Illinois Official Reports

Appellate Court

Alley 64, Inc. v. Society Insurance, 2022 IL App (2d) 210401

Appellate Court Caption	ALLEY 64, INC., d/b/a Alley 64, Individually and on Behalf of All Others Similarly Situated, Plaintiff and Counterdefendant-Appellee, v. SOCIETY INSURANCE, Defendant and Counterplaintiff-Appellant.
District & No.	Second District No. 2-21-0401
Filed Rehearing denied	March 30, 2022 April 29, 2022
Decision Under Review	Appeal from the Circuit Court of Kane County, No. 20-MR-982; the Hon. Kevin T. Busch, Judge, presiding.
Judgment	Reversed and remanded.
Counsel on Appeal	Michael D. Sanders, Michelle A. Miner, Amy E. Frantz, and Barret W. Whalen, of Purcell & Wardrope, Chtrd., of Chicago, for appellant. Peter J. Flowers, Ted A. Meyers, and Michael W. Lenert, of Meyers and Flowers, LLC, of St. Charles, and Caesar A. Tabet, Michael J. Grant, John M. Fitzgerald, and Amie M. Bauer, of Tabet Divito & Rothstein LLC, of Chicago, for appellee.

Panel JUSTICE BRENNAN delivered the judgment of the court, with opinion.
Justices Hutchinson and Birkett concurred in the judgment and opinion.

OPINION

¶ 1 This is an interlocutory appeal from the trial court's order granting class certification in the underlying insurance coverage case. Plaintiff, Alley 64, Inc., doing business as Alley 64, owns and operates a restaurant and bar in St. Charles. Alley 64 filed a declaratory judgment action, individually and on behalf of all members of the putative class, against defendant, Society Insurance (Society). Alley 64 sought a declaration of coverage under the "Contamination" provision of its commercial property insurance policy with Society for business losses due to the COVID-19 pandemic and Governor Jay Robert Pritzker's executive orders prohibiting on-premises consumption of food and beverages. Alley 64 also brought a count for bad-faith denial of its coverage claim. Society filed a countercomplaint for a declaration of no coverage and moved for judgment on the pleadings. The trial court denied Society's motion for judgment on the pleadings and entered judgment for Alley 64 on the coverage claim and countercomplaint.

¶ 2 The trial court subsequently granted Alley 64's motion for class certification. We granted Society's petition for leave to appeal from the trial court's order granting class certification pursuant to Illinois Supreme Court Rule 306(a)(8) (eff. Oct. 1, 2020). For the reasons set forth below, we reverse and remand.

¶ 3 ### I. BACKGROUND

¶ 4 We recount in relevant part the Governor's executive orders, the insurance policy, and the procedural history.

¶ 5 #### A. Executive Orders

¶ 6 In response to the COVID-19 pandemic, the Governor issued successive executive orders that imposed restrictions on dining establishments. See generally *Fox Fire Tavern, LLC v. Pritzker*, 2020 IL App (2d) 200623, ¶¶ 1-6. We discuss the executive orders pertinent to this case. On March 16, 2020, the Governor issued Executive Order 2020-7, providing, *inter alia*, that social distancing was "the paramount strategy for minimizing the spread of COVID-19" and noting the Department of Public Health's recommendation to "avoid group dining in public settings, such as in bars and restaurants, which usually involves prolonged close social contact contrary to recommended practice for social distancing." Exec. Order No. 2020-7, 44 Ill. Reg. 5536 (Mar. 16, 2020), https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-7.2020.html [https://perma.cc/5ZHY-C7VW]. The executive order further provided that "frequently used surfaces in public settings, including bars and restaurants, if not cleaned and disinfected frequently and properly, also pose a risk of exposure" and that "the ongoing spread of COVID-19 and the danger the virus poses to the public's health and wellness require the reduction of on-premises consumption of food and beverages." *Id.*

¶ 7 Accordingly, the executive order suspended on-premises consumption of food and beverages, beginning March 16, 2020, at 9 p.m., through March 30, 2020, as follows:

> "[A]ll businesses in the State of Illinois that offer food or beverages for on-premises consumption—including restaurants, bars, grocery stores, and food halls—must suspend service for and may not permit on-premises consumption. Such businesses are permitted and encouraged to serve food and beverages so that they may be consumed off-premises, as currently permitted by law, through means such as in-house delivery, third-party delivery, drive-through, and curbside pick-up. In addition, customers may enter the premises to purchase food or beverages for carry-out. However, establishments offering food or beverages for carry-out, including food trucks, must ensure that they have an environment where patrons maintain adequate social distancing." *Id.*

¶ 8 Regarding enforcement, the executive order provided:

> "Pursuant to Sections 7(2) and 7(3) of the Illinois Emergency Management [Agency] Act [(20 ILCS 3305/7(2), (3) (West 2020))], the Illinois State Police, the Illinois Department of Public Health, the State Fire Marshal, and the Illinois Liquor Control Commission are directed to cooperate with one another and to use available resources to enforce the provisions of this Executive Order with respect to entities under their jurisdiction under Illinois law." *Id.*

¶ 9 Subsequently, on March 20, 2020, the Governor issued Executive Order 2020-10, requiring Illinois residents to stay at home, except for travel for essential activities, essential governmental functions, or to operate essential businesses and operations, as defined in the executive order. Exec. Order No. 2020-10, 44 Ill. Reg. 5857 (Mar. 20, 2020), https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-10.2020.html [https://perma.cc/3MYL-7SAU]. "Restaurants for consumption off-premises" were identified as essential businesses. The executive order extended through April 7, 2020, the suspension of on-premises consumption of food and beverages at Illinois restaurants and other facilities that prepare and serve food but provided that these entities could continue to operate for purposes of preparing and serving food through means such as delivery, drive-through, curbside pickup, and carryout. *Id.* "Schools and other entities that provide food services under this exemption shall not permit the food to be eaten at the site where it is provided, or at any other gathering site due to the Virus's propensity to physically impact surfaces and personal property." *Id.* The executive order provided for its enforcement "by State and local law enforcement pursuant to, *inter alia*, Section 7, Section 18, and Section 19 of the Illinois Emergency Management Agency Act, 20 ILCS 3305." *Id.*

¶ 10 On April 1, 2020, the Governor issued Executive Order 2020-18, which extended through April 30, 2020, the prohibition of on-premises consumption of food and beverages at all Illinois restaurants, bars, grocery stores, and food halls. Exec. Order No. 2020-18, 44 Ill. Reg. 6186 (Apr. 1, 2020), https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-18.2020.html [https://perma.cc/2YAW-J53K]. The executive order reiterated that "[s]uch businesses are permitted and encouraged to serve food and beverages so that they may be consumed off-premises" and that "customers may enter the premises to purchase food or beverages for carry-out" but that the establishments must ensure an environment adequate for social distancing. *Id.* With respect to enforcement, the executive order reiterated:

"Pursuant to Sections 7(2) and 7(3) of the Illinois Emergency Management [Agency] Act, the Illinois State Police, the Illinois Department of Public Health, the State Fire Marshal, and the Illinois Liquor Control Commission are directed to cooperate with one another and to use available resources to enforce the provisions of this Executive Order with respect to entities under their jurisdiction under Illinois law." *Id.*

¶ 11 B. Insurance Policy

¶ 12 Society provided business property coverage to Alley 64 through a commercial property insurance policy for the policy period of June 1, 2019, to June 1, 2020. Alley 64's restaurant and bar in St. Charles was listed as an insured premises under the policy. The policy included "TBP2 (05-15)," entitled "Businessowners Special Property Coverage Form," which is a form published by Insurance Services Office, Inc. (ISO), and used in the insurance industry. The form provides for property coverage as defined in the policy and sets forth "Additional Coverages." The coverage provision at issue in this case is "Additional Coverage m," titled "Contamination."

¶ 13 Additional Coverage m provides in relevant part:

"m. Contamination

If your 'operations' are suspended due to 'contamination':

(1) We will pay for your costs to clean and sanitize your premises, machinery and equipment, and expenses you incur to withdraw or recall products or merchandise from the market. We will not pay for the cost or value of the product.

The most we will pay for any loss or damage under this Additional Coverage arising out of the sum of all such expenses occurring during each separate policy period is $5,000; and

(2) We will also pay for the actual loss of Business Income and Extra Expense you sustain caused by:

(a) 'Contamination' that results in an action by a public health or other governmental authority that prohibits access to the described premises or production of your product.

