ELECTRONICALLY FILED SEP 01, 2021 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 21-0374

WAKONDA CLUB,
Plaintiff-Appellant,

v.

SELECTIVE INSURANCE COMPANY OF AMERICA,
Defendant-Appellee

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE CELENE GOGERTY, JUDGE

POLK COUNTY NO. LACL148208

APPELLEE'S FINAL BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court correctly concluded that Wakonda's insurance policy does not cover Wakonda's claimed lost income because it did not suffer "direct physical loss of or damage to" its property.

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II. Whether, in the alternative, the district court correctly concluded that the policy's exclusion for "loss or damages caused by or resulting from any virus" bars coverage.

Authorities

Cases

10E, LLC v. Travelers Indem. Co., 500 F. Supp. 3d 1070 (C.D. Cal. 2020)

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III. Whether, in the alternative, the exclusion for losses resulting from an ordinance or law regulating the use of property bars coverage.

Authorities

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ROUTING STATEMENT

Selective Insurance Company of America opposes the retention of this case before the Iowa Supreme Court and respectfully requests that the Supreme Court transfer this matter to the Court of Appeals in the first instance. This case involves routine application of settled law to undisputed facts. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

The COVID-19 pandemic affected millions of businesses nationwide. As a result of the pandemic, state and local officials, including Iowa Governor Kim Reynolds, issued orders limiting certain business operations. The federal government stepped in to provide aid to small businesses, but many businesses unfortunately lost income. In the wake of these orders, a number of businesses brought litigation to attempt to shift their business losses to their property insurers. The vast majority of courts nationwide—including Iowa state and federal courts, as well as the U.S. Court of Appeals for the Eighth Circuit applying Iowa law—have rejected these efforts, holding that pandemic-related business losses do not result from physical loss of or damage to property and thus do not trigger property insurance coverage. Significantly, the U.S. Court of Appeals for the Eighth Circuit—citing the decision below—recently rejected arguments identical to those advanced by appellant Wakonda Club. *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, --- F.4th ---, 2021 WL 2753874 (8th Cir. July 2, 2021). Courts also have held in the alternative that virus exclusions present in many commercial insurance policies bar coverage. This Court should reach the same conclusions.

Wakonda brought this civil suit against its property insurer, appellee Selective Insurance Company of America, in the District Court for Polk County. In its First Amended and Substituted Petition, Wakonda asserted claims for breach of contract and bad-faith denial of insurance coverage and requested a declaratory judgment. (App. 7-21). Wakonda claimed that its property insurance policy provides coverage for income losses stemming from Governor Reynolds' March 17, 2020 Proclamation restricting in-person dining as a result of the COVID-19 pandemic. (App. 13).

Selective moved for summary judgment. (App. 483). The district court granted Selective's motion, holding that Wakonda's property insurance policy does not cover its business losses, both because Wakonda did not claim any "injury to or destruction to realty or other loss physical in nature" and because the policy's virus exclusion—which excludes payment for "loss or damages caused by or resulting from any virus"—forecloses coverage. (App. 1255-56).

Having determined that Wakonda's policy does not provide coverage, the district court necessarily rejected Wakonda's bad-faith claim. (App. 1256).

This appeal followed, although Wakonda does not appeal the district court's ruling on the bad-faith claim.

STATEMENT OF FACTS

A. Wakonda's Commercial Property Insurance Policy

1. Selective and Wakonda entered into a commercial insurance contract. Wakonda's policy contained different types of insurance, including commercial property insurance, commercial general liability insurance, and commercial automobile insurance. (App. 78). This dispute concerns Wakonda's Commercial Property Coverage ("Property Policy").

Like virtually all insurance policies, the Property Policy contained coverage provisions (*i.e.*, provisions identifying the losses for which Wakonda is entitled to insurance coverage) as well as exclusions from coverage (which carve out certain kinds of losses from the coverage provisions). Both types of provisions are at issue in this case.

The centerpiece of the Property Policy is the Building and Personal Property Coverage Form. In that form, Selective indemnified Wakonda for direct physical loss of or damage to property: "[Selective] will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." (App. 152). The policy defined "Covered Cause of Loss" to be "direct physical loss unless the loss is excluded or limited in this policy." (App. 180). If covered

physical loss or damage occurred, Selective agreed to repair, replace, or otherwise compensate Wakonda for "the value of lost or damaged property." (App. 162). To provide a simple example, if a fire physically destroyed or damaged Wakonda's property, Selective would compensate Wakonda for the amount required to replace or repair the property.

The Property Policy further covered certain losses of business income caused by physical loss of or damage to property (the "Business Income" provision). If physical loss or damage to Wakonda's property required it to suspend operations in order to restore the property, Selective would compensate Wakonda for the resulting loss of income:

> 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". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations . . . . The loss or damage must be caused by or result from a Covered Cause of Loss.

(App. 168). The policy defined the "period of restoration" as:

> the period of time that:
>
> a. Begins: (1) 72 hours after the time of direct physical loss or damage for Business Income Coverage; or (2) Immediately after the time of direct physical loss or damage for Extra Expense Coverage; caused by or resulting from any Covered Cause of Loss at the described premises; and

> b. Ends on the earlier of: (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) The date when business is resumed at a new permanent location.

