IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CORNERSTONE WARRINGTON, INC., CORNERSTONE HEALTH & FITNESS LP, CORNERSTONE NEW HOPE LP, CONEHOPA, LLC and THE EVENT CENTER BY CORNERSTONE, Plaintiffs, v. THE CINCINNATI INSURANCE COMPANY, Defendant.	Civil Action No. 2:20-cv-02398-MMB Hon. Michael M. Baylson

MOTION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS AND IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

United Policyholders respectfully submits this Motion for Leave To File an *Amicus Curiae* Brief for the Court's consideration in the above-captioned matter, and avers as follows:

Interest of Proposed *Amicus* United Policyholders in this Matter

1. Defendant The Cincinnati Insurance Company's ("Cincinnati Insurance") pending motion to dismiss is among the early challenges nationwide, and the earliest challenge in this federal judicial district, to a policyholder's ability to state a claim for business interruption insurance coverage stemming from the spread of the novel coronavirus formally known as SARS-CoV-2 and the illness it causes, COVID-19. The nature of the arguments raised by Cincinnati Insurance are far-reaching in scope and touch on issues raised in similar litigation now pending in numerous federal judicial districts and state courts across the country.[1]

[1] *See* University of Pennsylvania Carey Law School "Covid Coverage Litigation Tracker," available at https://cclt.law.upenn.edu/ (last visited August 12, 2020).

2. The application and interpretation of insurance contracts requires special judicial handling. Not only are insurance contracts adhesive in nature, which compels judicial balancing, but effecting indemnification in case of loss is a fundamental economic and social objective that courts can advance. *See Collister v. Nationwide Life Ins. Co.*, 388 A.2d 1346, 1350 (Pa. 1978) (ruling that giving effect to a policyholder's reasonable expectations of coverage is appropriate because insurance policies are contracts of adhesion drafted by the insurance companies or an insurance industry organization); *401 Fourth St., Inc. v. Inv'rs Ins. Grp.*, 879 A.2d 166, 171 (Pa. 2005) (noting that indemnification is an insurance contract's prime purpose). United Policyholders respectfully seeks to assist this Court in fulfilling these significant roles.

3. United Policyholders, seeking leave to act as *amicus curiae* in this matter, is a non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public on insurers' duties and policyholders' rights. United Policyholders monitors developments in the insurance marketplace and serves as a voice for a broad range of policyholders in legislative and regulatory forums. United Policyholders helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in sales and claim practices. Grants, donations and volunteers support the organization's work. United Policyholders does not accept funding from insurance companies.

4. United Policyholders' work is divided into three program areas: Roadmap to Recovery™ (disaster recovery and claim help), Roadmap to Preparedness (disaster preparedness through insurance education), and Advocacy and Action (advancing pro-consumer laws and public policy through appearances as *amicus curiae*). United Policyholders hosts a

library of informational publications and videos related to personal and commercial insurance products, coverage and the claims process at www.uphelp.org.

5. In furtherance of its mission, United Policyholders regularly appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. United Policyholders regularly consults with the insurance commissioners of many states, including Pennsylvania, and has previously appeared as *amicus curiae* in cases involving Pennsylvania insurance law at the Third Circuit Court of Appeals,[2] in this federal judicial district[3] and in the Pennsylvania Supreme Court.[4] United Policyholders' *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999). A complete listing of all cases in which United Policyholders has appeared as *amicus curiae* can be found in United Policyholders' online *Amicus* Project library at https://www.uphelp.org/resources/amicus-briefs.

6. Thus, United Policyholders has a special interest in fulfilling the traditional role of *amicus curiae* by assisting in this case of significant public interest, supplementing the

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[2] United Policyholders has appeared as *amicus curiae* in the following Third Circuit Court of Appeals cases: *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 321 n.16 (3rd Cir. 2007) (citing UP's *amicus* brief); *Hussey Copper, Ltd. v. Arrowood Indem. Co.*, 391 Fed. App'x 207 (3rd Cir. 2010); *AstenJohnson, Inc. v. Columbia Cas. Co.*, 562 F.3d 213 (3rd Cir. 2009); *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224 (3rd Cir. 2005); and *Barber v. UNUM Life Ins. Co. of Am.*, 383 F.3d 134 (3rd Cir. 2004).

[3] *See, e.g.*, *Simon Wrecking Co. v. AIU Ins. Co.*, 541 F. Supp. 2d 714 (E.D. Pa. 2008).

[4] United Policyholders has appeared as *amicus curiae* in the following Pennsylvania Supreme Court cases: *Erie Ins. Exch. v. Moore*, No. 20 WAP 2018 (Pa. Super. Ct. 2018); *Pa. Mfrs.' Ass'n Ins. Co. v. Johnson Matthey, Inc.*, No. 24 MAP 2017 (Pa. 2017); *Rancosky v. Wash. Nat'l Ins. Co.*, No. 28 WAP 2016 (Pa. 2017); *Mut. Benefit Ins. Co. v. Politopoulos*, No. 60 MAP 2014 (Pa. 2014); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, No. 39 MAP 2014 (Pa. 2014); *Babcock & Wilcox Co. v. Am. Nuclear Insurers*, No. 2 WAP 2014 (Pa. 2014); *ACE Am. Ins. Co. v. Underwriters at Lloyds and Cos.*, No. 45 EAP 2008 (Pa. 2007); and *Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, No. 88 MAP 2008 (Pa. 2007).

efforts of counsel, and drawing the Court's attention to law that may have escaped consideration. *Sciotto v. Marple Newtown Sch. Dist.*, 70 F. Supp. 2d 553, 554 (E.D. Pa. 1999) (citations omitted).

