UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 21-1203

TJBC, Inc.,

Plaintiff-Appellant,

v.

THE CINCINNATI INSURANCE COMPANY,

Defendant-Appellee.

BRIEF OF APPELLEE THE CINCINNATI INSURANCE COMPANY

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-1203

Short Caption: TJB,C Inc. v. The Cincinnati Ins. 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.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

The Cincinnati Ins. Co.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Litchfield Cavo LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

Cincinnati Financial Corp.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

Cincinnati Financial Corp.

(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/ Daniel G. Litchfield Date: 02/22/2021

Attorney's Printed Name: Daniel G. Litchfield

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/ Alan I. Becker Date: 4/28/2021

Attorney's Printed Name: Alan I. Becker

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

Attorney's Signature: /s/ Brian M. Reid Date: Feb. 22, 2021

Attorney's Printed Name: Brian M. Reid

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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CORPORATE DISCLOSURE STATEMENT

CINCINNATI FINANCIAL CORPORATION is the parent corporation of THE CINCINNATI INSURANCE COMPANY and is the only publicly held company owning ten percent (10%) of more of the stock of THE CINCINNATI INSURANCE COMPANY.

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STATEMENT OF JURISDICTION

Appellee The Cincinnati Insurance Company ("Cincinnati") agrees that this Court has jurisdiction to hear this appeal for the reasons stated by Appellant TJBC, Inc. ("TJBC").

STATEMENT OF ISSUES

1. Did the District Court correctly hold that TJBC's Amended Complaint did not state a claim upon which relief could be granted because it did not allege facts (as distinguished from legal conclusions) that would plausibly show that TJBC incurred direct physical loss or damage to its Covered Property as a result of the Coronavirus or government orders that temporarily limited TJBC's operations to delivery and carry-out food service and therefore did not trigger Business Income coverage?
2. Did the District Court correctly hold that government orders that temporarily limited TJBC's operations to delivery and carry-out food service did not trigger Civil Authority Coverage because they were not based on direct physical loss or damage to property other than TJBC's property?
3. Is the District Court's determination that the government orders did not trigger Civil Authority Coverage also correct because the orders did not prohibit access to TJBC's premises?

STATEMENT OF THE CASE

TJBC operates a restaurant, banquet hall and taproom in Belleville, Illinois. It purchased a commercial property insurance policy from Cincinnati. The Policy provides for Business Income coverage as follows:

> 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" to property at "premises" caused by or resulting from any Covered Cause of Loss.

(A35).[1] "Loss" is defined to mean "accidental loss or damage." (A38). Thus, the Business Income coverage requires direct accidental physical loss or damage to property.

The Policy also provides coverage for business income loss arising from certain governmental acts under the Civil Authority coverage provision. The Civil Authority coverage applies where orders of civil authority are issued due to direct physical "loss" to property, other than property at the insured "premises," and which prohibit access to the Insured's "premises." (A36).

Beginning in March 2020, due to the Coronavirus pandemic, Illinois Governor Pritzker issued a series of executive orders seeking to slow the spread of the disease by reducing the congregation of people. With respect to restaurants, the initial order on March 16, 2020, required restaurants to suspend on-premises food consumption, but the order further provided that restaurants "are permitted and encouraged to serve food and beverages so that they may be consumed off-premises" and specified that consumers were permitted to "enter the premises to purchase food or beverages for carry-out." (A43). TJBC acknowledges the orders permitted food and beverage sales for off-site consumption at all times, yet also alleges the orders closed its business for periods of time. *See, e.g.*, A20-23 at ¶¶ 66–67, 74, 80, 82, 87, 89, 98; A43. TJBC's Amended Complaint does not allege that Coronavirus was ever detected on its premises.

The District Court granted Cincinnati's motion to dismiss, with prejudice, and denied TJBC's motion for partial summary judgment. TJBC appealed only from the judgment granting Cincinnati's motion to dismiss.[2]

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[1] Citations to A## are to TJBC's Short Appendix

[2] TJBC includes in its Short Appendix at A48 the Declaration of Todd Kennedy. This Declaration was not filed as part of the Amended Complaint or TJBC's motion to dismiss briefing. TJBC filed the Declaration in support of its motion for partial summary judgment, which the District Court denied as moot.

SUMMARY OF ARGUMENT

TJBC seeks coverage solely because of government orders issued to slow the spread of the Coronavirus. These orders restricted the congregation of people. To achieve that end, the orders temporarily limited the type of services restaurants could provide. TJBC characterizes this as "loss of use" of its property. The Policy, however, provides coverage only for income loss arising as a result of direct physical loss or damage to the insured's property or, under the Civil Authority coverage, income loss arising from orders issued as a result of physical loss or damage to property other than the insured's, where the orders prohibit access to the insured's property. TJBC's Amended Complaint did not allege facts that plausibly showed direct physical loss or damage to its property, much less anybody else's property. It did not allege orders that prohibited access to its property. Therefore, neither the Business Income coverage nor the Civil Authority coverage applied.

The District Court correctly held that the Policy provision requiring direct physical loss or damage to property requires some physical alteration of the Covered Property, which comprises the building and its contents, and that loss of use of the property, without any such alteration, was insufficient. This application of the Policy terms is supported by numerous judicial decisions prior to the Coronavirus pandemic as well as the great majority of decisions applying the same or similar policy language to Coronavirus claims, including in Illinois. Moreover, the minority of Coronavirus decisions that have denied insurers' motions to dismiss do not properly apply the established principles of insurance policy interpretation. Among other deficiencies, these cases deconstruct the policy language by focusing on one of the definitions of the word "loss" apart from the phrase in which the word loss is used. In this way, those cases ignore that the word loss is modified by the words "direct" and "physical". Additionally, these

minority decisions improperly focus on whether the agent that causes loss is physical, rather than on whether the effect to the Covered Property is physical. The Policy requires the latter. Also, some of these cases improperly assume that the preposition "or" in the phrase direct physical loss or damage means that the word loss must mean something entirely different from damage so that if something is damaged it cannot be a loss. From here, these minority decisions conclude that direct physical loss can be the temporary loss of use of a business's property or operations. The minority decisions also fail to apply the principle that policy provisions should be read in context and in harmony with each other. Those decisions disregard the provision that Business Income coverage only applies during a period of restoration, which is the reasonable time to repair, rebuild or replace damaged or lost property. This provision harmonizes with the requirement that the Business Income coverage only applies where the insured has sustained a physical loss or damage to property.

With respect to the Civil Authority coverage, the District Court correctly held that TJBC's Amended Complaint did not allege facts constituting direct physical damage to anyone else's property. Moreover, the orders cited by TJBC did not prohibit access to its premises, which is required for civil authority coverage. Rather, access was not only permitted but was affirmatively encouraged for the preparation of food and beverages to be consumed off-premises.

Finally, TJBC argues that the Policy does not contain an express exclusion of claims based on a pandemic. However, there is no coverage in the Policy's affirmative grant of coverage. Therefore, the absence of an exclusion is irrelevant. An absent exclusion cannot constitute a grant of coverage as a matter of law.

ARGUMENT

I. BUSINESS INCOME COVERAGE UNDER THE POLICY REQUIRES DIRECT PHYSICAL LOSS OR DAMAGE TO PROPERTY.

The insurance policy that TJBC purchased from Cincinnati is a commercial property policy. It protects TJBC from physical loss or damage to its property, as in the event of a fire or a storm. It does not insure against economic loss in the absence of physical loss or damage. TJBC's claim is based on government orders that temporarily restricted the type of services it could provide, not on any physical loss or damage to its property.

The District Court correctly applied Illinois law that governs the interpretation of insurance policies, citing this Court's summarization in *Windridge of Naperville Condominium Association v. Philadelphia Indemnity Insurance Co.*, 932 F.3d 1035 (7th Cir. 2019):

> the Court's primary objective is to ascertain and give effect to the parties' intentions as expressed in the policy *Windridge*, 932 F.3d at 1039 (citing *Hobbs v. Hartford Ins. Co. of the Midwest*, 214 Ill. 2d 11 (Ill. 2005)). In ascertaining the meaning of the Policy's language, the Court 'must construe the policy as a whole and 'take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract, *Windridge*, 932 F.3d at 1039 (citing *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill. 278 (Ill. 2001)).

(A4–A5). Applying these principles, the District Court correctly dismissed the Amended Complaint because it did not allege facts that plausibly constituted a claim that either the Coronavirus or the orders issued by Governor Pritzker constituted direct physical loss or damage to TJBC's Covered Property or to any property.

A. Illinois Law, Including Other Illinois Coronavirus Coverage Decisions, Supports the Trial Court's Dismissal Decision.

Since the onset of the Coronavirus pandemic, numerous courts nationally have considered the meaning of the phrase direct physical loss or damage to property, or similar phrases, in insurance cases involving the broad presence of the virus in society and government orders that adversely affected businesses. This includes three Illinois state court decisions and

12 Illinois federal court decisions, including this case. *See Firenze Ventures LLC v. Twin City Fire Ins. Co.*, 2021 WL 1208991 (N.D. Ill. Mar. 31, 2021); *Chief of Staff LLC v. Hiscox Ins. Co. Inc.*, 2021 WL 1208969 (N.D. Ill. Mar. 31, 2021); *Zajas, Inc. v. Badger Mut. Ins. Co.*, 2021 WL 1102403 (S.D. Ill., March 23, 2021); *Smeez, Inc. v. Badger Mut. Ins. Co*., No. 3:20-cv-01132 (S.D. Ill. March 22, 2021) (Appellee066)[3]; *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617 (N.D. Ill. Feb. 28, 2021); *In re Society Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.* ("*In re Society*"), 2021 WL 679109 (N.D. Ill. Feb. 22, 2021); *Crescent Plaza Hotel Owner L.P. v. Zurich Am. Ins. Co.*, 2021 WL 633356 (N.D. Ill. Feb. 18, 2021); *The Bend Hotel Dev. Co., LLC v. The Cincinnati Ins. Co.*, 2021 WL 271294 (N.D. Ill. Jan. 27, 2021); *Riverside Dental of Rockford, Ltd. v. Cincinnati Ins. Co.*, 2021 WL 346423 (N.D. Ill. Jan. 19, 2021); *Bradley Hotel Corp. v. Aspen Spec. Ins. Co.*, 2020 WL 7889047 (N.D. Ill. Dec. 22, 2020); *T&E Chicago LLC v. Cincinnati Ins. Co.*, 2020 WL 6801845 (N.D. Ill. Nov. 19, 2020); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690 (N.D. Ill. Sept. 21, 2020), *reconsideration denied*, 2021 WL 83758 (N.D. Ill. Jan. 10, 2021); *Steve Foley Cadillac, Inc. v. N.Y. Marine & Gen. Ins. Co.*, No. 20-L-6774 (Ill. Cir. Ct. Feb. 19, 2021) (Appellee076); *Jaewook Lee d/b/a Evanston Grill v. State Farm Insurance Co. v. State Farm Fire & Cas. Co.*, No. 20 CH 4589 (Ill. Cir. Ct. Jan. 13, 2021) (Appellee087); *It's Nice, Inc. v. State Farm Fire & Cas. Co.*, No. 20 L 547 (Ill. Cir. Ct. Sept. 29, 2020) (Appellee095). *See also Paradigm Care & Enrichment Center, LLC v. W. Bend Mut. Ins. Co.*, 2021 WL 1169565 (E.D. Wis. Mar. 26, 2021) (applying Illinois law).

