No. 21-1186

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Sandy Point Dental, P.C.

Plaintiff-Appellant,

v.

The Cincinnati Insurance Company.

Defendant-Appellee.

On Appeal from the United States District Court
For the Northern District of Illinois,
Case No. 20 CV 2160
Hon. Robert W. Gettleman

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT, SANDY POINT DENTAL, P.C.

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Appellate Court No: 21-1186

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Sandy Point Dental, P.C.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Charles Aaron Silverman

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None.

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Attorney's Signature: s/Jonathan Lubin Date: 4/6/2021

Attorney's Printed Name: Jonathan Lubin

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Table of Contents

Table of Authorities

Cases

Other Authorities

Rules

I. Statement of Jurisdiction

The basis of federal jurisdiction over the underlying Complaint was diversity jurisdiction pursuant to 28 U.S.C. § 1332 in that Plaintiff-Appellant is an Illinois corporation with its office of operations in Lake Zurich, Illinois, and Defendant is an Ohio corporation with its principal place of business in Ohio. Docket #1, Complaint. The matter in controversy exceeded $75,000.00. The judgment, granting a Motion to Dismiss, was entered on September 21, 2020. Docket #37, Order on Motion to Dismiss. A timely Motion to Reconsider, as well as a Motion for Leave to File an Amended Complaint, was filed on October 16, 2020. Docket #40, Motion for Reconsideration; Docket #39, Motion for Leave to File Amended Complaint. On January 10, 2021, the District Court denied the Motion to Reconsider, and the Motion for Leave to File an Amended Complaint, terminating the action. Docket #52, Memorandum Order. A timely Notice of Appeal was then filed on January 29, 2021. Docket #54, Notice of Appeal.

II. Statement of the Issues

The issue before this Court of Appeal is whether, under Illinois law, Defendant insurance company was required to pay Plaintiff, pursuant to its policy, when, as a result of COVID-19 – a deadly pandemic – and the resulting lockdowns, Plaintiff experienced a business stoppage.

III. Statement of the Case

The Complaint in this matter was filed on April 6, 2020. It was amended on April 17, 2020 to remove several related Defendants that were not correct parties. The facts underlying the Complaint in this matter are, by now, a familiar story: Plaintiff is a small business – in this case, a dentist's office. Docket #23, Complaint at ¶¶ 1-2 (the Complaint referred to throughout is the Amended Complaint, which eliminated unnecessary parties and was otherwise identical to the original Complaint). Due to the COVID-19 pandemic, and the government's response to it, Plaintiff was forced to halt most of its business. Docket #23, Complaint ¶ 3. Plaintiff had insurance for the

purpose of mitigating the risk of such a work-stoppage. Docket #23, Complaint at ¶ 4. The Insurance company, Defendant here, refused to pay out on the policy. Docket #23, Complaint at ¶ 6.

Many if not most Illinois businesses were impacted, from March onward, by Governor Pritzker's executive order closing all "non-essential" businesses, including Plaintiff here. As a result of them, for a time, Plaintiffs were barred from performing anything other than "emergency work." Docket #23, Complaint at ¶ 7.

The policy contains provisions for loss due to actions of the civil authority in two places: Building and Personal Property, and Business Income (and Extra Expense). The applicable one here is the Business Income (and Extra Expense) section. The Business Income section promises coverage for

> the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical "loss" to property at a "premises" which is described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The "loss" must be caused by or result from a Covered Cause of Loss. With respect to "loss" to personal property in the open or personal property in a vehicle, the "premises" include the area within 1,000 feet of the site at which the "premises" are located. Docket #25, Motion to Dismiss, Exhibit A, 78 (hereinafter "policy.")

One such "Covered Cause of Loss" is a loss due to the actions of a "Civil Authority." That section reads:

> We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the "premises" due to direct physical "loss" to property, other than at the "premises", caused by or resulting from any Covered Cause of Loss. Docket #25, Policy, 79.

The Complaint sought Declaratory Judgment (Count I), Damages for Breach of Contract (Count II), and a finding that the refusal to honor the insurance contract was vexations and improper under 215 ILCS 5/155 (Count III). Docket #23.

On July 31, 2020, Defendant filed a Motion to Dismiss the Complaint. As will be discussed at some length, that Motion argued that the policy did not extend to business losses due to either COVID-19 or the resulting lockdowns. The main thrust of the motion was that neither COVID-19 nor the lockdowns constituted physical damage to Plaintiff's property, and that they therefore did not trigger the policy. Docket #25.

On September 21, 2020, Hon. Robert W. Gettleman granted the Motion to Dismiss and terminated the case. Docket #37, Memorandum Order of Sept. 21, 2020. That Order found that the definition of "direct physical loss – unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage." Memorandum Order at 4.

On, October 16, 2020, Plaintiff timely filed two motions: 1.) a Motion for Leave to Amend the Complaint, Docket #39, and 2.) a Motion for reconsideration of the Order on the Motion to Dismiss. Docket #40. The basis of these Motions was that in the intervening time, a District Court had ruled on a similar motion, in a similar matter, and that the Order took notice of some of the particular characteristics of COVID-19 that were physical intrusions or incursions into a property.

Those Motions were fully briefed, and the Court denied them on January 10, 2021. Docket #52, Memorandum Order of Jan. 10, 2021. The decision found that the facts alleged in the proposed Complaint did not change the analysis, as "there are no allegations that COVID-19 was ever present in the facility, and no allegations of tangible physical damage." Memorandum Order at 5. Even if there was such an allegation, that still would not be "direct physical damage to the property." Memorandum Order at 5. A timely Notice of Appeal was filed on January 29, 2021. Docket #54, Notice of Appeal.

IV. Summary of the Argument

Since the legal question before this Court is the relationship between the specific insurance policies at issue in this case and the general effect of COVID-19 and the resulting lockdowns, there are several reasons that this Honorable Court should overturn the District Court's decision:

1.) The simple terms of the insurance contract make it clear that the damages that Plaintiff suffered constitute physical damage as that term is used in the contract.

2.) An analysis of case law similarly shows that the word physical should be understood expansively, and that COVID-19 therefore did physical damage to the property as that term is to be understood in case law.

3.) The insurance industry considered (and some policies implemented) a specific exclusion for pandemic-related damages in the wake of the SARS outbreak scare because it recognized that then-current policies would not exclude such damages.

