No. 2-21-0088

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

SWEET BERRY CAFE, INC.,

Plaintiff-Appellant,

v.

SOCIETY INSURANCE, INC.,

Defendant-Appellee.

Appeal from the Circuit Court for the
Sixteenth Judicial Circuit, Kane County, Illinois,
No. 20 CH 266
The Honorable Kevin Busch, Judge Presiding.

BRIEF OF THE RESTAURANT LAW CENTER AND ILLINOIS RESTAURANT ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

John H. Mathias Jr.
David M. Kroeger
Megan B. Poetzel
Gabriel K. Gillett
Counsel of Record
Sara M. Stappert
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 840-7220
GGillett@jenner.com

Counsel for Amici Curiae

POINTS AND AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amicus Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the world's largest foodservice trade association. The industry is comprised of over one million establishments that represent a broad and diverse group of owners and operators—from large national outfits, to small, family-run neighborhood restaurants, and everything in between. The industry employs over 15 million people and is the nation's second-largest private-sector employer. Through regular participation in *amicus* briefs on behalf of the industry, the Restaurant Law Center provides courts with the industry's perspective on legal issues that may have industry-wide implications.

Amicus Illinois Restaurant Association is a non-profit trade organization founded over one hundred years ago to promote, educate, and improve the restaurant industry in Illinois. Headquartered in Chicago, the Association has nearly 8,000 members statewide—including restaurant operators, food service professionals, suppliers, and related industry professionals—and represents the Illinois restaurant industry that includes more than 25,000 owners and operators, and employs hundreds of thousands across the state. The Association supports the restaurant industry by promoting local tourism, providing food service education and training programs, providing analysis on topics of the day, providing networking opportunities, hosting culinary events, and advocating for members' interests.

Amici and their members have a significant interest in the issues in this case. Many in the restaurant industry have sought business interruption coverage under "all risk" commercial insurance policies for the physical loss or damage they suffered as a direct result of unprecedented state and local shutdown orders. Those restaurants have been unreasonably and categorically denied coverage because they supposedly have not incurred physical loss or damage even though their properties have been rendered non-functional, detrimentally altered, and physically impaired as a result of the orders.

Whether Plaintiff-Appellant Sweet Berry Café, Inc. has stated a claim for coverage depends on the specific factual allegations in its pleadings. Still, *amici* and their members have a strong interest in highlighting for the Court why certain issues raised in this appeal are important to the broader restaurant industry as a whole. Roughly half of the state courts to decide these issues have found policyholders stated a claim or were entitled to summary judgment. Some federal courts in Illinois have reached a similar conclusion. Accordingly, *amici* also have a strong interest in emphasizing that, depending on a complaint's specific allegations, restaurants may be entitled to coverage for shutdown orders that caused direct physical loss or damage to their property.[1]

[1] *Amici* also have a strong interest in other appeals pending in the Illinois Appellate Court that raise similar issues under Illinois law, and where the circuit court similarly erred in dismissing business interruption claims. *See, e.g.*, *Jaewook Lee d/b/a Evanston Grill v. State Farm Fire & Cas. Co.*, No. 1-

SUMMARY OF ARGUMENT

Amici write to provide this Court—which is among the first appellate courts to address these issues—with additional context about this case and practical perspectives on potential outcomes, and to emphasize how restaurant and foodservice companies have suffered physical "loss or damage" as a result of executive shutdown orders.

I. The restaurant industry is a significant sector of the Illinois economy and a major driver of economic activity across the country. The industry creates many employment and entrepreneurship opportunities, including for women, minorities, and immigrants. It supports local businesses, draws tourists, produces significant tax revenue, and is an integral part of the cultural fabric in Illinois and beyond.

For years, restaurants in Illinois and elsewhere have paid substantial premiums for business interruption coverage under "all risk" commercial property insurance policies. These policies cover any and all risks, even unforeseen and unprecedented ones, unless specifically excluded. Restaurants bought this insurance believing that it would cover income lost as a result of physical "loss or damage" to their property, as they understood those plain, ordinary, and everyday words.

Yet when the Governor of Illinois and others issued executive orders that caused precisely what these restaurant owners believed to be physical

---

21-0105 (1st Dist.); *Firebirds Int'l, LLC v. Zurich Am. Ins. Co.*, No. 1-21-0558 (1st Dist.).

"loss or damage" to property—by detrimentally altering physical property, imposing physical changes, and materially impairing physical spaces that rendered property nonfunctional for its intended purposes—insurers denied coverage without legitimate justification. Facing catastrophic losses, thousands of restaurants have already closed—*permanently*. Restaurants have turned to the courts to obtain the coverage they are entitled to receive.

II. These are issues of first impression arising in an unprecedented context. This Court applies *de novo* review, considering the issues independently and without according the decision below any deference. That is especially appropriate here. The circuit court committed some of the same interpretive and analytical errors as other courts that have dismissed claims by policyholders and failed to construe the policy's terms according to the natural meaning a reasonable policyholder would ascribe to them.

By contrast, many other trial courts—including in the Northern District of Illinois and in other cases against Society—have found in well-reasoned decisions that a plaintiff stated a claim for business interruption coverage by alleging it suffered physical loss or damage as a result of shutdown orders. Indeed, roughly half of state courts nationwide to decide these state law questions—including in cases against Society—have found policyholders stated a claim or were entitled to summary judgment. That supports the conclusion that the circuit court wrongly dismissed Sweet Berry Café's claims.