[3] References to Appellee### are to the Appellee's Short Appendix.

All but two of these cases hold that when the insured only incurs adverse economic effect without distinct, demonstrable, physical alteration of the property, there is no coverage. The trend is overwhelmingly the same throughout the country.

The three Illinois state courts all held that the Governor's orders restricting restaurant operations do not constitute direct physical loss or damage to property.

Steve Foley held that Illinois law has established that "physical loss" means "alteration in appearance, shape, color or other material dimension" of property, based on the holding of the Supreme Court in *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 301 (Ill. 2001). (Appellee080–81). *Steve Foley* also pointed out that the Supreme Court in *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 445 (Ill. 1989), cautioned against claims based on "some fictional property damage." (Appellee082).

Jaewook Lee d/b/a Evanston Grill v. State Farm Insurance Co. similarly holds that Illinois law requires "alteration in appearance, shape, color or other material dimension" in order to satisfy an insurance policy coverage premised on physical property loss or physical property damage. (Appellee089–90, 91–92).

It's Nice, in dismissing the insured's claim for "business interruption loss resulting from the COVID-19 pandemic and the [Illinois] executive orders," held,

> [D]irect 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.

(Appellee122:13-21).

It's Nice cites *Sandy Point Dental, PC v. The Cincinnati Insurance Co.*, 488 F. Supp. 3d 690 (N.D. Ill. 2020) approvingly. (Appellee123:10–124:11). *Sandy Point* holds that an insured

failed to state a claim for lost business income resulting from the Coronavirus and civil authority orders. *Sandy Point* rejected the insured's argument that it suffered direct physical loss because it lost the use of its offices for some services. Instead, it held that "the critical policy language here—'direct physical loss'—unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage. 488 F. Supp. 3d at 693. Thus, because the Coronavirus does not physically alter property, Sandy Point "failed to plead a direct physical loss—a prerequisite for coverage." *Id.* at 694. This failure required dismissal of the insured's claims for business income coverage and civil authority coverage. *Id*.

TJBC's Amended Complaint does not "raise a right to relief" or "state a plausible claim for relief" as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is devoid of any factually supported, non-conclusory allegations of direct physical loss or damage to property. TJBC makes conclusory allegations that its business and premises suffered a 'Covered Cause of Loss' to its property. But, these are not based on any stated facts about the Coronavirus specific to its premises. Rather, TJBC makes conclusory allegations repeating phrases from the Policy. (A20–A21 at ¶¶ 65, 69; A24 at ¶¶ 102-04, 106; A28–A29 at ¶¶ 142–44). There is not even a specific allegation that Coronavirus was even found at TJBC's property. Instead, TJBC alleges that "Studies have found that COVID-19 is detectable" on cardboard, plastic and stainless steel, which it alleges are materials in its facilities. TJBC does not allege the virus was detected on any of those materials at its premises. (A18 at ¶¶ 49-50).

Moreover, even if TJBC had alleged that the virus was actually present at its premises, the science that TJBC itself touts establishes that the virus naturally disappears and can be removed by cleaning. "The virus that causes COVID-19 can be killed if you use the right products.

EPA has compiled a list of disinfectant products that can be used against COVID-19, including ready-to-use sprays, concentrates, and wipes." (*See* Centers for Disease Control and Prevention ("CDC"), *Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes* (Appellee052)[4]; *see also* CDC, *Cleaning and Disinfection for Households* (Appellee061)). The civil authority order TJBC alleges similarly acknowledges that cleaning and disinfecting eliminate the risk of Coronavirus. (A20 at ¶ 66, A24 ¶ 104). Thus, even where the Coronavirus is present, there is no direct physical loss to property because the virus either dies naturally in days, or it can be wiped away.[5]

The Eleventh Circuit Court of Appeals recently held that there must be an actual change in property in order for there to be a direct physical loss and that the presence of a substance that can be readily cleaned away does not constitute such change. *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868 (11th Cir. 2020), *cert. denied*, 2021 WL 1163753 (U.S. Mar. 29, 2021). There, the insured alleged that dust and debris from a nearby road construction project entered its premises and caused its customers to avoid the insured's restaurant, resulting in a loss of income. *Id.* at 871. But, the insured identified no actual physical change to the premises. The district court held that the presence of material that could be washed away did not constitute actual, direct physical loss and the insurer was granted summary judgment, which the Court of Appeals

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[4] The Amended Complaint cites to CDC publications. This Court may take judicial notice of EPA and CDC reports and other matters of public record without converting a Rule 12(b)(6) motion into a Rule 56 motion. Fed. R. Evid. 201(b); *Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013).

[5] The CDC has stated that surfaces are not "thought to be the main way the virus spreads." *CDC updates COVID-19 transmission webpage to clarify information about types of spread*, https://www.cdc.gov/media/releases/2020/s0522-cdc-updates-covid-transmission.html (accessed Oct. 4, 2020). The CDC has stated it is theoretically "possible for people to be infected through contact with contaminated surfaces or objects (fomites), but the risk is generally considered to be low," cleaning can eliminate up to 99.9% of microbe levels and mask-wearing indoors also reduces risks. *SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, Updated April 5, 2021, https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html (accessed April 23, 2021).

affirmed. *Id.* at 879.

B. Restriction on the Use of a Property Does Not Constitute Direct Physical Loss.

TJBC's Amended Complaint does not allege that there has been any identifiable physical harm to its building or contents, the relevant Covered Property specified in the Policy. Yet, that is required for Business Income coverage. Instead, TJBC argues that the range of services it customarily provided was truncated by the government orders. It says that this lessened range of services is "physical loss." (App. Br. 24). This "loss of use" theory has been widely rejected both before the pandemic and in numerous pandemic-related coverage cases. It should be rejected here.

1. Well-Reasoned Cases Preceding the Pandemic Support the Trial Court's Decision.

Prior to the pandemic, numerous courts held that actual, identifiable physical alteration to property is required to have coverage under property policies. These decisions include *Windridge*, 932 F.3d at 1040 ("'physical' generally refers to tangible as opposed to intangible damage"); *Source Food Technology, Inc. v. U.S. Fidelity & Guaranty Co.*, 465 F.3d 834, 838 (8th Cir. 2006); *Pentair, Inc. v. American Guarantee & Liability Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005); *City of Burlington v. Indemnity Insurance Co. of North America*, 332 F.3d 38, 44 (2d Cir. 2003) (direct physical loss "strongly implies that there was an initial satisfactory state that was changed . . . into an unsatisfactory state"); *Trinity Industries, Inc. v. Insurance Co. of North America*, 916 F.2d 267, 270–71 (5th Cir. 1990); Additionally, the leading treatise on insurance law has long concluded: "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." 10A *Couch on Insurance*, § 148:46.

The two decisions from the Eighth Circuit are particularly instructive. *Source Food* expressly rejected the loss of use theory. 465 F.3d at 838. There, the insured claimed loss of use of its beef product that was not permitted to be transported into the United States from Canada due to an embargo. The embargo was based on a general concern about incidents of mad cow disease in Canada. *Id*. at 835. There was no evidence that the insured's product was tainted. *Id*. at 838. The insured's insurance policy provided coverage for "direct physical loss to property". *Id*. *Source Food* rejected the loss of use claim because it would render the term "physical" meaningless. *Id*.

Similarly, *Pentair* considered a claim for business income arising from the shutdown of a factory caused by a loss of electrical power from the local electric utility to the factory. 400 F.3d at 614. *Pentair* affirmed the district court's conclusion that the factory's inability to operate without power did not constitute direct physical loss or damage to it. *Id*. at 616–17.

TJBC argues that this Court's decision in *Advance Cable Co. v. Cincinnati Insurance Co.*, 788 F.3d 743 (7th Cir. 2015), supports its theory that direct physical loss can include loss of use in the absence of actual physical harm to the insured property. It does not. *Advance Cable* arose from a hailstorm and "some structures were damaged." *Id.* at 744–45. *Advance Cable* held that there was coverage because "the hail, in denting the building's [metal] rooftop, physically and directly altered it." *Id.* at 748. In the related case *Welton Enterprises v. Cincinnati Insurance Co.*, 131 F. Supp. 3d 827, 834 (W.D. Wis. 2015), the court explained that the holding in *Advance Cable* meant that the denting "change[d] the physical characteristics of the roof and thus satisfie[d] the Policy requirement that the denting be 'physical'."

TJBC has not alleged facts that would show that any presence of virus on surfaces in its premises made any change in the physical characteristics of any of its Covered Property. TJBC points to a statement in one of Governor Pritzker's orders in which he parrots the statutory requirements for issuing his executive order by stating that the virus has caused property damage. However, that general statement, which is not supported by specific facts and which does not refer to direct physical damage to any property, much less TJBC's property, likewise does not satisfy *Iqbal*. *See Sharde Harvey, DDS, PLLC v. Sentinel Ins. Co., Ltd.*, 2021 WL 1034259, at *10 (S.D.N.Y. Mar. 18, 2021) (holding, with reference to New York Mayor de Blasio's executive order asserting that "the virus is physically causing property loss and damage", "such generalized allegations cannot suffice to establish coverage."); *Food for Thought Caterers Corp. v. Sentinel Ins. Co., Ltd.*, 2021 WL 860345, at *5 (S.D.N.Y. Mar. 6, 2021) (holding that Mayor de Blasio's statements lacked factual support and are too general and too speculative to serve as the basis for a claim).

