No. 21-6045

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GOODWILL INDUSTRIES OF CENTRAL OKLAHOMA, INC.
d/b/a GOODWILL CAREER PATHWAYS INSTITUTE,
Plaintiff-Appellant,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,
Defendant/Appellee.

On Appeal from the United States District Court
for the Western District of Oklahoma, No. 20-CV-511-R (Russell J.)

APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT REQUESTED

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STATEMENT OF PRIOR OR RELATED CASES

Pursuant to 10th Cir. R. 28.2(C)(3), there are no prior or related appeals.

STATEMENT OF JURISDICTION

Plaintiff/Appellant Goodwill Industries of Central Oklahoma, Inc. d/b/a Goodwill Career Pathways Institute ("Goodwill") originally filed this action in Cleveland County, State of Oklahoma, on May 6, 2020. *Aplt. App. Vol. 1 at 39-47.* On June 1, 2020, pursuant to 28 U.S.C. § 1441, the case was removed by Defendant/ Appellee Philadelphia Indemnity Insurance Company ("PIIC") to the Western District of Oklahoma under 28 U.S.C. § 1332(a) because there is complete diversity of citizenship and the amount in controversy exceeds the sum of $75,000. *Aplt. App. Vol. 1 at 33-38*.

On November 9, 2020, the district court entered its Order dismissing Goodwill's claim for declaratory relief under Fed. R. Civ. P. 12(b)(6) for failure to state a claim and entered a Judgment in favor of PIIC. *ROA at 7-18*. On March 11, 2021, the district court entered its Order denying Goodwill's Motion to Alter or Amend Judgment. *ROA at 19-30*. Goodwill timely filed its Notice of Appeal on April 9, 2021. *ROA at 31-32*. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Goodwill filed a declaratory judgment action seeking a declaration that it is entitled to coverage under its insurance policy with PIIC for damages sustained as a result of state and local government closure orders and restrictions stemming from the COVID-19 pandemic. The district court dismissed Goodwill's claim, finding Goodwill failed to state a claim for declaratory relief because it did not allege it suffered a "direct physical loss" to its property, and even if it had, the Virus Endorsement to the policy expressly excludes coverage. This appeal presents the following six (6) issues for review:

1. Whether the district court properly applied Oklahoma's rules of contract construction with respect to insurance policies;

2. Whether the district court failed to give meaning to each and every word of the Policy, specifically with respect to the term "direct physical loss of or damage to";

3. Whether the district court erred in finding the term "direct physical loss" unambiguous;

4. Whether the district court erred in finding that the term "direct physical loss" requires tangible damage to property;

5. Whether the district court erred in finding the Virus Endorsement precludes coverage to Goodwill; and

6. Whether the district court erred in dismissing Goodwill's claim for declaratory judgment and entering Judgment in favor of PIIC.

STATEMENT OF THE CASE

This case is an important one to Goodwill, and its importance goes beyond the significant sum of money involved. This case involves Goodwill's right to expect protection, under its policy of insurance, for an unforeseen fortuity caused by the government closure of Goodwill's business because of the COVID-19 crisis. The district court's dismissal of this case was undergirded by its confidence that "[a] majority of district courts have found a "direct physical loss" to require some form of tangible damage to property." *ROA at 25, n.1*. But this case cannot turn on what a majority of district courts from other states have found; this case must be determined by the law of Oklahoma as interpreted by the Oklahoma Supreme Court.

Goodwill is an Oklahoma not-for-profit corporation which serves vulnerable populations in the State. *Aplt. App. Vol. 1 at 39*. Since 1936, Goodwill has provided people with job training, support services to veterans, and operated donation and retail centers. *Id*. Goodwill works to enhance the dignity and quality of life through the power of work by strengthening communities, eliminating barriers to opportunity, and helping people reach their full potential. *Id*.

In 2019, Goodwill renewed its all-risk policy with PIIC for a term from May 1, 2019 to May 1, 2020. *Aplt. App. Vol. 2 at 300.* Therein PIIC agreed to provide "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 <u>direct physical loss of or damage to property</u> at premises** which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.

Aplt. App. Vol. 2 at 459 (emphasis added). "Covered Causes of Loss" are defined as "risks of direct physical loss" to covered property unless otherwise excluded or limited under the Policy. *Aplt. App. Vol. 2 at 539-40.* The Policy defines "Suspension" and "Operations" as follows:

> "Suspension" means:
>
> a. **The slowdown or cessation of your business activities**; or
> b. That a part of all of the described premises is rendered untenable, if coverage for Business Income Including "Rental Value" or "Rental Value" applies.
>
> * * *
>
> "Operations" means:
>
> a. Your business activities occurring at the described premises; and
> b. The tenantability of the described premises, if coverage for Business Income Including "Rental Value" or "Rental Value" applies.

Aplt. App. Vol. 2 at 467 (emphasis added).

At some point, without notice or value given, PIIC added a Virus Endorsement to the Policy, which purports to exclude coverage for any "loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is

capable of inducing physical distress, illness or disease." *Aplt. App. Vol. 2 at 316*. Goodwill disputes the applicability and enforceability of this Endorsement.

In early 2020, the COVID-19 virus began infecting citizens throughout the country, often with deadly consequences. The pandemic quickly drew responses from various civil authorities, including state-ordered closures, stay-at-home/safer-at-home orders, mandatory restrictions on gatherings, and required social distancing. On March 15, 2020, Governor Stitt issued Executive Order 2020-07 and declared an emergency caused by the impending threat of COVID-19 to the people of Oklahoma and the public's peace, health and safety. *Aplt. App. Vol. 1 at 219-21.* This Executive Order applied to all seventy-seven (77) counties in Oklahoma. *Id*. Effective March 25, 2020, all businesses not identified as being within a critical infrastructure were ordered to close to the public. *Aplt. App. Vol. 1 at 223-29.* Goodwill was not identified as being within a critical infrastructure sector. *Id.* Mayors of the cities followed suit, including Oklahoma City, Norman, Moore, Ardmore, Guthrie, Stillwater, and Midwest Cities. *Aplt. App. Vol. 1 at 241-82.* Goodwill has operations in each of these locales. *Aplt. App. Vol. 1 at 44*. Pursuant to these orders, Goodwill closed its doors and made a claim for insurance coverage with PIIC. *Aplt. App. Vol. 1 at 46.*

On June 1, 2020, Goodwill filed a claim for declaratory judgment, seeking a declaration from the Court that it was entitled to business income coverage under

the Policy. *Aplt. App. Vol. 1 at 39-47.* On June 8, 2020, PIIC filed its Motion to Dismiss, arguing Goodwill failed to plead any facts showing it suffered a "direct physical loss of or damage to" its premises because it suffered no tangible, physical alteration to its property. *Aplt. App. Vol. 3 at 678-703*. PIIC also argued the Virus Endorsement bars Goodwill's claim for declaratory judgment. *Id*. Goodwill disagreed, arguing that "direct physical loss of or damage to" its premises does not require tangible loss, that the policy language is ambiguous and must be construed in its favor under Oklahoma law, and that it sufficiently pled lack of consideration and consent for the Virus Endorsement, as well as its inapplicability to Goodwill's claim for business income coverage. *Aplt. App. Vol. 2 at 704-32.*

On November 19, 2020, the court granted PIIC's Motion to Dismiss, finding Goodwill failed to allege a "direct physical loss" caused by the pandemic—a term the court found unambiguous and requiring physical alteration of or tangible damage to the property. *ROA at 7-17.* The district court further held that even if it applied Goodwill's interpretation of "direct physical loss" to include intangible loss, its claim is still subject to dismissal because the Virus Endorsement precludes coverage, and Goodwill failed to sufficiently state any facts showing why the Virus Endorsement would not apply. *ROA at 14-16.* The court entered its Judgment in PIIC's favor on November 19, 2020. *ROA at 18.*

On December 7, 2020, Goodwill filed its Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e). *Aplt. App. Vol. 3 at 786-95*. The district court denied Plaintiff's Motion, restating its holding that no ambiguity exists in the Policy and that any amendment was untimely and futile. *ROA at 19-30*. Goodwill timely filed its Notice of Appeal on April 9, 2021. *ROA at 31-32*.

SUMMARY OF THE ARGUMENT

The district court erred when it held Goodwill failed to state a claim for declaratory relief. The district court's error is fourfold. ***First***, the district court erred in finding Goodwill's interpretation of the language of the Policy unreasonable. ***Second*****,** the district court improperly found the term "direct physical loss of or damage to" unambiguous. ***Third*****,** the district court improperly applied the canons of contract construction with respect to insurance policies by: (a) failing to construe ambiguous policy language in favor of the insured as required by Oklahoma law; and (b) failing to consider the reasonable expectations of the insured. ***And fourth***, the district court erred in finding Goodwill failed to sufficiently plead the Virus Endorsement does not bar its claims due to lack of consent, consideration, and/or applicability.

STANDARD OF REVIEW

The standard of review of an order granting a motion to dismiss for failure to state a claim upon which relief can be granted is *de novo*. *See Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545, 1551 (10th Cir. 1992). When reviewing dismissal of a complaint, the Court must treat all material allegations of the complaint as true. *See Riggs v. City of Albuquerque*, 916 F.2d 582, 584 (10th Cir. 1990), *cert. denied*, 499 U.S. 976 (1991). Dismissal is inappropriate unless Goodwill can prove no set of facts in support of its claims to entitle it to relief. *See Johnson v. Beye*, 17 F.3d 1437 (10th Cir. 1994) (citing Fed. R. Civ. P. 12(b)(6)).

ARGUMENT

The COVID-19 pandemic has caused hundreds of thousands of deaths in this country and has wreaked havoc on every level of the United States economy. Like most other American businesses, Goodwill—a not-for-profit corporation dedicated to nurturing Oklahomans and helping them improve their lives through jobs and job training—was significantly impacted by the State and cities' closure orders and suffered serious financial losses. Also like many other American businesses, Goodwill turned to its all-risk insurance Policy with the reasonable expectation of protection from these losses.

An all-risk policy is "a special type of insurance extending to risks not usually contemplated." *Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 564 (10th Cir. 1978). In order to establish coverage under an all-risk policy, Oklahoma law only requires Goodwill to show: (1) it suffered a covered loss; and (2) the loss was fortuitous. *Oklahoma Sch. Risk Mgmt. Tr. v. McAlester Pub. Sch.*, 457 P.3d 997, 1002 (Okla. 2019), *reh'g denied* (Apr. 29, 2019) ("[a]n 'all-risk' policy [covers] a loss when caused by any fortuitous peril not specifically excluded by the policy."). Goodwill's Complaint—the allegations of which must be accepted as true—sufficiently pled both of these requirements. However, the district court misapplied Oklahoma's rules of contract construction

with respect to insurance policies, and improperly dismissed Goodwill's claim for declaratory judgment. The district court's ruling should be reversed.

A. Rules For Interpretation Of Insurance Policies.

In this diversity action, the interpretation of the insurance policy is controlled by Oklahoma law. *Houston Gen. Ins. Co. v. Am. Fence Co., Inc.*, 115 F.3d 805, 806 (10th Cir. 1997) ("The interpretation of an insurance contract is governed by state law and, sitting in diversity, we look to the law of the forum state."). Under Oklahoma law, an insurance policy is a contract subject to general contract interpretation principles of ordinary contract law. *IDG, Inc. v. Cont'l Cas. Co.*, 275 F.3d 916, 921 (10th Cir. 2001).[1] An unambiguous insurance policy is interpreted according to the plain meaning of the language of the policy. *VBF, Inc. v. Chubb Grp. of Ins. Companies*, 263 F.3d 1226, 1230 (10th Cir. 2001).

However, where the policy language is ambiguous—that is, when it is reasonably susceptible to more than one meaning—special interpretive rules are then applied in favor of coverage. *See Stewart v. Adolph Coors Co.*, 217 F.3d 1285, 1290 (10th Cir. 2000) (ambiguity exists when a contract provision is "reasonably susceptible to more than one meaning, or where there is uncertainty as to the meaning of a term") (internal citations omitted). For example, it is well-established that when policy language is ambiguous, it will be construed against the insurer and

[1] The ordinary rules of contract interpretation are set forth in 15 O.S. § 151, *et seq.*

in favor of the insured. *See, e.g., VBF, Inc.*, 263 F.3d at 1230-31 (if a policy is ambiguous it will be construed against the insurer); *Houston Gen. Ins. Co. v. Am. Fence Co.*, 115 F.3d 805, 806 (10th Cir. 1997) ("We are mindful…that where a genuine ambiguity exists in an insurance policy, Oklahoma courts will interpret the contract most favorably to the insured and against the carrier.").

It is also imperative to note Oklahoma recognizes the "reasonable expectations" doctrine with respect to insurance policies. *See Max True Plastering Co. v. U.S. Fid. & Guar. Co.*, 912 P.2d 861 (Okla. 1996). This doctrine, which is also employed when policy provisions are found to be ambiguous, seeks to honor the objectively reasonable expectations of insureds concerning the terms of the insurance contract "even though painstaking study of the policy provisions might have negated those expectations." *Id*. at 862. Ordinary contract principles, therefore, are simply the starting point for interpretation of an insurance policy. In the face of ambiguity, those principles give way to the application of these special rules.

B. Goodwill Sufficiently Pled A Claim For Declaratory Relief And Coverage Under Its All-Risk Policy With PIIC.

Goodwill's all-risk Policy with PIIC provides for business income coverage during the "suspension" of operations, defined as a "slowdown or cessation of business activities" caused by "direct physical loss of or damage to property at [Goodwill's] premises." *Aplt. App. Vol 2 at 459, 467* (emphasis added). The loss or damage must be caused by or result from "Covered Causes of Loss," which are

defined as "risks of direct physical loss" to covered property. *Aplt. App. Vol. 2 at 539-40.* However, the district court misinterpreted "direct physical loss of or damage to" property—**a term which the district court acknowledged is not defined anywhere in the Policy**—in dismissing Goodwill's lawsuit. *ROA at 10.*

1. Plaintiff Suffered A Covered Loss.

The district court found Goodwill is not entitled to business income coverage because the term "direct physical loss" is unambiguous and requires a "demonstrable, physical *alteration* of the property…[which] exclude[s] alleged losses that are intangible." *ROA at 11-12* (internal citations omitted; emphasis in original). The court held that because Goodwill "only alleged an intangible loss to its property," more specifically that "the mandated closures rendered its premises unusable," its claim must be dismissed. *ROA at 12.* This is an incorrect reading of the Policy language and contrary to Oklahoma law.

