

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
LAW DIVISION**

CADILLAC FUNDING ASSOCIATES, LLC,	)	
	)	Case No. 2020L006709
Plaintiff,	)	Calendar W
vs.	)	
	)	
ZURICH AMERICAN INSURANCE	)	
COMPANY,	)	
	)	
Defendant.	)	

**ORDER**

This matter coming to be heard on on October 1, 2021 via Zoom video conferencing (i) Defendant Zurich American Insurance Company’s (“Zurich”) Motion for Leave to Submit Supplemental Authority; (ii) Plaintiff Cadillac Funding Associates’ (“Cadillac Funding”) oral Motion for Leave to Submit Supplemental Authority; and (iii) Zurich’s Combined Motion For Dismissal (“Combined Motion”), the Court having received the briefing submitted by the parties, having heard oral argument from counsel, and being fully advised in the premise;

**IT IS HEREBY ORDERED:**

1. Zurich’s Motion for Leave to Submit Supplemental Authority is GRANTED;
2. Cadillac Funding’s oral Motion for Leave to Submit *Novant Health, Inc. v. Am. Guarantee and Liability Ins. Co.*, No. 1:21-cv-00309 (M.D.N.C. Sept. 23, 2021) as supplemental authority is GRANTED;
3. The 2-615 motion to dismiss is GRANTED without prejudice..
4. That part of the Combined Motion seeking dismissal pursuant to 735 ILCS 5/2-615(a) (relating to Cadillac Funding’s claims for Business Interruption, Extra Expense, Contingent Time Element, Extended Period of Liability, and Interruption By Civil Authority and Military Authority coverage under Policy No. PPR 3700638-17 (the “2019 Policy”) and Policy No. PPR 3700638-18 (the “2020 Policy”)), is GRANTED, with prejudice, for the reasons stated on the record in open court. .
5. That part of the Combined Motion seeking dismissal pursuant to 735 ILCS 5/2-619(a)(9) (relating to Cadillac Funding’s claims for Cancellation of Bookings coverage under the 2019 Policy and the 2020 Policy renewal), is hereby DENIED, without prejudice, for the reasons stated on the record in open court.

6. Cadillac Funding is granted leave to file a Second Amended Complaint relating solely to Cancellation of Bookings coverage for both the 2019 and 2020 Policies on or before November 1, 2021.
7. Zurich shall answer, move, or otherwise plead in response to the Second Amended Complaint on or before November 30, 2021.
8. This matter is set for status on the amended pleadings on December 1, 2021 at 9:00am CST via Zoom video conferencing. **Meeting ID: 921 0771 7798**  
**Password: 88178.**

ENTERED

Judge Diane M. Shelley  
OCT 15 2021  
Circuit Court - 1925

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Hon. Diane M. Shelley #1925

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IN THE CIRCUIT COURT OF COOK COUNTY ILLINOIS  
LAW DIVISION

CADILLAC FUNDING ASSOCIATES,  
LLC,  
Plaintiff,

vs.

ZURICH AMERICAN INSURANCE  
COMPANY,  
Defendants.

~~~~~

ORAL ARGUMENT

October 1, 2021

3:02 p.m. EST

All parties appeared remotely

Aria Edwards, NP0732568

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13 Also Present: Daniel Robbin, Law Clerk;

14 Darneshia Armstead, Court Clerk

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INDEX OF EXAMINATION

PROCEEDING: ORAL ARGUMENT

INDEX TO EXHIBITS

(None marked.)



1  
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ORAL ARGUMENT

October 1, 2021

JUDGE SHELLEY: Good afternoon, everyone. I see that some of you are still connecting. Do we have a court reporter on the line?

COURT REPORTER: Yes, ma'am. I'm here. My name is Aria.

JUDGE SHELLEY: Madam Court Reporter, I can't hear you, but I saw your lips moving.

COURT REPORTER: Are you able to hear me now?

JUDGE SHELLEY: Yes. I am. Good afternoon.

COURT REPORTER: Good afternoon. Good afternoon.

JUDGE SHELLEY: I would ask that you continue to run your video while transcribing. You must have your video on. I must be able to observe you while you're transcribing. If you have a problem in understanding anything, just raise your hand and you'll have to waive it in the air a couple of times to get our attention. At this time, I'm going to ask the clerk to call the case.

CLERK: Good afternoon. This is the 2:00 case, Cadillac Funding versus Zurich American Insurance.

JUDGE SHELLEY: Attorneys, please in --

1 introduce yourselves for the record.

2 MR. HURST: I am John Hurst, Your Honor. Good  
3 afternoon. For the plaintiffs.

4 MR. ROOF: This is Brian Roof on behalf of  
5 Plaintiff as well.

6 MR. LENERT: And Michael Lenert on behalf of  
7 the plaintiff.

8 MR. GROSSBART: John Grossbart, Your Honor, on  
9 behalf of Zurich.

10 MS. CLAIR: Alanna Clair on behalf of Zurich.

11 MR. SILVERBERG: And I think last but not  
12 least, Philip Silverberg on behalf of Zurich.

13 JUDGE SHELLEY: Okay. Good afternoon,  
14 attorneys. This matter is coming on to be heard on  
15 Defendant's motion to dismiss pursuant to 26.15, and  
16 26.19. In addition, Defendant has filed the motion  
17 to submit supplementary authority. Let's begin with  
18 the motion to submit supplementary authority.  
19 Plaintiff, I'm assuming you have no objection.

20 MR. HURST: Well, Your Honor, we're -- we're  
21 prepared to discuss the supplemental authority. The  
22 reason -- the only thing I would add to that is that  
23 we were going to submit our on supplemental  
24 authority for cases that arose after September 21st,  
25 but in recognition of the Court's July order saying

1 that all papers had to be submitted for this motion  
2 proceeding by September 21st, we did not do our own  
3 request for notice of supplemental authority for  
4 cases that have arisen since then that have denied  
5 motions to dismiss. So, you know, we don't have an  
6 objection. I -- I -- we would request that the  
7 Court allow us to file our own notice of  
8 supplemental authority for those other cases denying  
9 motions to dismiss since September 21st.

10 JUDGE SHELLEY: Thank you, Counsel. The  
11 supplemental request to file supplemental  
12 authorities addresses a specific case, the Santo and  
13 Battalion Cafe case, Case Number 21-3068, a Sixth  
14 Circuit decision that came down on  
15 September 22, 2021. I had an opportunity to look at  
16 it, and it kind -- it basically reiterates the  
17 defendant's position. Attorney Hurst, what I need  
18 to know is whether you have located other cases that  
19 contradicts this decision or raises issues that are  
20 in opposition to this decision that I need to look  
21 at. And you feel that you haven't been given an  
22 opportunity to - - to submit to the Court.

23 MR. HURST: Your Honor, there is another case  
24 that was just decided on September 23rd. It's  
25 called Novant Health, Inc. and it's in the District

1 Court for the District of North Carolina. It's  
2 against another Zurich American company. And that  
3 case states that the plaintiff in that case, Novant,  
4 had adequately alleged physical losses, and that the  
5 -- that there was potential coverage under the  
6 policy. So that is a case that's contrary to the  
7 Sixth Circuit case, Your Honor.

8 JUDGE SHELLEY: Counsel, would you please give  
9 us the citation?

10 MR. HURST: This is a slip decision. It just  
11 came out, Your Honor. Would I be able to e-mail  
12 that -- to find it an e-mail it to the Court?

13 JUDGE SHELLEY: Yes. You can e-mail it to my  
14 law clerk. Attorney Robbin, would you put your e-  
15 mail address -- direct e-mail address in the chat.  
16 But I do want it -- Counsel, there should be a  
17 number on it even if it's a slip opinion, correct?

18 MR. HURST: Yes. There's a -- there is a  
19 number, Your Honor, it's 1:21-CV-309.

20 JUDGE SHELLEY: Okay. Okay. That -- I think  
21 attorney Robbin you can locate that, correct -- by  
22 the slip opinion. But you can send it. Okay. And  
23 Counsel, at issue are we -- in that case and I want  
24 the record to reflect that I have not read that  
25 case. At issue are their allegations of COVID

1 infiltration, or some other type of viral or  
2 bacterial infiltration.

3 MR. HURST: Would you like me to go over, Your  
4 Honor?

5 JUDGE SHELLEY: Yes. Please.

6 MR. HURST: For the plaintiff. Okay. So we're  
7 talking about the Sixth District case?

8 JUDGE SHELLEY: Yes.

9 MR. HURST: Okay.

10 JUDGE SHELLEY: No. Counsel, I'm so sorry. I  
11 maybe had -- I wasn't clear. I'm speaking of this  
12 Novant Health Care case that you just brought to the  
13 Court's attention?

14 MR. HURST: Yes, Your Honor. There were  
15 allegations that it was -- it was very similar to  
16 our situation, allegations of physical loss or  
17 damage, and the presence of COVID-19 on the  
18 property, and the Court ruled that the allegations  
19 in the complaint were sufficient to overcome a  
20 motion to dismiss.

21 JUDGE SHELLEY: Okay. And who will be speaking  
22 on behalf of the defendants this to -- this  
23 afternoon?

24 MR. SILVERBERG: Your Honor, that will be me,  
25 Philip Silverberg.

1 JUDGE SHELLEY: Okay. Attorney Silverberg, are  
2 you familiar with this case?

3 MR. SILVERBERG: Just, but you -- are you  
4 talking about the North Carolina case, Your Honor?  
5 The lower court case in North Carolina, the District  
6 Court case?

7 JUDGE SHELLEY: Yes. That's the Novant Health,  
8 Inc. v. American Guarantee and Liability Insurance.

9 MR. SILVERBERG: Yeah, I will confess that I  
10 have not fully read the opinion. I'm, you know, I'm  
11 generally aware that -- of the -- of fact of the  
12 decision.

13 JUDGE SHELLEY: Okay. Well, what I must  
14 determine is whether or not it has an impact on our  
15 proceeding today without me having read it. And as  
16 you're speaking, I'm pulling it up now.

17 MR. SILVERBERG: Okay. Is there a question  
18 pending, Your Honor, I don't want to --

19 JUDGE SHELLEY: No there is not.

20 MR. SILVERBERG: Okay.

21 JUDGE SHELLEY: If you would like to make a  
22 statement, you may.

23 MR. SILVERBERG: Well, I would just very  
24 briefly, you know, there were about three to 400 of  
25 these COVID decisions we did seek leave to -- for

1 the supplemental authority. That was a Circuit  
2 Court decision, an appellate decision. So we  
3 thought it was important. That was also important  
4 because it in essence vacates a ruling that  
5 Plaintiff spent a fair amount of time in their  
6 briefing Henderson Road, which was another case.  
7 And in fact, the Henderson Road decision was just  
8 two days ago. And that was one of those very few  
9 cases that went against the insurance in the COVID  
10 coverage context vacated the Henderson Road decision  
11 so that -- that is why we submitted it. I will  
12 admit that there are what we would call outlier  
13 decisions in certain jurisdictions, but they are  
14 very few and far between and it would be our  
15 position that this Novant case is no different than  
16 those few and far between outlier decisions, and  
17 certainly doesn't reflect what is the overwhelming -  
18 - vast majority of the case law coming out of  
19 Illinois, both in the federal courts and in the  
20 circuit courts law and chancery division. Most  
21 significantly coming out of Cook County.

22 JUDGE SHELLEY: The Court will allow the  
23 supplemental authority cited by the defendant and  
24 the Court will also take into consideration the  
25 supplemental authority presented this mor -- this

1 afternoon by Plaintiff, namely the Novant Health  
2 Inc. case.

3 MR. HURST: Your Honor, may I just briefly  
4 address the remarks of Mr. Silverberg on the Santo's  
5 Italian Cafe case they submitted?

6 JUDGE SHELLEY: Counsel, I'm going to turn the  
7 entire floor over to you, and because well, I'm  
8 sorry, I will not turn it over to you. I'm  
9 addressing the wrong party. Can I turn it over to  
10 Attorney Silverberg, allow him to present his  
11 motion, and then you'll have a full opportunity to  
12 respond. You can address Santos and you can address  
13 Novant at that time.

14 MR. HURST: Thank you, Your Honor.

15 JUDGE SHELLEY: Okay. Attorney Silverberg, the  
16 floors yours.