(b) 'Contamination threat'

(c) 'Publicity' resulting from the discovery or suspicion of 'contamination.' "

¶ 14 The "Additional Definitions" provision set forth in Additional Coverage m(4) defines the foregoing terms. First, " 'Contamination' means a defect, deficiency, inadequacy or dangerous condition in your products, merchandise, or premises." Second, a " 'Contamination threat' means a threat made by a third party against you to commit a 'malicious contamination' [an 'intentional, malicious and illegal alteration or adulteration of your products'] unless the third party's demand for money or other consideration is met." And third, " 'Publicity' means a publication or broadcast by the media, of the discovery or suspicion of 'contamination' at a described premise."

¶ 15 Additional Coverage m limits to three consecutive weeks the "Business Income" and "Extra Expense" coverage provided for in section m(2), as follows:

"Coverage for the actual loss of Business Income under this section will begin immediately upon the suspension of your business operations and will continue for a period not to exceed a total of three consecutive weeks after coverage begins.

Coverage for necessary Extra Expense under this section will likewise begin immediately upon the suspension of your business operations and will continue only for a total of three consecutive weeks after coverage begins, or until the loss of Business Income coverage ends, whichever is longer."

¶ 16 The policy specifies that the coverages under Additional Coverage m(2) "may not be extended nor repeated." The policy further provides that "[t]he definitions of Business Income and Extra Expense, contained in the Business Income and Extra Expense Additional Coverages section shall also apply to the additional coverages under this section."

¶ 17 Additional Coverage m(3), titled "Contamination Exclusions," provides that "[a]ll exclusions and limitations apply except [exclusions not applicable here]." The two exclusions at issue are the "Ordinance or Law" exclusion and the "Acts or Decisions" exclusion, both of which are set forth in section B of the policy, titled "Exclusions."

¶ 18 The "Ordinance or Law" exclusion provides in relevant part:

"1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

a. Ordinance or Law

The enforcement of or compliance with any ordinance or law:

(1) Regulating the construction, use or repair of any property; or

* * *

This exclusion, Ordinance Or Law, applies whether the loss results from:

(1) An ordinance or law that is enforced even if the property has not been damaged; or

(2) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property or removal of its debris, following a physical loss to that property."

¶ 19 The "Acts or Decisions" exclusion provides in relevant part:

"3. We will not pay for loss or damage caused by or resulting from any of the following B.3.a through B.3.c. [Weather Conditions, Acts or Decisions, and Negligent Work]. But if an excluded cause of loss that is listed in B.3.a through B.3.c results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

* * *

b. Acts or Decisions

Acts or Decisions, including the failure to act or decide, of any person, group, organization or governmental body."

¶ 20 The policy does *not* include the "ISO Virus Exclusion," which, as the record demonstrates, many insurers inserted into their policies following the 2002-03 SARS outbreak to exclude

losses arising from or related to a viral or bacterial outbreak.

¶ 21 C. Procedural History

¶ 22 We turn to the parties' pleadings, Society's motion for judgment on the pleadings, and Alley 64's class certification motion.

¶ 23 1. Alley 64's Complaint

¶ 24 On July 22, 2020, Alley 64, individually and on behalf of all members of the putative class, filed a two-count complaint against Society. Count I for a declaratory judgment under section 2-701 of the Code of Civil Procedure (Code) (735 ILCS 5/2-701 (West 2020)) sought a declaration of contamination coverage under Additional Coverage m. Count II for bad-faith denial of insurance coverage under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2020)) sought statutory penalties.

¶ 25 The complaint alleged that the Governor's executive orders were issued in response to the uncontrolled spread of COVID-19 throughout Illinois. The complaint further alleged that, as reflected by the executive orders, on-premises consumption of food and dining presented an unsafe condition because COVID-19 could be spread through the air and on surfaces. According to the complaint, the executive orders were issued to limit the spread and "further contamination" of Illinois businesses and the threat that "contaminated businesses," like Alley 64, posed to the public.

¶ 26 Alley 64 alleged that it was forced to suspend its on-premises dining operations and sustained losses due to the Governor's executive orders. According to Alley 64, the Governor's executive orders "prohibited all patrons from entering Plaintiff's business premises and essentially suspended Plaintiff's normal business operations." Alley 64 alleged generally that the presence and threat of the presence of SARS-CoV-2 particulates and of persons infected with the virus at business premises render the premises unsafe. With respect to Alley 64's premises, Alley 64 alleged that it was not only "highly probable" that SARS-CoV-2 particulates and airborne particulates were physically present at its premises during the policy's effective dates but that it was also "highly probable" that people carrying particulates of the virus were present at its premises during the policy's effective dates. Moreover, Alley 64 alleged that, absent the executive orders, it was a "virtual certainty" that its premises would be "continually contaminated" with particulates of the virus and "highly probable" that patrons of its business would be exposed to particulates of the virus.

¶ 27 In its complaint, Alley 64 defined the putative class as:

> "All Illinois Non-Essential Businesses (as defined under the Shutdown Orders) that purchased a commercial business property policy issued by Society and in effect on and after March 16, 2020 which contains the same operative language set forth in Society's Businessowners Special Form and which businesses were denied Contamination Coverage or received a reservation of rights letter denying Contamination Coverage for claims arising out of the full or partial suspension of their business operations due to the Shutdown Orders."

¶ 28 2. Society's Countercomplaint

¶ 29 On September 23, 2020, Society filed an answer denying coverage and a countercomplaint for a declaratory judgment under section 2-701 of the Code. In its countercomplaint, Society sought a declaration of no contamination coverage under Additional Coverage m and, moreover, that the claim was precluded by, *inter alia*, the policy's ordinance or law exclusion and the acts or decisions exclusion.

¶ 30 3. Judgment on the Pleadings

¶ 31 Alley 64 answered the countercomplaint, and thereafter, on December 28, 2020, Society moved for judgment on the pleadings pursuant to section 2-615(e) of the Code (735 ILCS 5/2-615(e) (West 2020)).

¶ 32 a. Society's Motion

¶ 33 Society argued that Additional Coverage m did not apply by its terms. Initially, Society argued that Alley 64's speculative allegations that the virus was in its premises ("virtual certainty"; "highly probable") were insufficient to establish that its premises was "contaminated" as defined in the policy. According to Society, Alley 64 also failed to establish that any such presence of the virus rendered the premises "dangerous," as the virus may be removed with cleaning, and other properties remained open to the public despite an exposure risk.

¶ 34 Moreover, Society argued that Alley 64 did not establish Additional Coverage m(2)(a)'s three situations under which coverage is available for contamination. First, there was no contamination that "result[ed] in an action by a public health or other governmental authority that prohibit[ed] access to the described premises or production of your product." The executive orders were entered to slow the transmission of the virus in Illinois, not because of the purported presence of the virus on Alley 64's premises. Additionally, access to Alley 64's premises was not prohibited due to contamination of the premises. Rather, Alley 64 was permitted to serve food and beverages for off-site consumption, and customers were permitted to enter the premises to pick up food and beverages for carryout. Second, there was no "contamination threat" made by a third party to commit a "malicious contamination." And third, there was no "publicity" regarding the actual or suspected presence of the virus at Alley 64.

¶ 35 Furthermore, even if Alley 64 could establish contamination coverage, Society argued that Alley 64's claim was otherwise barred by the policy's ordinance or law exclusion. According to Society, Alley 64's losses were caused by compliance with a law—the Governor's executive orders. In addition, Society argued that Alley 64's claim was barred by the policy's acts or decisions exclusion because Alley 64's losses were caused by an act or decision of a person or governmental body—the Governor's executive orders. As a final matter, Society argued that it was also entitled to judgment on the pleadings on count II for bad-faith denial of coverage because there was no coverage under the policy or, minimally, a *bona fide* dispute regarding coverage.

¶ 36 b. Alley 64's Response

¶ 37 In its opposition to Society's motion for judgment on the pleadings, Alley 64 argued that, minimally, there were questions of fact as to the existence of contamination coverage under Additional Coverage m. According to Alley 64, it properly alleged that COVID-19 was a "dangerous condition" in its premises that fell within the policy's definition of "contamination," and Society's contrary arguments amounted to improper imposition of a heightened pleading requirement to allege evidentiary facts. Alley 64 further argued that the continued operation of essential businesses did not mean that COVID-19 was not dangerous but rather that the need for the businesses outweighed the dangers of the virus.

¶ 38 Moreover, Alley 64 argued that it satisfied each of the remaining three situations under which coverage is available for contamination (although it did not set forth an argument with respect to whether there was a "contamination threat" by a third party). First, the executive orders were issued in response to COVID-19 contamination at Illinois businesses, including Alley 64, and prohibited access to Alley 64's premises and production of Alley 64's product—on-premises dining. Alley 64 further argued that "access" as stated in the policy should be strictly construed against Society and that prohibition of *complete* access to Alley 64's premises was not required to trigger coverage. Second, the "publicity" provision applied because the executive orders were well publicized in Illinois and "the clear implication" was that "COVID-19 contamination exists (or is suspected) at every restaurant [or] bar in Illinois, including Plaintiff's premises."

