No. 21-1173

In the
United States Court of Appeals
for the Seventh Circuit

BRADLEY HOTEL CORP., doing business
as Quality Inn & Suites Bradley,

Plaintiff-Appellant,

v.

ASPEN SPECIALTY INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:20-cv-04249.
The Honorable **Charles P. Kocoras**, Judge Presiding.

BRIEF OF DEFENDANT-APPELLEE
ASPEN SPECIALTY INSURANCE COMPANY

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-1173

Short Caption: Bradley Hotel Corp. v. Aspen Specialty Insurance Co.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature /s/ Yvette Ostolaza Date: 2/15/2021

Attorney's Printed Name: Yvette Ostolaza

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Signature: /s/ Yolanda Garcia Date: 2/15/2021

Attorney's Printed Name: Yolanda Garcia

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature /s/ Mitchell Alleluia-Feinberg Date: 2/15/2021

Attorney's Printed Name: Mitchell Alleluia-Feinberg

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Mark Blocker Date: 2/15/2021

Attorney's Printed Name: Mark Blocker

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Virginia A. Seitz Date: 4/16/2021

Attorney's Printed Name: Virginia A. Seitz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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JURISDICTIONAL STATEMENT

Defendant-Appellee Aspen Specialty Insurance Company ("Aspen") does not dispute the jurisdictional facts set forth by Plaintiff-Appellant Bradley Hotel Corp. ("Bradley Hotel" or "the Hotel"). Appellant's jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

1. Does Bradley Hotel's property insurance policy—which requires "direct physical loss of or damage to property" as a prerequisite to coverage—insure against lost income resulting from governmental orders issued during the COVID-19 pandemic?

2. Does the Loss of Use Exclusion in Bradley Hotel's insurance policy bar the Hotel's claims for losses stemming from COVID-19 government closure orders that temporarily affected the Hotel's ability to use its property for certain purposes?

3. Does the Ordinance or Law Exclusion in Bradley Hotel's insurance policy independently bar the Hotel's claims for losses stemming from COVID-19 government closure orders that temporarily affected the Hotel's ability to use its property for certain purposes?

STATEMENT OF THE CASE

I. Nature of the Case

This dispute, between a hotel and a property insurer, is one of thousands that have arisen nationwide following numerous COVID-19 closure orders. Business owners like Bradley Hotel have made claims on their property insurance policies

seeking to recover lost income and have filed lawsuits when those claims were denied. The overwhelming majority of courts that have examined the issue—including multiple federal and state courts in Illinois—have determined as a matter of law that a property insurance policy requiring "direct physical loss of or damage to property" does not cover mere loss of use. Specifically, those courts have consistently recognized that "physical" loss of or damage to property must be tangible; there must be some actual, physical alteration or permanent dispossession of property to trigger coverage.

Bradley Hotel has not alleged such loss or damage under its property insurance policy here. Complaint Ex. A ("Policy") (Dkt. No. 1-1).[1] The Hotel alleges only that it lost income due to executive orders issued by the Governor of Illinois requiring businesses to cease non-essential operations and causing guests to cancel their reservations. Complaint ("Compl.") p. 10 (Dkt. No. 1). On this basis, the District Court granted Aspen's motion to dismiss. This is the Hotel's appeal from that order.

In the alternative, Aspen argued below and urges here that two exclusions in the Policy provide additional independent bases on which to affirm the dismissal of Bradley Hotel's claims. First, the Policy contains a "loss of use" exclusion that bars coverage when a loss of use is not caused by *physical* harm to the property, but is instead alleged as a standalone harm in its own right. Policy p. 36. Second, the Policy contains an "ordinance or law" exclusion that bars coverage when an ordinance restricts the use of property in situations where no property has suffered

[1] The page citations to the District Court record in this brief refer to the page numbers generated by that court's CM/ECF system, which are located at the top of each page.

physical harm. Policy p. 34. Aspen contends that these express exclusions independently preclude coverage and support affirmance of the decision below.

II. Course of Proceedings and Decision Below

Aspen agrees with Bradley Hotel's recitation of the Course of Proceedings.

In its decision granting Aspen's motion to dismiss (App. pp. A-1-9, hereafter "Order"), the District Court held that the Policy "requires some sort of harm to the property" beyond the loss of use alleged in the Complaint. *Id.* p. A-7. In so doing, the District Court relied on multiple decisions from the District Courts of Illinois applying Illinois law to COVID-related business losses. The District Court observed that "the overwhelming majority of courts" had concluded that no coverage existed under similar insurance policy language, and cited two decisions in which the Northern District of Illinois had held that the loss of use stemming from COVID-19 closure orders does not, as a matter of law, constitute loss that is both "direct" and "physical." *Id.* p. A-6-7 (citing *T&E Chi. LLC v. Cincinnati Ins. Co.*, No. 20 C 4001, 2020 WL 6801845, at *4 (N.D. Ill. Nov. 19, 2020), and *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690, 693-94 (N.D. Ill. 2020)). Explaining that "Bradley Hotel does not allege that the suspension of operations was the result of any physical loss of or damage to the property," or "that the physical property was changed or altered in any way," the Court held that the Policy did not provide coverage for Bradley Hotel's alleged losses under two Policy provisions—the Business Income and Extra Expense provisions. Order p. A-7.

The District Court also rejected Bradley Hotel's claims under a third coverage, the Civil Authority provision of the Policy. The court again noted that "Bradley does not allege any damage to any property in [its] vicinity," as the Policy required, and that "access to the hotel was not prohibited because it was expressly exempt from the [Governor's] Executive Orders." *Id.* p. A-8. In its brief in this Court, Bradley Hotel has abandoned its claim under Civil Authority coverage.

The District Court did not separately address Bradley Hotel's claim for declaratory relief, although the court noted that the claim was based on the same coverage-related facts as the breach of insurance contract claim. *Id.* p. A-4-5. Bradley Hotel offers no support for its declaratory relief claim in its opening brief appeal and has thus waived it. *See United States v. Spaeni*, 60 F.3d 313, 317 (7th Cir. 1995) (appellant "waiv[ed] [an] argument by failing to raise it in his initial brief").

III. Statement of Relevant Facts

A. *The Closure Orders*.

In response to the outbreak of COVID-19, Illinois Governor J.B. Pritzker issued proclamations and orders requiring public health precautions, including a temporary prohibition of on-premises food consumption for hotels and a temporary prohibition of gatherings of 50 people or more (the "Closure Orders"). Compl. p. 5; Appellant's Br. p. 6. The Closure Orders did not prohibit Bradley Hotel from continuing to provide lodging—a central function of any hotel business—or carry-out dining. Compl. p. 5; Appellant's Br. p. 6.

B. *The Policy*.

Bradley Hotel contends that the Business Income and Extra Expense provisions of the Policy apply to its alleged losses and asserts breach of contract claims as to Aspen's denial of coverage under each of the two provisions. Compl. pp. 13-16. Both provisions require, as a predicate for coverage, that losses be caused by direct physical loss or damage:

- Business Income: "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 insured] premises . . . [and such] loss or damage must be caused by or result from a Covered Cause of Loss . . . ."
- Extra Expense: "Extra Expense means necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no *direct physical loss or damage* to property caused by or resulting from a Covered Cause of Loss."
- The term "period of restoration" is further defined as a period that
    - begins "72 hours after the time of direct physical loss or damage for Business Income Coverage" or "[i]mmediately after the time of direct physical loss or damage for Extra Expense Coverage," and
    - ends on the date "when the property . . . should be repaired, rebuilt or replaced," or "when business is resumed at a new permanent location."

Policy pp. 25, 33 (emphases added). The principal question presented here is whether Bradley Hotel's claimed economic losses were caused by "direct physical loss of or damage to" the insured property.

The Policy also contains exclusions, which can preclude coverage even when a loss or cause of loss would otherwise come within the Policy's scope of coverage:

- "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 in any sequence to the loss."

- "The enforcement of or compliance with any ordinance or law: (1) Regulating the construction, use or repair of any property; or (2) Requiring the tearing down of any property, including the cost of removing its debris."

- "This exclusion, Ordinance Or Law, applies whether the loss results from: (a) An ordinance or law that is enforced even if the property has not been damaged . . ." (hereinafter, the "Ordinance or Law Exclusion").

- "We will not pay for loss or damage caused by or resulting from any of the following: . . . Delay, loss of use or loss of market" (hereinafter, the "Loss of Use Exclusion").

Policy pp. 34-36, §§ B.1, § B.2. In the District Court, Aspen argued that even if it were assumed (incorrectly) that the Policy otherwise provided coverage, these exclusions would independently preclude that coverage and require dismissal of Bradley Hotel's claims. The District Court did not reach these issues.

SUMMARY OF THE ARGUMENT

Bradley Hotel's property insurance Policy with Aspen provides coverage for "direct physical loss of or damage to" covered property. The District Court held that Bradley Hotel had failed to plead facts establishing such loss or damage and accordingly dismissed the Complaint. This Court should affirm.

This Court has previously explained that under Illinois law, "'physical' generally refers to tangible as opposed to intangible damage." *Windridge of Napierville Condo. Ass'n v. Phila. Indem. Ins. Co.,* 932 F.3d 1035, 1040 (7th Cir. 2019) (quoting *Advance Cable Co., LLC v. Cincinnati Ins. Co.*, 788 F.3d 743, 746-47 (7th Cir. 2015)). The Illinois Supreme Court has held that "the term 'physical injury' unambiguously connotes damage to tangible property causing an alteration in appearance, shape, color or in other material dimension." *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 757 N.E.2d 481, 502 (Ill. 2001). Bradley Hotel's claim is for loss of use—

not for any physical loss of or damage to insured property. Bradley Hotel's reading of "direct physical loss" to include "loss of use" contradicts the plain language of the Policy, particularly when viewed in the context of the Policy as a whole. This includes the Policy's "period of restoration" clause, which specifies that coverage lasts only until damaged or lost property is repaired, rebuilt or replaced. A property whose use has merely been restricted does not require repair, rebuilding or replacement. Further, as the District Court observed, interpreting the relevant policy language to foreclose coverage for mere loss of use is consistent with decisions issued by the "overwhelming majority" of courts nationwide confronted with similar COVID-related claims made under the same policy language. Order p. A-6; *infra* at 5 (citing authorities).

This reading of the relevant Policy language is also consistent with the nature and history of property insurance. As the National Association of Insurance Commissioners has explained, property insurance policies "were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19," and imposing coverage for such claims "would create substantial solvency risks for the sector, [and] significantly undermine the ability of insurers to pay other types of claims." *NAIC Statement on Congressional Action Relating to COVID-19*, Nat'l Ass'n of Insurance Commissioners (Mar. 25, 2020), http://tinyurl.com/y59fdw4m. Indeed, forcing insurers to shoulder the enormous costs of the global pandemic would not only imperil the insurance industry but

would also prevent insurers from fulfilling their obligations to policyholders for losses that are covered.

Bradley Hotel's claims contravene both this larger insurance framework and Illinois insurance law specifically interpreting the term "physical." Rather than addressing these key issues, Bradley Hotel relies principally on two recent decisions, both of which represent a minority position and neither of which shows that Bradley Hotel is entitled to coverage under Illinois law. The first decision, issued by a federal court in Illinois, cited no Illinois state law on the critical question of what constitutes "physical" loss. *In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2964, 2021 WL 679109, at *8-9 (N.D. Ill. Feb. 22, 2021). The second, issued by a state trial court in North Carolina, similarly failed to engage with any state law precedent on the meaning of "physical." *N. State Deli, LLC v. The Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507, at *3 (N.C. Super. Oct. 9, 2020).

Bradley Hotel also contends that if its loss of income is not covered, then the term "physical loss of" will have no meaning distinct from "physical damage to." This is wrong too. Courts nationwide have held that "physical loss of" *does* have a distinct meaning—but that meaning is theft, displacement or permanent dispossession rather than the loss of use Bradley Hotel alleges here.

This Court can affirm the District Court's decision on any basis supported by the record. In the District Court, Aspen demonstrated that Bradley Hotel's claims fail both because they fall outside the cited coverage provisions and because the alleged

losses come within two unambiguous Policy exclusions. The Loss of Use Exclusion bars coverage for business losses that result from loss of use alone, unaccompanied by property damage or loss. This exclusion both bars coverage on its own terms and confirms, consistent with the argument above, that loss of use cannot constitute direct physical loss of or damage to property. The Ordinance or Law Exclusion bars coverage for business losses caused by compliance with a law that restricts the use of property; this exclusion unambiguously extends to losses caused by the Closure Orders. On the basis of these exclusions, or on the basis of Bradley Hotel's failure to plead direct physical loss of or damage to property, this Court should affirm dismissal.

ARGUMENT

I. Standard of Review

This Court's review of the District Court decision granting Aspen's motion to dismiss is *de novo*. *See Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc.*, 536 F.3d 663, 667 (7th Cir. 2008)). While the Court must accept Bradley Hotel's factual allegations as true, a pleading that offers "labels and conclusions" and "naked assertions devoid of further factual enhancement" does not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Bradley Hotel is required to plead facts supporting coverage under the Policy, rather than "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678.

II. Bradley Hotel Has Not Alleged A Loss Covered By Its Policy

The issues before this Court all involve insurance policy interpretation, and "[t]he interpretation of an insurance policy is a matter of state law." *Westfield Ins. Co. v. Vandenberg*, 796 F.3d 773, 777 (7th Cir. 2015). Aspen filed its motion to dismiss based on the assumption that Illinois law governs.[2] Under Illinois law, "[a]n insurance policy is a contract, and the general rules governing the interpretation of other kinds of contracts also govern the interpretation of insurance policies." *Hobbs v. Hartford Ins. Co. of the Midwest*, 823 N.E.2d 561, 564 (Ill. 2005). Unambiguous policy language "will be applied as written, unless it contravenes public policy." *Id.* And "[a]lthough 'creative possibilities' may be suggested, only reasonable interpretations [of ambiguous language] will be considered." *Id.* (internal citations omitted); *see also Founders Ins. Co. v. Munoz*, 930 N.E.2d 999, 1004 (Ill. 2010) ("A policy provision is not rendered ambiguous simply because the parties disagree as to its meaning."). In Illinois, as elsewhere, courts must construe an insurance policy as a whole. *Westfield Ins. Co. v. Rose Paving Co.*, No. 12 C 40, 2014 WL 866119, at *2 (N.D. Ill. Mar. 5, 2014); *Sanders v. Ill. Union Ins. Co.*, 157 N.E.3d 463, 467 (Ill. 2019).

A. *"Loss of Use" Is Not "Physical Loss of or Damage to" Property.*

Applying these principles of policy interpretation is fatal to Bradley Hotel's claims, which rest on the insupportable premise that loss of use constitutes direct physical loss of property. The Hotel alleged that it suffered losses as a result of two

[2] Aspen expressly reserved the choice of law question in the event its motion was not granted. *See* Memorandum in Support of Motion to Dismiss p. 4 n.3 (Dkt. No. 14).

Executive Orders issued by Illinois Governor Pritzker to address the COVID-19 pandemic: Order 2020-07, which prohibited in-person dining and gatherings of 50 or more people, and Order 2020-10, which required non-essential businesses to cease operating. Order p. A-2. Although Bradley Hotel was an essential business and was therefore allowed to continue providing lodging and food delivery and carry-out services, it alleged that it suffered business losses due to its inability to provide in-person dining and to host large events. *Id.* Bradley Hotel bears the burden of demonstrating "that its claim falls within the coverage of [the] insurance policy." *Addison Ins. Co. v. Fay*, 905 N.E.2d 747, 752 (Ill. 2009). As the District Court correctly held, Bradley Hotel failed to carry this burden.

1. Bradley Hotel failed to allege the tangible harm to property required by Illinois law.

On appeal, Bradley Hotel rests solely on the two coverage provisions set forth above—the Business Income and Extra Expense provisions. *Supra* at 5. These provisions, however, cover only those losses that are caused by "direct physical loss of or damage *to property*." Policy p. 25 (emphasis added). Under Illinois law, insurance provisions that predicate coverage on direct physical loss or damage "unambiguously require[] some form of actual, physical damage to the insured premises to trigger coverage." *Sandy Point Dental*, 488 F. Supp. 3d at 693. As this Court observed in interpreting, under Illinois law, a policy covering "direct physical 'loss'" to property, "an alteration in appearance constitutes physical, tangible damage." *Windridge*, 932 F.3d at 1041 n.4. The Court further noted that "[t]he Illinois Supreme Court has explained that 'the term "physical injury"

unambiguously connotes damage to tangible property causing an alteration in appearance, shape, color, or in other material dimension.'" *Id.* (quoting and citing *Eljer*, 757 N.E.2d at 502.)

