

No. 1-21-0558

**IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

FIREBIRDS INTERNATIONAL, LLC,

Plaintiff-Appellant,

v.

ZURICH AMERICAN INSURANCE CO.,

Defendant-Appellee.

Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 20 CH 05360
The Honorable Michael T. Mullen, Presiding.

**MOTION OF THE AMERICAN PROPERTY CASUALTY
INSURANCE ASSOCIATION, THE ILLINOIS CHAMBER OF
COMMERCE, THE ILLINOIS MANUFACTURERS ASSOCIATION,
AND THE ILLINOIS INSURANCE ASSOCIATION FOR LEAVE TO
FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLEE ZURICH
AMERICAN INSURANCE CO. AND AFFIRMANCE**

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Amici Curiae in Support of Defendant-Appellee*

Pursuant to Illinois Supreme Court Rule 345, American Property Casualty Insurance Association (“APCIA”), the Illinois Chamber of Commerce (“Illinois Chamber”), the Illinois Manufacturers Association (“IMA”), and the Illinois Insurance Association (“IIA”) (collectively, “*Amici Curiae*”) request leave of this Court to file the accompanying brief as *amici curiae* in support of Appellee Zurich American Insurance Company and affirmance of the Circuit Court’s decision. Appellee consents to this filing. In support of this motion, *Amici Curiae* submit:

1. APCIA is the primary national trade association for home, auto, and business insurers.

2. The Illinois Chamber is the unifying voice of the varied Illinois business community and represents businesses in all components of Illinois’ economy.

3. The IMA is an Illinois not-for-profit corporation is the oldest, and one of the largest, statewide manufacturing associations in the United States.

4. The IIA is the property-casualty insurance industry’s leader in advocating public policy positions before the media, interest groups, and political forces in Illinois.

5. The issues in this and similar cases pending in courts throughout the country that arise from COVID-19-related business income insurance claims will significantly impact *Amici Curiae*’s members, insurance policyholders, and the business marketplace as a whole. The straightforward

enforcement of contracts is essential to the insurance system, and to all businesses, because the parties rely on courts to provide certainty in commercial transactions.

6. *Amici Curiae* highlight the consequences of potential outcomes, offer additional analytical approaches, and cite supplementary authority that might otherwise escape this Court's attention. In their proposed *amicus curiae* brief, *Amici Curiae*:

- explain how the failure to effectuate the plain language of the insurance policies would undermine the insurance marketplace and all business interests in contract certainty;
- demonstrate that the history and purpose of commercial property insurance policies support the Circuit Court's decision;
- show how imposing a new and retroactive extra-contractual risk of economic losses in a pandemic on insurers would harm the Illinois insurance marketplace because it would open the floodgates to many claims these policies were never intended to cover and thus threaten insurers' ability to honor their promises made in other existing insurance policies; and
- show that the Circuit Court correctly applied basic contract law principles to find that the plain meaning of the policy excludes coverage for the claimed losses due to the coronavirus.

APCIA, the Illinois Chamber, IMA, and IIA urge this Court to allow them to participate as *Amici Curiae* by allowing the filing of the proposed *amicus curiae* brief.

Dated: December 23, 2021

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NOTICE OF FILING AND PROOF OF SERVICE

The undersigned, being first duly sworn, states that on December 23, 2021, there was electronically filed and served upon the Clerk of Court the Motion of the American Property Casualty Insurance Association, the Illinois Chamber of Commerce, the Illinois Manufacturers Association, and the Illinois Insurance Association for Leave to File an *Amicus Curiae* Brief in Support of Appellee Zurich American Insurance Company and Affirmance. Service of the Motion will be accomplished by email, as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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I certify that everything in the Proof of Service is true and correct. I understand that making a false statement on this form is perjury and has penalties provided by law under 735 ILCS 5/1-109.