17 MR. SILVERBERG: Thank you, Your Honor. Let me  
18 start by saying that there is no question that  
19 Plaintiff, like many businesses across the country  
20 and around the world, suffered financial loss  
21 because of the pandemic. COVID has had a negative  
22 impact on businesses worldwide, especially  
23 businesses that deal with the public on a daily  
24 basis. Not surprisingly, that would include a hotel  
25 operation, much like we've seen a lot of the cases



1 out there involving hotels, gyms, restaurants, and  
2 that sort. What the law is pretty much across the  
3 country and as I think I just mentioned earlier,  
4 there's I think three or 400 decisions out there in  
5 virtually every jurisdiction where the courts have  
6 held in one fashion or another that the presence of  
7 COVID or even the potential presence of COVID does  
8 not cause physical loss or damage to property. Now,  
9 might it be that the potential presence of COVID is  
10 something that's dangerous? No question it's a  
11 danger to human beings. That's why a lot of the  
12 stay-at-home orders to prevent the transmission of  
13 this virus from human-to-human. Well, it may be  
14 dangerous, it is not property damage, it is not  
15 physical loss or damage. What's at issue in this  
16 lawsuit are two first-party property policies issued  
17 to Marriott International and certain franchisees,  
18 and other operations under the Marriott license  
19 including the plaintiff here. The two policies are  
20 consecutive year policies, a policy from nine --  
21 from 2019 to '20 and then the policy from 2020 to  
22 2021.

23 JUDGE SHELLEY: Now, they're contesting the  
24 2021 modification, correct? Regarding the inclusion  
25 of the communicable disease provision.

1 MR. SILVERBERG: They -- well, they are  
2 contesting that, and I'm prepared to address that  
3 now or later. Let me just point out that those are  
4 exclusions. And as I think I mentioned earlier, in  
5 fact, as I know I mentioned earlier, there's a --  
6 and certainly the point in our briefing is that  
7 while, Your Honor, you're certainly free and clearly  
8 Your Honor will consider the exclusions, you don't  
9 get to the exclusions unless you first find that  
10 there's been covered physical loss or damage. And  
11 the thrust of our motion and would certainly deal  
12 with exclusion, and I will deal with them this  
13 afternoon before Your Honor and hopefully be able to  
14 answer any questions you have. Is that if you  
15 choose to address those exclusions, those exclusions  
16 also would exclude what's being alleged here, but  
17 you don't get to it because it's not physical loss  
18 or damage. And that really picks up exactly where I  
19 was about to go. These are first-party property  
20 policies that ensure, "against all risk of direct  
21 physical loss or damage. " And what I just read --  
22 what I just read in quotes is from the policies of  
23 insurance at issue. It is the wording that is found  
24 in virtually all of these property policies. And if  
25 Your Honor has read the various cases that were

1 cited in the briefs, that's, you know, it's  
2 virtually -- it's either identical or virtually  
3 identical wording. The Sixth Circuit in the Santos  
4 case characterized that wording as the North Star of  
5 these policies. And I thought that was a really --  
6 an apt phrase because that's really -- everything  
7 emanates from that and in a sense, in a very real  
8 sense, it the simple issue here, the direct issue  
9 here, is the presence of COVID. And let's assume  
10 that there's even COVID present at the hotel because  
11 that's not entirely clear. But even assuming that  
12 to be the case, does that constitute physical  
13 lawsuit damage to the insured property? We would  
14 submit, Your Honor, that 15 Illinois State Court  
15 cases of which 14 come out of Cook County law and  
16 chancery, and 23 Illinois Federal District Court  
17 cases and literally hundreds of cases across the  
18 country, have found that it -- that the presence of  
19 COVID does not constitute physical loss or damage.  
20 And for all parts of our motion except for, and I  
21 want to get the numbers right. The 2-61989 motion -  
22 - for the rest of our motion, that's really the  
23 North Star, was there physical loss or damage to the  
24 property? Now, you know, assuming that COVID is a  
25 virus and can harm people, and I think that's a

1 given. The presence of it on property, does not  
2 constitute physical loss or damage -- tangible  
3 damage to that property. It -- is it potentially  
4 dangerous? Yes. If I dropped tacks on the floor,  
5 does that create dangerous condition on the floor?  
6 Yes. Does it damage the floor? No. If I broke  
7 glass on the floor, is the floor in a dangerous  
8 condition? Potentially, yes, especially if you're  
9 going to walk around barefoot. Does it damage the  
10 floor? No. And that's really the point and that's  
11 really been the thinking, and the fundamental basis  
12 for the decisions really across the country  
13 including in especially Illinois, which is the law  
14 under which this is to be decided. If I could turn  
15 my attention to the -- to their 2-615 motion, which  
16 is, you know, I'll characterize it as the main part  
17 of the motion, and then we'll -- and then we'll deal  
18 with the cancellation of bookings aspect of this  
19 motion because that is very separate and unique  
20 piece. And I would point this out now -- sort of  
21 put a pin in it and we'll get back to it. That is a  
22 one very limited, narrow sub-limited coverage  
23 subject to a \$5,000,000 sub-limit that existed only  
24 in the 2019 policy that does not require physical  
25 loss or damage. And we'll -- and I will get to that

1 in this presentation. But everything else in this  
2 motion and everything else that's been pleaded does  
3 require physical loss or damage. That motion  
4 relates to full coverage grants in the policies,  
5 business interruption, extra expense, contingent  
6 time element, and interruption by civil and military  
7 authority. The wording couldn't be clearer on the  
8 face of the policies themselves. It requires  
9 physical loss or damage. "As a matter of law, in  
10 Illinois, the presence of COVID is not physical loss  
11 or damage." That's -- that is really the North Star  
12 of the policy. And that is really the main issue in  
13 this motion and why the pleading -- why the  
14 complaint should be dismissed with respect to those  
15 four items. And as I said, I will deal with the  
16 cancellation of booking. I intend to deal with the  
17 -- address the cancellation of bookings issue. So  
18 it is Cadillac funding burden to plead that a claims  
19 fa -- that its claim falls within the scope of  
20 coverage. Using scientific words, citing to disease  
21 transmission articles, guidelines, that doesn't  
22 change the fact, and that doesn't change the law in  
23 Illinois that the presence of COVID does not  
24 constitute physical loss or damage. Plaintiff  
25 concedes that it has not alleged to change to its

1 property appearance, shape, or color. Other courts  
2 have already rejected the theory that other material  
3 dimension somehow is a physical loss or damage. And  
4 I would point to the GPIF Crescent Court Hotel,  
5 Elite Dental Specialists, MTDB Corp, all of those  
6 cases support the position of Zurich. It's also  
7 worth noting that these very same policies -- these  
8 Marriott policies have also been subject of at least  
9 two lawsuits so far by other Marriott insured  
10 franchisee -- franchisees. There's the Crescent  
11 Plaza Hotel v. Zurich American, and it's in Northern  
12 District of Illinois case. Again, that was the  
13 motion to dismiss was granted with prejudice for a  
14 lack of "actual physical damage to the hotel."  
15 There's another case in New York Supreme, which is  
16 the trial level court in State Court, New York 6593  
17 Weighlock Drive, and these were cited in our briefs.  
18 So I don't want to spend too much time going over  
19 what was in the briefs. There the allegations that  
20 his virus spread onsite via "droplets." The Court  
21 found that insufficient and the motion to dismiss  
22 was granted. Now Plaintiffs make much about that  
23 the allegations in their complaint is somehow  
24 different or somehow should change the result here  
25 in response to this motion to dismiss. It's not the

1 case at all. What Plaintiffs have pled in their  
2 amended pleading, I might add, is really no  
3 different than hundreds of the other cases that have  
4 ended with the same result and the same finding.  
5 They say they alleged virus onsite and it's really  
6 basically due to statistics. First of all, they're  
7 not the first ones to allege that there was virus  
8 onsite. It's not clear that there was virus onsite,  
9 but even assuming there was virus onsite they're not  
10 the first ones to allege that and still have a  
11 complaint dismissed. And what I would point Your  
12 Honor to is the Steve Foley Cadillac case. Again,  
13 this was out of the Circuit Court -- Judge Esrig  
14 Circuit Court in Cook County. And it really  
15 featured nearly identical allegations regarding  
16 COVID-19. And what Judge Esrig came to say was --  
17 and I'm quoting here, "The COVID-19 virus is no  
18 different than other viruses or bacteria which  
19 frequently, if not continually, contaminate  
20 virtually all surfaces. As a matter of plain  
21 English, such temporary contamination does not  
22 represent physical loss of or damage to property."  
23 Other cases, BlackRock restaurants, allegations that  
24 particles attached to surfaces touched by people and  
25 that it was, "Highly probable" these particles" were

1 onsite. The Court concluded that COVID- 19  
2 particles can be cleaned and, "did not affect any  
3 physical aspect of the business able to be seen or  
4 felt." I mean, I could go on with the cases they're  
5 in the brief. I don't want to take up all the time  
6 other than if Your Honor has a particular question  
7 about this point. Looks like you may want to ask a  
8 question. I'm not sure.

9 JUDGE SHELLEY: Yes. And I know that your  
10 opponent is going to raise this issue, but I'm just  
11 curious, I guess I want to hear from you now on this  
12 asbestos -- on the asbestos cases and how you  
13 distinguish those.

14 MR. SILVERBERG: Sure. And I'm glad you asked.  
15 I was going to get to that. I wasn't sure if I was  
16 going to get to that on my reply or now, but the  
17 Judge has asked so the Judge will -- the Judge will  
18 hopefully get an answer from me that response.  
19 Asbestos is very different, and what I'd like to  
20 point Your Honor to is again, and I'm going to --  
21 I'm going to keep it local. By the way, this is my  
22 second time this week I'm in Cook County Circuit  
23 Court, I was with the good Judge Brennan a little  
24 earlier this week. So I wanted --

25 JUDGE SHELLEY: Our pleasure.



1 MR. SILVERBERG: Yeah. Well, it was and that  
2 was -- digress. Sorry to hear that she's retiring  
3 but I wish her luck. So we're going to keep it  
4 local and we're going to keep it in Cook County.  
5 And here's what Judge Sherlock said. Source One  
6 Restaurant, again a COVID case. And there's really  
7 no limit to the cases out here but this was as good  
8 as anything Judge Sherlock called the asbestos  
9 cases, "Unavailing" in the coverage -- in the COVID  
10 coverage context. Asbestos is difficult to  
11 remediate and must be done by a licensed  
12 professional since it is embedded into the physical  
13 structure and systems of the physical property, the  
14 coronavirus -- COVID-19 is disseminated through  
15 different means (respiratory transmission) and  
16 exposure can be reduced significantly through  
17 prophylactic measures like proper masking, hand  
18 washing, social distancing. COVID-19 contagion  
19 naturally dissipates and is easily killed through  
20 ordinary cleaning means. Simply put COVID-19  
21 impacts human health and behavior but not physical  
22 structures. Also, I'll go back to Steve Foley  
23 Cadillac. Unlike -- "Unlike asbestos, the COVID-19  
24 virus is not released from components or systems  
25 which are part of Plaintiff's property. COVID-19

1 dissipated without intervention." And I think I'll  
2 -- you know, I think it's also fair to say when we  
3 think in terms of asbestos, you're talking about  
4 walls and ceilings getting ripped out, things like  
5 that where the property is actually being removed.  