Notably, three Illinois state courts have now addressed the meaning of the policy language "direct physical loss of or damage to property" in the context of losses resulting from COVID-19 closure orders. Consistent with the analysis above, each of the three held that such policy language does not cover such losses. *Steve Foley Cadillac, Inc. v. N.Y. Marine & Gen. Ins. Co.*, No. 20-L-6774, slip op. at 5 (Ill. Cir. Ct. Feb. 19, 2021) (relying on *Eljer* and dismissing policyholder's claims, explaining that policy language "expressly requir[ing] a 'physical' injury to trigger coverage . . . unambiguously contemplates an 'alteration' to the covered property," and that "[t]emporary contamination of a surface by bacteria and viruses appearing naturally in the environment does not constitute physical damage to that surface within the usual and ordinary meaning of that phrase."); *Jaewook Lee d/b/a Evanston Grill v. State Farm Fire & Cas. Co.*, No. 20 CH 4589, slip op. at 5-6 (Ill. Cir. Ct. Jan. 13, 2021) (applying *Eljer* and holding that no "accidental direct physical loss" to property occurs if the plaintiff's restaurant did not "suffer[] an 'alteration in appearance, shape, color or other material dimension' as a result of the Closure Orders"); Rep't. of Videoconference Proceedings, *It's Nice, Inc. d/b/a Harold's Chicken Shack #83 v. State Farm Fire & Cas. Co.*, No. 20 L 547, at 31:4-9 (Ill. Cir. Ct. Sept. 29, 2020) (likewise holding that policyholder suffered no covered loss in connection with COVID-19 closures).

In addition to these Illinois state courts, numerous federal district courts applying Illinois law have held that property insurance policies covering "direct physical loss of or damage to property" do not cover business losses resulting from government closure orders issued to halt the spread of COVID-19. For example, in *TJBC v. Cincinnati Insurance*, 20-CV-815-DWD, 2021 WL 243583 (S.D. Ill. Jan. 25, 2021), the court addressed substantially similar policy language and held that under Illinois law, "direct physical loss . . . unambiguously requires some form of tangible loss or damage to the physical dimension of Plaintiff's property." *Id.* at *4. Conversely, "[m]ere loss of use or diminishment in value of Plaintiff's business without underlying tangible damage or loss to the business property or structure is not enough to trigger coverage under the policy." *Id.*; *see also T&E Chi. LLC*, 2020 WL 6801845 at *4 (collecting authorities holding that no coverage existed under similar policy provisions from Illinois and other jurisdictions); *Sandy Point Dental*, 488 F. Supp. 3d at 693 (interpreting similar language in insurance policy and holding that its unambiguous terms required that income loss be caused by physical harm to the premises: "[t]he words 'direct' and 'physical,' which modify the word 'loss,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure").

Illinois courts' interpretation of the relevant policy language is far from unique. Numerous courts from jurisdictions across the nation have likewise construed

property insurance policies requiring that income losses flow from "direct physical loss of or damage to" covered property to preclude recovery in the absence of such tangible injury or loss. This has been the case in pre-COVID decisions as well as in decisions arising from the pandemic. In the pre-pandemic setting, courts have repeatedly rejected claims for income losses caused by government shutdowns or other events that curtailed a policyholder's use of property without physically harming that property. *E.g.*, *Dickie Brennan & Co., Inc. v. Lexington Ins. Co.*, 636 F.3d 683, 685-86 (5th Cir. 2011) (business interruption losses incurred by operators of New Orleans restaurants due to mandatory evacuation of city before hurricane were not caused by direct physical loss or damage); *United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 129 (2d Cir. 2006) (airline's lost earnings due to shutdown of airport after 9/11 did not result from physical damage to its property); *Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005) (inability of insured's suppliers to function after a power failure did not constitute physical loss or damage to insured; rejecting policy interpretation that "would mean that direct physical loss or damage is established whenever property cannot be used for its intended purpose"); *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834 (8th Cir 2006) (closing of border to beef products did not cause direct physical loss to beef products treated as if they were physically contaminated; a contrary result would render the word "physical" meaningless); *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 879 (11th Cir. 2020) (dust and debris from road construction and reduced vehicle traffic did not cause direct physical loss or damage to

restaurant's property), *cert. denied*, 20-998, 2021 WL 1163753 (U.S. Mar. 29, 2021).[3] These authorities are consistent with the treatment of the term "physical" in the leading insurance law treatise. *See* 10A *Couch on Insurance* § 148.46 (3d ed. 2019) ("The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal, and thereby to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property").

Courts examining similar policy language in the COVID context have reached the same result, rejecting claims for income losses not caused by property damage or loss. *See, e.g., Chief of Staff LLC v. Hiscox Ins. Co. Inc.*, No. 20 C 3169, 2021 WL 1208969, at *4 (N.D. Ill. Mar. 31, 2021) ("[T]he policy's Business Income provision does not apply where, as here, a government closure order prohibits access to a business's premises for reasons unconnected to any change in the physical condition of those premises, or in the physical condition or location of property at those premises."); *Zajas, Inc. v. Badger Mut. Ins. Co.*, No. 20-CV-1055-DWD, 2021 WL 1102403, at *3 (S.D. Ill. Mar. 23, 2021) ("[T]he Covid-19 virus does not cause 'direct

[3] *See also, e.g.*, *Simon Mktg., Inc. Co., v. Gulf Ins. Co.*, 149 Cal.App.4th 616, 624 (2007) ("detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property" was not compensable under a property insurance policy); *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 751 N.Y.S.2d 4, 8-9 (N.Y. App. Div. 2002) (physical loss or damage did not include loss of use when insured's theatre became inaccessible due to nearby street closure); *Trinity Indus., Inc. v. Ins. Co. of N. Am.*, 916 F.2d 267, 270-71 (5th Cir. 1990) ("The language 'physical loss or damage' strongly implies that there was an initial satisfactory state that was changed by some external event into an unsatisfactory state—for example, the car was undamaged before the collision dented the bumper.").

physical loss or damage to' covered property under a business income loss policy."); *Jaewook Lee*, No. 20 CH 4589, slip op. at 6 (restaurant that lost business by complying with COVID-19 closure orders suffered "an economic loss," not a "physical" loss); *supra* at 12-13 (citing additional Illinois authorities).[4]

Here, as a matter of law, Bradley Hotel has not pled that it lost income as a result of "direct physical loss" because it has not alleged "actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure." *Sandy Point Dental*, 488 F. Supp. 3d at 693. Bradley Hotel contends only that it was "deprived of using" certain portions of its business premises "for the business purposes for which they were intended." Appellant's Br. p. 14. As the District Court correctly held—and consistent with Illinois insurance law and the overwhelming weight of authority—this does not come within the plain and ordinary meaning of "direct physical loss." Order p. A-6-7.

2. "Direct physical loss" has a meaning distinct from "direct physical damage," but that meaning is not loss of use.

Notwithstanding these copious authorities, Bradley Hotel argues that "physical loss" must encompass loss of use because otherwise "physical loss" would have the

[4] Courts outside of Illinois have reached the same result, including in cases filed against Aspen. *E.g.*, *R.T.G. Furniture Corp. v. Hallmark Speciality Ins. Co.*, No. 8:20-cv-2323-T-30AEP, 2021 WL 686864 (M.D. Fla. Jan. 22, 2021); *Berkseth-Rojas v. Aspen Am. Ins. Co.,* No. 3:20-CV-0948-D, 2021 WL 101479 (N.D. Tex. Jan. 12, 2021); *Kirsch v. Aspen Am. Ins. Co.*, No. 20-11930, 2020 WL 7338570 (E.D. Mich. Dec. 14, 2020); *Emerald Coast Rests., Inc. v. Aspen Specialty Ins. Co.*, No. 3:20cv5898-TKW-HTC, 2020 WL 7889061 (N.D. Fla. Dec. 18, 2020); *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-CIViv-WILLIAMS/TORRES, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020); *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-CV-00087-KS-MTP, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020).

same meaning as "physical damage"—which is contrary to principles of contract construction. Appellant's Br. at 13-14. The Hotel is wrong. Numerous courts have considered and rejected precisely this argument, explaining that "physical loss" indeed has a meaning separate from "physical damage"—but that meaning is theft, displacement, or dispossession rather than loss of use. A recent decision from the Northern District of Illinois provides a full explanation:

> [Plaintiff] is correct that the phrases "direct physical loss" and "direct physical … damage" are best read so as not to completely overlap and thereby render one or the other superfluous. But it does not follow that mere loss of use—without any tangible alteration to the physical condition or location of property at the insured's premises—falls within the meaning of either phrase. Read naturally, the two phrases can be read to exclude loss of use without rendering either superfluous. To illustrate, consider a thief who attempts to steal a desktop computer. If the thief succeeds, the computer is "physical[ly] los[t]" but not necessarily "physical[ly] … damage[d]." If the thief cannot lift the computer, so instead of stealing it takes a hammer to its monitor in frustration, the computer would be "physical[ly] … damage[d]" but not "physical[ly] los[t]." Yet if the thief were only to change the password on the system so that employees could not log in, there would be neither "physical … damage" nor "physical loss," though the computer would be unusable for some while. The Business Income provision might cover the first two cases, but it does not cover the third.

Chief of Staff, 2021 WL 1208969, at *3. Other decisions—from federal courts both in Illinois and elsewhere—are in accord. *See Crescent Plaza Hotel Owner L.P. v. Zurich Am. Ins. Co*, No. 20 C 3463, 2021 WL 633356, at *3 (N.D. Ill. Feb. 18, 2021) (rejecting the same argument by a policyholder and stating that "[t]he plain wording of the phrase [direct physical loss or damage] requires either a permanent disposition of the property due to a *physical* change ('loss'), or *physical* injury to the property requiring repair ('damage')") (emphasis in original); *Real Hosp.,* 2020 WL

6503405, at *5; *Henry's La. Grill, Inc. v. Allied Ins. Co. of Am.*, No. 1:20-CV-2939-TWT, 2020 WL 5938755, at *5 (N.D. Ga. Oct. 6, 2020).

Bradley Hotel appears to suggest that this Court's decision in *Advance Cable* requires a different result. Appellant's Br. p. 13. Again, the Hotel is wrong. This Court in *Advance Cable* stated that it is "sensible" to assign "loss" and "damage" different meanings. 788 F.3d at 747. That proposition is not in dispute here: Bradley Hotel and Aspen agree that the two terms have different meanings. The dispute is over what "direct physical loss" means, and on this point, *Advance Cable* supports *Aspen's* position: This Court specifically emphasized there that the cosmetic damage for which the policyholder sought coverage was covered because it was tangible damage. *Id.*; *see also TJBC*, 2021 WL 243583, at *4 ("[N]othing in *Advance Cable* suggests that this alteration to the character of Plaintiff's business can be covered as a direct physical loss in the absence of some tangible damage or loss.").

For all of these reasons, the District Court properly dismissed Bradley Hotel's claims for coverage. "Direct physical loss of or damage to property" is a requirement for coverage under both of the Policy provisions at issue—the Business Income and the Extra Expense provisions. *Supra* p. 5 (quoting Policy). Because Bradley Hotel has failed to allege the required damage or loss, it has also failed to state a claim for coverage.

B. *Additional Policy Language Confirms That Bradley Hotel Has Not Alleged Direct Physical Damage Or Loss.*

Other language in the Policy provides additional significant support for the District Court's interpretation of the "direct physical loss of or damage to property" requirement. Under the Policy, coverage is limited to the "period of restoration," which begins 72 hours after the loss of or damage to property, and which critically ends when the property is "repaired, rebuilt or replaced." *Supra* p. 5 (quoting Policy). The strong implication of this language is that a mere loss of use of the property does not result in coverage; the language makes clear that a covered loss is one that requires "repair[], "rebuil[ding]," or "replace[ment]." *Bend Hotel Dev. Co., LLC v. Cincinnati Ins. Co.*, No. 20 C 4636, 2021 WL 271294, at *3 (N.D. Ill. Jan. 27, 2021) ("[P]laintiff has not alleged any physical alteration or structural degradation to the premises, nor the need to 'repair,' 'replace,' or 'restore' any physical element of the property in order to reopen for business."); *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 332 (S.D.N.Y. 2014) (use of "repair" and "replace" in period of restoration clause "contemplate[s] physical damage to the insured premises as opposed to loss of use of it").

Bradley Hotel acknowledges that it was not required to physically repair, rebuild, or replace any property. *See* Appellant's Br. p. 18. It nevertheless seeks to reconcile its loss of use theory with this language in two ways. First, the Hotel argues that the "period of restoration" clause is not part of the "explicit definition of coverage." Appellant's Br. p. 17. But that is not responsive to the point made by the numerous courts that have held that this language supports the conclusion that the

Policy requires a tangible impact on covered property. Under Illinois law, an insurance policy must be interpreted as a whole, with all policy provisions borne in mind. *Sanders*, 157 N.E.3d at 467. It is therefore highly instructive that under the "period of restoration" provision, "direct physical loss or damage" to property is necessarily of such a nature that the property can be repaired, rebuilt, or replaced. A property that has not suffered a tangible impact—like Bradley Hotel's property—does not need to be repaired, rebuilt, or replaced.

Second, Bradley Hotel argues that its loss of use theory is consistent with dictionary definitions of the terms "repair" ("to restore to a sound or healthy state") and "replace" ("to restore to a former place or position"). Appellant's Br. pp. 17-18. Based on these definitions, Bradley Hotel contends that the "period of restoration" clause in the Policy describes the period during which the Hotel experienced a "loss of physical use of covered property"—a loss that will be somehow repaired or replaced "when Governor Pritzker permits full *use* of Bradley Hotel's on-premises restaurant and convention center." *Id.* at 17-18 (emphasis added). But this reading of "repair" and "replace" is highly unnatural and, moreover, is inconsistent with the context of the "period of restoration" clause. Bradley Hotel ignores the fact that the period of restoration begins only after a "direct physical loss or damage" to property, as well as the fact that the Policy at issue is a property insurance policy. Blinding itself to these realities, Bradley Hotel invokes metaphorical uses of "repair" and "replace" (repairing a relationship, for example) that have no purchase in the

context in which the terms appear in the Policy.[5] Nothing physical will be either repaired or replaced when the Governor's Orders are lifted. And restoration of use is not fairly characterized as "repairing" or "replacing" the loss of use, let alone "repairing" or "replacing" a property.[6]

Not surprisingly, Illinois courts have consistently rejected the strained interpretation Bradley Hotel offers of the period of restoration clause and the critical terms repair, rebuild, and replace. In addition to *Bend Hotel*, cited above, *see, e.g.*, *Chief of Staff*, 2021 WL 1208969, at *3 ("The uneasy fit between the 'period of restoration' language and [plaintiff's] reading of the Business Income provision confirms that the better reading of the provision is the one that requires some physical change to the condition or location of property at the insured's premises."); *TJBC*, 2021 WL 243583, at *5 ("Without underlying tangible damage or loss to the insured's property, no repair, rebuilding, replacement, or permanent location would outwardly be required, rendering [the defined "period of restoration" clause] unclear

[5] *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, No. 20C2806, 2021 WL 767617 (N.D. Ill. Feb. 28, 2021), on which Bradley Hotel relies, similarly interprets the term "repair" metaphorically, without regard for the context in which the term appears—context that makes plain that the period of restoration clause concerns physical rather than metaphorical impacts on property. *Id.* at *12 (referring to "repairing a relationship or repairing one's health").

[6] Bradley Hotel cites *Oregon Shakespeare Festival* for the proposition that a period of restoration ends "when the insured can resume normal operations at the described premises." Appellant's Br. p. 19 (purporting to paraphrase *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247 (D. Or. June 7, 2016), *vacated on other grounds*, 2017 WL 1034203, at *1 (D. Or. Mar. 6, 2017)). The Hotel omits the fact that the property at issue in that case sustained *physical* impacts—soot and ash from wildfires that covered an outdoor theater. The period of restoration did not end because a closure order was lifted. The period of restoration ended when the physical impacts had been remedied: the smoke in the air had cleared, the physical space had been cleaned, and air filters had been replaced.

at best. Such strained construction here, and elsewhere in the policy, would likely offend the rules of construction and interpretation the Court is bound to abide.") (internal citations omitted).

Likewise, courts in other jurisdictions nationwide have rejected interpretations of the "period of restoration" clause akin to what Bradley Hotel proposes here. *E.g. Real Hosp.*, 2020 WL 6503405, at *6 (rejecting as a "contorted interpretation" policyholder's contention that property was "repaired" in connection with COVID-19 closure orders); *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, No. 1:20-CV-275-JB-B, 2020 WL 6163142, at *8 (S.D. Ala. Oct. 21, 2020) ("[A] reasonable insured would understand a 'repair' to become necessary only upon a tangible alteration of property"); *DeMoura v. Cont'l Cas. Co.*, No. 20 CV 2912 NGGSIL, 2021 WL 848840, at *5 (E.D.N.Y. Mar. 5, 2021) ("Because something must first be physically damaged in order to be 'restore[d] to a sound or good condition' or 'fix[ed]' it follows from the plain language of the Policy that 'physical loss of or damage to' requires a change to the real, tangible property at issue for coverage to apply.").

Read correctly, the "period of restoration" clause corroborates the interpretation of the "direct physical loss of or damage to property" clause that the "overwhelming majority" of courts have adopted in cases arising from the pandemic: Mere loss of use resulting from government closure orders issued in response to COVID-19 is insufficient to trigger coverage under the relevant Policy language.

C. *Property Insurance Policies Were Not Designed to Address Losses From Global Pandemics or Other Highly Correlated Risks*.

