STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2021AP000585

CIRCOLO, LLC DBA PASQUAL'S HILLDALE,
Plaintiff-Appellant,

v.

SOCIETY INSURANCE, A MUTUAL COMPANY,
Defendant-Respondent.

On Appeal from the Circuit Court of Dane County
The Honorable Mario D. White Presiding
Circuit Court Case No. 2020CV001062

AMICUS CURIAE BRIEF BY THE RESTAURANT LAW CENTER

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INTEREST OF AMICUS CURIAE

Amicus the 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 locations, 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 Law Center provides courts with the industry's perspective on legal issues that may have industry-wide implications.

Amicus and its 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 executive 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 suffered real and tangible losses, been physically altered and impaired, and rendered non-functional because of the orders.

Whether Plaintiff-Appellant Circolo has stated a claim for coverage depends on the specific factual allegations in its pleadings. Still, *amicus* and its members have a strong interest in highlighting for the Court why certain issues raised in this appeal are important to the restaurant industry and in emphasizing that—depending

on the factual specificity of allegations in their complaints regarding direct physical loss or damage to their property—restaurants may sufficiently plead viable business interruption claims against their insurers. Indeed, roughly half of the state courts to consider this issue have ruled that policyholders stated a claim or were entitled to summary judgment.

SUMMARY OF ARGUMENT

I. Many restaurants, a significant sector of the Wisconsin economy, have been unreasonably denied business interruption coverage under "all risk" insurance policies that cover physical "loss or damage" caused by unprecedented executive shutdown orders that detrimentally altered physical property, imposed physical changes, and rendered property nonfunctional for its intended purposes.

II. Applying *de novo* review, this Court should construe the policy's terms according to the natural meaning a reasonable policyholder would ascribe to them and find that a plaintiff states a claim by alleging it suffered physical loss or damage because of shutdown orders that dispossessed the restaurant of its tangible physical space by mandating real, material, detrimental physical alterations.

III. As many other courts have found, recent and longstanding precedent supports reversing the trial court's decision because bedrock canons of insurance policy interpretation require giving undefined terms their plain and ordinary meaning, finding coverage when a provision is ambiguous, and crediting allegations that shutdown-order-mandated physical alterations qualify as direct physical loss or damage for purposes of stating a claim.

ARGUMENT

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

A. The Restaurant Industry Is Working Hard To Stay Afloat.

In 2019, the restaurant industry accounted for an estimated $10.7 billion in sales across 13,025 locations in Wisconsin. It employed 280,800 in 2020 and is expected to employ 10.8% more people over the next decade.[1] Consumer spending at restaurants also has a multiplier effect and boosts tax revenue.[2] Restaurants create unique neighborhood identities, drive commercial revitalization, and provide opportunities for historically disadvantaged communities.

Since March 2020, nationwide restaurant and foodservice sales were "down $270 billion" and industry employment has decreased in every state.[3] As of late 2020, 17% of restaurants—more than 110,000 establishments, on average in business over 16 years—were closed.[4]

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

[2] Nat'l Restaurant Ass'n, *Wisconsin Restaurant Industry at a Glance* (2019); 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).

[3] 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).

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

B. Insurers Have Wrongfully Denied Business Interruption Coverage.

Restaurants purchased "all risk" policies that insure against losses from risks of any kind unless specifically excluded. "Business interruption" insurance provides coverage to replace income lost due to a covered cause of loss. That coverage is triggered when a policyholder suffers direct physical "loss or damage" to its premises.

Due to the breadth of coverage, restaurants paid substantial premiums for coverage and reasonably believed their policies would cover business income losses from shutdown orders that imposed harmful physical alterations on their property.

The physical design of a restaurant is an essential element of its success. In a business known for tight margins, restaurants thoughtfully utilize their physical space. Insurers know this. They price and charge premiums based on the policyholder's properties operating in a fully functional manner and account for having to pay claims for lost business at levels commensurate with the policyholder being fully operational. Business interruption coverage insures against the risk that property will not be able to function as intended.

That kind of interruption is precisely what happened when shutdown orders imposed detrimental physical alterations that materially impaired the functionality of their premises. In barring or limiting on-premises dining within the restaurants' physical spaces, those orders dispossessed restaurants of millions of square feet of tangible physical space by imposing 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 examples of the direct physical loss and damage restaurants have suffered.

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.