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No. 1-21-0558

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AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION,
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IN SUPPORT OF APPELLEE AND AFFIRMANCE**

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INTEREST OF AMICI CURIAE

American Property Casualty Insurance Association (“APCIA”) is the primary national trade association for home, auto, and business insurers. With a legacy dating back 150 years, APCIA promotes and protects the viability of private competition to benefit consumers and insurers. APCIA’s member companies represent nearly 60 percent of the U.S. property-casualty insurance market, including 67 percent of the commercial property insurance market. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the United States and across the globe. APCIA’s interests are in the clear, consistent, and reasoned development of law that affects its members and the policyholders they insure.

The Illinois Chamber of Commerce (“Illinois Chamber”) is a nonprofit organization comprised of businesses and organizations of all types and sizes from across Illinois. The Illinois Chamber is the unifying voice of the varied Illinois business community and represents businesses in all components of Illinois’ economy, including mining, manufacturing, construction, transportation, utilities, finance and banking, insurance, gambling, real estate, professional services, local chambers of commerce, and other trade groups and membership organizations. Members include many small to mid-sized businesses, as well as large international companies headquartered in Illinois. The Illinois Chamber is dedicated to strengthening Illinois’ business climate and economy for job creators. Its mission focuses on representing the business community at the state level by working with state representatives,

senators, and the Governor's Office to advocate for Illinois businesses. The Illinois Chamber also operates an amicus briefs program to spotlight specific cases and provide additional information for the Court to consider.

The Illinois Manufacturers Association ("IMA") is an Illinois not-for-profit corporation founded in 1893 and is the oldest, and one of the largest, statewide manufacturing associations in the United States. Nearly 4,000 Illinois manufacturing companies and facilities currently hold IMA membership. IMA's members, which include businesses of all sizes, employ over 75% of the total Illinois manufacturing workforce. IMA's mission is to preserve and strengthen the Illinois manufacturing base by providing information and advocacy on behalf of member companies in areas like employer workers' compensation costs as they relate to the Illinois business climate. IMA works actively in the legislative arena to further this objective and has filed *amicus* briefs in important cases affecting manufacturing and the interests of Illinois commerce.

The Illinois Insurance Association ("IIA") is the property-casualty insurance industry's leader in advocating public policy positions before the media, interest groups, and political forces in Illinois. In addition, the IIA seeks to promote a greater consumer understanding of insurance products. The overall mission of the IIA is to promote and preserve an open and competitive property and casualty insurance marketplace in Illinois and to foster the public's understanding of insurance and its value to the consumer and to the

economy. The IIA seeks to preserve a positive legislative and regulatory insurance climate where member companies may conduct business, responsibly serve the needs of Illinois consumers, and grow and prosper in a highly competitive insurance market.

The issues in this and similar cases pending in courts throughout the country that arise from COVID-19-related business income insurance claims will significantly impact *Amici Curiae's* members, the policyholders of APCIA's members, and the business marketplace as a whole. The straightforward enforcement of contracts is essential to the insurance system, and to all businesses, because the parties rely on courts to provide certainty in commercial transactions.

APCIA, the Illinois Chamber, IMA, and IIA seek to fulfill the classic role of *amici curiae* by providing further background, context, and perspective on the issues before this Court and citing additional authority that might otherwise escape the Court's attention. *Amici Curiae's* unique local and national viewpoints will prove useful to this Court in analyzing the important issues before it.

INTRODUCTION

This case involves the straightforward application of the plain meaning of two commercial property insurance policies Appellee, Zurich American Insurance Company, issued to Appellant, Firebirds, International LLC, that were in effect in 2020. Both insurance contracts contain exclusions, which exclude all coverage for any harm resulting from the presence of a virus or

disease-causing or illness-causing agent, which the policies call a “contamination exclusion.” Moreover, for the policies to provide coverage, there must be direct physical loss of or damage to property. *Amici* adopt the statement of facts in Zurich’s brief.

