

2022 IL App (1st) 211462-U

No. 1-21-1462

Order filed June 30, 2022

Third Division

**NOTICE:** This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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BOTTLENECK MANAGEMENT, INC., an Illinois Corporation,	)	Appeal from the
	)	Circuit Court of
	)	Cook County
Plaintiff-Appellant,	)	
	)	
v.	)	No. 20 CH 4769
	)	
ZURICH AMERICAN INSURANCE COMPANY, an Illinois Corporation,	)	Honorable
	)	Michael T. Mullen
Defendant-Appellee.	)	Judge presiding.

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JUSTICE BURKE delivered the judgment of the court.  
Justices McBride and Ellis concurred in the judgment.

**ORDER**

¶ 1 *Held:* We affirm the circuit court's grant of defendant's motion for a judgment on the pleadings where plaintiff's alleged business income losses and extra expenses resulting from the COVID-19 Virus and related government orders were not covered by the commercial property insurance policy issued by defendant.

¶ 2 After plaintiff Bottleneck Management, Inc., the owner and operator of various restaurants, incurred various business income losses and extra expenses due to the COVID-19 Virus and

related government orders, it sought coverage under its commercial property insurance policy issued by defendant Zurich American Insurance Company.<sup>1</sup> Zurich denied coverage under the policy, and as a result, Bottleneck filed a complaint for declaratory relief and breach of contract. On Zurich's motion, the circuit court granted a judgment on the pleadings in favor of Zurich. Bottleneck now appeals and contends that its insurance policy covered the various business income losses and extra expenses it incurred because of the COVID-19 Virus and related government orders. Bottleneck therefore argues that the circuit court erred by granting Zurich's motion for a judgment on the pleadings. For the reasons that follow, we affirm the circuit court's judgment.

¶ 3

## I. BACKGROUND

¶ 4

### A. The Insurance Policy

¶ 5 Bottleneck owns and operates several restaurants in different states, including Illinois. Bottleneck purchased a commercial property insurance policy for its restaurants from Zurich that became effective on December 1, 2019, for a term of one year. The premium for the policy totaled approximately \$342,000. Bottleneck's policy with Zurich contained various coverage for business interruptions.

¶ 6 One part of the policy included coverage for Bottleneck's loss of business income if its restaurants had to suspend operations during certain periods of time ("Business Income Coverage"). However, the suspension had to be caused by a "direct physical loss of or damage to property" at one of Bottleneck's restaurants, and the loss or damage had to be directly caused by a covered cause of loss, as defined in the policy. In addition, the policy contained coverage for

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<sup>1</sup> SARS-CoV-2 is the virus that causes the disease Covid-19. See *Firebirds International, LLC v. Zurich American Insurance Co.*, 2022 IL App (1st) 210558, ¶ 5. For simplicity sake, we will refer to the virus as the "COVID-19 Virus."

necessary extra expenses Bottleneck incurred as a result of a “direct physical loss of or damage to” property at one of Bottleneck’s restaurants, though the loss or damage had to be directly caused by a covered cause of loss, as defined in the policy (“Extra Expense Coverage”). Additionally, the policy provided coverage for Bottleneck’s loss of business income if its restaurants had to suspend operations during certain periods of time when the suspension was caused by a “direct physical loss of or damage to property” at a dependent premises. Further, the loss or damage had to be directly caused by a covered cause of loss, as defined in the policy (“Dependent Premises Business Income Coverage”). The Dependent Premises Business Income Coverage provision also included insurance for necessary extra expenses Bottleneck incurred as a result of a “direct physical loss of or damage to” property at a dependent premises so long as the loss or damage was directly caused by a covered cause of loss, as defined in the policy.

¶ 7 As part of the Business Income Coverage, Extra Expense Coverage and Dependent Premises Business Income Coverage provisions, the policy contained additional coverage for lost business income and extra expenses attributable to orders issued by civil authorities that “prohibit[ed] access” to Bottleneck’s restaurants or a dependent premises, and necessitated the suspension of Bottleneck’s operations (“Civil Authority Coverage”). However, the civil authority order had to result from a civil authority’s response to a “direct physical loss of or damage to” property located within one mile of Bottleneck’s restaurants or a dependent premises, and the loss or damage had to be directly caused by a covered cause of loss, as defined in the policy.