The National Association of Insurance Commissioners has explained that policies insuring against "direct physical loss of or damage to property" "were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19," and that imposing coverage for such claims "would create substantial solvency risks for the sector, [and] significantly undermine the ability of insurers to pay other types of claims." *NAIC Statement on Congressional Action Relating to COVID-19*, Nat'l Ass'n of Insurance Commissioners (Mar. 25, 2020), http://tinyurl.com/y59fdw4m. These policies instead provide coverage for losses resulting from wind, hail, fire, theft and vandalism, and other physical loss of and damage to property. Property insurance is valued and priced to cover this kind of non-correlated loss—non-correlated meaning that the events that trigger loss do not affect all or a large fraction of the insured population simultaneously. *See* Press Release, Am. Prop. Cas. Ins. Ass'n, APCIA Releases New Business Interruption Analysis (Apr. 6, 2020), available at https://www.apci.org/media/news-releases/release/60052/ ("APCIA Press Release"). By the same token, as courts have recognized in concluding that property insurance policies do not cover COVID-related income losses, a key feature of such policies is that they cover property losses—not the kinds of general business or income losses that may be triggered by macro events affecting massive numbers of policyholders simultaneously across the nation or around the globe. *Real Hosp.*, 2020 WL 6503405, at *5 n.9.

Pandemics are highly correlated risks and very difficult to insure without government intervention or participation in the market. The premiums charged for property insurance were not valued to address the world-wide correlated losses caused by the global pandemic. Reading policies drafted to cover "direct physical loss or damage to property" to cover business losses resulting from the COVID-19 pandemic both stretches the policy language beyond any reasonable reading and ignores the industry context in which property insurance policies are issued. APCIA Press Release, *supra*. Because property insurers did not establish premiums with this extra-textual risk in mind and because the closures resulting from the global pandemic are so widespread and costly, expanding property insurance to cover losses resulting from the pandemic would bankrupt the industry. *Id.* The consequences of an incorrect reading of the coverage language in property insurance policies would be catastrophic not only for the industry but also for policyholders, who purchased and are entitled to coverage for "direct physical loss of or damage to property," such as from theft, fire, wind and hail—but who would be left unprotected if their insurers became insolvent.

For all these reasons, the District Court correctly dismissed Bradley Hotel's claims for coverage of losses caused by the Closure Orders under the Business Income provision, which critically requires that loss of business income be caused by "direct physical loss of or damage to" property. Policy p. 25.

D. *Bradley Hotel's Claims Fail Under The Extra Expense Provision.*

The District Court correctly dismissed Bradley Hotel's claim under the Extra Expense provision—the only other coverage provision that remains in play—for the

same reasons that it dismissed the Hotel's claims under the Business Income provision. Both provisions contain the same critical requirement of "direct physical loss or damage to property"—which Bradley Hotel cannot satisfy. Specifically, the Extra Expense provision states: "Extra expense means necessary expenses you incur during the '*period of restoration*' that you would not have incurred if there had been no *direct physical loss or damage to property* caused by or resulting from a Covered Cause of Loss." Policy at 25 (emphases added). Because Bradley Hotel has alleged no direct physical loss or damage and no property in need of repair or restoration, it cannot recover for its losses under either the Business Income or the Extra Expense provision.

E. *Bradley Hotel's Arguments And Authorities Are Contrary To Illinois Law.*

Bradley Hotel addresses neither Illinois law governing the interpretation of the term "physical" in insurance policies nor the numerous decisions, from state and federal courts in Illinois and elsewhere, holding that restrictions imposed by COVID-19 closure orders do not constitute the "direct physical loss or damage" required by property insurance policies. The Hotel instead relies heavily on the Northern District of Illinois' decision in *Society Insurance* and a North Carolina trial court order, *North State Deli*. Neither shows that Bradley Hotel is entitled to coverage.

In *Society Insurance*, the district court ruled, in a single decision, on motions to dismiss and for summary judgment in three actions, governed by the law of four states—Wisconsin, Minnesota, Tennessee and Illinois. 2021 WL 679109, at *1, *6.

The court noted that the "key interpretive question" in the motions before it was "primarily a question of law." *Id.* at *5. After first addressing questions of causation—which are not at issue here—the court turned to the meaning of "direct physical loss." Unaccountably, the court failed to discuss or cite the Illinois Supreme Court's *Eljer* decision; indeed, the district court cited no Illinois law at all on the meaning of "direct physical loss." The court observed that "direct physical loss" must have a meaning distinct from "direct physical damage" but failed to account for the meaning that has consistently been ascribed to "direct physical loss" both before and during the pandemic—theft, displacement, or permanent dispossession, each of which is a tangible harm, *see supra* at 16-17.

After considering the effect of COVID-19 closure orders on policyholders' ability to use their properties, the *Society Insurance* court concluded that the meaning of "direct physical loss" was "genuinely in dispute" and thus needed to be considered by a jury. *Id.* at *9-10. The court did not attempt to reconcile that conclusion with its earlier statement that policy interpretation was "primarily a question of law." In the present case, notably, Bradley Hotel and Aspen *agree* that the meaning of "direct physical loss" is a legal rather than a jury question. Appellant's Br. p. 8; *supra* at 10.

Society Insurance is thus an outlier in multiple respects, including both the district court's treatment of policy interpretation as a jury question and the district court's failure to credit meanings of "direct physical loss" that are distinct from "direct physical damage"—but are equally distinct from mere loss of use. Most

significantly, the district court in *Society Insurance* analyzed the term "physical" in a legal vacuum, citing neither *Eljer* nor any other Illinois (or Seventh Circuit) law interpreting the term. Unsurprisingly, in the weeks since *Society Insurance* was issued, two district courts have already declined to follow it. *See Town Kitchen LLC v. Certain Underwriters at Lloyd's, London,* No. 20-22832-CIV-MORENO, 2021 WL 768273, at *5 & n.1 (S.D. Fla. Feb. 26, 2021); *Food for Thought Caterers Corp. v. Sentinel Ins. Co.*, Ltd., No. 20-cv-3418 (JGK), 2021 WL 860345, at * 4 n.2 (S.D.N.Y Mar. 6, 2021).

Bradley Hotel's second principal authority, *North State Deli*, is even less persuasive. The court there held that direct physical loss "includes the loss of use or access to covered property even where that property has not been structurally altered." 2020 WL 6281507, at *3. The court did not cite a single state or federal decision in support of that conclusion—neither pre-COVID law nor the copious decisions in the COVID context holding that loss of use is *not* sufficient to establish direct physical loss or damage. Like the district court in *Society Insurance*, moreover, the court in *North State Deli* concluded that "direct physical loss" must include loss of use if it is to have a meaning distinct from "direct physical damage," but did not consider the various situations in which a property may suffer a direct physical loss without damage—theft, displacement, permanent dispossession—or the many decisions recognizing that this is the case. Most critically, the *North State Deli* opinion is contrary to North Carolina authority. *See Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp.*, 486 S.E.2d 249 (N.C. Ct. App. 1997) (inability

to access insured dealership in a snowstorm was not a covered business income loss). Not surprisingly, courts have declined to follow *North State Deli. Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.*, Ltd., No. 20-CV-04783-SK, 2021 WL 141180, at *5 n.1 (N.D. Cal. Jan. 13, 2021) ("Due to its lack of analysis and the vast majority of courts contradicting this finding, the Court finds *North State Deli* is not persuasive.").[7]

Bradley Hotel finally seeks to turn the decisions arrayed against it to its advantage by arguing that the differing conclusions reached by courts considering the "direct physical loss" requirement in the context of COVID-19 closure orders prove that the term is ambiguous—and hence that it must be construed in the Hotel's favor. Appellant's Br. p. 19. But a difference in judicial outcomes does not establish ambiguity, and courts applying Illinois or Seventh Circuit law have rejected precisely the argument Bradley Hotel makes here, against the background of developing law on COVID-related insurance issues. "[D]isagreement among courts regarding the interpretation of an insurance policy provision does not, by itself, render the provision ambiguous." *Chief of Staff*, 2021 WL 1208969, at *4 (citing *Erie Ins. Grp. v. Sear Corp.*, 102 F.3d 889, 894 (7th Cir. 1996), and collecting authorities); *see also, e.g.*, *Smeez, Inc. d/b/a Big Daddy's Disco Diner v. Badger Mut.*

[7] In addition to *Society Insurance* and *North State Deli*, Bradley Hotel relies heavily on dictionary definitions of "loss" and "physical." Appellant's Br. pp. 14-15. The Hotel overlooks the fact that this Court does not write on a blank slate in ruling on state-law insurance issues under its diversity jurisdiction. The Court is guided instead by the rulings of the Illinois appellate courts, and principally by the Illinois Supreme Court. *Eljer*—and this Court's own application of *Eljer* in *Windbridge*—are the guideposts in interpreting the term "physical," which critically qualifies the term "loss" in the Policy. Dictionary definitions cannot supersede that law.

Ins. Co., No. 20-CV-1132-DWD, slip op. at 9 (S.D. Ill. Mar. 22, 2021) ("Despite Plaintiff's suggestion that the use of 'physical loss of' . . . creates an ambiguity, there is ample case law to the contrary, and courts should 'not strain to find an ambiguity where none exists.'") (citing *Hobbs*, 823 N.E.2d at 564).

Case law applying precedent to new factual situations does not always develop uniformly, but that scarcely proves ambiguity. Critically, moreover, the ultimate authority on the interpretation of insurance policies under Illinois law—the Illinois Supreme Court—has held that the term "physical" "*unambiguously* connotes damage to tangible property causing an alteration in appearance, shape, color or in other material dimension." *Eljer*, 757 N.E.2d at 502 (emphasis added). Bradley Hotel's ambiguity argument cannot create coverage here. The Court should affirm dismissal on the ground that Bradley Hotel's alleged losses are not covered.

III. Bradley Hotel's Alleged Losses Are Excluded.

The Court may also affirm dismissal on the alternative ground that the Hotel's losses fall within unambiguous Policy exclusions. Two exclusions apply here, and each independently bars coverage and hence disposes of the Hotel's breach of contract claim.

The Loss of Use Exclusion. Consistent with the coverage provisions, the Policy excludes "damage caused by or resulting from . . . delay, *loss of use* or loss of market . . . ." Policy p. 36 (emphasis added). This clause unambiguously excludes coverage for "loss of use," which is the basis of Hotel's claim. As discussed above, the Hotel pled no facts showing that its property was physically lost or damaged.

Instead, the Hotel alleged that it was unable to use the property for certain functions: The Hotel "suspended in-dining service" and "suspended all operations at the convention center." Compl. p. 10.

The Loss of Use exclusion accordingly bars the Hotel's claim. Multiple state and federal courts interpreting similar loss of use exclusions in connection with policyholder claims for COVID-related income losses have held that these exclusions unequivocally bar coverage. *E.g.*, *Salon XL Color & Design Grp., LLC v. W. Bend Mut. Ins. Co.*, No. CV20-11719, 2021 WL 391418, at *4 (E.D. Mich. Feb. 4, 2021) (loss of use exclusion bars coverage of COVID-related income losses under business income and extra expense provisions); *Whiskey River on Vintage, Inc. v. Illinois Cas. Co.*, No. 4:20-CV-185-JAJ, 2020 WL 7258575, at *18 (S.D. Iowa Nov. 30, 2020) (consequential losses provision, which contains the loss of use exclusion, "unambiguously states that [the insurer] will not pay for loss or damage resulting from a loss of use," and thus precludes coverage for COVID-related losses); *Paul Glat MD, P.C. v. Nationwide Mut. Ins. Co.*, No. CV 20-5271, 2021 WL 1210000, at *6-7 (E.D. Pa. Mar. 31, 2021) ("unequivocal language" of loss of use exclusion "makes it clear" that the insurer will not "pay for any loss or damage caused by a loss of use"; exclusion accordingly bars coverage of COVID-related income losses); *Visconti Bus Serv., LLC v. Utica Nat'l Ins. Grp.*, No. EF005750-2020, 2021 WL 609851, at *13 (N.Y. Sup. Ct. Feb. 12, 2021) ("even if coverage were somehow found to exist," loss of use exclusion "would potentially create an insurmountable barrier to [the policyholder's] recovery" of COVID-related losses).

In applying loss of use exclusions, these courts have also recognized the significance of the exclusions in adjudicating a prior issue—that is, whether coverage exists in the first place under that require "direct physical loss" of property. These courts have recognized that the existence of a loss of use exclusion confirms that the "direct physical loss" requirement in the same policy cannot be satisfied by mere loss of use. *Glat*, 2021 WL 1210000, at *5 n.25 (loss of use exclusion "underscores our conclusion that the policy contemplates only physical damage"); *Visconti*, 2021 WL 609851, at *13 (loss of use exclusion "undermines [the policyholder's] primary argument in this case, i.e., that a loss of use or functionality of its property is a covered loss under the policy").

Other courts have made the same observation, even when, having determined that no coverage exists, they do not reach the question of whether the exclusion bars coverage. "[C]onstruing the policy's requirement of 'direct physical loss or damage' to include the mere loss of use of insured property with nothing more *would negate the 'loss of use' exclusion*." *Ballas Nails & Spa, LLC v. Travelers Cas. Ins. Co. of Am.,* No. 4:20-CV-115-CDP, 2021 WL 37984, at *4 (E.D. Mo. Jan. 5, 2021) (emphasis added); *see also, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 842 (N.D. Cal. 2020) (loss of use exclusion shows that direct physical loss requirement "was not intended to encompass a loss where the property was rendered unusable without an intervening physical force.").

The Loss of Use Exclusion in the Hotel's Policy, like the exclusions in the cited cases, both bars coverage in itself and provides further support for the

interpretation of "direct physical loss" discussed above. Consistent with Illinois law, and further supported by the Loss of Use exclusion, the "direct physical loss" requirement in the Policy mandates a tangible impact on property that goes beyond loss of use. That again is fatal to the Hotel's claims.

The Ordinance or Law Exclusion. The Hotel's alleged losses also fall within the Ordinance or Law Exclusion, which excludes losses caused by the "enforcement of any ordinance or law regulating the construction, use or repair of any property." Policy at 34. Illinois courts apply such exclusions as written. *Cohen Furniture Co. v. St. Paul Ins. Co. of Ill.*, 214 Ill. App. 3d 408 (Ill. App. Ct. 1991). Illinois law explicitly rejects the contention that application of an ordinance or law exclusion would impermissibly swallow coverage, and similarly rejects the contention that such exclusions are contrary to public policy. *Id.* at 413.

The Closure Orders plainly qualify as ordinances or laws sufficient to trigger this exclusion. *See, e.g., Wright v. State Farm Fire & Cas. Co.*, 555 F. App'x 575, 578 (6th Cir. 2014) ("Ordinances and laws are characterized by their being created and enforced by a governmental authority . . . . For example, Webster's Third defines an 'ordinance' as 'an authoritative decree or direction' or 'a public enactment, or law promulgated by governmental authority'"). Governor Pritzker issued the Closure Orders pursuant to an Illinois statute granting the Governor the power to "control ingress and egress to and from a disaster area . . . and the occupancy of premises therein" and to "perform and exercise any other functions, powers, and duties as may be necessary to promote and secure the safety and

protection of the civilian population." 20 ILCS 3305/7. Governor Pritzker's Executive Orders have the force of law, and Bradley Hotel cannot credibly allege that Illinois businesses were not bound to comply with those Orders. *Cf. Plotkin v. Ryan*, No. 99 C 53, 1999 WL 965718, at *6 n.6 (N.D. Ill. Sept. 29, 1999) (Executive Order issued by Governor Ryan in 1999 "has the force of law"), *aff'd,* 239 F.3d 882 (7th Cir. 2001).

The Hotel's alleged losses fall squarely within the scope of the ordinance or law exclusion. At least two federal courts to date have recognized the application of this exclusion in the COVID-19 context. *Newchops Rest. Comcast LLC v. Admiral Indemn. Co.*, No. 20-1949, 2020 WL 7395153, at *7 (E.D. Pa. Dec. 17, 2020) (under "unequivocal" language of the governmental order exclusion, no coverage for business losses caused by compliance with COVID-19 related orders that regulated the use of property and had the force of law; dismissing complaint with prejudice); *Ceres Enters., LLC v. Travelers Ins. Co.*, No. 1:20-CV-1925, 2021 WL 634982, at *5 (N.D. Ohio Feb. 18, 2021) ("[W]here the loss arises from an ordinance or law . . . the policy does not provide coverage"); *see also Ira Stier, DDS, P.C. v. Merchants Ins. Grp.*, 7 N.Y.S.3d 365, 367 (N.Y. App. Div. 2015) (where dental practice could not operate due to ordinance requiring certificate of occupancy, Ordinance or Law exclusion precluded coverage for business income losses).[8] If the Court reaches the

[8] The lack of more numerous authorities on this issue in the COVID-19 context likely results from the fact that courts have overwhelmingly determined that policyholders cannot state a claim for lost income under the relevant coverage provisions, and therefore rarely reach the exclusion. *E.g., Michael Cetta, Inc. v. Admiral Indem. Co.*, No. 20 Civ. 4612 (JPC), 2020 WL 7321405, at *13 n.5 (S.D.N.Y. Dec. 11, 2020) ("Because the Court concludes that [plaintiff] fails to establish entitlement to coverage under the Policy, it need not reach the

Ordinance or Law Exclusion, it should hold that the exclusion independently bars coverage.

CONCLUSION

For all of these reasons, the Court should affirm the District Court's dismissal of Bradley Hotel's Complaint for failure to state a claim upon which relief can be granted.

question of whether [the ordinance or law exclusion] would apply"); *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, Np. 5:20-CV-04265-BLF, 2020 WL 7696080, at *6 (N.D. Cal. Dec. 28, 2020) (declining to reach the ordinance or law exclusion "[s]ince the Court has already found that [the plaintiff] fails to plead facts demonstrating coverage").