6 We're not talking about Clorox wipe on a counter or  
7 a rag to wipe off a door handle. So it's a very  
8 different thing. There's one judge who said going  
9 down that road is a slippery slope. And I may have  
10 the quote in my notes here, but again, the argument  
11 -- the asbestos case argument, it doesn't work here,  
12 and it really doesn't match up. And again, these  
13 are not -- these are not newer arguments. These are  
14 not new allegations. These are not allegations in  
15 the complaint that stand apart from the allegations  
16 that have not already been made and rejected, again  
17 across the board in Illinois and really across the  
18 country. So that's as best I can respond to Your  
19 Honor's inquiry about the asbestos cases.

20 JUDGE SHELLEY: Well, I hope I did not throw  
21 you off. I know you were going to address the  
22 cancellation of booking under two --

23 MR. SILVERBERG: Yeah. I will get and I  
24 actually, I just had -- I think -- no yeah, I can go  
25 to the cancellation booking and but I can make -- I

1 can walk Your Honor through all of the various  
2 coverages. I'm happy to do whatever you want here.  
3 Well, let me just -- you know, I'll -- very quickly  
4 go through the rest and then we can talk about the  
5 cancellation bookings piece. And again, of course,  
6 if there's any questions and I will just  
7 respectfully as to reserve some time to respond to  
8 after Plaintiff's counsel has an opportunity to make  
9 his presentation. So again, the allegations and  
10 these are all arguments that I'm trying to respond  
11 to that I think -- I know were fully responded to in  
12 the briefing. So I will try to be relatively brief  
13 on my comments here. But again, you know, there's  
14 sort of an underlying theme as what we're alleging  
15 here, Your Honor -- what -- and underlying theme of  
16 Plaintiff's opposition. What we're alleging here,  
17 Your Honor, you know, we've got the secret sauce.  
18 This is something different, and that's why the  
19 motion to dismiss should not be -- should not be  
20 granted. And our point is that there is nothing  
21 different here that hasn't already been seen and  
22 rejected by courts in Illinois and across the  
23 country. So the notion that there was someone at  
24 the hotel who was sick, I think an NBA player,  
25 someone who had coronavirus. Obviously, there's,

1 you know, many millions of people who've been  
2 infected with the coronavirus. Again, there's no  
3 proof per se that coronavirus was at the facility --  
4 was at the hotel itself or that it's still there.  
5 But that really is beside the point is that just  
6 doesn't constitute physical loss or damage. But in  
7 any event, Steve Foley Cadillac, Plaintiff, alleged  
8 that a sick employee was onsite. So it's not an  
9 allegation that hasn't been addressed by courts  
10 already. You know, it's also worth noting and here  
11 I'll just point the -- I guess what I would say is -  
12 - with respect to the complaint saying it's so  
13 doesn't make it so if it's insufficient as a matter  
14 of law, and as I've said probably -- five times  
15 already it is insufficient as a matter of law in  
16 Illinois and virtually every other jurisdiction, the  
17 notion that COVID being present on property, whether  
18 it'd be a counter or a doorknob or a wall, is simply  
19 not property damage, but separate and apart from  
20 that, you know, they've got lots of footnotes and  
21 lots of references to various websites and CDC  
22 documentation and links. And when you look at those  
23 links -- and that would be page 4 of the reply memo  
24 that was submitted. It actually says quite the  
25 opposite. Clean and disinfect frequently touched

1 objects. That's one of the documents they cite to -  
2 - cleaning and disinfection. So, you know, their  
3 own pleadings contradict what they alleged -- the  
4 documents that they attached. And we think that  
5 that's a significant point. It essentially becomes a  
6 non-credible allegation when you say something  
7 that's also not supported by the law. You know, they  
8 say it's impossible to clean, but that's -- you  
9 know, it's not permanent. It is easily cleaned.  
10 Again, the stay-at-home orders. It's not clear  
11 exactly where Plaintiff's going with that, but the  
12 stay-at-home orders were not issued because there  
13 was property damage. You know, it's not that a  
14 building collapsed. So, you know, there's a stay-at-  
15 home order for people with who live within two  
16 blocks of the collapsed building. The stay-at-home  
17 order -- the stay-at-home orders were issued in  
18 order to enforce social distancing and avoid the  
19 transference of the virus from human-to- human.

20 JUDGE SHELLEY: May I interrupt you again --

21 MR. SILVERBERG: Of course.

22 JUDGE SHELLEY: -- and then we'll pass it to  
23 Attorney Hurst. But one thing that I -- that  
24 crossed my mind is whether or not the determination  
25 of, you know, the extent and nature of this virus is

1 more of an expert issue and not necessarily a fact  
2 issue that is separate to some type of summary  
3 judgment or dispositive motion. And that's what I  
4 was grappling with. I have nothing but great  
5 respect for my colleague's decisions that you've  
6 decided. I know they're very wise and, you know, I  
7 looked at them for, you know, guidance, but that's  
8 just really bothering me in the back of my head.

9 How was it that we're concluding the nature of this  
10 ill -- this disease without having expert testimony?

11 MR. SILVERBERG: Well, here's what I would say,  
12 you know, two things. First of all, you know,  
13 again, that's an argument that's been raised and  
14 that certainly I think what they -- what's tried --  
15 what's attempted here, again, the only documents  
16 that they attach and reference in their complaint  
17 that say the opposite. You know, these good  
18 governmental links say you can clean it and  
19 disinfect it. But I would -- but I would go beyond  
20 that, Your Honor, you know, viruses have been around  
21 forever. No one's ever -- you know, where you-all  
22 were -- you know, we can all sort of remember. I  
23 didn't pay so much attention to it when I was a  
24 young boy. But, you know, wash your hands, don't,  
25 you know, don't touch things and then put it to your

1 hand or your mouth. So viruses have been around  
2 forever. Viruses adhere to surfaces and some  
3 viruses live longer than others. Nothing is  
4 different and no one ever suggested that there was  
5 property damage. So what's the issue here that this  
6 is a potentially bad virus that can harm people?  
7 That's the issue. The issue is that it's a virus  
8 that can harm people, which is why people for a  
9 period of time stopped going to -- restaurants were  
10 closed and even when they opened, business was down  
11 that, you know, that's why they're separate -- you  
12 know, that's why the stay-at-home orders. But it  
13 was never about property damage. And it's still not  
14 about property damage. Yes, if a door handle has  
15 COVID on it and I touch that door handle and then I  
16 put it to my mouth and my eye or whatever and is it  
17 possible that I can get COVID? Yes. So did I get  
18 COVID from -- I mean, it's -- you know, it's hard to  
19 prove that could have I gotten COVID by picking up  
20 that virus on the door handle? Yes. So was that  
21 dangerous? Yeah, maybe so, but it's sort of gets  
22 back to what I said about tacks on the floor or  
23 broken glass on the floor. It's a dangerous  
24 condition, but it's not physical damage. It's not  
25 tangible physical damage to the property itself.

1 Now, listen the hotel is open now. The plaintiff --  
2 the hotel is opening. People stay in the rooms or  
3 people go to the restaurant. Did they replace the  
4 restaurant equipment? Did they replace the counter?  
5 Did they replace the doorknobs? No. I'm sure  
6 they're doing even more cleaning. I mean, hotels  
7 clean all the time. Were police station -- I mean,  
8 was there COVID in police stations? Yes. But were  
9 they closed? No, because they were essential. In  
10 fact, most hotels didn't completely close either.  
11 And we're not for a minute suggesting that there was  
12 no financial lawsuit because of COVID but, you know,  
13 it's not -- no one has made a claim that they've  
14 had, you know, replaced their hotel or move their  
15 facility or anything like that. So again, is COVID  
16 dangerous? Yes. Might be able to adhere to a  
17 countertop or a door handle or a wall or some other  
18 piece of equipment. I think, yes, but does it cause  
19 physical loss or damage? And that is where the  
20 courts have gone and that's why the courts have gone  
21 in the direction they've gone in, overwhelmingly so.  
22 I'm not here -- well, I would have to say it, I --  
23 it would be wrong. But I'm not here to say that  
24 it's 100 percent. I am here to say that it's about  
25 95 or 98 percent of these decisions that raised



1 really the same or similar issue. So that's how I  
2 would best answer that question, Your Honor. I  
3 don't know if that -- I don't know if you have any  
4 follow up on that for me or not but that would --

5 JUDGE SHELLEY: Thank you so much, Counsel.

6 MR. SILVERBERG: Yeah. So I do have a couple  
7 of more points. I wanted to sort of address the  
8 exclusions, and then of course, I want to address  
9 the second aspect, the 2-61989 aspect of the motion,  
10 if that's okay with Your Honor. Okay. Thank you.

11 JUDGE SHELLEY: Yes.

12 MR. SILVERBERG: So, you know, as I said, it  
13 -- as a threshold matter, and I think it really is a  
14 straight line that's supported by the case law,  
15 including now, you know, some appellate courts that,  
16 you know, it really -- it isn't covered in the first  
17 instance. One goes to exclusions, you know, if it  
18 is covered. But let's -- if this Court wishes to  
19 consider the exclusions, you know, I'd like to  
20 address that. So in the -- both policies have the  
21 microorganism exclusion and, you know, we submit  
22 that that's clear on its face. I know that there's  
23 an argument and like you know, I would say it is  
24 very much in the very slim minority view that a  
25 microorganism is a living thing, and a virus is dead

1 so it can't be a microorganism. But the  
2 microorganism exclusion doesn't stop there. The  
3 microorganism is an exclusion -- sorry. Also, it  
4 has the words -- and actually let me just get the  
5 exact word in itself. I apologize for the delay on  
6 this. All right. The wording is substances present  
7 pro -- poses any -- I'm sorry, "substances present  
8 poses an actual or potential threat to human  
9 health." So there doesn't seem to be much -- so any  
10 substance, not just a microorganism. And there  
11 doesn't seem to be much of a dis -- debate that  
12 coronavirus poses an actual or potential threat to  
13 human health. So it is a broad exclusion.

14 JUDGE SHELLEY: I'm sorry. You're reading that  
15 from the micro -- that -- from the policy?

16 MR. SILVERBERG: Yes. From --

17 JUDGE SHELLEY: Is that verbatim?

18 MR. SILVERBERG: Yes. Let me just get their  
19 wording right here.

20 MR. HURST: Your Honor if I may it just --

21 JUDGE SHELLEY: Is there a page number?

22 MR. HURST: -- "including, but not limited to  
23 any substance whose presence poses an actual or  
24 potential threat to human health."

25 MR. SILVERBERG: Yeah. And that's -- that is

1 the wording. It is in the microorganism exclusion B  
2 -- subsection B where it says -- except as set forth  
3 in foregoing Section A. "This policy does not  
4 ensure any loss, damage claim cost, expense, or  
5 other some directly or indirectly arising out of or  
6 relating to mold, mildew, fungus, sports or other  
7 microorganism with any type nature description  
8 including, but not limited to any substance whose  
9 presence poses and actual or potential threat to  
10 human health." So that exclusion is in both  
11 policies and in addition --

12 JUDGE SHELLEY: Can you give me --

13 MR. SILVERBERG: -- yes, I'm sorry.

14 JUDGE SHELLEY: Counsel, can you give me the  
15 page number?

16 MR. SILVERBERG: It was -- I think it's -- I'm  
17 not sure the exhibit number.

18 MR. HURST: 344, Your Honor.

19 JUDGE SHELLEY: Thank you.

20 MR. HURST: 344. Attached to the defendant's  
21 motion to dismiss Bates Z-A-I-C-C-F 000344.

22 MS. CLAIR: And then the same Bates number 207  
23 for the 2020 policy, but it's identical language.

24 JUDGE SHELLEY: Please continue.

25 MR. SILVERBERG: Okay. And then in addition,

1 the 2020 to 2021 policy has the communicable disease  
2 exclusion, which Plaintiff raises for the first time  
3 that there wasn't proper notice in adding that to  
4 the policy and, you know, that's a state regulatory  
5 issue, there was proper notice provided. It said --  
6 this says, as I noted at the outset, this is a  
7 policy issued to Marriott International, which is a  
8 Maryland corporation, policies delivered in  
9 Maryland. And it certainly proper notice of that  
10 addition was provided under Maryland regulatory law.  