¶ 8 The policy also contained coverage for Bottleneck’s lost business income attributable to microorganisms (“Microorganisms Coverage”). Under this provision of the policy, Zurich would pay for Bottleneck’s lost business income when its restaurants had to suspend operations due to a “direct physical loss of or damage to” its property caused by microorganisms so long as the

microorganisms were the result of a covered cause of loss or a prolonged period of restoration due to the remediation of microorganisms caused by a covered cause of loss, as defined in the policy. The policy defined microorganisms to include viruses. Lastly, the policy provided various excluded causes of loss, including one related to microorganisms that was incorporated by reference into the Business Income Coverage and Extra Expense Coverage provisions from provisions related to real and personal property. To this end, Zurich would: “not pay for loss or damage consisting of, directly or indirectly caused by, contributed to, or aggravated by the presence, growth, proliferation, spread, or any activity of ‘microorganisms’, unless resulting from fire or lightning.”

¶ 9

#### B. COVID-19 and the Instant Litigation

¶ 10 In late January 2020, the World Health Organization declared the COVID-19 Virus a public health emergency of international concern. See Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV) ([https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov))). Two months later, as the COVID-19 Virus began to spread in Illinois, Governor JB Pritzker issued executive orders in an effort to curb the spread of the virus that included a stay-at-home order for all nonessential activities and ordered all nonessential businesses to temporarily cease operations. Exec. Order No. 2020-7, 44 Ill. Reg. 5536 (Mar. 16, 2020), <https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-7.2020.html>; Exec. Order No. 2020-10, 44 Ill. Reg. 5857 (Mar. 20, 2020), <https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-10.2020.html>. For restaurants, these orders meant that they could not offer on-premises

dining, but rather only takeout or delivery services. *Id.* Around the same time, governors of other states in which Bottleneck operated restaurants issued similar executive orders. In turn, Bottleneck sustained various economic losses. Because Bottleneck sustained a significant loss of revenue due to the COVID-19 pandemic and various government orders, Bottleneck made a claim for coverage under its policy with Zurich. However, Zurich denied coverage asserting that there had been no direct physical loss of, or damage to, the property covered by the policy. Additionally, Zurich denied coverage because Bottleneck's losses were not caused by a covered cause of loss, as defined in the policy.

¶ 11 As a result, Bottleneck filed the instant complaint against Zurich in the circuit court seeking declaratory relief and damages for a breach of contract. In the complaint, Bottleneck asserted that its policy with Zurich covered the business income losses and extra expenses caused by the COVID-19 Virus and related government orders. These orders, according to Bottleneck, resulted in it having to close several of its restaurants either completely or for all but take-out or delivery service. Bottleneck asserted that, due to the nature of the COVID-19 Virus being "present on physical surfaces" and staying there "for an extended period of time," it was "probable that COVID-19 particles ha[d] been physically present on surfaces and items of property located at [its] premises," which were covered by its insurance policy with Zurich. As such, Bottleneck alleged that the COVID-19 Virus "render[ed] items of physical property unsafe," "impair[ed] [the] value, usefulness and/or normal function" of physical property, and "render[ed] the premises unsafe, thereby impairing the premises' value, usefulness and/or normal function." Thus, according to Bottleneck, it had "sustained direct physical loss and damage to items of property located at its premises and direct physical loss and damage to its premises \*\*\* as a result of the presence of COVID-19 particles and/or the Pandemic."

¶ 12 In Count I of its complaint, Bottleneck sought declarations, *inter alia*, that: (1) it sustained a direct physical loss of, or damage to, property at its premises due to the COVID-19 Virus and the pandemic; (2) the COVID-19 Virus and pandemic were covered causes of loss under the policy; (3) it was entitled to its business income losses and extra expenses as a result of the COVID-19 Virus and the pandemic; (4) its business income losses as a result of the government orders were covered under the policy; and (5) no applicable exclusion or limitation in the policy applied to its claim. In Count II of its complaint, Bottleneck asserted that Zurich breached the policy by denying coverage to Bottleneck.

¶ 13 After Zurich's attorneys filed an appearance on its behalf, the company denied that its policy with Bottleneck covered Bottleneck's claimed losses and extra expenses, and further denied that it had breached the policy. Zurich also raised several affirmative defenses.