Recent decisions also reinforce that a complaint's allegations and applicable substantive state law, not the current scorecard of non-binding decisions, are what matter in determining whether a plaintiff has stated a claim. Consistent with those important principles, this Court should make clear that a restaurant may state a claim by alleging that it suffered physical loss or damage when shutdown orders dispossessed the restaurant of its tangible physical space by mandating real, material, detrimental physical alterations to the premises. As courts have done in other hotly contested insurance coverage cases, this Court should review the allegations of the complaint and the policy language, apply basic principles of policy interpretation, and resolve this case based on the unprecedented factual circumstances under which it arises.

III. This Court should reverse the trial court's decision. Bedrock canons of insurance policy interpretation require that undefined terms be given their "plain and ordinary" meaning. *Gulino v. Econ. Fire & Cas. Co.*, 2012 IL App (1st) 102429, ¶ 18. A court should not inject extrinsic terms or conditions into the policy. If a provision is susceptible to more than one reasonable interpretation, it is ambiguous and should be construed in accordance with the policyholder's reasonable expectations of coverage. A phrase's "plain and ordinary meaning" is "that meaning which the particular language conveys to the popular mind, to most people, to the average, ordinary, normal [person], to a reasonable [person], to persons with usual and ordinary

understanding, to a business [person], or to a lay[person]." *Travelers Ins. Co.*, *v. Eljer Mfg., Inc.*, 197 Ill. 2d 278, 301 (2001). The policy's terms require no judicial redefinition: they should be construed according to what a reasonable consumer would expect.

Sweet Berry Café's policy provides that Society will "pay for the actual loss of Business Income" sustained due to a necessary suspension of Sweet Berry Café's operations, where the "suspension must be caused by direct physical loss of or damage to covered property" and the loss or damage "must be caused by or result from a Covered Cause of Loss." Am. Compl. at ¶ 17. Sweet Berry Café has alleged as a matter of fact that it has "suffered losses because of the COVID-19 pandemic and the Governor's emergency mitigation orders imposed upon businesses, in particular restaurants." Decision & J. Order ¶ 1; *see, e.g.*, Am. Compl. ¶ 22 ("Plaintiff sustained, and continue to sustain, losses due to the civil authority orders issued" by Illinois officials "addressing the physical presence of and harm caused by SARS-CoV-2 particles, COVID-19 and the Pandemic.").

Many other courts have found allegations that shutdown-order-mandated physical alterations and impairments to property qualify as direct physical loss or damage for purposes of stating a claim. Those rulings are consistent with longstanding precedent holding that a property may suffer physical loss or damage when rendered nonfunctional for its intended purpose, or when its appearance or form is altered.

The circuit court correctly recognized that "loss" is distinct from "damage," and that Society's "Policy does cover lost income resulting from the temporary loss or limited use of covered property when the direct loss of use is caused by viral contamination." Decision & J. Order ¶ 8. But the circuit court erred in finding Plaintiff had not adequately alleged that it suffered loss or damage because Plaintiff had not alleged that its building was "unusable" and it "restricted its operations" due to executive orders. Decision & J. Order ¶¶ 10, 11. This was error because the policy does not require that the property be "unusable," the executive orders have imposed physical alterations on the property, and those orders are not barred by the Policy's "ordinance or law" exclusion. Moreover, reasonable consumers would expect a policy that covers "loss or damage" to provide coverage under these circumstances, and include protection if the property was "severely restrict[ed]" by executive orders that impaired physical property and imposed detrimental physical alterations by "limiting restaurants to preparing food on site for delivery and pick-up." *See id.* at ¶ 9. The circuit court thus erred by reading the policy to preclude coverage and by dismissing Sweet Berry Café's claim.

ARGUMENT

I. Restaurants Sought Insurance Coverage To Help Survive Unprecedented Hardship And Continue Their Critical Contributions To Illinois's Economy And Culture.

A. The Restaurant Industry, Which Drives Billions In Revenue And Employs Millions, Is Working Hard To Stay Afloat.

The restaurant and foodservice industry is the lifeblood of the Illinois economy. In 2019, the industry accounted for an estimated $32 billion in sales across 25,851 locations in Illinois. It employed nearly 600,000 in 2020 and is expected to employ nearly 7% more people over the next decade.[2]

Consumer spending at restaurants has a multiplier effect, too. Every dollar spent at table-service restaurants—the businesses most threatened by the state and local shutdown orders—returns roughly two dollars to the state's economy, not to mention the positive impact on the state's tax revenue.[3] A single restaurant contributes to the livelihood of dozens of employees, suppliers, purveyors, and related businesses.[4] That is certainly the case in Illinois, where ample and diverse dining opportunities drives tourism across the state.

---

[2] Nat'l Restaurant Ass'n, *Factbook*: *2020 State of the Restaurant Industry* 7 (2020) ("*Factbook*").

[3] Nat'l Restaurant Ass'n, *Illinois Restaurant Industry at a Glance* (2019).

