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No. 1-21-0558

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FIREBIRDS INTERNATIONAL, LLC,

Plaintiff-Appellant,

v.

ZURICH AMERICAN INSURANCE, CO.,

Defendant-Appellee.

Appeal from the Circuit Court of Cook County, Illinois,
No. 20 CH 05360
The Honorable Michael T. Mullen, Judge Presiding.

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

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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, which 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 to property they suffered as a direct result of executive orders or COVID-19. Those restaurants have been unreasonably and categorically denied coverage. Many insurers have contended that restaurants have not incurred physical loss or damage, even though their properties were unable to function as the restaurants they were insured to be, suffered detrimental alterations and impairments to their physical spaces, and in some instances became completely inaccessible to diners. Some insurers, like Zurich American Insurance, Co. ("Zurich") here, have also contended that coverage was not available because of various policy exclusions.

Whether Plaintiff-Appellant Firebirds International, LLC ("Firebirds") has stated a claim for coverage depends on the specific factual allegations and legal theories in its pleadings. The key question here is whether applying a "contamination" exclusion to bar coverage for a virus is so "clear and free from doubt" that it warrants dismissal, even though exclusions must be resolved in favor of the insured. *Phusion Projects, Inc. v. Selective Ins. Co.,* 2015 IL App (1st) 150172, ¶¶ 40, 47. The answer, *amici* submit—and as Firebirds will address at length—is no. At a minimum, irrespective of whether COVID-19 was present on Firebirds's properties, the executive orders that caused physical loss or damage were not themselves prompted by the presence of

COVID-19 causing "contamination" at any particular Firebirds location. The exclusion, therefore, does not apply here and reversal is warranted.

Amici anticipate that Zurich may raise other grounds for affirmance, including arguing that Firebirds has not suffered "direct physical loss or damage to property." Zurich did not raise that issue below and the Circuit Court did not address it, so this Court should not reach it here. Nevertheless, to provide the Court with important context, *amici* write to explain why restaurant and hospitality companies *have* sufficiently alleged that executive orders, COVID-19, or both caused "physical loss or damage" to their insured properties, as "the average, ordinary, normal, reasonable person"—*i.e.,* a juror—would understand the "plain, ordinary and popular meaning" of those undefined policy terms. *Gillen v. State Farm Mut. Auto. Ins. Co.*, 215 Ill. 2d 381, 393 (2005).[1]

SUMMARY OF ARGUMENT

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,

[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. 1-21-0105 (1st Dist.); *Sweet Berry Café, Inc. v. Soc'y Ins., Inc.*, No. 2-21-0088 (2d Dist.); *MTDB Corp. v. American Automobile Ins. Co.*, No. 1-21-0979 (1st Dist.); *Parson's Chicken & Fish v. Society Ins. Inc.*, No. 1-21-1112 (1st Dist.); *Lodge Mgmt. Corp. v. Carlson Mikuzis & Taylor*, No. 1-21-1133 (1st Dist.).

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 for that reason, believing it would cover income lost as a result of physical "loss or damage" to their property—whether caused by executive orders, a virus, or anything else not specifically excluded. Insurers knew this. They calculated premiums for business interruption coverage based on the assumption that the insured restaurants would be generating revenues as fully functional businesses using all available square footage during the term of the policy—not that they would be non-functional, physically impaired shells incapable of providing the customer experience or generating revenues as expected.

Yet when restaurant owners suffered physical "loss or damage" after executive orders or COVID-19 detrimentally altered their physical property and rendered it nonfunctional for its intended purposes, insurers denied coverage anyway. Restaurants have turned to the courts for 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. While many decisions have favored insurers, those non-binding decisions have no bearing on this Court's review. Many of those decisions are tainted by foundational interpretive and analytical errors—including flouting the Illinois Supreme Court's teachings by failing to construe the policy's terms according to the natural meaning a reasonable policyholder would ascribe to them, engrafting additional adjectives onto the policy when the insurer opted not to do so itself, and placing undue weight on federal decisions rather than governing state law and the policies themselves. *See Gillen*, 215 Ill. 2d at 393.

