IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

JDS Construction Group, LLC, and 9 Dekalb Fee Owner LLC, Plaintiffs, v. Continental Casualty Company, Defendant.	Case No. 2020 CH 5678 Calendar 2

ORDER

RAYMOND W. MITCHELL, Circuit Judge.

Defendant Continental Casualty Company moves for reconsideration of an August 12, 2021 decision denying Defendant's motion to dismiss Plaintiffs JDS Construction Group, LLC and 9 Dekalb Fee Owner LLC's first amended complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure.

The August 12, 2021 Order denied Defendant's motion to dismiss Plaintiffs' complaint, because that complaint explicitly alleges "physical loss or damage" to the insured property based on the presence of SARS CoV-2, the virus that causes COVID-19. As an initial matter, Defendant devoted a significant portion of its motion to reconsider to argue that I had mistakenly applied Illinois law and that the August Order somehow "created a conflict with New York law." However, at the hearing on the reconsideration motion, Defendant's counsel conceded that the legal standard articulated in the August 12, 2021 Order was, in fact, the correct one. New York and Illinois law are in accord, and courts in both states have adopted identical interpretations of the policy-triggering language "direct physical loss or damage." *See* 8/12/21 Order at 3.

Defendant has cited numerous decisions from New York and Illinois, asserting that courts in both jurisdictions have uniformly — or, at least, overwhelmingly — concluded that the presence of the virus does not trigger coverage under a policy requiring "direct physical loss of or damage to property." In fact, Defendant has cited to COVID coverage cases in which I too have dismissed complaints. *See, e.g., MTDB Corp. d/b/a Striker Lanes v. American Automobile Ins. Co.,* No. 20 CH 5257 (Ill. Cir. Ct. Cook Cnty. July 16, 2021); *Royale Bezjian Bros.,*

Inc. v. Pekin Ins. Co., No. 20 CH 4954 (Ill. Cir. Ct. Cook Cnty. July 16, 2021). Of course, trial court decisions, particularly those untested on appeal, have no precedential value. But more importantly, whatever inference can be drawn from any particular dismissal necessarily depends on the allegations in the complaint and the arguments advanced by counsel in that specific case. In the *MTDB*, for example, the complaint merely alleged a probability of the presence of the virus, and did not contain specific, detailed allegations that the virus in any way altered the subject property. The same is true for the complaint in *Bezjian*.

What is remarkable about Defendant's reconsideration motion is that it is bereft of even a single citation to the Plaintiffs' complaint. The complaint alleges not only the presence of the virus on the insured premises, but also how the virus droplets were conveyed to solid surfaces and into the air and HVAC system, causing structural damage and alteration to the property:

> 46. First, respiratory droplets (*i.e.*, droplets larger than 5-10 μm) expelled from infected individuals land on, attach, and adhere to surfaces and objects. In doing so, they structurally change the property and its surface by becoming a part of that surface. This structural alteration makes physical contact with those previously safe, inert surfaces (*e.g.*, fixtures, handrails, furniture) unsafe.
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> 52. When the coronavirus and COVID-19 attach to and adhere on surfaces and materials, they become a part of those surfaces and materials, converting the surfaces and materials to fomites. This represents a physical change in the affected surface or material, which constitutes physical loss and damage.
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> 53. Merely cleaning surfaces may reduce but does not altogether eliminate the risk of transmission amongst people. There may be surfaces with residual infectious virus, and aerosolized infectious particles. In other words, disinfection is temporary at best; however, a space may remain contaminated if an aerosol is present, and immediately become contaminated thereafter if another infected person is present in the area. This contamination will provide a constant modality for infection to people.
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> * * * *

99. When individuals carrying the coronavirus breathe, talk, cough, or sneeze, they expel aerosolized droplet nuclei that remain in the air and, like dangerous fumes, make the premises unsafe and affirmatively dangerous. In addition, the coronavirus physically alters the air. Air inside buildings that was previously safe to breathe but can no longer safely be breathed due to coronavirus and COVID-19, has undergone a physical alteration.