Dated: April 16, 2021

Respectfully submitted,

By: /s/ *Yvette Ostolaza*

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CERTIFICATE OF COMPLIANCE

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Dated: April 16, 2021

/s/ *Yvette Ostolaza*
Yvette Ostolaza

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2021, the Brief of Defendant-Appellee Aspen Specialty Insurance Company was filed with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF System. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF System.

/s/ *Yvette Ostolaza*
Yvette Ostolaza

Index of Unpublished Decisions

Attachment 1

IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

IT'S NICE, INC., d/b/a HAROLD'S CHICKEN SHACK #83, an Illinois Corporation,	)	
Plaintiff,	)	
-vs-	)	No. 20 L 547
	)	2-615 Motion
STATE FARM FIRE AND CASUALTY CO.,	)	
Defendant.	)	

REPORT OF VIDEOCONFERENCE PROCEEDINGS

had at the hearing of the above-entitled cause, before the Honorable BRYAN S. CHAPMAN, DuPage County, Illinois, recorded via Zoom and transcribed by Kristin M. Barnes, Certified Shorthand Official Court Reporter, commencing on the 29th day of September, 2020.

Kristin M. Barnes, CSR
Official Court Reporter
CSR No. 084-004026

PRESENT:

FRANKLIN LAW GROUP, by
MR. RYAN ENDSLEY,

appeared on behalf of the Plaintiff;

SUDEKUM, CASSIDY & SHULRUFF, CHTD., by
MS. FLORENCE M. SCHUMACHER and
MR. FREDERICK J. SUDEKUM, III,

appeared on behalf of the Defendant.

THE COURT: All right. Good morning, Counsel.

MR. ENDSLEY: Good morning, your Honor.

THE COURT: All right. This is 20 L 547, It's Nice, Inc. versus State Farm Fire and Casualty.

We come on for a 2-615 motion in connection with It's Nice's claim for coverage under the policy.

I've had a chance to read the motion, the corresponding briefing, and I know there had been some motions for leave to file supplemental authority. I have had a chance to look at those motions.

I assume both parties are okay with each side submitting their respective -- their respective briefs in support of their -- their respective authority in support of their positions.

Is that a fair characterization?

MR. ENDSLEY: Yes, your Honor. For It's Nice, at least.

THE COURT: Sure.

MS. SCHUMACHER: State Farm as well, your Honor, there's no objection.

THE COURT: All right. Why don't we go ahead and have the parties state their names for the record.

MS. SCHUMACHER: Sure.

Florence Schumacher and Rick Sudekum here on

behalf of State Farm.

THE COURT: Uh-huh.

MR. ENDSLEY: Ryan Endsley on behalf of It's Nice, Inc.

THE COURT: Okay. What I'd like to do here, guys, I have spent considerable time with the -- with the courtesy copies. I've got my tabs. Like I said, I've read the authority. I've read the additional authority submitted.

I don't necessarily need a regurgitation of the positions already taken in the briefs. I feel like I have adequately familiarized myself with the parties' positions.

I do want to give the parties a chance to make their record here. I appreciate the issue and that it's kind of a fastly moving issue through the courts right now, and, as a result, I want to give the parties a chance a make their record.

That said, I don't necessarily need, you know, sort of, your Honor, this is how insurance policies work. I mean, tell me whatever you want to tell me. I may have a question or two for the parties, but I'll let you make your record first.

State Farm, it's your motion. I'll let you

go ahead if there's anything you want to add.

MS. SCHUMACHER: Sure, your Honor.

I am going to briefly run through our argument again, trying to sort of work in some of those cases that have come in more recently.

I understand that the court is familiar with insurance policies in general, so we won't -- hopefully won't belabor you with too much elementary insurance law here.

Obviously, the plaintiffs know -- or the court knows that the plaintiff is seeking to recover for a business interruption loss resulting from the COVID-19 pandemic and the executive orders.

In our view, there are basically two main barriers to plaintiffs being able to state a cause of action. The first is the lack of accidental direct physical loss and the second is the virus exclusion.

The way I look at these, your Honor, it's sort of like -- the lack of accidental direct physical loss is like a 10-foot hurdle and the virus exclusion is like a brick wall. So even if the plaintiffs could plead accidental direct physical loss, which they can't, they're going to run right into the virus exclusion and there's not going to be any coverage for

that reason either.

THE COURT: That was my -- that was the one thing I wondered a little bit about in reading your briefing, more the structure of your brief.

MS. SCHUMACHER: Right.

THE COURT: You led with the virus exclusion, and, to my mind, there's an insuring agreement here as a preliminary matter and we only get to the virus exclusion if the court finds that there is, in fact, accidental direct physical loss to the property in the first instance.

You would agree with that?

MS. SCHUMACHER: I would, your Honor.

THE COURT: Okay.

MS. SCHUMACHER: You know, the court is familiar -- it's the trigger of coverage. I mean, just like in a life insurance policy, until you have the death of the insured, there's no coverage to begin with.

It's the same for these policies. They're property policies, so their triggering coverage is accidental direct physical loss. You know, you can't just skip this part. It's the trigger of coverage. It's something that the plaintiff has the burden of

proof on.

So, in this case, the covered property is the restaurant property, so the first question is, where is the accidental direct physical loss pleaded, and our response, obviously, is that it isn't.

So, you know, just looking briefly at the complaint, you know, they allege that there was no virus on the property and their accidental direct physical loss argument is based on loss and use.

But, you know, my first point is, it has to be accidental direct physical loss, and I think it's undisputed that there was no difference to this property physically on the day before these executive orders were issued than there was on the day after, so physically the property was exactly the same.

So where's the loss? Where's the loss they're arguing? They're saying that loss of use is sufficient, that they couldn't use the property in the same way, and that somehow that constitutes accidental direct physical loss to the property, and we disagree with that position.

So we believe that the Illinois law and all these cases that have recently come out correctly hold that loss of use of property without any physical

change to that property cannot constitute accidental direct physical loss.

THE COURT: Mr. Endsley, at the risk of stealing your thunder, I'm going to ask Ms. Schumacher why don't you go ahead and respond to the western district of Missouri cases that were cited by It's Nice where it looks like some district courts in the western district have found, you know, sort of a lack of definition in the policy for physical damage or loss of -- you know, what are the factual distinctions in those cases, if any --

MS. SCHUMACHER: Right, right.

THE COURT: -- as to why the court should not find those cases persuasive here as opposed to some of the cases you've cited?

MS. SCHUMACHER: Sure.

So the first thing I would say, the court says there are courts in the western district of Missouri. What we actually have is one court -- it's the same judge in the two cases -- who has gone essentially the other way on this accidental direct physical loss question.

Those cases are factually distinguishable on two main grounds. The first is that the plaintiffs in

those cases argue that they had virus on the premises. So the plaintiff in this case has not even alleged that there was any virus present.

The second distinction is in the policy language. So the trigger of coverage in those policies, in the Studio 417 and the other case, were -- I think I've got the exact language here -- accidental direct -- or accidental physical loss or accidental physical damage.

And so the court in Studio 417 felt that it had to somehow -- you know, focusing on that disjunctive *or*, the court found that it had to give separate meaning to physical loss and physical damage.

That's not the case in our policy. There's one trigger of coverage, which is accidental direct physical loss to property.

We also have a virus exclusion, which wasn't present in those cases, but I know the court is asking me about physical loss.

So I would say the first and the most important distinguishing factor is, obviously, the pleading in this case -- I think it's in paragraphs, I think, 25 and 36 of the complaint where the plaintiffs specifically deny that they had any virus present on

premises.

And, again, I would disagree with Studio 417. I'm not sure even in their presence a virus is enough. Other courts have disagreed with that opinion as well, but I think for our purposes in our compliant we have a complaint that alleges the absence of the virus. And then, obviously, we have a policy that doesn't have that *or* in there that the Studio 417 court seemed to think was determinative.

THE COURT: All right. Anything else you want to add?

MS. SCHUMACHER: Just jumping briefly into the virus exclusion, your Honor, in case we get there, we have that anti-concurrent causation language which broadly excludes coverage when a loss would not have occurred in the absence of a virus.

That language, that anti-concurrent causation language, has been upheld in Illinois. The virus exclusion clearly applies in this case. There is no requirement in that policy language that the virus be physically present on the property, like plaintiff alleges. They're just adding language to the exclusion which isn't present. The exclusion needs to be applied as written. It unambiguously excludes a broad range of

losses. Virus is one of them.

Oh, the argument about, you know, the proliferation issue, that somehow those two subparagraphs of the virus exclusion need to be read together, that's just not correct. The virus portion of that exclusion is separate. It says that loss is excluded, current virus, bacteria, or other microorganism.

So, again, I think it's -- I don't see how it could possibly be ambiguous: I mean, this -- clearly we have a too late chain of causation here. The virus caused the executive orders which caused the loss and it's excluded under the virus exclusion.

THE COURT: Okay. Mr. Endsley, do you want to respond to anything that's -- do you want to respond with anything that's not in your brief? Or if there's a point or two you want to emphasize, I'm happy to give you a chance to do so.

MR. ENDSLEY: Thank you, your Honor.

So I just wanted to highlight a couple of things. In particular, we -- you know, the Studio 417 case, we have the same situation where State Farm elected not to define physical loss or damage. And, in this case, while counsel has pointed out that this

policy only says physical loss, that's really the broader of the two. Physical damage is what's probably more in line with what State Farm's position is, which is that a physical loss or damage must be a structural alteration.

And the fact is that I think the Illinois courts have not limited themselves quite so much to structural physical alteration as State Farm would like the court to believe. In particular, it's sort of an all squares are rectangles argument. They cite cases which are saying, you know, a change in color or shape or appearance to the property is a physical loss or damage, which is true, but that's not the only type of physical loss.

And I think sort of looking at the asbestos cases really sort of points that out, and State Farm's position really throughout the briefs has been that Illinois law requires a physical alteration to the structure, and that's just not really what Illinois case law actually says.

The other thing I'd sort of like to highlight -- and this impinges a little bit on both the virus exclusion and the physical loss or damage -- and that's sort of the nature of an exclusion. And I know

that this is, you know, kind of a basic insurance issue, but the fact is that an exclusion exists to exclude coverage which would otherwise be present.

A virus cannot cause physical alteration to the building, as far as I'm aware. If there's a way that it can be done, State Farm certainly hasn't articulated it. So at least this policy, as written, clearly seems to contemplate nonphysical alterations which would otherwise be covered causes of loss.

And that's a problem for the policy in a couple -- for State Farm in a couple of ways in that State Farm wants to apply the virus exclusion where it was not present. Even in the absence of a virus exclusion, if the governor had never closed the building, It's Nice could never have made a claim for -- under this policy because the coronavirus existed somewhere. You know, even if there is absolutely no virus exclusion in a different policy like that, there just wasn't anything affecting It's Nice's property.

And separately, with the physical loss or use, when you're reading the policy, a number of these exclusions, including, you know, both the virus exclusion itself as well as the government closure

exclusion, really does contemplate under the policy exclusions for nonphysical, nonstructural altering causes of loss.

And that, to me, reads -- particularly when State Farm has elected not to define loss or -- you know, physical loss, that's a problem for them because the policies seem to exclude things which wouldn't be covered anyway under State Farm's interpretation, and yet there they are.

Reading the policy as a whole and constructing the ambiguities in favor of coverage, certainly at this point dismissal seems premature.

THE COURT: Counsel, do you have a response to the virus exclusion argument that the -- as I understand counsel's argument, it's that the virus -- if we were to take State Farm's proffered definition of physical as understood in insurance contracts, the virus exclusion would never fit that definition because it's never going to alter a physical structure.

I'm going to go to paragraph 23 of your motion, page 10, where State Farm says, In cases interpreting the word *physical* in insurance contracts, *physical* is widely held to exclude alleged losses that are intangible or incorporeal, such as detrimental

economic impact, unaccompanied by distinct demonstrable physical alteration of property.

So how is the virus exclusion consistent with that proffered definition of *physical*?

MS. SCHUMACHER: Well, my first response, your Honor, is I'm not sure we should assume that a virus could never alter a structure. We're not familiar with every --

THE COURT: Fair enough.

MS. SCHUMACHER: -- virus in the world, so I think that the exclusion -- you know, I look at it as sort of a belt and suspenders approach. I mean, surely I think this virus is not causing physical damage, but that certainly doesn't mean that there's no virus that could ever develop that doesn't cause physical damage and bodily injury. We don't know that. So I think, in a sense, that the insurer clearly wanted to exclude this kind of loss.

I think in the event that there is some unexpected virus that comes up in the future that could cause physical damage, I think the insurer is well within its right to, you know, exclude that in the event that that might happen some day.

It's clearly in the policy. The insured was

aware of it. It's a broad exclusion. And, again, I think their whole question is just based on the assumption that all viruses are going to be like this virus, and I just don't think that that's the case.

THE COURT: Counsel, Mr. Endsley, let me ask you a question.

One of the things, as I've thought about this case a little bit, I'm worried a little bit or I'm concerned at least about, were the court to accept your argument as to loss of use, I'm concerned about a limiting principle or lack thereof in terms of what is the underwritten risk here.

And there appears to be, to my mind, different types of coverage available for loss of use, whether it is, in fact, civil authority when you think about the cases right after 9/11 around the World Trade Center. There's a lot of case law coming down in the southern district of New York in the second circuit involving business interruption where civil authority has retail shops shut down but you've got physical damage to other property, ingress/egress sorts of issues.

Without the loss of use, sort of, well, there's physical accidental physical loss to property

if I can't access it, that strikes me, when I look at the policy in its entirety, to be potentially a very different risk than what may have been contemplated here.

Is that a fair concern?

MR. ENDSLEY: So I think that is something of a concern. But to alleviate that a little bit, we're dealing with a fairly unique set of circumstances and I think there sort of still is a principle here.

If the governor's orders hadn't actually required closure, if they, you know, had limited how many patrons you could have in the restaurant or if the -- you know, the effect of the general governor's orders to shelter at home had been to reduce income, you know, if we were talking about loss of income, that's not a covered cause of loss.

And, in fact, I think some of the cases cited by State Farm sort of indicate what the -- what the difference is -- and those would be the Anchor [phonetic] and Keach [phonetic] cases. And, particularly, those focused on the difference between when something is actually completely closed down and when it's merely suffered, you know, a loss of business income, and there really is a significant difference

here.

And the other thing I would sort of add, as far as a policy situation, is I think the tremendous number of lawsuits we've seen from this is sort of an indication that a lot of these insureds thought that this would have been covered, something like this, and learned only late in the game that it wasn't or at least the insurance company thought it wasn't.

And I'd just sort of articulate again, you know, the basic principle that ambiguities in the policy are construed against the drafter. State Farm was the one who got to say what this policy looked like, State Farm was the one who got to draft the language of the policy, and, frankly, had put a lot more thought into it than any of their insureds.

So I think to say that, you know, this wasn't in the contemplation of the parties, it was at least a little bit. State Farm has a number of exclusions which nearly but do not quite apply. They were able to draft around this.

And, frankly, exclusions exist in certain policies which do address this specific concern. We've reviewed a couple of them from client -- from potential clients who wanted coverage and actually saying that if

there's a government closure order because of a pandemic, no coverage.

So there are ways for the insurer to protect themselves from this, but in this case it's the insured who really had this dropped on them unexpectedly and is now having to litigate.

THE COURT: Well, certainly, obviously, companies and businesses around the world and certainly the country and certainly Illinois are faced with a remarkable predicament through largely no cause of their own, if at all, as a result of the pandemic.

Let me be very clear. I am not -- when I ask the question about the limiting principle, I am not suggesting that the court is trying to ascertain the intent of the parties at this point. I'm simply trying to ascertain whether or not there's a reasonable interpretation on the other side.

But wouldn't your argument, Mr. Endsley, be a bit stronger if the definition or if the insuring agreement language said insure for all accidental direct physical loss of covered property as opposed to to?

In other words, it's talking about -- I'm concerned that we're reading direct physical to

property. We're kind of just pretending that it doesn't say what it -- what it clearly says and we're kind of saying, well, loss of property or loss to property, same thing, whatever.

Wouldn't you have a stronger argument if it said loss of property?

MR. ENDSLEY: In this case, I'm actually not sure that we would, your Honor.

It's Nice still has the property, but the property suffered a loss of use and that was a loss to the property. It's Nice hasn't -- you know, the property isn't gone. It's Nice has, in fact, recently resumed business operations --

THE COURT: So let me ask you a question.

If I said, when I think loss to the property, I think the roof is blown off; okay? That's what I think of just -- at the very least, at a superficial level.

If you're telling me a closing of the doors by executive order is a loss to the property, help me understand why that's the same thing.

MR. ENDSLEY: Well, I think you're certainly correct that, you know, when we think of -- that is classic losses.

THE COURT: That is, to my mind, closer to a loss of property. It's a functional loss of property, not to property.

MR. ENDSLEY: I guess the best argument I can sort of think of, just off the spur of the moment, relates to the fact that the type of property it is is what affected the loss and that's -- because it's a restaurant, this was a different type of loss. If this was just being used as residential housing, there is no loss to the property.

So State Farm insured a particular type of business and a particular -- that particular type was a restaurant which was affected, and that impacted this property. That was a loss to this specific property rather than a removal.