Because the phrase "direct physical loss" is not defined in the Policy, the district court turned to dictionary definitions "to provide the common usage of the terms." *ROA at 11.*[2] In doing so, the court defined "physical" as "**having material**

[2] Goodwill certainly does not object to the district court's use of dictionaries to ascertain the meaning of words, as it is a practice well-established by Oklahoma courts, *see, e.g., Adair State Bank v. Am. Cas. Co. of Reading, Pa.*, 949 F.2d 1067 (10th Cir. 1991), *overruled on other grounds by Stauth v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 236 F.3d 1260 (10th Cir. 2001) (addressing the meaning of the word "collusion," the court noted the district court's reference to a dictionary to ascertain the popular meaning of the term); *Nat'l Indem. Co. v. U.S. Pollution Control, Inc.*,

existence or relating to material things," and a "loss" as a "**deprivation**." *Id*. (emphasis added). The district then held that because a "direct physical loss results from an actual, or material, deprivation of Plaintiff's property," the Policy only covers a "physical *alteration* of the property." *ROA at 12* (underline added; internal citations omitted). This conclusion does not follow the words used. There is nothing about the phrase "actual or material deprivation" which requires a "physical alteration," and the district court fails to connect the dots between the definition and the conclusion. There does not need to be any structural damage to be deprived of a physical space, and there is nothing in the dictionary definitions the court relies on to indicate an alteration or tangible structural change to the property is necessary. Goodwill was forced to close its doors and was physically deprived of using the buildings in all of its locations. A "material deprivation" of property is **exactly** what Goodwill alleged. *See, e.g., Aplt. App. Vol. 1 at 44-45* ("These closure orders and proclamations prohibited Goodwill from accessing its property in response to dangerous physical conditions that constitute a Covered Cause of Loss…As a direct

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717 F. Supp. 765 (W.D. Okla. 1989) (court resorted to dictionary to ascertain a term's plain, ordinary and accepted use in common speech), as well as the consideration of the structure and grammatical arrangement of the words used. *See, e.g., Shaw v. Grumbine*, 278 P. 311, 315 (Okla. 1929); *Law and Practice of Insurance Coverage Litigation* § 1.3 at pp. 1-75 (West Group & ABA 2000). **However, "if there is a range of reasonable [dictionary] meanings[,] the court must apply the meaning which provides the most coverage for the insured**." *Houston v. Nat'l Gen. Ins. Co.*, 817 F.2d 83, 85 (10th Cir. 1987) (quoting *Poland v. Martin*, 761 F.2d 546, 548 (9th Cir. 1985)) (emphasis added).

result of this pandemic and closure orders, Goodwill was required to suspend its operations and it has been damaged, as described above, and Goodwill's property cannot be used for its intended purpose."). **Using the district court's own definitions, the Policy provides coverage**.

In line with the district court's "actual or material deprivation" definition for "direct physical loss," there are several cases where "direct physical loss" is unambiguously interpreted to include intangible loss and/or property rendered unusable for its intended purpose due to orders stemming from the COVID-19 pandemic. *See, e.g., Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 800 (W.D. Mo. 2020) (recognizing that a physical loss may occur when the property is uninhabitable or unusable for its intended purpose); *Aplt. App. Vol. 4 at 858-72, Order from Choctaw Nation of Oklahoma v. Lexington Ins. Co.*, CV-20-42, Bryan Cnty. Dist. Ct. Okla. (Feb. 15, 2021) (granting summary judgment in favor of insured on business interruption coverage and recognizing the reasonableness of the insured's interpretation of "direct physical loss" to include intangible loss); *Aplt. App. Vol. 3 at 837, Order from Cherokee Nation v. Lexington Ins. Co.*, CV-20-150, Cherokee Cnty. Dist. Ct. Okla. (Jan. 29, 2021) (same).[3]

[3] The summary judgment rulings from both the *Choctaw Nation* and the *Cherokee Nation* cases are before the Oklahoma Supreme Court on accelerated appeal. *See* Goodwill's Motion for Certification to the Oklahoma Supreme Court, filed simultaneously herewith.

A recent decision in North Carolina is instructive on this issue. In *North State Deli, LLC v. Cincinnati Ins. Co.*, 20-CVS-02569, 2020 WL 6281507 (N.C. Super. Ct. Oct. 9, 2020), the court granted summary judgment in favor of the insured on the same issue before this Court. *Aplt. App. Vol. 3 at 796-804*.[4] The court analyzed whether the insured was entitled to business income coverage due to COVID-19 related orders using a similar analysis of what "direct physical loss" means under standard Merriam-Webster and Black's Law definitions. *Aplt. App. Vol. 3 at 800*. However, the *North State Deli* court reached the opposite (and correct) conclusion:

> As an initial matter, the Policies do not define the terms "direct," "physical loss," or "physical damage." The Court must therefore turn first to the ordinary meaning of those terms. Merriam-Webster defines "direct" when used as an adjective, as "characterized by close, logical, casual, or consequential relationship" as "stemming immediately from a source," or as "proceeding from one point to another in time or space without deviation or interruption." *Direct*, Merriam-Webster (Online ed. 2020). Merriam-Webster defines "physical" as relating to "material things" that are "perceptible especially through the sense." *Physical*, Merriam-Webster (Online ed. 2020). The term is also defined in a way that is tied to the body: "of or relating to the body." *Id*. Webster's Third New International Dictionary defines physical as "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary." *Physical*, Webster's Third New International Dictionary (2020). **The definition from Black's Law Dictionary comports: "Of, relating to, or involving material things; pertaining to real, tangible objects." *Physical*, Black's Law Dictionary (11th ed. 2019). Finally, "loss" is defined as "the act of losing possession," "the harm of**

[4] Significantly, the policy language at issue in *North State Deli* is actually more restrictive than the language here. The *North State Deli* policies required "accidental physical loss or accidental physical damage" "**to** property," whereas the instant Policy requires only "direct physical loss **of** or damage to property"—a distinction which cannot be ignored. *Aplt. App. Vol. 3 at 798-99* (emphasis added).

> **privation resulting from loss or separation," or the "failure to gain, win, obtain, or utilize." *Loss*, Merriam-Webster (Online ed. 2020). Another dictionary defines the term as "the state of being deprived of or being without something that one has had." *Loss*, Random House Unabridged Dictionary (Online ed. 2020).**
>
> **Applying these definitions reveals that the ordinary meaning of the phrase "direct physical loss" includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions.**

Aplt. App. Vol. 3 at 800-01 (emphasis added).

Accordingly, the *North State Deli* Court held that "**'direct physical loss' describes the scenario where business owners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government Orders**." *Aplt. App. Vol. 3 at 801* (emphasis added). The court further explained that because the plaintiff's businesses "were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured," such loss is "**unambiguously a 'direct physical loss,' and the Policies afford coverage**." *Id.* (emphasis added); *see also In re: Society Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL No. 2964, 2021 WL 679109, at *1 (N.D. Ill. Feb. 22, 2021) (reasonable people could determine a loss due to the pandemic was a "direct physical loss" when the plaintiffs were unable to fully use the physical space of their restaurants); *Attachment 4, Order from Cajun Conti LLC v. Certain Underwriters at*

Lloyd's, London, No. 2020-02558 (La. Dist. Ct. Nov. 4, 2020) (insurer's motion for summary judgment denied where COVID-19 related orders caused insured restaurant to "drastically change its operations to exclude sit-down patrons, which was previously the heart of its business, because the Orders restricted their presence in the building").

Oklahoma Judges Campbell and Kirkley in Bryan and Cherokee Counties, respectively, agree with the *North State Deli* court that a "direct physical loss" occurs when property is no longer rendered usable for its intended purpose, stating that "the ordinary meaning of the phrase 'direct physical loss' includes the inability to utilize or possess something in the real, material or bodily world, resulting from a given cause without the intervention of other conditions." *Aplt. App. Vol. 4 at 858-72 (Choctaw Nation Order); see also Aplt. App. Vol. 3 at 837 (Cherokee Nation Order).*[5] Even using the district court's definition of these terms, it should have reached the same result as the courts in *North State Deli* and the Choctaw and Cherokee Nation cases.[6]

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[5] The district court argues Goodwill's reliance on the Choctaw and Cherokee Orders is misplaced as they use "different words, definitions, and provisions." *ROA at 24.* While the district court is correct the language is different, **it is even more expansive here than it was in the Nations cases** where the language was "direct physical loss **or** damage" instead of "direct physical loss **of or** damage to." *Aplt. App. Vol. 4 at 858* (emphasis added). The direct physical deprivation **of** Goodwill's space is what Goodwill alleged.

[6] Numerous other courts throughout the country have similarly held that "tangible damage" such as structural alteration is ***not*** required to trigger coverage under

The district court also failed to give meaning to each word of the phrase "direct physical loss of or damage to." *See Phillips Petroleum Co. v. McCormick*, 211 F.2d 361, 364 (10th Cir. 1954) ("Every word, phrase or part of a contract should be given a meaning and significance according to its importance in the context of the contract."). There is no point including both "loss of" and "damage to" in this provision unless they are intended to mean different things. In *Studio 417*, the United States District Court for the Western District of Missouri held the relevant governmental closure orders caused a "physical loss" because "the Closure Orders prohibited or significantly restricted access to Plaintiffs' premises." *Studio 417*, 478 F. Supp. 3d at 803. The policies provided for coverage for "accidental physical loss ***or*** accidental physical damage"—a narrower provision than the "loss of or damage to" language here. *Id*. at 800-01 (emphasis in original). The court explained that the insurer "conflates 'loss' and 'damage' in support of its argument that the

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insurance policies containing "direct physical loss" or "direct physical loss of or damage to" policy language. *See, e.g., One Place Condo., LLC v. Travelers Prop. Cas. Co. of Am.*, No. 11 C 2520, 2015 WL 2226202, at *9 (N.D. Ill. Apr. 22, 2015) ("where a general all-risk commercial or homeowner's policy insureds against both 'loss' and 'damage' to an existing structure, 'physical' damage may take the form of loss of use of otherwise undamaged property, which in turn suffices as a covered loss"); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *9 (D. Or. Jun. 18, 2002) ("the inability to inhabit a building [is] a 'direct, physical loss' covered by insurance"); *Am. Guar. & Liab. Ins. Co. v. Ingram Micro, Inc.*, No. 99-185 TUC ACM, 2000 WL 726789, at *2 (D. Ariz. Apr. 18, 2000) (holding that "physical damage" is "not restricted to the physical destruction or harm of computer circuitry but includes loss of access, loss of use, and loss of functionality.").

Policies required a tangible, physical alteration," but the court "must give meaning to both terms." *Id.* at 801 (emphasis added).

In a recent case in the Northern District of Ohio, the court granted summary judgment in the insureds' favor concerning business interruption coverage triggered by closure orders entered as a result of the COVID-19 pandemic. *See Henderson Road Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 1:20-CV-1239, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021). As here, the insurer argued "direct physical loss" required the property to be damaged so that the property exhibit "physical alteration or structural damage." *Id*. at *5. However, "Zurich's Policy d[id] not state that 'direct physical loss of or damage to property' required 'physical alteration or structural damage to any property at the Insured Premises.'" *Id*. The court acknowledged the validity of the plaintiffs' argument "**that physical loss of the real property means something different than damage to the real property**…." *Id.* at *10 (emphasis added). "Otherwise, why would both phrases appear side-by-side separated by the disjunctive conjunction 'or'? Plaintiffs argue that they lost their real property when the state governments ordered that the properties could no longer be used for their intended purpose—as dine-in restaurants. The Policy's language *is* susceptible to this interpretation." *Id* (emphasis in original); *see also Nautilus Grp., Inc. v. Allianz Global Risks US*, No. C11-5281BHS, 2012 WL 760940, at *7 (W.D. Wash.

Mar. 8, 2012) (stating that "if 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous.").

A state court in Pennsylvania recently granted the insured's motion for summary judgment on its claim for declaratory relief, analyzing this same language as follows:

> However, as noted above, in the context of this insurance contract, the concepts of "loss" and "damage" are separated by the disjunctive "or," and, therefore, the terms must mean something different from each other. **Accordingly, in this instance, the most reasonable definition of "loss" is one that focuses on the act of losing possession and/or deprivation of property instead of one that encompasses various forms of damage to property, i.e., destruction and ruin**. Applying this definition gives the term "loss" meaning that is different from the term "damage." Specifically, whereas the meaning of the term "damage" encompasses all forms of harm to Plaintiff's property (complete or partial), **this Court concluded that the meaning of the term "loss" reasonably encompasses the act of losing possession [and/or] deprivation, which includes the loss of use of property absent any harm to property**.

Attachment 5, Order at pp. 13-14 from MacMiles, LLC d/b/a Grant Street Tavern v. Erie Ins. Exch., No. GD-20-7753, Court of Common Pleas of Allegheny County, Pa. (May 25, 2021) (emphasis added).

Moreover, other courts deciding similar cases have opined on the importance of the "physical loss **of or** damage to" policy language present here, as opposed to other more limiting language. For example, in *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690 (N.D. Ill. 2020), *reconsideration denied*, No. 20 CV 2160, 2021 WL 83758 (N.D. Ill. Jan. 10, 2021), the court found a policy

that covered only "direct physical 'loss' to property" required tangible damage, distinguishing the restrictive policy language from that at issue in *Studio 417*, where the court "rested its decision on that policy's expansive language, language very different from the policy in the instant case." *Id*. at 694, n.2

Likewise, in *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, 484 F. Supp. 3d 492 (E.D. Mich. 2020)—a case relied upon heavily by the district court in its Order [*see, e.g. ROA at 13, 16*]—the court rejected the plaintiff's claim for business income coverage due to its closure in response to executive orders in Michigan, construing the policy to require "tangible damage" to trigger coverage. *Id*. at 500. However, the relevant policy language in *Turek* provided coverage only for "accidental direct physical loss to Covered Property." *Id*. at 499-01. As the *Turek* court explained, **"[t]he term here is 'direct physical loss,' not 'direct physical loss *or* damage**.' Consequently, reading 'direct physical loss' to require tangible damage does not risk redundantly interpreting 'loss' and 'damage.'" *Id.* at 500 (italics in original; bold added). The *Turek* court further stated:

> Plaintiff suggests that "physical loss to Covered Property" includes the inability to use Covered Property. This interpretation seems consistent with one definition of "loss" but ultimately renders the word "to" meaningless. "To" is used here as a preposition indicating contact between two nouns, "direct physical loss" and "Covered Property." *To Merriam-Webster*, https://www/merriam-webster.com/dictionary/to (last visited Aug. 31, 2020). Accordingly, the plain meaning of "direct physical loss to Covered Property" requires that there by a loss *to* Covered Property; and not just any loss, a *direct physical loss*. **Plaintiff's interpretation would be plausible if, instead, the term at**

> **issue were "accidental direct physical loss *of* Covered Property." *See Source Food Tech., Inc. v. U.S. Fid. Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006) ("[T]he policy's use of the word 'to' in the policy language 'direct physical loss *to* property' is significant. [The claimant's] argument might be stronger if the policy's language included the word 'of' rather than 'to,' as in 'direct physical loss *of* property' or even 'direct loss *of* property.'") (emphasis original).**

Id. at 500-01 (internal footnotes omitted) (italics in original; bold added). This more expansive policy language ***is*** present here. Again, the Policy reads "direct physical loss of or damage to," and therefore demands the opposite result reached by the district court.

