reasonable" interpretation. The court concludes that the policy language is unambiguous, that court interpretations of the phrase are consistent

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physical loss' provisions require only that a covered property be injured, not destroyed." *Id*. at 300 (citations omitted). The court noted that even though the physical structure of the buildings was uninjured, "a building's function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants." *Id.* Ultimately, the court found that the properties sustained direct physical loss because they were "contaminated" by asbestos, thereby "creating a hazard to human health." *Id*. The fact that the loss comprised the cost of contamination abatement rather than the contamination itself did not convert the loss from physical to economic. *Id*. (citations omitted except *Farmers Ins. Co. v. Trutanich*, 123 Or. App. 6, 858 P.2d 1332, 1335 (1993) (cost of removing home odor constituted a physical loss because remediation eliminated a physical problem)).

Plaintiffs argue that the second case, *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 150 (Minn. Ct. App.), *rev. denied* (Minn. 2001), is dispositive in their favor. (Mem. of Law in Supp. of Pl.s' Joint Mot. for J. on the Pleadings and in Opp'n to Def.'s Mot. for J. on the Pleadings at 14-17.) In *General Mills, Inc.* ("General Mills"), sixteen million bushels of raw oats were treated with a pesticide that was not approved by FDA regulations for use on oats. *Id*. at 150. Consequently, General Mills discarded all of the adulterated products based on its belief that the FDA would order it to do so, although no such order was ever issued. *Id*. at 150-51.

General Mills' insurer denied the existence of "direct physical loss or damage to property" because the oats remained fit for human consumption and the government regulation caused no harm to the property. *Id.* at 151-52. Since the oats were consumable, the insurer claimed that the insured's property was not really damaged. *Id.*

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with dictionary definitions of the words within the phrase, and that plaintiffs misinterpret the cases upon which they rely. *See Witcher Const. Co. v. Saint Paul Fire & Marine Ins. Co.*, 550 N.W.2d 1, 5 (Minn. Ct. App.), *rev. denied* (Minn. 1996) (argument that "the phrase 'risks of direct physical loss or damage" in all-risk policy is ambiguous "is contrary to the weight of authority").

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Treating the "direct physical loss or damage to property" threshold as unambiguous, the Minnesota Court of Appeals applied *Sentinel Management Co.* to find that General Mills' oats were indeed injured:

> We have previously held that direct physical loss can exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way. *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997). In *Sentinel*, we noted that the function of a residential apartment building, to provide safe housing, was seriously impaired or destroyed by the presence of asbestos fibers, although the building itself did not suffer a "tangible injury." *Id*. Likewise, the function of the food products produced by General Mills is not only to be sold, but to be sold with an assurance that they meet certain regulatory standards. When General Mills is unable to lawfully distribute its products because of FDA regulations, that function is seriously impaired.

Id. at 152. The court rejected the insurer's argument that the oats "could be safely consumed but for a legal regulation that does not truly affect the function of the product" by drawing an analogy to *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 256 Minn. 404, 98 N.W.2d 280 (1959). *Id*. In *Marshall Produce Co.*, the insured had an U.S. Army contract to provide milk powder, egg powder, and raw eggs pursuant to exacting standards, including a requirement that the plant be "free from strong foul odors, dust, and smoke-laden air." 256 Minn. at 408, 98 N.W.2d at 284-85. Marshall Produce Co. did not have a fire but a neighboring plant did and the infiltration of smoke from that fire into plaintiff's factory resulted in the army rejecting its product. *Id*. at 423, 98 N.W.2d at 293. Plaintiff made a claim under an all-risk fire insurance policy that covered "all loss or damage by fire originating from any cause." *Id*. at 409, 98 N.W.2d at 285. The Minnesota Supreme Court found that the fire did not have to occur on the insured's property to trigger coverage because:

> [w]hatever the loss may have been, it is obvious that the fire was the proximate cause of the loss; that smoke and its resulting foul odors spread into the plant and its contents, which led the government officials to do what they might well be

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> expected to do under the prevailing conditions; namely, to reject the merchandise and render the same valueless.