¶ 14 Thereafter, Zurich filed a motion for a judgment on the pleadings. First, Zurich argued that Bottleneck could not recover under the insurance policy because neither the COVID-19 Virus nor the related government orders caused direct physical loss of, or damage to, Bottleneck's property. Zurich highlighted that the Covid-19 Virus was only present on the surfaces of property and had no physical impact on the property because it could be eradicated with routine cleaning. As such, according to Zurich, the virus did not cause property to be permanently or totally lost. Second, Zurich argued that Bottleneck could not demonstrate that its alleged losses or extra expenses were caused by a covered cause of loss, as defined in the policy.

¶ 15 In October 2021, after Bottleneck filed a response, the circuit court entered a written order granting Zurich's motion for a judgment on the pleadings. The court concluded that the COVID-19 Virus and related government orders issued to slow the spread of the virus did not cause direct physical loss of, or damage to, Bottleneck's property because the virus did not cause a "distinct,

demonstrable, physical alteration of property.” As such, the court found that Zurich’s policy did not cover Bottleneck’s claim. Additionally, the court found that the policy’s additional coverage for microorganisms did not apply to the facts alleged in Bottleneck’s complaint. Further, the court asserted that, regardless of the inapplicability of the additional coverage for microorganisms, the policy’s microorganisms exclusion allowed Zurich to deny coverage for any loss caused by a virus. Lastly, the court concluded that, because of its findings related to the coverage issues, Bottleneck’s breach of contract claim necessarily failed. Consequently, the court dismissed the case with prejudice.

¶ 16 Bottleneck timely appealed the circuit court’s dismissal.

¶ 17 **II. ANALYSIS**

¶ 18 Bottleneck contends that the circuit court erred in granting Zurich’s judgment on the pleadings for several reasons. First, Bottleneck argues that the court erred in concluding that its pleadings failed to establish the existence of a direct physical loss of, or damage to, its property under the Business Income Coverage and Extra Expense Coverage provisions of the insurance policy. Second, Bottleneck argues that the court erred in finding that its pleadings failed to sufficiently allege a claim for coverage under the Civil Authority Coverage provisions of the policy. Third, Bottleneck argues that the court erred in holding that the policy’s coverage for microorganisms did not insure its business income losses. And finally, Bottleneck argues that the court erred in concluding that its pleadings failed to establish a breach of contract.

¶ 19 Axiomatically, when reviewing a judgment on the pleadings, we are limited to the pleadings. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010). A judgment on the pleadings “is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Hess v. Estate of Klammer*, 2020 IL 124649, ¶ 14. In analyzing such

a motion, the circuit court is required to accept as true all well-pled facts set forth in the nonmoving party's pleadings and any rational inferences therein. *Wilson*, 237 Ill. 2d at 455. We review the circuit court's ruling on a judgment on the pleadings *de novo*. *Hess*, 2020 IL 124649, ¶ 14.

¶ 20 Additionally, this case involves the interpretation of an insurance policy, which is a legal question we review *de novo*. *Id.* “When an insured sues its insurer over a denial of coverage, ‘the existence of coverage is an essential element of the insured’s case, and the insured has the burden of proving that [its] loss falls within the terms of [its] policy.’ ” *ABW Development, LLC v. Continental Casualty Co.*, 2022 IL App (1st) 210930, ¶ 26 (quoting *St. Michael’s Orthodox Catholic Church v. Preferred Risk Mutual Insurance Co.*, 146 Ill. App. 3d 107, 109 (1986)). Under Illinois law, “the general rules governing the interpretation of other types of contracts also govern the interpretation of insurance policies.” *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). When interpreting an insurance policy, the primary goal “is to ascertain and give effect to the intention of the parties, as expressed in the policy language.” *Id.* “To ascertain the intent of the parties and the meaning of the words used in the insurance policy, the court must construe the policy as a whole, taking into account the type of insurance for which the parties have contracted, the risks undertaken and purchased, the subject matter that is insured and the purpose of the entire contract.” *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). When the language of an insurance policy is clear and unambiguous, we must give that language its plain and ordinary meaning. *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 292-93 (2001). However, if the language is ambiguous, we will construe the language against the insurer, who drafted the policy. *Id.* at 293.