Based on the foregoing, a plain reading of the Policy's language unambiguously demonstrates Goodwill suffered a "direct physical loss of or damage to property" due to the restrictions imposed on it by the state and local orders. Goodwill sufficiently stated a claim for declaratory relief.

2. Policy Provisions Relating To "Direct Physical Loss" Are Ambiguous And Must Be Construed In Goodwill's Favor.

"[I]f an insurer desires to limit its liability under a policy, it must employ language that **clearly and distinctly** reveals its stated purpose." *First United Methodist Church of Stillwater, Inc. v. Philadelphia Indem. Ins. Co.*, 423 P.3d 29, 40 (Okla. Civ. App. 2016) (emphasis added). This entire lawsuit could have been avoided had PIIC included a definition for the term "direct physical loss of or damage to" within the Policy, defining it to include only "physical alteration to property." It did not. The Policy leaves the words undefined and left to their plain

and ordinary meaning which, as stated above, includes intangible rights such as the ability to possess something and use it for its intended purpose. While such a reading supports Goodwill's interpretation of the Policy, at the very least the Policy is susceptible of two different meanings, requiring application of Oklahoma contract law governing ambiguity.

Language of a contract is considered ambiguous when it is "fairly susceptible to two different constructions, so that reasonably intelligent men, on reading the contract would honestly differ as to its meaning." *Pitco Prod. Co. v. Chaparral Energy, Inc.*, 63 P.3d 541, 545-46 (Okla. 2003) (citing *U.S. Fid. & Guar. Co. v. Guenther*, 281 U.S. 34, 37 (1930)). When a term in an insurance policy is reasonably susceptible to more than one meaning, Oklahoma courts construe the term **in favor of the insured and against the insurer**. *Dodson v. St. Paul Ins. Co.*, 812 P.2d 372, 376-77 (Okla. 1991). In other words, in order to defeat coverage, Goodwill must show that its interpretation of the language in question is the only reasonable one. For the reasons set forth above, Goodwill cannot make this showing.

The holding in *Erik Scott Media, LLC v. Owners Ins. Co.*, No. 2:16-CV-35, 2018 WL 4146608 (D. Utah. Aug. 20, 2018) is instructive regarding the presence of ambiguity in the phrase "direct physical loss of or damage to." In *Erik Scott Media*, the insured sought coverage under its commercial property coverage provision of its policy for the loss of unretrieved products which were mis-shipped to its customers.

The policy provided the insurer would 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 [l]oss." *Id*. at *2 (emphasis added). The insurer denied coverage under the provision, contending there was "no direct physical loss of the property" because "the term 'loss' requires the physical destruction of the property." *Id.* at *3. The court disagreed, stating:

> The term "direct physical loss is not defined in the Policy. Nor is it stated that "direct physical loss" requires destruction of or any physical impact altering the property itself. **"Direct physical loss" of the property is not clear or unmistakable.** A plain reading of the term as used in the CPC provision could include the loss of physical possession or control of property that was not physically destroyed or altered in any way. **The term "loss" is susceptible to different interpretations and under Utah law must therefore be construed in favor of coverage**. The Court finds that [the insured] suffered a direct physical loss of the products it sent to the wrong customers or in the wrong amounts.

Id. (emphasis added).

The court in *North State Deli* reached a similar conclusion regarding the phrase "direct physical loss," explaining:

> The parties sharply dispute the meaning of the phrase "direct physical loss." Cincinnati argues that "the policies do not provide coverage for pure economic harm in the absence of direct physical loss to property, which requires some form of physical alteration to property. Even if Cincinnati's proffered ordinary meaning is reasonable, the ordinary meaning set forth above [that "direct physical loss" includes losing the full range of right and advantages of using or accessing the business property] is also reasonable, rendering the Policies at least ambiguous. **Accordingly, in giving the ambiguous terms the reasonable definition which favors coverage, the phrase "direct physical loss"**

> **includes the loss of use or access to covered property even where that property has not been structurally altered**.

2020 WL 6281507, at *3 (emphasis added).

Further, the mere fact that courts have come down on either side of this issue only highlights the term's ambiguity, which must be resolved in Goodwill's favor. This includes courts in Oklahoma which have granted summary judgment in favor of the insured on this issue. *See Aplt. App. Vol. 4 at 858-72 (Choctaw Nation Order); Aplt. App. Vol. 3 at 837 (Cherokee Nation Order)*.

3. The District Court Failed To Consider The Reasonable Expectations Of Goodwill.

Business income provisions of all-risk policies "are intended to do for the insured what the business itself would have done had no interruption occurred." *4 Appleman Insurance Law and Practice*, § 2329. "In other words, the goal is to preserve the continuity of the insured's earnings." *United Air Lines, Inc. v. Ins. Co. of State of PA*, 439 F.3d 128, 131 (2d Cir. 2006) (quoting *N.Y. Jur. Insurance* § 539 (2005)). Goodwill had a reasonable expectation its all-risk Policy with PIIC would provide business income coverage in the event it had to close its doors. The district court's ruling dismissing Goodwill's claim fails to take into account this reasonable expectation.

The Oklahoma Supreme Court expressly adopted the reasonable expectations doctrine, recognizing a departure from the ordinary rules of contract construction

when an ambiguity exists in an insurance policy. In *Max True Plastering*, the Court analyzed the reasoning of courts which have adopted the reasonable expectations doctrine, stating:

> These courts acknowledge that different rules of construction have traditionally been applied to insurance contracts because of their adhesive nature**.** Tribunals embracing the doctrine recognize that it is consistent with numerous other interpretive rules pertaining to adhesion contracts. Many of these rules are a part of Oklahoma law. For instance: 1) ambiguities are construed most strongly against the insurer; 2) in cases of doubt, words of inclusion are liberally applied in favor of the insured and words of exclusion are strictly construed against the insurer; 3) an interpretation which makes a contract fair and reasonable is selected over that which yields a harsh or unreasonable result; 4)insurance contracts are construed to give effect to the parties' intentions; 5) the scope of an agreement is not determined in a vacuum, but instead with reference to extrinsic circumstances; and 6) words are given effect according to their ordinary or popular meaning.

912 P.2d at 865 (footnotes omitted). The Court goes on to emphasize that the presence of ambiguous terms is the springboard for the application of insurance-specific rules of interpretation, stating:

> In Oklahoma, unambiguous insurance contracts are construed as are other contracts, according to their terms. The interpretation of an insurance contract and whether it is ambiguous is determined by the court as a matter of law.
>
> * * *
>
> **The reasonable expectations doctrine comports with our case law and with the rules of construction applied to insurance contracts**.

Id. at 869-70 (footnotes omitted; emphasis added).[7] As stated above, the term "direct physical loss of or damage to" is, at the very least, ambiguous. "Under the reasonable expectations doctrine, when construing an ambiguity or uncertainty in an insurance policy, the meaning of the language is not what the drafter intended it to mean, but what a reasonable person in the position of the insured would have understood it to mean." *Edens v. The Netherlands Ins. Co.*, 834 F.3d 1116, 1121 (10th Cir. 2016) (citing *Am. Econ. Ins. Co. v. Bogdahn*, 89 P.3d 1051, 1054 (Okla. 2004)).

Any reasonable insured would expect its insurance company to step in and protect it from unexpected losses over which it has no control. Goodwill followed the State's orders and closed its doors to protect the safety and welfare of Oklahoma citizens from the spread of COVID-19. It has a reasonable expectation of protection from PIIC due to these closures—an expectation the district court's ruling failed to acknowledge.

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[7] This departure from traditional rules of interpretation is recognized by commentators and considered widespread. For instance:

> Traditional rules still prevail when courts address unambiguous policy provisions…Strict allegiance to traditional rules of contract interpretation quickly erodes when courts confront ambiguity, hear compelling evidence of the insured's claimed coverage expectations, or parse through standardized policy terms. In those circumstances, many courts turn to one or more of the pro-coverage approaches…to achieve a fair result…

Law and Practice of Insurance Coverage Litigation § 1.3 at pp. 1-39 (West Group & AMA 2000).

4. Goodwill's Loss Was Fortuitous.

There is no question Goodwill's losses due to the pandemic and resulting executive orders were fortuitous. This Court, interpreting Oklahoma, defined a "fortuitous event" as follows:

> A fortuitous event…is an event which so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, as the loss of a vessel, provided that the fact is unknown to the parties.

Texas E. Transmission Corp., 579 F.2d at 564. The pandemic is an event that neither Goodwill nor PIIC were aware could occur in 2020, rendering it a fortuitous event. *See also https://www.merriam-webster.com/dictionary/fortuitous* ("fortuitous" defined as "occurring by chance"). Because Goodwill sufficiently pled it suffered a covered, fortuitous loss, Goodwill stated a claim for coverage under its all-risk Policy and the district court erred in dismissing its lawsuit.

C. Goodwill Sufficiently Pled The Inapplicability Of The Virus Endorsement.

In its Order dismissing Goodwill's lawsuit, the district court held that even if it applied a more expansive meaning of the phrase "direct physical loss," Goodwill's claim "is still subject to dismissal because the Virus Endorsement expressly excludes coverage." *ROA at 14.* The district court is wrong for two reasons.

First, the district court held that Goodwill "did not plead any facts explaining why the Virus Endorsement lacked consideration." *ROA at 15.* This Court can only

uphold a dismissal for failure to state a claim "when the plaintiff failed to plead facts which, if proved, would entitle him to relief." *Aston v. Cunningham*, 216 F.3d 1086, 2000 WL 796086, at *2 (10th Cir. June 21, 2000) (unpublished). Goodwill's Complaint alleged:

> At some point, [PIIC] added an endorsement to the Policy that purports to exclude coverage for loss due to virus or bacteria. However, no consideration was provided to Goodwill in exchange for the addition of this endorsement. Therefore, the endorsement is void or invalid. Furthermore, [PIIC] failed to obtain consent from Goodwill to add the subject endorsement. Because said endorsement is void or invalid, [PIIC] cannot rely upon said endorsement as a basis to limit or deny coverage.

Aplt. App. Vol. 1 at 43. In addition, Goodwill argued a representative of PIIC failed to sign the Endorsement in accordance with Oklahoma Administrative Code 365:15-1-3. *Aplt. App. Vol. 3 at 723*. This is certainly sufficient to put Goodwill on notice that the Virus Endorsement was improperly added to the Policy and its application to Goodwill's claim was questionable, at best. If Goodwill proves the facts alleged—that PIIC improperly added the Virus Endorsement to the Policy without proper consent or consideration—then it would be rendered void and/or invalid. These allegations are sufficient under the law, and Goodwill should have survived a motion to dismiss.

Second, the Virus Endorsement is not applicable to Goodwill's insurance claim. The Endorsement precludes coverage "for loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is

capable of inducing physical distress, illness or disease." *Aplt. App. Vol. 2 at 316.* The district court held "COVID-19 clearly qualifies as a 'virus' that caused Goodwill to close its doors, which bars coverage under the Virus Endorsement." *ROA at 16.* The district court misinterprets Goodwill's insurance claim, which was for losses due to the pandemic-related Orders—not the presence of the virus itself.

To that point, Judge Campbell in the Choctaw Nation case found the same exclusion before the Court would not apply absent "proof of actual viral presence." *Aplt. App. Vol. 4 at 871* ("Defendant Liberty Mutual's Excess Policy exclusion requires the virus is 'capable of inducing physical distress, illness or disease,' but to be capable of inducing such an effect the virus would need to be on the premises."); *see also Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co*., No. 2:20-CV-265, 2020 WL 7249624, at *12-13 (E.D. Va. Dec. 9, 2020) ("Therefore, in applying the Virus Exclusion there must be a direct connection between the exclusion and the claimed loss and not, as the Defendants argue, a tenuous connection anywhere in the chain of causation…Here, Plaintiff is neither alleging that there is a presence of a virus at the covered property nor that a virus is the direct cause of the property's physical loss…. Therefore, Defendants have failed to meet its burden to show that the Virus Exclusion applies to Plaintiff's claim."); *Henderson Road*, 2021 WL 168422, at *14-15 ("**Here, Plaintiffs' argument prevails because the Microorganism exclusion does not clearly exclude loss of property caused by a**

government closure. **Plaintiffs' restaurants were not closed because there was an outbreak of COVID-19 at their properties; they were closed as a result of governmental orders**.") (emphasis added).

Just as in *Henderson Road*, Goodwill has not alleged the cessation of its operations was caused by the presence of COVID-19 at Goodwill's locations, but rather resulted from governmental orders. Had PIIC intended to exclude losses caused by government-ordered closures arising from a virus, it could have done so. It did not. *Id.* at *14 ("Going forward, Zurich could undoubtedly include an exclusion for government closures in its policies. But the Policy that Plaintiffs purchased did not contain such an exclusion."). As such, the district court erred finding the Virus Endorsement barred Goodwill's claims.

CONCLUSION

For the reasons set forth above, Goodwill respectfully requests the Court reverse the Orders and Judgment of the district court and allow Goodwill to proceed with its claim for declaratory relief against PIIC, and for such further relief the Court deems proper.

STATEMENT REGARDING ORAL ARGUMENT

Goodwill respectfully requests argument at such time as this Court receives answers from the Oklahoma Supreme Court to the requested certified questions. This appeal concerns the rules of Oklahoma contract interpretation, particularly with respect to Oklahoma insurance contracts. The manner in which courts interpret "direct physical loss" and/or "direct physical loss of or damage to" for purposes of business income coverage will have a widespread impact on businesses seeking to recover losses sustained as a result of executive orders issued due to the COVID-19 pandemic. Goodwill believes oral argument will be helpful to the Court in resolving the issues on appeal. Both sides are represented by able counsel who can assist the Court in resolving issues that will have an impact beyond the parties themselves.

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s/ Jim T. Priest
Jim T. Priest

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I hereby certify that with respect to the foregoing:

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s/ Jim T. Priest
Jim T. Priest

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I hereby certify that on June 8, 2021, I electronically filed the foregoing using the Court's CM/ECF system which will send notification of such filing to the following:

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ATTACHMENT 1

Order dated November 9, 2020 granting Defendant Philadelphia Indemnity Insurance Company's Motion to Dismiss [*Doc. 24*].

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

GOODWILL INDUSTRIES OF CENTRAL OKLAHOMA, INC., d/b/a GOODWILL CAREER PATHWAYS INSTITUTE,	)	
Plaintiff,	)	
v.	)	No. CV-20-511-R
PHILADELPHIA INDEMNITY INSURANCE COMPANY,	)	
Defendant.	)	

ORDER

Before the Court is Defendant Philadelphia Indemnity Insurance Company's ("PIIC") Motion to Dismiss. Doc. No. 8. Plaintiff, Goodwill Industries of Central Oklahoma, Inc. ("Goodwill"), filed a Response to PIIC's Motion (Doc. No. 13), and PIIC filed a Reply in Support of its Motion. Doc. No. 17. The Court finds as follows.