2. A Rapidly Growing Number of Decisions Nationally Support the Trial Court's Holding Here.

As shown above, the substantial majority of Illinois Coronavirus coverage cases hold that loss of use without actual physical injury to property is insufficient to establish coverage. This same principle has already been widely applied in over 100 virus-related coverage decisions from state and federal courts throughout the country. *See* Table 1.

3. The Illinois "Insurance Law" Cases Cited by TJBC Involve Liability Insurance with Different Coverage from Property Insurance and are Not Relevant.

TJBC asserts that Illinois "Property Insurance Law" holds that "the presence or threatened release of tiny but harmful materials causes loss and damage. (App. Br. 24) In support of this proposition, TJBC (and its amici) cites cases that involved either the release of asbestos

fibers or the inclusion of a defective component into a product and, with respect to insurance, involved coverage under liability policies that provide an insured with defense and indemnity against claims by others.[6] Those liability policies are differently worded and serve a different purpose than the commercial property policy here. Comments in those cases regarding the defined term "property damage" in liability policies are thus not relevant here. As the court explained in *Chief of Staff*, 2021 WL 1208969, at *4, "property damage" as used in liability insurance does not mean the same thing as direct physical loss or damage to property as used in property insurance coverage. *See United Am. Ins. Co. v. Wilbracht,* 825 F.2d 1196, 1203 (7th Cir. 1987) (differently worded provisions in an insurance policy carry different meanings)."

The amici's characterization that Illinois law requires that coverage be construed liberally actually refers to commonplace statements, found in each of the cases, that exclusions should be read narrowly and the duty to defend is read broadly. Cincinnati did no rely on any exclusions and the District Court did not cite any exclusions in dismissing TJBC's Amended Complaint. The cases cited by the Amici reiterate that in interpreting an insurance policy "the court must construe the policy as a whole with due regard to the risk undertaken, the subject matter that is insured and the purposes of the entire contract", *Phusion Projects, Inc. v. Selective Ins. Co. of South Carolina,* 2015 IL App (1st) 150172, ¶ 40, and that "the construction we give to an insurance policy should be a natural and reasonable one." *Gillen v. State Farm Mut. Auto. Ins. Co.*, 215 Ill. 2d 381, 393 (2005).

The subject matter of the policy here is property insurance, not liability coverage that involves the broad duty to defend. The insured risk here is stated to be the risk of direct physical loss or direct physical damage to the insured premises and contents. Nothing in the policy

[6] App. Br. 24-26; RLC Br. 25 n.25; UP Br. 8–9 nn.8–10.

evinces a purpose to provide coverage for loss of income independent of any physical harm to the premises or contents. The claim by TJBC and its amici that the Policy covers an interruption of business operations caused by government orders without any actual physical impact or change to the premises or its contents is not a natural or reasonable construction of the Policy, and it is not supported by Illinois law.

Furthermore, one of TJBC's amici argues that "property" means the right to use property so that any loss of use constitutes direct physical loss of property. (UP Br. 4–5). This argument ignores the provisions of the Policy that identify Covered Property as tangible things: the premises and the contents, not intangible property rights. (Appellee035–36).[7]

4. The Definition of Covered Cause of Loss Does Not Eliminate the Requirement of Actual Direct Physical Loss or Damage.

TJBC rhetorically argues that the definition of Covered Cause of Loss, which is direct physical loss or damage that is neither limited nor excluded, means that coverage is triggered any time there is a risk of direct physical loss or damage to property coverage is triggered, even if the direct physical loss or damage does not actually occur. That is a patently incorrect reading of the policy, and it is nonsensical. The definition of Covered Cause of Loss requires an actual, direct physical loss or damage, not just a risk of them. Only once there is actual direct physical loss or actual direct physical damage is there coverage.

5. The Use of the Word "Or" in the Definition of "Loss" Does Not Mean that the Term Physical Loss Must Mean Something Entirely Different from Physical Damage.

TJBC argues, with citation to *In re Society*, 2021 WL 679109 (N.D. Ill. Feb. 22, 2021), that because the term "physical loss" is separated from the term "physical damage" by the word

[7] Appellant omitted this portion of the Policy from its Appendix. This citation is to the District Court's docket for this case.

"or", physical loss and physical damage must mean entirely different things and that "loss" could be interpreted by a jury to mean a limitation of use of the premises. (App. Br. 23-24). This conclusion is incorrect both legally and analytically.

First, under Illinois law the construction of an insurance policy is a question of law and so it is the function of the judge, not a jury, to interpret the meaning of the terms of an insurance policy. *Nicor, Inc. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 860 N.E.2d 280, 285 (Ill. 2006). Second, the use of the word "or" does not mean that the surrounding terms are totally different, much less that direct physical loss must mean loss of use without any physical harm to the property. Judge Gettleman rejected the "or" argument in *Crescent Plaza Hotel*, 2021 WL 633356, at *3:

> Finally, plaintiff argues that the use of the disjunctive in "direct physical loss or damage" requires that "loss" and "damage" be interpreted differently. According to plaintiff, the term "loss" provides coverage when there was no structural alteration to the property, such as when there is a mere loss of use. Any other interpretation would, plaintiff argues, render "loss" and "damage" redundant. Once again, the court disagrees. The plain wording of the phrase requires either a permanent dispossession of the property due to a physical change ("loss"), or physical injury to the property requiring repair ("damage"). *See Real Hospitality, LLC v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 6503405 at *5 (S.D. Miss. Nov. 4, 2020).

Long before the Coronavirus emerged, courts in other jurisdictions established the principle recognized in *Crescent Plaza Hotel*. *Bethel Village Condominium Association v. Republic-Franklin Insurance Co.*, 2007 WL 416693 (Ohio Ct. App.), involved the same insurance policy language as is at issue here. The plaintiff Bethel urged that the word "or" separated two distinct and mutually exclusive, non-synonymous terms, physical loss and physical damage. *Id.*, at *4. The appellate court in *Bethel* rejected this argument. It explained that "the conjunction 'or' may introduce any number of alternatives or may introduce a synonym or explanation of a previous word." *Id.* at *4. *Bethel* added that "Insurance contracts regularly

insure against both total loss and damage to a portion of property." *Id*. *See also Indiana Mut. Ins. Co. v. North Vermillion Cnty. Sch. Corp.*, 665 N.E.2d 630, 635 (Ind. Ct. App. 1996) (the use of "or" can suggest similarity between the connected terms).

TJBC's argument is far from novel and it has been soundly rejected by courts in Illinois and throughout the country. In *Chief of Staff*, Judge Feinerman provided a graphic illustration in rejecting the "or" argument:

> Chief of Staff is correct that the phrase "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.

2021 WL 1208969, at *3. *See also Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 2020 WL 5938755, at *5-6 (N.D. Ga, Oct. 6, 2020) (when read in the context of a phrase like direct physical loss or damage to property, "or" is a coordinating conjunction used to link complementary terms: "loss is . . . 'the act of losing possession' by complete destruction, while damage is any other injury requiring repair."). *TRIA WS LLC v. Am. Auto. Ins. Co.*, 2021 WL 1193370, at *6 (E.D. Pa.) (the terms "loss" and "damage" "indicate the degree to which the insured property has suffered a negative physical change."); *Bluegrass Oral Health Ctr., PLLC v. Cincinnati Ins. Co. ("BOHC")*, 2021 WL 1069038, at *4 (W.D. Ky. Mar. 18, 2021) (collecting cases).

As all of these cases show, the use of "or" cannot be read to eliminate the physical element for loss or damage to property. There simply is no basis in law or grammar for concluding that the presence of the word "or" in the phrase "accidental physical loss or accidental physical damage" requires that the term "physical loss" be construed to mean loss of use of property that has not suffered some physical alteration. Nor is there any basis to conclude that the presence of the word "or" means it is reasonable to ignore the modifier "physical" in the phrase direct physical loss.

No amount of clever word play can escape the Illinois law imperative that the operative language here be read in context. TJBC's Amended Complaint alleges no physical alteration to property so there is no coverage.

II. CASES TJBC AND ITS AMICI CITE ARE POORLY REASONED, INAPPLICABLE OR DISTINGUISHABLE.

A. The *Studio 417* Suite Of Cases Are Poorly Reasoned, Contrary To A National Trend Of Better Reasoned Decisions And Have Been Broadly Rejected By Courts in the Seventh Circuit and Nationally.

TJBC and its amici cite a trio of orders by one judge in the Western District of Missouri. These decisions deny motions to dismiss claims like TJBC's claim here. *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020); *K.C. Hopps, Ltd v. The Cincinnati Ins. Co., Inc.*, 2020 WL 6483108 (W.D. Mo. Aug. 12, 2020); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867 (W.D. Mo. 2020) (collectively, "*Studio 417*"). But, those decisions are poorly-reasoned, and contrary to an overwhelming body of directly on-point authority nationally.

Zwillo V, Corp. v. Lexington Insurance Co., 2020 WL 7137110, at *8 (W.D. Mo. Dec. 2, 2020) and *Promotional Headwear International v. Cincinnati Insurance Co.*, 2020 WL 7078735, at *4 (D. Kan. Dec. 3, 2020) are among the cases rejecting *Studio 417*. After a detailed

examination of the relevant law and unambiguous policy language, both courts reject the "loss of use" theory because it does not satisfy the direct physical loss or damage requirement. And, both cases expressly reject *Studio 417's* errant holding.

Zwillo also decisively "*consider[s]*" *and rejects* the argument that it should deny the motion to dismiss "to be in harmony with other rulings in [the Western District of Missouri]." 2020 WL 7137110, at *10. And, it dispenses with any pretextual effort to distinguish those cases: "To the extent this Court's ruling – finding the language in the policy plainly and unambiguously does not cover the claims – conflicts with *Studio 417*, *K.C. Hopps*, and *Blue Springs Dental Care, this Court respectfully disagrees with those cases.*" (*Id*. at *8) (emphasis added).