SUMMARY OF ARGUMENT

Illinois and North Carolina enforce the plain meaning of insurance contracts. Failure to give effect to the plain meaning of terms in the policy would have disastrous implications not only for insurers but for the marketplace as a whole. Every day, individuals, businesses, and corporate entities freely negotiate and enter into contracts. The parties rely on the terms of their contracts, as written, to protect themselves and to codify their business transactions, and they expect courts to enforce the plain meaning of those contracts.

The Circuit Court below enforced the plain meaning of the insurance policies at issue. The exclusion in the policies Firebirds contracted for with Zurich could not be plainer: coverage is precluded for harm resulting from “[c]ontamination, and any cost due to **Contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy.” C1329. These policies define “Contamination” to include “the actual presence of any . . . virus, [or] disease causing or illness causing agent.” C1366. There is no question that coronavirus is a “virus [or] disease causing or illness causing agent.” *Id.* Under the policies, harm resulting from the coronavirus, and any cost due to the coronavirus, including

the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy, is excluded. C1329.

The language of the policy alone resolves this case. The Circuit Court's decision should be affirmed.

ARGUMENT

I. FAILURE TO EFFECTUATE THE PLAIN LANGUAGE OF THE INSURANCE POLICIES WOULD UNDERMINE THE INSURANCE MARKETPLACE AND ALL BUSINESS INTERESTS IN CONTRACT CERTAINTY.

Firebirds' and its *amici curiae*'s efforts to create ambiguity when none exists threaten to impair the ability of all businesses operating in Illinois to structure their affairs with confidence. Their arguments were rightly rejected by the Circuit Court. Commercial entities throughout Illinois, including the banking, finance, and insurance industries, conduct their affairs expecting that courts will enforce contracts as written if called upon to resolve a dispute. See *Hudson Ins. Co. v. Gelman Scis., Inc.*, 921 F.2d 92, 95 (7th Cir. 1990); *McClure Eng'g Assocs., Inc. v. Reuben H. Donnelly Corp.*, 95 Ill. 2d 68, 72 (1983) (recognizing that public policy "strongly favors freedom to contract"); *Bond Cnty. Cmty. Sch. Dist. No. 2 v. Ind. Ins. Co.*, 269 Ill. App. 3d 488, 491–92 (5th Dist. 1995) (reiterating importance of enforcing insurance contracts, especially because "insurance companies generally are owned by thousands of citizens, are operated by citizens, provide a needed service to our citizens, and are an important element in our economy"). Judicial fidelity to these basic principles is critical to retain the confidence of the business community at large that the

bargain made will be the bargain enforced. Given the volume and breadth of business activity conducted within Illinois, deviation from these principles could have particularly destructive consequences.

A. Enforcing Contract Terms as Written Provides Predictability and Confidence to the Insurance Marketplace.

Failure to enforce the plain terms of insurance contracts would have destabilizing effects on the insurance underwriting process, which relies heavily on contract predictability. Insurance is an important, but delicate, social mechanism. Insurers are not “deep pocket” guarantors against the consequences of all unfortunate events. Rather, insurers underwrite contracts only on those specific risks that they agree to assume in exchange for premiums. See *N. River Ins. Co. v. Cy Thompson Transp. Agency, Inc.*, 840 F.2d 139, 141–42 (1st Cir. 1988) (recognizing that coverage is tailored to the risks defined in the insurance policy).

Effectuating the plain meaning of the policy language enhances predictability. This allows parties to rely on the courts to implement their intentions as memorialized in the written contract. Courts create great uncertainty, however, when they disregard express, unambiguous provisions defining and circumscribing the risks that the insurer agrees to cover. Because underwriters rely on their actuarial predictions in calculating premiums, insurers must have confidence that unambiguous policy language will be enforced as written and not be subjected to arbitrary distortion. See *New Process Baking Co. v. Fed. Ins. Co.*, 923 F.2d 62, 63–64 (7th Cir. 1991) (applying

Illinois law and recognizing that insurance premiums reflect the risks that insurers have agreed to assume and that policies should not be transmogrified to cover different risks).