¶ 21

#### A. Assumptions About the COVID-19 Virus



¶ 22 Although the circuit court never explicitly raised the issue of judicial notice in its written order granting Zurich’s motion for a judgment on the pleadings, underlying many of its legal conclusions were factual conclusions about the COVID-19 Virus, namely that the virus could be easily cleaned off surfaces through inexpensive and routine cleaning methods. The fact that the virus can so easily be remediated off physical surfaces is, in part, what led to the court’s conclusion that the virus did not cause direct physical loss of, or damage to, Bottleneck’s property. While the court never explicitly took judicial notice of these facts about the COVID-19 Virus, we may do so on appeal because they are a matter of common knowledge about the virus. See *Sweet Berry Cafe, Inc. v. Society Insurance, Inc.*, 2022 IL App (2d) 210088, ¶ 43 (observing that the “[t]he trial court did not err in taking judicial notice of the ease of cleaning the [COVID-19 V]irus off surfaces, as this is a matter of common knowledge about this virus”).

¶ 23 B. “Direct Physical Loss of or Damage to” Property

¶ 24 With that preliminary issue out of the way, we turn to Bottleneck’s first argument, where it posits that the circuit court erred in concluding that its pleadings failed to establish the existence of a direct physical loss of, or damage to, its property under the Business Income Coverage and Extra Expense Coverage provisions of the insurance policy.

¶ 25 According to the policy’s Business Income Coverage provision, Zurich would:

“pay for the actual loss of *business income* [Bottleneck] sustain[ed] due to the necessary *suspension* of [Bottleneck’s] *operations* during the *period of restoration*.

The *suspension* must be caused by direct physical loss of or damage to property at a *premises* \*\*\*. The loss or damage must be directly caused by a *covered cause of loss*.” (Internal quotation marks omitted) (Emphasis in original.)

Additionally, according to the policy's Extra Expense Coverage provision, Zurich would: "pay for the actual and necessary *extra expense* [Bottleneck] incur[red] due to direct physical loss of or damage to property at a *premises* \*\*\*. The loss or damage must be directly caused by a *covered cause of loss*." (Internal quotation marks omitted) (Emphasis in original.) An extra expense was defined as, in essence, an extraordinary expense incurred by Bottleneck resulting from a disruptive incident. Although the policy defined the terms "business income," "suspension," "operations," "premises" "period of restoration" and "covered cause of loss," none of those definitions are relevant to the analysis of this issue.

¶ 26 The critical phrase for purposes of this issue is "direct physical loss of or damage to property." The policy defined neither that phrase nor the word "physical." Our supreme court has interpreted the word "physical" in an insurance policy when the policy provided no definition, though not in the context of the COVID-19 Virus. In *Eljer*, 197 Ill. 2d at 301, the court concluded that the word "physical" was unambiguous, and under the plain and ordinary meaning of it, "tangible property suffers a 'physical' injury when the property is altered in appearance, shape, color or in other material dimension." Recently, in *ABW Development*, 2022 IL App (1st) 210930, ¶¶ 27-30, this court addressed whether the COVID-19 Virus constituted a "direct physical loss of or damage to" property when a commercial insurance policy did not define the word "physical." After observing that the word "physical" had to be given its plain and ordinary meaning, the court found no reason to depart from the definition the supreme court used in *Eljer*. *Id.* ¶¶ 29-30. We agree with this court's analysis in *ABW Development* and likewise find no reason to depart from the definition in *Eljer*. As such, the word "physical" connotes an alteration in appearance, shape, color or in other material dimension.

¶ 27 Given the plain and ordinary definition of “physical,” we now turn to Bottleneck’s complaint to determine whether it has sufficiently alleged facts to support the conclusion that the COVID-19 Virus caused direct physical loss of, or damage to, its property. In its complaint, Bottleneck alleged that it was “probable” that individuals infected with the virus were at its premises during the term of the policy and “probable” that the COVID-19 Virus was present on the surfaces and items of property in its restaurants. Given these allegations, Bottleneck claimed that it had “sustained direct physical loss and damage to items of property located at its premises and direct physical loss and damage to its premises \*\*\* as a result of the presence of COVID-19 particles and/or the Pandemic.”