¶ 39 With respect to the policy exclusions, Alley 64 argued that the ordinance or law exclusion did not apply because the executive orders were not laws. Additionally, Alley 64 argued that the entirety of the acts or decisions exclusion demonstrates its inapplicability. While the first sentence of the exclusion states that Society will not pay for loss or damage caused by or resulting from acts or decisions such as the executive orders, the second sentence of the exclusion qualifies this language by stating that, if an excluded cause of loss results in a "Covered Cause of Loss" (such as contamination coverage), "we will pay for the loss or damage caused by that Covered Cause of Loss." As a final matter, Alley 64 argued that Society was not entitled to judgment on the pleadings on count II because Society denied its claim without conducting any investigation and "directed its Claims Representatives to mislead its insurers [*sic*] like Plaintiff as to the availability and applicability of Contamination Coverage in regard to claims arising from the health crises associated with COVID-19 contamination."

¶ 40 c. Society's Reply

¶ 41 Society's reply in support of its motion for judgment on the pleadings argued that Alley 64's speculative allegations regarding the probability of the presence of the virus in its premises was not merely a failure to plead an evidentiary fact but a failure to plead that the virus was, in fact, in the premises—a prerequisite for contamination coverage. In addition, Society argued first that the suspension of indoor dining did not constitute a prohibition of the production of Alley 64's product—prepared food—because the executive orders expressly allowed and encouraged the production and sale of food for off-premises consumption. Second, the "publicity" provision did not apply because there was no publication or broadcast regarding the actual or suspected contamination of *Alley 64*'s premises.

¶ 42 In any event, Society maintained that coverage was excluded under both the ordinance or law and acts or decisions exclusions. Regarding the former exclusion, Society argued that the

executive orders have the force of law and regulated the manner in which Alley 64 used its premises. Regarding the latter exclusion, Society argued that, in addition to the failure to establish contamination coverage in the first instance, the policy defines a "Covered Cause of Loss" as "Direct Physical Loss." Even allegations that the virus was in the premises would not suffice to establish a direct physical loss because the virus does not render property uninhabitable or cause a physical alteration to property.

¶ 43 d. Trial Court's Ruling

¶ 44 Following argument on March 11, 2021, the trial court took the matter under advisement and subsequently issued a written ruling on April 1, 2021. (The trial court issued a "corrected" written ruling on May 20, 2021, which merely fixed typographical errors in the April 1, 2021, order). The trial court denied Society's motion for judgment on the pleadings; the trial court also *sua sponte* entered judgment for Alley 64 and against Society on count I of the complaint and on the countercomplaint.

¶ 45 Though Alley 64 sought contamination coverage under only Additional Coverage m, the trial court stated that Alley 64 "is seeking to recoup lost income under sections 'A5g [(business income)]' and 'A5m [(contamination)]' of the policy." The trial court held that Alley 64 was *not* entitled to coverage under Additional Coverage g because Alley 64 failed to plead " 'direct physical loss of or damage to [c]overed [p]roperty' " as defined in the policy. In doing so, the trial court found that Alley 64's allegations "relating to any actual contamination, dangerous condition or physical damage to the property are speculative and hyperbole." The trial court stated that it "must take judicial notice that the presence of COVID-19 has not rendered other businesses, such as grocery stores, liquor stores, or retail stores, unsafe or unusable" and that "the COVID-19 virus is easily destroyed with soap and water, disinfectants (some that are effective for hours after application), and by UV lighting." Thus, "[a]llegations that the COVID-19 virus has rendered the building unusable [are] just not substantiated by the pleadings." The trial court also cited its decision in *Sweet Berry Café, Inc. v. Society Insurance*, No. 20 CH 266 (Cir. Ct. Kane County Feb. 4, 2021), in which it granted judgment on the pleadings in Society's favor and against the plaintiff restaurant, finding no coverage under Additional Coverage g. Parenthetically, we note that this court recently affirmed the trial court's decision in that case. See *Sweet Berry Café, Inc. v. Society Insurance*, 2022 IL App (2d) 210088.

¶ 46 However, the trial court found that Alley 64 was entitled to contamination coverage under Additional Coverage m(1) and m(2)(a). The trial court reiterated that Alley 64 "has not, and cannot adequately plead that the premises is actually contaminated. Nor have they sufficiently plead negative publicity as defined in section 'A5m.' " Nevertheless, citing the statement in the March 20, 2020, executive order regarding the virus's "propensity to physically impact surfaces and personal property," the trial court reasoned that, "[g]iven that physically impacting surfaces and personal property could render them defective, deficient, or inadequate, it would appear that the executive order was concerned about the contamination of surfaces and property located within restaurants and bars." Although the executive order did not identify Alley 64, "the order does identify all such businesses" and "clearly establishes that the governmental authority took the action it did because of a concern for contamination in all such businesses."

¶ 47 Moreover, the trial court found the reference to the contamination being "in your" products, merchandise, or premises in the definition of contamination to be ambiguous given the entirety of Additional Coverage m and other types of covered losses, *i.e.*, "Contamination threat" of committing a malicious act of contamination and "Publicity" involving the suspicion that the premises is contaminated—neither of which require *actual* contamination. Construing the terms strictly against Society, the trial court concluded: "Just as it is sufficient that there only be a threat of a malicious act, or a news story that just suggests that the premises is contaminated, so too is it sufficient that the governmental authorities[']s action be prompted merely by its concern for contamination in the premises."

¶ 48 Accordingly, the trial court concluded that the remaining question as to contamination coverage under Additional Coverage m was whether the "executive orders required [Alley 64] to suspend its operations because it [*sic*] prohibited access to the premises." In turn, the trial court reasoned that, "[w]hether Alley 64 was required to suspend its operations requires resolving two phrases in the policy"—" 'that prohibited access to the described premises' " and to " 'suspend' " its operations. First, applying the dictionary definition of "access"—the "freedom or ability to obtain or make use of something, and to be able to use, enter, or get near (something)"—the trial court found that the executive orders clearly "limited the public's access and use of the premises" and that Alley 64 was "deprived of its freedom or ability to make full use of the premises." Second, regarding "whether [Alley 64] was forced to 'suspend' its operations because of the Governor's order, the answer is simple." The policy defines " 'suspension' " in Additional Coverage g to include the " 'partial slowdown *** of your business activities' " and states that the definition applies to all Additional Coverage provisions. The trial court found that Alley 64 sufficiently pled that the Governor's restrictions required it to "scale back business by eliminating in-person or on-premises dining." Thus, coverage under Additional Coverage m(2)(a) was triggered.

¶ 49 The trial court did not address the parties' arguments regarding the applicability of the ordinance or law exclusion or the acts or decisions exclusion. It did note, however, in initially addressing coverage under Additional Coverage g, that, "[s]ince the Policy does not contain the 'ISO Virus exclusion,' if such allegations are sufficiently [pled], coverage would apply."

¶ 50 In sum, the trial court found that Alley 64 was entitled to seek reimbursement for up to $5000 worth of actual costs expended under Additional Coverage m(1) and up to three consecutive weeks of lost income, beginning on March 20, 2020, under Additional Coverage m(2)(a). The trial court further ordered Society to adjust the claim and reserved jurisdiction to appoint an umpire if the parties were unable to resolve the claim. The trial court also addressed class certification, stating: "A[lley] 64 has demonstrated that, as to this court's declaration of coverage under the Policy, this case is well suited for class action status for all similarly situated plaintiffs. Namely, those plaintiffs holding SOC[IETY]'s 'BUSINESSOWNERS SPECIAL PROPERTY COVERAGE FORM' policy containing the 'contamination' coverage detailed herein, and not containing the 'ISO Virus Exclusion.' "

¶ 51 4. Class Certification

¶ 52 A week later, on April 9, 2021, Alley 64 moved for class certification and requested a stay of briefing to allow sufficient time for the parties to engage in class certification discovery. The record reflects that briefing on the class certification motion proceeded (and does not

reflect whether the trial court ruled on the stay request).

¶ 53 a. Alley 64's Motion

¶ 54 In its class certification motion, Alley 64 amended the putative class initially set forth in its complaint and sought certification of the following class:

> "All Illinois businesses that (1) had in effect on and after March 16, 2020, a Society insurance policy which incorporates Society's 'Form TBP2 (05-15)' titled 'Businessowners Special Property Form,' (2) were required to shut down or suspend their business operations, including the partial slowdown or completion [*sic*] cessation of their business activities, due to Governor Pritzker's Executive Orders (the 'Shutdown Orders'), (3) have made a claim for contamination coverage as a result [*sic*] the shut down or suspension of their business operations as a result of the Shutdown Orders, and (4) have been denied contamination coverage."