B. Failure to Adhere to the Policy's Plain Terms Could Lead to Disruptions in the Marketplace and Insurer Insolvencies.

The long-term consequences of failing to effectuate the plain language of insurance contracts are potentially far-reaching. Over time, imposing liability on insurers despite clear contractual limitations to the contrary would invade and deplete insurer surplus, threatening insurers' ability to respond to disasters such as tornadoes, fires, and earthquakes, and to everyday claims that properly fall within commercial property coverage.

Insurers ask courts to enforce their policies as written, not to put a thumb on the scale to protect them from insolvency. If insurers were forced to bear the financial responsibility for helping businesses stay afloat through a pandemic without regard to their policies' terms, however, the result would harm not only insurers, but their policyholders and the insurance marketplace. Enforcing the clear insurance policy requirements is critical to contract certainty and a strong insurance system.

Insurance can cover risks, even very large ones, if they can be actuarially predicted over a large number of policyholders. See generally Robert E. Keeton & Alan I. Widiss, *Insurance Law, A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices*, 12—13 (1988). Indeed, insurers are able to respond to the random catastrophes that befall individual policyholders

precisely because the financial cost of such events becomes reasonably predictable on a large scale. Conversely, the National Association of Insurance Commissioners (“NAIC”) has explained that “[b]usiness interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19[.]”¹

Insurers calculate and pool the risks of covered damage to property, which impacts different policyholders in different locations at different times. Insurers can and do insure the risk of property damage from risks such as tornadoes, theft, and fires, which unpredictably affect individual policyholders in separate incidents. But the risk of economic losses in a pandemic, which could hit all or many members of a risk pool at virtually the same time, is different. To the extent that any pandemic insurance was available in the insurance marketplace before COVID-19 for an appropriate premium, it was rarely purchased.² To convert the Zurich policies retroactively into pandemic

¹ *NAIC Statement on Congressional Action Relating to COVID-19*, NAIC (Mar. 25, 2020), available at https://content.naic.org/article/statement_naic_statement_congressional_action_relating_covid_19.htm (last visited Dec. 21, 2021). Other courts have observed: “While there is no doubt that the COVID-19 crisis severely affected Plaintiffs’ businesses, [insurers] cannot be held liable to pay business interruption insurance on these claims as there was no direct physical loss[.]” *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353, 362 (W.D. Tex. 2020).

² See 3 *Casualty Insurance Claims, Pandemics* § 53:12 (4th ed.) (noting the availability of “pandemic insurance coverage . . . under which coverage is triggered by a World Health Organization alert level of three or higher,” which was available since at least 2008-09); *Wimbledon’s pandemic insurance coverage results in \$141M payout*, Property Casualty 360 (Apr. 10, 2020) (“tennis tournament is set to receive around \$141 million after paying for pandemic insurance coverage for nearly 20 years”).

insurance would violate the plain language of the property policies and distort the insurance mechanism.

As the Sixth Circuit recently explained in affirming the dismissal of a COVID-19 business interruption claim:

Fair pricing of insurance turns on correctly accounting for the likelihood of the occurrence of each defined peril and the cost of covering it. *Efforts to push coverage beyond its terms creates a mismatch, an insurance product that covers something no one paid for and, worse, runs the risk of leaving insufficient funds to pay for perils that insureds did pay for.*

Santo's Italian Café LLC v. Acuity Ins. Co., 15 F.4th 398, 407 (6th Cir. 2021) (emphasis added). The NAIC has explained that requiring insurers to cover businesses' uninsured economic losses from the pandemic "would create substantial solvency risks for the [insurance] sector[.]"³ Rating agencies agree with NAIC on the threat to insurer solvency if courts and governments impose coverage for the COVID-19 pandemic based on property policies contrary to their plain terms.⁴ In May 2020, APCIA estimated that Illinois COVID-19-related business interruption losses for businesses with fewer than 250

³ NAIC, *supra* note 1.

