UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAKOTA GIRLS, LLC et al.,	:	
	:	**Case No. 2:20-cv-02035**
Plaintiffs,	:	
	:	**JUDGE Sarah D. Morrison**
v.	:	
	:	**MAGISTRATE JUDGE Kimberly A. Jolson**
PHILADELPHIA INDEMNITY INSURANCE COMPANY,	:	
	:	
	:	
Defendant.	:	

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

Pursuant to S.D. Ohio Civ. R. 7.2(a), Amicus Curiae United Policyholders respectfully requests leave of this Court to file an amicus brief in support of Plaintiffs and in opposition to Defendant's Motion to Dismiss.[1] This motion is supported by the following memorandum. The brief of United Policyholders is attached as Exhibit A.

Respectfully submitted,

Date: August 10, 2020

/s/ James M. Doerfler
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[1] In compliance with S.D. Ohio Civ. R. 7.3(b), on July 28, 2020, counsel for Amicus Curiae United Policyholders contacted counsel for the Defendant to obtain consent to the filing of the amicus brief. Counsel for Defendant declined to provide consent via email of July 30, 2020. In response to a similar request counsel for Plaintiffs, Dakota Girls, LLC consented to the filing via email on July 9, 2020.

MEMORANDUM IN SUPPORT

United Policyholders ("UP") seeks to file a brief as amicus curiae addressing the Motion To Dismiss of Defendant Philadelphia Indemnity Insurance Company (the "Motion To Dismiss" and "PIIC," respectively). UP seeks to address the limited issue that the certain covered causes of loss can in good faith be alleged to have caused "direct physical loss of or damage to" property. This issue is at the forefront of COVID-19 related business interruption litigation in Ohio and nationwide, and this Court's treatment of this issue has the potential to affect a multitude of other claims made by policyholders in Ohio.

As set forth below, PIIC's legal position – that the presence of a highly dangerous substance, such as the COVID-19 virus, on property does not result in physical damage to or loss of use of that property – is one that courts have routinely rejected. For more than fifty years, the law in the United State has been settled that structural alteration of covered property is not a necessary element of "direct physical loss or damage," especially when the insured property is otherwise rendered unusable or unusable for its intended purpose. In addition, contamination itself, such as the presence of a noxious or disease causing agent in and around the insured property, can constitute "direct physical loss of or damage to" property, and "time element" coverage may be triggered where contamination of insured property – even if the contamination is merely presumed or imminent – causes a "necessary suspension" (either completely or in part) of the insured business's "operations."

STATEMENT OF INTEREST

United Policyholders ("UP") is a non-profit 501(c)(3) organization founded in 1991 that is a voice and an information resource for insurance consumers in Ohio and throughout the United States. The organization assists and informs disaster victims and individual and

commercial policyholders with regard to every type of insurance product. Grants, donations, and volunteers support UP's work. UP does not accept funding from insurance companies.

UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help), *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness), and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage, and the claims process at www.uphelp.org.

UP advances policyholders' interests in courts across the United States by filing *amicus curiae* briefs in cases involving important insurance principles. UP has filed *amicus curiae* briefs on behalf of policyholders in more than 450 cases throughout the United States, including numerous cases before the United States Supreme Court, United States Courts of Appeal, and the courts of the State of Ohio.

Given its decades of experience, UP is uniquely suited to provide context to the application of standard-form property insurance wording to the issues in this case. Here, UP is concerned about ensuring this Court has that context before it when addressing the Motion To Dismiss.

Respectfully submitted,

Date: August 10, 2020

/s/ James M. Doerfler

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed electronically on August 10, 2020. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

Date: August 10, 2020

/s/ James M. Doerfler
James M. Doerfler

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

INTEREST OF THE AMICUS CURIAE

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INTRODUCTION

Through this amicus brief, as supplementary to Plaintiff's opposition, UP seeks to address the limited issue that the certain covered causes of loss can in good faith be alleged to have caused "direct physical loss of or damage to" property. This issue is at the forefront of COVID-19 related business interruption litigation in Ohio and nationwide, and this Court's treatment of this issue has the potential to affect a multitude of other claims made by policyholders in Ohio.

As set forth below, PIIC's legal position – that the presence of a highly dangerous substance, such as the COVID-19 virus, on property does not result in physical damage to or loss of use of that property – is one that courts have routinely rejected. For more than fifty years, the law in the United State has been settled that structural alteration of covered property is not a necessary element of "direct physical loss or damage," especially when the insured property is otherwise rendered unusable or unusable for its intended purpose. In addition, contamination itself, such as the presence of a noxious or disease causing agent in and around the insured property, can constitute "direct physical loss of or damage to" property, and "time element"

coverage may be triggered where contamination of insured property – even if the contamination is merely presumed or imminent – causes a "necessary suspension" (either completely or in part) of the insured business's "operations."

At a minimum, the existence of physical loss or damage presents a quintessential fact issue that cannot be resolved as a matter of law, let alone as a matter of law based on an insurer's contentions in a motion to dismiss.