Promotional Headwear rejects a claim of loss of use of premises resulting from emergency orders issued by the Governor of Kansas and Johnson County, Kansas. 2020 WL 7078735, at *1. It holds that the same Cincinnati policy language involved in the present case did not provide coverage. *Id*. at *2. There was no physical loss or physical damage to property because there was no claim that the property had been physically altered.

Promotional Headwear applies the same basic insurance law principles that apply in Illinois: the policy must be read as a whole and terms in the policy must be read in context. *Id*. at *4-*5; *Nicor*, 860 N.E.2d at 285. Thus, to find coverage based solely on dictionary definitions of the word loss, in isolation from the phrase containing that word, would read the modifying elements "direct" and "physical" out of the policy. This was done erroneously in *Studio 417*. *Promotional Headwear*, 2020 WL 7078735, at *7.

The court in *Uncork & Create, LLC v. Cincinnati Ins. Co.*, 2020 WL 6436948, at *5 (S.D.W. Va. Nov. 2, 2020), held that even where an allegation was made that virus was present at an insured's premises, the presence does not trigger coverage:

> Although some courts have drawn a distinction based on whether a complaint alleged presence of the virus on the premises, the Court does not find such an allegation determinative. . . . Firstly, while factual allegations drive the analysis of a motion to dismiss, courts are not required to set aside common sense, and neither *Studio 417*, which relied in part on the allegation of presence of the virus, nor the instant case, involve actual allegations of employees or patrons with infections traced to the business. There is a similar risk of exposure to the virus in any public setting, regardless of artful pleading as to the likelihood of the presence of the virus. Secondly, ***even when present***, COVID-19 does not threaten the inanimate structures covered by property insurance policies, and ***its presence on surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property***. Because routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover, and a covered "loss" is required to invoke the additional coverage for loss of business income under the Policy.

Studio 417 also errs by accepting the plaintiffs' conclusory allegations and legal conclusions in addressing a F.R.C.P. Rule 12(b)(6) motion. In particular, it treats the allegation that the virus was "likely" on the premises of each of the numerous plaintiffs as if there were an allegation that the virus actually caused physical loss or damage to those properties. Moreover, *Studio 417* erroneously concludes that the plaintiffs there had alleged direct physical loss because there was a "causal relationship" between plaintiffs' purely financial losses and the virus, which is "a physical substance". 478 F. Supp.3d at 800. But, under the plain language of the policies, it is the alleged loss or damage to property, *not* the damage-causing *agent*, that must be physical. Under *Studio 417's* reasoning this Court in *Advance* would not have needed to base its decision on the fact that the roof had been dented because the hail was a physical object. *See Bridal Expressions LLC v. Owners Ins. Co.*, 2021 WL 1232399, at *7 (N.D. Ohio Mar. 23, 2021) (reading "impairment of functionality" into the policy "would result in the Policy being triggered any time the rain renders the [insured's] outdoor furniture unusable", an "absurd result" that would follow equating loss of use with direct physical loss.).

There are numerous other well-reasoned decisions that reject *Studio 417*, including from Illinois. *See, e.g.*, *Chief of Staff*, 2021 WL 1208969, at *6; *Crescent Plaza Hotel*, 2021 WL 633356, at *3; *Bend Hotel*, 2021 WL 271294, at *2; *Sandy Point*, 2021 WL 83758, at *2; *Bradley Hotel*, 2020 WL 7889047, at *4; *see also Am. Food Sys., Inc. v. Fireman's Fund Ins. Co.*, 2021 WL 1131640, at *4 n.7 (D. Mass. Mar. 24, 2021) (collecting cases); *St. Julian Wine Co. v. Cincinnati Ins. Co.*, 2021 WL 1049875, at *4 (W.D. Mich. Mar. 19, 2021); *BOHC* , 2021 WL 1069038, at *3 (collecting cases); *Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co.*, 2021 WL 778728, at *6 (N.D. Ga. Mar. 1, 2021).

B. *North State Deli* Is Poorly Reasoned And Inapplicable.

TJBC also points to *North State Deli, LLC v. The Cincinnati Insurance Co.*, 2020 WL 6281507 (N.C. Super. Oct. 9, 2020) (appeal pending). There, the trial court's ruling ignored controlling North Carolina precedent. *Harry's Cadillac-Pontiac-GMC Truck Co., Inc. v. Motors Ins. Corp.*, 486 S.E.2d 249 (N.C. App. 1997). In *Harry's Cadillac*, the sole issue was whether plaintiff's alleged lost profits as a result of a snowstorm causing plaintiff's dealership to be inaccessible to patrons for a week were covered under the policy's business interruption coverage. *Harry's Cadillac* concluded:

> We hold that, under the language of the business interruption clause of the policy, coverage is provided only when loss results from suspension of operations due to damage to, or destruction of, the business property by reason of a peril insured against.

Id., 486 S.E.2d at 251-52 (emphasis added).

North State Deli not only fails to follow *Harry's Cadillac*, it makes no mention of that case despite *Harry's Cadillac* being binding authority from its appellate court. *North State Deli* has been rejected in subsequent Coronavirus rulings in North Carolina. *Summit Hosp. Grp. Ltd. v. Cincinnati Ins. Co.*, 2021 WL 831013 (E.D.N.C. Mar. 4, 2021); *FS Food Grp., LLC v. The*

Cincinnati Ins. Co., No. 3:20-cv-00588-RJC-DSC (W.D.N.C. Mar. 18, 2021) (Appellee135, 144); *Bluewater Sales LLC v. Erie Ins. Grp.*, No. CVS 00506 (Moore Cnty, N.C. Feb. 9, 2021) (Appellee151, 153).

C. The Minority View in Two Illinois Coronavirus Cases Is Highly Flawed.

As noted above, 14 state and federal district court decisions in Illinois have dismissed Coronavirus coverage claims. TJBC cites the two cases in which motions to dismiss were denied.

1. *Derek Scott Williams*

Derek Scott Williams purported to apply Texas law and improperly based its decision on the conclusion that a factfinder (e.g., a jury) could find that the term "physical loss" could mean mere loss of use. 2021 WL 767617, at *3, *4. Under Illinois law, this conclusion would have been in error because the interpretation of the meaning of an insurance policy is a matter of law for the court, not a matter of fact that a jury can determine. *Nicor*, 860 N.E.2d at 285.

Second, *Derek Scott Williams* focused on a dictionary definition of the word "loss", without regard to the fact that the word is part of a phrase that includes the terms "direct" and "physical". 2021 WL 767617, at *4. As *Chief of Staff* pointed out, while the dictionary definition of "loss" standing alone, can refer to a deprivation of possession, in the Business Income policy "loss" is modified by the adjective "physical" "which in context means "tangible, concrete. . . . So 'physical loss' refers to a deprivation caused by a tangible or concrete change in or to the thing that is lost." *Chief of Staff*, 2021 WL 1208969, at *2 (internal citations and quotations omitted); *see also Paradigm Care*, 2021 WL 1169565, at *5–*7. It was error for *Derek Scott Williams* to rely on the definition of "loss" standing alone and out of context. *See Nicor*, 860 N.E.2d 285.

Third, in an effort to make its conclusion that physical loss can mean loss of use

harmonize with the "period of restoration" provision that limits the duration of business income loss to the reasonable time needed to rebuild, replace or repair the affected property, the *Derek Scott Williams* court decreed that "repair" could mean the revocation of the governor's order that restricted TJBC's operations. 2021 WL 767617, at *4. This was a totally arbitrary and artificial definition of a word that has a plain and ordinary meaning. *TRIA* directly rejected this extraordinary holding, observing that "As ordinarily understood, however, a property is 'repaired' only when it is restore(d) to its sound and healthy state." 2021 WL 1193379 *7 n.5. *Hillcrest Optical, Inc. v. Continental Casualty Co.*, 2020 WL 6163142, at *8 (S.D. Ala.) held that a reasonable insured would not understand "repair" to mean a government order that revokes a prior order regulating business activity, citing, *inter alia*, *Wildin v. American Family Mutual Insurance Co.*, 638 N.W.2d 87, 90 (Wis. Ct. App. 2001) ("The common and ordinary meaning of 'repair' is 'restore by replacing a part or putting together what is torn or broken.'"). *See also Real Hospitality*, 2020 WL 6503405, at *6.

Finally, although the *Derek Scott Williams* court recognized that the claim was governed by Texas law, the decision does not even acknowledge the numerous Texas law decisions holding that "physical loss" to property means "a distinct, identifiable, physical alteration of the property." Therefore, Texas courts reject the claim that loss of use of property because of the Coronavirus pandemic or government orders restricting operations triggers coverage under commercial property insurance. *See, e.g.*, *Vandelay Hosp. Grp. LP v. Cincinnati Ins. Co.*, 2021 WL 462105, at *1 (N.D. Tex. Feb. 9, 2021); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, 2021 WL 972878, at *6 (W.D. Tex. Jan. 21, 2021); *Hajer v. Ohio Sec. Ins. Co.*, 2020 WL 7211636, at *2 (E.D. Tex. Dec. 7, 2020); *Diesel Barbershop LLC v. State Farm Lloyd's*, 479 F. Supp. 3d 353, 360 (W.D. Tex. 2020).

The *Derek Scott Williams* court also ignored a pre-Coronavirus Texas state law decision underlying these Coronavirus coverage dismissals, *North American Shipbuilding, Inc. v. Southern Marine & Aviation Underwriting, Inc.*, 930 S.W.2d 829, 833-34 (Tex.App. 1996), which held that physical loss means "an initial satisfactory state that was changed by some external event into an unsatisfactory state.".

2. *In re Society*

In *In re Society* the court adopted the faulty notion that the use of the word "or" to separate "physical loss" from "physical damage" meant that the plaintiff did not need to show any change to the property's physical characteristics. 2021 WL 679109, at *8. As discussed above, this reliance on "or" is legally, grammatically and analytically unsound. In its decision, which purportedly considered Illinois law along with the law of several other states, *In re Society* makes no mention of the Illinois state law decisions involving Coronavirus claims or the underlying Illinois Supreme Court cases on which those decisions relied. The *In re Society* ruling also omits reference to the multiple, contrary Illinois federal court rulings, including *TJBC* and those other decisions issued prior to February 22, 2021. And, like *Derek Scott Williams*, *In re Society* erroneously held that a jury would assume the task of interpreting the meaning of "physical loss" and could find that it included restrictions placed on operations by government order. *Id.* at *10.