(App. 176). Thus, to take the same example, if Wakonda had to suspend dining operations in order to restore property damaged by a fire, the policy entitled it to compensation for the income lost during the restoration period.

The Business Income section of the policy also included a "Civil Authority" provision. That provision covered lost income in the event that public authorities prohibited access to Wakonda's property because a nearby property suffered a "Covered Cause of Loss":

> When a Covered Cause of Loss causes damage to property other than property at the described premises, 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 described premises, provided that both of the following apply:
>
> (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
>
> (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

(App. 169). In other words, if a neighboring property suffered a fire, and the fire department temporarily restricted access to Wakonda's property due to concerns about the structural integrity of the neighboring property, the "Civil Authority" provision would cover Wakonda's resulting losses.

2. As is typical in insurance contracts, the Property Policy also excluded certain losses from the scope of the property coverage. Three exclusions are relevant to this appeal.

First, the policy excluded losses caused by or resulting from a virus. ("Virus Exclusion"). (App. 179). This exclusion appeared on a separate document entitled "Exclusion of Loss Due to Virus or Bacteria." The Virus Exclusion stated in plain terms that the Property Policy would "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." (*Id.*).

Second, the policy separately excluded insurance coverage for "loss or damage" caused "directly or indirectly" by "[t]he enforcement of or compliance with any ordinance or law . . . [r]egulating the construction, use or repair of any property." (App. 180).

Finally, the policy excluded coverage for loss or damage caused by or resulting from "[d]elay, loss of use or loss of market." (App. 182).

B. Wakonda's Claim and Lawsuit

In the wake of the COVID-19 pandemic, Iowa Governor Kim Reynolds, in conjunction with the Department of Public Health, directed changes to the operation of certain businesses. Restaurants and bars were directed to cease in-person dining, although restaurant owners, employees, and customers were permitted to access restaurant premises to provide/obtain carry-out and/or delivery service. (App. 699).

On June 9, 2020, Wakonda submitted an insurance claim to Selective for the business income it claimed to have lost as a result of Governor Reynolds' Proclamation. (App. 476). Selective declined Wakonda's claim by letter dated June 12, 2020, on the grounds that (1) Wakonda had not suffered any "direct physical loss of or damage to" its property and (2) even if it had, the Virus Exclusion and Ordinance or Law Exclusion barred coverage. (App. 476, 478-79).

Wakonda then brought this suit. In the operative petition, Wakonda did not allege any physical loss or damage to its property. (App. 7-21). Wakonda affirmatively disclaimed any allegation that the virus that causes COVID-19

was present on its premises or infected any of its employees. (App. 14). Wakonda instead alleged that Governor Reynolds' Proclamation "resulted in the necessary suspension of Plaintiff'[s] operations as it economically could not operate their bar, restaurant and event businesses solely on a take-out or delivery basis." (App. 13). According to Wakonda, the Proclamation "preclud[ed] [it] from conducting its operations, preclud[ed] customers from patronizing the business, and otherwise frustrate[ed] the intended purpose[] of [its] businesses, all thereby causing the necessary suspension of operations during a period of restoration." (*Id.*). On that basis, Wakonda claimed coverage under the Business Income and Civil Authority provisions of its Property Policy. (App. 18-19).

The district court granted Selective's motion for summary judgment. Relying on *Milligan v. Grinnell Mutual Reinsurance Co.*, 2001 WL 427642 (Iowa Ct. App. Apr. 27, 2001), the court held that policy language referring to "physical loss or damage" required "injury to or destruction of the realty." (App. 1256 (citation omitted)). Because "Wakonda claims no injury to or destruction to realty or other loss physical in nature," the court held that Wakonda's claimed loss was "not covered under the policy." (*Id.*).

The court further held that the policy's Virus Exclusion barred Wakonda's claim, observing that COVID-19 is indisputably a virus. (App. 1255). The court rejected Wakonda's argument that its "loss was not caused by COVID-19 . . . but by the Governor's proclamation." (*Id.*). As the court explained: "The proclamation was not issued in isolation but as a direct result of the pandemic." (*Id.*).

Finally, the court rejected Wakonda's claim to coverage under the Civil Authority provision because "[t]here was not damage to another property and Wakonda was not prohibited access to their own property." (App. 1256). Wakonda has abandoned on appeal its claim under the Civil Authority provision. (Br. 50).

ARGUMENT

Wakonda purchased a commercial *property* insurance policy. Under that policy, if Wakonda suspended operations as a result of "direct physical loss of or damage to" its property, it was entitled to compensation for the income it lost while it restored the property. As the Iowa Court of Appeals and U.S. Court of Appeals for the Eighth Circuit already have held, that policy language requires a material alteration to property to trigger coverage. Wakonda did not suffer any such alteration of its property, nor did it restore

its property. Wakonda's policy does not cover business income losses resulting from operational changes that it implemented in response to Governor Reynolds' Proclamation. In fact, the policy affirmatively excludes coverage for such losses, which result from both a virus and an ordinance or law regulating the use of property.

