STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: June 4, 2021]

ATWELLS REALTY CORP., *Plaintiff,*	:	
v.	:	**C.A. No. PC-2020-04607**
SCOTTSDALE INSURANCE COMPANY, *Defendant.*	:	

DECISION

STERN, J. Before this Court is Defendant Scottsdale Insurance Company's Motion to Dismiss, pursuant to Rule 12(b)(6) of the Superior Court Rules of Civil Procedure, Plaintiff Atwells Realty Corp.'s Complaint, which was filed in response to Defendant's rejection of Plaintiff's insurance claim for business interruption coverage due to Covid-19. Plaintiff objects to the motion. Jurisdiction is pursuant to G.L. 1956 §§ 8-2-13, 8-2-14, and 9-30-1.

I

Facts and Travel

Since June 24, 2003, Plaintiff Atwells Realty Corp. (Atwells) has been a licensed operator of a nightclub known as "Desire" located at 1 Franklin Square, Providence (Premises). (Compl. ¶ 8 (June 17, 2020).) Atwells operates Desire on three floors with an outdoor patio and has a total occupancy capacity of approximately 522 patrons. *Id.* ¶ 11. In order to lawfully operate its nightclub, Atwells holds class BV/BX liquor, food sales, holiday sales, entertainment, and adult entertainment licenses issued by the Board of Licenses of the City of Providence. *Id.* ¶¶ 9-10. Defendant Scottsdale Insurance Company (Scottsdale) is a property and casualty insurer whose

business operations consist of marketing, selling, and entering into insurance contracts/policies with individuals and businesses domiciled in the State of Rhode Island. *Id.* ¶¶ 2-3.

On May 25, 2019, Atwells entered into an insurance policy contract with Scottsdale (Policy), which Atwells asserts was entered into in order to protect its business in the event of a sudden suspension of its operations for reasons outside Atwells' control and to prevent further damage to its property. *Id.* ¶¶ 13-14. Atwells alleges that its Policy was an "all risk" indemnification policy and provided that Scottsdale "will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Causes of Loss[,]" and that Scottsdale agreed to pay for "any covered loss not specifically excluded by an applicable exclusion under the Policy." *Id.* ¶¶ 17, 18, 36; Def.'s Mem. Supp. Mot. Dismiss (Def.'s Mem.) Ex. A (Certified Policy) (Aug. 12, 2020).[1]

The Policy includes Commercial Property Coverage Part Supplemental Declarations providing coverage for "Improvements & Betterments[,]" "Business Personal Property[,]" and "Business Income[,]" and provides that the "Covered Causes of Loss" are "Special[.]" (Certified Policy at 14-15.) The "Causes of Loss – Special Form" states that "[w]hen Special is shown in the Declarations, Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy." *Id.* at 50. In addition, Atwells' Business Income (and Extra Expense) Coverage Form provides for coverage of Business Income, Extra Expense, and an additional coverage for Civil Authority. *Id.* at 66-67.

[1] Plaintiff attached a copy of the Policy to its Complaint as Exhibit A; however, because Defendant provided a Certified Copy of the Policy, which appears to be in the order set forth on the "Schedule of Forms and Endorsements" page, we refer to Defendant's Exhibit A for references to the Policy only for purposes of ease of navigating the Policy. (Certified Policy at 6.) The substance of each party's copy of the Policy is the same.

Among Policy exclusions is an "Exclusion of Loss Due to Virus or Bacteria" (the "Virus Exclusion"). *Id.* at 46. Section A of the Virus Exclusion provides that this exclusion "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.* Section B of this exclusion provides that Scottsdale "will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease." *Id.*

On March 11, 2020, the United States began to experience significant economic disruption as a result of the global coronavirus pandemic. (Compl. ¶ 19.) As a result, Governor Gina M. Raimondo and Mayor of the City of Providence Jorge O. Elorza issued several Executive Orders interrupting Atwells' business operations. *Id.* ¶ 24. Specifically, on March 12, 2020, Mayor Elorza issued an order suspending all entertainment and adult entertainment licenses in the City of Providence, making it impossible for Atwells to lawfully operate its nightclub. *Id.* ¶¶ 26-27. Then, on March 16, 2020, Governor Raimondo issued an order suspending all dine-in service in restaurants, lounges, and nightclubs. *Id.* ¶ 28.

Atwells alleges that "COVID-19 can survive on surfaces" and "be transmitted through contact with affected surfaces[,]" and thus, "as a result of the fear of imminent widespread harm to public's health" the Governor and Mayor issued the aforementioned Executive Orders. *Id.* ¶¶ 22-24. As a result of these orders, Atwells was prohibited from having any patrons on its Premises, and all business operations were suspended despite there being "no evidence to suggest that any customer, employee, independent contractor or any other individual associated with Atwells ha[d] contracted COVID-19 or that the Premises was contaminated with COVID-19[.]"

Id. ¶¶ 29, 32. Atwells alleges that it "has suffered a direct physical loss of its Premises for use for its intended purpose" which "has resulted in an extreme and total loss of Business Income." *Id.* ¶¶ 33-34.

On April 10, 2020, Atwells filed a claim with Scottsdale under the Policy's Business Income (And Extra Expense) and Civil Authority coverages. *Id.* ¶ 61. In response, Scottsdale issued a letter denying coverage for Atwells' losses resulting from the State of Rhode Island's response to the coronavirus pandemic. *Id.* ¶ 62. Scottsdale's denial letter explained that it would not provide coverage under the Business Income (And Extra Expense) provision because the losses suffered by Atwells were not "direct physical damage to property" and that any losses due to a virus, such as COVID-19, are excluded under the Policy. *Id.* ¶ 63. This letter also explained that Scottsdale would not cover Atwells' losses under the Civil Authority provision because it "require[d] damage to property within one mile of [Atwells'] premises from a covered loss, and the prohibition on access is taken in response to dangerous physical conditions . . . which also did not occur." *Id.* ¶ 64. In response to Scottsdale's denial, Atwells sent Scottsdale a letter, alleging that Scottsdale denied its claim in bad faith. *Id.* ¶ 65.

Subsequently, Atwells filed this action. Atwells asserts that, pursuant to the Policy, Scottsdale "agreed to pay for any covered loss not specifically excluded by an applicable exclusion under the Policy" and that "[t]he cause of the losses [it] suffered . . . is not specifically excluded by an applicable exclusion and are Covered Losses pursuant to the terms of the Policy." *Id.* ¶¶ 36-37, 42-49. In addition, Atwells alleges that the "Virus Exclusion does not exclude losses resulting from a global pandemic or the threats posed by such a pandemic" or "a government shutdown order and the direct and physical losses sustained by a business in connection therewith." *Id.*

¶¶ 58-59. Scottsdale filed a Motion to Dismiss Atwells' Complaint in its entirety for failure to state a claim, and on November 12, 2020, this Court held a hearing on the motion.