Legal Standard for Appointing *Amicus Curiae*

7. "District courts have broad discretion to appoint amicus curiae." *Sciotto*, 70 F. Supp. 2d at 554 (citations omitted); *see also Pa. Envtl. Def. Found. v. Bellefonte Borough*, 718 F. Supp. 431, 434 (M.D. Pa. 1989) (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982)).

8. An *amicus curiae* assists "in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Newark Branch, NAACP. v. Harrison*, 940 F.2d 792, 808 (3d Cir. 1991) (citations omitted). As commentators have explained, an *amicus* is often in a superior position to focus the court's attention on the broad implications of various possible rulings. Stephen M. Shapiro *et al.*, SUPREME COURT PRACTICE 753 (10th ed. 2013).

9. Courts frequently grant leave to nonprofit organizations like United Policyholders with industry familiarity and perspective that may assist in the resolution of a case. *See Gen. Refractories*, 500 F.3d at 321 n.16 (citing UP's *amicus curiae* brief); *Office Depot, Inc. v. AIG Specialty Ins. Co.*, No. 17-55125, 2018 U.S. App. LEXIS 12191 (9th Cir. 2018) (granting UP's motion for leave to file *amicus curiae* brief); *Probuilders Specialty Ins. Co. v. Phoenix Contracting, Inc.*, 743 Fed. App'x 876, 877 n.1 (9th Cir. 2018) (same); *HotChalk, Inc. v. Scottsdale Ins. Co.*, 736 Fed. App'x 646, 649 n.4 (9th Cir. 2018) (same).

See also Bryant v. Better Bus. Bureau, 923 F. Supp. 720, 728 (D. Md. 1996); *Perry-Bey v. City of Norfolk*, 678 F. Supp. 2d 348, 357 (E.D. Va. 2009).

10. This Court has so exercised its inherent authority and discretion previously in granting nonprofit organizations' motion to appear as amici. *See Abu-Jamal v. Price*, No. 95-618, 1996 U.S. Dist. LEXIS 8597, at *6 (W.D. Pa. Feb. 23, 1996) (granting the American Civil Liberties Union's motion to appear as *amicus curiae*); *Rupert v. PPG Indus.*, Nos. 07-cv-0705 and 08-cv-0616, 2009 U.S. Dist. LEXIS 102538, at *4-5 (W.D. Pa. Oct. 28, 2009) (granting the American Association of Retired Persons' motion to file an *amicus* brief).

The Issues Addressed by UP's *Amicus* Brief Are Of Nationwide Importance and Relevant to the Court's Review of Defendant Cincinnati Insurance's Motion To Dismiss.

11. Defendant Cincinnati Insurance's motion to dismiss asserts that certain covered causes of loss – namely, COVID-19 and civil authority closure orders – have not caused sufficient physical alteration to property to constitute "physical loss" to property. Def.'s Mot. at 12.
12. The public at large has a significant interest in this issue, which is being actively litigated in COVID-19-related coverage disputes across the country. This Court's disposition of Cincinnati Insurance's motion has the potential to affect thousands of policyholders, not only in this federal judicial district but nationwide.
13. The Court will benefit by reviewing the perspective of *amicus* UP, who has considerable experience in briefing courts on insurance coverage issues and an interest in ensuring a proper ruling under the well-established principles of policy interpretation. The attached brief provides UP's broad perspective on how the propensities of the SARS-CoV-2 virus

and the civil authority closure orders constitute "physical loss" under a property insurance policy, under Pennsylvania law and more generally.

WHEREFORE, Movant United Policyholders respectfully requests that the Court grant it leave to file the attached *amicus curiae* brief and accept the attached *amicus curiae* brief in consideration of Defendant Cincinnati Insurance's motion to dismiss. A copy of the proposed *amicus curiae* brief is attached hereto as **Exhibit A**.

Respectfully submitted,

Dated: August 17, 2020

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CORNERSTONE WARRINGTON, INC., CORNERSTONE HEALTH & FITNESS LP, CORNERSTONE NEW HOPE LP, CONEHOPA, LLC and THE EVENT CENTER BY CORNERSTONE, Plaintiffs, v. THE CINCINNATI INSURANCE COMPANY, Defendant.	Civil Action No. 2:20-cv-02398-MMB Hon. Michael M. Baylson

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFFS AND IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Corporate Disclosure Statement,
Federal Rule of Civil Procedure 7.1

(1) *Amicus curiae* United Policyholders is a not-for-profit, non-governmental corporate entity that has no parent corporation and is not affiliated with any publicly owned corporation.

(2) No publicly held company holds 10% or more of *amicus curiae* United Policyholders' stock.

(3) *Amicus curiae* United Policyholders certifies that it has no parents, subsidiaries and/or affiliates that have issued shares or debt securities to the public.

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Amicus curiae United Policyholders[1] seeks to address the limited issue that certain covered causes of loss – namely, COVID-19 and civil authority orders – sufficiently constitute "physical loss" to property, which is a key issue in Plaintiffs' (the "Cornerstone Policyholders") claim for breach of contract under first-party property insurance policies providing time element coverages. The Cornerstone Policyholders' claims seek coverage for losses arising out of the interruption of their businesses due to the ubiquitous presence of COVID-19 and the numerous civil authority "stay at home" and "closure" orders, all of which qualify as types of loss that "all risk" property policies are designed to insure.