11 I would -- unless Your Honor has any questions, then  
12 turn to the cancellation of bookings aspect of the  
13 motion that 2-61989. Okay. So, you know, as we  
14 noted in the 2019, 2020 policy, there was a special  
15 coverage and this coverage does not require physical  
16 lawsuit damage. It really sort of underscores the  
17 entire point we're making. And there was \$5 million  
18 aggregate you know, to -- really available to all of  
19 the insureds under the policy, but it was just a  
20 single aggregate. We put in evidence an affidavit  
21 document and a witness who testified that that  
22 cancellation bookings coverage was exhausted pre-  
23 COVID and certainly before this litigation, not on a  
24 COVID related claim. It happened to be a different  
25 type of loss so the dollars are exhausted.

1 Exhaustion is a defense which negates the cause of  
2 action completely cited by Van Meter v. Darien Park  
3 case, an Illinois case. The argument that somehow  
4 the affidavit is hearsay and that is, it doesn't  
5 fall within the business records exception, I think  
6 makes no sense. We're an insurance company, we  
7 presented records and testimony of corporate  
8 representative witness to testify about the payment  
9 of a claim and the exhaustion of a limited. It's  
10 virtually the definition of a business record  
11 exception. So with respect to the cancellation of  
12 bookings coverage, the limit has been exhausted, and  
13 therefore, that piece of the claim, you know, should  
14 be dismissed. I would also add that nothing was put  
15 in by Plaintiff to refute that and that's necessary.  
16 Plaintiff failed to offer any affidavit and response  
17 to Zurich's affidavit. And the law is this and I'm  
18 citing to Piser v. State Farm Mutual, "The failure  
19 to challenge her contradicts supporting affidavits  
20 filed with a section 2-619 motion results in an  
21 admission of the facts stated therein." We provided  
22 the facts, but that limit is exhausted. We've  
23 provided an affidavit, we've provided the sworn  
24 testimony, we've provided the documents, nothing was  
25 submitted in response, and frankly, nothing. It's

1 the truth, it's the reality of it. So we would  
2 respectfully submit that that piece of Plaintiff's  
3 claim should be dismissed with prejudice as well.  
4 And finally, I would just add that there was -- that  
5 there's no basis under Illinois law to re-plead  
6 because they simply can't re- plead again, something  
7 that would be recognized under the law of Illinois.  
8 The presence of COVID is not physical loss of  
9 damage. That's the law -- that's the policy. And  
10 unless Your Honor has any further questions, I would  
11 rest for the time being.

12 JUDGE SHELLEY: Thank you, Attorney Silverberg.  
13 Thank you for answering the questions when I  
14 interrupted your presentation. Attorney Hurst?

15 MR. HURST: Yes, Your Honor. Thank you. And  
16 once again, good afternoon. I'm going to cover  
17 three different main arguments. The first argument  
18 being the coverage for -- the time element coverage  
19 within the Zurich American Policy. Related to that  
20 is that the exclusions asserted by the defendant do  
21 not apply. The second main argument is going to be  
22 the cancellation of bookings endorsement. And the  
23 third is regarding the material changes in coverage  
24 to the April 2020 policy renewal, without the  
25 legally required notice under Illinois law. All

1 three issues -- and require a fully developed  
2 factual record not appropriate for disposition at  
3 the pleadings section, I'll deal with the affidavit  
4 when we come to the 2-619A. The rules of  
5 construction are very clear in Illinois, once  
6 Plaintiff brings itself within the insuring  
7 language, the burden then shifts to the insurer to  
8 prove that a policy exclusion accepts coverage.  
9 Exclusions from coverage are to be strictly  
10 construed. When the language in the policy is  
11 capable of differing construction, it is to be given  
12 the construction most favorable to the insured. And  
13 were there contradictory provisions and policy there  
14 to be resolved against the insurer that drafted the  
15 policy. There are somewhat unique facts here, Your  
16 Honor. This is a hotel policy. This is a policy  
17 that was drafted by Zurich for hotels. It's --  
18 example of that is the cancellation of bookings  
19 coverage. You don't find that in most policies.  
20 The virus exclusion is mentioned nowhere in this  
21 policy. They do mention, in several parts of the  
22 policy, exclusion for a malicious virus in a  
23 computer. So clearly, they could use the word  
24 virus, but they used it nowhere in this 2019 policy.  
25 Knowledge of the ISO endorsement is also alleged

1 specifically in our complaint that makes this case  
2 different than the others. We have alleged that  
3 there was a 2006 ISO virus exclusion, that defendant  
4 Zurich American was aware of it, and they chose not  
5 to use it. Again, they've never mentioned "virus"  
6 anywhere in this policy, which is an all-risk policy  
7 which I will get to in a moment. The only thing  
8 that they have included is in the 2020 policy a  
9 communicable disease endorsement. Which was on time  
10 - - untimely and improperly added under Illinois  
11 statutes section 143.17. This all shows the intent  
12 and it shows the intent of Zurich and what they  
13 intended to cover under the four corners of the  
14 policy. I'm not going beyond that where discovery  
15 would certainly go beyond that, but we don't have  
16 to, because there is actually a page in the Zurich  
17 policy which refers to the ISO language. And I'm  
18 referring to Bates page 251. Again, all references  
19 to Bates pages will be the convenience to the Court  
20 and to avoid confusion. Let's see, the Bates pages  
21 attached to Zurich's motion to dismiss. At the  
22 bottom of 251, they acknowledge that the material in  
23 the policy includes copyrighted material of the  
24 insurance services office with its permission. So  
25 clearly, they were able to use the ISO endorsements.



1 They used other policy language. They chose not to  
2 in the 2019 policy. Direct physical loss is one of  
3 the predicate issues here. We have alleged it  
4 multiple times in the complaint, in numerous  
5 different contexts, and with extensive scientific  
6 references. There's an entire section in the  
7 complaint on science, and the science of tangible  
8 change in some material dimension, beginning in  
9 paragraph 16 of our complaint. Direct physical loss  
10 of over damages alleged five different times. Now,  
11 I'm going to quickly address --

12 JUDGE SHELLEY: Counsel, how do --

13 MR. HURST: I'm sorry.

14 JUDGE SHELLEY: The same question I asked of  
15 your opponent. How do you lay the foundation for  
16 that?

17 MR. HURST: The -- so the direct physical loss  
18 or damage, Your Honor, is -- as Your Honor raised in  
19 her question, the analogy -- analogous situation to  
20 asbestos. So under applicable law in -- and this  
21 would be the Travelers v. Eljer case which  
22 established the test here. And I'm recalling it  
23 from the top of my head, but I believe it is  
24 appearance. So any alteration in appearance, color,  
25 shape, or other material dimension -- I hope I got

1 that verbatim. So obviously in Illinois -- and  
2 that's a pronounced for the Illinois Supreme Court,  
3 it's more than just something you can see. So that  
4 would be the, the appearance, the color of the  
5 shape, or other material dimension is something that  
6 includes what you can't see. And damage to the  
7 surface of property is tangible damage. In the  
8 other Illinois Supreme Court case that we cited,  
9 which is Wilkin Insulation Company, that discusses  
10 asbestos, and it discusses how that is potentially  
11 covered under property damage caused by an  
12 occurrence. Now, asbestos is very, very similar to  
13 the situation we have at hand, because it's  
14 something you can't see -- the fibers that are  
15 floating in the air you can't see just like the  
16 COVID-2 virus is floating in the air. It's easily  
17 transmitted, it's present in the HVAC system, and  
18 the ductwork, in the vents of our hotel in this  
19 situation and it's blown about the property. It's  
20 constantly coming in the door every time a patron  
21 comes in, when the property is open and remember  
22 it's a hotel, it's a hotel policy. So there's  
23 hundreds of people a day coming in through the door,  
24 we can certainly prove, and we've alleged this in  
25 our complaint with statistical modeling that the --

1 that that virus was present in that hotel constantly  
2 and actually still is to this day, since it -- the  
3 hotel is open. So that virus is analogous to  
4 asbestos, it's -- it's something that you can't see  
5 but if it doesn't mean that it's not equally as  
6 dangerous to health and in fact, has caused in this  
7 country alone almost three- quarters of a million  
8 deaths. I will get back to that. Is that sufficient  
9 for now, Your Honor?

10 JUDGE SHELLEY: Yes. You may continue.

11 MR. HURST: Okay. Thank you. Now, the other  
12 case and yes, on the face of it, the majority of the  
13 cases do dismiss Plaintiff's allegations. However,  
14 as I pointed out, this case is a little unique in  
15 the fact that we've alleged science specifically and  
16 all her allegations. It's a hotel policy and some  
17 of the other factors I'm going to get to. The cases  
18 that are cited by the defendant and are summarized  
19 in, actually a University of Pennsylvania law  
20 website, they put in a footnote in their motion to  
21 dismiss. If you look at those cases, the vast  
22 majority of the dismissals are for what I would call  
23 for lack of a better term, pleading deficiencies or  
24 maybe a better term would be pleading omissions. We  
25 have cases that are cited that have no allegation of

1 direct physical loss or damage. That's not true in  
2 our case. That made conclusory allegations, that's  
3 not true in our case. That have solely relied upon  
4 the authority of civil orders which cause economic  
5 loss, but no property damage per se, as being the  
6 only thing that was alleged in that case. So if  
7 these types of cases -- also there are other cases  
8 that have specific virus exclusions which for the  
9 basis for motions to dismiss, like the ISO virus  
10 exclusion. If those cases are all weeded out, it's  
11 a much more comparable number. And with our  
12 allegations, we took great pains at putting and  
13 researching and including page after page of  
14 scientific studies from the Journal of American  
15 Medical JAMS, NIH, CDC, and other specific studies  
16 that have been done by each of those institutions.  
17 Establishing that these fomites -- I'm sorry, Your  
18 Honor.

19 JUDGE SHELLEY: Counsel one reason I'm looking  
20 away it's because I have another screen here.

21 MR. HURST: Uh-huh.

22 JUDGE SHELLEY: And I'm looking at that screen,  
23 I'm pulling up documents and I have before me now  
24 your amended complaint.

25 MR. HURST: Yes, Your Honor. So --

1 JUDGE SHELLEY: One line into the paragraph  
2 that you believe meets -- states that threshold  
3 requirement?

4 MR. HURST: Yes, Your Honor. Beginning on  
5 paragraph number 16. We're alleging the science of  
6 tangible change in some material dimension. Now,  
7 the policy at issue, Your Honor, is an all-risk  
8 policy. And what we mean by that is, if you look at  
9 the insuring clause and this would be found on Bates  
10 256, "its insurance provided under this policy" --  
11 this is what it says, "applies to loss or damage,  
12 buyer resulting from risks of direct physical loss  
13 of or damage from any external cause to cover  
14 property occurring at a premises unless excluded."  
15 So that's the essence of an all-risk policy. It's  
16 covered if its direct physical loss of or damage  
17 unless excluded. Now, the insured property, as I  
18 pointed out, was altered and other material  
19 dimension -- we've made that allegation. We intend,  
20 as Your Honor would expect, to show that with expert  
21 testimony in this case. It's not something that  
22 could be resolved without a developed factual record  
23 and without expert testimony. Now, the fomites are  
24 the damage to the property and this will be shown  
25 with the science. That is, the physical alteration

1 of the property, just like asbestos dust that's on  
2 property is damage. Asbestos can be remediated  
3 also. They could bring in a hazmat crew in any  
4 building in the country that was built in the '70s  
5 or '80s if there was some disturbance of asbestos in  
6 the walls. I'm actually in a building like that in  
7 Cleveland, Ohio, that's my office as it was built in  
8 1929. There's asbestos everywhere. So that dust is  
9 being disturbed anytime that there's anything  
10 happening or remodeling of one of the suites. So  
11 that dust is spread just like the virus in this  
12 case, the COVID virus, it's spread through the  
13 ventilation system, through the duct's all over the  
14 building. And no, there's nothing you can see, but  
15 it's harmful and it's deadly to humans. And it's a  
16 result of it being on the surface of property. That  
17 can be remediated. So why aren't insurance  
18 companies paying for asbestos? Because they've put  
19 an exclusion in the policy which they're doing in  
20 these policies as well. That's what the 2020  
21 policy, they -- the answer for the insurance  
22 industry is to put an exclusion in the policy that  
23 specifically excludes virus. And that's what  
24 they're starting to do now, as this defendant has  
25 attempted to do in the 2020 policy. Now, there's

1 nothing in the policy I might add that dictates that  
2 the damage be some kind of permanent damage.  
