

[Kirsch v. Aspen American Ins. Co.](#)

Year: 2021

Court: United States Court of Appeals for the Sixth Circuit

Case Number: 21-1038

In its brief, UP address the issue of physical loss of or damage to the property of Dr. Kirsch’s dental practice during the COVID-19 pandemic. This case presents a basic lesson in textualism. Aspen promised to insure business income if Dr. Kirsch suffered “physical loss of or damage to” his property. The disjunctive “or” shows that there are two bases for coverage: “physical loss of” the property or “physical damage to” the property. When a deadly pandemic prevents someone from physically using property as it was intended, ordinary people would describe that as a “physical loss of” the property.

Unhappy with the policy’s ordinary meaning, Aspen argues that the policy requires “tangible alteration” to trigger coverage. Aspen is wrong. The policy nowhere uses that (or any other) more specific term to displace the broad, ordinary meaning of “physical loss.” Despite this, the district court accommodated Aspen’s request to narrow coverage to “tangible alteration.” The Court needs to correct this error. The basic rule of textualism is that words are given their natural meaning, not a narrow or contrived one. A. SCALIA & B. GARNER, *READINGLAW* §62, at 355-58 (2012) (explaining that courts “have only to say what the very words mean”). This is crucial for insurance cases. Insurers write all of the forms and, as a result, terms are strictly construed against them, not in their favor. The text must control, even if the insurer can contrive a narrow reading of broad language. Courts are not authorized to construe language in the insurer’s favor based on a conviction that the insurer could not have meant what it said. What Aspen said in its policy of insurance is clear: It insured “physical loss of” Dr. Kirsch’s property and not just “tangible damage to” that property. UP employs these arguments to enforce its argument:

- I. Decades of case law warned insurers that this language is broad and not limited to tangible damage.
- II. The better-reasoned Covid-19 cases follow the consensus.

III. Universal Image ignores the plain language of the policy and is error under Michigan law.

IV. Aspen's exclusions do not apply.

This brief was authored pro bono by George M. Plews, Gregory M. Gotwald, and Christopher E. Kozak of Plews Shadley Racher & Braun LLP and John Ellison of Reed Smith