ARGUMENT

The policies PIIC sold require "direct physical loss of or damage to" covered property to trigger PIIC's Business Income Coverage.[1] For Civil Authority coverage, the policies PIIC sold require the issuance of civil authority orders barring access to Plaintiffs' premises in response to "direct physical loss or damage" to properties within a mile of Plaintiffs' premises.[2]

PIIC's arguments in relation to the foundational issue in this case are concisely stated. PIIC argues that, "[t]o establish direct physical loss or damage under applicable law, Plaintiffs must show that the property suffered demonstrable, physical alteration."[3] PIIC argues that Plaintiffs does not allege facts showing "direct physical loss or damage."[4] As to the Civil Authority coverage, the Motion To Dismiss describes the "related orders by government officials" as "requiring the closure of non-essential businesses as a precaution to prevent further spread of the disease."[5] Further, PIIC states that the governmental orders closing businesses to the public generally were in response to the pandemic and to control further spread of the disease, not in response to any physical damage to property.[6]

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1 Motion To Dismiss at 1.
2 Motion To Dimiss at 2.
3 Motion To Dismiss at 3.
4 Motion To Dismiss at 13.
5 Motion To Dismiss at 1.
6 Motion To Dismiss at 18-19.

These arguments echo the relentless drumbeats with which the insurance industry has been pounding into the media since the onset of COVID-19 infections in the United States and the consequent shut-downs of locations too dangerous to operate safely.[7] But the arguments do not track the language of the insurance policy that PIIC drafted and sold to the Plaintiffs. Indeed, notwithstanding near six decades of cases rejecting its arguments, PIIC has not changed its standard-form policy language to require "structural" changes to trigger coverage.

I. MOST COURTS HAVE CONCLUDED THAT EVENTS RENDERING PROPERTY UNFIT FOR ITS INTENDED PURPOSE HAVE CAUSED PHYSICAL LOSS OR DAMAGE.

A. Property Insurance Protects Against Events that Render Property Unsafe to Inhabit or Use.

As an initial matter, courts have found physical loss or damage to property which was simply too unsafe to inhabit. For instance, in an early decision, Hughes v. Potomac Insurance Co., 199 Cal. App. 2d 239 (1962), the court found that policyholder's home, which became perched on the edge of a cliff after a sudden landslide caused a large chunk of the ground surrounding their property to fall into a creek, depriving the home of lateral support and stability, was damaged because it became unsafe to live in and thus useless to the owners:

> To accept [the insurance company's] interpretation of its policy would be to conclude that a building which has been overturned or which has been place in such position as to overhang a steep cliff has not been "damaged" so long as its paint remains intact and its walls still adhere to one another. Despite the fact that a "dwelling building" might be rendered completely useless to its owners, [the insurance company] would deny that any loss or damage had occurred unless some

[7] See, e.g., Michelle Bernhard, et al., "Coronavirus Is Not a Direct Physical Loss Triggering Event," Law360 (Apr. 6, 2020); Bill Wilson, "Here We Go Again: Another Unsubstantiated and Unsupported Accusation" (Apr. 7, 2020); Shannon O'Malley, "Commercial Property Insurance Coverage and Coronavirus," Zelle LLP (Mar. 11, 2020); Heidi Hudson Raschke & Amanda Proctor, " Business Interrupted: Policyholders seek to Avoid the 'Direct Physical Loss or Damage" Requirement for Business Interruption Insurance in the Wake of the COVID-19 Pandemic," Property Casualty Focus (Mar. 27, 2020); Bill Wilson, "Commentary: Does Business Income Insurance Cover Coronavirus Shutdowns?" Insurance Journal (Mar. 24, 2020).

> tangible injury to the physical structure itself could be detected. Common sense requires that policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner. **[The policyholders] correctly point out that a "dwelling" or "dwelling building" connotes a place fit for occupancy, a safe place in which to dwell or live.** It goes without question that [the policyholders'] "dwelling building" suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff. Until such damage was repaired and the land beneath the building stabilized, the structure could scarcely be considered a "dwelling building" in the sense that rational persons would be content to reside there.[8]

Similarly, in Murray v. State Farm Fire & Casualty Co., 509 S.E.2d 1 (W. Va. 1998), an even more widely cited decision, the policyholder sought coverage for the complete loss of its home after continued occupancy in it was rendered dangerous by the presence of falling rocks under a policy providing coverage for "direct physical loss to the property." The court rejected the insurance companies' argument that, while their policies were obligated to cover actual physical damage from falling rocks, they did not "cover any losses occasioned by the potential damage that could be caused by future rockfalls":