¶ 55 Alley 64 argued that it satisfied the four statutory prerequisites for maintenance of a class action under section 2-801 of the Code (735 ILCS 5/2-801 (West 2020))—numerosity of the class, predominance of common questions of fact or law, adequacy of representation, and appropriateness of the class action.

¶ 56 First, Alley 64 stated that the putative class included "hundreds of members" and noted that "at least 41 separate lawsuits" have been centralized in a multidistrict litigation proceeding in the United States District Court for the Northern District of Illinois. Next, according to Alley 64, every putative class member purchased the same policy containing identical coverage, was forced to shut down or suspend its operations following the executive orders, and was subsequently denied coverage for lost business income under the policy. Third, Alley 64 stated that its interest in redressing the alleged wrongful denial of coverage is identical to the interest of all proposed class members. Alley 64 stated that it has a significant economic stake in the outcome of the litigation (with alleged economic damages exceeding $100,000) and is committed to the case. Moreover, Alley 64 set forth the experience of its proposed class counsel and counsel's investment in this case. Lastly, Alley 64 argued that a class action is the superior method for adjudicating the controversy, given the commonality of the issues. Alley 64 further argued that the mere fact that damages may need to be individually calculated does not defeat class certification under Illinois law.

¶ 57 b. Society's Response

¶ 58 In opposition to the class certification motion, Society argued that Alley 64 failed to meet its burden of establishing the statutory prerequisites for class certification. First, according to Society, Alley 64's assertions regarding the number of putative class members were conclusory and speculative. Next, Society maintained that, notwithstanding the common policy provision, individualized evidence would be necessary on the issues of the existence and causation of any suspension of business or reduction in business income, each class member's efforts to mitigate damages, and the measure of each class member's recoverable damages. Indeed, Society pointed out that Alley 64 completely closed during the three-week period following the executive order, notwithstanding its ability to remain open for carryout and delivery. Third, Society argued that Alley 64's interests were not aligned with the interests of the proposed class, which, at that point, included all Illinois businesses, not just restaurants. Society also pointed out that Alley 64 already obtained judgment in its favor and thus had limited incentive

to pursue the litigation. And finally, Society argued that a class action was not appropriate, because the only remaining issues involved individualized damages claims.

¶ 59 c. Alley 64's Reply

¶ 60 In its reply in support of the class certification motion, Alley 64 amended the putative class by substituting "[a]ll Illinois businesses" with "[a]ll Illinois restaurants, taverns, and bars" and eliminating the requirements that the proposed class members made a claim for coverage or were denied coverage. Alley 64 also countered the argument that individualized proof would be needed to assess each class member's damages. Under the policy's terms, Society is required to adjust each class member's claim. According to Alley 64, the adjustment process will resolve any unique issues regarding damages. Regardless, Alley 64 argued that, under Illinois law, individual questions of damages do not defeat class certification.

¶ 61 d. Trial Court's Ruling

¶ 62 Following argument on June 22, 2021, the trial court granted Alley 64's motion for class certification but certified the class as follows:

> "All Illinois restaurants, taverns, and bars that (1) were an insured as of March 20, 2020, under a Society insurance policy that incorporates 'Form TBP2 (05-15)' titled 'Businessowners Special Property Coverage Form' and not containing the 'ISO Virus Exclusion,' and (2) were required to shut down or suspend their business operations, including the partial slowdown or complete cessation of their business activities, due to Governor Pritzker's March 20, 2020 Executive Order."

¶ 63 The trial court held that Alley 64 met all four statutory prerequisites for class certification. See 735 ILCS 5/2-801 (West 2020). First, with respect to numerosity, the trial court found:

> "[T]here has not really been a denial by Society that the potential plaintiffs aren't numerous. They have alluded to other claimants out there that presumably might satisfy this class. And they did not deny today a representation that Society had proactively notified a number of potential claimants. The Court does not doubt that, given the fact that we have a uniform policy that is likely to have been purchased by a number of plaintiffs that would potentially fall within the class, that Joiner [*sic*] of all class members would in any way be impractical."

¶ 64 Next, regarding the commonality of issues and their predominance over questions affecting only individual members, the trial court found:

> "[I]t's a simple question as to coverage; and so in that respect the claims are identical. I believe that the proposed class is a very easily defined class and does not invoke the perils of causation that Society argues potentially disrupts that class. I believe that it will be very simple for Society to produce the list of parties who potentially fall in that class and then identifying which of those, in fact, do based on whether or not they were required to shut down or suspend their business operations. And then after determining those individuals, after that, I agree it is a fairly simple math problem to determine did they suffer some of the costs to cure that are anticipated in the coverage under [Additional Coverage m(1)] up to $5,000, and did they otherwise have the type of lost profits that would be available to them for up to three consecutive

weeks beginning March 20th, 2020, when the governor's revised edict was entered, which I believe invoked the contamination coverage under the policy.

As to typicality, there is no question that, with the exception of damages, these claims are all identical."

¶ 65 Third, addressing the adequacy-of-representation prong, the trial court stated:

"I'm obviously very familiar with the Meyers & Flowers firm as they are a local firm that consists of principals that I have been familiar with their legal ability for most of my professional career here in Kane County. I'm aware of the types of cases that the Meyers & Flowers firm handle. I have no doubt that they possess the necessary skill and expertise to prosecute these claims and nor do I doubt that they will be sufficiently motivated to do so. I'm confident they will.

I find no problem with the fact that they seek to bring on additional help, and the manner in which they did so is of no consequence. If they are telling the Court that they believe this team that sits before me today is appropriate, I would have found them appropriate without the additional members. And so adding somebody who has had, as I'm told, experience—I take them at face value at their word—experience with notice and identifying class members that wish to opt in or out, that would only seem to improve their ability to handle the case."

¶ 66 And finally, regarding the appropriateness of a class action for adjudication, the trial court found that class certification "would be an efficient way of addressing the specific claim that was raised by Society and would further provide [efficiency] in eliminating the need for numerous court hearings to adjudicate the same question and potentially result in different opinions in different jurisdictions."

¶ 67 In its written order entered the next day, June 23, 2021, the trial court further ordered Society to provide to class counsel, within 30 days, "the names and addresses of the Illinois insureds who are restaurants, taverns, and bars who were insureds as of March 20, 2020 under a Society insurance policy which incorporates 'Form TBP2 (05-15)' titled 'Businessowners Special Property Coverage Form.' " Society subsequently moved to stay disclosure of the list of policyholders. After the trial court denied the motion, Society produced the list, which included approximately 3300 relevant Illinois insureds.

¶ 68 Meanwhile, on July 21, 2021, Society timely filed a petition for leave to appeal pursuant to Rule 306(a)(8) from the trial court's order granting class certification. Following briefing, we granted the petition.

¶ 69 II. ANALYSIS

¶ 70 Society argues that the trial court abused its discretion in certifying the class, because Alley 64 does not have a valid cause of action and failed to meet the statutory prerequisites for class certification. Alley 64 responds that the contamination coverage under Additional Coverage m of the policy was triggered and that it established all requirements for class certification.

¶ 71 The four statutory prerequisites for maintenance of a class action are (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of fact or law common to the class that predominate over any questions affecting only individual members, (3) the representative parties will fairly and adequately protect the interests of the class, and (4) the class action is an appropriate method for the fair and efficient adjudication of the

controversy. 735 ILCS 5/2-801 (West 2020); *Smith v. Illinois Central R.R. Co.*, 223 Ill. 2d 441, 447 (2006). The party seeking class certification bears the burden of establishing all four statutory prerequisites. *Gridley v. State Farm Mutual Automobile Insurance Co.*, 217 Ill. 2d 158, 167 (2005).

¶ 72 The determination whether to certify a class is within the discretion of the trial court and will not be disturbed on appeal unless the trial court abused its discretion or applied impermissible legal criteria. *Smith*, 223 Ill. 2d at 447. A trial court abuses its discretion when no reasonable person would take the position adopted by the court. *Gridley*, 217 Ill. 2d at 169. A " 'trial court's discretion in deciding whether to certify a class action is not unlimited and is bounded by and must be exercised within the framework of the civil procedure rule governing class actions.' " *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 126 (2005) (quoting 4 Alba Conte & Herbert Newberg, Newberg on Class Actions § 13:62, at 475 (4th ed. 2002)).

¶ 73 A. Scope of Review

¶ 74 Initially, the parties dispute whether the merits of the underlying declaratory judgment claim are encompassed within the scope of our review. We have jurisdiction over this appeal pursuant to Rule 306(a)(8), which allows appeals from orders granting or denying class certification. Ill. S. Ct. R. 306(a)(8) (eff. Oct. 1, 2020). Thus, Alley 64 argues, the only question on appeal is the propriety of class certification; the propriety of judgment on the pleadings in Alley 64's favor is outside the scope of our review. Society counters that the question whether the named representative of the putative class has a valid cause of action is a threshold consideration and subsumed in the statutory prerequisites for class certification. We agree that the question of whether Society's policy provides coverage to Alley 64 must be considered in our review of the class certification.