Id. at 418, 98 N.W.2d at 290. Drawing upon *Marshall Produce Co*., the *General Mills* court found physical damage to the oats because General Mills "was unable to sell its products or use the contaminated oats, because of legal regulations." *General Mills, Inc*., 622 N.W.2d at 152.

Somehow, the plaintiffs convert the *Marshall Produce Co*., *Sentinel Mgmt. Co.*, and *General Mills, Inc*. trilogy from cases requiring a showing of injury to property, albeit something less than total destruction or structural damage, to cases requiring no showing of actual injury to the property at all. The cases simply do not support plaintiff's "no touch" coverage theory. Quite to the contrary, the trilogy share an attribute that is not present in the instant case—the insured's property was physically touched, indeed injured. In *Marshall Produce Co.*, smoke from a fire contaminated the insured premises and triggered applicability of the Army specification leading to rejection of the insured's product. In *Sentinel Management Co.*, asbestos contamination of the insured's premises damaged the functionality of rental property. Finally, in *General Mills, Inc*., contamination of the insured's property by an unapproved pesticide triggered application of a regulation prevented use of that property. In fact, in *General Mills, Inc*., the person that physically touched the insured's property was convicted of food adulteration and served a jail sentence. 622 N.W.2d at 150 n.1. In each of the three cases, the insured's property was physically touched and, in conjunction with a regulation or specification, the physical condition of the property rendered it unusable, resulting in the insured's loss. Absent the physical harm to the insured's property, there was nothing for the regulation or specification to control.

Source Food Tech., Inc. v. U.S. Fid. & Guar. Co., 465 F.3d 834 (8th Cir. 2006) (applying Minnesota law), demonstrates plaintiffs' conceptual error. In *Source Food Tech., Inc.*, the Eighth Circuit Court of Appeals found no coverage for the insured's extra expense and business income

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losses sustained after the United States Department of Agriculture prohibited the importation of beef products from the insured's Canadian supplier because of the potential for contamination from "mad cow disease." *Id.* at 834-36. The court rejected the insured's invocation of *General Mills, Inc.* and *Marshall Produce Co.* in support of their argument that the government regulation closing the border caused direct physical loss to its beef products. *Id.* at 836-37. The court distinguished *General Mills, Inc.* and *Marshall Produce Co.* because both cases involved physical damage to or contamination of the insured's property. *Id.* Once there is physical loss or damage, loss of use or function is relevant in determining the amount of loss, but loss of use or function in the absence of direct physical loss or damage is not itself covered. *Id.* at 838 (citing *Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005) (applying Minnesota law and distinguishing *Marshall Produce Co., Sentinel Mgmt. Co.,* and *General Mills, Inc.*) In the final analysis, the court reasoned that the insured's argument "would render the word 'physical' meaningless." *Id.* at 838.

Plaintiffs concede that despite numerous COVID-related claims against issuers issuing identical "all-risk" insurance policies, not one court in the United States has adopted their "no-touch" interpretation of the "direct physical loss of or damage to property" requirement. Defendant's brief cites many of these cases. (Midwest Family Mut. Ins. Co.'s Mem. of Law in Supp. of Mot. for J. on the Pleadings at 19-22.) Most recently, the Minnesota Federal District court rejected a claim virtually identical to plaintiffs'. In *Seifert v. IMT Ins. Co.*, Chief Judge Tunheim dismissed a hair salon's claim for lost business income resulting from the shuttering of the business following the issuance of Governor Waltz's Emergency Executive Orders. No. CV 20-1102 (JRT/DTS), 2020 WL 6120002 (D. Minn. October 16, 2020). The court held that "governmental action prohibiting the use of property, by itself, is not enough" to constitute "direct physical loss