> The policies in question provide coverage against "sudden and accidental loss" and "accidental direct physical loss" to property. "'Direct physical loss' provisions require only that a covered property be injured, not destroyed. **Direct physical loss also may exist in the absence of structural damage to the insured property.**" Sentinel Management Co. v. New Hampshire Ins. Co., 563 N.W.2d 296, 300 (Minn. App. 1997) (citations omitted).
>
> The properties insured by [the insurance companies] in this case were homes, buildings normally thought of as a safe place in which to dwell or live. It seems undisputed from the record that on February 22, 1994 all three of the plaintiffs' homes became unsafe for habitation, and therefore suffered real damage when it became clear that rocks and boulders could come crashing down at any time. The record suggests that until the highwall on [the policyholder's] property is stabilized, the plaintiffs' houses could scarcely be considered "homes" in the sense that rational persons would consent to reside there.
>
> We therefore hold that an insurance policy provision providing coverage for a "sudden and accidental" loss or an "accidental direct physical loss" to insured

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[8] Hughes, 199 Cal. App. 2d at 248-49 (emphasis added); see also Hampton Foods, Inc. v. Aetna Cas. & Sur. Co., 787 F.2d 349, 352 (8th Cir. 1986) (finding policyholder could claim Business Income coverage where risk of collapse necessitated abandonment of grocery store).

> property requires only that the property be damaged, not destroyed. **Losses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property.**[9]

In Manpower Inc. v. Insurance Co. of the State of Pennsylvania, No. 08C0085, 2009 WL 3738099 (E.D. Wis. Nov. 3, 2009), the policyholder owned two adjacent buildings, but occupied only one of them. The building it did not occupy partially collapsed; but this collapse did not cause any noticeable damage to the policyholder's occupied space.[10] In the coverage action, the court first rejected the insurance company's argument that "because the collapse damaged only the area of the building around the courtyard and parking structure and not [the policyholder's] leased office space, it did not cause 'direct physical loss… or damage to' [the policyholder's] 'interest' in the building":

> [The insurance company's] argument assumes that [the policyholder's] interest in the building was limited to that portion reserved for its exclusive use. But [the policyholder's] could not use its offices unless other parts of the building functioned properly. Such parts include the entrances and exits, hallways, elevators, staircases, hearing and cooling systems, electricity, water, fire and security systems, and most importantly, the building's foundation and support structure. That [the policyholder's] did not enjoy the exclusive use of the above features does not mean that a business interruption caused by damage to them was not covered. The policy covered business interruption resulting from damage to [the policyholder's] interest in property it owned, used or intended to use. (Policy §9.A.) A tenant "uses" the support structure of a building as much as it uses its own office space. Indeed, without the support structure, [the policyholder's] could not have operated in its leased space. A tenant also uses other common aspects of an office building, such as electricity, water, and heating and cooling systems, although perhaps to a lesser extent than the support structure. Thus, if a covered peril damaged any of these features of the building, and the damage caused [the policyholder's] to sustain a business interruption loss, the policy would cover such loss up to $15 million, and resort to the civil authorities extension would be unnecessary.[11]

The court rejected any argument that a building which is unstable is not physically damaged:

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9 Murray, 509 S.E.2d at 17 (emphasis added).

10 Manpower, 2009 WL 3738099, at *1.

11 Id. at *3.

> [The insurance company] suggests that instability is insufficient to trigger coverage and that the foundation in the area of [the policyholder's] offices would have had to collapse or sustain visible damage before [the policyholder's] could claim business interruption losses as a result of damage to the building's support structure. However, the location of damage to the foundation does not matter, so long as the damage renders the entire structure unstable missing part. A tenant cannot use its office space even if such space is not close to the damaged beam. In such a case, the tenant will have sustained damage to its property interest in the building, and that damage will not have been caused by a subsequent evacuation order.[12]

As these cases reflect, occurrences that render property too dangerous to use as it was designed to be used cause physical loss or damage to that property.

B. Property Insurance Protects Against Temporarily Unsafe Conditions Rendering Property Uninhabitable or Unusable.

Temporary conditions that render property unsafe or unable to function likewise are deemed to cause "physical loss or damage." In Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America, No. 2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014), there was a large release of ammonia at a plant at which the policyholder manufactured juice cups. The plant was evacuated and the ammonia was remediated over the course of the following week, during which time the plant was "physically unfit for normal human occupancy and continued use."[13] The policyholder sought coverage for a loss of business, which the insurance company resisted on the ground that the plant had not suffered physical loss or damage, which the insurance company argued "necessarily involves 'a physical change or alteration to insured property requiring its repair or replacement,'" stating that the policyholder's inability to use the plant as it might have hoped or expected was not physical loss or damage.[14] The court concluded that "property can sustain physical loss or damage without experiencing structural alteration."[15]

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12 Id. at *4 n.7.
13 Gregory Packaging, 2014 WL 6675934, at *2-3.
14 Id. at *2.
15 Id. at *5.