I. INTEREST OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN THIS MATTER

United Policyholders is a non-profit organization founded in 1991 and dedicated to educating the public on insurance issues and consumer rights. United Policyholders serves as an information resource and a voice for a diverse range of insurance policyholders across the United States, from low-income homeowners to international businesses. Donations, foundation grants and volunteers support the United Policyholders' work.

United Policyholders serves an important purpose by representing the interests of policyholders. Most policyholders can scarcely afford legal counsel to pursue their rights under their insurance policies, whereas insurance companies have extensive resources to retain lawyers at major law firms to oppose providing coverage to their policyholders. In coverage disputes, insurance companies also enjoy a significant advantage because their policies are written on standardized forms that individual policyholders have no power to revise. United Policyholders seeks to level the playing field by offering similar resources and comparable counsel to represent otherwise vulnerable policyholders in cases raising important insurance coverage issues.

[1] Pursuant to Fed. R. App. P. 29(a)(4), United Policyholders affirms that no party's counsel authored this brief, that no party or party's counsel contributed money to United Policyholders that was intended to fund preparing or submitting this brief, and no person contributed money that was intended to fund preparing or submitting the brief.

In furtherance of its mission, United Policyholders regularly advocates on behalf of policyholders in legislative and regulatory forums,[2] and United Policyholders regularly appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. Since its founding in 1991, United Policyholders has filed *amicus curiae* briefs in numerous federal and state courts in over 450 cases.[3] In particular, United Policyholders has previously appeared as *amicus curiae* in cases involving Pennsylvania insurance law at the Third Circuit Court of Appeals,[4] in this federal judicial district[5] and in the Pennsylvania Supreme Court.[6]

Thus, United Policyholders has a special interest in fulfilling the traditional role of *amicus curiae* by assisting in this case of significant public interest, supplementing the efforts of counsel, and drawing the Court's attention to law that may have escaped consideration. *Sciotto v. Marple Newtown Sch. Dist.*, 70 F. Supp. 2d 553, 554 (E.D. Pa. 1999) (citations omitted).

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[2] United Policyholders' Executive Director has been appointed for six consecutive terms as an official consumer representative to the National Association of Insurance Commissioners, and works regularly with the insurance commissioners of many states, including Pennsylvania, on issues affecting policyholders.

[3] A complete listing of all cases in which United Policyholders has appeared as *amicus curiae* can be found in United Policyholders' online *Amicus* Project library at https://www.uphelp.org/resources/amicus-briefs.

[4] United Policyholders has appeared as *amicus curiae* in the following Third Circuit Court of Appeals cases: *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 321 n.16 (3rd Cir. 2007) (citing UP's *amicus* brief); *Hussey Copper, Ltd. v. Arrowood Indem. Co.*, 391 Fed. App'x 207 (3rd Cir. 2010); *AstenJohnson, Inc. v. Columbia Cas. Co.*, 562 F.3d 213 (3rd Cir. 2009); *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224 (3rd Cir. 2005); and *Barber v. UNUM Life Ins. Co. of Am.*, 383 F.3d 134 (3rd Cir. 2004).

[5] *See, e.g.*, *Simon Wrecking Co. v. AIU Ins. Co.*, 541 F. Supp. 2d 714 (E.D. Pa. 2008).

[6] United Policyholders has appeared as *amicus curiae* in the following Pennsylvania Supreme Court cases: *Erie Ins. Exch. v. Moore*, No. 20 WAP 2018 (Pa. Super. Ct. 2018); *Pa. Mfrs.' Ass'n Ins. Co. v. Johnson Matthey, Inc.*, No. 24 MAP 2017 (Pa. 2017); *Rancosky v. Wash. Nat'l Ins. Co.*, No. 28 WAP 2016 (Pa. 2017); *Mut. Benefit Ins. Co. v. Politopoulos*, No. 60 MAP 2014 (Pa. 2014); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, No. 39 MAP 2014 (Pa. 2014); *Babcock & Wilcox Co. v. Am. Nuclear Insurers*, No. 2 WAP 2014 (Pa. 2014); *ACE Am. Ins. Co. v. Underwriters at Lloyds and Cos.*, No. 45 EAP 2008 (Pa. 2007); and *Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, No. 88 MAP 2008 (Pa. 2007).

II. INTRODUCTION

The issue of whether COVID-19 and civil authority closure orders can constitute "physical loss" to property is at the forefront of COVID-19-related business interruption litigation in Pennsylvania and nationwide. This Court's treatment of this issue has the potential to affect a multitude of other claims made by policyholders not only in Pennsylvania, but also across the nation.

The Cornerstone Policyholders purchased "all-risk" property insurance policies[7] (the "Event Center Policy," "Warrington Policy" and "Cornerstone Policy;" collectively referred to as the "Policies") from Defendant The Cincinnati Insurance Company ("Cincinnati Insurance") for the Cornerstone Policyholders' indoor health and fitness centers, commercial real estate, and banquet and community event center. All-risk policies cover all risks of loss except for risks that are specifically excluded.

The "physical loss"[8] language is part of the coverage grants of Cornerstone Policyholders' Event Center policy (the "Event Center Policy")[9] and their Warrington and Cornerstone policies (respectively, the "Warrington Policy" and "Cornerstone Policy").[10]

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[7] Pls.' Mem. Of Law in Opp'n to Def.'s Mot. ("Pls.' Mem.") at 21.

[8] Plaintiffs' Event Center Policy contains the construction "direct physical 'loss' to property," and Plaintiffs' Warrington and Cornerstone Policies contain the construction "direct 'loss' to property." Some policies in the property insurance market use the construction "direct physical loss of or damage to." Other policies use the wording "direct physical loss or damage to," omitting the word "of" after "loss." The difference is of no moment because both iterations provide coverage for losses like those of the Cornerstone Policyholders.