In considering a defendant's Motion to Dismiss under Rule 12(b)(6), the Court must determine whether the plaintiff's [Petition] contains enough "facts to state a claim to relief that is plausible on its face," and whether the factual allegations "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007) (citations omitted).

The Court must accept all the well-pleaded allegations of the Petition as true and must construe the allegations in the light most favorable to Plaintiff. *Twombly*, 550 U.S. at

555; *Alvarado v. KOB–TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007). However, the Court need not accept as true those allegations that are conclusory in nature. *Erikson v. Pawnee Cty. Bd. of Cty. Comm'rs*, 263 F.3d 1151, 1154–55 (10th Cir. 2001). "[C]onclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

Goodwill is a not-for-profit corporation operating in various locations throughout central Oklahoma. Doc. No. 12, p. 2. PIIC is a Delaware corporation with its principal place of business in Pennsylvania. Doc. No. 1, ¶ 3.

Goodwill purchased a Commercial Lines Policy ("the Policy") underwritten by PIIC for the "period from May 1, 2019 to May 1, 2020." Doc. No. 1-1, p. 2. The Policy provides "Business Income" coverage for "the actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration.'" Doc. No. 1-4, p. 169. The "'suspension' must be caused by direct physical loss of or damage to property." *Id.* It provides similar coverage for "Extra Expenses" and for interruption by means of "Civil Authority." *Id.* at 169–70. The parties agree that any coverage is conditioned on Goodwill suffering a "direct physical loss of or damage to property" operated by Goodwill throughout central Oklahoma. Doc. No. 1-1, pp. 2–3.

Additionally, Goodwill alleges that "[PIIC] added an endorsement to the Policy that purports to exclude coverage for loss due to virus or bacteria." *Id.* p. 5. The endorsement is titled "Exclusion of Loss Due to Virus or Bacteria" ("Virus Endorsement"), and it "applies to all coverage under all forms and endorsements …, including … damage to buildings or personal property and … business income, extra expense, or action of civil

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authority." Doc. No. 1-1, p. 100. It states that "[PIIC] will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Doc. No. 1-1, p. 100.

On March 15, 2020, the Governor of Oklahoma issued an Executive Order declaring a state of emergency as a result of the eighth case of the novel coronavirus ("COVID-19") in Oklahoma. *Id.* p. 3. Soon after, mayors in cities across central Oklahoma required the "suspension of non-essential businesses," causing Goodwill to close its locations in each respective city. *Id.*

Goodwill sought a declaratory judgment in the District Court of Cleveland County on May 6, 2020 that "[it] sustained a 'direct physical loss' and/or 'risk of direct physical loss'" from the mandated closures. Doc. No. 1-1. On June 1, 2020, PIIC removed this action from state court.

Goodwill argues that it alleged a direct physical loss because the government-mandated COVID-19 closures caused it to "sustain[] direct physical loss or damage to its property … covered by the Policy," and further, that PIIC cannot rely on the Virus Endorsement because it was added to the Policy without consideration and is therefore void. *Id.* pp. 5, 7. PIIC argues, however, that the Policy does not cover the losses resulting from the closures because Goodwill never suffered a direct physical loss, and even if it did, the Virus Endorsement excludes its recovery. [1] Doc. No. 8, pp. 12, 14.

[1] PIIC also alleges that the Complaint fails to meet Rule 8's pleading requirement, arguing that a Complaint must contain "a short and plaint statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Court finds that a short and plain statement was properly pled. PIIC also argues that Goodwill's "threadbare conclusions are insufficient to state a claim," Doc. No. 8, p. 10, and the Court addresses such allegations throughout its analysis of PIIC's Rule 12(b)(6) discussion, Doc. No. 8, pp. 12–20.

As discussed above, the Policy entitles Goodwill to "various forms of coverage, such as business income, extra expense, and interruption by civil authority," Doc. No. 13, p. 7, and Goodwill and PIIC agree that "[a]ll of these coverages require direct physical loss of or damage to Goodwill's property." Doc. No. 13, p. 7; Doc. No. 1-1, ¶¶ 6–11. However, "[n]either 'risk of direct physical loss' nor 'direct physical loss' is defined in the Policy," Doc. No. 1-1, ¶ 7, and the parties dispute its definition.

PIIC argues that a direct physical loss is a "demonstrable, physical *alteration* of the property," which necessarily "exclude[s] alleged losses that are intangible or incorporeal and … unaccompanied by a distinct … alteration of the property." Doc. No. 8, p. 15 (quoting 10A Couch on Ins. § 148:46) (emphasis in original). Goodwill counters that a direct physical loss results when "property is rendered unusable for its intended purpose." Doc. No. 13, p. 8 (citing *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 39 (Colo. 1968); *Matzner v. Seaco Ins. Co.*, No. CIV.A.96-0498-B, 1998 WL 566658 at *4 (Mass. Super. 1998)).

Importantly, Goodwill does not allege that COVID-19 infected its premises, but rather that its loss of income arose from the suspension of its business in compliance with the Governor's Executive Order. Doc. No. 1-1, ¶ 18. Without a definition in the policy, direct physical loss "is accorded its ordinary, plain meaning and enforced so as to carry out the parties' intentions." *Bituminous Cas. Corp. v. Cowen Const., Inc.*, 55 P.3d 1030, 1033 (Okla. 2002) (citing *Phillips v. Estate of Greenfield*, 859 P.2d 1101, 1104 (Okla. 1993)).

"The interpretation of an insurance contract and whether it is ambiguous is determined by the [C]ourt as a matter of law." *Serra v. Estate of Broughton*, 364 P.3d 637,

641 (Okla. 2015). The Court shall not "force[ ] or constrain[ ] interpretations to create … [or] construe ambiguities." *Max True Plastering v. U.S. Fid. & Guar Co.*, 912 P.2d 861, 869 (Okla. 1996). Each party is free to contract as it wishes and is bound by the terms of the agreement. *See Bennett v. The Preferred Acc. Ins. Co. of N.Y.*, 192 F.2d 748, 751 (10th Cir. 1951) (interpreting a liability policy in Oklahoma). Further, "the Court will not undertake to rewrite … nor make … either party a better contract than the one … executed." *Bituminous*, 55 P.3d 1030 at 1033 (citing *Max True Plastering*, 912 P.2d at 869).

The Oklahoma Supreme Court has explained that "terms of an insurance policy must be considered not in a technical but in a popular sense, and … according to their . . . accepted use in common speech." *Serra*, 364 P.3d at 642 n. 6 (Okla. 2015) ((citing *Houston v. Nat'l Gen. Ins. Co.*, 817 F.2d 83, 85 (10th Cir. 1987) (quoting *Nat'l Aviation Underwriters, Inc. v. Altus Flying Serv., Inc.*, 555 F.2d 778, 782 (10th Cir. 1977))).

PIIC's proffered definition resembles the common use of the terms "direct," "physical," and "loss." The Oklahoma Supreme Court has relied on dictionary definitions to provide the common usage of terms; *see, e.g.*, *U. S. Fid. & Guar. Co. v. Briscoe*, 239 P.2d 754, 757 (Okla. 1951), and Merriam-Webster defines "direct" as "proceeding from one point to another … without deviation or interruption" or as "stemming immediately from a source," implying that a causal connection must exist. Merriam Webster, https://www.merriam-webster.com/dictionary/direct (last visited Oct. 29, 2020). "Physical" is defined as "having material existence" or as "relating to material things," and a "loss" is defined as a "deprivation." Merriam Webster, https://www.merriam-webster.com/dictionary/physical (last visited Oct. 29, 2020); Merriam Webster,

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https://www.merriam-webster.com/dictionary/loss (last visited Oct. 29, 2020). Thus, a direct physical loss results from an actual, or material, deprivation of Plaintiff's property, which closely aligns with PIIC's proffered definition explaining that the Policy only covers a "demonstrable, physical *alteration* of the property … [which] exclude[s] alleged losses that are intangible." Doc. No. 8, p. 15.

Goodwill urges the Court to adopt a more expansive definition of "direct physical loss." Doc. No. 13, p. 8. It argues that a direct physical loss includes a loss that renders "property unusable for its intended purpose." *Id.* (citing *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968)). In *Western Fire*, the Colorado Supreme Court explained that "because of the accumulation of gasoline around and under the church building[,] the premises became so infiltrated and saturated as to be uninhabitable," and thus caused a direct physical loss. *Western Fire*, 437 P.2d at 55. In two additional cases cited by Goodwill, the plaintiff alleged that a direct physical loss occurred because a physical substance entered the covered premises or somehow otherwise materially affected it. *See, e.g.*, *Travco Ins. Co. v. Ward*, 504 F. App'x 251 (4th Cir. 2013) (toxic gasses within drywall); *Matzner*, 1998 WL 566658, at *4 (carbon monoxide levels rendered building uninhabitable). Here, Goodwill did not allege that any substance entered its premises or damaged it, but only that the mandated closures rendered its premises unusable. Doc. No. 13, p. 8.

Goodwill did not allege a "direct physical loss" under the Policy because it only alleged an intangible loss to its property. Doc. No. 13, p. 8. Specifically, Goodwill alleged that "[a]s a result of this COVID-19 pandemic, Goodwill sustained direct physical loss of

or damage to its property and will continue to sustain direct physical loss of or damage to its property covered by the Policy….” Doc. No. 1-1, ¶ 18. As PIIC explains, Goodwill does not describe “how the spread of a communicable disease nationally caused tangible physical loss of or damage to any of [Goodwill’s] premises.” Doc. No. 8, p. 7.

In similar insurance coverage cases brought due to COVID-19 closures, district courts have repeatedly held that “direct physical loss” requires showing some “tangible damage.” *See, e.g.*, *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *8 (E.D. Mich. Sept. 3, 2020) (interpreting direct physical loss as requiring “some tangible damage to Covered Property.”); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-03213-JST, 2020 WL 5525171, at *4 (N.D. Cal. Sept. 14, 2020) (“the damage contemplated by the Policy is physical in nature”) (quoting *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 287 (S.D.N.Y. 2005)); *but see Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385, at *6 (W.D. Mo. Aug. 12, 2020) (finding that the plaintiffs adequately alleged a direct physical loss when they stated that “COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable.”). In *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-CIV, 2020 WL 5051581, at *1 (S.D. Fla. Aug. 26, 2020), the plaintiff had a policy providing business income and personal property insurance. The plaintiff closed its doors due to city-wide orders preventing restaurants from hosting patrons indoors, *id.*, and subsequently sought a declaratory judgment that it suffered a direct physical loss. *Id.* at 6–7. The district court held that the plaintiff’s allegations were insufficient because “interruption in business must be caused by some

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physical problem with the covered property," and the plaintiffs alleged only that the city-wide orders caused its closure. *Id.* at 7 (quoting *Philadelphia Parking Authority*, 385 F. Supp. 2d at 288).

This Court agrees with the other district courts' holdings, finding that at a minimum, a plaintiff must allege that a substance entered its premises or attached to its surfaces to plead a "direct physical loss." *Studio 417*, 2020 WL 4692385, at *6. The district court in *Studio 417* concluded that the plaintiffs pled a "direct physical loss" when the plaintiffs alleged that "COVID-19 … attached to and deprived [p]laintiffs of their property." *Id.* at *4. The court ultimately denied the Defendant's motion to dismiss because the plaintiffs in *Studio 417* alleged a tangible loss. *Id.* Here, however, Goodwill only states that the government's mandated closures rendered it unusable, not that COVID-19 "attached to [or] deprived [it] of [its] property." *Id.*

Alleging a direct physical loss unambiguously requires a showing of tangible damage. Goodwill failed to allege it suffered any tangible damage, and therefore, its claim is subject to dismissal.

Even if the Court applied an expansive definition of direct physical loss, as Goodwill requests, its claim is still subject to dismissal because the Virus Endorsement expressly excludes coverage. The Virus Endorsement provides that "there is no coverage under such insurance for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Doc. No. 1-1, p. 32. By its terms, the exclusion applies because COVID-19 is a virus that "is capable of inducing physical distress, illness or disease." *Id.*

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Goodwill alleges, however, that the unambiguous exclusion is inapplicable because it lacked consideration and it applies only in the event of "actual contamination" on the premises rather than "suspected contamination." Doc. No. 13, p. 18.

First, Goodwill argues that the Virus Endorsement lacks consideration. *Id.*, p. 3. It explains that "[i]t is unclear what additional facts PIIC would have liked Goodwill to plead on this issue. It is not possible, nor is it required, for Goodwill to plead facts proving a negative." *Id.* Notwithstanding whether it is "required … to … prov[e] a negative," Goodwill must plead facts that underlie its allegations. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). Goodwill did not plead any facts explaining why the Virus Endorsement lacked consideration. Instead, Goodwill stated that "[a]t some point, [PIIC] added an endorsement to the Policy that purports to exclude coverage for loss due to virus or bacteria,"[2] Doc. No. 1-1, ¶ 12, followed by a legal conclusion—that "no consideration was provided to Goodwill." *Id.* The Court will not credit such conclusory allegations. *See Erikson*, 263 F.3d at 1154–55.

Goodwill additionally argues that the Virus Endorsement only applies in the event of "actual contamination" on the premises rather than "suspected contamination," Doc. No. 13, p. 18, but this argument defeats itself. First, the Virus Endorsement precludes coverage "resulting from" any virus "*capable* of inducing physical distress, illness or disease," indicating it would encompass a scenario where "suspected contamination" qualifies. Doc. No. 1-4, p. 26 (emphasis added). The mandated closures, which caused Goodwill to seek

[2] The Complaint does not clearly state when the endorsement was added.

declaratory judgment, resulted from the ability, or capability, of COVID-19 to "induc[e] physical distress, illness or disease." Thus, even if Goodwill alleged a Covered Loss, the Virus Endorsement would exclude coverage.

Other district courts have reached the same conclusion. In *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *9 (E.D. Mich. Sept. 3, 2020), the district court held that even "assuming [p]laintiff has suffered an 'accidental direct physical loss to Covered Property,' the Virus Exclusion negates any coverage for [p]laintiff's loss of income or extra expense." The Virus Exclusion in *Turek* barred coverage for a loss caused by "[v]irus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness, or disease," just like the Virus Endorsement here. *Turek*, 2020 WL 5258484, at *8.

Here, "the plain, unambiguous meaning of the Virus [Endorsement] … [also] negates coverage." *Turek*, 2020 WL 5258484, at *9. Therefore, COVID-19 clearly qualifies as a "virus" that caused Goodwill to close its doors, which bars coverage under the Virus Endorsement.