II

Standard of Review

A motion to dismiss pursuant to Rule 12(b)(6) of the Superior Court Rules of Civil Procedure "has a narrow and specific purpose." *Mokwenyei v. Rhode Island Hospital*, 198 A.3d 17, 21 (R.I. 2018). "'[T]he sole function . . . is to test the sufficiency of the complaint,' and thus this Court need not look further than the complaint in conducting our review." *Palazzo v. Alves*, 944 A.2d 144, 149 (R.I. 2008) (quoting *Rhode Island Affiliate, ACLU, Inc. v. Bernasconi*, 557 A.2d 1232, 1232 (R.I. 1989)). The court should only grant a Rule 12(b)(6) motion to dismiss "'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim.'" *Id.* at 149-50 (quoting *Ellis v. Rhode Island Public Transit Authority*, 586 A.2d 1055, 1057 (R.I. 1991)); *see also Builders Specialty Co. v. Goulet*, 639 A.2d 59, 60 (R.I. 1994). In examining the allegations contained in the Complaint, the court "assumes them to be true, and views them in the light most favorable to the plaintiff." *Id.* at 149.

The court "may, however, look to the insurance contract to apply the facts, as alleged by plaintiff, to the contract." *Chase v. Nationwide Mutual Fire Insurance Co.*, 160 A.3d 970, 974 (R.I. 2017) (citing *Alternative Energy, Inc. v. St. Paul Fire & Marine Insurance Co.*, 267 F.3d 30, 33 (1st Cir. 2001)).[2]

[2] Atwells cited the federal pleading standard; however, our Supreme Court has not adopted the federal plausibility standard of pleading, whereby "'[f]actual allegations must be enough to raise a right to relief above the speculative level,' and a plaintiff must 'nudge[] their claims across the line from conceivable to plausible.'" *Chhun v. Mortgage Electronic Registration Systems, Inc.*, 84 A.3d 419, 422 (R.I. 2014) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

III

Analysis

Scottsdale contends that Atwells failed to state a claim for relief because coverage is only available when there has been "direct physical loss of or damage to insured property, caused by a Covered Cause of Loss[,]" and Atwells failed to allege any "direct physical loss of or damage to the insured property[,]" or to property within one mile, resulting in a civil authority action that prohibited access to the insured property. (Def.'s Mem. at 2.) In sum, Scottsdale argues that Atwells cannot avail itself of either Business Income or Civil Authority coverage. *Id.*

The "Business Income (And Extra Expense) Coverage Form" provides for several coverages, including "Business Income[,]" "Extra Expense[,]" and "Additional Coverages" which includes "Civil Authority" coverage. (Certified Policy at 66-67.) Whether Atwells stated a claim for either Business Income or Civil Authority coverage depends upon the facts alleged by Atwells as applied to the Policy.[3] *See Chase,* 160 A.3d at 974. Specifically, Atwells must state a *prima facie* case that coverage for the loss exists under the Policy. *See General Accident Insurance Company of America v. American National Fireproofing, Inc*., 716 A.2d 751, 757 (R.I. 1998) (citing 19 Ronald A. Anderson, *Couch on Insurance* § 79:315 (2d ed. 1981)); *Providence Journal*

Rather, Rhode Island follows a notice pleading standard; thus, "[a] pleading need not include 'the ultimate facts that must be proven in order to succeed on the complaint . . . [or] to set out the precise legal theory upon which his or her claim is based.'" *Gardner v. Baird*, 871 A.2d 949, 953 (R.I. 2005) (quoting *Haley v. Town of Lincoln*, 611 A.2d 845, 848 (R.I. 1992)). Therefore, the "pleading simply must provide the opposing party with 'fair and adequate notice of the type of claim being asserted.'" *Id.* (quoting *Haley*, 611 A.2d at 848).

[3] As a threshold matter, Atwells pled a cause of action for breach of contract, that there was a valid contract—the Policy—between Atwells and Scottsdale, that Atwells fulfilled its obligations under the contract by paying the premium, that Scottsdale breached the contract by denying coverage, and that Atwells was damaged.

Co. v. Travelers Indemnity Co., 938 F. Supp. 1066, 1073 (D.R.I. 1996)). Thereafter, Scottsdale "bears the burden of proving the applicability of policy exclusions and limitations[.]" *Id.*

A

Business Income Coverage

Scottsdale argues that Atwells failed to allege and, further, admitted that there was no, direct physical loss of or damage to the Premises as required for Business Income Coverage. (Def.'s Mem. at 11.) Scottsdale asserts that, under the "plain and ordinary meaning" of the Policy, the economic damages that Atwells claims from its loss of use of the Premises must be coupled with a "direct physical loss of or damage to property[,]" which is a tangible loss or damage to property, such as a "distinct demonstrable, physical alteration of the property." *Id.* at 11-12 (citing *National Refrigeration, Inc. v. Travelers Indemnity Company of America*, 947 A.2d 906, 909-10 (R.I. 2008); 10A Steven Plitt et al., *Couch on Insurance* § 148:46 (3d. ed. 2020)). Atwells contends that because "direct physical loss of or damage to property" is undefined in the Policy, the Court should render the phrase as ambiguous, construe it against Scottsdale, as the drafter, and allow the phrase to be more broadly interpreted to include more than a tangible, structural injury to or alteration of covered property. (Pl.'s Obj. Def.'s Mot. Dismiss (Pl.'s Obj.), 11-12, 14 (Sept. 28, 2020).)

In applying the principles of contract interpretation, as they are used when interpreting an insurance policy, if the terms of the policy "are clear and unambiguous, 'the task of judicial construction is at an end and the agreement must be applied as written.'" *Ashley v. Kehew*, 992 A.2d 983, 987 (R.I. 2010) (quoting *McBurney v. Teixeira*, 875 A.2d 439, 443 (R.I. 2005)); *see also Bliss Mine Road Condominium Association v. Nationwide Property and Casualty Insurance Co.*, 11 A.3d 1078, 1083 (R.I. 2010). "To determine whether the policy is ambiguous, we give words

their plain, ordinary, and usual meaning." *Bliss Mine Road*, 11 A.3d at 1083 (citing *Mallane v. Holyoke Mutual Insurance Company in Salem*, 658 A.2d 18, 20 (R.I. 1995)). "The Court considers the policy in its entirety and does not 'establish ambiguity by viewing a word in isolation or by taking a phrase out of context.'" *Id.* (quoting *Amica Mutual Insurance Co. v. Streicker*, 583 A.2d 550, 552 (R.I. 1990)); *see also McBurney*, 875 A.2d at 443 (quoting *W.P. Associates v. Forcier, Inc.*, 637 A.2d 353, 356 (R.I. 1994) ("'In determining whether an agreement is clear and unambiguous, the document must be viewed in its entirety and its language be given its plain, ordinary and usual meaning.'")).