So to some extent, you know, if it said *loss of property*, that, to me, almost suggests that something -- a little more of the structural alteration argument State Farm prefers, which is almost that something was removed from the property or just ceased to exist on the property -- because it was burned up or something -- whereas I think *to property* sort of suggests that it's anything that affects, you know, that business property. It wasn't just the -- you

know, this wasn't just a title policy or something like that. This was a business coverage policy.

THE COURT: It doesn't say anything is physical; right?

MR. ENDSLEY: It does say physical.

THE COURT: I mean, it's not any conceivable way you're unable to use the property in the way you see fit. It's got to be direct physical loss. And, I guess, your view is loss of use, there's a physical displacement; right? That's --

MR. ENDSLEY: Yes.

THE COURT: -- your position?

Okay. Ms. Schumacher, if there's anything you want to respond to, I'll give you the last word.

MS. SCHUMACHER: Sure. There are many things. I'm going to try to stick to a couple.

I think the Turek court actually discussed that *physical loss to* concept and I think it held that *to* implies contact and *physical* implies physical contact, direct physical loss to property.

And I looked in the dictionary. They gave examples like a right uppercut to the jaw or applying varnish to a surface. Whatever theory they have about their loss not being able to use the property, that

simply is not physical loss to that property.

And I just want to briefly touch on -- the court is concerned about the breadth of their interpretation. So the first thing they said is, well, this is a different situation because the restaurant was required to be closed.

I would point out that in the executive orders they did not close restaurants. Restaurants were permitted to stay open for takeout or delivery. So regardless of whether they chose to close the restaurant, even under their complaint, they weren't required to. So this is not a situation where restaurants were closed.

The second and more broad point I would make, your Honor, is that under their theory of accidental direct physical loss, let's just say after COVID is over the restaurant is open until 1:00 a.m. There's an ordinance that says restaurants have to close at midnight now. According to their theory, they now have a loss of income claim because the restaurant has to close an hour early because, according to them, there doesn't have to be any physical impact; it just has to affect the use of their property.

So, again, I agree with the court's concern

that their interpretation is way too broad and it brings many more things into coverage than are intended under a property policy which covers accidental direct physical loss and then loss of income once that's happened. But you just can't skip that step.

And I think that's all I have. I know the court is familiar with all of this and there was a lot that was said, but I'd like to keep it as brief as I can. So I think unless the court has any additional questions, I think we've made our point.

THE COURT: I think we -- I just want to make sure all the parties agree that regardless of the coverage form under the all risk policy, everyone agrees that direct physical loss is required; right?

MR. ENDSLEY: Yes.

THE COURT: That phrase, that is an insuring agreement that attaches to all. You know, sometimes these all risk policies, there's all these amendments, you know, there's the general exclusions and then there's the exclusions within the broad form coverage and there's exclusions within that and those don't apply to the general -- you know, so that was my review of the policy, that there was no separate insuring agreement, everything goes back to Section 1 property

insuring agreements, direct physical loss requirement.

MS. SCHUMACHER: Yes.

THE COURT: Okay.

MR. ENDSLEY: Yeah, I believe there was a little bit of confusion that we were maybe trying to get coverage under the civil -- civil authority provision, but that was --

THE COURT: Well, as I understand your argument, you'll take coverage wherever you can find it; right?

MR. ENDSLEY: Yes, that's correct.

And that all relates back to the all risk direct physical loss.

THE COURT: Right. Okay. Very good. Thank you.

Okay. The court is in a position to rule on this today. The question presented by a 2-615 motion to dismiss is whether sufficient facts are contained in the pleadings that, if proved, would entitle the plaintiff to relief. That's Evers versus Edwards Hospital, 247 Ill. App. 3d 717.

A motion to dismiss under Section 615 admits all well-pleaded facts but does not admit conclusions of law or conclusions of fact not supported by allegations of specific fact.

Exhibits -- I assume the policy was, in fact,

attached to the complaint?

MS. SCHUMACHER: It was -- your Honor, it was either attached or filed by agreement.

I have two different cases. One they attached a partial policy and then --

MR. ENDSLEY: Yeah, I --

MS. SCHUMACHER: Was yours the partial policy?

MR. ENDSLEY: Yeah, I believe it was attached by agreement.

MS. SCHUMACHER: Okay.

THE COURT: The court is --

MR. ENDSLEY: There was --

THE COURT: The parties are asking the court to consider the policy, right --

MR. ENDSLEY: Yes.

MS. SCHUMACHER: Yes, your Honor.

THE COURT: -- for purposes of this motion?

All right. So the policy is an exhibit to the complaint for purposes of this motion.

Exhibits are part of the complaint to which they are attached and the factual allegations contained within an exhibit attached to a complaint serve to negate inconsistent allegations of fact contained within the body of the complaint.

I say that because, in some ways, this operates almost more like a 12(b)(6) than -- most 615's are sort of, if you haven't pled this element, you haven't pled that element, and this operates more sort of a -- whether or not there is a claim upon which relief can be granted based on the complaint itself.

And, for that reason, I point out simply that the exhibits to the complaint, which, in this case, includes the policy, the parties have asked the court to consider that as well.

Okay. Having said all of that, the critical language here, first, is the direct physical loss language, and the court finds that direct physical loss unambiguously requires some form of actual physical damage to the insured premises to trigger coverage.

The words *direct* and *physical*, which modify the word *loss*, ordinarily connote actual demonstrable harm of some form to the premises itself rather than force the closure of the premises for reasons extraneous to the premises itself or adverse business consequences that flow from such closure.

Defense counsel -- I'm sorry, the insurance counsel points out here that Illinois courts have not squarely addressed direct physical loss in this

context, but I do want to note in cases interpreting the word *physical* in insurance contracts, *physical* is widely held to exclude alleged losses that are intangible or incorporeal in Illinois, such as detrimental economic impact unaccompanied by a distinct demonstrable physical alteration of the property.

That's One Place Condo, LLC, versus Travelers, 2015 Westlaw, Northern District of Illinois, applying Illinois law.

The other case here that, I think, is particularly useful is, in fact, Judge Gettleman's decision in the northern district of -- I want to get this right -- Sandy Point Dental v. Cincinnati Insurance. This is 2020 Westlaw 5360465 dealing with very similar facts and similar policy language.

In this case, the court finds, just as in that case, plaintiff simply cannot show any such loss as a result of either inability to access its own office or the presence of the virus on its physical surface, the latter of which here plaintiff fails to allege in its complaint.

I don't think that's in dispute. There's no argument that the coronavirus was, in fact, on the surface of the property. The plaintiff has not pled

any facts showing physical alteration or structural degradation of the property, which is required to trigger coverage under this all risks policy.

The court wants to note that in addressing this insuring agreement argument, this holding is consistent with other courts that have evaluated whether the coronavirus causes property damage warranting insurance coverage.

Again, I want to reference 20 L -- I'm sorry, not 20 L. 2020 Westlaw 5360465. That's Sandy Point Dental versus Cincinnati Insurance.

I want to further note that Social Life Magazine versus Sentinel Insurance Company, denying a motion for preliminary injunction because the coronavirus does not cause direct physical loss; therefore, no coverage was required. The coronavirus, quote, damages lungs. It doesn't damage printing presses, close quote.

Diesel Barbershop versus State Farm Lloyds, 2020 Westlaw 4724305, Western District of Texas, August 13, 2020, granting a motion to dismiss because the coronavirus did not cause a direct physical loss and, quote, the loss needs to have been a distinct demonstrable physical alteration of the property, close

quote.

I further want to direct the parties' attention to Gavrilides Management versus Michigan Insurance Company. This is a state court of Michigan handing down a decision last month that was cited by State Farm in this case explaining that direct physical loss to property requires tangible alteration or damage that impacts the integrity of the property and dismissing the case because plaintiff failed to allege that the coronavirus had any impact to the premises.

I want to point out that these are not controlling cases for purposes of an Illinois state court; however, the court finds that these cases just cited are, in fact, consistent with Illinois courts treating of physical damage under insurance policies.

And, of course, there are meaningful differences at times between first and third party policies and first and third policy claims; however, the court finds that there is a consistent line of reasoning by Illinois courts as far as what physical damage must mean for purposes of insurance coverage in this case.

In essence, to quote Judge Gettleman in the Sandy Point Dental Case, plaintiff here seeks coverage

for financial losses as a result of closure orders. And I don't think anybody really disagrees with that here.

The coronavirus has not physically altered the appearance, shape, color, structure, or other material dimension of the property and, as a result, it doesn't come within the insuring agreement and, as a result, plaintiff has failed to plead a direct physical loss, which is a prerequisite for coverage.

However, I do want to point out here that even if, even if, plaintiff had, in fact, been able to plead within the insuring agreement -- that this claim comes within the insuring agreement, the court does find that the virus exclusion applies.

Now, the virus exclusion, which is Exclusion J under Section 1 of the policy, states as follows -- and there's important, what we'll call, lead-in language that I want to direct the parties' attention to. The lead-in language under Section 1 exclusions, which applies to all coverage forms under this all risks policy, all coverage forms incorporate Section 1, the lead-in language states as follows: We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the

following excluded events.

We do not insure for such loss regardless of, A, the cause of the excluded event; or, B, other causes of loss; or, C, whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or, D, whether the event occurred suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these, and it begins to list the exclusions.

So the virus exclusion is Exclusion J. The heading, which does not control, says fungi, virus, or bacteria. Paragraph 1 states, Growth, proliferation, spread, or presence of fungi or wet or dry rot or, new paragraph, 2, Virus, bacteria, or other microorganism that induces or is capable of inducing physical distress, illness, and disease.

For our purposes, those are the relevant provisions of the virus exclusion that needs to be addressed here. First, the court finds that the growth, proliferation, spread, or presence is not required for purposes of applying the virus exclusion because that is in a separate paragraph designed to address fungus or fungi. There are not just one but

two disjunctive *or's* in between fungus and virus because it goes fungus -- or states fungus or wet or dry rot or and then a new paragraph starting with the word *virus* enumerated as number two.

So the court finds that it doesn't have to establish a growth of a virus, just simply the idea of a virus, the fact that a virus that is capable of inducing physical distress, illness, or disease.

Even if -- if, in fact, this was some kind of physical -- accidental physical damage, physical loss coming within the insuring agreement, the virus exclusion applies because Subsection C of the lead-in language says this virus exclusion applies whether other causes, executive orders, acted concurrently or in any sequence with the excluded event to produce the loss.

Here, I think everyone would agree absent the virus, absent the virus, there would be no executive orders, and so because C says this exclusion would apply even where the sequence of the ordering with other causes isn't entirely known or isn't entirely clear or happens one two or two one, it still applies.

Furthermore, whether or not a virus could, in fact, alter the physical structure, I think that's a

much -- that's not entirely clear at all that a virus could.

And that's plaintiff's -- or I'm sorry, insured's argument is the virus exclusion doesn't make any sense for a sort of physical alteration requirement of physical damage -- or a loss of, I should say -- physical loss because a virus would never alter the physical structure.

The court doesn't agree with that. Virus, bacteria, and microorganisms can exist in, in fact, a meaningful way, and I think there's a strain of thought out there that at one time was dominant -- it still may be true to a certain extent -- that this virus can exist on surfaces.

So even if the loss of use because of coronavirus could constitute, the virus exclusion would still apply -- could constitute physical -- accidental physical loss, direct physical loss, I should say -- the virus exclusion applies.

And so for those reasons, the court is going to grant the motion to dismiss.

I want to point out -- or I do want to address the authority provided by Harold's Chicken -- It's Nice, Inc., d/b/a Harold's Chicken. A couple

things, I think, are worth pointing out.

One is the State Farm language here -- not only are those cases from the western district and, as a result, they're not controlling, the court believes or is of the opinion that the cases relied upon for its ruling today are more consistent with Illinois law as it exists with respect to this issue.

Furthermore, the policy language was different in those western district cases. And that's not to say that the result would be different if you had identical language, but I do think that's different language.

And, moreover, and perhaps importantly, the court was evaluating a 12(b)(6) motion in which the insureds in that case allege the presence of COVID on the property. And, to the court's mind, that is a -- that's a meaningful distinction here.

And, again, there's no virus exclusion in that policy that the court would have had to have considered as well and we don't know what the court would have done in that case.

But I do think, at least for purposes of the insuring agreement argument, those cases are distinguishable without regarding -- without, you know,

advising as to what the result would be in this court. But I do think those are different cases and they need to be treated differently as such.

And so, for those reasons, the court is going to go ahead and grant the motion both with respect to the insuring agreement argument as well as with respect to the virus exclusion.

I do want to point out, for the record, the insured does not seem to argue -- kind of seems to have one foot in and one foot out on civil authority. They're happy to find civil authority coverage if it exists, but they're not specifically asking for it.

But I want to point out, for the record, that, as noted above, the policy's civil authority coverage applies only if there is a covered cause of loss, meaning direct physical loss, again, going back to direct physical loss to property other than the plaintiff's property.

Just as the coronavirus did not cause direct physical loss to plaintiff's property here, the complaint has not and likely could not allege that the coronavirus caused direct physical loss to other property. By the policy's own terms, the civil authority coverage then does not apply.

So with that having been said, I'm granting the motion. You know, I'm kind of -- do the parties want a dismissal with prejudice?

MS. SCHUMACHER: Your Honor, we are asking for a dismissal with prejudice, the reason being their claim is for the loss of income due to the executive orders which is caused by the virus, and without alleging a completely different kind of claim, there's no set of facts that they're going to be able to allege that's going to avoid that result.

The executive orders are full of references to the virus. The chain of causation is strong. The virus exclusion is present. And, again, the same thing with the physical damage issue. There's no claim that there was any structural alteration to the property.

So I think in this case, your Honor, on that basis, I don't think there's any way they're going to be able to plead around either of those issues, and so we are asking for a dismissal with prejudice.

THE COURT: Mr. Endsley, any response to that or are you in agreement that this is time for other minds to evaluate this claim?

MR. ENDSLEY: Yeah, your Honor, that's probably correct. I don't think we can change the pleading such

that -- to get around the issues that you're finding are insurmountable.

THE COURT: I don't disagree. It is a 615, and so I do want to just at least give the parties the opportunity to request without -- whether or not I give that is a different issue, but it sounds like the parties are of one mind and the court is in agreement that this dismissal for this type of a 615 motion is and should be with prejudice, and the court will enter such an order.

MS. SCHUMACHER: Thank you, your Honor.

THE COURT: Okay.

MR. ENDSLEY: Thank you, your Honor.

THE COURT: Thank you, guys. Thank you very much for your time and energy on this. I want to commend the parties. I know this is a very interesting issue under very -- a very unique set of facts.

MS. SCHUMACHER: Thank you, your Honor.

MR. ENDSLEY: Thank you, your Honor.

THE COURT: Thank you.

(Which were all the proceedings had at the hearing of the above-entitled cause, this date.)

IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT

DU PAGE COUNTY, ILLINOIS

I, KRISTIN M. BARNES, do hereby certify that the foregoing Report of Proceedings, consisting of Pages 1 to 39, inclusive, was reported in shorthand by me via Zoom videoconferencing, and the said Report of Proceedings is a true, correct and complete transcript of my shorthand notes so taken at the time and place hereinabove set forth.

_____

Official Court Reporter
Eighteenth Judicial Circuit of Illinois
DuPage County
CSR License No. 084-004026

Attachment 2

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

JAEWOOK LEE, D/B/A/ EVANSTON GRILL, INDIVIDUALLY AND ON BEHALF OF THE CLASSES DESCRIBED BELOW, Plaintiffs, v. STATE FARM FIRE & CASUALTY COMPANY, Defendant.	Case No. 20 CH 4589 Calendar 03 Honorable Allen Walker **JURY DEMAND**

MEMORANDUM OPINION AND ORDER

This matter comes to be heard on Defendant, State Farm Fire and Casualty Company's, Motion to Dismiss Class Action Complaint Pursuant to 735 ILCS 5/2-615. The Court has reviewed the briefs submitted by the parties, heard their arguments in the matter, and is fully advised in the premises. It is ordered that Defendant's motion is granted with prejudice.

BACKGROUND

Plaintiff, Evanston Grill, is an Illinois restaurant, owned and operated by Cook County residents, Hyun Lee, and his father, Jaewook Lee.[1] Defendant, State Farm, is an insurance company licensed in Illinois and engaged in the business of insuring properties throughout the United States, with its principal place of business in Bloomington, Illinois. State Farm issued Policy No. 93-KH-H688-5 to Evanston Grill for the period of August 15, 2019 to August 15, 2020 (the "Policy").

On March 15, 2020, Illinois Governor J.B. Pritzker ("Governor Pritzker") issued Executive Order 2020-07, requiring that all bars, restaurants, and movie theaters close to the public beginning March 16, 2020. Executive Order 2020-07 specifically stated, "the Illinois Department of Public Health recommends Illinois residents avoid group dining in public settings, such as in bars and restaurants, which usually involves prolonged close social contact contrary to recommended practice for social distancing."

[1] The facts recited herein are derived from Plaintiffs' Complaint and the exhibits attached thereto, and are accepted as true for purposes of Defendant's Motion to Dismiss. *Kedzie & 103rd Currency Exchange v. Hodge*, 156 Ill. 2d. 112, 115 (1993).