Argument

I. Standard of Review

The District Court's ruling was to dismiss the Complaint on the pleadings, which is reviewed *de novo*. Tamayo v. Blagojevich, 526 F. 3d 1074, 1081 (7th Cir., 2008). This Court has stated that a plaintiff whose original complaint has been dismissed under Rule 12(b)(6) may be given an opportunity to amend the complaint before the entire action is dismissed. Runnion v. Girl Scouts of Greater Chicago, 786 F.3d 510, 519 (7th Cir., 2015). "The court should freely give leave to [amend] when justice so requires." Forman v. Davis, 371 U.S. 178, 182 (1962). As the Court found that the new allegations do not correct the deficiencies in the original Complaint, it follows that that decision should be subject to the same standard of review, *de novo*, as any other determination under Federal Rules of Civil Procedure § 12(b)(6). By contrast, the denial of the Motion for Reconsideration should be reviewed on an abuse of discretion basis. Buck v. Davis, 580 U.S. ___ (2017).

II. The simple terms of the agreement demand that Defendants treat COVID-19 and the resulting lockdowns as a covered loss.

"In construing the terms in an insurance policy, the court must ascertain the intent of the parties." Outboard Marine Corp. v. Liberty Mutual Ins. Co., 154 Ill.2d 90, 607 NE 2d 1204, 1217 (1992). "If the terms in the policy are clear and unambiguous, the court must give them their plain, ordinary, popular meaning." *Id.* "If a term in the policy is subject to more than one reasonable interpretation within the context in which it appears, it is ambiguous." *Id.* "Ambiguous terms are construed strictly against the drafter of the policy and in favor of coverage." *Id.* This is especially true with respect to exclusionary clauses." *Id.* "This is so because there is little or no bargaining involved in the insurance contracting process, the insurer has control in the drafting process, and the policy's overall purpose is to provide coverage to the insured." *Id.* The "public policy of this State… requires that insurance contracts be construed and enforced to accord with the objectively reasonable expectations of the *insured*." Posing v. Merit Ins., 258 Ill. App.3d 827, 629 N.E.2d 1179, 1183 (Ill. 3 Dist. 1994). An insurance policy is to be construed as a whole, "giving effect to every provision, if possible, because it must be assumed that every provision was intended to serve a purpose." Valley Forge Ins. Co. v. Swiderski Elecs., Inc., 860 N.E.2d 307, 314 (Ill. 2006).

The COVID-19 remediation, like the lockdowns, were engaged in out of a fear that, absent such work-stoppages, Plaintiffs' employees and their clients would contract Covid-19, a virus that has been responsible for hundreds of thousands of deaths across the world, and over 100,000 deaths in the United States of America. See French, Christopher C., COVID-19 Business Interruption Insurance Losses: The Cases For and Against Coverage (June 30, 2020). 27 Conn. Ins. L. J. 1, 3 (2020), Available at SSRN: https://ssrn.com/abstract=3639589, (hereinafter French).

As the proposed Amended Complaint points out, the executive orders that impacted Plaintiff in Illinois were premised, in part, on the desire to avoid the negative health impacts of the

spread of the virus, and to prevent physical damage to the effected structures that would occur if patients and employees were permitted to occupy the premises as usual. Exhibit 1 to Docket #39, Proposed Amended Complaint, at ¶ 33. COVID-19 is transmitted by air and surfaces through water droplets, aerosols, and fomites that remain infectious for extended periods of time. Proposed Amended Complaint at ¶ 34. Aerosols, which are water droplets suspended in air, can remain suspended for hours until gravity ultimately forces them to the nearest surface, spreading the virus. Proposed Amended Complaint at ¶ 35. That is to say, COVID-19 physically attaches itself to the physical premises, and thereby deprive plaintiff of the use of said premises. Proposed Amended Complaint at ¶ 36. According to the Center for Disease Control, the virus can spread by respiratory droplets with an infected person coughs, sneezes or talks. A person can become infected from respiratory droplets by touching a surface or object that has the virus on it and then touching the mouth, nose, or eyes. According to some studies, the virus can live on surfaces for several days. Proposed Amended Complaint at ¶ 37. For example, an April 2020 study published in the journal Emerging Infectious Diseases found a wide distribution of COVID-19 on surfaces and in the air about 13 feet from patients in two hospital wards in Wuhan, China, leading the authors to conclude that the virus spreads in aerosols in addition to large respiratory droplets. The investigators found evidence of the virus in swabs of floors, computer mice, trash bins, bed handrails, patients' face makes, health workers' personal protective equipment, and air vents. Proposed Amended Complaint at ¶ 38.

The implications of airborne spread of the virus means that the virus can travel long distances from any infected person. It can then infect someone who unknowingly walks through a pathogenic cloud. It can also infect someone by settling on a physical surface, which someone touches and later becomes infected. And regardless of the transmission method, the evidence suggests that COVID-19 can be transmitted by shoes even once it reaches the ground. Proposed

Amended Complaint at ¶ 39. It is possible and even likely, as evidence of infections and deaths from infections in the United States as early as February develops, that customers, employees, and other visitors to the insured property were infected with the coronavirus due to their physical contact with the premises. Proposed Amended Complaint at ¶ 40.

The policy, which ostensibly covers only damages related to the physical building, contains specific disclaimers of policy coverage for, among other things, suspensions of operations caused by "destruction or corruption of electronic data, or any loss to electronic data." Exhibit 1 to Docket #34, Policy, 79. The "Building and Personal Property" section – which is one of the policies that covers Plaintiff here, though not the applicable one - quite explicitly covers the "Building" (it is in the name). But it also covers "stock." Policy, 9. It explicitly does not cover electronic data, and "costs to research" (Policy, 10), or loss due to "ordinance or law that is enforced *even if the building or structure has not been damaged*." (Policy, 11).

It also disclaims coverage of various intangibles. The section under which this suit is brought, the Business Income (and Extra Expense) section, explicitly covers "direct physical loss to property." But it specifically disclaims loss due to electronic data – something that would be totally unnecessary if the policy were only intended to cover the physical building.

In this case, the building became unusable due to a condition affecting the physical property: being inside increases susceptibility to COVID-19. Morawska L, Tang JW, Bahnfleth W, et al. How can airborne transmission of COVID-19 indoors be minimised? Environ Int. 2020;142:105832, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7250761/, (hereinafter "Morawska").

These exclusions would not be necessary if the policy were to be understood in as limited a fashion as the District Court understood it. There would be no need to explicitly exclude damage to electronic data if the term "physical" meant something as mundane as the Defendant suggests. Perhaps most glaringly, if the word "physical" were meant to be construed the way both the District

Court and Defendant suggests, there would be no need whatsoever to disclaim damages caused by "ordinance or law that is enforced *even if the building or structure has not been damaged.*" These exclusions exist specifically because the Policy recognizes that the term "physical" should be interpreted expansively.