3 Asbestos -- it's temporary and if it's remediated,  
4 you can get a crew in there, and a matter of a few  
5 days or a few weeks, the whole building is fine.  
6 It's habitable again. So it doesn't have to be  
7 permanent damage, it can be temporary damage. And  
8 we have specifically alleged that there was a Utah  
9 Jazz player in our complaint that was a guest and  
10 tested positive for COVID -- he was there  
11 immediately before the shutdown. So this is a case  
12 where we can establish that COVID was actually  
13 present at the property prior to the shutdown.  
14 There are also cases in Illinois, and we'll  
15 acknowledge that there were already cases that have  
16 been interpreted that physical loss includes loss of  
17 use without physical damage. The Derek Scott  
18 Williams case is one such case from the Northern  
19 District of Illinois. But it's important to point  
20 out that direct physical loss is not defined  
21 anywhere in the policy. Even before the pandemic,  
22 Court struggled with defining physical loss in  
23 insurance policies with things like asbestos, LED  
24 pollutant, hazardous materials. And once again, the  
25 answer was excluded from the policy if that's what

1 you don't want to cover.

2 JUDGE SHELLEY: But isn't just because the  
3 parties disagree on the meaning of the term does not  
4 mean that it creates an ambiguity in the policy.  
5 The policy should be given it's -- you know, it  
6 should be interpreted consistent with the common  
7 usage if -- unless it's a specific industry term or  
8 technical term but property damage.

9 MR. HURST: Yes, Your Honor. That is true.  
10 It's to be given its plain and ordinary meaning, but  
11 its physical loss of or damage to. And there is a  
12 disjunctive there also, the "or." And "loss of" was  
13 specifically used -- it's used interchangeably by  
14 Zurich American in this policy with loss or damage.  
15 So if -- we have alleged the damage to the property,  
16 the surface of the property that is deadly. And we  
17 also think there's coverage under loss of the  
18 property. There's been no loss of use exclusion,  
19 which has been asserted by the defendant in this  
20 case. Now, the communicable disease exclusion  
21 endorsement, as I indicated, was not timely  
22 communicated, but that shows that they knew they  
23 were in trouble. It was the last minute that they  
24 put that exclusion into the renewal policy without  
25 adequate and timely notice under the Illinois law



1 and they specifically mentioned virus in that  
2 exclusion. They knew they were in trouble when the  
3 pandemic hit and all the claims started coming in,  
4 they drafted the communicable disease exclusion.  
5 They should have done that earlier and they should  
6 have timely included it in the 2020 policy, which by  
7 operation of law, because they didn't comply with  
8 the law, that exclusion is not to be considered as  
9 part of the coverage in the 2020 law -- policy. I'm  
10 sorry. So repair. If you look up the plain and  
11 ordinary meaning of the word "repair," it's "to  
12 restore to a good or sound state, to restore it to  
13 its prior condition." That's something you do with  
14 asbestos once again, you remediate it, you restore  
15 it to his prior condition. The fact that there's  
16 special cleaning apparatus that's needed and PPE  
17 gloves, masks, et cetera, to protect oneself when  
18 cleaning a property and erratic hating this virus is  
19 a repair. It is not routine cleaning. Routine  
20 cleaning -- I don't know if I've ever seen any  
21 article that stated that routine cleaning could  
22 eradicate this virus from property, it cannot. It  
23 requires special cleaning techniques and even  
24 Zurich's own website alluded to that and discussed  
25 the special training that would be required for it.

1 Now, the period of liability is the only place in  
2 Zurich's policy where they reference any requirement  
3 to repair or replace. But the period of liability,  
4 which is found on Bates 310, actually refers to an  
5 extended period of liability under the policy which  
6 is Bates 304. And it states that coverage extends  
7 for such additional length of time as would be  
8 required with the exercise of due diligence and  
9 dispatch to restore the insurance business to the  
10 condition that would have existed had no loss  
11 occurred. So even if Your Honor thinks that all the  
12 special cleaning and remediation required for  
13 eradicating this virus from premises is not a  
14 repair, the policy actually only requires -- this  
15 policy actually only requires that the premises be  
16 restored. Now, the exclusions that have been  
17 referenced by Mr. Silverberg, there's a  
18 microorganism exclusion and that is present in both  
19 policies, the microorganism exclusion, it doesn't  
20 cover a virus. By the vast weight of authority of  
21 biologist, scientific journals, a -- a microorganism  
22 is something that is alive. It's -- micro means  
23 that it can only be detected at the microscopic  
24 level, organism is something that it is alive. A  
25 virus is not alive. It can only live with a host --

1 an animal or a human host. So the microorganism  
2 exclusion does not apply in that regard. Actually,  
3 the name of the exclusion was, like Mr. Silverberg,  
4 I don't have it in front of me. Here we go. Mold,  
5 mildew, fungus clause and microorganism exclusion.  
6 The language that he refers to, which is including  
7 but not limited to any substance whose presence  
8 poses an actual or potential threat to human health.  
9 That language is rather odd for several reasons.  
10 First of all, I don't know that anybody would really  
11 call a microorganism or a virus a substance. I  
12 mean, I think that would be about the last thing you  
13 call it, maybe a chemical is a substance, maybe  
14 that's what they were referring to. But secondly,  
15 this clause here is a catch-all. It's something  
16 that they throw in -- typically insurance companies  
17 throw it in as an exclusion so that if they're in  
18 trouble and they need to fall back on something,  
19 they'll fall on this overly vague and broad clause  
20 to argue anything. And in fact, it's broad enough to  
21 blanket virtually every risk in the policy. So any  
22 substance that poses an actual or potential threat  
23 to human health, oh my gosh, that would be hot  
24 water, that would be ammonia that's used in  
25 cleaning, that would be carbon dioxide, CO2 that's

1 used commonly in the hospitality industry for  
2 beverage dispensing. If that spills and you have an  
3 incident, they could say, "Well that's a substance  
4 that poses actual or potential threat to human  
5 health." So as a matter of law, Your Honor, this is  
6 overly broad, it's vague, and it must be strictly  
7 construed against Zurich. I want to get to the  
8 cancellation of bookings endorsement, but before  
9 that I just wanted to remind Your Honor that we have  
10 cited cases that established -- studies that have  
11 established that the COVID virus is not something  
12 that you can just easily clean away. That it is  
13 something that will last. One study said nine days  
14 on inanimate surfaces and up to 28 days on other  
15 surfaces. It's on glass, it's on plastic, it's on  
16 every aspect of the insured property and it's  
17 ventilated and its continuously coming in the door  
18 with people that are staying at the hotel for, you  
19 know, up to a week at a time. Hundreds of people a  
20 day are bringing it in. It's not a safe environment  
21 when you can't just simply eradicate this by  
22 cleaning it with a cloth. You wouldn't even know  
23 where it's at. Now, the cancellation of bookings  
24 endorsement if I may go to that.

25 JUDGE SHELLEY: Yes.

1 MR. HURST: There was an affidavit submitted,  
2 that is true. It was from Mr. Foraker and in his  
3 affidavit, there were some rather conclusory  
4 statements made and a lot of holes, frankly. We  
5 took Mr. Foraker's deposition. It's not true that  
6 the affidavit was not countered for the 2-619A  
7 motion. We attached his deposition testimony, his  
8 sworn testimony to our opposition the motion to  
9 dismiss. So it has been properly countered with  
10 testimony. Now, the affidavit claimed that there  
11 was \$5 million total paid under the cancellation of  
12 bookings coverage provision. Mr. Foraker had  
13 actually no personal knowledge of that. His  
14 affidavit does say his has personal knowledge. His  
15 deposition testimony admitted that he does not. So  
16 here are some of the key facts, and I want to cite  
17 the Court to some of the pages for this testimony.  
18 He said that he never adjusted the cancellation of  
19 bookings claim of the plaintiff. And, in fact, has  
20 never even adjusted a cancellation of bookings claim  
21 in his life -- that's on page 25. His affidavit  
22 relies on a conversation he had with an adjuster who  
23 actually handled the claim, somebody different --  
24 that's on page 15. He never reviewed the claim  
25 documents produced until defense counsel was

1 preparing him for his deposition testimony, which  
2 was after the time that he filled out his affidavit  
3 and swore to it -- that's on page 39 and page 77.  
4 He only reviewed what was giving to him by counsel.  
5 And what was given to him was blacked out or  
6 redacted on certain -- in certain areas -- that's on  
7 page 77 of the deposition. He's not familiar with  
8 the statutory requirements for change of coverage  
9 provisions upon renewal -- that's the Illinois  
10 statute we're arguing, page 20 of the deposition.  
11 He adjusted the claim from the State of Illinois.  
12 He -- and that's page 24. And the adjustment of the  
13 claim that conclusion that there was exhaustion of  
14 coverage was based on a conversation with this other  
15 adjuster who is handling an Argentina claim and not  
16 based on his personal investigation, that's pages 15  
17 and 16. He doesn't even know how many payments were  
18 issued under the policy, page 48. The only  
19 documents produced that show that \$2.5 million was  
20 paid initially because there are two payments of  
21 \$2.5 million for \$5 million in total coverage was  
22 paid by a different insurance company called Chilena  
23 Consolidada Seguros Generales SA. And it's a  
24 company in Chile and he never heard of the company -  
25 - that's on pages 28 and 40 of the deposition. He

1 never reviewed the policy -- that's page 29. And he  
2 has no personal knowledge of that occurrence in  
3 Chile, which was a completely different occurrence  
4 from what we're talking about here with the COVID  
5 pandemic. It was an occurrence for a transportation  
6 fare increase riot that happened in Santiago --  
7 that's on page 31. He doesn't know who created the  
8 documents that were produced or how they were  
9 produced, so how can they be business records?  
10 That's page 32. Can't speak to the specifics of the  
11 claim because he didn't adjust it -- that's page 35.  
12 And he didn't know the dates that the claim payments  
13 were made -- that's on page 56. So in summary, he  
14 there's two separate policies. One is this Chile  
15 policy written by a different insurer, different  
16 policy numbers, different claim number, different  
17 coverage language in fact, from the two policy -- we  
18 established that in the deposition. And the bottom  
19 line, the payments that were made should never have  
20 been made on that step on the -- on that Chilean  
21 policy credited to the policy at issue here, the  
22 Zurich American policy for Marriott and Cadillac  
23 Funding, there should still be a full \$5 million  
24 available for coverage for cancellation of bookings.  
25 Now, when I get to the argument which is next,

1 failure to comply with Illinois law, that removal of  
2 the cancellation of bookings, endorsement should  
3 never have been made in the renewal policy -- the  
4 2020 policy, there should be \$10 million of  
5 available cancellation of bookings coverage. Okay.  
6 The statement that we didn't allege this is in -- is  
7 inaccurate. The cancellation of bookings  
8 allegations are in paragraph 95 of the complaint  
9 where we say, "Plaintiff did not receive adequate,  
10 proper, timely, reasonable, or legally required  
11 notice o defense of elimination of this policy  
12 coverage prior to the time that issued its policy  
13 renewal on April 1, 2020." It's pretty specific.  
14 Also, we have a reference on -- in footnote 59,  
15 pages 21, 22 of the amended complaint. Okay.

16 JUDGE SHELLEY: I'm sorry. In the amended  
17 complaint paragraphs --

18 MR. HURST: Yeah. So page 32 of the amended  
19 complaint and also footnote 59 on pages 21, and 22  
20 of the amended complaint, Your Honor. Yeah. So key  
21 point here, Your Honor, is that the Chilean  
22 insurance company that issued this policy that Mr.  