On March 20, 2020, Governor Pritzker issued Executive Order 2020-10, which ordered the immediate closure of all "non-essential" businesses in Illinois (Executive Order 2020-07 and 2020-10 are collectively referred to as the "Closure Orders"). The Closure Orders prohibited the public from accessing restaurants, thereby causing Evanston Grill to suspend its operations. Evanston Grill has not been operating since March 16, 2020.

Following the Closure Orders, Evanston Grill submitted a claim to State Farm requesting coverage for its business interruption losses under the "Loss of Income and Extra Expense" Provision of the Policy, identified as CMP-4705.

Section CMP-4705 provided:

1. Loss of Income

> a. We will pay for the actual "Loss of Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by accidental direct physical loss to the property at the described premises. The loss must be caused by a Covered Cause of Loss …

Section CMP-4705 also included coverage for losses resulting from an action of Civil Authority, and provided:

4. **Civil Authority**

> a. When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual "Loss of Income" you sustain, and necessary "Extra Expense" caused by action of civil authority that prohibits access to the described premises …

State Farm denied the claim, citing the "Fungi, Virus or Bacteria" Exclusion, which excluded from coverage losses due to "[v]irus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease." State Farm similarly denied coverage statewide for lost income as a result of the Closure Orders.

On June 17, 2020, Evanston Grill filed a three-count complaint (the "Complaint") on its behalf and on behalf of a class of similarly situated insureds (hereinafter collectively "Plaintiffs") for: (1) a declaratory judgment, Count I; (2) breach of contract, Count II; and (3) bad faith denial of insurance under 215 ILCS 5/155.

On August 12, 2020, State Farm (hereinafter "Defendant") filed a motion to dismiss the Complaint pursuant to 735 ILCS 5/2-615, which is presently before the Court.

2-615 MOTION TO DISMISS STANDARD

"The question presented by a section 2-615 motion to dismiss is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Beahringer v. Page*, 204 Ill. 2d 363, 369 (2003). In reviewing the sufficiency of a complaint, a court must "accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). "Moreover, Illinois is a fact-pleading jurisdiction." *Beahringer*, 204 Ill. 2d at 369. As such, a plaintiff "must allege facts that set forth the essential elements of the cause of action" and may not rely on "conclusions of law [or] conclusory allegations not supported by specific facts." *Visvardis v. Ferleger, P.C.*, 375 Ill. App. 3d 719, 724 (1st Dist. 2007). However, "the plaintiff is not required to set out evidence." *Chandler v. Illinois Cent. R.R.*, 207 Ill. 2d 331, 348 (2003). Instead, the plaintiff need only allege the ultimate facts to be proved, "not the evidentiary facts tending to prove such ultimate facts." *Id.* Therefore, "[t]o survive a [section 2-615] motion to dismiss, a complaint must present a legally recognized claim as its basis for recovery, and it must plead sufficient facts which, if proved, would demonstrate a right to relief." *Derby Meadows Util. Co. v. Inter-Cont'l Real Estate*, 202 Ill. App. 3d 345, 358 (1st Dist. 1990). Further, a court should dismiss a cause of action on the pleadings "only if it is clearly apparent that no set of facts can be proven which will entitle the plaintiff to recovery." *Chanel v. Topinka*, 212 Ill. 2d 311, 318 (2004). It is within this framework that the Court analyzes Defendant's motion to dismiss.

DISCUSSION

Count I: Declaratory Judgment

Count I of Plaintiffs' Complaint seeks a declaration that: (1) the losses incurred by Plaintiffs as the result of the Closure Orders are covered losses under the Policies; (2) Defendant has not and cannot prove the application of any exclusion or limitation to the coverage for Plaintiffs' losses alleged herein; (3) Plaintiffs are entitled to coverage for their past and future Business Income loss(es) and Extra Expense resulting from the Closure Orders for the time period set forth in the Policies; (4) Plaintiffs have coverage for any substantially similar Closure Orders in the future that limits or restricts the access to Plaintiffs' places of business; and (5) any other issue that may arise during the course of litigation that is a proper issue on which to grant declaratory relief. Count II alleges Defendant breached the Policy by failing to pay Plaintiffs' losses for claims covered by the Policy. Count III alleges that Defendant's denied coverage in bad faith.

i. Whether Plaintiffs have adequately alleged coverage under the Policy

Defendant argues that Plaintiffs' claims are barred by the clear language of the Policy and its Endorsement. To trigger coverage, Defendant asserts that the Policy requires "accidental direct physical loss to" Covered Property. According to Defendant, the Illinois Supreme Court has interpreted "physical" loss to require an alteration in "appearance, shape, color or in other material dimension," citing *Travelers Ins. Co. v. Eljer Mfg., Inc*., 197 Ill. 2d 278, 301 (2001). Defendant claims that Plaintiffs' alleged "suspension of [its] business operations," "exclusion of customers"

from its restaurant, and "loss of revenue" due to the Closure Orders is an economic loss, not a physical injury to covered property.

Plaintiffs respond that the Policy is an "all-risk" policy, which means that the insurer agrees to cover all risks of loss not specifically excluded by the policy**,** citing *Board of Educ. v. International Ins. Co.*, 292 Ill. App. 3d 14, 17 (1st Dist. 1997). Because of this, Plaintiffs argue they need only allege a covered loss, rather than prove the exact cause of the loss or disprove any excluded perils in order to establish a prima facie case, citing *Wallis v. Country Mut. Ins. Co*., 309 Ill. App. 3d 566, 570 (2d Dist. 2000). Plaintiffs contend that they have adequately pled a "direct physical loss" under the Policy, and now the burden shifts to Defendant to prove Plaintiffs' loss was the result of an excluded risk, citing *Gulino v. Econ. Fire & Cas. Co*., 971 N.E.2d 522, 527 (1st Dist. 2012).

According to Plaintiffs, "accidental direct physical loss" is not defined in the Policy. When a phrase in an insurance policy is undefined, assert Plaintiffs, courts afford that phrase "its plain and ordinary meaning which can be derived from a dictionary. *Gulino*, 971 N.E.2d at 527. Plaintiffs contend that an average, ordinary, and reasonable person would interpret the meaning of "direct physical loss of … covered property" to include the sudden inability to use property that was previously usable. Plaintiffs allege that they suffered "physical" loss to their property due to the suspension of their business operations from the Closure Orders. According to Plaintiffs, the "loss" of Plaintiff's in-restaurant dining areas was undoubtedly "physical" as the dining rooms are composed of square footage and material, physical, tangible objects (like chairs, tables, dispensers, and utensils) that are perceptible to the senses and interactive.

Plaintiffs argue that *Mehl v. The Travelers Home & Marine Ins. Co.*, 2018 U.S. Dist. LEXIS 74552, *1 (E.D. Mo. 2018) is analogous and persuasive here. Plaintiffs note that in *Mehl*, the court rejected the defendant insurance company's argument that "actual physical damage" was required to allege "direct physical loss." Plaintiffs argue that like the court in *Mehl,* this Court should reject Defendant's argument that the Closure Orders did not actually cause damage to the property because Defendants' did not define "physical loss" and "point to no language in the policy that would lead a reasonable insured to believe that actual physical damage is required for coverage." *Id*.

Last, Plaintiffs argue that Defendant's complete dependence upon *Travelers Ins. Co. v. Eljer Mfg., Inc*., 197 Ill. 2d 278 (2001) is erroneous because that case interpreted the term "property damage" rather than a "physical loss." Plaintiffs note that "damage" is a far narrower term than "loss", arguing that loss is defined as "[a]n undesirable outcome of a risk; the disappearance or diminution of value, usually in an unexpected or relatively unpredictable way [;] … [and] [t]he failure to maintain possession of a thing." Conversely, "damage" is defined as "loss or harm resulting from injury to person, property, or reputation," citing Merriam-Webster's Online Dictionary.

In construing an insurance contract, regular contract interpretation principles apply. The objective of the court is to ascertain the intent of the parties, construing the policy as a whole, with due regard to the risk undertaken, the subject matter of the policy and the purposes of the entire contract. *Outboard Marine Corp. v. Liberty Mutual Ins. Co*., 154 Ill. 2d 90 (1992). If words in the

policy are unambiguous, the court must afford them their ordinary meaning. *Id.* But if words are susceptible to more than one reasonable interpretation, they are ambiguous, and the insurance policy should be construed in favor of the insured and against the insurer who drafted the policy. *Id.* The determination of whether a term is ambiguous depends on how an ordinary person would understand it, not how a legally trained mind understands it. *USF&G v. Specialty Coatings*, 180 Ill. App. 3d 378 (1989).

At the outset, the Court notes that Plaintiffs cite numerous cases from other jurisdictions in their Response brief, including the *Mehl* case cited above, that address similar issues asserted in the instant case. These cases, while not binding, "are persuasive authority and entitled to respect." *Kostal v. Pinkus Dermatopathology Laboratory, P.C.*, 357 Ill. App. 3d 381(2005). However, "Illinois courts do not look to the law of other states when there is relevant Illinois case law available." *In re Estate of Walsh*, 2012 IL App (2d) 110938, ¶ 45. Moreover, the Court finds that Plaintiffs misstate the holding in *Mehl*. The *Mehl* court concluded that since "direct physical loss" was not defined in the policy, there was nothing in the policy "that would lead a reasonable insured to believe that actual physical damage was required for coverage." *Mehl*, 2018 U.S. Dist. LEXIS 74552 at * 2. The court noted, however, that the policy did define "property damage" as "physical injury to, damage of, *or loss of use* of tangible property," and therefore determined that the policy explicitly provided coverage for "loss of use." *Id*. Unlike *Mehl*, the Policy at issue in this case does not explicitly provide for "loss of use" coverage.

Notably, Plaintiffs concede in their Response brief that coverage under the Policy requires direct physical loss "to" Covered Property, but then proceed to argue that a reasonable person would interpret direct physical loss "of" covered property to include the inability to use property that was previously usable. In fact, the cases that Plaintiffs cite in support of this assertion interpret direct physical loss "of," not "to" property. The Court notes that there is a difference between direct physical loss *of* property and physical loss *to* property, which, as Defendant notes above, Illinois courts have defined as alteration in the physical condition of the property.

While Plaintiffs argue that Defendant's reliance on *Travelers* is misguided because the Illinois Supreme Court interpreted "property damage" rather than "physical loss," the Court finds that is simply not the case. The insurance policy in *Travelers* defined the term "property damage" as "*physical injury to* tangible property which occurs during the policy period." 197 Ill. 2d 278 at 289 (Emphasis added). At issue was whether the installation of a faulty plumbing system in a residential building constituted "physical injury to tangible property," given that system allegedly reduced the value of the building once it was installed. *Id*. at 299. The insurance company argued that the claimed reduction in value was an intangible economic loss, not covered under the Policy. *Id*. The Illinois Supreme Court concluded that "to the average, ordinary person, tangible property suffers a 'physical injury' when the property is altered in appearance, shape, color or in other material dimension. Conversely, to the average mind, tangible property does not experience 'physical injury' if that property suffers intangible damage, such as diminution in value…" *Id*. at 301-302.

Likewise, in this instance, the Court finds that Plaintiffs' alleged economic losses do not constitute "accidental direct physical loss to" Covered Property. Plaintiffs allege that due to the Closure Orders, they suffered "a substantial a loss of revenue in excess of $100,000 in the month

of April 2020" alone. Compl. at 18. The lost revenue, however, is an economic loss. Plaintiffs fail to allege that their restaurant suffered an "alteration in appearance, shape, color or other material dimension" as a result of the Closure Orders. Even if the Court granted Plaintiffs leave to amend the Complaint, Plaintiffs would not be able to establish that the Closure Orders resulted in "physical" loss to their property.

ii. *Whether Plaintiffs' claims are barred by an exclusion under the Policy*

Having determined that Plaintiffs failed to satisfy their burden of establishing coverage under the Policy, the Court's inquiry need not proceed any further. However, as outlined below, the Court finds that even if Plaintiffs had met their initial burden, their claims would not succeed under the Virus Exclusion of the Policy.

a. Virus Exclusion

Defendant contends that Plaintiffs' claims are barred by the Policy's Virus Exclusion, which bars coverage for "any loss which would not have occurred in the absence of ... [a] virus." Policy at 5-6 ¶ 1, j (2). Defendant asserts that under Illinois law, "[a]n insurer has the right to limit coverage on a policy, and where an insurer has done so, a court must give effect to the plain language of the limitation, absent a conflict with the law." *Phusion Projects, Inc. v. Selective Ins. Co*., 2015 IL App (1st) 150172, ¶ 38. Here, Defendant insists that the presence or suspected presence of a virus does not constitute "accidental direct physical loss to" Covered Property under the terms of the Policy.

Defendant argues that the Virus Exclusion is unambiguous, and that Illinois courts evaluating comparable policy exclusions have found the provisions unambiguous and applied their plain meaning, citing *DeVore v. Am. Family Mut. Ins. Co*., 383 Ill. App. 3d 266, 269 (2d Dist. 2008). Further, Defendant contends that Plaintiffs attempt to avoid the unambiguous language of the contract by alleging its loss "was not caused by the presence of COVID-19 on its premises," but rather "from the Closure Orders." Compl. ¶ 38. However, Defendant notes that the COVID-19 virus is plainly at the root of these orders, especially since each of the Closure Orders cited by Plaintiffs state they were issued in response to COVID-19. Put simply, asserts Defendant, if there were no COVID-19 virus, there would be no government orders to prevent its spread.

Plaintiffs respond that for the purposes of reviewing the instant 2-615 motion, the Court must accept as true that its losses were not caused by a Virus "on the insured premises." Plaintiffs contend that its losses arise from the *Closure Orders,* not a virus, and that a virus would not have caused the suspension of Plaintiffs' operations unless that virus spread throughout the property and/or required decontamination, which Plaintiffs' claim was contemplated under the Virus Exclusion. Plaintiffs contend that the Virus Exclusion clearly does not apply here, since Plaintiffs do not allege that any virus is present on its property.

Defendant replies that Plaintiffs do not dispute that under Illinois law "[a]n insurer has the right to limit coverage on a policy, and where an insurer has done so, a court must give effect to the plain language of the limitation, absent a conflict with the law." *Phusion Projects, Inc. v.*

Selective Ins. Co., 2015 IL App (1st) 150172, ¶ 47.[2] Defendant notes that the Policy unambiguously excludes loss caused by virus, and specifically states that this includes *all losses* that "would not have occurred in the absence of the excluded event" (virus). "Defendant maintains that Plaintiffs' alleged loss "would not have occurred in the absence of" a "virus" and is thus barred by the Virus Exclusion.

The Illinois Supreme Court has long held that the burden rests with an insured to establish that their claim is covered under its policy. *Wells v. State Farm Fire & Cas. Co.,* 2021 IL App (5th) 190460, ¶ 25. Once the insured has demonstrated coverage, the burden shifts to the insurer to prove that a limitation or exclusion applies. *Id*.

The plain language of the Policy states:

> **SECTION I – EXCLUSIONS**
>
> 1. We do not insure under any coverage for *any loss which would not have occurred in the absence of one or more of the following excluded events*. We do not insure for such loss *regardless of*: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these: …
>
> **J. Fungi, Virus or Bacteria**
>
> … (2) *Virus*, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease; ….

While Plaintiffs argue that their losses were a result of the Closure Orders, and not a virus, the Court finds this argument unpersuasive. As Defendant argues above, each of the Closure Orders were entered in response to the COVID-19 virus. If not for COVID-19, the Governor would not have issued the Closure Orders, and Plaintiffs would not have incurred the claimed losses. As such, the Court finds that Defendant has met its burden of establishing an exclusion applies under the Policy. Accordingly, the Court grants Defendant's motion to dismiss Count I.

[2] Plaintiffs filed a motion to strike certain portions of Defendant's Reply. Accordingly, the Court did not consider the following additional cases cited by Defendant in the Reply: *It's Nice, Inc. v. State Farm Fire and Casualty Co*., No. 20-L-547 (Ill. Cir. Ct. DuPage County Sept. 29, 2020); *Malaube, LLC v. Greenwich Ins. Co*., 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, No. 20-cv-04434 (N.D. Cal. Sept. 22, 2020); *Turek Enterprises Inc. v. State Farm Mutual Automobile Insurance Co*., 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020).

Count II: Breach of Contract

Count II of Plaintiffs' Complaint alleges Defendant breached the Policy by denying coverage for Plaintiffs' alleged losses. However, having determined that Plaintiffs' claims are not covered under the Policy, the Court finds that Plaintiffs have not and cannot adequately plead a breach of the insurance contract for failing to provide coverage. Thus, the Court grants Defendant's motion to dismiss Count II.

Count III: Bad Faith

Defendant argues that in the absence of a breach of the Policy, Plaintiffs' bad faith claim should also be dismissed, citing *Woodard v. Am. Family Mut. Ins. Co*., 950 F. Supp. 1382, 1394 (N.D. Ill. 1997) (dismissing a claim under section 155 because such a claim "is dependent upon a valid claim for breach of contract"). The Court agrees. As such, the Court grants Defendant's motion to dismiss Count III.

CONCLUSION

Defendant, State Farm's, Motion to Dismiss Plaintiff's Complaint pursuant to 735 ILCS 5/2-615 is granted with prejudice.