III. Illinois case law, and other state and federal case law supports the expansive reading of the term "physical."

Case law makes the picture even more clear. Policies of this nature have been interpreted many times in many states throughout the country, and in many federal courts. Physical damage, consistently, does not mean damage to the physical damage to the structure of the property.

a. Illinois Case law supports fact that insurance coverage of "physical loss" is not relegated to tangible damage.

The Complaint cites, for example, Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Int'l Ins. Co., 308 Ill. App.3d 597, 720 N.E.2d 622, 625–26 (Ill. 1 Dist. 1999), which finds that asbestos – something that was placed in the building purposefully and did not threaten the structure of the building one iota – constituted damage to the physical building by simple fact of its existence. As that decision found:

> It would be incongruous to argue there is no damage to other property when a harmful element exists throughout a building or an area of a building which by law must be corrected. The view that asbestos fibers may contaminate a building sufficiently to allege damage to property has been recently adopted in a number of cases. The essence of the allegations [of the complaints] is that the buildings have been contaminated by asbestos to the point where corrective action, under the law, must be taken. Thus, the buildings have been damaged. *Id.* citing United States Fidelity & Guaranty Co. v. Wilkin Insulation Co., 144 Ill.2d 64, 578 N.E.2d 926 (1991)(internal citations removed).

That decision, in turn, quoted Wilkin, immediately *supra*, which found that asbestos within a building – put there on purpose as part of the structure of the building – "constitutes physical injury to

tangible property" as opposed to "intangible economic loss in the form of diminished market values." *Id.* Similarly, infestations of termites have been considered physical damage to a physical building despite not physically damaging the building. Posing v. Merit Ins., 258 Ill. App.3d 827, 629 N.E.2d 1179, 1183 (Ill. 3 Dist. 1994).

This Court, in applying Illinois law, similarly found that the word "physical" was not limited to its dictionary definition, and required a more expansive reading, in Eljer Mfg. Inc., v. Liberty Mut. Ins. Co., 972 F.2d 805 (7th Cir. 1992). As the Court found: "The central issue in the case — when if ever the incorporation of one product into another can be said to cause physical injury — pivots on a conflict between the connotations of the term "physical injury" and the objective of insurance." *Id.* at 808-9. It contrasted leaking pipes to a ticking time bomb: "The ticking time bomb, in contrast, does not injure the structure in which it is placed, in the sense of altering the structure in a harmful, or for that matter in any, way — until it explodes." *Id.* at 809. "But these nice, physicalist, "realistic" (in the philosophical sense) distinctions have little to do with the objectives of parties to insurance contracts." *Id.* The same recognition must be made here[1]. The Court then found that the weakness of the literal, dictionary, interpretation of "physical" was that it would fail to address, for example, "if a manufacturer of construction cranes sold a defective crane which collapsed in front of a restaurant, blocking access to it and thereby impairing the restaurateur's income, and the restaurateur sued the manufacturer and recovered a judgment." *Id.* at 810. In such a case, "the manufacturer's liability insurer might not have to pay, because the blocking of access might not be considered an injury to tangible property." *Id.*

The proper understanding of "physical" that would be

[1] The decision contains an eloquent and valuable discussion of the purpose of insurance policies as it relates to linguistic debates such as this. Rather than quote the whole thing – which would span pages – it will be incorporated here by reference. *Id.* at 808-814.

> "real and not illusory, is when a potentially dangerous product is incorporated into another and, because it is incorporated and not merely contained (as a piece of furniture is contained in a house but can be removed without damage to the house) must be removed, at some cost, in order to prevent the danger from materializing." *Id.*

Here, the "real and not illusory" understanding of the policy requires it to be interpreted so as to cover the damages Plaintiff suffered here. The alternative explanation is akin to the example of a ticking time bomb. Particularly as the matter was envisioned by the Illinois state government, leaving the business open would be a ticking time bomb in which it would only be a matter of time before patients and staff would come down with COVID-19, a potentially deadly virus. The virus was (or would have been) present within the building, and not in the way that a chair is in the building but could simply be picked up and moved out. It would have been invisible but present in the air, and on surfaces, physically, in the property. That the lockdowns ostensibly prevented this just means that the time bomb did not go off. But the time bomb nonetheless caused damages in that Plaintiff was out of business for the duration of the lockdown. This is specifically what it attempted to insure again.

b. Case law from outside of Illinois supports the conclusion that the "real and not illusory" interpretation of "physical" should include the damage done by COVID-19 and the resulting lockdowns.

Outside of Illinois, other decisions have come to similar determinations. For example, the District Court in Oregon determined that the "infiltration of smoke into the interior of [a] theater is a covered 'physical loss of or damage to property'." Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co., 15 CV 1932, 2016 WL 3267247 (D. Or. June 7, 2016). In that case, the business loss was due to the infiltration of the smoke into the theater, making it impossible to hold events, including performances. The building itself was not damaged. However, the economic impact of the

smoke was nonetheless covered as a physical incursion. *Id.* Similarly, ammonia discharge inflicted "direct physical loss of or damage to" a facility because its existence made the facility unusable – despite the lack of physical damage." Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am., 12 CV 4418, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014). The Massachusetts Superior Court found that carbon monoxide infiltration constituted physical damage because the term "direct physical loss or damage" is ambiguous. Matzner v. Seaco Ins. Co., No. 96-0498-B, 1998 WL 566658, at *3 (Mass. Super. Aug. 12, 1998). Gas buildup ***under*** (not in) a church was "direct physical loss" (despite the lack of direct physical loss) because it rendered the church unusable. Western Fire Ins. Co. v. First Presbyterian Church, 437 P.2d 52, 55 (Colo. 1968). Physical damage can also be an "odor." Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 339, 406 (1 Cir. 2009); . In Windridge v. Naperville Condo v. Philadelphia Indem. Ins. Co., 932 F.3d 1035, 1040 (7 Cir. 2019), the Seventh Circuit, applying Illinois law, determined not only that hail damage constituted physical damage, but that repairs to a property (from the hail damage) that resulted in inconsistent siding on the premises were further damage – an expansive understanding of both the word physical and damage.