¶ 75 Our supreme court has stated explicitly that " 'a class cannot be certified unless the named plaintiffs have a cause of action.' " *Avery*, 216 Ill. 2d at 139 (quoting *Spring Mill Townhomes Ass'n v. Osla Financial Services, Inc.*, 124 Ill. App. 3d 774, 779 (1983)). Indeed, "[t]he requirement that the named representatives of the putative class possess a valid cause of action is subsumed in at least two of the aforementioned elements" under section 2-801 of the Code—commonality and adequacy of representation. *Landesman v. General Motors Corp.*, 72 Ill. 2d 44, 48 (1978); accord *Wheatley v. Board of Education of Township High School District 205*, 99 Ill. 2d 481, 486 (1984). That is, "the requirement that common questions of law or fact predominate ***obviously assumes that the complaint states facts which, if proved, would present questions of fact for the trier of fact." *Landesman*, 72 Ill. 2d at 48. Moreover, "the requirement that the named 'parties' be adequate representatives of the class also assumes that, as 'parties,' they possess a valid cause of action." *Id.*; see also *Schlenz v. Castle*, 132 Ill. App. 3d 993, 1001 (1985), *aff'd and remanded*, 115 Ill. 2d 135 (1986) ("In *Landesman*, the seminal case, the supreme court approved the view that where the plaintiff has no individual cause of action, it necessarily follows that any attempted class action also must fail.").

¶ 76 Thus, in considering whether to grant class certification, a court must necessarily determine whether the underlying claim is actionable. *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 72 (2007). The underlying claim in *Barbara's Sales* was consumer fraud based upon Intel's alleged deceptive marketing of its "Pentium 4" microprocessor. *Id.* at 47. The named plaintiffs brought a nationwide class action against Intel, but the trial court certified a class of only

Illinois consumers and ruled that Illinois substantive law controlled. *Id.* at 55-56. In an interlocutory review under Illinois Supreme Court Rule 308 (eff. Feb. 1, 1994), the supreme court reviewed the certified question of " '[w]hether the circuit court erred in certifying a class of Illinois consumers under Illinois law, rather than certifying a nationwide or Illinois class under California law (as plaintiffs requested) or holding that the action should not proceed as a class action (as Intel requested).' " *Barbara's Sales*, 227 Ill. 2d at 57.

¶ 77 After resolving the choice-of-law determination and holding that Illinois law applied, the supreme court proceeded to address the propriety of class certification. *Id.* at 71. In doing so, however, the court held that it need not determine whether the plaintiffs satisfied class requirements because, as a threshold matter, the marketing statement identified by the plaintiffs did not form the basis of an actionable claim under the Consumer Fraud and Deceptive Practices Act (815 ILCS 505/10a(a) (West 2002)). *Barbara's Sales*, 227 Ill. 2d at 72. Namely, in addressing the merits of the underlying consumer fraud claim, the court concluded that Intel's representation amounted to inactionable "puffing." *Id.* at 72-76. Accordingly, in answering the certified question, the court concluded that "the lawsuit as presently constituted should not proceed as a class action." *Id.* at 77.

¶ 78 Similarly, in *Turnipseed v. Brown*, 391 Ill. App. 3d 88, 94-95 (2009)—an interlocutory appeal under Rule 306(a)(8) from an order granting class certification like the case *sub judice*—the appellate court addressed the merits of the underlying claim in reversing the class certification order. In *Turnipseed*, the trial court denied the defendant's motion to dismiss the complaint and granted class certification in an action arising out of the allegedly impermissible failure to pay interest on bail bond funds deposited with the Clerk of the Circuit Court of Cook County. *Id.* at 91-93. Noting that a " 'threshold' " consideration was whether the plaintiffs' claims were actionable (*id.* at 94 (quoting *Barbara Sales*, 227 Ill. 2d at 72, 76-77)), the appellate court turned to an analysis of the underlying allegations and held that the plaintiffs failed to state a claim for a compensable taking or a constitutional violation (*id.* at 95-100). Accordingly, the court held that the plaintiffs "failed to state a valid cause of action, and thus their suit must be dismissed." *Id.* at 100. In turn, the court held that, "[s]ince plaintiffs' individual claims must be dismissed, we do not decide whether they would have been adequate class representatives or whether the proposed class was too broad." *Id.*

¶ 79 It follows then that the issue of Alley 64's coverage under its policy with Society is a threshold consideration in reviewing the propriety of the class certification order. See *Barbara's Sales*, 227 Ill. 2d at 72; *Turnipseed*, 391 Ill. App. 3d at 94. The validity of Alley 64's claim is part and parcel of the overarching issue of whether the trial court abused its discretion in certifying the class. Without a valid claim, Alley 64 cannot establish the statutory elements of commonality and adequacy of representation necessary for class certification. See 735 ILCS 5/2-801 (West 2020); *Landesman*, 72 Ill. 2d at 48.

¶ 80 Notwithstanding the above, Alley 64 maintains that our jurisdiction under Rule 306(a)(8) is confined to a review of the class certification order and does not extend to consideration of the underlying merits of the coverage claim. In support, Alley 64 cites *LVNV Funding, LLC v. Davis*, 2020 IL App (5th) 190380, *Chultem v. Ticor Title Insurance Co.*, 401 Ill. App. 3d 226 (2010), *Cruz v. Unilock Chicago*, 383 Ill. App. 3d 752 (2008), and *In re Delta Airlines*, 310 F.3d 953 (6th Cir. 2002). Careful consideration of these cases discloses that they do not support Alley 64's position.

¶ 81 We begin with the appellate court's decision in *LVNV Funding*. There, a debt collection agency sued a credit card holder to recover outstanding payment due. The card holder filed a class action counterclaim against the debt collection agency and third-party claims against other entities for violations of section 8b of the Illinois Collection Agency Act (225 ILCS 425/8b (West 2012)) on the basis that the debt collection agency filed suit without the requisite assignment form. *LVNV Funding*, 2020 IL App (5th) 190380, ¶¶ 3-4. The trial court certified the class of all individuals named as a defendant in an Illinois collection lawsuit where the plaintiff debt collector did not possess a valid assignment of the purported debt and/or failed to attach the assignment to the complaint. *Id.* ¶ 5.

¶ 82 The appellate court granted the debt collection agency's and third-party defendants' petition for leave to appeal under Rule 306(a)(8) from the class certification order. *Id.* ¶¶ 6, 19. In holding that class certification was improper, the appellate court reasoned that the claim upon which class certification was predicated failed to state a cause of action because the requirements of section 8b do not apply to debt buyers pursuing litigation on their own behalf. *Id.* ¶ 17. Thus, noting that " 'there is no need to determine whether the prerequisites of the class action are satisfied if, as a threshold matter, the record establishes that the plaintiffs have not stated an actionable claim,' " the court reversed the order granting class certification and remanded for further proceedings. *Id.* ¶¶ 8, 17 (quoting *Coy Chiropractic Health Center, Inc. v. Travelers Casualty & Surety Co.*, 409 Ill. App. 3d 1114, 1118 (2011) (citing *Barbara's Sales*, 227 Ill. 2d at 72)).

¶ 83 Alley 64 sidesteps the preceding analysis set forth in *LVNV Funding*. Rather, it cites *LVNV Funding* for the proposition that "orders denying a motion to dismiss for lack of personal jurisdiction and compelling production of documents were 'outside of our scope of review' under Rule 306(a)(8) and 'we have no jurisdiction to review those orders as part of this appeal.' " However, the orders outside the scope of review to which the appellate court referred were the trial court's orders denying a third-party defendant's motion to dismiss for lack of jurisdiction and compelling the third party's production of documents. *Id.* ¶ 19. These orders were outside the scope of review because they were unrelated to the underlying claim at the heart of class certification, as highlighted by the appellate court's statement that "[t]he propriety of the order denying class certification is in no way dependent on the merits of the order denying the motion to dismiss as to [the third-party defendant], nor the order compelling discovery." *Id.* Thus, Alley 64's reliance upon *LVNV Funding* for the proposition that the underlying merits of the coverage claim are outside the scope of our review ignores the *ratio decidendi* of its holding, which actually supports Society's position.

