1 STATE OF ILLINOIS   )

2   ) SS:

3 COUNTY OF C O O K   )

4

5   IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

6   COUNTY DEPARTMENT - CHANCERY DIVISION

7

8 UNIQUE CONCEPTS, LLC,   )

)

9   Plaintiff,)

)

10   vs.   ) No. 2020 CH 04342

)

11 STATE FARM FIRE AND   )

CASUALTY COMPANY, et al.,   )

12   )

                Defendants.)

13

14

15

16   ZOOM VIDEOCONFERENCE TRANSCRIPT OF PROCEEDINGS

17 had in the above-entitled cause on the 7th day of

18 July, A.D. 2021, at 10:30 a.m.

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21 BEFORE: HONORABLE CELIA G. GAMRATH

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 1   A P P E A R A N C E S:
 2         LAW OFFICES OF ROBERT J. SHELIST
           205 North Michigan Avenue
 3         Suite 810
           Chicago, Illinois  60601
 4         312-226-0675
           BY:  MR. ROBERT J. SHELIST
 5              robert@shelistlaw.com
 6              appeared on behalf of the Plaintiff;
 7
           RILEY SAFER HOLMES & CANCILA, LLP
 8         Three First National Plaza
           70 West Madison Street
 9         Suite 2900
           Chicago, Illinois  60602
10         312-471-8700
           BY:  MR. JAMES P. GAUGHAN
11              jgaughan@rshc-law.com
12              appeared on behalf of the Defendants.
13
14
15   ALSO PRESENT:   BERT WOLFF
                     D DUNHAM
16                   LEN KURFIRST
                     MARK MITCHELL
17                   OLIVIA RAIMONDI
                     SEAN CONNOLLY
18                   SEAN SULLIVAN
                     KATHERINE DEMPSEY
19                   1708****533
20
21
22
23   REPORTED BY:   TRUDY G. GORDON, C.S.R.
24                  CERTIFICATE NO. 084-004077
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1   THE COURT: We are calling the case of Unique

2   Concepts versus State Farm.

3   Who is present for Unique Concepts this

4   morning?

5   MR. SHELIST: Morning, your Honor. Robert

6   Shelist on behalf of Plaintiff.

7   THE COURT: Who is going to be speaking on

8   behalf of State Farm?

9   MR. GAUGHAN: Morning, your Honor. Jim Gaughan

10   on behalf of State Farm. I will be giving today's

11   presentation. There are other attorneys and clients

12   that will be viewing the presentation as well.

13   THE COURT: Thank you.

14   To the record and for the court reporter,

15   I would ask those who are not speaking to go on mute

16   and also to go off camera just to save the Broadband

17   so that we get the cleanest record possible.

18   With that, Mr. Gaughan, it is your motion

19   to dismiss this morning. I will allow you to

20   proceed.

21   MR. GAUGHAN: Thank you, very much, your Honor.

22   At issue today is State Farm's 2-615

23   motion to dismiss the Unique Concepts complaint.

24   Unique Concepts alleges that State Farm breached its

1 business owners insurance policy when it denied

2 coverage for loss of business income arising or

3 relating to the Covid 19 virus. We certainly

4 sympathize with the many businesses that have lost

5 revenues during this difficult time. We've all

6 sustained hardships. However, there is no coverage

7 here. Indeed the vast majority of courts in Illinois

8 and across the country have found no coverage for

9 these claims. Of particular note, Judge Moreland, in

10 the Windy City case, and Judge Walker, in the

11 Evanston Grill case, each dismissed, with prejudice,

12 a Covid-related business interruption claim against

13 State Farm under the same policy language presented

14 to your Honor. State Farm's business owners policy

15 insures a covered cause of loss. This raises the

16 touchstone of the policy, including the loss of

17 income endorsement that is at issue here. Under the

18 terms of the policy, covered cause of loss means an

19 accidental direct physical loss to property that is

20 not excluded. Unique Concepts has not alleged any

21 facts suggesting physical loss to its property,

22 instead it alleges a loss of use of its property.

23   But even more importantly, your Honor, the

24 policy contains a virus exclusion. Under Illinois

1 law an insurer has the right to limit coverage under

2 the policy. Here the policy clearly excluded virus,

3 and Plaintiff alleged loss would not have occurred

4 but for the virus. Nonetheless Plaintiff attempts to

5 make three arguments to make the virus exclusion

6 disappear. First, Plaintiff argues that the sentence

7 in State Farm's policy that is sometimes referred to

8 as the anti-concurrent causation clause violates

9 public policy.