First, "[t]he interpretation of an insurance policy is a question of law" subject to *de novo* review. *State Farm Mut. Auto. Ins. Co. v. Langridge*, 2004 WI 113, ¶13. This Court thus interprets the policy "without deference to the decision of the circuit court." *Mooren v. Econ Fire & Cas. Co.*, 230 Wis. 2d 624, 628 (Ct. App 1999). While reviewing a motion to dismiss, "all facts alleged in the complaint, as well as all reasonable inferences from those facts, are accepted as true." *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶11. "The complaint need not state all the ultimate facts constituting the cause of action, but rather" should be dismissed "only if there are no conditions under which the plaintiff can recover." *Id.*

Second, this Court's review comes at a time when shutdown-related business interruption litigation is in its early stages; only a small fraction of the thousands of suits filed have been decided.

Among the trial-level decisions in state courts, roughly half have found a plaintiff stated a claim for business interruption coverage or granted summary judgment to the plaintiff—including in cases against Society.[5] And many federal district courts have reached the same conclusion—including in the federal MDL against Society.[6]

While other decisions have favored insurers, many turn on the specific facts, circumstances, or theories 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 legal publications ordinary people would never consult. Yet many of these early, unremarkable decisions have been cited frequently by other courts.

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[5] *See e.g.*, Penn Law, *Covid Coverage Litigation Tracker*, https://cclt.law.upenn.edu/cclt-case-list/ (last accessed July 22, 2021); Tr., *Santino, LLC v. Society Ins. Co.*, No. 20-CV-358 (Wis. Cir. Ct. Outagamie Cnty. Mar. 1, 2021); Tr., *Colectivo Coffee Roasters, Inc. 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, *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); *Goodwill Indus. of Orange Cnty. v. Phila. Indem. Ins. Co.*, 2021 WL 476268 (Cal. Super. Ct. Jan. 28, 2021); *Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, 2020 WL 5806576 (N.J. Super. Ct. Law Div. Aug. 13, 2020); *Perry St. Brewing Co. v. Mut. of Enumclaw Ins. Co.*, 2020 WL 7258116 (Wash. Super. Ct. Nov. 23, 2020); *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, 2020 WL 7190023 (Nev. Dist. Ct. Nov. 30, 2020).

[6] *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); *Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Ins. Co.*, 2021 WL 1837479 (E.D. Pa. May 7, 2021); *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 168422 (N.D. Ohio Jan, 19, 2021).

Most troubling, many decisions appear to be the result of a self-fulfilling feedback loop in which federal courts appear to rule based on federal common law on business interruption insurance. But no such law exists—state law controls these questions. So, rather than tally decisions by other courts, each court must focus on a complaint's allegations, liberally construed in plaintiff's favor, and determine whether they satisfy the applicable standard. *See Seifert*, 2021 WL 2228158, at *3-4; *Legacy Sports*, 2021 WL 2206161, at *2-3. Indeed, as the U.S. Court of Appeals for the Eighth Circuit recently stressed (albeit in a case under Iowa law and involving different policy language than at issue here), whether a plaintiff alleges physical loss or damage is case-and-complaint specific; there is no categorical rule that such damage cannot be pleaded. *See Oral Surgeons, P.C. v. The Cincinnati Ins. Co.*, 2021 WL 2753874, at *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 weigh in. *See N. Ins. Co. of N.Y. v. Aardvark Assocs., Inc.*, 942 F.2d 189, 191 (3d Cir. 1991) (discussing pollution exclusions). With multiple decisions finding plaintiffs have stated claims against Society, broader disagreement among trial courts about whether plaintiffs have stated business interruption claims, and roughly half of state courts having concluded plaintiffs have stated claims,[7] this Court is on solid ground in reversing the decision below.

[7] *See* Tr., *Colectivo*, No. 2020-CV-002597, at 38-39 ("[T]he very fact that there are many cases coming out in many different respects on these types of issues illustrates the fact that the legal

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

Circolo alleges that its property suffered physical loss, was materially impaired, and no longer functioned as intended because of executive orders issued starting in March 2020. *See* Appellant's Br. 10-13. Society, like other insurers, has insisted that the shutdown orders have not caused physical "loss or damage." That is inconsistent with the policy's language, foundational policy-interpretation principles, and precedent.

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

Under Wisconsin law, "[a]n insurance policy is construed to give effect to the intent of the parties as expressed in the language of the policy." *Folkman v. Quamme*, 2003 WI 116, ¶12. Courts "interpret insurance policy language according to its plain and ordinary meaning as understood by a reasonable insured." *Preisler v. Gen. Cas. Ins. Co.*, 2014 WI 135, ¶18. "Therefore, the first issue in construing an insurance policy is to determine whether an ambiguity exists regarding the disputed coverage issue." *Id*. ¶13. "Policy language is ambiguous when a reasonable insured would read the policy to provide coverage and the language is susceptible to more than one reasonable interpretation." *Id.* ¶20. Any "ambiguities are construed against the insurer and in favor of coverage," *id.*, and any exclusions "are narrowly construed against the insurer," *Day v. Allstate Indem. Co.*, 2011 WI 24, ¶29.