[9] Event Center Policy's language found in Def.'s Mot. to Dismiss ("Def.'s Mot.") at 7-8. The Event Center Policy provides that Cincinnati Insurance will pay for "physical 'loss.'" The Event Center Policy further defines "loss" to mean "accidental loss or damage." Moreover, the Event Center Policy defines a "Covered Cause of Loss" to mean "physical loss unless the 'loss' is excluded or limited" therein.

[10] Warrington and Cornerstone Policies' language found in Def.'s Mot. at 7. The Warrington and Cornerstone Policies provide that Cincinnati Insurance will pay for "'loss.'" The Warrington and Cornerstone Policies further define "loss" to mean "accidental physical loss or accidental physical damage." In addition, the Warrington and Cornerstone Policies define "Covered Cause of Loss" to mean "loss unless the 'loss' is excluded or limited" therein.

Overall, the three Policies do not define the terms "physical loss" or "physical damage." The "physical loss" language is found in most property insurance policies.

Indeed, the Pennsylvania Supreme Court has already ruled that COVID-19 can cause physical loss and/or property damage in the Commonwealth in this context.[11] Relying on the overwhelming evidence of the ubiquity and transmissibility of COVID-19 in the Commonwealth, the Court ruled that it is self-evident that Pennsylvania Governor Tom Wolf had authority to issue his emergency orders to reduce and attempt to stop further losses from occurring.

United Policyholders has heard from numerous policyholders that have made business interruption claims under property insurance policies with similar language as the Cornerstone Policyholders' Policies and that have had those claims wrongly denied to devastating effect. The insurance industry's blanket, across-the-board denials of all claims for business interruption losses related to COVID-19 has produced a mass scale of calamity for business policyholders.[12]

III. SUMMARY OF ARGUMENT

Cincinnati Insurance's position regarding the meaning of "physical loss" and what events are sufficient to state a claim to trigger coverages requiring "physical loss" has been widely rejected in Pennsylvania and elsewhere. Cincinnati Insurance chose not to define the phrase "physical loss" in the Policies sold to Cornerstone Policyholders. Courts applying Pennsylvania law, as well as rulings from other jurisdictions, have made clear that tangible, permanent alteration of covered property is not a necessary element of "physical loss," especially where the

[11] *Devito v. Wolf*, 227 A.3d 872, 888-89 (Pa. 2020) (finding that COVID-19 qualifies as a natural disaster and noting that the stated goals of the Commonwealth's Emergency Code, one of the Governor's statutory grounds for his authority to issue closure orders, were to, inter alia, "[r]educe vulnerability of people and communities of this Commonwealth to damage, injury and loss of life and property resulting from disasters.")

[12] *See Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 886 N.E.2d 127, 131-32 (N.Y. 2008) (explaining that "[t]he purpose of business interruption insurance cannot be clearer – to ensure that [the policyholder] had the financial support necessary to sustain its business in the event disaster occurred … " and that "the purpose of the contract was not just to receive money, but to receive it promptly so that in the aftermath of a calamitous event, as [the policyholder] experienced here, the business could avoid collapse and get back on its feet as soon as possible").

insured property is otherwise rendered unusable or unable to be occupied for its intended purpose. Accordingly, the presence of disease-causing agents in and around the insured property can constitute "physical loss" to property, and business interruption coverage may be triggered where the presence, suspected presence, and/or the imminent threat of the presence of disease-causing agents on property causes a "necessary suspension" (either completely or in part) of the policyholder's "operations."[13]

For these reasons, United Policyholders respectfully urges this Court to reject the position submitted by Cincinnati Insurance in its Motion to Dismiss, and reaffirm that Pennsylvania law, consistent with the law in other jurisdictions and the intent and scope of what "all risk" property insurance protection is designed to provide, affords Pennsylvania policyholders the ability to seek coverage when their insured property is rendered unusable and/or uninhabitable in the circumstances described above.

IV. ARGUMENT

A. THE CORNERSTONE POLICYHOLDERS HAVE SUFFICIENTLY ALLEGED "PHYSICAL LOSS" UNDER THE POLICIES.

1. "Physical Loss" Does Not Require Structural Alteration under the Policies or Under the Term's Ordinary Meaning.

Cincinnati Insurance argues that the Cornerstone Policyholders have not sufficiently pled a "physical loss" as required by the Policies. Cincinnati Insurance claims that "physical loss requires actual, tangible, permanent, physical alteration of property."[14] Cincinnati Insurance further asserts that the Policies "are designed to indemnify loss or damage to property, such as in the case of a fire or storm. [COVID-19] does not damage property; it hurts people."[15] According to Cincinnati Insurance, the supposed requirement of "tangible, permanent, physical alteration of

[13] Policies' language found in Def.'s Mot. at 4.
[14] *Id.* at 14.
[15] *Id.* at 1.

property" applies to—and precludes—"the Policies' Business Income, Extended Business Income, Extra Expense, and Civil Authority coverages"[16] sought in this case.

Although "physical loss" and "physical damage" are critical terms in the Policies, and Cincinnati Insurance could have defined these terms, neither "physical loss" nor "physical damage" is defined in any of the Policies. Additionally, the Event Center Policy expressly covers "loss ***or*** damage," and the Warrington and Cornerstone Policies expressly cover "physical loss ***or*** physical damage." (emphasis added). The use of the disjunctive "or" in the Policies necessarily means that either a "loss" or "damage" is required, and that "loss" is distinct from "damage." As such, Cincinnati Insurance's contention regarding the purported requirement of "tangible, permanent, physical alteration of property" overlooks the coverage for a "physical loss."