10   Your Honor, I don't know if you'd like to

11 follow along. But if so, it would be Exhibit A to

12 the motion to dismiss where a copy of the policy is

13 attached. There you will see under Bates No. 42 the

14 exclusions and including especially the preamble

15 language that has two sentences to it. The first

16 sentence I'll get to in a moment. But the second

17 sentence is the sentence that Plaintiff challenges,

18 and it provides as follows. We do not insure for

19 such loss regardless of, A, the cause of the excluded

20 event or, B, other causes of the loss or, C, whether

21 other causes acted concurrently or in sequence with

22 the excluded event to produce the loss or, D, whether

23 the event occurred suddenly or gradually, involved

24 isolated or widespread damage, arises from natural or

 1 | external forces, or occurs as a result of a

 2 | combination of these, with a colon. And then you

 3 | would toggle down to Paragraph J where you will find

 4 | Virus. So under this clause which is sometimes

 5 | referred to as the anti-concurrent causation clause,

 6 | if, for example, there are two competing causes of a

 7 | loss and one is excluded but one is covered, the loss

 8 | will be excluded.

 9 | Of course, Plaintiff cites no Illinois

10 | case indicating that the clause violates this

11 | anti-concurrent causation -- anti-concurrent clause

12 | violates Illinois public policy. To the contrary,

13 | the Illinois Appellate Court in the Bozac case

14 | enforced such a clause holding that it actually

15 | barred coverage under Illinois law under the facts

16 | presented there. And Judge Chapman in DuPage in the

17 | It's Nice case specifically addressed this argument

18 | that State Farm's anti-concurrent causation language

19 | is contrary to Illinois public policy and rejected

20 | it. And I'd also note that Judges Walker and

21 | Moreland found State Farm's virus exclusion to

22 | preclude coverage for nearly the exact claim.

23 | Importantly, though, the anti-concurrent

24 | causation clause is not even needed to trigger the

1   virus exclusion. That is so because the policy also

2   has a sentence that provides -- And going back to

3   Bates No. SF42, which is the preamble language in the

4   exclusions, has the first sentence, and the first

5   sentence reads, "we do not insure under any coverage

6   for any loss which would not have occurred in absence

7   of one or more of the following events," with a

8   colon. Go down to Section J. That's where the virus

9   is -- virus exclusion is. So in absence of the

10   virus, Plaintiff would have sustained no loss of

11   income and, therefore, Plaintiff's claim is excluded.

12   Plaintiff's second argument with regard to

13   the virus exclusion is that they say that it's the

14   government order, not the virus, that caused this

15   loss. This argument is contrary to the plain

16   language of State Farm's policy given that the

17   government order would not have issued without the

18   virus, and it's contrary to the language of the

19   government orders themselves which are attached to

20   State Farm's motion as Exhibit B and C which provide

21   that the orders were issued in response to the

22   Covid 19 virus. Also, this argument is contrary to

23   the overwhelming number of decisions that have

24   addressed this very same argument, including the

1   decisions under State Farm's policy language in the

2   Evanston Grill and Windy City cases by Judge Walker

3   and Judge Moreland. Indeed there can be no doubt

4   that the virus was the root cause of the government

5   orders. To quote Judge Kocoras from the Riverwalk

6   decision in the Northern District of Illinois, he

7   identified the governmental orders as the,

8   quote/unquote, root cause and, therefore, excluded

9   under the policy.

10   Plaintiff's third argument with regard to

11   the virus exclusion is that the term virus was

12   insufficient and that the policy needed to include

13   the term pandemic. Again, Judge Kocoras in the

14   Riverwalk decision rejected this same argument. In

15   the Riverwalk case, Judge Kocoras identified that the

16   virus exclusion is subject to only one reasonable

17   interpretation and that is that coverage does not

18   extend to any claim based upon virus-related damage

19   regardless of its magnitude. A virus spread around

20   the world which is then classified as a pandemic fits

21   squarely into the plain language of the virus

22   exclusion. The fact that the Covid 19 virus has

23   become a pandemic does not negate the simple fact

24   that the government orders were issued to curb the

1 spread of the Covid 19 virus.