23 Foraker doesn't even -- hasn't even reviewed,  
24 doesn't even know about what was never then produced  
25 by the defendant here. It's impossible on a 2-61989



1 motion to somehow say that there's no cancellation  
2 of bookings coverage here available for Cadillac  
3 because the \$5 million has been eroded or exhausted  
4 by this payment in Chile for a different occurrence.  
5 Getting to the choice of law, Your Honor, this is  
6 the applicable law for coverage issues. Notably,  
7 the defendant has admitted that Illinois applied --  
8 Illinois law applies. They can't have it both ways.  
9 They can't say on the one hand, "Well, Illinois law  
10 applies for coverage interpretation of all these  
11 provisions of the policy. But by the way, Marriott  
12 International is in Maryland, so Maryland law should  
13 apply for this other issue that we don't like." You  
14 can't have it both way -- ways. In fact, choice of  
15 law is in Illinois because of the most significant  
16 contexts chest, which is set forth in Westchester  
17 Fire Insurance Company. And that case sets forth  
18 that testimony -- significant contex -- more  
19 significant context, excuse me. So Marriott is not  
20 even a party to this suit, we should note. But the  
21 policy was underwritten, and issue from Illinois is  
22 by Defendant Zurich American, which is domiciled in  
23 Illinois and does business in Illinois. Zurich is  
24 licensed in Illinois. The premium was accepted in  
25 Illinois. The claim was investigated and adjusted

1 by Mr. Foraker from Illinois. We've given you the  
2 citation in his deposition for that. The policy  
3 itself issues coverage for risks all over the  
4 country. I mean, it's Marriott Insurance, for  
5 example, so -- including Illinois properties.  
6 Cadillac Funding is actually in Michigan, not in  
7 Maryland and the broker for the policy is Marsh USA,  
8 which is in New York. So the most significant  
9 context here are in the state of Illinois, as we've  
10 demonstrated, and the defendant has not seriously  
11 contested that. I don't even think they've argued  
12 that, but they have argued Illinois law applies. So  
13 in conclusion, Your Honor, Illinois law applies the  
14 communicable disease exclusion, materially changing  
15 the policy coverage was not timely noticed and  
16 communicated in accordance with the Illinois  
17 statute, thereby continuing the same coverage under  
18 the renewal policy. The same thing for the  
19 cancellation of bookings and endorsement that  
20 coverage continues. There's another \$5 million  
21 under the renewal policy. This is an all-risk  
22 policy here. The -- the cancellation of bookings  
23 coverage does not even require direct physical --  
24 direct physical loss or damage to property notably.  
25 And we've discussed all the different policy

1 interpretation rules. I won't take Your Honor  
2 through that again. But clearly, this policy it's  
3 languages to be interpreted broadly in favor of  
4 Cadillac Funding and the exclusions strictly  
5 interpreted. And our science allegations -- we  
6 stand on that. We feel that it requires expert  
7 testimony in order to properly have a fully  
8 developed natural record for merits determination.  
9 Thank you, Your Honor.

10 JUDGE SHELLEY: Okay. Thank you, Counsel. And  
11 I know the -- madam court reporter is tired. Do you  
12 need a second to just re-adjust yourself? Are you  
13 okay?

14 COURT REPORTER: No, ma'am. I'm fine. Thank  
15 you.

16 JUDGE SHELLEY: Okay. Very good. Okay.  
17 Attorney Hurst, this isn't my -- and I understand --  
18 and I know you understand that you're pushing a  
19 boulder uphill. You -- I know that. And I want to  
20 give you, you know, as much attention and be as  
21 objective as possible. But I'm looking at your  
22 complaint and that's what I have to turn to, you  
23 know.

24 MR. HURST: That's right.

25 JUDGE SHELLEY: All pled facts are going to be

1 interpreted in your favor. And I just don't see  
2 where you plead the required direct physical loss.  
3 You directed me to paragraph 16 earlier. Those are  
4 conclusory statements.

5 MR. HURST: Your Honor, I do know that we  
6 alleged it multiple times. I can -- it's easier for  
7 me to use a computer to, you know, to find that  
8 reference. But all of the science that we've alleged  
9 does establish that. That was the point of our  
10 alleging the science. The science establishes that  
11 there's direct physical loss with the full fomites  
12 discussion that is on the property -- on the surface  
13 of the property just like asbestos, that is the  
14 direct physical loss or damage that we're alleging.  
15 So it's based on the science and the references that  
16 we've made to the science. And I know, Your Honor,  
17 we did say direct physical loss or damage. We cited  
18 the policy provision and we said there's coverage  
19 under it, which is our allegation. There wouldn't be  
20 coverage under it unless there is direct physical  
21 loss or damage.

22 JUDGE SHELLEY: Thank you. So, Attorney  
23 Silverberg, very short because we're not going to  
24 keep the court reporter any longer. Your colleague  
25 has phrased an interesting argument. He talks about

1 loss of use, physical damage -- physical loss or  
2 damage to the property. You're muted, Counsel.

3 MR. SILVERBERG: Yes. He did. And that of  
4 course, has been an issue that's been raised in a  
5 number of cases and it's been rejected. And I would  
6 also note that the policy has an exclusion for loss  
7 of use, for pure loss of use without physical loss  
8 of damage. And I can point Your Honor to that.

9 It's in both policies, "The following exclusions  
10 apply unless specifically stated elsewhere in the  
11 policy. This policy excludes loss of market or loss  
12 of use." And this really underscores because it  
13 really brings you back to what the Sixth Circuit  
14 called the North Star -- physical loss or damage.  
15 In other words, if you can't use your property, but  
16 it's not otherwise, it's not -- it hasn't otherwise  
17 suffered physical loss or damage there's not going  
18 to be coverage. Now, yes when they were --

19 JUDGE SHELLEY: You would agree that there's a  
20 loss of use provision in the policy?

21 MR. SILVERBERG: No. I would -- is that  
22 question to me, Your Honor?

23 JUDGE SHELLEY: No. To Attorney Hurst.

24 MR. SILVERBERG: Oh, okay.

25 MR. HURST: Yes, Your Honor. The coverages for

1 loss of physical loss of/or damage. And I -- what I  
2 was saying before is there's no loss of use  
3 exclusion that's been cited by the defendant. It's  
4 been argued by them.

5 MR. SILVERBERG: It's in the -- it's in the  
6 policy -- is only the policy is in this action. But  
7 if I could -- if I got just further respond in the  
8 courts and the cases have dealt with this.

9 JUDGE SHELLEY: I'm sorry. We have a  
10 disagreement here that I need to reconcile. You're  
11 saying there's no loss of use provision in the  
12 policy -- exclusion in the policy?

13 MR. HURST: I'm saying they didn't argue it,  
14 Your Honor.

15 JUDGE SHELLEY: Oh.

16 MR. HURST: There is a loss of use exclusion  
17 and it wasn't argued. And the loss of use exclusion  
18 is not intended for a situation like this. And if  
19 you give me a moment, I'd like to find that  
20 exclusion and then I can intelligently discuss it.

21 JUDGE SHELLEY: Well, then you're correcting  
22 your statement. There is a loss of use exclusion in  
23 the policy.

24 MR. HURST: Yes. None that they've been --  
25 none of they've argued and none that is applicable.

1 It's not applicable. So they have an exclusion.  
2 And it says loss of market or loss of use. It's a  
3 delayed type of exclusion. It's so loss of use in  
4 this context is used too generally, it's again, just  
5 like the microorganism exclusion -- any other  
6 substance, loss of use, loss of market in that  
7 context. So it's a consequential thing. It -- if  
8 that were -- if that exclusion, Your Honor, were to  
9 be given broad use, it would vitiate all the  
10 coverage under a business interruption policy.  
11 Because how else do you have business interruption,  
12 actual loss of revenue unless it's because the hotel  
13 itself can't be used? So loss of use would -- is  
14 way too broad and it would vitiate the coverage  
15 provisions on the policy if that were given brought  
16 effect and is to be narrowly interpreted under  
17 Illinois law. That's all I was saying, Your Honor.  
18 That it was not even argued by the defendant.

19 JUDGE SHELLEY: That's a little different,  
20 Counsel.

21 MR. HURST: Yeah.

22 JUDGE SHELLEY: So there's a loss of use  
23 exclusion.

24 MR. SILVERBERG: Yeah. And I would just --

25 JUDGE SHELLEY: Continue.

1 MR. SILVERBERG: -- yes, Your Honor. For  
2 reference, I'll give you the Bates number too and  
3 it's in both policies. This would be the policy for  
4 2019 to 2020. It's on page ZAICCF 000292, it's  
5 exclusion 5A Sub 3. Furthermore, the exclusion  
6 really underscores the point that without physical  
7 loss or damage, the North Star, the mere loss of use  
8 is not enough. And it -- so it really underscores  
9 what the point of this policy is. Everything arises  
10 out of physical loss or damage. And it is our  
11 position that in Illinois and really across the  
12 board, it is physical loss of damage. The presence  
13 of COVID does not constitute physical loss or  
14 damage. Now, if I could just -- and I will be brief  
15 because I don't want to injure or cause -- injure  
16 your court reporter, Your Honor. Counsel started  
17 off by talking about the ISO virus exclusion and it  
18 wasn't included. Well, that issue was dealt with and  
19 rejected in Cook County and Black Rock, Station Two,  
20 this Defaney (phonetic) case. It was also dealt  
21 with and rejected in Illinois federal courts, Bend  
22 Hotel, L and J Max and Stoney Point -- Sandy Point  
23 rather. You know, again, and this also underscores  
24 acquainted. There's nothing new or remarkable about  
25 Plaintiff's complaint here. There's nothing new that



1 merits this complaint surviving in the face of this  
2 motion. Now, I would --

3 JUDGE SHELLEY: Thank you so much, Counsel. I'm  
4 going to interrupt you. Attorney Hurst, I believe  
5 that the business interruption, extra expense,  
6 contingent time, and interruption by civil and  
7 military approval authority requires physical loss.  
8 The question is whether or not you've adequately  
9 plead such and whether or not you could plead such  
10 if I would allow you to amend your complaint? And  
11 that's what I'm getting at.

12 MR. HURST: Well, if you -- certainly if, Your  
13 Honor feels that we have not adequately alleged it,  
14 we certainly would avail ourselves of the  
15 opportunity for leave. We, you know, we feel we  
16 have alleged it, but Your Honor is the decider on  
17 that one.

18 JUDGE SHELLEY: Okay. Thank you so much for  
19 your presentations. The Court will make a finding  
20 that I do not believe that you've alleged direct  
21 physical loss in the complaint -- in the amended  
22 complaint that is before the court. Now, let's  
23 pivot to whether or not this should be with or  
24 without prejudice. Attorney Hurst, I don't know.  
25 You must suggest to the Court a set of facts that

1 you believe if you put before the Court would  
2 satisfy this plea deal requirement.

3 MR. HURST: Well, Your Honor, are you stating  
4 that we didn't expressly state it, or are you saying  
5 that we can't show it?

6 JUDGE SHELLEY: No. I'm saying state it. This  
7 is pleading. This is not -- you don't have to prove  
8 your case, but you have to put forth allegations at  
9 this point.

10 MR. HURST: Yes, Your Honor. We can --

11 JUDGE SHELLEY: I've heard.

12 MR. HURST: We can certainly allege --

13 JUDGE SHELLEY: They don't have to agree with  
14 you, but they -- you can't just make conclusory  
15 statements that there's these articles out there and  
16 you believe these articles stand for a proposition.  
17 You have to tell me what happened to the property.  
18 Now, you say that the property was wiped down or  
19 sanitized, I mean, I don't believe that's physical  
20 damage to the property.

21 MR. HURST: Okay. Your Honor, yes, we can  
22 allege that. There were entire measures that were  
23 taken by Cadillac Funding Hotel to mitigate the  
24 physical loss or damage to the property. And  
25 similar to the remediation that's done for asbestos.