[4] Eric Amel et al., *Independent Restaurants Are a Nexus of Small Businesses in the United States and Drive Billions of Dollars of Economic Activity That Is at Risk of Being Lost Due to the COVID-19 Pandemic* (June 10, 2020),

Restaurants are also cultural centers, creating unique neighborhood identities and driving commercial revitalization. Restaurants "bring stability to the neighborhoods in which they are located" and they "pay property taxes and have a vested interest in seeing that their neighborhoods continue to grow and thrive so that their own businesses will flourish." *LMP Servs., Inc. v. City of Chicago*, 2019 IL 123123, ¶ 18. That is true of the many small (often family-owned) restaurants that make up the vast majority of the industry. They are "a vibrant part of the community and bring a long-term sense of cohesiveness and identity to the area." *Id.*

The restaurant industry remains a shining example of upward mobility. Eight in ten restaurant owners say their first job in the industry was an entry-level position. Even more restaurant managers say the same. Restaurants also provide opportunities for historically disadvantaged communities. More women and minorities are managers in the restaurant industry than in any other industry, and restaurants provide immigrants with opportunities to work and to own their own businesses.[5]

The past successes of the restaurant industry are neither self-sustaining nor guaranteed. Since March 2020, nationwide restaurant and foodservice sales were "down $270 billion from expected levels" and industry employment

[5] *Factbook*, *supra* note 2; Americas Soc'y et al., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015).

has decreased in every state and the District of Columbia.[6] As of late 2020, 17% of restaurants—more than 110,000 establishments, on average in business over 16 years—were closed permanently or long-term.[7]

Illinois restaurants have not been spared. As of January, employment in Illinois was down more significantly,[8] and the numbers for independent restaurants are even starker.[9] These closures can devastate neighborhoods as the harm from closures reverberates through communities, impacting other local businesses and industries. "Virtually every kind of restaurant is suffering: the corner diner, the independents, the individual owners of full-service restaurant chains."[10]

B. Insurers Have Wrongfully Denied Restaurants Business Interruption Coverage Under "All Risk" Insurance Policies.

Faced with unprecedented losses caused by orders forcing restaurants to severely alter and restrict their physical premises, restaurants throughout Illinois and across the country turned to their insurers for coverage under "all

---

[6] Nat'l Restaurant Ass'n, *Restaurant sales pulled back from a healthy January* (Mar. 16, 2021); Nat'l Restaurant Ass'n, *Forty states and DC lost restaurant jobs in January* (Mar. 15, 2021) ("*Forty states*").

[7] Nat'l Restaurant Ass'n, *Restaurant Industry in Free Fall; 10,000 Close in Three Months* (Dec. 7, 2020).

[8] Nat'l Restaurant Ass'n, *Forty states*, supra note 6.

[9] Heather Lalley, *Report: Up To 85% of Independent Restaurants Could Close Due To Pandemic*, Rest. Bus. (June 11, 2020).

[10] Nat'l Restaurant Ass'n, *National Restaurant Association Statement on Congressional Recess Without Recovery Deal* (Oct. 27, 2020).

risk" property insurance policies that included protection for business interruption.

"All risk" property policies insure against losses from unexpected and unprecedented circumstances, and provide coverage for risks of any kind or description, unless specifically excluded. "Business interruption" insurance provides coverage—often up to a year or more—to replace business income lost as a result of a covered cause of loss. Under industry-standard "all risk" policies procured by many restaurants, business interruption coverage is triggered when a policyholder suffers direct "loss or damage" to its premises. These policies provide businesses with comfort knowing they have coverage for even unforeseeable or unlikely risks that may physically impair or alter their property.

Due to the breadth of coverage, restaurants paid substantial premiums for "all risk" policies with business interruption coverage. In doing so, restaurants reasonably understood, expected, and believed their policies would cover business income losses from any and all non-excluded risks. Those risks, in the eyes of a reasonable policyholder, include shutdown orders causing direct physical "loss or damage," as policyholders understood those words to mean.

The physical design of a restaurant is an essential element of its success. In a business known for tight margins, restaurant owners and operators thoughtfully utilize their physical space to maintain the level of revenue

necessary to support their staff and other operational costs. Table service restaurants, for example, were not designed to operate as a hub for take-out or delivery. They have far larger dining areas than a take-out only operation, and most have proportionally smaller kitchens than a restaurant designed only to produce food. Those dining areas are built out, often at significant expense, to create the kind of warm, inviting ambience that draws guests in. Restaurant dining is an experience, not just a financial transaction. The physical space and layout play a crucial role in that experience.

Insurers know this. They price and charge premiums based on the policyholder's properties operating in a fully functional manner—whether as restaurants, bars, venues, or another type of food service business—and based on the available square footage at the outset of the policy period. Insurers also account for the prospect of having to pay claims for lost business at levels commensurate with the policyholder being a fully operational business. Business interruption coverage thus insures against the risk that a business-owner's property will not be able to function as intended.

That kind of interruption is precisely what happened when shutdown orders required restaurants to make physical, detrimental alterations that materially impaired the functionality of their premises. In barring or limiting on-premises dining, those orders caused the loss of millions of square feet of vital physical space. The orders dispossessed restaurants of their tangible spaces and forced very real, material detrimental physical changes and

alterations to their premises. Dining rooms closed or limited. Areas blocked off. Seating areas eliminated. Barriers erected and dividers installed. Layouts altered. Fixtures and furniture removed. Self-service stations gone. Spaces shuttered. Floors marked. Plexiglass mounted. These are but a few of the physical manifestations of the direct physical loss and damage that restaurants have suffered.

Yet insurance carriers have refused coverage and issued blanket denials without just cause. Those denials are frequently rapid, featuring boilerplate language asserting that coverage is excluded because the restaurant supposedly has not satisfied the industry-standard "loss or damage" requirement. Those denials followed telegraphed statements by insurers and trade groups,[11] and were frequently issued without meaningful (if any) investigation.

