No. 21-1865

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AFM MATTRESS COMPANY, LLC,

Plaintiff-Appellant,

v.

MOTORISTS COMMERCIAL MUTUAL INSURANCE COMPANY,

Defendant-Appellee,

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 1:20-cv-03556
Hon. Manish S. Shah

BRIEF AND SHORT APPENDIX OF PLAINTIFF-APPELLANT AFM MATTRESS COMPANY, LLC

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-1865

Short Caption: AFM Mattress Company, LLC v. Motorists Commercial Mutual Insurance Company

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

AFM Mattress Company, LLC

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

Brown, Udell, Pomerantz & Delrahim, Ltd.

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

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

N/A

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

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Bryan D. King Date: 5/28/2021

Attorney's Printed Name: Bryan D. King

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

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N/A

Attorney's Signature: /s/ Glenn L. Udell Date: 5/28/2021

Attorney's Printed Name: Glenn L. Udell

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

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Michael S. Pomerantz Date: 06/01/2021

Attorney's Printed Name: Michael S. Pomerantz

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

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I. Jurisdictional Statement

A. Jurisdiction in the District Court

The United States District Court for the Northern District of Illinois ("District Court") had jurisdiction over the subject matter of this matter pursuant to 28 U.S.C. § 1332. The amount in controversy exceeds $75,000.00. Plaintiff-Appellant AFM Mattress Company, LLC ("AFM") is a Delaware limited liability company with its principal place of business in Illinois. The members of AFM are GSI Family Office LLC, a Delaware limited liability company, and GSI Finance Company LLC, an Illinois limited liability company.

The members of GSI Family Office LLC are: Eduardo E. Greco, as Trustee of the Eduardo E. Greco Revocable Trust, u/a/d 11/14/96; Pasquale F. Greco (aka Pasquale F. Greco II), as Trustee of the Pasquale F. Greco Trust, u/a/d 9/29/03; Gian Greco, as Trustee of the Gian Greco Trust, u/a/d 9/25/03; Roberto Greco, as Trustee of the Roberto Greco Trust, u/a/d 9/25/03; Francesca C.M. Greco-Jaffe and Dominic S. Maduri, as Co-Trustees of the Francesca C.M. Greco-Jaffe GSI Irrevocable Trust dated 12/18/02; Gian F. Greco and Dominic S. Maduri, as Co-Trustees of the Pasquale P. Greco GSI Irrevocable Trust, u/a/d 12/18/02; Gian F. Greco and Dominic S. Maduri, as Co-Trustees of the Gina V. Greco GSI Irrevocable Trust, u/a/d 12/18/02; Gian F. Greco and Dominic S. Maduri, as Co-Trustees of the Eduardo E. Greco, Jr. GSI Irrevocable Trust, u/a/d 12/18/02; Gian F. Greco and Dominic S. Maduri, as Co-Trustees of the Roberto Greco Irrevocable Trust II u/a/d 12/16/98; Gian F. Greco and Dominic S. Maduri, as Co-Trustees of the Pasquale F. Greco Irrevocable Trust II u/a/d 12/16/98; Gian F. Greco and Dominic S. Maduri, as Co-Trustees of the Eduardo E.

Greco Irrevocable Trust II u/a/d 12/16/98; Pasquale F. Greco II and Dominic S. Maduri, as Co-Trustees of the Gian F. Greco Irrevocable Trust II u/a/d 12/16/98; and Pasquale F. Greco II and Dominic S. Maduri, as Co-Trustees of the Francesca C.M. Greco-Jaffe Irrevocable Trust II u/a/d 12/16/98. The members of GSI Finance Company LLC are Greco Family Holdings LLC, an Illinois limited liability company, Greco PG Five LLC, an Illinois limited liability company, and Greco EG Three LLC, an Illinois limited liability company.

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The members of Greco Family Holdings LLC are: Eduardo E. Greco, as Trustee of the Eduardo E. Greco Revocable Trust, u/a/d 11/14/96; Pasquale F. Greco (aka Pasquale F. Greco II), as Trustee of the Pasquale F. Greco Trust, u/a/d 9/29/03; Gian Greco, as Trustee of the Gian Greco Trust, u/a/d 9/25/03; Roberto Greco, as Trustee of the Roberto Greco Trust, u/a/d 9/25/03; Francesca C.M. Greco-Jaffe and Dominic S. Maduri, as Co-Trustees of the Francesca C.M. Greco-Jaffe GSI Irrevocable Trust dated 12/18/02; Gian F. Greco and Dominic S. Maduri, as Co-Trustees of the Pasquale P. Greco GSI Irrevocable Trust, u/a/d 12/18/02; Gian F. Greco and Dominic S. Maduri, as Co-Trustees of the Gina V. Greco GSI Irrevocable Trust, u/a/d 12/18/02; Gian F. Greco and Dominic S. Maduri, as Co-Trustees of the Eduardo E. Greco, Jr. GSI Irrevocable Trust, u/a/d 12/18/02; Gian F. Greco and Dominic S. Maduri, as Co-Trustees of the Roberto Greco Irrevocable Trust II u/a/d 12/16/98; Gian F. Greco and

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The members of Greco PG Five LLC are: Gian F. Greco and Dominic S. Maduri, as Co-Trustees of the Roberto Greco Irrevocable Trust II u/a/d 12/16/98; Gian F. Greco and Dominic S. Maduri, as Co-Trustees of the Pasquale F. Greco Irrevocable Trust II u/a/d 12/16/98; Gian F. Greco and Dominic S. Maduri, as Co-Trustees of the Eduardo E. Greco Irrevocable Trust II u/a/d 12/16/98; Pasquale F. Greco II and Dominic S. Maduri, as Co-Trustees of the Gian F. Greco Irrevocable Trust II u/a/d 12/16/98; and Pasquale F. Greco II and Dominic S. Maduri, as Co-Trustees of the Francesca C.M. Greco-Jaffe Irrevocable Trust II u/a/d 12/16/98.

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AFM is deemed to be a citizen of Illinois because all of the individuals who hold direct or indirect membership interests in AFM (*i.e.*, the trustees of all of the trusts that hold the membership interests, as set forth above) consist of Eduardo E. Greco,

Pasquale F. Greco (aka Pasquale F. Greco II), Gian Greco, Roberto Greco, Francesca C.M. Greco-Jaffe, and Dominic S. Maduri, each of whom resides in and is a citizen of Illinois.

Defendant-Appellee Motorists Commercial Mutual Insurance Company ("Motorists") is an Ohio corporation with its principal place of business in Ohio, rendering Defendant a citizen of Ohio.

B. Appellate Jurisdiction

Appellate jurisdiction in this matter is premised on 28 U.S.C. § 1291 because AFM appeals from a final order of the District Court disposing of all parties' claims. The District Court entered an Order on April 15, 2021, granting Motorists' motion to dismiss with prejudice and terminating the case. (A.011-014, Doc. 37.)[1] Judgment was entered that same day. (A.015, Doc. 38.) AFM filed its Notice of Appeal on May 14, 2021. (Doc. 39.)