As addressed above, it is true that Plaintiff was forced to close down because otherwise, there *would be* an infiltration of a deadly virus – not that there was an actual infiltration. However, much like gas under a church made it dangerous to operate inside of the church, COVID-19 made it impossible to operate inside Plaintiff's premises. The policy would be implicated, almost without question, if there was an undeniable physical infiltration of Covid-19 into the premises. That is to say, just like in the case of ammonia, carbon monoxide, a bad odor, and smoke, if COVID-19 had infiltrated Plaintiff's premises, perhaps by making one of Plaintiff's employees or patients sick, there would be ample precedent that a resulting business shutdown would be a covered loss. Here, the civil authority's lockdown preceded the infiltration, preventing it from happening. Like the above example, form Eljer, of a ticking time bomb, the difference between closing the business in

anticipation of damage and actual damage is only a question of whether the time bomb went off. Either way, it constitutes physical damage. Plaintiff should not be penalized for prioritizing the safety of its employees and patients.

The public policy implications of this reality are dire: Plaintiff could have more undeniably fallen under the ambit of the policy by subjecting its employees and patients to the dangers of COVID-19 rather than doing the responsible thing (not to mention the legal thing), and shutting down. But the role of insurance is to give businesses the freedom to choose the safer route, not to incentive living dangerously.

There was no physical damage or loss in the case of ammonia, odors, etc. The policies applied, by their apparently simple language, to business losses due to physical damage to the building – not to incidental business losses due to the building becoming unusable despite the lack of any physical damage. Nonetheless, courts have consistently held that such business losses constitute the effects of physical damage to the building. The terms physical damage, physical injury, and physical loss are all terms of art that have been interpreted to apply to work stoppage due to physical conditions that render the premises of the business unusable. This is what occurred here: due to a physical condition – COVID-19 – the government prevented Plaintiff from using its physical premises, leading to a business loss.

c. District and State Courts dealing with the specific question of COVID-19 have found that insurance policies should be interpreted to cover damages caused by COVID-19 and resulting lockdowns.

In this rapidly developing area, various decisions have cut both ways. For example, Studio 417, Inc.v. The Cincinnati Insurance Co., 20 CV 3127-SRB (S.D. Missouri, August 12, 2020), recently found that a similar policy covered damages due to COVID-19, and the resulting lockdowns. In that matter, the Court analyzed the expression "direct physical loss," and found that it

did not preclude claims for business interruption due to COVID-19. It did so by simply applying the dictionary definition of the applicable terms:

> The Merriam-Webster dictionary defines "direct" in part as "characterized by close logical, causal, or consequential relationship." Merriam-Webster, www.merriamwebster.com/dictionary/direct (last visited August 12, 2020). "Physical" is defined as "having material existence: perceptible especially through the senses and subject to the laws of nature." Merriam-Webster, www.merriam-webster.com/dictionary/physical (last visited August 12, 2020). "Loss" is "the act of losing possession" and "deprivation." Merriam-Webster, www.merriam-webster.com/dictionary/loss (last visited August 12, 2020). Studio 417, at 8.

The decision was further supported by references to various decisions interpreting similar insurance policies liberally so as to ensure that the insured's reasonable understanding of the policy was upheld. In Hampton Foods, Inc. v. Aetna Cas. & Sur. Co., 787 F.2d 349 (8th Cir. 1986), a policy that insured against "loss of or damage to the property insured… resulting from all risks of direct physical loss" was interpreted to cover "any loss or damage due to the danger of direct physical loss," *Id.* at 351-2, cited by Studio 417 at 9. Similarly, the "physical loss" language in a homeowner's policy was held to cover a spider infestation[2]. Mehl v. The Travelers Home & Marine Ins. Co., Case 16-CV-1325-CDP (E.D. Mo. May 2, 2018), cited by Studio 417 at 9. There, the court found that since the policy did not define "physical loss" and since the insurance company "pointed to no language in the policy that would lead a reasonable insured to believe that actual physical damage is required for coverage," that "physical loss" is ***not*** synonymous with physical damage. *Id.*

Studio 417 found, further, that even absent a physical alternation, it was possible for a physical loss to occur. *Id.* at 10, citing Port Authority of New York and New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226, 236 (3 Cir. 2002)(finding that the presence of asbestos constituted a physical

[2] The policy here would likely exclude spider infestations, not because they are not physical, but due to a specific policy exclusion for vermin and other animals. This is further evidence that the policy here *should* cover COVID-19, which is not excluded.

loss); Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts, CV-01-1362-ST, 2002 WL 31495830, at 9 (D. Or. June 18, 2002)(" the inability to inhabit a building [is] a "direct, physical loss" covered by insurance"). Finally, Studio 417 explicitly rejects the holding in both Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd., 1:20-cv-03311-VEC (S.D. N.Y.) (attached to Defendant's Motion) and Gavrilides Mgmt. Co v. Michigan Ins. Co., 20-258-CV-C30, 2020 WL 4561979 (Mich. Cir. Ct., July 21, 2020)(also attached to Defendant's Motion). The same District (and the same judge within the district) similarly denied a Motion to Dismiss in K.C. Hopps v. The Cincinnati Insurance Co., 20-cv-00437-SRB (W.D., Missouri, Aug. 12, 2020).

Another such ruling is Blue Springs Dental Care, LLC v. Owners Insurance Co., 20-CV-383-SRB (W.D., Missouri 2020), in which a district court denied a similar Motion to Dismiss. It found that it is likely customers, employees, and/or other visitors to the insured properties over the recent months were infected with the coronavirus." *Id.* at 8. The business "suspended operations due to COVID-19 to prevent physical damages to the premises by the presence or proliferation of the virus and the physical harm it could cause persons present there." *Id.* at 8. "Customers cannot access the property due to the Stay at Home Orders or fear of being infected with or spreading COVID-19." *Id.* at 8. "COVID-19 is physically transmitted by air and surfaces through droplets, aerosols, and fomites that that remain infectious for extended periods of time." *Id.* at 8.

Similarly, the Superior Court of New Jersey refused to dismiss a complaint premised on nearly the same question in the matter of Optical Services USA/JC1, v. Franklin Mutual Ins. Co., Ber-L-3681-20 (Aug. 13, 2020)(See Exhibit 2 to Docket #34, a transcript of the hearing and the Court's ruling). There, the Court emphasized the plaintiff's suggestion that physical loss means "loss of physical functionality." Transcript at 25. The Court also found that there is no common law basis for interpreting "direct physical loss" in such a limited way as the insurer there suggested. Transcript

at 26. This is consistent with the record in Illinois, in which the expression "direct physical loss" has been interpreted quite expansively.