Notably, many trial courts (including in Illinois) have found in well-reasoned decisions that plaintiffs *have* stated claims for business interruption coverage by alleging executive orders or COVID-19 detrimentally altered physical spaces and deprived policyholders of tangible physical property. State courts have issued most of those rulings—which is telling given that insurance coverage is an issue of state law, and that federal law has no application whatsoever to such questions.

Those decisions admittedly are not controlling here. But they demonstrate that reasonable minds can disagree about the reasonable interpretation of insurance policies that provide business interruption coverage. Under longstanding policy-interpretation rules, that reasonable

disagreement is alone grounds to deny insurers' motions to dismiss, and warrants allowing a properly instructed jury to determine, based on the admissible evidence, whether a policyholder has proven that it suffered "physical loss or damage" under the policy.

III. Bedrock canons of insurance policy interpretation support finding policyholders have stated a claim for coverage. Those principles require that undefined terms be "given their plain, ordinary and popular meaning, i.e., they will be construed with reference to the average, ordinary, normal, reasonable person." *Id.* at 393. "[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." *Id*. "If the policy language is susceptible to more than one reasonable meaning, it is considered ambiguous and will be construed against the insurer." *Id.* In other words, the policyholder prevails if its interpretation is reasonable, even if its interpretation is not the only reading of the policy.

A court should not inject extrinsic terms or conditions into the policy. A phrase's "plain and ordinary meaning" is the "ordinary and popular meaning" as understood by "the average, ordinary, normal, reasonable person." *Id*. The policy's express terms require no redefinition or clarification from the bench or bar—they should be construed according to what a reasonable consumer would expect.

Firebirds's policy provides that Zurich will pay for "direct physical loss of or damage caused by a Covered Cause of loss to Covered Property." Am. Compl. ¶ 23. The policies define "Covered Cause of Loss" to mean "[a]ll risks of direct physical loss of or damage from any cause unless excluded." *Id.* ¶ 24. Firebirds has alleged as a matter of fact that "[t]he presence of COVID-19 undoubtedly caused 'physical loss of or damage' to Firebirds' covered properties," and that the physical loss and damage is "visibly apparent to anyone upon immediate entry at the insured premises." *Id.* ¶¶ 25, 29. In addition to "Plexiglass in place at the hostess desk," the "reduction in furniture and functional space," Plexiglass booth dividers, and the removal of bar stools, Firebirds has also alleged that it "conducts its business operations differently as well" to satisfy the demands of the various executive orders enacted. *Id.* ¶¶ 30, 32, 35, 36, 39.

Many other courts have found similar allegations 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 its appearance or form is altered, or when it is rendered nonfunctional for its intended purpose. That is precisely what happened to many restaurants when executive orders or COVID-19 effectively blocked off or nullified large swaths of previously functional square footage, impaired physical property, and imposed visible detrimental physical

alterations to the space. Restaurant businesses thus satisfied the "physical loss or damage" requirement and triggered business interruption coverage.

Critically, to state a claim policyholders need not allege "complete destruction," "permanent dispossession," or other post-hoc formulations that insurers have conjured amid litigation. Those terms are not included in the policies and are not what an ordinary, reasonable consumer would understand "physical loss or damage" to mean. They are therefore irrelevant for purposes of determining whether a policyholder has stated a claim for coverage arising from executive shutdown orders or COVID-19. The only issue at this stage of the proceedings should be whether a reasonable jury could find that, if plaintiffs prove the allegations of their complaint, they have incurred "direct physical loss (of) or damage" to their property.

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 Drives Billions In Revenue, Employs Millions, Is Working Hard To Serve The Community.

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 at the start of 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 executive orders and harmful virus—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 true in Illinois, where ample and diverse dining opportunities drives tourism across the state.

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 Chi.*, 2019 IL 123123, ¶ 18. That is especially so for the many small (often family-owned) restaurants that make up the vast majority of the industry.

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[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).