II. Statement of the Issues

1. Does the State of Illinois recognize the theory of "regulatory estoppel" as a basis for precluding Motorists from refusing to provide insurance coverage to AFM pursuant to a so-called virus exclusion in an insurance policy where Motorists misrepresented the effect of the virus exclusion when it submitted the proposed virus exclusion to state regulators for approval?

2. Did the District Court err in dismissing AFM's claim for coverage regarding claims for losses caused by actions of governmental authorities, as opposed

[1] Citations to "A.___" refer to the Short Appendix, attached hereto.

to losses caused by a virus, where the language of the insurance policy states that Motorists "will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises"?

III. Statement of the Case

A. Factual Background

AFM operates fifty-two (52) retail mattress stores in Illinois and Indiana. (Doc. 28 ¶¶ 3, 14.) When the COVID-19 pandemic hit in early 2020 and the governors of Illinois and Indiana ordered the closure of business throughout their respective states, AFM was forced to cease business activities at all 52 of its stores. (*Id.* ¶ 4.) At the time, AFM was covered under an insurance policy issued by Motorists, including coverage for commercial property, Policy No. 5000045035 (the "Policy"). (*Id.* ¶ 1.) AFM submitted a claim for coverage for the losses it suffered as a result of the pandemic and governmental orders. (*Id.* ¶ 7.) Nevertheless, Motorists denied AFM's claim. (*Id.* ¶ 8.) As pertinent to this appeal, Motorists denied AFM's claim based on an exclusion contained in an endorsement to the Policy (the "Virus Endorsement") purporting to exclude from coverage "any losses attributable to the SARS-CoV-2 virus [which causes COVID-19] or the Pandemic." (*See* Doc. 31 at 11.)[2]

1. Relevant Coverage Provisions in the Policy.

Among other coverages, the Policy contains a Business Income (and Extra Expense) Coverage Form pursuant to which Motorists agreed to indemnify AFM for

[2] Citations herein to page numbers of docketed documents refer to the page references generated by the CM/ECF system and printed at the top of each page in the record.

various losses relating to its business, including "Business Income," "Extra Expense," and "Civil Authority" coverages. (*Id.* ¶¶ 17-23; Doc. 28-1 at p. 156-57.) The Business Income coverage provides:

> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.
>
> With respect to the requirements set forth in the preceding paragraph, if you occupy only part of a building, your premises means:
>
> (a) The portion of the building which you rent, lease or occupy;
>
> (b) The area within 100 feet of the building or within 100 feet of the premises described in the Declarations, whichever distance is greater (with respect to loss of or damage to personal property in the open or personal property in a vehicle); and
>
> (c) Any area within the building or at the described premises, if that area services, or is used to gain access to, the portion of the building which you rent, lease or occupy.

(Doc. 28 ¶ 18; Doc. 28-1 at p. 156.) The term "Business Income" is defined to include: "a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and b. Continuing normal operating expenses incurred, including payroll." (Doc. 28 ¶ 19; Doc. 28-1 at p. 156.)

Extra Expense coverage under the Policy provides:

> We will pay necessary Extra Expense (other than the expense to repair or replace property) to:
>
> (1) Avoid or minimize the "suspension" of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.
>
> (2) Minimize the "suspension" of business if you cannot continue "operations".
>
> We will also pay Extra Expense to repair or replace property, but only to the extent it reduces the amount of loss that otherwise would have been payable under this Coverage Form.

(Doc. 28 ¶ 20; Doc. 28-1 at p. 156-57.) "Extra Expense" includes "necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss." (Doc. 28 ¶ 21; Doc. 28-1 at p. 156.)

Civil Authority coverage in the Policy provides:

> In this Additional Coverage, Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.
>
> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
>
> (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the

> damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.
>
> Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.
>
> Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end:
>
> (1) Four consecutive weeks after the date of that action; or
>
> (2) When your Civil Authority Coverage for Business Income ends; whichever is later.

(Doc. 28 ¶ 23; Doc. 28-1 at p. 157.) The Policy does not define the term "civil authority." (Doc. 28 ¶ 24.)

2. Motorists' Misrepresentation to Regulators Regarding the Proposed Virus Endorsement.

As an insurance company, Motorists is required by Illinois law to submit its policy forms, endorsements, and exclusions to the Illinois Department of Insurance ("DOI") for approval prior to using such documents and provisions in its policies. (*Id.* ¶ 29.) Insurance companies may file such documents directly with the DOI, authorize a third-party filer to do so, or "authorize[] the advisory organization, of which it is a member or subscriber, to make the filing on the company's behalf." (Doc. 33 at p. 8 n.2; Ill. Admin. Code tit. 50, § 753.10(b).) Motorists used forms and endorsements prepared by Insurance Services Office, Inc. ("ISO")—an organization that prepares standardized insurance forms and endorsements for its subscribing member

insurance companies—for the Policy. (Doc. 28 ¶ 30.) Thus, with respect to the pertinent provisions of the Policy, Motorists submitted the Policy forms and endorsements to the DOI via ISO. (*Id.* ¶¶ 30, 34.)

In 2006 or 2007, Motorists—through ISO—submitted to the DOI a proposed policy endorsement (later included as the Virus Endorsement in the Policy issued to AFM) entitled "Exclusion of Loss Due to Virus or Bacteria" on form number CP 01 40 07 06. (*Id.* ¶ 32.) ISO created the Virus Endorsement for its members' use in response to the insurance industry's liability for business interruption claims arising from the outbreak of Severe Acute Respiratory Syndrome ("SARS") in 2003. (*Id.* ¶ 31.) Motorists' submission of the Virus Endorsement to the DOI included an ISO circular describing the genesis of the Virus Endorsement and the reasoning therefor. (*Id.* ¶ 35; Doc. 28-2.) In order to procure approval from the DOI, the ISO circular falsely stated:

> *While property policies have not been a source of recovery for losses involving contamination by disease-causing agents*, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.

(Doc. 28 ¶ 37; Doc. 28-2 at p. 7 (emphasis added).) Motorists' statement that property policies had not been a source of recovery for losses from disease-causing agents was false because such policies historically had covered losses such as those caused by SARS, *e coli*, and other health-threatening organisms. (Doc. 28 ¶¶ 31, 39.) By mischaracterizing the Virus Endorsement merely as a clarification of existing coverage under property insurance policies, as opposed to an additional exclusion

from such policies, Motorists effectively obtained a reduction of coverage under the Policy without a corresponding reduction in insurance premiums. (Doc. 28 ¶ 38.)