The court concluded that "the ammonia release physically transformed the air within [the plant] so that it contained an unsafe amount of ammonia" and that "the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated," and therefore that the ammonia discharge caused direct physical loss or damage to the plant.[16]

In Western Fire Insurance Co. v. First Presbyterian Church, 437 P.2d 52 (Colo. 1968), at issue was "whether the insured suffered a 'direct physical loss'" where "the insured acting upon the orders of the Littleton Fire Department closed the church building 'because of the infiltration of gasoline in the soil under and around the building, which gasoline and vapors thereof infiltrated and contaminated the foundation and halls and rooms of the church building, making the same uninhabitable and making the use of the building dangerous.'"[17] The policyholder sought coverage for the costs of remedying the infiltration and contamination, and the court rejected the insurance company's argument that the church had suffered no direct physical loss:

> It is perhaps quite true that the so-called "loss of use" of the church premises, standing alone, does not in and of itself constitute a "direct physical loss." A "loss of use" of course could be occasioned by many different causes. But, in the instant case the so-called "loss of use," occasioned by the action of the Littleton Fire Department, cannot be viewed in splendid isolation, but must be viewed in proper context. **When thus considered, this particular "loss of use" was simply the consequential result of the fact that because of the accumulation of gasoline around and under the church building the premises became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous.** All of which we hold equates to a direct physical loss within the meaning of that phrase as used by the Company in its Special Extended Coverage Endorsement insuring against "all other risks."[18]

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[16] Id. at *6; see also TRAVCO Ins. Co. v. Ward, No. 2:10cv14, 2010 WL 2222255, at *8-9 (E.D. Va. June 3, 2010) (finding that house built with Chinese drywall which emitted toxic gases, causing the policyholder to move out, had suffered direct physical loss, despite the fact that it was "physically intact, functional and ha[d] no visible damage," noting the majority of cases nationwide find that "**physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces**") (emphasis added).

[17] Western Fire, 437 P.2d at 53-54.

[18] Id. at 55 (emphasis added); see also Matzner v. SEACO Ins. Co., No. 96-0498-B, 1998 WL 566658, at *4 (Mass. Super. Ct. Aug. 12, 1998) (concluding that the phrase "direct physical

In Oregon Shakespeare Festival Ass'n v. Great American Insurance Co., No. 1:15-cv-01932-CL, 2016 WL 3267247 (D. Or. June 7, 2016), the policyholder cancelled several performances at its outdoor theatre because of dangerous levels of smoke and ash caused by numerous nearby fires.[19] The policyholder made a claim for lost Business Income which was denied on a number of grounds, but primarily because the loss was not caused by "physical loss or damage to the theatre."[20] In the coverage case, the policyholder argued that "the wildfire smoke caused injury or harm to the interior of the theatre, which includes the air within the theatre."[21] The court first rejected the insurance company's argument that "air is not 'property'": "The 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."[22] Next the court rejected the insurance company's argument that "the loss or damage must be *physical*," finding it did "not give a sufficient explanation for which air is not physical": "Certainly, air is not mental or emotional, not is it theoretical."[23] Third, the court rejected the

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loss or damage" was ambiguous and could mean either "only tangible damage to the structure of insured property" or "more than tangible damage to the structure of insured property," and that "carbon monoxide contamination constitutes 'direct physical loss of or damage to' property"); Arbeiter v. Cambridge Mut. Fire Ins. Co., No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Ct. Mar. 15, 1996) (finding oil fumes present in house after discovery of oil leak constituted physical damage to the house); Hetrick v. Valley Mutual Ins Co., 15 Pa. D. & C. 4th 271, 1992 WL 524309, at *3 (Pa. Ct. Comm. Pl. Cumberland County May 28, 1992) (finding that there would be coverage for loss of use of a house if an outside oil spill made the house uninhabitable).

[19] The policyholder, however, likely in exchange for a larger settlement, agreed to vacate this decision. The insurance company's move to vacate this decision was one to pervert the common law in the insurance industry's favor. For this very reason, the late Justice Scalia criticized the use of *vacatur* as against the public interest. U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994).

[20] Oregon Shakespeare Festival, 2016 WL 3267247, at *5.

[21] Id.

[22] Id.

[23] Id.

insurance company's argument that "in order to be 'physical,' the loss or damage must be *structural* to the building itself," finding the insurance company "does not provide any evidence from within the policy to show that the plain meaning of the term 'physical' includes such a limitation."[24] Fourth, the court rejected the insurance company's argument that the smoke from the fires did not require any "structural" "repairs" to the theatre, and thus there was no Period of Restoration,"[25] finding instead that dissipation of the smoke took several days, and that it was not a plausible reading of the policy to add the word "structural" into the contract of insurance.[26]

The court's decision to reject insurer arguments that natural dissipation of smoke over time eliminates coverage applies equally to the temporary presence of ammonia, oil fumes, or carbon monoxide. As applicable to this motion, the argument that there must be some permanency and not just a temporary impairment for damage to constitute direct physical loss is contrary to established law.[27]