DATE: January 13, 2021

ENTERED:

Allen Price Walker
Associate Judge

Jan. 13, 2021

Allen P. Walker Circuit Court - 2071

Attachment 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

SMEEZ, INC. d/b/a BIG DADDY'S DISCO DINER, ***individually and on behalf of all others similarly situated,***	)	
Plaintiff,	)	**Case No. 20-cv-1132-DWD**
vs.	)	
BADGER MUTUAL INSURANCE COMPANY,	)	
Defendant.	)	

MEMORANDUM & ORDER

DUGAN, District Judge:

On October 1, 2020, Plaintiff Smeez Inc. filed this putative class action in the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois. Smeez, who purchased a business insurance policy from Defendant Badger Mutual Insurance Company, owns a restaurant and bar that was impacted financially by the Covid-19 pandemic and the "stay home" and occupancy limit orders issued in response. By motion dated December 1, 2020, Badger Mutual seeks dismissal of Plaintiff's complaint. (Doc. 17). Plaintiff filed a response (Doc. 30) and a supplement (Doc. 32), and Defendant responded to each (Docs. 34, 35). For the reasons delineated below, the Court grants Defendant's motion to dismiss.

FACTUAL ALLEGATIONS AND THE INSURANCE POLICY

Smeez, Inc. operates Big Daddy's Disco Diner, a restaurant and bar located in Belleville, Illinois. Due to "stay home" and closure orders issued by the State of Illinois

in response to the Covid-19 pandemic, Plaintiff's restaurant was closed to all in-person dining and consumption beginning in March 2020. Limited service through take-out and delivery options was permitted at first. Over time, Smeez was able to open for limited in-person dining under the Restore Illinois plan. As long as St. Clair County remains in Phase 4, Smeez may offer in-person dining, though the capacity of the restaurant is subject to capacity limits.

Smeez purchased a comprehensive commercial liability and property insurance from Badger Mutual that provided coverage for the period from March 15, 2020, through March 15, 2021.[1] The policy covers business income and extra expense for "direct physical loss to covered property at the premises described on the declarations caused by a covered peril." (Doc. 18-1, p. 38). It contains a virus or bacteria exclusion and a civil authority exclusion, but Plaintiff's complaint alleges that the exclusions do not preclude coverage for its business losses tied to the closure orders and restrictions.

Under the policy's business income and extra expense coverage, Badger agreed:

> 1. **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. The loss or damage must be caused by or result from a Covered Cause of Loss.

[1] The insurance policy at issue is discussed in, but not attached to, Plaintiff's complaint. Defendant attached the policy as an exhibit to its memorandum in support of its motion to dismiss (Doc. 18-1). Ordinarily, a court may not consider documents other than the operative complaint and any attachments thereto without converting a motion under Rule 12(b)(6) to a motion for summary judgment under Rule 56. An exception exists, however, where documents, like the insurance policy, "are central to the complaint and are referred to in it," provided that the information is "properly subject to judicial notice." *Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013). Here, that exception applies, so the Court will consider the policy (Doc. 18-1) as provided by Defendant.

(Doc. 18-1, p. 35)(emphasis in original). If the loss is otherwise covered, the Virus or Bacteria Exclusion provides:

> The additional exclusion set forth below applies to all coverages, coverage extensions, supplemental coverages, optional coverages, and endorsements that are provided by the policy to which this endorsement is attached, including, but not limited to, those that provide coverage for property, earnings, extra expense, or interruption by civil authority.
>
> 1. The following exclusion is added under Perils Excluded, item 1.:
>
> **Virus or Bacteria –**
>
> **We** do not pay for loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress.
>
> This exclusion applies to, but is not limited to, any loss, cost, or expense as a result of:
>
> a. any contamination by any virus, bacterium, or other microorganism; or
>
> b. any denial of access to the property because of any virus, bacterium, or other microorganism.

(Doc. 18-1, p. 14)(emphasis in original). Under the excluded perils, the policy also declines coverage for losses caused by orders of any civil authority:

> 1. **We** do not pay for loss if one or more of the following exclusions apply to the loss, regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded causes or events.
>
> …
>
> c. **Civil Authority – We** do not cover loss caused by order of any civil authority, including seizure, confiscation, destruction, or quarantine of property.

> **We** cover loss result from acts of destruction by the civil authority to prevent the spread of fire, unless the fire is caused by a peril excluded under this policy.

(Doc. 18-1, p. 30)(emphasis in original).

Plaintiff's complaint alleges that the civil authority exclusion does not apply because Plaintiff's property was not seized, confiscated, destroyed, or quarantined. Plaintiff also alleges that the losses were caused by measures taken by the State of Illinois to prevent the spread of Covid-19, not due to the virus being detected at Plaintiff's insured property, negating the applicability of the virus or bacteria exclusion. Smeez first reported a loss of business income to Badger Mutual on March 16, 2020. Badger Mutual denied coverage of the claim in a letter dated May 13, 2020, citing the civil authority and virus exclusions. Smeez alleges that the denial letter was, in essence, a form letter and that the insurance claim was not considered seriously before being denied.

Smeez seeks to bring three claims on behalf of a class of Illinois restaurants with similar insurance policies issued by Badger Mutual and who made claims for lost business income that were denied. Smeez alleges that Badger Mutual has breached their contract by failing to cover the business losses caused by the Covid-19 closure orders. Smeez also alleges that in refusing coverage, Badger Mutual has breached the covenants of good faith and fair dealing and has acted in bad faith.

LEGAL STANDARD

A complaint must include enough factual content to give the opposing party notice of what the claim is and the grounds upon which it rests. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 698 (2009). To satisfy the

notice-pleading standard of Rule 8, a complaint must provide a "short and plain statement of the claim showing that the pleader is entitled to relief" in a manner that provides the defendant with "fair notice" of the claim and its basis. *Erickson v. Pardus,* 551 U.S. 89, 93 (2007)(citing *Twombly*, 550 U.S. at 555 and quoting Fed. R. Civ. P. 8(a)(2)). In ruling on a motion to dismiss for failure to state a claim, a court must "examine whether the allegations in the complaint state a 'plausible' claim for relief." *Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011)(citing *Iqbal*, 556 U.S. at 677-678). A complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," rather than providing allegations that do not rise above the speculative level. *Id.*

ANALYSIS

"[I]nterpretation of an insurance policy is a matter of state law." *Windridge of Naperville Condo. Assoc. v. Philadelphia Indemnity Ins. Co.*, 932 F.3d 1035, 1039 (7th Cir. 2019). The parties agree that Illinois law controls the outcome of their dispute. Under Illinois law an "insurance policy is a contract … . [T]he general rules governing the interpretation of other types of contracts also govern the interpretation of insurance policies." *Id.* (quoting *Hobbs v. Hartford Insurance Co. of the Midwest*, 823 N.E.2d 561, 564 (Ill. 2005)). As the Supreme Court of Illinois has explained, in this context, a court's "primary objective is to ascertain and give effect to the intention of the parties, as expressed in the policy language. If the policy language in unambiguous, the policy will be applied as written, unless it contravenes public policy." *Hobbs*, 823 N.E.2d at 564. Whether there is an ambiguity "turns on whether the policy language is subject to more than one reasonable interpretation." *Id.* An ambiguity exists where "policy language is

subject to more than one reasonable interpretation. Although 'creative possibilities' may be suggested, only reasonable interpretations will be considered." *Id.* (citation omitted).

Badger Mutual argues that there is no coverage for Smeez's lost or diminished income because there has not been a "direct physical loss of or damage to" property at the business. In the alternative, Defendant suggests that, even if Plaintiff had adequately pleaded the direct loss or damage, the civil authority and virus or bacteria exclusions bar coverage. Smeez counters that Badger Mutual's interpretation of the phrase "direct physical loss of or damage to" property equates "physical loss" with "damage," which cannot be permitted because it would render one of the terms superfluous. Instead, Plaintiff suggests either that the plain meaning should include coverage when property is uninhabitable or unusable for its full intended purpose or that the language is too ambiguous to preclude coverage at this stage.

Defendants point to a line of cases interpreting the phrase "direct physical loss to" as requiring physical, tangible damage to insured property. *See, e.g.*, *Sandy Point Dental, PC v. Cincinnati Insurance Co.*, 2020 WL 5630465 (N.D. Ill. Sept. 21, 2020)(finding that "direct physical loss" unambiguously requires physical harm to the covered premises "rather than forced closure … or adverse business consequences that flow from such closure."). *See also* 10A STEVEN PLITT ET AL., COUCH ON INSURANCE § 148:46 (3d. ed 2020) ("When the structure of the property itself is unchanged to the naked eye, however, and the insured alleges that its usefulness for its normal purposes has been destroyed or reduced, there are serious questions whether the alleged loss satisfies the policy trigger. … The requirement that the loss be 'physical' … is widely held to exclude alleged losses

that are intangible or incorporeal."). Plaintiff contends that the line of cases cited by Defendant do not apply here because they do not include or consider the disjunctive "or damage" present in the Badger Mutual policy when discussing the meaning of "direct physical loss."

There are courts that agree with Plaintiff's contention that "direct physical loss" should not be interpreted to mean "physical damage." In *Studio 417, Inc. v. Cincinnati Ins. Co.*, a district court in the Western District of Missouri considered coverage for Covid-19-related losses where a policy provided coverage for "accidental physical loss or accidental physical damage" and used both the term "direct loss" and the term "direct damage" in the policy. 478 F.Supp.3d 794, 797 (W.D. Mo. 2020). The plaintiffs included hair salons and restaurants who alleged that it was "likely that customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus." *Id.* at 798. Applying Missouri law, the district court weighed whether the terms were superfluous if physical loss was defined to mean damage. The Court ultimately concluded that the policy was ambiguous under Missouri law such that discovery into the degree to which Covid-19 was present on the business's premises was warranted, noting that the ruling was subject to later reversal, as "[s]ubsequent case law in the COVID-19 context, construing similar provisions, and under similar facts, may be persuasive." *Id.* at 805.

A subsequent decision issued in the same district acknowledged the ruling in *Studio 417, Inc.* when faced with a policy with the phrase "direct physical loss of or damage to property" before disagreeing with it and finding no coverage for Covid-19-

related reductions in business income. *See Zwill V, Corp. v. Lexington Ins. Co.*, --- F.Supp.3d ---, 2020 WL 7137110 (W.D. Mo. Dec. 2, 2020). This later decision is more closely tied to the policy terms at issue in this litigation, and, unlike in *Studio 417 Inc.*, Smeez does not allege that the coronavirus was present on its premises. Several district courts within the Seventh Circuit also have reached the same conclusion as the *Zwill* court in cases where the policy language covered direct physical loss or damage, as the Badger Mutual policy does. *See Bend Hotel Development Company, LLC v. Cincinnati Insurance Company*, --- F.Supp.3d --- 2021 WL 271294 (N.D. Ill. Jan. 27, 2021)(finding that Covid-19 virus does not cause "direct physical loss or damage to" covered property and noting that the complaint did not allege a need to restore any physical element of the property such that there was a "period of restoration"); *Crescent Plaza Hotel Owner L.P. v. Zurich American Insurance Company*, 2021 WL 633356 (N.D. Ill. Feb. 18, 2021)(dismissing for failure to allege "direct physical loss or damage to" covered hotel); *Bradley Hotel Corp. v. Aspen Specialty Insurance Company*, --- F.Supp.3d ---, 2020 WL 7889047 (N.D. Ill. Dec. 22, 2020)(Covid-19-related losses were not caused by "direct physical loss of or damage to property).

In addition to these decisions, this Court recently considered whether "stay home" orders and the Covid-19 pandemic caused direct physical loss to restaurants under Illinois law and rejected the arguments raised by Plaintiff here. *TJBC, Inc. v. Cincinnati Insurance Company, Inc.*, 2021 WL 243583 (S.D. Ill. Jan. 25, 2021). In dismissing the case, the Court noted that many courts located in Illinois have rejected claims similar to those brought here and rejected arguments that the loss of functionality of restaurants due to in-person dining limits constituted a direct physical loss of property. Instead, the

undersigned found that an "alteration in appearance constitutes physical, tangible damage," which is required to give rise to coverage, and intangible, diminutions in value are not physical losses. *See id.* at *4 (quoting *Windridge*, 932 F.3d at 1040 n.4 and citing *Cincinnati Ins. Co. v. Taylor-Morley, Inc.*, 556 F.Supp.2d 908, 917 (S.D. Ill. 2008)).

The Court has carefully reviewed the policy at issue and the positions of the parties and finds that the policy language at issue is not ambiguous. Despite Plaintiff's suggestion that the use of "physical loss of" with the disjunctive "or damage to" creates an ambiguity, there is ample case law to the contrary, and courts should "not strain to find an ambiguity where none exists." *Hobbs*, 823 N.E.2d at 564 (citing *McKinney v. Allstate Insurance Co.*, 722 N.E.2d 1125 (Ill. 1999)). While courts throughout the country reach different conclusions when weighing dismissal of claims like Plaintiff's, including in the *Henderson Road* ruling that Plaintiff submitted a supplement to its response,[2] the undersigned is persuaded by the decisions of the many courts within Illinois that have held that reductions in usefulness or in profits due to the Covid-19 pandemic and any related closure orders do not constitute "direct physical loss of or damage to" insured properties.

Without an initial grant of coverage, the Court need not address the applicability of the civil authority or virus or bacteria exclusions, and Plaintiff's claim for breach of contract must be dismissed. As Plaintiff's remaining claims flow from the breach of

[2] *See e.g.*, *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.*, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021)(considering a policy that covered "direct physical loss or damage to" property and finding that it covered losses from the indirect closure of the plaintiffs' restaurants). Plaintiff supplemented their response to Defendant's motion with a brief argument related to this decision. (Doc. 32). Upon review, the Court notes *Henderson Road* is not binding precedent, nor is it persuasive.

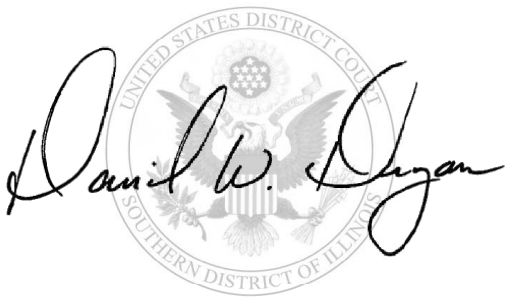
contract claim, they must be dismissed as well. The Court further finds that the failure to state a claim is not tied to a pleading deficiency that can be corrected with an amended complaint. As such, the Court will not grant leave to amend.

CONCLUSION

For the above-stated reasons, Defendant Badger Mutual Insurance Company's motion to dismiss (Doc. [17]) is **GRANTED**. This action is **DISMISSED with prejudice** and without leave to amend. The Clerk of Court shall enter judgment reflecting the dismissal and shall close this case.

SO ORDERED.

Dated: March 22, 2021



DAVID W. DUGAN
United States District Judge

Attachment 4

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Steve Foley Cadillac, Inc. d/b/a Steve Foley Cadillac, Bentley of Northbrook, Steve Foley Rolls Royce, Rolls Royce Motor Cars Chicago; Napleton's Auto Werks, Inc., d/b/a Napleton's Audi, Napleton's Honda, Napleton Mercedes Benz; Napleton 6677, Inc. d/b/a Land Rover Rockford, Jaguar Rockford; and Napleton Motor Corp. d/b/a Napleton Porsche, Napleton Subaru, Plaintiffs, v. New York Marine and General Insurance Company, and Corkill Insurance Agency, Inc., Defendants.	No. 20-L-6774 Calendar S Judge Jerry A. Esrig

ORDER

New York Marine and General Insurance Company ("New York Marine") moves under 735 ILCS 5/2-615 to dismiss, with prejudice, the complaint filed by the plaintiffs named above. For the reasons below, the motion is granted.

I.

A section 2-615 motion to dismiss attacks the sufficiency of a complaint and raises the question of whether a complaint states a cause of action upon which relief can be granted. *Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (1st Dist. 2008). All well-pleaded facts must be taken as true and any inferences should be drawn in favor of the non-movant. 735 ILCS 5/2-615; *Hammond v. S.I. Boo, LLC*, 386 Ill. App. 3d 906, 908 (1st Dist. 2008). Plaintiffs are not required to prove their case at the

pleading stage; they are merely required to allege sufficient facts to state all elements which are necessary to constitute each cause of action in their complaint. *Visvardis v. Eric P. Ferleger, P.C.*, 375 Ill. App. 3d 719, 724 (1st Dist. 2007). A section 2-615 motion should not be granted unless no set of facts could be proved that would entitle the plaintiff to relief. *Beacham v. Walker*, 231 Ill. 2d 51, 58 (2008).

II.

Plaintiffs are Illinois corporations in the business of selling and repairing automobiles.[1] Defendant New York Marine is a New York company in the business of selling commercial property insurance to Illinois businesses such as plaintiffs. Plaintiffs are insured by New York Marine under two policies. The first policy was issued to the first four plaintiffs ("Foley plaintiffs") and the second was issued to the last three plaintiffs ("Napleton plaintiffs"). The policies provide identical coverage.