Restaurants in Illinois, and thousands of restaurants across the country, have challenged these wrongful denials. Without judicial relief, many restaurants will be out of business entirely, many restaurant-industry

---

[11] For example, Society all but denied coverage "preemptively and *en masse*" through a memo to "agency partners" on March 16, 2020—before most businesses had even submitted claims but after many states limited operations of certain businesses—"observing that 'a quarantine of any size,'" or a "a widespread governmental imposed shutdown" would "likely not trigger the additional coverage." *In re Society Ins. Co.*, MDL 2964, 2021 WL 679109, at *4 (N.D. Ill. Feb. 22, 2021). In early April, the American Property Casualty Insurance Association similarly opined, without reference to any policy language, that "[p]andemic outbreaks are uninsured because they are uninsurable." Press Release, *APCIA Releases New Business Interruption Analysis* (Apr. 7, 2020).

employees will remain out of work, and many residents will be robbed of the neighborhood places and spaces they treasure.

II. This Is An Important Case Of First Impression Where The Court Applies *De Novo* Review.

This Court should closely scrutinize the policy language, apply well-established principles of policy interpretation, and resolve this case of first impression based on the unprecedented circumstances under which it arises. That is particularly so in light of other pending cases involving claims by restaurants for three reasons.

First, "the construction of an insurance policy is a question of law" subject to *de novo* review. *Rich v. Principal Life Ins. Co.*, 226 Ill. 2d 359, 371 (Ill. 2007). This Court thus interprets the policy "without any deference to the trial court's decision." *Shulte v. Flowers*, 2013 IL App (4th) 120132, ¶ 17. Reviewing the complaint "in the light most favorable to the plaintiff, and with all well-pleaded facts and all reasonable inferences that may be drawn from those facts taken as true," the issue is not whether a plaintiff will ultimately prevail but whether the plaintiff has stated "a cause of action upon which relief may be granted." *Blevins v. Marcheschi*, 2018 IL App (2d) 170340, ¶ 26.

Second, this Court's review comes at a time when shutdown-related business interruption litigation is in its early stages. More than 1,900 lawsuits have been filed, but only a small fraction have been decided so far. *See* Penn Law, *Covid Coverage Litigation Tracker*, https://cclt.law.upenn.edu/cclt-case-list/ (last accessed June 26, 2021).

Among the trial-level decisions to date in state courts—where the judiciary is well-versed in applying the state law that governs insurance policies—roughly half have found a plaintiff stated a claim for business interruption coverage or granted summary judgment to the plaintiff on that claim.[12] Indeed, multiple state courts have found for policyholders asserting claims against Society. *See Santino*, No. 20-CV-358 (Wis. Cir. Ct. Outagamie Cnty. Mar. 1, 2021); *Colectivo Coffee Roasters*, No. 2020-CV-002597 (Wis. Cir.

---

[12] *See e.g.*, Tr., *Santino, LLC v. Society Ins. Co.*, No. 20-CV-358 (Wis. Cir. Ct. Outagamie Cnty. Mar. 1, 2021); Tr., *Colectivo Coffee Roasters, Inc., et al. v. Society Ins. Co.*, No. 2020-CV-002597 (Wis. Cir. Ct. Milwaukee Cnty. Feb. 25, 2021); *Cherokee Nation v. Lexington Ins. Co.*, 2021 WL 506271 (Okla. Dist. Ct. Jan. 28, 2021); *North State Deli, LLC v. The Cincinnati Ins. Co.*, 2020 WL 6281507 (N.C. Super. Ct. Oct. 9, 2020); *McKinley Dev. Leasing Co. v. Westfield Ins. Co.*, 2021 WL 506266 (Ohio Ct. C.P. Feb. 9, 2021); Order, *Ungarean, v. CNA*, No. GD-20-006544 (Pa. Ct. C.P. Mar. 22, 2021); Order, *Macmiles, LLC v. Erie Ins. Exch.*, No. GD-20-7753 (Pa. Ct. C.P. May 25, 2021); *Scott Craven DDS v. Cameron Mut. Ins. Co.,* 2021 WL 1115247 (Mo. Cir. Ct. Mar. 9, 2021); *Johansing Family Enters. LLC v. Cincinnati Specialty Underwriters Ins.*, 2021 WL 145416 (Ohio Ct. C.P. Jan. 8, 2021); *Queens Tower Rest. Inc. v. Cincinnati Fin. Corp.*, 2021 WL 456378 (Ohio Ct. C.P. Jan. 7, 2021); *Goodwill Indus. of Orange Cnty. v. Phila. Indem. Ins. Co.*, 2021 WL 476268 (Cal. Super. Ct. Jan. 28, 2021); *Best Rest Motel Inc. v. Sequoia Ins. Co.*, 2020 WL 7229856 (Cal. Super. Ct. Sept. 20, 2020); *Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, 2020 WL 5806576 (N.J. Super. Ct. Law Div. Aug. 13, 2020); *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, 2020 WL 6380449 (Pa. Ct. C.P. Oct. 26, 2020); *Perry St. Brewing Co. v. Mut. of Enumclaw Ins. Co.*, 2020 WL 7258116 (Wash. Super. Ct. Nov. 23, 2020); *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*, 2020 WL 6784271 (Wash. Super. Ct. Nov. 13, 2020); *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, 2020 WL 7190023 (Nev. Dist. Ct. Nov. 30, 2020); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, 2020 WL 7258114 (Ohio Ct. C.P. Nov. 17, 2020); *Johnston Jewelers, Inc. v. Jewelers Mut. Ins. Co.,* 2020 WL 6556842 (Fla. Cir. Ct. Sept. 22, 2020); *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, 2020 WL 8484870 (La. Civ. Dist. Ct. Nov. 4, 2020); Order, *Lombardi's, Inc. v. Indem. Ins. Co. of N. Am.*, No. DC-20-05751-A (Tex. Dist. Ct. Oct. 15, 2020).