D. Other Cases Denying Insurer's Motions to Dismiss Are the Minority View.

TJBC and its amici cite a number of other decisions that have denied motions to dismiss. *See, e.g.*, RLC Br. 14. These decisions generally follow *Studio 417*, lack analysis, or, as in *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 7249624, at *11 (E.D. Va. Dec. 9, 2020), involve an unwillingness to dismiss in the absence of clear state law precedent.

Others are cursory denials of dismissal by state trial courts, which are "unpersuasive" and have "little value" to federal courts. *Equity Planning Corp. v. Westfield Ins. Co.*, 2021 WL 766802, at *14 (N.D. Ohio Feb. 26, 2021); *MIKMAR, Inc. v. Westfield Ins. Co.*, 2021 WL 615304, at *7 (N.D. Ohio Feb. 17, 2021). The decisions cited by Appellants do not conclusively determine that the insurance policies provide coverage for the plaintiffs' claims. Moreover, they are far fewer than the decisions listed in Table 1that have rejected coverage. That some courts have disagreed with the majority view as to the meaning of "direct physical loss" does not render that policy terms ambiguous. *See Erie Ins. Grp. v. Sear Corp.*, 102 F.3d 889, 894 (7th Cir. 1996); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 152 (7th Cir. 1994); *Chief of Staff, supra* (collecting cases); *Indiana Repertory Theatre, Inc. v. Cincinnati Ins. Co.*, No. 49D01-2004-PL-013137, at 24–25 (Ind. Super. Ct. Mar. 12, 2021) (Appellee178–79).

E. TJBC's Cases Involving Contamination or Uninhabitability Are Either Distinguishable Or Inapplicable.

TJBC and its amicus also cite a number of cases where contamination was found to cause physical loss to properties or where physical conditions involving the property rendered the property so unsafe as to be uninhabitable. *See* App. Br. 26–27 & n.15; RLC Br. 25 n.25; UP Br. 8–9 nn.8–10.

These properties were actually contaminated by deleterious substances, such as sulfide gas, e-coli bacteria, gasoline fumes, and methamphetamine odors. In each case, the contamination involved a chemical reaction or a chemical or biological intrusion in or on the property that was so pervasive and persistent that it rendered the premises completely uninhabitable. As a result, these courts found that there was actual physical injury to the premises.

TJBC and its amici cite several Illinois cases involving released asbestos fibers for the proposition that physical damage to property can occur without any physical effect on the property. Their argument misunderstands the nature of the release of asbestos fibers. *Board of Education v. International Insurance Co.*, 720 N.E.2d 622, 626 (Ill. App. Ct. 1999), pointed out that the presence of asbestos in a building did not constitute physical damage to the building. But, it held that physical damage occurred when asbestos fibers were released from asbestos constructed into the building that had become friable. Friability means that the asbestos containing material had deteriorated, releasing fibers, which means that the material had become damaged. Moreover, the friable asbestos material was required by law to be removed—the required remediation inherently means there was physical alteration of the premises, unlike ordinary cleaning. *Widder v. Louisiana Citizens Property Ins. Corp.,* 82 So. 3d 294, 295 (La. Ct. App. 2011), similarly found property damage where a house that had become widely contaminated by lead particles had to be gutted to be remediated. There was thus a substantial physical alteration caused by the lead dust.

Other cases cited by TJBC and its amici as supporting the proposition that property damage can be found in the absence of any physical alteration of property actually involve tangible physical alteration. *Advance Cable*, discussed *supra*, is exemplary. In *Azalea, Ltd. v. American States Insurance Co.,* 656 So.2d 600 (Fla. Dist. Ct. App. 1995), the interruption of use of a sewage treatment plant arose from the destruction of a bacteria colony that was part of the plant's property. The colony had to be replaced for the plant to resume operations. Thus, actual, tangible physical damage to property was the basis of the claim. In *General Mills, Inc. v. Gold Medal Insurance Co.* 622 N.W.2d 147 (Minn. Ct. App. 2001), grain was treated with an unapproved pesticide. The treatment did not destroy the grain and may not have been harmful to

humans. Still, it was permanently attached to or absorbed by the grain and thereby physically altered the grain, rendering it unusable. And, in *Manpower, Inc. v. Insurance Co. of Pennsylvania*, 2009 WL 3738099 (E.D. Wis. Nov. 3, 2009), parts of a building had collapsed, resulting in actual physical damage to common areas of the building. The insured was a tenant and was entitled to use the damaged common space. Thus, tangible physical damage was the direct cause of the tenant's inability to continue business in the premises.

These cases have no bearing here. TJBC does not allege facts showing its premises were uninhabitable. To the contrary, TJBC admits that the government orders expressly permitted TJBC's premises to be used for carry-out services. This means that the premises were habitable because TJBC's employees could work at the premises to prepare food and customers could enter the premises to pick it up. *See, e.g.*, A22–23 at ¶¶ 80, 87; A43. Furthermore, courts throughout the country hold there is no coverage under policies like Plaintiff's because the virus, *even if present*, does not render plaintiffs' property or premises unusable or uninhabitable. *See, e.g., Promotional Headwear*, 2020 WL 7078735, at *9; *Uncork*, 2020 WL 6436948, at *5; *Hillcrest*, 2020 WL 6163142, at *5–*7.

TJBC's amici also point to the decision in *Dundee Mutual Ins. Co. v. Marifjeren*, 587 NW 2d 191, 194 (N.D. 1998). It involved potatoes that froze following a windstorm that took down power lines, causing the potato storage shed to lose its heating. Contrary to amici's' characterization, *Marifjeren* did not find that insurance coverage for direct physical damage did not require actual harm to the insured storage shed. The court expressly did not address the meaning of "direct physical damage" because the policy included an endorsement that separately, specifically covered freezing of potatoes if caused directly or indirectly by windstorm

damage. *Id.* at 193. That special coverage did not limit windstorm damage to be direct physical damage to the storage shed.

Similarly, in another case cited by one of TJBC's amici, *Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co.*, 406 N.J. Super. 524 (2009), a claim for food spoilage was based on a power outage. *Wakefern* found that the claim was covered by an extension to the policy that specifically covered loss of power arising from damage to the power grid providing power to the warehouse. *Id.* at 530. The court also noted that coverage would not arise from a general property damage provision because the loss of power did not constitute "direct physical loss to covered property." *Id.* at 546.

In several of the cases cited by TJBC, deterioration of physical conditions surrounding the property, such as subsidence of land leaving a house teetering on the edge of a cliff or a continuing rockfall, rendered the property wholly unsafe and uninhabitable. Those physical conditions resulted in physical loss to the property. *See Hughes v. Potomac Ins. Co.*, 199 Cal. App.2d 239 (1962); *Murray v. State Farm Fire & Cas. Ins. Co.*, 203 W. Va. 477 (1998).

The common thread of these cases is that the physical conditions were not readily remediable and caused permanent dispossession. Those conditions are not alleged by TJBC here nor could they be. "[E]ven assuming that the virus physically attached to covered property, it did not constitute the direct, physical loss or damage required to trigger coverage because its presence can be eliminated. Much like the dust and debris at issue in *Mama Jo's*, routine cleaning and disinfecting can eliminate the virus on surfaces." *Promotional Headwear*, 2020 WL 7078735, at *8.

Similarly, *Universal Image Products., Inc. v. Chubb Corp.*, 703 F. Supp. 2d 705, 710 (E.D. Mich. 2010), *affd*, 475 F. App'x. 569 (6th Cir. 2012), held that the cost of a complete

cleaning of a ventilation system did not address a direct physical loss. Thus, there was no coverage.

III. DECONSTRUCTING THE OPERATIVE PHRASE TO FIND COVERAGE FOR LOSS OF USE IN THE ABSENCE OF PHYSICAL INJURY IS CONTRARY TO ILLINOIS INSURANCE LAW.

"Deconstruction" of written language is a critical method which asserts that the meaning of a word or phrase never means exactly what the author intended. *See* "Deconstruction." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/deconstruction (accessed April 25, 2021). The deconstruction method involves extracting words from the context in which they were written and reconstructing the writing to suit the narrative of the deconstructor without regard to the original intention of the writing. The point is to knowingly ignore the author's intended meaning and impose a reader's alternative meaning. Deconstruction may have its devotees in academic circles, but the Illinois law of insurance policy interpretation requires that words in insurance policies be read in context and rejects the notion that individual words can be read out of context to create an ambiguity or alternate meaning. *Nicor*, 860 N.E.2d at 285; *Hobbs*, 214 Ill. 2d at 17; *Gen. Ins. Co. of Am. v. Robert B. McManus, Inc.*, 650 N.E.2d 1080, 1083 (Ill. App. Ct. 1995) ("All provisions of the insurance contract, not just an isolated part, should be read together to interpret it . . . .").

Zwillo made an extensive analysis of this technique and correctly rejected the deconstruction approach:

> An Insured cannot create an ambiguity by reading only a part of the policy and claiming that, read in isolation, that portion of the policy suggests a level of coverage greater than the policy actually provides when read as a whole.

2020 WL 7137110, at *2 (internal citations and quotations omitted). *Zwillo* further held that the word "loss" could not be read in isolation from the words "direct" and "physical," which modify

the words loss and damage, and convey actual, demonstrable loss or harm to some portion of the premises itself. *Id*. at *4–*5. Fundamentally, physical alteration of property is required by the modifying word "physical". Thus, there must be a tangible impact that physically alters property. *Id*. at *4. Indeed, it is *Studio 417's* use of a deconstruction analysis that led the district court in *Zwillo* to ***expressly reject*** *Studio 417*, an earlier decision in the same district. *Id*. at *8.

Similarly, in *Mama Jo's*, the Eleventh Circuit Court of Appeals rejected arguments based solely on definitions of the word loss applied out of the context of the whole phrase. It holds that "'direct' and 'physical' modify loss and impose the requirement that the damage be actual." *Mama Jo's*, 823 F. App'x. at 879.

The Third Circuit Court of Appeals has likewise rejected the deconstruction of insurance policy language. *Royal Insurance Co. of America v. KSI Trading Co.*, 563 F.3d 68, 73-74 (3d Cir. 2009), stated, quoting from *A&S Fuel Co., Inc. v. Royal Indemnity Co., Inc.*, 652 A.2d 1236 (N.J. App. 1995):

> Our case law, however, does not require us to credit every conceivable deconstruction of contractual language. As Justice Clifford stated in *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 23, 405 A.2d 788 (1979), the "doctrine of ambiguity" should be invoked only to resolve "genuine ambiguities", not "artificial" ambiguities created by "semantical ingenuity."