The decision below is consistent with existing Iowa law and the decisions of every court to have applied Iowa law to similar claims, including the recent decision of the U.S. Court of Appeals for the Eighth Circuit citing with favor the decision below. *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, --- F.4th ---, 2021 WL 2753874, at *2 (8th Cir. July 2, 2021). Wakonda relies heavily on a few outlier cases from other jurisdictions, but none applied Iowa law and their reasoning has been roundly rejected. Under Iowa law and the policy's plain language, Wakonda is not entitled to coverage.

Preservation of Error

Selective agrees that the alleged error has been preserved through the district court's ruling on Selective's Motion for Summary Judgment and related briefing.

Standard of Review

Selective agrees that a district court's ruling on a motion for summary judgment is reviewed for correction of errors at law.

I. THE BUSINESS INCOME PROVISION DOES NOT COVER WAKONDA'S CLAIMED BUSINESS LOSSES.

Wakonda, the insured, bears the burden to show it suffered a covered loss. *Unkrich Ag, Inc. v. Farm Bureau Prop. & Cas. Ins. Co.*, 2020 WL 2060302, at *4 (Iowa Ct. App. Apr. 29, 2020).[1] Wakonda did not make that showing in the district court. Both the Business Income provision and other policy provisions make clear that the policy does not cover Wakonda's claims. Courts in Iowa and around the country have rejected each of Wakonda's attempts to circumvent the policy language.

A. The Plain Text of the Business Income Provision Forecloses Coverage.

Iowa courts determine the intent of parties to an insurance contract by looking to "what the policy itself says." *Amish Connection, Inc. v. State Farm Fire & Cas. Co.*, 861 N.W.2d 230, 236 (Iowa 2015) (quoting *Boelman v. Grinnell Mut. Reins. Co.*, 826 N.W.2d 494, 501 (Iowa 2013)). Iowa courts give

[1] By contrast, the insurer bears the burden to prove the applicability of coverage exclusions. *Unkrich*, 2020 WL 2060302, at *4.

undefined words in an insurance contract their ordinary meanings. *Id.* Courts "will not strain the words or phrases of the policy in order to find liability that the policy did not intend and the insured did not purchase." *Boelman*, 826 N.W.2d at 501. "An insurance policy is not ambiguous . . . just because the parties disagree as to the meaning of its terms"; for a policy to be ambiguous, it must be "susceptible to two *reasonable* interpretations." *Amish Connection*, 861 N.W.2d at 236. The policy here unambiguously does not cover Wakonda's claimed losses.

1. The Business Income provision covers losses of income occurring during a suspension of operations "caused by direct physical loss of or damage to property." (App. 168). The key word is "physical," which modifies both "loss" and "damage." "Physical" means "[o]f, relating to, or involving material things; pertaining to real, tangible objects." *Physical*, Black's Law Dictionary (11th ed. 2019). As the Eighth Circuit recently recognized, policy language covering "physical" loss or damage requires "some physicality to the loss or damage of property—*e.g.*, a physical alteration, physical contamination, or physical destruction." *Oral Surgeons*, 2021 WL 2753874, at *2 (applying Iowa law).

The policy in *Oral Surgeons* covered business income losses in cases of "accidental physical loss" to property (or "accidental physical damage" to property). *Id.* at *1.[2] The plaintiff in that case advanced the same argument as Wakonda here: that "physical loss" included *loss of use* after Governor Reynolds imposed business restrictions in the wake of the COVID-19 pandemic. Citing the district court's decision in this case, among other Iowa authorities, the Eighth Circuit easily determined that the plain meaning of "physical loss" did not encompass pandemic-related closures; instead, the words "physical loss" required tangible alteration to property. *Id.* at *2-3 & n.3 (citing, *inter alia*, *Wakonda Club v. Selective Ins. Co. of Am.*, No. LACL148208, slip op. at 6 (Iowa Dist. Ct. Mar. 3, 2021)).

In another decision cited by the Eighth Circuit in *Oral Surgeons*, the Iowa Court of Appeals reached the same conclusion. In *Milligan v. Grinnell Mutual Reinsurance Co.*, 2001 WL 427642 (Iowa Ct. App. Apr. 27, 2001), the Court of Appeals read the words "direct physical loss or damage" to require tangible change to property. *Id.* at *2. Under the at-issue policy, a coverage suit had to be brought within two years of "direct physical loss or damage."

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[2] The policy in *Oral Surgeons* did not contain a virus exclusion, so the Eighth Circuit had no occasion to consider the applicability of such an exclusion.

Id. at *1. The *Milligan* plaintiffs' property suffered physical fire damage, but they brought suit more than two years after the fire. The plaintiffs argued that their suit was timely because they initiated the suit less than two years after receiving repair estimates, an event that had no tangible effect on the insured property. The court found that the policy language could not support the plaintiffs' interpretation. *Id.* at *2. Instead, the policy "unambiguously referred to injury to or destruction of the [insured] realty." *Id.* This reading "f[ound] further support in the fact that the loss or destruction must be physical in nature." *Id.*

Wakonda tries to avoid *Milligan*, arguing (at 38) that the policy language in that case "dealt with a different and more restrictive definition of 'loss.'" But the *Milligan* policy referred to "direct physical loss or damage." Wakonda does not explain why that language is "more restrictive" than the virtually identical policy language here. As in *Milligan*, the word "physical" here unambiguously requires tangible loss or damage.