Finally, the Middle District of Florida has refused to dismiss a Complaint, citing, among other things, clauses in the insurance contract quite similar to the clauses here. It focuses on the ambiguous portions of the policy, like the exclusion of coverage for fungi and bacteria: "Notably, the Policy provided does not exist as an independent document. For example, the 'Limited Fungi, Bacteria or Virus Coverage' section of the Policy starts by stating that it modifies certain coverage forms." Urogynecology Specialist of Florida, LLC v. Sentinel Ins. Co., 6:20-cv-1174-Orl-22EJK, 6-7 (Sept. 23, 2020). This, plus the lack of common law support for the restrictive interpretation advanced by the insurer, compelled the Court to deny the Motion to Dismiss.

Studio 417 similarly addressed the question of whether the government's lockdown broke the chain between COVID-19 and the damages. There, the complaint did not allege that the government forbade all access to the premises – in that case, restaurants and clubs – just like here. Though some limited access was permitted, access was, by and large, either prohibited or strongly discouraged. Studio 417 at 14. This was sufficient to trigger the Civil Authority clause of the insurance policy. By contrast, if access to the premises was not "dramatically decreased," the policy may not be triggered. *Id.* citing TMC Stores, Inc. v. Federated Mut. Ins. Co., No. A04-1963, 2005 WL 1331700, at * 4 (Minn. Ct. App. June 7, 2005). Like there, the policy here covers circumstances in which the civil authority prohibits access (not "all access" or "any access") to the property – which is exactly what the Complaint alleges happened. *Id.*

This is very different from decisions like Southern Hospitality, Inc. v. Zurich Am. Ins. Co., 393 F.3d 1137 (10th Cir. 2004), which found that the civil authority clause was not triggered, as to hotels, when the FAA ground flights in the wake of September 11, 2001. Simply put, the FAA had prevented people from flying, not from checking in to hotels. Similarly, when bridge repairs

prevented a majority of customers from visiting a ski resort, the civil authority clause was not triggered. Ski Shawnee, Inc. v. Commonwealth Ins. Co., 2010 WL 2696782, 4 (M.D. Pa. July 6, 2010). Finally, curfews related to riots technically prevented customers from being outside, but did not prohibit access to the insured's premises. Syufy Enters. v. Home Ins. Co. of Ind.,1995 WL 129229 (N.D. Cal. Mar. 21, 1995).

All of these decisions are distinguishable. In each case, the civil authority prevented the insured from doing business by doing something other than prohibiting access to the premises. In this case, as in Studio 417, the civil authority prohibited customers, clients, and patients from going into the premises of various businesses – in this case, a dentistry practice – in almost every event. That is to say, the civil authority prevented access to the premises.

That the prevention was due to a physical loss was already discussed, above. The same concept applies here. Studio 417, at 13, ("This argument is rejected for substantially the same reasons as discussed above. Plaintiffs adequately allege that they suffered a physical loss, and such loss is applicable to other property"). The stay at home orders at issue here covered large portions of Illinois, and impacted people – patients of Plaintiff included – very fundamentally. See *Id.*

There is a suggestion in the Motion (which the District Court did not seem to credit, but nonetheless bears addressing) that COVID-19 can be cleaned with a cloth, and that it therefore does not constitute physical damage. To analogize this to Eljer, this would be like calling COVID-19 a chair as opposed to defective piples. This seems to suggest that the danger posed by COVID-19 is illusory – that all that is necessary is to wipe down surfaces frequently, and all is well. But as Blue Springs Dental Care found, the concern is not merely that the virus can be present on physical surfaces, but that it can travel and be present in the air, through water droplets and fomites, for some time. It is, in that sense, at least as physical, and at least as damaging, as gas buildup beneath a structure, odor within

a structure, smoke, asbestos, inconsistent shingles, and other forms of damage that do not impact the structure or color of a property.

IV. The insurance industry has already The insurance industry created and promulgated specific clauses – not found in this policy – out of the realization that the "physical loss" language in policies would apply to pandemics like COVID-19.

Finally, the insurance industry recognizes the fact that policies disclaiming losses unrelated to physical damages would not be sufficient to prevent liability in the case of a pandemic. The

> Insurance Services Office, Inc. (ISO), an association of approximately 1,400 domestic property and casualty insurers… is the almost exclusive source of support services in this country for [commercial general liability] insurance. ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 772 (1993).

In 2006, responding to the SARS outbreak, the ISO introduced suggested exclusions to existing policies – almost all of which are standardized to be identical or nearly identical to the policies at issue here. French, at 9. The proposed policy states "We will not pay for loss or damage resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." French, at 9; Exhibit 3 to Docket #34, Insurance Service Office, ISO Form CP 01 40 07 06 – Exclusion of Loss Due to Virus or Bacteria 8, LI-CF-2006-175 (hereinafter "ISO Circular"). The ISO Circular identifies the source of its concern:

> Commercial Property policies currently contain a pollution exclusion that encompasses contamination (in fact, uses the term contaminant in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time. ISO Circular at 1, "Background."

The ISO Circular then explains that "Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case." ISO Circular at 6. Based on that concern, the ISO Circular suggests "an exclusion relating to contamination by disease causing viruses or bacteria or other disease-causing microorganisms." ISO Circular AT 6. This exclusion specifically seeks to bar recovery premised upon "viral and bacterial contaminants" such as "rotavirus, SARS, influenza (such as avian flu), legionella and anthrax. The universe of disease-causing organisms is always in evolution." ISO Circular at 5. The specific exclusion reads: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." ISO Circular at 8.

In other words, not only did the industry recognize that its policies covered "physical loss" due to a pandemic or virus, it attempted to change certain policies to avoid liability. As much as Defendants here claim that the policy was not intended to cover viruses, the greater insurance industry has admitted, over a decade ago, that nearly identical policies did cover viruses. Defendant did not change this policy in accordance with that directive. The policy therefore covers COVID-19.

Conclusion

This is a new and rapidly changing area of the law. But it is based on existing principles. The State of Illinois recognizes that insurance contracts are not negotiated the way many other contracts are negotiated. They are presented, with the final wording intact, on a platter – take it or leave it. As a result, they must be construed in accordance with the reasonable expectation of the insured. This Court has heard the specific question of how "physical" must be understood. The District Court's understanding of that term is something other than its dictionary definition, as Eljer pointed out.

Rather, the term has to have a real and not illusory interpretation that takes into consideration the physical effects of, for example, the COVID-19 pandemic and the resulting lockdowns.

It was for circumstances such as this that Plaintiffs, like many insureds, purchased the subject insurance policy.

WHEREFORE, Plaintiff-Appellant requests that this Honorable Court REVERSE and REMAND this matter with instructions to require Defendant to Answer the Complaint.