¶ 28 However, as the circuit court noted, due to the nature of the COVID-19 Virus, Bottleneck did not, and could not, allege that the virus caused an alteration in appearance, shape, color or in other material dimension to its property. Notably, Bottleneck never pled any factual assertions detailing what of its property was physically damaged, what that physical damage was or what repairs were necessary to repair said physical damage. In short, Bottleneck’s complaint was bereft of any facts showing that there was any physical damage to its property. See *ABW Development*, 2022 IL App (1st) 210930, ¶¶ 35-36 (finding the plaintiff’s alleged business losses not covered by its insurance policy that required a direct physical loss of, or damage to, covered property where, “[a]lthough plaintiff alleged that the COVID-19 virus caused physical loss or damage to its property, the complaint [did] not allege any facts that would support that conclusion”).

¶ 29 In fact, Bottleneck did not even allege with certainty that the COVID-19 Virus was present at any of its properties. Rather, Bottleneck could only reasonably claim that it was “probable” that the COVID-19 Virus was physically present at its premises. As this court observed in *ABW Development*, “even assuming the COVID-19 virus was present at the premises, the mere presence

of the virus on surfaces does not constitute ‘physical loss of or damage to property’ because COVID-19 does not physically alter the appearance, shape, color, structure, or other material dimension of the property.” *Id.* ¶ 35. Furthermore, the Seventh Circuit Court of Appeals recently observed that, “[e]ven if the virus was present *and* physically attached itself to [the plaintiff]’s premises, [the plaintiff] does not allege that the virus *altered* the physical structures to which it attached, and there is no reason to think that it could have done so.” (Emphasis in original.) *Sandy Point Dental, P.C. v. Cincinnati Insurance Co.*, 20 F.4th 327, 335 (7th Cir. 2021). The Seventh Circuit Court of Appeals went on to note that, “[w]hile the impact of the virus on the world over the last year and a half can hardly be overstated, its impact on physical property is inconsequential: deadly or not, it may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days.” *Id.* This is why Bottleneck never once claimed that any of its property needed to be repaired or replaced due to the COVID-19 Virus because the virus simply does not have that kind of ability. Because Bottleneck failed to allege that the COVID-19 Virus caused an alteration in appearance, shape, color or in other material dimension to its property, *i.e.*, a “direct physical loss of or damage to property,” Bottleneck failed to make a claim that its business income losses and extra expenses were covered by the Business Income Coverage and Extra Expense Coverage provisions of its insurance policy. See *ABW Development*, 2022 IL App (1st) 210930, ¶ 36.

¶ 30 Not only does our conclusion comport with this court’s recently decision in *ABW Development*, but also with multiple other decisions applying Illinois law, where courts found that the COVID-19 Virus did not cause physical loss or damage to property so as to be covered by commercial insurance policies. See *Firebirds*, 2022 IL App (1st) 210558, ¶¶ 38-40; *Sweet Berry*, 2022 IL App (2d) 210088, ¶ 43; *Sandy Point*, 20 F.4th at 333-34. Nevertheless, Bottleneck

attempts to liken the COVID-19 Virus to other causes of loss, such as airborne asbestos fibers or noxious gases, that are similarly incapable of being seen by the naked eye, but have been found to alter physical property sufficient to cause direct physical loss of, or damage to, property. See *e.g.*, *Inns by the Sea v. California Mutual Insurance Co.*, 286 Cal. Rptr. 3d 576, 587-89 (2021) (citing cases); *Farmers Insurance Co. of Oregon v. Trutanich*, 858 P.2d 1332, 1335-36 (1993). However, in *Sweet Berry*, 2022 IL App (2d) 210088, ¶ 43, this court rejected an insured's similar comparison to airborne asbestos fibers and noxious gases because, unlike those substance which can damage property and render a premises unusable, the COVID-19 Virus does not cause physical damage to property and can easily remediated by routine and inexpensive cleaning. We agree with the analysis in *Sweet Berry* and find Bottleneck's comparison of the COVID-19 Virus to airborne asbestos fibers and noxious gases to be similarly inapposite.