Because the Policies do not define "physical loss," Pennsylvania law dictates that each word be given its ordinary or plain meaning. [17] The Court may consult standard dictionary definitions of a word to determine its ordinary meaning. [18] Indeed, the same policy wording sold by Cincinnati Insurance was recently examined by the Western District of Missouri in *Studio 417, Inc. v. The Cincinnati Insurance Company*, another COVID-19-related coverage dispute involving a policy Cincinnati Insurance sold containing no definition of direct "physical loss." In denying Cincinnati Insurance's motion, the *Studio 417* Court referred to the standard dictionary definition of "physical," meaning to have "material existence." [19] The *Studio 417* Court further explained the ordinary meaning of "loss" includes either "the act of losing possession" or

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[16] *Id.* at 1.
[17] *See Toffler Assocs. v. Hartford Fire Ins. Co.*, 651 F. Supp. 2d 332, 344 (E.D. Pa. 2009) (applying Pennsylvania law).
[18] *Id.*
[19] Order Den. Def.'s Mot. to Dismiss, 8-13, *Studio 417, Inc. v. The Cincinnati Ins. Co.*, No. 6:20-cv-03127-SRB (W.D. Mo. Aug. 8, 2020) (quoting Merriam-Webster, www.merriam-webster.com/dictionary/physical (last visited August 12, 2020)).

"deprivation" of use for an intended purpose.[20] Further, because COVID-19 is alleged to be "a physical substance" that "live[s] on" and is "active on inert physical surfaces," and COVID-19 "allegedly attached to and deprived [p]laintiffs of their property," a direct physical loss was in fact sufficiently alleged.[21]

Applying these standard dictionary definitions to the Policies' undefined "physical loss" term, the Cornerstone Policyholders have sufficiently alleged a "physical loss." The Cornerstone Policyholders have satisfied the ordinary meaning of the undefined "physical" because COVID-19's virus-containing droplets or particles have "material existence." Although these virus-containing droplets are very small, they still constitute physical, material objects that can travel and attach to physical surfaces. Because the imminent threat of, or actual attachment of COVID-19 droplets to the surfaces of Cornerstone Policyholders' properties renders those properties unsafe and unusable for their intended purpose, COVID-19 deprives the Cornerstone Policyholders of their property. Thus, the Cornerstone Policyholders have sufficiently stated a claim for "physical loss" based on the phrase's plain and ordinary meaning.

2. Case Law Supports that "Physical Loss" Does Not Require Structural Alteration.

Under Pennsylvania law, a court should interpret an insurance policy so as to give effect to all of the policy's terms.[22] Here, the Event Center Policy provides coverage for "loss ***or*** damage," and the Warrington and Cornerstone Policies provide coverage for "physical loss ***or*** physical damage." (emphasis added). Despite how Cincinnati Insurance erroneously conflates "loss" and "damage" in support of its argument that the Policies require a "tangible, permanent,

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[20] *Id.* (quoting Merriam-Webster, www.merriam-webster.com/dictionary/loss (last visited August 12, 2020)).
[21] *Id.* at 8.
[22] *See Newman v. Mass. Bonding & Ins. Co.*, 361 Pa. 587, 591 (Pa. 1949); *Travelers Home & Marine Ins. Co. v. Stahley*, 239 F. Supp. 3d 866, 870-71 (E.D. Pa. 2017) (applying Pennsylvania law).

physical alteration of property," the Court must give meaning to both "loss" and "damage" in order to properly give effect to all of the Policies' terms.[23]

Moreover, courts applying Pennsylvania law support the conclusion that the Cornerstone Policyholders have sufficiently stated a claim for "physical loss" because courts have found that "physical loss" does not require structural alteration if a physical condition or a disease-causing agent renders the covered property unfit or uninhabitable for its intended purpose. In *Motorists Mutual Insurance Co. v. Hardinger*, a controlling Third Circuit Court of Appeals ruling, the court determined that there was an issue of fact concerning whether bacteria, a disease-causing agent, nearly eliminated the functionality of the policyholder's property and thereby caused "physical loss" under a homeowner's policy.[24] Because that issue of fact had not been considered, the appellate court vacated the lower court's premature entry of summary judgment in favor of the insurance company.[25]

In another case under Pennsylvania law, the court found that an outside oil spill rendering an insured house uninhabitable constituted direct loss to insured property that would afford coverage under a homeowner's policy.[26] The *Hetrick* court cited with approval the reasoning in *W. Fire Ins. Co. v. First Presbyterian Church*, in which Colorado's highest court found that the policyholder suffered a "physical loss" and compensable loss of use where a church was rendered unsafe by gasoline around and under the property.[27]

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[23] *See Nautilus Grp., Inc. v. Allianz Global Risks US*, 2012 U.S. Dist. LEXIS 30857, at *18 (W.D. Wash. Mar. 8, 2012) (reasoning, with respect to a policy's "direct physical loss or damage to" language, that "if 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous").

[24] 131 Fed. App'x 823, 827 (3d Cir. 2005) (applying Pennsylvania law).

[25] *Id.* at 828.

[26] *Hetrick v. Valley Mutual Ins. Co.*, 15 Pa. D. & C. 4th 271, 1992 Pa. Dist. & Cnty. Dec. LEXIS 236, at *5 (Pa. Comm. Pl. May 28, 1992).