Respectfully Submitted,

s/Jonathan Lubin
One of Plaintiff's Attorneys

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Index of Plaintiff-Appellant's Short Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SANDY POINT DENTAL, PC, Plainti ,	)	
v.	)	Case No. 20 CV 2160
THE CINCINNATI INSURANCE COMPANY, Defendant.	)	Judge Robert W. Gettleman

MEMORANDUM OPINION & ORDER

Plainti Sandy Point Dental, PC brought a three count complaint against defendant, e Cincinnati Insurance Company, seeking a declaration that defendant must provide coverage under the policy for losses due to governmental closure orders intended to slow the spread of the Coronavirus and COVID-19, damages and attorneys' fees under 215 ILCS 5/155, and a claim for breach of contract for failing to provide coverage. Defendant moves to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. For the reasons set forth below, the court grants defendant's motion.

BACKGROUND

Plainti is a denti ce. On March 20, 2020, Illinois Governor Pritzker issued an order instructing all "non-essential businesses" to close in order to slow the spread of COVID-19. at order left de s able to do emergency and non-elective work, but not routine work. As a de that mostly does routine work, plaint lleges that it was e ectively forced to shut

2

down for the duration of the crisis. is shut-down has resulted in a substantial loss of revenue for plainti .

Defendant issued an insurance policy to plaint or the period of October 14, 2017 to October 14, 2020. e relevant provisions can be found in the Building and Personal Property Coverage Form and the Business Income Coverage Form. e Business Income Coverage states, in relevant part:

> We will pay for the actual loss of "Business Income" … you sustain due to the necessary "suspension" of your "operation" during the "period of restoration". e "suspension" must be caused by direct physical "loss' to property at "premises" cause by or resulting from any Covered Cause of Loss.
>
> […]
>
> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". e "suspension" must be caused by direct physical "loss" to property at "premises" which is described in the Declarations and for which a "Business Income" Limit of Insurance is shown in the Declaration. e "loss" must be caused by or result from a Covered Cause of Loss.

e policy de nes a Covered Cause of Loss as "RISKS OF DIRECT PHYSCIAL LOSS," unless expressly excluded by the policy.

e policy also provides Civil Authority coverage. To trigger such coverage, orders of civil authority must "prohibit access to the 'premises' due to direct physical 'loss' to the property, other than at the 'premises', caused by or resulting from a Covered Cause of Loss."

DISCUSSION

Defendants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). e purpose of such a motion is to test the ciency of the complaint, not to judge the merits of the case. Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990). When considering the motion, the court accepts as true all well-pleaded factual allegations and draws all reasonable inferences in

plainti 's favor. McMillan v. Collection Professionals Inc., 455 F.3d 754, 758 (7th Cir. 2006). e complaint must plea cient facts to plausibly suggest that plaint s a right to relief and raise that possibility above the "speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

1) Property Damage

e parties agree that Illinois law governs their dispute. In Illinois, the construction of an insurance policy is a question of law. Country Mut. Ins. Co. v. Livorsi Marine, Inc., 856 N.E.2d 338, 342 (Ill. 2006). An insurance policy is to be construed as a whole, "gi ect to every provision, if possible, because it must be assumed that every provision was intended to serve a purpose." Valley Forge Ins. Co. v. Swiderski Elecs., Inc., 860 N.E.2d 307, 314 (Ill. 2006). "If the words used in the policy are clear and unambiguous, they must be given their plain, ordinary, and popular meaning." Cent. Ill. Light Co. v. Home Ins. Co., 821 N.E.2d 206, 213 (Ill. 2004). However, "[a] policy provision is not rendered ambiguous simply because the parties disagree as to its meaning." Founders Ins. Co. v. Munoz, 930 N.E.2d 999 (Ill. 2010).[1]

At the most basic level, the parties dispute whether the substantial closure of the dentist due to Governor Pritzker's orders constituted a "direct physical loss" under the policy. Plainti 's complaint does not allege that there was any demonstrable, physical alteration to the property at its denta ce. Rather, plaint asserts that the language of the policy does not require a tangible, material loss to the physical structure, but allows for a partial loss to the properties from loss of use. Plainti further argues that the policy contains several exclusions to coverage, and that an exclusion for pandemics is conspicuously absent from the exclusion section.

[1] e court may take notice of the policy without converting the motion to dismiss into a motion for summary judgment. Venture Assoc. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993).

e critical policy language here—"direct physical loss"—unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage. e words "direct" and "physical," which modify the word "loss," ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences tha ow from such closure. See Newman Myers Kreines Gross, P.C. v. Great Northern Ins. Co., 17 F.Supp.3d 323 (S.D.N.Y. 2014) (la m did not s er "direct physical loss" when electric utility preemptively shut power in advance of Hurricane Sandy). Plainti simply cannot show any such loss as a result of either inability to access i ce or the presence of the virus on its physical surfaces, the latter of which plainti fails to allege in its complaint. Plainti has not pled any facts showing physical alteration or structural degradation of the property. Nothing about the property has been altered since March 2020. Plainti need not make any repairs or change any part of the building to continue its business. Compare Id. (explaining that "repair" and "replace" in period of restoration clause "contemplate physical damage to the insured premises as opposed to loss of use of it"); with Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Int'l Ins. Co., 720 N.E.2d 622, 625-26 (Ill. Ct. App. 1999), as mod ed on denial of rehearing (Dec. 3, 1999) (nding physical damage to the property, and thus coverage, because plaint as required to conduct repairs and remove asbestos-causing materials from the premises).

is holding is consistent with other courts that have evaluated whether the coronavirus causes property damage warranting insurance coverage. See, for example, Social Life Magazine, Inc. v. Sentinel Ins. Co. Ltd., No. 20 C 3311 (S.D.N.Y. 2020), ECF No. 25, Ex. B at 5:3-4 (denying a motion for preliminary injunction because the coronavirus does not cause direct physical loss, therefore no coverage was required; the coronavirus "damages lungs. It doesn't

5

damage printing presses"); Diesel Barbershop, LLC v. State Farm Lloyds, -- F.Supp.3d --, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020) (granting a motion to dismiss because the coronavirus did not cause a direct physical loss, and "the loss needs to have been a 'distinct, demonstrable physical alteration of the property.'"); Gavrilides Mgmt. Co. v. Michigan Ins. Co., No. 20-258-CB (Mich. 2020), ECF. No. 25, Ex. C (explaining that direct physical loss to property requires tangible alteration or damage that impacts the integrity of the property, and dismissing the case because plainti failed to allege that the coronavirus had any impact to the premises); Rose's 1, LLC v. Erie Ins. Exch., No. 2020 CA 002424 B, 2020 WL 4589206, at *5 (D.C. Super. Aug. 6, 2020) (granting summary judgment for insurer on restaurant's claims of lost business caused by coronavirus closure orders because there was no direct physical loss to property).[2]