See also Selery Fulfillment, Inc. v. Colony Ins. Co., 2021 WL 963742, at *3 (E.D. Tex. Mar. 15, 2021) ("While reviewing the policy, [n]o one phrase, sentence, or section of [it] should be isolated from its setting and considered apart from the other provisions.") (internal quotations omitted); *Gilreath*, 2021 WL 778728, at *4 ("Courts also analyze the contract as whole (not merely isolated clauses and provisions) and interpret it both to give the greatest effect possible to all provisions and to avoid rendering any of the provisions meaningless."); *Equity Planning*, 2021 WL 766802, at *6 ("Further, in construing a contract, a court must read and consider the

provisions as a whole and not in isolation."); *Kessler Dental Assocs., P.C. v. Dentists Ins. Co.*, 2020 WL 7181057, at *2 (E.D. Pa. Dec. 7, 2020) ("A court should not consider individual items in isolation. It must consider the entire insurance provision to ascertain the intent of the parties."); *Henderson v. State Farm Ins. Co.*, 596 N.W.2d 190, 195 (Mich. 1999) ("The proper approach is to read the phrase as a whole, giving the phrase its common meaning" rather than attempting to define each word in the phrase separately.).

Contrary to the deconstruction approach, in insurance law the meaning of loss cannot be construed independently from the words that surround it in the operative phrase: direct, accidental, ***physical*** loss or damage to property. TJBC seeks to impose a definition of loss as merely a deprivation of use. But, this ignores the context in which loss is used in the Policy. Coverage based on restrictions on the use of property, without more, reads the word "physical" out of the phrase, broadening the scope of coverage beyond the ordinary meaning of the language. *See Chief of Staff*, 2021 WL 1208969, at *4; *Bridal Expressions*, 2021 WL 1232399, at *5 (holding that the dictionary definitions of the words "physical", "loss" and "damage" must be considered in the context of the complete phrase in which they appear ("direct physical loss of or damage to" property) and also in the context of the purpose of the insurance policy as a whole).

In the present case, the deconstruction fallacy is exemplified by arguments advanced by the TJBC and its amicus RLC that look solely to secondary definitions of the singular word "loss", such as "an undesirable outcome of a risk" (App. Br. 19) or "deprivation" (RLC Br. 19). Those definitions are broader than physical loss, which is the type of loss insured under the Policy. Moreover, the definitions quoted are misleading as they omit the leading definition, which is "destruction, ruin." "Loss." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss (accessed April 25, 2021); *see also The*

Woolworth LLC v. The Cincinnati Ins. Co., 2021 WL 1424356, at *4 (N.D. Ala. Apr. 15, 2021); *Paradigm Care*, 2021 WL 1169565, at *5; *BOHC*, 2021 WL 1069038, at *4; *Dakota Girls, LLC v. Phila. Indem. Ins. Co.*, 2021 WL 858489, at *6 (S.D. Ohio Mar. 8, 2021).

IV. INTERPRETING BOTH PHYSICAL LOSS AND PHYSICAL DAMAGE TO REQUIRE ACTUAL PHYSICAL INJURY TO PROPERTY HARMONIZES WITH OTHER PROVISIONS IN THE BUSINESS INCOME COVERAGE.

TJBC does not claim any damages based on physical injury to its premises or contents. Rather, it only claims loss of business income under the Business Income, Extra Expense and Civil Authority coverages. In particular, it does not allege that any of its property needs to be repaired, rebuilt or replaced. The Business Income and Extra Expense coverages apply to "the necessary 'suspension' of your 'operations' during the 'period of restoration'. The 'suspension' must be caused by direct 'loss'[8] to property at a 'premises' caused by or resulting from any Covered Cause of Loss." (A35). The Policy defines "period of restoration" to mean "the period of time that begins at the time of loss and ends the earlier of:

(1) The date when the property at the "premises" should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

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

(A38).

Thus, the period of restoration consists of the time needed to repair, rebuild or replace the property that is the subject of direct "loss"—the defined term that means physical loss to or physical damage to property. "Repair" is what one does to a building or contents that are damaged, but can be fixed. If the building is beyond repair—a total loss—it can be rebuilt. The provision of the Policy that ties Business Income coverage to a defined period of restoration

[8] As earlier shown, the defined term "loss" means "accidental physical loss or accidental physical damage."

ending with repair, rebuilding or replacement squarely harmonizes with the necessity for ***physical*** loss or ***physical*** damage to property. *See, e.g.*, *Bridal Expressions*, 2021 WL 1232399, at *6.

In contrast, interpreting physical loss to mean "loss of use" without physical harm to the property does not harmonize with the period of restoration provision. There is nothing to repair, rebuild or replace. Nor can the lifting of the restrictions on TJBC's businesses substitute as an end-point to the period of restoration because there is no reasonable sense in which the terms "repair, rebuild or replace" can be understood in the ordinary use of those words to mean the abatement or termination of governmental regulation of the business's operations. *TRIA*, 2021 WL 1193370, at *5.

Toppers Salon & Health Spa, Inc. v. Travelers Property Casualty Co. of America, 2020 WL 7024287, at *4 (E.D. Pa. Nov. 30, 2020) exemplifies this point. *Toppers* addressed the identical period of restoration provision applicable here and held:

> [T]hese provisions make clear that there must be some sort of physical damage to the property that can be the subject of a repair, rebuilding or replacement.

Toppers concluded that the plaintiff's loss of use claim could not be harmonized with the period of restoration that governs the business income coverage, consistent with rulings from other courts. *See Sandy Point*, 488 F. Supp. 3d at 693–94; *see also Woolworth*, 2021 WL 1424356, at *4–*5; *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, 2021 WL 1400891, at *11 (D. Md. Apr. 14, 2021); *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, 2020 WL 7490095, at *10 (N.D. Ohio Dec. 21, 2020); *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405, at *6–*7 (S.D.N.Y. Dec. 11, 2020), *appeal withdrawn*, 2021 WL 1408305 (2d Cir. Mar. 23, 2021); *SA Palm Beach LLC v. Certain Underwriters at Lloyd's, London*, 2020 WL 7251643, at *4–*5 (S.D.

Fla. Dec. 9, 2020) (collecting cases); *Hillcrest*, 2020 WL 6163142, at *8; *Henry's*, 2020 WL 5938755, at *5–*6.

Therefore, here as in *Topper* and the other cases cited above, there must be some physical alteration to property in order to have direct physical loss or damage to property. The definition of the period of restoration resonates with this core requirement. If there is nothing to repair, rebuild or replace then there must not have been any direct physical loss or damage to property in the first place. TJBC's financial loss allegations fail to grasp this important point.

V. GOVERNMENT REGULATION OF BUSINESSES IS NOT A PHYSICAL LOSS TO THOSE BUSINESSES' PROPERTY.

TJBC's amicus asserts that "executive orders required restaurants to make physical, detrimental alterations to their premises".[9] (RLC Br. 11). Governor Pritzker's orders made no such demands and TJBC does not claim they did. Moreover, prophylactic measures taken by a business are not physical loss or damage to the property. *Crescent Plaza Hotel*, 2021 WL 633356, at *3.

TJBC's claim is about its loss of revenue due to government regulation. For a time, this regulation limited the types of food services TJBC was allowed to perform. Thus, if TJBC's complaint were deemed to establish coverage, then that result would mean that any loss of revenue caused by government regulation would be direct physical loss or damage to property. Businesses are subject to a host of federal, state and local government regulations that affect the bottom line. Thus, the transfiguration of government regulation into direct physical loss or

[9] United Policyholders' rhetoric is even more off the mark. It asserts that the limitations on use of the federal courthouse are because the building itself is unsafe and uninhabitable (UP Br. 1), when the limitations were in fact introduced to avoid the congregation of people in close quarters (A42–A43). UP similarly asserts that Governor Pritzker's orders were based on premises such as restaurants being physically unsafe, although the orders, which are aimed at promoting social distancing, make no such finding and instead encourage restauranteurs to continue to use their premises to provide food service for off-premises consumption. *Supra* at 1, 4.

damage to property could eventually make property insurers into guarantors of businesses' economic success in a regulated economy. Nothing could be further from the mission of property insurance coverage.

Plan Check Downtown III, LLC v. AmGuard Ins. Co., 485 F. Supp. 3d 1225 (C.D. Cal. 2020) exemplifies this concern. It rejects an insured's claim that physical loss encompassed a reduction in the permitted use of its restaurants, even though there was no physical alteration of property. The court held Plan Check's interpretation was not reasonable because it would result in a "sweeping expansion of coverage without any manageable bounds." *Id.* at 1231–32 & n. 6. Other courts have endorsed *Plan Check*'*s* concerns:

> [H]olding that the Governor's Executive Order led to a "physical loss of" the dining rooms ***would massively expand the scope of the insurance coverage at issue here. . . . The Plaintiffs' construction would potentially make an insurer liable for the negative effects of operational changes resulting from any regulation or executive decree, such as a reduction in a space's maximum occupancy.***

Henry's, 2020 WL 5938755, at *5 (emphasis added). *See also Bridal Expressions*, 2021 WL 1232399, at *7 (N.D. Ohio Mar. 23, 2021); *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.*, 2021 WL 389215, at *6 (S.D. Cal. Feb. 3, 2021); *Hillcrest*, 2020 WL 6163142, at *7.

What TJBC seeks here is lost revenue caused by a government order limiting its business, but not harming its physical property. All American businesses are subject to governmental regulation. That regulation often cuts into profits. If the government's temporary limitation of in-person dining services is twisted into a physical loss to property, then there is no end to where TJBC's position would go.