"'[A]n agreement is ambiguous only when it is reasonably and clearly susceptible to more than one interpretation.'" *McBurney*, 875 A.2d at 443 (quoting *W.P. Associates*, 637 A.2d at 356); *see also Bliss Mine Road*, 11 A.3d at 1084. Ambiguity found in an insurance policy "is strictly construed against the insurer." *Koziol v. Peerless Insurance Co.*, 41 A.3d 647, 651 (R.I. 2012). Lack of a defined term in an insurance policy is not conclusive of ambiguity; rather, the principals of contract interpretation should be followed, such as looking to the entire policy and giving terms their plain, ordinary, and usual meaning, which may be derived from a dictionary definition. *See Bliss Mine Road*, 11 A.3d at 1084.

The Policy states that Scottsdale "will pay for the actual loss of Business Income [Atwells] sustain[s] due to the necessary 'suspension' of [Atwells'] 'operations' during the 'period of restoration.'" (Certified Policy at 66.) Furthermore, the "'suspension' must be caused by direct physical loss of or damage to property at [P]remises[.]" *Id.* Although the Policy leaves "direct physical loss of or damage to property" undefined, when this coverage part is viewed in its entirety,

the loss of income must be (1) due to the necessary suspension of operations,[4] and (2) incurred during the "period of restoration[.]" *Id.* The Policy defines "period of restoration" as the period of time beginning "72 hours after the time of direct physical loss or damage" and ending "on the earlier of . . . [t]he date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or . . . [t]he date when business is resumed at a new permanent location." *Id.* at 74.

Thus, even prior to determining whether COVID-19 is the type of "direct physical loss of or damage to" the Premises as contemplated by the Policy, when viewing this provision in its entirety, it is clear that the loss of business income must have occurred during this "period of restoration[,]" that is, while the Premises is being repaired, rebuilt, or replaced. Certified Policy at 67, 74; s*ee also McBurney*, 875 A.2d at 443 (applying the rules on the interpretation of contracts and looking to the "all-encompassing language of the document"). Because Atwells did not allege that its operations were suspended in order for Atwells to somehow repair the property, such as a restoration effort to rid the Premises of COVID-19, it did not plead facts sufficient for a *prima facie* case that coverage for the loss of business income exists under the Policy. *See General Accident Insurance Company of* America, 716 A.2d at 757. Also, when viewing the meaning of "period of restoration" as it applies to this coverage part as a whole, it is clear and unambiguous that Business Income coverage requires that there be some tangible loss of or damage to property, as would require repair, rebuilding, or replacement of that property. (Certified Policy at 74.)

Atwells argues the Policy is ambiguous and that a reasonable interpretation of "direct physical loss of property" equates to physical loss of use of that property for its intended use,

[4] The Policy defines "suspension" as the "slowdown or cessation of [] business activities" and "operations" as "business activities occurring at the described premises[.]" (Certified Policy at 74.) Atwells pled a suspension of its operations, and there is no argument to the contrary.

which is the operation of a nightclub. (Pl.'s Obj. at 14.) Atwells cites a number of cases to establish its proposition that the phrase is reasonably susceptible to more than one meaning. *Id.* at 15. However, while these cases establish that many *things*—including intangible things—may be considered "physical loss" or "physical damage[,]" they do not establish that the phrase is ambiguous and open for interpretation.[5] For instance, in *Gregory Packaging, Inc. v. Travelers Property Casualty Company of America*, Civ. No. 2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014), ammonia discharged into the air of the insured's facility rendered it uninhabitable until the air was remediated, and the court held that the "ammonia discharge inflicted 'direct physical loss of or damage to' [the insured's facility.]"[6] *Gregory Packaging, Inc.*, 2014 WL 6675934, at *6-7. The court determined that, under both New Jersey and Georgia law, "physical loss" or "physical damage" not only includes "structural alteration" of property but also "property can be physically damaged . . . when it loses its essential functionality" due to something being physically altered or transformed, such as the air by ammonia, asbestos, dangerous gases, unpleasant odors,

[5] Atwells cites to *Hampton Foods, Inc. v. Aetna Casualty & Surety Co.*, 787 F.2d 349, 352 (8th Cir. 1986) for the proposition that direct physical loss need not be coupled with tangible loss or damage. (*See* Pl.'s Obj. at 15 ("business interruption loss [at Hampton Food Inc.'s facility] due to government ordered evacuation of a building due to risk of collapse was [a] covered business interruption loss even though there had been no tangible injury").) However, the dispute in *Hampton Foods* did not relate to what was considered "direct physical loss"; rather, the policy language, which related to the insured's personal property and business income, provided that it "insure[d] against loss of or damage to the [personal] property insured . . . resulting from *all risks of direct physical loss*." *Hampton Foods, Inc.*, 787 F.2d at 351 (emphasis added). The court held that the insured's loss of personal property, when it was required to vacate the premises, resulted from the "risk" or "danger" of direct physical loss of the property if the building collapsed. *Id.* at 352. Thus, the policy language in *Hampton Foods* is neither equivalent nor comparable to the language in Atwells' Policy, which does not include the risk or danger of direct physical loss language.

[6] The policy language in *Gregory Packaging, Inc.* was substantially the same as the language at issue in the instant action: "[the insurer] 'will pay for direct physical loss of or damage to Covered Property caused by or resulting from a Covered Cause of Loss.'" *Gregory Packaging, Inc.*, 2014 WL 6675934, at *1.

or toxic gases. *Id.* at *5-6 (citing *Essex Insurance Co. v. Bloomsouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor); *TRAVCO Insurance Co. v. Ward*, 715 F. Supp. 2d 699, 709 (E.D. Va. 2010), *aff'd*, 504 F. Appx. 251 (4th Cir. 2013) (toxic gases in home); *Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (gas vapors in building)).

Similarly, in *Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co.*, 968 A.2d 724 (N.J. Super. Ct. App. Div. 2009), the insured lost electricity on its premises due to an event that caused damage to the electrical grid. *Wakefern Food Corp.*, 968 A.2d at 727, 734. In *Wakefern Food Corp.* the court held that because the electricity could physically not function, this equated to physical damage, and the insured's losses were covered. *Id.* at 734. Likewise, in *Dundee Mutual Insurance Co. v. Marifjeren*, 587 N.W.2d 191 (N.D. 1998), wind damage was considered physical damage, absent damage to a storage facility itself, because (1) the wind caused the facility to lose power for three days, (2) the storage facility could no longer perform its function of protecting potatoes, and (3) there was a specific policy endorsement that provided coverage for the potatoes in storage in the event they were damaged under the circumstances. *Marifjeren*, 587 N.W.2d at 193-94.