¶ 31 Bottleneck further attempts to highlight the language of the phrase “direct physical loss of or damage” and posits that the language denotes independent conditions to invoke coverage: (1) the “loss of” property or (2) “damage to” property. However, in arguing as such, Bottleneck reads out the critical modifier of “physical” that attaches to both “loss” and “damage.” While we agree that physical loss and physical damage are different and have different meanings (see *ABW Development*, 2022 IL App (1st) 210930, ¶ 32), there must something physical in conjunction with the loss or damage to invoke coverage. Having not alleged any physical loss or physical damage to its property, the circuit court properly found that Bottleneck's alleged losses an extra expenses were not covered by the Business Income Coverage and Extra Expense Coverage provisions of the insurance policy.

¶ 32

#### C. Civil Authority Coverage

¶ 33 Bottleneck next argues that the circuit court erred in finding that its pleadings failed to sufficiently allege a claim for coverage under the Civil Authority Coverage provisions of the insurance policy. As part of the Business Income Coverage, Extra Expense Coverage and Dependent Premises Business Income Coverage provisions, Zurich would pay for lost business income and extra expenses Bottleneck sustained, in part, when an order of civil authority “prohibit[ed] access to” Bottleneck’s premises or dependent premises. However, that order must have “result[ed] from a civil authority’s response to direct physical loss of or damage to property located within one mile” from the *premises*” which sustained the business income loss or incurred the extra expenses or one mile from a “*dependent premises.*” (Internal quotation marks omitted.) (Emphasis in original.) And further “[t]he loss or damage must be directly *caused by a covered cause of loss.*” (Internal quotation marks omitted) (Emphasis in original.)

¶ 34 Like with coverage under the Business Income Coverage and Extra Expense Coverage provisions of the insurance policy, coverage under the Civil Authority Coverage provisions of the policy required a “direct physical loss of or damage to property.” And, as previously discussed, Bottleneck failed to allege that the COVID-19 Virus caused an alteration in appearance, shape, color or in other material dimension of any property. Therefore, Bottleneck failed to make a claim that its business income losses and extra expenses were covered by the Civil Authority Coverage provisions of its insurance policy.

¶ 35 However, Bottleneck’s claim for coverage under the Civil Authority Coverage provisions fails for another reason. The policy only covers the actual loss of business income or extra expenses attributable to orders issued by civil authorities that “prohibit[ed] access” to Bottleneck’s premises or dependent premises. Although in its complaint, Bottleneck claimed that the various government orders forced it to close several of its restaurants either completely or for all but take-out or delivery

service, Bottleneck never asserted that it was prohibited from accessing its premises. Its acknowledgment that it had the option to keep its restaurants open for take-out or delivery service is a tacit admission that it was not prohibited from accessing its premises. See *ABW Development*, 2022 IL App (1st) 210930, ¶ 40 (where the plaintiff did not allege “facts that would indicate that access to its premises was ever “ ‘prohibit[ed],’ ” and “only contend[ed] that the executive orders prohibited plaintiff from ‘operating its regular businesses,’ or making its full desired use of its premises,” it could not claim coverage under a civil authority provision of an insurance policy that required the civil authority order to prohibit access to its premises). Consequently, the circuit court properly found that Bottleneck’s alleged business income losses and extra expenses did not come under the purview of the Civil Authority Coverage provisions of the insurance policy.

¶ 36

#### D. Microorganisms Coverage and Exclusion

¶ 37 Bottleneck next argues that the circuit court erred in holding that the insurance policy’s coverage for microorganisms did not insure its business income losses. Under the policy’s Business Income Coverage provision related to microorganisms, Zurich would pay for: “the actual loss of *business income* [Bottleneck] sustain[ed] due to the: (a) [n]ecessary *suspension* of [its] *operations* from direct physical loss of or damage to Covered Property caused by *microorganisms* when the *microorganisms* are the result of a *covered cause of loss*” or “(b) [p]rolonged *period of restoration* due to the remediation of *microorganisms* from a covered loss.” (Internal quotation marks omitted) (Emphasis in original.) And the policy defined the term “microorganism” as “any type or form of organism of microscopic or ultramicroscopic size including, but not limited to \*\*\* virus.”