C. Property Insurance Protects Against Contamination and Suspected Contamination of Property.

Obviously, contamination can also constitute "physical loss or damage," and given the points above concerning property deemed too dangerous to use, so can likely contamination. In Stack Metallurgical Services, Inc. v. Travelers Indemnity Co. of Connecticut, No. 05-1315, 2007 WL 464715 (D. Or. Feb. 7, 2007), the policyholder was engaged in the heat treating of metal parts used as implanted medical devices. By mistake, one of its workers left a lead hammer in a heat treater, which contaminated the unit (and the products it treated) with lead; contamination

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24 Id.
25 Id. at *5-6.
26 Id. at *6.
27 Bill Wilson, "Commentary: Does Business Income Insurance Cover Coronavirus Shutdowns?" Insurance Journal (Mar. 24, 2020).

which was not discovered for some time.[28] The insurance company resisted payment of Business Income overage on the ground that the treater suffered no "physical loss or damage," which the court rejected:

> Though the terms "direct physical loss" and "physical damage" are not defined in the policy, it is only logical to conclude that the physical change in the furnace resulting from a release of lead particles, which prevented it from being used for its ordinary expected purpose, is fairly characterized as a "direct physical loss of or damage to" the furnace, which, unlike the parts processed in the furnace, was clearly "covered property" within the meaning of the policy. There is no question that the physical transformation of the furnace which rendered it useless for processing medical devices, the use for which it was specially certified, reduced both the value of the furnace and [the policyholder's] ability to derive business income from the furnace. This reduction of value was caused by an incident that is fairly characterized as "direct physical damage."[29]

Again, property which cannot be used for its intended purpose has suffered physical loss or damage.[30]

In American Alliance Insurance Co. v. Keleket X-Ray Corp., 248 F.2d 920 (6th Cir. 1957), the policyholder manufactured instruments used in measuring radioactivity, whose operations were interrupted by an incident which caused radioactive dust and radon gas to completely infuse the factory. The radiation contaminated much stock, made the building unsafe to work in, and made it impossible to calibrate the instruments prior to sale because of the

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28 Stack Metallurgical Services, 2007 WL 464715, at *1.

29 Id. at *8.

30 See, e.g., Cyclops Corp. v. Home Ins. Co., 352 F. Supp. 931, 937 (W.D. Pa. 1973) (finding policyholder entitled to coverage for loss of Business Income where vibration of motor, without apparent damage, caused it to be shut down); Azalea, Ltd. v. Am. States Ins. Co., 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995) (finding that where policyholder operated a mobile home park at which vandals damaged the sewage treatment plant by adding chemicals that destroyed a bacteria colony necessary for the plant to operate, this amounted to "direct damage to the structure"); Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co., 968 A.2d 724, 734 (N.J. Super. Ct. App. Div. 2009) ("In the context of this case, the electrical grid was 'physically damaged' because, due to a physical incident or series of incidents, the grid and its component generators and transmission lines were physically incapable of performing their essential function of providing electricity.").

background radiation. The trial court first concluded that the plant had suffered property damage, and that this property damage was the cause of the policyholder's loss of Business Income, and this was affirmed on appeal:

> The court found that all losses due to the contamination of physical property and all business interruption losses were "the direct, immediate and proximate result of the explosion of the radium source" located at [the policyholder's] plant. [The insurance companies] challenge this finding as being unsupported by substantial evidence. The findings of fact by the court are entitled to great weight and may not be set aside unless clearly erroneous. There is testimony that the rapid expansion of the compressed gases occupying the interstices of this finely divided powder would have ejected a portion of the radium salt from the capsule at the time of the explosion. These salt particles were so small (a few microns in diameter) that they could be picked up easily by air currents and carried considerable distances. Highly radioactive radon gas also escaped from the capsule at the time of the explosion and was disseminated about the plant by natural air currents. Radon is unstable and, in a comparatively short period of time, will decay into a solid substance which is also highly radioactive. Fans in operation at the time of the explosion doubtless assisted the transportation of these air-borne contaminants throughout the plant. The findings of the special master, as confirmed by the district judge, on this issue are not clearly erroneous and are supported by substantial evidence.[31]

[31] Keleket X-Ray, 248 F.2d at 925.

Similar holdings were reached involving properties impacted by an array of conditions such as bacteria,[32] brown recluse spiders,[33] lead and asbestos.[34]

D. Property Insurance Protects Against Conditions and Damage That Can Be Cleaned Up or Repaired.

Contrary to the chorus of insurance industry commentators, contamination which can be easily cleaned can cause physical loss or damage, just as property that can be repaired can be

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[32] Cooper v. Travelers Indem. Co. of Ill., No. C-01-2400, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002) (finding policyholder could make claim for Business Income and Extra Expense loss from contamination of well with E. coli bacteria); see also Motorists Mut. Ins. Co. v. Hardinger, 131 F. App'x 823, 827 (3d Cir. 2005) (considering an infestation of a home with E coli bacteria, the court held that "a genuine issue of fact whether the functionality of the [policyholder's] property was nearly eliminated or destroyed, or whether their property was made useless or uninhabitable," and thus reversed the lower court's ruling in favor of the insurance company).