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of or damage to property" as required by the subject insurance policy. *Id*., slip op. at *3. Rejecting plaintiff's argument that *General Mills, Inc.* supported his claim, the court held that, for there to be coverage, the authorities cited by plaintiff required a demonstration that the insured "properties were actually contaminated or damaged by the coronavirus."[9] *Id.*

Here, plaintiffs do not allege that the coronavirus, or anything else, physically harmed or physically changed their property or their products from what they were supposed to be. The Governor issued an order regulating certain business activity. The Governor's Executive Orders control the conduct of people and, quite literally, neither changed the physical condition of property nor regulated the property because of their damaged physical conditions as in the case trilogy they rely upon. Unlike the insureds' property in the Minnesota trilogy of cases cited above, plaintiffs' property was no different after the Governor's Executive Orders than it was before the Governor's Executive Orders. Plaintiffs' policy interpretation is rejected because it has no case support, contradicts the controlling Minnesota appellate cases, it is inconsistent with the plain meaning of the applicable policies, and it would render defendant's covering language—"direct physical loss or damage to property"—meaningless.

B. Plaintiffs' Claim is Also Barred by Policy Exclusions.

Assuming that plaintiff can successfully demonstrate application of the covering clause of the policies ("direct physical loss of or damage to property"), the court turns to policy exclusions

[9] Judge Tunheim appears to have conflated *General Mills, Inc.* with *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 256 Minn. 404, 98 N.W.2d 280 (1959). *Seifert v. IMT Insurance Co*., No. CV 20-1102 (JRT/DTS), 2020 WL 6120002, slip op. at *3 (D. Minn. October 16, 2020) (referring to the product contamination in *General Mills, Inc.* as "smoke" rather than pesticide). As already noted, the *General Mills, Inc.* court cited *Marshall Produce Co.* in support of its holding. 622 N.W.2d at 152. Judge Tunheim's conflation does not diminish the accuracy of his analysis. Whether it was the smoke on the insured's premises in *Marshall Produce Co.* or the contamination of General Mills' grain by an unapproved pesticide, the analogy is the same. The coverage threshold of "direct physical loss of or damage to property" requires a showing "that the insured's property [was] injured in some way." *General Mills, Inc.*, 622 N.W.2d at 152. Plaintiffs made no such showing in the instant cases.

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cited by defendant. As already noted, it is defendant's burden to demonstrate the applicability of a policy exclusion.

1. <u>The Virus Exclusion Bars Plaintiffs' Claim</u>.

As already noted in the Statement of Facts, the insurance policies issued by defendant state that the company "will not pay for loss or damage caused *directly or indirectly* by . . . [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (Businessowners Coverage Form (Form BP 00 03 01 10) at 15 of 49, 17 of 49 (emphasis added).) The policy also states "that [s]uch loss or damage is *excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss*." *Id*. (emphasis added).

Plaintiffs do not dispute that their losses were at least indirectly caused by a virus. Instead, plaintiffs argue that the virus exclusion is inapplicable because their losses were directly caused by the Governor's Executive Orders and not the COVID-19 virus that prompted the Governor's action. (Mem. of Law in Supp. of Pl.s' Joint Mot. for J. on the Pleadings and in Opp'n to Def.'s Mot. for J. on the Pleadings at 18.) Without citing any authority, plaintiffs' argue that excluding coverage due to the reason behind the Governor's Executive Orders (the coronavirus) goes "too far afield" and is too causally remote to bar coverage, particularly in light of the fact that there was no coronavirus present at any of the plaintiff properties. (*Id*. at 18-19.)

Plaintiffs' argument disregards both the "directly or indirectly" phrase and the anti-concurrent cause clause in the exclusionary language. The anti-concurrent cause provision resolves the "too far afield" proposition against plaintiffs and requires exclusion of the loss, if it ever was included.