[27] *Id.* at *4 (citing *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968)). In *First Presbyterian*, the policyholder, acting upon the orders of the local fire department, closed the insured premises – namely, a church building – because an accumulation of gasoline around and under the church building made the property uninhabitable and unusable.

Other jurisdictions have similarly recognized that even absent a structural alteration, a "physical loss" may occur when a disease-causing agent renders the insured property unfit or uninhabitable for its intended purpose. Specifically, courts have found that property insurance policies may cover claims for property damage from a variety of disease-causing agents that must be cleaned or removed from property—including E. coli bacteria,[28] radioactive dust,[29] noxious air particles,[30] asbestos,[31] mold,[32] health-threatening organisms,[33] vaporized agricultural chemicals,[34] and pesticides.[35] These cases are legion and span decades. Indeed, in response to

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[28] *See Cooper v. Travelers Indem. Co.*, No. C-01-2400, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002) (applying California law) (finding policyholder could make claim for Business Income and Extra Expense loss from presence of E. coli bacteria in well water).

[29] *See Am. Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (applying Ohio law) (finding dissemination of radioactive dust throughout manufacturing plant constituted property damage).

[30] *See Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, 2005 WL 600021, at *4 (N.Y. Supr. Mar. 4, 2005) (concluding that noxious particles from dust, soot and smoke in a law firm after the attacks of September 11, 2001 constituted "property damage").

[31] *See Bd. of Educ. v. Int'l Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. App. 1999) (citing liability insurance coverage cases finding that incorporation of asbestos into buildings caused "property damage" as defined under liability policies to be "physical injury to or destruction of tangible property," and finding that, for purposes of summary judgment, the policyholder had established that the presence of toxic asbestos fibers constituted property damage). *See also Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825-26 (Minn. 2000) (holding that asbestos fibers in carpeting and other surfaces in apartment building satisfied the definition of "direct physical loss" because asbestos seriously impaired the building's function, even though it did not result in tangible injury to the building's physical structure).

[32] *See Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8-*9 (D. Or. June 18, 2002) (applying Oregon law) (concluding that toxic mold damage to house which caused policyholder to abandon house and personal property could constitute "distinct and demonstrable" damage, sufficient to constitute "direct" and "physical" loss, and citing cases for the proposition that inability to inhabit a building may constitute "direct, physical loss"). *See also Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 98-434-HU, 1999 WL 619100, at *7-*8 (D. Or. Aug. 4, 1999) (applying Oregon law) (finding that policyholder could bear its burden to demonstrate that clothes with prolonged exposure to mold or mildew suffered "direct physical loss" if it established "at trial a class of garments which has increased microbial counts and that will, as a result, develop either an odor or mold or mildew").

[33] *See Pillsbury Co. v. Underwriters of Lloyd's*, 705 F. Supp. 1396, 1401 (D. Minn. 1989) (holding, where policyholder experienced difficulties in destroying organisms in its creamed corn and destroyed all cans of such corn, that the under-processing of the creamed corn was a loss covered by the policy; i.e., that the creamed corn had suffered physical loss).

[34] *See Henri's Food Prods. Co. v. Home Ins. Co.*, 474 F. Supp. 889, 892 (E.D. Wis. 1979) (applying Wisconsin law) (holding, where policyholder's salad dressings were seized by the

the most similar recent event to the current situation, insurance companies were paying claims under property insurance policies related to the SARS outbreak in the early 2000s without claiming there was a lack of property damage.[36] The history of this nationwide body of case law, and prior industry conduct, illustrates the insurance industry well knows that coverage for disease-causing agents exists under "all risk" property insurance policy forms. This history further supports policyholders' reasonable expectations that coverage would exist for losses caused by a disease-causing agent that rendered its property unfit for its intended purpose.

Presumed, suspected, or the imminent threat of a disease-causing agent on insured property can also constitute physical loss. As the Third Circuit and other courts have recognized in a variety of contexts, including cases involving microscopic asbestos fibers, there does not have to be actual adulteration of the insured property, so long as a physical cause imminently threatens the property's function or habitability.[37]

Further, and contrary to Cincinnati Insurance's contention, a physical condition or the presence of disease-causing agents, which can be alleviated in some degree through cleaning, can nonetheless cause physical loss, just as property that can be repaired can nevertheless be found to

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government after exposure to vaporized agricultural chemicals stored in the same warehouse, that policyholder "incurred a loss since its products were injured").

[35] *See Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. App. 2001) (finding that pesticide adulteration of policyholder's oats constituted an impairment of function and value sufficient to support a finding of "direct physical loss" to insured property).

[36] *See* Gavin Souter, *Hotel chain to get payout for SARS-related losses*, BUS. INS. (Nov. 2, 2003), https://www.businessinsurance.com/article/20031102/story/100013638/hotel-chain-to-get-payout-for-sars-related-losses.

[37] *See, e.g., Port Auth. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (physical loss results "if an actual release of asbestos fibers from asbestos-containing materials has resulted in contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable, or if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such loss of utility"); *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (policyholder could claim business income coverage where risk of collapse necessitated abandonment of grocery store).

have suffered physical loss.[38] Furthermore, Cincinnati Insurance misrepresents the hazardous and easily transmissible nature of SARS-CoV-2 by dismissively claiming a person can simply remove the virus from impacted property through cleaning. While the Cornerstone Policyholders can certainly engage in multiple rounds of cleaning the insured premises, the imminent threat of virus-containing droplets or particles persists, due to the ubiquity of SARS-CoV-2 everywhere.