B. Procedural History

AFM filed its original Complaint for Declaratory and Other Relief on May 12, 2020 in the Circuit Court of Cook County, Illinois, seeking a declaration of rights pursuant to a policy of insurance (the "Policy") issued to AFM by Motorists. (Doc. 1-1.) On June 18, 2020, Motorists filed a Notice of Removal, removing the action to the District Court. (Doc. 1.) On June 25, 2020, Motorists filed a Motion to Dismiss Plaintiff's Complaint and memorandum in support thereof. (Docs. 10-11.) Motorists based its motion solely on the Virus Endorsement in the Policy. (Doc. 11.) On November 25, 2020, the District Court granted Motorists' initial motion to dismiss without prejudice. (A.001-010, Doc. 27.) AFM filed its First Amended Complaint for Declaratory Judgment and Other Relief (the "Amended Complaint") on December 16, 2020. (Doc. 28.) On January 6, 2021, Motorists filed a Motion to Dismiss Plaintiff's Amended Complaint and memorandum in support thereof (the "Motion to Dismiss"). (Docs. 30-31.) Motorists' Motion to Dismiss again raised only a single challenge to the Amended Complaint, arguing that the Amended Complaint is barred by virtue of the Virus Endorsement. (Doc. 31.) On April 15, 2021, the District Court entered an Order granting Motorists' Motion to Dismiss the Amended Complaint with prejudice and terminating the matter, holding that the Virus Endorsement bars AFM's claims. (A.011-14, Doc. 37.) That same day, the Court entered its Judgment in Motorists favor. (A.015, Doc. 38.) AFM timely filed its Notice of Appeal on May 14, 2021. (Doc. 39.)

IV. Summary of the Argument

The sole basis asserted by Motorists in support of its Motion to Dismiss is Motorists' contention that the Virus Endorsement excludes AFM's right to coverage for its business interruption losses resulting from the COVID-19 pandemic and subsequent governmental orders. However, as more fully set forth below, the Virus Endorsement does not bar AFM's claims because Motorists misrepresented the effect of the Virus Endorsement when it submitted the Virus Endorsement for approval by the DOI. Under the theory of regulatory estoppel—a theory recognized under Illinois law—Motorists may not rely on the Virus Endorsement to exclude coverage under the Policy after procuring approval of the endorsement by fraud. The District Court erred in concluding that regulatory estoppel is not recognized in Illinois by misreading the governing decision of the Illinois Supreme Court. Further, the District Court erred in its alternate ruling that regulatory estoppel would not bar Motorists' reliance on the Virus Endorsement in any event.

Furthermore, even if regulatory estoppel does not bar Motorists from relying upon the Virus Endorsement, the District Court at a minimum erred in dismissing that portion of the Amended Complaint relating to AFM's claims pursuant to the Policy's Civil Authority coverage because the language of the Virus Endorsement—by its own terms—excludes only losses caused by a virus, and AFM's claim for Civil Authority coverage seeks business losses caused by the actions of governmental authorities, not damages caused by a virus itself.

V. Argument

A. Standard of Review

The Court reviews *de novo* the District Court's grant of a motion to dismiss pursuant to Federal Rules of Civil Procedure Rule 12(b)(6). *Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc.*, 536 F.3d 663, 667 (7th Cir. 2008). In doing so, the Court accepts as true all well-plead factual allegations in the Amended Complaint. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Furthermore, the District Court's interpretation of the Policy, as with any other contract, is a matter of law subject to *de novo* review. *GNB Battery Techs., Inc. v. Gould, Inc.*, 65 F.3d 615, 621 (7th Cir. 1995) (internal citation omitted).

B. The District Court Erred in Holding that Illinois Courts do Not Apply the Theory of Regulatory Estoppel.

AFM's Amended Complaint alleges that the Virus Endorsement does not act to bar AFM's claims for coverage under the theory of regulatory estoppel. (Doc. 28 ¶ 40.) Under the theory of regulatory estoppel, first espoused in *Morton Int'l, Inc. v. Gen. Accident Ins. Co.*, 629 A.2d 831 (N.J. 1993), a court will look beyond the plain, otherwise unambiguous language of an insurance policy exclusion to consider extrinsic evidence to find ambiguity. *Morton*, 629 A.2d at 847-48 (N.J. 1993). While *Morton.* itself does not apply Illinois law,[3] the Illinois Supreme Court in *American States Ins. Co. v. Koloms*, 177 Ill. 2d 473 (1997)—relying on *Morton*—applied the same principal by considering extrinsic evidence in order to find an ambiguity in an

[3] The parties agree that Illinois law applies to the interpretation of the Policy because the Policy was issued to AFM in Illinois. (A.005, Doc. 27 at p. 5; Doc. 11 at p. 5 n.2.)

insurance policy that did not exist on the face of the policy itself. *Koloms*, 177 Ill. 2d at 488-93. When an ambiguity exists, the policy is "construed strictly against the insurer who drafted the policy." *Id.* at 479. "[P]rovisions that limit or exclude coverage will be interpreted liberally in favor of the insured and against the insurer. *Id.*; *see also Nautilus Ins. Co. v. Vuk Builders, Inc.*, 406 F.Supp.2d 899, 903 (N.D. Ill. 2005) (applying Illinois law).

In granting Motorists' Motion to Dismiss, the District Court incorrectly concluded the theory of regulatory estoppel is not recognized under Illinois state law. (A.013, Doc. 37 at p. 3.) The District Court analyzed *Koloms* and mistakenly opined, "That the [*Koloms*] court looked to extrinsic evidence is unremarkable where it found the language at issue ambiguous." (*Id.*) But the *Koloms* Court did not look to extrinsic evidence *after* finding the policy language ambiguous, as the District Court suggests. Rather, as described in more detail below, *Koloms* acknowledged that the exclusion was unambiguous on its face, but despite the lack of facial ambiguity turned to consider extrinsic evidence in the form of the regulatory history of the exclusion in order to find ambiguity. *Koloms*, 177 Ill. 2d at 487-93.

Koloms involved the question of whether a pollution exclusion contained in an insurance policy barred claims arising out of carbon monoxide poisoning caused by a defective furnace. *Id.* at 476. The policy expressly excluded coverage for "actual, alleged or threatened discharge, dispersal, release or escape of pollutants" and defined "pollutants" as "'any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.'" *Id.* at 477.

It was indisputable that carbon monoxide is a gaseous contaminant, and thus fell squarely within the definition of pollutant under the policy. *Id*. at 480. Thus, on the face of the policy, the pollution exclusion would bar the claim. As the *Koloms* Court specifically noted, "[T]he exclusion is indeed 'quite specific,' and those courts wishing to focus exclusively on the bare language of the exclusion will have no difficulty in concluding that it is also unambiguous." *Id*. at 487.

Notwithstanding the *Koloms* Court's observation that the pollution exclusion was unambiguous on its face, it turned to the regulatory history of the pollution exclusion in order to reach the conclusion that the facially unambiguous exclusion was, in fact, ambiguous. *Id*. at 489-93. In the process, *Koloms* relied heavily on the New Jersey Supreme Court's decision in *Morton*. *Id*. at 489-91. Having found an ambiguity by virtue of the extrinsic evidence, *Koloms* resolved the ambiguity in favor of coverage and denied the insurer the benefit of the pollution exclusion. *Id*. at 494. While *Koloms* does not utilize the phrase "regulatory estoppel," its process of relying upon the regulatory history of the pollution exclusion demonstrates its adoption of the underlying principal that, under Illinois law, a court should consider the regulatory history of a policy exclusion even if the policy language itself is otherwise unambiguous. Thus, the District Court erred in concluding that Illinois courts do not apply the theory of regulatory estoppel.

C. The District Court Erred Because Motorists is Barred by Regulatory Estoppel from Contending that the Virus Endorsement Excludes Losses Involving Contamination by Disease-Causing Agents Such as COVID-19.