2   And, your Honor, in addition to coverage

3 being foreclosed by the virus exclusion, there is no

4 coverage based upon the policies requirement for a

5 direct physical loss. As Judge Walker and

6 Judge Moreland found when assessing State Farm's

7 policy language, a Plaintiff must allege damage to

8 property, meaning that there must be an alteration of

9 the physical condition of the property.

10   Plaintiff cites to Judge Chang's opinion

11 in the Society Insurance Case from the Northern

12 District of Illinois. There Judge Chang interpreted

13 different policy language. The policy language there

14 covered physical loss of or damage to property. This

15 is disjunctive language. It's damage to or physical

16 loss of. And Judge Chang used that disjunctive

17 language to find that, at least on the dismissal

18 phase, that the case could proceed. And --

19   THE COURT: Let me interrupt.

20   Do I need to address this or is your

21 exclusion argument predicated on the fact that

22 Plaintiff would be up to show coverage but for the

23 virus exclusion?

24   MR. GAUGHAN: Your Honor, we presented two

1   alternative arguments, each of which would lead to a

2   dismissal with prejudice. So your Honor does not

3   need to address the accidental physical loss language

4   if your Honor chooses not to. The virus exclusion

5   will carry the day. However, as a courtesy to your

6   Honor, I am also walking through the argument as to

7   why the accidental direct physical loss language of

8   the policy would too carry the day to a dismissal.

9   So, your Honor, with regard to the

10 accidental direct physical loss, Judge Chang was

11 looking at different policy language. Plaintiff also

12 points to Judge Kennelly's decision in the Williams

13 versus Cincinnati Insurance case which again involved

14 different policy language, and like Judge -- the case

15 that Judge Chang was reviewing did not have a virus

16 exclusion. So Judge Kennelly and Judge Chang were

17 dealing with cases that did not have a virus

18 exclusion, and each case dealt with disjunctive

19 language. With Judge Kennelly's case, loss was

20 defined as accidental direct physical loss or

21 accidental physical damage.

22   And what's particularly interesting, your

23 Honor, is just last Friday the Eighth Circuit Court

24 of Appeals addressed this same Cincinnati policy

1 language that Judge Kennelly interpreted and found as

2 follow. Quote, the policy cannot reasonably be

3 interpreted to cover mere loss of use when the

4 insured's property has suffered no physical loss or

5 damage. As a result, the Eighth Circuit affirmed the

6 dismissal, with prejudice, of a Covid-related loss of

7 income claim that had the exact same language

8 analyzed by Judge Kennelly. That cite, by the way,

9 your Honor, is Oral Surgeons versus Cincinnati

10 Insurance, 2021 Westlaw 2753874 with a ruling date of

11 July 2, 2021.

12   Meanwhile, your Honor, Plaintiff cites a

13 series of asbestos cases to suggest there's some sort

14 of analogy there. And I would note that

15 Judge Moreland in the Windy City case, Judge Sherlock

16 in the Fran Napleton Lincoln case and the Source One

17 case, as well as Judge Esrig in the Steve Foley

18 Cadillac case, they all rejected the analogy of

19 asbestos contamination to a virus pointing to the

20 physical repairs that are required to address

21 asbestos contamination. Indeed Plaintiff here does

22 not even allege that the virus was on the premises.

23 Simply put, Plaintiff alleges a loss of use of the

24 premises, not any physical damage to property.

 1   Lastly, your Honor, Plaintiff attempts to

 2   characterize State Farm's business owners policy as

 3   an all-risk policy. However, Plaintiff can't point

 4   to any language in the policy that supports such a

 5   characterization. Instead the touchstone of the

 6   coverage in the policy is a covered cause of loss

 7   which is an accidental direct physical loss to

 8   property that is not excluded. Here we have no

 9   physical loss to property. And in any event

10   Plaintiff's claimed loss is a loss of use subject to

11   the virus exclusion.

12   In sum, your Honor, consistent with the

13   vast majority of opinions across the country and

14   Illinois, there is no coverage for loss of business

15   income arising from the Covid virus under the

16   language of State Farm's policy, and there is no set

17   of facts that Plaintiff could allege that would alter

18   this disposition. A dismissal with prejudice is

19   appropriate. And, in fact, Judge Walker,

20   Judge Moreland, DuPage Judge Chapman, all dismissed

21   cases against State Farm, with prejudice. Thank you,

22   your Honor.