VI. THE ABSENCE OF A VIRUS EXCLUSION IS IRRELEVANT.

TJBC suggests in a passing reference (App. Br. 17) that because the Policy does not contain a virus exclusion it must cover any claim arising from or involving a virus. That

argument is contrary to how insurance coverage is applied in Illinois, and nationally. An exclusion can become relevant only if it is first determined that there is a loss within the scope of the insuring agreement apart from any exclusions. See 17A Couch on Insurance § 254:12. This insurance law principle is recognized by cases from across the nation. For example, in *Ward General Insurance Services, Inc. v. Employers Fire Insurance Co.*, 114 Cal. App. 4th 548, 555 (2003), *as modified on denial of reh'g* (Jan. 7, 2004), a computer database crashed. Because there was no direct physical loss, it was "unnecessary to analyze the various exclusions and their application to this case." Similarly, in *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 333 (S.D.N.Y. 2014), a law firm temporarily closed because of a power outage. The loss of power was not a direct physical loss to the law firm's property. Accordingly, it was unnecessary to decide whether a flood exclusion applied.

TJBC does not dispute that all of the coverages it seeks are based on direct physical loss or direct physical damage to property. Thus, in the absence of a showing of direct physical loss or damage to property, there is no need to explore whether TJBC's alleged losses resulted from an excluded cause.

Moreover, courts recognize that the scope of the insuring agreement cannot be inferred in the first instance from the absence of an exclusion:

> It is undisputed that there is no virus exclusion. However, Plaintiffs have failed to provide any support for the notion that the absence of an exclusion means that whatever could have been excluded but wasn't is necessarily covered. Even more fundamentally, the issue of exclusions is irrelevant as Plaintiffs' claims do not fall within the scope of the Policies' coverage.

4431, Inc. v. Cincinnati Ins. Cos., 2020 WL 7075318, at *3 (E.D. Pa. Dec. 3, 2020) . *See also Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, 2020 WL 7395153, at *3 (E.D. Pa. Dec. 17, 2020); *Doe Run Res. Corp. v. Lexington Ins. Co.*, 719 F.3d 868, 876 (8th Cir. 2013) ("[T]he

absence of an exclusion, standing alone, does not imply coverage; coverage must be provided in the remaining policy terms."); *Advance Watch Co. v. Kemper Nat. Ins. Co.*, 99 F.3d 795, 805 (6th Cir. 1996) ("the absence of an exclusion cannot create coverage"); *Paradigm Care*, 2021 WL 1169565, at *4 n.7.

Accordingly, the absence of a virus exclusion in TJBC's policy does not bear on the interpretation of the insuring agreement or the meaning of direct physical loss or damage.

VII. THERE IS NO COVERAGE FOR TJBC's CLAIM UNDER THE POLICY'S CIVIL AUTHORITY COVERAGE.

The Policy's Civil Authority coverage only applies if there is a Covered Cause of Loss, meaning direct physical loss or direct physical damage, to property other than the Insured's property. Even then, there is only coverage if the civil authority order(s): (1) "***prohibits*** access to the 'premises' due to [(2)] ***direct physical 'loss'*** to property, other than at the 'premises' caused by or resulting from any Covered Cause of Loss." (A36) (emphasis supplied).

A. There Is No Direct Physical Loss To Other Property.

The plain language of the Policy states that direct physical loss or damage to property other than TJBC's property is required for there to be Civil Authority coverage. *See, e.g., United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 131 (2d Cir. 2006); *Bend Hotel*, 2021 WL 271294, at *3. The Amended Complaint does not identify any actual physical alteration of property, anywhere. TJBC argues that some of the Governor's orders recite that they are issued in light of "severe damage, injury, and loss of life and property under Section 4 of the Illinois Emergency Management Act." Nothing in that Act defines "property" to mean direct physical loss or direct physical damage to property, which is the type of injury to property that is pre-requisite to Civil Authority Coverage. Nor is there any authority under the Act for the Governor to make findings of fact binding on insurers. As discussed earlier, general statements by a

government official, unsupported by specific facts, are insufficient to support a claim for coverage. *Sharde Harvey,* 2021 WL 1034259, at *10; *Food for Thought*, 2021 WL 860345, at *5.

As TJBC's Amended Complaint admits, the State's orders were issued to keep people separated and thus to lessen the spread of the virus. (A19–A20 at ¶¶ 55–56, 63). No facts are alleged that demonstrate that these things happened because of direct physical loss or damage to anybody's property. *See Paradigm Care*, 2021 WL 1169565, at *8 nn.16 & 17 (quoting Illinois government order issued "for the preservation of public health and safety," not due to damage near insured property).

B. The Requisite Prohibition of Access Is Lacking.

The Civil Authority coverage also requires that access to TJBC's premises be completely prohibited by an order of Civil Authority, "not just made more difficult or less desirable." See 11A *Couch on Ins.* § 167:15. Although TJBC asserts that Governor Pritzker's orders "prohibited Main Street from operating on the premises" (App. Br. 9), the orders cited contain no such prohibition. No government order issued in Illinois prohibited access to Plaintiff's premises. To the contrary, the orders expressly permitted persons engaged in food service, such as TJBC, to continue to engage in the business of food service through delivery, drive-through and carry-out services. (A.42). This inherently included an ongoing use of the premises. Indeed, in the March 16, 2020 Order that TJBC quotes at length (App. Br. 8–9; A20), Governor Pritzker included in Section 1 that restaurants, bars and food halls "are encouraged to serve food and beverages so that they may be consumed off-premises"—a portion of the Order that TJBC excised from its lengthy quotations. Engaging in those permitted and encouraged operations necessarily involved permitting TJBC's employees to have access to the premises, and allowing carry-out services

meant that customers were also permitted to have access to the Premises. As held by *Riverside Dental*, the Illinois orders relied on by TJBC:

> did not forbid or prevent the ability to enter plaintiff's dental office. The Governor's Orders limited the types of services that could be provided at plaintiff's dental office for several weeks. This limitation on services that could be provided caused plaintiff a substantial loss of revenue. But the Civil Authority coverage provisions require the civil authority to prohibit access to the premises for an insured's Business Income loss to be recoverable. The complaint's allegations do not allege entry to plaintiff's dental office was prohibited by the Governor's Orders and the text of Governor's Orders attached to the complaint do not contain language prohibiting access to dental offices. On the contrary, the Governor's Orders allow access to dental offices for essential services. Plaintiff's Business Income loss is not covered under the Civil Authority coverage provisions of the policy at issue in this case because the Governor's Orders did not prohibit access to plaintiff's dental office.

2021 WL 346423, at *5. *See also Firenze Ventures*, 2021 WL 1208991, at *6; *Sandy Point*, 488 F. Supp. 3d at 694: *It's Nice* at Appellee123.

Although TJBC argues that it elected not to continue to provide any of the permitted food services because it deemed it unprofitable to do so (App. Br. 10), its decision does not mean that any action by the state prohibited access to its premises. Accordingly, the Civil Authority Coverage does not apply.

CONCLUSION

For the reasons stated above, the decision of the District Court dismissing TJBC's Amended Complaint with prejudice should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(c) because, according to the word count function of Microsoft Word 2016, this brief contains 13,875 words, excluding the parts of the brief exempted by Fed. R. App. P.32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P.(32)(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P.32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 12 point Times New Roman Font for the main text and 11 point Times New Roman Font for the footnotes.

/s/ *Brian M. Reid*
Brian M. Reid

TABLE 1: CASES REJECTING CLAIMS FOR PROPERTY INSURANCE COVERAGE BASED ON CORONAVIRUS ORDERS[10]

Case (Federal 2021)	2021 WL Cite	Court
Muriel's New Orleans LLC v. State Farm Fire & Cas. Co.	1614812	E.D.La.
Q Clothier New Orleans LLC v. Twin City Fire Ins. Co. & Hartford Fire Ins. Co.	1600247	E.D.La.
Rye Ridge Corp. v. The Cincinnati Ins. Co.	1600475	S.D.N.Y.
Aggie Investments LLC v. Cont'l Cas. Co.	1550479	E.D.Tex.
Graspa Consulting Inc. v. United Nat'l Ins. Co.	1540907	S.D.Fla.
Mohawk Gaming Enters. LLC v. Affiliated FM Ins. Co.	1419782	N.D.N.Y.
PF Sunset View, LLC v. Atl. Specialty Ins. Co.	1341602	S.D.Fla.
SSN Hotel Mgmt., LLC v. The Hartford Mut. Ins. Co.	1339993	E.D.Pa.
Select Hospitality LLC v. Strathmore Ins. Co.	1293407	D.Mass.
Islands Restaurants, LP v. Affiliated FM Ins. Co.	1238872	S.D.Cal.
Mayssami Diamond Inc. v. Travelers Cas. Ins. Co. of Am.	1226447	S.D.Cal.
Chester Cnty. Sports Arena v. The Cincinnati Specialty Underwriters Ins. Co.	1200444	E.D.Pa.
7th Inning Stretch LLC v. Arch Ins. Co.	1153147	D.N.J.
Out West Restaurant Grp. Inc. v. Affiliated FM Ins. Co.	1056627	N.D.Cal.
Westside Head & Neck v. The Hartford Fin. Servs. Grp. Inc.	1060230	C.D.Cal.
Windber Hospital v. Travelers Prop. Cas. Co. of Am.	1061849	W.D.Pa.
Daneli Shoe Co. v. Valley Forge Ins. Co.	1112710	S.D.Cal.
Manhattan Partners LLC v. Am. Guar. & Liab. Ins. Co.	1016113	D.N.J.
Bachman's Inc. v. Florists' Mut. Ins. Co.	981246	D.Minn.
DZ Jewelry LLC v. Certain Underwriter at Lloyds London	1232778	S.D.Tex.
Arash Emami M.D. P.C. Inc. v. CNA	1137997	D.N.J.
Skillets LLC v. Colony Ins. Co.	926211	E.D.Va.
Kamakura LLC v. Greater N.Y. Mut. Ins. Co.	1171630	D.Mass.

[10] This Table does not include authorities that dismissed plaintiff's complaint based solely on the existence of a virus exclusion. Nor does it include cases cited in the Appellee's Brief or state court dismissals that are not available on Westlaw.