A similar argument was advanced by the insurance company in *Oregon Shakespeare Festival Ass'n v. Great American Insurance Co.*, after the policyholder cancelled several performances at its outdoor theatre because of dangerous levels of smoke and ash caused by numerous nearby fires. The insurance company denied the policyholder's business income claim on a number of grounds, but primarily under the argument that the loss was not caused by "physical loss [] to the theatre."[39] The court rejected the argument that "in order to be 'physical,' the loss or damage must be *structural* to the building itself," reasoning that the insurance company "does not provide any evidence from within the policy to show that the plain meaning

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[38] *See Brand Mgmt., Inc. v. Maryland Cas. Co.*, No. 05-cv-02293, 2007 WL 1772063, at *2 (D. Colo. June 18, 2007) (noting, where a sushi manufacturer closed for fifteen days to disinfect its premises after discovery of listeria contamination, that insurance company voluntarily paid the Business Income claim during the period in which the premises was decontaminated); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 806 (N.H. 2015) (holding that pervasive odor of cat urine was nonetheless "physical loss" to condominium); *Schlamm Stone*, 2005 WL 600021, at *4 (concluding that dust, soot and smoke in a law firm after the attacks of September 11, 2001 constituted "property damage"); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Ore. App. 1993) (noting that residue from cooking methamphetamine could be cleaned but courts have nevertheless found the residue to constitute physical loss); *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. App. 1992) (noting insurance company conceded odor caused by the operation of an illegal methamphetamine lab by the policyholder's tenants was within coverage of the property policy).

[39] No. 1:15-cv-01932-CL, 2016 WL 3267247, at *5-6 (D. Or. June 7, 2016), *vacated*, 2017 U.S. Dist. LEXIS 33208 (D. Or. Mar. 6, 2017). In *Oregon Shakespeare*, the policyholder maintained that "the wildfire smoke caused injury or harm to the interior of the theatre, which includes the air within the theatre." Notably, the court rejected the insurance company's argument that "air is not 'property,'" remarking that "[t]he policy itself does not give any indication that the air within a covered building cannot suffer contamination or infiltration such that 'physical loss of or damage to property' exists." The court also rejected the insurance company's argument that "air is not physical", commenting that "[c]ertainly, air is not mental or emotional, not is it theoretical."

of the term 'physical' includes such a limitation."[40] Finally, the court rejected the insurance company's argument that natural dissipation of smoke over time or the ability to clean disproves coverage.[41] Similarly, Cincinnati Insurance, seeking to minimize the Cornerstone Policyholders' COVID-19 losses here, is wrong in claiming that in order to constitute "physical loss," there must be permanent alteration of the insured property.

The insurance industry is so terrified of the body of case law discussed above that it has sought to hide it. Specifically, the *Oregon Shakespeare* case was vacated by settlement, almost certainly as a condition of the settlement offered by the insurance company. This practice, first identified in the 1990s,[42] is an increasingly common practice of the insurance industry in property insurance litigation. If the industry loses a case it knows will be used against them, the insurance company involved seeks to have the policyholder agree to vacate it as a condition of settlement. The insurance industry has used this tool to disappear a number of coverage decisions favoring policyholders in recent years. In this way, the common law is perverted against policyholders: cases in which policyholders lose stay on the books, cases in which they win disappear.[43]

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[40] *Id.* (emphasis in original).
[41] *Id.* at *5-6.
[42] Eugene R. Anderson, *et al.*, *Accessing the Law: Out of the Frying Pan and Into the Fire: The Emergence of Depublication in the Wake of Vacatur*, 4 J. APP. PRAC. & PROC. 475 (2002).
[43] Justice Scalia railed against this practice in *Bonner Mall*:

> In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), the litigants settled after oral argument and asked the Supreme Court to vacate the Court of Appeals' judgment without finding error. The Supreme Court held that equitable principles weighed against granting vacatur. First, a settling party gives up the legal remedies available through appeal or certiorari and with that gives up the extraordinary equitable remedy of vacatur. Second, vacatur was just as likely to "deter settlement at an earlier stage" as to facilitate it. "Some litigants, at least may think it worthwhile to roll the dice rather than settle in the district court, or in the court of appeals, if, but only if, an unfavorable outcome can be washed away by settlement related vacatur." *Id.* at 28 (emphasis original). The Court's opinion favorably cited the dissent in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993), that "'[*j*]*udicial precedents are presumptively correct and valuable to the legal community as a whole.*

3. The Case Law Cited By Cincinnati Insurance Is Factually Distinguishable.

Cincinnati Insurance argues that there is also case law supporting its position that "physical loss" requires tangible physical alteration. The cases to which Cincinnati Insurance refers, however, are not binding, or are factually distinguishable. For example, in *Philadelphia Parking Authority v. Federal Insurance Co.*, the court held that business income coverage was not triggered because there was no physical loss to the insured property—parking lots—at issue.[44] In contrast, the persistent, ubiquitous presence and highly transmissible propensities of COVID-19 droplets in indoor spaces support that the Cornerstone Policyholders' insured premises have suffered physical loss. This argument is consistent with *Devito v. Wolf*, which found that property damage as a result of COVID-19 was ubiquitous throughout Pennsylvania.[45] The *Philadelphia Parking* court also acknowledged that dangerous, though not visible or tangible, substances such as carbon monoxide, or the virus here, could constitute physical loss that "is very different from the purely economic damages for which [the *Philadelphia Parking*] Plaintiff s[ought] recovery."[46]

In addition, Cincinnati Insurance claims that "[a] seminal case concerning the direct physical loss requirement" is *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co*., but *Source Food* was decided at the summary judgment stage and under Minnesota law not binding on this Court.[47] Moreover, Cornerstone Policyholders' case is factually dissimilar to *Source Foods*

They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'" *Bancorp*, 513 U.S. at 26-27 (emphasis added).