The District Court not only erred in concluding that Illinois courts do not recognize the theory of regulatory estoppel, but it also erred in alternatively determining that, "even if regulatory estoppel applied in Illinois . . . AFM hasn't plausibly identified any conflict between what ISO [on behalf of Motorists] said in 2006 and Motorists' reliance on the virus exclusion now." (A.013, Doc. 37 at p. 3.) A review of the Amended Complaint demonstrates that the Amended Complaint sufficiently alleges the facts giving rise to regulatory estoppel, establishing the misrepresentations made by Motorists to the DOI and the conflict with its attempt to rely upon the Virus Endorsement to deny coverage to AFM.

As noted above, the Illinois Supreme Court in *Koloms* looked beyond the facially unambiguous language of the insurance policy and considered extrinsic evidence in the form of regulatory history in order to identify an ambiguity in the policy, thereby endorsing the theory of regulatory estoppel described in *Morton*. The factual scenario in *Morton* closely parallels Motorists' effort to invoke the Virus Endorsement after having made misrepresentations to the DOI.

The plaintiff in *Morton* sought coverage from its insurers for both indemnity and defense costs arising out of pollution claims brought against the plaintiff by the New Jersey Department of Environmental Protection. *Morton*, 629 A.2d at 835. The insurers denied coverage based on, among other things, a pollution exclusion contained in the various policies. *Id*. at 847. The pollution exclusion excluded from

coverage losses resulting from the discharge of pollutants except where such discharge was "sudden and accidental." *Id.* at 847. The *Morton* Court noted that, if applied literally, the exclusion would have "sharply and dramatically" restricted coverage previously available under such policies, which had generally provided coverage for "continuous or repeated" discharge of pollutants. *Id.*

Notwithstanding the drastic change in existing coverage that the exclusion would have had if applied as drafted, the insurance industry, when submitting the exclusion to state regulators for approval, made the following misrepresentation: "'Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent.'" *Id.* at 851.

Because the insurers had misrepresented the impact of the pollution exclusion to state regulators when they sought approval of the exclusion, the *Morton* Court therefore refused to enforce the pollution exclusion as written:

> We are fully satisfied that if given literal effect, the standard clause's widespread inclusion in CGL policies would limit coverage for pollution damage to so great an extent that the industry's representation of the standard clause's effect, in its presentation to New Jersey and other state insurance regulatory agencies, would have been grossly misleading. Proffered to regulators merely as a clarification of existing coverage "so as to avoid any question of intent," and as a continuation of coverage for pollution-caused "injuries that result[] from an accident," the industry's understatement of the clause's actual effect on coverage for pollution damage is both apparent and unjustifiable.
>
> * * *

> . . . Rather than "clarify" the scope of coverage, the clause virtually eliminated pollution-caused property-damage coverage, without any suggestion by the industry that the change in coverage was so sweeping or that rates should be reduced. For those reasons, we decline to enforce the standard pollution-exclusion clause as written. To do so would contravene this State's public policy requiring regulatory approval of standard industry-wide policy forms to assure fairness in rates and in policy content, and would condone the industry's misrepresentation to regulators in New Jersey and other states concerning the effect of the clause.

Id. at 848; *see also id*. at 872-73 ("This Court is now asked to construe CGL policies containing the pollution-exclusion clause in a manner consistent with the clause's literal language, ignoring the industry's misleading presentation to state regulators over twenty years ago"). Thus, the *Morton* court interpreted the pollution exclusion consistently with the representation to state regulators that the exclusion was merely a clarification of existing coverage—thereby ignoring any change to the existing state of the law with respect to pollution coverage. *Id*. at 874 ("As a matter of equity and fairness, the insurance industry should be bound by the representations of the IRB, its designated agent, in presenting the pollution-exclusion clause to state regulators.").

Just as the insurance industry had misrepresented to state regulators the impact of the pollution exclusion in the 1970s, leading courts to reject application of the exclusion and instead enforce coverage in a manner consistent with policy coverage prior to implementation of the misleading exclusion, so too should Motorists be barred from relying on the Virus Endorsement due to its misrepresentations to the DOI regarding the impact of the Virus Endorsement. Indeed, just like in *Morton*, at

the time Motorists submitted the Virus Endorsement to the DOI, it falsely represented that the Virus Endorsement was merely a clarification of existing coverage and the scope of coverage would not change because, purportedly, "'property policies have not been a source of recovery for losses involving contamination by disease-causing agents . . . .'" (Doc. 28 ¶¶ 37-38.)

Contrary to Motorists' representation, property polices had, in fact, been a source of recovery for losses from disease-causing agents. Such losses included claims paid out be the insurance industry relating to losses from SARS in the early 2000s, (Doc. 28 ¶¶ 31, 39), as well as contamination resulting from *e coli* and losses from "health threatening organisms." *Craig Cooper & Olive Indus. v. Travelers Indem. Co. of Ill.*, No. C-01-2400 VRW, 2002 U.S. Dist. LEXIS 29085, at *3, 6, 13 (N.D. Cal. Nov. 4, 2002); *Pillsbury Co. v. Underwriters of Lloyd's*, 705 F. Supp. 1396, 1400 (D. Minn. 1989) (coverage for loss from "health threatening organisms"). Thus, Motorists' contention that the Virus Endorsement bars coverage for AFM's claims is inconsistent with its representation to the DOI that application of the Virus Endorsement would not result in a change in coverage.

Had Motorists been truthful with the DOI that its proposed endorsement would result in a reduction in coverage, it would have been forced to offer a corresponding reduction in policy premiums. *See Morton*, 629 A.2d at 853. The Court should not permit Motorists to profit from its misrepresentation to the DOI and should instead apply the theory of regulatory estoppel, as set forth in *Morton* and endorsed in *Koloms*, to estop Motorists from now taking a position that the Virus

Endorsement has altered the scope of coverage such that AFM's claims are barred—a position directly at odds with Motorists representation to the DOI.

D. Even if Motorists is Not Barred by Regulatory Estoppel, the District Court Erred Because the Virus Endorsement by Its Own Terms Does Not Exclude Coverage for Losses Caused by Government Actions, as Opposed to Losses Caused by a Virus.

Notwithstanding whether the theory of regulatory estoppel bars Motorists from relying upon the Virus Endorsement, the District Court erred in dismissing AFM's Amended Complaint for another reason: the Virus Endorsement—by its own terms—does not exclude from coverage AFM's claims for business losses arising under the Policy's Civil Authority coverage.

Pursuant to Civil Authority coverage, AFM is entitled to coverage for its "loss of Business Income" and any "Extra Expense" it incurs by reason of "action of a civil authority that prohibits access" to the insured premises. (Doc. 28 ¶ 23; Doc 28-1 at p. 157.) The trigger for such coverage is where a "Covered Cause of Loss causes damage to property other than [AFM's] property . . . ." (*Id.*) The Policy defines "Covered Cause of Loss" as "direct physical loss unless the loss is excluded or limited in this policy." (Doc. 28-1 at p. 173 ¶ A; *see also* A.006, Doc. 27 at 6.) AFM alleged in the Amended Complaint that the Covered Cause of Loss triggering Civil Authority coverage was the direct physical loss to properties throughout Illinois and Indiana resulting from the presence of SARS-CoV-2, the virus that causes COVID-19. (Doc. 42-47.)