23   THE COURT: Thank you.

24   Mr. Shelist, response.

1   MR. SHELIST: Thank you, your Honor.

2   Unfortunately I have had an emergency

3   situation in my family. I got a cousin that was

4   hospitalized who passed away yesterday. I have not

5   had the opportunity to review or prepare for today's

6   hearing, and therefore I'm going to rely on my

7   response brief in opposition to the motion and waive

8   my oral argument.

9   THE COURT: I'm concerned for your family

10   situation. I do find that this has been fully and

11   adequately briefed. And I very much appreciate the

12   time that you all took with respect to these briefs.

13   The Court is prepared to rule today.

14   Again, Mr. Shelist, I do find that your

15   brief is quite thorough in this regard. As you are

16   well aware, the courts have been getting quite a

17   number of these cases in the Circuit Court of Cook

18   County, both in Chancery and Law Division. This too

19   is not my first case. So I've seen these cases

20   coming through for not just Illinois law, but other

21   states' law. I think that I have a pretty good

22   handle on where the law sits both in Illinois as well

23   as in other states and the federal system.

24   That said, the Court finds that dismissal

1 of this case is appropriate given the facts and

2 circumstances and that which is alleged. We are here

3 for a declaration that asked for coverage under this

4 business policy. There are three counts to this

5 Complaint. But the crux of this issue really centers

6 around this virus exclusion. We know in Illinois

7 that the Plaintiff, who is the insured in this

8 situation, has the burden to establish coverage.

9 Then it is State Farm's obligation to show that an

10 exclusion applies. In this case, given the clear

11 language of the exclusion, even if I assume that

12 Mr. Shelist can prove that he established coverage,

13 if I turn then to burden on Defendant to show the

14 exclusion applies, this is where it led to dismiss

15 this case with prejudice. The virus exclusion is

16 appropriate here, not because Plaintiff is pleading

17 that the virus caused the loss, but this virus

18 exclusion also applies when the closure orders caused

19 the loss. But for the virus, there would be no

20 closure order and thus no covered loss. And the

21 Court finds that Plaintiff cannot state a claim and,

22 therefore, the Court is granting the motion to

23 dismiss.

24   Going through this, the virus exclusion,

1   we don't insure for loss that wouldn't have occurred

2   but for an excluded event, and in this case namely

3   the virus. We don't insure for loss regardless of if

4   the event occurs suddenly, gradually, whether it's

5   widespread, whether it is natural or external or

6   occurs as a result of the virus. Mr. Gaughan

7   described this as the anti-concurrent causation

8   clause talking about in sequence or concurrently.

9   And because of the facts as pled and the reality of

10   this situation, there is a virus exclusion, and as

11   such there cannot be a covered loss as a result of

12   Covid 19. The closure orders and therefore the loss

13   would not have occurred absent the virus. It makes

14   no difference that the virus exclusion doesn't use

15   the word pandemic. The provision is broad enough to

16   include pandemic and expressly says there's no

17   insurance for a loss regardless, again, of whether it

18   is sudden, gradual, isolated, or widespread or occurs

19   as a result of the virus, which we know Covid 19

20   clearly is.

21   The Court finds many of those decisions

22   cited by Mr. Gaughan today and in the briefs to be

23   persuasive. In particular, Judge Walker's case in

24   Evanston Grill, the Court finds that this same

1   rationale applies here, namely that the closure

2   orders were in -- were entered as a result of the

3   virus, and without the virus there would be no such

4   orders. The Court is also persuaded by Judge

5   Kocoras' opinion in Riverwalk Seafood Grill versus

6   Travelers which recognizes that the virus exclusion

7   precludes coverage for claims predicated on

8   virus-induced damage regardless of the magnitude.

9   More recent cases also convinced this

10   Court that the motion to dismiss should be granted.

11   For instance, in Image Dental versus Citizens

12   Insurance of America, the Northern District of

13   Illinois dismissed a complaint on grounds that the

14   virus exclusion and ordinance and law exclusion

15   applied despite Plaintiff's allegations that it was

16   the closure orders that caused the loss.

17   In Source One Restaurant versus Western

18   World, Judge Patrick Sherlock rejected similar

19   exclusion arguments made by Plaintiff and held the

20   exclusion language as clear, it is not against public

21   policy, and the virus pandemic distinction is

22   irrelevant as Covid 19 is a virus irrespective of the

23   magnitude.