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 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]

These closures can devastate neighborhoods as the harm reverberates through communities, impacting "the corner diner, the independents, the

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[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).

[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).

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

individual owners of full-service restaurant chains," as well as other local businesses and industries.[8]

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

Faced with unprecedented losses caused by executive orders or COVID-19 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 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 physical "loss or damage" to its premises. These policies provide businesses with comfort in knowing they have coverage for even unforeseeable or unlikely risks that may physically impair or alter their property.

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

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, to a reasonable policyholder, include executive orders and COVID-19.

For *amici*'s members, the insured property is a restaurant and the physical design of that space 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, and maximizing the available space is key to financial viability.

Insurers know this. They price and charge premiums based on the policyholder's properties operating in a fully functional manner as the policyholder intends based on the type of business, available square footage at the outset of the policy period, and revenue data. 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 executive orders or COVID-19 imposed detrimental alterations that impaired a restaurant's physical space and prevented it from functioning as the restaurant that was insured. Millions of square feet of vital physical space were lost when on-premises dining was limited or barred entirely. Restaurants were deprived of their tangible spaces and their premises experienced very real, material, and detrimental physical changes and alterations. 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 often featuring boilerplate language asserting that coverage is unavailable due to the industry-standard "loss or damage" requirement.

Those denials followed telegraphed statements by insurers and trade groups,[9] and were frequently issued without meaningful (if any) investigation.

Restaurants in Illinois and thousands across the country have challenged these wrongful denials. Without judicial relief, more restaurants will go out of business entirely, many restaurant industry employees will remain out of work, and 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 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, this Court's review comes at a time when there is a pronounced and troubling divergence in outcomes in state and federal courts. Among the

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[9] 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).

trial-level decisions to date in state courts—where the judiciary is well-versed in applying the state law that governs insurance policies—many policyholders have stated a claim for business interruption coverage and some have even been granted summary judgment.[10] Many federal district courts, applying state substantive law as required and predicting how state courts would apply state law, have reached the same conclusion.[11]

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[10] *See e.g.*, Penn Law, *Covid Coverage Litigation Tracker*, https://cclt.law.upenn.edu/cclt-case-list/ (last accessed September 23, 2021); *JDS Constr. Grp., LLC v. Cont'l Cas. Co.*, 2021 WL 4027824 (Ill. Cir. Ct. Aug. 12, 2021); *Snoqualmie Ent. Auth. v. Affiliated FM Ins. Co.*, 2021 WL 4098938 (Wash. Super. Ct. Sept. 3, 2021); Minute Order, *Nev. Prop. 1 LLC v. Factory Mut. Ins. Co.*, No. A-21-831049-B (Nev. Dist. Ct. Aug. 16, 2021); *Santino, LLC v. Society Ins. Co.*, 2021 WL 2288231 (Wis. Cir. Ct. Mar. 1, 2021); Tr. Dec., *Colectivo Coffee Roasters, Inc. v. Society Ins. Co.*, No. 2020-CV-002597 (Wis. Cir. Ct. Jan. 29, 2021), Dkt. 71 ("*Colectivo* Tr."); *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); *MacMiles, LLC v. Erie Ins. Exch.*, 2021 WL 3079941 (Pa. Ct. C.P. May 25, 2021); *Scott Craven DDS v. Cameron Mut. Ins. Co.,* 2021 WL 1115247 (Mo. Cir. Ct. Mar. 9, 2021); *Ross Stores, Inc. v. Zurich Am. Ins. Co.*, 2021 WL 3700659 (Cal. Super. Ct. July 13, 2021); *Queens Tower Rest. Inc. v. Cincinnati Fin. Corp.*, 2021 WL 456378 (Ohio Ct. C.P. Jan. 7, 2021); *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).