More importantly, construing the presence of a virus on a premises as a "physical loss of" or "physical damage to" property is consistent with the Policy's Virus Exclusion. If presence of a virus could not be contained within these general provisions, the Virus Exclusion would be superfluous and rendered meaningless. Additionally, the "Causes of Loss – Special Form" specifically excludes from coverage "radioactive contamination" and "magnetic or electromagnetic energy[,]" which seemingly could have a physical presence but not cause structural alteration to property. (Certified Policy at 51, 52.) There would be no need for these

exclusions if "physical loss" and "physical damage" were limited to tangible, structural alterations of property.

In the instant case, Atwells did not allege any physical damage to or physical loss of the Premises, whether tangible or intangible—such as an alteration or transformation to its Premises caused by some event, *i.e.*, COVID-19—that rendered the Premises incapable of performing its essential function; rather, from what Atwells alleges, it could have used its Premises for its ordinary functions but for the Executive Orders.

Although Atwells pled facts sufficient for this Court to consider that COVID-19 may, in some instances, be considered a substance causing physical loss of or damage to property, Atwells stopped short.[7] (Compl. ¶¶ 22-23 ("COVID-19 can survive on surfaces" and "be transmitted through contact with affected surfaces.").) Specifically, Atwells alleged that there was "no evidence to suggest that any customer, employee, independent contractor or any other individual associated with Atwells ha[d] contracted COVID-19 or that the Premises was contaminated with COVID-19[.]" *Id.* ¶ 32. For purposes of Business Income coverage, Atwells plainly did not plead a *prima facie* case that property covered under the Policy had some physical alteration that required remedy and resulted in Atwells' loss of business income.

Indeed, courts across the country are grappling with whether the current losses that businesses allege are due to COVID-19 were caused by "physical loss" or "physical damage" to the insured's property under various policy terms. *See McKinley Development Leasing Company Ltd. v. Westfield Insurance Company*, No. 2020 CV 00815, 2021 WL 506266, at *6-7 (Ohio Stark Cty. Ct. Com. Pl. Feb. 9, 2021) (denying motion to dismiss and finding the terms ambiguous and

[7] This Decision does not consider what the outcome would be if Atwells alleged that there was COVID-19 on the premises; such an allegation would require this Court to look to the insurance contract to apply the facts, as alleged, to the contract and any Policy exclusions.

that insured adequately stated a claim for direct physical loss); *see also Goodwill Industries of Orange County, California v. Philadelphia Indemnity Insurance Co.*, No. 30-2020-01169032-CU-IC-CXC, 2021 WL 476268, at *2-3 (Cal. Super. Jan. 28, 2021) (Order) (denying the demurrer because the insured pled facts sufficient to demonstrate a "direct physical loss" by alleging that COVID-19 is a physical substance, alters air and lives on surfaces, and was present at property at time of closure, and upon reopening its employees were infected); *but see Vervaine Corp. v. Strathmore Insurance Co.*, SUCV20201378BLS2, 2020 WL 8766370, at *4-5 (Mass. Super. Dec. 21, 2020) (granting motion to dismiss complaint where the insured did not allege the presence of virus on the premises, as such there was no allegation of "direct physical loss").

The common theme among them is that the resolution depends upon the policy language and the facts as alleged by the insured and as applied to the applicable policy at issue. *See McKinley Development Leasing Company Ltd.*, 2021 WL 506266, at *4-7; *see also Goodwill Industries*, 2021 WL 476268, at *2-3; *Vervaine Corp.*, 2020 WL 8766370, at *5; *and see JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Insurance Co.*, No. A-20-816628-B, 2020 WL 7190023, at *2 (Nov. 30, 2020) (denying a motion to dismiss because the policy stated that it covered "against all risks of direct physical loss or damage to covered property" and the insured alleged that because COVID-19 was present at a property within one mile, it was "highly likely that [the virus] has been present on [its] premises").

While this particular issue is one of first impression in Rhode Island, the Court's approach to determining the validity of insurance claims—utilizing the principles of contract construction and interpretation to determine whether a policy is clear and unambiguous and whether an insured alleged sufficient facts as applied to its policy to state a claim for coverage—is well-established.

The Court finds that this Policy, as it relates to Business Income coverage, is unambiguous.[8] Because Atwells did not state a *prima facie* case by pleading facts that would entitle it to Business Income coverage, it failed to state a claim for this coverage. *See Chase*, 160 A.3d at 974.

B

Civil Authority Coverage

Scottsdale also argues that Atwells failed to allege that there was damage to any property within one-mile of the Premises and that the action of a civil authority prohibited Atwells from accessing the Premises, as a result of that third party's property damage, as both are required for Civil Authority coverage. (Def.'s Mem. at 18; Def.'s Reply Mem. Supp. Mot. Dismiss (Def.'s Reply) 13 (Oct. 12, 2020) ("[T]he threshold for coverage under the Civil Authority provision is an action of civil authority, which bars access to the Plaintiff's property, issued in response to 'damage' to property, other than property at the described premises, caused by a 'Covered Cause of Loss.'").) Scottsdale asserts that Atwells' allegation that its operations were suspended by a civil authority, *i.e.*, the Governor and Mayor, due to the "ongoing public health crisis[,]" and the general fact that Atwells could still access the Premises for some operations, such as carry out food, are fatal to its claim for Civil Authority coverage. (Def.'s Mem. at 18.)

Atwells contends that "The Governor's Stay at Home Order effectively declare[d] that the threat of COVID-19 was present everywhere in the state, including within one of [sic] mile of the Plaintiff's Property" and that "[t]he dangerous physical conditions created by the virus were such that all access to the Plaintiff's Property were prohibited." (Pl.'s Obj. at 38-39.)

[8] The Court may only consider the objectively reasonable expectations of coverage of the insured when the Court finds the policy language ambiguous. *See Riel v. Harleysville Worcester Insurance Co.*, 45 A.3d 561, 568-69 (R.I. 2012); *see also Employers Mutual Casualty Co. v. Pires*, 723 A.2d 295, 299 (R.I. 1999).

The Policy's Civil Authority coverage provides that:

> "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[.]" (Certified Policy at 67.)

The "Causes of Loss – Special Form" states that "[w]hen Special is shown in the Declarations, Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy." *Id.* at 50. The Commercial Property Coverage Part Supplemental Declarations Form provides that the "Covered Causes of Loss" are "Special[.]" *Id.* at 14-15. Thus, a "Covered Cause of Loss" under Civil Authority coverage is defined as "direct physical loss[,]" unless otherwise excluded. *Id.* at 50.