Ct. Milwaukee Cnty. Feb. 25, 2021). And many federal district courts, applying state substantive law as required and predicting how state courts would apply state law, have reached the same conclusion—including in the federal MDL against Society.[13]

While other decisions have favored insurers, many turn on the specific facts or business circumstances alleged. Others fail to apply the reasonable-interpretation rule and other basic policy interpretation principles—including by redefining the policy based on extrinsic case law or arcane legal publications that ordinary people would never consult.

More troubling, many decisions may be the result of a reflexive, self-fulfilling feedback loop. For example, early yet unremarkable decisions have already been cited more than fifty times by other courts, even though the decisions are not particularly detailed or persuasive, dismissed the claims without prejudice, and have not yet been subject to appellate review. *See, e.g. 10E, LLC v. Travelers Indem. Co. of Conn.*, 483 F. Supp. 3d 828 (C.D. Cal.

---

[13] *See, e.g.*, *In re Society*, 2021 WL 679109; *Legacy Sports Barbershop LLC v. Cont'l Cas. Co.*, 2021 WL 2206161 (N.D. Ill. June 1, 2021); *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617 (N.D. Ill. Feb. 28, 2021); *Seifert v. IMT Ins. Co.*, 2021 WL 2228158 (D. Minn. June 2, 2021); *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020); *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.,* 489 F. Supp. 3d 1297 (M.D. Fla. 2020); *Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Ins. Co.*, 2021 WL 1837479 (E.D. Pa. May 7, 2021); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020); *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 168422 (N.D. Ohio Jan, 19, 2021); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867 (W.D. Mo. 2020); *Serendipitous, LLC v. The Cincinnati Ins. Co.*, 2021 WL 1816960 (N.D. Ala. May 6, 2021).

2020), *appeal pending* No. 20-56206 (9th Cir.); *Sandy Point Dental PC v. Cincinnati Ins.*, (N.D. Ill. Jan. 10, 2021), *appeal pending* No. 21-1186 (7th Cir.).

Rather than tally decisions by other courts in other cases, each court must focus on a complaint's allegations, liberally construed in plaintiff's favor, and determine whether those specific allegations satisfy the applicable standard. *See Seifert*, 2021 WL 2228158, at *3-4 (denying motion to dismiss amended complaint that adequately alleged shutdown orders caused physical loss, after granting motion to dismiss initial complaint); *Legacy Sports*, 2021 WL 2206161, at *2-3 (denying motion to dismiss and distinguishing allegations from those in other cases where the same judge had granted motions to dismiss). Indeed, in affirming dismissal of a plaintiff's business interruption claim (albeit one arising under Iowa law and involving different policy language than at issue here), the U.S. Court of Appeals for the Eighth Circuit stressed that its decision was based on the plaintiff's failure to plead physical loss or damage—not a categorical rule that such damage cannot be adequately pleaded. *See Oral Surgeons, P.C. v. The Cincinnati Ins. Co.*, 2021 WL 2753874, *3 & n.2 (8th Cir. July 2, 2021).

Third, history shows that early decisions on issues of first impression are often viewed differently after appellate courts have the opportunity to weigh in. That has been true in insurance coverage cases involving the interpretation of industry-standard policy language. For example, "the meaning of the standard pollution exclusion clause's exception for discharges

that are 'sudden and accidental' … precipitated 'a legal war ... in state and federal courts from Maine to California.'" *N. Ins. Co. of N.Y. v. Aardvark Assocs., Inc.*, 942 F.2d 189, 191 (3d Cir. 1991). Eventually, courts viewed the split in authority as "at least suggesting that the term 'sudden' is susceptible of more than one reasonable definition." *New Castle Cnty. v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1196 (3d Cir. 1991). Many courts eventually coalesced around a meaning that permitted policyholders to recover in many situations. *See* 9 Couch on Ins. § 127:11 (2020).

This Court faces a similar task in interpreting the meaning of the industry-standard physical loss or damage requirement. And this Court is on solid ground in concluding that Plaintiff's allegations meet that requirement and reversing the judgment below—based on the multiple decisions finding plaintiffs have stated claims against Society, the broader disagreement among trial courts (including in Illinois) about whether plaintiffs have stated business interruption claims, and the fact that roughly half of state courts have concluded that plaintiffs have stated claims.[14] This Court should conclude that

[14] *See* Tr., *Colectivo*, No. 2020-CV-002597, at 38-39 ("I would say the very fact that there are many cases coming out in many different respects on these types of issues illustrates the fact that the legal issues to be decided here tend to be pretty fact specific. You tend to look pretty carefully at the specific policy language and the specific facts, the specific type of loss and type of damages as a result of that loss at issue in the case. I think the fact that there are so many different cases that each party has been able to find simply demonstrates that … that the issues around the nature of the policy language here and the particular facts present here are such that the case is not amenable to decision on a motion to dismiss.").

the plain meaning of the undefined, disjunctive terms physical "loss of or damage"—as a normal layperson would understand them—applies to cover losses allegedly caused by shutdown orders that imposed material physical alterations on restaurants.