In support of their complaint, plaintiffs allege the following:

As of March 9, 2020, plaintiffs sustained physical damage to insured property and business income losses caused by the COVID-19 pandemic and related governmental orders.[2] Specifically, after one of plaintiffs' executive officers, among others, became infected with, and spread the COVID-19 virus at plaintiffs' businesses, the presence of COVID-19 virus molecules in plaintiffs' insured properties caused direct physical damage to the air quality, surfaces, personnel, services, and interests of plaintiffs. Such damage, in conjunction with Governor Pritzker's Executive Orders, forced plaintiffs to restrict, slowdown, or cease ordinary business activities, causing (1) a loss of business income, (2) a substantial amount of plaintiffs' labor force being furloughed, (3) a substantial amount of plaintiffs' contracts with its labor forces being suspended or cancelled, and (4) an increase in expenses to continue business operations.

Plaintiffs claim they are entitled to coverage for their losses pursuant to the policies issued to them by defendant and bring three counts for New York Marine's failure to issue such coverage: Count I (Declaratory Judgment), Count II (Breach of

---

[1] For the purposes of the motion, the court takes as true the well-pleaded allegations of the complaint to the extent they are not contradicted by any exhibits attached thereto. *Bd. of Managers v. Pasquinelli, Inc.*, 354 Ill. App. 3d 749, 759 (1st Dist. 2004).

[2] The court takes judicial notice of the COVID-19 pandemic and related governmental orders issued by Governor J.B. Pritzker.

Contract), and Count III (Vexatious Misconduct, pursuant to 215 ILCS 5/155). The court first examines Count II.

III.

Under section 2-615, defendant moves to dismiss Count II (Breach of Contract) on grounds that (1) plaintiffs failed to allege a "direct physical loss of or damage to covered property" as required by the policies, and (2) the Virus Exclusion precludes recovery. The court agrees.

A.

To state a cause of action for breach of contract, plaintiffs must allege the existence of a valid and enforceable contract, substantial performance by plaintiffs, breach of the contract by defendants and resultant injury to plaintiffs. *Oliva v. Amtech Reliable Elevator Co.*, 366 Ill. App. 3d 148, 152 (2006). Where the contract is one for insurance, the burden is on the insured to prove that its claim falls within the scope of the insurance policy's coverage. *Addison Ins. Co. v. Fay*, 232 Ill. 2d 446, 453 (2009); *St. Michael's Orthodox Catholic Church v. Preferred Risk Mut. Ins. Co.*, 146 Ill. App. 3d 107, 109 (1st Dist. 1986) ("[T]he existence of coverage is an essential element of the insured's case, and the insured has the burden of proving that his loss falls within the terms of his policy."). The burden is on the insurer, however, to affirmatively prove that an exclusion in an insurance policy applies. *United Nat'l Ins. Co. v. Faure Bros. Corp.*, 409 Ill. App. 3d 711, 717 (2011) (citation omitted).

Provisions that limit or exclude coverage to the insured must be construed liberally in favor of the insured and strongly against the insurer. *United States Fire Ins. Co. v. Aetna Life & Cas.*, 291 Ill. App. 3d 991, 997 (1997) (citations omitted). Nonetheless, insurance contracts are subject to the same rules of construction as other types of contracts, *Int'l Surplus Lines Ins. Co. v. Pioneer Life Ins. Co.*, 209 Ill. App. 3d 144, 148 (1990) (citations omitted). When interpreting such contracts, the court must not distort the meaning of the policy language to reach a desired result, nor may the court invent ambiguities where none exist. *Id.* Rather, the court must examine the contract as a whole, give effect to the parties' intentions, and, if the words are unambiguous, afford them their plain, ordinary, and popular meaning. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992) (citations omitted).

B.

Section A (Coverage) to the Building and Personal Property Coverage Form attached to the policies provides that New York Marine will pay for "***direct physical loss of or damage to Covered Property***" resulting from any "Covered Cause of Loss." *See*, policies attached as Exhibits A and B to the Mot. to Dismiss (emphasis added). "Covered Property" includes plaintiffs' buildings, business personal property, and the personal property of others. *Id.* "Covered Causes of Loss" is defined by Section A to the "Causes of Loss Special Form" as "***direct physical loss*** unless the loss is excluded or limited in this policy." *Id.* (emphasis added).

While the parties agree that to trigger coverage under the policies, the insured must allege a "direct physical loss of or damage to covered property," the parties disagree as to what constitutes physical loss or damage to property sufficient to trigger coverage. At the outset, the Court notes that both parties cite numerous cases from other jurisdictions in their briefs in support of their arguments. These cases, while not binding, "are persuasive authority" and are "entitled to respect." *Kostal v. Pinkus Dermatopathology Laboratory, P.C.*, 357 Ill. App. 3d 381 (2005). Nevertheless, "Illinois courts do not look to the law of other states where there is relevant Illinois case law available." *In re Estate of Walsh*, 2012 IL App (2d) 110938, ¶ 45.

Plaintiffs' claim of physical loss or damage rests on the following allegation:

> COVID-19 molecules physically infect surfaces, remain on infected surfaces for considerable periods of time, and can remain on infected surfaces for up to four weeks in low temperatures.

Complaint at ¶ 52. In other words, the COVID-19 molecules rest on a surface and temporarily contaminate it for a finite period, during and after which the surface remains unchanged. In this respect, the COVID-19 virus is no different than other viruses or bacteria which frequently, if not continually, temporarily contaminate virtually all surfaces. Such viruses and bacteria present threats of varying degrees to the health of those who come into contact with those surfaces, although, undoubtedly, the COVID-19 threat is extraordinary because of the combination of its lethality and transmissibility.

As a matter of plain English, such temporary contamination does not represent physical loss of or damage to property.

"[B]ecause the primary objective in interpreting the provisions of an insurance policy is to give effect to the parties' intentions, where a policy provision is clear and unambiguous, its language must be taken in its plain, ordinary and popular sense." *Id.* at 303 (2001). Moreover, "the 'usual and ordinary' meaning of a phrase is 'that meaning which the particular language conveys to the popular mind, to most people, to the average, ordinary, normal [person], to a reasonable [person], to persons with usual and ordinary understanding, to a business [person], or to a layperson.'" *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill. 2d 278, 301 (2001), quoting *Outboard Marine Corp.*, 154 Ill. 2d 90, 116 (1992).

In *Travelers*, the Illinois Supreme Court expressly held that "under the plain meaning of the word, a 'physical' injury occurs when property is altered in appearance, shape, color or in other material dimension, and does not take place upon the occurrence of an economic injury, such as diminution in value." *Id.* at 308. Here, plaintiff does not and cannot allege that its property was altered in appearance, shape, color or other material dimension. Temporary contamination of a surface by bacteria and viruses appearing naturally in the environment does not constitute physical damage to that surface within the usual and ordinary meaning of that phrase. Instead, plaintiff seeks to recover for diminution of value, loss of use and other economic loss as a result of contamination.

Travelers leaves no doubt that Illinois law requires actual physical injury to property. *Travelers* specifically rejected a Seventh Circuit decision which held that "the term 'physical injury' does not require that the covered property actually be 'injured' in a 'physical' sense ... , but only that the claimants suffered *any* 'loss that results from physical contact, physical linkage' with the defective ... systems." *Id* at 303, quoting *Eljer Manufacturing Corp. v. Liberty Mutual Insurance Co.*, 972 F.2d 805, 810 (7th Cir. 1982). In *Eljer*, the Seventh Circuit held that physical damage to property occurred when a defective plumbing system was incorporated into a home even though the system had not yet actually malfunctioned. *Travelers* expressly rejected this holding. Thus, where the language of an Illinois comprehensive general liability insurance policy expressly requires a "physical" injury to trigger coverage, such language unambiguously contemplates an "alteration" to the covered property. *Id.* at 311.

Plaintiffs rely on Illinois asbestos cases, including *United States Fid. & Guar. Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64 (1991) and *Board of Educ. v. International Ins. Co.*, 308 Ill. App. 3d 597 (1997). Both of these cases were decided before *Travelers*. In rejecting *Eljer, Travelers* addressed *Wilkin* and asbestos as follows:

> We held [*in Wilkin*] that "asbestos fiber contamination constitutes physical injury to tangible property, *i.e.*, the buildings and their contents." Although, in the *Eljer* majority's view, the basis of our holding was unclear, we specifically explained that the property was "physically" injured as a result of the presence of toxic asbestos fibers within the structures, as "the buildings and their contents (*e.g.*, carpets, upholstery, drapes, etc.) are virtually contaminated or impregnated with asbestos fibers, the presence of which poses a serious health hazard to the human occupants." Thus, this court concluded that "the contamination of the buildings and their contents" due to the continuous release of these toxins constituted "physical injury" under the policies.

197 Ill. 2d at 305-06, quoting *Wilkin*, 144 Ill. 2d at 75, 77-78.

Clearly, like asbestos, COVID-19 represents a serious health risk; but, unlike asbestos, the COVID-19 virus is not "released" from components or systems which are a part of plaintiff's property. COVID-19 occurs naturally in the environment. And, unlike asbestos which continues to contaminate until it is affirmatively removed or abated, COVID-19 dissipates without intervention. *See* Compl. ¶ 52. Moreover, there is no legal duty to remove the COVID-19 virus from the premises, as there is with friable asbestos. *See Board of Education v. A, C & S, Inc.* 131 Ill. 2d 428, 446 (1989).

To the extent plaintiffs rely on asbestos-related cases, like *Wilkin*, to suggest that the Illinois Supreme Court dispensed with the requirement that a "physical" loss be a tangible alteration to covered property, this is incorrect. First, in *Wilkin* and the other asbestos cases, the Illinois courts hold that asbestos contamination *satisfied* the "physical injury to tangible property" requirement, not that the requirement was eliminated. Second, *Travelers* was decided after *Wilkin* and reiterates the requirement of an actual physical injury.

Finally, in *Board of Education*, 131 Ill. 2d 428 (1989), the court cautioned that its holding "should not be construed as an invitation to bring economic loss contract actions within the sphere of tort law through the use of some fictional property damage." 131 Ill. 2d 428, 445 (1989). In Illinois, the asbestos holdings have not been extended to cover temporary contamination from bacteria and viruses. To do so would open the door to an almost infinite array of contamination cases involving viruses and bacteria. The test for physical injury would no longer be a tangible impact on property, but rather the degree of harm to others caused by the contaminant. As a practical matter, this approach would dispense with a physical injury requirement in favor of an economic loss approach. This is precisely contrary to the Supreme Court's warning in *Board of Education.*

Plaintiffs also cite *Posing v. Merit Ins Co.*, 258 Ill. App. 3d 827, 824 (3rd Dist. 1994), but this case offers no support to plaintiffs. In *Posing*, plaintiff, an exterminator, obtained a declaration that it was entitled to a defense and indemnification from its insurer for claims brought by disgruntled customers, each of whom alleged they were required to repair their property as a result of termite infestations which the exterminator had failed to control. The appellate court affirmed as to the exterminator's entitlement to a defense, but reversed as to the insurer's duty to indemnify, finding the trial court's determination to be premature. The insurer argued that the exterminator had not suffered any physical damage to its property, but the court focused on the underlying complaints, finding that "[f]actually, each of the underlying complaints alleges 'property damage' in that the subject real estate was partially destroyed by pest infestation allegedly resulting from Posing's faulty inspection or treatment." *Id.* at 834. In the case at bar, there is no such destruction of property.

To the extent plaintiff relies on the Business Income and Extra Expenses Coverage Form and the Equipment Breakdown Form, its claim fails for the same reason. Each of these coverages requires physical damage to property.

The Business Income Form offers coverage for the "actual loss of Business Income [the insured] sustain[s] due to the necessary 'suspension' of [its] 'operations' during the 'period of restoration,'" but only where such suspension is "caused by a direct physical loss of or damage to property at premises." *See,*

Exs. A and B. For the reasons stated above, such loss or damage has not been and cannot be alleged.

Nor do plaintiffs qualify for additional coverage as provided under Section 5(a) of the Business Income Form ("Civil Authority Provision) which provides as follows:

> When a Covered Cause of Loss causes damage to property **other** than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that **prohibits access** to the described premises, provided that **both** of the following apply:
>
> (1) Access to the area immediately surrounding the damaged property is **prohibited** by civil authority as a result of the **damage**, and the described premises are within that area but are not more than one mile from the damaged property; and
>
> (2) The action of civil authority is taken in **response** to **dangerous physical conditions** resulting from the **damage** or **continuation** of the Covered Cause of Loss that caused the damage...

Id. (emphasis added). Since a "covered cause of loss" requires "direct physical loss," as discussed above, plaintiffs fail to meet this requirement. Moreover, plaintiffs fail to allege a damage to property other than at the insured premises or that the Civil Authority limited access to the covered premises as a result of damage to such other property. Here, to the extent that there is any limitation on access to the insured premises, it results from the contamination at the insured premises, not at another location.

The Equipment Breakdown Coverage provides that the insured "will pay for **direct physical damage** to Covered Property that is the direct result of an '**accident**.'" *Id.* As used in this Additional Coverage, '**accident**' means a fortuitous event that causes direct physical damage to '**covered equipment**.'" *Id.* For the reasons stated above, plaintiffs have not and cannot allege direct physical damage.

C.

Finally, defendants argue that even if the plaintiffs alleged a "direct physical loss of or damage to Covered Property," the

Exclusion of Loss due to Virus or Bacteria Endorsement ("Virus Exclusion") bars recovery for the losses claimed. As stated above, the burden is on the insurer to affirmatively prove that an exclusion in an insurance policy applies. *United Nat'l Ins. Co.*, 409 Ill. App. 3d 711, 717 (2011) (citation omitted).

Section B to the Exclusion of Loss due to Virus or Bacteria Endorsement ("Virus Exclusion") states that if the insured claims a loss due to "***any virus***... that induces or is capable of inducing physical distress, illness or disease," New York Marine will ***not*** pay for any loss or damage caused by such virus. *Id.* (emphasis added).

Section A provides:

> The exclusion set forth in Paragraph B. ***applies to all coverage under all forms and endorsements*** that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover ***business income, extra expense or action of civil authority***.

Id. (emphasis added). Given the plain language of Sections A and B, plaintiffs are precluded from recovering for *any* losses or damages, tangible or intangible, alleged to be caused by the presence or harmful effects of a virus. This is true regardless of the particular policy provision under which the insured proceeds to obtain coverage. Section E to the exclusion makes this explicit by stating that the terms of Section B, "or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part or Policy." *Id.*

First, despite this plain language, plaintiffs argue that the policies are ambiguous with respect to whether the Virus Exclusion applies to plaintiffs' damages. The court finds no such ambiguity. At the risk of repetition, the Virus Exclusion applies to "all coverage under all forms and endorsements." There is nothing remotely ambiguous about this language.

Second, plaintiffs argue that the Virus Exclusion is not relevant where plaintiffs have alleged, in the alternative, that their buildings were rendered unusable due to the Executive Orders which suspended their operations. First, this argument ignores the obvious fact that the Executive Orders were issued in response to the virus. Second, plaintiffs fail to identify any

provision of the policy which affords coverage for any losses arising out of actions taken by the government absent physical damage to property.

IV.

Under section 2-615, New York Marine moves to dismiss Count I (Declaratory Judgment). The essential requirements of a declaratory judgment action are: (1) a plaintiff with a legal tangible interest; (2) a defendant having an opposing interest; and (3) an *actual controversy* between the parties concerning such interests. *Beahringer v. Page,* 204 Ill. 2d 363, 372 (2003) (emphasis added). In light of the court's ruling with respect to Count II (Breach of Contract), plaintiffs do not state a claim for a declaratory judgment action, as there is not an actual controversy between the parties. The motion is granted.

V.

Under section 2-615, New York Marine moves to dismiss Count III (Vexatious Conduct, pursuant to 215 ILCS 5/155) on grounds that where a *bona fide* dispute concerning the scope and application coverage exists, or where the underlying claim is dismissed, sanctions pursuant to section 155 are inappropriate. The court agrees.

Under 215 ILCS 5/155, a party may recover attorneys' fees, costs and sanctions where an insurer has unreasonably delayed settling a claim and where that delay is "vexatious and unreasonable." Where a *bona fide* dispute concerning coverage exists, costs and sanctions pursuant to section 155 are inappropriate. *Cook v. AAA Life Ins. Co.*, 2014 IL App (1st) 123700, ¶ 49, citing *State Farm Mutual Automobile Insurance Co. v. Smith*, 197 Ill. 2d 369, 380 (2001). Further, where no coverage is owed under a policy, there can be no finding that the insurer acted vexatiously or unreasonably with respect to the claim. *Joseph T. Ryerson & Son, Inc. v. Travelers Indem. Co. of Am.*, 2020 IL App (1st) 182491, ¶ 48 (citations omitted).

Where, as here, the court finds that plaintiffs are not entitled to property coverage under the policies on the grounds alleged, section 155 sanctions are inappropriate. In light of this court's above ruling related to Count II (Breach of Contract), then, the court likewise grants the motion to dismiss Count III.

* * * *

Based on the foregoing,

(1) The section 2-615 motion to dismiss is granted, and Counts I, II, and III against New York Marine are dismissed with prejudice;

(2) The case-management conference set for March 5, 2021 at 9:00 shall stand as to the pending motion of Corkill Insurance Agency, Inc. No appearance is necessary.

Failure to comply may result in dismissal for want of prosecution or entry of a default order.

ENTERED:

Jerry A. Esrig

Honorable Jerry A. Esrig
Circuit Judge, Law Division

Dated: February 19, 2021

Circuit Judge
Jerry A. Esrig

Feb 19, 2021
Circuit Court - 2101