[33] Cook v. Allstate Ins. Co., No. 48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32, at *7-9 (Ind. Super. Ct. Nov. 30, 2007) (f"Case law demonstrates that a physical condition that renders property unsuitable for its intended use constitutes a 'direct physical loss' even where some utility remains and, in the case of a building, structural integrity remains…. Brown Recluse Spiders living, breeding and hunting on and within surfaces of the Home are a physical condition that renders the Home unsuitable for its intended use. The undisputed evidence is that the Brown Recluse Spiders make it unsafe for [the policyholder] and his very young children to live in the home and also that [the policyholder] had not been able to sell the Home, even at a loss.").

[34] Yale Univ. v. CIGNA Ins. Co., 224 F. Supp. 2d 402, 413 (D. Conn. 2002) (finding while the presence of asbestos and lead in buildings did not constitute "physical loss of or damage to property," contamination by such materials could, citing "the substantial body of case law" "in which a variety of contaminating conditions have been held to constitute 'physical loss or damage to property'"); Bd. of Educ. of Twp. High School Dist. No. 211 v. Int'l Ins. Co., 720 N.E.2d 622, 625-26 (Ill. App. Ct. 1999) (citing liability insurance coverage cases finding that incorporation of asbestos into buildings caused "property damage," 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 asbestos fiber contamination constituted Property Damage); Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co., 615 N.W.2d 819, 825-26 (Minn. 2000) (considering asbestos contamination of carpeting and other surfaces in apartment building and holding (1) "even though 'asbestos contamination does not result in tangible injury to the physical structure of the building, a building's function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants,' thereby satisfying the definition of direct physical loss"; and (2) "[a] principal function of any living space [is] to provide a safe environment for the occupants" and "[i]f rental property is contaminated by asbestos fibers and presents a health hazard to the tenants, its function is seriously impaired").

damaged. Indeed, the insurance company in Brand Management, Inc. v. Maryland Casualty Co., No. 05-cv-02293, 2007 WL 1772063, at *2 (D. Colo. June 18, 2007), where a sushi manufacturer which closed for 15 days to disinfect its premises after discovery of listeria contamination, voluntarily paid the Business Income claim during the period in which the premises was decontaminated.

Similarly, in Schlamm Stone & Dolan, LLP v. Seneca Insurance Co., No. 603009/2002, 2005 WL 600021 (N.Y. Supr. Mar. 16, 2005), the policyholder alleged that dust, soot and smoke in its law firm after the attacks of September 11, 2011 affected its operations for the balance of the month of September. The court first rejected the insurance company's argument that the policyholder "should be denied business interruption coverage because [the policyholder] failed to file a claim for actual damage to its property":

> The insurance contract does not condition a business interruption claim upon the filing of property damage claim. The [insurance company] has not cited, nor has the court found, any clause in the body of the contract to the contrary. Moreover, an insured may have valid reasons for not filing a claim with its insurer. For instance, the transaction costs for recovering the claim may be higher than the value of the claim itself.[35]

The court found that "the central question before the court on this portion of plaintiff's claims is whether 'property damage' as used in the Policy includes noxious particles in an insured premises," and held that such particles constituted property damage under the policy:

> Under the Policy, particles that have settled in the carpets and on other surfaces in [the policyholder's] offices constitutes property damage. The carpets and other surfaces are property of the [policyholder], and the presence [sic] noxious particles thereon clearly impairs [the policyholder's] ability to make use of them.[36]

Next, after initially noting that the policyholder did not own the air, and thus could not suffer property damage from particles in the air, the court observed that "the distinction between

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35 Schlamm, 2005 WL 600021, at *3.

36 Id. at *4.

particle that have settled and particles suspended in the air raises serious problems in practical application":

> Particles that have settled on surfaces could easily be stirred up and cause business interruptions not unlike that the particles suspended in the air could cause. However, unlike losses caused by particles which have never settled, the losses caused by the stirred up particles would be covered under the policy because they arise from property damage. Hence the parties would be faced with the impossible task of demonstrating what portion of the losses were caused by particles suspended in the air that never settled, and what portion were caused by particles that had been stirred up. The court is not aware of any conceivable method for establishing this distinction. However, the reading of the policy that says that particles in the air in the premises do not constitute property damage seems to require this. Therefore, this cannot be the intended reading of the policy, as it is inconceivable that the parties would have intended to set the terms of their agreement as to make it practically impossible to determine whether losses are covered. Following the rule that ambiguities in an insurance policy must be construed in favor of the insured and against the insurer, the court reads the policy to include, under the definition of property damage, particles both on surfaces and in the air in the insured premises.[37]

Accordingly, the court concluded that "the presence of noxious particles, both in the air and on surfaces of the plaintiff's premises, would constitute property damage under the terms of the policy."[38]

Residue from cooking methamphetamine can be cleaned but courts have found it to be physical loss or damage. In Farmers Insurance Co. v. Trutanich, 858 P.2d 1332 (Or. Ct. App. 1993), at issue was whether losses caused by odor from an illegal methamphetamine lab caused "direct physical loss" to the policyholder's property. The court first rejected the insurance company's argument that odor was not "physical," noting that "odor was 'physical,' because it damaged the house."[39] Second, citing First Presbyterian Church, the court rejected the insurance company's argument the cost of removing the odor was not a "direct physical loss," stating "[t]here is evidence that the house was physically damaged by the odor that persisted in it," "the

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37 Id. at *5.