Numerous Iowa courts have applied *Milligan*'s reasoning to the same policy language at issue here to reject claims for business income losses occurring during the COVID-19 pandemic. As one court explained, "the phrase 'direct physical loss of or damage to property' requires a physical

invasion and loss of use is insufficient to trigger coverage without physical damage to the insured properties." *Whiskey River on Vintage, Inc. v. Ill. Cas. Co.*, 503 F. Supp. 3d 884, 897 (S.D. Iowa 2020) (citing *Milligan*); *accord Lisette Enters., Ltd. v. Regent Ins. Co.*, --- F. Supp. 3d ---, 2021 WL 1804618, at *5 (S.D. Iowa May 6, 2021); *Gerleman Mgmt., Inc. v. Atl. States Ins. Co.*, 506 F. Supp. 3d 663, 670 (S.D. Iowa 2020); *Palmer Holdings & Invs., Inc. v. Integrity Ins. Co.*, 505 F. Supp. 3d 842, 856 (S.D. Iowa 2020).[3] "[D]irect physical loss or damage requires tangible alteration of property and . . . loss of use alone is insufficient." *Gerleman Mgmt.*, 506 F. Supp. 3d at 670. Wakonda remarkably has nothing to say about these Iowa federal court cases in its brief.

Iowa courts' interpretation of "direct physical loss of or damage to" mirrors the consensus of courts nationwide. As the leading insurance treatise recognizes, "[t]he requirement that the loss be 'physical,' . . . is widely held to exclude alleged losses that are intangible or incorporeal." 10A *Couch on Insurance* § 148:46 (3d ed. 2021); *see, e.g.*, *Mama Jo's Inc. v. Sparta Ins. Co.*,

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[3] Additionally, a Missouri federal court recently applied the Eighth Circuit's decision in *Oral Surgeons* to reject a claim for COVID-19-related business income coverage involving the same language in a Selective policy. *United Hebrew Congregation v. Selective Ins. Co.*, 2021 WL 2823213, at *2-3 (E.D. Mo. July 7, 2021).

823 F. App'x 868, 879 (11th Cir. 2020) (collecting cases and concluding that mere economic losses are not "direct physical loss"). And in the specific context of claims for losses that occurred during the COVID-19 pandemic, "[t]he majority of courts . . . have found that the loss of use of property because of government closure orders because of COVID-19 does not constitute a direct physical loss of property to trigger coverage." *Bachman's Inc. v. Florists' Mut. Ins. Co.*, --- F. Supp. 3d ---, 2021 WL 981246, at *4 (D. Minn. Mar. 16, 2021).

2. Wakonda's interpretation would read the word "physical" out of the policy. If "physical loss" means any loss, including loss of use, the policy need not have included the word "physical." Interpreting "physical loss as requiring only loss of use stretches 'physical' beyond its ordinary meaning and may, in some cases[,] render the word 'physical' meaningless." *Lisette Enters.*, 2021 WL 1804618, at *5 (alteration in original) (quoting *Phoenix Ins. Co. v. Infogroup, Inc.*, 147 F. Supp. 3d 815, 825 (S.D. Iowa 2015)); *see also Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006). "The policy cannot reasonably be interpreted to cover mere loss of use when the insured's property has suffered no physical loss or damage." *Oral Surgeons*, 2021 WL 2753874, at *2.

Wakonda argues (at 34-35) that giving "physical" its ordinary meaning somehow conflicts with the policy's use of the disjunctive "or" between the words "loss" and "damage." The Eighth Circuit rejected that same argument in *Oral Surgeons*, as have numerous other courts. *See id.* at *2, *3 ("The complaint . . . alleged no facts to show that it had suspended activities due to direct 'accidental physical loss or accidental physical damage,' regardless of the precise definitions of the terms 'loss' or 'damage.'"); *see also, e.g.*, *Michael Cetta, Inc. v. Admiral Indem. Co.*, 506 F. Supp. 3d 168, 180 (S.D.N.Y. 2020).

The phrases "physical loss of . . . property" and "physical . . . damage to property" have distinct meanings. Loss of property refers to "destruction" or "ruin" of the property. *Loss*, Webster's Third New International Dictionary (2002). Damage refers to "harm to" property. *Damage*, Webster's Third New International Dictionary (2002). The word "loss" thus connotes complete destruction, while the word "damage" connotes "any other injury requiring repair." *Henry's La. Grill, Inc. v. Allied Ins. Co.*, 495 F. Supp. 3d 1289, 1295 (N.D. Ga. 2020). "As an illustrative example, a tornado that destroys the entirety of the restaurant results in a 'loss of' the restaurant, while a tree falling on part of the kitchen would represent 'damage to' the restaurant." *Id.*; *see also Real Hospitality, LLC v. Travelers Cas. Ins. Co.*, 499 F. Supp. 3d 288,

294-95 (S.D. Miss. 2020). Each word has independent meaning, but both require some degree of physical alteration of the property. For this reason, the decision below does not create superfluity in the policy.

Thus understood, the policy requires a suspension of business operations resulting from tangible destruction of or harm to actual property. Wakonda alleges neither. Accordingly, it is not entitled to business income coverage.