¶ 84 We next consider this court's decision in *Cruz*—a Rule 306(a)(8) interlocutory appeal from the denial of a class certification motion in a wage-and-hour class action. *Cruz*, 383 Ill. App. 3d 752. The court reversed the denial of class certification and remanded the case with directions to certify the class of all current and former hourly paid employees of the defendant. *Id.* at 758, 761. Preliminarily, the court explained the proper scope of its appellate review, stating that "[t]he appellate court is limited to an assessment of the trial court's exercise of discretion; the appellate court cannot indulge in an independent, *de novo* evaluation of the facts alleged and the facts of record to justify class certification." *Id.* at 761.

¶ 85 The court then addressed an inconsistency in the case law regarding the proper scope of the *trial court's* review in ruling on class certification. *Id.* at 761-64 (comparing *Ramirez v. Midway Moving & Storage, Inc.*, 378 Ill. App. 3d 51, 53 (2007) (in determining whether a

proposed class should be certified, the court accepts the allegations of the complaint as true), and *Clark v. TAP Pharmaceutical Products, Inc.*, 343 Ill. App. 3d 538, 545 (2003) (same), with *Enzenbacher v. Browning-Ferris Industries of Illinois, Inc.*, 332 Ill. App. 3d 1079, 1084 (2002) ("At the time such a motion [for class certification] is presented for hearing, the trial court may consider any matters of law or fact properly presented by the record, including pleadings, depositions, affidavits, answers to interrogatories, and any evidence adduced at hearing on the motion."), and *Brown v. Murphy*, 278 Ill. App. 3d 981, 989 (1996) (same)). The court in *Cruz* found no cogent basis for the proposition that the allegations of the complaint are accepted as true in resolving a class certification motion and held that the trial court "may conduct any factual inquiry necessary to resolve the issue of class certification presented by the record." *Cruz*, 383 Ill. App. 3d at 764. Nevertheless, the court stressed that "the trial court is not to determine the merits of the complaint, but only the propriety of class certification, and its factual inquiry and resolution of factual issues is to be limited solely to that determination." *Id.* It was within this framework that the court in *Cruz* held that the trial court's fact-finding in denying class certification impermissibly crossed the line into the ultimate merits of the plaintiff's complaint. *Id.* at 765-69.

¶ 86 Nothing in *Cruz* spoke to the threshold consideration of whether the underlying claims were actionable and whether that consideration was outside the scope of appellate review. Rather, the court's discussion of the scope of appellate review under Rule 306(a)(8) merely explained the well-established limitations inherent in reviewing the trial court's exercise of its discretion and the impropriety of engaging in an independent, *de novo* evaluation of the facts. *Id.* at 761. The basis for reversal was that the trial court's fact-finding exceeded the scope of *its* review. *Id.* at 765-69.

¶ 87 The appellate court's decision in *Chultem* is likewise inapposite. *Chultem*, 401 Ill. App. 3d 226. There, in a Rule 306(a)(8) interlocutory appeal from the denial of class certification motions in actions arising out of the defendant title insurers' alleged payment of kickbacks to real estate attorney agents, the appellate court reversed and remanded the case with directions to certify the proposed classes. *Id.* at 227, 238. In doing so, the court held that the trial court abused its discretion in finding that the plaintiffs failed to establish that common questions predominated over individual issues. *Id.* at 235-37. In addition, the court rejected the parties' arguments regarding the level of deference the trial court should have given to certain regulatory materials, reasoning that the issue went to the underlying merits of the actions and was not an appropriate consideration in examining the propriety of class certification. *Id.* at 237. Again, however, nothing in *Chultem* squarely addressed the issue of whether the validity of the underlying claims was outside the scope of appellate review.

¶ 88 As a final matter, we address the federal appellate court's decision in *In re Delta Airlines*, which was a ruling on the defendants' petition for permissive interlocutory appeal under Federal Rule of Civil Procedure 23(f) from a class certification order in an antitrust action challenging airline ticketing practices. *In re Delta Airlines*, 310 F.3d 953. In denying the defendants' petition, the federal appellate court reasoned, *inter alia*, that an interlocutory appeal would necessarily require consideration of the merits of the underlying case. *Id.* at 961. The merits of the underlying case to which the court referred involved disputes regarding "the characterization of the monopoly and relevant markets" that were the basis of the defendants' unsuccessful motions to dismiss and motions for summary judgment. *Id.* Having noted that a "Rule 23(f) appeal should not become a vehicle for early review of a legal theory that underlies

the merits of class action," the court ultimately determined that an interlocutory appeal would not serve the purposes of the rule in that case. *Id.* at 960-62.

¶ 89 However, as the federal appellate court in *Regents of the University of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 380 (5th Cir. 2007), subsequently explained in an interlocutory appeal from a class certification order, "we may address arguments that implicate the merits of plaintiffs' cause of action insofar as those arguments also implicate the merits of the class certification decision." Thus, "[t]he fact that an issue is relevant to both class certification and the merits *** does not preclude review of that issue." *Id.* Rather, "[i]n a rule 23(f) appeal, this court can, and in fact must, review the merits of the district court's theory of liability insofar as they also concern issues relevant to class certification." *Id.* at 381. The court further noted that "our circuit's conclusion that review of the factual and legal analysis supporting the district court's decision is appropriate on review of class certification enjoys widespread acceptance in the courts of appeals." *Id.* (collecting cases).

¶ 90 Likewise, here, consideration of the underlying validity of the coverage claim in our interlocutory review of the order granting class certification is not just permissible, but necessary, to a resolution of the appeal. We further observe that the injection of the underlying merits of the claim into the scope of our review is also a function of the procedural posture of the case. The trial court denied Society's motion for judgment on the pleadings and *sua sponte* entered judgment on the pleadings in Alley 64's favor. Judgment was entered on the pure legal question of whether there is coverage under Additional Coverage m of the policy. The trial court subsequently granted Alley 64's motion for class certification. Thus, at the point the class was certified, coverage under the policy—the issue relevant to both class certification and the merits—already had been resolved by the trial court.

¶ 91 Significantly, Society's challenges on appeal with respect to the validity of the underlying claim do not raise disputed factual questions. Rather, its challenges are to the interpretation of the policy—a question of law upon which the trial court has ruled. See *Avery*, 216 Ill. 2d at 129 (interpretation of an insurance policy is a question of law). Alley 64 provides no explanation as to how we might parse these issues in reviewing whether the statutory prerequisites for class certification were met. In sum, our review of the propriety of the class certification order necessitates consideration of the threshold issue of whether Alley 64 has a valid cause of action for contamination coverage under the policy. We turn to that issue.

¶ 92 B. Validity of Coverage Claim

¶ 93 The parties dispute whether Alley 64 alleged a valid claim for contamination coverage under Additional Coverage m(1) and m(2)(a).[1] Their arguments center on interpretation of the policy terms set forth in Additional Coverage m. Moreover, Society argues that, even if Alley 64 could establish coverage, the claim is barred by the ordinance or law and acts or decisions exclusions. The legal sufficiency of Alley 64's coverage claim involving an interpretation of the insurance policy is a question of law, which we review *de novo*. See *id.*; see also *Turnipseed*, 391 Ill. App. 3d at 95 (reviewing the legal sufficiency of the underlying claim *de novo* in a Rule 306(a)(8) appeal from the grant of class certification).

[1]The trial court did not find coverage under the remaining subsections of Additional Coverage m—"Contamination threat" under section m(2)(b) and "Publicity" under section m(2)(c). It is undisputed that these provisions are not at issue in this appeal.

¶ 94 The rules of contract interpretation govern the interpretation of an insurance policy. *Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd.*, 223 Ill. 2d 407, 416 (2006). The primary objective is to ascertain and give effect to the parties' intention as expressed in the agreement. *Id.* In ascertaining the meaning of the policy language, the policy must be construed as a whole, taking into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the agreement. *Id.* The words of the policy should be given their plain and ordinary meaning, and the clear and unambiguous policy provisions will be applied as written unless doing so would violate public policy. *Id.* at 416-17. However, policy language that is susceptible to more than one reasonable interpretation will be considered ambiguous and construed strictly against the insurer. *Id.* at 417. A policy provision is not ambiguous merely because a term is undefined or because the parties disagree as to its meaning and suggest creative possibilities for its interpretation. *Id.*

¶ 95 With these concepts in mind, we address whether Alley 64 alleged a valid claim for contamination coverage under Additional Coverage m(1) and m(2)(a). The introductory sentence of Additional Coverage m provides that, "[i]f your 'operations' are suspended due to 'contamination,' " then Society will provide the specified coverage. The coverage under section m(1) is for costs to clean and sanitize the premises, machinery, and equipment (and other stated expenses up to $5000). The coverage under section m(2)(a) is for lost income (specifically "Business Income" and "Extra Expense" as defined in the policy) caused by " '[c]ontamination' that results in an action by a public health or other governmental authority that prohibits access to the described premises or production of your product."