In the Complaint, Atwells alleges—and Scottsdale conceded at the hearing on the motion—that Atwells is a nightclub. (Compl. ¶ 8; Hr'g Tr., 2:8 (Nov. 11, 2020).) Atwells holds entertainment and adult entertainment licenses, which were suspended by various Executive Orders, making it unable to lawfully operate. (Compl. ¶¶ 26-27.) In addition, Atwells alleges that (1) "[t]he global pandemic COVID-19 and the corresponding government response thereto have caused and continue to cause direct physical loss of or damage to the properties within a one mile radius of Atwells' property which inhibit Atwells' use of its property for its intended business purpose[,]" (Compl. ¶ 116); (2) COVID-19 "can survive on surfaces[,]" "be transmitted through contact with affected surfaces[,]" and "spreads . . . from person to person through small droplets

from the nose or mouth, which are expelled when a person with COVID-19 coughs, sneezes, or speaks[,]" (Compl. ¶¶ 22-23 n.6); (3) due to COVID-19 the Governor and Mayor began issuing Executive Orders, including the Governor's Declaration of Disaster Emergency, which states: "cases of COVID-19 have been documented in the State of Rhode Island" causing "dangers to health and life[,]" (Compl. ¶¶ 24-25, Ex. B); and (4) as a result of the Governor's Shutdown Order issued on March 16, 2020, "Atwells was precluded from having any customers in the Premises[,]" (Compl. ¶¶ 28-29, Ex. D ("COVID-19 continues to spread and, for the first time, Rhode Island has experienced community transmission of the virus.")). Taken together, Atwells alleges that COVID-19, a substance that can survive on surfaces, caused damage to property within one mile from its Premises and that the Executive Orders shut down Atwells business as a result of the virus being spread throughout the state, including the properties within one mile of Atwells.

Scottsdales' arguments that Atwells failed to state a claim for Civil Authority coverage are mistaken in two respects. First, it appears that, contrary to Scottsdales' contention, Atwells did allege facts that there was damage to property within one mile of the Premises. Specifically, Atwells alleges that "[t]he global pandemic COVID-19 . . . caused and continue to cause direct physical loss of . . . the properties within a one mile radius of Atwells' property[.]" (Compl. ¶ 116.) Additionally, Atwells pled that COVID-19 is a physical substance that can alter property. *Id.* ¶¶ 22-23 ("can survive on surfaces" and "be transmitted through contact with affected surfaces"). As set forth in Section III.A, *supra*, substances that cannot be seen but can survive in the air or on surface of property and that can make persons within a premises sick and the premises uninhabitable, can be considered to cause direct physical loss of or damage to property. *See Gregory Packaging, Inc.*, 2014 WL 6675934, at *6-7; *Essex Insurance Co.*, 562 F.3d at 406; *TRAVCO Insurance Co.*, 715 F. Supp. 2d at 709; *Western Fire Insurance Co.*, 437 P.2d at 53.

Second, Atwells need not allege, as suggested by Scottsdale, that the actions of a civil authority prohibited *Atwells* from accessing the Premises. Rather, the Policy does not specify who must be prohibited from accessing the Premises in order for the property to come under the umbrella of Civil Authority Coverage. (Certified Policy at 67 ("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 [one mile of] that area[.]").) Scottsdale suggests that the Executive Orders allowed limited access to the premises for preparing food for delivery and carry out. (Def.'s Reply at 20.) However, Atwells' Policy specifically indicates that it is a "Night Club[,]" so it is insured as a "Night Club[,]" not a restaurant. (Certified Policy at 7, "Schedule of Locations".) Under the facts as alleged, the Property was uninhabitable for this purpose.

Indeed, courts across the country have ruled that when access to the insured property is limited rather than prohibited—as alleged by the plaintiff—Civil Authority coverage is unavailable. *See, e.g., Sandy Point Dental, PC v. Cincinnati Insurance Co.*, 488 F. Supp. 3d 690, 694 (N.D. Ill. 2020) (considering that the orders limited plaintiff's dental operations to emergency matters); *Café La Trova LLC v. Aspen Specialty Insurance Co.*, Case No. 20-22055-CIV, 2021 WL 602585, at *11 (S.D. Fla. Feb. 16, 2021); *Michael Cetta, Inc. v. Admiral Indemnity Co.*, 20 civ. 4612 (JPC), 2020 WL 7321405, at *12 (S.D.N.Y. Dec. 11, 2020), appeal withdrawn, No. 21-57 (2d Cir. Mar. 23, 2021); *Vervaine Corp.*, 2020 WL 8766370, at *5.

However, these cases are distinguishable from the instant matter. First, these cases established that limitations on scope of use do not qualify as prohibition on access; however, in the instant matter, Atwells did not allege such limitations. For instance, when the insured is a restaurant that had access to the premises to prepare food for takeout and delivery, access was not considered to be prohibited as required by civil authority coverage. *See In re Society Insurance*

Co. COVID-19 Business Interruption Protection Insurance Litigation, No. 20 C 02005, 2021 WL 679109, at *10 (N.D. Ill. Feb. 22, 2021) (finding that "take-out customers and in-room dining guests may access the premises" and, thus, access was not prohibited); *see also Michael Cetta, Inc.*, 2020 WL 7321405, at *12 (alleging that orders limited restaurant to takeout and delivery; failing to "allege that delivery workers, restaurant employees, or customers could not access the address"; court finding that the allegations that plaintiff could continue to operate restaurant in some capacity was fatal to the claim); *Vervaine Corp.*, 2020 WL 8766370, at *5; *but see Blue Springs Dental Care, LLC v. Owners Insurance Co.*, 488 F. Supp. 3d 867, 879 (W.D. Mo. 2020) (alleging customers cannot access the property and thus plausibly stated claim under policy, which did not specify "all access" or "any access"). Compare these cases to the instant case; as a "Night Club[,]"Atwells alleges that it was precluded from allowing their patrons access to its premises, unlike restaurants, which were allowed to operate in some capacity.

In some cases, prohibition on access was largely or wholly based on restrictions to clientele, not the plaintiffs, and coverage ran so long as there were restrictions on clientele access to these business locations. *See 54th Street Limited Partners v. Fidelity and Guaranty Insurance Co.*, 763 N.Y.S.2d 243, 243 (N.Y. App. Div. 2003); *see also Abner, Herrman & Brock, Inc. v. Great Northern Insurance Co.*, 308 F. Supp. 2d 331, 333 (S.D.N.Y. 2004). For instance, in *54th Street Limited Partners*, civil authority coverage was available until the premises became "accessible to the public, plaintiff's employees and its vendors[.]" *54th Street Limited Partners*, 763 N.Y.S.2d at 244. Similarly, in *Abner, Herrman & Brock, Inc.* coverage only applied when there were restrictions on pedestrian and public transit access to the premises. *Abner, Herrman & Brock, Inc.*, 308 F. Supp. 2d at 333. In this circumstance, Atwells alleged that its patrons were prohibited from the Premises, and there is no allegation suggesting that any owner, employee, or

independent contractor was otherwise permitted on the premises. Nevertheless, the Court would not be inclined, at this stage of the litigation, to dismiss the claim even if a representative entered the Premises for a ministerial purpose. *See Maritime Park, LLC v. Nova Casualty Company*, DOCKET NO. A-3554-17T2, 2019 WL 1422918, at *4 (N.J. Super. Ct. Mar. 29, 2019) (for purposes of Civil Authority coverage, the court took no issue with a person going to check on the restaurant two days after the storm passed when persons were still prohibited from entering park and accessing the restaurant).