[11] *See, e.g.*, *In re Society*, 2021 WL 679109; *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); *K.C. Hopps, Ltd. v. Cincinnati Ins. Co.*, 2021 WL 4302834 (W.D. Mo. Sept. 21, 2021); *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.,* 489 F. Supp. 3d 1297

To be sure, many decisions have favored insurers. The bulk of those decisions have come from federal courts purporting to apply state law, consistent with the *Erie* doctrine. But many actually fail to do so. For example, they do not apply the reasonable-interpretation rule and other basic policy interpretation principles—including by rewriting the policy language, or injecting new terms into the policy based on extrinsic case law or arcane legal publications that ordinary people would never consult.

More disturbing, many decisions seem to be the result of a feedback loop premised on applying what appears to be federal common law on business interruption insurance. But no such federal law exists—state law controls these questions. Many pro-insurer decisions, including in Illinois, also improperly rely on a treatise that erroneously describes requiring "*physical alteration*" as the "widely held" majority rule, when the majority of courts have long taken the opposite view. *See* Masters, Kozak, Greenspan & Lewis, *Couch's "Physical Alteration" Fallacy*, 56:3 Tort, Trial & Ins. Practice L.J. (Am. Bar Ass'n forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3916391.[12]

(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); *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); *Koeppel Clark LLC v. Starr Indem. & Liab. Co.*, Case 2:20-cv-02055-GGG-JVM, Doc. 86 (E.D. La. Sept. 30, 2021).

[12] For example, federal judges in Illinois relied on the *Couch* treatise and its incorrect statement of the law in: *Park Place Hospitality, LLC v. Continental*

In Illinois, many courts also have relied on *Travelers Insurance Co. v. Eljer Manufacturing, Inc.* as requiring "an alteration in appearance, shape, color or other material dimension," but the policy there defined "physical damage" as a "physical injury to tangible property." 197 Ill. 2d at 287, 301-02. By contrast, standard-issue policies like the one here have no such definition. The reliance on *Eljer* to provide judicial gloss on the plain meaning of policy terms—which require no such gloss—is a clear example of how courts have incorrectly read case law to inject new requirements into policies that insurers themselves chose not to impose.

Rather than tally decisions by other courts or follow their faulty reasoning, this Court must focus on the complaint's allegations, liberally construed in plaintiff's favor, and determine whether those specific allegations satisfy the applicable standard. 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

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Ins. Co., 2021 WL 3549770, at *5 (N.D. Ill. Aug. 10, 2021); *Melcorp, Inc. v. West Am. Ins. Co.*, 2021 WL 2853371, at *2 (N.D. Ill. July 8, 2021); *G.O.A.T. Climb & Cryo, LLC v. Twin City Fire Ins. Co.*, 2021 WL 2853370, at *3 (N.D. Ill. July 8, 2021); *CFIT Holding Corp. v. Twin City Ins. Co.*, 2021 WL 2853376, at *3 (N.D. Ill. July 8, 2021); *Image Dental, LLC v. Citizens Ins. Co.*, 2021 WL 2399988, at *5 (N.D. Ill. June 11, 2021); *Cozzini Bros., Inc. v. Cincinnati Ins. Co.*, 2021 WL 3408499, at *2-3 (N.D. Ill. Aug. 4, 2021). Multiple state courts in turn relied on these federal decisions in dismissing business interruption claims. *See, e.g.*, *Masa Uno, Inc. v. Soc'y Ins. Co.*, 2021 WL 4707219, at *6-7 (Ill. Cir. Ct. Aug. 24, 2021).

"a cause of action upon which relief may be granted." *Blevins v. Marcheschi*, 2018 IL App (2d) 170340, ¶ 26; *see Seifert*, 2021 WL 2228158, at *3-4 (denying motion to dismiss amended complaint that alleged executive orders caused physical loss, after granting motion to dismiss initial complaint). While insurers "can cite decisions where courts" adopt their position, "[s]ome of them merely note that claimants haven't even alleged physical damage using the words 'physical.' Others go further. The virus damages lungs not property, they say. But can this merely be asserted to become true? … Pointing to scientifically unsupported conclusions from other courts isn't enough." Mem. Dec., *New Castle Hotels LLC v. Zurich Am. Ins. Co.*, No. X07-HHD-CV-21-6142969-S, at 5, 6 (Conn. Sup. Ct. Sept. 7, 2021).[13]