¶ 96 Initially, Society argues that the trial court erred in granting a declaration of coverage under Additional Coverage m(1), because Alley 64's complaint did not seek coverage under this subsection. However, Alley 64 responds that its complaint sought coverage under the contamination coverage section of the policy—which includes both sections m(1) and m(2). We agree that Alley 64's request for a declaration of contamination coverage encompasses both subsections of Additional Coverage m. Accordingly, the central issues raised on appeal are whether Alley 64's operations were "suspended due to contamination" for purposes of coverage under both sections m(1) and m(2)(a) and whether, in addition, the executive orders "prohibit[ed] access" to Alley 64's premises or production of its product for purposes of coverage under section m(2)(a). We address each issue in turn.

¶ 97 Preliminarily, we note that, throughout the briefs, the parties assert forfeiture of various arguments that were purportedly not raised in the trial court. See *U.S. Bank National Ass'n v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 24 ("Arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal."). We agree regarding one of the challenged arguments and find forfeited Society's argument that Alley 64's coverage claim is barred for failure to plead satisfaction of the policy's deductible. However, the remaining challenged arguments were effectively raised and reviewed in the trial court and are therefore not forfeited.

¶ 98 1. Suspension of Operations Due to Contamination

¶ 99 The very first sentence of Additional Coverage m, which qualifies the entirety of the contamination coverage provisions, requires that the insured's operations are suspended due to contamination. The parties agree that the definition of suspension set forth in Additional Coverage g(3)(a) for business income applies to contamination coverage under Additional

Coverage m. Suspension is defined in section g(3)(a) as "[t]he partial slowdown or complete cessation of your business activities." Society does not dispute Alley 64's contention that the elimination of on-premises dining amounted to a partial slowdown of Alley 64's business activities. Rather, the dispute at the heart of this issue is whether the suspension of operations was due to contamination.

¶ 100 The policy defines contamination as "a defect, deficiency, inadequacy or dangerous condition *in* your products, merchandise or premises." (Emphasis added.) Alley 64 did not allege the presence of the virus *in* its products, merchandise, or premises. Instead, Alley 64 alleged that the physical presence of particulates and airborne particulates of the virus in its premises was "highly probable." As the trial court found, Alley 64 "has not *** adequately plead that the premises is actually contaminated." To the contrary, as the trial court found, Alley 64's allegations "relating to any actual contamination, dangerous condition or physical damage to the property are speculative and hyperbole." Alley 64 does not argue that it alleged the actual presence of the virus in its premises.

¶ 101 We note that, in the centralized multidistrict litigation involving pandemic-related coverage claims against Society by restaurants and other businesses in the hospitality industry, the federal district court rejected the same coverage claim Alley 64 raises here. Specifically, the court granted Society's summary judgment motions on the issue of contamination coverage under Additional Coverage m in cases where actual contamination was not alleged. *In re Society Insurance Co. COVID-19 Business Interruption Protection Insurance Litigation*, 521 F. Supp. 3d 729, 744 (N.D. Ill. 2021). The court reasoned that Additional Coverage m requires, "first and foremost," that the plaintiffs' operations be suspended due to contamination. *Id.* However, the plaintiffs had maintained operations during the pandemic, and the suspension of business was not caused by contamination of the premises, machinery, or equipment themselves. *Id.* The plaintiffs also failed to make a particularized factual argument that they were closed due to "actual COVID-19 contamination of the premises, machinery, or equipment." *Id.* Thus, the contamination provision did not present a viable theory of coverage. *Id.*[2] Alley 64 cites no contrary authority.

¶ 102 Analogously, in pandemic-related litigation for coverage under communicable-disease policy provisions, courts have dismissed businesses' claims where there were no allegations of the virus's presence in the premises. See, *e.g.*, *Dakota Girls, LLC v. Philadelphia Indemnity Insurance Co.*, 17 F.4th 645, 651 (6th Cir. 2021) (affirming dismissal where, *inter alia*, there was a failure to plausibly plead an actual illness from COVID-19 at the covered facilities); *Blue Coral, LLC v. West Bend Mutual Insurance Co.*, 533 F. Supp. 3d 279, 283 (E.D.N.C. 2021) ("Plaintiffs fail to plausibly allege that the Communicable Disease Provision was implicated by their losses. While COVID-19 is a plausibly-alleged communicable disease within the meaning of the Communicable Disease Provision, Plaintiffs do not plausibly allege that COVID-19 was ever present 'at the insured premises.' "); *Green Beginnings, LLC v. West Bend Insurance Co.*, No. 20-CV-1661, 2021 WL 2210116, at *7 (E.D. Wis. May 28, 2021), *appeal pending*, No. 21-2186 (filed June 25, 2021) ("The order shutting down Green

[2]The federal district court subsequently ruled that certain allegations of the actual physical presence of the virus in the premises could allow the claim to survive a motion to dismiss. See *In re Society Insurance Co. COVID-19 Business Interruption Protection Insurance Litigation*, No. 20 C 5965, 2021 WL 3290962, at *9-10 (N.D. Ill. Aug. 1, 2021). We express no opinion on this issue.

Beginnings' operations must have been due specifically to an outbreak of COVID-19 at Green Beginnings' premises for there to be coverage under the Communicable Disease provision."). But see *Treo Salon, Inc. v. West Bend Mutual Insurance Co.*, 538 F. Supp. 3d 859, 866 (S.D. Ill. 2021) (the plaintiff's allegation that its premises were included geographically in the government shutdown orders was sufficient to plead an outbreak at the insured premises). Ultimately, as the court in *Terry Black's Barbecue, L.L.C. v. State Automobile Mutual Insurance Co.*, 22 F.4th 450, 459 (5th Cir. 2022), recently noted, coverage under such provisions "contemplates a problem *at the described premises*"—the plaintiff's restaurants. (Emphasis in original.)

¶ 103 We similarly conclude that Alley 64's failure to allege the presence of the virus *in* its products, merchandise, or premises defeats its claim for contamination coverage. Coverage under Additional Coverage m requires that the insured's operations be suspended due to contamination. Alley 64 never alleged that its premises was actually contaminated. Without contamination, there is no contamination coverage under Additional Coverage m.

¶ 104 To escape this conclusion, Alley 64 advances the rationale set forth by the trial court that the reference to the contamination being "in your" products, merchandise, or premises in the definition of contamination is ambiguous given the entirety of Additional Coverage m. According to Alley 64, just as the other triggering events set forth in Additional Coverage m(2)(b) and m(2)(c), *i.e.*, "Contamination threat" of committing a malicious act of contamination and "Publicity" involving the suspicion that the premises is contaminated, do not require *actual* contamination, so too, Additional Coverage m(2)(a) should be strictly construed against Society to not require actual contamination to trigger coverage. Society counters that the reference to "in your" products, merchandise, or premises in the definition of contamination is not ambiguous and that the definition of contamination is consistent with the triggering events for coverage under Additional Coverage m(2)(b) and m(2)(c). We agree with Society.

¶ 105 The reference to "in your" in the policy is not ambiguous. The second paragraph of the policy defines "your," stating that "[t]hroughout this policy the words 'you' and 'your' refer to the Named Insured shown in the Declarations." The named insured is Alley 64; Alley 64's restaurant and bar in St. Charles was listed as an insured premises. Thus, the definition of contamination requires the presence of a defect, deficiency, inadequacy, or dangerous condition in Alley 64's premises.

¶ 106 Moreover, the requirement of actual contamination to trigger coverage under Additional Coverage m(2)(a) is consistent with the lack of such a requirement for coverage under the "Contamination threat" and "Publicity" coverage provisions set forth in Additional Coverage m(2)(b) and m(2)(c). Both sections m(2)(b) and m(2)(c) contain language that modifies the word "contamination"—"threat" and "suspicion of," respectively. And this makes sense because it is the threat or suspicion of contamination in the insured's premises that results in the loss set forth in those provisions. In contrast, Additional Coverage m(2)(a) does not contain a modifier. Rather, that subsection is triggered, as discussed *infra*, by *actual* contamination that results in an action by a governmental authority that prohibits access to the premises—not when a threat or suspicion of contamination results in the governmental action. Alley 64 did not allege actual contamination in its premises as required by the policy. Thus, coverage under Additional Coverage m(2)(a) was not triggered.