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"When an anti-concurrent loss provision is triggered . . . courts need not inquire into which of a covered or excluded loss was the proximate cause of the damage, but simply exclude coverage where any portion of the loss was caused or contributed to by an excluded loss." *Ken Johnson Properties, LLC v. Harleysville Worchester Summary Ins. Co*., No. CIV. 12-1582 (JRT/FLN), 2013 WL 5487444, slip op. at *12 (D. Minn. 2013) (tracing the history and scope of anti-concurrent cause provisions in Minnesota insurance law). Here, plaintiffs do not dispute that the coronavirus is part of the causal chain that prompted the Governor to issue his Executive Orders, which resulted in their business losses. Any debate about the applicability of the virus exclusion ends with the anti-concurrent cause clause because the exclusion extends "to all losses where a virus is part of the causal chain." *Seifert*, 2020 WL 6120002, slip op. at *4 (finding that the virus exclusion precludes a coverage claim based upon the Executive Orders of Governor Walz; quoting *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.,* No 20-11655, 2020 WL 5258484, slip op. at *8-9 (E.D. Mich. Sept. 3, 2020)).

In addition to the exclusion of coverage due to the application of the virus exclusion in *Seifert*, defendant cited other cases around the country that applied the virus exclusion to bar insurance claims prompted by government-imposed restrictions related to the novel coronavirus. (Midwest Family Mut. Ins. Co.'s Mem. of Law in Supp. Of Mot. For J. on the Pleadings at 24.) Plaintiffs cited no authority for their assertions. The exclusion bars all coverage claims.

2. <u>The Ordinance or Law Exclusion Bars Plaintiffs Claim</u>.

The insurance policy issued by defendant to plaintiffs also has an ordinance or law exclusion and the exclusion is subject to the same anti-concurrent cause language as the virus exclusion. (Businessowners Coverage Form (Form BP 00 03 01 10) at 15 of 49; Minnesota Endorsement (Form BP 01 25 07 13) at 1 of 7.) The provision excludes coverage for losses caused

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directly or indirectly by "[t]he enforcement or compliance with any ordinance or law . . . regulating the construction, use or repair of any property." (*Id.*)

Plaintiffs' opposition to application of the ordinance or law exclusion is based solely on the premise that defendant cannot demonstrate that the Governor's Executive Orders are "laws." (Mem. of Law in Supp. of Pl.s' Joint Mot. for J. on the Pleadings and in Opp'n to Def.'s Mot. for J. on the Pleadings at 19.) However, there is no arguing that the Governor's Executive Orders must be regarded as laws. The orders were issued pursuant to authority delegated directly by the legislature. Under Chapter 12 of Minnesota Statutes, titled the Minnesota Emergency Management Act of 1996, the legislature delegated certain emergency authority to the Governor. Minn. Stat. § 12.01 (2020) ("This chapter may be cited as the 'Minnesota Emergency Management Act of 1996.'"). In performing his or her emergency management duties, the Governor is authorized to:

> make, amend, and rescind the necessary orders and rules to carry out the provisions of this chapter and section 216C.15 within the limits of the authority conferred by this section, with due consideration of the plans of the federal government and without complying with sections 14.001 to 14.69, but no order or rule has the effect of law except as provided by section 12.32.

Minn. Stat. § 12.21, subd. 3(1) (2020). According to section 12.32:

> Orders and rules promulgated by the governor under authority of section 12.21, subdivision 3, clause (1), when approved by the Executive Council and filed in the Office of the Secretary of State, have, during a national security emergency, peacetime emergency, or energy supply emergency, the full force and effect of law.

Id. § 12.32. Plaintiffs do not dispute the fact that the Governor issued the Executive Orders at issue pursuant to the authority of section 12.32 and that they were approved by the Executive Council and filed in the Office of the Secretary of State. The Executive Orders say as much. By statute, Executive Orders issued under section 12.32 are no different than laws passed by the legislature. Violation of one of the Executive Orders may even subject violators to criminal prosecution. *See, e.g.*, Emergency Executive Order 20-04 ¶ 7 (Mar. 16, 2020) (citing Minn. Stat.