PIIC also argues that under *Katz v. Gerardi*, 655 F.3d 1212 (10th Cir. 2011), Goodwill is attempting to utilize improper claim-splitting. Doc. No. 8, p. 19. PIIC alleges Goodwill is seeking a declaration that it suffered a covered loss and if it is successful, that it will pursue a second action to determine the "amounts … due and owing." Doc. No. 8, p. 20. However, in *Katz*, the Court explained that the "test for claim splitting is […] whether the first suit . . . would preclude the second suit." 655 F.3d at 1218. Thus, until a second suit is pending, dismissing Goodwill's suit on claim splitting grounds is inappropriate.

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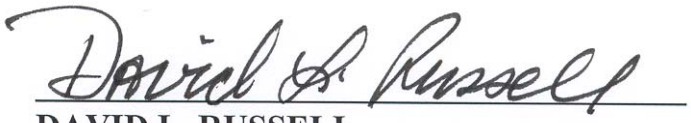
In conclusion, Goodwill's claim is, as a matter of law, not covered by the Policy with PIIC because Goodwill did not suffer a direct physical loss. Furthermore, even if it did suffer a direct physical loss, the plain meaning of the Virus Endorsement expressly excludes Goodwill's claim from coverage. Therefore, Goodwill is not entitled to relief and PIIC's motion to dismiss is GRANTED in its entirety.

IT IS SO ORDERED on this 9th day of November 2020.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

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ATTACHMENT 2

Judgment dated November 9, 2020, in favor of Defendant Philadelphia Indemnity Insurance Company [*Doc. 25*].

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

GOODWILL INDUSTRIES OF CENTRAL OKLAHOMA, INC., d/b/a GOODWILL CAREER PATHWAYS INSTITUTE,	)	
Plaintiff,	)	
v.	)	No. CV-20-511-R
PHILADELPHIA INDEMNITY INSURANCE COMPANY,	)	
Defendant.	)	

JUDGMENT

In accordance with the Court's Orders entered this date, Plaintiff's action is dismissed, and judgment is entered in favor of the Defendant.

ENTERED this 9th day of November 2020.

David L. Russell

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

ATTACHMENT 3

Order dated March 11, 2021 denying Plaintiff Goodwill Institute of Central Oklahoma, Inc. d/b/a Goodwill Career Pathways Institute's Motion to Alter or Amend Judgment [*Doc. 35*].

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

GOODWILL INDUSTRIES OF CENTRAL OKLAHOMA, INC., d/b/a GOODWILL CAREER PATHWAYS INSTITUTE,	)	
Plaintiff,	)	
v.	)	No. CV-20-511-R
PHILADELPHIA INDEMNITY INSURANCE COMPANY,	)	
Defendant.	)	

ORDER

Before the Court is Plaintiff Goodwill Industries of Central Oklahoma, Inc.'s ("Goodwill") Motion to Alter or Amend Judgment. Doc. No. 26. Defendant Philadelphia Indemnity Insurance Company ("PIIC") filed a Response in Opposition. Doc. No. 27. Goodwill then filed a Reply, Doc. No. 28, and PIIC filed a sur-Reply. Doc. No. 31.

This dispute arises from Goodwill's closure of its central Oklahoma locations after the Governor of Oklahoma issued an Executive Order declaring a state of emergency due to rising cases of the novel coronavirus ("COVID-19") on March 15, 2020. Doc. No. 1-1, p. 6.

Goodwill purchased a Commercial Lines policy underwritten by PIIC ("the Policy"), providing "Business Income" coverage [ ] for "the actual loss of Business Income [ ] sustain[ed] due to the necessary 'suspension' of [ ] 'operations' during the 'period of

restoration.'" Doc. No. 1-1, p. 2; Doc. No. 1-4, p. 169. The Policy, which ran "from May 1, 2019, to May 1, 2020," only covers "'suspension[s]' [ ] caused by direct physical loss of or damage to property." Doc. No. 1-4, p. 169; Doc. No. 1-1, p. 2. Any coverage is conditioned on Goodwill suffering a "direct physical loss of or damage to property" operated by Goodwill throughout central Oklahoma. Doc. No. 1-1, pp. 2–3.

Importantly, the Policy included an endorsement that excludes coverage for "loss due to virus or bacteria." Doc. No. 1-4, p. 26. The endorsement is titled "Exclusion of Loss Due to Virus or Bacteria" ("Virus Endorsement"), and it "applies to all coverage under all forms and endorsements …, including … damage to buildings or personal property and … business income, extra expense, or action of civil authority." Doc. No. 1-1, p. 100. It states that "[PIIC] will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Doc. No. 1-1, p. 100.

After state-wide orders prompted Goodwill to close its doors, Goodwill sought a declaratory judgment in state court on May 6, 2020 that "[it] sustained a 'direct physical loss' and/or 'risk of direct physical loss'" from the mandated closures. Doc. No. 1-1. On June 1, 2020, PIIC removed the action to this Court. Doc. No. 1. PIIC then moved to dismiss the claims against it on the grounds that Goodwill failed to allege a "direct physical loss" under the Policy and because the Virus Endorsement precluded coverage. Doc. No. 8.

On November 9, 2020, the Court granted PIIC's motion to dismiss in its entirety for two reasons. Doc. No. 24. First, the Court explained that "[a]lleging a direct physical loss

unambiguously requires a showing of tangible damage." Doc No. 24, p. 8. Further, because Goodwill did not allege any tangible damage to its property, it failed to state a claim of a "direct physical loss" under the Policy. *Id.* Second, the Court explained that "[e]ven if [it] applied a more expansive definition of direct physical loss, [ ] its claim [was] still subject to dismissal because the Virus Endorsement expressly excludes coverage." *Id.*

On December 7, 2020, Goodwill filed a "Motion to Alter or Amend" Judgment pursuant to Fed. R. Civ. P. 59(e). Doc. No. 26. In its Motion, Goodwill argues that the Court erred when it granted PIIC's motion to dismiss because i) it evaluated the plain meaning of "direct physical loss" without accounting for the modifier "*risk of* direct physical loss"; ii) it did not adopt Goodwill's construction of direct physical loss when Goodwill offered a reasonable construction of the phrase; and iii) amendment of the Complaint would not be futile. Doc. No. 26, pp. 4, 6, 8.

Parties may file a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e). "Rule 59(e) derives from a common-law court's plenary power to revise its judgment during a single term of court, before anyone could appeal." *Banister v. Davis*, 140 S. Ct. 1698, 1709 (2020). "The Rule gives a district court the chance 'to rectify its own mistakes in the period immediately following' its decision." *Id.* at 1703 (quoting *White v. N.H. Dep't of Emp. Sec.*, 455 U.S. 445, 450 (1982)). The time for filing a Rule 59(e) motion "is short—28 days from entry of the judgment, with no possibility of an extension." *Id.*; *see also* Fed. R. Civ. P. 59(e); Fed. R. Civ. P. 6(b)(2).

A Rule 59(e) motion may be granted when the movant presents one of the following circumstances: "(1) an intervening change in the controlling law, (2) new evidence

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previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (citation omitted). In the Tenth Circuit, "a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Id.* However, a motion to reconsider "is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Ferluga v. Eickhoff*, 236 F.R.D. 546, 549 (D. Kan. 2006) (citing *Servants of the Paraclete*, 204 F.3d at 1012); *see also Banister*, 140 S. Ct. at 1703 ("[C]ourts will not address new arguments or evidence that the moving party could have raised before the decision issued.").

Goodwill argues that under *Servants of the Paraclete,* the Court should amend its prior judgment to correct clear error and prevent manifest injustice. Doc. No. 26, p. 4. To begin with, Goodwill urges the Court that it erred in its interpretation of the Policy language when it interpreted "direct physical loss," rather than "*risks of* direct physical loss." Doc. No. 26, pp. 4–5 (emphasis in original). Goodwill reasons that the threat of the spread of the virus, which was "the entire purpose of the Governor's Executive order…", should qualify as a "risk of direct physical loss." *Id.* at 5.

Goodwill argues it "is entitled to coverage if the "loss or damage" is caused by or result[s] from Covered Cause of Loss." Doc. No. 26, p. 4. However, Goodwill overlooks the fact that prior to describing what qualifies as a "Covered Loss," the Business Income Coverage Form states that the "'suspension' must be caused by direct physical loss of or damage to property…". Doc. No. 1-4, at 169. Accordingly, while "*risks of* direct physical loss" define what *property* qualifies as a "covered loss," loss of business due to the

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"necessary suspension of your operations" is only covered if the *period of suspension* is caused by "direct physical loss." *Id.* (emphasis added). Thus, as PIIC explains, and as the Court held in its previous Order, "the Business Income, Extra Expense, and Civil Authority Coverages […] specifically require the insured to establish direct physical loss or damage to property—not merely a 'risk of physical loss or damage.'" Doc. No. 27, pp. 5–6 (citing Doc. No. 1–4, pp. 169–170). Therefore, the Court did not err when it interpreted "direct physical loss" rather than "*risks of* direct physical loss."

Next, Goodwill argues that the Court erred in its interpretation of "direct physical loss" because it did not "construe the ambiguous term most favorably toward Goodwill and most strictly against PIIC." Doc. No. 26, pp. 6. However, the Court previously explained that "[a]lleging a direct physical loss *unambiguously* requires a showing of tangible damage. Goodwill failed to allege it suffered any tangible damage, and therefore, its claim is subject to dismissal." Doc. No. 24, p. 8 (emphasis added).

Goodwill cites a recent decision from a state court in North Carolina, which explains that when two proffered definitions are reasonable, the phrase is at least ambiguous, and the Court should therefore utilize the "reasonable definition which favors coverage." Doc. No. 26, pp. 6–7 (citing *North State Deli, LLC v. The Cincinnati Insurance Company*, Case No. 20-CVS-02569 (N.C. Super. Ct. Oct. 9, 2020)). However, the Court is bound by the laws of interpretation of the state of Oklahoma, not North Carolina.

As the Court explained in its previous Order, in Oklahoma,

> [t]he interpretation of an insurance contract and whether it is ambiguous is determined by the Court as a matter of law. *Serra v. Estate of Broughton*, 364 P.3d 637, 641 (Okla. 2015). The Court shall not "force[ ] or constrain[ ]

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> interpretations to create [… or] construe ambiguities. *Max True Plastering v. U.S. Fid. & Guar. Co.*, 912 P.2d 861, 869 (Okla. 1996).

Doc. No. 24, pp. 4–5.

Additionally, Goodwill relies on an Oklahoma trial court summary judgment opinion for its proposition that Goodwill properly pled a "direct physical loss" under the policy. *Choctaw Nation of Oklahoma v. Lexington Ins. Co., et. al.*, Case No. CV-20-42, Order (Okla. Dist. Ct., Bryan Cnty. Feb. 15, 2021), available at Doc. No. 34-1. However, in *Choctaw Nation*, the trial court explained the distinction in Goodwill's policy and Choctaw Nation's policy. *Id.* The court explained that

> the *Goodwill* court noted numerous other provisions in the [*Goodwill* Policy] that are absent from [Choctaw Nation's] Policy. The *Goodwill* policy required "actual loss" due to a "suspension" of "operation," but such words and requirements are absent from [Choctaw Nation's] Policy. *See Goodwill Indus. of Cent. Oklahoma, Inc.*, No. CV-20-511-R, at *1–2. Meanwhile, [Choctaw Nation's] Policy provides coverage for "imminent loss." *See supra* at 8. To interpret these policies the same would render those different words, definitions, and provisions meaningless, which this Court will not do.

Choctaw Nation, Case No. CV-20-42, at 10. Accordingly, as the court explained, Choctaw Nation's policy used "different words, definitions, and provisions" than Goodwill's Policy. *Id.* Therefore, Goodwill's reliance on *Choctaw Nation* is misplaced.

As PIIC notes, "the phrase 'direct physical loss' is not ambiguous simply because it is not defined in the Policy." Doc. No. 27, p. 6 (citing *Cranfill v. Aetna Life Ins. Co.*, 49 P.3d 703, 706 (Okla. 2002)). While Goodwill argues that a "direct physical loss" encompasses more than "an actual, or material, deprivation of Plaintiff's property," the

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majority of district courts across the country disagree.[1] *See generally* Doc. No. 24, p. 7. Accordingly, the Court did not err when it chose to apply the plain language of "direct physical loss" rather than to "force[ ] or constrain [an] interpretation[ ] to create […] ambiguit[y]." *Max True Plastering v. Unites States Fid. & Guar. Co.*, 912 P.2d 861, 869 (Okla. 1996). Thus, because an ambiguity did not exist, the Court need not defer to Goodwill's interpretation.

Lastly, Goodwill argues that it "should be provided an opportunity to amend its Complaint to set forth facts establishing a "tangible loss" and alternatively, that "the Court's [previous] Order implies that if these facts were supplied (i.e., facts showing there was not consideration for the [virus] endorsement), Goodwill's claim would not be dismissed." Doc. No. 26, pp. 8–9. However, the Court disagrees.

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[1] A majority of district courts have found a "direct physical loss" to require some form of tangible damage to property. *See, e.g. DAB Dental PLLC v. Main Street America Protection Ins. Co.*, No. 20-CA-5504 (Fla. Cir. Civ. Div. Nov. 10, 2020); *Goodwill Indus. of Central Okla., Inc. v. Phila. Indem. Ins. Co.*, ___ F. Supp. 3d ___, 2020 WL 6561315 (W.D. Okla. Nov. 9, 2020); *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, ___ F. Supp. 3d ___, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020); *Real Hospitality, LLC v. Travelers Cas. Ins. Co. of Am.*, ___ F. Supp. 3d ___, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020); *Raymond H. Nahmad DDS PA v. Hartford Cas. Ins. Co.*, ___ F. Supp. 3d ___, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020); *Travelers Cas. Ins. Co. v. Geragos and Geragos*, ___ F. Supp. 3d ___, 2020 WL 6156584 (C.D. Cal. Oct. 19, 2020); *Seifert v. IMT Ins. Co.*, ___ F. Supp. 3d ___, 2020 WL 6120002 (D. Minn. Oct. 16, 2020); *Harvest Moon Distributors, LLC v. Southern-Owners Ins. Co.*, ___ F. Supp. 3d ___, 2020 WL 6018918 (M.D. Fla. Oct. 9, 2020); *Vandelay Hosp. Group LP v. Cincinnati Ins. Co.*, 2020 WL 5946863 (N.D. Tex. Oct. 7, 2020); *Henry's Louisiana Grill, Inc. v. Allied Ins. Co.*, ___ F. Supp. 3d ___, 2020 WL 5938755 (N.D. Ga. Oct. 6, 2020); *Mark's Engine Co. No. 28 Restaurant LLC v. The Travelers Indemn. Co.*, 2020 WL 5938689 (C.D. Cal., Oct. 2, 2020); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London*, ___ F. Supp. 3d ___, 2020 WL 5791583, at *1 (M.D. Fla. Sept. 28, 2020); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of America*, 2020 WL 5525171 (N.D. Cal. Sept. 14, 2020); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, ___ F. Supp. 3d ___, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020); *Plan Check Downtown III, LLC v. Amguard Ins. Co.*, 485 F. Supp. 3d 1225 (C.D. Cal., 2020); *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.*, 484 F. Supp. 3d 492 (E.D. Mich. 2020); *10E, LLC v. Travelers Indemnity Co.*, 483 F. Supp. 3d 828 (C.D. Cal. 2020); *Diesel Barbershop, LLC, et al. v. State Farm Lloyds*, 479 F. Supp. 3d 353 (W.D. Tex. 2020); *Rose's 1, LLC v. Erie Ins. Exch.*, 2020 WL 4589206 (D.C. Super. Aug. 06, 2020); *The Inns by the Sea v. California Mut. Ins. Co.*, Case No. 20-CV-001274 (Cal. Super. Ct., Monterey Cnty. Aug. 6, 2020); *Gavrilides Mgm't Co., LLC v. Mich. Ins. Co.*, , 2020 WL 4561979 (Mich. Cir. Ct. July 21, 2020).