Second, history shows that early decisions on issues of first impression are often viewed differently after appellate courts 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' …

[13] The federal appellate decisions to date are not to the contrary, as each focuses on the specific allegations at issue and is necessarily limited to those allegations. *See Oral Surgeons, P.C. v. The Cincinnati Ins. Co.*, 2 F.4th 1141, 1145 & n.2 (8th Cir. 2021); *Gilreath Fam. & Cosm. Dentistry, Inc. v. The Cincinnati Ins. Co.*, ---F. App'x---, 2021 WL 3870697, at *2 (11th Cir. Aug. 31, 2021); *Santo's Italian Café LLC v. Acuity Ins. Co.*, 2021 WL 4304607, *3-4 (6th Cir. Sept. 22, 2021). *See also K.C. Hopps*, 2021 WL 4302834, at *6-8 (distinguishing *Oral Surgeons* and finding "'physical loss' or 'physical damage' under the Policy not only includes actual, tangible physical alteration of the property," but also virus exposure "which renders the property unsafe").

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.

This Court faces a similar task in interpreting the meaning of the policy here. Based on the undisputed policy-interpretation principles that govern—and recognizing that many state courts (and even some federal ones) have found plaintiffs stated business interruption claims—this Court is on solid ground in concluding that Plaintiff's allegations meet the industry-standard physical loss or damage requirement, that no policy exclusions apply, and that the judgment below should be reversed.[14] This Court should conclude that coverage is available under the plain meaning of the terms of the policy, as a layperson would understand them.

[14] *See Colectivo* Tr. at 38-39 ("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 *Colectivo* case is currently pending before the Wisconsin Supreme Court. *See* No. 2021AP463 (Wis.).

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

Firebirds alleges that its property suffered physical loss, was materially impaired, and was no longer functional as intended after exposure to COVID-19 and a series of executive orders issued starting in March 2020. *See* Am. Compl. ¶¶ 50, 61, 65. That satisfies the policy's "physical loss or damage" requirement based on the policy's language, foundational policy-interpretation principles, and both recent and historical precedent.

A. Policy Language And Policy-Interpretation Principles Support Policyholders' Position.

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.,* 2015 IL App (1st) 150172, ¶¶ 38-40. "Where the insurer relies on a provision that it contends excludes coverage" the Court reviews "the applicability of the provision to ensure it is clear and free from doubt that the policy's exclusion prevents coverage." *Phusion Projects, Inc.*, 2015 IL App (1st) 150172, ¶ 47. To preclude coverage, an exclusion's applicability must be "clear and free from doubt" because any doubts as to coverage "will be resolved in favor of the insured." *Id.* at ¶¶ 40, 47; *see also Empire Indem. Ins. Co. v. Chicago Province of the Soc'y of Jesus*, 2013 IL App (1st) 112346, ¶ 39; *Pekin Ins. Co. v. Wilson*, 237 Ill. 2d 446, 456, (2010)

("provisions that limit or exclude coverage will be interpreted liberally in favor of the insured and against the insurer").

Critically, the policyholder is entitled to coverage so long as its interpretation is reasonable, even if it is not necessarily the only interpretation. *See Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 108-09 (1992). "[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*, 154 Ill. 2d at 108.

When construing an insurance policy, a court gives undefined terms their "plain and ordinary" meaning. *Gillen*, 215 Ill. 2d at 393. A phrase's "plain and ordinary meaning" is its "popular meaning … construed with reference to the average, ordinary, normal, reasonable person." *Id.*; *see Eljer*, 197 Ill. 2d at 301 ("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]."). Such a meaning "can be derived from a dictionary." *Gulino v. Econ. Fire & Cas. Co.*, 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. *See Eljer*, 197 Ill. 2d at 301.

Here, the plain language of the policy supports finding coverage for physical loss or damage caused by executive orders that physically impaired property. Zurich 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. To read the policy otherwise would improperly collapse the meaning of "loss" with the meaning of "damage." *Id.*[15]

Had Zurich 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. Grp.*, 2015 IL App (2d) 150155, ¶ 20. But Zurich chose not to. 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; *Serendipitous, LLC*, 2021 WL 1816960, at *4-6.