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§ 12.45 ("a person who willfully violates [an] order having the force and effect of law issued under authority of this chapter is guilty of a misdemeanor")). As such, the court concludes that the ordinance or law exclusion bars coverage for all claims.

3. <u>The Consequential Loss Exclusion Bars Plaintiffs Claim</u>.

The Complaints allege that plaintiffs were "unable to use certain food inventory before the date by which such inventory could be safely used." (Compls ¶ 12.) The Complaints further allege that plaintiffs "sustained lost business income while the Restaurant's operations have been suspended and will continue to lose income under the Limited Dining Order's restrictions." (*Id.* ¶ 13.)

Plaintiffs' description of their losses implicate the consequential loss exclusion in the subject insurance policies. The exclusion states that the insurer "will not pay for any loss or damage caused by or resulting from . . . [d]elay, loss of use or loss of market." (Businessowners Coverage Form (Form BP 00 03 01 10) at 17 of 49 to 19 of 49.) Loss of use is precisely what plaintiffs claim in connection with both the food inventory losses and lost business during the complete or partial suspension of operations.

Plaintiffs' response to the exclusion is to suggest that it applies only to a complete loss of use as opposed to a partial loss of use.[10] (Mem. of Law in Supp. of Pl.s' Joint Mot. for J. on the Pleadings and in Opp'n to Def.'s Mot. for J. on the Pleadings at 19-20.) However, the plain language of the three words "loss of use" quite literally encompass any loss of use. The rule requiring strict construction of policy exclusions is not a license to bypass the plain and ordinary meaning of the words used in the exclusion.

[10] Plaintiffs also argue that the phrase "loss of market" is ambiguous. (Mem. of Law in Supp. of Pl.s' Joint Mot. for J. on the Pleadings and in Opp'n to Def.'s Mot. for J. on the Pleadings at 20.) However, the phrase is not relied upon by defendant so neither the phrase nor plaintiffs' characterization of the phrase need to be considered by the court.

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Plaintiffs' position is also inconsistent with cases interpreting the exclusion. In *Witcher Const. Co. v. Saint Paul Fire & Marine Ins. Co.*, the Minnesota Court of Appeals considered an all-risk policy's loss of use exclusion in the context of lost use of a construction site that was shut down while the site was inspected following a nearby natural gas explosion. 550 N.W.2d 1, 2-3 (Minn. Ct. App.), *rev. denied* (Minn. 1996). Assuming applicability of the insuring clause, the court found that the "loss of use" exclusion precluded coverage because it "substantively embodies a contractual limitation on the insurer's liability for the consequences of an otherwise insured loss." *Id*. at 5-6 (citations omitted). *See also Harvest Moon Distributers, LLC v. S.-Owners Ins. Co.*, No. 620CV1026ORL40DCI, 2020 WL 6018918, slip op. at *6 (M.D. Fla. Oct. 9, 2020) (loss of use exclusion in all-risk policy precluded coverage for loss of beer that spoiled due to customer's coronavirus-related closure). Based upon the clear and unambiguous language of the exclusion and the case law construing the exclusion, plaintiffs' loss of use and product expiration claims are barred even if it is assumed that plaintiffs can demonstrate applicability of the covering clause.

4. <u>The Other Types of Loss Exclusion Bars Plaintiffs Inventory Loss Claim</u>.