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issues to be decided here tend to be pretty fact specific. … such that the case is not amenable to decision on a motion to dismiss.").

Here, the plain language of the policy supports coverage for physical loss or damage caused by shutdown orders: Society agreed to pay for "direct physical loss of or damage to" covered 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. Had Society wanted "loss" and "damage" to mean the same thing, or to narrow their meaning, it was obligated to do so explicitly. To be enforced, exclusions must be "clear from the face of the policy." *Day*, 2011 WI 24, ¶29. But Society chose to leave the terms undefined, so they must be given their ordinary meaning consistent with a reasonable business's expectations, and must be construed in favor of coverage.

Merriam-Webster defines physical as "of or relating to material things" that are "perceptible especially through the senses."[8] Loss is defined as "the act of losing possession," "deprivation," and the "failure to gain, win, obtain, or utilize."[9] 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, visible, detrimental, physical alterations to their spaces and caused multiple harmful changes to their premises—closing or limiting dining rooms, blocking off areas, erecting barriers, and altering layouts, among other direct

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

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

physical changes. The shutdown orders "deprived" restaurant owners of property because they no longer possessed the same rights to their property and large swaths were rendered non-functional. Reasonable policyholders understand that interposing visible, harmful physical barriers within their property, blocking off physical space, and detrimentally changing property in material physical ways constitute physical alterations.

The circuit court erred in finding otherwise. The court read the policy to require allegations that shutdown orders presented a physical barrier to the use of Circolo's property or that the property was contaminated by COVID-19. *See* Appellant's App. 137-38. But Society did not define "loss" this way. And the circuit court's interpretation ignores Circolo's allegations that the shutdown orders themselves caused physical loss or damage.[10] Therefore, the plain language of the policy—in conjunction with settled policy-interpretation principles—dictates that Circolo has sufficiently alleged that shutdown orders caused "physical loss" by imposing physical changes that dispossessed Circolo of its property and rendered that property nonfunctional.

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

[10] *See* Tr., *Colectivo*, No. 2020-CV-002597, at 43-44 (losing a dining room via shutdown order constitutes a physical loss); *In re Society Ins.*, 2021 WL 679109, at *9.

businesses adequately alleged that they suffered physical "loss of or damage" as a result of executive shutdown orders.

Powerful examples come from the Northern District of Illinois, where the district court denied Society's motion to dismiss claims in the federal MDL proceeding 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 679109, at *8. The court 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. The fact that restaurants could physically alter their property to mitigate losses and restore lost function, the court explained, shows they have suffered *physical* loss or damage from shutdown orders. *Society*, 2021 WL 679109, at *9 (rejecting Society's argument that "period of restoration" implies a limit on coverage as opposed to a time period).

Another district court concluded that, although "loss of or damage to" property required "physical damage or alteration," policyholders satisfied that standard by alleging orders required them 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, 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, at *3 & n.2.

Other courts have reached the same well-reasoned conclusion. In *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.*, the 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." 2021 WL 168422, at *10 (N.D. Ohio Jan. 19, 2021). In *North State Deli, LLC v. The Cincinnati Insurance Co.*, the court granted summary judgment for the restaurant and found state and local shutdown orders caused "direct physical loss" by limiting "the full range of rights and advantages of using or accessing their business property," because the orders barred owners from "putting their property to use for the income-generating purposes for which the property was insured." 2020 WL 6281507, at *3 (N.C. Sup. Ct. Oct. 9, 2020).

These are just a few examples of the many courts that have ruled against insurers for the same reasons. *See, e.g.*, *supra* notes 5-6. And they are consistent with longstanding precedent. Nearly sixty years ago, a California 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." Just like a home suffers physical loss when it is uninhabitable, a restaurant suffers physical loss when it is rendered non-functional or when it is subject to orders that impose harmful physical alterations.

CONCLUSION

This Court should conclude that—consistent with Wisconsin law and properly applied policy-interpretation principles—a plaintiff may adequately state a claim under an "all risk" property insurance policy by alleging it suffered physical loss or damage as a result of shutdown orders that imposed material, detrimental, visible, physical alterations to their property, effectively rendering them useless and lost for their insured and intended purposes. The judgment below should be reversed.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (c) for an amicus brief. The length of this brief is 2,994 words.

Dated: August 5, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2021, a true and correct copy of the foregoing has been serviced via the Court's electronic filing system and via first class mail upon the following:

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