III. Policy Language, Interpretation Principles, And Precedent Support Finding Executive Shutdown Orders Caused Physical Loss Or Damage.

Sweet Berry Café alleges that its property suffered physical loss, was materially impaired, and was no longer functional as intended after a series of executive orders issued starting in March 2020. *See* Am. Compl. ¶¶ 56-78. Society, like other insurers, has insisted that the shutdown orders that impaired policyholders' property have not caused physical "loss or damage." Society, like other insurers, further contends that only events like hurricanes and fires trigger business interruption coverage. But those positions are inconsistent with the policy's language, foundational policy-interpretation principles, and both recent and historical precedent. The circuit court was therefore wrong to dismiss the complaint.

A. Policy Language And Policy-Interpretation Principles Support Reversal.

Under Illinois law, policy provisions and exclusions are "to be construed liberally in favor of the insured and 'most strongly against the insurer.'" *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Glenview Park Dist.,* 158 Ill. 2d 116, 122 (1994); *see Phusion Projects, Inc. v. Selective Ins. Co.,* 2015 IL App (1st) 150172, ¶¶ 38-40. "[A] policy provision that purports to exclude or limit

coverage will be read narrowly and will be applied only where its terms are clear, definite, and specific." *Gillen v. State Farm Mut. Auto. Ins. Co.*, 215 Ill. 2d 381, 393 (2005).

"[I]f a provision of the insurance policy can reasonably be said to be ambiguous, that provision will be construed in favor of the insured." *Abrams v. State Farm Fire & Cas. Co.*, 306 Ill. App. 3d 545, 549 (1st Dist. 1999). A provision of an insurance policy is "ambiguous" if "the words … are susceptible to more than one reasonable interpretation." *Outboard Marine Corp. v. Liberty Mut. Ins. Co*., 154 Ill. 2d 90, 108 (1992).

When construing an insurance policy, a court gives undefined terms their "plain and ordinary" meaning. *Gulino*, 2012 IL App (1st) 102429, ¶ 18. A phrase's "plain and ordinary meaning" is "that meaning which the particular language conveys to the popular mind, to most people, to the average, ordinary, normal [person], to a reasonable [person], to persons with usual and ordinary understanding, to a business [person], or to a lay[person]." *Travelers Ins. Co.*, 197 Ill. 2d at 301. Such a meaning "can be derived from a dictionary." *Gulino*, 2012 IL App (1st) 102429, ¶ 18. "[I]f a term has multiple dictionary definitions, it is ambiguous." *West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.*, 2021 IL 125978, ¶ 43. Definitions should not be derived from arcane legal sources or other materials that "most people" would not consult.

Here, the plain language of the policy supports finding coverage for physical loss or damage caused by shutdown orders that physically impaired

property. Society agreed to pay for "direct physical loss of or damage to" covered property. The policy provides coverage if the policyholder shows physical loss of **or** damage to property. "The disjunctive 'or' in that phrase means that 'physical loss' must cover something different from 'physical damage.'" *In re Society Ins. Co.*, 2021 WL 679109, at *8-10. As the circuit court found here, and many courts have recently held in the business interruption context, to read the policy otherwise would improperly collapse the meaning of "loss" with the meaning of "damage." *Id.*; Decision & J. Order ¶¶ 7-8.[15]

Had Society wanted "loss" and "damage" to mean the same thing, or to narrow their meaning, it was obligated to do either explicitly: "If an insurer relies on an exclusionary provision, it must be clear and free from doubt that the provision prevents coverage." *Bozek v. Erie Ins. Group*, 2015 IL App (2d) 150155, ¶ 20. But Society chose not to do either, despite knowing these terms can reasonably be construed (and indeed have been construed by courts) more broadly than the narrow reading Society favors. Each of those terms must therefore be given its plain and ordinary meaning, consistent with the knowledge and expectations of an ordinary, reasonable consumer, and construed in favor of coverage.

---

[15] *See also Cherokee Nation*, 2021 WL 506271, at *6-7; *North State Deli*, 2020 WL 6281507, at *3; *Seifert*, 2021 WL 2228158, at *3; *Henderson Rd.*, 2021 WL 168422, at *11-12; *Urogynecology Specialist,* 489 F. Supp. 3d at 1301-03; *Studio 417*, 478 F. Supp. 3d at 800-03; *Serendipitous, LLC*, 2021 WL 1816960, at *4-6; *Susan Spath Hegedus, Inc.*, 2021 WL 1837479, at *8-9.

Merriam-Webster defines physical as "of or relating to material things" that are "perceptible especially through the senses."[16] Loss is defined as "the act of losing possession," "deprivation," and the "failure to gain, win, obtain, or utilize."[17] Put together, the ordinary meaning of "physical loss" includes when a property can no longer function as intended in the real, material world.

For many restaurants, that was exactly what happened when shutdown orders imposed real, detrimental, physical alterations to their spaces—closing or limiting dining rooms, blocking off areas, erecting barriers, and altering layouts, among other direct physical changes. The shutdown orders "deprived" Sweet Berry Café and other restaurants of property in a way that is perceptible through the senses because they no longer possessed the same rights to their property and large swaths of their property was rendered non-functional.

The circuit court erred in finding otherwise. The court read the policy to require allegations that the COVID-19 virus itself rendered the building "unusable." Decision & J. Order at ¶ 10. But Society did not define "loss" to require the physical space to be "unusable." And the circuit court's interpretation ignores Sweet Berry Café's allegations that the shutdown orders

[16] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical (last accessed July 5, 2021).