3. The Business Income provision's definition of "the period of restoration" confirms that the policy requires a physical alteration to property to trigger coverage. The provision covers lost business income "due to the necessary 'suspension' of [Wakonda's] 'operations' during the 'period of restoration.'" (App. 168). The "period of restoration" begins 72 hours after the "direct physical loss or damage" and ends when the property should be "repaired, rebuilt or replaced with reasonable speed" or when "business is resumed at a new permanent location." (App. 176). Each possible endpoint requires some sort of tangible change to the property: either a physical repairing of injury or a physical move to a new property after complete destruction. As the Eighth Circuit explained, "[t]hat the policy provides coverage until property 'should be repaired, rebuilt or replaced' or until

business resumes elsewhere assumes physical alteration of the property, not mere loss of use." *Oral Surgeons*, 2021 WL 2753874, at *2; *accord United Airlines, Inc. v. Ins. Co. of State of Pa.*, 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005) (citing cases), *aff'd* 439 F.3d 128 (2d Cir. 2006).

Wakonda's argument that "physical loss" means "loss of intended use" of property is incompatible with the definition of "period of restoration." Wakonda has not alleged that it repaired, rebuilt, or replaced its property, nor that it moved permanently to a new location. Absent any such allegation, it cannot show that it suffered losses due to a suspension of its operations during the "period of restoration."

4. Wakonda looks elsewhere in the policy to attempt to overcome the plain language of the Business Income provision, but the broader policy only reinforces Selective's reading.

Wakonda invokes (at 34, 53) the policy's Commercial General Liability Coverage ("Liability Policy") to support its argument, but the Liability Policy reaffirms the plain meaning of the Business Income provision. The Liability Policy indemnifies Wakonda for "those sums that [it] becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage.'" (App. 265). That policy defines "property damage" to include both "[p]hysical

injury to tangible property" and "[l]oss of use of tangible property that is not physically injured." (App. 279).

The Liability Policy's broader definition of "property damage" reflects the fact that the operative provision covers liability for "property damage," full stop, without the modifier "physical." By contrast, the Business Income provision requires "*physical* loss of or damage to" property. Wakonda's attempt to import into the Business Income provision a definition from a separate provision would improperly read the word "physical" out of the coverage provision.

Wakonda also argues (at 34) that, if Selective intended not to cover losses caused by loss of use of Wakonda's property, it should have excluded such losses specifically. That argument puts the cart before the horse. For a policy to exclude an otherwise-covered loss, the policy must cover the loss in the first place. An insurer properly denies coverage for losses that a policy does not cover, without needing to identify an exclusion specifically mentioning those losses.

In any event, Selective did exclude losses caused by loss of use of Wakonda's property. The Property Policy expressly excludes from property-related losses "loss or damage caused by or resulting from . . . loss of use."

(App. 182). That exclusion confirms that the Property Policy (as opposed to the Liability Policy) does not cover losses resulting from mere loss of use.

B. Wakonda's Outlier Cases Do Not Require a Different Result.

Wakonda cannot point to any case applying Iowa law accepting any of its arguments. Wakonda also has no credible response to the groundswell of authority, applying Iowa law and the law of other states, rejecting similar arguments. Wakonda characterizes that authority (at 39) as "several courts [that] have found against coverage." That assertion is a gross understatement: to date, more than *300* federal and state courts have ruled against plaintiffs bringing similar claims.[4]

Wakonda asserts (at 45) that "the majority of state courts ruling on business interruption claims and applying state law have been decided in favor of the insured." That is incorrect. According to the source it cites, the Covid Coverage Litigation Tracker, https://cclt.law.upenn.edu/, state courts have granted motions to dismiss in 70 percent of COVID-19-related cases. With one exception discussed below, Wakonda does not actually cite any state-court

[4] Given the volume of relevant cases, it is impractical to cite all cases nationwide that have rejected Wakonda's arguments. Selective has cited representative cases in this brief. A more comprehensive list of relevant cases is available at: https://cclt.law.upenn.edu/.

decisions in its coverage discussion. It does not demonstrate that its unidentified state-court cases involve similar allegations or policy language.[5] The lone case it cites arises under North Carolina law. Every case applying Iowa law has ruled for the insurer.

Wakonda predictably cites a handful of cases from other jurisdictions that have denied insurers' dispositive motions in similar cases. Those cases say nothing about Iowa law, have been repeatedly and explicitly rejected by other courts examining this question, and none has yet been upheld on appeal. Nor does any of those decisions involve a virus exclusion similar to the one at issue here (discussed in Section II). They provide no reason to rule for Wakonda.

In *Studio 417, Inc. v. Cincinnati Insurance Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020), a district court in the Eighth Circuit reasoned that the insurer's arguments conflated "loss" and "damage," requiring the court to read "physical loss" to mean mere "loss of use." The Eighth Circuit's decision in *Oral Surgeons* authoritatively abrogated that reasoning. Numerous courts

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[5] Well more than half of the state-court suits that survived a motion to dismiss are reported to have no virus exclusion in the relevant policy. *See* https://cclt.law.upenn.edu/judicial-rulings/.

have explicitly rejected *Studio 417*. *See, e.g.*, *Zwillo V, Corp. v. Lexington Ins. Co.*, 504 F. Supp. 3d 1034, 1043 (W.D. Mo. 2020); *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, 484 F. Supp. 3d 492, 502 (E.D. Mich. 2020). The *Studio 417* court also based its decision on allegations "that COVID-19 particles attached to and damaged [the plaintiffs'] property." 478 F. Supp. 3d at 803. Wakonda disclaimed any such infection in this case. (App. 14). Courts consistently have distinguished *Studio 417* on this basis. *See, e.g.*, *BBMS, LLC v. Cont'l Cas. Co.*, 504 F. Supp. 3d 1044, 1051 (W.D. Mo. 2020); *Turek*, 484 F. Supp. 3d at 502.