¶ 107 Alley 64 nevertheless maintains that, given the definition of contamination as a "dangerous condition in your *** premises," the issue is not whether there was "contamination" in the insured's premises but whether there was a "dangerous condition" in the insured's premises. Noting that "dangerous condition" is not defined in the policy, Alley 64 cites the dictionary definition of the term. "Dangerous" means "involving *possible* injury, pain, harm, or loss" or "able or likely to inflict injury or harm." (Emphasis added.) Merriam-Webster Online Dictionary, https://www.merriamwebster.com/dictionary/dangerous (last visited Mar. 18, 2022) [https://perma.cc/S79X-RVQB]. "Condition" means "a state of being" or "a state of physical fitness or readiness for use." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/condition (last visited Mar. 18, 2022) [https://perma.cc/8VP4-D3DM]. According to Alley 64, these definitions establish that a "dangerous condition" requires not the actual presence of a virus but, rather, the mere possibility that injury, pain, harm, or loss might result from the state of the premises. In turn, citing the language in the Governor's executive orders, Alley 64 argues that "the presence of people consuming food and beverages on-premises during the ongoing spread of COVID-19" is the "dangerous condition in your *** premises" that satisfied the definition of "contamination" under the language of the policy.

¶ 108 Society initially responds that Alley 64 misrepresents that the executive orders determined that on-premises dining constituted a dangerous condition in the *premises* of Illinois restaurants. Rather, the executive orders were preventative measures issued to slow transmission of the virus among *people* in Illinois. Moreover, the definition of contamination in the policy still requires the dangerous condition to have been *in* Alley 64's premises. Society argues that there is no possibility that the virus will injure or harm anyone in the premises if the virus is not actually there. Society also raises what amounts to an argument that Alley 64 failed to establish a causal relationship between the condition of its premises and the executive orders.

¶ 109 We reject Alley 64's argument that the possibility of injury, pain, harm, or loss resulting from the state of the premises suffices to establish a dangerous condition *in its premises* as required by the policy. As set forth above, the clear and unambiguous definition of contamination requires the dangerous condition to have been *in* Alley 64's premises. In that Alley 64 failed to allege that its operations were suspended due to contamination in its premises, it does not have a valid claim for coverage under either Additional Coverage m(1) or m(2)(a).

¶ 110 2. Prohibition of Access to the Premises

¶ 111 Society also argues that Alley 64 does not have a valid claim for coverage under Additional Coverage m(2)(a) because, in addition to failing to allege that its operations were suspended due to contamination, Alley 64 failed to allege " 'contamination' that results in an action by a public health or other governmental authority that prohibits access to the described premises or production of your product," as set forth in section m(2)(a). The central dispute is whether the executive orders prohibited access to the premises. Society argues that access to Alley 64's premises was not prohibited—carryout and delivery were permitted and encouraged by the executive orders. Alley 64 counters that the trial court properly interpreted the policy to require only a limitation on access to the property to trigger coverage—met by virtue of the executive

orders' restriction on on-premises dining. We disagree with the trial court's interpretation of the policy.

¶ 112 To begin, the trial court improperly collapsed the analysis of whether the executive orders prohibited access to Alley 64's premises with the requirement set forth in the first sentence of Additional Coverage m that the insured's operations are suspended due to contamination. Namely, the trial court reasoned that the question as to contamination coverage under Additional Coverage m(2)(a) was whether the "executive orders required [Alley 64] to suspend its operations because it [*sic*] prohibited access to the premises." Ultimately, applying a dictionary definition of "access" as "the freedom or ability to obtain or make use of something," the trial court found coverage under section m(2)(a) because the executive orders "limited the public's access and use of the premises" and Alley 64 was "deprived of its freedom or ability to make full use of the premises." In addition to disregarding other dictionary definitions of "access" and adding "full" to "use of" in its application of the definition, the trial court ignored the term "prohibits" in resolving whether the executive orders prohibited access to Alley 64's premises.

¶ 113 The policy does not define "prohibit." The lack of a definition, however, does not render the provision ambiguous. See *Nicor*, 223 Ill. 2d at 417. Society cites the dictionary definition of "prohibit," meaning "to forbid by authority" or "to prevent from doing something." Merriam-Webster Online Dictionary, https://www.merriamwebster.com/dictionary/prohibit (last visited Mar. 18, 2022) [https://perma.cc/R4AH-8R2Y]. Access to Alley 64's premises was neither forbidden nor prevented. To the contrary, under the executive orders, restaurants like Alley 64 were "permitted and encouraged to serve food and beverages so that they may be consumed off-premises," and customers were permitted to "enter the premises to purchase food or beverages for carry-out." Exec. Order No. 2020-7, 44 Ill. Reg. 5537 (Mar. 16, 2020), https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-7.2020.html [https://perma.cc/HT82-4QUK]. As the Seventh Circuit recently noted, "at most—the Businesses' preferred use of the premises was partially limited [by the executive orders], while other uses remained possible." *Sandy Point Dental, P.C. v. Cincinnati Insurance Co.*, 20 F.4th 327, 334 (7th Cir. 2021).

¶ 114 Contrary to Alley 64's argument, a *limitation* on the use of the premises does not equate to a *prohibition* on access to the premises. Indeed, as Society argues, the average person in everyday life would understand a sign that prohibits an activity to mean that the activity is completely disallowed. We are bound to give the words in a policy their plain and ordinary meaning. See *Nicor*, 223 Ill. 2d at 416-17. We cannot rewrite the policy, as Alley 64 essentially requests, to replace the word "prohibits" with the word "limits." Simply put, the executive orders did not prohibit access to Alley 64's premises.

¶ 115 In interpreting policy provisions providing coverage for lost business income caused by an action of civil authority that likewise "prohibits access" to the insured's premises, numerous courts have rejected the argument that shutdown orders in response to the pandemic amounted to a prohibition of access under the respective policies. See, *e.g.*, *Brown Jug, Inc. v. Cincinnati Insurance Co.*, No. 21-2644, 2022 WL 538221, at *5 (6th Cir. Feb. 23, 2022) ("[A]ccess to the area immediately surrounding the plaintiffs' properties was limited, but not 'prohibited' as required by the Civil Authority provision."); *Food for Thought Caterers Corp. v. Sentinel Insurance Co.*, 524 F. Supp. 3d 242, 250 (S.D.N.Y. 2021) ("The Policy provides for coverage if the civil authority denies all access to the insured property, not simply its full use. [Citation.]

Therefore, because no civil authority order denied complete access to the plaintiff's premises, the Amended Complaint fails to allege that access was 'specifically prohibited.' "); *TAQ Willow Grove, LLC v. Twin City Fire Insurance*, 513 F. Supp. 3d 536, 546 (E.D. Pa. 2021) ("That TAQ could have provided carry-out and/or delivery services at its insured property under the Civil Authority Orders reveals that a prohibition on access to the properties—a prerequisite to coverage under its policy—is absent here ***."); *Riverside Dental of Rockford, Ltd. v. Cincinnati Insurance Co.*, No. 20 CV 50284, 2021 WL 2660774, at *3 (N.D. Ill. June 29, 2021) ("The fact certain services were prohibited from being performed at the premises did not prohibit access to the premises. The premises could be accessed for purposes of performing and receiving essential services."). But see *Studio 417, Inc. v. Cincinnati Insurance Co.*, 478 F. Supp. 3d 794, 804 (W.D. Mo. 2020) ("[T]he Policies require that the 'civil authority prohibits access,' " without specifying " 'all access' or 'any access' to the premises. For these reasons, Plaintiffs have adequately stated a claim for civil authority coverage.").

¶ 116 Here, too, the Governor's executive orders did not completely prohibit access to Alley 64's premises. Rather, the orders permitted and encouraged the service of food and beverages for off-site consumption. Employees and staff were allowed access to the premises. Customers were allowed to enter the premises to place or pick up orders. Limiting the use of the premises does not amount to prohibition of access to the premises. Accordingly, Alley 64 does not have a valid claim for coverage under Additional Coverage m(2)(a).

¶ 117 Given the foregoing analysis and our conclusion that there is no coverage under Additional Coverage m, we decline to consider Society's arguments that any coverage would be barred by the ordinance or law and acts or decisions exclusions.

¶ 118 In sum, Alley 64 does not have a valid claim for contamination coverage under Additional Coverage m. We therefore need not determine whether Alley 64 satisfied the statutory prerequisites for class certification. See *Barbara's Sales*, 227 Ill. 2d at 72; *Turnipseed*, 391 Ill. App. 3d at 100.

¶ 119 In closing, we recognize that the restaurant industry has been saddled with immense challenges during the COVID-19 pandemic, with devastating impact on these businesses and their employees, contractors, and suppliers. Our disposition in no way discounts what the restaurant industry has had to endure. However, for the reasons discussed, we are compelled to hold that Alley 64 did not allege a valid claim for contamination coverage under Additional Coverage m and that the lawsuit, therefore, may not proceed as a class action.

¶ 120 III. CONCLUSION

¶ 121 For the foregoing reasons, the trial court's order granting class certification is reversed, and the cause is remanded for proceedings consistent with this opinion.

¶ 122 Reversed and remanded.