The subject insurance policies contain an Other Types of Loss exclusion that excludes any claims based on "[r]ust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself." (Businessowners Coverage Form (Form BP 00 03 01 10) at 19 of 49.) Defendant contends that the exclusion bars recovery for plaintiffs' expired food inventory claim because the food deteriorated based upon the common and ordinary meaning of the term. (Midwest Family Mut. Ins. Co.'s Mem. of Law in Supp. Of Mot. For J. on the Pleadings at 25-26 (quoting Deterioration, Merriam-Webster Online Dictionary, www.merriam-webster.com/dictionary/deterioration (last accessed Sept. 16, 2020)

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("deterioration" means "the action or process of being impaired or inferior in quality, functioning, or condition: the state of having deteriorated.").))[11]

Plaintiffs' disagree with defendant's premise, arguing that the food inventory never went bad and it never became spoiled. Thus, the loss did not occur "because the items 'deteriorated,' it is because the Governor's Orders prevented Plaintiffs from using the items during the timeframe when their use was permissible." (Mem. of Law in Supp. of Pl.s' Joint Mot. for J. on the Pleadings and in Opp'n to Def.'s Mot. for J. on the Pleadings at 20.)

The Complaints in this case allege that the restaurants "were unable to use certain food inventory before the date by which such inventory could be safely used." (Compls. ¶ 12.) Plaintiff's assertion that the food inventory could not be used safely leads to the inescapable conclusion that the food was impaired or inferior in quality, i.e., deteriorated. To suggest that the exclusion is inapplicable because the food was not literally rancid is a distinction without a difference in the context of the common and ordinary meaning of the word "deterioration" in the exclusion. The exclusion is plainly applicable.

However, the court rejects defendant's view that the policy's additional $10,000 in "spoilage coverage" bolsters its argument for application of the exclusion. There is simply no basis to suggest that all of the expired food inventory met the definition of "perishable stock." Based on the present record, it is not known if any of the expired food was "maintained under controlled conditions for its preservation" or that the food was "susceptible to loss or damage if the controlled conditions change." (Ultimate Property Advantage Endorsement (Form

[11] To discern the ordinary meaning of words and terms used in insurance policies, Minnesota courts regularly consult dictionaries. *See, e.g., Carlson v. Allstate Ins. Co.,* 749 N.W.2d 41, 45 (Minn. 2008); *Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 480 N.W.2d 368, 375 (Minn. Ct. App.) ("Dictionaries are helpful insofar as they set forth the ordinary, usual meaning of the words."), *rev. denied* (Minn. 1992).

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MFMBP035 09-18) at 4 of 7.) Even dry goods stored at room temperature on an ordinary shelf have an expiration date.[12]

5. The Acts or Decisions Exclusion.

The final exclusion relied upon by defendant is the Acts or decisions exclusion. The policies exclude coverage for "[a]cts or decisions, including the failure to act or decide, of any person, group, organization or governmental body." (Businessowners Coverage Form (Form BP 00 03 01 10) at 19 of 49).) In their briefs and arguments, plaintiffs stand behind the assertion in the Complaints that the most immediate and direct cause of their claimed losses are the acts and decisions of one or more governmental bodies—Executive Orders issued and approved by Minnesota's Governor and Executive Council. Nevertheless, plaintiffs ask the court to "decline" application of the exclusion "because it is inherently ambiguous and overbroad." (Mem. of Law in Supp. of Pl.s' Joint Mot. for J. on the Pleadings and in Opp'n to Def.'s Mot. for J. on the Pleadings at 21 (citations omitted).)

The Acts or Decisions exclusion has received a lukewarm reception by courts asked to consider its application. Some courts apply the exclusion to deny some or all of a claim with little fanfare. *See, e.g., Worldwide Sorbent Prod., Inc. v. Invensys Sys., Inc.,* No. 1:13-CV-252, 2014 WL 12597394, slip op. at *10-12 (E.D. TX Jul. 31, 2014) (distinguishing cases finding acts or decisions exclusion ambiguous but excluding only part of the claim); *Johnson Gallagher Magliery, LLC v. Charter Oak Fire Ins. Co.*, No. 13 CIV. 866 (DLC), 2014 WL 1041831, slip op. at *7-8 (S.D.N.Y. Mar. 18, 2014) (Mayor of New York ordered evacuation of power plant due to Superstorm Sandy causing loss of power to insured; subsequent water damage established covered

[12] It should be noted that even the additional spoilage coverage has a special exclusion for claims occurring when the spoilage results from a "Governmental order." (Ultimate Property Advantage Endorsement (Form MFMBP035 09-18) at 3 of 7.)