[17] Merriam-Webster Dictionary, http://www.merriam-webstercollegiate.com/dictionary/loss (last accessed July 5, 2021).

themselves caused physical loss or damage—allegations which other courts have relied on in finding policyholders have stated claims against Society.[18]

Reasonable policyholders would understand that interposing physical barriers within a restaurant, blocking off physical space, and detrimentally changing property in other physical ways constitute physical alterations and impair a restaurant's function. Therefore, even under the circuit court's interpretation of the meaning of the policy language, restaurants have suffered physical "loss or damage" as a result of shutdown orders.

Policyholders should not have to hire lawyers to understand what the word "loss" means. They should not have to guess whether a judge will require a loss to involve something beyond what the policy describes. A policy term's meaning is what "the particular language conveys to the popular mind, to most people, to the average, ordinary, normal [person], to a reasonable [person], to persons with usual and ordinary understanding, to a business [person], or to a lay[person]." *Travelers Ins. Co.*, 197 Ill. 2d at 301. Plain and ordinary policy terms require no judicial redefinition or clarification.

---

[18] *See* Tr., *Colectivo*, No. 2020-CV-002597, at 43-44 (noting that losing a dining room via shutdown order constitutes a physical loss). As Judge Chang summed up in the denying Society's motion to dismiss in the federal MDL proceeding: "the pandemic-caused shutdown orders do impose a physical limit: the restaurants are limited from using much of their physical space. It is not as if the shutdown orders imposed a *financial* limit on the restaurants by, for example, capping the dollar-amount of daily sales that each restaurant could make. No, instead the Plaintiffs cannot use (or cannot fully use) the physical space." *In re Society Ins.*, 2021 WL 679109, at *9.

The plain language of the policy—in conjunction with settled policy-interpretation principles that honor a reasonable policyholder's expectations—dictates that Sweet Berry Café has sufficiently alleged as a matter of fact that the relevant shutdown orders have caused "physical loss" by dispossessing it of its property and rendering that property nonfunctional. Sweet Berry Café should be able to test whether it can offer evidentiary support to obtain a jury verdict in its favor.[19]

B. Recent and Longstanding Precedent Supports Reversal.

In reversing the judgment below, this Court will be squarely within the mainstream of recent coverage decisions that have found restaurants and other businesses adequately alleged that they suffered physical "loss of or damage" to property as a result of state and local shutdown orders.

Several powerful examples come from the Northern District of Illinois, where two district courts denied motions to dismiss and found that plaintiffs "need not plead or show a change to the property's physical characteristics" where policies cover "loss" in addition to "damage." *In re Society*, 2021 WL

[19] The circuit court also determined that the ordinance or law exclusion in Sweet Berry Café's policy foreclosed any recovery. Decision & J. Order at ¶¶ 10-11. However, the state and local shutdown orders are executive orders and, therefore, not laws or ordinances, making this exclusion irrelevant. *See, e.g.*, *Seifert*, 2021 WL 2228158, at n.15 ("In addition to the virus exclusion, IMT argues that the ordinance or law exclusion applies. However, IMT offers nothing to demonstrate that the executive orders specifically closing barbershops and hair salons had the force of law. Moreover, this exclusion likely only applies to ordinances or laws regulating the construction or repair of a property, or land use. As such, IMT has not meet its burden to demonstrate that the ordinance or law exclusion applies.").

679109, at *8; *Derek Scott Williams PLLC*, 2021 WL 767617, at *1, *3-4 (noting broad agreement on the basic principle that "each word [in a contract] has some significance and meaning"). Those courts further reasoned that a jury could find plaintiffs suffered physical losses because the shutdown orders "impose a *physical* limit: the restaurants are limited from using much of their physical space." *Society*, 2021 WL 679109, at *8-9; *see Williams*, 2021 WL 767617, at *3-4 (finding a reasonable factfinder could determine that "physical loss" includes "a deprivation of the use of … business premises"). As Judge Chang further elaborated in his decision denying Society's motion to dismiss in the federal MDL proceeding, the fact that restaurants could physically alter their property to mitigate losses and restore lost function evidences that they have suffered *physical* loss or damage as a result of shutdown orders:

> Another way to understand the physical nature of the loss inflicted by the shutdown orders is to consider how a restaurant might mitigate against the suspension of operations caused by, say, a 25%-capacity limitation on the number of guests inside the restaurant. If the restaurant could expand its physical space, then the restaurant could serve more guests and the loss would be mitigated (at least in part). The loss is physical—or at the very least, a reasonable jury can make that finding.

Society, 2021 WL 679109, at *9 (rejecting Society's argument that the policy's "period of restoration" implies a limit on coverage as opposed to a time period).

A third district court concluded that, although "loss of or damage to" property required "physical damage or alteration," policyholders had satisfied that standard by alleging they were required to "build a new outdoor patio, install social distancing barriers and germ sanitation stations, and remove

work stations in order to promote proper social distancing." *Legacy Sports*, 2021 WL 2206161, at *2-3. In so finding, and distinguishing its own prior decisions dismissing business interruption claims in other cases, the court made clear that whether a plaintiff has stated a claim turns on the individual allegations in each case. *Accord Seifert*, 2021 WL 2228158, at *3-4; *Oral Surgeons*, 2021 WL 2753874, *3 & n.2.

Another example is *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.*, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021). Applying policy-interpretation principles like those in Illinois, the district court granted summary judgment for the policyholder and found that shutdown orders caused "physical loss" under the plain language of the policy at issue because "the properties could no longer be used for their intended purposes—as dine-in restaurants." *Id.* at *10.