24   Also, in Steve Foley Cadillac Judge Jerry

1 Esrig found the virus exclusion applied even though

2 Plaintiff alleged Governor Pritzker's orders is what

3 caused the suspension of business operations. To

4 hold up otherwise is to ignore the fact that those

5 executive orders were issued in response to the virus

6 and, again, but for the virus there would be no

7 closure orders. The same is true here, without the

8 virus there would be no closure orders, which is what

9 Plaintiff alleges caused the loss. And for these

10 reasons the Court grants Defendant's motion to

11 dismiss.

12   Like Mr. Gaughan said, I don't think

13 there's a person who doesn't sympathize with the

14 hardships and losses to individuals and to businesses

15 during the last year plus. But the sympathies cannot

16 trigger coverage where there is language in the

17 policy that includes a clear and unambiguous virus

18 exclusion which is the case here.

19   The Court has looked carefully at Exhibit

20 A and the policy language including Bates Stamp No.

21 Page 42 and those provisions in the preamble as

22 described today. The Court did this before you came

23 in today. The Court appreciates the argument today.

24 There is no prejudice to Mr. Shelist in not

1 responding to points made orally by Mr. Gaughan

2 because things have been fully briefed, finely

3 briefed, and fleshed out in Plaintiff's response

4 brief to the motion to dismiss.

5   Mr. Shelist, if you ask for additional

6 time to respond, I can give it to you. If you think

7 that that would be prudent, do so orally. But,

8 again, after digging deeply into the case law and the

9 briefs, the Court was prepared to rule today, and

10 there's nothing new that Mr. Gaughan said that

11 changed my mind in terms of where I was going with

12 this decision based on my analysis in preparation for

13 today.

14   Mr. Gaughan, I would ask you to please

15 prepare an order that states for the record or for

16 the reasons set forth in -- on the record, in open

17 court, court reporter present, the motion to dismiss

18 is granted. That concludes today.

19   Is there anything else that we need to do?

20   MR. GAUGHAN: Your Honor, would you like me to

21 put in that it's granted with prejudice?

22   THE COURT: It is granted with prejudice, and

23 that is consistent with many of the cases -- I have

24 dismissed similar claims -- not just in Illinois, but

1   throughout this country, where there are no set of

2   facts that would alter the outcome. The Court,

3   again, has analyzed this issue in this case and other

4   cases and has thought deeply about it. The Court is

5   well aware of the standard and the idea that, you

6   know, it -- that -- typically a Plaintiff is given a

7   separate gavel. But unless Mr. Shelist thinks that

8   he can pivot and state some facts that would convince

9   this Court otherwise, I just don't see any facts in

10   light of this virus exclusion that can be pled that

11   could survive a motion to dismiss.

12   MR. GAUGHAN: Thank you, your Honor. I'll

13   prepare the order.

14   THE COURT: Mr. Shelist, is there anything else

15   you wish to speak to?

16   MR. SHELIST: No, your Honor. It doesn't make

17   sense to re-plead. I don't think any set of facts

18   would satisfy the Court based on today's ruling, and

19   therefore I'm not seeking leave to do that.

20   THE COURT: Thank you. And, again, best of luck

21   to you and your family.

22   I appreciate you all being here today.

23   Mr. Gaughan, please circulate that order,

24   again, stating court reporter present, for the

1   reasons set forth in open court on the record, the

2   motion is granted with prejudice. Thank you all.

3   MR. GAUGHAN: Thank you, your Honor.

4   (WHEREUPON, WE WERE OFF THE

5   RECORD AT 11:01 A.M.)

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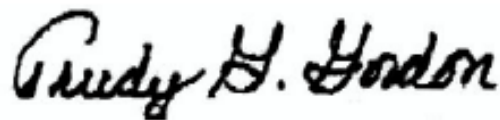
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1   STATE OF ILLINOIS   )

2   ) SS:

3   COUNTY OF COOK   )

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5

6   I, TRUDY G. GORDON, a Certified Shorthand

7   Reporter of the State of Illinois, do hereby certify

8   that I reported in shorthand the proceedings had at

9   the hearing aforesaid, and that the foregoing is a

10 true, complete and correct transcript of the

11 proceedings of said hearing as appears from my

12 stenographic notes so taken and transcribed under my

13 personal direction.

14   IN WITNESS WHEREOF, I do hereunto set my

15 hand at Chicago, Illinois, this 9th day of July,

16 2021.

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18

19

            TRUDY G. GORDON

20   Certified Shorthand Reporter

21

22

23 C.S.R. Certificate No. 084-004077

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