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direct physical loss or damage but the loss of power prior to the flood was not a covered loss and it was excluded by the acts or decisions exclusion because the loss was caused entirely by the Mayor's decision); *Scottsdale Ins. Co. v. Sally Grp., LLC*, No. 4:11-CV-011184, 2012 WL 1144577, slip op. at *13 (S.D. TX Apr. 4, 2012) (Acts or Decisions exclusion excluded loss that occurred when landlord ordered tenant to destroy its inventory); *Torres Hillside Country Cheese, LLC v. Auto-Owners Ins. Co.*, No. 308824, 2013 WL 5450284, slip op. at *4-7 (Mich. Ct. App. Oct 1, 2013) (unpublished) (Listeria discovered in some of plaintiff's cheese; the state and federal government confiscated, disposed of, and required the recall of contaminated and uncontaminated cheese and required plaintiff cease and desist from the production of cheese; dismissal of plaintiff's claim based on the Acts or Decisions exclusion affirmed on appeal); *Cytopath Biopsy Lab., Inc. v. U.S. Fid. & Guar. Co.*, 774 N.Y.S.2d 710, 6 A.D.3d 300, 301, (N.Y. App. Div. 2004) (laboratory ordered shut down after discharge of noxious fumes caused tenants to become ill but court held the real loss was refusal of authorities to permit resumption of operations until proper permits obtained; insured's claim dismissed based on lack of "direct physical loss to property" and the Acts or Decisions exclusion).

Other courts view the exclusion as inherently ambiguous and overbroad. They note that if the exclusion were applied literally "it would exclude coverage from all acts and decisions of any character of all persons, groups, or entities," which would "leave the insurance policy practically worthless." *Jussim v. Massachusetts Bay Ins. Co.*, 33 Mass. App. Ct. 235, 238-39, 597 N.E.2d 1379, 1381-82 (1992), *aff'd as amended*, 414 Mass. 24, 610 N.E.2d 954 (1993); *accord Mettler v. Safeco Ins. Co. of Am.*, No. C12-5163 RJB, 2013 WL 231111, slip op. at *6 (W.D. Wash. Jan. 22, 2013) (quoting *Jussim*); *Auto Owners Ins. Co. v. Hansen Hous., Inc.*, 604 N.W.2d 504, 512 (S.D. 2000) (quoting *Jussim*); *Rapid Park Indus. v. Great N. Ins. Co.*, No. 09 CIV. 8292 JSR, 2010 WL

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4456856, slip op. at *5 n.11 (S.D.N.Y. Oct. 15, 2010) (coverage denied but not based on acts or decisions exclusion; quoting *Jussim*); *aff'd on other grounds*, 502 Fed. App'x 40 (2d Cir. 2012).

The court agrees with defendant that, in the context of the present claim, the issue of ambiguity need not arise. *See, e.g., Bd. of Regents of the Univ. of Minn. v. Royal Ins. Co.*, 517 N.W.2d 888, 892 (Minn. 1994) ("Because a word has more than one meaning does not mean it is ambiguous. The sense of a word depends on how it is being used; only if more than one meaning applies within that context does ambiguity arise."). In the context of the present case, there is no dispute that plaintiffs' losses were caused by the acts and decisions of Minnesota's Governor and the Minnesota Executive Council. If the exclusion is to be given any effect at all, the instant losses should fall within it. However, the acts and discussions at issue only underscore what occurred in cases like *Johnson Gallagher* and *Magliery Cytopath Biopsy Lab., Inc.* There, the exclusion was superfluous because the covering language did not bring the loss into coverage in the first place. Either way, plaintiffs' losses were not covered. The same is true in the instant case. The claims simply are not covered.

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