In essence, plainti seeks insurance coverage fo ial losses as a result of the closure orders. e coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property. Consequently, plainti has failed to plead a direct physical loss—a prerequisite for coverage.[3]

2) Civil Authority

Plainti 's arguments regarding civil authority coverage fail for similar reasons. As noted above, the policy's civil authority coverage applies only if there is a Covered Cause of Loss, meaning a direct physical loss, to property other than the plainti 's property. Even then, there is

[2] Plain heavily relies on Studio 417 Inc. v. e Cincinnati Insurance Co., 20 C 3127-SRB (S.D. Mo. Aug. 12, 2020), a Missouri case that found that the coronavirus caused a physical loss to property warranting insurance coverage. at court rested its decision on that policy's expansive language, language very d ent from the policy in the instant case. e unambiguous language in the instant policy warrants a d ent conclusion—physical damage that demonstrably alters the property is necessary for coverage, and the coronavirus does not cause physical damage.

[3] Plain 's arguments regarding the exclusions are unavailing. By the policy's plain and unambiguous text, the exclusions are triggered only when there is a direct physical loss. Having determined that there is no direct physical loss, the court need not address arguments regarding the exclusions.

coverage only if the civil authority order, (1) prohibits access to the premises due to (2) direct physical loss to property, other than plainti 's premises, caused by or resulting from any Covered Cause of Loss.

Just as the coronavirus did not cause direct physical loss to plainti 's property, the complaint has not (and likely could not) allege that the coronavirus caused direct physical loss to other property. By the policy's own terms, the civil authority coverage does not apply. Failure to meet this requirement alone warrants dismissal of any claim for civil authority coverage. As to the next prong, while coronavirus orders have limited plaint s operations, no order issued in Illinois prohibits access to plainti 's premises. See Syufy Enters. v. Home Ins. Co. of Ind., 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995) (riot-related curfew prevented customers from being outside, it did not prohibit access to the insured's premises). Indeed, plainti concedes that de s were deemed essential businesses for emergency and non-elective work. Consequently, plainti has failed to allege that access to its premises was prohibited by government order, and its claim for civil authority coverage fails.

For the foregoing reasons, Counts I and II are dismissed.

3) Section 155

215 ILCS 5/155 provides "an extracontractual remedy to policy-holders whose insurer's refusal to recognize liability and pay a claim under a policy is vexatious and unreasonable." Phillips v. Prudential Ins. Co. of America, 714 F.3d 1017, 1023 (7th Cir. 2013). "If there is a bona de dispute regarding coverage—meaning a dispute that is real, genuine, and not feigned—statutory sanctions under section 5/155 are inappropriate." Id. (internal citations omitted). Section 5/155 claims may be dismissed at the pleadings stage when a plainti fails to state a cient factual basis for sanctions, or when a bona de dispute regarding coverage is apparent

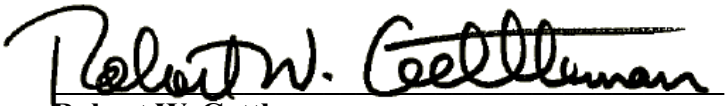
from the face of the complaint. See 9557, LLC & River W. Meeting Assocs., Inc. v. Travelers Indem. Co. of Conn., No. 15 C 10822, 2016 WL 464276, at *4 (N.D. Ill. Feb. 8, 2016).

Here, plainti 's complaint states in a conclusory fashion: "[d]efendant's denials were vexatious and unreasonable." e only factual allegation provided is that defendant denied the insurance claim without conducting an investigation. Plainti has thus failed to plead a ciently plausible basis for sanctions. Further, the face of the complaint presents, at most, a bona de dispute over coverage which precludes a nding of Section 155 liability. Count III is dismissed.

CONCLUSION

For the reasons stated above, defendant's motion to dismiss (Doc. 25) is granted.

ENTER: September 21, 2020



Robert W. Gettleman
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SANDY POINT DENTAL, PC,	)	
	)	
Plainti ,	)	
	)	Case No. 20 CV 2160
v.	)	
	)	Judge Robert W. Gettleman
THE CINCINNATI INSURANCE COMPANY,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION & ORDER

Plainti Sandy Point Dental, PC brought a three count complaint against defendant, e Cincinnati Insurance Company, seeking a declaration that defendant must provide coverage under the policy for losses due to governmental closure orders intended to slow the spread of the Coronavirus and COVID-19, damages and attorneys' fees under 215 ILCS 5/155, and a claim for breach of contract for failing to provide coverage. On September 21, 20, the court granted defendant's motion to dismiss and terminated the case. [Doc. 37]. Plainti has led a motion for leave to le a Second Amended Complaint [Doc. 39] and a motion to reconsider [Doc. 40]. After reviewing the briefs and considering the supplemental authority, the court denies both motions.

BACKGROUND

e background facts are set forth in the court's earlier opinion and need not be restated here. Sandy Point Dental, PC v Cincinnati Insurance Co., 2020 WL 5630465, at *1 (N.D. Ill. Sep. 21, 2020). Relevant to the instant motions, defendant issued an insurance policy to plaint for the period of October 14, 2017 to October 14, 2020. e relevant provisions can be found in

the Building and Personal Property Coverage Form and the Business Income Coverage Form.

e Business Income Coverage states, in relevant part:

> We will pay for the actual loss of "Business Income" … you sustain due to the necessary "suspension" of your "operation" during the "period of restoration". e "suspension" must be caused by direct physical "loss' to property at "premises" cause by or resulting from any Covered Cause of Loss.
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> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". e "suspension" must be caused by direct physical "loss" to property at "premises" which is described in the Declarations and for which a "Business Income" Limit of Insurance is shown in the Declaration. e "loss" must be caused by or result from a Covered Cause of Loss.

e policy de nes a Covered Cause of Loss as "RISKS OF DIRECT PHYSCIAL LOSS," unless expressly excluded by the policy.

DISCUSSION

Plainti ha led two motions: one for leave to le a Second Amended Complaint and the other for reconsideration under Rule 59(e). e court will discuss each in turn.

1) Motion to reconsider

e court's September 21, 2020, opinion found that the insurance policy covering plainti 's business is triggered only by a direct physical loss, and that the COVID-19 pandemic and subsequent lockdown orders did not cause such a loss. [Doc. 37]. e court further found that the lockdown orders did not trigger civil authority coverage, and that plaint ailed to plead a 215 ILCS 5/155 claim. Plainti moves to reconsider only the court's rst nding: that there was no physical damage triggering insurance coverage.