Neither Motorists' motion to dismiss the original Complaint nor its motion to dismiss the Amended Complaint challenged the allegations that the presence of

SARS-CoV-2 causes direct physical loss to properties. Rather, the sole basis for its motions was the Virus Endorsement. (Doc. 11; Doc. 31.) The pertinent language in the Virus Endorsement states, "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (Doc. 28-1 at p. 167 ¶ B.) With respect to Civil Authority Coverage, AFM seeks damages it suffered from the closure orders issued by the governors of Illinois and Indiana. (*See, e.g.*, Doc. 28 ¶¶ 65-66.) AFM does not seek damages caused by SARS-CoV-2 (or any other virus) to the property of others, so the fact that, pursuant to the Virus Endorsement, Motorists "will not pay" for such losses does not preclude AFM's claim for Civil Authority Coverage, and the District Court erred in dismissing such claim.

VI. Conclusion

For each of the foregoing reasons, Plaintiff-Appellant AFM Mattress Company, LLC respectfully requests that the Court reverse the District Court's April 15, 2021 Order dismissing AFM's Amended Complaint and remand this case for further proceedings.

Dated: June 23, 2021

Respectfully Submitted,
AFM MATTRESS COMPANY, LLC

By: */s/ Michael S. Pomerantz*
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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limits of Fed. R. App. P. 32(a)(7)(B) and Cir. R. 32 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,429 words.

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Dated: June 23, 2021

/s/ Michael S. Pomerantz
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has caused a copy of the Brief and Short Appendix of Plaintiff-Appellant AFM Mattress Company, LLC to be served upon all parties of record by filing it with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit, on June 23, 2021 via the CM/ECF System.

Dated: June 23, 2021

/s/ Michael S. Pomerantz
Attorney for Plaintiff-Appellant

No. 21-1865

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AFM MATTRESS COMPANY, LLC,

Plaintiff-Appellant,

v.

MOTORISTS COMMERCIAL MUTUAL INSURANCE COMPANY,

Defendant-Appellee,

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 1:20-cv-03556
Hon. Manish S. Shah

SHORT APPENDIX

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CIR. R. 30(d) STATEMENT

The undersigned hereby certifies pursuant to Circuit Rule 30(d) that all material required by Circuit Rule 30(a) and (b) are included in the Short Appendix

Dated: June 23, 2021

/s/ Michael S. Pomerantz
Attorney for Plaintiff-Appellant

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

AFM MATTRESS CO., LLC,

Plaintiff,

v.

MOTORISTS COMMERCIAL MUTUAL INS. CO.,

Defendant.

No. 20 CV 3556

Judge Manish S. Shah

MEMORANDUM OPINION AND ORDER

Plaintiff AFM Mattress Company owns 52 mattress stores in Indiana and Illinois. In March 2020, it shut down its businesses due to the COVID-19 pandemic and the related state and local governments' stay-at-home orders. Plaintiff submitted a claim for business-interruption coverage to its insurer, defendant Motorists Commercial Mutual Insurance Company, but defendant denied the claim. Plaintiff seeks a declaratory judgment that it is entitled to coverage. Defendant moves to dismiss for failure to state a claim, citing the policy's virus exclusion. For the reasons discussed below, the motion is granted.

I. Legal Standards

To survive a motion to dismiss under Rule 12(b)(6), a complaint must state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). The complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In reviewing a motion to dismiss, I

construe all factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *Sloan v. Am. Brain Tumor Ass'n*, 901 F.3d 891, 893 (7th Cir. 2018).

At this stage of the case, I may only consider allegations in the complaint, documents attached to the complaint, documents that are both referred to in the complaint and central to its claims, and information that is subject to proper judicial notice. *Reed v. Palmer*, 906 F.3d 540, 548 (7th Cir. 2018) (quoting *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012)). Plaintiff attaches the insurance policy to its complaint, [1-1] Exh. 1,[1] so I consider that policy in ruling on the motion to dismiss. *See Hongbo Han v. United Cont'l Holdings, Inc.*, 762 F.3d 598, 601 n.1 (7th Cir. 2014).

II. Facts

Plaintiff owned 52 mattress stores in Indiana and Illinois. [1-1] ¶ 14. Defendant was plaintiff's insurer. [1-1] ¶¶ 15–16. The insurance policy covered loss of business income and loss due to actions of a civil authority. [1-1] ¶ 17. Under the civil authority provision, defendant would pay for businesses losses sustained "[w]hen a Covered Cause of Loss cause[d] damage to property other than the property at the described premises" and the "action of civil authority" prohibited access to the described premises. [1-1] ¶ 23. For coverage to apply, the civil authority must have prohibited access to the area surrounding the damaged property "as a result of the damage," and the described premises must have been within a mile of the damaged

[1] Bracketed numbers refer to entries on the district court docket. Referenced page numbers are taken from the CM/ECF header placed at the top of filings.

property. [1-1] ¶ 23. Also, the civil authority must have acted "in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage," or "the action [wa]s taken to enable a civil authority to have unimpeded access to the damaged property." [1-1] ¶ 23. The policy defined "Covered Cause of Loss" as "direct physical loss unless the loss is excluded or limited in this policy." [1-1] ¶ 25. The policy did not define "civil authority." [1-1] ¶ 24. Plaintiff alleges that the states of Illinois and Indiana, the governors of those states, the Illinois state department of health, and the City of Chicago are all civil authorities. [1-1] ¶¶ 41–47, 54–55.

The policy also contained a "virus exclusion" clause. [1-1] at 180. The exclusion stated: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." [1-1] at 180. The exclusion applied to "all coverage under all forms and endorsements that comprise this Coverage Part or Policy," including, but not limited to, business income, extra expense, or action of a civil authority. [1-1] at 180.

On March 11, 2020, the World Health Organization characterized COVID-19 as a pandemic. [1-1] ¶ 48. A few days later, Illinois Governor J.B. Pritzker issued an executive order banning public and private gatherings of 50 or more people. [1-1] ¶¶ 40–41, 49–50. The intent of the executive order was to slow the spread of COVID-19, because frequently used surfaces in public settings posed a risk of exposure if not cleaned and disinfected property. [1-1] ¶ 50. It was also to promote social distancing,

the "paramount strategy for minimizing the spread of COVID-19." [1-1] ¶ 51. A few days later, in response to COVID-19, the governor issued an order requiring Illinois residents to stay home, except for essential activities, and reduced gatherings to ten people or less. [1-1] ¶¶ 4, 51. The Illinois Department of Health and the City of Chicago also issued orders banning gatherings of more than ten people. [1-1] ¶¶ 42–43. On March 6, 2020, Indiana Governor Eric Holcomb declared a public health emergency due to the pandemic. [1-1] ¶ 52. Ten days later, he issued an order prohibiting events of more than fifty people, and, on March 23, 2020, issued a stay-at-home order directing all nonessential businesses to close and reducing gatherings to ten people. [1-1] ¶¶ 52–53.