1 So yes, we can allege that.

2 JUDGE SHELLEY: Well, I think that's what you  
3 need to plea. What was the remediation that was  
4 taken by your client? Because right now it's -- I  
5 don't see it in the amended complaint. The motion  
6 to dismiss under 2615 will be granted. As to those  
7 particular provisions as to the microorganism? I  
8 agree with you on that one, Plaintiff. I don't  
9 believe that there's an exclusion that's applicable  
10 as contained within this definition of  
11 microorganisms. I think that at most is a question  
12 of a battle of the experts whether or not a virus is  
13 a living entity or microorganism is a living entity.  
14 I don't know. You know, I just went to law school  
15 so I can't answer that question, but I think that's  
16 for later on, but you can't -- you have to get  
17 through over this threshold. I mean, you don't even  
18 give into those little fine details unless you get  
19 past this threshold and you haven't done so. Now,  
20 as to the cancellation of bookings, my concern is  
21 that there is an affidavit attached and I think that  
22 I've lost that affidavit. The affidavit does state  
23 in a conclusory fashion, Counsel, that there was  
24 this policy amount that was paid -- there are  
25 documents attached to the affidavit. I made a

1 cursory review of those documents. They're not  
2 self-explanatory. It's not like it's a copy of a  
3 check showing the payment to the plaintiff. They're  
4 a combination of, I guess, some type of internal  
5 processes, but the affidavit doesn't address those  
6 assets -- those documents. So it's dif -- I must  
7 agree with Plaintiff on that one also, that I don't  
8 think you've met your burden of persuasion and  
9 whether or not you've met your burden of persuasion  
10 decides whether or not Mr. Attorney Hurst was  
11 required to file a counter- affidavit. You know, I  
12 think the affidavit is deficient. And when I  
13 considered the affidavit on its face and with the  
14 excerpts from the deposition, I cannot find that  
15 that was an exception to the business -- exception  
16 to hearsay under the business records rule. I can't  
17 find it.

18 MR. SILVERBERG: Your Honor, just for the  
19 record. Your Honor's ruling -- so I'm not  
20 responding beyond that and I'm respecting you on  
21 this ruling. I do have responses, but I will --

22 JUDGE SHELLEY: So in other words, under the  
23 2619 and I'll give you an opportunity because I'm  
24 going to deny your 2619 request as to the  
25 cancellation of booking. But if there's something

1 that you want to highlight, you may.

2 MR. SILVERBERG: Are you saying right now, Your  
3 Honor?

4 JUDGE SHELLEY: Yes, Attorney Silverberg.

5 MR. SILVERBERG: Yeah. Sure. So, you know,  
6 just to be clear and again, I -- you know, I  
7 recognize what Your Honor has said and conclusions,  
8 Your Honor, have reached. It is, you know, I would  
9 say it is unfortunately a complicated situation.  
10 But there is no question, there's no doubt, and we  
11 don't believe counsel has raised any legitimate  
12 issue that the \$5 million is exhausted. Zurich is  
13 not playing games, in saying that it paid this money  
14 and it didn't. If I could just take 30 seconds to  
15 explain what -- this is a massive program. This is  
16 as we've all, you know, acknowledged both sides.  
17 This is a policy issued to Marriott International.  
18 It insures I think six to 700 properties around the  
19 world. This plaintiff is one of those franchises,  
20 one of those insureds. So and again, I'm going to  
21 get into a little bit of the business of insurance  
22 here and how it works. So when you're insuring a  
23 property under a master policy and that's what this  
24 policy is, in a foreign country, there's a local  
25 policy. You know whether or not Plaintiff's counsel

1 understands that and I'm not trying to be -- I'm not  
2 trying to be obnoxious in saying that that's why  
3 when he says it's a different policy, it's not even  
4 Zurich -- this was Zurich's money that was paid out.  
5 This sublimit was exhausted. There's no question  
6 about that. And as I think I said at the start, the  
7 person who we presented, and was -- he was a  
8 corporate designee, Zurich, and its counsel did what  
9 it needed to do to educate him so that he was able  
10 to answer the questions and testify about the  
11 exhaustion of the \$5 million. This was the adjuster  
12 on this claim. He was the appropriate person to be  
13 deposed, and he was educated, and the records do  
14 establish -- and I -- when I say I regret, I wish I  
15 could just send a copy of a check, but it just  
16 doesn't work that way with the program like this.  
17 The \$5 million was exhausted there's no -- there's  
18 just no question about that.

19 JUDGE SHELLEY: And I don't question your  
20 belief.

21 MR. SILVERBERG: I understand that Your Honor.

22 JUDGE SHELLEY: I do understand that I can't  
23 base my decision on your belief, it has to be based  
24 on what's they --

25 MR. SILVERBERG: I understand and respect that,

1 Your Honor. If I could just now go back to the -- I  
2 guess the -- what I would call the lion's share of  
3 the motion, which is the 6.5 motion to dismiss the  
4 other counts. It's our position that amendment  
5 would be futile here. You know, there's no magic  
6 word to be stated. And it does go back to where I  
7 started. That the law in Illinois and the law and  
8 elsewhere really, really pretty much across the  
9 board. And we understand that there was some  
10 outlier decision, so but they're very few and really  
11 hardly anything in Illinois and nothing in Cook  
12 County. That there's no magic word that they can  
13 say that we suffer physical loss or damage because  
14 the presence, because ultimately what their claim is  
15 is the presence of COVID. If they could prove it,  
16 the presence of COVID at their hotel constitutes  
17 physical loss or damage. And our point is, as a  
18 matter of law, it is not under Illinois law. So  
19 there's no amending to be done. And frankly, you  
20 know, you read the complaint with all the footnotes  
21 and with all the records sites that talk about harm  
22 to people and all of that, they took their shot at  
23 that. So we would suggest that the motion to  
24 dismiss on that aspect be with prejudice. And so  
25 we're not back here again, really making the same

1 arguments.

2 JUDGE SHELLEY: Thank you so much.

3 MR. HURST: Your Honor, can I quickly address?

4 JUDGE SHELLEY: Very short. It's --

5 MR. HURST: Yeah. I understand that Your Honor  
6 is denying a motion on the cancellation of bookings.  
7 I just wanted to add because Mr. Silverberg  
8 continued on with the explanation. This is per  
9 occurrence coverage under this policy, that's a  
10 separate occurrence. There should never be any  
11 payment that would exhaust our --

12 JUDGE SHELLEY: It's not necessary for you to  
13 argue that the cancellation of booking let's not --  
14 let's move on.

15 MR. HURST: Okay. Thank you, Your Honor.

16 JUDGE SHELLEY: My concern is whether or not I  
17 should allow you to amend.

18 MR. HURST: The only thing I would tell Your  
19 Honor is that your initial inclination at the outset  
20 of the discussion by Mr. Silverberg, we concur that  
21 this is going to require a factually developed  
22 record and we can show we've alleged it's  
23 statistical modeling and we've alleged that there  
24 was physical damage that can be shown through  
25 experts testifying about these fomites on property.



1 Ultimately, the case is going to be decided, we all  
2 know by the Illinois Supreme Court. Is it like  
3 asbestos? Is it not like asbestos? Is it all the  
4 material dimension? We understand that and we know  
5 that there are courts that come down on both sides  
6 of the ledger on this issue. We feel that this is  
7 the right decision and ultimately, the Illinois  
8 Supreme Court is going to say this is another  
9 material dimension and it's very similar as I  
10 pointed out, to be like asbestos.

11 JUDGE SHELLEY: And that's why I'm concerned  
12 about allowing you to make your record, but I don't  
13 know what else you can give the Court on this issue.  
14 I -- and unfortunately, some of my -- some of your  
15 colleagues believe that a longer pleading is the  
16 answer. A longer pleading is in the -- isn't the  
17 answer, it's the allegations. And that can be done  
18 sometimes in two or three pages.

19 MR. HURST: Your Honor, one of my colleagues  
20 texted me and said look at page -- paragraph 24 of  
21 the complaint. So that's what I would reference the  
22 court to. I don't have it in front of me, but.

23 JUDGE SHELLEY: I have it here. Paragraph 24  
24 makes references to the WHO, the World Health  
25 Organization.

1 MR. SILVERBERG: I'm happy to respond to that  
2 if and when Your Honor is ready.

3 JUDGE SHELLEY: Okay. Five more minutes, Madam  
4 Court Reporter, then we'll get through this call.

5 MR. SILVERBERG: And if it's five more minutes,  
6 it won't be on me I will only take about 20 seconds.  
7 So the WHO article, LinkedIn footnote 32 paragraph  
8 30 -- 24 recommends cleaning and disinfection. I  
9 mean this is our point, and this is the point. And  
10 that's why we say the amendment is futile. And, you  
11 know, and that's something that I just read, Your  
12 Honor, it was on page 4 of the reply brief.  
13 Amending the complaint and making it longer and  
14 having more links to articles does not change the  
15 law. And, you know, what has been the overwhelming  
16 finding of the courts that the presence of COVID,  
17 assuming that COVID was present, does not constitute  
18 physical loss or damage on the property - - to the  
19 properties.

20 JUDGE SHELLEY: Thank you so much. The Court  
21 is prepared to rule. It will be dismissed with  
22 prejudice. The only thing I can say to Plaintiff,  
23 you can always -- and I'm not inviting this because  
24 it, you know, motions for reconsideration should  
25 only be filed if there's a legal basis, a change in

1 the law, or a fact that was not known at the time  
2 that the original matter was brought to the Court's  
3 attention. But if you feel so compelled and you  
4 think you have some allegations, then I'll look  
5 forward to it, but at this time, I will not give you  
6 a lead to amend as to those issues. That still  
7 leaves us with cancellation of booking.

8 MR. HURST: Understood, Your Honor.

9 JUDGE SHELLEY: 26.9 will be denied as to that  
10 one.

11 MR. ROOF: Your Honor, this is Brian Roof, I  
12 got cut out for a bit. Have you ruled on whether  
13 the cancellation of bookings in the 2020 policy is  
14 not valid as well as the virus exclusion because  
15 they didn't comply with Illinois law? I just didn't  
16 know if you ruled on that or not. I -- like I said  
17 I lost connection twice now, and so I did not.

18 JUDGE SHELLEY: Okay. On the proper notice  
19 issue, no, I have not ruled on that issue.

20 MR. GROSSBART: Your Honor, John Grossbart, the  
21 denial on the cancellation of bookings to 2-619, I  
22 take it is without prejudice too. If they replead,  
23 we'll address it appropriately at that time.

24 JUDGE SHELLEY: I'm sorry, I didn't understand,  
25 Attorney Grossbart.

1 MR. GROSSBART: Your denial of the 2-619 motion  
2 regarding cancellation of bookings. If it is -- if  
3 the plaintiffs choose to re-plead. I understood  
4 your denial to be based on the sufficiency of the  
5 affidavit, which leaves open the prospect of -- that  
6 we'll address it with an affidavit that we think  
7 more clearly meets what, Your Honor found  
8 insufficient here.

9 JUDGE SHELLEY: So you're saying the 2-619  
10 should be denied without prejudice?

11 MR. GROSSBART: If it's going to be denied, it  
12 should be denied without prejudice, yes.

13 JUDGE SHELLEY: I agree because there was a  
14 deficiency that I based my ruling on the lack of  
15 support --

16 MR. GROSSBART: Thank you.

17 JUDGE SHELLEY: -- I will give that without  
18 prejudice.

19 MR. SILVERBERG: Thank you, Your Honor.

20 JUDGE SHELLEY: I still haven't addressed  
21 Attorney Roof's concern regarding the notice. And  
22 I'll be perfectly honest, I became distracted as to  
23 all of the other issues. That is in my notes here.  
24 That would increase the -- and your concern,  
25 Attorney Roof, is that it would increase the

1 possible coverage to \$10 million?

2 MR. ROOF: Yes. You know, Your Honor and  
3 again, go back to what John said just briefly.  