As a second distinction, in many of the cases where courts determined that there was no prohibition on access—and thus no coverage—a plausibility standard applied. *See Legal Sea Foods, LLC v. Strathmore Insurance Co.*, Civil Action No. 20-10850-NMG, 2021 WL 858378, at *5 (D. Mass. Mar. 5, 2021), appeal docketed, No. 21-1202 (1st Cir. Mar. 19, 2021) (under federal plausibility standard, finding that permission to allow carry out and delivery was not prohibition of access); *see also Michael Cetta, Inc.*, 2020 WL 7321405, at *12 (same); *Mangia Restaurant Corp. v. Utica First Insurance Co.*, 713847/ 2020, 2021 WL 1705760, at *5 (N.Y. Sup. Ct. Mar. 30, 2021) (under state plausibility standard, finding "[a] limitation of use is not the equivalent of a 'prohibition of access'"); *Visconti Bus Service, LLC v. Utica National Insurance Group*, 142 N.Y.S.3d 903, 916 (N.Y. Sup. Ct. Feb. 12, 2021) (under plausibility standard, failing to allege that the orders prohibited access to the premises or that "it was a 'nonessential' business subject to th[e] closure order"). For instance, under New York's plausibility standard, the court in *Visconti Bus Service*, in part, reasoned that although plaintiff alleged that the orders forced the closure of all nonessential businesses, it failed to allege that it was a business subject to that order. *Id.* at 916.

However, in the instant matter, a different pleading standard applies, and Atwells alleges that the Executive Orders forced non-essential businesses to close and its business fit into the

category of those non-essential businesses. Our Supreme Court has not adopted the federal plausibility pleading standard. *See DiLibero v. Mortgage Electric Registration Systems, Inc.*, 108 A.3d 1013, 1016 (R.I. 2015); *see also Chhun*, 84 A.3d at 422. As a notice pleading jurisdiction:

> "'[A] pleading need not include the ultimate facts that must be proven in order to succeed on the complaint or to set out the precise legal theory upon which his or her claim is based. Rather, the pleading simply must provide the opposing party with fair and adequate notice of the type of claim being asserted.'" *Oliver v. Narragansett Bay Insurance Co.*, 205 A.3d 445, 451 (R.I. 2019) (quoting *Rhode Island Mobile Sportsfishermen, Inc. v. Nope's Island Conservation Association, Inc.*, 59 A.3d 112, 119 (R.I. 2013)) (citations omitted).

Furthermore, in construing the Civil Authority coverage in accordance with its very purpose—to compensate an insured for loss of income, which is derived from its patrons—the language is ambiguous and reasonably susceptible to more than one meaning, including Atwells' meaning that the civil authority prohibited its patrons from accessing the Premises. (Certified Policy at 67 ("we will pay for the actual loss of Business Income you sustain and necessary Extra Expense"); Compl. ¶ 29 ("As a result of the Shutdown Order, Atwells was precluded from having any customers in the Premises.").)

Scottsdale argues that the Executive Orders issued by the Governor and Mayor make "no reference to COVID-19 presenting an actual or potential threat to property[,]" but rather the threat was "to health and life." (Def.'s Mem. at 6.) Civil Authority coverage may be applicable when "[t]he action of civil authority is taken in response to dangerous physical conditions[.]" (Certified Policy at 67.) Atwells alleges that COVID-19 could survive on surfaces, made people sick if they came in contact with a contaminated surface, resulted in community transmission, and caused damage to property within one mile of its Premises, and that the Mayor and Governor issued orders

shutting down establishments and requiring people to stay home because the community transmission presented a danger to health and life.

Although Scottsdale contends that the Executive Orders "were issued out of fear of the spread of COVID-19 to persons and not because of property damage[,]" the orders clearly noted the presence of COVID-19, and it is not the Executive Orders that need to state a claim but Atwells that needs to state a claim. (Def.'s Mem. at 18; Compl. Ex. B ("cases of COVID-19 have been documented in the State of Rhode Island"); Compl. Ex. E ("All Rhode Island residents are required to stay home[.]"). The United States District Court for the Southern District of New York stated that "[i]t is plausible that the risk of COVID-19 being physically present in neighboring properties caused state and local authorities to prohibit access to those properties." *10012 Holdings, Inc. v. Sentinel Insurance Company, Ltd.*, No. 20 civ. 4471 (LGS), 2020 WL 7360252, at *4 (S.D.N.Y. Dec. 15, 2020), appeal docketed, No. 21-80 (2d Cir. Jan. 14, 2021). Although the court dismissed the civil authority claim because it lacked allegations that "closures of [these] neighboring properties 'direct[ly] result[ed]' in closure of [p]laintiff's own premises[,]" both the pleading standard and the policy language in that case differed from the instant matter. *10012 Holdings, Inc.*, 2020 WL 7360252, at *3-4.

True, some courts have determined that when a plaintiff failed to allege that there was a specific neighboring property that had COVID-19 on the premises, the plaintiff failed to state a claim. *See Michael Cetta, Inc.*, 2020 WL 7321405, at *12; *see also Water Sports Kauai, Inc. v. Fireman's Fund Insurance Co.*, 499 F. Supp. 3d 670, 679 (N.D. Cal. Nov. 9, 2020); *Henry's Louisiana Grill, Inc. v. Allied Insurance Company of America*, 495 F. Supp. 3d 1289, 1297 (N.D. Ga. Oct. 6, 2020). However, those cases were determined under a plausibility pleading standard, and the allegations differed than those at issue here. To reiterate, holdings across the country differ

because the sufficiency of a claim for coverage under an insurance policy depends upon the facts as alleged, as applied to the policy language at issue.

In the instant matter, Atwells alleges that COVID-19 "caused and continue to cause . . . damage to *the properties* within a one mile radius of Atwells' property[.]" (Compl. ¶ 116.) (Emphasis added.) Furthermore, Atwells alleges that the orders were issued in connection with their response to the ongoing health crisis, to the threats posed by COVID-19, and to community transmission of COVID-19, which can survive on surfaces and be transmitted through contact with those surfaces, and that COVID-19 caused damage to the properties within one mile of Atwells' Premises. (Compl. ¶¶ 22-23, 25, 32, 116.) Notwithstanding, the Court is not prepared to rule out, at the pleading stage, that COVID-19 in the air and on surfaces could be considered a physical alteration of a premises that only causes harm to persons on the premises while not altering the physical structure. *See Gregory Packaging, Inc.*, 2014 WL 6675934, at *6-7. This is a factual issue better left for discovery.