38 Id.

39 Trutanich, 858 P.2d at 1335.

odor produced by the methamphetamine lab had infiltrated the house," and "[t]he cost of removing that odor was a direct rectification of the problem."[40]

E. Conclusion as to the Historic Treatment of "Physical Loss or Damage"

Suspected contamination of property by the novel coronavirus is enough to damage insured property. As was recently noted by the Pennsylvania Supreme Court:

> The enforcement of social distancing to suppress transmission of the disease is currently the only mitigation tool . . . COVID-19 does not spread because the virus is 'at' a particular location. Instead it spreads because of person-to-person contact . . . [and] [t]he virus can live on surfaces for up to four days and can remain in the air within confined areas and structures.[41]

There is no commercial method to test for the presence of COVID-19 on property, many afflicted with COVID-19 are asymptomatic yet able to transmit the virus, and as hundreds use establishments such as those operated by Plaintiffs experience daily, it is statistically certain that the virus was and continues to be present in most if not all of those locations. Physical loss or damage is therefore presumed and its likelihood can be established by expert and statistical evidence. Certainly, it cannot be disproved merely because PIIC says so in its motion to dismiss.

II. DEFENDANT'S CASES INCORRECTLY INTERPRET THE INSURANCE INDUSTRY'S HISTORIC WORDING

PIIC, like insurance industry authors, cite two cases concluding that mold did not constitute "physical loss or damage." The first is Mastellone v. Lightning Rod Mutual Insurance Co., 884 N.E.2d 1130, 1143, 1144-45 (Ohio Ct. App. 2008), which addressed whether presence of mold on outdoor siding was "physical loss or damage," concluding that "physical injury"

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[40] Id.; see also Mellin v. Northern Sec. Ins. Co., 115 A.3d 799, 806 (N.H. 2015) (holding that pervasive odor of cat urine was "physical loss" to condominium); Largent v. State Farm Fire & Cas. Co., 842 P.2d 445, 446 (Or. Ct. 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).

[41] Friends of DeVito v. Wolf, 227 A.3d 872, 891 (Pa. April 13, 2020).

meant "harm to the property that adversely affects the structural integrity of the house," and that the mold did not "alter or otherwise affect the structural integrity of the siding," as the "mold was present on the surface of the siding and could be removed without causing harm to the wood."

The second is In Universal Image Productions, Inc. v. Chubb Corp., 703 F. Supp. 2d 705 (E.D. Mich. Mar. 29, 2010), the policyholder's business was disrupted by the pervasive smell of mold, which eventually caused the policyholder to relocate. The insurance company argued that, unless a contaminant actually alters the structural integrity of the building – i.e., causes "material damage" – there is not physical loss.[42] In contrast, the policyholder cited cases which had "applied a more liberal standard."[43] The court agreed with the insurance company that, "[i]nasmuch as [the policyholder] has failed to show that it suffered a direct physical loss under the Policy, [the insurance company] is entitled to a summary judgment"[44] Because the policyholder had not proved direct physical loss, the court granted summary judgment to the insurance company on the policyholder's Business Income claim.[45] As the court in Universal Image itself noted, however, there is contrary authority in relation to the presence of mold.[46]

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42 Universal Image, 703 F. Supp. 2d at 709 (citing Mastellone).

43 Id. at 709 (citing Columbiaknit, Matzner, Trutanich and First Presbyterian Church).

44 Id. at 710.

45 Id. at 711.

46 See, e.g., Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts, No. CV-01-1362-ST, 2002 WL 31495830, at *8-9 (D. Or. June 18, 2002) (concluding that 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 *First Presbyterian Church* and *Matzner* for the proposition that inability to inhabit a building may constitute "direct, physical loss"); Columbiaknit, Inc. v. Affiliated FM Ins. Co., No. 98-434-HU, 1999 WL 619100, at *7-8 (D. Or. Aug. 4, 1999) (finding that policyholder could bear its burden to demonstrate that clothes impregnated with mold or mildew suffered "direct physical loss or damage" 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").

What is more, mold is entirely unlike COVID-19. Mold is visible. Mold is discrete. Mold is, in the short term, not ambulatory. Most important, if one touches mold or inhales spores, it is not life threatening. In contrast, COVID-19 is invisible. It cannot be confined to a surface or an area. It is ambulatory, and can move in the air. Although it can be remediated, doing so is incredibly dangerous, because it is so aggressively infectious and life threatening.