Rule 59(e) of the Federal Rules of Civil Procedure "allow[s] a party to bring to the district court's attention a manifest error of law or fact so that it may correct, or at least address,

the error in the rst instance." A&C Constr. & Installation, Co. WLL v. Zurich Am. Ins. Co., 963 F.3d 705, 709 (7th Cir. 2020). Such a motion serves a limited function and may not be used to reargue or rehash arguments previously presented. See Oto v. Metro. Life. Ins. Co., 224 F3d 601, 606 (7th Cir. 2000). The party seeking the Court's reconsideration must give the Court "a reason for changing its mind." Ahmed v. Ashcroft, 388 F.3d 247, 249 (7th Cir. 2004).

Plainti argues that the court should reconsider its decision because there as been "a change in the law after the case was submitted to the Court for consideration." e only change plainti es is a single case from the United States District Court for the Western District of Missouri, Blue Springs Dental Care, LLC v. Owner Ins. Co., 2020 WL 5637963 (W.D. Mo. Sep. 21, 2020). e court in Blue Springs found that the COVID-19 virus physically attached itself to the premises, causing physical damage or loss to the property, and thus triggered insurance coverage. Id. at *4. Plainti argues that the Blue Springs case is particularly relevant because the plainti in Blue Springs is a dental o , just like the plaint re.

Contrary to plaint 's arguments, Blue Springs is nothing new. Indeed, the reasoning of Blue Springs is nearly identically to the reasoning in Studio 417, Inc., et al. v. the Cincinnati Ins. Co., 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020). Both cases were issued by the same judge and focus on policy language that this court has already distinguished. e relevant policy language in both Studio 417 and in Blue Springs provided that the insurer "will pay for direct physical loss of or damage to Covered Property." Studio 417, 2020 WL 4692385, at *4-5; Blue Springs, 2020 WL 5637963, at *4. e Western District of Missouri court focused heavily on the disjunctive "or" and found that the policy contemplated loss to property other than direct physical damage. Id. is court expressly distinguished the policy language and reasoning of Studio 417 in its earlier opinion, concluding that the policy language in Studio 417 was much

more expansive than the policy language here (providing for "direct physical 'loss' to property"). A second case with the same distinguishable policy language hardly amounts to a "change in the law" warranting reconsideration.

Further, the majority of courts to address this issue have agreed with this court, nding that COVID-19 and corresponding closure orders do not cause physical damage or physical loss to insured property. An Illinois state court and several federal courts have cited this court's earlier decision favorably and have agreed with this court's conclusion. See for example, It's Nice Inc. v. State Farm Fire and Cas., Co., Case No. 2020 L 000517 (18th Judicial Circuit (DuPage County) Sep. 29, 2020) (favorably citing Sandy Point and relying on that reasoning to conclude that COVID-19 does not cause physical damage triggering insurance coverage, and dismissing the case); Bradley Hotel Corp. v. Aspen Specialty Ins. Co., 2020 WL 7889047, at *3-4 (N.D. Ill. Dec. 22, 2020) (same); T & E Chi. LLC v. Cincinnati Ins. Co., 2020 WL 6801845, a *4 (N.D. Ill. Nov. 19, 2020) (same); Uncork and Create LLC v. Cincinnati Ins. Co., 2020 WL 6436948, at *4-5 (S.D. W. Va. Nov. 2, 2020) (same); Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co., 2020 WL 6392841, at *5 (S.D. Fl. Nov. 2, 2020) (same).

Plainti has not provided a manifest error of fact or law. All plaint s provided is an out-of-circuit case that relies on a rent state's law a rent policy language. Plainti 's arguments do not warrant a motion to reconsider. e motion is accordingly denied.

2) Leave to File a Second Amended Complaint

Plainti has additionally moved for leave to le a Second Amended Complaint.[1] Ordinarily, a plaint hose complaint has been dismissed under Rule 12(b)(6) may be given an opportunity to amend the complaint before the entire action is dismissed. Runnion v. Girl Scouts

[1] Plain has already amended its complaint once as a matter of course [Doc. 23].

of Greater Chi., 786 F.3d 510, 519 (7th Cir. 2015). Under Rule 15(a)(2), "[t]he court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). " e terms of the rule, however, do not mandate that leave be granted in every case." Park v. City of Chi., 297 F.3d 606, 612 (7th Cir. 2002). e Seventh Circuit has recognized that, "when it is clear that the defect cannot be corrected so that amendment is futile, it might do no harm to deny leave to amend and enter an immediate nal judgment." Runnion, 786 F.3d at 520. Such is the case here.

Plainti 's proposed Second Amended Complaint contains eight new paragraphs that essentially state that the COVID-19 virus spreads through particles that land on surfaces and physically attaches itself to physical premises. However, these new allegations do not correct the de ciencies in plaint 's original complaint. ere are no allegations that COVID-19 was ever present in the facility and no allegations of tangible physical damage. Even if plaint ould plead the presence of the COVID-19 virus on the premises, that allegation alone is no cient to present a claim based on direct physical damage to the property. As the court held in its earlier order, "[t]he coronavirus does not physical alter the appearance, shape, color, structure, or other material dimension of the property." Sandy Point, 2020 WL 5630465, at *3. e Second Amended Complaint does not change this fact and does not cure this defect. Because leave to amend is futile, plainti 's motion for leave to amend is denied.

CONCLUSION

For the reasons stated above, the court denies plainti 's motion for leave to le a Second Amended Complaint [Doc. 39] and motion to reconsider [Doc. 40].

ENTER:

Date: **January 10, 2021**

Robert W. Gettleman
United States District Judge

Certificate of Service

I, Jonathan Lubin, hereby certify that I caused a copy of this instrument to be served upon all parties of record by filing it with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit.

s/Jonathan Lubin

Certificate of Compliance with Federal Rules of Appellate Procedure § 32(g)

I, Jonathan Lubin, hereby certify that Plaintiff-Appellant's brief is fewer than 30 pages in accordance with Federal Rules of Appellate Procedure § 32(g).

s/Jonathan Lubin

Certificate of Compliance Pursuant to Circuit Rule 30(a) and 30(b)

I, Jonathan Lubin, hereby certify that I have included all of the materials in this Short Appendix that are required by the Federal Rules of Appellate Procedure § 30, and Circuit Rules 30(a) and 30(b).

s/Jonathan Lubin