B Street Grill & Bar LLC v. Cincinnati Ins. Co.	857361	D.Ariz.
Legal Sea Foods LLC v. Strathmore Ins. Co.	858378	D.Mass.
deMoura v. Cont'l Cas. Co.	848840	E.D.N.Y.
AE Mgmt. LLC v. Ill. Union Ins. Co.	827192	S.D.Fla,
Town Kitchen LLC v. Certain Underwriters at Lloyd's London	768273	S.D.Fla.
Circus Circus LV LP v. AIG Specialty Ins. Co.	769660	D.Nev.
15 Oz Fresh & Healthy Food LLC v. Underwriters at Lloyd's London	896216	S.D.Fla.
SAS Int'l Ltd. v. Gen. Star Indem. Co.	664043	D. Mass.
Brunswick Panini's LLC v. Zurich Am. Ins. Co.	663675	N.D.Ohio
Ceres Enters. LLC v. Travelers Ins. Co.	634982	N.D.Ohio
Torgerson Props. Inc. v. Continental Cas. Co.	615416	D.Minn.
Family Tacos LLC v. Auto Owners Ins. Co.	615307	N.D.Ohio
Café La Trova LLC v. Aspen Specialty Ins. Co.	602585	S.D.Fla.
Robert Levy D.M.D. LLC v. Hartford Fin. Servs. Grp. Inc.	598818	E.D.Mo.
Levy Ad Grp. Inc. v. The Chubb Corp.	777210	D.Nev.
Café Plaza de Mesilla Inc. v. Continental Cas. Co.	601880	D.N.M.
Whiskey Flats Inc. v. Axis Ins. Co.	534471	E.D.Pa.
Selane Prods. Inc. v. Cont'l Cas. Co.	609257	C.D.Cal.
Protege Rest. Partners LLC v. Sentinel Ins. Co. Ltd.	428653	N.D.Cal.
Kahn v. Pa. Nat'l Mut. Cas. Ins. Co.	422607	M.D.Pa.
First Watch Rests. Inc. v. Zurich Am. Ins. Co.	390945	M.D.Fla.
Gym Mgmt. Servs. Inc. v. Vantapro Specialty Ins. Co.	647528	C.D.Cal.
Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.	775397	N.D.Cal.
Frank Van's Auto Tag LLC v. Selective Ins. Co. of the Se.	289547	E.D.Pa.
Rococo Steak LLC v. Aspen Specialty Ins. Co.	268478	M.D.Fla.
Colgan v. Sentinel Ins. Co. Ltd.	472964	N.D.Cal.
Karmel Davis & Assocs. Attorneys-at-Law LLC v. The Hartford Fin. Servs. Grp. Inc.	420372	N.D.Ga.
Fink v. The Hanover Ins. Grp. Inc.	647374	N.D.Cal.

Unmasked Mgmt. Inc. v. Century-Nat'l Ins. Co.	242979	S.D.Cal.
R.T.G. Furniture Corp. v. Hallmark Specialty Ins. Co.	686864	M.D.Fla.
Graspa Consulting Inc. v. United Nat'l Ins. Co.	199980	S.D.Fla.
7th Inning Stretch LLC v. Arch Ins. Co.	800595	D.N.J.
Webb Dental Assocs. DMD PA v. The Cincinnati Indem. Co.	800113	N.D.Fla.
1 S.A.N.T. Inc. v. Berkshire Hathaway Inc. & Nat'l Fire & Marine Ins. Co.	147139	W.D.Pa.
Roundin3rd Sports Bar LLC v. The Hartford	647379	C.D.Cal.
Moody v. The Hartford Fin. Grp. Inc.	135897	E.D.Pa.
ATCM Optical Inc. v. Twin City Fire Ins. Co.	131282	E.D.Pa.
Clear Hearing Solutions LLC v. Cont'l Cas. Co.	131283	E.D.Pa.
Independent Rest. Grp. v. Certain Underwriters at Lloyd's London	131339	E.D.Pa.
TAQ Willow Grove LLC v. Twin City Ins.	131555	E.D.Pa.
Ultimate Hearing Sols. II LLC v. Twin City Fire Ins. Co.	131556	E.D.Pa.
Zagefen Bala LLC v. Twin City Fire Ins. Co.	131657	E.D.Pa.
Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co. Ltd.	141180	N.D.Cal.
BA Lax LLC v. Hartford Fire Ins. Co.	144248	C.D.Cal.
Carrot Love LLC v. Aspen Specialty Ins. Co.	124416	S.D.Fla.
O'Brien Sales & Mktg. Inc. v. Transp. Ins. Co.	105772	N.D.Cal.
Berkseth-Rojas DDS v. Aspen Am. Ins. Co.	101479	N.D.Tex.
Island Hotel Properties, Inc. v. Fireman's Fund Ins. Co.	117898	S.D.Fla.
Mena Catering, Inc. v. Scottsdale Ins. Co.	86777	S.D.Fla.
Digital Age Mktg. Grp., Inc. v. Sentinel Ins. Co. Ltd.	80535	S.D.Fla.
Rialto Pockets, Inc. v. Certain Underwriters at Lloyd's, Including Beazley Furlonge Ltd.	267850	C.D.Cal.
K D Unlimited v. Owners Ins.	81660	N.D.Ga
Bluegrass v. State Auto. Mut. Ins.	42050	S.D.W.Va.
Ballas Nails & Spa v. Travelers Cas. Ins.	37984	E.D.Mo.
Edison Kennedy v. Scottsdale Ins.	22314	M.D.Fla.
Roy H. Johnson, DDS v. The Hartford Fin. Servs.	37573	N.D.Ga

Baker v. Oregon Mut. Ins.	24841; 1145882	N.D.Cal.
Palmdale Estates. v. Blackboard Ins.	25048	N.D.Cal.

Case (Federal 2020)	**2020 WL Cite**	**Court**
Atma Beauty v. HDI Global Spec.	7770398	S.D.Fla.
Drama Camp Productions. v. Mt. Hawley Ins.	8018579	S.D.Ala.
Jonathan Oheb MD. v. Travelers Cas. Ins.	7769880	C.D.Cal.
Sun Cuisine v. Certain Underwriters at Lloyd's	7699672	S.D.Fla.
Karen Trinh, DDS v. State Farm Gen. Ins.	7696080	N.D.Cal.
1210 McGavock St. Hosp. Part. v. Admiral Indem.	7641184	M.D.Tenn.
Mortar And Pestle v. Atain Spec. Ins.	7495180	N.D.Cal.
Emerald Coast Restaurants v. Aspen Spec. Ins.	7889061	N.D.Fla.
Prime Time Sports Grill v. DTW 1991 Underwriting	7398646	M.D.Fla.
10012 Holdings v. Sentinel Ins.	7360252	S.D.NY
Kirsch v. Aspen Am. Ins.	7338570	E.D.Mich.
Re: Boulevard Carroll Entm't v. Fireman's Fund Ins.	7338081	D.N.J.
Gerleman Mgmt. v. Atlantic States Ins.	8093577	S.D.Iowa
Palmer Holdings & Investments v. Integrity Ins.	7258857	S.D.Iowa
El Novillo Rest. v. Certain Underwriters at Lloyd's	7251362	S.D.Fla.
Geragos & Geragos Eng. Co. No. 28 v. Hartford Ins.	7350413	C.D.Cal.
4431, Inc. v. Cincinnati Ins.	7075318	E.D.Pa.
Whiskey River on Vintage. v. Ill. Cas.	7258575	S.D.Iowa
BBMS v. Cont'l Cas.	7260035	W.D.Mo.
Selane Prods. v. Continental Cas.	7253378	C.D.Cal.
Chattanooga Prof'l Baseball v. Nat'l Cas.	6699480	D.Ariz.
Long Affair Carpet & Rugv. Liberty Mut. Ins.	6865774	C.D.Cal.
Goodwill Ind. of Centr. Okla. v. Philadelphia Ind. Ins.	8004271	W.D.Okla.
Water Sports Kauai v. Fireman's Fund Ins.	6562332	N.D.Cal.
Brian Handel D.M.D. v. Allstate Ins.	6545893	E.D.Pa.

Raymond H Nahmad DDS v. Hartford Cas. Ins..	6392841	S.D.Fla.
W. Coast Hotel Mgmt. v. Berkshire Hathaway	6440037	C.D.Cal.
Travelers Cas. Ins. v. Geragos & Geragos	6156584	C.D.Cal.
Seifert v. IMT Ins.	6120002	D.Minn.
Mark's Engine Co. No. 28 Rest. v. Travelers Indem.	5938689	C.D.Cal.
Oral Surgeons. v. Cincinnati Ins.	5820552	S.D.Iowa
Infinity Exhibits v. Certain Underwriters At Lloyd's	5791583	M.D.Fla.
Mudpie, Inc. v. Travelers Cas. Ins.	5525171	N.D.Cal.
Pappy's Barber Shops. Farmers Grp.	5500221; 5847570	S.D.Cal.
Turek Enterprises v. State Farm Mut. Auto. Ins.	5258484	E.D.Mich.
10E, LLC v. Travelers Indem.	5359653; 6749361	C.D.Cal.
Malaube, LLC v. Greenwich Ins.	5051581	S.D.Fla.
Social Life Magazine v. Sentinel Ins.	2904834	S.D.N.Y.

Case (State 2021)	**2021 WL Cite**	**Court**
Visconti Bus Serv., LLC v. Utica Nat'l Ins. Grp.	609851	N.Y.Sup.Ct.
Soundview Cinemas, Inc. v. Great Am. Ins. Grp.	561854	N.Y.Sup.Ct.
The Scranton Club v. Tuscarora Wayne Mut. Grp., Inc.	454498	Pa.Com.Pl.
Case (State 2020)	**2020 WL Cite**	**Court**
Musso & Frank Grill. v. Mitsui Sumitomo Ins.	7346569	Cal.Super.
The Inns By the Sea v. California Mut. Ins.	5868738	Cal.Super.
Rose's 1 v. Erie Ins.	4589206	DC Super.
Catlin Dental, P.A. v. The Cincinnati Indem. Co.	8173333	Fla.Cir.Ct.
Dime Fitness v. Markel Ins.	6691467	Fla.Cir.Ct.
DAB Dental v. Main Street Am. Protection Ins.	7137138	Fla.Cir.Ct.
Gavrilides Mgm't v. Michigan Ins.	4561979	Mich.Cir.Ct.
MAC Property Grp. v. Selective Fire & Cas. Ins.	7422374	N.J.Super.

CERTIFICATE OF SERVICE FOR DOCUMENTS FILED USING CM/ECF

I, Brian M. Reid, an attorney, hereby certify that on April 28, 2021, I caused the Brief and Short Appendix of Appellee The Cincinnati Insurance Company to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be automatically accomplished by the CM/ECF system.

/s/ *Brian M. Reid*
Brian M. Reid