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Goodwill did not properly file a motion for leave to amend. Fed. R. Civ. P. 15(a) gives parties a right to amend pleadings once as a matter of course at any time before a responsive pleading is served. Accordingly, Goodwill could have amended the Complaint *as of right* after it received the motion to dismiss and before the Court ruled on it. *See, e.g.*, *Glenn v. First Nat. Bank in Grand Junction*, 868 F.2d 368, 370 (10th Cir. 1989). However, once the Court granted PIIC's motion to dismiss, Goodwill was required to obtain leave of court or written consent from PIIC to amend the Complaint. Fed. R. Civ. P. 15(a)(2). The Tenth Circuit has explained that

> [a]fter a motion to dismiss has been granted, plaintiffs must first reopen the case pursuant to a motion under Rule 59(e) or Rule 60(b) *and then* file a motion under Rule 15, and properly apply to the court for leave to amend by means of a *motion* which in turn complies with Rule 7. In that event, in accordance with Rule 15, "leave shall be freely given when justice so requires."

Glenn, 868 F.2d at 371 (internal citations omitted) (emphasis added). Instead of properly following the procedure laid out in Rule 15(a), in its Reply brief, Goodwill requests that the Court provide an opportunity for it to amend its Complaint.[2] Doc. No. 28, p. 2. Further, though "Rule 59(e) permits a court to alter or amend a judgment, [ ] it 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485, n.5 (2008) (citing 11 C. Wright & A. Miller, Federal Practice and Procedure § 2810.1, pp. 127–128 (2d ed. 1995) (footnotes omitted)). Goodwill did not follow the proper procedure for

[2] Goodwill first requests leave to amend in its initial Rule 59(e) motion, Doc. No. 26, p. 1, but first provides its proposed amended Complaint in its Reply brief. Doc. No. 28, pp. 8–9.

seeking leave to amend because it did not seek leave prior to the Court's ruling on PIIC's motion to dismiss and it argued for leave within a motion to reconsider rather than by filing a motion seeking leave to amend as outlined in Rule 15(a).

Even though courts freely grant leave to amend "when justice so requires," Fed. R. Civ. P. 15(a)(2), leave to amend may not be granted when the party opposing the motion shows "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Castanon v. Cathey*, 976 F.3d 1136, 1145 (10th Cir. 2020) (explaining limitations on the general notion that amendment should be freely given); *Durham v. Xerox Corp.*, 18 F.3d 836, 840 (10th Cir. 1994) ("[U]nexplained delay alone justifie[d] the district court's discretionary decision" to deny leave to amend.). "A proposed amendment to a complaint is futile if it would be subject to dismissal for any reason, including that the amendment would not survive a motion for summary judgment or a motion to dismiss." *Weinstein v. U.S. Air Force*, 468 F. Supp. 2d 1366, 1374 (D.N.M. 2006) (citing *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1239–40 (10th Cir. 2001); *Gohier v. Enright*, 186 F.3d 1216, 1218 (10th Cir. 1999)).

Here, amending Goodwill's Complaint would be futile because it would not survive a motion to dismiss.

As explained above, the Court found that a "direct physical loss" unambiguously requires alleging some tangible damage to property, and Goodwill did not allege anything

other than business closures due to government orders. Doc. No. 24, p. 6. Plaintiff's proposed amended complaint is no different. It alleges that

> closure orders […] prohibited Goodwill from accessing its property in response to dangerous physical conditions that constitute a Covered Cause of Loss.
>
> […]
>
> 23. […] Goodwill's property was tangibly damaged because it was likely customers, employees, mail delivery persons, and/or other visitors to the insured property prior to Goodwill's closure were infected with COVID-19.
>
> 24. Goodwill's property was also tangibly damaged because it sustained tangible losses of revenue as a result of the civil authority mandated closure order.
>
> 25. As a result of the likely presence of COVID-19 on or around Goodwill's properties, Goodwill was deprived of the use of its property.
>
> 26. Goodwill was required to suspend its business operations to further prevent physical damages to the premises by the presence or proliferation of COVID-19 and the physical harm it could cause persons present on or near Goodwill's properties as COVID-19 is physically transmitted by air and surfaces that remain infections (sic) for an extended time.

Doc. No. 28-1, ¶¶ 20, 23–26.

Simply adding words such as "tangible" or "physical" does not change the nature of Goodwill's claims. Just as this Court explained in its previous Order, Goodwill is alleging that the closure orders rendered its locations unusable. Doc. No. 24, p. 8. Goodwill does not allege that any of its properties' structures were physically altered or damaged. Rather, the basis of Goodwill's claim is that it suffered economic loss caused by government orders issued in response to COVID-19. Such allegations are insufficient to state a direct physical loss. *See, e.g.*, *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins.*

Co., No. 20-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020) (economic loss did not establish coverage under policy requiring direct physical loss). Accordingly, granting Goodwill leave to amend its allegations of a direct physical loss would be futile because it still cannot plead a direct physical loss under the Policy.

Alternatively, Goodwill argues it should be permitted to amend its Complaint in regard to the Virus Endorsement as well.[3] Specifically, Goodwill seeks to plead that

> no consideration was provided to Goodwill in exchange for the addition of this endorsement. The endorsement was not part of the original Policy. By adding this endorsement, Philadelphia limited Goodwill's coverage with no benefit conferred upon Goodwill in exchange.

Doc. No. 28-1, ¶ 14.

The parties do not dispute that Goodwill obtained the Policy, No. PHPK1972850, underwritten by PIIC "for a policy period from May 1, 2019 to May 1, 2020." *Id.* ¶ 5. Further, it is undisputed that the Virus Endorsement was included in the Policy. Goodwill apparently seeks to argue that the Virus Endorsement was not part of "the original Policy." Doc. No. 28-1, ¶ 14. Perhaps at one point in the relationship between Goodwill and PIIC, Goodwill was insured under a policy without a Virus Endorsement. However, "Oklahoma courts have … held that 'the renewal of an insurance policy is a new contract.'" *Dalpaos-Lawrence v. Guideone Am. Ins. Co.*, 243 F. App'x 358, 363 (10th Cir. 2007) (citing *Wynn v. Avemco Ins. Co.*, 963 P.2d 572, 574 (Okla. 1998)). Here, PIIC and Goodwill renewed

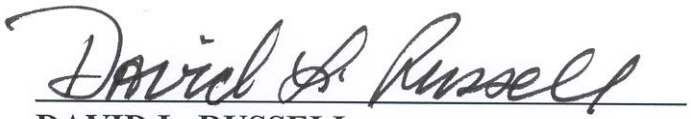
[3] Of the 113 federal district courts to consider a motion to dismiss by an insurer with a virus endorsement in the policy, 108 granted the motion. *See Outcome on Merits-Based Motions to Dismiss,* Covid Coverage Litigation Tracker, available at https://cclt.law.upenn.edu/judicial-rulings, accessed March 11, 2021 (tracking district court rulings from July 15, 2020 to March 1, 2021).

ATTACHMENT 3

the Policy between the parties for the period of May 1, 2019 to May 1, 2020. Doc. No. 28-1, ¶ 5. Once the Policy was renewed, a new contract between the parties was formed. This new contract clearly included the Virus Endorsement. Doc. No. 1-1, p. 32. As this Court stated previously, the "plain, unambiguous meaning of the Virus [Endorsement] … [ ] negates coverage." Doc. No. 24, p. 10 (citing *Turek*, 2020 WL 5258484, at *9). For this reason, granting leave to amend the Complaint would be futile.

In conclusion, the Court did not err in its interpretation of "direct physical loss" and amendment of the Complaint would be futile. Therefore, Goodwill's motion to alter or amend judgment pursuant to Rule 59(e) is hereby DENIED.

IT IS SO ORDERED on this 11th day of March, 2021.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

ATTACHMENT 3

ATTACHMENT 4

Order from *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, No. 2020-02558 (La. Dist. Ct. Nov. 4, 2020)

Civil District Court for the Parish of Orleans
STATE OF LOUISIANA

No: 2020 - 02558 Division/Section: M-13

CAJUN CONTI LLC ET AL
versus
CERTAIN UNDERWRITERS AT LLOYD'S,LONDON ET AL

Date Case Filed: 3/16/2020

NOTICE OF SIGNING OF JUDGMENT

TO:

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1100
New Orleans, LA 70130

In accordance with Article 1913 C.C.P., you are hereby notified that Judgment in the above entitled and numbered cause was signed on November 4, 2020

New Orleans, Louisiana
November 4, 2020

MINUTE CLERK

ATTACHMENT 4

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2020-02558 **DIVISION M** **SECTION 13**

CAJUN CONTI LLC, CAJUN CUISINE 1 LLC, AND CAJUN CUISINE LLC D/B/A OCEANA GRILL

VERSUS

CERTAIN UNDERWRITERS AT LLOYD'S LONDON

FILED: _____ _____
DEPUTY CLERK

JUDGMENT

The original hearing took place on October 29, 2020. Appearing at the hearing for the respective parties were the following:

James Williams, Rico Alvendia, Bernard Charbonnet, Desiree Charbonnet, and Jennifer Perez, Attorneys for Plaintiffs;
Allen Miller, Virginia Dodd, and Kevin Welsh, Attorneys for Defendant

Certain Underwriters at Lloyd's London ("Underwriters") urged a motion for summary judgment.

The Court, after hearing testimony and considering applicable law as well as the entire record, renders the following judgment:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Underwriters' motion for summary judgment is hereby DENIED.

JUDGMENT READ, RENDERED AND SIGNED on this ***4th*** day of ***November, 2020*** in New Orleans, Louisiana.

Judge Paulette R. Irons

ATTACHMENT 4

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2020-02558 **DIVISION M** **SECTION 13**

CAJUN CONTI LLC, CAJUN CUISINE 1 LLC, AND CAJUN CUISINE LLC D/B/A OCEANA GRILL

VERSUS

CERTAIN UNDERWRITERS AT LLOYD'S LONDON

FILED: _____ _____
DEPUTY CLERK

REASONS FOR JUDGMENT

Whether COVID constitutes direct physical loss or damage appears to be an issue of first impression. While Underwriters distinguishes the *Chinese Drywall* case by noting that the policy interest being protected in that case necessitated a more lenient definition of "direct physical loss," the Court is not convinced that similar interests are not at play here. It is a genuine issue of material fact whether the policy interests here necessitate a more liberal reading of "direct physical loss or damage" in keeping with the *Chinese Drywall* cases.

It is also a genuine issue of material fact whether the suspension of Oceana Grill's operations was caused by physical loss or damage to its property. If COVID constitutes a physical loss or damage, it is clear that the question of how COVID impacts the environment is a genuine issue of material fact. While Underwriters argues that the harms can be abated with simple household cleaning supplies, Oceana Grill's citation to studies that offer a contrary interpretation presents a genuine issue of material fact.

With respect to the period of restoration, if whether COVID constitutes a physical loss or damage is a genuine issue of material fact and if the question of how COVID impacts the environment is a genuine issue of material fact, then here is a

genuine issue of material fact as to whether the physical loss or damage caused a suspension of Oceana Grill's operation beginning 72 hours after the time of direct physical loss.

Turning to the Civil Authority Endorsement, for the same reasons stated above, there is a genuine issue of material fact that a "Covered Cause of Loss" caused damage to property at another location within one mile of the insured premises. The question of whether COVID is a Covered Cause of Loss is a genuine issue of material fact, and Plaintiffs have alleged its presence at locations surrounding its insured premises, including a hospital.

Whether the Orders prohibited access to the insured premises is also a genuine issue of material fact. The restaurant had to drastically change its operations to exclude sit-down patrons, which was previously the heart of its business, because the Orders restricted their presence in the building.

Finally, there is a genuine issue of material fact whether the orders were taken in response to dangerous physical conditions resulting from the damage to other property within one mile of the insured premises or continuation of the Covered Cause of Loss that caused the damage. The Orders cited damage to property in the city and state.

SIGNED on this ***4th*** day of ***November, 2020*** in New Orleans, Louisiana.

Judge Paulette R. Irons

ATTACHMENT 4

ATTACHMENT 5

Order from *MacMiles, LLC d/b/a Grant Street Tavern v. Erie Ins. Exch.*, Court of Common Pleas of Allegheny County, Pennsylvania, Case No. GD-20-7753 (May 25, 2021)

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MACMILES, LLC D/B/A GRANT STREET TAVERN 310 Grant Street, Ste. 106 Pittsburgh, PA 15219-2213,	:	
Plaintiff,	:	No.: GD-20-7753
vs.	:	
	:	Hon. Christine Ward
ERIE INSURANCE EXCHANGE 100 Erie Insurance Place Erie, PA 16530,	:	**Memorandum and Order of Court**
Defendant.	:	

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ATTACHMENT 5

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MACMILES, LLC D/B/A GRANT STREET TAVERN 310 Grant Street, Ste. 106 Pittsburgh, PA 15219-2213,	:	
Plaintiff,	:	No.: GD-20-7753
vs.	:	
ERIE INSURANCE EXCHANGE 100 Erie Insurance Place Erie, PA 16530,	:	
Defendant.	:	

MEMORANDUM AND ORDER OF COURT

I. The Parties

MacMiles, LLC d/b/a Grant Street Tavern (hereinafter "Plaintiff") is a restaurant and bar located in the Downtown neighborhood of Pittsburgh, Allegheny County, Pennsylvania.

Erie Insurance Exchange (hereinafter "Defendant") is a reciprocal insurance exchange organized under the laws of Pennsylvania with its principal place of business in Erie, Pennsylvania.

II. Introduction

Defendant issued Plaintiff an Ultra Plus Commercial General Liability Policy for the policy period between September 12, 2019 to September 12, 2020 (hereinafter "the insurance contract"). The insurance contract is an all-risk policy, which provides coverage for any direct physical loss or direct physical damage unless the loss or damage is specifically excluded or limited by the insurance contract.