Courts around the country have come to similar conclusions. In *Seifert v. IMT Ins. Co.*, the Chief Judge of the District of Minnesota denied a motion to dismiss and "conclude[d] that a plaintiff would plausibly demonstrate a direct physical loss of property by alleging that shutdown orders forced a business to close because the property was deemed dangerous to use and its owner was thereby deprived of lawfully occupying and controlling the premises to provide services within it." 2021 WL 2228158, at *4-5.

In *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Co.*, a district court in Virginia denied an insurer's motion to dismiss,

explaining that if the insurer "wanted to limit liability of 'direct physical loss' to strictly require structural damage to property, then [insurers], as the drafters of the policy, were required to do so explicitly." 2020 WL 7249624, at *6-10 (E.D. Va. Dec. 9, 2020).

In *North State Deli, LLC v. The Cincinnati Insurance Co.*, a state court in North Carolina reasoned 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." 2020 WL 6281507, at *3 (N.C. Sup. Ct. Oct. 9, 2020). The court concluded that "'direct physical loss' describes the scenario" where policyholders "lose the full range of rights and advantages of using or accessing their business property," which was "precisely the loss caused by" state and local shutdown orders that forbade the policyholders from "putting their property to use for the income-generating purposes for which the property was insured." Granting summary judgment to the plaintiff, the court then concluded that "direct physical loss" includes "the loss of use or access to covered property even where that property has not been structurally altered."

Numerous other courts have ruled against insurers for the same reasons. *See, e.g.*, *Studio 417*, 478 F. Supp. 3d at 801 (holding that "loss" and "damage" must be given separate meanings, and that "even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose"); *Perry St. Brewing*, 2020 WL 7258116, at *2-3 (finding "direct physical loss" as "an average lay person would understand

by th[at] phrase" when "property could not physically be used for its intended purpose" because owner "was deprived from using it"); *see also, e.g.*, *supra* notes 12, 13.

The cases favoring policyholders are consistent with longstanding precedent. For example, nearly sixty years ago, a California appellate court considered a case involving a home left "standing on the edge of and partially overhanging a newly formed 30-foot cliff," resulting from a landslide. *Hughes v. Potomac Ins. Co. of District of Columbia*, 199 Cal. App. 2d 239, 243 (Cal. Ct. App. 1962).

The insurer argued the policy only insured the house itself, which had not been damaged. *Id.* at 245-49. The court rejected that argument, reasoning that it would "render the policy illusory" because the insurer's position "would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been 'damaged' so long as its paint remains intact and its walls still adhere to one another. Despite the fact that a 'dwelling building' might be rendered completely useless to its owners, [the insurer] would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner."

Similarly, in *Murray v. State Farm Fire & Cas. Co.*, large boulders had fallen onto two homes, leaving two other plaintiffs' homes at risk of further

rockfalls. 203 W. Va. 477, 481, 493-93 (1998). The insurer argued that, while the policies might cover the damage to those homes actually hit by rocks, they "do not cover any losses occasioned by the potential damage that could be caused by future rockfalls." *Id.* at 492-93. The West Virginia Supreme Court disagreed, reasoning that "'[d]irect physical loss' provisions require only that a covered property be injured, not destroyed." *Id.* at 493.

The court continued: the insured properties "were homes, buildings normally thought of as a safe place in which to dwell or live" but until the risk of rockfalls abates, "plaintiffs' houses could scarcely be considered 'homes' in the sense that rational persons would be content to reside there." *Id.* The court thus held that "direct physical loss[es]" covered by the policy, "including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property." *Id.*[20]

Sweet Berry Café has alleged that its insured property suffered "direct physical loss" and has been rendered materially non-functional as a result of executive shutdown orders. Just like a home suffers physical loss when it is

---

[20] *See also, e.g.*, *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014) ("property can sustain physical loss or damage without experiencing structural alteration"); *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) (finding coverage where properties "no longer performed the function for which they were designed"); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *9 (D. Ore. June 7, 2016) (finding "direct property loss or damage" when property became "uninhabitable and unusable for its intended purpose"); *Philadelphia Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding "direct, physical loss" when "a building's function may be seriously impaired or destroyed").

uninhabitable, a restaurant suffers physical loss when it is rendered non-functional and can no longer serve customers on premises as intended, even if not rendered completely unusable.

This Court should hold that, when evaluating the sufficiency of such allegations of physical loss or damage caused by shutdown orders that imposed material, detrimental, physical alterations to a plaintiff's property, Illinois courts should liberally construe plaintiff's allegations and properly apply Illinois policy-interpretation principles. Under those well-established standards, this Court should conclude that Sweet Berry Café has stated a claim by alleging the shutdown orders caused "physical loss" of its property and rendered the property non-functional for its intended purpose.

CONCLUSION

The judgment below should be reversed.

Dated: July 7, 2021

Respectfully submitted,

/s/ Gabriel K. Gillett

John H. Mathias Jr.
David M. Kroeger
Megan B. Poetzel
Gabriel K. Gillett
Counsel of Record
Sara M. Stappert
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 840-7220
GGillett@jenner.com

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Illinois Supreme Court Rules 345(b) and 307(d). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 7,636 words.

Dated: July 7, 2021

/s/ Gabriel K. Gillett

Gabriel K. Gillett
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350
GGillett@jenner.com

Counsel for Amici Curiae