¶ 38 As the circuit court observed, for Bottleneck’s alleged losses to be covered by the policy’s additional coverage for microorganisms, the microorganisms, here the COVID-19 Virus, had to

be the result of either (1) a covered cause of loss or (2) remediation of the COVID-19 Virus from a covered cause of loss. Stated otherwise, there had to first be a covered cause of loss and the COVID-19 Virus resulting from that covered cause of loss. As Bottleneck has never alleged that it incurred business income losses due to the COVID-19 Virus resulting from an independent covered cause of loss, the court correctly determined that the additional coverage for microorganisms contained in the policy did not apply.

¶ 39 The only real argument that Bottleneck makes for coverage under this provision of the policy is that, if it did not apply, the provision would be illusory. Bottleneck posits that this provision in conjunction with the policy's microorganisms exclusion provision essentially leaves no conceivable circumstances in which the policy would cover any loss related to microorganisms. The microorganisms exclusion, which was incorporated by reference into the Business Income Coverage and Extra Expense Coverage provisions, provides that Zurich would: "not pay for loss or damage consisting of, directly or indirectly caused by, contributed to, or aggravated by the presence, growth, proliferation, spread, or any activity of 'microorganisms', unless resulting from fire or lightning." But, as Zurich notes, in arguing that the policy's additional coverage for microorganisms is illusory if it did not apply to the instant facts, Bottleneck conflates the policy's clear distinction between cause and result. As we just observed, in order for the policy's additional coverage for microorganisms to apply, the microorganisms must be the result of some other covered cause of loss.

¶ 40 Recently, when reviewing a nearly identical policy provision related to microorganisms issued by Zurich, the United States District Court for Northern District of Illinois rejected a similar argument made by an insured that the policy's additional coverage for microorganisms and the microorganisms exclusion "conflict[ed]" with one another. *America's Kids, LLC v. Zurich*



*American Insurance Co.*, 2021 WL 4477872, at \*6 (N.D. Ill. Sept. 30, 2021). In doing so, the court remarked that “the Policy excludes losses *caused by* a microorganism, except when the microorganism is a *result of* a covered cause of loss.” (Emphasis in original.) *Id.* The court then provided a helpful example of the cause-and-result relationship: “For example, an insured could recover for fungus damage to walls if that fungus is the result of a flood, but could not recover for the same damage absent a flooding event.” *Id.* Given the critical distinction in the policy between cause and result, the policy’s additional coverage for microorganisms is not illusory. See *Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd.*, 362 Ill. App. 3d 745, 754, *aff’d*, 223 Ill. 2d 407 (2006) (“The policy need not provide coverage against all possible liabilities; if it provides coverage against some, the policy is not illusory.”).

¶ 41 Because the policy’s additional coverage for microorganisms does not cover Bottleneck’s business income losses, we need not discuss Bottleneck’s further argument that the circuit court erred in finding that the policy’s microorganisms exclusion barred its claim for business income losses. See *Wells v. State Farm Fire & Casualty Insurance Co.*, 2021 IL App (5th) 190460, ¶ 27 (“An exclusion in an insurance policy is a provision that eliminates coverage that would have existed in the absence of the exclusion.”). And therefore, the circuit court properly granted Zurich’s motion for a judgment on the pleadings as to Bottleneck’s Count I for declaratory relief.

¶ 42 E. Breach of Contract Claim

¶ 43 Lastly, Bottleneck argues that the circuit court erred in concluding that its pleadings failed to establish a breach of contract. In order to state a claim for breach of contract, the plaintiff “must allege (1) the existence of a valid and enforceable contract, (2) substantial performance by the plaintiff, (3) a breach by the defendant, and (4) resultant damages.” *Bankers Life & Casualty Co. v. American Senior Benefits LLC*, 2017 IL App (1st) 160687, ¶ 15. Based on our conclusions above

that Bottleneck’s policy with Zurich did not cover Bottleneck’s alleged business income losses and extra expenses as a result of the COVID-19 Virus and related government orders, Zurich could not have breached the insurance policy with Bottleneck. See *Lee v. State Farm Fire & Casualty Co.*, 2022 IL App (1st) 210105, ¶ 23 (concluding that, where an insurance policy did not cover a business’s claimed losses, “there can be no breach of the insurance contract premised on the allegation that [the insurer] improperly failed to provide coverage”). Consequently, the circuit court properly granted Zurich’s motion for a judgment on the pleadings as to Bottleneck’s Count II for breach of contract.

¶ 44

### III. CONCLUSION

¶ 45 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 46 Affirmed.