Scottsdale cites to *Syufy Enterprises v. Home Insurance Company of Indiana*, 94-0756 FMS, 1995 WL 129229 (N.D. Cal. Mar. 21, 1995), for the proposition that there needs to be a "causal link between damage to adjacent property and denial of access to [an insured premises]." (Def.'s Mem. at 19 (citing *Syufy Enterprises*, 1995 WL 129229, at *2).) However, *Syufy Enterprises* is different from the instant case in many respects; it was determined on a motion for summary judgment, the policy language was different, access to the premises was not denied but was limited by the imposition of curfews, and at the summary judgment stage there was no evidence of any damage to property within the vicinity of the insured's premises that resulted in the civil action. *Syufy Enterprises*, 1995 WL 129229, at *1-2. At the pleading stage, as opposed to the summary judgment stage, Atwells does not need to establish where COVID-19 was

present—although the government may have known where COVID-19 was present and as a result issued orders restricting access to certain premises and requiring residents to stay home.

Scottsdale asserts that "[Atwells] cannot *establish* that physical damage occurred due to COVID-19, nor can it establish that the Executive Orders prohibited access to the Premises." (Def.'s Mem. at 20.) (Emphasis added.) Certainly, Atwells needs evidence to substantiate its claims; however, we are not there yet. At the pleading stage, neither Scottsdale nor this Court could know what Atwells can ultimately establish, and plainly, causation is not an issue to be determined on a 12(b)(6) motion. To state a claim, all that is required under the Rhode Island standard are facts sufficient to provide fair and adequate notice as determined by the four corners of the complaint and as applied to the policy. *Chase*, 160 A.3d at 974. Atwells' allegations for Civil Authority coverage meet this standard.

C

Virus Exclusion

Scottsdale argues that coverage, including Civil Authority coverage, requires that the direct physical loss of or damage to property be caused by or result from a Covered Cause of Loss and that Civil Authority coverage is, "barred by the Virus Exclusion, which unambiguously precludes coverage for 'loss or damage caused by or resulting from any virus[.]'" (Def.'s Reply at 13; Def.'s Mem. at 20 (citing Certified Policy at 46; Compl. ¶¶ 20, 32 (pointing to Atwells' allegations that COVID-19 is a "virus" and caused the "public health crisis")).) Atwells contends that the Virus Exclusion is ambiguous, conflicts with other provisions in the Policy, and is, therefore, inapplicable. (Pl.'s Obj. at 29-30.)

Scottsdale "bears the burden of proving the applicability of policy exclusions and limitations[.]" *General Accident Insurance Company of America*, 716 A.2d at 757. If the terms of

the policy "are clear and unambiguous, 'the task of judicial construction is at an end and the [policy] must be applied as written.'" *Ashley*, 992 A.2d at 987. It is well established that if an ambiguity exists, however, it is "strictly construed in favor of the insured and against the insurer." *Town of Cumberland v. Rhode Island Interlocal Risk Management Trust, Inc.*, 860 A.2d 1210, 1215 (R.I. 2004). Conflicting provisions of an insurance contract should be similarly construed against the drafter. *Elliott Leases Cars, Inc. v. Quigley*, 118 R.I. 321, 328, 373 A.2d 810, 813 (1977) (citing *Zifcak v. Monroe*, 105 R.I. 155, 159, 249 A.2d 893, 896 (1969)). Nevertheless, "before we may construe the provisions of an insurance policy, this [C]ourt must first find that an ambiguity exists." *Amica Mutual Insurance Co.*, 583 A.2d at 551-52 (citing *Bush v. Nationwide Mutual Insurance Co.*, 448 A.2d 782, 784 (R.I. 1982)). An insured's objectively reasonable expectations are only relevant if ambiguity is found in the policy language. *See*, *supra*, note 6 (citing *Riel*, 45 A.3d at 568-69; *Employers Mutual Casualty Co.*, 723 A.2d at 299).

The Policy's Virus Exclusion states that:

> "The exclusion . . . 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.
>
> "We will not pay for loss or damage caused by or resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease." (Certified Policy at 46.)

Most of the relevant terms and phrases in the "Exclusion Of Loss Due To Virus Of Bacteria" Form are left undefined; thus, the Court applies the principles of contract interpretation to determine if the exclusion is clear and unambiguous. *See Ashley*, 992 A.2d at 987. When viewing the exclusion in its entirety, there is no part that provides insight or guidance as to the meanings of its terms, unlike the Business Income coverage provisions. *See Bliss Mine Road*, 11 A.3d at 1083. Therefore, the Court must view the exclusion in relation to the Policy as a whole

and give the terms their plain, ordinary, and usual meaning. *See id.* at 1084. Some courts have looked to the principles of construction for the general rule that "the law recognizes a natural presumption that identical words used in different parts of [an] insurance policy are intended to have the same meaning[.]" 2 Steven Plitt et al., *Couch on Insurance* § 22:1 (3d ed. 2020) (citing *RSUI Indemnity Company v. The Lynd Company*, 466 S.W.3d 113, 126 (Tex. 2015)).

Incorporating these principles and comparing the Virus Exclusion to other Policy exclusions, the cause requirement in the Virus Exclusion is different from some of the other exclusion provisions. For example, the Virus Exclusion provides that Scottsdale, "will not pay for loss or damage *caused by or resulting from* any virus . . . that induces or is capable of inducing physical distress, illness or disease." (Certified Policy at 46, § B) (emphasis added.) In comparison, the Causes of Loss – Special Form, subsection B.1. provides that Scottsdale, "will not pay for loss or damage *caused directly or indirectly by* any of the following. Such loss or damage is *excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss*." *Id.* at 50, § B.1 (emphasis added). Thus, the causation terms in each of these exclusions should be given different effect.

Scottsdale argues, and this Court agrees, that the Virus Exclusion precludes coverage if the loss or damage is caused by or resulting from a virus. However, the Court is not convinced by Scottsdale's argument that the Virus Exclusion precludes Civil Authority coverage when Atwells did not allege that its "loss or damage [was] caused by or result[ed] from a virus," as contemplated by the exclusion, but rather was caused by the Executive Orders that suspended operations due to a pandemic and presence of COVID-19 throughout the state. Simply, Atwells does not allege that its loss of income was due to a virus but alleges that it was due to the orders issued by a civil authority.