4 Illinois law applies. They admitted it in their  
5 oral argument that it applies. They admitted it in  
6 their briefs. Their motion to dismiss said there is  
7 no choice law issue, so they never addressed it. In  
8 the briefing opposition, we put a footnote that  
9 analyzed choice of law. They never contested that  
10 footnote. They -- as John said, they want to cherry  
11 pick which law applies for their benefit. If it --  
12 Illinois law applies for physical loss and damage in  
13 the interpretation of that part of the policy. Then  
14 Illinois law applies for the entire policy. It  
15 can't pick and choose. Just because Marriott is in  
16 Maryland, doesn't make Maryland law apply to the  
17 notice requirement. And they didn't comply with it.  
18 We said they didn't comply with it. They offered no  
19 facts. They couldn't because it's a motion to  
20 dismiss. But they have offered no facts. They can  
21 offer any facts that they complied with the 90-day  
22 notice and if they don't comply with the 90-day  
23 notice, it reverts back to the prior policy which  
24 has a cancellation of bookings. So we clearly plead  
25 it. It was misleading to say that we didn't put it

1 in the complaint. And it is clearly in the  
2 complaint and so we're entitled to have that  
3 cancellation of bookings in the 2020 policy, in the  
4 virus exclusion stricken.

5 MR. SILVERBERG: Your Honor, may I respond?

6 JUDGE SHELLEY: Well, first of all, this is  
7 Defendant's motion to dismiss. You're asking for  
8 affirmative relief right now. I don't think it's  
9 properly before the Court.

10 MR. SILVERBERG: Okay. I'm -- okay. Sorry.

11 JUDGE SHELLEY: Just for a second, Attorney  
12 Silverberg, I wanted to make sure I understood  
13 Attorney Roof correctly.

14 MR. ROOF: They are saying that there's no  
15 cancellation of bookings policy and the virus  
16 exclusion applies to the 2020 policy and therefore  
17 it's excluded and we don't have coverage under  
18 cancellation of bookings and we don't have  
19 cancellation because of the virus exclusion and our  
20 point is that we do because they didn't comply with  
21 Illinois law. That's their motion to dismiss. We  
22 alleged that --

23 JUDGE SHELLEY: It's been denied under 2-619.  
24 So I can't award you affirmative relief if you want  
25 me to make if I understand, you want me to make a

1 pronouncement -- affirmative pronouncement at this  
2 point. That's -- you don't have a corresponding  
3 motion or any -- before the Court, if --

4 MR. ROOF: I guess then I would -- I mean, I  
5 asking for the guidance so we still have those  
6 claims pending.

7 JUDGE SHELLEY: Correct.

8 MR. ROOF: Okay. That's all I wanted to know  
9 is we still have those cancellation of bookings  
10 pending on the 2020 policy.

11 JUDGE SHELLEY: And it would be inappropriate  
12 for me to now make a pronouncement on it now that I  
13 denied 2619. Let's see how it develops. Maybe it  
14 will come back before the Court in some type of mop-  
15 up motion. If this case proceeds, motion in limine,  
16 or its motion for summary judgment, I don't know.

17 MR. ROOF: Okay. Thank you for that  
18 clarification.

19 JUDGE SHELLEY: Okay. Thank you, attorneys, so  
20 much. So the question is, counsel, I guess the ball  
21 is actually in Defendant's court right now, but the  
22 cancellation of booking being the only matter that  
23 really had survived today -- it was granted without  
24 prejudice. Now, Attorney Roof, this may be where  
25 you get your opportunity to raise this issue again.

1 Attorney Grossbart was pretty persistent about it'd  
2 be without pres -- prejudice. I don't know if he's  
3 seeking to refile the motion or supplement it with  
4 an affidavit.

5 MR. GROSSBART: Your Honor, I think we will  
6 wait to see if the complaint is not -- if the  
7 complaint is refiled. Now, basically, want -- one  
8 count on cancellation of bookings. We'll respond to  
9 that either with an answer or another 2-619 motion  
10 with a new and improved affidavit because Objective  
11 truth, we -- is that there's exhaustion and if we  
12 need a better affidavit to do that, we will do that.  
13 And if there's a pleading that there's two sub  
14 limits of \$5 million each, which for the reasons  
15 said they complete that, and we'll deal with that.  
16 We exhausted for 5 million. And if they say there's  
17 another 5 million coverage and another policy here,  
18 I don't think that's right based on their arguments,  
19 but we'll answer it with a motion or an actual  
20 answer. We'll just wait and see what they plead.

21 MR. ROOF: Your Honor, I don't think we have to  
22 re-plead. We pled the cancellation of bookings  
23 under both policies. And we said that the virus  
24 exclusion does not apply. We said it in the  
25 complaint. And I don't think we need to replead the



1 --

2 JUDGE SHELLEY: For your --

3 MR. ROOF: -- cancellation of bookings.

4 JUDGE SHELLEY: Attorneys, you will not speak  
5 to each other directly --

6 MR. GROSSBART: I -- my apologies.

7 JUDGE SHELLEY: -- I understand your position  
8 Attorney Grossbart, but I understand Attorney Roof's  
9 position also. These are strategic concerns of  
10 litigants that I see every day. So attorney -- if  
11 Attorney Roof wants to stand on his pleading as he  
12 is, I think he should take the opportunity to clean  
13 it up, but I'm not going to force you to do it. I  
14 will compel the defendant to answer. But the  
15 problem is, is there's irrelevant allegations in the  
16 complaint right now. So I would have to go through  
17 it and I would have to strike certain allegations is  
18 to tell the defendant to only answered these  
19 allegations because they pertain to the cancellation  
20 issue. And as I say that that out loud, I'm not  
21 willing to take on that task. So an amendment would  
22 be the appropriate thing to do.

23 MR. ROOF: Okay. Your Honor.

24 MR. HURST: Are you granting a motion for leave  
25 or without a motion are you granting leave at this

1 time to amend the complaint?

2 JUDGE SHELLEY: Yes. Oh, yes.

3 MR. HURST: All right.

4 JUDGE SHELLEY: As to the cancellation, yes.

5 MR. HURST: Thank you.

6 JUDGE SHELLEY: Okay. How much time will you  
7 need?

8 MR. HURST: 14 days.

9 JUDGE SHELLEY: Is that enough time, Counsel?  
10 And again, I do not subscribe to the school of  
11 thought that longer means better.

12 MR. HURST: Yeah. Well, we'll certainly take  
13 30. We could, you know, we can do it sooner if  
14 we're able to.

15 JUDGE SHELLEY: 30 days. How much time do you  
16 want to respond?

17 MR. SILVERBERG: Your Honor, we'd like -- 30  
18 days probably makes sense.

19 JUDGE SHELLEY: 30 days, no problem. Do I  
20 still have my case coordinator on the line? Yes.  
21 Mrs. Marinakis (phonetic), give us a status date 60  
22 days out. Let's see if she's still there. Mrs.  
23 Marinakis? Attorney Robbin, do you know if Mrs.  
24 Marinakis is still with us? No. She is not. Okay.  
25 Can you give me a date 60 days out?

1 MR. ROBBIN: Yes, Your Honor. 60 days out, we  
2 happen to have one of our first jury trials. Do you  
3 want them to appear that week?

4 JUDGE SHELLEY: We'll just be a status on the  
5 pleading if they filed the motion to dismiss. I'll  
6 look at that instead of briefing schedule.

7 MR. ROBBIN: Okay. Your Honor, I think 9:00,  
8 on December the first is best. That's a Wednesday.

9 JUDGE SHELLEY: Okay. Does that work for  
10 everyone? It will be virtual. We will continue  
11 with our case managements virtually until you are --  
12 until you are advised otherwise.

13 MR. HURST: Yes, Your Honor. That works.

14 JUDGE SHELLEY: Okay.

15 MR. GROSSBART: One last thing, if I might,  
16 would you like us to prepare an order as the  
17 corporate?

18 JUDGE SHELLEY: No. I would like for you to  
19 make the first draft send it to you.

20 MR. GROSSBART: That's what I mean.

21 JUDGE SHELLEY: Yes. Send it to me in a Word  
22 format, of course, I'll tweak it once I receive it.

23 MR. GROSSBART: Of course, and I will draft it,  
24 will confer with Plaintiff's counsel and then  
25 hopefully get something at least that are collective

1 Ben's were okay with.

2 JUDGE SHELLEY: Yes. That you appeared before  
3 me today. I'm sure you'll agree with that.

4 MR. GROSSBART: No. I've got the -- I've got  
5 that part down. After 40 years, I've sort of got  
6 that one.

7 JUDGE SHELLEY: Okay. Okay. Attorneys, thank  
8 you so much. Thank you, the ones that were silent.  
9 Very interesting. And I hope you understand where I  
10 was coming from. I think that it merits a close  
11 attention and listening to. I'm old enough to  
12 remember the development of the asbestos cases.  
13 And, yes, Attorney Grossbart, I've been around a  
14 while too and I remember how they were handled  
15 initially. You know, the law, bends and moves  
16 according to the social necessities. So let's see.  
17 Right now, I think there's been really nothing to  
18 support your position, Attorney Hurst. Okay.

19 MR. HURST: Thank you for your time, Your  
20 Honor.

21 MR. ROOF: Thank you, Your Honor.

22 MR. SILVERBERG: Thank you, Your Honor.

23 MR. GROSSBART: Thank you.

24 COURT REPORTER: And before everyone leaves, I  
25 wasn't able to get people's information. So if you

1 don't mind just putting in the chat box, if you can,  
2 your e-mail and firm.

3 MR. GROSSBART: You know, you know, Clayton,  
4 would you mind doing that for everybody on our side  
5 with e-mail so we're not bombarding --

6 MR. FAITS: Yeah. I have that information I  
7 can pass it on, yes.

8 MR. SILVERBERG: And, Clayton, would you give  
9 them my information too.

10 MR. FAITS: Yes. Yes.

11 MR. SILVERBERG: Thank you so much.

12 MR. FAITS: Thank you, Counsel.

13 COURT REPORTER: Judge, did you happen to have  
14 a good e-mail from for you?

15 JUDGE SHELLEY: Yes. My case -- my law clerk  
16 will put my e-mail address.

17 COURT REPORTER: Okay. And we didn't -- anyone  
18 want to order the transcript today?

19 MR. HURST: Not at this time.

20 MR. GROSSBART: Phil, do you want a copy?

21 MR. SILVERBERG: Yeah. I think we ought to  
22 order it.

23 MR. GROSSBART: We'll order a copy.

24 MS. CLAIR: Yeah, we'll want one.

25 COURT REPORTER: Okay. It just -- electronic?

1 MR. GROSSBART: Sure.

2 MR. SILVERBERG: Sure. Thank you.

3 MR. ROOF: Yeah. We'll order one too, please.

4 COURT REPORTER: I'm sorry. Who was that? I  
5 missed it.

6 MR. ROOF: That's Brian Roof. I think we want  
7 one, too.

8 JUDGE SHELLEY: So that's Plaintiff and  
9 Defendant.

10 COURT REPORTER: Okay.

11 MR. ROOF: Yeah. Just so we're clear on what  
12 we needed to do.

13 COURT REPORTER: All right. Thank you.

14 JUDGE SHELLEY: And Madam Court Reporter, you  
15 have all of the --

16 MR. GROSSBART: Thank you.

17 JUDGE SHELLEY: -- information?

18 COURT REPORTER: Yep. Thank you.

19 JUDGE SHELLEY: Good. Thank you for working  
20 late on a Friday. We appreciate it.

21 MR. ROOF: Thank you everybody.

22 COURT REPORTER: Thank you.

23 MR. SILVERBERG: Thank you, Your Honor.

24 COURT REPORTER: You-all have a great day.

25 MR. GROSSBART: Thank you, Your Honor.

1 (Oral argument concluded at 4:54 p.m.)

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CERTIFICATION

I, ARIA EDWARDS, a Shorthand Reporter and notary public, do hereby certify:

That ORAL ARGUMENT, the witness whose examination is hereinbefore set forth, was first duly sworn in by me and that this transcript of said testimony is a true record of the testimony given by said witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 8TH DAY OF OCTOBER, 2021.



ARIA EDWARDS