In contradiction to the cases cited above, PIIC argues that "[a] ***threat*** of damage, however, does not constitute physical loss or damage."[47] Neither of those cases has anything to do with a "threat" of damage or injury.

Next, PIIC argues that, "[a]t most, the presence of the Coronavirus inside Plaintiffs' premises would have required cleaning or sanitizing – a purely economic loss that the courts have recognized is ***not*** 'physical loss of or damage to property.'"[48] Under that reasoning, PIIC would provide no coverage for a house that burns down because the house can be restored to its pre-loss condition by rebuilding it. But if that were the case, property insurance policies would cover nothing because almost everything can be restored to pre-loss condition.

In Mama Jo's, the policyholder operated a restaurant which allegedly suffered physical loss and damage, and lost income, as a result of dust and debris associated with road work conducted outside the restaurant for a nineteen-month period, which required the policyholder to

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[47] Motion to Dismiss at 15 (citing Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co., 17 F. Supp. 3d 323, 331 (S.D.N.Y.2014) (phrase "direct physical loss or damage" did not include closure of insured law firm after utility company preemptively shut off power to lower Manhattan in advance of Superstorm Sandy); Roundabout Theatre Co., Inc. v. Continental Cas. Co., 751 N.Y.S.2d 4, 8 (App. Div. 2002) (phrase "direct physical loss or damage to [insured's] property" did not include loss of use when insured's theatre became inaccessible because city closed nearby stafter nearby structure collapsed).").

[48] Motion To Dismiss at 16 (citing Mama Jo's, Inc. v. Sparta Ins. Co., No. 17-cv-23362, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) ("cleaning is not considered direct physical loss")).

engage in daily cleaning. The policyholder submitted expert reports from three experts, two assessing damage to audio and lighting systems, awnings and retractable roofs, and one addressing causation generally: these reports were excluded by the court under Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (2006).[49] In countering the insurance company's motion for summary judgment, the policyholder argued "that the migration of dust and construction debris from the roadwork adjacent to the restaurant caused damage to the restaurant" and that this constituted "direct physical loss."[50]

The court first considered the issue of causation – i.e., whether the dust and debris caused damage to the premises. The court concluded that this was a question that a lay witness could not answer.[51] With its expert witness reports excluded, the policyholder could not bear its burden to prove that the dust and debris caused property damage to the restaurant.[52] Further, the court concluded that "cleaning is not considered direct physical loss."[53] The court found that "[a] direct physical loss 'contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so."[54] To be entitled to coverage, the policyholder had to demonstrate that its restaurant was "unusable":

> Here, the restaurant was not "uninhabitable" or "unsuable." In fact, the restaurant remained open every day, customers were always able to access the restaurant, and there is no evidence that dust had an impact on the operation other than requiring daily cleaning. "The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a

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49 Mama Jo's, 2018 WL 3412974, at *3-8.
50 Id. at *8.
51 Id.
52 Id. at *9.
53 Id.
54 Id.

> distinct, demonstrable, physical alteration of the property. The fact that the restaurant needed to be cleaned more frequently does not mean [the policyholder] suffered a direct physical loss or damage and thus, summary judgment is appropriate.[55]

Last, the court concluded that the policyholder was not entitled to Business Income coverage because it had not shown direct physical loss or damage and because there was no "suspension of operations caused by 'physical damage.'"[56] Mama Jo's is in no way akin to any case in which premises is infused with a deadly virus; the restaurant was not rendered unfit for its intended use.

CONCLUSION

Contamination, suspected contamination, and/or the imminent threat of contamination of COVID-19 all constitute "physical loss and damage" under a property insurance policy. Structural alteration of the property is not required for "physical loss and damage" where the property can no longer serve or is unsafe for its intended purpose. UP respectfully requests this Court consider these issues, ubiquitous in nearly every COVID-19 business interruption and civil authority case nationwide, in denying Defendant's Motion To Dismiss.

Dated: August 10, 2020

AMICUS CURIAE UNITED POLICYHOLDERS

By: */s/ James M. Doerfler*

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55 Id.

56 Id. at *10.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAKOTA GIRLS, LLC et al.,	:	
	:	**Case No. 2:20-cv-02035**
Plaintiffs,	:	
	:	**JUDGE Sarah D. Morrison**
v.	:	
	:	**MAGISTRATE JUDGE Kimberly A. Jolson**
PHILADELPHIA INDEMNITY INSURANCE COMPANY,	:	
	:	
	:	
Defendant.	:	

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

Amicus Curiae United Policyholders has moved to file an amicus curiae brief in support of Plaintiffs and in opposition to Defendant's Motion to Dismiss. The Motion of United Policyholders [Dkt. No. ____] sets forth good cause and the motion is therefore granted. The Clerk is hereby directed to detach and file the amicus brief attached as Exhibit "A" to the Motion.

Date: _____