If Atwells alleged COVID-19's presence on the insured Property, this type of loss due to COVID-19 would be excluded by the Virus Exclusion. Simply, Atwells cannot have it both ways under *this* Policy; specifically, it cannot assert that its loss was due to the virus on its Premises *and* that its loss was due to the Executive Orders. For instance, if loss was due to the presence of a virus on its Premises, although Business Income coverage might be available, the Virus Exclusion would apply. Similarly, if the virus was present on Atwells' Premises and an action of a civil authority prohibited access to Atwells' Premises, the Virus Exclusion would also apply. In either of these instances, the loss would have been caused by or resulted from the virus.

Scottsdale has the burden of demonstrating the Virus Exclusion's applicability to Civil Authority coverage. "An exclusion . . . must necessarily be specific and not general." Plitt et al., *supra*, § 22:31. Civil Authority provision provides that coverage may be available, "[w]hen a Covered Cause of Loss causes damage to property other than property at the described premises[.]" (Certified Policy at 67.)

As aforementioned, a "Covered Cause of Loss" means "direct physical loss[,]" unless otherwise excluded. *Id.* at 50. First, if the Court substitutes "direct physical loss" for "Covered Cause of Loss[,]" the provision then reads: "[w]hen a [direct physical loss] causes damage to property other than property at the described premises . . . ." *Id.* at 50, 67. The only logical understanding of "direct" and "physical" here is that both words are adjectives describing the "loss," which is the noun or thing.

Giving the word "loss" its plain and ordinary meaning, courts in the context of interpreting insurance contracts have looked to dictionary definitions to define "loss" as: "'the act of losing possession,' 'the harm of privation resulting from loss or separation,' or the 'failure to gain, win, obtain, or utilize[,]' *Loss*, Merriam-Webster (Online ed. 2020)[;] [or] 'the state of being deprived

of or of being without something that one has had.' *Loss*, Random House Unabridged Dictionary (Online ed. 2020)." *North State Deli, LLC v. The Cincinnati Insurance Co.*, No. 20-CVS-02569, 2020 WL 6281507, at *3 (N.C. Super. Oct. 9, 2020). "Loss" also means "'the disappearance or diminution of value.'" *American Food Systems, Inc. v. Fireman's Fund Insurance Co.*, CIVIL ACTION NO. 20-11497-RGS, 2021 WL 1131640, at *3 (D. Mass. Mar. 24, 2021) (quoting Black's Law Dictionary (11th ed. 2019)). In addition, "damage" has been defined as "[l]oss or injury to person or property; esp., physical harm that is done to something[.]" *Id.* (quoting Black's Law Dictionary (11th ed. 2019)).

Applying these definitions to loss and damage, regardless of the adjectives used to limit the type of loss—a loss causes "loss or injury" to property, "the act of losing possession" causes "loss or injury" to property, "the state of being deprived of . . . something that one has had" causes "loss or injury" to property—the provision is nonsensical in and of itself and in relation to the Policy as a whole. *See American Food Systems, Inc.*, 2021 WL 1131640, at *3; *see also North State Deli, LLC*, 2020 WL 6281507, at *3. Simply, the terms, "Covered Cause of Loss" and "direct physical loss[,]" are neither synonymous nor symbiotic. (Certified Policy at 50.)

Assuming that the "cause" element is not dropped from "Covered Cause of Loss" and the word "direct" is intended to describe the type of causation, the question of whether a cause is direct, rather than indirect, under the facts as alleged here leaves an issue of fact to be resolved by a factfinder, not a 12(b)(6) motion.

Second, the exclusions of this Policy, including the Virus Exclusion, specifically operate to exclude the loss that Scottsdale agreed to pay for: "[w]e will not pay for loss or damage caused by or resulting from any virus[.]" *Id.* at 46. Looking at the causes of loss as they relate to limitations on payments to the insured, it is a reasonable interpretation that the Virus Exclusion

can only have an operative effect on the insured. Scottsdale points to no language, and this Court could find no language in the Policy, that changes the operative effect of the exclusions to apply to damage to other property that causes loss to the insured. At a minimum, the provisions of the Civil Authority coverage as they relate to the Covered Causes of Loss and Virus Exclusion conflict and, therefore, should be narrowly construed against the insurer.

Because the language of the Virus Exclusion limits the losses for which Scottsdale agreed to pay and which Atwells alleged were caused by the Executive Orders, Scottsdale has not met its burden of proving, as a matter of law, that the Virus Exclusion applies to preclude Civil Authority coverage under the facts as alleged by Atwells.

Lastly, whether the actions of a civil authority are a superseding or a direct cause, as being not caused by or resulting from the virus itself, or rather, as Scottsdale asserts, caused by or resulting from the virus, cannot be resolved on a motion to dismiss. As an example, the Building and Personal Property Coverage Form states that "[w]e will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations *caused by or resulting from* any Covered Cause of Loss." (Certified Policy at 28) (emphasis added). Hypothetically, then, if an insured alleged that it suffered a loss of property at the premises, that the loss was caused by or resulting from fire, and that fire was a Covered Cause of Loss, whether or not the losses were caused by something other than fire that was excluded under the policy would be a question of fact not properly resolved on a 12(b)(6) motion. Here, too, a determination of causation under this Virus Exclusion and these factual allegations is premature. *Rowey v. Children's Friend & Service*, No. C.A. 98-0136, 2003 WL 23196347, at *20 (R.I. Super. Dec. 12, 2003) ("causation presents a question of fact usually reserved for the jury"). This conclusion is further supported by the differences in the causation language amongst the exclusions in the Policy, as aforementioned.

Further, as Scottsdale bears the burden of proof with respect to Policy exclusions, it also bears the burden of proof on the causal connection, or lack thereof. *See General Accident Insurance Company of America*, 716 A.2d at 757; *see also Robichaux v. Nationwide Mutual Fire Insurance Co.*, 81 So.3d 1030, 1040 (Miss. 2011) (determining insurer had the burden of proof that claimed damage was excluded under policy); *see also Holiday Inns Inc. v. Aetna Insurance Co.*, 571 F. Supp. 1460, 1463 (S.D.N.Y. 1983) ("The insurer . . . has 'the burden of proving that the proximate cause of the loss . . . was included within one of the terms of exclusion.'") (citing *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989, 999 (2d Cir. 1974)). Under the facts as alleged and arguments in support of the Motion to Dismiss, the Court cannot say that Scottsdale has met this burden.

IV

Conclusion

Based on the foregoing, Scottsdale's Motion to Dismiss is granted in part and denied in part. Based on our notice pleading standard and looking to the allegations contained in the four corners of the Complaint as applied to the Policy language, Atwells sufficiently stated a claim for Civil Authority coverage and Scottsdale has not met its burden of proving the applicability of the Virus Exclusion to Atwells' Civil Authority coverage claim.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Atwells Realty Corp. v. Scottsdale Insurance Company**
CASE NO:	**PC-2020-04607**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**June 4, 2021**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
For Plaintiff:	**Nicholas J. Hemond, Esq.**
For Defendant:	**Stephen Adams, Esq.**