In March and April of 2020, in order to prevent and mitigate the spread of the coronavirus disease "COVID-19," Governor Tom Wolf ("Governor Wolf") issued a series of mandates restricting the operations of certain types of businesses throughout the Commonwealth of Pennsylvania (the "Governor's orders"). On March 6, 2020, Governor Wolf issued an order declaring a Proclamation of Disaster Emergency. On March 19, 2020, Governor Wolf issued an order requiring all non-life sustaining businesses in Pennsylvania to cease operations and close physical locations. On March 23, 2020, Governor Wolf issued an order directing Pennsylvania citizens in particular counties to stay at home except as needed to access life sustaining services. Then, on April 1, 2020, Governor Wolf extended the March 23, 2020 order, and directed all of Pennsylvania's citizens to stay at home. As of April 1, 2020, at least 5,805 citizens of Pennsylvania contracted COVID-19 in sixty counties across the Commonwealth, and seventy-four (74) citizens died.[1] Unfortunately, since April 1, 2020, the number of positive cases and deaths from COVID-19 has increased dramatically.[2]

As a result of the spread of COVID-19 and the Governor's orders, Plaintiff suspended its business operations. Plaintiff thereafter submitted a claim for coverage under its insurance contract with Defendant. Defendant denied Plaintiff's claim.

On September 29, 2020, Plaintiff filed a complaint in the Court of Common Pleas of Allegheny County. In its complaint, Plaintiff asserted the following counts: [a] count one is for declaratory judgment in regards to the business income protection provision of the insurance contract; [b] count two is for breach of contract in relation to the business income protection

[1] *See* Governor Tom Wolf, *Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home*, (April 1, 2020), https://www.governor.pa.gov/wp-content/uploads/2020/04/20200401-GOV-Statewide-Stay-at-Home-Order.pdf.

[2] As of May 14, 2021, 993,915 citizens of Pennsylvania have contracted COVID-19 and 26,724 citizens have died. *See* Pennsylvania Department of Health, COVID-19 Data for Pennsylvania, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx.

provision of the insurance contract; [c] count three is for declaratory judgment with regard the civil authority provision of the insurance contract; [d] count four is for breach of contract in regards to the civil authority provision of the insurance contract; [e] count five is for declaratory judgment with regard to the extra expense provision of the insurance contract; and [f] count six is for breach of contract in regards to the extra expense provision of the insurance contract. All of Plaintiff's claims require this Court's determination as to whether Plaintiff is entitled to coverage under various provisions of the insurance contract with Defendant for losses Plaintiff sustained in relation to the spread of COVID-19 and the Governor's orders.

On December 22, 2020, Plaintiff filed a Motion for Partial Summary Judgment as to Plaintiff's claims for declaratory judgment with regard to the business income protection and civil authority provisions of the insurance contract. On March 10, 2021, Defendant filed a Cross Motion for Judgment on the Pleadings. On March 31, 2021, this Court heard oral argument on Plaintiff's Motion for Partial Summary Judgment and Defendant's Cross Motion for Judgment on the Pleadings. For the reasons set forth herein, this Court grants Plaintiff's Motion for Partial Summary Judgment, in part, and denies Defendant's Cross Motion for Judgment on the Pleadings.

III. The Contract Provisions

Plaintiff's and Defendant's dispute involves the following provisions regarding coverage under the insurance contract.

> **Section 1 - Coverages**
>
> **Insuring Agreement**
>
> We will pay for direct physical "loss" of or damage to Covered Property at the premises described in the "Declarations" caused by or resulting from a peril insured against.

Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 61, Exhibit A.

> **Section II – Perils Insured Against**
>
> * * * * *
>
> **Income Protection – Coverage 3**
>
> **Covered Cause of Loss**
>
> This policy insures against direct physical "loss", except "loss" as excluded or limited in this policy.[3]

Id. at 64.

> **Income Protection – Coverage 3**
>
> **A. Income Protection**
>
> Income Protection means loss of "income" and/or "rental income" you sustain due to partial or total "interruption of business" resulting directly from "loss" or damage to property on the premises described in the "Declarations" or to your food truck or trailer when anywhere in the coverage territory from a peril insured against.[4]

---

[3] "Loss" means direct and accidental loss of or damage to covered property. Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 96, Exhibit A.

[4] The insurance contract defines "interruption of business" as "the period of time that your business is partially or totally suspended and it: 1. Begins with the date of direct "loss" to covered property caused by a peril insured against: and 2. Ends on the date when the covered property should be repaired, rebuilt, or replaced with reasonable speed and similar quality." Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 96, Exhibit A. The insurance contract defines "income" as "the sum of net income (net profit or loss before income taxes) that would have been earned or incurred and necessary continuing operating expenses incurred by the business such as payroll expenses, taxes, interest, and rents." *Id*. The insurance contract defines "rental income" as the following:

> 1. The rents from the tenant occupancy of the premises described in the "Declarations";
>
> 2. Continuing operating expenses incurred by the business such as:
>
> a. Payroll; and
>
> b. All expenses for which the tenant is legally responsible and for which you would otherwise be responsible;
>
> 3. Rental value of the property described in the "Declarations" and occupied by you; or

Id. at 63.

C. Additional Coverages

1. Civil Authority

When a peril insured against causes damage to property other than property at the premises described in the : Declarations", we will pay for the actual loss of "income" and/or "rental income" you sustain and necessary "extra expense" caused by action of civil authority that prohibits access to the premises described in the "Declarations" or access to your food truck or trailer anywhere in the coverage territory provided that both of the following apply:

a. Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the premises described in the "Declarations" or your food truck or trailer are within that area but are not more than one mile from the damaged property; and

b. The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the peril insured against that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Id. at 64.

Section III. Exclusions

A. Coverages 1, 2, and 3

We do not cover under Building(s) – Coverage 1; Business Personal Property and Personal Property of others – Coverage 2; and Income Protection – Coverage 3 "loss" or damaged caused directly or indirectly by any of the following. Such a "loss" or damage is excluded regardless of any cause or event that contributes concurrently or in any sequence to the "loss":

* * * * *

10. By the enforcement of or compliance with any law or ordinance regulating the construction, use, or repair of any property, or requiring the tearing down of any

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4. Incidental income received from coin-operated laundries, hall rentals, or other facilities on the premises described in the "Declarations".

Id. at 97. Finally, "Declarations" is defined as "the form which shows your coverages, limits of protection, premium charges, and other information." *Id*. at 96.

> property, including the cost of removing its debris, except as provided in Extensions of Coverage – **B.3., B.7.,** and **B.8.**

Id. at 66.

IV. Standard of Review

It is well-settled that, after the relevant pleadings are closed, a party may move for summary judgment, in whole or in part, as a matter of law. Pa. R.C.P. 1035.2. Summary judgment "may be entered only where the record demonstrates that there are no genuine issues of material fact, and it is apparent that the moving party is entitled to judgment as a matter of law." *City of Philadelphia v. Cumberland County Bd. of Assessment Appeals*, 81 A.3d 24, 44 (Pa. 2013). Furthermore, appellate courts will only reverse a trial court's order granting summary judgment where it is "established that the court committed an error of law or abused its discretion." *Siciliano v. Mueller*, 149 A.3d 863, 864 (Pa. Super. 2016).

The interpretation of an insurance contract is a matter of law, which may be decided by this Court on summary judgment. *Wagner. V. Erie Insurance Company*, 801 A.2d 1226, 1231 (Pa. Super. 2002). When interpreting an insurance contract, this Court aims to effectuate the intent of the parties as manifested by the language of the written instrument. *American and Foreign Insurance Company v. Jerry's Sport Center*, 2 A.3d 526, 540 (Pa. 2010). When reviewing the language of the contract, words of common usage are read with their ordinary meaning, and this Court may utilize dictionary definitions to inform its understanding. *Wagner*, 801 A.2d at 1231; *see also AAA Mid-Atlantic Insurance Company v. Ryan*, 84 A.3d 626, 633-34 (Pa. 2014). If the terms of the contract are clear, this Court must give effect to the language. *Madison Construction Company v. Harleysville Mutual Insurance Company*, 735 A.2d 100, 106 (Pa. 1999). However, if the contractual terms are subject to more than one reasonable interpretation, this Court must find that the contract is ambiguous. *Id*. "[W]hen a provision of

a[n insurance contract] is ambiguous, the [contract] provision is to be construed in favor of the [the insured] and against the insurer, as the insurer drafted the policy and selected the language which was used therein." *Kurach v. Truck Insurance Exchange*, 235 A.3d 1106, 1116 (Pa. 2020).

V. Discussion

a. Coverage Provisions

Plaintiff bears the initial burden to reasonably demonstrate that a claim falls within the policy's coverage provisions. *State Farm Cas. Co. v. Estates of Mehlman*, 589 F.3d 105, 111 (3d Cir. 2009) (applying Pennsylvania law). Then, provided that Plaintiff satisfies its initial burden, Defendant bears "the burden of proving the applicability of any exclusions or limitations on coverage." *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996) (applying Pennsylvania law). In order to prevail, Defendant must demonstrate that the language of the insurance contract regarding exclusions is "clear and unambiguous: otherwise, the provision will be construed in favor of the insured." *Fayette County Housing Authority v. Housing and Redevelopment Ins. Exchange*, 771 A.2d 11, 13 (Pa. Super. 2001).

First, this Court will address whether Plaintiff is entitled to coverage under the Income Protection provision of the insurance contract for losses Plaintiff sustained in relation to the public health crises and the spread of the COVID-19 virus. With regard to Income Protection coverage, the insurance contract provides that:

> **Section 1 - Coverages**
>
> **Insuring Agreement**
>
> We will pay for *direct physical "loss" of or damage to* Covered Property at the premises described in the "Declarations" caused by or resulting from a peril insured against.

Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 61, Exhibit A (emphasis added).

> **Section II – Perils Insured Against**
>
> * * * * *
>
> **Income Protection – Coverage 3**
>
> **Covered Cause of Loss**
>
> This policy insures against direct physical "loss", except "loss" as excluded or limited in this policy.[5]

Id. at 64.

> **Income Protection – Coverage 3**
>
> **A. Income Protection**
>
> Income Protection means loss of "income" and/or "rental income" you sustain due to partial or total "interruption of business" resulting *directly from "loss" or damage to property* on the premises described in the "Declarations" or to your food truck or trailer when anywhere in the coverage territory from a peril insured against.[6]

---

[5] "Loss" means direct and accidental loss of or damage to covered property. Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 96, Exhibit A.

[6] The insurance contract defines "interruption of business" as "the period of time that your business is partially or totally suspended and it: 1. Begins with the date of direct "loss" to covered property caused by a peril insured against: and 2. Ends on the date when the covered property should be repaired, rebuilt, or replaced with reasonable speed and similar quality." Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 96, Exhibit A. The insurance contract defines "income" as "the sum of net income (net profit or loss before income taxes) that would have been earned or incurred and necessary continuing operating expenses incurred by the business such as payroll expenses, taxes, interest, and rents." *Id*. The insurance contract defines "rental income" as the following:

> 1. The rents from the tenant occupancy of the premises described in the "Declarations";
>
> 2. Continuing operating expenses incurred by the business such as:
>
> a. Payroll; and
>
> b. All expenses for which the tenant is legally responsible and for which you would otherwise be responsible;
>
> 3. Rental value of the property described in the "Declarations" and occupied by you; or

Id. at 63 (emphasis added).

In order to state a reasonable claim for coverage under the Income Protection provision of the insurance contract, Plaintiff must show that it suffered "direct physical loss of or damage to" its property. The interpretation of the phrase "direct physical loss of or damage to" property is the key point of the parties' dispute. Defendant contends that "direct physical loss of or damage to" property requires some physical altercation of or demonstrable harm to Plaintiff's property. Plaintiff contends that the "direct physical loss of . . . property" is not limited to physical altercation of or damage to Plaintiff's property but includes the loss of use of Plaintiff's property. Plaintiff further asserts that, because its interpretation is reasonable, this Court must find in Plaintiff's favor.

The insurance contract does not define every term in the phrase "direct physical loss of or damage to" property.[7] As previously noted, Pennsylvania courts construe words of common usage in their "natural, plain, and ordinary sense . . . and [Pennsylvania courts] may inform [their] understanding of these terms by considering their dictionary definitions." *Madison Construction Company,* 735 A.2d at 108. Four words in particular are germane to the determination of this threshold issue: "direct," "physical," "loss," and "damage." "Direct" is

---

4. Incidental income received from coin-operated laundries, hall rentals, or other facilities on the premises described in the "Declarations".

Id. at 97. Finally, "Declarations" is defined as "the form which shows your coverages, limits of protection, premium charges, and other information." *Id*. at 96.

[7] Although the insurance contract does define the term "loss" as meaning "direct and accidental loss of or damage to covered property," this definition is essentially meaningless because it is repetitive of the phrase "direct physical loss of or damage to." Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 96, Exhibit A. Accordingly, when interpreting the term "loss," this Court relies upon the term's the ordinary dictionary definition as it does with the other terms in this phrase, which the insurance contract did not define.

defined as "proceeding from one point to another in time or space without deviation or interruption . . . [and/or] characterized by close logical, causal, or consequential relationship . . . ."[8] "Physical" is defined as "of or relating to natural science . . . having a material existence . . . [and/or] perceptible especially through the senses and subject to the laws of nature . . . ."[9] "Loss" is defined as "DESTRUCTION, RUIN . . . [and/or] the act of losing possession [and/or] DEPRIVATION . . . ."[10] "Damage" is defined as "loss or harm resulting from injury to person, property, or reputation . . . ."[11]

Before analyzing the definitions of each of the above terms to determine whether Plaintiff's interpretation is reasonable, it is important to note that the terms, in addition to their ordinary, dictionary definitions, must be considered in the context of the insurance contract and the specific facts of this case. *See Madison Construction Company,* 735 A.2d at 106 (clarifying that issues of contract interpretation are not resolved in a vacuum). While some courts have interpreted "direct physical loss of or damage to" property as requiring some form of physical altercation and/or harm to property in order for the insured to be entitled to coverage, this Court reasonably determined that any such interpretation improperly conflates "direct physical loss of" with "direct physical . . . damage to" and ignores the fact that these two phrases are separated in the contract by the disjunctive "or."[12] It is axiomatic that courts must "not treat the words in the

[8] Direct, Merriam-Webster, https://www.merriam-webster.com/dictionary/direct.

[9] Physical, Merriam-Webster, https://www.merriam-webster.com/dictionary/physical.

[10] Loss, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss.

[11] Damage, Merriam Webster, https://www.merriam-webster.com/dictionary/damage.

[12] *See Fayette County Housing Authority v. Housing and Redevelopment Ins. Exchange*, 771 A.2d 11, 15 (Pa. Super. 2001) (explaining that merely accepting the non-binding decisions of other courts "by the purely mechanical process of searching the nations courts for conflicting decisions" amounts to an abdication of this Court's judicial role).