In *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.,* --- F. Supp. 3d ---, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021), a district court concluded that the plaintiffs experienced "a loss *of* their real property" because they could not use it for in-person dining, but the court made no attempt to give meaning to the word "physical." *Id.* at *11. And the court's discussion of the "period of restoration" definition (which differed from the one at issue here) overlooked language that contemplated physical alterations to the property. *Id.* at *2, *13. Many other courts have rejected *Henderson* as unpersuasive. *See, e.g.*, *Kahn v. Pa. Nat'l Mut. Cas. Ins. Co.*, --- F. Supp. 3d ---, 2021 WL 422607, at *7 (M.D. Pa. Feb. 8, 2021) (concluding

that *Henderson*'s interpretation renders the "period of restoration" language superfluous); *Equity Planning Corp. v. Westfield Ins. Co.*, --- F. Supp. 3d ---, 2021 WL 766802, at *13 (N.D. Ohio Feb. 26, 2021) (rejecting *Henderson* and reading the policy to require "some kind of tangible, material destruction or deprivation in full, or tangible, material harm in part").

North State Deli, LLC v. Cincinnati Insurance Co., 2020 WL 6281507 (N.C. Super. Oct. 9, 2020), which did not include a virus exclusion, relied on the same argument advanced by Wakonda here that "physical loss" must mean "loss of use" to avoid rendering the word "loss" superfluous. Selective has already demonstrated the flaw in that reasoning. Courts have rejected *North State Deli* as well. *See, e.g.*, *Tria WS LLC v. Am. Auto. Ins. Co.*, --- F. Supp. 3d ---, 2021 WL 1193370, at *7 n.5 (E.D. Pa. Mar. 30, 2021) (noting that *North State Deli* failed to consider the "period of restoration" language); *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.*, --- F. Supp. 3d ---, 2021 WL 141180, at *5 n.1 (N.D. Cal. Jan. 13, 2021) (finding *North State Deli* unpersuasive "[d]ue to its lack of analysis and the vast majority of courts contradicting [its reasoning]").

In re Society Insurance Co., --- F. Supp. 3d ---, 2021 WL 679109 (N.D. Ill. Feb. 22, 2021), is similarly flawed. In that case (which likewise did not

involve a virus exclusion), the court implausibly interpreted the term "physical loss" to cover restrictions on use of property, on the theory that a business could serve more customers by expanding its physical premises. *Id.* at *9. Even more implausibly, the court dismissed the relevance of the "period of restoration" definition by equating a business's installation of safety features like partitions with a "repair." *Id.* Numerous courts have appropriately rejected this case. *See, e.g.*, *Town Kitchen LLC v. Certain Underwriters at Lloyd's, London*, --- F. Supp. 3d ---, 2021 WL 768273, at *5 (S.D. Fla. Feb. 26, 2021) (disagreeing that loss of use constitutes "physical loss"); *Tria WS*, 2021 WL 1193370, at *7 n.5 (*In re Society*'s analysis "contort[s] [the 'period of restoration'] provisions far beyond their ordinary meaning").

Finally, Wakonda invokes *Turek Enterprises*, but that decision held that the policy did not cover the business interruption claim and, alternatively, that the virus exclusion barred coverage. 484 F. Supp. 3d at 501, 504. Wakonda cites dicta in that case speculating that "Plaintiff's interpretation would be plausible if, instead, the term at issue were 'accidental direct physical loss *of* Covered Property.'" *Id.* at 501 (emphasis added). But there is no material distinction between "physical loss of" (Wakonda's policy) and "physical loss to" (the *Turek* policy). Both require that the loss be "physical."

In short, Wakonda's cases conflict with Iowa law as set forth in *Milligan* and *Oral Surgeons*. This Court should join the chorus of courts nationwide rejecting these outlier cases.

C. The Parties' "Reasonable Expectations" Do Not Compel a Different Result.

Wakonda's resort to the doctrine of reasonable expectations does not save its flawed interpretation. This "carefully circumscribed" doctrine applies only when the insurer "fostered coverage expectations" or "the policy is such that an ordinary layperson would misunderstand its coverage." *Boelman*, 826 N.W.2d at 506. Even then, the insured must further show that the policy provision "(1) is bizarre or oppressive, (2) eviscerates terms explicitly agreed to, or (3) eliminates the dominant purpose of the transaction." *Id.* (quoting *Clark-Peterson Co. v. Indep. Ins. Assocs.*, 492 N.W.2d 675, 677 (Iowa 1992)).