⁴ See, e.g., *Best's Commentary: Two Months of Retroactive Business Interruption Coverage Could Wipe Out Half of Insurers' Capital*, Business Wire (May 5, 2020, 11:07 AM), available at <https://www.businesswire.com/news/home/20200505005723/en/Best%E2%80%99s-Commentary-Two-Months-of-Retroactive-Business-Interruption-Coverage-Could-Wipe-Out-Half-of-Insurers%E2%80%99-Capital> (last visited Dec. 21, 2021); *Credit FAQ: How COVID-19 Risks Factor Into U.S. Property/Casualty Ratings*, S&P Glob. Ratings (Apr. 27, 2020, 2:50 PM), available at <https://www.spglobal.com/ratings/en/research/articles/200427-credit-faq-how-covid-19-risks-factor-into-u-s-property-casualty-ratings-11454312> (last visited Dec. 21, 2021).

employees and some business interruption coverage—should coverage be mandated—would range from \$3 billion to \$11 billion per month. By comparison, total monthly premiums for commercial property policies written in Illinois amount to only \$160 million, of which business interruption premiums constitute a small fraction.

Nationwide, small business losses from the COVID-19 pandemic have been estimated at between \$255 billion and \$431 billion *per month*.⁵ By contrast, the total property casualty industry surplus, for companies of all sizes, is about \$800 billion to protect auto, home, and business policyholders from all types of future insured losses.⁶ These funds are reserved to pay insured losses caused by tornadoes, wildfires, and other events that occur daily throughout the country.⁷ Forcing insurers to pay claims for uncovered pandemic risks would jeopardize the industry’s ability to pay existing covered property claims, such as claims for theft, wind and hail damage, or vandalism.

Retroactive imposition of a new, massive, and extra-contractual risk on insurance carriers could well lead to insurer insolvencies, creating an anticompetitive market and impairing the availability and affordability of insurance in Illinois.⁸ The impact would reach all property and casualty

⁵ *APCIA Releases Update to Business Interruption Analysis*, APCIA (Apr. 28, 2020), available at <https://www.apci.org/media/news-releases/release/60522/> (last visited Dec. 21, 2021).

⁶ *Id.*

⁷ *Id.*

⁸ See generally NAIC, *Cycles and Crises in Property/Casualty Insurance: Causes and Implications for Public Policy* 31-32, 412 (NAIC eds. 1991),

insurers providing primary coverage, as well as excess insurance carriers and reinsurers. Any insurer insolvency would affect insurance guaranty associations and clog the courts with complex insurance rehabilitation and liquidation proceedings.

The overly expansive interpretation of the policies sought here would adversely impact insurers, policyholders, and the insurance marketplace in Illinois. In the end, the cost of these unforeseen liabilities would be shifted to all insurance consumers. For example, failing to enforce the insurance contract as written could affect the price and availability of insurance for those who do not have the resources to self-insure—most notably, individuals and small businesses. See, e.g., *Affiliated FM Ins. Co. v. Bd. of Educ.*, No. 90 C 6040, 1993 WL 189808, at *3 (N.D. Ill. June 3, 1993), *aff'd*, 23 F.3d 1261 (7th Cir. 1994) (noting the “considerable unfairness” of failing to enforce insurance contract provisions as written, as well as the increased premiums and difficulties in obtaining insurance such judicial nullification would cause).

Significantly, the NAIC expressed concern that requiring insurers to cover such claims would “potentially exacerbate the negative financial and economic impacts the country is currently experiencing.”⁹ There is no doubt many businesses across the country have experienced economic strain, but it is the province of elected legislatures to provide relief. Trillions of dollars have

available at https://www.naic.org/documents/prod_serv_special_cyc_pb.pdf (last visited Dec. 21, 2021).

⁹ NAIC, *supra* note 1.

been allocated by federal and state governments to aid businesses that have experienced economic strain during the pandemic, through a series of laws providing forgivable loans and other relief to businesses.¹⁰ Funding for businesses in duress must come from government-backed pandemic recovery solutions, not efforts to force property insurers to pay for economic losses despite the limitations of their contractual obligations.¹¹

C. Besides Protecting Policyholders at Some of Their Most Distressing Times, Insurers Also Fill a Larger Role Within the Communities They Serve.