In March 2020, because of the executive orders issued in response to COVID-19, plaintiff closed its stores. [1-1] ¶ 56. Plaintiff sustained losses as a result. [1-1] ¶¶ 27–29, 57. The company submitted a claim to defendant for its business losses, and defendant denied the claim. [1-1] ¶¶ 58–59.

III. Analysis

Plaintiff seeks a declaratory judgment under 735 ILCS § 5/2-701 requiring defendant to cover its losses.[2] Defendant moves to dismiss for failure to state a claim

[2] Plaintiff brought its claim for a declaratory judgment under Illinois law. A federal court sitting in diversity applies state substantive law and federal procedural law. *Reynolds v. Henderson & Lyman*, 903 F.3d 693, 695 (7th Cir. 2018). Both the federal and Illinois declaratory judgment statutes are procedural, not substantive. *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 199 (2014) (federal statute); *Beahringer v. Page*, 204 Ill.2d 363, 373 (2003) (state statute). So the federal Declaratory Judgment Act governs plaintiff's claim. *People ex rel. Barra v. Archer Daniels Midland Co.*, 704 F.2d 935, 940 (7th Cir. 1983).

based on the virus exclusion in the insurance policy.[3] Defendant does not concede that plaintiff has adequately pleaded that physical damage or loss occurred, [11] at 6 n.3; [16] at 4 n.1, but argues that it need not address any argument other than whether the virus exclusion applies. As plaintiff sees it, defendant must cover its losses because it was the shutdown orders, not the virus itself, that caused them. Plaintiff also argues that the virus exclusion applied only to viruses that existed at the time the parties entered into the insurance policy.

The interpretation of an insurance policy is a matter of state law. *Westfield Ins. Co. v. Vandenberg*, 796 F.3d 773, 777 (7th Cir. 2015). A court sitting in diversity applies the law of the forum state. *See Lodholtz v. York Risk Servs. Grp., Inc.*, 778 F.3d 635, 639 (7th Cir. 2015). Both parties here agree that Illinois law applies. Under Illinois law, the general rules governing interpretation of contracts also govern the interpretation of insurance policies. *Scottsdale Ins. Co. v. Columbia Ins. Grp.*, 972 F.3d 915, 919 (7th Cir. 2020). The goal is to "ascertain and give effect to the intention of the parties, as expressed in the policy language." *Id.* (quoting *Hobbs v. Hartford Ins. Co. of the Midwest*, 214 Ill.2d 11 (2005)); *Ill. Farmers Ins. Co. v. Hall*, 363 Ill.App.3d 989, 993 (1st Dist. 2006). All provisions of the policy should be read together; every part of the contract must be given meaning, so no part is meaningless

[3] The court has subject-matter jurisdiction over these state-law claims. Plaintiff is an LLC. Its members are all citizens of Illinois or Delaware. *See* [25]. Defendant is an insurance company organized under the laws of Ohio with its principal place of business of business in Ohio. The amount in controversy exceeds $75,000. [1] ¶¶ 4(f)–(g); *see* 28 U.S.C. § 1332.

or surplusage. *Mkt. St. Bancshares, Inc. v. Fed. Ins. Co.*, 962 F.3d 947, 954–55 (7th Cir. 2020), *reh'g denied* (July 10, 2020).

If the words of a policy are reasonably susceptible to more than one meaning, the words are considered ambiguous. *Cent. Ill. Light Co. v. Home Ins. Co.*, 213 Ill.2d 141, 153 (2004). If language in the policy is ambiguous, it is construed against the insurer. *Id; see also Altom Transp., Inc. v. Westchester Fire Ins. Co.*, 823 F.3d 416, 421 (7th Cir. 2016). But a contract is not ambiguous "merely because the parties disagree on its meaning." *Cent. Ill. Light Co.*, 213 Ill.2d at 158. Courts will not strain to find ambiguity where none exists. *Hall*, 363 Ill.App.3d at 994.

The text of the policy precludes civil authority coverage here. Civil authority coverage applied when "a Covered Cause of Loss cause[d] damage" that led a civil authority to prohibit access to plaintiff's property, under certain circumstances. [1-1] at 170. The policy defined Covered Cause of Loss as "direct physical loss unless the loss is excluded or limited in this policy." [1-1] at 186. The policy excluded loss or damage "resulting from any virus," [1-1] at 180, and that exclusion applied to "all coverage under all forms and endorsements that comprise this Coverage Part or Policy," including action of a civil authority. [1-1] at 180. Contracts in Illinois must be interpreted to honor the parties' intentions as reflected in the text, and the text of this policy is straightforward. Defendant agreed to cover plaintiff when a covered cause of loss caused damage to a nearby property, triggering the government to prohibit access to plaintiff's stores. But damage from a virus was not a covered cause of loss—the policy explicitly excluded coverage for virus-related loss. And the virus

exclusion itself made clear that the exclusion applied to civil authority coverage. The policy contemplated that a government entity might take some action in response to a virus, and specifically excluded coverage in that scenario.[4]

Plaintiff's argument that its losses occurred because the Indiana and Illinois governmental entities issued shutdown orders, not because of the virus itself, is unpersuasive. Plaintiff's complaint undermines its argument—the complaint alleges that plaintiff's losses were due to both the virus and the shutdown orders that followed. *See, e.g.*, [1-1] ¶ 4 (plaintiff suspended business "due to the COVID-19 pandemic, and the ensuing orders of governmental authorities"); [1-1] ¶ 8 ("Defendant has refused to pay Plaintiff's claim for losses sustained due to the COVID-19 pandemic and the ensuing orders of governmental authorities.").

Moreover, civil authority coverage does not exist in a vacuum—there is always some underlying cause of loss that triggers the government action, and the policy must cover that underlying cause for civil authority coverage to apply. Generally, civil authority coverage "is intended to apply to situations where access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property." *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686–87 (5th Cir.

[4] Other courts that have considered similar or identical virus exclusions have found the text of the policy precluded coverage and granted the insurers' motions to dismiss. *See, e.g.*, *10e, LLC v. Travelers Indem. Co.*, 2020 WL 6749361, at *3 (C.D. Cal. Nov. 13, 2020) (collecting cases); *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 5258484, at *8 (E.D. Mich. Sept. 3, 2020); *Martinez v. Allied Ins. Co.*, 2020 WL 5240218, at *2 (M.D. Fla. Sept. 2, 2020); *Diesel Barbershop, LLC v. State Farm Lloyds,* 2020 WL 4724305, at *7 (W.D. Tex. Aug. 13, 2020).

2011) (citation omitted). Governments typically don't issue shutdown orders for no reason, so the underlying cause of damage matters. For example, courts have found civil authority coverage applied when governments prohibited access in response to damage caused by the September 11 terrorist attacks, hurricanes, and civil unrest. *See S. Hospitality, Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1140–41 (10th Cir. 2004) (collecting cases); *Abner, Herrman & Brock, Inc. v. Great Northern Ins. Co.*, 308 F.Supp.2d 331, 333 (S.D.N.Y. 2004). In this case, the governments issued shutdown orders in response to the virus, an excluded cause of loss. Without a covered cause of loss, there is no civil authority coverage, and plaintiffs do not plead that some other event triggered the shutdown orders. That other governments reacted differently or imposed looser restrictions doesn't change the fact that the governments at issue here restricted public access to plaintiff's stores in response to the virus.