Wakonda cannot satisfy this demanding standard. It identifies no conduct by Selective that fostered coverage expectations. And, for all the reasons set forth above, nothing in the Property Policy would confuse an ordinary layperson about the scope of its coverage. An ordinary layperson would understand the Property Policy to cover physical destruction of or injury to property.

Additionally, Selective's interpretation is not "bizarre or oppressive," it does not "eviscerate[] terms explicitly agreed to," and it does not "eliminate[] the dominant purpose of the transaction." *Id.* Wakonda fully retains the benefit of its bargain: the policy protects Wakonda in the event it loses its physical property (for example, due to a fire) or its physical property is injured.

By contrast, Wakonda's interpretation has no "manageable bounds," *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co.*, 492 F. Supp. 3d 1051, 1056 (C.D. Cal. 2020), and would lead to absurd results. Coverage for loss of use without physical alteration of property "would mean that direct physical loss or damage is established *whenever* property cannot be used for its intended purpose." *Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005). On that theory, property insurers would be responsible for covering any risk of interruption of an insured's business operations at its premises—for example, protests blocking access to a premises—even without "physical loss of or damage to property." "Policyholders are not insuring against 'all risks' to their income—they are insuring against 'all risks' to their property—that is, the building and its contents." *Real Hospitality*, 499 F. Supp. at 294 n.9. A court cannot rewrite

the policy to provide coverage the contract does not contain. *Amish Connection*, 861 N.W.2d at 236.

II. ALTERNATIVELY, THE VIRUS EXCLUSION BARS COVERAGE.

Even if the Property Policy provided coverage (it does not), the policy's Virus Exclusion independently bars coverage for Wakonda's business losses. Pursuant to that provision, Selective 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." (App. 179). Wakonda does not dispute that the COVID-19 pandemic resulted from a virus "that induces or is capable of inducing physical distress, illness or disease." As many courts around the country (including in Iowa) have recognized, losses such as Wakonda's "result[ed]" from the virus that caused the COVID-19 pandemic, without which those losses would not have occurred. *See Lisette Enters.*, 2021 WL 1804618, at *6; *Gerleman Mgmt.*, 506 F. Supp. 3d at 671-72; *Palmer Holdings*, 505 F. Supp. 3d at 858-59; *Whiskey River*, 503 F. Supp. 3d at 901-02.[6]

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[6] *See also, e.g.*, *10E, LLC v. Travelers Indem. Co.*, 500 F. Supp. 3d 1070, 1074 (C.D. Cal. 2020); *Mashallah, Inc. v. W. Bend Mut. Ins. Co.*, 2021 WL 679227, at *2 (N.D. Ill. Feb. 22, 2021).

Wakonda does not address the text of the Virus Exclusion. "Where there is no textual or contextual indication to the contrary, courts regularly read phrases like 'results from' to require but-for causality." *Burrage v. United States*, 571 U.S. 204, 212 (2014); *see also Allstate Ins. Co. v. Steele*, 74 F.3d 878, 881 (8th Cir. 1996) (construing "resulting from" in an insurance policy to mean but-for causation). Citing *Burrage*, the Iowa Court of Appeals has agreed that "results from" in an insurance contract refers to but-for causation. *City of W. Liberty v. Emps. Mut. Cas. Co.*, 2018 WL 1182764, at *5 (Iowa Ct. App. Mar. 7, 2018), *aff'd*, 922 N.W.2d 876 (Iowa 2019). Wakonda offers no reason to read "resulting from" differently here.

The coronavirus that causes COVID-19 unquestionably is a but-for cause of Wakonda's claimed losses. But for that virus, Governor Reynolds would not have suspended in-person dining, and Wakonda would not have suffered its claimed losses. *See Berte v. Bode*, 692 N.W.2d 368, 372 (Iowa 2005) ("[T]he defendant's conduct is a cause in fact of the plaintiff's harm if, but-for the defendant's conduct, that harm would not have occurred." (quoting Dan B. Dobbs, *The Law of Torts* § 168, at 409 (2000))). The Governor's Proclamation resulted from the virus; its "whereas" clauses identified "multiple cases of

COVID-19" in Iowa and explained that "state assistance is needed to manage and contain this outbreak." (App. 695-96).

Wakonda asserts (at 47), with no legal analysis, that Governor Reynolds' Proclamation is the "real cause" of its claimed losses. "Similar COVID-19 causation arguments have been consistently rejected." *Chattanooga Prof'l Baseball LLC v. Nat'l Cas. Ins. Co.*, 2020 WL 6699480, at *3 (D. Ariz. Nov. 13, 2020). The district court correctly rejected that argument. As the court explained, "[t]he proclamation was not issued in isolation but as a direct result of the pandemic." (App. 1255); *see also, e.g.*, *Lisette Enters.*, 2021 WL 1804618, at *6 ("The virus played a part in Plaintiff's closure. The Virus Exclusion therefore applies. . . . But-for the pandemic, the Governor would not have issued her Proclamation . . . ."). Whether the issuance of the Proclamation is *a* cause of Wakonda's claimed losses is immaterial, because a loss may result from multiple, related causes.