Insurance “is not a general safety net for all dangers.” *Santo’s*, 15 F.4th at 407. Yet insurers play a vital role in helping individuals and businesses prepare for and recover from the potentially devastating effects of catastrophic events such as hurricanes, storms, and wildfires. Insurance claims payments help ensure the economic security of individuals and businesses and help sustain many related industries. During the first year of the pandemic, these

¹⁰ See Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, Pub. L. No. 116-136, 134 Stat. 281 (2020); Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 116-123, 134 Stat. 146 (2020); Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020); American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (2021).

¹¹ As courts have recognized, ignoring clear insurance policy limitations has adverse effects on other policyholders and the insurance system. See, e.g., *Foster-Gardner, Inc. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, 959 P.2d 265, 282 (Cal. 1998) (enforcing the policy language as written “encourages stability and efficiency in the insurance system”); *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704 (Cal. 1989) (finding unwarranted imposition of coverage beyond the limitations circumscribed by contract language leaves “ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers’ potential liabilities”).

payments in Illinois, as measured by direct property and casualty incurred losses, totaled nearly \$16.9 billion.¹² The ability of insurers to honor their promises made in insurance policies covering property perils would be dangerously undermined by a finding of coverage for uninsured losses attributable to the COVID-19 pandemic.

The Illinois insurance industry significantly impacts the economy, extending well beyond its responsibilities to collect premiums and settle covered claims. It employs licensed professionals, pays taxes, owns municipal bonds, and serves people in their times of greatest need. As the Insurance Information Institute reports, in 2020 in Illinois, the insurance industry provided 165,618 jobs and accounted for nearly \$16.69 billion in compensation in 2019.¹³ The insurance industry contributed almost \$45.7 billion to the Illinois gross state product (“GSP”) in 2019, accounting for 5.16 percent of the state’s GSP.¹⁴ These are just some of the myriad ways insurers’ contributions

¹² Ins. Info. Inst., *A Firm Foundation: How Insurance Supports the Economy, Incurred Losses by State*, available at <https://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy/a-50-state-commitment/incurred-losses-by-state> (last visited Dec. 21, 2021).

¹³ Ins. Info. Inst., *A Firm Foundation: How Insurance Supports the Economy, Employment*, available at <https://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy/a-50-state-commitment/employment> (last visited Dec. 21, 2021).

¹⁴ Ins. Info. Inst., *A Firm Foundation: How Insurance Supports the Economy, Gross State Product*, available at <https://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy/a-50-state-commitment/gross-state-product> (last visited Dec. 21, 2021).

go beyond their core function of managing risk, and they help provide a firm foundation for our economy in Illinois and nationwide.

II. THE CIRCUIT COURT CORRECTLY FOUND THAT THE ZURICH POLICIES UNAMBIGUOUSLY EXCLUDE COVERAGE FOR COVID-19 LOSSES.

Illinois’ and North Carolina’s well-established principles of plain meaning interpretation mandate that the language of an insurance policy controls. The general rules of construing insurance policies in both states are straightforward. As with all contracts, the goal of construction is to arrive at the parties’ intent. See *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 108 (1992). A “court must construe the policy as a whole and take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract.” *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill. 2d 278, 292 (2001) (internal quotation marks and citation omitted).¹⁵

When the policy is unambiguous, courts enforce the contract as written. *Samost v. Duke Univ.*, 742 S.E.2d 257, 260 (N.C. Ct. App.), *aff’d*, 751 S.E.2d 611 (N.C. 2013); *Polzin v. Phoenix of Hartford Ins. Cos.*, 5 Ill. App. 3d 84, 88 (1972). Specifically, a court may not, under the guise of construing an ambiguous term, rewrite the contract and impose liabilities on the insurer that it did not assume and that the insured did not pay for. *Harleysville Mut. Ins.*

¹⁵ Undefined non-technical words are given their ordinary meaning according to their context, and each word is to be given effect whenever possible. *Gaston Cnty. Dyeing Mach. Co. v. Northfield Ins. Co.*, 524 S.E.2d 558, 563 (N.C. 2000) (citations omitted); *Williams v. Nationwide Mut. Ins. Co.*, 152 S.E.2d 102, 105–06 (N.C. 1967).