[contract] as mere surplusage . . . [and] if at all possible, [this Court must] construe the [contract] in a manner that gives effect to all of the [contract's] language." *Indalex Inc. v. Nation Union Fire Ins. Co. Pittsburgh, PA*, 83 A.3d 418, 420-21 (Pa. Super. 2013). Based upon this vital principle of contract interpretation, this Court concluded that, due to the presence of the disjunctive "or," whatever "direct physical 'loss' of" means, it must mean something different than "direct physical . . . damage to."

In order to determine what the phrase "direct physical loss of . . . property" reasonably means, this Court looked to the ordinary, dictionary definitions of the terms "direct," "physical," "loss," and "damage." This Court began its analysis with the terms "damage" and "loss," as these terms are the crux of the disputed language. As noted above, "damage" is defined as "loss or harm resulting from injury to person, property, or reputation . . . ,"[13] and "loss" is defined as "DESTRUCTION, RUIN . . . [and/or] the act of losing possession [and/or] DEPRIVATION . . . ."[14]

Based upon the above-provided definitions, it is clear that "damage" and "loss," in certain contexts, tend to overlap. This is evident because the definition of "damage" includes the term "loss," and at least one definition of "loss" includes the terms "destruction" and "ruin," both of which indicate some form of damage. However, as noted above, in the context of this insurance contract, the concepts of "loss" and "damage" are separated by the disjunctive "or," and, therefore, the terms must mean something different from each other. Accordingly, in this instance, the most reasonable definition of "loss" is one that focuses on the act of losing possession and/or deprivation of property instead of one that encompasses various forms of

[13] Damage, Merriam Webster, https://www.merriam-webster.com/dictionary/damage.

[14] Loss, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss.

damage to property, i.e., destruction and ruin. Applying this definition gives the term "loss" meaning that is different from the term "damage." Specifically, whereas the meaning of the term "damage" encompasses all forms of harm to Plaintiff's property (complete or partial), this Court concluded that the meaning of the term "loss" reasonably encompasses the act of losing possession [and/or] deprivation, which includes the loss of use of property absent any harm to property.

In reaching its conclusion, this Court also considered the meaning and impact of the terms "direct" and "physical." Ultimately, this Court determined that the ordinary, dictionary definitions of the terms "direct" and "physical" are consistent with the above interpretation of the term "loss." As noted previously, "direct" is defined as "proceeding from one point to another in time or space without deviation or interruption . . . [and/or] characterized by close logical, causal, or consequential relationship . . . ,"[15] and "physical" is defined as "of or relating to natural science . . . having a material existence . . . [and/or] perceptible especially through the senses and subject to the laws of nature . . . ."[16] Based upon these definitions it is certainly reasonable to conclude that Plaintiff could suffer "direct" and "physical" loss of use of its property absent any harm to property.

Here, Plaintiff's loss of use of its property was both "direct" and "physical." The spread of COVID-19, and a desired limitation of the same, had a close logical, causal, and/or consequential relationship to the ways in which Plaintiff materially utilized its property and physical space. *See* February 22, 2021 Court Order of the United States District Court, N.D. Illinois, Eastern Division case *In re: Society Insurance Co. COVID-19 Business Interruption*

[15] Direct, Merriam-Webster, https://www.merriam-webster.com/dictionary/direct.

[16] Physical, Merriam-Webster, https://www.merriam-webster.com/dictionary/physical.

Protection Insurance Litigation, Civil Case No. 1:20-CV-05965 at 21 (stating that government shutdown orders and COVID-19 *directly* impacted the way businesses used *physical* space) (emphasis added). Indeed, the spread of COVID-19 and social distancing measures (with or without the Governor's orders) caused Plaintiff, and many other businesses, to *physically* limit the use of property and the number of people that could inhabit *physical* buildings at any given time, if at all. Thus, the spread of COVID-19 did not, as Defendant contends, merely impose economic limitations. Any economic losses were secondary to the businesses' *physical* losses.

While the terms "direct" and "physical" modify the terms "loss" and "damage," this does not somehow necessarily mean that the entire phrase "direct physical loss of or damage to" property requires actual harm to Plaintiff's property in every instance. Any argument that the terms "direct" and "physical," when combined, presuppose that any request for coverage must stem from some actual impact and harm to Plaintiff's property suffers from the same flaw noted in this Court's above discussion regarding the difference between the terms "loss" and "damage:" such interpretations fail to give effect to all of the insurance contract's terms and, again, render the phrase "direct physical loss of" duplicative of the phrase "direct physical . . . damage to."

Defendant also contends that the insurance contract's Amount of Insurance provision supports the conclusion that the contract necessitates the existence of tangible damage in order for Plaintiff to be entitled to Income Protection coverage. According to Defendant, because the Amount of Insurance provision contemplates the existence of damaged or destroyed property, and the need to rebuild, repair, or replace property, Plaintiff's argument regarding loss of use in the absence of any tangible damage or destruction to property is untenable.

Although this Court agrees with Defendant on the general principle that the insurance contract's provisions must be read as a whole so that all of its parts fit together, this Court is not persuaded that the Amount of Insurance provision is inherently inconsistent with an interpretation of "direct physical loss of . . . property" that encompasses Plaintiff's loss of use of its property in the absence of tangible damage. The insurance contract provides that:

> We will pay the actual income protection loss for only such length of time as would be required to resume normal business operations. We will limit the time period to the shorter of the following periods:
>
> 1. The time period required to rebuild, repair, or replace such part of the Building or Building Personal Property that has been damaged or destroyed as a direct result of an insured peril; or
>
> 2. Twelve (12) consecutive months from the date of loss.

Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 64, Exhibit A. Upon review of the above language, this Court determined that the Amount of Insurance provision does not limit coverage only to instances where Plaintiff needed to rebuild, repair, or replace damaged or destroyed property. Indeed, the relevant part of the Amount of Insurance provision starts by generally stating that the insurer will pay for income protection loss for only such length of time as would be required to resume normal business operations. Thereafter, the Amount of Insurance provision further explains that this time period for coverage will be limited to either (a) the length of time needed to rebuild, repair, or replace damaged or destroyed property; *or* (b) twelve (12) months from the initial date of loss.

Although Defendant is correct to point out that the Amount of Insurance provision expressly contemplates some circumstances in which Plaintiff's property is actually damaged or destroyed, this provision does not necessitate the existence of damaged or destroyed property,

and does not require repairs, rebuilding, or replacement of damaged or destroyed property in order for Plaintiff to be entitled to coverage. The Amount of Insurance provision merely imposes a time limit on available coverage, which ends whenever any required rebuilding, repairs, or replacements are completed to any damaged or destroyed property that might exist, *or* twelve (12) months after the initial date of the loss. To put this another way, the Amount of Insurance provision provides that coverage ends when Plaintiff's business is once again operating at normal capacity after damaged or destroyed property is fixed or replaced, *or* within twelve (12) months from the initial date of loss in circumstances where it is not necessary to fix or replace damaged or destroyed property, or it is not feasible to do so within a twelve (12) month time frame. The Amount of Insurance provision does not somehow redefine or place further substantive limits on types of available coverage.

As this Court determined that it is, at the very least, reasonable to interpret the phrase "direct physical loss of . . . property" to encompass the loss of use of Plaintiff's property due to the spread of COVID-19 absent any actual damage to property, and because Plaintiff established that there are no genuine issues of material fact regarding its right to coverage under the Income Protection provision of the insurance contract, this Court grants Plaintiff's Motion for Partial Summary Judgment in relation to Plaintiff's claim for declaratory judgment and the income protection provision of the insurance contract.

Second, this Court will address whether Plaintiff is entitled to coverage under the Civil Authority provision of the insurance contract for losses Plaintiff sustained in relation to the Governor's orders, which were issued to help mitigate the spread of the COVID-19 virus. With regard to Civil Authority coverage, the insurance contract provides that:

> When a peril insured against causes damage to property other than property at the premises described in the : Declarations", we will pay for the actual loss of

> "income" and/or "rental income" you sustain and necessary "extra expense" caused by action of civil authority that prohibits access to the premises described in the "Declarations" or access to your food truck or trailer anywhere in the coverage territory provided that both of the following apply:
>
> a. Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the premises described in the "Declarations" or your food truck or trailer are within that area but are not more than one mile from the damaged property; and
>
> b. The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the peril insured against that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Id. at 64.

With regard to Civil Authority coverage, Plaintiff must, as a threshold matter, demonstrate that COVID-19 caused damage to property other than Plaintiff's property. Unlike the Income Protection provision, under the Civil Authority provision there is no coverage for the loss of use of property other than Plaintiff's property. Accordingly, this Court's above analysis with regard Income Protection coverage and loss of use is inapplicable, as it does not address whether COVID-19 separately caused damage to property.

Again, as noted above, "damage" is defined as "loss or harm resulting from injury to person, property, or reputation . . . ."[17] Based upon this definition, this Court determined that, at the very least, in order for COVID-19 to damage property, COVID-19 must come into contact with property and cause harm. Presently, it is contested whether COVID-19 can live on the surfaces of property for some period of time. Additionally, while this might be one way by which individuals contract COVID-19, it is not the primary means by which COVID-19 spreads. *See Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 892 (Pa. 2020) (holding that COVID-19

[17] Damage, Merriam Webster, https://www.merriam-webster.com/dictionary/damage.

does not spread because the virus is present on any particular surface or at any particular location, rather COVID-19 spreads because of person-to-person contact). Indeed, person-to-person transmission of COVID-19, as opposed to property damage, was the primary reason for the Governor's orders, social distancing measures, and resultant changes in the ways business utilized property. With or without COVID-19 contacting the surface of any given property in the Commonwealth, businesses throughout the Commonwealth shutdown, at least partially, and suffered the loss of use of property due to the risk of person-to-person COVID-19 transmission. Thus, in the above discussion regarding the Income Protection provision, this Court determined that there are no genuine issues of material fact as to whether Plaintiff suffered the loss use of property due to COVID-19. The same is, however, not as clear with regard to the question of whether COVID-19 caused damaged to property throughout the Commonwealth.

Even if this Court were to accept that COVID-19 could and did cause damage to property under the theory presented by Plaintiff, whether Plaintiff is entitled to coverage under the Civil Authority provision depends upon whether Plaintiff can demonstrate that COVID-19 was actually present on property other than Plaintiff's property. Additionally, Plaintiff must show that any such damaged property was within one mile of Plaintiff's property, and that the actions of civil authority (in this case the Governor's orders) were "taken in response to dangerous physical conditions resulting from the *damage* or continuation of the peril insured against that caused the *damage*, or the action is taken to enable a civil authority to have unimpeded access to the *damaged* property." Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 64, Exhibit A (emphasis added). At this time, genuine issues of material fact remain in dispute as to the following: [a] whether COVID-19 caused damage to property; [b] whether COVID-19

was actually present at any particular property; and [c] the extent to which the Governor's orders were issued in response to property damaged by COVID-19. Accordingly, this Court denies Plaintiff's Motion for Partial Summary Judgment in relation to its claim for declaratory judgment and the Civil Authority provision of the insurance contract without prejudice.[18]

b. Exclusions

Having determined that Plaintiff provided a reasonable interpretation demonstrating that Plaintiff is entitled to coverage under the Income Protection provision of the insurance contract, this Court turns to the question of whether Defendant demonstrated "the applicability of any exclusions or limitations on coverage." *Koppers Co.*, 98 F.3d at 1446 (applying Pennsylvania law). As discussed previously, in order to prevail, Defendant must show that the language of the insurance contract regarding an exclusion is "clear and unambiguous: otherwise, the provision will be construed in favor of the insured." *Fayette County Housing Authority*, 771 A.2d at 13.

Defendant argues that the insurance contract's exclusion regarding the enforcement of or compliance with laws and ordinances prevents coverage for income protection. The insurance contract states that the insurer will not pay for loss or damage caused "[b]y the enforcement of or compliance with any law or ordinance regulating the construction, use, or repair, of any property, or requiring the tearing down of any property, including the cost of removing its debris . . . ." Omnibus Memorandum in Support of Erie's Cross-Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, at 66, Exhibit A.

According to Defendant, coverage is precluded by the above exclusion because Plaintiff's alleged losses are due solely to the Governor's orders. This, however, is not the case. In its complaint, Plaintiff states that its claim for coverage is based upon losses and expenses Plaintiff

[18] As this Court is not convinced that, as a matter of law, Plaintiff cannot prevail on its damage theory, this Court also denies Defendant's Cross Motion for Judgment on the Pleadings.

suffered in relation to both "*the COVID-19 pandemic* . . . and the orders of civil authorities enacted in response to this natural disaster." Plaintiff's Complaint at 13 (emphasis added). As this Court explained earlier in this memorandum, COVID-19 and the related social distancing measures (with and without government orders) directly forced businesses everywhere to physically limit the use of property and the number of people that could inhabit physical buildings at any given time. The Governor's orders only came into consideration in the context of Plaintiff's claim for coverage under the Civil Authority provision of the contract.[19] Accordingly, Defendant failed to demonstrate that the exclusion regarding the enforcement of or compliance with laws and ordinances clearly and unambiguously prevents coverage.

VI. Conclusion

As this Court determined that [a] Plaintiff's interpretation of the Income Protection provision of the insurance contract is, at the very least, reasonable, [b] that there are no genuine issues of material fact regarding Plaintiff's loss of use, and [c] that none of the insurance contract's exclusions clearly and unambiguously prevent coverage, Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's claim for declaratory judgment with regard to Income Protection coverage is GRANTED. In contrast, because this Court determined that there are genuine issues of material fact remaining as to the Civil Authority provision and whether COVID-19 caused damage to property, Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's claim for declaratory judgment with regard to Civil Authority coverage is DENIED

[19] Certainly, the exclusion regarding the enforcement of or compliance with laws and ordinances could not have been intended to exclude coverage under the Civil Authority provision of the contract, as this would make any extended coverage for the actions of Civil Authority illusory. *See Heller v. Pennsylvania League of Cities and Municipalities*, 32 A.3d 1213, 1228 (Pa. 2011) (holding that where an exclusionary provision of an insurance contract operates to foreclose expected claims, such a provision is void as it renders coverage illusory).

without prejudice. Finally, Defendant's Cross Motion for Judgement on the Pleadings is DENIED.

By the Court:

Christine Ward, J.

Christine Ward, J.

Dated: 5/25/2021

ATTACHMENT 5

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MACMILES, LLC D/B/A GRANT STREET TAVERN 310 Grant Street, Ste. 106 Pittsburgh, PA 15219-2213,	:	
Plaintiff,	:	No.: GD-20-7753
vs.	:	
ERIE INSURANCE EXCHANGE 100 Erie Insurance Place Erie, PA 16530,	:	
Defendant.	:	

ORDER OF COURT

And now, this 25 day of May, 2021 it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's claim for declaratory judgment with regard Income Protection coverage is GRANTED;
2. Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's claim for declaratory judgment with regard to Civil Authority coverage is DENIED without prejudice; and
3. Defendant's Cross Motion for Judgement on the Pleadings is DENIED.

By the Court:

Christine Ward, J.

Christine Ward, J.

Dated: 5/25/2021

ATTACHMENT 5