That COVID-19 didn't exist when the parties entered into the insurance contract is irrelevant. The policy excludes coverage for damages caused by "any" virus. To be sure, the word "any" could mean "some" or "all." *See United States v. Miscellaneous Firearms*, 376 F.3d 709, 712 (7th Cir. 2004) (defining the word "any"); *see also People v. Sedelsky*, 2013 IL App (2d) 111042, ¶¶ 20–21 ("any" could mean "some," "one out of many," or an "indefinite number"). And where "any" could reasonably mean either "all" or "some," contracts and statutes have been deemed ambiguous. *See First Bank & Tr. v. Firstar Info. Servs., Corp.*, 276 F.3d 317, 323–24 (7th Cir. 2001) (contract was ambiguous where "any Service" could plausibly mean either all services or some services).

But the meaning of a contract "cannot be derived from words and phrases considered in isolation." *Id.* at 324. The text of the exclusion here does not support the meaning that plaintiff gives it. The exclusion reads: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." In context, the word "any" here means all viruses that induce or are capable of inducing illness or disease. There's no temporal limitation in the policy on when a given virus must have come into existence to be included in the virus exclusion, and nothing in the text suggests that the parties intended the exclusion to apply only to viruses that existed at the time they entered into the policy. While plaintiff rightly points out that, under Illinois law, ambiguous language should be interpreted to favor the insured, that presumption is triggered only when the language is ambiguous. *Phillips v. Prudential Ins. Co.*, 714 F.3d 1017, 1020 (7th Cir. 2013); *Hobbs v. Hartford Ins. Co.*, 214 Ill.2d 11, 17 (2005). There is no ambiguity in the language here.

IV. Motion for Sur-Response and Leave to Amend

Plaintiff's motion to file a sur-response is denied. Plaintiff seeks to reframe its case in a sur-response brief by adding an allegation that defendant made misrepresentations to state insurance regulators to obtain approval of the virus exclusion. But that allegation doesn't appear in the complaint, and a plaintiff may not amend its complaint in a response brief. *Rose v. Bd. of Election Comm'rs*, 815 F.3d 372, 376 n.3 (7th Cir. 2016).

Leave to amend should be freely given after dismissal of an initial complaint, unless amendment would be futile. *Pension Tr. Fund for Operating Eng'rs v. Kohl's Corp.*, 895 F.3d 933, 941 (7th Cir. 2018). Given that plaintiff may have an alternative theory for why defendant should cover its losses, amendment is not obviously futile. Plaintiff's complaint is dismissed without prejudice.

V. Conclusion

Plaintiff's motion to file a sur-response [26] is denied. Defendant's motion to dismiss [10] is granted. The complaint is dismissed without prejudice. If plaintiff does not file an amended complaint by December 16, 2020, the dismissal will convert to one with prejudice.

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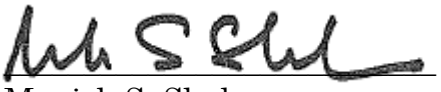

Manish S. Shah
United States District Judge

Date: November 25, 2020

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

AFM MATTRESS COMPANY, LLC,

Plaintiff,

v.

MOTORISTS COMMERCIAL MUTUAL INSURANCE COMPANY,

Defendant.

No. 20 CV 3556

Judge Manish S. Shah

ORDER

Defendant's motion to dismiss, [30], is granted. Plaintiff's amended complaint is dismissed with prejudice. Enter judgment and terminate civil case.

STATEMENT

Background

Plaintiff AFM owned 52 mattress stores in Illinois and Indiana. [28] ¶ 14.[1] AFM had an insurance policy with defendant Motorists. [28] ¶ 16. The policy obligated Motorists to cover AFM's business-interruption losses caused by a "Covered Cause of Loss." [28] ¶¶ 18–23. The policy defined covered cause of loss as "direct physical loss unless the loss is excluded or limited in this policy." [28] ¶ 26. The policy also contained a virus exclusion, which stated, "We will not pay for loss or damage caused by or resulting from any virus." [28-1] at 167.[2] That exclusion applied "to all coverage under all forms and endorsements," including business income, extra expense, and actions of a civil authority. [28-1] at 167.

Insurance companies in Illinois must submit policy forms, endorsements, and exclusions, or any proposed changes to them, to the Illinois Department of Insurance for approval. [28] ¶ 29. An insurance services company, Insurance Services Office, Inc. prepared standard insurance forms and endorsements for insurance companies

[1] Bracketed numbers refer to entries on the district court docket. Referenced page numbers are taken from the CM/ECF header placed at the top of filings. Facts are taken from the amended complaint. [28].

[2] I consider the text of the policy because AFM attached a copy of it to the complaint. *See Reed v. Palmer*, 906 F.3d 540, 548 (7th Cir. 2018).

and submitted those forms to state regulators for approval. [28] ¶ 30. After the SARS outbreak in 2003, insurers paid out millions of dollars in business-interruption claims. [28] ¶ 31. Around 2006, ISO created a new policy endorsement that excluded damages caused by a virus from covered causes of loss. [28] ¶¶ 32–33. ISO submitted that endorsement to the Department of Insurance on behalf of Motorists and other insurers, along with a circular explaining that the virus endorsement was a clarification of existing coverage rather than a reduction in coverage. [28] ¶¶ 34–38. The circular said that property policies had not been a source of recovery for losses from viruses, but the possibility of a pandemic raised the concern that insurers would have to cover such losses, "contrary to policy intent." [28] ¶¶ 37–38. AFM alleges those representations were false, because the insurance industry had previously covered losses caused by SARS, E. coli, and other diseases. [28] ¶¶ 39–40.

In March 2020, Illinois and Indiana authorities issued stay-at-home orders in response to the COVID-19 pandemic. [28] ¶¶ 49–64. AFM sustained losses as a result, and submitted a claim for business-interruption coverage to Motorists. [28] ¶¶ 66–67. Motorists denied the claim. [28] ¶ 68. AFM seeks declaratory relief establishing that Motorists must cover its losses.

This is AFM's second attempt to state a claim. I granted Motorists's first motion to dismiss and dismissed AFM's claim without prejudice because the text of the virus exclusion was unambiguous and precluded coverage. [27]. The parties don't seek to relitigate that finding, and the amended complaint doesn't change the allegations regarding what's in the policy. AFM has added allegations about ISO's representations to state insurance regulators, and it alleges that a doctrine known as "regulatory estoppel" bars Motorists from denying coverage for losses caused by a virus. Motorists again moves to dismiss.

Analysis

To survive a motion to dismiss under Rule 12(b)(6), a complaint must state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). The complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In reviewing a motion to dismiss, I construe all factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *Sloan v. Am. Brain Tumor Ass'n*, 901 F.3d 891, 893 (7th Cir. 2018).