Co. v. Buzz Off Insect Shield, L.L.C., 692 S.E.2d 605, 612 (N.C. 2010) (citation omitted). Although it is true that ambiguities in an insurance policy are construed in favor of the policyholder, see *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374, 378 (N.C. 1986), for an ambiguity to be found, the language of the policy must be found to bear more than one reasonable reading after all appropriate tools of textual construction have been applied:

No ambiguity . . . exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend. If it is not, the court must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay.

Id. at 379 (citation omitted); see also *Founders Ins. Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010) (holding “[a] policy provision is not rendered ambiguous simply because the parties disagree as to its meaning”).

“Where a policy defines a term, that definition is to be used.” *Woods v. Nationwide Mut. Ins. Co.*, 246 S.E.2d 773, 777 (N.C. 1978). The Zurich policies’ exclusion and the definition of “contamination” could hardly be any clearer. A virus is unquestionably “contamination” under the policy term setting out the meaning of “contamination.” The coronavirus is “generally known to cause or to be capable of causing disease” and thus fits within this definition. *Till Metro Ent. v. Covington Specialty Ins. Co.*, No. 20-CV-255-GKF-JFJ, 2021 WL 2649479, at *10 (N.D. Okla. June 28, 2021); *Image Dental, LLC v. Citizens Ins.*

Co. of Am., No. 20-cv-02759, 2021 WL 2399988, at *9 (N.D. Ill. June 11, 2021) (applying a virus exclusion to the coronavirus).

Firebirds’ claim of ambiguity amounts to no more than an argument that language is ambiguous because two parties in litigation have differing views on its meaning. That is, of course, not the standard. The question is whether the language may bear two *reasonable* interpretations. Firebirds has not shown that its reading has a reasonable basis in the text of the policy itself. Thus, harm resulting from the “[coronavirus], and any cost due to [the coronavirus,] including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy,” is excluded. C1329. The language is clear and unambiguous. Neither the language of the exclusion nor logic countenances any exception from the exclusion for a “virus” allegedly present during Firebirds’ normal business activities.

Applying these basic contract law principles, the Circuit Court correctly found that the plain meaning of the agreed commercial property policy – here, due to the “contamination” exclusion¹⁶ – excludes coverage for loss due to

¹⁶ Commercial property policies, such as the Zurich policies here, afford coverage for direct physical loss of or damage to property. These policies provide important coverage for losses caused by such perils as fire, wind, hail, and vandalism. They do not—and were never intended to—provide coverage for economic losses untethered to physical loss or physical damage. Although the issue is not before this Court, *Amici* also note that no coverage exists for the independent reason that plaintiffs have shown no direct physical loss or damage in COVID-19 business interruption claims. *E.g.*, *Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co.*, No. 21-11046, 2021 WL 3870697 (11th Cir. Aug. 31, 2021) (*per curiam*); *Goodwill Indus. of C. Okla., Inc. v. Phila. Indem. Ins. Co.*, No. 21-6045 (10th Cir. Dec. 21, 2021); *Mudpie, Inc. v.*

COVID-19. The plain terms exclude harm resulting from the “[coronavirus], and any cost due to [the coronavirus,] including the inability to use or occupy property.”¹⁷ C1329. Further, the policy precludes coverage for property damage or loss caused by a virus or any cost attributable to a virus to make the property “safe or suitable for use or occupancy.” *Id.* This includes the installation of plexiglass and payment for cleaning products.