100. Coronavirus droplets have been conveyed from infected persons (whether symptomatic, pre-symptomatic, or asymptomatic) to solid surfaces, including but not limited to furniture, doors, floors, bathroom facilities, equipment, and supplies, and into the air and HVAC system at Plaintiffs' properties, causing damage and alteration to physical property and ambient air at the premises. Aerosolized coronavirus has entered the air in Plaintiffs' properties.

101. The presence of the coronavirus and COVID-19, including but not limited to coronavirus droplets or nuclei on solid surfaces and in the air at insured property, has caused and will continue to cause direct physical damage to physical property and ambient air at the premises. Coronavirus, a physical substance, has attached and adhered to Plaintiff's properties, and by doing so, altered that property. Such presence has also directly resulted in loss of functionality of that property.

Compl. ¶¶ 46, 52-53, 99-101. A complaint need only set forth the ultimate facts to be proved. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 369 (2004). Most importantly, a court must take as true and construe the allegations in the light most favorable to the plaintiff and draw all reasonable inferences in the plaintiff's favor. *Young v. Bryco Arms*, 213 Ill. 2d 433, 441 (2004).

Defendant's counsel argues that it does not matter what Plaintiffs alleged in their complaint because a virus like SARS-CoV-2 can *never* trigger coverage since it can just be wiped off. How do I know that? Counsel suggests that it is a "fact" subject to judicial notice, but at least in Illinois, only commonly known facts beyond reasonable dispute are subject to judicial notice. Ill. R. Evid. 201(b). Hard to imagine that emerging "facts" about a *novel* coronavirus would satisfy that standard. There is far from universal agreement on how the virus attaches to

surfaces and the effectiveness of efforts to remove the virus.[1] More importantly, it is procedurally improper to introduce facts from outside the complaint in a motion to dismiss brought under section 2-615. *See, e.g., Seith v. Chi. Sun-Times, Inc.*, 371 Ill. App. 3d 124, 133 (1st Dist. 2007) (section 2-615 is strictly limited to the four corners of the complaint). Indeed, the complaint alleges that "[m]erely cleaning surfaces may reduce but does not altogether eliminate the risk of transmission" and that "disinfection is temporary at best." Compl. ¶ 53. On a motion to dismiss, that allegation must be accepted as true. Introducing a "fact" that contradicts an allegation of a complaint is never a basis for dismissal. Resolving such a fact conflict is what trials are for.

There seems to be some suggestion that the August 12, 2021 Order must be wrong because so many other courts have reached a contrary conclusion. Economists refer to this as an appeal to "herding behavior"—a process by which group-think replaces individual decision-making. As set out above, I do not quarrel with the contrary decisions (my own included), but those decisions are not helpful in determining whether the facts alleged in this complaint satisfy the legal standard, a standard which Defendant now concedes was correctly articulated. Judges are not sheep, and I do not decide a case by counting noses. Further, the "herd" can be wrong. *See, e.g.,* A. Daughety et al., "Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts," 1 *American Law and Economics Review* 158 (Fall 1999) (analyzing a cascade of decisions among various circuits of United States Court of Appeals on a single point of law later invalidated by the United States Supreme Court). As I have said, I always welcome motions to reconsider because I approach the judicial role with humility and a recognition of my own limitations. After full briefing and argument on this motion to reconsider, I am more convinced now than ever as to the correctness of my original decision. As a consequence, the August 12, 2021 Order stands.

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[1] *See, e.g.,* N. Cimolai et al., "Environmental and Decontamination Issues for Human Coronaviruses and Their Potential Surrogates," *Journal of Medical Virology* 2020; 92: 2498-2510; M. Aydogdu et al., "Surface Interactions and Viability of Coronavirus," *Journal of the Royal Society Interface* 18: 20200798.

III.

It is hereby ORDERED:

1. Defendant Continental Casualty Company's motion to reconsider the August 12, 2021 Order is DENIED.

2. The case is continued for a case management conference on November 17, 2021 at 10:30 a.m. for the purpose of setting a comprehensive schedule including a dispositive motion cut-off date and trial date.

   Zoom Meeting ID: 940 2104 4687

   Password: 296476

ENTERED,

Raymond W. Mitchell, Judge No. 1992

Judge Raymond W. Mitchell

OCT 25 2021

IRIS Y. MARTINEZ
Circuit Court-1992