Collins Backhoe & Water Serv. v. Anadarko Petroleum Corp., No. H-15-196, 2016 WL 4479530, at *1 (S.D. Tex. Aug. 25, 2016).

[44] 385 F. Supp. 2d 280, 286 (S.D.N.Y. 2005).

[45] *Devito*, 227 A.3d at 889-90.

[46] *Phila. Parking*, 385 F. Supp. 2d at 289.

[47] *Id.* at 15 (citing *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834 (8th Cir. 2006)).

because in *Source Foods*, "[t]he parties agree[d] that there [wa]s no evidence that the beef product was contaminated by mad cow disease."[48] In contrast, the overwhelming evidence on COVID-19's methods of transmission substantiates that COVID-19 was in the area of, attached to, and damaging the Cornerstone Policyholders' insured property. Due to the easily transmissible propensities of COVID-19, it is statistically certain that the virus' droplets or particles were and continue to be ubiquitous in heavily trafficked indoor spaces such as Cornerstone Policyholders' health and fitness centers, commercial real estate, and banquet and community event center. At a minimum, this is an issue for a jury to resolve. Finally, Cincinnati Insurance fails to mention that *Source Foods* also recognized, under Minnesota law, that "physical loss" may occur without structural alteration where a disease-causing agent is involved.[49]

B. THE CORNERSTONE POLICYHOLDERS HAVE SUFFICIENTLY ALLEGED A CLAIM FOR CIVIL AUTHORITY COVERAGE.

Cincinnati Insurance attempts two arguments in support of dismissal of the Cornerstone Policyholders' claim for civil authority coverage. Cincinnati Insurance first contends that the Cornerstone Policyholders do not sufficiently allege "physical loss to property other than" to their own[50] because "[j]ust as the Coronavirus is not causing direct physical loss to Plaintiff Policyholders' premises, it is not causing direct physical loss to other property."[51] For substantially the same reasons as discussed above, the Cornerstone Policyholders have sufficiently alleged that they suffered a "physical loss" as a result of the presence of COVID-19 at Cornerstone Policyholders' property, and such loss is also applicable to other property.

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[48] *Source Food*, 465 F.3d at 835.
[49] *Id.* at 837-38 (citing *Gen. Mills*, 622 N.W.2d at 150-152 and *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997) (finding that asbestos fibers in carpeting and other surfaces in apartment building satisfied the definition of "direct physical loss" because asbestos seriously impaired the building's function, even though it did not result in tangible injury to the building's physical structure)).
[50] Def.'s Mot. at 20.
[51] *Id.* at 21.

Because Pennsylvania civil authorities issued stay at home and closure orders throughout the state, "physical loss" caused by COVID-19 has occurred at property other than Cornerstone Policyholders' premises.

Cincinnati Insurance's second argument is that the Cornerstone Policyholders' case does not satisfy the civil authority coverage's requirement of prohibition of access to the insured premises. At the motion to dismiss stage, the Cornerstone Policyholders' allegations sufficiently allege that Pennsylvania's civil authority closure orders, responding to the danger of COVID-19 at the policyholders' property and other property, prohibited access to insured premises to such a degree as to trigger civil authority coverage. Notably, the Policies require that the "civil authority prohibits access,"[52] but do not specify that the relevant civil authority must prohibit "all access" or "any access" to the policyholder's premises.

V. CONCLUSION

The policy wording and decades of legal authorities from Pennsylvania and nationwide agree that "physical loss" to property under a property insurance policy is demonstrated by the presence, suspected presence, and/or the imminent threat of the presence of a dangerous substance or disease-causing agent such as SARS-CoV-2. Neither the policy definitions nor courts require a permanent alteration of insured property for "physical loss" to be found. Instead, "physical loss" can be shown where the policyholders' property can no longer serve or is unsafe for its intended use after exposure to the dangerous and highly transmissible propensities of SARS-CoV-2 in heavily-trafficked indoor spaces, such as the Cornerstone Policyholders' premises.

UP respectfully requests this Court consider these issues, ubiquitous in nearly every COVID-19 business interruption and civil authority case nationwide, in denying Cincinnati Insurance's motion to dismiss.

[52] Def.'s Mot. at 20.

Respectfully submitted,

Dated: August 17, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Motion for Leave to File an *Amicus* Brief using the United States District Court for the Eastern District of Pennsylvania's CM/ECF service, which will send notification of such filing to all counsel of record on this 17th day of August 2020.

/s/ John N. Ellison

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CORNERSTONE WARRINGTON, INC., CORNERSTONE HEALTH & FITNESS LP, CORNERSTONE NEW HOPE LP, CONEHOPA, LLC and THE EVENT CENTER BY CORNERSTONE, Plaintiffs, v. THE CINCINNATI INSURANCE COMPANY, Defendant.	No. 2:20-cv-02398-MMB Hon. Michael M. Baylson

[PROPOSED] ORDER GRANTING *AMICUS CURIAE* UNITED POLICYHOLDERS MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS AND IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

United Policyholders has moved for leave to file an *amicus curiae* brief in support of Plaintiffs and in opposition to the Motion to Dismiss put forth by Defendant. The Motion for Leave (Dkt. No. ___) sets forth good cause and is hereby **GRANTED**.

The Clerk is directed to detach and file the Amicus Brief attached to the Motion as **Exhibit A**.

Dated: _____

_____
J.