Under Illinois law, a court may look to extrinsic evidence—such as ISO's statements to regulators—to interpret an insurance policy only when the policy is ambiguous. *Newman v. Metro. Life Ins. Co.*, 885 F.3d 992, 999 (7th Cir. 2018); *Thompson v. Gordon*, 241 Ill.2d 428, 441 (2011). Some jurisdictions allow extrinsic evidence to interpret even an unambiguous contract under the doctrine of regulatory estoppel, which holds that an industry may not take one position in front a regulatory

agency to win agency approval, then take an opposite position when policyholders file claims for coverage. *Hussey Copper, Ltd. v. Arrowood Indem. Co.*, 391 Fed. App'x 207, 211 (3d Cir. 2010). Pennsylvania and New Jersey recognize this concept as a matter of state law. *See Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 566 Pa. 494, 505 (2001); *Morton Int'l, Inc. v. Gen. Acc. Ins. Co. of Am.*, 134 N.J. 1, 75 (1993).

A court sitting in diversity must answer a question of state law the same way the state's highest court or intermediate appellate courts would. *Newman*, 885 F.3d at 999. No Illinois court has explicitly applied regulatory estoppel. AFM relies on *Am. States Ins. Co. v. Koloms*, 177 Ill.2d 473 (1997), to suggest that the Illinois Supreme Court implicitly endorsed the doctrine. But that case found the relevant exclusion to be ambiguous: "[W]e are troubled by … the manifestation of an ambiguity which results when the exclusion is applied" to certain cases. *Id.* at 488. The *Koloms* court then looked to the drafting history and approval process of the provision to ascertain the drafters' intent. *Id.* at 490–91 (discussing evolution of pollution exclusion). The court never addressed any estoppel theory, and it never stated that insurers were bound by what was said to regulators. The *Koloms* court cited to the New Jersey Supreme Court's decision in *Morton* only for background on the drafters' intent, not because it was endorsing that court's application of regulatory estoppel. *Id.* That the court looked to extrinsic evidence is unremarkable where it found the language at issue ambiguous. Because no Illinois court has ever recognized a theory of regulatory estoppel, and I predict that the Illinois Supreme Court would not apply it to an unambiguous insurance policy, it has no application here. *See also Sojo's Studios, Inc. v. Citizens Ins. Co. of Am.*, 2021 WL 837623, at *1 (N.D. Ill. Mar. 4, 2021).

Finally, even if regulatory estoppel applied in Illinois, and assuming that ISO was acting as Motorists's agent,[3] AFM hasn't plausibly identified any conflict between what ISO said in 2006 and Motorists' reliance on the virus exclusion now. As AFM alleges, the reason ISO submitted a virus exclusion was precisely to make explicit that the standard policy was meant to exclude virus-related claims. ISO stated: "[T]he specter of pandemic … raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent." [28] ¶ 37.

AFM emphasizes ISO's statement that the policy had historically "not been a source of recovery" for losses "involving contamination by disease-causing agents." [28] ¶ 37. As AFM sees it, that statement misled regulators into thinking the virus

[3] AFM's assertion that ISO was acting as Motorists's agent is conclusory, and generally, a "mere allegation of agency" is insufficient to plead an agency relationship. *Bogenberger v. Pi Kappa Alpha Corp., Inc.*, 2018 IL 120951, ¶ 28; *see Warciak v. Subway Restaurants, Inc.*, 949 F.3d 354, 357 (7th Cir. 2020) (complaint lacked sufficient facts to establish an agency relationship). Motorists doesn't concede the point, but doesn't argue it either. [31] at 18. Since neither party briefed the sufficiency of the agency allegations, I do not reach it and assume for purposes of this motion that ISO's statements are imputed to Motorists.

exclusion wouldn't change existing coverage, under which insurers had paid out claims for SARS-related damage. I accept AFM's allegation that ISO's statement was false. But a misleading statement about past coverage wouldn't trigger the application of regulatory estoppel. The doctrine bars insurers from saying one thing to regulators to gain approval, then saying the opposite to policyholders, and AFM doesn't point to any assurances ISO made to regulators that insurers would cover virus-related damage claims. Any such assurance would have been in clear conflict with the unambiguous language of the virus exclusion. Whether the exclusion was a clarification of existing coverage or a new addition to the policy is beside the point—what matters is that ISO told regulators that the virus exclusion would bar coverage. That's what Motorists says now. The positions are consistent.[4]

Ordinarily, leave to amend should be freely given unless amendment would be futile. *Doe v. Vill. of Arlington Heights*, 782 F.3d 911, 919 (7th Cir. 2015). AFM has amended its complaint once and is still unable to state a claim. AFM doesn't ask for leave to file a second amended complaint, and it doesn't suggest what it would add to another complaint. Amendment would be futile, so AFM's claim is dismissed with prejudice.

ENTER:

Manish S. Shah
United States District Judge

Date: April 15, 2021

[4] Jurisdictions that recognize regulatory estoppel have rejected its application in this context. *See, e.g.*, *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, 2020 WL 6545893, at *5 (E.D. Pa. Nov. 6, 2020) (insurer took "the same position here as the ISO" did "by arguing that the virus exclusion eliminates coverage"); *see also Garmany of Red Bank, Inc. v. Harleysville Ins. Co.*, 2021 WL 1040490, at *9 n.6 (D.N.J. Mar. 18, 2021) ("[F]ederal courts … have uniformly rejected claims that virus exclusions in commercial insurance policies are void under principles of regulatory estoppel."). And courts in jurisdictions that don't recognize the doctrine likewise have rejected its hypothetical application to the same facts AFM alleges. *See, e.g.*, *Robert E. Levy, D.M.D., LLC v. Hartford Fin. Servs. Grp. Inc.*, 2021 WL 598818, at *7 (E.D. Mo. Feb. 16, 2021) ("Plaintiffs allege that the industry groups made statements in 2006 representing that the policies were not intended to cover virus-related losses. … Defendants take the same position here."); *Border Chicken AZ LLC v. Nationwide Mut. Ins. Co.*, 2020 WL 6827742, at *5 (D. Ariz. Nov. 20, 2020) ("[T]he ISO Circular is clear that the Virus Exclusion is meant to exclude losses caused by pandemics. Assuming regulators did rely on the ISO document, they would have been aware of its effect on future coverage.").

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

AFM MATTRESS COMPANY, LLC,

Plaintiff,

v.

MOTORISTS COMMERCIAL MUTUAL INSURANCE COMPANY,

Defendant.

Case No. 20 CV 3556
Judge Manish Shah

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☒ in favor of defendant MOTORISTS COMMERCIAL MUTUAL INSURANCE COMPANY and against plaintiff AFM MATTRESS COMPANY, LLC.

Defendant shall recover costs from plaintiff.

☐ other:

This action was *(check one)*:

☐ tried by a jury with Judge Manish Shah presiding, and the jury has rendered a verdict.
☐ tried by Judge Manish Shah without a jury and the above decision was reached.
☒ decided by Judge Manish Shah on a motion.

Date: 4/15/2021

Thomas G. Bruton, Clerk of Court

/Susan McClintic , Deputy Clerk