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 restaurant businesses, that was exactly what happened when executive orders and/or COVID-19 imposed real, detrimental, physical alterations to their spaces and barred access to the property—banning or limiting dining rooms, blocking off areas, erecting barriers, and altering layouts, among other direct physical changes. As even a cursory comparison of the property before and after shows, Firebirds and other restaurants were deprived of property in a way that is perceptible through the senses. The property was visibly altered for the worse and large swaths of physical property could not function for the purpose for which it was insured. *See Colectivo*, Tr. at 43-44 (noting that losing a dining room via executive order constitutes a physical loss).

Reasonable policyholders would understand that interposing physical barriers within a restaurant, blocking off physical space, and detrimentally changing property in other harmful ways that fundamentally alters the

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[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).

property as it was intended to function constitute "physical loss or damage to property." Likewise, reasonable policyholders would understand that property suffers "physical loss or damage" when it is impacted by a dangerous virus that prevents it from functioning as it was insured to function.

Reasonable 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. Plain and ordinary policy terms require no judicial redefinition or clarification.

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

B. Recent and Longstanding Precedent Supports Policyholders' Position.

Many other coverage decisions have found restaurants and other businesses adequately alleged that they suffered physical "loss of or damage" to property as a result of executive orders or COVID-19.

In particular, many state courts have denied an insurer's motion to dismiss and allowed a policyholder's claim to proceed. *See, e.g.*, *JDS Constr. Grp.*, 2021 WL 4027824 (Illinois); *Snoqualmie Ent. Auth.*, 2021 WL 4098938

(Washington); *Santino, LLC*, 2021 WL 2288231 (Wisconsin); *Ross Stores*, 2021 WL 3700659 (California); *McKinley*, 2021 WL 506266 (Ohio); *MacMiles, LLC*, 2021 WL 3079941 (Pennsylvania); *Scott Craven DDS,* 2021 WL 1115247 (Missouri); *Optical Servs. USA/JCI*, 2020 WL 5806576 (New Jersey); *JGB Vegas Retail Lessee*, 2020 WL 7190023 (Nevada).

Some state courts have even granted summary judgment for policyholders. In *North State Deli, LLC v. The Cincinnati Insurance Co.*, for example, 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 executive 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."

Some federal courts have reached the same conclusion. 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 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 executive orders "impose a *physical* limit: the restaurants are limited from using much of their physical space." *Society*, 2021 WL 679109, at *8-9; *see also 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"). 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 executive 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).

Another powerful example comes from Minnesota. In *Seifert v. IMT Insurance 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 executive 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.

So too, 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).

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 D.C.*, 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 & Casualty Company*, 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 damage to homes 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*.

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.*[18]

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[18] *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

Firebirds has alleged its insured property suffered "direct physical loss" and has been rendered materially non-functional as a result of executive orders and COVID-19. Just like a home suffers physical loss when it is uninhabitable, a restaurant suffers physical loss when it is rendered non-functional, in whole or in part, and can no longer serve customers on premises as intended. Although Zurich did not raise this issue in the Circuit Court and the decision below did not address it, Firebirds has therefore sufficiently stated a claim by alleging executive orders or COVID-19 caused physical loss or damage to property and that no policy exclusion precludes coverage.

CONCLUSION

The judgment below should be reversed.

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property became "uninhabitable and unusable for its intended purpose"); *Sentinel 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").

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Respectfully submitted,

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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 7,290 words.

Dated: October 15, 2021

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CERTIFICATE OF SERVICE

I, Gabriel K. Gillett, hereby certify that on October 15, 2021, I caused a copy of **Brief of the Restaurant Law Center and Illinois Restaurant Association as *Amici Curiae* in Support of Plaintiff-Appellant and Reversal** to be served via electronic mail and via email using the Court's e-file system to the email addresses listed below:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.

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