Wakonda argues (at 47) that the virus did not cause its suspension of operations because Governor Reynolds "lifted all restrictions on restaurants on February 7, 2021 despite the ever-present existence of the virus." It cannot deny, however, that the virus caused Governor Reynolds to issue the original

proclamation limiting Wakonda's operations. Wakonda's claimed losses thus resulted from the virus.

Wakonda does not attempt to reconcile its argument with the near-uniform collection of case law holding similarly worded virus exclusions to foreclose coverage in these circumstances. Wakonda identifies a total of two decisions rejecting application of virus exclusions, both in Ohio. *Henderson* involved a wholly different exclusion. The provision there excluded coverage 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.'" 2021 WL 168422, at *14. The court interpreted that distinct language to require physical presence of microorganisms at the plaintiffs' properties. *Id.* The "significant differences" between that language and the language in Wakonda's policy make *Henderson* inapposite, as courts have recognized. *E.g.*, *Dye Salon, LLC v. Chubb Indem. Ins. Co.*, --- F. Supp. 3d ---, 2021 WL 493288, at *8, *10 (E.D. Mich. Feb. 10, 2021). In any event, the *Henderson* court provided no basis for reading into that distinct exclusion a requirement that the "presence" or "activity" of the microorganism exist at the subject property.

McKinley Development Leasing Co. v. Westfield Insurance Co., 2021 WL 506266 (Ohio Ct. Common Pleas Feb. 9, 2021), applied *Henderson* to hold that a policy's virus exclusion was ambiguous. *Id.* at *5-6. The court reasoned that the virus exclusion did not apply because "a virus is not the same as a pandemic." *Id.* at *5. The court did not acknowledge, however, that viruses cause pandemics. Its reasoning is plainly wrong.

III. ALTERNATIVELY, THE ORDINANCE OR LAW EXCLUSION BARS COVERAGE.

Finally, the Ordinance or Law Exclusion—which Selective invoked below—forecloses Wakonda's claim.[7] The Property Policy excludes coverage for "[t]he enforcement of or compliance with any ordinance or law . . . [r]egulating the construction, use or repair of any property." (App. 180). Governor Reynolds' Proclamation—which Wakonda argues caused its losses—unquestionably qualifies as a law or ordinance regulating the use of property.

As relevant here, the Proclamation implemented section 135.144(3) of the Iowa Code, which authorizes the Governor and the Department of Public

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[7] Although the trial court did not rely on the Ordinance or Law Exclusion, this Court can uphold the decision below on any ground preserved below and supported by the record. *See State v. Howard*, 509 N.W.2d 764, 768 (Iowa 1993).

Health to "[t]ake reasonable measures as necessary to prevent the transmission of infectious disease and to ensure that all cases of communicable disease are properly identified, controlled, and treated." Iowa Code § 135.144(3); *see also* Iowa Code § 29C.6(1) (authorizing Governor to "proclaim a state of disaster emergency"). The Proclamation (which the Governor issued "in conjunction with the Iowa Department of Public Health" (App. 699)) carried the force of law. *See* Iowa Code § 135.38 ("Any person who knowingly violates . . . any lawful order, written or oral, of the department or of its officers, or authorized agents, shall be guilty of a simple misdemeanor."). And the Proclamation regulated the use of property, because it legally limited restaurants and bars to service of food and beverage items "promptly taken from the premises." (App. 699).

Wakonda does not deny that its claimed losses arose from a law or ordinance as those terms are commonly understood. Wakonda instead argues (at 50) that applying the plain terms of the Ordinance or Law Exclusion would nullify its Civil Authority coverage. Under the policy, Civil Authority coverage applies in one specific situation: where "action" by a "civil authority" restricts access to property because of danger from a covered cause of loss occurring near Wakonda's property. (App. 169). As discussed above, for example, if a

fire (a covered cause of loss) occurred at a neighboring property, and the fire department temporarily restricted access to Wakonda's premises, the Civil Authority provision would cover Wakonda's lost income during the period of restricted access.

To be clear, although Wakonda argued in the trial court that the Civil Authority provision covers its claimed losses (App. 958), it has abandoned that argument on appeal. It argues only that Selective's interpretation of the Ordinance or Law Exclusion cannot be reconciled with the Civil Authority provision. That argument ignores the differences in scope and application of the two provisions. As just discussed, Civil Authority coverage is triggered in cases where the government acts in a geographically targeted fashion in reaction to some physical loss or damage to property that would qualify as a covered cause of loss. By contrast, the Ordinance or Law Exclusion applies in cases of generally applicable ordinances or laws regulating use of property, such as Governor Reynolds' statewide Proclamation. In addition, the Civil Authority coverage provides insurance when *access* to the insured property is prohibited; the Ordinance or Law Exclusion concerns regulation of the *use* of property, rather than access to the property. Nothing about applying the

Ordinance or Law Exclusion in this circumstance would nullify the Civil Authority provision.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

REQUEST FOR ORAL ARGUMENT

Defendant-appellee respectfully requests to be heard orally upon the submission of this appeal.

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that he, or a person acting on his behalf, filed the Final Brief of Appellee with the Clerk of the Iowa Supreme Court via EDMS on September 1, 2021.

The undersigned further certifies that on September 1, 2021, he, or a person acting on his behalf, did serve the Final Brief of Appellee on counsel of record to this appeal via EDMS.

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Dated: September 1, 2021

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