In essence, Firebirds seek to rewrite its insurance contracts, with the support of its *amici*. Allowing this effort to succeed would send notice that in Illinois, insurers may be burdened with obligations they never accepted and

Travelers Cas. Ins. Co. of Am., 15 F.4th 885 (9th Cir. 2021); *Selane Prods., Inc. v. Cont’l Cas. Co.*, No. 21-55123, 2021 WL 4496471 (9th Cir. Oct. 1, 2021); *Chattanooga Profl. Baseball LLC v. Nat’l Cas. Co.*, No. 20-17422, 2021 WL 4493920 (9th Cir. Oct. 1, 2021); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141 (8th Cir. 2021); *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.*, No. 21-1173, 2021 WL 5833486 (7th Cir. Dec. 9, 2021); *Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.*, No. 21-1316, 2021 WL 5833485 (7th Cir. Dec. 9, 2021); *Mashallah, Inc. v. W. Bend Mut. Ins. Co.*, No. 21-1507, 2021 WL 5833488 (7th Cir. Dec. 9, 2021); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, No. 21-1186, 2021 WL 5833525 (7th Cir. Dec. 9, 2021); *Dakota Girls, LLC v. Phila. Indem. Ins. Co.*, 17 F.4th 645 (6th Cir. 2021); *Santo’s*, 15 F.4th 398; *Bridal Expressions LLC v. Owners Ins. Co.*, No. 21-3381, 2021 WL 5575753 (6th Cir. Nov. 30, 2021); *In re Zurich Am. Ins. Co.*, No. 21-0302, 2021 WL 4473398 (6th Cir. Sept. 29, 2021); *Inns By the Sea v. Cal. Mut. Ins. Co.*, 71 Cal. App. 5th 688 (Cal. Ct. App. 2021); *Sanzo Enters. v. Erie Ins. Exch.*, No. 21-CAE-06-0026, 2021 WL 5816448 (Ohio Ct. App. Dec. 7, 2021); *Nail Nook, Inc. v. Hiscox Ins. Co.*, No. 110341, 2021 WL 5709971 (Ohio Ct. App. Dec. 2, 2021).

¹⁷ There is clearly no merit to Firebirds’ suggestion that the Louisiana Endorsement, which removes “virus” from the definition of “Contamination,” is relevant here. C3916. The Louisiana Endorsement is a state-specific amendatory endorsement, and the definition of “Contamination” was not changed in the body of the policies. As the Circuit Court held, the contamination exclusion excludes losses caused by a “virus” at all of the insured locations for which Firebirds seek coverage here—none of which are in Louisiana.

that some policyholders – at the expense of others – may receive benefits to which they were never entitled. It would also undermine contract certainty for all businesses, who rely on the terms of their contracts, as written, to protect themselves and to codify their business transactions. Unless courts enforce the plain meaning of those contracts, there is no guarantee that the commercial bargain made will be the bargain enforced.

Fundamental public policy considerations reinforce what Illinois and North Carolina law already mandate: that the terms of an insurance policy, like those of any other contract, be enforced according to the policy language. Firebirds contracted for commercial property coverage subject to a “contamination” exclusion that expressly bars coverage for virus and its associated costs. To preserve the settled expectations of insurers, policyholders, and all persons doing business within this state, the Court should refuse to rewrite the contract to create coverage for COVID-19-related losses. There is no coverage in this case.

CONCLUSION

Amici Curiae urge this Court to affirm the Circuit Court’s judgment.

Dated: December 23, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service is 18 pages or 4,650 words.

/s/ Rachel A. Jankowski

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NOTICE OF FILING AND PROOF OF SERVICE

The undersigned, being first duly sworn, states that on December 23, 2021, there was electronically filed and served upon the Clerk of Court the *Amicus Curiae* Brief of the American Property Casualty Insurance Association, the Illinois Chamber of Commerce, the Illinois Manufacturers Association, and the Illinois Insurance Association in Support of Appellee Zurich American Insurance Company and Affirmance. Service of the Brief will be accomplished by email, as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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I certify that everything in the Proof of Service is true and correct. I understand that making a false statement on this form is perjury and has penalties provided by law under 735 ILCS 5/1-109.

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